100TH CONGRESS
1ST SESSION

H. R. 1881

To clarify the meaning of the phrase "program or activity" as applied to educational institutions that are extended Federal financial assistance, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 31, 1987

Mr. SENSENBRENNER (for himself, Mr. STENHOLM, Mr. HYDE, Mr. DEWINE, Mr. EMERSON, Mr. COBLE, Mr. SKEEN, Mr. LAGOMARSINO, Mr. COMBEST, Mr. CRAIG, Mr. SHUMWAY, and Mr. HUBBARD) introduced the following bill; which was referred jointly to the Committees on Education and Labor and the Judiciary

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A BILL

To clarify the meaning of the phrase "program or activity" as applied to educational institutions that are extended Federal financial assistance, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1987".

SEC. 2. (a) Title IX of the Education Amendments of 1972 is amended by adding at the end thereof the following new section:

"SEC. 908. (a) Notwithstanding the decisions of the Supreme Court in Grove City College and others, versus Bell, Secretary of Education, and others, and in North Haven Board of Education and others, versus Bell, Secretary of Education, and others, the phrase 'program or activity' as used in this title shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution.

"(b) In any other application of the provisions of this title, nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase 'program or activity' and that phrase shall be construed without reference to or consideration of the Supreme Court decisions in Grove City and North Haven.

"(c) 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.".

(b) Section 901(a) of title IX of the Education Amendments of 1972 is amended by striking out subsection (3) and inserting in lieu thereof the following:

"(3) this section shall not apply to an educational institution which is controlled by, or which is closely identified with the tenets of, a particular religious

organization if the application of this section would not be consistent with the religious tenets of such organization;".

(c) Section 504 of the Rehabilitation Act of 1973 is amended by inserting "(a)" after the section designation and by adding at the end thereof the following new subsection:

"(b)(1) Notwithstanding the decisions of the Supreme Court in Grove City College and others, versus Bell, Secretary of Education, and others, and in North Haven Board of Ecucation and others, versus Bell, Secretary of Education, and others, the phrase 'program or activity' as used in this section shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution.

"(2) In any other application of the provisions of this section, nothing in paragraph (1) shall be construed to expand or narrow the meaning of the phrase 'program or activity' and that phrase shall be construed without reference to or consideration of the Supreme Court decisions in Grove City and North Haven.".

(d) The Age Discrimination Act of 1975 is amended by adding at the end thereof the following new section:

"SEC. 310. (a) Notwithstanding the decisions of the Supreme Court in Grove City College and others, versus Bell, Secretary of Education, and others, and in North Haven

Board of Education and others, versus Bell, Secretary of Education, and others, the phrase 'program or activity' as used in this title shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution.

"(b) In any other application of the provisions of this title, nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase 'program or activity' and that phrase shall be construed without reference to or consideration of the Supreme Court decisions in Grove City and North Haven.".

(e) Title VI of the Civil Rights Act of 1964 is amended by adding at the end thereof the following:

"SEC. 606. (a) Notwithstanding the decisions of the Supreme Court in Grove City College and others, versus Bell, Secretary of Education, and others, and in North Haven Board of Education, and others, versus Bell, Secretary of Education, and others, the phrase 'program or activity' as used in this title shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution.

"(b) In any other application of the provisions of this title, nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase 'program or activity' and that phrase shall be construed without reference to or consid-

eration of the Supreme Court decisions in Grove City and North Haven.".

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FLAWS IN S. 557 ("CIVIL RIGHTS RESTORATION ACT")

- This bill addresses the scope of federal jurisdiction under four civil rights statutes as well as certain substantive aspects of these laws.

- The Civil Rights Restoration Act (CRRA) represents a vast expansion of federal power over State and local governments and the private sector, including churches and synagogues, farmers, businesses, voluntary associations, and private and religious schools. This expansion goes well beyond the scope of power exercised by the federal government before Grove City. Without being exhaustive, some examples are:

  - An entire church or synagogue will be covered under at least three of these statutes if it operates one federally-assisted program or activity.

  - Every school in a religious school system will be covered in its entirety if one school within the school system receives even one dollar of federal financial assistance.

  - Grocery stores and supermarkets participating in the Food Stamp Program will be subject to coverage solely by virtue of their participation in that program.

  - Farmers receiving crop subsidies, price supports, or similar federal support will be subject to coverage.

  - Every division, plant, facility, store and subsidiary of a corporation or other private organization principally engaged in the business of providing education, health care, housing, social services, or parks or recreation will be covered in their entirety whenever one portion of one division, plant, facility, store, or subsidiary, receives any federal aid.

  - Thus, if one program at one nursing home or hospital in a chain receives federal aid, not only is the entire nursing home or hospital covered, but all other nursing homes or hospitals in the chain are automatically covered in their entirety even if they don't receive federal aid.

  - Further, if the tenant of one unit in one apartment building owned by an entity principally engaged in providing housing receives federal housing aid, not only is the entire apartment building covered, but all other apartment buildings, all other housing operations, and all other non-housing businesses of the owner are covered even though they receive no direct or even indirect federal aid.

- The entire plant or separate facility of all other corporations and private organizations not principally engaged in one of the five specified activities would be covered if one portion of, or one program at, the plant or facility receives any federal aid. This includes all other plants or facilities in the same locality as the facility which receives federal aid for one of its programs.

- A private, national social service organization will be covered in its entirety, together with all of its local chapters, councils, or lodges, if one local chapter, council, or lodge receives any federal financial assistance.

- A state, county, or local government department or agency will be covered in its entirety, whenever one of its programs receives federal aid. Thus, if a state health clinic is built with federal funds in San Diego, California, not only is the clinic covered, but all activities of the state's health department in all parts of the state are also covered.

- All of the commercial, non-educational activities of a school, college, or university, including rental of commercial office space and housing to those other than students or faculty, as well as investment and endowment policies, will be covered if the institution receives even one dollar of federal education assistance.

- A vague, catch-all provision creates additional coverage.

- As a consequence, more sectors of American society will be subject to: increased federal paperwork requirements; random on-site compliance reviews by federal agencies even in the absence of an allegation of discrimination; thousands of words of federal regulations; costly Section 504 accessibility regulations that can require structural and equipment modifications, job restructuring, modifications of work schedules, and provision of auxiliary aids; equality-of-result rather than equality-of-opportunity standards that can lead to quotas and proportionality requirements; the need to attempt to accommodate contagious persons; increased exposure to costly private lawsuits that will inevitably seek the most expansive interpretation of the already overbroad language of the bill; and increased exposure to the judgments of federal courts.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 25, 1988

Honorable Orrin G. Hatch
135 Senate Russell Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

The enclosed bill comment on S. 557, the "Civil Rights Restoration Act" of 1987, sets forth the views of the Department of Justice on this proposal. This bill would significantly amend four civil rights statutes which ban discrimination on various bases in programs and activities receiving Federal financial assistance: title VI of the Civil Rights Act of 1964 (race, color, national origin); title IX of the Education Amendments of 1972 (sex) (limited to education); section 504 of the Rehabilitation Act of 1973 (handicap); and the Age Discrimination Act of 1975 (age).

S. 557 is one of the most sweeping expansions of federal jurisdiction in the post World War II era. We remain firmly opposed to this bill. We support, instead, the "Civil Rights Act of 1987", introduced in the House of Representatives as H.R. 1881.

We continue to support an approach to the decision in Grove City College v. Bell 465 U.S. 555 (1984), embodied in H.R. 1881, tailored to the concerns identified since the decision: a bill that subjects educational institutions to coverage under all four civil rights statutes whenever any part of the institution receives Federal financial assistance; retains the program-specific coverage in all other respects existing before the Grove City decision; renders title IX abortion-neutral; and sufficiently protects religious liberty under title IX.

This letter will summarize the attached bill comment:

- No case has been made for the sweeping expansion of federal authority represented by S. 557.

- Grove City has barely had any impact outside of education; most agencies, except for the Department of Education, have indicated to us that their civil rights programs are not at all impeded by Grove City. The Administration's bill fully addresses concerns in the education area.

- There are two reasons why Grove City has had such little impact outside of education: (1) there have been numerous federal, state, and local civil rights laws enacted in the last 25 years that provide protection and (2) there is far more federal aid dispensed today than 25 years ago, giving rise to significant jurisdiction under these four statutes, as construed in Grove City.

- Among the burdens that result from expanded federal jurisdiction are:

  - Increased Federal paperwork;

  - A requirement to consult with disabled persons or disability rights groups and to make and maintain a record of such consultations;

  - The requirement of adopting "grievance procedures that incorporate appropriate due process standards;

  - Exposure to Federal bureaucratic compliance reviews and on-site reviews even in the absence of an allegation of discrimination;

  - Thousands of words of Federal regulations;

  - The need to adhere, not to an equality-of-opportunity standard, but an equality-of-result standard under Federal regulations which forbid conduct, including admission standards not adopted for a discriminatory purpose, just because it falls with a disproportionate impact on particular groups -- a basis for the imposition of proportionality requirements, quotas, and other Federal intrusions;

  - The need to adhere to accessibility requirements under section 504, including structural requirements, and the need for job restructuring, modification of work schedules, and provision of auxiliary aids;

  - The requirement to attempt to accommodate persons with infectious diseases such as tuberculosis and AIDS;

  - Increased exposure to costly private lawsuits.

- As Justice Powell, joined by Chief Justice Burger and Justice O'Connor, stated in an opinion concurring in the result in Grove City, "[W]ith acceptance of [Federal financial] assistance one surrenders a certain measure of freedom that Americans always have cherished." 465 U.S. at 577.

- Thus, if there is no demonstrated, compelling need for Federal regulation -- and the concomitant exposure to expensive private litigation under these statutes -- it ill behooves Congress to impose the costs and burdens of such regulation and litigation on new sectors of the American economy not covered prior to the Grove City decision. The expansion of Federal jurisdiction in any field, including civil rights, is not without costs -- costs which should not be imposed unless shown to be necessary.

Some Examples of S. 557's Expansions of Pre-Grove City Coverage:

- An entire church or synagogue will be covered under title VI, section 504, and the Age Discrimination Act, if it operates one federally-assisted program or activity, as well as under title IX if the church or synagogue conducts an educational program or activity (with exceptions under title IX in those circumstances where title IX requirements conflict with religious tenets).

- Every school in a private or religious elementary or secondary school system will be covered in its entirety if any one school within the school system receives even one dollar of Federal financial assistance.

- Grocery stores and supermarkets participating in the food stamp program will be subject to coverage solely by virtue of their participation in that program.

- Every division, plant, subsidiary, store, and facility of a corporation, partnership, or other private organization or an entire sole proprietorship principally engaged in the business of providing education, health care, housing, social services, or parks and recreation will be covered in its entirety whenever one portion of one division, plant, subsidiary, store, or facility receives any Federal financial assistance.

- If one program at one nursing home or hospital in a chain receives Federal aid, not only is the entire nursing home or hospital covered, but all other nursing homes or hospitals in the chain are automatically covered in their entirety even if they don't receive Federal aid.

- If the tenant of one unit in one apartment building owned by an entity principally engaged in providing housing receives Federal housing aid, not only is the entire apartment building covered, but all other apartment buildings, all other housing operations, and all other non-housing activities of the owner are covered even though they receive no direct or even indirect Federal aid.

- Similarly, if a private organization principally engaged in home building or development constructs one housing project with any direct or indirect Federal aid, all of the builder's housing projects and other activities, including non-housing activities, would be covered in their entirety even if they receive no direct or indirect Federal aid.

- If a private organization principally engaged in one of these five broad activities employs part-time a student receiving Federal work-study aid in one program at one facility, not only is that facility covered in its entirety, all aspects of the entire organization -- all of its plants, facilities, local offices and all of its activities unrelated to its principal business -- are covered.

- Further, if an entity conducting one or more educational programs receives Federal financial assistance to any part of the entity, whether or not that part is educational, then all four statutes, including title IX's ban on sex discrimination, apply to the entire entity, including non-educational activities.

