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REPORT
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THE CIVIL RIGHTS RESTORATION ACT OF 1987

JUNE 5, 1987.—Ordered to be printed

Mr. KENNEDY, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 557]

The Committee on Labor and Human Resources, to which was referred the bill (S. 557), to restore the broad scope of coverage and to clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill as amended do pass.

I. INTRODUCTION

On May 20, 1987, the Committee on Labor and Human Resources, by a vote of 12-4, ordered favorably reported S. 557, "The Civil Rights Restoration Act of 1987." Senators voting in favor of the bill were Senators Kennedy, Pell, Metzenbaum, Matsunaga, Dodd, Simon, Harkin, Adams, Mikulski, Stafford, Weicker, and Cochran. Voting against were Senators Hatch, Quayle, Thurmond, and Humphrey.

The bill is sponsored by Senator Edward M. Kennedy, Chairman of the Committee, and cosponsored by Senators Weicker, Metzenbaum, Packwood, Cranston, Stafford, Adams, Baucus, Bentsen, Biden, Bingaman, Bradley, Breaux, Burdick, Chafee, Chiles, Cohen, Daschle, DeConcini, Dodd, Ford, Fowler, Glenn, Gore, Harkin, Hol-

lings, Inouye, Johnston, Kerry, Lautenberg, Leahy, Levin, Matsunaga, Melcher, Mikulski, Mitchell, Moynihan, Pell, Proxmire, Riegle, Rockefeller, Sanford, Sarbanes, Simon, Specter, Stevens, Wirth, Dixon, Rudman, Durenberger, Evans, Boschwitz, Heinz, Sasser, Graham, Nunn, Bumpers and Pryor.

II. Purpose

S. 557 was introduced on February 19, 1987, to overturn the Supreme Court's 1984 decision in *Grove City College* v. *Bell,* 465 U.S. 555, and to restore the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally assisted programs.

The *Grove City* ruling severely narrows the application of coverage of Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

The purpose of the Civil Rights Restoration Act of 1987 is to reaffirm pre-*Grove City College* judicial and executive branch interpretations and enforcement practices which provided for broad coverage of the anti-discrimination provisions of these civil rights statutes.

III. Background

In 1963, when President John F. Kennedy transmitted the Civil Rights Act to Congress, he stated:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. Direct discrimination by Federal, state or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious, . . .

The legislation responded to increasing minority protest over continuing racial discrimination in schools, voting, public accommodations and housing discrimination that had persisted in many instances in the face of court decisions declaring the practices unconstitutional. Title VI bars discrimination based on race, color or national origin in a "program or activity" that receives Federal aid, and was part of the most far-reaching civil rights legislation since the Reconstruction Era.

Title VI became a major vehicle for attacking the separate and unequal society which denied basic opportunities to millions of Americans. Recognizing that other groups also suffered the effects of discrimination, Congress enacted legislation protecting the civil rights of women, disabled persons and older Americans.

Title IX of the Education Amendments of 1972 prohibits sex discrimination in educational programs or activities receiving Federal financial assistance. Title IX has broken down a variety of sex barriers in education, including participation in athletics and graduate degree programs.

Section 504 of the Rehabilitation Act of 1973 prohibits recipients of Federal funding from discriminating against disabled persons.

Since this law was passed, opportunities for disabled persons have increased in education, employment, housing, transportation and health and social services.

The Age Discrimination Act of 1975 prohibits discrimination on the basis of age in the delivery of services and benefits supported by Federal funds. This act has helped increase public awareness of the barriers to full opportunity that continue to exist for millions of Americans.

Each of the statutes employs the same careful language to describe coverage so that the same standards are used to interpret and enforce all four laws. Therefore, on February 28, 1984, when the Supreme Court decided the Title IX case, *Grove City* v. *Bell*, all four statutes were affected.

The Court unanimously held that the student aid dollars reaching the college through its students constituted federal financial assistance to the school. However, in determining the scope of the duty not to discriminate, a divided court interpreted the law's "program or activity" phrase narrowly. Because the only Federal money reaching the college was in the form of student aid the Court concluded that only the financial aid office was covered by Title IX. The rest of the college was left free to deny equal opportunities to women (and by analogy to minorities, disabled and older persons as well). The *Grove City* ruling reversed years of administrative interpretation and enforcement practice by Republican and Democratic administrations and was in conflict with many court interpretations of the laws. On the same day, the Supreme Court ruled in an employment case arising under Section 504 that the phrase "program or activity" was as narrow under that law as under Title IX. *Consolidated Rail Corporation* v. *Darrone,* 465 U.S. 624, 104 S. Ct. 1248 (1984).

In response to the *Grove City College* decision, Senators Kennedy and Packwood introduced S. 2568, the "Civil Rights Act of 1984" on April 12, 1984. The bill had 63 cosponsors in the Senate. Hearings were held in the Labor and Human Resources Committee on May 24, 1984 and June 26, 1984.

The bill would have deleted the words "program or activity" from Title IX, Title VI, section 504, and the Age Discrimination Act, and substituted the word "recipient." An identical bill passed the House of Representatives by a vote of 375 to 32 on June 26, 1984.

The bill was not reported by the Labor and Human Resources Committee. It was offered as a floor amendment to the continuing resolution and was tabled in the closing days of the 98th Congress after a filibuster which continued even after the invocation of cloture.

In the 99th Congress, S. 431, the "Civil Rights Restoration Act of 1985" was introduced on February 7, 1985 with 47 cosponsors. Hearings were held in the Labor and Human Resources Committee on July 17, 1985 and September 20, 1985. The bill was not reported by the Labor and Human Resources Committee.

In this Congress, S. 557, the "Civil Rights Restoration Act of 1987" was introduced on February 19, 1987, with 56 cosponsors. As of the filing of this report, there are 58 cosponsors. Hearings were held by the Labor and Human Resources Committee on March 19

and April 1. The bill was ordered reported on May 20, by a vote of 12–4.

IV. Summary of the Bill

S. 557 will restore Title IX, Section 504, the Age Discrimination Act and Title VI to the broad, institution-wide application which characterized coverage and enforcement from the time of initial passage until the *Grove City* decision. It adds no new language to the coverage or fund termination provisions of Title VI, Title IX, section 504, and the Age Discrimination Act. The Civil Rights Restoration Act of 1987 amends each of the affected statutes by adding a section defining the phrase "program or activity" and "program" to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance. This approach is very different from that taken in the bill considered in the 98th Congress. That bill deleted the term "program or activity" and instead defined "recipient" of federal financial assistance. The change in S. 557 was made in the interest of greater clarity.

For education institutions, the bill provides that where federal aid is extended anywhere within a college, university, or public system of higher education, the entire institution or system is covered. If federal aid is extended anywhere in an elementary or secondary school system, the entire system is covered.

For State and local governments, only the department or agency which receives the aid is covered. Where an entity of state or local government receives federal aid and distributes it to another department or agency, both entities are covered.

For private corporations, if the federal aid is extended to the corporation as a whole, or if the corporation provides a public service, such as social services, education, or housing, the entire corporation is covered. If the federal aid is extended to only one plant or geographically separate facility, only that plant is covered.

For other entities established by two or more of the above-described entities, the entire entity is covered if it receives any federal aid.

The bill contains a rule of construction which leaves intact the current exemption from coverage by the civil rights laws for "ultimate beneficiaries" of federal financial assistance. The bill also incorporates regulatory "small providers" exceptions into the coverage provisions of section 504 and clarifies that the religious tenet exemption in Title IX extends to any activity of an entity controlled by a religious organization which would otherwise be covered by Title IX. It does not otherwise change the current nature of the religious tenet exemption.

V. Need for Legislation

PRE-GROVE CITY COVERAGE OF THE FOUR STATUTES WAS INSTITUTION-WIDE

The legislative history of the statutes in question shows Congress intended institution-wide coverage.

In enacting the four civil rights statutes, Congress intended that each be broadly interpreted to provide effective remedies against discrimination. The debates emphasized both the anticipated breadth of coverage as well as the important and fundamental aims these statutes would achieve. This was clear not only in connection with Title VI, but also with the other civil rights statutes which were modeled on Title VI with respect to both language and intended effect. Contrary to the view of the Supreme Court that the language common to these statutes (i.e., "program or activity") should be given a limited interpretation, Congress intended institution wide coverage and the executive branch has historically insisted upon this view. It was understood at the outset that the task of eliminating discrimination from institutions which receive federal financial assistance could only be accomplished if the civil rights statutes were given the broadest interpretation.

A. Title VI

When Congress enacted Title VI, it emphasized the breadth of its coverage. For example, Senator Hubert Humphrey stated that "the purpose of Title VI is to make sure the funds of the United States are not used to support racial discrimination" 110 Cong Rec. 6544 (1964). Indeed, both proponents and opponents agreed that the prohibition of discrimination would be a broad one. See 110 Cong. Rec. 6544 (broad power to eliminate discrimination conferred) (remarks of Senator Humphrey); Id at 13322. (". . . title VI sufficiently broad . . . for issuance of open housing order affecting the entire United States") (remarks of Senator Gore); Id at 13378 (broad power delegated to eliminate discrimination) (remarks of Senator McClellan.)

