

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 24468

JOHN W. GARDNER, Secretary of the United States
Department of Health, Education & Welfare
of the United States,

Appellant,

vs.

THE STATE OF ALABAMA, for and in behalf of and
as Trustee for the Department of Pensions and
Security of the State of Alabama,

Appellee.

Appeal from the United States District Court for
the Northern District of Alabama

RECORD ON APPEAL

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RECORD ON APPEAL

Received U. S. Court of Appeals, New Orleans, La.,
Feb. 13, 1967.

Filed U. S. Court of Appeals, Feb. 13, 1967, Edward
W. Wadsworth, Clerk.

SOUTHERN DIVISION DOCKET

C.A. 67-19

TITLE OF CASE: THE STATE OF ALABAMA, for
and in behalf of and as Trustee for the Department of
Pensions and Security of the State of Alabama,

vs.

JOHN W. GARDNER, as Secretary of the U. S. De-
partment of Health, Education and Welfare of the
United States,

BASIS OF ACTION: Action to enjoin defendant from
cutting off and discontinuing Federal funds to plaintiff,
which plaintiff is informed will result if assurance
forms are not executed etc. claims such action is un-
constitutional, etc.

ATTORNEYS:

For Plaintiff: Reid B. Barnes, Special Assistant At-
torney General, 317 North 20th St., Exchange-Security
Bank Bldg., Birmingham, Ala. 35203; McDonald Gal-
lion, Attorney General of Alabama, Gordon Madison,
Assistant Attorney General, Montgomery, Ala.

For Defendant: John Doar, Assistant Attorney Gen-
eral; Macon L. Weaver, United States Attorney; D.
Robert Owen, Attorney, Department of Justice, Wash-
ington, D. C.

PLAINTIFF'S ACCOUNT:

January 13, 1967—Ck. Lange, Simpson, Robinson &
Somerville, Received \$15.00.

January 16, 1967—Cr. 102411—\$15.00.

FILINGS—PROCEEDINGS

DATE

1967

- Jan. 13 Complaint filed—Page 1.
- Jan. 16 Amendment to complaint filed—Page 60.
- Jan. 16 Summons and complaint as amended issued—
del. to Marshal with copies for service.
- Jan. 25 Summons and complaint returned, executed on
Jan. 19, 1967 on defendant and filed.
- Jan. 26 Motion of plaintiff for hearing on prayer for
preliminary injunction filed—set for hearing
Feb. 1, 1967 at 10 A.M. (Allgood)—Page 72.
Motion of defendant to dismiss etc. filed—
Page 73.
- Jan. 26 Order setting Motion of defendant to dismiss
and in the alternative for change of venue for
hearing February 1, 1967 at 10 A.M. filed and
entered (Allgood) all parties personally noti-
fied by counsel—Page 77.
- Feb. 1 On trial before the Hon. C. W. Allgood, on
plaintiff's prayer for preliminary injunction,
and on defendant's motion to dismiss and in
the alternative for change of venue. Second
amendment to the complaint joining Sarah
Harton, Emma Morton, Louise Jones, resi-
dents of Jefferson County, Alabama, as parties
plaintiff in this action filed—Page 79. An-
swer of defendant to the complaint and
amended complaint filed—Page 82. Argu-
ment of counsel—prayer for preliminary in-

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junction to be granted—other motion taken under advisement etc.

Feb. 3 Findings of Fact, Conclusions of Law, Order taking motion to dismiss for lack of jurisdiction and in the alternative for change of venue under advisement, and Temporary and Preliminary Injunction, pending final hearing and final decree, enjoining defendant, John W. Gardner, Secretary of the U. S. Department of Health, Education and Welfare, his officers, agents, servants, employees and attorneys etc., from (1) Withholding, discontinuing or cutting off in any wise financial assistance to the State of Alabama and to the Department of Pensions and Security of the State of Alabama under any and all welfare programs administered by said State and State Department (including the State Board of Pensions and Security) under Titles I, IV, V (Part 3), X and XIV of the Social Security Act, pursuant to the Secretary's order of Jan. 12, 1967, and (2) Carrying into effect the order, directive or decision of the defendant, the Secretary of the U. S. Department of Health, Education and Welfare, made Jan. 12, 1967, approving or directing the withholding, discontinuance or cutting off of Federal funds to each and all of the welfare programs of the State of Alabama and Said State Department (including the State Board of Pensions and Security) described in Sec. 1 just above, and further ordering that no bond

DATE
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or security is required to be given as a condition of said injunction, filed and entered (All-good)—copies served by counsel—Page 87.

Feb. 10 Notice of Appeal by defendant filed—cert. copy del. to plaintiff's attorneys—Page 98.

Feb. 10 Transcript of proceedings at trial, except for oral arguments of counsel, filed by Court Reporter Zegarelli.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE STATE OF ALABAMA, for and
in behalf of and as Trustee for the
Department of Pensions and Security
of the State of Alabama,

Plaintiff,

vs.

JOHN W. GARDNER, as Secretary of
the U. S. Department of Health,
Education and Welfare of the
United States,

Defendant.

CIVIL
ACTION
No.
CA 67-19

Filed in Clerk's Office, Northern District of Alabama,
January 13, 1967. William E. Davis, Clerk, U. S. District
Court. By Mary L. Tortorici, Deputy Clerk.

COMPLAINT

Comes the plaintiff and avers as follows:

1. Plaintiff is a sovereign state of the United States
of America.

2. The Department of Pensions and Security of the
State of Alabama is a department and agency of the State
of Alabama within the meaning of Act No. 703, General
Acts of Alabama 1951 (as amended) and also Chapter I,
Title 49, Code of Alabama (as amended), and pursuant to
the provisions of Section 4 of Act No. 703, supra, and Ruben
K. King is the executive and administrative officer of the

State Department of Pensions and Security of the State of
Alabama and is responsible for the adoption of policies,
rules and regulations of the department and all administra-
tive and executive duties and responsibilities of the said
state department (which operates by and through its county
departments in every county in the State); all subject to
the authority of the State Board of Pensions and Security.
As such executive and administrative officer Ruben K. King,
Commissioner, is responsible for the administration of Fed-
eral funds granted to the State to aid in the furtherance of
any of the functions of the State Department of Pensions
and Security, and develops regulations and is charged with
the responsibility for adopting policies which are in con-
formity with the regulations promulgated by the Depart-
ment of Health, Education and Welfare for the purpose of
receiving Federal funds to be used for public welfare ser-
vices in the State of Alabama.

3. The defendant, Honorable John W. Gardner, is
the Secretary of Health, Education and Welfare, and as
such is the head of the United States Department of Health,
Education and Welfare, a part of the executive branch of
the Government of the United States.

4. This is a suit for injunctive relief authorized by
Title 5 U.S.C. § 1009, and by § 1331, Title 28, U.S.C. The
amount in controversy far exceeds the sum or value of Ten
Thousand and No/100 (\$10,000.00) Dollars.

5. Since 1935 the State Department of Pensions and
Security, formerly State Department of Public Welfare, has
through its Commissioner, received Federal financial as-
sistance pursuant to the provisions of the public assistance
titles of the Social Security Act, which assistance in the
Social Security Act is described as grants to states for Old
Age Assistance and Medical Assistance for the Aged, grants

to states for Aid and Services to Needy Families with Children, grants to states for Aid to the Permanently and Totally Disabled, grants to states for Aid to the Blind, and Child Welfare Service Funds. Plaintiff avers that financial assistance has always been and is now in the form of grants paid by the Federal Government to the State Department of Pensions and Security (formerly State Department of Public Welfare) since 1935.

6. The action of defendant Gardner complained of purports to be taken in pursuance of Title VI of the Civil Rights Act of 1964; this act provides for judicial review of any department action taken thereunder. Plaintiff alleges that such judicial review would be meaningless and of no effect unless the department action complained of is suspended by this Court until such time as a judicial review on the merits thereof can be had.

7. On January 12, 1967, defendant Gardner entered an order terminating Federal funds to the Alabama Department of Pensions and Security. A copy of his order is attached hereto as Exhibit A and made a part hereof. Plaintiff avers that the effect of this order is to terminate funds to 200,000 needy people in the State of Alabama whose subsistence depends upon these funds. Plaintiff avers that approximately seventy-five (75%) per cent of the money utilized by the Alabama Department of Pensions and Security constitutes Federal funds and without these funds the department cannot make present payments to and on behalf of needy, aged, blind, handicapped, needy children and persons entitled to child welfare services. The amount of Federal funds involved is approximately 103 million dollars per year.

8. On March 1, 1965, the Alabama State Board of Pensions and Security and the Commissioner of the State

Department of Pensions and Security assured the Department of Health, Education and Welfare that the Department of Pensions and Security will not deny aid, care or services to any individual on the grounds of race, color or national origin. He has also assured the Department of Health, Education and Welfare that said state department will abide by the Civil Rights Act of 1964 (when the law has been determined with respect to the rules and regulations promulgated by the Department of Health, Education and Welfare). In spite of this assurance defendant has entered said order to terminate funds based on non-compliance with the rules and regulations promulgated by the Department of Health, Education and Welfare purporting to be pursuant to Title VI of the Civil Rights Act of 1964.

9. Plaintiff avers that said state department has not executed the assurance attached hereto as Exhibit B, and has not done other things required by the regulations (45 C.F.R. 80) on the ground that said assurance and the other things required of said state department by said regulations and instructions or by the provisions of Title VI of the Civil Rights Act of 1964 under which they were promulgated are, as applied to said state department in excess of the authority and powers of the Department of Health, Education and Welfare conferred by Title VI of the Civil Rights Act for the following separate reasons, in addition to each of the separate reasons heretofore set forth:

(a) The regulations promulgated by the Department of Health, Education and Welfare transcend the authority of Title VI of the Civil Rights Act in that the many specific Provisions in the regulations prescribing the acts or omissions that constitute "discrimination" go far beyond the general criterion proscribed in Section 601 of the Act (the first section of Title VI).

(b) The said regulations transcend and violate the intention of Congress as expressed or implied in Title VI of the Civil Rights Act, in that said regulations authorize the cutting-off or refusal to grant Federal financial assistance for failure of the recipient to give an assurance of compliance, whereas the intention of Congress was that financial assistance should be withheld only upon a finding of discrimination proscribed by the act.

(c) The regulations and instructions promulgated thereunder constitute an arbitrary classification and punishment of innocent as well as guilty conduct, by authorizing or requiring a denial or discontinuance of Federal funds on the sole ground of the applicant's failure to execute an assurance form represented by Exhibit B hereto, or give other assurances, without regard to whether any conduct of the applicant actually constitutes "discrimination" and without the necessity of any finding of the existence of "discrimination" or other conduct incompatible with the requirements of the act.

(d) The regulations and instructions promulgated by the Department of Health, Education and Welfare have no rational relevance to the purposes and objective promoted by the furnishing of financial assistance under the various statutes heretofore referred to in this complaint.

(e) The regulations and instructions of the defendant impose arbitrary and unreasonable requirements which exceed the powers and authority conferred upon defendant by Title VI of the Civil Rights Act and which are unnecessary to the achievement of the purposes of said act.

(f) The regulations and instructions of defendant exceed the powers and authority conferred upon defendant by the provisions of Title VI of the Civil Rights Act in that

they purport to authorize the denial or discontinuance of Federal financial assistance prior to and pending the exhaustion of the administrative proceedings provided for thereunder.

(g) The regulations and instructions of defendant exceed the powers and authority conferred upon defendant by the provisions of Title VI of the Civil Rights Act in that they purport to authorize the denial or discontinuance of Federal financial assistance prior to and pending the judicial review contemplated by the act.

10. Plaintiff is informed and believes, and therefore, avers that its failure to execute the assurance form contained in Exhibit B hereto or to comply in other respects with the requirements of defendant's regulations and instructions has resulted in the denial or discontinuance by defendant of financial assistance extended under the statutes heretofore enumerated in this complaint.

11. Plaintiff further avers that such denial or discontinuance of Federal financial assistance will cause irreparable damage to the plaintiff, and all of the citizens of the State.

12. Plaintiff avers that said state department has the right to receive such Federal financial assistance without compliance with the unlawful and unconstitutional requirements imposed with respect thereto by Title VI of the Civil Rights Act of 1964 or defendant's regulations and instructions thereunder.

13. Plaintiff further avers that the method under which said state department receives Federal funds and has received such Federal funds, by the operation of the State Plan, is a sufficient method of continuing a program which in its operation does not discriminate unfairly in any aspect of its operation on the basis of race, color or national origin.

14. Plaintiff avers that Section 4 of Form CBFS-5022 (Exhibit B) and the regulations of the Department of Health, Education and Welfare would require that the Commissioner, acting on behalf of the State Agency to assure that other agencies, institutions, or organizations participating in the department's program, through contractual or other arrangements, would comply with civil rights acts and regulations promulgated thereunder. Plaintiff avers that this is an unreasonable administrative requirement, that this requirement is without the authority of the Civil Rights Act, and said state department has no power or ability to effectuate the requirement imposed hereunder. Plaintiff avers that said state department has no power, authority, jurisdiction or ability to require compliance on the part of other agencies, institutions or organizations who provide services, contractual or otherwise, to public assistance recipients or children needing the care and services of said department. Plaintiff avers that it is unfair to the State of Alabama, Department of Pensions and Security, and to the citizens who receive the services of said department, to make receipt of funds contingent upon such unreasonable, unwarranted and illegal.

15. In order for individuals to receive certain benefits administered by this department, including Aid to the Blind and Aid to the Permanently and Totally Disabled, it is necessary for them to undergo medical examination. Under the regulations promulgated under Title VI of the Civil Rights Act of 1964 (See Exhibit B), such individuals will be deprived of these benefits unless there are available to them physicians who not only accept both Negro and White patients, but who also provide only nonsegregated office, waiting room and rest room facilities for all patients. Said state department has no authority, power or jurisdiction to require physicians in private practice to provide

facilities on a nonsegregated basis and the effect of such requirement would be to deny needy persons benefits which such persons are entitled to receive pursuant to the Social Security Act as administered by Alabama's State Plan. The requirement that plaintiff enforce such regulations constitutes an unreasonable administrative requirement and is beyond the scope of Title VI of the Civil Rights Act of 1964.

16. Paragraph 4 of Form CB-FS 5022 (See Exhibit B) states:

"The State agency will take such steps as necessary to assure that any other agency, institution, or organization participating in the program, through contractual or other arrangements, will comply with the Act and Regulations."

This provision has the effect of requiring the State Department of Pensions and Security to be an enforcement officer in regard to private institutions, such as nursing homes. Plaintiff has no authority, power or jurisdiction to obtain compliance by such private institutions or businesses. The requirement that plaintiff submit Form CB-FS 5022, including the above quoted provision, and the regulations under which this form is required, constitute an unreasonable administrative requirement and are beyond the scope of Title VI of the Civil Rights Act of 1964.

17. A present actual justiciable controversy exists as to each of the matters and things set forth in this complaint, and plaintiff seeks a resolution of such controversy and a declaration as to each by this Court.

18. Plaintiff avers that adequate assurance has already been given the Department of Health, Education and Welfare that it will not discriminate with respect to direct grants and services to people and that any order to terminate funds

to needy people in Alabama for direct grants and services is capricious, arbitrary and unreasonable.

19. Plaintiff avers that the order of the Secretary of Health, Education and Welfare of January 12, 1967, is capricious, arbitrary and unreasonable and in violation of law in that it purports to deprive Alabama of funds for direct payments to otherwise eligible needy persons for public assistance without a showing that the Alabama Agency discriminates in violation of Title VI of the Civil Rights Act.

20. Plaintiff avers that the Secretary's order of January 12, 1967, terminating assistance to needy persons authorized by law to receive public assistance payments is defective in that individuals who have no dealings with third parties should not be deprived of much needed public assistance.

21. Plaintiff avers that the order of the Secretary of January 12, 1967, is unlawful in that it deprives needy individuals in Alabama of necessary public assistance payments and services to which they are entitled under the statutes of the State of Alabama, which statutes have been accepted by the Department of Health, Education and Welfare as part of its continuing plan to help needy persons, and the Department of Health Education and Welfare has not shown that Alabama has failed to assure the department that it is not discriminating or will not discriminate in violation of Title VI of the Civil Rights Act.

