



U.S. Department of Justice

Office of Justice Programs

Office for Civil Rights

Washington, D.C. 20531

January 4, 2016

VIA E-MAIL AND CERTIFIED MAIL

Spencer Collier
Secretary
Alabama Law Enforcement Agency
201 South Union Street, Suite 300
Montgomery, Alabama 36104

Colonel John E. Richardson
Acting Director of Public Safety
Alabama Department of Public Safety
301 South Ripley Street
Montgomery, Alabama 36104

Re: Compliance Review of Ala. Law Enf't Agency and Ala. Dep't of Pub. Safety
(14-OCR-0444)

Dear Secretary Collier and Colonel Richardson:

I am writing to report the findings of the Compliance Review that the Office for Civil Rights (OCR), Office of Justice Programs (OJP), U.S. Department of Justice (DOJ) conducted of the Alabama Law Enforcement Agency (ALEA or Agency) and the Alabama Department of Public Safety (DPS or Department).

On July 14, 2014, I notified the DPS that the OCR selected it for a Compliance Review under the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act) and its implementing regulations. On January 1, 2015, through an agency restructuring, the DPS became part of the ALEA.¹ In the notice letter to the DPS, I explained that the OCR is conducting compliance reviews that evaluate several employment practices of state law enforcement agencies, in accordance with 28 C.F.R. § 42.206. The Safe Streets Act and its regulations prohibit discrimination in employment based on sex² and the Safe Streets Act's regulations also describe a recipient's obligations to develop an appropriate equal employment opportunity program.³ Through this compliance review initiative, the OCR focuses on each recipient's recruitment, hiring, and retention of female troopers. As part of this project, the OCR selected for review the DPS, which received a substantial amount of financial assistance from the DOJ that is subject to the civil rights requirements of the Safe Streets Act and its implementing regulations.

From September 22 – 25, 2014, the OCR conducted an onsite visit with the DPS that included interviews with management and program personnel at DPS headquarters in Montgomery and at DPS posts throughout Alabama. Additionally, the OCR visited the Department's Alabama Criminal Justice Training Center and spoke to personnel about how the DPS selected trooper

¹ ALA. CODE § 41-27-1(1) (2015).

² 42 U.S.C. § 3789d(c)(1) (2012); 28 C.F.R. § 42.203 (2014).

³ 42 U.S.C. § 3782(a) (2012); 28 C.F.R. § 42.301–.308.

applicants and trained entry-level troopers. The OCR thanks your personnel for assisting it throughout the Compliance Review, including during its onsite visit.

I. Executive Summary

After evaluating the ALEA's and the DPS' employment practices regarding recruiting, hiring, and retaining female troopers, we issue the following Compliance Review Report (Report).⁴ In preparing the Report and its findings, the OCR relied on information from the following sources: the ALEA's and the DPS' responses to the OCR's data requests; interviews with DPS applicants, employees, and former employees; and interviews with persons affiliated with the Alabama State Personnel Department, the Alabama Peace Officers Standards and Training Commission, the Jefferson County Sheriff's Office, and the Birmingham Police Department. After carefully reviewing all of this information, the OCR finds that the ALEA and the DPS are not in compliance with the civil rights requirements of the Safe Streets Act and its implementing regulations. Specifically, we have the following reservations about the adequacy of the ALEA's and the DPS':

- **Recruitment Program:** The DPS does not analyze its recruitment program to understand why female potential applicants might not apply for the trooper position. Because of this deficiency, it does not have an effective, measurable plan for recruiting additional female trooper applicants.
- **Selection Practices:** The DPS did not analyze its process for selecting troopers to determine whether any of its screening devices improperly excluded female applicants from the application process. Because of this deficiency, in 2009, 2011, and 2014, it used a pre-offer physical agility and ability test to screen trooper applicants that adversely impacted females and that was neither sufficiently related to the trooper position nor consistent with business necessity.
- **Retention Program:**
 - The DPS does not consider whether female troopers have sufficient access to career-enhancing training opportunities. It also does not analyze its employment practices or workforce trends to learn why female troopers leave the organization. As a result, it does not have a coherent plan for improving workplace conditions for female troopers and encouraging them to remain with the organization.
 - The OCR received troubling information about the effectiveness of the ALEA's nondiscrimination and anti-harassment policies and training, the accountability of DPS supervisors in interacting with female subordinates, the integrity of the DPS' complaint system, and the ability of women to report discrimination or

⁴ On September 14, 2015, the OCR issued a draft Report to the ALEA and the DPS. The final Report incorporates feedback they provided to the OCR about that draft.

harassment, free from retaliation.

- Assignment of Personnel to Equal Employment Opportunity Program: The ALEA and the DPS do not provide adequate resources to personnel to administer the Respondents' recruitment, selection, and retention programs.
- Distribution of Information About Equal Employment Opportunity Program: The ALEA and the DPS do not disseminate adequate information about their equal employment opportunity program to employees, applicants, and the public. Consequently, these groups cannot readily learn about the Respondents' recruitment, selection, and retention programs.

To address these deficiencies, this Report makes specific recommendations to the ALEA and the DPS to improve their processes for recruiting, selecting, and retaining female troopers.

II. Background

The OCR's Compliance Review of the ALEA and the DPS is part of a broader compliance review initiative that evaluates the efforts of law enforcement agencies to employ women as sworn officers. This project aligns with the DOJ's strategic plan, which prioritizes the enforcement of federal laws prohibiting discrimination in employment.⁵ To achieve this goal, the plan encourages DOJ components to investigate and address discrimination against female applicants and employees.⁶ Using this plan as a touchstone, the OCR designed a compliance review initiative that focuses on several employment practices of state law enforcement agencies.

A. Compliance Review Selection Criteria

In conducting compliance reviews of recipients subject to the Safe Streets Act's nondiscrimination provision and its implementing regulations, the OCR selects recipients for review based on the following criteria:

- (1) The relative disparity between the percentage of minorities or women in the relevant labor market and the percentage of minorities or women employed by the recipient;
- (2) The number and nature of discrimination complaints filed against a recipient with the OCR or other federal agencies;
- (3) The scope of the problems revealed by a complaint investigation or a pre-award compliance review; and

⁵ DOJ, DEPARTMENT OF JUSTICE STRATEGIC PLAN FOR FISCAL YEARS 2014 – 2018 34–36, <https://web.archive.org/web/20151223212044/http://www.justice.gov/sites/default/files/jmd/legacy/2014/02/28/doj-fy-2014-2018-strategic-plan.pdf>.

⁶ *Id.* at 36.

- (4) The amount of assistance provided to the recipient by the OJP, the Office of Community Oriented Policing Services (COPS Office), and the Office on Violence Against Women.⁷

For its initial compliance reviews on women in policing, the OCR selected state law enforcement agencies because of their failure, over two decades, to significantly increase the percentages of women in their sworn ranks. In 2010, the Bureau of Justice Statistics (BJS) published a report that analyzed the long-term employment trends of women as sworn officers.⁸ The study showed that, from 1987 – 2007, state law enforcement agencies made the least amount of progress in hiring female sworn officers, when compared to local police departments and sheriffs' offices. The percent of female officers at law enforcement agencies changed as follows: at local police departments, it increased from 7.6% to almost 12%; at sheriffs' offices, it decreased from 15.6% to 11.2%; and at state law enforcement agencies, it increased from 3.8% to 6.5%. Given these comparative data, which suggest that state agencies might have especially significant challenges in hiring and retaining female officers, the OCR prioritized these agencies for review.

Once the OCR began its compliance review initiative regarding women in law enforcement and decided to review state law enforcement agencies, it applied the above factors to all state police and highway patrol agencies. We selected the DPS because it employs so few female troopers and it received a substantial amount of DOJ funding to hire troopers. As to the first factor, the DPS reported data to the OCR, as part of the OCR's general data collection on recipients' equal employment opportunity efforts,⁹ showing that it should aim to hire more female troopers. It also reported data to the Federal Bureau of Investigation (FBI), through the FBI's Uniform Crime Reporting Program, on its rate of full-time female law enforcement officers.¹⁰ In 2011, women only held 2.09 percent of the Department's full-time officer positions (i.e., 14 out of 670 positions).¹¹ As to the funding-related factor, the DPS received more than seventeen million dollars under grant programs that require recipients to adhere to the Safe Streets Act's civil rights requirements. Notably, the Department received much of this money, totaling \$9,577,296, from

⁷ See 28 C.F.R. § 42.206(c).

⁸ LYNN LANGTON, BJS, WOMEN IN LAW ENFORCEMENT, 1987 – 2008 (June 2010), <https://web.archive.org/web/20151223160645/http://www.bjs.gov/content/pub/pdf/wle8708.pdf>.

⁹ See *Questions and Answers and Self-Test Scenarios*, OCR, https://web.archive.org/web/20151223160800/http://ojp.gov/about/ocr/faq_eoop.htm (last visited Dec. 23, 2015); OCR, Sample Utilization Report: Law Enforcement Agencies (July 3, 2013), https://web.archive.org/web/20151223160848/http://ojp.gov/about/ocr/pdfs/shortform_law_enforcement.pdf.

¹⁰ See, e.g., FBI, UNIFORM CRIME REPORT PROGRAM, CRIME IN THE UNITED STATES, 2012, tbl.76 (Full-time State Law Enforcement Employees by State, 2012), https://web.archive.org/web/20151223160949/https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/76tabledatadecpdf/table_76_full_time_state_law_enforcement_employees_by_state_2012.xls.

¹¹ FBI, UNIFORM CRIME REPORT PROGRAM, CRIME IN THE UNITED STATES, 2011, tbl.76 (Full-time State Law Enforcement Employees by State, 2011), https://web.archive.org/web/20151223161031/https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table_76_full-time_state_law_enforcement_employees_by_state_2011.xls. The DPS did not report these data to the FBI for 2012, 2013, or 2014.

the COPS Office to hire and rehire sworn personnel:¹² in 2010, it received \$7,702,296 to rehire thirty-eight officers;¹³ in 2013, it received \$1,875,000 to hire fifteen officers.¹⁴

B. The ALEA

On March 18, 2013, Governor Robert Bentley signed into law a bill that consolidated twelve state law enforcement agencies into the ALEA.¹⁵ As a result of this wide-sweeping reorganization, on January 1, 2015, the ALEA assumed responsibility for the functions of these agencies, including the DPS.¹⁶ The ALEA is led by a cabinet-level Secretary, who reports to the Governor.¹⁷ The ALEA Secretary is responsible for recruiting, selecting, and training law enforcement personnel within the Agency.¹⁸ Because the ALEA now manages the DPS, the OCR identifies several recommendations in the Report that apply to the Agency. The ALEA is also responsible for ensuring that the DPS implements those recommendations that apply to it.

C. The OCR's Investigative Sources and Methods

During the Compliance Review, the OCR gathered information from the ALEA and the DPS, females who applied to become DPS troopers, a former trooper, the Alabama State Personnel Department (SPD), the Alabama Peace Officers Standards and Training Commission (APOSTC), the Jefferson County Sheriff's Office (JCSO), and the Birmingham Police Department (BPD).

¹² 42 U.S.C. § 3796dd(b)(1)–(2) (2012).

¹³ DPS, 2010 COPS Hiring Program, Office of Cmty. Oriented Policing Servs. Grant No. 2010-UL-WX-0003 (Sept. 1, 2010 – Aug. 31, 2014).

¹⁴ DPS and ALEA, 2013 COPS Hiring Program, Office of Cmty. Oriented Policing Servs. Grant No. 2013-UL-WX-0004 (Sept. 1, 2013 – Aug. 31, 2016). In 2014, the DPS applied for and received \$3,125,000 to hire twenty-five officers, but ultimately declined to accept the award. *See also* DPS, FY 2006 Congressionally Mandated Awards, Bureau of Justice Assistance Project No. 2006-DD-BX-0503 (Oct. 1, 2005 – Sept. 30, 2006) (award for \$987,228); DPS, In-Car Digital Video Camera Evaluation Project, Nat'l Institute of Justice Project No. 2007-IJ-CX-K011 (Sept. 11, 2007 – Sept. 30, 2008) (award for \$375,000); DPS, ADPS Air Search and Rescue Capabilities/Hurricane Relief Project (ADPS Code 7HEL), Bureau of Justice Assistance Project No. 2007-DJ-BX-0755 (Oct. 1, 2006 – Sept. 30, 2010) (award for \$3,000,000); ALEA, State Justice Statistics Program for Statistical Analysis Centers, Bureau of Justice Statistics Project No. 2015-BJ-CX-K021 (Oct. 1, 2015 – Sept. 30, 2016) (award for \$209,285).

¹⁵ ALA. CODE § 41-27-1, -3 (2015). These agencies are the Alcohol Beverage Control Board Enforcement Division; the Bureau of Investigation; the Criminal Justice Information Center; the Department of Agriculture and Industry; the Department of Homeland Security; the DPS; the Department of Revenue Enforcement; the Forestry Commission; the Fusion Center; the Marine Police; the Office of Prosecution Services, Computer Forensic Laboratories; and the Public Service Commission Enforcement. *See Legacy Agencies*, ALEA, <https://web.archive.org/web/20151223161110/http://www.alea.gov/Home/wfContent.aspx?ID=4&PLH1=plhAbout-LegacyAgenciesBiography> (last visited Dec. 23, 2015). Because the DPS became part of the ALEA, the entire Agency is subject to the Safe Streets Act's nondiscrimination provision and its implementing regulations. *See* 28 C.F.R. § 42.202(k) (2014).

¹⁶ *See* ALA. CODE § 41-27-3.

¹⁷ *Id.* § 41-27-2(a).

¹⁸ *Id.* § 41-27-3(b).

1. The ALEA and the DPS

The OCR developed its investigative record in this matter largely from the ALEA's and the DPS' responses to the OCR's data requests, the OCR's site visit, and the OCR's interviews of trooper applicants and a former trooper.

On July 14, 2014, the OCR issued an initial data request to the DPS; it also issued several supplemental data requests to the ALEA and the DPS. In response to these requests, the Respondents produced an extensive amount of material that allowed the OCR to better understand their recruitment program, selection process, work environment, and retention efforts and to identify additional sources of information.

While onsite in September of 2014, the OCR visited DPS headquarters; the Academy; and the Department's Montgomery, Selma, Jacksonville, and Evergreen Posts. At the beginning of the site visit, OCR attorneys met at DPS headquarters with senior sworn and civilian personnel to discuss the DPS' responses to the OCR's data request. This meeting included the Acting Division Chief of the Highway Patrol Division and the leaders of those divisions responsible for trooper recruitment, training for entry-level troopers, the trooper selection process, the DPS' equal employment opportunity program, and trooper career development. We visited the Academy, where we spoke with personnel about the Academy and the DPS' administration of a physical agility and ability test to applicants during the trooper hiring process.¹⁹ At the selected posts, OCR attorneys interviewed troop and post commanders and supervisors, troopers, and civilian communications personnel about their training and work experiences at the DPS. By the end of our site visit, we had also interviewed all ten of the DPS' active-duty female troopers, as well as female sworn personnel assigned to the DPS' Alabama Bureau of Investigation and Capitol Police. Altogether, OCR attorneys interviewed forty-three DPS officials and non-managerial employees. The OCR also interviewed a former trooper.

2. The SPD and the APOSTC

The OCR interviewed representatives from the SPD and the APOSTC to learn more about the interactions between these entities and the DPS. In speaking with the SPD, the OCR discussed the process for selecting entry-level troopers and the SPD's provision of equal employment opportunity training to DPS employees. The APOSTC interview focused on its role in recruiting, selecting, and training law enforcement officers throughout Alabama and, in particular, at the DPS. We were especially interested in learning more about the APOSTC's development of its physical agility and ability test for entry-level officers.

3. The JCSO and the BPD

The OCR interviewed ten female officers at the JCSO and the BPD about their perceptions of and interactions with the DPS. The OCR contacted the JCSO and the BPD based on data they

¹⁹ Apart from the site visit, the OCR also interviewed several individuals who applied to become DPS troopers.

submitted to the FBI's Uniform Crime Reporting Program²⁰ on their relatively high ratios of female sworn officers, compared to their peer agencies in Alabama. OCR attorneys talked to the selected officers at these two agencies about why they chose to work at the JCSO or the BPD, instead of becoming troopers at the DPS.

4. Expert Consultants

To assist the OCR during its Compliance Review of the ALEA and the DPS, the OCR retained a statistician, an industrial/organizational psychologist, and an exercise physiologist. In providing their analyses and opinions to the OCR, these experts relied on data the Agency, the Department, and the SPD provided about their employment and selection practices. The statistician analyzed data about the DPS' recent trooper hiring cycles, as well as pertinent data about the Alabama and United States labor markets. The industrial/organizational psychologist primarily evaluated two studies that the ALEA and the DPS rely on to defend the DPS' administration of a physical assessment test that disproportionately excluded female applicants from its trooper hiring process. The exercise physiologist evaluated that particular pre-offer physical assessment test, as well as a different physical assessment that the DPS applies to incumbent troopers.

III. The DPS' Notice of Its Nondiscrimination Obligations

Well before the OCR initiated its Compliance Review of the DPS, the Department received notice, through two litigation matters, that its employment practices must protect the civil rights of female applicants and employees. In one matter, the DPS entered into a consent decree designed to ensure that its recruitment efforts target female potential applicants and that its workforce includes a substantial number of female employees. In a second case, a district court ordered the DPS to improve its efforts to recruit and hire female troopers. More recently, in receiving DOJ grant awards, it repeatedly agreed to administer its employment practices in ways that do not discriminate against women and to provide equal employment opportunities to them.

A. Litigation Challenging the DPS' Fair Employment Practices

In 1972, private litigants initiated litigation against the DPS, challenging its employment practices; sixteen years later, the DPS signed a consent decree to resolve the matter. In *NAACP v. Allen*, the National Association for the Advancement of Colored People (NAACP) sued the DPS under the Fourteenth Amendment's Equal Protection Clause, alleging that it engaged in a "continuous and pervasive pattern and practice of excluding Negroes from employment,"

²⁰ FBI, UNIFORM CRIME REPORT PROGRAM, CRIME IN THE UNITED STATES, 2012, tbl.77 (Full-time Law Enforcement Employees by State, 2012), https://web.archive.org/web/20151223161148/https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/77tabledatadecpdf/table_77_full_time_law_enforcement_employess_by_state_2012.xls. This table provides data, broken down by state, on the numbers of male and female officers at local law enforcement agencies in 2012. To identify those local agencies in Alabama that had especially large numbers of female officers, the OCR obtained from the FBI's Criminal Justice Information Services Division all the responses that agencies in the state provided to the FBI on this topic.

including as troopers.²¹ After lengthy litigation, in 1987, the U.S. Supreme Court endorsed the district court's order that the DPS hire one African-American candidate for each White candidate until approximately twenty-five percent of its trooper force consisted of African Americans, irrespective of whether they were male or female. After this decision, on February 1, 1988, the parties entered into a consent decree.²² Under this agreement, the terms of which have expired, the DPS agreed to make wide-ranging changes to its recruitment practices, hiring practices, and equal employment opportunity program, all of which affected persons who were interested in, applied for, and became troopers.

A second class-action case, *Mieth v. Dothard*, also provided clear notice to the DPS that it needed to improve its efforts to recruit and hire female troopers.²³ Like the *Allen* plaintiffs, Brenda Mieth, a trooper applicant, alleged that the DPS' employment practices violated the Equal Protection Clause, although she focused on the height and weight requirements that the DPS applied to female trooper applicants. A three-judge panel of the Middle District of Alabama agreed with Ms. Mieth, striking down these restrictions because they discriminated against women. In explaining its decision, the court noted that the DPS' reliance on these requirements constituted intentional discrimination and did not advance any legitimate interest.²⁴ To sustain its burden of showing that these requirements were sufficiently job related, the DPS argued that they protect women and the public. The court summarily rejected each proffered defense. As to the first explanation, the court explained that "women do not need protectors; they are capable of deciding whether it is in their best interest to take romantic or dangerous jobs."²⁵ As to the DPS' public safety concern, the court said there was no evidence that females could not perform trooper duties.²⁶ At the time of this decision, the DPS did not actively recruit women to become troopers.²⁷ To remedy this deficiency, the court ordered the DPS to implement a recruiting program targeted at women that "shall stress the equal role of men and women" as troopers.²⁸

B. Grant Agreement Assurances and Conditions

The DPS received notice of the civil rights requirements that the OCR evaluates through this Compliance Review when it agreed to adhere to those requirements in exchange for receiving COPS Office and OJP grant awards. When an applicant seeks grant funding from these DOJ

²¹ NAACP v. Allen, 340 F. Supp. 703, 704 (M.D. Ala. 1972); *see also id.* at 705.

²² Consent Decree, *Paradise v. Wells*, No. 3561-N (M.D. Ala. Feb. 1, 1988) [hereinafter *Paradise Consent Decree*], https://web.archive.org/web/20151223161258/https://www.splcenter.org/sites/default/files/d6_legacy_files/paradise_vallen_consentdecree.pdf.

²³ 418 F. Supp. 1169 (M.D. Ala. 1976).

²⁴ *Id.* at 1180, 1182. The court also held that the DPS violated the civil rights of females applying for correctional counselor positions by subjecting them to these same height and weight requirements. *Id.* at 1183–85. The DPS appealed this portion of the court's decision but did not challenge the court's holding as to female trooper applicants. *Dothard v. Rawlinson*, 433 U.S. 321, 324 n.4 (1977).

²⁵ *Mieth*, 418 F. Supp. at 1181.

²⁶ *Id.*

²⁷ *Id.* at 1173.

²⁸ *Id.* at 1185.

components, it signs and submits an assurances document stating that it agrees to comply with the nondiscrimination requirements of the Safe Streets Act. Before receiving each award that prompted the OCR to review its employment practices, the DPS signed and submitted this assurances document to the DOJ. As a separate condition of these awards, an applicant must agree to develop and implement an appropriate Equal Employment Opportunity Plan. Here, too, the DPS agreed to comply with this requirement in exchange for receiving COPS Office and OJP grant awards.

IV. Overview of the DPS and the Highway Patrol Division

The DPS is the law enforcement arm of the State of Alabama. The Governor of Alabama appoints the DPS' director and deputy director. In addition to the Director's Office, the Department has the following main units: the Alabama Bureau of Investigation (ABI); the Alabama Criminal Justice Training Center (Academy); the Operations Division, which includes the Highway Patrol Division (HPD) and the Driver License Division; the Special Projects Division; and the Support Services Division, which includes the Administrative Division and the Service Division.²⁹ Typically, a major leads each division,³⁰ which includes civilian personnel and may include sworn officers. The trooper position is the most junior sworn officer position within the organization.

The HPD, which enforces Alabama's laws on the state's highways, plays an especially important role in the early-stage careers of troopers because all troopers work there after graduating from the Academy. The HPD includes subunits called troops and posts, which cover the state. A captain or a lieutenant commands each troop, with lieutenants usually assuming deputy commander positions. A troop includes at least one post. A sergeant leads each post, while corporals provide management assistance by supervising troopers and, occasionally, civilian personnel. The HPD also includes specialized components, including the K-9 unit, the aviation unit, accident reconstruction teams, tactical team operations, the special operations platoon, and a marijuana eradication unit.

V. The DPS' Recruitment of Troopers

In accepting the financial assistance that gives rise to this Compliance Review, the DPS agreed to adhere to the Safe Streets Act's regulations regarding equal employment opportunity. Under these regulations, a recipient must evaluate several significant aspects of its employment

²⁹ The ABI is the DPS' investigative unit and operates: the Center for Missing and Exploited Children, the sex offender registry unit, the bomb squad, a marijuana eradication unit, the Internet Crimes Against Children Task Force, and the hostage negotiation team. The Academy trains trooper candidates and sworn officer candidates from other law enforcement agencies in Alabama. The Administrative Division provides organizational support to other DPS components and modifies the Department's policies and procedures. The Driver License Division issues drivers' licenses, maintains records on accidents and other incidents on Alabama's roads, and administers driving examinations. The Service Division provides supplies and equipment to other DPS units. The Special Projects Division coordinates the Department's activities across components and prepares for large-scale events. DPS Response to OCR Data Request No. 2 (Aug. 14, 2014).

³⁰ The DPS has largely imported the rank structure of the U.S. Army.

practices, which range from recruitment to employment separation.³¹ Based on that assessment, a recipient must develop and implement an equal employment opportunity program (EEO), which explains how the recipient provides equal employment opportunity to applicants and employees, irrespective of their race, national origin, or sex.³² In this section of the Report, the OCR discusses these administrative obligations, as to the recruitment of female potential trooper applicants. While the DPS satisfies several of the regulations' requirements, it does not analyze, develop, or monitor its recruitment program.

A. The DPS' Obligation to Enumerate Its Sworn Officers by Rank

Before designing an appropriate recruitment program, a recipient must identify its recruitment needs. To that end, the Safe Streets Act's EEO regulations require a recipient to identify each job category and the number of employees in each of those positions, cross-classified by race, national origin, and sex.³³ The DPS submitted data to the OCR that substantially complies with this obligation, as to its sworn officer positions.

On October 2, 2014, the DPS provided certified information to the OCR about the number of the Department's sworn officers, cross-classified by race, national origin, and sex.³⁴ The DPS also provided information about the composition of its workforce during the OCR's site visit. As of October 2014, out of the DPS' 633 sworn officer positions, men held the overwhelming majority of them (616, or 97.31 percent), with women filling the balance (17, or 2.69 percent). The following chart provides demographic information about these sworn positions:

Sworn Officers of the DPS³⁵

Job Category	Male				Female			
	White	Hispanic or Latino	Black or African American	American Indian or Alaska Native	White	Hispanic or Latino	Black or African American	American Indian or Alaska Native
State Troopers and ABI Special Agents	315	3	90	0	4	3	2	0
State Trooper Corporal	91	1	13	0	0	0	0	0
State Trooper Sergeant	37	0	6	1	2	0	0	0
State Trooper Lieutenant	23	0	8	0	2	0	0	0
State Trooper Captain	12	0	6	0	1	0	1	0
State Trooper Major	2	0	2	0	0	0	0	0

³¹ 28 C.F.R. § 42.303(a), (c) (2014).

³² *Id.* § 42.304.

³³ *Id.* § 42.303(c)(1).

³⁴ DPS, EEO Utilization Report 7 (Oct. 2, 2014) (on file with the OCR).

³⁵ This chart only contains those racial and national origin categories that include at least one DPS employee.

Job Category	Male				Female			
	White	Hispanic or Latino	Black or African American	American Indian or Alaska Native	White	Hispanic or Latino	Black or African American	American Indian or Alaska Native
Trooper Pilot Supervisor	1	0	0	0	0	0	0	0
Protective Services State Capitol Police Corporal	3	0	1	0	1	0	0	0
Protective Services State Capitol Police Sergeant	1	0	0	0	0	0	1	0

B. The DPS’ Obligation to Identify Its Underutilization Rates for Female Sworn Officers

Once a recipient collects demographic data for its job categories, it must compare this workforce information to available data on potential applicants in the labor market who are eligible for each position.³⁶ A recipient that has fifty or more employees and receives a grant award of at least \$500,000 under a program that is authorized by the Safe Streets Act must submit a report to the OCR that analyzes these comparative data. The OCR refers to these reports as “utilization reports.” Each utilization report provides a snapshot of the number of the recipient’s employees within specific job categories, cross-classified by race, national origin, and sex, and identifies whether a recipient has an “underutilization rate.” This rate compares the percentage of employees of a protected class in a particular job category to the percentage of qualified workers of the same protected class in the relevant labor market. By consulting this information, a recipient can evaluate whether it should refine any of its recruitment practices, such as by encouraging more women to apply for sworn officer positions. The DPS submitted data to the OCR that substantially complies with its obligation to provide information on its underutilization rates for the sworn officer position.

Since 2010, the DPS provided four reports to the OCR that identified significant underutilization rates for female sworn officers, and in particular White and Black/African-American officers. To identify these rates, the Department compared the information in the previous chart to the number of people in Alabama who were between the ages of twenty and thirty-four and were high school graduates.³⁷ The following chart identifies statistically significant underutilization rates for these two racial categories:³⁸

³⁶ 28 C.F.R. § 42.304(a).

³⁷ As the OCR explains in Section V.C.4.a of the Report, the OCR will consider different demographic data to evaluate the DPS’ progress in recruiting more female trooper applicants.