That Congress intended a broadly applicable prohibition of discrimination is underscored by the narrow funding termination provision included in each of the statutes. During the Title VI debate, great emphasis was given to the distinction between Section 601 of Title VI which bans discrimination, and Section 602 which provides for termination of federal aid. Many feared that the passage of Title VI would lead to immediate termination of federal aid to many institutions and states which engaged in open racial discrimination. Senator Humphrey noted that the purpose of Title VI was not to penalize recipients of federal financial assistance but to end discrimination. Id. To that end, Senator Humphrey said, agencies would have broad discretion to adopt measures which would accomplish the goal of eliminating discrimination in a "state agency" or "institution" which engages in discrimination. He said, "[a]ny nondiscrimination requirement an agency adopts must be supportable as tending to end racial discrimination with respect to the particular program or activity to which it applies." Id. Humphrey pointed out that agencies were authorized to achieve compliance "by any other means authorized by law" in order to encourage them to find ways to end discrimination without refusing or terminating assistance. Id.

B. Title IX

Congress also intended that Title IX, the first of several discrimination statutes to be modeled on Title VI, also be broadly interpret-

ed. For example, Senator Birch Bayh, chief sponsor and floor manager of Title IX, said that Congress intended that Title IX be—

> a strong and comprehensive measure [that] is needed to provide women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women. 118 Cong. Rec. 5804 (1972).

And during the Title IX debate, several members of Congress stated that Title IX prohibitions would apply to universities ". . . across the board . . ." irrespective whether individual departments received federal funds. See e.g. 118 Cong. Rec. 39256, (remarks of Rep. Green); 117 Cong. Rec. 30407 (1971) (intent is to "provide equal access for women and men students to the educational process and the extracurricular activities in a school) (remarks of Senator Bayh); 117 Cong. Rec. 30408 (sanctions directed at institution) (remarks of Senator Bayh); 117 Cong. Rec. 39251-52 ("*institutions* of higher learning [must] practice (equality or not come to Federal Government for financial support") (remarks of Rep. Mink) (emphasis added).

More than a decade after the passage of title IX, former Senator Birch Bayh returned to the Senate to reiterate "what we, as legislators, understood about the law at that time." Testimony of Birch Bayh, Joint Hearings on H.R. 5490, p. 41, May 9, 1984. According to Mr. Bayh, Title IX was enacted by a Congress which was familiar with the broad manner in which Title VI had been enforced. There was no need to restate these understandings at the time Title IX was enacted.

> . . . if you look back into what we in Congress understood title VI to mean at the time we adopted title IX, it is no wonder we did not feel it necessary to repeat, every time we mentioned the purpose and scope of the legislation, that we intended broad, institutionwide coverage . . .
> . . . [W]e were building on an understanding of Title VI that had never suggested narrow coverage was intended. Id.

According to Senator Bayh, institutionwide coverage was necessary in order to accomplish the broad purposes of the bill.

> Nothing else would have made any sense if our goal was meaningful coverage and effective enforcement. Id.

C. Section 504 of the Rehabilitation Act

Congress also intended that the prohibitions of Section 504 of the Rehabilitation Act also apply institution-wide. Key sponsors of earlier versions of Section 504 spoke of the broad purposes which would underlie a prohibition against handicap discrimination. For example, Representative Vanik stated that—

> my proposed legislation will insure equal educational and employment opportunities for the handicapped by making discrimination illegal in federally assisted programs and activities. 118 Cong. Rec. 526

And Senator Percy emphasized the spectrum of rights which would be embodied in a prohibition against handicap discrimination.

> The bill would guarantee the handicapped equal opportunity to education, job training, productive work, due process of law, a decent standard of living, and protection from exploitation, abuse, and degradation.

Just a year after the passage of Section 504, Congress clearly expressed the view that prohibition against discrimination included in Section 504 was to be read as broadly as that included in Title VI.

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of . . . [Title VI] . . . and Title IX] . . . the Section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. Senate Report (Labor and Public Welfare Committee) (No. 93-1297, November 16, 1974, 120 Cong. Record p. 30534 (1974).

D. Age Discrimination Act of 1975

The Age Discrimination Act must also be read in the same fashion. The statute is virtually identical to the previous nondiscriminatin statutes. When the Congress passed this legislation, it did so against a rich background of legislative and enforcement experience. This background is evidenced in the complete absence of controversy during Congressional consideration of the ADA, and the swift passage of the legislation. See House Report No. 94-67 at 16, March 14, 1975 ("Committee drafted this section to draw on the experience this natin has had in combatting . . . other prejudices"). *See also National Alliance et al.* v. *Bowen,* 789 F. 2d 931, 934 (5th Cir. 1986) (ADA) modeled on Title VI.)

Conclusion

The inescapable conclusion is that Congress intended that title VI as well as its progeny—Title IX, Section 504, and the ADA—be given the broadest interpretation. All four statutes were passed to assist in the struggle to eliminate discrimination from our society by ending federal subsidies of such discrimination. Congress understood that these goals could be achieved if the Federal government used its power and authority to end discrimination.

Prior to the Grove City Decision, the Executive Branch Asserted Authority to Enforce the Nondiscrimination Statutes Institution-Wide

Beginning in 1964 with the enactment of Title VI and until the Grove City decision in 1984, the Federal officials charged with enforcing these civil rights statutes interpreted them to be institution-wide in their coverage.

For example, David Tatel who was Director of the Office for Civil Rights of the Department of Health, Education and Welfare, from

1977–1979, testified that HEW had consistently interpreted Title VI to require institution-wide coverage.

> This broad interpretation was grounded on the language of the statute, its legislative history, and the well-accepted constitutional principle that all levels of government must steer clear of providing public revenues to institution which discriminate on the basis of race or national origin.

Testimony of David Tatel, Joint Hearings on H.R. 700, page 1177; Id. at 1189. (1985); Testimony of David Tatel, Hearing on S. 557 transcript 143, (1987); Testimony of David Tatel, Hearings on S. 2568, p. 162–177.

Another former administration official, Dan Marcus, who served with the Department of Health, Education and Welfare from 1977 to 1980, endorsed Mr. Tatel's assessment of prior administration practice. Testimony of Dan Marcus, Esq, Joint Hearings on H.R. 700, page 1189 (1985).

A former general counsel to HEW, Peter Libassi, also supported this view of the breadth of the civil rights statutes. Mr. Libassi, who was general counsel of HEW from 1977–1979 and Director of OCR at HEW from 1966–1968 testified in 1984 that HEW official did recognize that there might be "interpretations of Title VI restricting its impact to the particular activity receiving federal funds. That narrow construction was rejected. It was rejected on the basis of our understanding of the realities of legislative enforcement." Joint Hearings on H.R. 5490, p. 64, May 9, 1984.

Cynthia Brown, former Assistant Secretary for Civil Rights of the Department of Education from 1980 to 1981, Deputy Director of the office for Civil Rights in HEW, and an employee of HEW's Office of Civil Rights from 1966–1970, gave similar testimony.

> Every administration charged with enforcing Title IX, as well as title VI . . . has interpreted coverage of these antidiscrimination laws in the same broad manner.

Testimony of Cynthia Brown, Hearings on S. 2568, p. 376, June 5, 1984.

Mary Berry, currently a member of the Civil Rights Commission, a former Assistant Secretary for Education, former chancellor at the University Colorado, and former director of the Higher Education Division in the Office of Civil Rights-HEW, also testified that previous administrations interpreted these laws broadly. Testimony of Mary Berry, Joint Hearings on H.R. 5490, at 93–95 May 9, 1984.

She said that post-Grove City, administration officials have encountered serious difficulty complying with the "program specific" enforcement mandate because available data system did not permit the tracing of federal funds. This is so, Commissioner Berry said, because existing data systems did not include program specific information.

> The . . . Federal Assistance Award Data System, set up in 1983, as a central source for data . . . doesn't tell you exactly where on campus or in an institution the money goes.
>
> It just tells you that the place gets money. And the reasons why that is the case is that because before Grove City

> nobody had to identify exactly where the money was before you could engage in investigation. Since Grove City . . . under Title IX, 23 education complaints involving large institutions have been closed by the Department because of a question of whether the activities were in some program that was funded directly by the Federal Government. These were cases that earlier were proceeding without any trouble. Id at 94.

Former Justice Department officials under both Republican and Democratic Administrations supported the views of officials of other agencies on the breadth of the statutes. Stanley Pottinger and Drew Days, former assistant Attorneys General for Civil Rights, in the Ford and Carter administrations respectively, testified that the Department of Justice gave a broad interpretation to Title VI, Section 504, and Title IX. Mr. Pottinger said that—

> [t]here was no requirement to make a prior finding that the alleged discrimination occurred in a program or activity receiving federal funds and indeed the Department would not have been able to do that. Joint Hearings on H.R. 5490, at 256.
>
> Congress should now make clear . . . what we all thought has been made clear in 1964, again in 1972, again in 1973, and through subsequent years by the consistent administrative and law enforcement practice. Joint Hearings on H.R. 5490, at 258, May 1984.