22. Plaintiff avers that the Secretary's order of January 12, 1967, is contrary to law in that it appears that Alabama has not assured the Department of Health, Education and Welfare that it will not discriminate on the basis of race, color and creed when, in fact, the Alabama Agency has given adequate assurance pursuant to the provisions of Title VI of the Civil Rights Act and any legal requirement thereof.

23. Plaintiff avers that the Secretary's order of January 12, 1967, is contrary to law in that it purports to equate the regulations of the Department of Health, Education and Welfare with the provisions of law of Title VI of the Civil Rights Act and such regulations are in excess of the authority given the Department of Health, Education and Welfare by Congress in Title VI. Such regulations are contrary to law as applied to the Alabama Agency and void.

WHEREFORE, the plaintiff prays that this Court will take jurisdiction of this cause and cause the proper process to be issued to the defendant.

Plaintiff further prays that this Court will issue a preliminary injunction, or restraining order, enjoining the defendant from putting the defendant's said action into effect and from discontinuing the funds from the said state department in accordance with defendant's said action.

Plaintiff further prays that this Court will review the said action (Exhibit A), and will upon final hearing enjoin the defendant and the Department of Health, Education and Welfare from taking the action prescribed in the said order of the defendant (Exhibit A) and from cutting off and discontinuing the Federal funds which would otherwise be made available to the said state department.

Plaintiff prays for such other and further relief as shall be proper.

Reid B. Barnes [Sig.]

REID B. BARNES

*Special Assistant Attorney General
Attorney for the Plaintiff*

317 North 20th Street

*Exchange Security Bank Building
Birmingham, Alabama*

EXHIBIT A

In the Matter of the ALABAMA STATE BOARD OF
PENSIONS AND SECURITY and the ALABAMA
STATE DEPARTMENT OF PENSIONS AND
SECURITY

Docket No. CR-1

Compliance Proceeding Pursuant to Section 602 of
the Civil Rights Act of 1964 and the Regulation of the
Department of Health, Education and Welfare Issued
Pursuant Thereto

ACTION OF THE SECRETARY OF HEALTH,
EDUCATION AND WELFARE

This case involves the refusal of the Alabama Board of Pensions and Security and the Alabama State Department of Pensions and Security (hereinafter referred to jointly as the Agency) to comply with the Regulation issued by this Department and approved by the President pursuant to Section 602 of the Civil Rights Act of 1964 (45 CFR 80).

Under Section 80.4(b) of this Regulation each State agency administering "continuing" public assistance and welfare programs financed in part by Federal funds is to submit a statement of the extent to which those programs are and are not in compliance with Title VI of the Civil Rights Act and a description of methods of administering those programs which the Commissioner of Welfare finds give reasonable assurance of securing compliance under Title VI. The Alabama agency administers such programs under Titles I, IV, V (Part 3), X and XIV of the Social Security Act. Their programs provide for Old Age Assistance and Medical Assistance for the Aged, Aid to Families with Dependent Children, Child Welfare Services, Aid to the Blind and Aid to the Permanently and Totally Disabled.

Only the Alabama agency, among the welfare agencies of all the States, has refused to submit the required statement and description of its compliance program. Between December 1964 and August 1965, the Commissioner of Welfare, through printed materials, briefings, private conferences and direct correspondence, sought the compliance of the Alabama agency.

On August 17, 1965, however, the Commissioner determined in writing that she was unable to bring the Agency into voluntary compliance with Title VI and scheduled a hearing on the matter. A notice was sent to the Alabama agency on that same day by the General Counsel of this Department specifying those matters of fact and law which were considered to constitute non-compliance and stating that Federal assistance to Alabama under the programs involved would be terminated if the Agency was found to be in non-compliance.

The hearing procedures called for in Section 602 of the Civil Rights Act and in Sections 80.8(c), 80.9, 80.10 and 81 of the Regulation of this Department (45 CFR Parts 80 and 81) have been followed.

The Hearing Examiner in this case recommended on April 6, 1966, that the Alabama welfare agency be found in non-compliance with Title VI and that Federal assistance to Alabama under Titles I, IV, V (Part 3), X and XIV of the Social Security Act be terminated. After a hearing and the consideration of briefs and exceptions, the Commissioner of Welfare substantially adopted those recommendations in a decision dated November 16, 1966.

My function is to "approve such decision, . . . vacate it, or remit or mitigate any sanctions imposed" . . . (45 CFR Part 80, Section 80.10(e)). If I approve any termination of Federal assistance as a result of a finding of non-compliance

with Title VI, I am to make a full report of the matter to the Ways and Means Committee of the House of Representatives and to the Senate Finance Committee. Under the law the effective date of such termination is to be no less than thirty days after such reports are filed.

I have reviewed the Commissioner's decision, the testimony, exhibits, briefs and recommendations on which it was based, the exceptions filed by the Alabama agency and the reply thereto of the General Counsel of this Department.

Three requests or motions made by the Alabama agency call for an answer at this point:

1. *Request for a hearing before the Secretary* Under Section 81.106 of this Department's Regulation or independent thereof, the Agency requests an opportunity to make an oral presentation to me.

This request is denied. In my opinion the issues in this case have been fully elaborated, clarified and emphasized in the testimony before the Hearing Examiner and the Commissioner and in the exhibits, briefs, recommendations and decision which have been submitted.

2. *Motion to present current data concerning civil rights in Alabama as it relates to grants and services under the child welfare and public assistance programs involved in this proceeding.*

The Alabama agency asserts that changes have taken place since the time of the hearing before the Examiner which "materially affect" Alabama's right to receive Federal assistance for child welfare and public assistance programs. They ask to be allowed to submit such evidence by affidavit or otherwise or that final decision be withheld until this evidence can be presented at a new hearing.

This motion is denied. Evidence of decreased racial discrimination in the operation of the Federally assisted child welfare and public assistance programs in Alabama would be welcome. However, such evidence of decreased discrimination alone would not compensate for the failure of the Alabama agency to commit itself to achieve non-discriminatory care and services in Federally-assisted programs as called for in Section 80.4(b) of this Department's Regulation. Were it willing to do so, however, this evidence would, of course, be relevant and needed to evaluate the adequacy of the methods of administration which it would propose to use to assure compliance with Title VI.

3. *Motion to incorporate Title XIX into this proceeding.*

Pursuant to Section 81.56 of this Department's Regulation, the Alabama agency moves to add to this proceeding, the question of the compliance of its proposed Medical Assistance program with Title VI. The Agency is trying in this way to have this new program approved and funded without providing the assurances of non-discrimination called for in our Regulation. The Agency promises only to comply with what the courts ultimately decide it must do.

This motion is denied. I do not believe that granting it would be either timely or appropriate.

This Department shares the expressed interest of the Alabama welfare agency in bringing the benefits of Title XIX to the people of Alabama as soon as possible.

We stand ready to help it to resolve all of the issues—civil rights and otherwise—which presently stand in the way of approval of its Title XIX plan.

If the Commissioner of Welfare determines that voluntary compliance with Title VI requirements cannot be ob-

tained for that plan, formal action on the matters in dispute will be expedited.

Approval of Decision

The Alabama agency recognizes that the "legality" of this Department's Title VI Regulation is not a question to be considered in this proceeding. This issue may be raised before the courts.

Within the area of Departmental discretion under the Regulation, however, I consider the actions of the Commissioner of Welfare in this matter to have been reasonable and appropriate and I approve her decision that the Alabama agency is not in compliance with Title VI.

It is disappointing that we have had to seek compliance formally in an area where the voluntary cooperation of all parties is so important. It is particularly unfortunate that such action may necessitate the termination of badly needed Federal welfare funds in Alabama.

The Alabama welfare agency in effect seeks to force this Department to choose between its mission to assist States in aiding the needy and its obligation to secure non-discriminatory treatment for those receiving assistance through Federally aided programs. As stated at page 26 of its brief to the Commissioner of Welfare, "Until public assistance recipients receive an adequate grant and receive needed services, Respondents submit that the requirements of the Civil Rights regulations are irrelevant, oppressive and illegal."

This Department does not agree that the poor and the disabled are less entitled to non-discriminatory treatment than other Americans. We do not propose to ignore or postpone their fundamental human rights until we can adequately provide for their physical needs. We do not accept

the proposition that seeking non-discriminatory care for the needy will reduce the amount of care available to them.

It seems self-evident that the more scarce facilities are, the more important it is to try to assure full access to them by all those in need of assistance under Federally aided programs.

The Alabama agency alone among the welfare agencies of all the States has refused to accept the procedures suggested by the Welfare Administration for compliance with Title VI. It has attacked the validity of the provisions in Section 80.3 of the Department regulation which prohibits discrimination in the provision of Federally-assisted services through third parties. It has been unwilling to commit itself to achieve non-discriminatory care and services in Federally-assisted programs as called for in Section 80.4(b) of that regulation. It has not adopted or proposed methods of administering its programs which give "reasonable assurance" that compliance with Title VI can be obtained; nor has it made a clear commitment not to discriminate on the basis of race in those aspects of its program which are solely within its control as is also required in Section 80.4(b). It has said only that it will comply with the Civil Rights Act as that Act is interpreted in the courts.

To await ultimate judicial review and approval of the Department's Regulation before enforcing its provisions would constitute an abdication of the responsibility of this Department.

The object of Title VI and of our Regulation is to assure that with respect to Federally-assisted programs no person shall on the basis of race, color or national origin be subjected to discrimination or excluded from any Federal benefit.

Where compliance with this statutory mandate cannot be secured by voluntary means, Congress has directed that, after an opportunity for a hearing and a finding on the record, Federal agencies and departments are to terminate or withdraw financial assistance. The procedures prescribed by Congress have been adhered to fully and meticulously. Alabama continues to have the right of seeking judicial review of any final action taken by the Department.

The refusal to submit the required assurances and methods of administration is more than a matter of form. The General Counsel is correct in stating that in programs such as these:

"The Federal-State relationship is grounded in State plans which evidence the State's commitment, whereby the single State agency (here, the Respondents) is charged with responsibility for seeing that Federal requirements are met. In absence of such an undertaking of responsibility by the State, there is no basis for operation of the Federal-State program."

As he also stated:

"With the enactment of Title VI the State's responsibility was automatically extended, if it desired to continue to receive Federal financial assistance, to embrace the prevention of racial discrimination under the programs."

Alabama has refused to comply with the Department Regulation despite the repeated conciliatory efforts of the Commissioner of Welfare to find a basis for agreement. Correspondence from the Commissioner and the General Counsel and their statements in this proceeding make clear that they have remained ready to consider any reasonable modification proposed by the State to the suggested procedures which would still meet the requirements of the Regulation.

Specifically, the Alabama welfare agency has been assured in writing that it need commit itself to compliance only for those programs under which it wishes to qualify for continued Federal assistance. The Agency also has been advised that it may negate any inference that it is guaranteeing the compliance of those whom it compensates for furnishing services to beneficiaries of Federal Services.

It should also have been obvious to the Agency that it could have offered to comply on those parts of its programs which do not involve any compensation for services provided to beneficiaries by third parties. More than 80 percent of the Federal assistance provided for its program does not involve such third party services.

None of these possibilities has produced any perceptible movement by the Alabama agency toward compliance for any part of its programs. It remains in non-compliance in at least the following respects:

1. It has not made a clear and adequate commitment to insure non-discriminatory operation of its Federally aided welfare programs even in those parts which involve payments or the provision of services directly to beneficiaries by the Agency. As stated by the General Counsel at page 4 of his brief dated December 22, 1965, "This prohibition against discrimination extends to any differential treatment on account of race in any aspect of the making of money payments, including the treatment of individuals in facilities where application is made, any medical examinations incident to the determination of eligibility, the determination of eligibility itself and the amount or type of benefits or social services, and the assignment of case workers." The prohibition against discrimination similarly extends to other matters which are under the Agency's control such as the location of local offices.

2. The Alabama agency has refused to accept any responsibility for assuring that third parties to whom it provides services, or whom it compensates in connection with care they provide to beneficiaries, shall provide such care without racial discrimination.

3. It has not provided an adequate statement of the extent to which racial discrimination presently exists in connection with its Federally-assisted welfare programs.

4. It has not agreed to or proposed methods of administering its Federally-assisted welfare programs—even in connection with those matters which do not involve the services of third parties—in a way that gives reasonable assurance that those parts of its programs will be operated on a non-discriminatory basis. More specifically, it has *not*:

(a) provided sufficiently for instruction or dissemination of information about the rights and responsibilities under Title VI of staff members, beneficiaries or third parties providing services;

(b) proposed any system of surveying compliance, keeping records or filing reports that would enable compliance to be properly evaluated;

(c) suggested a complaint process that offers all interested or affected persons an adequate opportunity for consideration of complaints of alleged non-compliance.

In short, more than two years after promulgation of this Department's Title VI Regulation and more than 16 months after receipt of the bill of particulars contained in the General Counsel's letter of August 27, 1965, the Alabama agency has not offered to correct any of the deficiencies in compliance as to any part of any of its Federally-assisted programs.

Exceptions Taken by the Alabama Agency

The Alabama agency has taken numerous exceptions to the decision of the Commissioner of Welfare most of which repeat exceptions which it had taken to the Hearing Examiner's recommended decision.

I have considered each of these and make the following rulings on them:

I. *Withholding of Funds for Direct Grants to Public Assistance Recipients.* The Alabama Welfare agency contends that the parts of its programs which involve direct money payments to beneficiaries are separable from the parts which involve payments to third parties for services to beneficiaries, that no significant discrimination has been shown as to such direct payments and therefore that Federal funds for such payments should not be withheld.

Commissioner Winston's decision did not rule that the Alabama agency could not comply on the direct payment parts of its programs alone. She noted, however, that it was still not clear "whether the Respondents are prepared to offer a Statement of Compliance which the Commissioner of Welfare could find acceptable under Federal law and regulations with respect to direct money payments."

The Alabama agency seems unwilling to accept the fact that it must do more than pledge non-denial of benefits based on race and refute any allegations of discrimination which are made.

Section 601 of the Civil Rights Act of 1964 provides not only that beneficiaries of Federally assisted programs shall not be denied benefits on the basis of race, but also that they shall not be subjected to racial discrimination under such programs.

In accordance with Section 602, the Regulation which this Department has issued seeks to effectuate those provisions consistent with the achievement of the objectives of the various programs covered by this Regulation.

The Regulation seeks to do so in the tradition of Federal-State health, welfare and education programs by providing for each State agency to submit a statement assuming responsibility for securing compliances with Title VI and a program for achieving that result. As stated earlier, the Alabama agency has refused to submit such a statement and a program.

The Agency also suggests that its practice of assigning case workers to beneficiaries on the basis of race is excluded from the coverage of Title VI by Section 604. I reject that suggestion. Section 604 does not excuse discriminatory employment practices which also constitute discrimination in the way services are provided to beneficiaries of Federally assisted programs. This has been our consistent position in connection with the assignment of teachers under Federally assisted education programs and it is equally applicable to case workers employed by State welfare agencies.

The exception of the Alabama agency to the withholding of Federal funds for direct payments to beneficiaries is therefore denied because the Alabama agency has thus far refused to comply with the requirements of Title VI even as to such direct payments.

As noted by the General Counsel at pages 7 and 8 of his brief:

"In the Federal-State programs, the Congress has made Federal financial assistance available to the States if they comply with certain Federal requirements prescribed in or pursuant to the applicable Federal statutes.

The States have the sole choice as to whether they wish to participate in any program. If the Respondents will not comply with the requirements pursuant to Title VI of the Civil Rights Act of 1964, it is their choice, and theirs alone, not to be eligible for Federal financial assistance."

"Respondents have challenged the implementation of Title VI in the simplest and most fundamental way—by refusing to agree to a basic condition for operation of the programs. Unless the Federal authorities are to abandon their responsibility for carrying out the Federal statute and the Presidentially-approved Regulation, there is no alternative to acceding to the State's choice to opt out of the Federal-State programs."