- Under the expanded coverage established by subparagraph (3)(A)(ii), contracting activities of covered entities will be covered in all cases -- contracting is an "operation" of the covered entity.

- A private, national social service organization will be covered in its entirety, together with all of its local chapters, councils, or lodges, if one local chapter, council, or lodge receives any Federal financial assistance.

- (a) All of the operations of the entire plant or geographically separate facility of businesses and other private entities not principally engaged in education, health care, housing, social services, or parks and recreation would be covered if one portion of, or one program at, the plant or facility receives any Federal financial assistance. (b) Further, all other plants and facilities associated with, and in the same locality or region as, the one receiving any Federal aid are covered even if they receive no direct or indirect Federal aid.

- If a research hospital receiving Federal aid establishes a research laboratory jointly with a pharmaceutical company, and the research laboratory does not receive Federal aid, it is covered because it is an "operation of" the hospital.

- Similarly, if a private business contributes its own funds or equipment informally to a federally-assisted school district, private school, or private social service program, the business itself is covered.

- Farmers receiving crop subsidies and price supports will be subject to coverage.

- A State, county, or local government department or agency will be covered in its entirety, whenever one of its programs receives Federal aid. Thus, if a State health clinic is built with Federal funds in San Diego, California, not only is the clinic covered, but all activities of the State's health department in all parts of the State are also covered.

- The zoning function of local government will likely be covered by these laws in ways never before achieved.

- Every college or university in a public system of higher education will be covered in its entirety if just one department at one school in that system receives Federal financial assistance.

- A school, college, or university investment policy and management of endowment will be covered if the institution receives even one dollar of Federal education assistance.

- The commercial, non-educational activities of a school, college, or university, including rental of commercial office space and housing to those other than students or faculty, and other commercial ventures will be covered if the institution receives even one dollar of Federal education assistance.

- A new, vague catch-all provision provides additional coverage in potentially limitless ways.

- S. 557 does not adequately protect the religious tenets of institutions it covers; Congress should adopt the religious tenets language it has already enacted in the Higher Education Amendments of 1986. There, a ban on religious discrimination in the construction loan insurance program used the phrase: "controlled by, or closely identifies with the tenets of," a religious organization. We propose the same language for title IX.

- This bill runs a serious risk that the traditional, and universally agreed upon, pinpoint scope of an agency's authority to terminate federal aid is greatly expanded.

- This bill not only leaves in place title IX's abortion regulations which explicitly condition receipt of federal aid on providing abortion insurance to students and employees; it dramatically expands their scope.

- Indeed, at a minimum, hospitals receiving any federal aid and which also operate an education program, must provide abortion on demand to the general public.

- We support the Danforth abortion-neutral language.

For all of these reasons, we strongly recommend against enactment of S. 557.

Sincerely,

John R. Bolton
Assistant Attorney General for
Legislative Affairs

Enclosure

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JAN 25 1988

Department of Justice Bill Comment on S. 557 ("Civil Rights Restoration Act of 1987")

This bill comment will set forth the views of the Department of Justice on S. 557, the "Civil Rights Restoration Act of 1987," as reported by the Senate Committee on Labor and Human Resources. S. Rep. No. 64, 100th Cong., 1st Sess. (1987). This bill would significantly amend four civil rights statutes which ban discrimination on various bases in programs or activities receiving Federal financial assistance: title VI of the Civil Rights Act of 1964 (race, color, national origin); title IX of the Education Amendments of 1972 (sex) (limited to education); section 504 of the Rehabilitation Act of 1973 (handicap); and the Age Discrimination Act of 1975 (age).

Since the Committee version of the bill is virtually unchanged from the bill as introduced, nearly all of the testimony presented to the Committee by the Department on April 1, 1987, by Deputy Assistant Attorney General Mark R. Disler, and virtually all of the analyses in the letters of April 28 and 29, 1987, from Mr. Disler to Senator Edward Kennedy, Chairman of the Labor and Human Resources Committee, and the May 19, 1987, letter from Mr. Disler to Senator Strom Thurmond, remain applicable. Indeed, the Committee Report raises disturbing, new concerns about the meaning of the bill. As just one example, the Committee Report misstates the scope of the pinpoint termination clause and thus raises a serious specter of a broadened termination authority -- contrary to the assertions of the bill's sponsors.

S. 557 remains one of the most sweeping expansions of federal jurisdiction in the post World War II era. We remain firmly opposed to this bill. We support, instead, the "Civil Rights Act of 1987," introduced in the House as H.R. 1881.

We continue to support an approach to the decision in Grove City College v. Bell, 465 U.S. 555 (1984), tailored to the concerns identified since the decision: a bill that subjects educational institutions to coverage under all four civil rights statutes whenever any part of the institution receives Federal financial assistance; retains the program-specific coverage in all other respects existing before the Grove City decision; renders title IX abortion-neutral; and sufficiently protects religious liberty under title IX.

No case has been made for the sweeping expansion of Federal authority over State and local governments and the private sector represented by S. 557.

The Grove City decision has not had even remotely the dire impact suggested by the proponents of S. 557. The Committee Report cites hardly any examples of curtailment of civil rights outside of the education context. Moreover, of the 674 complaints closed in whole or in part or suspended by the Department of Education in fiscal years 1984 through 1986, 468 concern abortion and were filed by one individual.

It is not surprising that Grove City has not had a greater impact: (1) there are many more Federal and State laws in existence today than in 1964 when the first of these four civil rights statutes was enacted,[1] and (2) much more Federal aid is dispensed today than in 1964. In FY 1963, less than $11 billion of Federal aid was dispensed through less than 200 programs in contrast to more than $200 billion in Federal aid dispensed under nearly 1400 programs in FY 1985, thus yielding significant coverage today under the program-specific language of these four statutes. Indeed, with the exception of the Department of Education, a number of Federal agencies have indicated to this Department and to the Committee that Grove City has had virtually no impact on complaint investigations, compliance reviews, and procedures pertaining thereto.

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[1]For example, title II of the Civil Rights Act of 1964 forbids discrimination in public accommodations. Title IV of that Act authorizes the United States to bring a school desegregation case where private parties are unable to do so. Title VII forbids discrimination in employment. The Fair Housing Act of 1968 forbids discrimination in housing. The Age Discrimination in Employment Act of 1967 forbids discrimination on the basis of age in employment. Section 503 of the Rehabilitation Act of 1973 requires affirmative action in employment by Federal contractors for persons with handicaps. Executive Order 11246 forbids discrimination by Federal contractors on the basis of race, color, national origin, sex, or religion. The Voting Rights Act of 1965 prohibits discrimination in the exercise of the franchise. Other Federal protections exist. Sections 1981 and 1983 of title 42 of the United States Code provide, in part, that all persons in the United States have the same rights as whites to make and enforce contracts, and that civil rights violations that occur under color of State law are prohibited under Federal law. The fifth amendment's due process clause requires the Federal Government to treat citizens equally under the law. The fourteenth amendment compels State governments and local governments to adhere to the principle of equal protection of the laws.

To the extent complaints have not been satisfactorily addressed in the education context, the Administration-supported measure adequately deals with that concern. If there are discrete areas outside of education where civil rights problems exist, they ought to be addressed by appropriately tailored legislation. For example, we supported the Air Carrier Access Act of 1986 (Pub.L. 99-435), which prohibits discrimination by airlines against qualified handicapped individuals, but avoids the overbroad and unnecessarily intrusive approach of S. 557.

Among the burdens that result from expanded Federal jurisdiction under these four statutes are:

- Increased Federal paperwork;
- Exposure to Federal bureaucratic compliance reviews and on-site reviews even in the absence of an allegation of discrimination;
- Thousands of words of Federal regulations;
- The need to adhere, not to an equality-of-opportunity standard, but an equality-of-result standard under Federal regulations which forbid conduct, including admission standards not adopted for a discriminatory purpose, just because it falls with a disproportionate impact on particular groups -- a basis for the imposition of proportionality requirements, quotas, and other Federal intrusions;
- The need to adhere to accessibility requirements under section 504, including structural requirements, and the need for job restructuring, modification of work schedules, and provision of auxiliary aids;
- The requirement to attempt to accommodate persons with infectious diseases such as tuberculosis and AIDS;
- Increased exposure to costly private lawsuits.

As Justice Powell, joined by Chief Justice Burger and Justice O'Connor, stated in an opinion concurring in the result in Grove City, "[W]ith acceptance of [Federal financial] assistance one surrenders a certain measure of freedom that Americans always have cherished." 465 U.S. at 577.

Judge Abraham Sofaer, currently Legal Advisor to the Secretary of State, noted a Federal agency's significant authority under title VI, even at the investigation stage: "[T]he power to inquire, and to demand explanation, provides leverage that will inevitably delay or discourage many nondiscriminatory and essential decisions." Bryan v. Koch, 492 F. Supp. 212, 235 (S.D.N.Y.), aff'd, 627 F.2d 612 (2d Cir. 1980).

In the Bryan case, private plaintiffs, supported in part by the Department of Health and Human Services (HHS), sought to bar New York City from closing a city hospital. The city sought the hospital's closure in order to cut city costs during a fiscal crisis. This hospital served less than 2% of the city hospital system's patients and had an average of only 93 inpatients each day. It served a primarily black community, and plaintiffs, supported by HHS and relying on HHS's disproportionate impact rules, asserted that the hospital's closure would create a disproportionate impact on a minority group and that the city was under a heavy burden of justification before it could close the hospital, a burden the plaintiffs said had not been met.

In rejecting the plaintiff's argument, Judge Sofaer said: "Any disciplined analysis would reveal [HHS's] formula for what it really is -- a vehicle by which HHS, and the other Title VI agencies, may assert jurisdiction to review the merits of, and to require justification for, virtually all important decisions by federal fund recipients." Id. The judge noted that a Federal agency may not always find fault, "[b]ut the power to inquire, and to demand explanation, provides leverage that will inevitably delay or discourage many nondiscriminatory and essential decisions." Id. The judge stated that "[this case] appears . . . to be an effort by plaintiffs to use the federal courts as a last resort for delaying if not preventing the implementation by elected officials of a painful but purely political decision. Under these circumstances, to delay the closing of [the hospital] for any period . . . would serve to undermine the authority and governing capacity of the City's responsible officials." Id. at 217. Indeed, "the Government's approach . . . far too readily shifts to cities and states the burden of justifying many governmental decisions. The record of this proceeding and the record and opinion in a similar case in Delaware, provide only a hint of the difficulty and cost HHS's burden of justification will frequently impose." Id. at 236. The same concerns apply to private sector programs.

In this particular opinion, the judge rejected the allegation of discrimination based on disparate impact. Many public and private entities conducting federally-assisted programs, however, cannot afford to challenge the legitimacy of Federal agency allegations and theories of discrimination, or defend private lawsuits brought by advocacy groups or others. Federal agencies are rarely checked by Federal judges because few

federally-assisted private or public programs have the resources to assert a claim that the government is overreaching. This is part of Judge Sofaer's point: the extension of Federal authority itself, particularly with equality-of-result rather than equality-of-opportunity as the guiding principle, imposes costs and burdens and inevitably deters federally-assisted programs from undertaking nondiscriminatory actions.

Thus, if there is no demonstrated, compelling need for Federal regulation -- and the concomitant exposure to expensive private litigation under these statutes -- it ill behooves Congress to impose the costs and burdens of such regulation and litigation on new sectors of the American economy not covered prior to the Grove City decision. The expansion of Federal jurisdiction in any field, including civil rights, is not without costs -- costs which should not be imposed unless shown to be necessary.

One additional example illustrates the importance of this concern. As explained below, S. 557, for the first time, will subject grocery stores and supermarkets participating in the Food Stamp program to coverage under at least three of these four statutes. Yet, in nearly four years of hearings on Grove City legislation, no evidence of a discrimination problem in the nation's food stores has been presented to Congress. The National Grocers Association testified before Congress on March 27, 1985, that its members' profit margin is one penny on the dollar. Civil Rights Restoration Act of 1985: Joint Hearings on H.R. 700 Before the House Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 888 (March 27, 1985) (statement of Thomas F. Wenning). Why force grocers to spend a portion of their penny-on-the-dollar profit to comply with new Federal requirements when no basis for the imposition of such requirements has been shown to exist?