Mr. Days was equally strong in his recollection of administration practice. Joint Hearings at 258–261. In his view, the "overall objective . . . [of these statutes] . . . was to make certain, in the areas of Federal funding, that taxpayer's dollars were not used to initiate or perpetuate . . . bias and prejudice . . ." Joint Hearings at 258.

According to Mr. Days, a—

> narrow reading of the law denigrates the historic work of . . . [Representative Emmanuel] Celler and . . . [Senator Hubert] Humphrey, whose vision in promoting the passage of Title VI pointed the way for later leaders in the Congress to address forcefully the shameful treatment of women, the handicapped, and the aged by recipients of Federal money.

In 1975 Caspar Weinberger, then Secretary of HEW, told Congress that coverage of Title IX was exceedingly broad and that this broad coverage was reflected in the Title IX regulations promulgated during his tenure . . . Secretary Weinberger said—

> The final regulation applies to all aspects of all educational programs or activities of a school district, institution of higher education, or other entity which receives Federal Funds for any of those programs. If Congress wished to excluded athletics, for example, as so many people seem to wish, Congress could have easily have said so. However Congress . . . made very clear athletics should be covered by the regulation . . . Sex Discrimination regulations,

hearings Before the Subcommittee on Post Secondary Education of the Committee on Education and Labor, House of Representatives, June 26, 1975, page 438.

These views are corroborated by evidence that the Department of Education conducted institution and system wide compliance reviews prior to the Grove City decision. Hearings on S. 557, prepared testimony of Elaine Jones, Exhibits A-1 and A-2, and prepared testimony of Elaine Jones, transcript page 6, April 1, 1987.

Thus, the evidence is overwhelming that the institution wide coverage that Congress intended was understood and implemented by previous administrations.

Judicial Decisions Prior to Grove City Endorsed Broad Coverage of the Civil Rights Statutes

With few exceptions, courts consistently interpreted the nondiscrimination statutes broadly prior to the *North Haven* [1] and *Grove City* decisions. This pattern was especially strong in the enforcement of Title VI. Court decisions rarely addressed the issue explicitly, but the facts left no doubt that courts assumed and endorsed institution-wide coverage. See e.g. *Board of Public Instruction of Taylor Co.* v. *Finch* 414 F. 2d 1068 (5th Cir. 1969) (assumes institution-wide coverage and that pinpointing limited to fund termination); *United States* v. *Jefferson Co. Board of Education,* 372 F. 2d 836 (5th Cir. 1966), aff'd en banc, 380 F. 2d 385, *cert denied sub nom Caddo Parish Board of Education* v. *United States,* 389 U.S., 840 (1967) (Title VI institution wide desegregation order appropriate); *Bossier Parish School Board* v. *Lemon,* 370 F. 2d 847, 852) (5th Cir.), cert. denied 388 U.S. 911 (1967) (systemwide application of Title VI) institution-wide desegregation order) *Yakin* v. *University of Illinois,* 508 F. Supp 848 (N.D. Ill. 1981) (federal financial assistance to university triggers department coverage) *United States* v. *El Camino Community College District,* 454 F. Supp. 825 (C.D. Cal. 1978). aff'd, 600 F. 2d 1258 (9th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) (Title VI investigation of entire College appropriate); *Bob Jones University* v. *Johnson,* 396 F. Supp 597 (D. S.C. 1974) (Veterans Administration education grants aid to whole university) *Flanagan* v. *President & Directors of Georgetown Coll,* 417 F. Supp 377 (D.D.C. 1976) (financial aid activities covered); . . .

Courts also assumed that institutional wide coverage was appropriate under Title IX. See e.g. *Haffer* v. *University,* 524 F. Supp 531 (E.D. Pa 1981), affirmed 688 F. 2d 14 (3rd Cir. 1982) (athletic program which did not receive earmarked funds covered), but see *Rice* v. *President and Fellows of Harvard College,* 663 F. 2d 336 (1st Cir. 1981). Two courts of appeals read Section 504 narrowly, *Brown* v. *Sibley,* 659 F. 2d 760, (5th Cir. 1980); *Simpson* v. *Reynolds Metals Co.,* 629 F. 2d 1226 (7th Cir. 1980) but other decisions read the statute broadly. *Wolff* v. *South Colonie School District,* 534 F. Supp 758 (N.D. N.Y. 1982) (schools trips covered) . . .

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[1] In *North Haven Board of Education* v. *Bell,* 456 U.S. 511 (1982), the Supreme Court's holding was that Title IX prohibited sex discrimination in employment in educational institutions. In dicta, however, the Court suggested that Title IX should be viewed as "program specific" in its coverage as well as its fund termination provisions. This dicta paved the way for Grove City.

Judicial recognition of institution wide coverage waned only after the Supreme Court opinion in *North Haven.* See e.g. *Dougherty County School System* v. *Bell,* 694 F. 2D 78 (5th Cir. 1982) (follows North Haven dicta that Title IX requires program specific interpretation). Prior to *North Haven* the weight of authority was clearly on the side of institution wide coverage of the civil rights statutes.

The Civil Rights Restoration Act of 1987 is urgently needed

The impact of the Supreme Court decision was immediate. On March 8, 1984—a little over a week after the *Grove City College* decision—the Department of Education dropped sex discrimination charges against the University of Maryland's intercollegiate athletics program because the athletics program did not receive direct federal funding. The Department's Office for Civil Rights—which enforces Title VI, Title IX, Section 504 and the Age Discrimination Act as they apply to education—had uncovered discrimination in several areas, including travel and per diem allowance, the provision of support services, and the accommodation of student interests and abilities. Yet, female athletes and coaches at the University of Maryland and other universities no longer had federal protection against this discrimination.

The University of Maryland case was just the beginning. In the wake of the *Grove City College* decision, at least 674 complaints filed under the four civil rights statutes in the Department of Education have been closed, in whole or in part or suspended. At least 156 Department-initiated compliance reviews also have been dropped or narrowed. (Letter from Alicia Coro, Acting Assistant Secretary for Civil Rights, Department of Education to Chairman Kennedy, March 31, 1987).

In addition, other cases that were in the formal enforcement stage still are in jeopardy. These are cases where discrimination has been found, voluntary compliance was refused, and recipients are using the Supreme Court's decision as a defense against federal enforcement.

The decision has created absurd results in many instances. Complaints are not investigated because the alleged discrimination took place in a building not constructed or renovated with federal assistance. When complaints are investigated, the whole process takes longer because the federal government has to search for federal money connected with a specific program. The paperwork for institutions has increased as they are asked to show precisely where the current federal dollars are, and in some instances where past federal assistance went (as in the case of buildings or equipment).

Clear violations of federal law go uncorrected while students lose valuable educational benefits that can rarely be recovered and employees lose jobs or job opportunities. Prolonged debate takes place over what constitutes a "program or activity" under the civil rights law, while the universities, schools, and correctional facilities receive millions of federal dollars.

A few examples from a recent report, *Federal Funding of Discrimination: The Impact of Grove City College* v. *Bell,* issued in 1987 by the National Womens' Law Center, illustrates the civil

rights enforcement problems in the aftermath of the *Grove City College* decision:

> A Black high school student in the Haddon Heights School District, filed a complaint alleging that her school's chapter of the National Honor Society had failed to induct her because of her race. In spite of being ranked fifth in her class and participating in a wide variety of extracurricular activities, she was not among the sixteen students invited to join the Society. OCR closed the case because it found the alleged discrimination did not occur in a program or activity which was a direct recipient of federal financial assistance from the Department of Education.
>
> A first year medical student at the University of California at Davis alleged that she had been sexually harassed by a professor who made explicit sexual remarks to her, offered to give her better grades in exchange for sexual favors, and finally threatened to use his alliances with other professors to manipulate her grades. Although the medical school received federal funding through the Department of Education, no money was earmarked for the educational program for first year students or the Department of Surgery in which the professor taught. OCR closed the case in January 1986 because it decided the Grove City "program or activity" requirement could not be satisfied.

Other cases are summarized in a 1986 report of private civil rights organizations, *Injustice Under Law:*

> A student at Hill Top Beauty School in Daly City, California complained to OCR that clients were more often assigned to white students than Black students, that Black students were assigned to Black clients and that clean up duties not properly the responsibility of students were given to Black students. Many students attend Hill Top with the help of federal assistance such as Pell Grants.
>
> But OCR decided it could not investigate the complaint because the alleged discrimination occurred in the Practical Training part of the cosmetology course which did not receive direct federal funds. The case was closed. Now there will never be any investigation of the truth or falsity of the charges of discrimination. OCR #09-83-4004.
>
> A Northeastern University (Boston, Massachusetts) student filed a Title IX complaint. She said the university failed to take action to redress a sexual harassment complaint and had no grievance procedure as required by Title IX. Prior to the Grove City College decision, OCR only had to determine that the university received federal funds. Now OCR must find whether federal funds go to the program in which discrimination is charged. In this case it was the Economics Department located in Lake Hall. And the University had received $2,216,000 under the College Housing Loan Program to renovate student housing, as well as $9.9 million in student aid for 1983-84.