The Alabama agency is specifically invited, however, to submit a satisfactory compliance statement and methods of administration to cover at least the parts of its programs which provide for direct money payments. Such action on its part would make it possible for us to continue more than 80 percent of the Federal assistance we are now providing for the programs in question. The Commissioner of Welfare is available to discuss this possibility if the Alabama agency so desires.

II. *Withholding of Federal Funds Used to Pay for Services Where the Beneficiary Has Selected the One Providing the Service.* The Alabama agency urges that Federal funds used to pay for the services provided by third parties should not be terminated because of racial discrimination in providing such services since the beneficiary not the State agency selects the one to provide the service.

This exception is also rejected. The refusal of the Alabama agency to accept responsibility for assuring beneficiaries are served without discrimination cannot be justified

on the ground that the beneficiaries are "free" to choose the providers of their care. In many cases the beneficiaries have no choice but to accept what they can get on whatever terms it is offered and wherever in the State it is available. The ultimate object of Title VI, this Department's Regulation and this proceeding is to broaden their choice and to improve their options.

It is also noted that the Alabama agency performs functions in connection with third party "vendors" beyond paying for their services. Either directly or through other State agencies it negotiates or sets the fees which it will pay and it is involved—as the Agency itself admits—in at least "helping" make arrangements for medical care "if requested to do so."

If the Alabama agency would assume its responsibilities, the termination of Federal funds for third party payments could be avoided. We could work together with the Agency toward our common objective of better service for the needy of Alabama.

III. *Withholding of Administrative Funds.*

The Alabama agency states that "Commissioner King has made it clear that he will do everything within his control to comply with Title VI of the Civil Rights Act and it excepts to any withholding of Federal funds for administration of Alabama's Public Assistance and Child Welfare programs."

The exception is denied. For the reasons set forth above, I do not believe that either Commissioner King or those representing him in this proceeding have made clear that the Alabama agency is complying or is ready to comply with Title VI on any of its programs or parts thereof.

If the Agency is ready to do so now, however, for those

parts of its programs which involve only direct payments and services to individuals, we will be able to continue providing funds for administration of those program parts.

IV. *Exceptions Repeated from Brief to the Commissioner of Welfare*

(1) *Determination of the Alabama Agency's Unwillingness to Comply Voluntarily.* The Agency contends that both the Hearing Examiner and the Commissioner of Welfare misjudged it. It asserts that it "wishes now to comply with any legally effective law or rule and regulation," but that the Agency does not consider the Title VI regulation of this Department to be legally effective in Alabama. It seems to suggest that since it may seek judicial review of our Regulation and since it has said it will comply with what the courts will enforce, that it is premature to find it unwilling to comply.

I agree with Commissioner Winston's overruling of this exception. The "willingness to comply" which the Alabama agency expresses is neither adequate nor immediate.

(2) *Proposed Findings.* The Commissioner of Welfare recognized that the Alabama agency had proposed findings to the Hearing Examiner and the Agency stated that she had corrected the error alleged.

(3) *Application of Title VI to Discrimination in Services Provided by Third Parties in Federally Assisted Programs.* The Alabama agency repeats its objection to the Hearing Examiner having summarized part of its position as being "that Title VI of the Civil Rights Act does not, in substance, authorize the Federal Government to object where individuals are separated or segregated on the grounds of race, color or national origin, in being provided

benefits under Federally financed assisted programs, particularly when such services are provided by third parties through contractual or other means." The Agency says instead that its position is that it does not have the power to compel such third parties to stop discriminating on the basis of race.

The Commissioner of Welfare overruled the exception saying that she considered the Hearing Examiner's interpretation "to be more in accord with the Respondent's primary position than the exception suggests."

I agree. However it is phrased, the Alabama agency is saying that in complying with Title VI it should not have any responsibility to avoid arrangements with third parties who discriminate.

No one has suggested that it can compel private parties to provide services to Federally assisted beneficiaries without discrimination.

Our Regulation under Title VI is based upon the premise that most of those providing such services can be persuaded to provide them nondiscriminatorily and to the extent they will not, that Federal funds should not be paid to help perpetuate such discriminatory practices against innocent beneficiaries. Alternate, acceptable services should be found and developed.

The Alabama agency has refused to be a party to such persuasion and administrative action, at least until it has exhausted its rights to judicial review. Assuming the legality of our Regulation were upheld, the Agency apparently would then accept responsibility for seeking third party compliance—although, of course, it will have no greater power then to compel such compliance than it now has.

(4) *Eligibility for Public Assistance in Alabama.* The

Alabama agency repeats its exception to the Hearing Examiner's statement that "a completely destitute aged individual may receive a money payment of \$75 per month. The Agency concedes that this is or was correct but contends that it is misleading because "a person need not be 'completely destitute' to receive the amount."

I concur in the Commissioner's ruling that the issue involved here is immaterial.

(5) *Help Provided in Arranging for Medical Care.* The Alabama agency asserts that the Hearing Examiner erred in stating that "quite frequently" it participates in helping to make arrangements for those needing medical care and that the Commissioner of Welfare failed to recognize that this was "an incorrect reference to freedom of choice" which raises "a material question."

The Commissioner noted that the Alabama agency's view of its undertakings on behalf of those wanting arrangements for medical care to be made for them was more limited than that of the Examiner. She found support for this statement in the record, however, and determined that "in any event, the Exception relates to an issue substantially immaterial to the basic mode of administration to which it is addressed."

This exception is again overruled. As stated earlier, the Alabama agency, as the disbursing of Federal funds for welfare in Alabama, has a responsibility to seek an end to discrimination in the services provided by third parties under Federally assisted programs.

This is true even when the individual selects the provider of his care. The extent of the Alabama agency's involvement in making arrangements for such care does not affect the existence of that responsibility but only the ways

in which it should be exercised.

(6) *Securing the Services of Physicians.* The Alabama agency also repeats its exception to the Hearing Examiner's statement that the Alabama agency uses the services of physicians to determine eligibility for certain forms of public assistance. It again urges the materiality of any point relating to freedom of choice.

In its previous assertion of this exception the Agency had also noted a second reference to the eligibility of "completely destitute" persons which it considered misleading.

For the reasons stated in dealing with exceptions (4) and (5), I consider that this exception is not material and concur in the Commissioner's action on it.

(7) *Omission of Findings on the Legislative History of the Civil Rights Act of 1964.* The Commissioner properly overruled this exception. As noted earlier the "legality" of this Department's Title VI Regulation will not be considered in this proceeding. Therefore, no findings of legislative history are considered necessary to support it.

(8) *Discrimination in Availability of Day Care Centers.*

The Alabama agency repeated its objection to the Hearing Examiner's statements concerning discrimination in the availability of day care centers in Alabama. It objects to his having stated that the same ratio of availability of better quality day care centers existed in favor of whites as was true for day care centers in general.

The Commissioner of Welfare did not consider this objection material because it was directed at the precise ratio of white to Negro quality day care centers and did not dispute the findings of discrimination in the availability of those centers. Her ruling is affirmed.

The analysis "of the ways in which discrimination exists or is practiced" which the Alabama agency urges be undertaken, can best be done—as our Regulation provides—by the Alabama agency as part of its program of compliance with Title VI.

(9) *Separate but Equal Doctrine.* The Alabama agency contends that it is not seeking to justify the segregationist practices of third parties providing services under Federally assisted programs but is only contending that it is unable to require civil rights compliance by such parties. It "objects strenuously" to the Hearing Examiner's statement identifying its position with the separate-but-equal doctrine.

This objection is overruled. The Hearing Examiner's characterization was neither unreasonable nor material.

Without using the phrase "separate but equal," the Alabama agency has repeatedly urged that compliance with Title VI should not be considered to require it to seek "sociological purity of the suppliers of services to the indigent." It has sought to establish its compliance with Title VI principally on the basis that no beneficiary is denied benefits in Alabama because of race even though such benefits may be provided on a segregated or discriminatory basis.

All of these things indicate the acceptance by the Alabama agency of present patterns of segregation and discrimination in providing Federally assisted welfare services.

Whether or not the agency approves of such segregation and discrimination or merely acquiesces in it, its approach would help to perpetuate such practices and does not discharge its responsibilities under Title VI of protecting beneficiaries from such practices.

(10) *Adequacy of Statement of Compliance.* The Ala-

bama agency contends that it has filed a statement of compliance with Title VI. It also objects to the Hearing Examiner's determination that it had, in executing its State plan, in fact assumed responsibilities for assuring that third parties providing services must avoid discrimination in so doing.

The inadequacies of the statement submitted by Commissioner King were fully covered in the General Counsel's letter of August 27, 1965, and have been reaffirmed at each stage of this proceeding, including earlier parts of this action.

As Commissioner Winston noted, the point raised as to the State plan is immaterial.

(11) *Coverage of Individual Physicians.* The Alabama agency implies that since conditions in the offices of individual physicians are not explicitly covered in Title VI or in this Department's Regulation, we should not insist that those whose care is paid for with Federal funds are entitled to non-discriminatory treatment in such offices.

Commissioner Winston was correct in ruling that this matter is adequately covered in the illustrative examples of the scope of the Regulation, specifically in Section 80.5(a).

(12) *Reasonableness of Compliance Requirements Regarding Third Party Actions.* The Alabama agency asserts again that it should not be required to "boycott" third parties providing services in a discriminatory manner under Federally assisted programs in order to receive such Federal assistance. It asks reexamination of its exceptions to the Hearing Examiner's decision in which the Agency observed that "It appears that the regulations with respect to third parties promulgated by the Department of Health, Education, and Welfare are irrelevant, oppressive and illegal in Alabama."

As stated earlier the legality of the Regulation will not be considered in this proceeding and the expressed intention of the Alabama agency to seek judicial review of this Regulation will not be accepted in lieu of compliance with the Regulation.

(13) *Failure to File a Statement of Compliance.*

The Alabama agency excepts to a second finding of the Hearing Examiner that it did not submit a Statement of Compliance. It also refers to its exception to any withholding of Federal funds for direct money payments.

For the reasons stated in overruling exceptions 1 and 10, this exception is also overruled.

(14) *Knowledge of Discriminatory Practices.*

The Alabama agency contends that the Hearing Examiner incorrectly described Commissioner King's knowledge of discriminatory practices involving welfare recipients. The Examiner stated that "Respondents have neither made nor taken any action to make or secure a fair inventory or evaluation of the extent of unavailability of treatment, or other discriminatory practices directed against beneficiaries of the programs involved here, solely on account of their race or color, and Respondents have not evidenced any intention of so doing. . . ."

As the Agency's brief to the Commissioner of Welfare indicates, the exception is based on the fact that Commissioner King did assert that he was informed about the availability of certain kinds of medical care to the needy of both races in Alabama. However, the Commissioner also testified that he had not tried to make any evaluation of Title VI compliance or non-compliance in Alabama welfare programs and that the Alabama agency had no intention of signing

a compliance statement covering contractual arrangements with third parties.

I agree with Commissioner Winston that the record supports the finding of the Hearing Examiner. Commissioner King did not have nor has he expressed any willingness to compile the detailed inventory of compliance and non-compliance required under Title VI. The finding should be modified, however, to reflect Commissioner King's knowledge about the availability or unavailability of certain forms of treatment.

(15) *Segregation in County Office Buildings.*

Commissioner Winston conceded that the Hearing Examiner's finding of segregation or discrimination in the use of physical facilities in county office buildings where welfare programs are administered, should be modified to indicate that such segregation or discrimination only exists in some of such buildings.

The Alabama agency still objects to the finding, stating that the testimony established "that county offices, with very few exceptions, maintain all facilities on a nearly non-discriminatory basis."

The Commissioner of Welfare ruled properly on this matter, in my opinion. The record does not make clear how extensive segregation is in such office buildings. The word "some" certainly does not prejudice the position of the Alabama agency that "with very few exceptions" such buildings are operated on a non-discriminatory basis.

(16) *Validity of Departmental Regulation.*

The reservation of this exception is noted. As stated earlier, this matter will not be considered in this proceeding.

(17) *Failure to Find Non-Denial of Benefits on the Basis of Race.*

The Alabama agency "objects strenuously" to the lack of a finding that it does not deny benefits on the basis of race.

It is true that the Agency has repeatedly asserted that it does not deny benefits on the basis of race and that it is not aware of anyone who, because of race, has not been able to secure medical care or services somewhere in Alabama. Given the testimony as to the amount of discrimination and segregation existing and in the absence of a complete evaluation of the extent of compliance under Title VI, the Commissioner of Welfare correctly determined that it was neither possible nor appropriate to make the finding requested by the Agency.

(18) *Concern about Timing.* The Alabama agency does not press its exception that the Certificate of Service attached to the Hearing Examiner's Recommended Decision is defective because of incomplete dating. It suggests, however, "that on questions of timing the Department of Health, Education and Welfare has consistently shown a lack of concern about establishing the point of time in which certain legal actions can be deemed to have occurred or not to have occurred." As Commissioner Winston ruled and the Alabama agency seems to concede, any clerical error that occurred in connection with the Certificate of Service did not prejudice it. Its request for a hearing before the Commissioner was granted and its request for an extension of time to file their exceptions and briefs with me was granted.

The Alabama agency's "suggestion" of our lack of concern with the time at which legal actions "can be deemed to have occurred or not to have occurred" seems intended to renew its exception that this proceeding is premature. That exception is again rejected. Two years after the effec-

tive date of our Title VI Regulation is not too early to determine that agencies which have refused from the beginning to provide the assurances required, are not in compliance with Title VI.

(19) *Failure to Find that the Compliance Statement Required is an Unreasonable Implementation of the Civil Rights Act.* The Alabama agency objects to the failure to find that it should not be required to state more than that it will comply with the Civil Rights Act and that the compliance statement required by the Commissioner of Welfare is not authorized by the Civil Rights Act as it applies to welfare programs. This objection is overruled. The desired findings are wrong. *Under the Title VI Regulation of this Department, the Alabama agency is required to state more than that it will comply with the law as it is ultimately interpreted in the courts.* The compliance form which the Welfare Administration has suggested is a reasonable and appropriate implementation of that Regulation. It has also been made clear that it may suggest any modifications thereof which meet the requirements of the Regulation.

As requested by the Alabama agency, the material contained at pages 1-13 and 23-27 of the brief to Commissioner Winston is considered to have been included in the exception and brief which the Agency filed with me.

The points contained in those pages and in the conclusion to the brief filed with me are considered to have been adequately discussed and disposed of elsewhere in this action. Any point or exception raised by the Alabama agency and not otherwise disposed of is rejected.

CONCLUSION

For the reasons stated above, I approve the decision of the Commissioner of Welfare that the non-compliance

of the Alabama welfare agency with Title VI requires the termination of Federal assistance until compliance can be achieved.

Such a termination will produce serious hardship to many needy persons and their families in Alabama. It will also rupture a Federal-State relationship which has functioned for more than 30 years in serving the poor and disabled of Alabama.

I want to avoid both results to the extent possible. I cannot do so, however, by condoning the refusal of the Alabama welfare agency to assume the same kind or responsibility for Federal standards on non-discrimination that it has assumed for other aspects of its Federally assisted programs.

Although the Alabama agency has repeatedly stated its intention not to comply unless it fails to have the Commissioner's decision reversed on judicial review, I continue to hope that the Alabama agency will come into full compliance for all of its programs voluntarily and thus end the necessity of eliminating or reducing Federal assistance to the needy of Alabama.

Because its primary objection seems to be against requiring third parties to serve beneficiaries of Federal assistance without discrimination and because of its concern about termination of funds for direct money payments to beneficiaries, I have specifically invited the Alabama agency to submit adequate compliance statements for the parts of its plans which involve only direct money payments or social services to individuals. This option of compliance for some but not all of the Federally-aided programs has always been available to the State agency. I wish to urge the agency to avail itself of this option during the period prior to the effective date of this order. If the agency fails to do so, it

must assume full responsibility for any disruption in the provision of aid and care to the needy of Alabama.