³⁸ In concluding that these underutilization rates are statistically significant, the OCR applied a “standard deviation” analysis to them. See Compliance Review Report, *infra* note 116.

Significant Underutilization Rates for Female Sworn Officers

Date of DPS Utilization Report	White	Black or African American
June 4, 2010	-26%	-14%
June 15, 2012	-23%	-10%
June 27, 2014	-22%	-16%
October 2, 2014	-21%	-15%

These underutilization rates demonstrate that, over time, the DPS has had ongoing challenges in hiring a sworn officer workforce that resembles the community it serves. During the onsite visit, the DPS acknowledged that it did not take these underutilization rates into account in targeting its recruitment efforts. As the OCR discusses in the next subsection of the Report, the ALEA and the DPS should consider this information in designing a recruitment program that will improve the diversity of their trooper applicant pool.

C. The DPS' Obligation to Analyze Its Recruitment Program

Under the Safe Streets Act's EEO regulations, a recipient should conduct a thorough, annual self-assessment of its recruitment program to determine whether it denies equal employment opportunities to women.³⁹ If, as a result of this analysis, a recipient identifies deficiencies in its recruitment program, it should timely correct them.⁴⁰ The DPS is not in compliance with this requirement because it does not analyze whether its recruitment program is effective at encouraging women to apply for the entry-level trooper position.

1. Minimum Trooper Requirements and the State Personnel Department's Involvement in the Trooper Hiring Process

As context for the OCR's discussion of the DPS' failure to analyze its recruitment program, we discuss the minimum qualifications to become a trooper and the DPS' interactions with the State Personnel Department (SPD) in selecting troopers, before the ALEA assumed responsibility for the trooper selection process. As the OCR will discuss, the DPS made several decisions, vis-à-vis the SPD's involvement in the trooper selection process, that negatively affected the Department's ability to recruit female troopers.

a. Minimum qualifications to become a DPS trooper

The Alabama Peace Officers Standards and Training Commission (APOSTC), which is an independent state agency, establishes the minimum standards that a law enforcement agency in Alabama must follow in selecting law enforcement personnel.⁴¹ Under the APOSTC's standards, applicants for sworn officer positions must satisfy the following minimum qualifications to become certified law enforcement officers:

³⁹ 28 C.F.R. § 42.303(c)(2), .306(a).

⁴⁰ *Id.* § 42.306(b).

⁴¹ ALA. ADMIN. CODE r. 650-X-1.02 (2015).

1. Complete the APOSTC's required course of training;⁴²
2. Be at least nineteen years old;⁴³
3. Possess a high school diploma or a qualifying equivalent;⁴⁴
4. Meet the physical qualifications for good health;⁴⁵
5. Have good moral character, which means not having committed a felony or other serious crime;⁴⁶
6. Be a citizen of the United States;⁴⁷
7. Have been discharged under honorable conditions, if the applicant was a member of the U.S. Armed Services;⁴⁸ and
8. Possess a valid driver's license.⁴⁹

b. Defining the scope of the SPD's involvement in the DPS' trooper hiring process

The DPS coordinated its entry-level trooper hiring process with the SPD.⁵⁰ The Department had to hire troopers from a list of qualified candidates, called a Certification of Eligibles (COE), which the SPD created and sent to the Department. The SPD created this COE from a larger list, or register, of trooper candidates who participated in earlier stages of the hiring process. When the DPS wanted to hire troopers, it had to decide whether the SPD would create a new register of applicants or whether the DPS would rely on a register the SPD created during an earlier hiring round. In making this decision, the Department considered how much time the SPD would need to design its part of the application process. If the SPD needed months to complete its work, the Department was not likely to ask it to screen applicants for a new register.

c. The SPD's development of a written test for the trooper position

If the DPS decided that the SPD should create another register, the SPD administered a written test to candidates. At that point, the SPD had to decide, in consultation with the DPS, whether to develop a new written test or to screen applicants by administering an exam that it developed during a prior round of trooper hiring. In making this decision, the SPD considered whether the existing exam still measured whether applicants had the minimal knowledge, skills, and abilities for the trooper position. When the SPD concluded that its test no longer accurately predicted an applicant's success as a trooper, it developed a new one. As part of this test-design process, the

⁴² *Id.* at 650-X-2.01(2).

⁴³ *Id.* at 650-X-2.02.

⁴⁴ *Id.* at 650-X-2.03.

⁴⁵ *Id.* at 650-X-2.04.

⁴⁶ *Id.* at 650-X-2.05(1)–(11). In evaluating applications, a law enforcement agency will consider an applicant's conviction of a misdemeanor crime on a case-by-case basis.

⁴⁷ *Id.* at 650-X-2.06.

⁴⁸ *Id.* at 650-X-2.07.

⁴⁹ *Id.* at 650-X-2.08.

⁵⁰ The ALEA now manages the trooper hiring process. *See* ALEA, Recruitment & Selection, Personnel Policies & Procedures Manual 32 (Oct. 1, 2014) [hereinafter Recruitment & Selection Policy].

SPD conducted a job analysis of the trooper position, drafted questions for the written test, based on the job analysis, and validated the proposed test so that it could identify and address any prohibited disparate impact that the exam might have on specific protected classes of applicants.

In designing the test, the SPD consulted with the DPS to stratify the test scores into groups called bands. These bands differentiated candidates based on their test scores. Thus, the first band identified applicants with the highest scores, while the second band included applicants with the next highest scores. These bands determined the number of trooper applicants on the COE that the SPD sent to the DPS. Generally, the COE for trooper vacancies that the SPD sent to the Department only included applicants from the first band.

d. The SPD's administration of the trooper hiring process

Once the SPD finalized its written test and knew the DPS wanted to begin the trooper hiring process, it posted an announcement on its website inviting interested candidates to apply for the position. The SPD also sent e-mail alerts and notification cards to people who asked it to notify them about future trooper openings.⁵¹ When the SPD received applications, it reviewed them to determine whether the applicants satisfied the minimum qualifications for the trooper position, like those related to age and educational background, and then provided information to minimally qualified applicants about the test dates and locations.

After administering the first test, the SPD scored it and created a register with the names and test scores of all the candidates who took the test. On the register, the SPD ranked the candidates by score, placing each in a band. After each subsequent administration of the test, the SPD updated the register by adding the names and scores of additional test takers. As the SPD administered the tests, it shared information with the DPS about the number of candidates who fell within the top-scoring band.⁵² If this band did not include enough applicants, the DPS could ask the SPD to modify it so that successive registers and COEs would include more applicants for the DPS to consider. To expand the number of applicants within this top-scored band, the DPS could also ask the SPD to administer the test more often. At any point during a continuous announcement period, the DPS could ask the SPD to issue a COE. Once the SPD sent the COE to the DPS, the SPD's involvement in the application process ended. The SPD, by law, certifies the top ten applicants and any ties on the COE.

⁵¹ Because there were long periods of time when the SPD did not solicit applications from trooper applicants, the SPD had a mechanism on its website to collect information, on an ongoing basis, from persons who wanted to apply to become a trooper. Interested potential applicants could provide their Social Security number, name, and e-mail address, thereby allowing the SPD to notify them when it began to accept additional applications for the trooper position. See *Exam Announcements/Job Listings*, SPD, <https://web.archive.org/web/20151223161352/http://www.personnel.alabama.gov/Jobs.aspx> (last visited Dec. 23, 2015).

⁵² Although the COE only included applicants who fell within the top band, the SPD made a distinction among these high-scoring candidates based on their veteran status. The SPD placed applicants with veteran's preferences at the top of each band of the COE and then listed the remaining applicants in alphabetical order.

2. The DPS' Explanation for Its Failure to Evaluate Its Recruitment Program

In the utilization reports the DPS submitted to the OCR from June 2010 to October 2014, the Department stated and then consistently reiterated that it would regularly evaluate its recruitment practices to ensure women receive equal employment opportunities.⁵³ Despite including these statements in its reports, the DPS provided no evidence to the OCR that it evaluated the effect of any facet of its recruitment practices on female potential trooper applicants. Instead, the DPS sought to excuse its failure to analyze its recruitment practices, citing two reasons: (1) it did not need to evaluate its recruitment program because it was not actively seeking trooper applicants; and (2) few females in Alabama are interested in the trooper position because of the nature of the job. Neither argument is persuasive.

a. Status of trooper hiring

As evidence that it did not need to consider whether its recruitment program reached enough female potential trooper applicants, the DPS noted that the SPD had not accepted trooper applications since 2009.⁵⁴ Between 2009 and 2014, the DPS sought to hire troopers in 2009, 2010, 2011,⁵⁵ and 2014. For each of these hiring rounds, merely to save time, the Department asked the SPD to issue a Certification of Eligibles (COE) based on a register the SPD created in 2009.⁵⁶ A ranked DPS trooper asserted to the OCR that, because the SPD received many trooper applications in creating the register, the Department did not need to evaluate its recruitment program. This argument has three flaws. First, the DPS has a duty under the Safe Streets Act's EEOP regulations to analyze its recruitment procedures each year. Underlying this requirement is the assumption that, at some point, the SPD would once again accept trooper applications. Second, the DPS, through its leadership, repeatedly certified to the OCR that it would conduct these assessments. Its failure to act consistent with these representations is troubling.

Third, the DPS' decision to rely on an outdated register highlights the very problem that an effective recruitment monitoring program would identify and correct. From 2009, when the DPS first relied on the SPD's 2009 register to hire a trooper class, to 2014, when it hired its most recent trooper class, there was a precipitous decline in female interest in the trooper position.

⁵³ Compare DPS, EEOP Utilization Report 7 (June 4, 2010) (on file with the OCR), with DPS, EEOP Utilization Report 3 (Oct. 2, 2014) (on file with the OCR).

⁵⁴ On August 12, 2015, the SPD posted a vacancy announcement for the position of ALEA Trooper, Trainee, which is the ALEA's entry-level trooper position. See SPD, Vacancy Announcement: ALEA Trooper, Trainee – 60670, https://web.archive.org/web/20150826202234/http://www.personnel.alabama.gov/Documents/Announcements/101973_A.pdf. At that point, the ALEA lacked funding to hire anyone for this position. Despite this inability to hire troopers, the ALEA asked the SPD to seek applications for the trooper position and to prepare a register so that, if the Alabama legislature appropriated funds for trooper hiring, the Agency could quickly initiate its part of the selection process. Given the uncertainty of this trooper hiring cycle, the Compliance Review Report focuses on the DPS' efforts to hire troopers between 2009 and 2014.

⁵⁵ The DPS started to select troopers in 2011 but halted that process because the Alabama Governor's Office withdrew funding for these positions.

⁵⁶ The SPD generated this register based on the results of written trooper tests that it administered to candidates from 2006 to 2009.

The OCR reached this conclusion by analyzing the first step of the DPS' trooper hiring process in 2009, 2010, 2011, and 2014. At that stage, the Department notified applicants on the 2009 register that it was hiring troopers and asked them to confirm their interest in the trooper position. To illustrate the trend of declining interest in the trooper position by women, the OCR prepared the following two tables: (1) one that compares the rates at which female and male applicants confirmed interest in participating in the DPS' trooper hiring process; and (2) one that considers the proportion of women, among all DPS trooper applicants, who notified the Department that they wanted to participate in its trooper hiring process.

Female and Male Interest in the DPS Trooper Position

Date of Hiring Process	Females		Males	
	Females Confirming Interest/Total Eligible Females	Rate of Female Interest	Males Confirming Interest/Total Eligible Males	Rate of Male Interest
2009	27/53	50.94%	387/787	49.17%
2010	3/6	50.00%	56/143	39.16%
2011	11/54	20.37%	293/849	34.51%
2014	4/52	7.69%	129/857	15.05%

The above table shows that, during the five-year period when the DPS relied on the 2009 register, a lower percentage of female applicants than male applicants chose to participate in the DPS' trooper hiring process. When the Department hired troopers in 2009, the rate of female interest was actually higher than the rate of male interest. By 2011, however, women were less likely than men to notify the DPS that they remained interested in the position. The Department could have readily analyzed these data and concluded that, based on the relative lack of interest of women, it needed to obtain an updated register.

Applicants Confirming Interest in the DPS Trooper Position

Date of Hiring Process	Females		Males	
	Number	Percent of Total Interested Applicants	Number	Percent of Total Interested Applicants
2009	27	6.52%	387	93.48%
2010	3	5.08%	56	94.92%
2011	11	3.62%	293	96.38%
2014	4	3.01%	129	96.99%

This table shows that, over time, fewer females, both in real numbers and as a percentage of interested applicants, participated in the DPS' trooper hiring process. The DPS should have analyzed this applicant trend as well and realized that, by continuing to rely on a register that included applicants who took the written trooper exam as early as 2006, it had a much smaller pool of female applicants. But it conducted no such analysis. Instead, in 2014, despite its chronic underutilization rates for White and Black/African-American female applicants, it continued to rely on an even more outdated register. As a result, out of 909 trooper applicants, only 52 of them (5.72%) were women. Had it asked the SPD to issue another vacancy announcement and create an updated register, more women likely would have expressed an

interest in the trooper position. In interviewing one female deputy who started working for the Jefferson County Sheriff's Office in 2014, she made precisely that point to the OCR: if the SPD had solicited applications for the trooper position, she would have submitted one.

Because of the ALEA-related reorganization, the Agency will not use the SPD's register from 2009 to hire additional entry-level troopers. Instead, the SPD developed a new written test for the trooper position, which it administered to applicants in the fall of 2015. As a result, the SPD will create a register and issue a COE based on a more recent trooper applicant pool.

b. Purported lack of interest by female potential applicants

In explaining its inability to attract many female trooper candidates, the DPS also suggested that women do not want to become troopers because of several perceived drawbacks of the job. First, from its perspective, the trooper position is dangerous because troopers patrol by themselves and in remote areas, where backup support from another trooper is not readily available. Second, the DPS may assign troopers to a post anywhere in the state, including in rural areas, which means that they may need to relocate for their first assignment. Third, compared to local law enforcement agencies, troopers do not receive competitive compensation and benefits. According to the DPS, these factors dissuade women from applying for the trooper position.

To understand whether these factors discourage potential applicants from seeking the trooper position, the OCR interviewed ten sworn female employees from the Jefferson County Sheriff's Office (JCSO) and the Birmingham Police Department (BPD) (five from each agency). Nine of the ten officers joined the JCSO and the BPD in the last four years; three of them started while the DPS was selecting its 2014 trooper class. The OCR also interviewed two women who applied to become DPS troopers. Through these interviews, the OCR gathered information about how these women viewed the DPS, its troopers, and its recruitment program. When prompted to discuss their views of the trooper position, while some interviewees raised concerns about their safety and the possible need to relocate, most did not. In explaining the appeal of the trooper position, one of the local law enforcement officers explained that she would prefer to patrol on her own, which would challenge her to independently resolve problems. None of the interviewees cited compensation and benefits as the basis for not pursuing a trooper career. Several interviewees actually expressed an interest in becoming a trooper.

While there was not a consensus among these interviewees that the DPS correctly identified the reasons why so few females applied to become troopers, there was broad agreement that the Department's recruitment program is inadequate. From the perspective of the local law enforcement officers, women do not apply to become troopers because the DPS does not convey basic information about a trooper's responsibilities or the opportunities for women to serve in this position. Some of these officers said they had no idea what the job of a trooper entailed, while others encouraged the DPS to emphasize that troopers do more than issue traffic tickets and patrol highways. These interviewees also provided stark assessments about the Department's efforts to recruit women and urged the DPS to expand its outreach efforts to them.

3. The OCR's Findings

Based on the record it developed in this matter, the OCR finds that the DPS is not in compliance with the Safe Streets Act's EEO regulations because it does not analyze whether its recruitment program effectively encourages women to apply for the entry-level trooper position. Because the Department did not evaluate readily available data, it hired troopers in 2014 from an applicant pool that contained an astonishingly low percentage (i.e., 5.72%) of female applicants.

4. The OCR's Recommendations

- a. Hire troopers from an applicant pool that reflects the proportion of qualified women in the ALEA's labor market

The OCR is encouraged by the ALEA's recognition that the SPD needs to develop an updated pool of trooper applicants. This is an important first step in improving its recruitment program. During the next three years,⁵⁷ whenever the SPD issues a vacancy announcement for the trooper position, the ALEA should analyze the adequacy of its efforts to recruit female trooper applicants so that it can determine whether the SPD should extend the vacancy period or issue another vacancy announcement. In conducting this assessment, the ALEA should compare the proportion of female trooper applicants to the expected proportion of female trooper applicants, based on the proportion of qualified women in the Agency's labor market. Based on available U.S. Census data, women should be about 19.4% of trooper applicants.⁵⁸ Given the information available to it at this point, the OCR will use this benchmark in evaluating the ALEA's progress in recruiting more female trooper applicants.

- b. Research ways to attract more female trooper applicants

Because the DPS relied on conventional wisdom rather than evidence to explain its ongoing inability to attract female trooper applicants, the ALEA lacks accurate information about the best way to develop an effective recruitment program. Rather than embracing the unsupported notion that women do not want to become troopers, the ALEA should identify how it can reach those

⁵⁷ The OCR presumes that, throughout this timeframe, the ALEA will continue to receive financial assistance from the DOJ that is covered by the Safe Streets Act and its implementing regulations.

⁵⁸ The OCR arrived at this figure by analyzing national and Alabama-specific demographic information on the proportion of women employed in certain protective-service-related occupations. Women are 22.9% of the Census' general occupational category of protective service workers for the nation as a whole, and 20% in Alabama. When the OCR further restricts that occupational group to sworn protective service workers, which includes only those working for state and local governments, women's representation declines somewhat, to 20% for the nation and 17.8% for Alabama. If the OCR further narrows the sworn protective service workers category to include only those employed as (1) bailiffs, correctional officers, and jailers; (2) detectives and criminal investigators; (3) police officers; and (4) private detectives and investigators in the nation (these data are not available for Alabama), women are 21.8% of these four job groups nationally. If the OCR adjusts the 17.8% representation of women among Alabama's sworn protective service workers using the national data to estimate their representation among the narrower group of jobs above, and assumes that Alabama mirrors national differences, then women would be 19.4% of this narrower group of occupations.

women who would apply for the trooper position, if they knew about the opportunity. To achieve this goal, the Agency should learn more about the strengths and weaknesses of its recruitment program, such as by asking the APOSTC to study effective ways to recruit female sworn personnel.⁵⁹ It should also ask the SPD to commission a statewide poll of female potential applicants, which might provide information about how to encourage more women to apply to become troopers.

- c. Determine whether the ALEA provides market-competitive compensation and benefits to troopers

The ALEA should gather evidence about whether there are structural impediments that prevent females from seeking the trooper position. As part of this fact-gathering process, the Agency should ask the SPD to determine whether troopers receive competitive compensation and benefits, as compared to law enforcement officers in other states, law enforcement officers in local Alabama jurisdictions, and other government employees in Alabama.⁶⁰ The starting salary for a trooper who meets the ALEA's minimum requirements is \$35,589.60; troopers who have an associate or a bachelor's degree receive an additional \$1000 or \$3000, respectively. Troopers also receive several benefits regarding subsistence pay. Alabama does not tax subsistence pay but includes it in calculating a trooper's retirement payments. The ALEA also pays troopers' Social Security taxes. In addition, the Agency offers a retirement package that allows troopers hired before January 1, 2013, to retire if they (1) are at least fifty-two years old and have at least ten years of creditable service or (2) have at least twenty-five years of creditable service. Troopers hired on or after January 1, 2013, may retire if they are at least fifty-six years old and have at least ten years of creditable service. While the DPS suggested that troopers receive less competitive compensation and benefits, the ALEA should test this theory by obtaining comparative data from the SPD. If such a disparity exists, the Agency should develop a strategy to address it.⁶¹

- d. Collect and evaluate data on its recruitment program

To satisfy its obligation to analyze its recruitment program, the ALEA must design a system for annually monitoring the successes and shortcomings of its trooper recruitment efforts. At one time, the DPS implemented just such a system. As part of the *Paradise* Consent Decree, the Department implemented a Comprehensive Equal Employment Opportunity Program (*Paradise* EEOP) that included affirmative recruitment goals for all underrepresented groups, including

⁵⁹ The APOSTC has the authority to evaluate whether law enforcement agencies have adequate recruitment programs and to improve them, if appropriate. ALA. ADMIN. CODE r. 650-X-1.15(1) (2015).

⁶⁰ In the DPS' utilization reports in 2010, 2012, and 2014, it stated that it would ask the SPD to conduct a benchmark survey of other law enforcement agencies to evaluate whether the Department's troopers receive competitive pay. See, e.g., DPS, EEOP Utilization Report unnumbered 1 (Oct. 2, 2014) (on file with the OCR).

⁶¹ By ensuring that trooper compensation is higher than the average wage for government employees in Alabama, the ALEA would likely attract additional White female applicants. See Carl F. Matthies, Evidence-Based Approaches to Law Enforcement Recruitment and Hiring 39 (June 2011) (unpublished Ph.D. dissertation, RAND Graduate School), https://web.archive.org/web/20151223161541/http://www.rand.org/content/dam/rand/pubs/rgs_dissertations/2011/RAND_RGSD281.pdf.

women.⁶² In this document, the DPS agreed to monitor its recruitment procedures for the trooper position and to remove any barriers that prevent women from applying for that position.⁶³ To that end, the DPS collected data to determine whether the Department achieved its recruitment goals.⁶⁴ The ALEA should renew this effort, especially given the DPS' significant challenges in hiring and retaining female troopers. As part of this more robust system, the Agency should identify appropriate data to collect to measure its progress toward each goal; develop a template to record the information; decide who will collect the information; and regularly analyze the information so that it can refine its recruitment efforts.

The ALEA already has a mechanism in place to collect and evaluate data on some of its recruitment activities. The Public Information Office's (PIO) public information officers make daily entries on activity logs that document their recruitment activities, such as attending career fairs, participating in school events, preparing television and radio public service announcements, and giving media interviews. These employees provide these logs to their supervisory sergeant for review. The PIO also prepares monthly and yearly reports that contain the same data fields as the daily report; these reports allow it to monitor its recruitment activities for a particular month and fiscal year. In Fiscal Year 2013, the public information officers devoted 691 hours to recruiting; the next year, this figure declined to 410 hours. The ALEA should continue to track information about the PIO's activities, but should expand its data collection system to capture information about each goal of its recruitment program, which the OCR discusses in the next subsection of the Report.

D. The DPS' Obligation to Develop A Recruitment Program

As part of a recipient's EEOP, a recipient must design an effective, multi-faceted program for recruiting applicants from underutilized groups and draft a detailed narrative statement that describes those efforts.⁶⁵ To satisfy these requirements, a recipient should identify (1) groups that are not adequately represented in its workforce, (2) objectives to guide its recruitment program, and (3) steps to achieve those objectives.⁶⁶

1. The DPS' Inadequate Efforts to Develop a Recruitment Program

As to the first requirement, the OCR already explained that the DPS identified White and Black/African-American women as the largest underrepresented groups in the sworn officer job category, which includes troopers.⁶⁷ In its most recent utilization report, the DPS commits to undertaking efforts to increase the number of White and Black/African-American women in its

⁶² See *Paradise Consent Decree*, *supra* note 22, at Attach. 1 [hereinafter *Paradise EEOP*]; *id.* at 4.

⁶³ See *id.* at 1, 4.

⁶⁴ *Id.* at 4. The DPS no longer adheres to the *Paradise EEOP*.

⁶⁵ 28 C.F.R. § 42.304(g)(1)–(2) (2014).

⁶⁶ See *Questions and Answers and Self-Test Scenarios*, OCR, https://web.archive.org/web/20151223160800/http://ojp.gov/about/ocr/faq_eeop.htm (last visited Dec. 23, 2015); OCR, *Sample Utilization Report: Law Enforcement Agencies* (July 3, 2013), https://web.archive.org/web/20151223160848/http://ojp.gov/about/ocr/pdfs/shortform_law_enforcement.pdf.

⁶⁷ See *Compliance Review Report*, *supra* Section V.B.

trooper ranks.⁶⁸

As to the second requirement, the Department identified the following objectives, recognizing that “there are no permanent obstacles” to creating a more diverse trooper corps.⁶⁹

- Include female officers in the recruitment process;
- Post photos of female troopers on the DPS’ website;
- Expand recruitment activities at schools and colleges, including women’s schools and colleges; and
- Increase attendance at job fairs that target females.⁷⁰

As to the third requirement, during the OCR’s site visit, the DPS conceded that it had no formal plan to recruit female applicants. As a result, the Department did not achieve the above objectives in hiring troopers in 2014.

2. The OCR’s Findings

Based on the record it developed in this matter, the OCR finds that the DPS is not in compliance with the Safe Streets Act’s EEOP regulations because it has an inadequate recruitment program that neither identifies measurable goals nor describes how it will achieve them.

3. The OCR’s Recommendations Regarding the DPS’ Objectives

The DPS faces significant recruitment challenges. It has relatively few female troopers and it hired trooper classes at irregular intervals. To address these challenges, the ALEA and the Department must make a long-term commitment to substantially broaden and diversify their pool of female trooper candidates. While the DPS’ goals are laudable and necessary, they are inadequate because they are neither sufficiently detailed nor comprehensive. To guide the Respondents’ efforts going forward, they must develop a robust recruitment plan that provides detailed information about their goals. For each goal, the ALEA and the DPS should explain how they will measure progress, what steps they will take, who is responsible for implementing each step, and when the Agency and the Department will complete each step. By devoting more resources to recruiting, the ALEA is more likely to hire additional female troopers.⁷¹

⁶⁸ DPS, EEOP Utilization Report unnumbered 1 (Oct. 2, 2014) (on file with the OCR).

⁶⁹ *Id.*

⁷⁰ *Id.* at 3.

⁷¹ William T. Jordan et al., *Attracting Females and Racial/Ethnic Minorities to Law Enforcement*, 37 J. CRIM. JUST. 338 (2009) (by increasing its annual recruiting budget by \$16,900, a law enforcement agency hired an average of forty-eight percent more women in sworn positions).

a. Include female officers in the recruitment process

The DPS correctly acknowledges that it should include female troopers and other female sworn officers in its recruitment efforts. Repeatedly, female sworn personnel from the JCSO, the BPD, and the DPS highlighted the importance of making female troopers more visible to potential trooper applicants. Two JCSO and BPD officers noted that they never met a female trooper, while a DPS trooper said that members of the public regularly tell her they have never seen a female trooper. Many of the interviewees also suggested that female troopers should interact with the public at recruiting events. At one time, the DPS did just that; at the request of the PIO, female troopers represented the DPS at outreach events, including job fairs. Recently, the PIO made tentative progress in this area by including a female trooper in a career fair at Auburn University at Montgomery and by making arrangements for women to attend future career fairs and job fairs. While these steps are promising, the ALEA should develop a comprehensive strategy to increase interactions between female sworn personnel and female potential applicants. In developing a multi-step plan to achieve this goal, the Agency should seek feedback from current female troopers.

b. Highlight female troopers in recruitment materials

The OCR agrees that the DPS should increase its efforts to profile female troopers, including on the ALEA's website. In discussing this objective, most of the female sworn personnel whom the OCR interviewed suggested that the Department could reach more female potential applicants by expanding its marketing efforts and by featuring women in its recruiting materials. The ALEA website is an especially important recruitment tool. For many members of the public, the Agency's website is their primary source of information about the organization. Moreover, it could reach female potential candidates in Alabama and throughout the rest of the United States.⁷² To better leverage this resource, the DPS should profile on the ALEA's website the work of its female troopers.⁷³ The Agency has already made improvements in this area, as it includes on its main webpage two photos of sworn personnel that prominently include women.⁷⁴

While the ALEA's website is an important recruitment tool, it is just one way to reach female potential applicants. As another online tool, the Agency should consider how it could use social media resources to communicate with the public about the trooper position and trooper vacancies. The ALEA should also develop additional recruitment materials that highlight female sworn personnel. For instance, it should design additional posters and brochures that include female troopers and identify effective ways to distribute them. It should also consider the

⁷² The ALEA posts some information for potential trooper applicants on its website. *See Recruitment Information*, ALEA, <https://web.archive.org/web/20151223161844/http://alea.gov/Home/wfContent.aspx?ID=70&PLH1=plh> Information-Recruiting (last visited Dec. 23, 2015).