Expansions of Pre-Grove City Coverage

The following represents a partial list of the areas in which S. 557 expands coverage under the civil rights statutes it amends:

1. An entire church or synagogue will be covered under title VI, section 504, and the Age Discrimination Act, if it operates one federally-assisted program or activity, as well as under title IX if the church or synagogue conducts an educational program or activity (with exceptions under title IX in those circumstances where title IX requirements conflict with religious tenets).

Explanation. Subparagraph (3)(B) of the bill's operative sections cover "all of the operations of . . . [a] private

organization" which is a "geographically separate facility" comparable to a plant and not otherwise covered by subparagraph (3)(A), "any part of which is extended Federal financial assistance. . . ." (emphasis added). Churches and synagogues obviously are such private organizations. Accordingly, any federally-assisted program at a church or synagogue would render the entire synagogue or church covered. Sponsors acknowledged such coverage of religious institutions at the Committee mark-up. See also Committee Report at 19-20 (implicitly acknowledging such church coverage under subparagraph (3)(B)).[2] Thus, if a church or synagogue operates a federally-assisted surplus food program, or a federally-assisted program for the homeless or to help illegal immigrants apply for amnesty, not only are those assisted programs covered as before Grove City, all of the activities of the church or synagogue will be covered, including their religious components and prayer rooms.

Since "all of the operations" of a facility, any part of which receives Federal aid, are covered under subparagraph (3)(B), if a church or group of churches operates a summer camp in a different locality open to youngsters of all faiths, and the camp receives free use of surplus Federal property, not only is the camp covered, but so is the church or group of churches.

Moreover, if the church or synagogue operating one federally-assisted activity also operates educational classes or

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[2]No one should be misled by comments in the Committee Report regarding coverage of religious organizations under other provisions of S. 557. In discussing the separate coverage of the private sector when aid is provided to an entity "as a whole" under subparagraph (3)(A)(i) of the bill's operative sections, the Committee Report notes: "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." Committee Report at 17. Similarly, the Committee Report disclaims coverage of entire churches or synagogues under subparagraph (3)(A)(ii) because these entities are engaged in religious activities, rather than any of the activities listed in subparagraph (3)(A)(ii). Committee Report at 18.

Of course, the coverage of entire churches and synagogues occurs as a result of subparagraph (3)(B), as mentioned in the text of this letter: it is subparagraph (3)(B)'s coverage of an entire geographically separate private facility (including several facilities in the same city or even region), any part of which receives Federal financial assistance, that triggers coverage of the entire church or synagogue in these examples cited in the Committee Report.

a school, those classes or school, at a minimum, will also be covered not only under title VI, section 504, and the Age Discrimination Act, but also under title IX, even when the educational classes receive no Federal aid. Indeed, title IX will cover the entire church or synagogue in this instance, contrary to pre-Grove City coverage. Conversely, if a church school or synagogue school alone receives any Federal aid, not only is the entire school covered, the church or synagogue itself will be covered in its entirety under all four statutes, even if the school is in a separate building and the church or synagogue itself receives no Federal aid.

The Committee Report creates another expanded avenue of coverage under this section. The Committee Report makes clear that a "geographically separate facility" includes more than one building: the phrase "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." Committee Report at 18 (emphasis added).

A number of churches and synagogues operate housing projects for elderly persons, low-income persons, and persons with handicaps. The church or synagogue may receive HUD development financing for the project or tenants in the project may receive Federal housing aid. Under subparagraph (3)(B), if the church or synagogue receives Federal development financing for the project or just one tenant at such a project receives Federal housing aid, not only is the entire housing project covered, but so is the church or synagogue. This result occurs under the bill in two ways. First, the housing project, like the summer camp mentioned earlier, is one "of the operations of" the "facility," i.e., the church or synagogue. This alone triggers coverage of the church or synagogue. Second, if the church or synagogue operates such a housing project or complex in the same neighborhood, locality, or region as the church or synagogue itself, the entire church or synagogue is also covered under this bill's unprecedented scope since the church or synagogue is not considered "geographically separate" from the housing project. Committee Report at 18. This is a version of the old "trickle-around" theory of the bill's predecessor in the 98th Congress, more cleverly camouflaged in this version.

It is also clear that an entire Catholic diocese risks coverage under subparagraph (3)(B). A diocese is a private organization -- identified as such by the Committee Report at 18. If a particular Catholic diocese receives Federal financial assistance for just one program operated or administered out of its headquarters, the language and logic of sweeping coverage under this bill would subject to coverage all other diocesan programs operated or administered out of this "geographically separate facility" -- even if they are conducted outside of the

headquarters. That is, as mentioned earlier, subparagraph (3)(B) covers "all of the operations of" the covered facility even when not conducted in the facility.

Indeed, if the diocese has more than one building in a city, Federal aid to one program in one building will result not only in coverage of all programs conducted from that building, but also in coverage of all programs in the other buildings under the Committee Report's interpretation that "geographically separate facility" really means all facilities of the entity in the same city or even region. Committee Report at 18.[3] Further, a Catholic diocese, or at least its activities in a particular locality or region, might be covered if one program at one church in the diocese receives Federal aid, since separate churches in the same locality are not regarded as geographically separate under subparagraph (3)(B).[4] Committee Report at 18.

Sponsors of S. 557 have provided no evidence that any of this coverage existed prior to Grove City under the language of these statutes and case law construing coverage thereunder in the private sector. Nor have they demonstrated a present need for such distrustful treatment of our Nation's religious institutions. The costs of Federal regulation may deter some churches and synagogues from further participation in social welfare programs if receipt of Federal aid triggers such broad, new coverage, as reflected in S. 557. Such pervasive coverage of religious institutions, based on federal aid going directly or indirectly to a discrete activity of a religious institution, raises grave First Amendment concerns.

2. Every school in a private or religious elementary or secondary school system will be covered in its entirety if any one school within the school system receives even one dollar of Federal financial assistance.

Explanation. This coverage results under subparagraphs (2)(B) and (3)(A)(ii) of the bill. Subparagraph (2)(B) of the operative provisions of S. 557 covers "all of the operations of . . . a local educational agency (as defined in section

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[3]The Committee Report at 19-20 asserts that paragraph (4) of the operative provisions of the bill, i.e., the vague, new catch-all provision discussed at pages 28-32, infra, does not cover an entire diocese where three parishes receive Federal aid. Whatever the validity of this assertion regarding paragraph (4) may be, it has no relevance to the scope of subparagraph (3)(B). Moreover, the Committee Report's example does not cover a circumstance in which the diocese itself receives Federal aid for a program or receives a part of a Federal grant given to a parish.

[4]See notes 2 and 3.

198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system . . . any part of which is extended Federal financial assistance . . . ." (emphasis added).

A local educational agency as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965 is a public school system. Once all public school systems and systems of vocational education are identified as covered, the only school systems left to be covered by the bill's phrase "other school system" are private elementary and secondary school systems, including religious school systems. Thus, for example, if one elementary school in a diocesan school system or system of Jewish Yeshivas receives any Federal financial assistance, not only is the entire school covered, but so is every other school in the diocesan or Yeshiva school system.

In contrast to this expansion of pre-Grove City coverage, compare the Department of Education's definition of "educational institution" in its title IX regulation, which does not include private elementary or secondary school systems:

> "Educational institution" means a local educational agency (LEA) as defined by section 1001(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

34 C.F.R. § 106.2(j) (emphasis added).

The local educational agency described in this definition is a public school system. The institutions referred to in paragraphs (k), (l), (m), and (n) are individual schools or institutions. Nowhere in this definition is a private or religious elementary or secondary school system covered. Indeed, while an entire individual private elementary or secondary school receiving some Federal aid may be covered under this definition, the phrase "other school system" or "private school system" or "religious school system" is conspicuously absent. No evidence of broader coverage was ever presented in hearings before the Committee.

The Committee Report's cryptic reference to four Catholic dioceses in Louisiana submitting system-wide desegregation plans to HEW in 1969 is not to the contrary. Committee Report at 26. No mention of this "example" was made during hearings on the bill. The facts pertaining to this "example" are nowhere discussed -- it may well be that every school in these systems received Federal aid or that the example is otherwise inapt. In

any event, this example, whatever its source or validity, predates by six years the Department of Education's title IX regulation mentioned earlier, which clearly defines "education institution" as not including an entire private or religious elementary or secondary school system, and which had been followed by that Department.

Moreover, the Committee Report's statement that an amendment providing for coverage of just private elementary and secondary educational institutions "would have established, for the first time, a different standard of civil rights protection for public and private schools," id. at 26, is belied not only by the long-standing regulatory definition, but by S. 557 itself: the bill establishes coverage of entire public systems of higher education (subparagraph (2)(A)) but only covers individual private institutions of higher education. Thus, this allegedly "unprecedented" distinction between the public and private education sectors actually occurs in S. 557. We believe the same treatment of private education institutions should also be applied in the elementary and secondary contexts. We also note that S. 557 itself also creates a double-standard of coverage in the private sector generally. See pages 13-17, infra.

3. Grocery stores and supermarkets participating in the food stamp program will be subject to coverage solely by virtue of their participation in that program.

Explanation. The operative provisions of S. 557 cover:

> all of the operations of --
> . . . .
> (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 . . .
> any part of which is extended Federal financial assistance . . . .

The language of paragraph (3) of the operative provisions of the bill supports our conclusion that grocers and supermarkets participating in the Food Stamp program are covered.

Such a grocery store or supermarket can readily be subsumed within the definition of "entire corporation, partnership . . . or an entire sole proprietorship" receiving Federal financial assistance extended to it "as a whole." Subparagraph (3)(A)(i). It is also covered as a geographically separate facility comparable to a plant. Subparagraph (3)(B). Further, since grocery stores and supermarkets provide food for the needy under the Food Stamp program, they might also be covered in their entirety as businesses, partnerships, other private organizations or sole proprietorships principally engaged in the business of providing "social services." Subparagraph (3)(A)(ii).

Indeed, the Committee Report tacitly admits that grocers are subject to coverage under this bill. Committee Report at 23, 24. Coverage of grocery stores participating in the Food Stamp program has been acknowledged by a principal co-sponsor of this bill's predecessor in the 98th Congress (H.R. 5490). 130 Cong. Rec. H7038 (daily ed. June 26, 1984) (Statement of Rep. Simon).

Despite these theories of coverage delineated under S. 557, coverage of grocery stores participating in the Food Stamp Program did not exist prior to Grove City. As stated by Daniel Oliver, General Counsel, Department of Agriculture, in a July 1984 letter to Senator Jesse Helms:

> The Department does not currently treat food stores which redeem food stamps as recipients of Federal financial assistance which are subject to the requirements of Federal anti-discrimination laws. There are no regulations or instructions that define these stores as recipients and the agreement between the Department and the stores concerning their participation in the food stamp program does not contain any reference to the requirements of the anti-discrimination laws.
>
> This has been the practice of the Department since 1964 when the original legislation creating a food stamp program and the Civil Rights Act of 1964 were both enacted. Although a review of the Department's records has disclosed no program instruction or legal opinion confirming this position, it is clear from a review of the Department's records concerning enforcement of the Federal anti-discrimination laws and from discussions with numerous program

> officials that the Department does not treat food stores which redeem food stamps as recipients of Federal financial assistance for purposes of the Federal anti-discrimination laws. It is also clear that it has consistently adhered to this position over the last twenty years.
>
> There is a reference to "small providers" in the Department's regulations concerning nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from Federal financial assistance (7 C.F.R. 15b. 18(c)). That regulation has not been interpreted as referring to grocery stores, but only to the agencies and organizations that distribute food stamps to the ultimate beneficiaries.

(Emphasis added.)