As part of such compliance statements, the Alabama agency should state that third parties are not and will not be involved in the assistance and services provided to beneficiaries and therefore that the requirement of the Regulation concerning third party responsibility is not applicable.

Compliance with Title VI for those parts of the Alabama Public Assistance and Welfare programs which do not involve third party "vendors" would enable us to continue providing more than 80 percent of the approximately 95 million dollars that the Federal government contributes annually to those programs.

We regret that even if compliance is achieved for these program parts, Federal funds for medical assistance for the aged and the disabled will still have to be terminated in Alabama if the State Agency persists in its refusal to accept responsibility for securing compliance with Title VI by third parties providing such Federally assisted care. The necessity of terminating Federal funds used in making payments to physicians, hospitals and nursing homes in Alabama or in providing services to nursing homes and other institutions will also adversely affect the State programs for child welfare, aid to dependent children and aid to the blind.

I, of course, continue to invite the voluntary compliance of the Alabama agency for these third-party payments and services also.

I am this day filing a full report of this matter with the Ways and Means Committee of the House of Representatives and with the Senate Finance Committee. Pursuant to Section 602 of the Civil Rights Act of 1964 and Section 80.8(c) of the Regulation of this Department, the

decision terminating Federal assistance which is approved in this action will become effective at midnight, February 28.

As indicated above, I would welcome the opportunity to modify this action and the termination of funds to the extent that the Alabama agency comes into compliance as to all or part of any of the Federally-assisted programs involved. The opportunity for it to do so has been available for two years but I want to make it clear that the action I am now taking in no way reduces that opportunity or our desire that Alabama take advantage of it.

JOHN W. GARDNER

Secretary

*Department of Health, Education,
and Welfare*

Washington, D. C. 20201

Jan. 12, 1967

EXHIBIT B

Form CB-FS-5022

Budget Bureau No. 122-R097

Approval expires 1/31/66

DEPARTMENT OF HEALTH, EDUCATION,

AND WELFARE

Welfare Administration

Bureau of Family Services

Children's Bureau

(1/65)

(CR-4000)

STATEMENT OF COMPLIANCE PURSUANT TO
TITLE VI OF THE CIVIL RIGHTS ACT OF 1964(To be completed and submitted as part of the
State CWS and PA plans)

State _____

State Agency _____

State plans included in this Statement of Compliance

- a. Title I OAA ()
- b. MAA ()
- c. Title IV AFDC ()
- d. (Community Work and Training)..... ()
- e. Title V CWS ()
(Part 3, Secs. 521-525; 527-528)
- f. Title X AB ()
- g. Title XIV APTD ()
- h. Title XVI AABI ()
- i. MAA ()

Pursuant to title VI of the Civil Rights Act of 1964, the Regulation issued thereunder (Title 45, Code of Federal Regulations, Part 80), and the BFS-CB Handbook Supplement, the State agency certifies, in respect to the above identified State plans, as follows:

1. *Scope*

The State plan is being (or, in the case of a new plan, will be) and will continue to be administered in such manner that no person in the United States will, on the ground of race, color, or national origin, be excluded from participation in, be denied any aid, care, services, or other benefits of, or be otherwise subjected to discrimination in, the program under the State plan, (except as indicated under paragraph 9 below, if applicable).

2. *Discriminatory Practices Prohibited*

The State agency will not, directly or (through contractual or other arrangements), on the ground of race, color, or national origin:

- a. deny any individual any aid, care, services, or other benefits provided under the program;
- b. provide any aid, care, services, or other benefits to an individual which is different, or is provided in a different manner, from that provided to others under the program;
- c. subject an individual to segregation or separate treatment in any matter related to his receipt of any aid, care, services, or other benefits provided under the program;
- d. restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any aid, care, services, or other benefits provided under the program;

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- e. treat an individual differently from others in determining whether he satisfies any eligibility or other requirement or condition which individuals must meet in order to receive any aid, care, services, or other benefits provided under the program;
- f. deny any individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee where the primary objective of the Federal financial assistance to the program is to provide employment, including a program under which the employment is provided to reduce unemployment, as set forth in section 80.3(c) of the Regulation).

3. *Administrative Practices*

The State agency, in determining (a) the types of aid, care, services, or other benefits to be provided under the program, or (b) the class of individuals to whom, or the situations in which, such aid, care, services, or other benefits will be provided under the program, or (c) the class of individuals to be afforded an opportunity to participate in the program, will not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin or have the effect of defeating or substantially impairing accomplishment of the objectives of the program in respect to individuals of a particular race, color, or national origin.

4. *Other Agencies, Institutions, Organizations, and Contractors*

The State agency will take such steps as necessary to assure that any other agency, institution or organization participating in the program, through contractual or other arrangements, will comply with the Act and Regulation.

5. *Methods of Administration*

The State agency will include in the State plan such methods of administration as are found by the Commissioner of Welfare to give reasonable assurance of compliance.

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6. *Dissemination of Information*

The State agency will make available information (including information in written form) about the Civil Rights Act and the Regulation and the protections against discrimination assured by such Act and Regulation, to all applicants, recipients, participants in the program (including any other agency, institution or organization participating in the program through contractual or other arrangements), State and local staff, and other interested persons.

7. *Complaint Procedure*

In addition to any other remedies available, a complaint procedure will be in effect whereby (a) any aggrieved person may file with the designated State or local agency officials a written complaint of alleged discriminatory conditions or practices in the operation of the program, (b) prompt investigation will be made, and (c) corrective action will be taken, when warranted.

8. *Records and Reports*

The State agency will maintain such records and submit such reports as may be required by the Federal Government to assure compliance with the Regulation and will permit access by appropriate Federal officials during normal business hours to such of its facilities, records, and other sources of information as may be pertinent to ascertain compliance with the Regulation.

9. *Extent of Noncompliance* (Not Applicable ____; Applicable ____)

The following statement ("Statement of Noncompliance"), incorporated herein, identifies the titles and programs which are not in full compliance with paragraphs 1 through 8 above, and shows the nature and extent to which there is noncompliance (e.g., in prohibited practices, geographical areas, political subdivisions, institutions, agencies, organizations). The State agency certifies that the State plan will be brought into compliance, and that the plan and the steps and timing for so doing, are set forth in the following statement.

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State Agency:

Extent of Noncompliance

(Prepared pursuant to paragraph 9, if applicable)

(Continue on separate sheet, if necessary, with State agency name identified at top of page.)

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The State agency recognizes and agrees that the Federal financial assistance under the titles of the Social Security Act referred to herein will be extended in reliance on the specific representations contained in this statement.

(Date)

(Signature)

Title (Authorized Official)

BFS-H.T. No. 47
CB-Release No. 65-1

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE STATE OF ALABAMA, for and
in behalf of and as Trustee for the
Department of Pensions and Security
of the State of Alabama,

Plaintiff,

vs.

JOHN W. GARDNER, as Secretary of
the U. S. Department of Health,
Education and Welfare of the
United States,

Defendant.

CIVIL
ACTION

No.
67-19

Filed in Clerk's Office, Northern District of Alabama,
January 16, 1967. William E. Davis, Clerk, U. S. District
Court. By Mary L. Tortorici, Deputy Clerk.

AMENDMENT TO THE COMPLAINT

Plaintiff hereby amends the original complaint in this
action in the following respects:

A. By striking and eliminating paragraph 12 thereof.

B. By adding the following paragraph, designated
as paragraph 8-A, to be treated as inserted immediately
after paragraph 8 of the original complaint:

"8-A. The assurance referred to in paragraph 8 as
having been given by the said Alabama State Board of Pen-
sions and the said Department of Pensions and Security, on

March 1, 1965, is contained in a letter, of that date, a true
copy of which is attached hereto as Exhibit C and made a
part hereof. With reference to the assurance sought to be
required by the Department of Health, Education and Wel-
fare, a letter of August 20, 1965, was written to the Com-
missioner of Welfare, Dr. Ellen Winston, a true copy of
which letter is attached hereto as Exhibit D and made a
part hereof."

C. By adding a paragraph, designated as paragraph
14-A, to be treated as inserted immediately after paragraph
14 of the original complaint:

"14-A. The Federal regulation 45 C.F.R. 80.3 states
in part:

'(b) *Specific discriminatory actions prohibited.* (1)

A recipient under any program to which this part ap-
plies may not, directly or *through contractual or other*
arrangements, on ground of race, color, or national
origin:

(i) Deny an individual any service, financial aid,
or other benefit provided under the program;

(ii) Provide any service, financial aid, or other
benefit to an individual which is different, or is pro-
vided in a different manner, from that provided to
others under the program;

(iii) Subject an individual to segregation or sepa-
rate treatment in any matter related to his receipt of
any service, financial aid, or other benefit under the
program;'

The underscored portion (underscoring supplied) relates to
what is referred to as the 'third party' assurance, meaning
in essence persons or organizations (even in private busi-
ness) over whom said state department has no control. The
Federal form required (Exhibit B) provides in part:

'2. Discriminatory Practices Prohibited

The State agency will not, directly or *through contractual or other arrangements*, on the ground of race, color, or national origin:

- a. deny any individual any aid, care, services, or other benefits provided under the program;
- b. provide any aid, care, services, or other benefits to an individual which is different, or is provided in a different manner, from that provided to others under the program; . . .

* * * *

4. Other Agencies, Institutions, Organizations, and Contractors

The State agency will take such steps as necessary to assure that *any other* agency, institution or organization participating in the program, *through contractual or other arrangements*, will comply with the Act and Regulation.

The underscoring relates to the 'third party' question. This includes, as is particularly shown in the transcript of the testimony taken on the hearing before the Hearing Examiner in Washington, D. C. (referred to in Exhibit A, the final decision of the Secretary), services of physicians in examining, certifying or treating needy persons qualified to receive aid, placing them in nursing homes or hospitals, placing children in church homes or other institutions (the child welfare service program), and providing for day care for children whose parent or parents have no way otherwise to care for them while the parent is working (also the child welfare program—all programs under the State Plan are mentioned in the order of the Secretary, Exhibit A, and also in the transcript of the testimony before the Hearing Examiner which will of course be made available to the Court). With reference to the services of physicians, the Department of Health, Education and Welfare (as shown

in the testimony at the hearing) interprets the regulation and the said form as meaning that the use of Federal money for payment to a private physician is prohibited unless the physician maintains a *desegregated waiting room* and rest room facilities for sick or disabled people waiting to be examined or treated. On that issue Mr. Ruben K. King, the State Commissioner, testified in part:

A Well, I will say this: For giving the examination the private physician is given \$5 provided he sits down and fills out a form about as long as a Sears-Roebuck catalogue, and then he has to sit back and wait on a bunch of bureaucrats in Montgomery to get his money. I will say this, that we need them a lot worse than they need us.

Q You are talking about the doctors?

A Yes, sir.

Q Do you have doctors in all counties? How many counties do you have in Alabama?

A We have sixty-seven counties.

Q Do you know whether doctors are available in all counties?

A As far as I know they are available in all counties, but there are several counties where there is only one doctor.

Q One doctor?

A Yes, sir.

Q Is that usually a white doctor?

A In most cases, yes, sir.

Q The people that you send—that you refer, I will call it referring, they are elderly people, too?

A Well, in order for a person to receive old age assistance he has to be 65 years of age or older, and the average age in Alabama of an old age recipient

is 75 years and 3 per cent is over 90, so you do have—

Q Who makes the determination whether they are to be sent to a doctor?

A If a person needs that type of care, of course they can decide themselves as to whether or not they go to a doctor and ask the doctor if they need that type of care. And if they do, then, of course, our department helps with the physician and with the family for a person to go into a home. . . .

* * *

Q Do you know of any instance of the people that you send doctors to, I mean sometimes do you let them go to the doctor that they want to go to?

A We let them go to the doctor they want to go to at all times, and that is the way it should be.

Q All right. Do you know of a doctor, your acquaintance, we will call him a white doctor, do you know of one who takes this type of patient, as you said, for the small sum that he refuses to take Negro patients?

A *I know of no doctor in the State of Alabama that refuses to take Negro patients. . . .*

* * *

A I talked to several doctors, yes, sir, and in most cases the doctors that I have talked to stated that they felt that they were doing the State of Alabama a service by rendering the examination, that they would not jeopardize their private practice and sign such a compliance statement.

Q Or by segregating the waiting room?

A Waiting room and rest rooms, that they would refuse to do it.

Q But they would treat—

A Yes, sir.

Q —and give them treatment?

A Yes, sir.

Q Treatment they are supposed to give?

A As far as I know, no doctor in the State of Alabama refuses to accept a Negro patient.'

Note: The above excerpts commence on page 76 and end on page 80 of the transcript.

He further testified (page 90 and 91) that the physicians who maintained separate waiting rooms had just as nice waiting room in most cases for Negro patients as for white patients. As a part of the program for medical assistance for aged people, the said state department, according to the testimony at the hearing, upon the certification of physicians would place people in nursing homes, all of which are private and some of which would accept only white patients or only Negro patients, and it is shown that the insistence of the Department of Health, Education and Welfare is that no Federal funds be used except for nursing homes that are completely desegregated. The same is true of furnishing day care for children under the child welfare program and also for placing children in institutions. The testimony of Commissioner King, relating to another essential function of the child welfare service program is as follows (pages 80-82 of the transcript):

'A Well, they know, the Federal officials know as well as I do. And in the conference I have discussed with them the thing that bothers us and that is particularly in the field of child care and institutions where no Federal money or State money is going to pay the money for the care of our children and yet they tell us the mere fact that they pay half the salary of case workers, of some social worker in the home, that these homes must inte-

grate. They start off on the premise that a child is better off in an integrated—

Q You are talking about the Federal officials?

A The Federal officials, particularly those in the child welfare, start off on the premise that children do better in an integrated society and I disagree with them.

Q Let's take the institutions themselves. Now what are we talking about?

A We are talking about your Methodist homes, your Baptist homes. We are talking about your Presbyterian homes, your church homes. These people are not charging us under the State plan one penny for taking care of our children and yet we have told the Federal officials time and time again what is going to happen to these children if we have to integrate these facilities.

Our job—and I want to say this, Mr. Barnes—my job as Welfare Commissioner is to see that the needy people in the State of Alabama get help. And I want to know, and I would like to bring it out in this hearing today, I want to know whether or not the Federal Government is more interested in integration or seeing that needy people get help.

I live down there with these people and I see the poor and hungry and the children that come in every day, in many cases who are half beaten to death and have burns, and my interest is in that child and to see that that child gets help. That is the reason I went to Montgomery. I am interested in those children.

Q When you say child, you mean both white and Negro?

A That's right.

Q Do you have any, or do you have any Negro church homes?

A We have some that are serving families, yes, sir, Negro children.

Q Do you also—

A We have some who serve in both. We have some that serve only white and some that serve only Negro, and I believe we have some that serve both.

Q Both?

A Yes, sir.

Q You are talking about in the State of Alabama?

A In the State of Alabama.'

With reference to the child welfare service program, and the essential function above mentioned, the Federal Department has always insisted that Federal money cannot be used by the State to pay the salaries of case workers who investigate and search for children in need of care, if the institution such as a church home or other like institution accepts only white children, or only Negro children, as the case may be; and necessarily the use of such Federal money by the State Department for placing a child in such a much needed institution would be a violation of the regulation above quoted as interpreted by the Federal Department and also of the assurance in the form required by said department. The above instances furnish examples of the reasons for the refusal of the State Department to give the assurances required by the Federal Department. The plaintiff asserts that such requirements are inconsistent with the objects of the portions of the Social Security Act which authorize and provide for Federal financial assistance for such programs, that the essential thing is that poor, indigent and needy people be treated and cared for, not that they must socialize while waiting to be cared for; also that children be placed in the best of church homes (which care for the children without any charge whatsoever) without regard to whether

such private homes maintain a desegregation policy.