⁷³ *See, e.g., Women in Policing*, CITY OF SCOTTSDALE, <https://web.archive.org/web/20151223212536/http://www.scottsdaleaz.gov/police/join-scottsdale-pd/police-officer/women-in-policing> (last visited Dec. 23, 2015).

⁷⁴ ALEA, <https://web.archive.org/web/20151223161944/http://www.alea.gov/Home/> (last visited Dec. 23, 2015).

effectiveness and feasibility of placing online,⁷⁵ print, billboard, radio, and television advertisements that include female troopers.

c. Expand recruitment activities, including at schools and colleges

The DPS appropriately acknowledges that it needs to improve its efforts to communicate with female potential applicants, both in the community and across the country. The OCR agrees that it is important for the Department to expand recruitment activities at schools and colleges; however, this approach is too narrow. Many of the JCSO, the BPD, and the DPS female sworn personnel whom the OCR interviewed specifically noted that DPS representatives should attend more recruiting events. To improve its trooper applicant pool, the ALEA should develop new and strengthen existing relationships with educational institutions, community organizations, and other stakeholder groups. The Agency's PIO should identify and meet with college career offices, both in Alabama and in Mississippi, Tennessee, Florida, and Georgia;⁷⁶ student organizations for women; college criminal justice organizations;⁷⁷ and fitness clubs.⁷⁸ During these meetings, the ALEA should discuss effective strategies for recruiting students and athletes who, according to one female trooper, have "dedication" and "grit." It should also develop ties with law enforcement organizations for women,⁷⁹ national minority and women's organizations, community organizations, and career offices at local military bases. Through this process, the ALEA should identify key points of contact so that it can quickly and cost-effectively distribute information about trooper vacancies and the hiring process. The Agency should also obtain schedules of events that recruitment personnel and female troopers can attend. Finally, once it develops recruitment materials it believes will be effective, the ALEA should conduct a nationwide advertising campaign to increase its female applicant pool.⁸⁰

d. Increase attendance at job fairs

The OCR concurs with the DPS' assessment that the PIO should attend more job fairs. The PIO only attends a small number of fairs each year. In deciding which events to attend, the PIO

⁷⁵ See *Matthies, supra* note 61, at 39 (concluding that spending funds on online advertisements is an effective tool to recruit White female applicants).

⁷⁶ The ALEA notified seven universities in these neighboring states about the SPD's August 2015 trooper vacancy announcement.

⁷⁷ Alabama has at least nine colleges and universities that each enrolls more than 10,000 students. Eight of these schools have an educational track dedicated to criminal justice: Calhoun Community College (A.A. in Criminal Justice); Jacksonville State University (B.S. in Criminal Justice); Jefferson State Community College (A.A. in Criminal Justice); Troy University (B.S. in Criminal Justice); the University of Alabama (B.S. in Criminal Justice); the University of Alabama at Birmingham (B.S. in Criminal Justice); the University of Alabama in Huntsville (B.A. in Sociology with a track in Law and Justice); and the University of South Alabama (B.A. in Criminal Justice). The ALEA notified most of these institutions about the SPD's August 2015 trooper vacancy announcement.

⁷⁸ As part of its recruitment strategy, the DPS has already begun to consider ways to encourage female members of fitness clubs to apply to become troopers.

⁷⁹ The ALEA notified members of Alabama Women in Law Enforcement, which is an Alabama-based nonprofit organization, and the National Association of Women Law Enforcement Executives about the SPD's August 2015 trooper vacancy announcement.

⁸⁰ See *Paradise Consent Decree, supra* note 22, ¶ 25.c.

considers staff availability and the cost of attending the event. For job fairs that charge attendance fees, the PIO cannot attend them because of a lack of money. The ALEA should change this practice and ensure the PIO has sufficient resources to attend more job fairs, irrespective of whether they charge attendance fees.⁸¹

4. The OCR's Recommendations Regarding Additional Objectives

During the OCR's Compliance Review, it developed an extensive record regarding the Respondents' recruitment program. For instance, it interviewed JCSO, BPD, and DPS personnel who identified recruitment goals that, if achieved, could encourage more women to pursue careers as troopers. Based on this record, the OCR recommends that the ALEA (1) recruit APOSTC-certified female trooper applicants, (2) utilize existing programs, like the DPS Trooper Reserve Program, (3) improve coordination with the SPD, and (4) provide information about trooper vacancies to all ALEA employees.

a. Recruit APOSTC-certified female applicants

To boost its number of female trooper applicants, the ALEA should recruit from the ranks of women who are already APOSTC-certified. In 2014, law enforcement agencies in Alabama reported to the FBI that they employed 567 female sworn officers.⁸² In interviewing ten of these sworn personnel, two of them told the OCR they are interested in the trooper position. While the OCR cannot draw broad conclusions from such a small interview sample, these interviews provide anecdotal evidence that, if female APOSTC-certified officers learn about the ALEA's trooper hiring process, at least some of them would apply. To determine what steps the Agency should take to reach these female officers, it should discuss its recruitment program and the trooper position with Alabama Women in Law Enforcement (AWILE). Established in 2009, AWILE is a nonprofit organization that provides professional support to female law enforcement officers who work in Alabama. It hosts an annual meeting for its members to discuss topics of concern within the law enforcement community⁸³ and provides information about employment, networking, and training opportunities throughout the state.

b. Utilize existing programs

The DPS administers several programs that allow students, APOSTC-certified officers, and members of the public to learn about the trooper position. In developing effective recruitment strategies, the ALEA should identify ways to include women in these programs.

⁸¹ See Matthies, *supra* note 61, at 39 (spending funds to attend recruitment events is an effective tool to recruit Black female applicants).

⁸² FBI, UNIFORM CRIME REPORT PROGRAM, CRIME IN THE UNITED STATES, 2014, tbl.77 (Full-time Law Enforcement Employees by State, 2014), <https://web.archive.org/web/20151223195550/https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-77>.

⁸³ Alabama Women in Law Enforcement, FACEBOOK, <https://www.facebook.com/Alabama-Women-in-Law-Enforcement-110594155637150/> (last visited Dec. 23, 2015).

i. DPS Reserve Trooper Program

Created in 1978, the Reserve Trooper Program is a cadre of volunteer sworn officers who augment the Highway Patrol Division throughout Alabama. As with permanent troopers, reserve troopers serve under the command of the DPS' Director, although they report to post commanders who administer the program. Members of the Reserve Trooper Program share many of the same responsibilities as permanent troopers. For instance, they take the same oath; have the same law enforcement powers; carry a service weapon; and adhere to the same regulations and policies. To participate in the program, applicants must complete a reserve training program, based on their prior law enforcement experience. APOSTC-certified applicants must complete a thirty-two-hour training course, while other applicants must complete ninety-five hours of training. Once appointed, reserve troopers must complete annual in-service training and satisfy the same physical fitness standards that apply to permanent troopers.

ii. Internship and Volunteer Programs

The DPS operates two additional unpaid programs: an Internship Program and a Volunteer Program.⁸⁴ These programs provide practical experience to participants in administrative, investigative, and patrol settings at most of the Department's service locations. The Internship Program is open to undergraduate and graduate students who maintain a grade point average of 2.5. If accepted, students may receive academic credit hours for participating in the program. The Volunteer Program is designed for Alabamans who want to learn about the DPS or become more involved in their community. To participate in either program, applicants must pass a background check, sign a nondisclosure agreement, serve a certain number of hours, adhere to the DPS' policies and procedures, and complete tasks assigned to them by a supervisor. The Department accepts applications to both programs on a rolling basis.

Through these three programs, the ALEA could strengthen its recruitment program by reaching additional female potential trooper applicants. The Internship, Reserve, and Volunteer programs target different groups of people who may be at different stages of their careers. The Internship Program encourages college students to begin their law enforcement careers as troopers. The Reserve Program allows APOSTC-certified officers to consider the trooper position as their next law enforcement job. The Volunteer Program gives people a glimpse of a trooper's daily responsibilities and may encourage participants to make a mid-career change. To broaden awareness of and interest in these programs, the ALEA should develop an information sheet about them and distribute that document at recruitment events and to its recruitment contacts.

c. Improve coordination with the State Personnel Department

The ALEA should closely coordinate its recruitment efforts with the SPD.⁸⁵ To start, the ALEA should regularly meet with the SPD to discuss the Agency's recruitment program and to learn

⁸⁴ See DPS, Internship/Volunteer Program Guidelines (June 2008), <https://web.archive.org/web/20151223162247/http://dps.alabama.gov/Documents/Documents/InternshipVolunteerPackage.pdf>.

⁸⁵ 28 C.F.R. § 42.303(b) (2014).

about effective recruitment strategies that other state agencies use. It should also ask the SPD to provide information about how candidates learn about the trooper job. The SPD's trooper application form asks applicants to note how they learned about the job and includes sixteen potential recruitment sources, including many that the OCR discusses in the Report (e.g., a newspaper, a college placement or career office, a high school counselor, an outreach program, and a television or radio commercial). These data could help the ALEA to identify which recruitment activities encourage the most women to apply for the trooper position, to refine its recruitment efforts, and to reach additional female potential applicants. Despite these benefits, the DPS did not ask the SPD to provide this information. During future trooper hiring cycles, the ALEA should obtain and analyze these data. It should also publicize information about each trooper hiring process. When the SPD issues a vacancy announcement for the trooper position, it posts on its website a Trooper Candidate Information Guide (Guide), which provides information about the written test for trooper applicants.⁸⁶ The ALEA should post the Guide on its website as well so that more female potential trooper applicants can learn about applying for this position.

- d. Provide information about trooper vacancies to all ALEA employees

The ALEA should notify all of its employees when it seeks to hire additional troopers. Several of the DPS' female sworn officers applied for their positions after hearing about the opportunity from current troopers. Indeed, during past hiring cycles, the DPS' personnel manager e-mailed the trooper job announcement to all Department employees. But in hiring troopers in 2014, the DPS did not notify employees about this selection process because the DPS relied on the SPD's candidates register from 2009. More recently, the ALEA distributed the SPD's August 12, 2015, trooper vacancy announcement to all Agency employees. The ALEA should continue to adhere to this practice. It should also encourage female civilian personnel to apply for this position and ask female troopers to refer applicants to the SPD.

VI. The DPS' Selection of Troopers

The OCR evaluated the DPS' efforts to hire entry-level troopers over the past six years and focused on its 2009 hiring cycle, during which it hired forty-five troopers; on its 2011 hiring cycle, during which it hired no troopers; and on its 2014 hiring cycle, during which it hired twenty-two troopers.⁸⁷ In this section of the Report, the OCR describes the DPS' processes for hiring and training troopers. Then, the OCR evaluates the DPS' compliance with the Safe Streets Act and its implementing regulations, as to the selection of troopers.

⁸⁶ See, e.g., SPD, Candidate Information Guide: ALEA Trooper, Trainee 60670 Written Examination, https://web.archive.org/web/20150826201806/http://www.personnel.alabama.gov/Documents/HTPGuides/101973_G.pdf.

⁸⁷ The OCR did not evaluate the SPD's efforts, from 2006 – 2009, to create the register on which the DPS relied in hiring these troopers.

A. Background Information on the DPS' Entry-Level Trooper Hiring and Training Process

As the OCR explained in Section V.C.1.d of the Report, when the DPS wanted to hire entry-level troopers, it asked the SPD to send it a Certification of Eligibles (COE). After the DPS received the COE, Department personnel sent a letter to all applicants on the COE, processed applicants who responded to the letter, administered a pre-offer physical agility and ability test, administered several additional selection devices, including a background investigation, and decided to whom to extend conditional offers of employment. If applicants accepted these offers, they attended the Department's Alabama Criminal Justice Training Center (Academy) and, if they completed the Academy, became certified troopers.

1. Applicant Letter

In the DPS' letter, it asked applicants to confirm they remained interested in the trooper position and to attend a processing session at the Academy. The DPS also notified applicants that, immediately after processing, it would administer a physical agility and ability test, which applicants had to pass in order to receive a conditional offer of employment.

2. Applicant Processing

At the processing stage, the DPS gathered additional information from candidates about their applications. To facilitate its background investigations of the applicants, the Department fingerprinted and photographed them, and conducted initial background interviews of them. It also identified any vision problems that applicants had to correct before entering the Academy.

3. Pre-Offer Physical Agility and Ability Test

After the processing phase of the selection process, the DPS administered its pre-offer physical agility and ability test (Pre-Offer PAAT), which included an obstacle course and required applicants to perform push-ups, sit-ups, and a 1.5-mile run.⁸⁸ The obstacle course, or agility, portion of this test had four parts: (1) pushing a standard patrol vehicle, in neutral, fifteen feet; (2) climbing a six-foot wall or chain-link fence; (3) stepping through an obstacle that resembled a small open window; (4) walking the length of a balance beam that was approximately four inches from the ground; and (5) dragging a 165-pound dummy fifteen feet. An applicant had two chances to complete each obstacle, but had to finish the entire course within ninety seconds. Following a twenty-minute break, applicants took the ability portion of the test, which had three parts: (1) performing twenty-two push-ups in sixty seconds; (2) performing twenty-five sit-ups in sixty seconds; and (3) running 1.5 miles in 15 minutes and 28 seconds or less. In administering the test, Department personnel video recorded the applicants and documented their performance

⁸⁸ No provision of Alabama law required the DPS to administer this test to trooper applicants. Indeed, in discussing APOSTC's role in setting standards for a law enforcement agency's hiring process, as to sworn personnel, an APOSTC representative reaffirmed to the OCR that the APOSTC lacks the authority to set such standards regarding an agency's pre-offer hiring process.

on score sheets. After the test, the DPS notified applicants whether they passed or failed it.

4. Additional Requirements and Final Selection

Before the DPS extended conditional offers of employment to trooper applicants who passed the Pre-Offer PAAT, it conducted background investigations of them and empaneled a selection board to consider their applications. The background investigation evaluated the applicants' credit history, educational background, job history, and personal and family references. Next, a selection board, which included all of the DPS' division chiefs, considered to whom to extend conditional offers of employment. In making these decisions, the board considered the information the DPS collected during the selection process, including through its background investigations, and the number of slots available at the Academy. In reviewing each candidate's file, the board also identified any factors that automatically disqualified an applicant from serving as a trooper.⁸⁹

Once the board made its conditional offer decisions, the DPS notified the successful applicants and, for those applicants who accepted the conditional employment offers, administered a medical examination, a psychological examination, and a urinalysis test. If applicants passed these screening tools, the selection board reviewed their applications one more time and made final decisions about which candidates should receive offers to become probationary troopers. After the board selected these troopers, the DPS notified them of the board's decision and provided information about the Academy.

5. The Academy and Certification

Under the APOSTC's requirements, trooper recruits must complete the DPS' Academy in order to become certified troopers.⁹⁰ As part of this training, recruits must complete 520 hours of instruction on various substantive topics, pass written tests on those topics,⁹¹ complete forty-three hours of firearms training, and pass a firearms skills test.

In addition, within five days of entering the Academy, recruits must pass a physical agility and ability test (APOSTC PAAT) that has the same components as the Pre-Offer PAAT.⁹² The agility phase of the test is a multi-staged obstacle course where applicants must push a standard patrol vehicle fifteen feet; scale a six-foot wooden or chain-link fence; climb through an opening that simulates a window; sprint across a balance beam that is approximately four inches off the ground; and drag a 165-pound dummy fifteen feet. Applicants have ninety seconds to traverse

⁸⁹ See DPS, Order No. 34, Employment Disqualifications for Trooper/Cadet/Capitol Police Applicants (Sept. 1, 2008).

⁹⁰ ALA. ADMIN. CODE r. 650-X-2.01(2) (2015).

⁹¹ *Id.* at 650-X-3.02(1)–(13). On June 19, 2013, APOSTC increased the length of the Academy instruction from 480 hours to 520 hours; this change became effective on January 2, 2014. See APOSTC, 520 Hour Basic Training Curriculum (Jan. 1, 2014), <https://web.archive.org/web/20151223162601/http://www.apostc.state.al.us/LinkClick.aspx?fileticket=u41o7liGHBi%3D&tabid=58>.

⁹² ALA. ADMIN. CODE r. 650-X-4.01(3)(d).

the course and have two attempts to pass each part. Following a twenty-minute break, applicants must pass the ability portion of the test, which measures an applicant's ability to complete push-ups, sit-ups, and a 1.5-mile run. Applicants must perform at least twenty-two push-ups in sixty seconds. Then, after a minimum twenty-minute break, applicants must complete twenty-five sit-ups in sixty seconds. After another break of at least twenty minutes, applicants must run 1.5 miles within 15 minutes and 28 seconds. If applicants fail any part of the test, they fail the entire APOSTC PAAT, but can retake it between forty-eight and seventy-two hours after failing it.⁹³ If they fail the retest, they cannot continue in the Academy training program.

B. The DPS' Obligation to Provide Demographic Information on Its Recently Hired Troopers

Under the Safe Streets Act's EEOP regulations, a recipient must identify the number of individuals, classified by sex, who, within the preceding fiscal year, (1) applied for employment, (2) received offers of employment from the recipient, and (3) accepted the recipient's offers of employment.⁹⁴ In hiring entry-level troopers in 2014, the DPS relied on the SPD to issue a Certification of Eligibles, which the SPD prepared after receiving applications from 1,798 male applicants and 134 female applicants. At the end of this trooper hiring process, the DPS extended offers of employment to twenty-three males and zero females; twenty-two of these men accepted the DPS' offer to enter the Academy as entry-level troopers. The OCR finds that the DPS is in compliance with this reporting requirement, as to the trooper position.

C. The DPS' Obligation to Identify and Address Discriminatory Selection Devices

A recipient that receives funding under the Safe Streets Act must utilize nondiscriminatory selection devices in hiring employees, such as troopers.⁹⁵ Under the Safe Streets Act's regulations, the OCR applies Title VII of the Civil Rights Act of 1964 (Title VII) to determine whether a recipient engaged in prohibited, sex-based employment discrimination against applicants.⁹⁶ Title VII prohibits a recipient from adopting employment practices that are "fair in form, but discriminatory in operation."⁹⁷ The Supreme Court enunciated this disparate impact theory of discrimination in *Griggs v. Duke Power Co.* According to the *Griggs* Court, under Title VII, employers cannot erect employment obstacles that serve as "built-in headwinds" and prevent members of protected classes, like women, from accessing particular job opportunities.⁹⁸ Congress later amended Title VII to codify *Griggs*' disparate impact test.⁹⁹

⁹³ *Id.*; ALA. ADMIN. CODE r. 650-X app. I. On its website, the APOSTC provides a detailed outline of the APOSTC PAAT. APOSTC, Physical Agility/Ability Examination Outline and "Script," <https://web.archive.org/web/20151223162641/http://www.apostc.state.al.us/Portals/0/Physical%20Agility%20Ability%20Course.pdf>.

⁹⁴ 28 C.F.R. § 42.304(c) (2014).

⁹⁵ 42 U.S.C. § 3789d(c)(1) (2012); 28 C.F.R. § 42.203(b)(10).

⁹⁶ *See* 28 C.F.R. § 42.203(c); 42 U.S.C. § 2000e-17 (2012).

⁹⁷ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

⁹⁸ *Griffin v. Carlin*, 755 F.2d 1516, 1524 (11th Cir. 1985) (*quoting Griggs*, 401 U.S. at 431-32).

⁹⁹ *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

To establish a disparate impact claim based on sex, the OCR must satisfy a two-part *prima facie* test. First, the OCR must identify a facially neutral practice.¹⁰⁰ Second, we must demonstrate that the identified practice caused statistically significant adverse results against female applicants, as compared to male applicants.¹⁰¹ The OCR can also rely on additional evidence of discrimination to bolster its *prima facie* disparate impact case against a respondent.¹⁰²

Once the OCR establishes a *prima facie* case of disparate impact, the burden of proof shifts to the respondent, who must show “that the challenged practice is job related for the position in question and consistent with business necessity.”¹⁰³ Even if the respondent can satisfy this rigorous standard, the OCR still prevails if it can identify an alternative employment practice that has less disparate impact and still meets the respondent’s business needs.¹⁰⁴

1. The DPS’ Pre-Offer PAAT Is a Facially Neutral Selection Device That Adversely Impacted Women

The OCR identifies the DPS’ Pre-Offer PAAT as a selection device that inappropriately excluded women during its 2009, 2011, and 2014 trooper hiring processes; these findings are statistically significant. To come to this conclusion, the OCR reviewed the selection devices the Department utilized and considered their effects on actual applicants.¹⁰⁵ We refer to this information as applicant flow data. In evaluating these data, the OCR applies (1) the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines)¹⁰⁶ and, in particular, the Uniform Guidelines’ Four-Fifths, or 80%, Test, and (2) the Fisher’s Exact Test.¹⁰⁷ Under the Four-Fifths Test, if, for a particular job, a respondent uses a selection device that selects applicants of one sex at a rate that is less than four-fifths (or 80%) of the selection rate for applicants of the other sex, the OCR views that as some evidence that the selection process adversely impacts the sex with the lower passage rate.¹⁰⁸ The Uniform Guidelines recognize that

¹⁰⁰ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).

¹⁰¹ *Watson*, 487 U.S. at 994; *see also* *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1268 (11th Cir. 2000).

¹⁰² *Nash v. Consol. City of Jacksonville*, 895 F. Supp. 1536, 1543 (M.D. Fla. 1995), *aff’d*, 85 F.3d 643 (11th Cir. 1996).

¹⁰³ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

¹⁰⁴ *Id.* § 2000e-2(k)(1)(A)(ii).

¹⁰⁵ *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977) (emphasizing that applicant flow data are “very relevant” in evaluating an employer’s hiring practices); *Richardson v. Lamar Cty. Bd. of Educ.*, 729 F. Supp. 806, 822–23, 825 (M.D. Ala. 1989) (observing that, in evaluating the disparate impact of an employment test, it is most logical to consider the effects of the test on actual examinees), *aff’d*, 935 F.2d 1240 (11th Cir. 1991).

¹⁰⁶ *See* 28 C.F.R. § 42.203(b)(10) (2014); *id.* § 50.14(4)(C).

¹⁰⁷ *Id.* § 50.14(4)(D).

¹⁰⁸ *Id.* § 50.14(4)(C), (D). For example, if 100 males took an employment test and ninety of those males passed it, then the selection rate for male applicants would be 90/100 (or 90%). If seventy females took the same test and thirty-five females passed it, then the female selection rate would be 35/70 (or 50%). By comparing the female selection rate (50%) with the male selection rate (90%), the OCR would demonstrate that the female selection rate was 50/90 (or 55.55%) of the male selection rate. Because the female selection rate was less than 80% of the male selection rate, the OCR could conclude that the employment test adversely impacted female applicants, if the adverse impact is confirmed by further statistical analysis.

the OCR should apply an additional test to determine that the device's results are statistically significant.¹⁰⁹ To that end, the OCR uses the Fisher's Exact Test. This test is useful in evaluating whether, as to a small sample, an employer's selection devices adversely impact women.¹¹⁰ By relying on this test, the OCR can determine whether an employment practice has a disparate impact on women that is statistically significant, or, stated differently, unlikely to occur by chance.¹¹¹ A Fisher's Exact Test result is statistically significant if it has a p-value of less than five percent.¹¹²

In hiring entry-level troopers in 2009, 2011, and 2014, the DPS required applicants to take its Pre-Offer PAAT. The following charts identify the number of male and female applicants who passed this test, and applies the Four-Fifths Test and the Fisher's Exact Test to those data:

The DPS' Administration of Pre-Offer PAAT to Trooper Applicants: 2009 Hiring Process					
Male Passers/Total Number of Males Taking Test	Male Pass Rate	Female Passers/Total Number of Females Taking Test	Female Pass Rate	Ratio of Female Pass Rate to Male Pass Rate (Four-Fifths Test Results)	Fisher's Exact Test Results
150/178	84.27%	4/9	44.44%	52.74%	Two-tailed p-value equals 0.0096 (statistically significant)

The DPS' Administration of Pre-Offer PAAT to Trooper Applicants: 2011¹¹³ Hiring Process					
Male Passers/Total Number of Males Taking Test	Male Pass Rate	Female Passers/Total Number of Females Taking Test	Female Pass Rate	Ratio of Female Pass Rate to Male Pass Rate (Four-Fifths Test Results)	Fisher's Exact Test Results
164/202	81.18%	3/7	42.86%	52.79%	Two-tailed p-value equals 0.0314 (statistically significant)

¹⁰⁹ *Id.* § 50.14(4)(D).

¹¹⁰ *See* *Perez v. Pavex Corp.*, 510 F. Supp. 2d 755, 762 (M.D. Fla. 2007); *see also* *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1164 (9th Cir. 2014) (recognizing, in the context of jury selection, that the Fisher's Exact Test examines statistical significance in small sample sizes); *Bazile v. City of Houston*, 858 F. Supp. 2d 718, 765–68 (S.D. Tex. 2012).

¹¹¹ *See* *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1223 (10th Cir. 2013).

¹¹² *Bazile*, 858 F. Supp. 2d at 738.

¹¹³ *See* Compliance Review Report, *supra* note 55.

The DPS' Administration of Pre-Offer PAAT to Trooper Applicants: 2014 Hiring Process					
Male Passers/Total Number of Males Taking Test	Male Pass Rate	Female Passers/Total Number of Females Taking Test	Female Pass Rate	Ratio of Female Pass Rate to Male Pass Rate (Four-Fifths Test Results)	Fisher's Exact Test Results
70/76	92.11%	0/3	0.00%	0.00%	Two-tailed p-value equals 0.001 (statistically significant)

The Four-Fifths Test results suggest that this selection device improperly screened out women in 2009, 2011, and 2014 because the female selection rate was less than eighty percent of the male selection rate. Corroborating these results, the Fisher's Exact Test shows that this device had a statistically significant disparate impact on female applicants. Given these results, the OCR satisfies both prongs of the *prima facie* disparate impact test. Recall that, under the first element of this test, the OCR must identify a facially neutral practice that contributed to a hiring process that adversely impacted women. Here, for the 2009, 2011, and 2014 entry-level trooper hiring processes, the facially neutral employment practice is the DPS' Pre-Offer PAAT.

Under the second prong of the *prima facie* test, the OCR must demonstrate that the Pre-Offer PAAT caused statistically significant adverse results against female applicants. Stated differently, there must be evidence that this test proximately caused the disparity, and that the degree of the disparity was "sufficiently substantial" to raise "an inference of causation."¹¹⁴ Through the Fisher's Exact Test, the OCR demonstrates that the DPS' Pre-Offer PAAT had a statistically significant disparate impact on women. As the OCR explains above, the Fisher's Exact Test is an especially apt statistical tool when there are small sample sizes at issue. In evaluating the merits of a disparate impact case, "[t]here is no rigid mathematical threshold" for establishing statistical significance.¹¹⁵ Courts in the Eleventh Circuit generally consider a p-value of at least five percent, or 1.96 "standard deviations," as sufficient *prima facie* evidence that an employment practice harms individuals because of their membership in a protected class.¹¹⁶ Here, the Fisher's Exact Test results satisfy this threshold of statistical significance. As a result, the OCR concludes that the Pre-Offer PAAT excluded women from the 2009, 2011, and 2014 hiring processes because of their sex.¹¹⁷ Had the DPS not used this discriminatory

¹¹⁴ *Watson*, 487 U.S. at 995; *see also* *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989); *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1278 (11th Cir. 2000).

¹¹⁵ *Groves v. Ala. State Bd. of Educ.*, 776 F. Supp. 1518, 1526 (M.D. Ala. 1991).

¹¹⁶ *See* *Peightal v. Metro. Dade Cty.*, 26 F.3d 1545, 1556 (11th Cir. 1994); *Groves*, 776 F. Supp. at 1526; *see also* *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977); *Jones v. City of Boston*, 752 F.3d 38, 46-47 (1st Cir. 2014); BARBARA T. LINDEMANN, PAUL GROSSMAN & C. GEOFFREY WEIRICH, 1 EMPLOYMENT DISCRIMINATION LAW 3-19-20 (5th ed. 2012); 2 *id.* at 35-71. The standard deviation is a unit of measurement that allows statisticians to measure all types of disparities in common terms. *Palmer v. Shultz*, 815 F.2d 84, 92 n.7 (D.C. Cir. 1987) (internal quotations omitted) (citing D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION 359 (1980)).