But OCR decided that it could not investigate the complaint because Lake Hall, where the alleged discrimination occurred, was not built or renovated with federal loans. Ironically, if the alleged sexual harassment had occurred in student dorms which were renovated with federal loans, the complaint would have been investigated. This case is on "policy hold" at the Education Department. OCR #01-84-2020.

A maintenance worker at the University of Charleston in West Virginia complained to OCR that he had been the victim of discrimination in employment because he was disabled. The University's lawyers told OCR that it received no federal funds for maintenance and therefore OCR had no authority to investigate. Since 1979 the University of Charleston has received approximately $3,376,182 in federal funds from the Department of Education, including $472,194 in federal student aid in the 1983-84 school year.

But OCR put this complaint on "policy hold" because it could not link the allegation of discrimination to a specific, federally funded program. Section 504 is the only federal law protecting disabled persons from employment discrimination based on their handicap. Without an OCR investigation, this disabled employee has no other recourse under federal law. OCR #03-84-2040.

In an administrative proceeding against Mecklenburg County Public Schools, Virginia, the school district's motion to dismiss the proceedings was granted by an administrative law judge because the district's federal funds were not earmaked to the specific program where discrimination was alleged. The case was dismissed although OCR had determined that the school system used grouping policies and procedures which resulted in racially identifiable classes without educational justification; employed a curricular tracking system which resulted in racially identifiable tracks; employed policies and procedures which did not permit movement between those tracks from middle school to high school. As a result OCR found minority students were locked into segregated classes that denied them educational opportunity. But because of Grove City's limited view of the law, Title VI did not provide a remedy for the students. The case is under review.

In Pickens County, South Carolina, junior and senior high school students may choose between co-educational or same-sex physical education classes. However, if too few students sign up for the same sex classes, students who chose co-ed classes are assigned to sex segregated Physical Education classes. The Office for Civil Rights found that this practice discriminated against boys and girls, in violation of Title IX (sex discrimination). The school district claimed that OCR did not have jurisdiction because none of the $2 million in federal funds received by the school district were used for physical education. An Administrative Law Judge and the Civil Rights Reviewing Authority agreed with the school district, and OCR did not appeal the decision. The case is closed and the

district continues to operate its physical education program in a discriminatory manner.

During the hearings on S. 557, the committee heard the testimony of Mr. Jerry Kicklighter of Bellville, Georgia, who has epilepsy, and gave the following account:

> In the summer of 1974 I was hired by DeKalb Community College to be an adjunct instructor. A few months later, in September 1974, I was hired as a full instructor in botany-biology. I worked full time until 1977. I enjoyed my job and consistently received positive performance evaluations. In April 1977, I discovered that my contract was not going to be renewed.
>
> I requested that the College give me a hearing and was refused. The college never put anything in writing as to why I was terminated—the law did not require that because I wasn't tenured yet.
>
> I found out, in an off-the-record conversation with the Chairman of my department that I was terminated because of my epilepsy. Mr. Chairman, at worst, I had only two seizures a week—lasting a total of 40 seconds each, maximum. They were like daydreaming for a minute—I always went right back to my work with no problem, after one of these episodes. The College even had a letter from my doctor stating that even these small petit mal seizures were being treated and that they in no way posed any hazard to my students.
>
> I lost my job because of 80 seconds a week.
>
> I thought this was wrong. I talked to an attorney who told me that the government followed laws and regulations that insured equal opportunity for all citizens. He told me that I shouldn't file a formal lawsuit because I was covered by those laws. So I went to the EEOC officer at the college who recommended that I file both a complaint with the Office of Civil Rights at the Department of Education and with the Office of Federal Contract Compliance at the Department of Labor. I did exactly what they instructed me to do.
>
> Seven years later, on May 24, 1984, OCR sent me a letter stating that, because of the *Grove City* decision, they didn't have jurisdiction to pursue my case. The government had established that DeKalb Community College received over a quarter of a million dollars in federal funds for the 1976–77 school year, but they couldn't trace the funds directly to my job, as the *Grove City* decision required.

In addition to these cutbacks in administrative enforcement, the lower federal courts have also begun to incorporate *Grove City's* restrictive interpretation of "program or activity into Section 504 cases as well as Title IX, Title VI and Age Discrimination Act cases.

In written testimony submitted to the Committee, Arlene Mayerson of the Disability Rights Education and Defense Fund, Inc., described some of the casualties of the *Grove City College* decision:

In *Jacobson* v. *Delta Airlines, Inc.*, 742 F.2d 1202 (9th Cir. 1984), the court held that the airline did receive federal financial assistance in the form of subsidies for small community service, but the receipt of such payments only subjected the small community service program—not the entire airline—to the civil rights laws. Since the alleged discrimination against plaintiff did not take place in connection with this program, Section 504 was found to be inapplicable and the case was dismissed. As a result, Delta's practice of requiring disabled persons to sign "medical release forms" acknowledging that they may be removed from a flight at any point for unspecified reasons, was allowed to stand. This result occurred despite the fact that the court found Delta's practice to be otherwise unreasonable under substantive Section 504 laws, and despite the fact the Delta received considerable and varied types of federal financial assistance.

Price v. *Johns Hopkins University, et al.*, Bench Opinion, Civil Number HM83-4286 (D.C. Maryland 1985), involved a blind philosophy professor who was denied access to an adequate number of college work study readers by the University and was forced to pay for necessary extra readers from his own funds. Price asserted that the relevant "program or activity" for Section 504 purposes was the entire university. Citing *Grove City* and *Jacobson*, the court ruled that a program-specific approach was in order, and thus the case must be limited to the work study program only.

Gallagher v. *Pontiac School District*, No. 85-1134, (6th Cir.), Slip Opinion, December 16, 1986.

A handicapped student's case was dismissed because the court held that there was no federal assistance to a specific program, even though the student participated in special education which received federal funds.

Russell v. *Salve Regina College,* C.A. No. 85-06 28-S U.S. Dist. Ct. of R.I., Slip Opinion, November 17, 1986

The court held that there was no cause of action under Section 504 in a case alleging discrimination in a nursing program where the only money received by the college is through financial aid to students.

Foss v. *City of Chicago,* 640 F. Supp. 1088, (N.D. Ill. 1986)

The court held that a handicapped firefighter could not sue the Chicago Fire Department under Section 504 because he was not employed in a specific program receiving federal financial assistance. Although revenue sharing funds could have been distributed to the fire department because they were not earmarked, the court held that the fact that they were not so distributed avoids Section 504 coverage. The specific grants to the fire department concerned programs unrelated to plaintiff's employment.

Chaplin v. *Consolidated Edison Company,* 628 F. Supp. 143 (S.D.N.Y. 1986)

Receipt of CETA and WIN training grants did not suffice to invoke coverage of the entire company.

The court held that coverage is limited to persons participating in the training programs.

Greater Los Angeles Council of Deafness v. *Zolin, County of Los Angeles,* No. CV 81-6338-ER, Slip Opinion (D.C. CA July 2, 1984)

Refusal to seat deaf jurors may not be challenged under Section 504 where superior court has been in the past but is not in the present receiving federal financial assistance. Unearmarked revenue sharing funds were held not to be sufficient to invoke coverage, if not specifically dispersed to the superior court.

Bradford v. *Iron County C-4 School District,* C. No. 82-303-C(4), Slip Opinion, (E.D. MO June 13, 1984)

The court held that unrestricted federal funds trigger coverage, but also held that the defendant has the opportunity to prove that the program or activity at issue did not utilize the unrestricted federal funds.

In sum, the hard won gains of the past two decades have been significantly eroded in the three years since the *Grove City College* case was decided. Congressional action is urgently needed to restore the broad prohibition on the use of federal funds to discriminate.

VI. Major Provisions of S. 557, as Reported

COVERAGE

The definition of "program or activity" and "program" contained in the bill describe the application of the principle of institution-wide coverage to the public and private entities which are recipients of federal financial assistance.

A. State and Local Governments

The bill provides that when any part of a state or local government department or agency is extended federal financial assistance, the entire agency or department is covered. If a unit of a state or local government is extended federal aid and distributes such aid to another governmental entity, all of the operations of the entity which distributes the funds and all of the operations of the department or agency to which the funds are distributed are covered.

Examples: If federal health assistance is extended to a part of a state health department, the entire health department would be covered in all of its operations.

If the office of a mayor receives federal financial assistance and distributes it to local departments or agencies, all of the operations of the mayor's office are covered along with the departments or agencies which actually get the aid.

B. Education Institutions and School Systems

S. 557 provides that when federal financial assistance is extended to any part of a college, university, other postsecondary institution, or public system of higher education, all of the operations of the institution or education system are covered. Postsecondary institution is a generic term for any institution which offers education beyond the twelfth grade. Examples of postsecondary institutions would include vocational, business, and secretarial schools.