D. By adding after paragraph 16 of the original complaint the following paragraph, designated as paragraph 16-A, to be treated as inserted immediately after paragraph 16 in the complaint:

"16-A. The defendant erred in denying the request of said State Department for a hearing before the Secretary (see page 4, section 1, of the defendant's order). The defendant also erred in denying the motion of said State Department to be allowed to present further evidence and current data concerning civil rights in Alabama as related to grants and services under the child welfare and public assistance program (see page 4, section 2, of the defendant's order). The defendant also erred in denying the motion of said State Department to be allowed to incorporate Title XIX into the proceeding (see page 5, section 3, of the defendant's order)."

E. By adding after paragraph 23 of the original complaint the following paragraph, designated as paragraph 23-A, to be treated as inserted immediately after paragraph 23 in the complaint:

"23-A. Plaintiff avers that the plaintiff, the said State Department, the said State Board, and those receiving financial assistance under the welfare program will suffer irreparable injury and damage by the cutting-off of Federal funds."

Reid B. Barnes [Sig.]

REID B. BARNES

*Special Assistant Attorney General
Attorney for the Plaintiff*

Exchange Security Bank Building

317 North 20th Street

Birmingham, Alabama

EXHIBIT C

STATE OF ALABAMA

Department of Pensions and Security

Montgomery, Alabama

March 1, 1965

Ruben K. King
Commissioner

Dorothy S. Hitchcock
Confidential assistant

Mr. Wave L. Perry, Regional Representative
Bureau of Family Services

and

Mr. Dwight H. Ferguson,
Regional Child Welfare Representative
Children's Bureau
Room 404-50 Seventh Street, N.E.
Atlanta, Georgia 30323

Dear Mr. Perry and Mr. Ferguson:

This is in response to the letter of January 15, 1965, from Mrs. Oettinger and Mr. Steininger on the submittal of state plan material pursuant to Title VI of the Civil Rights Act of 1964.

The State Board of Pensions and Security, in session on February 25, 1965, recognized the fact that the Department of Pensions and Security does not deny aid, care, or service to any individual on the grounds of race, color, or national origin. Board members also expressed their intent to have the program continue to operate on this basis. However, Board Members believe that the statement of compliance which the Commissioner is asked to sign by March 3, 1965, goes far beyond what is called for in Title VI of the Civil Rights Act and constitutes an unreasonable administrative requirement. Therefore, I was instructed not to sign the Statement of Compliance pursuant to regulations promulgated under Title VI of the Civil Rights Act of 1964

at this time. I was directed also to wait until the courts made a ruling on the Bessemer, Alabama, school board case with regard to compliance in the matter of school funds.

Please be assured that the Department of Pensions and Security will not deny any individual any aid, care, or service on the grounds of race, color, or national origin.

Cordially yours,

Ruben K. King
Commissioner

cc: Dr. Ellen Winston

EXHIBIT D

STATE OF ALABAMA
Department of Pensions and Security
Administrative Building
64 N. Union Street
Montgomery, Alabama 36104
August 20, 1965

Ruben K. King
Commissioner

Dorothy S. Hitchcock
Confidential Assistant

Dr. Ellen Winston, Commissioner
Welfare Administration
Department of Health, Education and Welfare
Washington, D. C. 20201

Dear Dr. Winston:

In line with suggestions made in a conference participated in by Mr. Carl Harper, Regional Attorney, Mr. Reid Barnes, Special Counsel for this Department, and the Department's Legal Advisors, on August 11, 1965, I am transmitting to you the following statement of this Department's

compliance with Title VI of the Federal Civil Rights Act of 1964.

Administrative Practices—The Department of Pensions and Security in Alabama is responsible for the administration of the public assistance and child welfare programs. They are financed primarily by Federal and state funds. The Department of Pensions and Security is in full conformity with the Federal Civil Rights Act in determining who can get aid and how much they are entitled to get. This is determined for each person on the basis of the specific eligibility requirements for each type of aid, such as age, residence, need, etc. and not on the basis of race, color, or national origin. Likewise, other services are given according to the need for the service and available resources and not on the basis of race, color, or national origin.

There are no discriminatory practices in the use of physical facilities of the State Department of Pensions and Security or in the offices of County Departments of Pensions and Security which are located in buildings under the control of the State Department. In a number of counties office space is furnished by local governing bodies with no Federal or state participation. This agency has no authority to control the use of the physical arrangements in these buildings. It would be impossible to enforce discontinuance of separate facilities in these departments and also impossible to make other housing arrangements in many of these counties.

Other Agencies, Institutions, Organizations, and Contractors—The Alabama Department of Pensions and Security is told that segregation exists in some institutions, agencies, and organizations within the state from whom aid, care, services and other benefits are received on behalf of applicants or recipients of the department through contractual

or other arrangements. Nevertheless, this agency offers the same type of aid, care, or services without regard to race, color, or national origin.

Hospitals—While many of the hospitals are complying with the Civil Rights Act of 1964, and others are taking definite steps toward integration of their facilities, this agency has no authority to control such hospitals and cannot enforce compliance. One of the three maternity hospitals has notified us that it is in compliance.

Nursing Homes—This agency has no authority to control nursing homes and would have no authority to see that compliance was effected.

Children's Institutions—The voluntary child-caring institutions and agencies are not operated by this department but are operated under separate boards which have full responsibility for admission and discharge policies. A number of children receiving care in these institutions are under the jurisdiction of juvenile courts with the department designated as having supervisory responsibility. Any change in plans would be at the discretion of the courts and not the department. Six of the seventeen privately supported child-caring institutions have notified us that they are in compliance.

All of the approximately one hundred licensed day care centers are under private auspices with sixteen supported by United Appeal funds. This department has no authority to enforce compliance on the part of these centers.

The Crippled Children's Service of the State Department of Education has also advised that they are in compliance with the Civil Rights Act.

Training Schools—The three training schools serving delinquent children are under separate boards and the chil-

dren in these schools are in the legal custody of the schools. Although this department participates as probation officers in planning for admission, the courts and schools make the final decision.

Physicians Services—The State Department of Pensions and Security is of the opinion that it is not within its province nor its duty to attempt to require physicians to comply with the Civil Rights Act nor does it think that needy people who are in need of a physician's service should be denied the right of freedom of choice in this matter. Unavailability of physicians' services in some areas would result in lack of equity of treatment to individuals in those areas and violate the principle of statewideness.

Plan for Dissemination of Information—We have been advised that the Welfare Administration of the Department of Health, Education and Welfare is preparing a leaflet with pertinent information to go to all those involved or those interested in the child welfare service or public assistance programs with pertinent information about Title VI as it affects those programs. As soon as these leaflets are received, they will be disseminated through the county departments and in other ways to appropriate groups of people.

Complaint Procedure—Any recipient of any type of assistance or service who has question about whether he is being given the proper consideration under the Civil Rights Act should first discuss this with the organization, agency, or institution providing the service. If he is still not satisfied and his question is concerned with aid or service for which the Department of Pensions and Security is responsible he can write the county or state department of pensions and security or the Department of Health, Education and Welfare. An investigation will be made to see if any action is needed. If the complaint is against another agency, or-

ganization, or institution over which the Department of Pensions and Security has no control, the complainant will be asked to file his complaint with that agency.

The Alabama Department of Pensions and Security does not deny aid, care, or services to any individual on the ground of race, color, or national origin.

Cordially yours,
Ruben K. King [Sig.]
RUBEN K. KING
Commissioner

cc: Mr. Carl Harper
Regional Attorney
Mr. Reid Barnes

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE STATE OF ALABAMA, for and
in behalf of and as Trustee for the
Department of Pensions and Security
of the State of Alabama,

Plaintiff,

vs.

JOHN W. GARDNER, as Secretary of
the U. S. Department of Health,
Education and Welfare of the
United States,

Defendant.

CIVIL
ACTION
No.
67-19

Filed in Clerk's Office, Northern District of Alabama,
January 26, 1967. William E. Davis, Clerk, U. S. District
Court. By Mary L. Tortorici, Deputy Clerk.

MOTION OF PLAINTIFF FOR HEARING ON
PRAYER FOR PRELIMINARY INJUNCTION

Plaintiff hereby moves that the Court fix a date and
time for a hearing on Plaintiff's prayer for a preliminary
injunction.

Reid B. Barnes [Sig.]

REID B. BARNES

*Special Assistant Attorney General
Attorney for the Plaintiff*

*Exchange Security Bank Building
317 North 20th Street
Birmingham, Alabama*

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing motion upon _____

_____ this _____ day of January, 1967.

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

THE STATE OF ALABAMA, for and
in behalf of and as Trustee for the
Department of Pensions and Security
of the State of Alabama,

Plaintiff,

vs.

JOHN W. GARDNER, as Secretary of
the U. S. Department of Health,
Education and Welfare of the
United States,

Defendant.

CIVIL
ACTION
No.
67-19

Filed January 26, 1967. C. W. Allgood, U. S. District
Judge.

MOTION TO DISMISS AND IN THE ALTERNATIVE FOR CHANGE OF VENUE

The defendant, John W. Gardner, Secretary of the
Department of Health, Education, and Welfare of the
United States, by his attorneys moves this Court, as follows:

1. To dismiss this cause on the ground that this Court
lacks jurisdiction to hear and determine this case because
jurisdiction to review the action of the defendant is in the
United States Court of Appeals for the Fifth Circuit.

2. In the alternative to enter an order transferring this

case to another jurisdiction because the venue is improperly laid in the Northern District of Alabama.

John Doar [Sig.]
JOHN DOAR
Assistant Attorney General

Macon L. Weaver [Sig.]
MACON L. WEAVER
United States Attorney

D. Robert Owen [Sig.]
D. ROBERT OWEN, *Attorney*
Department of Justice

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE STATE OF ALABAMA, for and
in behalf of and as Trustee for the
Department of Pensions and Security
of the State of Alabama,

Plaintiff,

vs.

JOHN W. GARDNER, as Secretary of
the U. S. Department of Health,
Education and Welfare of the
United States,

Defendant.

CIVIL
ACTION
No.
67-19

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS AND IN
THE ALTERNATIVE TO CHANGE VENUE

I.

The proper and exclusive forum for judicial review of the defendant Secretary of Health, Education, and Welfare's order terminating Federal assistance to Alabama under Titles I, IV, V (Part 3), X and XIV of the Social Security Act is the United States Court of Appeals for the Fifth Circuit.

Section 603, Civil Rights Act
of 1964

5 U.S.C. 1009
42 U.S.C. 1316

Piazza Co. v. West Coast Line, 113 F. Supp. 193 (S.D. N.Y. 1953), aff'd. 210 F. 2d 947, cert. denied 348 U.S. 839

Almour v. Pace, 193 F. 2d 699 (C.A.D.C. 1951)

II.

If this Court should find it has jurisdiction over all or any part of the instant case, venue is improper in the Northern District of Alabama.

28 U.S.C. 1391

28 U.S.C. 1406

State v. Cote, 95 N.H. 108 (1948)

92 C.J.S. Venue, sec. 115

Respectfully submitted,

John Doar [Sig.]

JOHN DOAR

Assistant Attorney General

Macon L. Weaver [Sig.]

MACON L. WEAVER

United States Attorney

D. Robert Owen [Sig.]

D. ROBERT OWEN

Attorney

Department of Justice

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

THE STATE OF ALABAMA, for and
in behalf of and as Trustee for the
Department of Pensions and Security
of the State of Alabama,

Plaintiff,

vs.

JOHN W. GARDNER, as Secretary of
the U. S. Department of Health,
Education and Welfare of the
United States,

Defendant.

CIVIL
ACTION

No.
67-19

Filed in Clerk's Office, Northern District of Alabama,
January 26, 1967. William E. Davis, Clerk, U. S. District
Court. By Mary L. Tortorici, Deputy Clerk.

ORDER

The defendant, John W. Gardner, Secretary of the Department of Health, Education, and Welfare of the United States, by his attorneys moved this Court for oral argument on its Motion to Dismiss and in the Alternative for Change of Venue made on January 26, 1967, and that said Motion be heard on an expedited basis.

It is ORDERED that the Motion to Dismiss be and is hereby set for hearing in the courtroom of the United States District Court for the Northern District of Alabama in Birmingham, Alabama, at 10 o'clock a.m. on the 1st day of February, 1967.

/s/ C. W. ALLGOOD

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE STATE OF ALABAMA, for and
in behalf of and as Trustee for the
Department of Pensions and Security
of the State of Alabama,

Plaintiff,

vs.

JOHN W. GARDNER, as Secretary of
the U. S. Department of Health,
Education and Welfare of the
United States,

Defendant.

CIVIL
ACTION

No.
67-19

SECOND AMENDMENT TO THE COMPLAINT

The complaint is hereby amended by joining Sarah Harton, Emma Morton, Louise Jones and Addie Kelly as parties plaintiff in this action, and by adding to the complaint paragraph 1-A to be treated as inserted immediately after paragraph 1, as follows:

1-A. Plaintiffs, Sarah Harton and Emma Morton, both of whom reside at 121 Graymont Avenue, West, in the City of Birmingham, Alabama, are residents of Jefferson County, Alabama, and are members of the white race. Plaintiffs, Louise Jones and Addie Kelly, both of whom are residents of Jefferson County, Alabama, (residing at 36 Eighth Avenue North and 62 Eighth Avenue North, respectively, in the City of Birmingham, Alabama) are members of the Negro race. Each of said individual plaintiffs is over twenty-

one (21) years of age, and in fact is an aged person receiving public assistance from the Department of Pensions and Security of the State of Alabama, through the Jefferson County Department of Pensions and Security of the State of Alabama. Each of said plaintiffs will be irreparably injured if Federal funds are cut off, as threatened by the order of the Secretary of Health, Education and Welfare rendered on January 12, 1967. Each of said plaintiffs is eligible to receive benefits from the said State Department, and consequently through the State Department Federal funds, and is entitled by law to receive benefits. If said Federal funds are wrongfully cut off, as is alleged in the complaint and as said plaintiffs allege, plaintiffs will suffer a legal wrong or will be adversely affected or aggrieved, within the meaning of § 702, Title 5, United States Code Annotated (formerly included in § 1009 of Title 5), and within the meaning of Title VI of the Civil Rights Act of 1964. In the State of Alabama there are at least 149,063 persons receiving public assistance benefits under Title 49 of the Alabama Code of 1940, from said State Department, including Federal funds. Of the number receiving benefits at least 82,859, or 55.6% of those residing in the State, reside in the area of the Northern District of Alabama, and 12.1% (of the entire State persons) reside in Jefferson County, Alabama (the actual number being 18,036). Said individual plaintiffs hereby sue not only for their own benefit but for the benefit of and on the behalf of all of said recipients in the State of Alabama as a class, such class being so numerous as to make it impracticable to bring them all before the Court. There is a common question of law or fact affecting the several rights of said recipients and a common relief is hereby sought. Said individual plaintiffs adopt the allegations of the original complaint, and allege that an irreparable injury will result to the poor and indigent people entitled or who will be

entitled to receive benefits, if the order of January 12, 1967, made by the Secretary of Health, Education and Welfare, is carried out. Said plaintiffs have no adequate remedy except to seek relief in a nisi prius court of equity of competent jurisdiction.

MacDonald Gallion [Sig.]
MACDONALD GALLION
Attorney General of Alabama

Reid B. Barnes [Sig.]
REID B. BARNES
Attorneys for said Plaintiffs
Exchange Security Bank Building
Birmingham, Alabama

Filed in Clerks Office, Northern District of Alabama, February 1, 1967. William E. Davis, Clerk, U. S. District Court. By Lister H. Jones.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE STATE OF ALABAMA, for and
in behalf of and as Trustee for the
Department of Pensions and Security
of the State of Alabama,

Plaintiff,

vs.

JOHN W. GARDNER, as Secretary of
the U. S. Department of Health,
Education and Welfare of the
United States,

Defendant.

CIVIL
ACTION
No.
67-19

ANSWER TO COMPLAINT AND
AMENDED COMPLAINT

First Defense

The Complaint and Amended Complaint fail to state a claim against defendant on which relief can be granted.