¹¹⁷ *Wright v. Stern*, 450 F. Supp. 2d 335, 368 (S.D.N.Y. 2006) ("When statistical tests sufficiently diminish chance as a likely explanation, it can then be presumed that an apparently substantial difference in pass rates is attributable to discriminatory bias."); *see also* *Bazile v. City of Houston*, 858 F. Supp. 2d 718, 765-68 (S.D. Tex. 2012) (relying in part on Fisher's Exact Test results to conclude that plaintiffs satisfied their *prima facie* disparate impact burden under Title VII by showing that a facially neutral promotion exam excluded black candidates); *Easterling v. Conn.*

selection device, it would have hired additional female troopers. In 2009, an additional 3.6 women would have advanced to the next selection stage, and an additional 1.05 women would be expected to be hired. In 2014, 2.8 women would have advanced to the next selection stage, and one woman (0.99, to be precise) would be expected to be hired.¹¹⁸

2. Additional Evidence of Discrimination

In the Eleventh Circuit, to buttress its *prima facie* case of disparate impact, the OCR may use additional, non-statistical evidence that the respondent's selection process discriminated against female applicants.¹¹⁹ As further support for its position that the DPS' Pre-Offer PAAT adversely impacted female applicants, the OCR relies on the DPS' (1) failure to evaluate the effect of its recruitment practices on female potential applicants and (2) failure to evaluate the effect of its selection procedures on female applicants.

- a. The DPS did not evaluate the impact of its recruitment practices on female potential applicants

Since 2009, the DPS hired sixty-six male troopers and only one female trooper. Despite this lackluster record of hiring women, the Department did not improve its recruitment practices. Instead, as the OCR already explained in discussing the Department's recruitment program,¹²⁰ the DPS disregarded its chronic failure to ensure gender diversity among its trooper corps, even though its involvement in prior litigation notified it of its challenges in this area.¹²¹ It did not evaluate whether its recruitment program effectively encouraged women to apply to become troopers, despite the clear requirement in the Safe Streets Act's EEOP regulations that it conduct such a self-assessment. It repeatedly relied on an outdated register of applicants to hire troopers, even though its reliance on that register distorted the gender composition of its trooper applicant pool. And then it blamed its failure to recruit women on a lack of interest among female potential applicants, rather than on the easily identifiable deficiencies in its own recruitment program. The DPS' failure to take seriously its obligations to recruit women as troopers is further evidence that, as to its selection processes in 2009, 2011, and 2014, the DPS displayed a total disregard for the disparate impact that its Pre-Offer PAAT had on women.

Dep't of Corr., 783 F. Supp. 2d 323, 332–33 (D. Conn. 2011) (relying on standard deviation analysis to conclude that plaintiffs satisfied their *prima facie* disparate impact burden under Title VII by showing that a facially neutral 1.5-mile run excluded female candidates).

¹¹⁸ Because the DPS did not provide data on the APOSTC-certification status of trooper applicants, despite the OCR's request for that information, the OCR's expert statistician cannot calculate what effect, if any, applicants' APOSTC-certification status might have on these calculations.

¹¹⁹ Nash v. Consol. City of Jacksonville, 895 F. Supp. 1536, 1543 (M.D. Fla. 1995), *aff'd*, 85 F.3d 643 (11th Cir. 1996).

¹²⁰ See Compliance Review Report, *supra* Section V.C.

¹²¹ *Id.* Section III.A.

- b. The DPS did not evaluate the impact of its Pre-Offer PAAT on female applicants

Contrary to the requirements of the Safe Streets Act's EEOP regulations, the DPS did not consider whether its administration of the Pre-Offer PAAT inappropriately excluded women. Under these regulations, a recipient must annually determine whether it uses selection devices that adversely impact applicants based on their sex.¹²² If it identifies deficiencies in its applicant-screening process, it should timely correct them.¹²³

Three times since 2009, the DPS used a Pre-Offer PAAT to screen trooper applicants that discriminated against women. Despite these negative results, the DPS did not revisit the Pre-Offer PAAT, but instead continued to administer it. Based on the record it developed in this matter, the OCR finds that the Department did not evaluate its trooper hiring process to determine whether this selection device adversely impacted female applicants.¹²⁴ If the DPS had reviewed the effects of the Pre-Offer PAAT on applicants in 2009, 2011, and 2014, it would have readily discovered that the test adversely impacted female trooper applicants. Armed with that knowledge, the Department could have – and, indeed, should have – cured this deficiency by revising this test or removing it from the pre-offer selection process. But it did not and, as recently as August 2014, continued to assert that the Pre-Offer PAAT had no known or likely disparate impact on women.¹²⁵ The DPS' inaction is especially concerning because, to resolve the *Paradise* litigation, it agreed to monitor the effects of its screening procedures for the trooper position on female applicants.¹²⁶ At some point, the DPS abandoned this practice. The Department's disregard of the requirements of the Safe Streets Act's EEOP regulations, as to the Pre-Offer PAAT, further supports the OCR's conclusion that the Pre-Offer PAAT discriminated against female trooper applicants in 2009, 2011, and 2014.

3. The DPS' Purported Defense of Its Pre-Offer PAAT

Once the OCR satisfies the *prima facie* elements of its disparate impact case, the burden of proof shifts to the respondent to show that the employment practice adversely impacting women is sufficiently job related and serves a business necessity.¹²⁷ To determine whether the respondent establishes this two-prong defense, the OCR considers the respondent's justifications for using the discriminatory practice.¹²⁸ While the DPS advances several arguments to defend its reliance

¹²² 28 C.F.R. § 42.303(a), .303(c)(2), .304(g), (g)(1), .306(a) (2014).

¹²³ *Id.* § 42.306(b).

¹²⁴ DPS Response to OCR Data Request Nos. 24.k, 29 (Aug. 28, 2014). This response directly contradicts the DPS' June 2012 and June 2014 Utilization Reports, which assert that the DPS would initiate "cooperative efforts with the State Personnel Department to review their selection procedures for all positions within DPS." DPS, EEOP Utilization Report unnumbered 9 (June 8, 2012) (on file with the OCR); DPS, EEOP Utilization Report unnumbered 9 (June 27, 2014) (on file with the OCR).

¹²⁵ DPS Response to OCR Data Request No. 24.k (Aug. 28, 2014) (**Question:** "[D]escribe the known or likely disparate impact on women, if any, of the use of the [Pre-Offer PAAT] and its criteria;" **Answer:** "None").

¹²⁶ See *Paradise* EEOP, *supra* note 62, at 1, 4; see also 28 C.F.R. § 42.203(i)(1).

¹²⁷ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

¹²⁸ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

on the Pre-Offer PAAT, they do not demonstrate that its use of this physical assessment is sufficiently job related or consistent with business necessity.

- a. The DPS does not show that the Pre-Offer PAAT is related to the trooper position
 - i. The Uniform Guidelines' analytical framework

Under the job-related prong of its defense, a respondent must show that a discriminatory test, including the score it uses to eliminate applicants, has “a manifest relationship” to the job in question.¹²⁹ In evaluating whether a respondent meets this standard, the OCR applies the Uniform Guidelines, which provide a validation-based framework for measuring the nexus, if any, between the respondent’s test and the job at issue.¹³⁰ In this context, the concept of validation means that the respondent utilizes professionally accepted methods to demonstrate that a test is “predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job.”¹³¹ To validate a test’s cut score, an employer should show that the score is “reasonable and consistent with normal expectations of acceptable proficiency within the work force.”¹³²

The Uniform Guidelines permit respondents to rely on the following three types of validation to show that a selection device is sufficiently job related: criterion-related validation, content validation, and construct validation.¹³³ Under criterion-related validation, the respondent demonstrates a correlation between an applicant’s performance on a test and objective standards for measuring successful performance of the job at issue.¹³⁴ Content validation means that the respondent’s selection procedure “closely approximates tasks to be performed on the job.”¹³⁵ If a respondent relies on a construct validity study, it should demonstrate that the selection procedure measures the degree to which applicants have identifiable characteristics that are important for successful performance of the job in question.¹³⁶ For each type of validation, the Uniform Guidelines describe both the minimum technical standards that a respondent should satisfy and the required documentation that a respondent should maintain.¹³⁷

¹²⁹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); *Easterling v. Conn. Dep’t of Corr.*, 783 F. Supp. 2d 323, 330 (D. Conn. 2011) (an employer must show that the cut score it uses “reliably predict[s] an individual’s performance on particular job tasks”).

¹³⁰ 28 C.F.R. § 50.14(3)(A) (2014).

¹³¹ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (internal quotation omitted).

¹³² 28 C.F.R. § 50.14(5)(H); *Richardson v. Lamar Cty. Bd. of Educ.*, 729 F. Supp. 806, 822–23, 825 (M.D. Ala. 1989) (holding that an employment test was invalid, in part because its cut scores were improper), *aff’d*, 935 F.2d 1240 (11th Cir. 1991).

¹³³ 28 C.F.R. § 50.14(5)(A).

¹³⁴ *Id.* (5)(B); *see also Groves v. Ala. State Bd. of Educ.*, 776 F. Supp. 1518, 1530 n.26 (M.D. Ala. 1991).

¹³⁵ *Groves*, 776 F. Supp. at 1530 n.26; *see also* 28 C.F.R. § 50.14(5)(B).

¹³⁶ 28 C.F.R. § 50.14(5)(B); *see also Groves*, 776 F. Supp. at 1530 n.26.

¹³⁷ *See* 28 C.F.R. § 50.14(14), (15).

- ii. The DPS may not rely on the BPD's and the APOSTC's research to support its Pre-Offer PAAT

Because the DPS' Pre-Offer PAAT purports to measure whether applicants are sufficiently physically fit to serve as troopers, the DPS relies on criterion-related validation studies that the BPD and the APOSTC conducted,¹³⁸ which the OCR refers to as the BPD Validity Study and the APOSTC Job Analysis Study. Under the Uniform Guidelines, a respondent may rely on another user's criterion-related validity study to establish job-relatedness if the respondent satisfies the following requirements: (1) the study satisfies the Uniform Guidelines' validation standards; (2) the incumbents in the respondent's job and the incumbents in the job that is the subject of the study perform substantially the same tasks, as shown by job analyses of both jobs; (3) the study investigates whether the test is fair, as to men and women, or, if the study does not evaluate test fairness, the respondent conducts this assessment, if technically feasible; and (4) the respondent takes into account variables that might affect how the study applies to the respondent.¹³⁹ In the following subsections of the Report, the OCR concludes that the DPS does not satisfy the first, third, and fourth prongs of this test.¹⁴⁰

The DPS may not apply the BPD and the APOSTC studies to its administration of the Pre-Offer PAAT to trooper applicants in 2009, 2011, and 2014 because: (1) the BPD Validity Study does not show that the Pre-Offer PAAT predicts on-the-job trooper performance (Requirement One); (2) the BPD Validity Study does not show that the Pre-Offer PAAT's qualifying standards are appropriate (Requirement One); (3) the DPS does not satisfy the Uniform Guidelines' standards as to test fairness (Requirement Three); and (4) the DPS undertook no ongoing effort to confirm the validity of the PAAT (Requirement Four). The DPS also did not provide adequate documentation about either study, contrary to another requirement of the Uniform Guidelines.¹⁴¹

- (1) Summaries of the BPD and the APOSTC studies
 - (a) The BPD Validity Study

In 1998, the BPD sought to validate the APOSTC's standards for selecting law enforcement personnel in Alabama.¹⁴² At the time of the BPD Validity Study, the APOSTC PAAT required

¹³⁸ DPS Response to OCR Data Request No. 24.i (Aug. 28, 2014).

¹³⁹ 28 C.F.R. § 50.14(7) (citing Section 14 of the Uniform Guidelines); Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996, 12,005 (Mar. 2, 1979) (Q&A No. 66).

¹⁴⁰ Because the OCR finds that the DPS does not show that it can rely on the BPD Validity Study and the APOSTC Job Analysis Study, we need not, at this point, determine whether local law enforcement officers and troopers have sufficiently similar responsibilities.

¹⁴¹ In addressing the problems with the DPS' reliance on the BPD and the APOSTC studies, the OCR incorporates in full the enclosed report, entitled Validity Report on APOSTC PAAT, prepared by David P. Jones, Ph.D., whom the OCR retained as an expert industrial/organizational psychologist in this matter. David P. Jones, Validity Report on APOSTC PAAT (Jan. 4, 2016) [hereinafter Jones Expert Report].

¹⁴² James C. Hilyer et al., Physical Abilities Analysis for the Birmingham Police Department (Aug. 1, 1998) [hereinafter BPD Validity Study].

applicants to first complete a 200-yard obstacle course in ninety seconds or less, which consisted of the following tasks in order of occurrence: (1) pushing a standard-sized automobile, in neutral, thirty feet; (2) climbing a six-foot wooden or chain-link fence; (3) climbing through a window opening; (4) walking a fifteen-foot-long, six-inch-wide balance beam; and (5) dragging a 165-pound dummy thirty feet.¹⁴³ Within one minute of completing the obstacle course, applicants had to pull the trigger of a standard police revolver thirty times in thirty seconds while holding the revolver straight out at arms-length.¹⁴⁴ Applicants then completed the physical ability segment of the test; applicants had to complete (1) a minimum of twenty-two push-ups in one minute, (2) a minimum of twenty-five sit-ups in one minute, and (3) a 1.5-mile run in fifteen minutes and twenty-eight seconds or less.¹⁴⁵

In conducting the BPD Validity Study, the researchers reviewed data from a job analysis study the BPD had conducted in 1997. The purpose of that job analysis study was to identify an entry-level BPD officer's essential physical job functions and the physical abilities that an officer needed to successfully perform those job functions.¹⁴⁶ In conducting that study, the BPD designed a survey, which it administered to a random sample of 102 incumbent BPD officers.¹⁴⁷ The survey included questions about the entry-level BPD officer position and asked officers (1) to note whether they needed to be able to perform twenty-two particular physical abilities, (2) to select tasks on the questionnaire they associated with each identified physical ability, (3) to state whether they performed each task frequently, and (4) to note whether each task was critical to their jobs.¹⁴⁸ Among all of the listed tasks, the participants noted that officers most frequently pursue suspects and engage in violent confrontations.¹⁴⁹

To validate the obstacle course, push-up, sit-up, and 1.5-mile-run parts of the APOSTC PAAT, the researchers developed pursue and subdue events in an effort to simulate an officer's completion of the frequently encountered job tasks of violent confrontation and pursuit of suspects. The researchers developed a short Birmingham Pursue and Subdue (BPAS) task and a long BPAS task, both of which required participants to pursue a suspect on foot through a series of obstacles and then to subdue the suspect in a physical confrontation.¹⁵⁰ The researchers used both BPAS tasks to validate the APOSTC PAAT's components.¹⁵¹

Next, the researchers asked various BPD officers to take the APOSTC PAAT, the short BPAS task, and the long BPAS task. From the original sample of 102 BPD officers who completed the job analysis study, ninety officers took the APOSTC PAAT.¹⁵² The researchers randomly

¹⁴³ *Id.* Vol. I, 1.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2.

¹⁴⁷ *Id.* at 13–15.

¹⁴⁸ *Id.* at 23–25.

¹⁴⁹ *Id.* at 34.

¹⁵⁰ *Id.* at 41–44.

¹⁵¹ *Id.* at 40.

¹⁵² *Id.* Vol. II, 4. It does not appear that officers completed the trigger pull portion of the APOSTC PAAT as part of the validity study.

selected forty-nine of these officers to complete the short BPAS task and fifty officers to complete the long BPAS task.¹⁵³ A panel of BPD-appointed experts observed the tests and rated each officer's performance on the short or long BPAS task on a subjective scale of "one" (fail) to "four" (excellent), with a minimum rating of "three" required to pass.¹⁵⁴ The experts also evaluated how long it took each officer to complete the short or long BPAS task and established the minimum performance standard for each task based on the slowest performance on each task that was rated "three" or higher.¹⁵⁵ Of the forty-nine officers who completed the short BPAS task, fifteen did not have acceptable performances.¹⁵⁶ Of the fifty officers who completed the long BPAS task, twenty-five failed the event.¹⁵⁷

The researchers concluded that the APOSTC PAAT, and its obstacle course, push-up, sit-up, and 1.5-mile-run components, was a valid way to screen out recruits who cannot adequately perform difficult police tasks.¹⁵⁸

(b) The APOSTC Job Analysis Study

After the BPD Validity Study purported to validate the APOSTC PAAT, the APOSTC sought to extrapolate those results to the hiring of sworn personnel by law enforcement agencies throughout Alabama. To do that, the APOSTC conducted its own job analysis study of entry-level law enforcement officers in the state and tried to draw comparisons between all of these positions and the job of a BPD officer. Specifically, it wanted to establish that (1) BPD officers and all sworn personnel in Alabama perform similar job tasks, and (2) BPD officers and all sworn personnel in Alabama must possess the same physical abilities to perform those tasks.¹⁵⁹ In undertaking this project, researchers compared the job skills of BPD officers to those of 319 entry-level officers at other law enforcement agencies in Alabama. First, the researchers administered a survey to the non-BPD officers to obtain information about their essential job tasks.¹⁶⁰ Then, the researchers compared those tasks to the ones the BPD officers identified in taking the BPD Validity Study's survey. According to the researchers, in both the BPD sample and the statewide sample, participants noted that they most frequently pursued suspects and engaged in violent confrontations.¹⁶¹ Based on this comparison, the researchers concluded that the job requirements of entry-level law enforcement officers in Alabama were similar to the requirements of entry-level BPD officers.¹⁶²

¹⁵³ *Id.* Vol. I, 42, 44.

¹⁵⁴ *Id.* Vol. II, 5.

¹⁵⁵ *Id.* at 5–6.

¹⁵⁶ *Id.* Vol. I, 42.

¹⁵⁷ *Id.* at 44.

¹⁵⁸ *Id.* Vol. II, 15.

¹⁵⁹ See James C. Hilyer & Michael Weaver, A Physical Abilities Analysis and Job Task Validation Study for the Alabama Peace Officers Standards and Training Commission 134 (Oct. 18, 1999).

¹⁶⁰ *Id.* at 136.

¹⁶¹ *Id.* at 113.

¹⁶² *Id.* at 138.

- (2) Reasons why the DPS cannot rely on the BPD and the APOSTC studies
 - (a) The BPD Validity Study does not meet the Uniform Guidelines' validation standards
 - (i) The study does not show that performance on the APOSTC PAAT predicts an officer's on-the-job performance

The DPS cannot rely on the BPD Validity Study to support its 2009, 2011, and 2014 Pre-Offer PAAT because the BPD did not show that performance on the APOSTC PAAT predicted job performance as a police officer. According to the OCR's expert industrial/organizational psychologist, the researchers' approach to validating the APOSTC PAAT did not meet professional standards.¹⁶³ The researchers conducting the BPD Validity Study did not design it to measure any on-the-job performance requirements of BPD officers.¹⁶⁴ Instead, the researchers created the short and long BPAS tasks, which sought to simulate events that might occur on the job.¹⁶⁵ The researchers made no effort to show that officers' performance on the BPAS' hypothetical job performance measures had any relationship to fundamental measures of BPD officers' on-the-job performance.¹⁶⁶ Nor did they consider the actual job performance of any of the officers who participated in the study, which made it impossible to measure any relationship between officers' performance on the APOSTC PAAT and their performance on the job.¹⁶⁷ Moreover, the researchers provided no data on how men and women separately performed on the BPAS tasks, on the APOSTC PAAT, or on the job; as a result, the OCR cannot determine whether the BPD Validity Study's outcomes were biased against female participants.¹⁶⁸

The BPD Validity Study suffers from another significant methodological flaw: it inappropriately measured correlations between three tests, rather than correlations between the results of the APOSTC PAAT and a BPD officer's job performance. The study attempted to show that BPD officers' performance on the BPAS job simulations related to their performance on the APOSTC PAAT.¹⁶⁹ These tests measured similar physical fitness levels.¹⁷⁰ When tests measure the same ability, an employer is likely to learn that there are significant correlations between a participant's results on them.¹⁷¹ It is thus not particularly surprising that, in the BPD Validity

¹⁶³ Jones Expert Report, *supra* note 141, at 17. While Dr. Jones' report describes numerous shortcomings of the BPD Validity Study, all of which we incorporate by reference into the Report, in this subsection of the Report, the OCR merely highlights some of the BPD Validity Study's more significant problems.

¹⁶⁴ *Id.* at 16.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 17.

¹⁶⁸ *Id.* at 18.

¹⁶⁹ *Id.* at 16.

¹⁷⁰ *Id.* at 19–21.

¹⁷¹ *Id.*

Study, the researchers identified a significant correlation between the participants' performance on the APOSTC PAAT's events and their completion times on the short and long BPAS tasks.¹⁷² Stated differently, participants who performed poorly on the APOSTC PAAT tended to perform poorly on the short or long BPAS task.¹⁷³

The BPD's identification of this correlation does not satisfy the Uniform Guidelines because it did not use actual job performance data to validate the APOSTC PAAT.¹⁷⁴ For example, it did not determine whether male and female officers who performed poorly on the PAAT also performed poorly as BPD officers.¹⁷⁵ The researchers also did not show that performance on the BPAS' hypothetical job performance measures by male and female officers had any relationship to those officers' job performance.¹⁷⁶ Indeed, sizable numbers of the BPD officers who took the short and long BPAS tasks – 31% and 50%, respectively – failed those tests. Unless all of these officers were, in fact, poor performers, these results suggest that the BPD Validity Study did not measure the real-world responsibilities of law enforcement officers and that the DPS should not have relied on it in screening trooper candidates.¹⁷⁷ Contrary to the Uniform Guidelines' standards, the BPD Validity Study does not provide evidence that a police officer's performance on the APOSTC PAAT predicts that officer's job performance. As a result, the DPS may not rely on the study to support its discriminatory Pre-Offer PAAT.

- (ii) The study does not show that the Pre-Offer PAAT's qualifying standards are appropriate

According to the OCR's expert industrial/organizational psychologist, the DPS cannot rely on the BPD Validity Study because the study contains no evidence that the APOSTC PAAT's pass-fail standard identifies candidates who will perform the job of a peace officer at an acceptable level. Under the Uniform Guidelines' criterion-related validation standards, an employer must show through statistics that test scores predict job performance.¹⁷⁸ Here, the BPD Validity Study wholly fails to satisfy this requirement. The BPD used the results from the short and long BPAS tasks to defend the passing standards of the APOSTC PAAT.¹⁷⁹ But the BPD Validity Study makes no effort to show that male and female officers who passed these tasks, failed these tasks, or had different scores on them actually performed better or worse as police officers.¹⁸⁰ In fact, the DPS requires incumbent troopers to take a physical fitness test that has standards for completing push-ups, sit-ups, and a 1.5-mile run that are different than the passing standards on

¹⁷² BPD Validity Study, *supra* note 142, at Vol. II, 14–15.

¹⁷³ *Id.* at 9.

¹⁷⁴ See Jones Expert Report, *supra* note 141, at 16, 17, 19–20.

¹⁷⁵ *Id.* at 16.

¹⁷⁶ *Id.* at 17–18.

¹⁷⁷ *Id.* at 17–18, 23.

¹⁷⁸ 28 C.F.R. § 50.14(14)(B)(5); see also *id.* (5)(H) (cutoff scores should be “consistent with normal expectations of acceptable proficiency within the work force”).

¹⁷⁹ See Jones Expert Report, *supra* note 141, at 18, 21.

¹⁸⁰ *Id.* at 21–22.

the APOSTC PAAT.¹⁸¹ Notably, as the OCR discusses in greater detail in concluding that the APOSTC PAAT does not satisfy a business necessity, a trooper could obtain a score that would fail the APOSTC PAAT's standard but that would actually surpass the DPS' physical fitness standard.¹⁸² Such an outcome critically undermines any argument that the Pre-Offer PAAT's qualifying standards are an appropriate proxy for acceptable trooper performance on the job. The study also does not explain why an applicant must pass multiple hurdles to obtain an overall passing score on the APOSTC PAAT, rather than, for instance, allowing an agency to consider how well or how poorly an applicant performed on each test component.¹⁸³ These failures are especially troubling given that many of the officers who took the short and long BPAS tasks failed them and given the potential that the test could adversely impact female applicants.¹⁸⁴

- (b) The DPS did not satisfy the Uniform Guidelines' standards, as to test fairness

Even if the BPD Validity Study satisfied the Uniform Guidelines' validation standards (which it does not), the DPS could not rely on it because the DPS did not evaluate whether its Pre-Offer PAAT is unfair, as to female applicants. Under the Uniform Guidelines, an employer should show that the study it wants to use from another entity is fair.¹⁸⁵ As to the protected class of sex, this test fairness concept relates to a possible mismatch between the performance of men and women on a screening test and their subsequent performance on the job. As the Uniform Guidelines explain, if women tend to obtain lower scores on a particular test than men, but women ultimately perform as well as men in the at-issue position, then a respondent's use of that test "may unfairly deny opportunities" to women.¹⁸⁶ When a test has significant disparities, it is especially important for the respondent to investigate whether it treats women fairly.¹⁸⁷ The BPD Validity Study did not evaluate this issue and did not note whether the APOSTC PAAT predicted performance the same way for male and female peace officers.¹⁸⁸ As a result, the DPS should have conducted its own study of test fairness, especially in light of the chronic, statistically significant disparate impact that the Pre-Offer PAAT had on female applicants. Despite this standard, the DPS conducted no such study and offers no explanation for its failure to do so.¹⁸⁹ Therefore, it may not rely on the BPD Validity Study to defend its Pre-Offer PAAT.

¹⁸¹ DPS, Order 37: Physical Fitness Program (Aug. 23, 2010).

¹⁸² See Compliance Review Report, *infra* Section VI.C.4.b.

¹⁸³ Jones Expert Report, *supra* note 141, at 22.

¹⁸⁴ *Id.* at 17, 23.

¹⁸⁵ 28 C.F.R. § 50.14(7)(B)(3); see also *id.* (14)(B)(8)(b).

¹⁸⁶ *Id.* (14)(B)(8)(a).

¹⁸⁷ *Id.* (14)(B)(8)(b).

¹⁸⁸ Jones Expert Report, *supra* note 141, at 23–25.

¹⁸⁹ *Id.*

- (c) The DPS and the APOSTC made no ongoing effort to confirm the validity of the PAAT

The DPS cannot rely on the APOSTC Job Analysis Study because neither the APOSTC nor the DPS determined whether the study's key conclusion – that all law enforcement agencies in Alabama may administer the PAAT, based on the BPD Validity Study – applies with equal force today. During the fifteen years since the BPD commissioned its study on the PAAT, the APOSTC and the DPS could have further explored the relationship, if any, between the PAAT and the job performance of peace officers, and in particular female troopers, in Alabama.¹⁹⁰ Yet they did not do so. They provided no information confirming that hired applicants' job performance actually relate to their PAAT results, and the DPS made no effort to show that the Pre-Offer PAAT's disparate impact on women – which it should have known about since at least 2009 – accurately reflects some performance disparity between male and female troopers. The APOSTC and the DPS should have conducted research on these topics.¹⁹¹ Because they did not do so, the DPS may not rely on the APOSTC Job Analysis Study.

The DPS and the APOSTC also did not revisit the wisdom of their continued reliance on the BPD Validity Study, even after the State Personnel Department (SPD) concluded that the tasks measured by the APOSTC PAAT are ones that applicants learn on the job. Under the Uniform Guidelines, employers should not exclude applicants because they lack knowledge, skills, or abilities they will acquire *after* they become an employee.¹⁹² The BPD Validity Study's researchers noted that BPD officers most frequently pursue suspects and engage in violent confrontations. To simulate officers' completion of these tasks, the researchers designed the short and long BPAS tasks, which in turn purported to validate the APOSTC PAAT's components. The 2009, 2011, and 2014 Pre-Offer PAAT included these parts.