When federal financial assistance is extended to any part of a local educational agency (LEA), a system of vocational education, or other elementary or secondary school system, all of the operations of the entire LEA or school system are subject to the requirements of the four civil rights laws. An individual elementary or secondary school which is extended federal financial assistance and which is neither part of an LEA nor part of a school system will be covered in its entirety as an entity which is principally engaged in the business of providing education pursuant to part (3)(A) of the definition of "program or activity" in the bill. For two or more schools to be considered a "school system", there must be some significant linkage between them. Thus, for example, any group of schools whose only connection to one another is that they belong to some umbrella advocacy or membership group, or that they are accredited by one central accrediting agency, would not constitute a school system.

The language "all of the operations of" an educational institution or system would include, but is not limited to, the following—traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities.

Examples: If the department of computer sciences at a college receives a federal grant, the entire college is prohibited from discrimination under the four civil rights laws.

If federal financial assistance is extended to one of three secondary schools which comprise a system operated by a Catholic Diocese, all of the operations of all three of the schools in the system are covered.

C. Corporations and Other Private Entities

The bill provides that a corporation, partnership, or other private organization or sole proprietorship will be covered in its entirety if it receives federal financial assistance which is extended to it as a whole or if it is principally engaged in certain kinds of activities. In all other instances, coverage will be limited to the geographically separate plant or facility which receives the federal funds.

Federal financial assistance extended to a corporation or other entity "as a whole" refers to situations where the corporation receives general assistance that is not designated for a particular purpose. Federal financial assistance to the Chrysler Company for the purpose of preventing the company from going bankrupt would be an example of assistance to a corporation "as a whole." Federal aid which is limited in purpose, e.g., Job Training Partnership Act (JPTA) funds, is not considered aid to the corporation as a whole, even if it is used at several facilities and the corporation has the discretion to determine which of its facilities participate in the program. A grant to a religious organization to enable it to extend assistance to refugees would not be assistance to the religious organization as a whole if that is only one among a number of activities of the organization. Further, federal financial assistance that is earmarked for one or more facilities of a private corporation or other private entity when it is extended is not assistance to the entity "as a whole." Nor does S. 557 embody a notion of "freeing

up." Federal financial assistance to a corporation for particular purposes does not become assistance to the corporation as a whole simply because receipt of the money may free up funds for use elsewhere in the company.

In specifying limited coverage of an entire plant as the geographically separate facility," the bill refers to facilities located in different localities or regions. Two facilities that are part of a complex or that are proximate to each other in the same city would not be considered geographically separate.

If an entity is extended federal financial assistance "as a whole," all of its operations at each of its locations must be conducted in compliance with these laws. Likewise, if the entity or individual is principally engaged in education, health care, housing, social services, or parks and recreation, all of its activities at each of its plants must comply with these laws if any part of the entity receives federal aid. Because they are principally religious organizations, institutions such as churches, dioceses and synagogues would not be considered to be "principally engaged in the business of providing education, health care, housing, social services or parks or recreation," even though they may conduct a number of programs in these areas.

It is important to note that the evidence presented to the committee supports corporation-wide coverage for all types of corporations receiving federal financial assistance prior to the *Grove City College* decision. In the 99th Congress, the sponsors of the Civil Rights Restoration Act in the House of Representatives accepted an amendment to restore institution-wide coverage only for corporations and other private entities which are extended assistance "as a whole" or that provide services that are traditionally regarded as within the public sector, i.e., those enumerated in part (3)(A)(ii) of the definition of "program or activity" in S. 557. The bill has left that compromise intact.

If a corporation, partnership, other private organization, or sole proprietorship is not principally engaged in one of the activities delineated above, and receives federal financial assistance which is not extended to it "as a whole," only the full operations of the geographically separate facility will be covered by the civil right laws.

Example: If a private hospital corporation is extended federal assistance for its emergency room, all the operations of the hospital, including for example, the operating rooms, the pediatrics department, admissions, discharge offices, etc., are covered under Title VI, section 504, and the Age Discrimination Act. Since Title IX is limited to education programs or activities, it would apply only to the students and employees of educational programs operated by the hospital, if any.

If corporation X is a chain of five nursing homes, federal financial assistance to one of the nursing homes will require complance with the civil rights laws in all of the operations of all five of the nursing homes, subject to the education limitation in Title IX described in the preceding example.

If the Dearborn, Michigan plant of General Motors is extended federal financial assistance for first aid training through the state department of health, all of the operations of the Dearborn plant

are covered. (The state health department is also covered as a state agency to which federal financial assistance is extended.)

D. Other Entities

The committee amendment provides in part (4) of the definition of "program or activity" that other entities established by two or more of a (1) state local government entity; (2) education institution or system; or (3) corporation, partnership, other private organization or sole proprietorship, will be covered in their entirety.

This so-called catch-all provision originated in the House version of the Civil Rights Restoration Act in the 99th Congress. The bill's sponsors recognized that it is impossible to describe precisely the thousands of entities which receive the more than $200 billion in federal financial assistance which is distributed annually. Nonetheless, receipt of that federal financial assistance requires compliance with the antidiscrimination provisions of Title VI, Title IX, section 504, and the Age Discrimination Act. The bill provided that entities receiving federal financial assistance which were not specifically described in the bill's definition of "program or activity" would be covered by the four civil rights laws in a manner analogous to the entity receiving the aid. Thus, a multistate, regional transportation commission which receives federal financial assistance would be covered in its entirety, like a state Transportation Department.

Some members of the House expressed the concern that the catch-all provision was too vague and open-ended. The House sponsors of the bill agreed to a compromise provision limiting the catch-all provision to "any combination comprised of two or more of the entities described" in the bill. In this Congress, the committee has accepted language proposed by Senators Thurmond and Hatch to clarify that part (4) of the "program or activity" definition, the catch-all provision, applies to entities which (1) are not described in parts (1), (2), or (3) of the definition of "program or activity" in the bill; and (2) are established by two or more entities which are described in parts (1), (2), or (3) of the program or activity definition.

Example: A school district and a corporation establish the PPP company—a public-private partnership whose purpose is to provide remediation, training and employment for high school students who are at risk of school failure. The PPP company applies for and is extended federal financial assistance. All of the operations of the PPP company would be covered even if the federal financial assistance was only to one division or component of the company.

This is appropriate because an entity which is established by two or more of the entities described in (1), (2), or (3) is inevitably a public venture of some kind, i.e., either a government-private effort (1 and 3), a public education-business venture (2 and 3) or a wholly government effort (1 and 2). It cannot be a wholly private venture under which limited coverage is the general rule. The governmental or public character helps to determine institution-wide coverage. For example, in a Catholic diocese where 3 parishes receive federal aid, the parishes are geographically separate facilities which receive federal aid, and the diocese is a corporation or private organization of which the parishes are a part. Only the three parishes which receive federal aid are covered by the antidiscrimi-

nation laws. Both the parishes and the diocese are entities described in paragraph (3), therefore paragraph (4) would not apply.

The governmental or public character of entities covered by paragraph (4) helps to determine institution-wide coverage. Even private corporations are covered in their entirety under (3) if they perform governmental functions, i.e., are "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation."

It should be added that no coverage of the separate entities which founded the PPP company is obtained under (4). They would be covered only by virtue of any federal financial assistance extended to them as entities. So, if the school district received assistance through a subgrant for the PPP company (or through the state or any other entity), it would be covered under (2). Likewise, if the corporation received assistance through PPP or some other entity, it would be covered by virtue of (3) and the distinctions made in (3) would determine how much of the corporation was covered.

Fund Termination

S. 557 will leave in effect the enforcement structure common to each of these statutes. The section in each statute states that the termination of assistance "shall be limited . . . to the particular program, or part thereof, in which such noncompliance has been so found." The bill defines "program" in the same manner as "program or activity", and leaves intact the "or part thereof" pinpointing language.

The seminal case dealing with fund termination is *Board of Public Institution of Taylor County* v. *Finch,* 414 F.2d 1068 (5th Cir. 1969), a Title VI case decided in 1969. Under that case, the Court noted that:

> If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. (at 1078).

Under the *Taylor* ruling, Federal funds earmarked for a specific purpose would not be terminated unless discrimination was found in the use of those funds or the use of the funds was infected with discrimination elsewhere in the operation of the recipient. In the case of Grove City College, for example, if there is discrimination in the math department, a fund termination remedy would be available because the funds from BEOG's flow throughout the institution and support all of its programs.

Religious Tenet Exemption in Title IX

Since its enactment in 1972, Title IX has contained an exemption for educational institutions "controlled by a religious organization." The exemption permits an education institution to seek an exemption from the prohibition on sex discrimination in Title IX where the application of Title IX "would not be consistent with the religious tenets of such organization."

S. 557 leaves the religious tenet exemption in Title IX intact and clarifies that the exemption is as broad as the Title IX coverage of

education programs and activities. Thus, a religiously controlled education program or activity which receives federal financial assistance and is therefore subject to the sex discrimination prohibition in Title IX, but is not part of an education institution, would still be within the scope of the religious tenet exemption. The inclusion of clarifying language for the religious exemption was prompted by concern expressed by the Catholic Conference in previous Congresses. Bishop Joseph Sullivan, who testified on behalf of the U.S. Catholic Conference before the committee on S. 557, commented approvingly on the religious tenet exemption in S. 557:

> When we testified on this legislation in the last Congress, we requested that the religious tenet provison be extended to ensure that the non-educational institutions would also be protected. As we read S. 557 in its present form, the extension of the religious tenet provision beyond education institutions has been made.