The bill's provision in subparagraph (4)(c) of the portion of the bill amending section 504 does not exempt any entity from coverage which is otherwise subject to S. 557.[5] Subparagraph (4)(c) states:

> Small providers are not required by subsection (a) to 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.

This language in the bill only applies under section 504 (discrimination against persons with handicaps), and does not reduce any compliance burdens under the other statutes amended by S. 557. Even under section 504, only some grocers and supermarkets will benefit from this exemption. Department of Agriculture section 504 regulations (which are referenced by the provision) define "small providers" as entities "with fewer than 15 employees." 7 C.F.R. § 15b.18(c). Many grocers and supermarkets employ more than 14 persons.

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[5]Indeed, the Committee Report twice states that grocery stores are among those entities that can take advantage of this limited exception, (Committee Report at 23, 24) which suggests they are covered in the first place.

Moreover, these small providers are only exempted from the most onerous of section 504 regulatory burdens: the requirement "to make significant structural alterations to their existing facilities. . . ." -- and only "if alternative means of providing the services are available." Subparagraph (4)(c) (emphasis added). These small providers will still be subject to many requirements including, among others, the following:

- o Paperwork and notice requirements (7 C.F.R. § 15b.7);
- o A requirement to consult with disabled persons or disability rights groups and to make and retain a record of such consultations (Id. at § 15b.8(c));
- o Extensive employment regulations, including the need to create part-time or modified work schedules, restructure jobs, and acquire or modify equipment or devices (Id. at §§ 15b.11-.15);
- o Regulations applicable to new construction or alteration of an existing building (Id. at § 15b.19);
- o A requirement to "take appropriate steps" to guarantee that communications with hearing-impaired and vision-impaired applicants, employees, and customers can be understood (Id. at § 15b.4(d)).

For those grocers and supermarkets with 15 or more employees, additional burdens are applicable, including:

- o The requirement of adopting "grievance procedures that incorporate appropriate due process standards" (Id. at § 15b.6(b));
- o The requirement of providing auxiliary aids for hearing-impaired and vision-impaired persons if necessary for them to participate in the entities' activities (Id. at § 15b.37).

4. Every division, plant, subsidiary, store, and facility of a corporation, partnership, or other private organization or an entire sole proprietorship principally engaged in the business of providing education, health care, housing, social services, or parks and recreation will be covered in its entirety whenever one portion of one division, plant, subsidiary, store, or facility receives any Federal financial assistance.

Explanation. Subparagraph (3)(A)(ii) subjects the entire organization principally engaged in these activities to coverage whenever "any part" of it "is extended Federal financial assistance." This special coverage, singling out the private

entities identified in subparagraph (3)(A)(ii) for especially overbroad treatment, did not exist prior to Grove City.

It should be emphasized that these five categories themselves -- education, health care, housing, social services, and parks and recreation -- are very broad. They include not only the obvious entities such as hospitals, nursing homes, private schools, campgrounds, and apartment owners, but also, among others, manufacturers of health products, sellers of health products, visiting nurse associations, doctors, surgeons, and dentists, textbook producers, real estate companies, home builders, amusement parks, chains of bowling alleys, private adoption services, social welfare organizations, and charitable organizations and everything they do, wherever located, and however remote from direct or even indirect Federal aid.

Other private entities not falling within these five categories are covered somewhat more narrowly, in theory, creating two-tier coverage of tactice, and erroneously suggest that coverage of corporations was corporate-wide prior to Grove City. Committee Report at 18. On the contrary, coverage in the private sector was program-specific before Grove City. Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Bachman v. American Society of Clinical Pathologists, 577 F. Supp. 1257 (D. N.J. 1983); see Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981). All three of these cases pre-date Grove City.

In Simpson, for example, involving a multi-plant business, the Court of Appeals for the Seventh Circuit, in construing the scope of section 504, said:

> The statute does not, as plaintiff seems to contend, generally forbid discrimination against the handicapped by recipients of federal assistance. Instead, its terms apparently require that the discrimination must have some direct or indirect effect on the handicapped persons in the program or activity receiving federal financial assistance. To be actionable, the discrimination must come in the operation of the program or manifest itself in a handicapped individual's exclusion from the program or a diminution of the benefits he would otherwise receive from the program.

629 F.2d at 1232 (emphasis added). The court went on to note that it could find nothing in other parts of the Act to show "an intent by Congress that section 504 impose a general requirement

upon recipients of federal grants not to discriminate against handicapped employees who are not involved in a program or activity receiving such assistance." Id. at 1233 (emphasis added). Thus, in Simpson, the court ruled that an employee at one of the defendant's plants could not assert a section 504 claim by virtue of a federally-assisted job-training program at the plant because the employee was not a participant in that job-training program. Thus, the court did not even deem the entire plant, let alone the entire company, as covered.

Likewise, in Bachman v. American Society of Clinical Pathologists, the court made an identical finding in a section 504 action:

> It is not enough . . . to show that a person has been discriminated against by a recipient of federal funds. Plaintiff must also show that she was subject to discrimination under the program or activity for which those funds were received. . . . Section 504 of the Rehabilitation Act imposes a program-specific requirement limiting claims brought pursuant to this section to those programs or activities which are federally funded.

577 F. Supp. 1262-63 (emphasis added). Here, a nonprofit medical association received approximately $50,000 in Federal aid to conduct three seminars on alcohol abuse and to publish the proceedings of the seminars. The court ruled that such Federal aid does not subject to coverage the association's Board of Registry, which develops standards and procedures for entry and promotion in medical laboratories and certifies and registers those who meet competency requirements, including the use of an examination. Had the court ruled otherwise, as it would be compelled to do under S. 557, the standards for certifying clinical pathologists would have been subjected to an equality-of-result rather than equality-of-opportunity analysis by Federal agencies and courts and the likely debasement of these certifying standards under such an analysis.

In Brown v. Sibley, a case involving a business operated by the State, the Court of Appeals for the Fifth Circuit held:

> [O]n the basis of the language of section 504 and its legislative history, and on the strength of analogies to Title VI and Title IX, we hold that it is not sufficient, for purposes of bringing a discrimination claim under section 504, simply to show that some aspect of the relevant overall entity or enterprise receives or has received some form of input from the federal fisc. A private plaintiff in a section 504 case must show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance.

650 F.2d at 769 (footnote omitted) (emphasis added). The court's footnote at the conclusion of the foregoing passage is highly enlightening and particularly relevant to the Grove City issue. The court noted:

> This burden should be slight. Contrary to popular belief in certain quarters, federal financial assistance does not materialize out of thin air. Requests in writing must be submitted by the applicant entity to some federal funding authority with respect to a proposed program or activity. If federal financial assistance is approved for the particular program or activity, it cannot be gainsaid that recordkeeping requirements will be imposed on the entity responsible for the expenditure of the federal funds. Discovery of the receipt and utilization of those funds with respect to particular programs and activities will be the least of plaintiffs' burdens.

Id. at 769 n.14 (emphasis added). In Brown, the Mississippi Industries for the Blind received Federal aid for its social services program and for its day care center, but not for its production departments. The court held, therefore, that the production departments were not covered by section 504.[6]

Why does the bill provide such extremely overbroad coverage for some private entities and slightly less overbroad coverage for others? The sponsors' chilling reply is yet further indication of the aggrandizing designs of S. 557 and the true "big government" vision of the bill: private entities principally engaged in the business of providing education, health care, housing, social services, or parks and recreation, are treated so harshly, according to the Committee Report, because they provide "a public service." Committee Report at 4 (emphasis added). Indeed, the activities listed in subparagraph (3)(A)(ii) "are traditionally regarded as within the public sector." Id. at 18 (emphasis added). In short, in the words of the Committee Report, "[e]ven private corporations are covered in their entirety under [paragraph] (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.'" Id. at 20 (emphasis added).

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[6]I should note that two cases, Marable v. Alabama Mental Health Board, 297 F. Supp. 291 (M.D. Ala. 1969), and Organization of Minority Vendors v. Illinois Central Gulf Railroad, 579 F. Supp. 574 (N.D. Ill. 1983), cited by a witness supporting S. 557, are not to the contrary. The Marable case involves neither the private sector nor the business operations of a recipient. The court in the Illinois Central Railroad case did not consider the "program or activity" issue.

Thus, certain activities in the private sector are really public activities according to the rationale of S. 557. A hospital operated by the Catholic church; private and religious elementary and secondary schools; private nursing homes; private social welfare groups; private operators of amusement parks and recreational facilities; textbook publishers; doctors; dentists; housing builders; apartment owners and so much more, are regarded as essentially public and subjected to the most wide-ranging and unprecedented coverage ever contemplated under these statutes. Under S. 557, what is regarded as "governmental" and subject to Federal regulation grows; what is regarded as private and independent dramatically shrinks.

Indeed, this provision of the bill, subparagraph (3)(A)(ii), also has the following unprecedented results:

5. If one program at one nursing home or hospital in a chain receives Federal aid, not only is the entire nursing home or hospital covered, but all other nursing homes or hospitals in the chain are automatically covered in their entirety even if they don't receive Federal aid.

Explanation. The Committee Report at page 18 acknowledges this sweeping coverage. It is an obvious extension even beyond the institution itself where the federally-funded program is. Indeed, it is a subtle resurrection of the old, discredited "trickle-up, trickle-down" and "trickle around" theories of this bill's predecessor in the 98th Congress.

It should be reiterated that coverage is not limited to a health institution's health activities, but all other activities, subsidiaries, and investments.

6. If the tenant of one unit in one apartment building owned by an entity principally engaged in providing housing receives Federal housing aid, not only is the entire apartment building covered, but all other apartment buildings, all other housing operations, and all other non-housing activities of the owner are covered even though they receive no direct or even indirect Federal aid.

Explanation. It is clear from the language of subparagraph (3)(A)(ii) that all housing activities of such an entity would be covered. But subparagraph (3)(A)(ii)'s coverage of "all of the operations of . . . an entire corporation, partnership, or other private organization, or an entire sole proprietorship . . . which is principally engaged in the business of providing . . . housing . . . any part of which is extended Federal financial assistance . . ." clearly means that all of the non-housing activities are covered as well. Thus, a private entity 51% of whose activities, income, or expenditures are in housing would

have the other 49% of its operations, however unrelated to housing, covered as well. A separate company that manages the apartment building where this tenant lives will also be covered in its entirety, including its management of housing complexes where there is no receipt of any Federal aid. Further, if this private entity owns or operates an office building, it too is covered and the businesses renting space in the office building run the risk of coverage as well.

7. Similarly, if a private organization principally engaged in home building or development constructs one housing project with any direct or indirect Federal aid, all of the builder's housing projects and other activities, including non-housing activities, would be covered in their entirety even if they receive no direct or indirect Federal aid.

Explanation. This coverage results from subparagraph (3)(A)(ii) as described in the previous example.

All of this coverage under subparagraph (3)(A)(ii) is a vast expansion from pre-Grove City coverage.

8. If a private organization principally engaged in one of these five broad activities employs part-time a student receiving Federal work-study aid in one program at one facility, not only is that facility covered in its entirety, all aspects of the entire organization -- all of its plants, facilities, local offices and all of its activities unrelated to its principal business -- are covered.

Explanation. Such expansive coverage occurs for entities principally engaged in any of these five activities when they use such students. This was not pre-Grove City practice. See also Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982) (grading system at Harvard Law School not subject to title IX merely because students at the law school participate in the federally-assisted work study program).

9. Further, if an entity conducting one or more educational programs receives Federal financial assistance to any part of the entity, whether or not that part is educational, then all four statutes, including title IX's ban on sex discrimination, apply to the entire entity, including non-educational activities.

Explanation. This represents another dramatic expansion of coverage under S. 557. Prior to Grove City, title IX applied only to educational activities -- and only when such activities

were federally-assisted themselves.[7] This expansion results from the definition of "'program or activity' and 'program'" as including "all of the operations of" entities covered by S. 557's amendment to title IX. Thus, once a covered entity receives Federal aid anywhere and conducts an educational program, title IX applies for the first time to the entire entity. This expansion is a significant departure from Congress' explicit limitation of title IX only to federally-assisted education activities. This issue is discussed in more detail in connection with S. 557's expansion of mandatory abortion coverage. Pages 37-43, infra.