A significant problem with this approach is that the SPD, in a job analysis of the DPS trooper position,¹⁹³ concluded that these tasks – pursuing suspects and engaging in violent confrontations – are ones that troopers learn how to conduct after they become troopers. Unlike the DPS, the SPD recognizes that it must periodically revisit whether its selection devices accurately measure whether applicants have the minimal knowledge, skills, and abilities to serve as troopers. To that end, in 2002 and 2003, the SPD sought to develop a written test for trooper applicants. As part of this project, it analyzed the trooper position to identify, among other things, tasks that a trooper performs. To learn about these tasks, the SPD discussed the trooper position with twenty-three subject-matter experts who were incumbent troopers. Through these interviews, it identified several trooper tasks, including pursuing a suspect or a violator; physically restraining, controlling, and subduing individuals; and using a firearm, baton, or chemical spray.¹⁹⁴ In discussing these tasks with the experts, the SPD discovered that troopers learn how to conduct

¹⁹⁰ *Id.* at 26–27.

¹⁹¹ *Id.*

¹⁹² 28 C.F.R. § 50.14(5)(F).

¹⁹³ Carolyn Lees-Hotton, Trooper 60203, Validation Study Final Report (June 2003).

¹⁹⁴ *Id.* app. F.

them at the Academy or during field service training.¹⁹⁵ As a result, because these tasks are not ones that the DPS should expect an applicant to know when they enter the Academy as trooper employees, the SPD did not consider them in designing its written test for trooper applicants.¹⁹⁶ We agree with the SPD that, in selecting entry-level troopers, the DPS should not have considered whether applicants can perform tasks they would learn on the job.¹⁹⁷ Therefore, the DPS should not have administered the 2009, 2011, and 2014 Pre-Offer PAAT to applicants and should have used the SPD's research to reconsider the merits of the BPD Validity Study.¹⁹⁸

- (d) The DPS provided inadequate documentation about the BPD and the APOSTC studies

The DPS cannot rely on the BPD and the APOSTC studies because it did not provide adequate documentation about them to the OCR. Under the Uniform Guidelines, an employer must maintain information about any validity study on which it relies to defend a selection procedure that adversely impacts women.¹⁹⁹ When a respondent relies on another entity's validity study, it must provide information about the following topics: (1) the important job behaviors of the respondent's job, how it concluded that those behaviors are important, and how those behaviors are the same as the important job behaviors of the job in the validity study; (2) how the respondent determined that the validity study's criteria are relevant to the respondent; (3) how the validity study's applicant pool or sample characteristics are similar to those of the respondent; (4) how the race, sex, and ethnic composition of the respondent's relevant labor market compares to that of the validity study's sample; (5) how the respondent's use of the selection procedure is consistent with the findings of the validity study; and (6) a bibliography of reports of the validity of the selection procedure in question.²⁰⁰

The DPS does not satisfy these documentation requirements, as to the BPD Validity Study and the APOSTC Job Analysis Study. In particular, it did not provide documents demonstrating that: (1) the BPD's physical ability test is the same as the DPS' Pre-Offer PAAT; (2) BPD officers have the same job responsibilities as DPS troopers; and (3) the BPD's physical ability test for officer candidates is relevant to the DPS' physical fitness requirements for troopers. The DPS also did not provide a bibliography of reports showing that its 2009, 2011, and 2014 Pre-Offer PAAT validly measured a candidate's ability to satisfy the standards for trooper performance, including, as we discuss next, the different physical fitness requirements of DPS Order 37.

¹⁹⁵ *Id.* at 18.

¹⁹⁶ *Id.* at 11, 18.

¹⁹⁷ See 28 C.F.R. § 50.14(5)(F) (employers should not make hiring decisions based on knowledge, skills, and abilities an employee learns during orientation).

¹⁹⁸ Jones Expert Report, *supra* note 141, at 26–27.

¹⁹⁹ 28 C.F.R. § 50.14(15)(A); see also *id.* (5)(D); Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996, 12,001–03 (Mar. 2, 1979) (Q&A Nos. 35, 39, and 44).

²⁰⁰ See 28 C.F.R. § 50.14(15)(E)(1).

4. The Pre-Offer PAAT is Not Consistent with Business Necessity

In addition to not being related to the duties of the trooper position, the DPS' 2009, 2011, and 2014 Pre-Offer PAAT is not consistent with business necessity. Under this second prong of its affirmative defense, as to an employment practice that discriminated against female applicants, a respondent must identify a legitimate business goal.²⁰¹ Then, it must prove that the challenged hiring practice, such as a physical assessment test's cutoff scores, is essential to achieving that goal.²⁰² As the OCR explains in the previous subsection of the Report, the DPS' 2009, 2011, and 2014 Pre-Offer PAAT included obstacle course, push-up, sit-up, and 1.5-mile-run components, with associated cutoff scores. In considering whether the DPS must use this physical assessment to hire qualified troopers, the OCR compares the cutoff scores for the PAAT's ability components with the physical fitness standards the Department applies to incumbent troopers. Notably, in measuring the physical abilities of its current trooper corps, the DPS administers a physical assessment test that is different than the Pre-Offer PAAT. As a result, the Department cannot argue that the PAAT is a business necessity, and its affirmative defense fails.

a. The Order 37 physical fitness test

As part of its performance evaluation program, the DPS requires troopers to maintain a minimum level of physical fitness. The DPS measures each trooper's physical fitness by means of an annual test that it describes in Policy Order 37 (Order 37).²⁰³ Troopers must comply with this physical fitness program so that the Department can "maintain a physically fit and mission-capable law enforcement organization."²⁰⁴ In designing the physical fitness test, the DPS relied on several unspecified cardiorespiratory fitness tests from the Cooper Institute, which is a nonprofit organization that provides information about such tests.²⁰⁵ The Order 37 test is different, in several significant ways, from the DPS' 2009, 2011, and 2014 Pre-Offer PAAT.

The Order 37 test measures incumbent troopers' ability to complete a certain number of push-ups in one minute, a certain number of sit-ups in one minute, and a 1.5-mile run or a 2.5-mile walk within certain time limits. For each activity, the DPS establishes different performance levels based on a person's age. As Appendix A to the Compliance Review Report shows, the test places troopers into one of five age groups: 20-29 years old, 30-39 years old, 40-49 years old, 50-59 years old, and 60 years old or older.²⁰⁶ Across all age groups and for each activity, the DPS determines whether the trooper meets, exceeds, or consistently exceeds its standards. It also awards points if, for instance, a trooper completes some but not enough push-ups to satisfy the "meets standards" measurement. The Department refers to this as its "participates standards"

²⁰¹ *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 245 (5th Cir. 1974) (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971)).

²⁰² *Craig v. Ala. State Univ.*, 804 F.2d 682, 689 (11th Cir. 1986); *Pettway*, 494 F.2d at 245, 245 n.87.

²⁰³ DPS, Order 37: Physical Fitness Program (Aug. 23, 2010).

²⁰⁴ *Id.* at 1.

²⁰⁵ See *About*, COOPER INST., <https://web.archive.org/web/20151223162710/https://www.cooperinstitute.org/about/> (last visited Dec. 23, 2015). At this point, the OCR makes no findings about the validity of the Order 37 test.

²⁰⁶ The test does not create different scores for men and women.

measurement. Unlike the Pre-Offer PAAT, the DPS allows a trooper to opt out of some or all elements of the Order 37 test if the trooper is medically prohibited from participating in strenuous exercise, suffered a temporary injury, or has a modified duty assignment.

Physical training specialists annually administer this test to troopers. After giving the test, the specialist adds up the trooper's points across all activities and then divides that sum by the number of events in which the trooper participated. A trooper must pass each portion of the test by obtaining a score within the "participates standards" category. To satisfy the physical fitness program and avoid discipline, a trooper must also achieve an overall rating of "meets standards." During the OCR's onsite visit, a DPS trooper of senior rank noted that, if troopers fail the test, they can take it again, as many times as they want, to satisfy Order 37's physical fitness standards.²⁰⁷ To help troopers prepare for the test, the DPS allows troopers to take three hours each week, as part of their paid schedule, to participate in a workout program.²⁰⁸

- b. The DPS uses the Order 37 test to ensure troopers are sufficiently physically fit

The DPS' reliance on the Order 37 test undermines any argument that its 2009, 2011, and 2014 Pre-Offer PAAT, which adversely impacted women, is consistent with business necessity. As an initial matter, the Order 37 test does not include an obstacle course and allows troopers to walk, rather than run. In addition, unlike the PAAT, the Order 37 test takes a person's age into account in evaluating her physical fitness. Because of this difference, an applicant could fail the PAAT even though the same score would satisfy the requirements of the DPS' physical fitness program that she will take approximately two years later. Consider, for instance, a forty-year-old trooper applicant who completes twenty-one push-ups during the Pre-Offer PAAT. Because she did not complete twenty-two push-ups, she would fail the test and could not become a trooper. But under the Order 37 test, she would actually *exceed* the DPS' push-ups standard and have a better chance of receiving a positive performance appraisal. Moreover, if she had a permissible reason for not taking the test, the DPS might have even granted her a waiver from taking it altogether. These factors, viewed together, show that the Pre-Offer PAAT and its cutoff scores are not essential to identifying applicants who would satisfy the DPS' physical fitness standards.

5. The OCR's Findings, as to the DPS' Pre-Offer PAAT

Based on the record it developed in this matter, the OCR finds that the DPS violated the Safe Streets Act's nondiscrimination provision and its implementing regulations, in connection with the Department's use of the 2009, 2011, and 2014 Pre-Offer PAAT for entry-level troopers. The DPS' administration of this test during these hiring cycles discriminated against female trooper applicants and was neither sufficiently job related nor consistent with business necessity. The

²⁰⁷ Order 37 applies slightly differently to entry-level troopers and more senior troopers. During the Academy, trooper recruits take the APOSTC PAAT, which, like the Order 37 test, includes push-up, sit-up, and run components. Once they graduate from the Academy, these troopers do not need to take the Order 37 test until their second year as troopers.

²⁰⁸ Order 37, *supra* note 203, at 2.

DPS cannot demonstrate job-relatedness through the BPD Validity and the APOSTC Job Analysis Study because (1) the BPD Validity Study does not show that the Pre-Offer PAAT predicts trooper performance; (2) the BPD Validity Study does not show that the Pre-Offer PAAT's qualifying standards are appropriate; (3) the DPS does not satisfy the Uniform Guidelines' test fairness standards; (4) the DPS made no effort to confirm the validity of the PAAT; and (5) the DPS did not provide enough documentation about either study. It also cites no evidence to support the second, business necessity prong of its affirmative defense. Instead, the record shows that a trooper applicant does not need to satisfy the Pre-Offer PAAT's pass points to become a successful trooper. Rather, a trooper need only satisfy Order 37's physical fitness standards, which have a markedly different scoring structure than the Pre-Offer PAAT.

6. The OCR's Recommendations, as to the DPS' Pre-Offer PAAT

To remedy the above violations, the ALEA should provide appropriate equitable relief to the eight women who failed the discriminatory 2009 and 2014 Pre-Offer PAAT.²⁰⁹ It should also notify these women and the additional women to whom the DPS sent letters in 2009, 2010, 2011, and 2014, seeking to confirm their availability for the trooper position, about this Compliance Review Report, its findings, and how they can learn about future trooper vacancies.²¹⁰

Prospectively, the ALEA must select troopers in ways that do not discriminate against female applicants. Given the DPS' chronic failure to hire female troopers, if the ALEA wants to measure the physical fitness of trooper applicants during future hiring cycles, it must validate that assessment.²¹¹ In evaluating any validation study on which the ALEA relies, the OCR will determine whether it satisfies the Uniform Guidelines' validation standards. In developing any validated physical fitness test, the Agency should gender-norm it. Gender-norming is the practice of making minimum adjustments to the cutoff scores for male and female applicants to take into account their biologic differences.²¹² The United States Army, Marine Corps, Navy, and Air Force all administer gender-normed physical fitness tests.²¹³ The Cooper Institute's resources on physical fitness assessments and norms may assist the ALEA as a starting point for

²⁰⁹ Because the DPS did not hire any troopers during its 2011 hiring cycle, the OCR focuses this recommendation on the women who failed the Pre-Offer PAAT in 2009 and 2014.

²¹⁰ The ALEA notified these women about the SPD's August 2015 trooper vacancy announcement.

²¹¹ 28 C.F.R. § 50.14(6)(B)(2) (2014).

²¹² Given the structure of the Order 37 physical fitness standards, the DPS should also consider age-norming any physical fitness test it administers to trooper applicants.

²¹³ See United States Army, Army Physical Fitness Scorecard (DA Form 705) (May 2010), https://web.archive.org/save/_embed/https://www.nmmi.edu/rotc/forms/DA_705_APFT.pdf; United States Marine Corps, Marine Corps Physical Fitness Program (Order 6100.13 W/CH 1) (Aug. 1, 2008), https://web.archive.org/web/20151223162858/http://www.marines.mil/Portals/59/Publications/MCO%206100.13%20W_CH%201.pdf; United States Navy, Physical Readiness Test (PRT), https://web.archive.org/web/20151223181316/http://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/physical/Documents/Guide%205-Physical%20Readiness%20Test.pdf; United States Air Force, USAF Fitness Test Scoring, <https://web.archive.org/web/20151223163053/http://www.afpc.af.mil/shared/media/document/AFD-110804-054.pdf>. For example, the United States Army Physical Fitness Test requires men between the ages of seventeen and twenty-six to run the two-mile portion of the test in 13:00 minutes or less to receive full points, while women in that same age group must complete the run in 15:36 minutes or less to receive full credit.

identifying appropriate scores for male and female applicants, but should not be a substitute for a full validation study. More broadly, for each trooper hiring process, the Agency must identify any selection device that adversely excludes women, including those it administers at the Academy, and either validate it or remove it from the hiring process.

7. The OCR's Recommendations, as to Alternative Practices

If the DPS could somehow defend its reliance on the Pre-Offer PAAT, the Safe Streets Act's nondiscrimination provision and its implementing regulations would still prevent the ALEA from using the procedure if the OCR identifies an alternative employment practice with less disparate impact that meets the Agency's needs.²¹⁴ Because the DPS does not show that the Pre-Offer PAAT is sufficiently job related or consistent with business necessity, the OCR does not need to identify less discriminatory alternatives to this test. In any event, to assist the ALEA, we offer several recommendations that might be less discriminatory than its reliance on a discriminatory physical assessment test and that might assist trooper applicants and recruits to demonstrate their physical fitness to serve as troopers.

- a. The ALEA should provide adequate notice to applicants about any pre-offer physical assessment test it uses

If the ALEA elects to administer a physical assessment test, the Agency should provide adequate notice to applicants about it. During the 2014 trooper hiring cycle, the DPS wanted as many candidates as possible to pass the Pre-Offer PAAT and move on to the next stage of the selection process. Despite this goal, it actually gave applicants less time to prepare for that test than they needed, according to the Department's own training materials. On April 14, 2014, the DPS notified trooper applicants that it would administer the PAAT on May 5, 2014, only three weeks later. Ostensibly to assist these applicants, the DPS enclosed a training brochure on the PAAT, which noted that applicants need at least ten weeks (not three weeks) to prepare for it. Because the DPS did not adhere to its own training guidance, a female applicant could perhaps be forgiven for concluding that it would be futile to try to become a trooper.²¹⁵ If the ALEA asks trooper applicants to take a pre-offer physical assessment test during future hiring cycles, it should provide adequate notice to them about it.²¹⁶

²¹⁴ See 42 U.S.C. § 2000e-2(K)(1)(A)(i), (ii); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (internal quotation omitted); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

²¹⁵ The DPS' failure to provide appropriate notice to applicants is especially troubling because the Department used a register from 2009. As a result, the DPS notified some applicants about the Pre-Offer PAAT more than five years after they first applied to become troopers. It was not reasonable for the Department to expect that applicants would maintain a fitness regimen for so long because of the mere possibility that the DPS might ask them, on three weeks' notice, to take and pass a physical fitness test.

²¹⁶ In monitoring the ALEA's implementation of this recommendation, the OCR will rely on its expert exercise physiologist to identify an appropriate notice period, based on the content of any pre-offer physical assessment test.

- b. The ALEA could administer a pre-offer physical assessment test without cutoff scores and develop a training program to assist applicants prepare for it

To assist female applicants develop certain trooper-related physical abilities, the ALEA could administer a pre-offer physical assessment test that does not exclude applicants from the selection process. During the 2014 trooper hiring process, four women expressed an interest in the trooper position. Had the DPS worked with these applicants over time to develop their physical skills, it is possible that some of them – rather than none of them – would have entered the Academy. If the ALEA wants to administer a pre-offer physical assessment test to applicants in the future, it should use it as a tool to identify areas where an applicant might need assistance, rather than using it to exclude women from the selection process.

As part of this revamped assessment process, the ALEA should develop a physical fitness training program for female trooper applicants. These applicants are more likely to pass a physical fitness assessment if they can view a demonstration on how to complete the test, try out the test, assess any deficiencies in taking it, and train on areas of weakness.²¹⁷ The DPS seemed to recognize the importance of providing additional guidance to applicants about the 2014 Pre-Offer PAAT. Despite this goal, the Department acted too late to help applicants pass this test. Immediately before administering the test to applicants, the DPS showed a video to them about how to take it.²¹⁸ On the day of the test, a DPS trooper also walked the course with the applicants, demonstrated how to complete the test's components, and offered to train the applicants on any part of the test they fail. The Department also allowed applicants to retake the test more than two weeks after failing it. These efforts were inadequate, given the DPS' recognition that applicants needed at least ten weeks to prepare for the physical assessment test, and given the resources and flexibility the DPS provides to troopers to prepare for and take the Order 37 test. Well before administering any physical assessment test in the future, the ALEA should provide opportunities for female trooper applicants to learn about and practice all elements of any such test. As part of these efforts, the Agency should show applicants how to complete each test component, offer to train applicants on the test, and permit applicants to practice the test, as often as necessary, on its Academy course.

- c. The ALEA should ask the APOSTC to waive compliance with its PAAT

Because the DPS' 2009 Academy class only included one woman and its most recent Academy trooper class included no women, the OCR could not evaluate the effect that the APOSTC PAAT had on female trooper candidates. While the OCR did not evaluate this test, we are mindful that it might adversely impact female trooper recruits. In measuring an applicant's or a recruit's physical fitness, the DPS and the APOSTC PAATs both require a person to (1) complete the

²¹⁷ See Joyce Hogan & Ann Quigley, *Effects of Preparing for Physical Ability Tests*, 23 PUB. PERS. MGMT. 101-02 (1994).

²¹⁸ See *The APOSTC Agility and Ability Test*, LAW ENF'T ACAD. TUSCALOOSA, <https://web.archive.org/web/2015122316141/http://www.lead.org/basic-training/> (last visited Dec. 23, 2015).

same five-stage obstacle course in ninety seconds, (2) complete twenty-two push-ups in sixty seconds, (3) complete twenty-five sit-ups in sixty seconds, and (4) run 1.5 miles in 15 minutes and 28 seconds or less. Given the similarities between these two tests, the ALEA should evaluate whether the OCR's findings as to the Pre-Offer PAAT also apply to the APOSTC PAAT.²¹⁹ As part of this assessment, the ALEA should ask the APOSTC to review Dr. Jones' expert report, to revisit whether its PAAT appropriately measures the physical fitness of trooper applicants, and to revise that test, if appropriate.²²⁰

If the APOSTC declines this request or does not change its PAAT before the ALEA hires another entry-level trooper class, the Agency should ask the APOSTC to waive the requirement that applicants pass the PAAT, as designed. In support of this request, the ALEA should cite the OCR's findings that the DPS' Pre-Offer PAAT – the elements of which mirror the APOSTC PAAT – violates the nondiscrimination provision of the Safe Streets Act and its implementing regulations. During an interview with the OCR, an APOSTC representative acknowledged that a law enforcement agency could ask the APOSTC to waive certain of its requirements, and that it would carefully consider any such request. Seeking such relief is not without precedent. In connection with protracted disparate impact litigation under Title VII, the Birmingham Police Department (BPD) petitioned the APOSTC to modify its PAAT because it adversely impacted the BPD's female recruits. The APOSTC acceded to this request.²²¹ The ALEA should ask the APOSTC to allow it to administer a gender- and age-normed physical fitness test to recruits, which they would need to pass before graduating from the Academy. The Agency should make this request in an effort to avoid discrimination claims involving the APOSTC PAAT.

VII. The DPS' Retention of Troopers

In this section of the Report, the OCR discusses a recipient's obligations to assess its efforts to retain employees and to develop and implement an EEOP that provides equal employment opportunities to women in its workforce.²²² The DPS is not in compliance with its obligations to analyze, develop, or monitor its employee retention program.

A. The DPS' Obligations to Analyze and Refine Its Training Programs

As part of its Compliance Review, the OCR evaluates whether the DPS adequately prepares female entry-level troopers for their jobs once they graduate from the Academy. Under the Safe Streets Act's EEOP regulations, a recipient should conduct a thorough, annual self-assessment of its training programs to determine whether they treat women equitably, when compared to men.²²³ If, as a result of this analysis, a recipient concludes that women do not receive the same

²¹⁹ As the DPS hires more female troopers, the OCR reserves the ability to determine whether the APOSTC PAAT – or any selection device, for that matter – adversely excludes women.

²²⁰ See ALA. ADMIN. CODE r. 650-X-1.15(1) (2015).

²²¹ Mem. Op., *Martin v. City of Birmingham*, Civ. A. No. CV-74-S-17-S 14 (N.D. Ala. July 12, 2005), ECF No. 1227.

²²² 28 C.F.R. § 42.303(a), (c), .304 (2014).

²²³ *Id.* § 42.303(c)(3).

level of training opportunities as men, it should describe what steps it will take to timely correct that deficiency.²²⁴ The DPS concedes that it does not analyze whether its training programs reduce opportunities for female troopers, as compared to male troopers.²²⁵

1. Field Training Officer Program

To help entry-level troopers acclimate to their new positions, once they graduate from the Academy, the DPS administers an eight-week field training officer program (FTO Program). During this program, the Department pairs a newly commissioned trooper with at least two experienced troopers who received specialized training on how to introduce troopers to their day-to-day responsibilities. In providing this specialized training, the DPS relies on a procedure manual from 2006 that appears to be written for male FTOs because it notes that troopers in their charge often view them as “father-figure[s].”²²⁶ The manual also suggests that FTOs should expect male and female troopers to behave differently in the field. According to the manual, “[m]ales may react to failure by showing signs of anger. Females may vent their frustrations by crying.”²²⁷ Once troopers successfully complete the FTO Program, they work on their own and, after successfully completing a one-year probationary term, become permanent employees. In discussing the FTO Program with female troopers and former troopers, one interviewee stated that it does not adequately prepare women to serve as troopers.

2. In-Service Training, Including Additional-Duty Assignments

The DPS provides several training and additional-duty opportunities to troopers who complete the FTO Program. Depending on their assignment and rank, troopers may attend basic accident investigation training, specialized tactics schools, and advanced accident reconstruction courses. Federal and private organizations provide most of this training, although the Department also conducts some of it at the Academy. While budgetary constraints limit training opportunities, the DPS sends troopers to courses when it needs to fill positions that require specialized skills.

In addition to traditional training programs, as part of their post assignments, troopers can apply for additional-duty opportunities, such as with the FTO Program, the Tactical Operations Team, the Motorcycle Team, and the Explosive Ordinance Disposal Team. By serving in these specialized units, troopers can develop skills that may assist them in seeking promotions or other especially desirable assignments during their careers at the DPS. From the perspective of several troopers whom the OCR interviewed, there is little transparency about the DPS’ process for selecting troopers for these opportunities. According to one female trooper who unsuccessfully applied for additional-duty opportunities in specialized units, the DPS did not explain why it did not select her for those opportunities, which made it impossible for her to know how she could improve the odds that the Department would select her for similar opportunities in the future. Because the specialized units did not include female troopers, and she believed she satisfied all

²²⁴ 28 C.F.R. § 42.304(g)–(g)(1).

²²⁵ DPS Response to OCR Data Request No. 29 (Aug. 28, 2014).

²²⁶ DPS, Field Training and Evaluation Program Procedure Manual 16 (2006).

²²⁷ *Id.* at 17.

the requirements for the assignments, her perception was that the DPS was not yet ready to include female troopers in those units. Another trooper confirmed to the OCR that, as to one of the units, a sergeant stated that female troopers are not welcome.

3. The OCR's Findings

Based on the record it developed in this matter, the OCR finds that the DPS is not in compliance with the Safe Streets Act's EEOP regulations because it does not analyze its training programs for entry-level troopers and has not developed a written plan to ensure women have sufficient access to them.

4. The OCR's Recommendations

To remedy the above deficiencies, the ALEA must design a system for annually monitoring the effectiveness of all of its trooper training programs, including the FTO Program, in-service training programs, and additional-duty assignments.²²⁸ As part of this assessment, the Agency should centrally collect the following data: each training opportunity it provides to troopers; the troopers who apply for the program, classified by sex; the troopers whom it selects to participate in the program, classified by sex; the reasons for selecting each participant; and the reasons for not selecting each rejected applicant.²²⁹ Each year, the ALEA should review this information and evaluate whether it is taking sufficient steps to include female troopers in its training programs. The Agency should also seek feedback from troopers about whether it provides sufficient notice to troopers of available training opportunities, provides adequate information to troopers about how it selects them to participate in training programs, and provides equitable training opportunities to male and female troopers.

Based on this information, the ALEA should identify what steps it will take to improve its training programs for troopers. As part of this plan, the Agency must revise the procedure manual for the FTO Program by removing both the sex-specific term "father-figure" and the stereotypical descriptions of how male and female troopers respond to challenges in the field. As to its in-service training programs, the ALEA should explain how it will provide similar training opportunities to male and female troopers who hold the same rank and work in the same division.²³⁰ The Agency should also describe how it will ensure that female troopers receive notice about training opportunities and the process for applying for them. To achieve these objectives, the ALEA should maintain a list of trooper training opportunities, as well as information about any pre-requisites for those opportunities, such as holding a certain rank or

²²⁸ See *Paradise* Consent Decree, *supra* note 22, ¶ 38. For those years when the DPS does not administer the FTO Program, it should still evaluate the effectiveness of its other training programs for entry-level troopers.

²²⁹ In the *Paradise* EEOP, the DPS acknowledged the importance of collecting data about trooper participation in its training programs. *Paradise* EEOP, *supra* note 62, at 5–6.

²³⁰ In allocating training opportunities, the DPS should consider a trooper's qualifications, experience, education, performance, and other reasonable, nondiscriminatory factors. See, e.g., Consent Decree, *McLaurin v. Nat'l R.R. Passenger Corp.*, No. 98CV2019, ¶ IV.G.1 (D.D.C. Sept. 2, 1999), ECF No. 24, <https://web.archive.org/web/20151223163249/http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1034&context=condec>.

having specialized skills. It should also post information on the Agency's intranet site about each training opportunity, including any pre-requisites, and how to apply for the opportunity; describe its process for making particular training decisions; and include a nondiscrimination provision in each training announcement. After selecting a trooper or troopers for a training opportunity, the ALEA should explain to each trooper who applied for the opportunity why it selected or did not select him or her for the training.

B. The ALEA's and the DPS' Obligations to Develop Appropriate EEO Policies and Related Training

Under the Safe Streets Act's nondiscrimination provision and its implementing regulations, the ALEA and the DPS must protect their employees from employment discrimination, including harassment and retaliation.²³¹

1. EEO Policy

a. Overview of the policy

Because the DPS is now part of the ALEA, it is subject to the Agency's personnel policies and procedures, including those related to fair employment practices.²³² On October 1, 2014, the ALEA issued two policies on EEO issues²³³ (EEO Policy and Recruitment & Selection Policy) that address the following topics: Title VII's protections against sex- and pregnancy-based discrimination, including harassment and retaliation; the ALEA's commitment to a work environment free from harassment; the multiple ways for employees to file EEO complaints with the Agency, the Alabama State Personnel Board, and the U.S. Equal Employment Opportunity Commission (EEOC);²³⁴ the ALEA's process for conducting prompt, thorough, and impartial complaint investigations;²³⁵ the prompt corrective action it will take against an employee who violates the policy; the protections from retaliation that apply to anyone who reports a violation of the EEO Policy or participates in a complaint investigation; the ALEA's duty to distribute the EEO Policy to employees and to ensure they understand the policy and related complaint

²³¹ 42 U.S.C. § 3789d(c)(1) (2012); 28 C.F.R. § 42.203(b)(9) (2014). Under the Safe Streets Act's nondiscrimination provision and its implementing regulations, the term "discrimination" includes harassment, *see* *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992), and retaliation. 28 C.F.R. pt. 42, subpt. D, app. A; *see also* *Riverside Cty. Sheriff's Office*, No. 10-OCR-0665, Office for Civ. Rts. Ltr. of Finding 13, 15 (U.S. Dep't of Justice Mar. 23, 2012), <https://web.archive.org/web/20151223163353/http://ojp.gov/about/ocr/pdfs/CA-10-OCR-0665.pdf>.