The record of implemenatation of the religious tenet exemption does not indicate any need to broaden the religious tenet provision. In March 1977, HEW requested every educational institution receiving federal assistance to complete and return an Assurance of Compliance with Title IX. The Assurance form contained instructions for claiming a religious exemption. The Attachment which accompanied the Assurance form defined what HEW considered to be religious "control":

> An application or recipient will normally be considered to be controlled by a religious organization if one or more of the following conditions prevail:
>
> (1) It is a school or department of divinity; or
>
> (2) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or
>
> (3) Its charter and catalog, or other official publication, contains explicit statement that it is controlled by a religious organization or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization of an organ thereof.

In response to a request from Chairman Kennedy, the U.S. Department of Education, the agency charged with administering Title IX religious exemption requests, provided the following information by letter dated May 19, 1987:

> OCR has received requests for religious exemptions from 227 institutions since July 21, 1975, the date the Title IX regulation was implemented, to the present.
>
> OCR has granted exemptions to 150 institutions. Under the 1985 religious exemption project aimed at resolving the requests pending at that time, OCR closed 79 request files for a variety of reasons, including, but not limited to:

the institution withdrew the request; the institution did not need a religious exemption since its admission practices were already exempt under 34 C.F.R. Sec. 106.15; the institution had ceased operations; or the institution failed to respond to repeated requests from OCR for additional information sufficient to act on the exemption request. Most of the institutions from which additional information was requested submitted information sufficient for a determination. The request files were closed for those institutions that did not respond to OCR's repeated requests for information. Two of the 79 institutions whose files were closed under the 1985 project later requested and were granted exemptions and thus are included in the total of 150 institutions granted exemptions. OCR has never denied a request for religious exemption. No requests for religious exemption are pending at this time.

The two most frequently cited reasons for requests for religious exemptions involved tenets calling for sex discrimination in institutions training students for the ministry and differential treatment of pregnant students and employees, particularly if unmarried. A significant number of requests also sought to treat men and women differently in athletic programs.

Some excerpts from actual request letters are illustrative of the practices sought to be exempt from Title IX:

> [O]ur religious standards so strongly condemn sexual activities outside the marriage that we must reserve to ourselves the handling of Sacred Scripture violations on the part of students and staff. For instance, if a woman student is found to be pregnant she could no longer be allowed to remain with other unmarrird women in the dorm.
>
> * * * * *
>
> The College requests exemption from this paragraph in that marital status could indeed be a factor in job suitability in certain instances. Since the Scriptures teach that the husband is the head of the wife . . . a woman whose employment came in conflict with her marriage obligations would be expected to be in submission to her husband. On this basis, the College may find it necessary to make an employment decision based upon marital status.
>
> * * * * *
>
> All of our physical education classes are open to both men and women with the exception of swimming classes. The College has never allowed mixed swimming in any of the activities which it sponsors, and this action has been enforced because of the position on what is "modest attire."
>
> * * * * *
>
> . . . College is committed to providing as many opportunities as possible for its women in the area of intramural and intercollegial athletics. However, the college has

> strong beliefs concerning the teachings of the Bible on the subject of modesty. . . . College therefore, must review from time to time the dress of athletic teams that visit on our campus in order to ensure that our beliefs in this area are not compromised. Should such dress by opposing teams violate our beliefs in modesty the college would be bound to curtail such opportunities that it now affords its women in athletics. All dress code provisions of the college are subject to such review and change by the board of directors as it sees fit in keeping with our basic and fundamental belief in the teaching of the Bible as it relates to modesty.

The committee is concerned that any loosening of the standard for application of the religious exemption could open a giant loophole and lead to widespread sex discrimination in education.

Small Provider Exception

The bill adds a new subsection (c) to Section 504 of the Rehabilitation Act of 1973. This new subsection specifies that small providers such as pharmacies or grocery stores, are not required to make significant structural alterations to their existing facilities to ensure accessibility to handicapped persons if alternative means of providing the services are available. It also provides that the terms in this subsection must be construed with reference to the regulations existing on the date of the enactment of this subsection.

An important aspect of the regulations is their provision regarding "program accessibility." The regulations of the Department of Health and Human Services, promulgated in 1977, for example, generally provide that qualified handicappd persons shall not be excluded from federally assisted education, health, welfare, or other social service programs merely becomse of the inaccessibility of a recipient's facilities. The regulations allow for a flexible approach by recipients in making programs accessible to handicapped persons in the most integrated setting. Recipients may, for example, redesign equipment, reassign classes or services to accessible facilities, or assign aides to handicapped persons (*See* 45 C.F.R. 8422 (b)). Where other methods of achieving compliance are ineffective to render programs accessible, a recipient is required to make structural changes in its facilities.

However, in the case of a small health, welfare, or other social service provider, a special last resort "small provider" exception is available under current regulations. It is a limited exception available only to small provider, defined as one with fewer than fifteen employees. If such small providers cannot render their programs accessible by any means other than making significant alterations to their facilities, they may, after consultation with the handicapped person seeking its services, and with no resulting additional obligations to the handicapped person, refer the person to another provider whose facilities are accessible. Before a small provider makes such a referral, it must determine that the other provider's program is, in fact, accessible and that the other provider is willing to provide the services. *See* 45 C.F.R. 84.22(c). The drafters of these regulations believed this "last resort" referral provisions was ap-

propriate" . . . to avoid imposition of additional costs in the health care area, to encourage providers to remain in the Medicaid program, and to avoid imposing significant costs on small, low-budget providers such as day-care centers or foster homes. *See* 45 C.F.R., Pt. 84, App. A, Analysis of Final Regulation.

The regulations of other Federal agencies have similar special provisions for "small providers." *See, e.g.,* Department of Agriculture regulations 7 C.F.R. 156.16(c); Department of Labor regulations, 28 C.F.R. 32.27 (b) (3); Veterans Administration, 38 C.F.R. 18.422(c); Department of Commerce, 15 C.F.R. 8b.16(c). For example, a "mom and pop" grocery store is such a "small provider."

This new subsection makes it clear that the special rules now contained in the above described regulations are now specifically statutorily authorized and that S. 557 will not entail any new requirements of architectural modification.

Ultimate beneficiaries

Section 7 of the bill sets forth a rule of construction which provides that "ultimate beneficiaries" that were excluded from coverage prior to the enactment of S. 557 would continue to be excluded from coverage after the enactment of the bill. The "lead agency" regulations interpreting Title VI, section 504, and the Age Discrimination Act currently define who is a "recipient" of federal assistance with a proviso excluding from such term the "ultimate beneficiaries" of such federal assistance.

For example, since the first of these civil rights statutes, Title VI, was enacted, farmers receiving crop subsidies have been excluded from coverage because they are "ultimate beneficiaries." On May 5, 1964, during debate in the Senate on the 1964 Civil Rights Act, Senator John Sherman Cooper introduced into the Congressional Record a letter from Attorney General Robert Kennedy answering several questions about Title VI. One of the issues Attorney General Kennedy addressed was the application of Title VI to farmers.

Mr. Kennedy responded as follows:

> *Question.* Would persons who receive payments under various agricultural support and marketing programs be "recipients" under Title VI? If so, what type of discrimination by these "recipients" under Title VI would be grounds for cutting off their participation in a program? Would it include employment practices?
>
> Answer. Farmers who receive federal grants, loans, or assistance contracts would be "recipients" within the meaning of Title VI. Title IV would protect such farmers, themselves, from being denied the benefits of such programs, or otherwise discriminated against under them, on grounds of race, color, or national origin. But, since such programs are basically commodity programs, and since individual farmers are the ultimate beneficiaries of such programs, Title VI would not authorize imposition of any requirements on individual farmers participating in these programs. And, more particularly, it would not authorize imposition of any requirements with respect to farm em-

ployment, since farm employees are not beneficiaries of the program referred to.

So, from the beginning, in the legislative history of Title VI, the model for the other three statutes, we have the unequivocal statement that farmers who receive crop subsidies are not covered.

In testimony before the House on this measure in the 99th Congress, Daniel Marcus, former Deputy General Counsel, HEW and former General Counsel for the Department of Agriculture confirmed that in practice, farmers who receive crop subsidies are not subject to these laws, although those who participate in recreational programs serving the public cannot discriminate in determining who they will allow on their land.