10. Under the expanded coverage established by subparagraph (3)(A)(ii), contracting activities of covered entities will be covered in all cases -- contracting is an "operation" of the covered entity.

Explanation. The failure to provide a particular share of contract opportunities to minority-owned businesses, for example, could lead result-oriented Federal agencies to undertake enforcement action asserting that the failure to provide more contracts to minority-owned firms, standing alone, is discriminatory. If title IX is applicable, the same action could be taken with respect to women-owned firms. Of course, advocacy groups will be able to bring private lawsuits making the same allegations before federal judges. This coverage is applicable to covered state, county, and local agencies and covered private entities. Before Grove City, contracting was covered only if that activity received federal aid or was part of the particular program receiving federal aid.

11. A private, national social service organization will be covered in its entirety, together with all of its local chapters, councils, or lodges, if one local chapter, council, or lodge receives any Federal financial assistance.

Explanation. Subparagraph (3)(A)(ii) makes clear that an entire private organization, or entire corporation, is covered in its entirety whenever any part of it is extended Federal financial assistance if it is "principally engaged in the business of providing . . . social services . . . ." Thus, entire national charitable, social welfare, and social service organizations, including all of their State and local units, will be covered for the first time if just one of their State or local units operates just one federally-aided program. Conversely, if just one activity at the headquarters of such an organization receives Federal aid, not only is every activity operated from

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[7]Moreover, Federal aid to non-educational components of an entity did not trigger coverage of the entity's educational components under any of these statutes.

the headquarters covered, so is every activity of every State and local unit of the organization.

12. (a) All of the operations of the entire plant or geographically separate facility of businesses and other private entities not principally engaged in education, health care, housing, social services, or parks and recreation would be covered if one portion of, or one program at, the plant or facility receives any Federal financial assistance. (b) Further, all other plants and facilities associated with, and in the same locality or region as, the one receiving any Federal aid are covered even if they receive no direct or indirect Federal aid.

Explanation. Subparagraph (3)(B) of the operative provisions of the bill delineates this scope of coverage for these private profit and non-profit businesses and other private organizations not otherwise covered in subparagraph (3)(A). As mentioned earlier, pages 6, 7, supra, under S. 557, a geographically separate facility includes all facilities in the same site, locality, or region of the facility with a federally-assisted activity. See Committee Report at 18.

Thus, if a plant or facility of such a private business or organization not already covered under subparagraph (3)(A), such as a fast food restaurant or department store, employed a part-time student receiving Federal work-study aid, the entire plant or facility would be covered, and not just the hiring of work-study students. Moreover, if this fast food restaurant is part of a chain or the department store is part of a multi-store chain in a locality or metropolitan area, all of the operations of all of the other stores and other facilities in the locality or metropolitan area would be covered. (See also pages 5-8, supra, for the impact of this provision on religious institutions.)

As also mentioned earlier, such facility-wide or plant-wide coverage, let alone multi-facility coverage within a locality, did not exist prior to Grove City. Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Bachman v. American Society of Clinical Pathologists, 577 F. Supp. 1257 (D. N.J. 1983); see Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981). All of these decisions would be reversed by the adoption of S. 557. See also Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982).

Title IX coverage of the nonfederally-assisted education parts of these facilities would also occur for the first time.

It should also be stressed that, while proponents of S. 557 may describe this coverage as slightly more limited than the extremely overbroad coverage for private businesses and organizations principally engaged in the business of providing education, health care, housing, social services, or parks or

recreation, in practical terms it is hardly more limited at all. Many private businesses and private organizations, which receive direct or indirect Federal aid for one discrete activity, consist of just one facility, or of facilities in one locality or region, and thus would be covered just as broadly as if they were principally engaged in the business of, say, health care.

In testimony on this bill and its predecessors, witnesses from the business community indicated that expanding the scope of these statutes will discourage businesses from participating in federal programs, such as job-training programs.

13. If a research hospital receiving Federal aid establishes a research laboratory jointly with a pharmaceutical company, and the research laboratory does not receive Federal aid, it is covered because it is an "operation of" the hospital.

Explanation. If a private organization receives any direct or indirect Federal aid for one activity, and creates another entity, business, or other private organization, such as a joint venture, with another private entity, then the newly created entity is also covered, even if it receives no Federal aid. Once "all of the operations of" a private entity such as one listed in paragraph (3) are covered, if that covered entity's operation includes an entirely new entity, even one created in conjunction with another entity, the plain language of S. 557 covers the newly created entity even if it receives no direct or indirect Federal aid.

The same result occurs if the private entity joins with a public entity to create a joint venture or if two public entities join to create a third entity (i.e., "all of the operations" of entities listed in paragraphs (1) and (2) are also covered). Such "operations" include subsidiaries and newly established entities, even if created with other organizations. Such coverage did not exist before Grove City.

Indeed, the sweep of paragraphs (1) through (3) is so broad -- much broader than its proponents care to admit -- that paragraph (4), the vague catch-all provision, is superfluous if its purpose is only to reach these so-called third entities created by other entities.

For example, if six localities form a water district, and the water district receives Federal aid, it is covered as a "special purpose district" listed in subparagraph (1)(A) as well as an operation of the agency of the city government, also covered in subparagraph (1)(A), most responsible for that locality's contribution to the water district.

As another example, if a public-private partnership (PPP) is formed by a school district and a company to provide help to

students at risk of school failure, and the PPP receives Federal aid, it is already covered as an operation of two other entities already described in the bill without need of coverage under paragraph (4).

In addition, contrary to pre-Grove City coverage, Federal aid to the PPP would sweep the school district and the company into coverage as well. This occurs because "all of the operations of" the school district would be covered, i.e., not just the new entity which receives Federal aid, but "all of the operations" of the school district itself under subparagraph (2)(B); and the same analysis applies to coverage of the company itself under subparagraph (3).

14. Similarly, if a private business contributes its own funds or equipment informally to a federally-assisted school district, private school, or private social service program, the business itself is covered.

Explanation. Even if a private business informally contributes to a public or private school or school system or social service program receiving federal aid, in an effort to enhance education or increase delivery of social services, the business will be covered, under paragraph (3) of the operative provisions of the bill, for the first time. This result occurs because the federally-assisted program, in effect, becomes one "of the operations" of the business, as well as being an operation of the other entity. Thus, "all of the operations of" the business are covered, pursuant to paragraph (3), because one part of the business's operations -- its help to another program -- in effect receives federal aid. This is a consequence, perhaps unintended, of the very broad language of S. 557.

Even the risk of such coverage will likely discourage private businesses from participating in such programs.

15. Farmers receiving crop subsidies and price supports will be subject to coverage.

Explanation. The operative provisions of S. 557 state:

> the term "program or activity" means all of the operations of --
> . . . .
> (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 . . .

any part of which is extended Federal financial assistance. . . .

Farms fall within this provision in several ways:

- Crop subsidy programs and combinations of such programs, and similar Federal farm aid, can be said to provide assistance to the farm as a whole.

- Moreover, a farm consisting of contiguous fields -- or fields in the same general geographic area -- could readily be deemed a "geographically separate facility" comparable to a plant, and thus covered in its entirety.

- Farming may be regarded as a form of "social service" because it provides food not only for consumers but for those who receive food stamps and other welfare assistance.

- A farmer employing part-time a student receiving Federal work-study aid would have his or her entire farming operation covered merely by employing such student.

Some might argue that the bill's section 7 provides a "Rule of Construction" which exempts farmers as "ultimate beneficiaries" of Federal aid: "Nothing in the amendments made by this Act shall be construed to extend the application of the Acts so amended to ultimate beneficiaries of Federal financial assistance excluded from coverage before the enactment of this Act." The Committee Report suggests that this section excludes farmers from coverage in certain circumstances along with persons receiving social security benefits, Medicare and Medicaid benefits, and food stamps. Committee Report at 24-25. This reasoning regarding farmers is unpersuasive because:

- There is no indication in the <u>bill</u> itself as to which persons or entities are considered to be "ultimate beneficiaries" and under which federal aid programs.

Does the bill's section 7 refer to persons receiving Social Security, Medicare, and Medicaid? Even if it does so, can it be read to include businesses such as farms? We believe it does not so read and language in the Committee Report does not cure the problem. The four cross-cutting civil rights statutes have been so completely rewritten by S. 557, and S. 557 contains language so clearly covering farms, that language in the Committee Report is seriously inadequate to exclude farmers from coverage.

- o The breadth of this bill is so sweeping that no one can presume that anyone is outside its coverage, unless specifically exempted. This is especially true because, as just mentioned, the bill makes significant changes in the language of these four civil rights statutes.

- o Farms appear to be clearly covered by paragraph (3) of each of the bill's operative sections, as mentioned earlier, because farms are readily identified as business entities or private organizations or both.

As an additional problem, even if farmers are regarded as ultimate beneficiaries of crop subsidies and similar Federal funds, and thus are exempt from coverage under section 7, the section only applies to those ultimate beneficiaries "excluded from coverage before the enactment of [S. 557]" (emphasis added). Thus, even under this interpretation, ultimate beneficiaries of farm programs adopted after S. 557's enactment are not excluded from coverage. The Committee Report's suggestion that, "[n]othing 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'," Committee Report at 25, is completely at odds with the plain language of the bill and is utterly unpersuasive.[8]

Coverage of farmers receiving crop subsidies or price supports did not exist before Grove City. Senator Hubert Humphrey stated, during consideration of title VI in 1964: "It will not affect direct Federal programs, such as CCC price support operations, crop insurance, and acreage allotment

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[8]Thus, even for individuals receiving direct social welfare aid such as persons on welfare, who may be exempt under the bill, if a new Federal welfare program was enacted following enactment of S. 557 in its current form, exemption from coverage for individuals beneficiaries would not exist in light of the language of the bill.

payments. It will not affect loans to farmers, except to make sure that the lending agencies follow nondiscriminatory policies. It will not require any farmer to change his employment policies." 110 Cong. Rec. 6545 (statement of Sen. Humphrey) (1964).

16. A State, county, or local government department or agency will be covered in its entirety, whenever one of its programs receives Federal aid. Thus, if a State health clinic is built with Federal funds in San Diego, California, not only is the clinic covered, but all activities of the State's health department in all parts of the State are also covered.

Explanation. Subparagraph 1(A) covers "all of the operations of . . . a department [or] agency . . . of a State or local government . . . any part of which is extended Federal financial assistance." See also subparagraph (1)(B), which covers "all of the operations of" a State agency to which Federal aid is extended through another State "entity".

This coverage beyond the federally-aided program exceeds pre-Grove City coverage. See Brown v. Sibley, 650 F.2d 760, 769 (5th Cir. 1981) (plaintiff must show that program or activity itself received or was directly benefited by Federal financial assistance; not sufficient to show that some aspect of relevant overall entity or enterprise receives or has received some form of input from Federal fisc).

Indeed, the Committee Report makes clear how sweeping subparagraph 1(B) is: "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." Committee Report at 16. This raises a number of serious concerns.

First, only that portion of the mayor's office funneling the Federal financial assistance through to another program was covered before Grove City, not the entire mayor's office. Moreover, what do sponsors mean by "all of the operations of the mayor's office"? A mayor's or governor's office is not hermetically sealed and is involved in a myriad of local or State government activities. This ambiguous but expansive gloss on the bill's broad language raises the likelihood that if a mayor's office "funnels" a health grant to the municipal health department, or merely is reimbursed overhead expenses from the grant, and the mayor's office is also overseeing social welfare programs, parks programs, police, fire, and sanitation functions, all of these latter activities, totally unconnected to the grant and not covered before Grove City under this scenario, will be covered under S. 557. This is a version of the "trickle-down" approach of the bill's predecessor.