²³² ALA. CODE § 41-27-3 (2015).

²³³ ALEA, Equal Employment Opportunity, ALEA Personnel Policies & Procedures (Oct. 1, 2014) [hereinafter EEO Policy]; Recruitment & Selection Policy, *supra* note 50. These policies superseded the DPS' EEO and sexual harassment policies.

²³⁴ By creating this reporting framework, the ALEA seeks to reassure employees that they do not need to file complaints with those who engaged in the prohibited conduct at issue. *See* EEO Policy, *supra* note 233, Section III ("In no event shall the employee's complaint of harassment or discrimination be filed with or appealed to the alleged harasser."). The Agency also strongly encourages employees to report all incidents of discrimination that they experience or observe.

²³⁵ In conducting these investigations, the ALEA notes that it will maintain confidentiality, to the extent possible.

procedures; employee responsibilities to comply with the EEO Policy and to report any violations of it; and the applicability of the EEO Policy to all work settings.²³⁶ While the EEO Policy has several strong features, it does not reference the ALEA's nondiscrimination obligations under the Safe Streets Act and its implementing regulations; reference the DPS' EEO Complaint Form,²³⁷ which assists employees who want to file discrimination complaints; provide contact information for the ALEA Personnel Director, Chief Legal Counsel, or Director, with whom employees can file discrimination complaints; permit employees to file anonymous complaints; identify timeframes for handling complaints; or provide a mechanism for regularly reviewing and revising the EEO Policy.

While the ALEA clearly takes seriously its responsibility to implement an effective EEO policy, the OCR is concerned that the Agency's commitment in this area does not align with the DPS' workforce culture. During the OCR's site visit, it interviewed DPS sworn personnel assigned to DPS headquarters, four posts, and the Academy. Several of these interviewees explained that, at four of these locations, they experienced or observed behavior that, under the ALEA's EEO Policy, constituted sexual harassment. Various female employees whom the OCR interviewed recounted their own experiences of sexual harassment. In some instances, male employees inappropriately touched them or made inappropriate, sex-based remarks to them.²³⁸ At other times, male supervisors assigned female employees to certain assignments because of their sex, even though those employees had already complained about being sexually harassed during similar assignments. Occasionally, male troopers observed offensive conduct but declined to report it to the DPS. In one such instance, a trooper told the OCR he was not comfortable complaining on behalf of a female colleague about what he perceived to be harassment.

Before the ALEA merger, the DPS had policies prohibiting discrimination, including sexual harassment and retaliation, but several female sworn personnel suggested to the OCR that these policies were wholly ineffective.²³⁹ From their perspective, filing a complaint would not have provided meaningful relief from discrimination because their supervisors were unreceptive or hostile to such complaints. Indeed, in some instances, their supervisors either participated in or condoned the improper behavior at issue. Two female troopers also expressed concern to the OCR about retaliation. They did not report harassment to the DPS because they did not believe that the Department would punish other employees who would invariably treat them negatively because of their complaints. From their vantage point, filing an EEO complaint would be tantamount to "career suicide" or signing their own "death warrant."

²³⁶ EEO Policy, *supra* note 233, at Sections I–IX.

²³⁷ DPS, Order No. 600, EEO Complaint Form (Form No. 600) (July 1, 1992).

²³⁸ The DPS also provided information to the OCR about a male employee acting improperly toward a female employee. In 2012, the Department investigated a sexual harassment complaint that a female employee filed against her supervisor. During the Department's interview of the supervisor, he reported that another male employee, while in the complainant's presence, animatedly discussed receiving oral sex.

²³⁹ DPS, Order No. 30, Equal Employment Opportunity 1 (May 1, 1999); DPS, Order No. 38, Sexual Harassment 2 (May 1, 2004).

b. The OCR's findings

The OCR commends the ALEA for issuing its EEO Policy, which will hopefully assist the Agency in preventing and promptly correcting discrimination, including sexual harassment²⁴⁰ and retaliation. At the same time, based on the record it developed in this matter, the OCR finds that the ALEA is not in compliance with the Safe Streets Act's nondiscrimination provision and its implementing regulations because the EEO Policy does not adequately protect employees from employment discrimination, including harassment and retaliation.

c. The OCR's recommendations

The Agency's EEO Policy and EEO program cannot, overnight, change a DPS culture that displays hostility toward some of its female employees. Because the OCR received so much negative information from such a small group of employees, the ALEA should be especially vigilant in implementing and monitoring an effective EEO program. To strengthen the EEO protections that apply to DPS personnel, the Agency should make five revisions to its EEO Policy and four additional refinements to its EEO program.

Changes to the EEO Policy²⁴¹

- The EEO Policy should reference the nondiscrimination requirements of the Safe Streets Act and its implementing regulations, which closely relate to those of Title VII.
- The EEO Policy should reference either the DPS' EEO Complaint Form or another complaint form that would supersede the DPS document and be available to employees throughout the Agency.
- The EEO Policy should include the contact information for the ALEA Personnel Director, Chief Legal Counsel, and Director so that employees can easily file discrimination complaints with these individuals.

²⁴⁰ See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 809 (1998); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 73 (1986).

²⁴¹ In making recommendations to the ALEA and the DPS about ways to improve their EEO program, the OCR relies on several of the EEOC's best practices for developing a model EEO program, a culture of nondiscrimination, and an effective program for retaining employees. See EEOC, *THE MODEL EEO PROGRAM* (2004) [hereinafter *MODEL EEO PROGRAM*], <https://web.archive.org/web/20151223163447/http://www.eeoc.gov/federal/directives/715instruct/section1.html>; *Best Practices for Employers and Human Resource/EEO Professionals*, EEOC, <https://web.archive.org/web/20151223163519/http://www.eeoc.gov/eeoc/initiatives/e-race/bestpractices-employers.cfm> (last visited Dec. 23, 2015); *Tips on Employee Retention*, EEOC, <https://web.archive.org/web/20151223163550/http://www.eeoc.gov/federal/retention.cfm> (last visited Dec. 23, 2015). The ALEA and the DPS should consult these resources in implementing the OCR's recommendations.

- The EEO Policy should permit employees to file anonymous complaints and explain how the ALEA will preserve employee anonymity, if requested.²⁴²
- The EEO Policy should include timeframes for investigating and resolving EEO complaints. For example, in the DPS' predecessor EEO policy, the DPS committed to investigating a complaint and briefing the DPS Director on the investigation's findings within thirty days.²⁴³ By adopting a similar standard that will apply throughout the organization, the ALEA can reassure DPS employees, wherever they work, that investigators will expeditiously handle any EEO complaints they file. The EEO Policy should also include timeframes for filing complaints with the EEOC.

Additional Changes to the EEO Program

- The ALEA should develop a mechanism to regularly review the EEO Policy to determine whether it remains effective or whether the Agency should revise it to ensure compliance with the Safe Streets Act and its implementing regulations.²⁴⁴
- The ALEA's leadership should annually reiterate its support for the EEO Policy to all Agency employees, including DPS personnel.²⁴⁵ As part of this effort, the ALEA should (1) determine whether to revise the EEO Policy, based on issues that arose during the preceding year; (2) reissue the EEO Policy; and (3) publish data on its intranet site on the number, type, and disposition of EEO complaints it received during the prior year.
- Because female employees are reluctant to report instances of discrimination, the ALEA should develop an opinion, or climate, survey and regularly administer it to all employees. To achieve a high level of employee participation in it, the ALEA should allow employees to complete the survey anonymously. Through these periodic surveys, the Agency could gain important insights about how employees view the EEO program, while assessing the "pulse" of the Agency.²⁴⁶ Given the significant changes related to the ALEA merger, this information could be especially timely and useful. By seeking employee feedback, the Agency would also signal to all of its sworn personnel, including female troopers, that their views are important, which could enhance employee morale.²⁴⁷

²⁴² Consent Decree, *EEOC v. Seapod Pawnbrokers, Inc.*, No. 14-cv-4567, ¶ C.F (E.D.N.Y. Jan. 22, 2015), ECF No. 20, https://web.archive.org/web/20151223163624/http://www.bloomberglaw.com/public/desktop/document/Equal_Employment_Opportunity_Commission_v_Seapod_Pawnbrokers_Inc_?1450888569.

²⁴³ Order No. 30, *supra* note 239, at 2.

²⁴⁴ MODEL EEO PROGRAM, *supra* note 241.

²⁴⁵ *Id.*

²⁴⁶ *See Tips on Employee Retention*, *supra* note 241; *see also* Valerie H. Mueck, Assessing the Workplace for a Climate Change, EXCEL Training Conference (2010), <https://web.archive.org/web/20151223163709/http://www.eetraining.eeoc.gov/images/content/9D%20Mueck%20slides%20-%20Assessing%20the%20Workplace%20for%20a%20Climate%20Change%20-%20EXCEL%202010%20%282%29.pdf>.

²⁴⁷ U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-639, DHS HAS OPPORTUNITIES TO BETTER IDENTIFY AND ADDRESS BARRIERS TO EEO IN ITS WORKFORCE (Oct. 1, 2009), <https://web.archive.org/web/20151223163746/http://www.gao.gov/assets/300/294474.html>.

- The ALEA should conduct exit interviews of troopers who voluntarily leave the organization. From September 1, 2011, through September 24, 2014, 125 troopers left the DPS: ninety-nine employees, including six women, retired; twenty-five employees, including one woman, resigned; and the DPS terminated one person's employment. The Department did not talk to any of these employees about their experiences working at the DPS. By conducting exit interviews, the ALEA could learn valuable information about why female troopers resign, such as whether discrimination, including harassment and retaliation, contributed to that decision.²⁴⁸ With this information, the Agency could refine its EEO program throughout the organization and at specific facilities.²⁴⁹

2. The ALEA's and the DPS' Efforts to Notify Employees About the Agency's EEO Program

Together, the ALEA and the DPS inform DPS personnel about the Agency's EEO program by including the EEO Policy in the Agency's Personnel Policies & Procedures Manual (Manual), placing EEO information at the DPS' facilities, providing Academy training to trooper recruits, and providing in-service training to troopers.

a. Personnel Policies & Procedures Manual and Posters

The ALEA includes the EEO Policy in its Manual. Consistent with the DPS' practice before its merger with the ALEA, the Agency posts this Manual on its intranet site so that employees can access it. Each year, all DPS employees must certify that they reviewed the EEO Policy, along with the other policies in the Manual, and agree to adhere to it. The DPS also provides information at its facilities about the Agency's EEO program. At each facility, the DPS posts a notice from the EEOC about an employee's protections from discrimination and retaliation, including under Title VII.²⁵⁰ Each year, representatives from the DPS' Office of Inspections visit a sample of facilities to confirm they properly display this poster. To conserve resources, the DPS primarily inspects facilities that are within a seventy-five-mile radius of the DPS' headquarters in Montgomery, Alabama. As a result, between 1999 and August 8, 2012, the DPS never inspected the Huntsville Driver License Examining District Office or the Huntsville Trooper Post to determine whether they posted appropriate EEO information.

b. Academy training for trooper recruits

At the DPS' Academy for trooper recruits, the APOSTC requires the DPS to deliver APOSTC-approved training on Title VII. While the APOSTC prepared the lesson guide for this course in

²⁴⁸ See *Tips on Employee Retention*, *supra* note 241.

²⁴⁹ *Id.*

²⁵⁰ EEOC, Equal Employment Opportunity Is the Law (Nov. 2009), https://web.archive.org/web/20151223163815/http://www1.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf.

December of 2012, the guide includes student handout and test materials from 2002.²⁵¹ The student handout generally describes Title VII and sexual harassment, but does not provide sufficient detail about prohibited discrimination, including retaliation. Attorneys from the DPS' legal unit supplement the APOSTC's curriculum by providing detailed training about prohibited sex discrimination, sexual harassment, and retaliation, and the process for filing employment discrimination complaints with the DPS and the EEOC.

c. In-service training for troopers

Before the ALEA merger, the DPS required all supervisors to attend annual EEO training, but had no formal EEO training program for non-supervisory troopers. Once these troopers left the Academy, the Department did not provide regular in-service training to them on its nondiscrimination policy, anti-harassment policy, or process for filing employment discrimination complaints. Rather than having a training program for all troopers, the DPS relied on leadership at individual posts to determine whether and how troopers should learn about EEO issues. While some post commanders required troopers under their supervision to take online nondiscrimination and anti-harassment courses provided by the SPD, many troopers received no EEO training. Among the troopers whom the OCR interviewed, most reported that they did not receive regular training on EEO topics, including on how to file a complaint, and many acknowledged that the only time they received such training was at the Academy.

In October and November of 2014, the ALEA provided training, through the SPD, to all DPS personnel about the Agency's EEO program, nondiscrimination and anti-harassment policies, and complaint procedures. The Agency required all employees to attend this training and documented their attendance at it.

d. The OCR's findings

In providing training to all DPS employees, the ALEA took a significant step to notify personnel about the Agency's EEO program. At the same time, based on the record it developed in this matter, the OCR finds that the ALEA and the DPS are not in compliance with the Safe Streets Act's nondiscrimination provision and its implementing regulations because they have not taken sufficient steps to notify employees about their EEO program. The OCR is not confident that, by providing one training session, the ALEA reversed the effects of the DPS' longstanding failure to develop an adequate EEO training program. As the OCR discusses above, the DPS permitted a culture to develop that tolerated – and in some cases abetted – the mistreatment of female employees, compared to their male peers, and that discouraged women from filing discrimination complaints to improve their work environments.

²⁵¹ The APOSTC's training also covers the Americans with Disabilities Act of 1990 (ADA), but does not discuss the ADA Amendments Act of 2008, which substantially amended the ADA.

e. The OCR's recommendations

The ALEA and the DPS should strengthen their efforts to educate recruits and troopers about their rights and responsibilities under the ALEA's EEO program by implementing the following three recommendations:

- The DPS should confirm, at least annually, that all of its facilities post information for employees about the Agency's EEO program. If it is not feasible for personnel from headquarters to perform all of these inspections each year, the Department should develop an alternative system to conduct this site monitoring.
- As to the Academy training for recruits, the ALEA should ask the APOSTC to update its Title VII curriculum and encourage it to ask the SPD for help in developing an appropriate, comprehensive training program. The ALEA should also provide the same information to recruits that it provided to incumbent employees through its in-service training program.
- The ALEA and the DPS should bolster their efforts to provide information about the Agency's EEO program to DPS employees. To ensure employees can easily access the ALEA's EEO training materials, the Agency should post them on its intranet site. Going forward, it should also require all employees, including supervisors, to attend in-service training on the EEO Policy at least once each year, and document their attendance at those sessions.²⁵² The training should be at least as comprehensive as the training the ALEA provided to employees in 2014 and should discuss how the EEO program supports the DPS' mission of providing law enforcement services throughout Alabama.²⁵³ In training supervisors, the ALEA should include segments on their accountability for the Agency's EEO program and effective ways to detect, prevent, and address discrimination, including harassment and retaliation.²⁵⁴ Well-trained supervisors will be best able to advance the core principles of the ALEA's EEO program.²⁵⁵

By implementing these recommendations, the ALEA and the DPS can strengthen their efforts to make the Department more welcoming to women.

²⁵² MODEL EEO PROGRAM, *supra* note 241.

²⁵³ *Id.*

²⁵⁴ *Id.*; see also *Facts About Retaliation*, EEOC, <https://web.archive.org/web/20151223163844/http://www.eeoc.gov/laws/types/facts-retal.cfm> (last visited Dec. 23, 2015); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67–68 (2006).

²⁵⁵ E. Jason Tremblay, *Properly Investigating Complaints of Harassment/How to Limit a Company's Exposure*, BUS. L. TODAY, Sept./Oct. 2008, <https://web.archive.org/web/20151223163916/http://apps.americanbar.org/buslaw/blt/2008-09-10/tremblay.shtml>.

C. The OCR's Additional Observations and Recommendations, Based on Witness Interviews

During the OCR's interviews of more than forty current and former DPS employees, interviewees talked about how the Department could improve its efforts to retain female troopers. Generally, these observations related to the DPS' lack of a mentorship program for female troopers, as well as its processes for making initial post assignments, transferring troopers to different assignments, making promotion decisions, and providing limited-duty leave. To improve the DPS' performance in these areas, the OCR makes the following recommendations.

1. Mentorship Program

The DPS does not offer a formal mentorship program for troopers.²⁵⁶ According to the EEOC, the absence of sufficient mentoring is a barrier to career advancement and career development for women.²⁵⁷ During the OCR's interviews of female current and former employees, several interviewees noted that the DPS does not facilitate their ability to form and benefit from mentor-mentee relationships. At the same time, several of these women had the perception that male troopers benefited significantly from informal mentorship relationships with other male troopers. In what several interviewees separately described as a "good old boys" system, male troopers regularly favor other male troopers over females, making it more difficult for female troopers to succeed. To address this perceived disadvantage, two interviewees recommended that the DPS develop a formal mentorship program for all troopers in an effort to support female troopers and encourage more of them to stay with the organization.

We agree with this recommendation. The ALEA should design and implement a mentorship program for entry-level troopers that will assist all troopers, including females, flourish in their positions.²⁵⁸ Through this program, trooper mentees could receive more information about training opportunities, career paths within the organization, and promotion opportunities.²⁵⁹ A mentorship program could also help the Agency identify future leaders while deepening participants' professional ties to the agency.²⁶⁰

²⁵⁶ The FTO Program is different than a formal mentorship program. During the FTO period, entry-level troopers practice the skills they learned during the Academy and FTO instructors formally evaluate whether these troopers satisfactorily perform their job responsibilities. Mentorship programs, on the other hand, encourage professional development and build relationships apart from the formal evaluation process. See Harvey Sprafka & April H. Kranda, *Institutionalizing Mentoring in Police Departments*, THE POLICE CHIEF, Jan. 2008, https://web.archive.org/web/20151223163948/http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1375&issue_id=12008.

²⁵⁷ EEOC, BEST PRACTICES OF PRIVATE SECTOR EMPLOYERS, https://web.archive.org/web/20151223164026/http://www.eeoc.gov/eeoc/task_reports/best_practices.cfm.

²⁵⁸ By including all troopers in this program, the DPS can avoid any concerns that it would be favoring female troopers. *Id.*

²⁵⁹ See Sprafka & Kranda, *supra* note 256. In developing this program, the DPS should consider whether to include elements from its earlier career counseling and career development programs for troopers. See *Paradise* EEOC, *supra* note 62, at 5.

²⁶⁰ BEST PRACTICES OF PRIVATE SECTOR EMPLOYERS, *supra* note 257.

2. Post assignments

After troopers graduate from the Academy, the DPS assigns them to a post. Under Alabama law, entry-level troopers must accept an assignment anywhere in the state; the SPD notifies applicants of this requirement during the application process. At the Academy, the DPS asks recruits to identify where they would like to be assigned, but the Department is not bound by these geographic preferences. Based on their post assignments, troopers may need to relocate to another part of the state.

The OCR recognizes that troopers have little control over where they work within the ALEA. But Alabama law does not curtail the Agency's ability to identify factors that it will consider in making trooper assignments.²⁶¹ The ALEA should gauge trooper sentiment about its process for making post assignments. To that end, when the Agency designs the climate survey that the OCR recommends in discussing the EEO Policy, it should ask troopers to provide feedback on whether it should change its process for assigning entry-level troopers to particular posts.

3. Transfer decisions

The DPS has had substantial declines in the size of its trooper corps. According to one estimate, the Department should hire an additional 582 troopers and 101 corporals to best fulfill its mission.²⁶² Among the personnel whom the OCR interviewed, there was broad consensus that many units are incredibly short-staffed, as compared to their prior staffing levels. But in discussing the DPS' process for filling these gaps, which the ALEA now handles, several troopers expressed concern that the transfer process was opaque and fraught with insider selection. Often, according to these troopers, a male trooper's ability to secure a transfer rested more on that trooper's relationship with another male trooper, and less on a transparent process that applied the same way to everyone.

The ALEA can transfer a trooper to another assignment within the Agency at the request of the trooper or the ALEA Secretary.²⁶³ To address troopers' perceptions that the DPS made discriminatory transfer decisions,²⁶⁴ the ALEA should provide more information to troopers about the Agency's transfer process. As part of this effort, each unit should post information on the ALEA's intranet site about transfer opportunities; include a nondiscrimination provision in each transfer announcement; describe its process for making particular transfer decisions;

²⁶¹ The ALEA cannot make assignment decisions based on an employee's sex. 28 C.F.R. § 42.202(g), .203(9) (2014). The Safe Streets Act's EEOP regulations also require the ALEA to identify the number of men and women assigned to each of its locations and on each of its shifts. *Id.* § 42.304(a). While the OCR's Compliance Review does not address the ALEA's compliance with these requirements, it still must satisfy them.

²⁶² T. Beau Elliott & W. (Bill) Engelke, Alabama Trooper Staffing Analysis: Workshop Results 5, 14 (Feb. 2014).

²⁶³ Recruitment & Selection Policy, *supra* note 50, at 30.

²⁶⁴ The ALEA cannot make transfer decisions based on an employee's sex. 28 C.F.R. § 42.202(g), .203(9). The Safe Streets Act's EEOP regulations also require the ALEA to analyze its transfer procedures and to identify, in its EEOP, the number of troopers, broken down by sex, who applied for and received transfers. *Id.* § 42.303(c)(3), .304(d). While the OCR's Compliance Review does not address the ALEA's compliance with these requirements, it still must satisfy them.

explain how troopers can apply for those opportunities; and explain why it selected or did not select a trooper for a particular transfer.

4. Promotion decisions

Before the DPS became part of the ALEA, the DPS and the SPD coordinated the process for awarding promotions. As with the trooper selection process, the SPD notified troopers about available promotions, evaluated promotion applications, and issued a Certification of Eligibles to the DPS that identified troopers who were qualified for promotion.²⁶⁵ During the OCR's interviews, several individuals expressed concern about the DPS' promotions process and encouraged the Department to make it more equitable. From their perspective, the DPS handled promotions the same way it handled transfers – by making decisions because of sex-based favoritism, sometimes in contravention of DPS policy, rather than based on the merits of individual candidates' applications.

To address troopers' concerns that the DPS made discriminatory promotion decisions,²⁶⁶ the ALEA should provide more information to troopers about the promotions process. As part of this effort, the Agency should partner with the SPD to describe the process for making promotion decisions and explain why it selected or did not select a trooper for a particular promotion.

5. Limited-duty status

As part of its policy to comply with the Americans with Disabilities Act of 1990 (ADA Policy), the ALEA permits an employee to work in a limited-duty status if she “returns from a personal or work-related injury or illness to medically restricted or modified duties.”²⁶⁷ Under this policy, if a limited-duty assignment is available, the Agency will modify the employee's job. Generally, under the policy, an employee can only work in a limited-duty status for ninety days, although the ALEA can agree to extend this time period, on a case-by-case basis. The Agency's issuance of this policy appears to address the concerns of several trooper interviewees who noted that, before the reorganization, the DPS did not have a light-duty policy for troopers. At the same time, the policy neither notes that the limited-duty category encompasses pregnancy-related restrictions nor confirms that the Agency applies the policy consistently to all employees, irrespective of their pregnancy status.

In addition to an employer's duties to pregnant employees under the ADA, under Title VII, an employer should treat pregnant employees the same way it treats other employees who have

²⁶⁵ Recruitment & Selection Policy, *supra* note 50, at 31.

²⁶⁶ The ALEA may not make promotion decisions based on an employee's sex. 28 C.F.R. § 42.202(g), .203(9). The Safe Streets Act's EEOP regulations also require the ALEA to analyze its promotion procedures and to identify, in its EEOP, the number of troopers, broken down by sex, who applied for and received promotions. *Id.* § 42.303(c)(3), .304(d). While the OCR's Compliance Review does not address the ALEA's compliance with these requirements, it still must satisfy them. *See also Paradise Consent Decree, supra* note 22, ¶ 38.

²⁶⁷ ALEA, Americans with Disabilities Act, as Amended, ALEA Personnel Policies & Procedures 10 (Oct. 1, 2014).

similar restrictions on their ability or inability to work.²⁶⁸ Thus, if an employer creates a light-duty option for employees, it should ensure that employees who are pregnant or may become pregnant can seek and receive light-duty assignments on the same basis as other similarly situated employees.²⁶⁹ The ALEA generally recognizes its obligation to provide equal employment opportunities to all employees without regard to their pregnancy status.²⁷⁰ But to ensure the DPS consistently makes limited-duty assignments and to provide better guidance to personnel about the availability of those assignments, the ALEA should revise the ADA Policy's definition of the term "limited duty" to confirm that it encompasses pregnancy-related restrictions. The ALEA should also revise the policy to note that the Agency will offer limited-duty assignments to pregnant employees the same way it offers such assignments to others who are similar in their ability or inability to work.

VIII. The ALEA's and the DPS' Obligation to Assign Personnel to Their Equal Employment Opportunity Program

Under the Safe Streets Act's EEOP regulations, a recipient must designate personnel to implement and monitor its equal employment opportunity program (EEO Program) and describe their specific responsibilities.²⁷¹

A. The ALEA's and the DPS' Assigned Personnel

The ALEA relies on an Equal Employment Opportunity Officer (EEO Officer) to administer its EEO Program. To provide direction to the EEO Officer, who is also the ALEA's Personnel Director, the Agency issued a position description, which explains his responsibilities to plan, coordinate, and direct the EEO Program. Among the varied duties of the EEO Officer, he is to:

- direct operations as to employee hiring, orientation, training and development, career counseling, and promotion;
- develop, update, and implement personnel policies so that the ALEA complies with applicable federal employment laws;
- ensure managers and employees understand and consistently apply federal employment laws and the Agency's personnel policies;
- investigate and resolve complaints from applicants and employees;
- identify training and development courses to strengthen employee performance; and

²⁶⁸ 42 U.S.C. § 2000e(k) (2012).

²⁶⁹ See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015); see also EEOC, No. 915-003, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES (June 25, 2015), https://web.archive.org/web/20151223164101/http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; Consent Decree, *United States v. Town of Davie*, No. 12-cv-61249, ¶ C.1.a (S.D. Fla. Sept. 13, 2012), ECF No. 7, <https://web.archive.org/web/20151223164130/http://www.justice.gov/sites/default/files/crt/legacy/2012/09/27/townofdaviecd.pdf>.

²⁷⁰ EEO Policy, *supra* note 233, at 3; Recruitment & Selection Policy, *supra* note 50, at 28.

²⁷¹ 28 C.F.R. § 42.304(i) (2014).

- review all personnel actions to ensure they comply with federal laws prohibiting discriminatory employment practices.²⁷²

The ALEA relies on additional personnel to augment the EEO Officer's efforts, as to recruiting and hiring female troopers. The Agency's Public Information Office (PIO) administers the recruitment program and consists of a sergeant and eight public information officers. During the OCR's site visit, several DPS officials acknowledged that the PIO lacked adequate staffing and funds, due in part to recent budget reductions. An acting personnel manager at the ALEA manages the trooper hiring process; she supervises eight positions.

B. The OCR's Findings and Recommendations

As the OCR discusses in the previous sections of the Compliance Review Report, the ALEA and the DPS fall short of their collective EEO obligations regarding recruitment, selection, and retention, and do not dedicate adequate resources to their EEO efforts. Based on the record it developed in this matter, the OCR finds that the ALEA and the DPS are not in compliance with the Safe Streets Act's EEOP regulations because they do not designate sufficient personnel to implement and monitor their EEO Program. In implementing the OCR's recommendations, the ALEA and the DPS should determine whether they need to hire additional staff or whether they can assign additional tasks to existing employees. If the Agency and the Department ask incumbent employees to handle additional EEO-related tasks, they should ensure that the employees understand their responsibilities by, for instance, revising or issuing additional position descriptions. The ALEA and the DPS should also give any assigned personnel the appropriate authority to satisfy their new responsibilities.