Mr. Marcus stated:

> Specifically, it has been charged that H.R. 700 would, by broadly defining "program or activity," subject farmers who receive price support payments or loans, social security beneficiaries, and food stamp and welfare recipients to the anti-discrimination provisions of Title VI, Title IX, Section 504, and the Age Discrimination Act.
>
> I believe there is no valid basis for these concerns. The basic language of Title VI and the other anti-discrimination statutes, barring discrimination in programs or activities receiving federal financial assistance, has never been interpreted to reach the activities or actions of ultimate beneficiaries of federally financed programs, such as farmers, social security beneficiaries or welfare recipients. This understanding, which is embodied in a number of agency regulations (e.g., the Department of Agriculture's Title VI regulations, 7 C.F.R. Section 15.2), reflects the basic purpose of those laws. In enacting these laws, Congress was not concerned with regulating the activities of the tens of millions of Americans who are the ultimate beneficiaries of the federal financial assistance, but who in no sense operate a federally-financed program or activity. Rather, Congress was concerned with the state agencies, the educational institutions and others who operate programs or conduct activities providing services to others and who are in a position to injure ultimate beneficiaries through discrimination. In other words, ultimate beneficiaries are to a large extent the people intended to be protected by Title VI and the other anti-discrimination statutes, not the people subjected to those statutes.

Other examples of ultimate beneficiaries include persons receiving social security benefits, persons that receive Medicare and Medicaid benefits, and individual recipients of food stamps.

Nothing in S. 557 would prohibit recipients of new forms of federal financial assistance created after enactment of the bill from being exempted from coverage as "ultimate beneficiaries," where the type of aid and the nature of the recipient is analogous to the existing categories of "ultimate beneficiaries."

VII. Summary of Committee Action

The committee met to consider S. 557 on May 7 and May 20, 1987. The committee accepted by unanimous consent two minor technical amendments proposed by Chairman Kennedy and Senator Weicker. The committee defeated six other amendments by roll call votes.

The Kennedy-Weicker amendments clarify that part (1) of the bill's definition of "program or activity" applies only to governmental entities, and that part (4) of the definition, the so-called catch-all provision, applies to entities established by two or more of the entities described in parts (1), (2), or (3).

By a vote of 5–11, the Committee defeated an amendment proposed by Senator Thurmond to delete system-wide coverage for private elementary and secondary schools. This amendment would have permitted schools within a private school system to funnel federal funds to some of its schools while practicing discrimination in other schools. It would have been inconsistent with pre-Grove City system-wide coverage of private school systems under which, for example, four Catholic dioceses in Louisiana submitted school system-wide desegregation plans to HEW in 1969, pursuant to Title VI. And it would have established, for the first time, a different standard of civil rights protection for public and private schools.

By a vote of 5–11, the Committee defeated an anti-abortion amendment to add a new section to Title IX, proposed by Senator Humphrey, as follows:

> Section 909. Nothing in this Title shall be construed to grant or secure or deny any right relating to abortion or the funding thereof, or to require or prohibit any person, or public or private entity or organization, to provide any benefit or service relating to abortion. Nothing in the preceding sentence shall be construed to authorize a penalty to be imposed on any person because such person has had a legal abortion.

The amendment would have made a substantive change in the law, and has no place in a bill which seeks to restore the effect of Title IX and other civil rights statutes to their pre-Grove City interpretation. It relates to the issue of what constitutes discrimination, not the scope of coverage of the civil rights laws. It is not abortion-neutral, as it sponsor claimed. The amendment would repeal long-standing Title IX regulations which protect students and employees from abortion-related discrimination in education programs. It would put abortion language in the text of Title IX for the first time. The Title IX regulations are not at issue in this legislation. They have been in place for twelve years, and there have been neither any legal challenges to these regulations by anti-choice groups, nor any effort on the part of this administration to withdraw or modify the regulations. S. 557 neither ratifies nor rejects the Title IX regulations related to discrimination based on pregnancy or termination of pregnancy.

Title IX does not now require any institution to perform abortions and no abortions would be mandated if S. 557 were enacted. This bill does not expand abortion rights. Religiously-controlled or-

ganizations will continue to be able to apply for, and receive, an exemption from Title IX requirements where compliance with those requirements would violate their religious tenets. For example, a religiously controlled university that wished to exclude insurance coverage of abortions from an otherwise comprehensive student health insurance policy, could seek a religious exemption. Additionally, the U.S. Catholic Conference's former general counsel, Wilfred Caron, stated in a legal analysis in 1985 that neither the House nor Senate bill "would create any new abortion rights." (Although the analysis was of a previous version of the bill, it did not differ on this point.) Title IX covers only students and employees, and does not reach the public at large. Therefore, claims that the bill would require hospitals to provide abortion services to the general public are false.

By a vote of 5–11, the committee rejected an amendment proposed by Senator Hatch to loosen the standard for the religious exemption in Title IX from "controlled by a religious organization" to "closely identified with the tenets of a religious organization." For the reasons discussed in part VII, *supra,* the committee determined that it is unnecessary and unwise to change the standard for the religious tenet exception.

By a vote of 5–11, the committee defeated an amendment proposed by Senator Thurmond that would limit coverage of programs or activities operated by religious organizations to the particular subunit of the organization which receives the federal funds. In other words, this amendment would not overturn the *Grove City College* decision as it applies to programs or activities which receive federal financial assistance, as long as the programs or activities are run by a religious organization. The dual system of civil rights protections for programs carried out by religious and secular organizations contained in this amendment is unprecedented in the history of our civil rights laws. For example, religious employers are subject to Title VII in the same manner as non-religious employers. With the narrow exception of the religious tenet exemption in Title IX, religious recipients of federal financial assistance have been and are subject to the prohibitions on discrimination of the four civil rights laws in the same manner as non-religious recipients of federal aid. There has been no trampling of religious liberty under these laws in the more than twenty years they have been in effect. S. 557 simply will restore the coverage of these laws to their pre-*Grove City College* scope.

By a vote of 5–11, the committee defeated an amendment by Senator Thurmond to strike institution-wide coverage for corporations, partnerships, and other private organizations principally engaged in the business of providing health care, housing, social services, or parks and recreation. As discussed in section VII, supra, pre-Grove City College practice was corporation-wide coverage for all corporations. The language of S. 557 limits broad coverage to those areas of public services where it is most important.

By a vote of 2–14, the committee rejected an amendment proposed by Senator Humphrey to reverse the decision of the Supreme Court in *School Board of Nassau County* v. *Arline,* that individuals with contagious diseases may be considered handicapped under section 504.

The amendment sought to overturn *Arline,* by stating that individuals with contagious diseases are not considered to be handicapped for purposes of section 504. This amendment would have made substantive change in the law, with no hearings or consideration by the Handicapped Subcommittee.

Furthermore, the amendment represents a complete retreat from the principles for which section 504 stands: protection of handicapped individuals from discrimination based not only on the handicap itself, but from irrational fears and prejudice of others. As the Court made clear, Congress did not authorize broad exceptions such as contagious diseases from the coverage of the law.

It is also clear that the Court's decision in *Arline* in no way altered the specific language of section 504 that an individual seeking the law's protection be "otherwise qualified." After *Arline,* as well as before, public health considerations such as contagion continue to be a factor in determining whether a person is in fact "qualified" to perform a particular job. What the Court said was that an individual with a contagious disease can be considered handicapped, thus affording the person the opportunity to make the case for why he or she is qualified to perform the job. If, after the evaluation of whether the individual constitutes a public health risk, no reasonable accommodation is possible, as the regulations require, then the individual will not be considered "otherwise qualified." The Court specifically noted that fact in a footnote to the *Arline* decision, where it made clear that a person who poses a significant risk of communicating an infectious disease will not be "otherwise qualified" for his job if a reasonable accommodation will not eliminate the risk.

The committee voted to report S. 557 favorably to the full Senate by a vote of 12–4.

Matters Not Affected by the Bill

S. 557 addresses only the scope of coverage under Title VI, Title IX, section 504, and the Age Discrimination Act of recipients of federal financial assistance. The bill does not change in any way who is a recipient of federal financial assistance. For example, Appendix A, Subpart A to the Department of Education Section 504 regulations addressed the fact that nonpublic elementary and secondary schools did not become recipients by virtue of the fact that their students participate in certain federally funded programs, as follows:

> One comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of section 104.4(b)(iv), which

prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

These regulations are unaffected by S. 557.

S. 557 does not alter what is defined as "federal financial assistance." Statements about the definition of federal financial assistance made during consideration of earlier versions of this legislation in the 98th and 99th Congresses, as well as the current version, merely reflect the views of individual members of Congress. Such statements are not relevant to the interpretation of S. 557. Whatever was determined to constitute "federal financial assistance" as that term applies to Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and Title VI of the Civil Rights Act of 1964, before the enactment of S. 557 will continue to constitute "federal financial assistance" after its enactment.

For example, S. 557 does not overrule or alter the Supreme Court ruling in the case *Department of Transportation* v. *Paralyzed Veterans of America,* —— U.S. ——— (1986), that airline companies are not recipients of federal financial assistance as a result of their use of federally-assisted airports or federal air traffic controllers. However, the Committee notes that in some instances, airline companies may, in their own right, be recipients of federal financial assistance. Further, Congress last year unanimously passed the Air Carrier Access Act (P.L. 99-435) to expressly prohibit discrimination against handicapped individuals by airlines.

Nor does the bill alter in any way the substantive definition of what constitutes discrimination under these statutes.