Further, only that part of a State or local agency receiving Federal aid was covered under these laws, not the entire agency, regardless of whether the Federal aid was received directly from the Federal Government or through another entity.

If a State health agency received Federal aid to assist private businesses in first aid training and provided such assistance to an automobile plant, then that program of the State agency, as well as the first aid program at the automobile plant where the federally-assisted training occurred, were covered before Grove City by these statutes, not the entire State health agency and the entire plant itself. Yet, S. 557 explicitly provides for the latter, expansive coverage. See Committee Report at 18.

One of the witnesses supporting S. 557 went so far as to state that any time a federally-assisted State or local agency provides funds to another entity, the latter entity is covered in its entirety. Statement of David S. Tatel, Before the Senate Comm. on Labor and Human Resources, at 5 (March 19, 1987). This gloss on the bill is also an expansion of pre-Grove City coverage -- only when a State or local government agency passed along actual Federal financial assistance as part of a Federal program to another entity was the latter entity covered -- and only in that program of the entity receiving the Federal aid.

17. The zoning function of local government will likely be covered by these laws in ways never before achieved.

Explanation. Given the language of paragraph (1) of the operative provisions of the bill and the Committee Report's discussion of coverage of the mayor's office, see discussion of item 16 supra, it will be difficult, if not impossible, for localities and states to escape total coverage under the bill, including a locality's zoning function. A mayor's office, which usually plays some role in obtaining federal aid, is usually involved in most, if not all, of the locality's activities, such as building and planning activity, selecting zoning commissioners, and the like.

This would mean that a federal agency's equality-of-result, rather than equality-of-opportunity, disproportionate impact rules implementing these statutes would be applied to local zoning requirements. Thus, for example, zoning requirements falling with a disproportionate impact on a particular minority group can be struck down, even if they were not adopted for a discriminatory purpose.

18. Every college or university in a public system of higher education will be covered in its entirety if just one department at one school in that system receives Federal financial assistance.

Explanation. Subparagraph (2)(A) covers "all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance. . . ." (emphasis added). Thus, if one department at one university in a public system of universities receives Federal aid, not only is that college covered in its entirety, every other college in that system is also covered in its entirety.

Yet, Secretary of Education T.H. Bell stated that, prior to the Grove City decision, coverage of one postsecondary institution did not result in coverage of the entire system of higher education: "Under our postsecondary programs will aid to a particular campus of a multi-campus university result in coverage of the entire university system, including all of its campuses? If so, the bill expands pre-Grove City coverage." Civil Rights Act of 1984: Hearings on S. 2568, Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 227-228 (1984) (statement of T. H. Bell).

Ironically, when this bill's immediate predecessor was introduced in the 99th Congress (S. 431), it covered both private and public systems of higher education. While this bill drops system-wide coverage in private higher education, it declines to do so for public higher education.

19. A school, college, or university investment policy and management of endowment will be covered if the institution receives even one dollar of Federal education assistance.

Explanation. See explanation for item 20, infra.

20. The commercial, non-educational activities of a school, college, or university, including rental of commercial office space and housing to those other than students or faculty, and other commercial ventures will be covered if the institution receives even one dollar of Federal education assistance.

Explanation. S. 557 covers "all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance . . . ." Subparagraph (2)(A) (emphasis added). Investment policy and management of endowment obviously fall within "all of the operations of" these entities. Subparagraph (2)(A) also subjects the commercial, non-

educational activities of an educational institution to coverage because they too fall within the scope of "all of the operations of" an educational institution described in subparagraph (2)(A). This is acknowledged in the Committee Report at 17.

Such coverage did not exist prior to Grove City. Harry M. Singleton, the Department of Education's Assistant Secretary for Civil Rights, testified:

> [Under the bill] financial assistance flowing to only one part of the university, one department, building, college or graduate school, would create jurisdiction in all departments, buildings, colleges, and graduate schools of that university, wherever geographically located, as well as in noneducational operations in which the university might be engaged such as broadcasting, rental of nonstudent housing, or even the management of its endowment fund. In declaring that all such operations of a college or university, even those absolutely unrelated to educational activities, are to be within the jurisdiction of the Federal Government, [the bill] goes well beyond its announced purpose, of merely restoring that jurisdiction, previously exercised."

Testimony of Harry M. Singleton, Civil Rights Restoration Act of 1985: Joint Hearings on H.R. 700, Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitution Rights of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 299-300 (March 7, 1985) (emphasis added).

21. A new, vague catch-all provision provides additional coverage in potentially limitless ways.

Explanation. Paragraph (4) states that "'program or activity' means all of the operations of . . . 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." (emphasis added). While this language reflects a Committee amendment which marginally improves the clause, it remains a potent vehicle for a significant expansion of Federal jurisdiction.

"Entity" is nowhere defined in the bill. If sponsors of the bill have particular types of "entities" in mind not otherwise covered in the first three already broad paragraphs of the bill's operative provisions, they should clearly delineate them rather than use unclear concepts and vague language. It is Congress' task to be precise, particularly on the part of those who believe

the Supreme Court misconstrued earlier legislation in the same field.

This section, on its face, would appear to include coverage of two separate entities, such as a public school district and a private university, as well as the third entity created by the former two entities, even when only the third entity receives Federal aid. While the Committee Report at 20 disclaims this result and asserts that only the third entity is covered if only it receives Federal aid, the section is at best ambiguous on this point. Similarly, on its face, the section would appear to cover the third entity and one of the two separate entities when the other separate entity receives Federal aid.[9]

Moreover, the Committee Report's description of the substance and rationale for this section is strikingly inaccurate, occasionally incoherent, and reflects the same attribution of "public" status to private entities as it does for paragraph (3) -- but even more broadly. The Committee Report gives an example of paragraph (4)'s operation:

> 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

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[9]As mentioned earlier, pages 21-22, supra, all three entities are already covered in this circumstance by the overbroad provisions of subparagraph (3)(A) or (3)(B).

> 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 antidiscrimination 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."

Committee Report at 19-20.

First, this passage falsely implies that paragraph (4) only covers entities created by an entity in one of the three preceding paragraphs and an entity in a different preceding paragraph (i.e., between entities in paragraphs (1) and (2); (1) and (3); and (2) and (3)). The language of paragraph (4) clearly covers entities created by two entities described in paragraph (1); two entities described in paragraph (2); or two entities described in paragraph (3). For example, two businesses covered under subparagraph (3)(A) can form a joint venture. That in this instance the entity formed can be covered under paragraph (3) itself as a private business or other private organization hardly precludes duplicative coverage under the language of paragraph (4).

Second, the Committee Report's assertion that an entity otherwise within the description of paragraphs (1), (2), or (3) is, therefore, not covered by paragraph (4), Committee Report at 19-20, simply is not supported by the language of paragraph (4). Paragraph (4) covers entities established by entities described in paragraphs (1), (2), or (3) regardless of whether the "new" entity itself falls within those first three paragraphs.[10]

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[10]The term "other entity" in paragraph (4) not only includes those entities not described in paragraphs (1), (2), and (3), but also includes entities described in those sections which "are established by two or more of the entities described in" those three paragraphs. For example, while a federally-assisted summer recreation camp in the mountains for youngsters established by a private group is covered by subparagraph (3)(A)(ii), if it is

(continued...)

Indeed, ironically, this very example of the PPP Company used in the Committee Report to illustrate the operation of paragraph (4) vindicates this criticism -- and illustrates instead the "overkill" of this catch-all provision. The PPP Company, created as a partnership by a school district and a corporation, is already separately covered under paragraphs (2) and (3) if it receives Federal financial assistance. The PPP Company is clearly an "operation" of the school district -- regardless of its joint nature -- and since the PPP Company receives Federal financial assistance, it is covered under subparagraphs (2)(B), along with the school district itself. As an operation of a school district, the PPP Company is a "part" of the school district "which is extended Federal financial assistance," thus covering all of the operations of the school district as well as the PPP Company. A similar analysis results in coverage of the PPP Company under paragraph (3), as an operation of the corporation, as well as coverage of the corporation itself under paragraph (3). Indeed, as indicated earlier, pages 21-22, supra, the PPP Company would be covered in its entirety if either the school district or the corporation receives one dollar of direct or indirect Federal aid, even if the PPP Company itself receives no Federal aid.

It should be noted that, in light of this transparently inaccurate description of paragraph (4), the Committee Report's suggestion that Federal aid to a few Catholic parishes does not yield coverage of the Diocese of which they are a part, which rests on this clearly erroneous reading of paragraph (4), is not necessarily going to be persuasive to future administrative enforcers of this bill if enacted, or to reviewing Federal judges.[11]

Third, corporate-wide coverage of the new entity established by the two separate entities described in paragraphs (1), (2), or (3) exists regardless of its principal business, in contrast to subparagraph (3)(B)'s slightly more limited "facility" coverage for at least some businesses.

Fourth, once again the bill's sponsors reveal their motivation in rendering "public" wholly private entities. They

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[10](...continued)
established instead by three synagogues, i.e., all four entities described in paragraph (3), the camp is not only covered by paragraph (3), it is also covered by virtue of paragraph (4).

[11] Aside from whether Catholic dioceses are covered in their entirety under paragraph (4), the risk of coverage of entire Catholic dioceses arises under subparagraph 3(B). See pages 7, 8, supra.

claim coverage of an entire corporation established by two other entities, regardless of its principal activity "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)." Committee Report at 19 (emphasis added).

Of course, this Committee "analysis" flagrantly misreads its own bill and is patently inaccurate: Paragraph (2) covers private colleges, universities and other postsecondary institutions ((2)(A)), as well as private and religious elementary and secondary school systems ((2)(B)). Thus, a venture between an entity in paragraph (2) and an entity in paragraph (3) can readily be entirely private,[12] in contradiction to the sponsors' inaccurate assertion. Yet, a rationale of S. 557 is that what is regarded as private continues to shrink. The bill imbues with a "public character" wholly private entities simply because they are the creation of two other private entities -- and regardless of the nature of those latter entities. This is even a significant step beyond the startling expression of this principle in subparagraph (3)(A)(ii), which, as novel and drastic as it is, at least was somewhat limited in theory to five very broad categories. Here, even that minor limit is removed.

Religious Tenets

Religious tenets language is needed in title IX as a necessary part of Grove City legislation in order to protect an institution's policy which is based upon tenets of a religious organization where the institution is controlled by, or closely identifies with the tenets of, the religious organization.

In 1972, when Congress enacted title IX, Congress included several exemptions to its coverage, including: "[T]his section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization. . . ." 20 U.S.C. § 1681(a)(3).

At that time, many educational institutions were controlled outright by religious entities. Some of these institutions today, while retaining their identity with religious tenets, are controlled by lay boards and have fewer financial ties to religious organizations and thus are outside the scope of the

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[12] Further, as mentioned earlier, paragraph (4) readily covers entities established by two or more entities within each of the preceding paragraphs, which would include many wholly private "third" entities.

religious tenets exemption of current law. Accordingly, the "control" test for application of the exemption no longer affords adequate protection for religious values under title IX.

Indeed from 1972 through 1984, according to the Department of Education, only 5 out of 220 requests for exemptions under the current "control" test were granted. Most applications received no response. While more exemptions have been granted since 1985, there is no guarantee that a subsequent Administration will treat future legitimate exemption requests favorably. Further, some proponents of S. 557 assert that a number of exemptions granted in the last two years are invalid under the "control" test. A subsequent Administration might well revoke current exemptions. Moreover, it is highly likely that advocacy groups hostile to the religious tenets exemption will initiate litigation to overturn existing exemptions if this bill is enacted unless title IX's current language is amended to reflect the changing nature of religiously oriented institutions today.