Second Defense

1. Defendant admits paragraph 1 of the Complaint.
2. Defendant admits paragraph 2 of the Complaint.
3. Defendant admits paragraph 3 of the Complaint.
4. Defendant denies paragraph 4 of the Complaint.
5. Defendant admits paragraph 5 of the Complaint, except that certain of the assistance grants described were not enacted until after 1935.

6. Defendant admits that the action complained of, namely the Order of January 12, 1967, was taken pursuant to Title VI of the Civil Rights Act of 1964 and, alleges it was also taken pursuant to the regulations of the United States Department of Health, Education and Welfare, issued pursuant thereto. Insofar as defendant may be required to answer other allegations of paragraph 6 of the Complaint, defendant denies them.

7. Defendant admits paragraph 7 of the Complaint, except that insofar as it alleges that the effect of the Order is to terminate funds to 200,000 needy people in Alabama, the allegation is denied on the ground that defendant has insufficient information to form a belief as to how much of the payments, if any, from state contributions will continue.

8. Defendant denies the allegation in paragraph 8 and 8A of the Complaint and Amended Complaint, but admits that the letters referred to in paragraph 8A marked Exhibits C and D are true copies of letters sent to agents of the defendant and were received by him.

9. Defendant admits that the state department has not executed the assurance attached to its Complaint as part of paragraph 9 and has not done other things required by the regulations (45 C.F.R. 80, *et seq.*), of the United States Department of Health, Education and Welfare, but denies each and every other allegation contained in the said paragraph, and subparagraphs 9a, b, c, d, e.

10. Defendant denies the allegation in paragraph 10 that the failure to execute the assurance in the form contained in Exhibit B resulted in the discontinuance of financial assistance, but admits that the failure to execute an assurance which contained substantially the same information as

set out in Exhibit B and the failure to comply in other respects with requirements of regulations resulted in the denial or discontinuance by defendant of federal financial assistance.

11. Defendant denies the allegations in Paragraph 11.

12. The Amended Complaint strikes paragraph 12 and it requires no answer.

13. Defendant denies paragraph 13 of the Complaint.

14. Defendant admits that section 4 of CB-FS 5022 (Exhibit B) and the regulations of the Department of Health, Education and Welfare, would require the Commissioner acting on behalf of the state agency to take such steps to assure that state agencies, institutions or organizations that do in fact participate in the Department's programs through contractual or other arrangements would comply with Title VI of the Civil Rights Act and regulations promulgated thereunder, but defendant denies each and every other allegation in paragraph 14.

14A. Paragraph 14A of the Amended Complaint contains only conclusions of law and argument, but insofar as that defendant may be required to answer it, denies each and every allegation in said paragraph, except that it admits that the quotations contained in said allegations are taken from the transcript of record before the hearing examiner in this cause.

15. Defendant admits that in order for individuals to receive certain benefits administered by the Alabama Department, including aid to the blind and aid to the permanently disabled, it is necessary for them to undergo physical examinations, but denies each and every other allegation contained in paragraph 15.

16. Defendant admits that paragraph 4 of Form CB-FS 5022 states:

The State agency will take such steps as necessary to assure that any other agency, institution, or organization participating in the program, through contractual or other arrangements, will comply with the Act and Regulations.

Defendant denies each and every other allegation in paragraph 16.

16A. Defendant denies each and every allegation in paragraph 16A of the Amended Complaint.

17. Defendant denies the allegations contained in paragraph 17, except insofar as a judicable controversy exists for review of the Order of the defendant of January 12, 1967.

18. Defendant denies each and every allegation contained in paragraphs 18, 19, 20, 21, 22, 23, and 23A.

John Doar [Sig.]
JOHN DOAR
Assistant Attorney General

Macon L. Weaver [Sig.]
MACON L. WEAVER
United States Attorney

D. Robert Owen [Sig.]
D. ROBERT OWEN
*Attorney
Department of Justice*

Filed in Clerk's Office, Northern District of Alabama, February 1, 1967, William E. Davis, Clerk, U. S. District Court. By Lister H. Jones.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE STATE OF ALABAMA, for and
in behalf of and as Trustee for the
Department of Pensions and Security
of the State of Alabama,

Plaintiff,

vs.

JOHN W. GARDNER, as Secretary of
the U. S. Department of Health,
Education and Welfare of the
United States,

Defendant.

CIVIL
ACTION
No.
67-19

Filed in Clerk's Office, Northern District of Alabama, February 3, 1967, William E. Davis, Clerk, U. S. District Court. By Mary L. Tortorici, Deputy Clerk.

This case came on for hearing upon the defendant's motion to dismiss the action, and the motion in the alternative for a change of venue under § 1406, Title 28, U.S.C.A., and upon the motion of the plaintiff, the State of Alabama, for and in behalf of and as Trustee for the Department of Pensions and Security of the State of Alabama, for a preliminary injunction, contained in the prayer of the bill.

The three motions were all set for hearing at 10:00 o'clock a.m., Wednesday, February 1, 1967, and at the commencement of the hearing the Court announced a submission upon the motion for a preliminary injunction would be required before making a decision on the motions of the defendant for reasons stated and appearing below.

The three motions were filed on Thursday, January 26, 1967, and, after being called to the attention of the Court, a conference was held in chambers between the Court and counsel for both parties. I stated that because of my assignment to hold court in Tampa, Florida, for two and one-half weeks commencing Monday, February 6, 1967, and because of the absence of the Chief Judge, also on court assignment, and on account of commitments and assignments of the other Judge of this Court, which would consume all or a considerable part of the period of two weeks commencing Monday, February 6, 1967, it would be necessary that a hearing be held during the week commencing Monday, January 30, 1967, and that it would not be feasible to postpone the hearing on the preliminary injunction until a time after the expiration of the following two-week period in view of the urgency presented by the situation and the deadline date of February 28, 1967, for the cutoff of public welfare funds to the state under decision of the Secretary, making such cutoff effective as of that time, as will be more specifically mentioned in the Findings of Fact hereunder. Accordingly, the Court heard all three motions on Wednesday, February 1, 1967. At the beginning of the hearing plaintiff asked leave to file a second amendment to the complaint joining four individual parties as plaintiff, alleging that each was a recipient of public welfare funds in Alabama and eligible therefor, and that all four were residents of Jefferson County in the Northern District of Alabama. The amendment, by its terms, was a class suit for the benefit of all welfare recipients throughout the state, upon averment that they were so numerous that it was impracticable to name them in the suit, in effect. In this amendment the individual plaintiffs alleged that they adopted the allegations of the complaint theretofore filed. Upon inquiry, the Department of Justice attorneys, representing the Sec-

retary, stated that they had received a copy of the amendment the night before and made known to the Court that defendant does not consent to the filing that it was at least questionable whether the individuals had standing to sue. The Court allowed the filing of this amendment.

After hearing the evidence, including evidence upon the motion for preliminary injunction (contained in the prayer in the complaint), and argument of counsel and taking a submission upon the motions, the Court decided to take the motions of defendant under advisement and to grant a preliminary injunction for reasons hereinafter stated, and finds the facts as follows:

FINDINGS OF FACT

On January 12, 1967, the defendant, the Secretary of Health, Education and Welfare, rendered a decision having the effect of terminating Federal financial assistance to the State Agency, the Alabama Board of Pensions and Security, which, along with the Alabama State Board of Pensions and Security, were respondents to a compliance proceeding pursuant to § 602 of the Civil Rights Act of 1964 and the regulations of the Department of Health, Education and Welfare issued pursuant thereto. The date of termination of all funds was fixed by said written decision of the Secretary as of Midnight, *February 28, 1967*.

The next day, January 13, 1967, plaintiff filed its action in this Court seeking a judicial review of the Secretary's decision under § 1009, Title 5, U.S.C.A., The Administrative Procedure Act (Rewritten as Title 5, Chapter 7, Sections 701-706), and praying for an injunction, both permanent and preliminary, and also invoking this Court's general jurisdiction (which includes general equity jurisdiction) under § 1331 of Title 28. The decision of the Secretary is

attacked on numerous and variously stated grounds and on January 16, 1967, prior to any perfected service upon the Secretary, filed an amendment to the complaint specifically attacking the validity of Federal regulation 45 C.F.R., 80 and the Federal form alleged to have been required by the Department of Health, Education and Welfare for signing by the Alabama Department of Pensions and Security and the Alabama State Board of Pensions and Security (actually the governing board of the state department), under Title 49, Alabama Code of 1940, as amended, (the department was formerly named the Alabama Department of Welfare, and the board the Alabama State Board of Welfare). The regulation and a portion of the form complained of are set forth on page 2 of the first amendment to the complaint, and relate to what may be characterized as the "third party" assurance, meaning in essence persons or organizations (even in private business) over whom such state department alleges that it has no control. We quote the part of the form set out, a form which, under the evidence, was issued by the department for the purpose of implementing the regulation.

"2. *Discriminatory Practices Prohibited* The State agency will not, directly or *through contractual or other arrangements*, on the ground of race, color, or national origin:

- a. deny any individual any aid, care, services, or other benefits provided under the program;
- b. provide any aid, care, services, or other benefits to an individual which is different, or is provided in a different manner, from that provided to others under the program; . . .

4. *Other Agencies, Institutions, Organizations, and Contractors*

The State agency will take such steps as necessary to assure that *any other* agency, institution or organization participating in the program, *through contractual or other arrangements*, will comply with the Act and Regulation." (underscoring supplied)

The claim is made by and in behalf of the state department and the evidence supports this (the entire form is in evidence) that the Federal Departments required the signing of the assurance contained in said form as a condition precedent to continuing to receive Federal financial assistance. The claim is further made that under the interpretation placed upon the required assurance that the state agency must take such steps as necessary to assure that third parties, through contractual or other arrangements, comply with the act and regulation, involving as it does private physicians, nursing homes, church homes (assuming the lodging, and other care in their institutions for dependent children), hospitals, etc., are unreasonable and in excess of the authority of the Civil Rights Act of 1964. Both the validity of the regulation and the assurance form are attacked, as well as the express interpretation of the Federal Department placed upon them.

One of the principal attacks is based upon the provision of the Civil Rights Act of 1964 to the effect that the Federal agency is authorized and directed to effectuate the provisions of § 601 with respect to any program or activity by issuing rules, regulations or orders of general applicability which are consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

Examples of the basis of the State's contention are shown in quotations in the first amendment to the complaint on pages 3, 4, 5 and 6. Quotations are from the testi-

mony of the State Commissioner of the State Department given on a hearing in Washington in the latter part of October, 1965, the hearing being held under the procedures prescribed by the Federal Department and provided for and required in Title VI of the Civil Rights Act as one of the steps to be taken before the withholding or cutting off of funds.

The Court will not dwell at length upon all of the contentions made as the basis for the State's attack in view of the fact that no decision is made on the merits, the matter being only on preliminary and not permanent injunction. A brief reference will be made to the examples (shown in the testimony) on pages 3 and 4 of the first amendment. The testimony delineated (and shown by the evidence before this Court) along with the testimony of the Federal Department official on the hearing in Washington, shows that, according to the Federal Department's interpretation, private physicians used by the state department in examining patients in each of the 67 counties of Alabama, under the Welfare Program must provide desegregated waiting rooms and rest room facilities; and physicians who refuse to make such provision cannot be used if Federal funds are employed by the State as a part of the payment made to him. It is claimed that the State has no control over the private physician, that there are instances where the doctor or doctors available in a given county or counties refuse to agree to this condition even though in all cases white and Negro welfare recipients are examined or treated by the physician, and both are provided with separate waiting and rest rooms. It is claimed, for example, that such requirement is not consistent with the objectives of the Social Security Act authorizing such financial assistance, the objections being, according to the contention of the State, to administer medical service. This is not an attempt to state

the whole case, for the reasons stated.

Alabama's welfare programs, under applicable Federal laws, are as follows:

	Social Security Act	U.S.C.A.
Title I	(Old Age Assistance and Medical Assistance to the Aged)	Title 42, § 301-306
Title IV	(Aid to Dependent Children—Alabama Program)	Title 42, § 601-606
Title V,	Part 3 (Child Welfare Service)	Title 42, § 721-728
Title X	(Blind)	Title 42, § 1201-1206
Title XIV	(Aid to the Total and Permanently Disabled)	Title 42, § 1351-1355

FACTS PERTAINING TO THE JURISDICTIONAL QUESTION

The evidence shows without dispute, and the Court so finds, that on both State and County levels the public assistance and child welfare activities are so interrelated that it is impossible to carry out the aims of the department to needy families and children without full collaboration and coordination. Each program in its actual operation is closely related and dependent upon the others. This evidence is wholly in affidavit form, introduced in behalf of plaintiff.

FACTS PERTAINING TO THE VENUE QUESTION

The evidence, also wholly in affidavit form, and not disputed, shows that the welfare program in each county in the State is administered by the County Department as an integral part of the State Department, as provided by Ala-

bama law, Title 49 of the Code, with offices in each county. Of the total population of the State, 56.8% are residents in the northern district of Alabama. Based on the 1960 census, of the total number of cases in the state receiving welfare payments 149,063, 55.6% are in the area of the northern district of Alabama (one case often includes more than one person as a beneficiary, and it is estimated that approximately 200,000 individuals throughout the State receive welfare benefits). Also, for the month of December, the total amount of payments for the State amounted to \$9,671,947.55, of which 56% represented payments in the northern district of Alabama. The majority of the nursing homes, day-care centers, hospitals, etc., are in the northern district of Alabama. The four individual plaintiffs added by amendment are receiving welfare benefits and are residents of Jefferson County and reside in the northern district of Alabama.

FURTHER FACTS PERTAINING TO PRELIMINARY INJUNCTION ISSUE

The prime issue between the parties is the validity of the regulation and the Federal requirements, and involves a question of law. However, whether purely a question of law or a mixed question of law and fact, the Court is not passing upon the question at issue at present and does not deem it necessary to comment further upon the evidence shown in the administrative proceedings. The Court is of the opinion that the questions involved in that respect are substantial. In regard to the factors of the balance of damage and convenience, and irreparability of injury, and the public interest, the evidence shows without dispute that the grant award to Alabama for all of the programs for the period commencing January 1, 1967 through February 28, 1967 (the cutoff date), amount to a total of \$1,499,780.21.

This is only for two months. For the fiscal year ending September 30, 1966, Federal funds actually expended by the State Department for Welfare recipients amounted to approximately \$95,000,000 and the State funds expended were approximately \$31,000,000. The budget for the fiscal year ending September 30, 1966, was \$103,000,000 of Federal funds and \$35,000,000 of State funds. This evidence, along with the allocation for each program above mentioned, and further evidence by affidavit, shows without dispute that in each and every program irreparable injury and damage will be done if the cutoff of Federal funds becomes effective, and the matter involved is one of great urgency and vital importance to the people who depend upon welfare funds for their very existence, as well as employees of the state department whose salaries are paid in whole or in part from Federal funds, and the Court so finds. The Court so finds all the facts found (regardless of the heading under which they are classified herein) are considered in connection with all the issues between the parties.

CONCLUSION OF LAW

A preliminary injunction should be granted where, upon consideration of the factors or probability of entitlement to relief, balance of damage and convenience, irreparable injury and damage if the injunction is not granted, and the public interest involved, it is determined that the granting of the injunction will best serve the interests of justice.

ORDER ON DEFENDANT'S MOTION

It is ordered by the Court that the motion filed by the defendant to dismiss for ground of lack of jurisdiction, and the defendant's motion in the alternative for change of venue, such motions raising serious and intricate problems

as to jurisdiction and venue which the Court cannot now resolve, are taken under advisement.

TEMPORARY AND PRELIMINARY INJUNCTION

Pursuant to the findings of the Court, and pending final hearing and final decree, herein, and until modified by further court order; it is

ORDERED, ADJUDGED and DECREED by the Court that the defendant, John W. Gardner, Secretary of the U. S. Department of Health, Education and Welfare, his officers, agents, servants, employees and attorneys, and those persons in active concert or participation with him, who receive actual notice of this order by personal service or otherwise, be and each of them are hereby, enjoined from:

(1) Withholding, discontinuing or cutting off in any wise financial assistance to the State of Alabama and to the Department of Pensions and Security of the State of Alabama under any and all welfare programs administered by said State and State Department (including the State Board of Pensions and Security) under Titles I, IV, V (Part 3), X and XIV of the Social Security Act, pursuant to the Secretary's order of January 12, 1967.