VIII. Votes in Committee

The vote on the Thurmond amendment to eliminate system-wide coverage of private and secondary schools was as follows:

AYES—5	NAYS—11
Hatch	Pell
Quayle	Metzenbaum
Thurmond	Matsunaga
Cochran	Dodd
Humphrey	Simon
	Harkin
	Adams
	Mikulski
	Stafford
	Weicker
	Kennedy

The vote on the Humphrey amendment concerning abortion was as follows:

AYES—5	NAYS—11
Hatch	Pell
Quayle	Metzenbaum
Thurmond	Matsunaga
Cochran	Dodd

Humphrey	Simon
	Harkin
	Adams
	Mikulski
	Stafford
	Weicker
	Kennedy

The vote on the Hatch amendment to expand the religious tenet exception was as follows:

AYES—5	NAYS—11
Hatch	Pell
Quayle	Metzenbaum
Thurmond	Matsunaga
Cochran	Dodd
Humphrey	Simon
	Harkin
	Adams
	Mikulski
	Stafford
	Weicker
	Kennedy

The vote on the Thurmond amendment to limit coverage of programs and activities operated by religious organizations was as follows:

AYES—5	NAYS—11
Hatch	Pell
Quayle	Metzenbaum
Thurmond	Matsunaga
Cochran	Dodd
Humphrey	Simon
	Harkin
	Adams
	Mikulski
	Stafford
	WEICKER
	KENNEDY

The vote on the Thurmond amendment to strike corporation-wide coverage for corporations engaged in certain activities was as follows:

AYES—5	NAYS—11
Hatch	Pell
Quayle	Metzenbaum
Thurmond	Matsunaga
Cochran	Dodd
Humphrey	Simon
	Harkin
	Adams
	Mikulski
	Stafford
	Weicker
	Kennedy

The vote on the Humphrey amendment to reverse the Arline decision was as follows:

AYES—2	NAYS—14
Thurmond	Pell
Humphrey	Metzenbaum
	Matsunaga
	Dodd
	Simon
	Harkin
	Adams
	Mikulski
	Hatch
	Stafford
	Quayle
	Weicker
	Cochran
	Kennedy

The vote to report the bill favorably with a committee amendment in the nature of a substitute was as follows:

AYES—12	NAYS—4
Pell	Hatch
Metzenbaum	Quayle
Matsunaga	Thurmond
Dodd	Humphrey
Simon	
Harkin	
Adams	
Mikulski	
Stafford	
Weicker	
Cochran	
Kennedy	

IX. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, June 5, 1987.

Hon. Edward M. Kennedy,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 557, the Civil Rights Restoration Act of 1987, as ordered reported by the Senate Committee on Labor and Human Resources, May 20, 1987. We estimate that the federal government would incur no additional costs and might realize some savings from enacting this bill. State and local governments are not expected to incur any significant direct costs, because we do not expect their nondiscrimination practices to change significantly as a result of this bill.

S. 557 would amend the Education Amendments of 1972, the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and

the Civil Rights Act of 1964. Under current law, and pursuant to the 1984 Supreme Court decision in the *Grove City College* v. *Bell* case, a program or activity that receives federal financial assistance is required to comply with nondiscrimination policies, but other programs or activities run by the same institution need not comply with these policies. Under the bill, a recipient of federal financial assistance would be required to comply with nondiscrimination policies in all activities.

Enacting S. 557 might result in savings to the federal government. To monitor adherence to nondiscrimination policies under current law, the federal government would have to increase administrative efforts and accounting capabilities to trace the flow of federal financial assistance to individual programs and activities. Enacting S. 557 would avoid these potential costs.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

X. REGULATORY IMPACT STATEMENT

While Senate rules require that statements as to the regulatory, inflationary and paper work impact of specific legislation be included, the Committee finds that this is impossible in this particular case. S. 557 amends four statutes which prohibit discrimination by recipients of federal financial assistance. Because receipt of federal financial assistance is voluntary and because federal financial assistance programs are constantly changing, it is impossible to predict precisely the number of entities which will be subject to the anti-discrimination requirements of the four statutes. Thus, it is impossible to predict the specific impact the bill will have on regulations, inflation, and paper work.

While specific estimates are impossible, certain assumptions may be made. Since S. 557 creates no new recipients of federal financial assistance, the bill will not alter the number of entities covered by the four anti-discrimination statutes. Since S. 557 spends no new money, the inflationary impact of the bill will be zero. In addition, because S. 557 requires no new regulations, the regulatory impact of the bill should be negligible. The bill requires no new paperwork in addition to that already required under the four statutes amended by S. 557. By eliminating the requirement that federal agencies and private parties trace federal funds within an entity which is extended federal financial assistance prior to initiating a compliance review, investigation of a discrimination complaint, or enforcement action, S. 557 will actually reduce administrative and paperwork burdens.

XI. CHANGES IN EXISTING LAW

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is in enclosed in black brackets, new matter

is printed in italic, existing law in which no change is proposed is shown in roman):

EDUCATION AMENDMENTS OF 1972

* * * * * * *

TITLE IX—PROHIBITION OF SEX DISCRIMINATION

* * * * * * *

INTERPRETATION OF "PROGRAM OR ACTIVITY"

SEC. 908. For the purposes of this title, the term "program or activity" and the term "program" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance, except that such terms do not include any operation of an entity which is controlled by a religious organization if the application of section 901 to such operation would not be consistent with the religious tenets of such organization.

* * * * * * *

SECTION 504 OF THE REHABILITATION ACT OF 1973

NONDISCRIMINATION UNDER FEDERAL GRANTS AND PROGRAMS

SEC. 504. *(a)* No otherwise qualified handicapped individual in the United States, as defined in section 7(7), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any pro-

gram or activity receiving Federal financial assistance or under any progam or activity conducted by an Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Small providers are not required by subsection (a) make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection.

SECTION 309 OF THE AGE DISCRIMINATION ACT OF 1975

DEFINITIONS

SEC. 309. For purposes of this title—

(1) the term "Commission" means the Commission on Civil Rights;

(2) the term "Secretary" means the Secretary of Health, Education, and Welfare; [and]

(3) the term "Federal department or agency" means any agency as defined in section 551 of title 5, United States Code, and includes the United States Postal Service and the Postal Rate Commission [.]; *and*

(4) the term "program or activity" means all of the operations of—

(A)(i) a department, agency, or special purpose district, or other instrumentality of a State or of a local government; or

(ii) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(B)(i) a college, university, or other postsecondary institution, or a public system of higher education; or

(ii) a local educational agency (as defined in section 198(a)(10), of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

(C)(i) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(I) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(II) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(D) any other entity which is established by two or more of the entities described in subparagraph (A), (B), or (C);

any part of which is extended Federal financial assistance.

CIVIL RIGHTS ACT OF 1964

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TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

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SEC. 606. For purposes of this title, the term "program or activity" and the term "program" mean all of the organizations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assist-

ance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965) system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sold proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social service, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

* * * * * * *

XII. MINORITY VIEWS

The controversy over S. 557 does not concern the prohibitions against discrimination found in the four statutes addressed in the legislation. There is no disagreement within the Committee that we should not permit or subsidize discrimination against minorities, women, persons with handicaps or the aged. Nor does the controversy arise over whether the decision of the Supreme Court in *Grove City College* v. *Bell* should be reversed. We agree on that point as well. What is at issue is whether S. 557, as drafted and interpreted by the majority of the Committee, would interfere with the exercise of some of our most fundamental rights, an ironic consequence for legislation bearing the label "civil rights," and whether the bill will result only in a restoration of the prior scope of federal regulatory jurisdiction.

In some respects, S. 557 is an improvement over prior attempts at *Grove City* corrective legislation. The two amendments to the bill accepted by the Committee helped to clarify some of the jurisdictional definitions in the bill by ameliorating two of the more glaring loopholes found in the initial draft of the legislation. Nonetheless, there are still serious problems with the bill. For example, the legislation does not simply restore the law to what it was the day before the Supreme Court issued the *Grove City* decision. Instead, it represents a marked increase in federal jurisdiction over churches and synagogues, private and religious schools, and the private sector. Similarly, it not only ratifies a federal regulation that makes the failure to provide abortion services a discriminatory act but would impose this regulation more broadly.

An amendment to make S. 557 abortion neutral was rejected, and amendments to protect the First Amendment rights of religious institutions and churches were also defeated. It is distressing that the majority feels it necessary to limit and infringe some civil rights in the name of others.

The report filed by the majority cannot be adequately or accurately responded to at this time. We were given forty-eight hours to respond to the first version of the report and then given a second version a day later. Given the inaccuracies in the versions of the report given to us, there is insufficient time to prepare a thorough response to the numerous and complex issues involved. A more complete response will be provided later, and individual members of the minority may wish to file separate views.

Consideration of civil rights legislation often is not a calm, dispassionate process. In the past, spirited rhetoric and polemic posturing have often gotten in the way of the traditional debate over the meaning and consequences of legislation. We hope that on the

floor, there will be sufficient time to discuss the problems with S. 557 and that the full Senate will choose to correct the problems with the bill. We can prohibit discrimination by those who receive federal financial assistance without jeopardizing other equally important civil rights.

ORRIN G. HATCH.
GORDON J. HUMPHREY.
STROM THURMOND.

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