Thus, language must be included under title IX in any Grove City bill to protect a policy of an educational institution based on religious tenets not only when the institution is controlled by a religious organization, but also when an educational institution "closely identifies with the tenets of" such a religious organization. This same protection should also be afforded to other institutions covered under title IX by Grove City legislation, such as hospitals, when they have a close identification with the tenets of a religious organization. Indeed, S. 557 itself makes a grudging acknowledgement of the need to protect such other institutions covered by title IX by substituting the word "entity" for educational institution in the current exemption, but unfortunately does not alter the rigid "control" test itself. With the language we support, the exemption under title IX would read:

> except that such term ["program or activity" and "program"] does not include any operation of an entity which is controlled by, or which is closely identified with the tenets of, a particular religious organization if the application of [Title IX] to such operation would not be consistent with the religious tenets of such organization. (Emphasis added.)

An institution cannot claim protection under this language for differentiation on the basis of race, handicap, or age. The exemption exists only under title IX, which addresses gender distinctions. The exemption recognizes that the tenets of some religious organizations differentiate in some ways between the sexes. In the spirit of diversity and pluralism in education and other parts of the private sector covered by title IX under Grove City legislation, the exemption respects the independence of an institution's conduct in carefully delineated circumstances when

the institution is controlled by, or closely identified with the religious tenets of, a religious organization.

A covered institution is not exempt in its entirety from title IX if just one or some of its policies is based on religious tenets and conflicts with title IX. The exemption applies only to the specific policy or policies, based on religious tenets at those institutions able to avail themselves of the exemption, when title IX would conflict with such policy or policies.

This exemption has no application in public schools or other public institutions. The first amendment, as applied to States and localities, effectively prohibits public schools or other public institutions from basing any policies or conduct squarely on the religious tenets of a religious organization. This exemption applies only to private institutions, where students are in attendance because they have freely chosen to attend the institution.

This language originated from concerns expressed during consideration of Grove City legislation in the 99th Congress. In May 1985, in response to concerns about the protection of religious liberty under title IX, the House Education and Labor Committee Report first strengthened the current religious tenets exemption when considering Grove City legislation.

The particular language set forth in this letter is virtually identical to language in the Higher Education Amendments of 1986, adopted by Congress and signed into law in October 1986. There, a prohibition against religious discrimination in the construction loan insurance program was enacted with an exception using virtually the same language now recommended for title IX. This provision, in short, is modeled on language used by the 99th Congress and should not be controversial.

While some proponents of S. 557 oppose this language as an "unacceptable" change to the exemption, as mentioned earlier, S. 557 itself changes the standard to try to take into account the extreme broadening of coverage represented by the bill. The current exemption applies to educational institutions. Yet, S. 557 broadens the exemption by replacing the term "educational institution" with the word "entity." This change, however, does not sufficiently address the problem posed by the "control" test. The "closely identifies with" language is needed to address this situation. It has the support of such organizations, among others, as the United States Catholic Conference; the National Association of Independent Colleges and Universities (NAICU), with over 800 college and university members (enrolling over two million students); the Association of Catholic Colleges and Universities; the American Association of Presidents of

Independent Colleges and Universities; Agudath Israel, a national Orthodox Jewish movement with tens of thousands of members; National Society for Hebrew Day Schools (approximately 500 elementary and secondary schools); and the Association of Advanced Rabbinical and Talmudic Schools (approximately 60 schools).

Fund Termination

The language addressing the scope of the fund termination remedy, whereby an agency cuts off Federal financial assistance to a program or activity, is unchanged by S. 557. It is universally agreed that Congress intended the scope of an agency's authority to use the draconian remedy of fund cut-off to be pinpointed to the discrete area where discrimination occurred.[13] The termination clause of these civil rights statutes currently states that termination of Federal financial assistance "shall be limited . . . to the particular program, or part thereof, in which such noncompliance has been . . . found." E.g., 42 U.S.C. § 2000d-1. Since S. 557 defines "program" so expansively, the continuation of the program-specific scope of the fund termination power under S. 557 rests on the "or part thereof" language. The Committee Report apparently seeks to note that this program-specific scope is so retained by mentioning that S. 557 "leaves intact the 'or part thereof' pinpointing language." Committee Report at 20.

Unfortunately, the Committee Report then goes on to misstate the scope of fund termination in the one example it lists: "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." Id. This is wrong. If there is discrimination in a math department which received no Federal funds in an educational institution covered in its entirety because of receipt of Federal student aid funds, the agency's remedial recourse after a failure of conciliation would be a referral for litigation to the Department of Justice, not a fund cut-off to the student aid program. In this example, only when the discrimination is in the student aid program can the agency terminate the Federal student aid money.

Ironically, it is the very Grove City decision that sponsors of S. 557 wish to overturn with respect to regulatory jurisdiction (but not in the scope of fund termination) that delineates the student aid program as the program-specific

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[13]Indeed, the Supreme Court relied on this pinpoint termination authority to conclude, in North Haven Board of Education v. Bell, 456 U.S. 512 (1982), that title IX's ban on discrimination is program-specific.

parameter when Federal student aid is involved. Thus, in light of this startling misstatement concerning the scope of the fund termination remedy in the Committee Report, there is a significant risk that the scope of the fund termination remedy is being expanded by S. 557.

As another example, if a State highway department receives Federal aid for a safe-driving program and part of that Federal aid is spent on overhead expenses at the highway department's headquarters, will discrimination in the safe-driving program lead to a Federal funds cut-off of highway construction money as well under S. 557? Further, since a Federal block grant in, for example, social services can be spent in a number of State programs, it seems that the interpretation in the Committee Report could mean that discrimination in just one program receiving block grant funds could lead to a cut-off of all block grant funds. This, of course, far exceeds the scope of fund termination authority before Grove City.

S. 557 Addresses Substance

Although proponents of S. 557 sometimes assert that the bill addresses only the scope, and not the substance, of the statutes it amends, this is untrue.

The bill addresses the substantive meaning of section 504 by stating in subparagraph (4)(c):

> Small providers are not required by subsection (a) to 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.

To illustrate what a striking venture into substance this provision represents, we note that some agencies do not have small provider exceptions for structural alterations in their section 504 regulations, e.g., the Department of Defense (32 C.F.R. pt. 56), and the Department of Transportation (49 C.F.R. pt. 27). Even those agencies that do have such provisions use different language. For example, the Department of Health and Human Services' section 504 regulation contains a provision relating to entities with fewer than fifteen employees. 45 C.F.R. § 84.22(c). The Department of Commerce's section 504 regulation at 15 C.F.R. § 8b.17(c) contains a provision relating to "a small recipient," which is defined as "a recipient who

serves fewer than 15 beneficiaries and who employs fewer than 15 employees." 15 C.F.R. § 8b.3(1) (emphasis added).

This exception, of course, does not remove jurisdiction under section 504, but only exempts the entity, in certain circumstances, from the most onerous of section 504 requirements. A key point about this section is that it belies the sponsors' claim that this bill does not address substantive issues.

Abortion Neutrality

Abortion-neutral language is a necessary part of Grove City legislation in order to ensure that no recipient of Federal aid is required to provide or pay for abortions or abortion-related services as a condition of the receipt of such Federal aid. The bill's failure to address adequately this important issue is a major flaw.

Current title IX regulations require an educational institution to treat abortion like any other temporary disability "for all job-related purposes, including . . . payment of disability income . . . and under any fringe benefit offered to employees. . . ." 34 C.F.R. § 106.57(c) (emphasis added). Moreover, the institution must treat abortion like any other temporary disability "with respect to any medical or hospital benefit, service, plan or policy" for its students. 34 C.F.R. § 106.40(b)(4).

Indeed, the regulations actually require discrimination in favor of abortion: an institution must provide leave for an abortion for both students and employees even when it does not maintain a leave policy for its students or employees, and when a student or employee does not otherwise qualify for leave under the institution's leave policy. See 34 C.F.R. §106.40(b)(5), .57(d).

When title IX was enacted in 1972, abortion was almost entirely illegal in most States. There is no evidence whatsoever that Congress intended to condition receipt of Federal aid upon an education program's provision of general abortion coverage when it enacted title IX. The adoption of "abortion-neutral" language would restore title IX to its meaning when first enacted. Thus, even if S. 557 did not expand the scope of these regulations, abortion-neutral language for title IX is a necessary part of Grove City legislation.

The abortion-neutral language provides that no institution subject to title IX must provide or pay for an abortion or abortion-related services as a condition of the receipt of Federal aid. The language, rejected 11-5 in the Committee, states:

> 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 language does not permit discrimination against a person who has had a legal abortion. Indeed, the language forbids discrimination against a person who has had such an abortion. The Committee Report's suggestion to the contrary, Committee Report at 26, is flatly false. In fact, the abortion-neutral language states that while title IX does not "grant" or "secure" any right relating to abortion or abortion funding, it does not "deny" any right thereto either. Indeed, the second sentence of this amendatory language makes doubly clear that no discrimination is permitted on the basis of having had an abortion.

Moreover, the language does not forbid an institution from providing or paying for abortions or abortion-related services if it wishes to do so. The language simply nullifies those portions of current regulations requiring all institutions to do so as a condition of the receipt of Federal aid; thus, an institution is free to choose either to pay or provide for abortions or abortion-related services or not to do so under this language.

We understand Senator John Danforth will offer abortion-neutral language which makes even clearer that no discrimination is permitted against a person who has had a legal abortion.

Currently, Congress annually votes to forbid use of Federal funds for abortions. Ironically, under current regulations, whose reach will be expanded by S. 557, the receipt of Federal funds will trigger an entity's obligation to use its own resources to provide abortion coverage. Such an anomalous situation must be addressed, not exacerbated, by S. 557's expansion of the coverage of these regulations.

S. 557 will, in fact, expand the reach of these pro-abortion regulations. Prior to Grove City, only education programs receiving Federal assistance were subject to title IX. If a hospital, for example, had a teaching program for nurses or doctors which received Federal aid, but other parts of the hospital did not receive Federal aid, only the teaching program would have been subject to title IX, not the rest of the hospital. Even if non-education programs at the hospital also received Federal aid, those non-education programs were not

covered by title IX: title IX, as currently written, is expressly limited to any "education program or activity receiving Federal financial assistance."

S. 557, however, defines "program or activity" to mean "all of the operations of" covered entities, including those "principally engaged in the business of providing . . . health care . . . any part of which is extended" Federal aid (emphasis added). Thus, under S. 557, if a hospital conducts an educational program and receives any direct or indirect federal aid, whether to the educational or non-educational components, the entire hospital, including its non-educational components, would be covered. In the case of a hospital providing surgery or obstetrics, not only must the hospital provide abortion coverage for students and all hospital employees, including employees in its non-educational activities, it must provide abortions on demand to the public it serves.

Indeed, any hospital in the same chain as a hospital receiving Federal aid and covered by title IX under S. 557's expansive principles (subparagraph (3)(A)(ii), see pages 13-17, supra) will also have to provide such all-encompassing abortion coverage even if it receives no direct or indirect Federal aid at all.

While some of S. 557's proponents refuse to acknowledge it, hospitals which perform surgical procedures or provide obstetrical services could no more refuse to perform abortions for the general public than an educational institution could deny abortion coverage in its student and employee benefit and hospital or medical insurance plans. At an educational institution, the "public," i.e., the program beneficiaries, are students. Since title IX applied only to federally-assisted education programs before Grove City, it is not surprising that the title IX regulations speak only of students and employees[14] -- they make up virtually the entire covered program. Once title IX covers "all of the operations" of the entities listed in the four subparagraphs, however, including health institutions, the rationale of title IX coverage of students and employees applies to all of the beneficiaries of these entities; in the case of the hospital, the general public. In short, if it is illegal sex discrimination under title IX for an entity to provide temporary disability insurance and other employee and student benefits such as medical and hospital plans or insurance without including abortion coverage, it must similarly be illegal sex discrimination not to include abortion in its surgical procedures

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[14]Employees in a federally-assisted program are covered under these statutes, along with the intended beneficiaries of the program. North Haven Board of Education v. Bell, 456 U.S. 512 (1982).

and obstetrical services. The title IX regulations make clear that an entity providing hospital, medical, or disability insurance or other fringe benefits which fails to provide abortion coverage in such insurance or benefits for students or employees, is guilty of illegal sex discrimination. Once that "principle" is established, i.e. that denial of abortion coverage is sex discrimination, it simply cannot be cabined when title IX's coverage is expanded. This "principle" goes along with title IX, applicable to the new programs or entities title IX covers under S. 557. If a hospital, which has an obstetrics or surgery program, has interns receiving Federal student aid and must provide abortion coverage in employee and student insurance and benefit programs, the hospital can hardly argue under so broad a bill as S. 557 that its patients may be denied abortion services which the hospital is insuring for its students and employees.