(2) Carrying into effect the order, directive or decision of the defendant, the Secretary of the U. S. Department of Health, Education and Welfare, made January 12, 1967, approving or directing the withholding, discontinuance or cutting off of Federal funds to each and all of the welfare programs of the State of Alabama and said State Department (including the State Board of Pensions and Security) described in Section 1 just above.

It is further ORDERED, ADJUDGED and DE-

CREED that no bond or security is required to be given as a condition of said injunction.

DONE and ORDERED this 3rd day of February, 1967.

C. W. ALLGOOD

United States District Judge

CWA

(Seal)

A True Copy. William E. Davis, Clerk, United States District Court, Northern District of Alabama. By Mary L. Tortorici, Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE STATE OF ALABAMA, for and
in behalf of and as Trustee for the
Department of Pensions and Security
of the State of Alabama,

Plaintiff,

vs.

JOHN W. GARDNER, as Secretary of
the U. S. Department of Health,
Education and Welfare of the
United States,

Defendant.

CIVIL
ACTION
No.
67-19

Filed in Clerk's Office, Northern District of Alabama,
February 10, 1967. William E. Davis, Clerk, U. S. District
Court. By Mary L. Tortorici, Deputy Clerk.

NOTICE OF APPEAL
AND DESIGNATION OF RECORD ON APPEAL

The defendant, John W. Gardner, Secretary of the
United States Department of Health, Education and Wel-
fare, hereby appeals to the United States Court of Appeals
for the Fifth Circuit, the order of the Court dated February
3, 1967 granting the plaintiff's motion for a preliminary
injunction.

The defendant designates the entire record, including
the pleadings, orders, exhibits and transcript of the proceed-
ings as the record on appeal.

Macon L. Weaver [Sig.]

MACON L. WEAVER

United States Attorney

D. Robert Owen [Sig.]

D. ROBERT OWEN

Attorney, Department of Justice

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF ALABAMA

I, WILLIAM E. DAVIS, Clerk of the United States
District Court for the Northern District of Alabama do
hereby certify that the foregoing pages numbered from
one (1) to ninety-eight (98), both inclusive, comprise the
original pleadings in this action and are herewith attached
as a full, true and correct transcript of the record on appeal
in the Matter of JOHN W. GARDNER, as Secretary of
the U. S. Department of Health, Education and Welfare
of the United States, Appellant, vs. THE STATE OF ALA-
BAMA, for and in behalf of and as Trustee for the Depart-
ment of Pensions and Security of the State of Alabama,
Appellee, Civil Action No. 67-19, Southern Division, as
fully as the same appears of record and on file in my office.

IN WITNESS WHEREOF, I have hereunto sub-
scribed my name and affixed the seal of said Court at Bir-
mingham, Alabama, in said District, on this the 10th day
of February, 1967.

William E. Davis [Sig.]

WILLIAM E. DAVIS, Clerk

United States District Court

(Seal)

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE STATE OF ALABAMA, for and
in behalf of and as Trustee for the
Department of Pensions and Security
of the State of Alabama,

Plaintiff,

vs.

JOHN W. GARDNER, as Secretary of
the U. S. Department of Health,
Education and Welfare of the
United States,

Defendant.

CIVIL
ACTION

No.
67-19

Filed in Clerk's Office, Northern District of Alabama,
February 10, 1967. William E. Davis, Clerk, U. S. District
Court. By Mary L. Tortorici, Deputy Clerk.

CAPTION

THE ABOVE-ENTITLED CAUSE came on to be
heard before the Honorable Clarence W. Allgood, Federal
District Judge, on the 1st day of February, 1967, at 10:00
a.m., Birmingham, Alabama, when the following proceed-
ings were had and done:

APPEARANCES

MR. REID B. BARNES and MR. WILLIAM G.
SOMERVILLE, of the firm, Lange, Simpson, Robinson &
Somerville, Exchange-Security Building, Birmingham, Ala-
bama; MRS. LEE STAPP, Assistant Attorney General,
Legal Advisor to the Department of Pensions and Security;

and MRS. CAROL F. MILLER, Assistant Attorney Gen-
eral, Assistant Legal Advisor, Department of Pensions and
Security.

MR. GORDON MADISON, Assistant Attorney Gen-
eral, appearing on behalf of McDonald Gallion, Attorney
General of the State of Alabama.

MR. ROBERT OWEN and MR. OWEN FISS, De-
partment of Justice, Washington, D. C., appearing on behalf
of the defendant.

BEFORE:

CARMEN ZEGARELLI, Commissioner.

10:00 a.m.

FEBRUARY 1, 1967

THE COURT: Mr. Zegarelli, do you have the style
of this case and the appearances?

MR. BARNES: May it please the Court, Mr. Gordon
Madison, who is well known to you and represents Mr.
McDonald Gallion, Attorney General of Alabama, is here.

THE COURT: I know Mr. Madison.

MR. BARNES: Might state we propose to file an
amendment to the complaint.

THE COURT: Have you filed it or do you wish
to file one at this time?

MR. BARNES: Yes, sir, last night we made a copy
to be delivered to the gentlemen, Mr. Owen and Mr. Fiss
of the Department of Justice.

THE COURT: Mr. Owen, do you have now a copy
of the amendment?

MR. OWEN: I do have a copy of it, Your Honor.
Your Honor, at this point we haven't really studied it or

really know what the implications are. It purports to bring in six private individuals and we would certainly not consent to—I don't want my silence to imply that we are consenting to the filing of the complaint.

THE COURT: The Court understands that. I just want to be sure that you have been served with a copy of it and you have had an opportunity to read it. As it was discussed in chambers, I propose this morning to take up all three motions that have been filed, two by the Secretary and one by the State of Alabama. I think it would be proper to take them up first on jurisdiction, then the motion on venue, and then the motion for the preliminary injunction, and I have set aside anything that I might have that would interfere with this hearing for as long as it takes for the balance of this week. So, you gentlemen need not be under any pressure and you may proceed in any manner in which you see fit.

MR. BARNES: May it please the Court, we have, on the question of jurisdiction, we have affidavits to submit by way of evidence which we think are relevant and also that would be true on the question of venue, and whatever procedure the Court prescribes, of course, would be agreeable to both sides. If you wish to hear arguments first, or wish to have whatever evidence to be introduced on those issues first, we would be glad to comply.

THE COURT: I have no preference in the matter. However, I want the record to reflect as clearly as possible the contentions of the parties in this case and I want you to have ample opportunity to present any matters that would support your contentions. Now, there again, you gentlemen haven't had an opportunity to see the affidavits.

MR. OWEN: The Government has no testimony as to the motion to dismiss.

THE COURT: I certainly would be happy to hear from counsel. I think, Mr. Barnes, it would be best if you have any evidence to present to the Court—Mr. Barnes, suppose you go right ahead and after you are through I will allow counsel to argue that motion.

MR. BARNES: I first present or offer in evidence the affidavit of Mr. A. H. McDanal, who is the Director of the Jefferson County Department of Pensions and Security for the State of Alabama. I propose to show, Your Honor, that—might as well introduce that affidavit which really relates to venue. If you rather I withhold that until we argue venue I will.

THE COURT: Probably be more orderly for the record, as we have agreed, to take jurisdiction first and then venue.

MR. BARNES: Well, I will withdraw that offer then. I have a joint affidavit from actually Mrs. Elizabeth Bryan and Mrs. Louise Pittman. Mrs. Bryan is shown here as being the Director of the Bureau of Public Assistance of the Department of Pensions and Security of the State of Alabama.

Mrs. Pittman being the Director of the Bureau of Child Welfare of the Department of Pensions and Security of the State of Alabama, and I might state by way of clarification the purpose of the affidavit is to show how interwoven the programs are with each other or that part of the program, at least one we could say there is no judicial review in the U. S. Court of Appeals, would be an inadequate review. That is the only affidavit purely on the question of jurisdiction.

MR. OWEN: Did I understand you to say that this did not or did cover child welfare?

MR. BARNES: Did not; we contend it doesn't.

THE COURT: Mr. Zegarelli, now, anytime that you want to get anything that should go in the record, stop these lawyers and let them repeat it, because I realize in this courtroom you do have difficulty, I know I do.

(Plaintiff's Exhibit 1
marked for identification.)

MR. OWEN: I have no objection to the affidavit except insofar as I think it merely states what the statutes require and what the plans in the Department of Health, Education—on file in the Department of Health, Education and Welfare show which were officially noted as administrative proceedings, but I think it is unnecessary. If the Court wants to consider it specifically for jurisdiction, I have no objection.

THE COURT: It is admitted without objection.

MR. BARNES: I would like to explain, I don't know if this Court takes judicial notice of the proceedings in Washington, it may be so, but I am in doubt about it.

THE COURT: Do you have any other affidavit now that you want to introduce?

MR. BARNES: Not on this question, no, sir. We do have on other questions, Your Honor.

THE COURT: Do you have any witnesses that you wish to put on?

MR. BARNES: No, sir, I don't.

THE COURT: Sir?

MR. BARNES: No, sir, not in this issue.

THE COURT: All right. Let's go on now to the

venue and introduce anything you want to on venue.

MR. BARNES: I mentioned the affidavit of Mr. A. H. McDanal and identified him. I now submit that affidavit to the Court and offer it. May I ask the Court, should I read these affidavits as I introduce them?

THE COURT: You may do so.

MR. BARNES: Before me, the Notary Public, in and for said State of Alabama, personally appeared A. H. McDanal, who deposes and says on oath that:

I am A. H. McDanal, I am an employee of the State of Alabama, and I am Director of the Jefferson County Department of Pensions and Security of the State of Alabama, one of the sixty-seven county Departments of Pensions and Security in the State of Alabama. It is my responsibility to certify needy persons for public assistance in Jefferson County pursuant to the applicable provisions of Title 49, Code of Alabama of 1940, as amended, and the public assistance Titles of the Social Security Act. I am responsible for maintaining Jefferson County Department records pertaining to the recipients of Public Assistance in Jefferson county. I have examined the Jefferson County Department of Pensions and Security records and find that Sarah Harton, Emma Morton, Louise Jones and Addie Kelly, individual plaintiffs added this morning by amendment, have been certified to receive and are, in fact, currently receiving public assistance as needy persons from the Department of Pensions and Security of the State of Alabama through the Jefferson County Department of Pensions and Security of the State of Alabama, and they are residents of Jefferson County, Alabama.

(Plaintiff's Exhibit 2
marked for identification.)

MR. BARNES: Also in support of our position on the venue question, the affidavit of Mrs. Margaret W. Jordan, J-o-r-d-a-n, will be offered. Now, first, I will offer the affidavit.

MR. OWEN: Your Honor, would you like me to respond to these as they are in a group or as they come in? I don't care.

THE COURT: The Court has no preference in the matter, use your own judgment.

MR. OWEN: All right.

MR. BARNES: That is agreeable with us.

MR. OWEN: With respect to the first affidavit presented, it relates to the residence of people that the plaintiffs have sought to join by the second amendment to the complaint. As I say, we do not waive any objection with respect to their right to join these new parties, but if the Court finds that they are properly joinable, I have no objection to the affidavit stating they are recipients of welfare or that they reside in Jefferson County. I do want to reserve any right with respect to joining them at all.

THE COURT: You may do so, and with that understanding the affidavit will be admitted subject to that reservation.

MR. BARNES: The next offer. The affiant says: My name is Mrs. Margaret W. Jordan. I am Director of the Bureau of Research and Statistics of the Department of Pensions and Security of the State of Alabama. One of my duties is to keep and make statistical reports and compilations from the records in the Department. I have made a compilation reflecting a comparison of the operations of

the Department (which, of course, includes the County Departments) in the Northern District of Alabama (and Jefferson County) with the Middle District and the Southern District. These are shown as set out below, five pages in number, and speak for themselves, and are correct to the best of my knowledge. The first is population data showing the total population of the state and they are here and I will not read the figures. Of course, it is a little over three and a quarter million of which 1,856,672 reside in the Northern District of Alabama and that is 56.8 percent of the total population of the State and it is to Jefferson County 634,864 or 19.4 percent of the total population. In the Middle District, of course, they are set out, 23 percent and 19 percent in the Southern District. Now, then, in—she lists in the number of cases receiving assistance a total of 149,063 in the entire State. I might say that we expect to show the number of cases is not the total number of persons. I am not testifying, you understand, I'm not supposed to; that should be approximately 200,000 because some cases may include four or five different people in the family. All right, now, of those cases, meaning the beneficiaries, 82,859 are in the Northern District of Alabama, which is 55.6 percent; in Jefferson County, 18,036 or 12.1 percent of all the beneficiaries in the entire State, case beneficiaries, case loads, you might say.

On the second page, the amount of money expended to all of the programs and that is the Northern—the total is \$9,000,000, and this is for the month of December, 1966, \$9,671,947.55 of which in the Northern District it is \$5,417,716.31, or 56 percent of the entire expenditures. Jefferson County has almost two million dollars which is 12.3 percent. As to the number of recipients, she has those listed. We have here nursing home care by the different

programs which I can read. Of course, maybe the Court wants to read them. They all show a preponderance, that is, a majority, for instance the vender payments for nursing home care, talking about the third party payment, the Northern District has 63.3 percent; Jefferson County 16.5, and then for hospital care for recipients of Old Age Pensions, that part of the Old Age Assistance program, there are—we are still talking about the month of December, in Jefferson County—I mean, Northern District is 54.2 percent of the entire State, and Jefferson County is 10.6 percent. Now, next, this is the number of child-caring institutions and agencies and related facilities, which I presume would be under the Child Welfare program. Total, 161 for the State of child-caring institutions, Northern District—of which the Northern District has 91 or 56.6 percent; Jefferson County 45 percent of the total—I beg your pardon, 45 in number, which is 28 percent. And then we come to the nursing homes, nursing home number and bed capacity. Nursing homes, 171 in Alabama, of which the Northern District has 98 and also the majority of the number of beds, 59 percent of the total; Jefferson County, 19.7 as to beds and 19.9 as to the number of nursing homes. Then, when you come to the hospitals, 126 in the Northern District—I beg your pardon, 126 for the whole State, of which 62 are in the Northern District of Alabama and 13 in Jefferson County with the Northern District having 49.2 percent, in Jefferson County 10.3 percent. When you come to the number of beds, Northern District has 55.8 percent; Jefferson County 22.5, and at the end of the affidavit: These compilations are made totaling the figures for all of the counties in the area of the Northern District of Alabama and the counties in the other two districts.

(Plaintiff's Exhibit 3
marked for Identification.)

MR. BARNES: I submit the affidavit of H. Hill Cory.

MR. OWEN: I would object to the introduction of this evidence on the grounds that the question of venue in this case doesn't relate to this kind of statistical information but what the statute provides. So, I simply object to its admission.

THE COURT: I will overrule. I will let it in for what it's worth.

MR. BARNES: Mr. Cory's affidavit may relate—also relates to irreputable injury but it is inseparable. It also relates to venue on account of the exhibit that is attached to it. My name is H. Hill Cory, and I am Director of the Bureau of Accounts of the Department of Pensions and Security of the State of Alabama and have held that office for about eight years, and as such it is my duty and responsibility to receive and disburse all funds for the Department and to keep records thereof. Such records are kept under my supervision. Set out immediately below is a true copy of a letter with attachment dated January 12, 1967, addressed to Mr. Ruben K. King and signed by Fred H. Steininger, Director of the Bureau of Family Services of the Department of Health, Education and Welfare, Welfare Administration of the Federal Government. This shows the approved grant award of federal funds from said federal department for the period of January 1, 1967, through February 28, 1967; that's the anticipated date of cutoff, wasn't it, the order?

THE COURT: Yes, sir.

MR. BARNES: —covering the programs stated therein. Set out immediately thereafter is a copy of a letter from the Chief of the Children's Bureau of H.E.W., dated January 12, 1967, to Mr. Ruben King, Commissioner, show-

ing the approved award for the same period for the program under Title 5, Part 3 of the Social Security Act, the Child Welfare Service Program.