IX. The ALEA's and the DPS' Obligation to Provide Information About Their EEO Program

As the OCR discusses throughout this Report, a recipient's EEO program should be in writing and should provide information about, among other things, the demographics of its workforce, compared to the demographics of its labor market,²⁷³ its recruitment efforts,²⁷⁴ its applicant flow data,²⁷⁵ its reliance on particular selection devices,²⁷⁶ and its training programs.²⁷⁷ Under the Safe Streets Act's EEOP regulations, a recipient must have a plan to disseminate this information to employees, applicants, and the public.²⁷⁸

²⁷² See ALEA, Form 40, Personnel Director (Mar. 3, 2014).

²⁷³ 28 C.F.R. § 42.304(a).

²⁷⁴ *Id.* § 42.304(g)(1)–(2).

²⁷⁵ *Id.* § 42.304(c).

²⁷⁶ *Id.* § 42.304(g)–(g)(1).

²⁷⁷ *Id.*

²⁷⁸ *Id.* § 42.304(h).

A. The ALEA's and the DPS' Efforts to Comply with This Requirement

While the ALEA and the DPS distribute some information about their EEO Program to employees,²⁷⁹ they do not provide information about any of the above-listed topics to personnel. They also do not disseminate any of this information to trooper applicants or the public, although the SPD, in its trooper vacancy announcements, and the DPS, on its website,²⁸⁰ note that Alabama and the DPS are equal opportunity employers. The DPS notified the OCR that it would provide its most recent utilization report, which includes information about its EEO Program, to those employees and members of the public who request it.²⁸¹ Inexplicably, however, the DPS does not notify these individuals about the existence of this report or how to obtain it.

B. The OCR's Findings and Recommendations

Based on the record it developed in this matter, the OCR finds that the ALEA and the DPS are not in compliance with the Safe Streets Act's EEOP regulations because they do not disseminate adequate information about their EEO Program. To ensure that members of the public, potential trooper applicants, and employees have sufficient information about the ALEA's and the DPS' EEO Program, the ALEA should post the OCR's Report, the DPS' most recent utilization report, and updated utilization reports on its website and on its intranet site for employees. Going forward, as the ALEA and the DPS implement the OCR's recommendations, it should regularly provide, on its website and on its intranet site, updated information about its workforce demographics, recruitment efforts, applicant flow data for the trooper position, selection devices for hiring troopers, and training programs for troopers.

X. Conclusion

This letter serves as notice that the OCR has concluded that the ALEA and the DPS must undertake additional steps to ensure compliance with the Safe Streets Act and its implementing regulations. Upon receipt of this letter, please have representatives from the ALEA and the DPS notify Attorney Advisor Christopher Zubowicz at 202.305.9012 or christopher.zubowicz@usdoj.gov whether the Respondents wish to engage in voluntary compliance negotiations before the DOJ makes a determination about the Respondents' compliance or noncompliance with the Safe Streets Act and its implementing regulations.²⁸² As part of this discussion, the ALEA and the DPS should be prepared to discuss their responses to the Report's findings and recommendations. The OCR is amenable to providing technical assistance to the ALEA and the DPS as they implement the Report's recommendations. Thank you for the cooperation and assistance that your staff provided to OCR Attorney Advisors Christopher Zubowicz, Benjamin Hernández-Stern, and Shelley Langguth throughout this Compliance Review.

²⁷⁹ See Compliance Review Report, *supra* Section VII.B.2.

²⁸⁰ *Alabama Department of Public Safety Mission Statement*, ALEA, <https://web.archive.org/web/20151223164209/http://dps.alabama.gov/Home/wfContent.aspx?ID=0&PLH1=plhDPS-MissionStatement> (last visited Dec. 23, 2015).

²⁸¹ DPS, EEOP Utilization Report 3 (Oct. 2, 2014) (on file with the OCR).

²⁸² See 28 C.F.R. § 42.206(e)(3).

Spencer Collier, Secretary, Alabama Law Enforcement Agency; Colonel John E. Richardson,
Acting Director of Public Safety, Alabama Department of Public Safety
January 4, 2016
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The ALEA and the DPS should be mindful that federal law protects persons who participated in the OCR's Compliance Review from retaliation for having provided information to the OCR. The OCR will initiate an investigation if it should receive credible evidence of reprisal.

This Report is a public document that the OCR will post on its website.

Sincerely,



Michael L. Alston
Director

Enclosure

cc: Robert J. Bentley, Governor
State of Alabama
VIA CERTIFIED MAIL

Jason Swann, Executive Counsel
Alabama Law Enforcement Agency
VIA E-MAIL AND CERTIFIED MAIL

William M. Babington, Division Chief
Law Enforcement and Traffic Safety Division
Alabama Department of Economic and Community Affairs
VIA E-MAIL AND CERTIFIED MAIL

R. Alan Benefield, Executive Secretary
Alabama Peace Officers Standards and Training Commission
VIA E-MAIL AND CERTIFIED MAIL

George L. Beck, Jr., United States Attorney
Middle District of Alabama
VIA E-MAIL

Kenyen R. Brown, United States Attorney
Southern District of Alabama
VIA E-MAIL

Joyce White Vance, United States Attorney
Northern District of Alabama
VIA E-MAIL

Appendix A: Excerpt from DPS Order 37

DPS PHYSICAL FITNESS STANDARDS CHART

CONSISTENTLY EXCEEDS STANDARDS – 12 POINTS **APPRAISAL POINTS 4**

AGE	PUSH-UPS	SIT-UPS	RUN TIME	WALK TEST
20-29	37	42	14:24	NA
30-39	30	39	15:08	
40-49	24	34	15:57	
50-59	19	28	16:58	
60-Over	18	22	17:46	

EXCEEDS STANDARDS – 9-11 POINTS **APPRAISAL POINTS 3**

AGE	PUSH-UPS	SIT-UPS	RUN TIME	WALK TEST
20-29	33	40	14:55	34:30
30-39	27	36	15:26	35:00
40-49	21	31	16:27	35:30
50-59	15	26	17:24	36:00
60-Over	15	20	18:16	36:30

MEETS STANDARDS – 6-8 POINTS **APPRAISAL POINTS 2**

AGE	PUSH-UPS	SIT-UPS	RUN TIME	WALK TEST
20-29	29	38	15:26	35:00
30-39	24	35	15:57	35:30
40-49	18	29	16:58	36:00
50-59	13	24	17:55	36:30
60-Over	10	19	18:44	37:00

PARTICIPATES STANDARDS – 3-5 POINTS **APPRAISAL POINTS 1**

AGE	PUSH-UPS	SIT-UPS	RUN TIME	WALK TEST
20-29	22	33	16:33	36:00
30-39	17	30	17:14	36:30
40-49	11	24	18:00	37:00
50-59	9	19	18:48	37:30
60-Over	6	15	19:21	38:00

A participant’s final physical fitness must meet standards to satisfy performance appraisal requirements.

If the participant fails to achieve the standard number of repetitions in a particular category, he/she will revert to the lesser capacity. For example, if the participant is required to perform 37 push-ups to consistently exceed standards, but he/she performs only 36 push-ups, the participant will be scored in the exceeds standards category.

A participant must perform the DPS Physical Fitness Test at least once in a calendar year, unless the participant has an approved medical waiver.

VALIDITY REPORT ON APOSTC PAAT

DAVID P. JONES, Ph.D.

January 4, 2016

Introduction

I currently am President and CEO of Growth Ventures, Inc., a human resources consulting organization headquartered in the State of Michigan, USA. I hold a Ph.D. in Industrial/Organizational Psychology gained from Bowling Green University in 1976. My more than 35 years' experience in the areas of talent assessment, acquisition, and retention has included hands-on design and implementation of candidate assessment and selection procedures. This work has been executed across thousands of job titles in both the public and private sectors, and has taken place in the United States, as well as globally.

I have been qualified by federal courts to serve as an expert consultant and expert witness in connection with matters related to reviewing and providing testimony regarding the professionalism and legal defensibility of organizations' employment selection procedures. In particular, these assignments have called for assembling professional opinions regarding an employer's evidence of job-relatedness and business necessity for a broad range of assessment and selection tools, including entry-level tests of knowledge, skills, abilities, personal characteristics, and candidate physical ability and agility.

I was retained by the Office for Civil Rights (OCR), Office of Justice Programs (OJP), U.S. Department of Justice (DOJ) as a consultant to review the design, development, job-relatedness (validity), and business necessity of the Physical Agility/Ability Test (PAAT) created by the Alabama Peace Officers Standards and Training Commission (APOSTC), which is a tool currently used in screening candidates to enter the State's peace officer positions. My experience includes design, validation, and implementation of such entry-level physical agility

and physical ability testing procedures, as well as many other approaches followed in candidate screening and selection.

What This Report Will Examine and Conclude

I was asked to review information provided to the OCR by the APOSTC, the Alabama Department of Public Safety, and the Alabama Law Enforcement Agency concerning the State's undertaking of design, development, validation, and implementation of the PAAT in screening peace officer candidates. Among a range of documents received from the OCR, the information reviewed in most detail in preparing this report included three technical reports provided to the OCR by the State of Alabama. These included:

Volume I: Physical Abilities Analysis for the Birmingham Police Department, J. Hilyer, M. Weaver, T. Thorne, B. Spruiell and J. Gibbs, Division of Preventive Medicine, School of Medicine, The University of Alabama at Birmingham, August 1, 1998.

Volume II: Validation of Physical Ability and Physical Agility Tests, G. Hunter, M. Bamman, C. Wetzstein, J. Hilyer and M. Weaver, Exercise Physiology, Department of Human Studies, The University of Alabama at Birmingham, May 5, 1998.

A Physical Abilities Analysis and Job Task Validation Study for the Alabama Peace Officers Standards and Training Commission, J. Hilyer and M. Weaver, Division of Preventive Medicine, School of Medicine, The University of Alabama at Birmingham, October 18, 1999.

Other materials provided to the OCR by the State of Alabama for review in producing this report are cited on the reference page at the end of this report, along with references to the professional publications and regulatory documents referenced throughout the report.

As shown in the three document titles cited above, work undertaken by the Birmingham Police Department (BPD) and the APOSTC to produce job analysis studies and validation reports for the PAAT was executed more than 15 years ago. No documents were provided to the OCR concerning steps undertaken to drive ongoing evaluation or verification of the PAAT's job-relatedness and business necessity. Taking such actions is highly recommended, and provides a means for verifying whether an employee selection procedure actually operates as claimed during its initial design and implementation.

Such work also can ensure that changes in the makeup of an employer's jobs, alteration in the jobs' requirements, or even changes in the jobs' candidate groups and their qualifications can be addressed as timeframes as long as 15 years proceed. No such information, though, was provided by the State of Alabama for review. Hence, my review draws upon professional research, analyses, and technical documentation relatively aged compared to most employers' documentation of selection procedure job-relatedness and business necessity.

Based on the information reviewed, this report sets forth my professional opinions as to whether the content of the technical reports, the makeup of the PAAT, and the methods by which the PAAT has been used meet today's standards for documenting selection procedure job-relatedness and business necessity. The report also presents specific observations that drive the conclusions presented – observations that cite specific segments of the technical report materials referenced above. While obtaining additional information, such as the validation study data referenced in the *Volume II* document, would have provided an even more comprehensive means for arriving at the conclusions reported here, sufficient information was presented to produce the conclusions offered.

With respect to the BPD's claims of job-relatedness (validity) and business necessity for the PAAT and its method of use by the BPD, it is claimed in the *Volume II* document that:

“Content, construct, and criterion-based validity were estimated for the APOST physical ability and physical agility tests for applicant screening . . .” (Volume II, Pg. 7).

It is my professional opinion that the information offered fails to support this claim. While requirements of the three validation study approaches cited in the above *Volume II* claim are addressed in this report, it is my professional opinion that the State of Alabama has not offered acceptable evidence supporting the job-relatedness or business necessity of the PAAT and its method of use in candidate screening. Nor, in particular, does the information provided offer any evidence that the design and implementation of the PAAT addresses professional standards for evaluating and documenting the procedure's “test fairness,” including additional standards described in the U.S. Department of Justice (DOJ) *Uniform Guidelines on Employee Selection Procedures*, 28 C.F.R. § 50.14 (henceforth in this report, *Uniform Guidelines*).

The remainder of this report provides explanations of the review executed in arriving at these conclusions. First presented, though, are details that focus on explaining the professional standards employers need to meet in documenting their selection procedures' job-relatedness and business necessity.

Steps Required to Document Selection Procedure Validity

In reaching my opinions, I have drawn upon the principles and standards by which our profession is guided. These include:

- a. the *Principles for the Validation and Use of Personnel Selection Procedures ('SIOP Principles')* produced by the Society for Industrial and Organizational Psychology, 2003,
- b. the *Standards for Educational and Psychological Testing ('Standards')* produced by the American Educational Research Association, American Psychological Association, and National Council on Measurement in Education, 1999, and
- c. the *Uniform Guidelines on Employee Selection Procedures* produced by the Equal Employment Opportunity Commission, Civil Service Commission, Department of Labor, and Department of Justice, 1978.

In providing guidance to employers, the *Uniform Guidelines* cited above reference three types of "validity strategies" for documenting a selection procedure's validity:

"For purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies, or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, Section 14 of this part." (Uniform Guidelines, Section 5 A)

The three strategies cited by the *Uniform Guidelines*, and referenced as noted above in the BPD's *Volume II* report, are echoed in both the *SIOP Principles* and *Standards* cited above, as well. Produced by the Industrial/Organizational Psychology profession, the *SIOP Principles* address the same concepts presented in the *Uniform Guidelines*. The *SIOP Principles* also have been updated several times as a result of unfolding professional research undertaken since their initial preparation; the most recent update took place in 2003.

The *Standards*, a set of professional guidelines whose focus rests more on mental ability and personality assessment tools used in both academic and workplace settings, are updated periodically, as well; the most recent update took place in 1999. While focusing less primarily on the design and validation of physical ability assessment procedures, the *Standards* still provide clear technical guidance relevant in guiding the creating, implementing, and tracking of results for physical agility and ability assessment procedures.

As described in the *Uniform Guidelines*, *SIOP Principles*, and *Standards* together, each of the three validation study approaches cited above offers a means for gathering and interpreting evidence of a selection procedure's validity. The most effective way to undertake, or evaluate, selection procedure validity rests upon integrating the science and practical guidance provided across all three of the professional documents cited.

The most objective and empirically demonstrative approach, criterion-related validity is evidenced when an employer shows statistically that candidate "scores" on its selection procedure, even scores as basic as "pass vs. fail," relate in a statistically significant way to a criterion (job performance) measure of employee on-the-job accomplishment, e.g., achieving training success, obtaining successful supervisory performance ratings, reducing absenteeism rates, accidents or injuries experienced, achieving advancement or promotional results, or other measures that reflect an employee's true level of on-the-job performance success.

In producing statistical evidence of job-relatedness, criterion-related validation requires assembly and use of research samples sufficient in size to warrant meaningful statistical evaluation of a selection procedure's validity. Criterion-related validation also requires that the validation study's job performance information is collected in a manner that allows accurate, meaningful, unbiased analysis of employees' on-the-job performance. Achieving these prerequisites through properly designed research methodologies means that most any type of selection procedure can be evaluated through a criterion-related research design. The BPD claims evidence of criterion-related validity for the PAAT.

Content validation calls for documenting the extent to which "performing the content of a selection procedure" accurately parallels "performing the content of the job." Executing content

validation activities requires assembling and summarizing professional judgments that evaluate the degree to which candidate performance on the selection procedure can be viewed as drawing upon the same behaviors documented as important to performing the job.

Content validation becomes an appropriate strategy as the opportunity increases to show a linkage between observable features of the selection procedure and observable aspects of performing the job. An example would be undertaking content validation of a computer-based word processing test to assess candidates for a job where computer-based word processing is a key part of day-to-day job performance. Here, the parallel between the “content of the test” and the “content of the job” (computer-based work processing) is easily observed and, hence, easily documented through content validation. Documenting content validity would not be feasible, though, by claiming that the content of a “finger dexterity test” assesses the ability to execute the content of a computer-based word processor.

Executing content validation calls not only for reaching rational judgments regarding the relevance of a selection procedure, but for assembling statistical documentation that can be called upon to support such rational claims; e.g., using tools to document statistically significant agreement among Subject Matter Experts (SMEs) regarding the content validity of each element making up the selection procedure. The BPD claims content validity for the PAAT.

Construct validity involves assembling numerous research studies, evaluating a selection procedure’s operation in other well-researched studies, examining the psychometric characteristics of the procedure, and drawing upon large, meta-analytic databases to document the criterion-related validation of the procedure in other settings. Many times, a construct validity approach is based upon assembling multiple criterion-related validity studies executed in other similar settings, examining the overall pattern of results shown therein, and drawing upon this overall research to help frame the design of a new selection procedure.

Construct validation is seldom used to produce arguments for an employer selection procedure’s validity in the workplace. It reflects much more of an “academic approach” to drawing upon prior research findings in creating the overall design plans for a fundamentally new selection process. As shown in professional publications, the approach is almost never used

to document, or argue, the validity of an employer's selection process. The BPD claims construct validity for the PAAT.

Finally, an employer might set out to “transport” information regarding the criterion-related validity of a specific selection procedure from one location to another, from one department or agency to another, or from one job to another, thereby eliminating the need to conduct a local validation study. Here, the *Uniform Guidelines Interpretation and Clarification (Questions and Answers)* (1980) specify that evidence drawn from a criterion-related validation study executed successfully at one location (e.g., at a given police agency department) might be “transported” to another location as the basis for using the selection procedure at the new location, without the need to execute a new criterion-related validation study. The *Uniform Guidelines*, however, set clear standards for claiming “validity transportability.” The standards indicate:

“A validity study done elsewhere may provide sufficient evidence if four conditions are met:

- 1. The evidence from the other studies clearly demonstrates that the procedure was valid in its use elsewhere.*
- 2. The job(s) for which the selection procedure will be used closely matches the job(s) in the original study as shown by a comparison of major work behaviors as shown by the job analyses in both contexts.*
- 3. Evidence of fairness from the other studies is considered for those groups constituting a significant factor in the user's labor market.*
- 4. Proper account is taken of variables which might affect the applicability of the study in the new setting, such as performance standards, work methods, representativeness of the sample in terms of experience or other relevant factors, and the currency of the study.”*
(Uniform Guidelines Questions and Answers, IV.A.66)

As indicated, “validity transportability” is an acceptable approach to claiming evidence of validity only when a) the same selection procedure successfully validated via criterion-related evidence in one location, b) is applied to the same types of jobs in a new location, and c) is used (scored, weighted, linked to hiring decisions) in the same way for which evidence of criterion-related validity was initially produced.

Regardless of the validation approach adopted, professional practice calls for completion of validation research, and execution of analyses like those referenced above, when an employer's selection procedure produces disparate impact on the employment opportunities of candidate groups protected by statute. A variety of statistical standards exist to guide evaluations as to whether, and to what degree, a selection procedure produces a disparate impact.

Regardless of the statistical analysis approach adopted, under Title VII jurisprudence it is my understanding that a finding of statistically significant adverse impact places a burden upon the user of the selection procedure to demonstrate that the tool has been properly designed, properly validated by the user organization, and properly used in reaching candidate screening decisions.

In executing my review of the PAAT selection procedure, I was informed the OCR documented, through the statistician expert engaged by the OCR, that a statistically significant difference between the qualifying rates of male versus female trooper candidates taking the PAAT had been documented.

Hence, the State of Alabama must document that the PAAT selection procedure meets standards of job-relatedness and business necessity by showing that the procedure itself, as well as its method of use, comply with the accepted professional standards for selection procedure validation cited above.

The BPD's primary approach to examining evidence of validity for the PAAT more than 15 years ago, as described in its *Volume I* and *Volume II* reports, was a criterion-related validation approach. The claimed criterion-related validation study was used by the APOSTC's professional consultants in producing the APOSTC's claimed evidence of PAAT validity, as well as in setting PAAT qualifying standards noted to result in statistically significant adverse impact upon female candidates for trooper positions – again, as reported by the OCR statistical expert.

As a result, the major focus of this report involves a) examining the BPD's evidence of criterion-related validity for the PAAT, b) evaluating the appropriateness of the procedure's

method of use, and c) determining whether evidence of “test fairness” exists for the procedure. Comments will also be presented with respect to the validity “transportability” claim made at the time of expanding use of the APOSTC’s PAAT from the initial BPD criterion-related validation study to State-wide use in trooper screening. The reason – verifying a claim of validity “transportability” for a selection procedure is based in large part on whether the criterion-related validation work executed at the procedure’s initial design location was completed successfully. If not, then a claim of validity “transportability” to an additional location cannot be presented. Hence, it is not necessary to comment upon the *Volume II* claims of content and construct validity, since it is criterion-related validity that was needed to support initial design of the PAAT and, more importantly, its “transportability” to State-wide use.

The Importance in Documenting That a Selection Procedure Predicts Actual On-the-Job Performance

Validation study research, particularly criterion-related validation like that reported in the BPD’s *Volume II* document, focuses on confirming that the manner in which a candidate performs (e.g., scores) on a selection procedure provides accurate, reliable prediction as to how the candidate will perform on the job. This concept applies to all validation study approaches, but is more effectively documented when a criterion-related validation strategy is followed to document the specific level of accuracy a selection procedure provides in predicting candidates’ future on-the-job performance.

A criterion-related validation is sometimes, though infrequently, executed by administering the selection procedure to actual job candidates, not using the candidates’ scores in making hiring decisions, but later examining how each candidate’s score relates to their future on-the-job performance. Labeled a “predictive” criterion-related validation study, such an approach provides very sound, accurate, and broad-based candidate selection procedure data for use in examining the tool’s ability to predict future on-the-job performance. Many employers, though, do not wish to hire candidates who have scored at very low levels on the selection procedure simply to confirm that they perform at very low levels on the job.

More frequent is the execution of “concurrent” criterion-related validation studies. This approach draws upon administering the initial version of a selection procedure to current employees, and then collecting information regarding the employees’ current on-the-job performance to confirm whether the employees’ performance on the selection procedure relates at a statistically significant level with their on-the-job performance. Acceptable as a criterion-related validation study approach, such a project also can be used to determine the degree of the selection procedure’s accuracy in predicting on-the-job performance, as well as its reliability in providing an assessment result likely to be repeated if the same individual completed the procedure at another “re-test” time.

Key to executing criterion-related validation studies are data collection and statistical analyses that document both the accuracy of the selection procedure in predicting actual on-the-job performance, as well as the reliability/stability of the prediction made for each individual who completes the procedure.

Some criterion-related validation studies, however, focus on predicting how initially hired employees perform during initial job training; e.g., during academy training. Such studies are useful, but one concern is that validating a selection procedure’s accuracy in predicting academy training success sometimes is based on simply “correlating a candidate’s score on a selection test with their score on a training test.” Much statistical research shows that using the same format (e.g., a written test) to assess two different concepts (e.g., candidates’ reading comprehension versus their academy training exam results) can result in finding only “common method of measurement” evidence of criterion-related validity.

This is why sound criterion-related validation studies focus on predicting actual on-the-job performance, which is the primary reason why an employer uses the selection procedure. Results of a criterion-related validation study executed, for example, by correlating employee performance on one physical agility or physical ability test with their performance on another physical agility or physical ability test created and claimed to reflect a hypothetical job performance measure would be influenced by, and likely “validated” substantially by, the concept of “common method of measurement” alone.

As noted earlier in describing the nature of criterion-related validation, most criterion-related studies seek to ensure that candidates' performance on a selection procedure actually predicts on-the-job performance measures, such as supervisors' evaluations of the employees' on-the-job performance, or even the likelihood of employees experiencing disciplinary actions, turnover, terminations, promotions, etc. Selection procedures produced to assess candidate physical agility or physical abilities can be compared to employees experiencing poor on-the-job performance evaluations, or experiencing accidents, injuries, or lost work time, and needing additional training in performing physically related aspects of their jobs.

The monitoring of on-the-job performance measures by employers also can be used to determine whether a selection procedure already validated and in place might be refined in terms of its makeup, scoring, qualifying standards, or use in combination with other components of the employer's selection process. In effect, ongoing monitoring of on-the-job performance results can be used to continually refine the makeup and method for using employee selection procedures. This is particularly important when a selection procedure has been created and used for a period of approximately 15 years, like the PAAT.

Evaluating the criterion-related validity of the PAAT by comparing current peace officers' performance on the PAAT to data monitored by the BPD in on-the-job performance evaluations could have been used as part of the BPD's *Volume II* criterion-related validation study. Additional information presented later in this report will document the fact that this was not done.

The Importance of Establishing Selection Procedure Qualifying Standards Correctly

Regardless of the strategy used to document the validity of a selection procedure's design and composition – criterion-related validation, content validation, construct validation, or validity transportability – professional standards require that whether the selection procedure is considered to be valid also depends on the manner in which the procedure is actually used to make employee screening and hiring decisions. In effect, documenting selection procedure validity calls for showing that the selection procedure's "method of use" is valid in making the specific kinds of decisions the employer wishes to make.

In effect, showing evidence of validity rests not only on “what composes” the selection procedure, but on “how it is used.” Assembling data that documents the accuracy with which different selection procedure “methods of use” operate is as important a part of meeting professional validation study standards as is composing the selection procedure of the proper content.

For example, steps might be taken to “weight” and combine how a candidate scores on a selection procedure’s various components. Such an approach can be used to produce a single, overall selection procedure score. Then, the candidate might be required to meet a pass-fail standard on the overall selection procedure score. Alternatively, a candidate might be required not only to meet a pass-fail standard, but might then be rank-ordered in terms of the specific overall score achieved on the selection procedure. Documenting validity for such a “method of use” requires producing evidence to show clearly that how individual components of the procedure are “weighted,” combined, and used to establish pass-fail qualifying or rank-ordering standards has been proven to provide statistically accurate predictions of on-the-job performance.

In addition, how a candidate performs (scores) on each of a selection procedure’s various components might be used to make pass-fail decisions component by component, rather than by drawing upon an overall score. This approach is often referred to as a “multiple hurdles” method for candidate screening. Here, evidence is needed to document the validity of each component used as a “hurdle” in screening candidates, and to confirm that the levels of scores used for each hurdle are confirmed as properly established. Again, the focus is on ensuring that “multiple hurdle” approaches to candidate scoring result in a validated selection procedure that document that each “multiple hurdle” contributes to predicting specific, or overall, on-the-job performance.

Examining alternatives to identify a specific “method of use” for a selection procedure calls for answering questions regarding a range of topics when, as undertaken in the BPD’s *Volume II*, a criterion-related validity study is executed. For example, does performance on the selection procedure actually predict candidates’ on-the-job performance? Alternatively, do the selection procedure scores simply predict how a candidate is likely to perform on another element of the selection process? Using scores on a selection procedure test, for example, to

forecast how a candidate will score on another similar test offers little evidence of validity for the “method of use” created.

In addition, how psychometrically reliable are candidate scores on the selection procedure? If the selection procedure were administered a second time, how closely could the candidate be expected to score? Is the selection procedure sufficiently reliable in the scores it produces during assessment of candidates to produce reliable decisions regarding those qualified versus not qualified?

How would current employees be expected to succeed if the “method of use” were applied to them? If noteworthy percentages were to fail the “method of use,” then is the workforce actually ineffective in its own on-the-job performance? What specific level of on-the-job performance is predicted for candidates who meet the selection procedure’s qualifying standards? Do criterion-related validation study regression equations predict reasonable levels of candidate on-the-job performance, or are the standards extremely demanding?

Might it be feasible to identify “equally valid, but less adverse alternatives” for using the selection procedure if it produces adverse impact upon protected candidate groups? Have criterion-related validity results been used to explore such alternatives?

Proper execution of validation studies calls for evaluating each of the above questions by drawing upon data collected as part of the criterion-related validation work executed during design and validation of the procedure. Again, each question is then drawn upon to ensure that not only the makeup of the selection procedure, but its “method of use” combine to meet professional standards for selection procedure validation. All of the above questions could have been answered as part of the BPD’s *Volume II* criterion-related validation study. Additional information presented later in this report will document the fact that they were not.

The Importance in Evaluating and Ensuring “Test Fairness”

The *Uniform Guidelines* cite specific areas where employers should focus in evaluating and ensuring the “test fairness” of selection procedures their organizations develop, validate, implement, and monitor. The concept of “test fairness” applies most directly to evaluating how a

selection procedure's use is likely to affect applicant groups protected by legal statute – specifically, ethnic and gender minority groups.

Section 14 B (8) of the *Uniform Guidelines* provides a specific definition of “test unfairness” with respect to employer selection procedures:

“Unfairness defined. When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores.” (Uniform Guidelines, Section 14 B 8)

One aspect to examining the concept of “test fairness” when developing and validating a selection procedure rests in analyzing whether individuals of different ethnic or gender groups who “score the same on the selection procedure” can be expected to “perform the same on the job.” Data assembled in executing criterion-related validation research can be used to determine, for example, whether males and females who score at the same level on a physical agility or physical ability test are found to perform at the same level on the job. If so, then using the same qualifying standard in screening male and female candidates can be supported by documenting that the selection procedure shows “test fairness” in using the same qualifying standard for both groups.

Other statistical approaches to examining a selection procedure's “test fairness” can be used to determine whether the procedure operates with the same level of validity for different ethnic or gender groups, whether it predicts on-the-job performance with the same level of accuracy, whether it provides equally reliable assessments of candidate qualifications for different candidate groups and, again, whether using the same qualifying standard results in predicting the same level of on-the-job performance for each group.

Failure to undertake “test fairness” analyses can, in fact, result in developing a selection procedure that “works for one group, but not the other” in predicting future on-the-job performance. Computing the criterion-related validity of the selection procedure for different

ethnic and gender groups, for example, provides an initial means for addressing the “test fairness” topic.

Again, an evaluation of “test fairness” is required most in executing selection procedure validation when the procedure developed can be expected to, or has been shown to, result in statistically significant adverse impact upon a protected candidate group. This topic could have been answered as part of the BPD’s *Volume II* criterion-related validation study. Additional information presented later in this report will document the fact that it was not.

Issue No. 1 – Unacceptable Documentation that the PAAT Predicts On-the-Job Performance

As noted earlier, it is my professional opinion that, despite the BPD’s claim of criterion-related validity, there is no evidence the PAAT actually predicts a candidate’s future on-the-job performance. This is because the measures of job performance created by the BPD’s vendor as “job performance criterion measures” in executing the *Volume II* criterion-related validation study within the BPD did not reflect measures of actual on-the-job performance.

As noted in a preceding section of this report, criterion-related validation strategies like that executed within the BPD typically involve administering a draft version of a new selection procedure, such as the PAAT, to a sample of employees currently working in the job for which the new selection procedure will be used in candidate screening. As noted, this is an approach referred to as a “concurrent” criterion-related validation strategy, which is, again, the approach described in the *Volume II* report.

Criterion measures of the tested employees’ on-the-job performance are then collected and statistical analyses are undertaken to evaluate the degree to which employees’ performance on the new test relates to (“predicts”) their actual on-the-job performance. According to the ***Uniform Guidelines***:

“Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance.” (Uniform Guidelines, Section 5 B)

In effect, professional standards focus on executing a criterion-related validation study in a way that will evaluate clearly and objectively the degree to which “scores on the test” relate statistically significantly to actual “performance on the job.”

In designing and executing its 1998 criterion-related validation study, however, the BPD vendor used no actual on-the-job performance measures (e.g., supervisory performance evaluations; documentation of prior awards, disciplinary records, accident, injury, or lost work time information; training accomplishments; prior promotional achievement, etc.) as the means for evaluating the criterion-related validity of the PAAT in predicting on-the-job performance.

Instead, the vendor created two hypothetical “job performance simulations” – the Short Birmingham Pursue and Subdue (BPAS) tasks and the Long BPAS tasks – and used these simulations as the validation study’s job performance criterion measures (*Volume II*, Pgs. 4 – 8). Both BPAS measures were simply “job performance simulations.” No steps were taken to collect actual measures of the validation study’s current peace officers’ on-the-job performance. Further, no steps were even taken to document that how officers performed on the BPAS “job performance simulations” actually related to other documented information about their current day-to-day on-the-job performance.

The 1998 PAAT validation study simply set out to show that current BPD officers’ performance on the two “job performance simulation” BPAS measures related to the same officers’ performance on the basic physical agility and physical ability components of the PAAT – the obstacle course test, the push-up test, the sit-up test, and the 1.5-mile-run test.

The vendor claimed the two “job performance simulation” measures reflected events that might occur on the job and therefore might be considered to “represent” measures of job performance. Again, however, no attempt was made to establish that performance on these hypothetical job performance measures bore any relationship with fundamental measures of the BPD officers’ on-the-job performance, which, again, would be measures such as the officers’ current supervisory performance evaluations, awards, disciplinary records, accidents, injuries, lost work time information, training accomplishments, etc.

In my professional opinion, this approach to “criterion-validating” the PAAT’s basic physical agility and physical ability components fell short of meeting professional standards for several fundamental reasons. First, no actual on-the-job measures of officers’ performance were collected and used during the validation project. Instead, hypothetical “job performance simulation” measures used as the study’s performance criterion measures simply represented an attempt to speculate how officers perform certain aspects of their job.

Second, when the “job performance simulation” measures were implemented, high percentages of current BPD officers were designated as “failing to perform successfully.” For example, when a group of 49 current BPD officers underwent evaluation on the Short BPAS “job performance simulation,” 15 (31%) were reported as having failed the event (*Volume I*, Pg. 42), based on a “subjective scale of 1 (fail) to 4 (excellent)” (*Volume II*, Pg. 6) used by those who observed the current officers perform the Short BPAS “job performance simulation” and rated their level of success in performing it. Even more noteworthy, when a group of 50 officers were evaluated on the Long BPAS “job performance simulation,” 25 (50%) of the officers were reported as having failed the event (*Volume I*, Pg. 44). (Note that Pg. 10 of *Volume II* reports that 24 of 49 officers failed to pass the Long BPAS.)

In effect, nearly one of three current officers were judged as failing to perform successfully on the Short BPAS “job performance simulation,” while approximately one-half of current officers were judged as failing to perform successfully on the Long BPAS “job performance simulation” measure. No discussion was provided in the vendor report as to whether the BPD would consider one-third, or one-half, of its current officers as failing to perform their jobs successfully, yet these Short BPAS and Long BPAS results laid the foundation for executing criterion-related validation analyses of the PAAT.

Third, while the vendor report indicates that officer performance on both the Short BPAS and Long BPAS “job performance simulations” was used in validating the four components of the PAAT (*Volume I*, Pg. 40), the report indicates it was the Long BPAS “job performance simulation” that was used in setting applicant qualifying standards for each component of the PAAT (*Volume II*, Pg. 4). Then again, *Volume II* indicates that both the Short BPAS and Long

BPAS played a role in setting qualifying standards for the PAAT obstacle course component (*Volume II*, Pg. 11).

In total, then, the vendor appeared to use officers' high failure rates on both the Short BPAS and Long BPAS "job performance simulation" as the central focus for establishing qualifying standards for each element of the PAAT. The vendor's "false positive versus false negative" standard-setting strategy (*Volume II*, Pg. 10) drew upon the high BPAS failure rates of current officers to result in stringent qualifying standards for future applicants. In effect, if less than one-third of incumbent officers had "failed" the Short BPAS, and less than one-half had "failed" the Long BPAS, the applicant standards established for PAAT components would have been set at less demanding levels.

More seriously, the BPD's vendor provided no information in the *Volume II* validation report to indicate exactly what percent of the 64 male and 26 female (*Volume II*, Pg. 4) officers participating in the criterion-related validation study succeeded when evaluated on the Short BPAS or Long BPAS "job performance simulation," or what percent of each group met the standards set on the PAAT's physical agility and physical ability components. Nor did the BPD's vendor provide any reports regarding the 64 male versus 26 female officers' average job tenure at the time of participation, most recent average on-the-job performance evaluation results, the groups' average incidence of workplace accidents, injuries, lost work time, disciplinary actions, awards received, special training completed, etc. Nor did the vendor execute and report data produced by re-administration of the two BPAS events and PAAT components during a second, independent administration in order to arrive at a statistical documentation of the procedures' test-retest reliability. Assembling and analyzing such data is called for to produce evidence of a selection procedure's reliability and validity in assessing qualities that can be shown to predict candidates' future on-the-job performance. Reporting all such data is required in determining whether the study's "job performance simulation" measures could be considered as accurate job performance metrics, versus reflecting unfair, biased, gender-related results.

While the use of "job performance simulation" exercises such as the *Volume II* vendor's hypothetical measures is not, in itself, a totally unacceptable technique, such measures must be

shown to be representative of actual on-the-job performance and, if they produce a noteworthy different “performance level” result for incumbents of one group versus another (e.g., based on gender, ethnicity, age, etc.), it is important to explore whether such differences reflect potential bias in the validation study’s criterion measure. According to the *SIOP Principles*:

“Criterion bias is systematic error resulting from criterion contamination or deficiency that differentially affects the criterion performance of different groups The possibility of criterion bias must be anticipated The researcher should protect against bias insofar as is feasible and use professional judgment when evaluating the data.” (SIOP Principles, Pg. 17)

Again, in reporting its results, the vendor did nothing to evaluate whether the hypothetical “job performance simulation” criterion measures, which are critical for arguing criterion-related validity of PAAT components, bore any relationship to officers’ actual on-the-job performance. The researchers did nothing to examine whether any other sources of performance data suggested that a large percentage (approximately one-half) of the PAAT takers would be expected to show deficient on-the-job performance, such as unusual accident, injury or absence records, the need for additional training or supervision, or other outcomes indicating that the hypothetical job performance criterion measures had, indeed, measured attributes that reflect themselves in individuals’ actual on-the-job performance. Finally, they did nothing to confirm that the “job performance simulation” measure reflected a reliable criterion measure – even if only a simulation.

An even more serious flaw in the BPD vendor’s criterion-related validation approach is the fact that the validation strategy executed by correlating the hypothetical “job performance simulation” measures’ results with PAAT test results simply showed that performance on one set of test components (the PAAT) correlated with officers’ performance on another set of test components (the hypothetical “job performance simulation” measures). As a result, it was not data regarding real on-the-job performance that was used in arguing the criterion-related validity of the PAAT; it was merely data produced by “administering and correlating scores on two tests” – the PAAT and BPAS “tests.” As noted earlier, this approach is similar to using a person’s

score on one test to predict their performance on another test, and claiming that the former is an effective “selection test” and the latter is a valid “measure of job performance.”

As any testing professional knows, scores on one test typically correlate with those on another, similarly formatted test merely as a function of the two measures being tests of the same attributes. When two tests are designed to assess the same attributes – agility, running speed, upper body strength, lower body strength, etc. – how could one expect performance on one test would not correlate with performance on the other? Such an approach simply indicates that one has created “alternate forms” of the same test – two tests that assess the same attributes. This activity does not reflect test validation; it simply confirms that two tests measure the same attributes, and that they are “alternate forms” of the same test.

There is well accepted professional research establishing that when a correlation (criterion-related validity coefficient) between two measures is computed using such similar “methods of measurement” – e.g., a basic physical agility and physical ability test versus a “job performance simulation” test developed to measure the same basic physical abilities – much of any correlation noted is a result of “common method variance.”

Podsakoff, MacKenzie, and Podsakoff (2012), for example, provide an example of two paper-and-pencil tests to illustrate “common method variance.” Citing research using multi-trait/multi-method correlations, the authors report that 18% to 32% of the variance in test scores is due to common method factors. Using the square root of these numbers as an estimate of the correlation attributable to common measurement methods, the authors note that results in correlations of .42-.57 are attributable to “common methods of measurement.” These values are quite similar to the “validity coefficients” reported in the *Volume II* report (*Volume II*, Pgs. 14 – 15). This is not professionally acceptable validation research. It is simply a self-fulfilling framing of a validity argument by showing that scores on two tests of the same attributes correlate with one another. In the approximately 15 years since development of the PAAT, no evidence was provided to the OCR by the State of Alabama indicating any follow-up improvements in on-the-job performance resulting from the PAAT, either.

In summary, it is my professional opinion that the *Volume II* validation study provides no evidence that performance on the PAAT provides criterion-related validity evidence in predicting candidate's future on-the-job performance. All that is shown is that an individual's performance on the PAAT would be expected to predict the individual's performance on a similar physical agility and physical ability test.

Issue No. 2 – Unacceptable Documentation of Defensible PAAT Qualifying Standards

It also is my professional opinion that there is no evidence the PAAT validation study was used to set a pass-fail hiring standard to identify candidates who will perform the job at an acceptable level. Even if there was evidence of criterion-related validity for the PAAT, which I conclude is not the case, there is no evidence the PAAT's qualifying standards identify candidates who can perform the peace officer job "at an acceptable level." This is because the *Volume II* vendor techniques for establishing qualifying standards on the PAAT gave no consideration to documenting that officers who "passed" the test actually performed their day-to-day jobs at an acceptable level, and that those who "failed" the test did not perform acceptably.

Steps taken in setting the PAAT qualifying standards failed to follow professionally acceptable practices for a number of reasons. First, as noted earlier and discussed in additional detail later in this report, the BPD's vendor executed a data collection effort in which current officers participated in administration of both the PAAT and "job performance simulation" measures. Again, the latter measures were claimed to reflect a job performance criterion against which PAAT component scores could be compared in order to document the PAAT's ability to predict job performance results. As noted, the male versus female officer performance on the "job performance simulation" measures was not investigated to determine whether the claimed performance criterion measures were biased in the results produced; as noted above, this is an important inquiry under the profession's *SIOP Principles*.

Absent any such investigation of potential bias in the validation study's criterion measures, the vendor then applied a statistical methodology referred to as regression and ROC curve analysis (*Volume II*, Pgs. 13 – 15) to establish qualifying standards on the PAAT's basic physical agility and ability tests by, essentially, identifying scores on the PAAT components that related

to “passing versus failing” the “job performance simulation.” Fundamentally, as noted earlier, these analyses simply relate the cut-off score recommended on one test (each component of the PAAT) with cut-off scores established on another test (the “job performance simulation” measure), which, as already noted, approximately one-half of the officers evaluated had failed.

Nowhere in the analyses was attention given to examining whether those who “passed versus failed,” or scored at different levels, on the “job performance simulation” measures showed any actual differences in more representative measures of on-the-job performance. As noted above, in no cases were steps taken to compare the peace officers’ performance on the “job performance simulation” measures with information regarding their on-the-job performance in order to determine whether “passing versus failing” the overall “job performance simulation” test could be argued as showing at least some level of correlation with actual on-the-job performance. This deficiency resulted in recommending components and qualifying standards on the PAAT based solely on the test’s relationship with another test – one that approximately one-half of current officers failed, as noted in the *Volume II* report citations referenced earlier.

A second failure to meet professional requirements in setting the PAAT qualifying standards rests in the fact that the standards followed a “multiple hurdles” approach to determining candidate “pass versus fail” status; that is, a candidate must meet each individual standard set for the PAAT’s multiple components – agility test, push-ups, sit-ups, and 1.5-mile run. This, in effect, frames a method of use for the PAAT as reflecting “one test, but four hurdles.” Failing to meet any one of the four standards will result in a candidate being disqualified.

The *Volume II* validation report produced by the BPD’s vendor offers no details regarding why a multiple-hurdles approach to using the PAAT offers a preferred “method of use,” compared to methods of use that might combine candidate’s performance on the various PAAT components in a “compensatory” manner to produce a single overall score, or offer an alternative that permits not meeting the qualifying standard set on one or more of the PAAT components, based upon scoring highly on other components. The report offers no comparison of such alternatives in terms of their job-relatedness or potential adverse impact reduction in screening candidates.

Finally, nowhere in the vendor's report was attention given to examining any ethnic or gender-based adverse impact such qualifying standards would have on external job candidates. The BPD's argument that the PAAT qualifying standards are job-related rests simply on the finding that those who meet the PAAT qualifying standards tend to pass another, similar test of essentially the same physical agility and abilities. Further, the APOSTC's establishment of the recommended qualifying standards was based on a claim that approximately one-half of the officers who completed the BPAS "job performance simulation" had failed.

Might it be the case that, if one-half of current officers failed the "job performance simulation" measures used in setting the PAAT qualifying standards, the PAAT standards might be overly stringent as candidate qualifying standards? No review, analysis, or comments on this concept appear in the *Volume II* report. If it would not make sense to terminate approximately one-half of current peace officers who "failed" the "job performance simulation," why would it be reasonable to use this standard in screening future candidates? No review, analysis, or comments on this concept appear in the *Volume II* report. Would taking this action have resulted in terminating a much higher percent of current female peace officers, and does the standard result in "terminating" a much higher percent of female peace officer candidates? Again, this topic, as noted below, is not addressed in the *Volume II* report.

Issue No. 3 – No Evidence of PAAT "Test Fairness"

The PAAT qualifying standards offer no evidence of having been established in a way so that the components of the candidate screening program are "fairly and evenly applied" with respect to candidate gender. As noted earlier in the report, the *Uniform Guidelines* call upon users of selection procedures to investigate the fairness of such candidate screening tools. As noted earlier:

"When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores." (Uniform Guidelines, Section 14 B 8a)

“Where a selection procedure results in an adverse impact on a race, sex, or ethnic group identified in accordance with the classification set forth in section 4 of this part and that group is a significant factor in the relevant labor market, the user generally should investigate the possible existence of unfairness for that group if it is technically feasible to do so.” (Uniform Guidelines, Section 14 B 8b)

The **SIOP Principles** cited also provide similar references regarding the need to undertake investigation of “predictive bias” in a selection procedure. The **SIOP Principles** provide clear direction on the steps for undertaking such an investigation when a selection procedure is noted to produce a significant adverse impact on a protected candidate group:

“Predictive bias is found when for a given subgroup, consistent nonzero errors of prediction are made for members of the subgroup.” (SIOP Principles, Pg. 32)

“Testing for predictive bias involves using moderated multiple-regression, where the criterion measure is regressed on the predictor score, subgroup membership, and an interaction term between the two.” (SIOP Principles, Pg. 32)

The BPD’s vendor undertook no such investigation of “test fairness” or “predictive bias” for the PAAT in its 1998 *Volume II* validity study. Yes, the vendor undertook a series of multiple-regression analyses (*Volume II*, Pgs. 14 – 15) in recommending candidate qualifying standards on the PAAT. No, none of these analyses explored the potential of the PAAT showing “predictive bias,” consistent with the **SIOP Principles**, in how the PAAT might predict male versus female performance on the “job performance simulation” criterion measure.

The vendor’s report provided no data or analysis of any nature regarding how male versus female officers performed on either the “job performance simulation” or the PAAT “multiple hurdle” pass-fail recommendations presented in the *Volume II* report. No information was provided in the report regarding the validity coefficients produced for male versus female officers who participated in the criterion-related validation study. No information even was provided in the report regarding the percent of male versus female officers who passed versus failed either the PAAT or “job performance simulation.”

As a result, no evidence was presented to indicate that the PAAT predicts performance in the same way for male and female officers or candidates. Further, no evidence was presented to indicate that the PAAT predicts actual on-the-job performance in the same manner for male and

female candidates. Given the absence of a connection between the validation study’s “job performance simulation” and officers’ actual on-the-job performance, and the potentially lower scores achieved by female officers on both the PAAT and “job performance simulation” measures, failure to involve a sample of female officers sufficiently large enough to permit fairness and predictive bias analyses to be undertaken further underscores the inadequacy of the BPD’s *Volume II* validation evidence. The concept of “test fairness” is not even referenced in the vendor report.

Issue No. 4 – No Ongoing Effort to Confirm the Validity of the PAAT

Comments provided in the preceding sections of this report have drawn upon the *Volume I* and, primarily, the *Volume II* 1998 BPD information provided to the OCR for review. The third document referenced in the opening section of this report – *A Physical Abilities Analysis and Job Task Validation Study for the Alabama Peace Officers Standards and Training Commission*, October, 1999 – summarizes work that was drawn upon to extend use of the PAAT from the BPD, where initial design and claimed validation of the selection procedure was executed per the *Volume I* and *Volume II* reports. This extension was undertaken for the purpose of using the PAAT candidate selection procedure on a State-wide basis.

As noted in this third report, work was undertaken by two of the same professionals engaged in the prior *Volume I* and *Volume II* studies executed within the BPD (J. Hilyer and M. Weaver) in order:

“To demonstrate that the validated applicant screening test (APOSTC Law Enforcement Physical Agility/Physical Ability Test) used by Birmingham can appropriately be used by law enforcement agencies in the State of Alabama as a screening test for entrance into the Alabama Law Enforcement Academies.” (A Physical Abilities Analysis and Job Task Validation Study for the Alabama Peace Officers Standards and Training Commission, October, 1999, Pg. 5.)

Law enforcement officer job analysis work, rather than additional validation work, was executed in this additional project and is described in this report, concluding that:

“The study conclusively established adequate similarity between the entry-level job requirements of Law Enforcement Agencies in the State of Alabama and the Police Department in Birmingham. The use of the Physical Agility/Physical Ability test

validated in the Birmingham study are appropriate for use by APOSTC and the Law Enforcement Academies in the State of Alabama.” (A Physical Abilities Analysis and Job Task Validation Study for the Alabama Peace Officers Standards and Training Commission, October, 1999, Pg. 138.)

In effect, work undertaken in the 1999 project draws upon the “validity transportability” standard cited in the earlier section of this report to support “transport” of the PAAT from the BPD to use on an Alabama State-wide basis.

Drawing simply upon the first “validity transportability” standard cited on Page 7 of this report – that the PAAT’s initial criterion-related validation needed to be completed successfully in order to undertake a “validity transportability” initiative – it is my professional opinion that there is no basis for “transporting” the non-documented validity of the BPD PAAT study to support using the tool on a State-wide basis. Even if similarities among the BPD versus other State-wide law enforcement positions were documented, the lack of acceptable validity evidence for the PAAT, as well as the tool’s observed adverse impact upon female candidates, precludes undertaking a “validity transportability” initiative. In effect, the initial BPD criterion-related validation study failed to meet professional standards. Hence, there was no basis for undertaking a “validity transportability” claim for extending use of the tool beyond the BPD to a State-wide basis.

In addition, the passage of approximately 15 years since implementation of the PAAT within the BPD, and State-wide, has provided an opportunity for the State of Alabama to answer two fundamental questions. First – Has implementation of the PAAT reflected any changes in peace officer on-the-job performance compared to that documented prior to its initial implementation? Such review would provide a means for “cross-validating” the fact that BPD peace officers’ PAAT performance related statistically to their performance on “another physical ability and physical agility test” used as the 1998 *Volume II* project’s job performance simulation measure.

No information was provided to the OCR to confirm that hired candidates’ job performance, or even the ongoing job performance of the 1998 peace officers who participated in the BPD validation study, showed any relationship to their PAAT results. In effect, no ongoing

analysis work was undertaken to compensate for the high likelihood that the results of the *Volume II* validation were simply based upon showing that peace officers' performance on one test (the PAAT) correlated with their performance on another test (the "job performance simulation" test).

The second question – Has any further research been undertaken to evaluate the "test fairness" of the PAAT, or its "method of use," since its implementation approximately 15 years ago? Again, the OCR was provided no information to document that differences noted between male versus female candidate performance on the PAAT, observed by the OCR statistician expert, reflect "fair" use of the selection procedure.

In addition, no information was provided to the OCR to indicate that male and female candidates performing at the same level on the PAAT can be expected to perform at the same level on the job, which is, again, one basis for executing a "test fairness" review. All that appears to have been documented thus far is the fact that male and female candidates pass the PAAT at statistically significant different rates. No documentation was produced in the *Volume II* validation study to document the accuracy of this difference on-the-job, and no additional data have been reported to show that additional "test fairness" reviews have been undertaken.

Finally, information provided to the OCR by the Alabama State Personnel Department (SPD) showed that an SPD job analysis of the State's trooper position concluded that the tasks of pursuing suspects and engaging in violent confrontations are ones that troopers learn how to conduct after they become troopers. In 2002 and 2003, the SPD sought to develop a valid selection process for the trooper position. As part of this project, the SPD analyzed the trooper position to identify, among other things, tasks that a trooper performs. To learn about these tasks, the SPD discussed the trooper position with twenty-three Subject Matter Experts (SMEs) who were incumbent troopers.

Through these interviews, the SPD identified several trooper tasks, including pursuing a suspect or a violator; physically restraining, controlling, and subduing individuals; and using a firearm, baton, or chemical spray. In discussing these tasks with the SMEs, the SPD discovered that troopers learn how to conduct them all at the Academy or during field service training. As a

result, because these tasks are not ones that the State should expect an applicant to know when they enter the Academy as trooper employees, the SPD did not consider them in designing screening tools for trooper applicants. These tasks, however, were what composed the PAAT and the “job performance simulation” during the 1998 study.

In summary, the passage of 15 years has provided an opportunity to review and confirm claims presented in the PAAT’s initial design and claimed validation study. Tracking training results, on-the-job performance evaluations, accident rates, injury rates, lost work time, awards received, etc. for those hired after implementation of the PAAT, compared to the same metrics for those hired prior to its implementation, could have been executed. Tracking whether those who “score better” on certain PAAT components achieve better outcomes on the same job performance metrics could have been executed. Even evaluating the rate at which those who failed the PAAT by small degrees on one administration were able to pass the selection procedure on a second administration soon thereafter could have been executed. The SPD project mentioned did not confirm the selection procedure validity of the PAAT, nor the relevance of assessing candidate physical agility and physical abilities related to pursuing and restraining or controlling individuals. No other supportive information appears to have been produced and, given the age of the PAAT screening process, it is my professional opinion that such review should have been undertaken, given the adverse impact of the PAAT upon female trooper candidates within the State of Alabama.

Summary

In conclusion, it is my professional opinion that the APOSTC’s PAAT is not supported by evidence of job-relatedness or business necessity in a manner acceptable under current professional standards. The evidence summarized in the BPD’s *Volume II* study and criterion-related validation report, while claimed to represent a criterion-related validation of the PAAT, simply shows that peace officer scores on the PAAT correlate with their scores on another test – the job performance simulation “test” – with the later test having been designed to assess fundamentally the same physical attributes as the PAAT. No evidence is offered that scores on the PAAT relate to any measure of actual on-the-job performance.

The BPD's 1998 validation study resulted in setting qualifying standards on the PAAT that, according to the OCR statistician's analysis, fail a significantly higher proportion of female trooper candidates than male candidates. Given this result, professional standards call for an investigation of "test fairness" or "predictive bias." No such efforts have been undertaken as part of the 1998 *Volume II* validation study, or as a result of any ongoing validation research feasible over the past approximately 15 years.

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Materials Provided for Review by the OCR

1. Alabama Administrative Code Provisions Regarding Alabama Peace Officers Standards and Training Commission's (APOSTC) Physical Agility/Ability Test
2. APOSTC, Diagram of Physical Agility Course
3. APOSTC, Physical Agility/Ability Test Outline and Script
4. Alabama Department of Public Safety (DPS), Brochure on Physical Fitness Entry-level Standards for State Troopers in Training
5. Alabama State Personnel Department, Exam History for 2003 Trooper Register
6. DPS, Score Sheets for 2014 Pre-Offer Physical Agility/Ability Test

7. Alabama Law Enforcement Agency, Male-Female Breakdown of Results of Early Trooper Selection Devices: 2009, 2010, and 2011
8. DPS, Order 37: Physical Fitness Program (Aug. 23, 2010)
9. *Volume I: Physical Abilities Analysis for the Birmingham Police Department*, J. Hilyer, M. Weaver, T. Thorne, B. Spruiell and J. Gibbs, Division of Preventive Medicine, School of Medicine, The University of Alabama at Birmingham, Aug. 1, 1998.
10. *Volume II: Validation of Physical Ability and Physical Agility Tests*, G. Hunter, M. Bamman, C. Wetzstein, J. Hilyer and M. Weaver, Exercise Physiology, Department of Human Studies, The University of Alabama at Birmingham, May 5, 1998.
11. *A Physical Abilities Analysis and Job Task Validation Study for the Alabama Peace Officers Standards and Training Commission*, J. Hilyer and M. Weaver, Division of Preventive Medicine, School of Medicine, The University of Alabama at Birmingham, Oct. 18, 1999.