Now, the letter, the first letter that he mentions shows, Old-Age Assistance for the two months that he is talking about of federal funds, it would be \$12,172,065.85; Aid to Families with Dependent Children, \$1,724,344.60; Aid to the Blind, \$204,315.82; Aid to the Permanently and Totally Disabled, \$1,303,254.21, and he says the grant by Mr. Steininger of the H.E.W., that particular that I have read, says, the grant award notice for the quarter January 1 through March 31, 1967, sent to you by my letter of December 20, 1966, has been revoked.

You are authorized to draw federal funds, not to exceed the above amounts, for the period January 1, 1967, through February 28, 1967, by presenting payment vouchers against the letter of credit certified to the Treasury Department. Please transmit the attached copy of this letter with enclosure to the State payee authorized to sign payment vouchers on the letter of credit, and he has the figures attached. And then the second letter also dated January 12, 1967, to Mr. Ruben King, from the Chief of the Children's Bureau of the Department of Health, Education and Welfare Administration, Washington, D. C.

Dear Mr. King:

The order issued by the Secretary of Health, Education and Welfare on January 12, 1967, approved the decision of the Commissioner of Welfare terminating federal financial assistance to the State of Alabama under Title 5, Part 3, of the Social Security Act. The Secretary's order made the termination effective February 28, 1967.

Accordingly, the grant award to your State for child

welfare service has been revised to cover only the period January 1, 1967, through January 28, 1967, in the amount of \$196,526.00. The form dated December 27, 1966, and covering the period January 1, 1967, through March 31, 1967, has been revoked.

You are authorized to draw federal funds, not to exceed \$196,526.00 for the period January 1, 1967, through February 28, 1967, by presenting payment vouchers against the letter of credit to the Treasury Department.

Mr. Cory has another exhibit and he says: For our fiscal year—this is not exhibit, this is a continuation of his affidavit—ending September 30, 1967, federal funds actually expended by the State Department amounted to approximately \$95,000,000 and approximately \$31,000,000 State funds, and the budget for the fiscal year that will end September 30, 1967, is approximately \$103,000,000 of federal funds and approximately \$35,000,000 of State funds. Attached hereto is the annual report of the State Department for the fiscal year, 1965-1966 (ending September 30, 1966), which is a compilation from the records of the Department kept in due course of business, and it is correct to the best of my knowledge. Page 27 shows the expenditures for the fiscal year ending September 30, 1966, as above stated. It is my opinion and judgment that the cutting off of federal funds specified—this letter really relates to irreparable injury but might as well read it now as to read it later—it is my opinion and judgment that the cutting off of federal funds specified by the order of Secretary Gardner of January 12, 1967, will result in irreparable harm and damage both to the Department of Pensions and Security of the State of Alabama and poor and needy individuals who are the recipients of federal and state money. It will be a crippling, if not destructive blow to the entire program.

He has attached here the report which he says he already referred to, the one page, and also I point out on page 45 and 46, the latter part of pages 44 and 45, there has been set out for September, 1966, the monthly assistance by case for each county in the 67 counties in the State of Alabama and the programs by name.

I will not read those, there is a lot of them. The counties are named in reference to each program.

MR. OWEN: May I inquire if this is being introduced with respect to all three motions?

MR. BARNES: Yes, sir. I limit it at the present time to the jurisdiction and also it does relate to—

THE COURT: I see no objection to it.

MR. BARNES: Part of it relates to the application for injunction. Of course, the Court doesn't have to consider that at this point if the Court doesn't wish to do so.

THE COURT: I see no objection to it coming in that way.

(Plaintiff's Exhibit 4
marked for Identification.)

MR. OWEN: If it is going to be considered for all three motions, I have no objection with respect to the introduction on the motion of jurisdiction. I object to it on the venue motion, because it doesn't have any relevancy. I object to it on the motion of preliminary injunction simply because that motion really involves a jurisdictional review of the administrative record before the Commissioner and this is additional evidence trying to supplement that record.

THE COURT: Overrule.

MR. BARNES: It is overruled but may I make a statement. We are here on an application for temporary injunction, a stay. We don't think we are limited to what is said in Washington a year and a half ago to show irreparable injury.

THE COURT: All right. Go ahead, Mr. Barnes. I already ruled.

MR. BARNES: All right.

MR. OWEN: In connection with that, if the affidavit related only to irreparable injury, I would have no objection, but it covers the whole field.

THE COURT: I understand the objection and I am going to overrule, and I will consider it for what it may be worth.

MR. OWEN: If the Court—

THE COURT: I don't know whether he is through.

MR. BARNES: Yes, sir. Pardon me.

MR. OWEN: With respect to all three motions?

MR. BARNES: No, sir.

THE COURT: While we are at it, gentlemen, since we have gotten into it this far it might be more orderly if you wish to do so, and I understand that you have no testimony to put on, no witnesses.

MR. OWEN: On the motion for preliminary injunction.

THE COURT: On any of it.

MR. OWEN: I have some evidence to put on with respect to the motion of preliminary injunction.

THE COURT: All right. We will proceed then

with that motion at this time and let you go ahead and then what I will do, I will let you gentlemen have all the time you want to argue all three motions at the same time. That will give you time later on to organize it any way you wish to.

MR. BARNES: Excuse me just a moment.

MR. OWEN: If we are going over—

MR. BARNES: No, sir. I understood in the beginning you wanted evidence on jurisdiction and venue. Now, I understand you think we ought to put them all in.

THE COURT: Yes. I think it would be good to go forward on your motion now for preliminary injunction. Now, if you would prefer to argue the other two motions at this time, we will stop and then we will proceed.

MR. OWEN: No, sir.

THE COURT: If not, let's go on and get through it and argue them all at one time in any manner that you wish to.

MR. OWEN: I have no preference in the matter but I would like if he is going forward with his motion for preliminary injunction to file our answer to the complaint and amended complaint.

MR. BARNES: I would like to offer the affidavit of Reid B. Barnes.

THE COURT: Mr. Barnes.

MR. BARNES: Yes, sir.

THE COURT: Apparently, from my viewpoint, that affidavit is quite lengthy. In order to save Mr. Owens the time it would take to read it all, would you state to him possibly the nature of the affidavit?

MR. BARNES: Yes, sir. I could read the first part of it without reading the whole thing.

MR. OWEN: I have no objection to its introduction. As a matter of fact, I am going to put this transcript of record in before the Court anyway.

MR. BARNES: That's all right.

THE COURT: All right.

MR. BARNES: Affiant. My name is Reid B. Barnes, and I am the attorney representing the interest of the State and the Department of Pensions and Security of Alabama in this case. I represented the respondents before the Hearing Examiner. I might say, may it please the Court, not in my affidavit, that the respondents the record will show before the Hearing Examiner were both the Alabama Department of Pensions and Security and the Alabama Board of Pensions and Security which is really the Board of Directors of the entire department. Attached hereto is a stenographic transcript of the record of the hearing in Washington, D. C. on October 21, 1965, before the Hearing Examiner. I was present, participated, and heard all the evidence in the proceedings. I received the copy of the transcript from the reporter who transcribed the testimony, it being forwarded to me at my request. I have examined and read the transcript, and it is a correct transcript of the proceedings, including the evidence, except for possibly some typographical or obvious clerical errors, and the pencil notations are mine, in parentheses. I know that the witnesses testified under oath as shown in said transcript.

The order of the Secretary of Health, Education and Welfare made January 12, 1967, for the cutoff of federal funds, states that the respondents recognize that the legality

of the Department's regulation is not a question to be considered in the proceeding before him. This is an inaccurate statement. I know of no instance in which the Alabama Agency recognized that such was not a question to be considered. The only thing we stated was that we were in effect not optimistic enough to think that the Executive Department would strike down its own regulation. The hearing before the Examiner was in October, 1965, as stated. He did not render a decision until April 5, 1966. The respondents duly filed exceptions which were heard in June before the Commissioner of Welfare in Washington. A decision was not rendered by her until five months later after the general election in Alabama. I know of no negotiations between the time of the hearing before the Examiner and the decision by the Secretary, with reference to the subject matter of the dispute. I attach the transcript as stated in the affidavit.

(Plaintiff's Exhibit 5
marked for identification.)

MR. BARNES: Now, may it please the Court, I have another affidavit which really merely refers to—I might as well go ahead after the gentleman has had an opportunity to see it, it is short, but the attachment to it is rather long. Attachment is a copy of the Hearing Examiner's recommended decision but if these gentlemen intend to introduce the record I presume it would include that and I do not have but the one copy and have not had an opportunity to make but the one copy in order to serve them.

MR. OWEN: We do, Mr. Barnes, and it will include that.

MR. BARNES: And you intend to introduce it?

MR. OWEN: Introduce the whole Administrative Act.

MR. BARNES: Let the record show then in view of the statement made by Mr. Owen that I will introduce the affidavit without the attachment in view of his statement, if that is agreeable with the gentleman.

MR. OWEN: That's all right.

MR. BARNES: All right.

(Plaintiff's Exhibit 6
marked for identification.)

MR. BARNES: Mr. Owen, may I ask if your actual record also includes the Alabama Plans?

MR. OWEN: No, it does not.

MR. BARNES: The Hearing Examiner took judicial notice of them. We have copy of them here. I think there would be enough evidence without it. At this time I wouldn't want to introduce something that thick (indicating) for the Court. I mean, the Plan, although it is very relevant to the case.

MR. OWEN: They were noticed by the Hearing Examiner in the administrative proceedings and they are volumes, they are public assistance plans, child welfare plans, and—

MR. BARNES: I think there would be enough evidence for the Court, I don't think it is necessary to introduce the plans. If we need them later, why we can get them on request or on motion.

THE COURT: I don't feel they should be put in.

MR. OWEN: I wouldn't disagree with Mr. Barnes. They could be noticed either in argument or briefs or whatever was required. We could set out those portions that we wanted to show the Court.

MR. BARNES: With that statement, I do not see any need to introduce the long, thick plan. I think we have evidence sufficient without it.

THE COURT: All right.

MR. OWEN: We will be agreeable.

MR. BARNES: I would also—my affidavit which I have just submitted also identifies the handbook which I have only the one copy and which identifies in my latest affidavit or the second one as being Exhibit—the Department, H.E.W. Federal Department's Exhibit No. 1 introduced on the hearing. These gentlemen have it here. I will withhold that since they have a copy of it and since that is agreeable.

MR. OWEN: Yes.

THE COURT: All right.

MR. BARNES: Excuse me just one moment. We have another affidavit of Mr. Ruben King merely identifying a copy of a letter, March 1, 1965. At the present it seems to be misplaced. That is addressed to H. E. W. and I do not know whether it is in the correspondence or not. We ask leave to be able to offer it sometime during the day or submit it subject to their right of objection. I have misplaced it for the time being.

MR. OWEN: Might save a little time by saying that letter of March 1st, I believe, is in one of the exhibits.

MR. BARNES: I would have thought so.

MR. OWEN: To the correspondence, exhibit attached to the transcript and the Examiner's decision.

MR. BARNES: I would have thought so.

MR. OWEN: It is in our files here. When we in-

roduce it I think it will be in evidence.

MR. BARNES: All right. Thank you.

THE COURT: All right, sir. Anything further now, Mr. Barnes?

MR. BARNES: No, sir. That is all.

THE COURT: That's all.

MR. BARNES: Yes, sir.

THE COURT: You have no witnesses now that you wish to put on the stand?

MR. BARNES: No, sir.

THE COURT: I am not suggesting it, I just want to be sure you are through. I will recess for ten minutes and let you have an opportunity to be sure you haven't missed anything.

(Whereupon, proceedings were in recess from 10:50 a.m. until 11:00 a.m., following which the following occurred:)

MR. BARNES: That's all, Your Honor.

THE COURT: Is that all, Mr. Barnes?

MR. BARNES: Yes, sir.

THE COURT: Mr. Owen, do you have anything to present?

MR. OWEN: Your Honor, I have evidence which I have to introduce which is the entire administrative record of the administrative proceedings. The proceeding itself, the records of the documents is contained in the six folders, each one labeled Volume 1 through 6 and they are tabbed. There is a certification at the beginning of each folder

that these are true copies on file at H.E.W. In addition to that, there is a document, copy of a document with a certification in this folder marked Index with the certification that the documents herein are true copies of what is on file with H.E.W. The document underneath is a memorandum to the General Counsel of H.E.W. from the Department of H.E.W. Hearing Clerk, who certifies that he has examined these and this constitutes the entire record of the administrative proceedings described above. He then has an index Volume 1, A through U, and Volume—describing each document; and Volume 1, if you return to Volume 1 each document is tabbed with the letter except they did not tab the first one, the first document is A and I would like to introduce this index and the six volumes of the administrative record.

MR. BARNES: That's all right.

THE COURT: I think it would be most helpful to handle it that way.

(Defendant's Exhibit 1
marked for Identification.)

MR. OWEN: That's all we have for the government.

THE COURT: Well, unless you gentlemen want a little time to organize yourself we can go right ahead and hear the oral arguments.

MR. OWEN: I am ready to proceed on the motion to dismiss.

MR. BARNES: We are ready.

THE COURT: Mr. Owen, you may take as much time as you like and if you wish to divide your time with your associate you may do so, whatever you may wish to do.

(Whereupon, oral argument was had on behalf

of the respective parties, following which the following occurred:)

THE COURT: Anything further, gentlemen?

MR. OWEN: No, Your Honor.

THE COURT: First, I want to thank counsel for the Government and for the State for the manner in which you have presented this case to the Court. You have been most helpful.

As all of you know, I have been scheduled for over two months to hear a docket in Tampa beginning Monday morning, it is a criminal docket and could not be put off. It will take me from two to two and a half weeks to try that docket. Therefore, at this time I am going to try to decide this matter as best I can.

The motions filed by the Secretary raises a serious and intricate problem as to jurisdiction and venue. I had hoped, due to the shortness of time and the urgency of this case, to be in position to decide these two motions from the bench. It now appears that in fairness to all of the parties and to myself, this cannot be done. Therefore, I am taking these two motions under advisement and will rule upon them as soon as I can reasonably do so upon my return from Florida.

This being a matter of such urgency and vital importance to the people who depend upon welfare funds for their very existence, and the cutoff order becoming effective February 28th, just a few short weeks from now, and the Court being of the opinion that in the event the cutoff of funds to the Alabama Department of Pensions and Security does become effective, irreparable harm and injury will be done; and the Court being of the further opinion that this matter will in all probability ultimately have to

be resolved by the Court of Appeals and would be considered by that Court as an emergency matter and reached as quickly as possible, plaintiff's motion for preliminary injunction will be granted and issued at this time.

This action on the part of the Court will maintain the status quo and allow the Courts reasonable time in which to carefully consider and decide the matters in dispute.

Mr. Barnes, if you will prepare the preliminary injunction I will sign it before I leave Birmingham.

MR. BARNES: Do what? Sign it before when?

THE COURT: I will sign it before I leave Birmingham as soon as you can get it prepared.

MR. BARNES: Yes, sir.

THE COURT: And it is my hope and I would like for the record to show that this matter will resolve itself without the Courts having to consider it further; and if not, if it goes to the Court of Appeals I will be hopeful that they could consider the entire matter at that time and I feel like they would.

Thank you, gentlemen.

END OF PROCEEDINGS

CERTIFICATE

STATE OF ALABAMA
JEFFERSON COUNTY

I, Carmen Zegarelli, Official Court Reporter of the United States District Court, Birmingham, Alabama, do hereby certify that I reported in shorthand the foregoing proceedings at the time and place stated in the caption

hereof; that I later reduced my shorthand notes to type-writing, or under my supervision, and the foregoing pages, except for the oral argument of counsel, contain a true and correct transcript of the proceedings as herein set out.

I further certify that I am neither of counsel nor of kin to any parties to said cause, nor in any manner interested in the result thereof.

Carmen Zegarelli [Sig.]
Official Court Reporter.