Under S. 557, if an intern receiving Federal student aid participated in the hospital's obstetrics program as part of his or her education, do sponsors assert that a black woman seeking treatment can be turned away from such a program because of her race -- even though she is not an employee or student at the hospital? Can a woman seeking foot surgery be turned away from this hospital because of gender after S. 557 is enacted? The plain language of S. 557 admits of only one answer -- "No." If the same women seek abortions from this same hospital's obstetrics or surgery program under S. 557 without abortion-neutral language, how can the hospital refuse to perform it, when the hospital is providing abortion insurance to the very intern treating her?

The same requirement for mandatory abortion services occurs in the hospital's surgery or obstetrics activities, of course, when Federal aid goes only to the hospital's emergency room, because S. 557 extends title IX's coverage to "all of the operations of" covered entities such as the hospital. Indeed, as mentioned earlier, even if this hospital received no Federal aid at all, but it is part of a chain in which one hospital does receive any Federal aid and also has an education program, the hospital must perform abortions for the general public.[15] No amount of obfuscation by sponsors of S. 557 can change the clear impact of the language of the bill.[16]

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[15]See also note 16, infra -- it is possible under S. 557 that the hospitals will be covered even if none of them has an educational program.

[16]Indeed, even the Committee Report acknowledges the hospital's requirement to adhere to title IX in its education programs even if those programs receive no Federal aid. The

(continued...)

Further, title IX, as amended by S. 557, expressly covers "all of the operations" of all other entities principally engaged in providing not only health care, but education, housing, social services, or parks and recreation. Thus, at a minimum, any of these entities conducting education programs -- even when such education programs do not receive Federal aid -- will be subject to title IX, including the abortion regulations, throughout its operations, if any division plant, subsidiary, store, or facility receives any Federal aid. This includes, as mentioned earlier, activities of these entities totally unrelated to these five broad categories. Thus, if one tenant in an apartment building owned by a housing operator receives Federal subsidies, and the housing operator provides any vocational education to any of its employees (even employees not engaged in housing activities), benefits and insurance for employees at that apartment building and at all other apartment buildings, at all other housing operations, and at all non-housing related businesses of that housing operation will have to include abortion coverage.[17]

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[16](...continued)
Committee Report concedes that if a hospital receives Federal aid to its emergency room, the hospital's education programs are covered by title IX, although the Committee Report erroneously asserts that only the students and employees of such hospital's education programs are covered. Committee Report at 18.

[17]Indeed, because of the expansive definition of "program or activity" and "program" in S. 557's amendment to title IX, S. 557 appears to read the education limitation completely out of title IX. By defining "program or activity" to include all of the operations of covered entities, the bill seems to render the word "education" in title IX a nullity. That is, under S. 557, Congress in effect has defined "education program or activity" under title IX to mean everything covered by S. 557 -- including entities which conduct no educational activities. While this may seem unusual, Congress does have the power to define terms however it wishes. This may be an inadvertent result of sloppy drafting. If sponsors wish to limit title IX clearly to education activities it will have to do so in the text of S. 557. Until then, under S. 557, title IX -- and its pro-abortion regulations -- may well apply to all entities receiving Federal aid, even if they have no education activities at all. This is a scope as broad as the three other cross-cutting civil rights statutes amended by S. 557, in clear contrast to title IX's limitation to education programs prior to Grove City. Even if this problem of clarity is cured, the expansions of coverage of title IX described in the text of this letter, i.e., title IX coverage of all activities of a covered entity which does have an educational component, would remain.

Some proponents of the bill are trying to "have it both ways," calling for "broad," "institution-wide" coverage and beyond under S. 557, but suddenly asserting mere programmatic coverage when the expansion of abortion rights in their bill is documented. If only education programs of hospitals -- or apartment owners -- are covered by Title IX under S. 557, why does the bill's definition of "program or activity" for title IX cover "all of the operations of . . . an entire corporation, partnership, or other private organization . . . which is principally engaged in the business of providing education, health care, housing, social services, or parks or recreation. . . . any part of which is extended Federal financial assistance . . . ." subparagraph (3)(A)(ii) (emphasis added)? Why do the bill's findings speak of "broad, institution-wide" application of all four laws? S. 557, § 2(2).

The same analysis applies to the plant or other separate geographic facility of private organizations not principally engaged in the business of providing education, health care, housing, social services, or parks and recreation and covered by subparagraph (3)(B). For example, if an automobile plant employs a student in the Federal work-study program or conducts a federally-assisted vocational education program, then benefits and insurance for all plant employees, and not just those in the education program, are covered by the abortion requirement of the title IX regulations. Or, if the automobile plant conducts an education program and receives Federal aid for an occupational safety program, the entire plant is subject to title IX and its abortion regulations.

One of the most disingenuous arguments against the abortion-neutral language is that it "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 the other civil rights statutes to their pre-Grove City interpretation." Committee Report at 26. S. 557 itself makes a substantive change in one of these laws, section 504, by creating an exemption from certain obligations for certain covered entities, as mentioned earlier (pages 36-37, supra). Indeed, as previously noted, not every agency regulation has a small provider exception. Sponsors seem to believe that they are entitled to address substantive matters in Grove City legislation, but no one else is. Moreover, as mentioned earlier, abortion-neutral language does restore the effect of title IX to its original meaning. Pages 37-38, supra.

Any effort to limit abortion-neutral language to religiously affiliated hospitals is seriously inadequate, in our view. Many hospitals with no religious affiliation decline to perform abortions on moral grounds. They should no more be forced to perform such abortions as a condition of their receipt of Federal aid than any other hospital. Moreover, federally-assisted entities other than hospitals which have employee benefits and

insurance programs should not be compelled to provide abortion insurance coverage for all of their employees when they are subject to coverage by virtue of having education programs.

Each year, Congress bans the use of federal funds for almost all abortions. Thus, unless abortion-neutral language is adopted for Title IX, federal policy will be contradictory. While no entity may use federal funds to pay for abortions, the receipt of such funds triggers a requirement for the entity to spend its own funds to pay for abortions. Such an anomaly in federal policy should be corrected through the Danforth Amendment.

Errors in Committee Report

The Committee Report contains a number of errors that should be addressed to set the record straight.

It suggests that S. 557 is necessary "to restore the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally-assisted programs." Committee Report at 2. It also states that Grove City narrowed the coverage of these statutes, that Executive agencies asserted institution-wide coverage prior to Grove City, and that judicial decisions prior to Grove City endorsed "broad" coverage. We respond to each assertion in turn.

Except for the Department of Education, no agency has indicated to us that Grove City has had much, if any, impact on it. Outside of education, the Committee's hearings produced hardly any evidence to support the dire predictions of civil rights retrenchment that followed the Grove City decision. This is due in part to agency practice comporting with the scope of these laws prior to Grove City, and, as mentioned earlier, the significant jurisdiction that exists today in light of the vast outlay of Federal financial assistance. For example, the Department of Labor reported that all 47 of its complaint investigations initiated since March 26, 1985 were unaffected by the Grove City decision. No investigation was narrowed in scope as a result of Grove City, and no investigation was found to be beyond the Department's jurisdiction as a result of Grove City. Letter from William J. Harris, Director, Directorate of Civil Rights, U.S. Department of Labor, to Susan J. Prado, Acting Staff Director, U.S. Commission on Civil Rights, December 9, 1986. Indeed, Secretary of Labor Brock advised Senator Kennedy on April 2, 1987, that no Department of Labor enforcement or investigative activity has been curtailed as a result of the Grove City decision, adding:

> The Department has traditionally interpreted the phrase "program or activity" consistently with the interpretation set forth by the Supreme Court in Grove City.

Letter from Secretary of Labor William E. Brock to Senator Edward M. Kennedy, April 2, 1987.

The Veterans Administration reported that its complaint investigation process had not been affected by Grove City, no compliance reviews were dropped, narrowed, or "put on hold" as a result of Grove City, and the Department's procedures for handling complaints and compliance reviews had not been changed. Letter from James R. Yancey, Director, Office of Equal Opportunity, Veterans Administration, to Susan J. Prado, Acting Staff Director, U.S. Commission on Civil Rights, February 27, 1987. Thus, with respect to the vast bulk of Federal agency activity, not only has there been no showing by sponsors of S. 557 that the effectiveness and vitality of these four cross-cutting civil rights statutes has been impaired, reports from a number of agencies demonstrate to the contrary.

Even for the Department of Education, of the 674 complaints closed in whole or in part, or suspended, during fiscal years 1984 through 1986, 468 of them concerned abortion rights and were filed by one person.

Moreover, the plain language and legislative histories of these statutes reflect congressional intent that they have a program-specific scope. For example, when title IX was first introduced in 1971, it was institution-wide in scope but was ruled non-germane. In 1972, title IX was adopted in its present form. Section 901 itself, covering "any education program or activity receiving Federal financial assistance" in its ban on sex discrimination, contains a definition of "educational institution" which includes entire schools. Congress used the broader term "educational institution" in other parts of section 901 in contrast to the "program or activity" limitation in the ban on discrimination.

Indeed, when Congress enacted section 901, applying the ban on gender discrimination to "any education program or activity receiving Federal financial assistance," it also enacted section 904. Section 904 prohibited discrimination on the basis of blindness "in any course of study by a recipient of Federal financial assistance for any education program or activity. . . ." 20 U.S.C. § 1684 (emphasis added). Here, Congress clearly banned discrimination on the basis of blindness throughout the institution by using the word "recipient" in the statute itself -- in stark contrast to the more discrete term "program or activity" used in the anti-sex discrimination provision of title IX and in the other three statutes. Congress clearly knew how to provide institution-wide coverage under these statutes and declined to do so. Further, the Supreme Court, in North Haven Board of Education v. Bell, 456 U.S. 512 (1982), noted the contrast between section 901 and section 904 in concluding that coverage under section 901 is program-specific.

Indeed, significant portions of the legislative histories cited in the Committee Report either do not contradict the view that the statutes were intended to be program-specific or actually support the program-specific view.

The Committee Report's discussion of case law before Grove City is, at best, equally misleading.

The Committee Report cites three cases as supporting the program-specific approach. Committee Report at 10. There are more. Including the three cited in the Committee Report, these cases include: Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982) (Federal scholarship and loan aid to a college subjects only the college's student aid program to title IX coverage), vacated and remanded in light of Grove City College v. Bell, 466 U.S. 901 (1984); Dougherty County School System v. Bell, 694 F.2d 78 (5th Cir. 1982) (reaffirming earlier decision holding that title IX is program-specific); Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981) (Federal financial assistance provided to the Harvard Law School through a college work-study program covers only the work-study program and does not constitute assistance to the entire law school educational program; title IX complaint must allege discrimination in the particular assisted program within the institution), cert. denied, 456 U.S. 928 (1982); Brown v. Sibley, 650 F.2d 760, 769 (5th Cir. 1981) ("on the basis of the language of section 504 and its legislative history, and on the strength of analogies to title VI and title IX, we hold that it is not sufficient, for purposes of bringing a discrimination claim under section 504, simply to show that some aspect of the relevant overall entity or enterprise receives or has received some form of input from the Federal fisc. A private plaintiff . . . must show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance.") (footnotes omitted); Simpson v. Reynolds Metal Co., 629 F.2d 1226 (7th Cir. 1980) (Federal aid to a work training program at a plant subjects only that program, not the entire plant, to section 504 coverage); Bachman v. American Society of Clinical Pathologists, 577 F. Supp. 1257 (D. N.J. 1983) (Federal aid to conduct seminars on alcohol abuse does not bring the society's activity of certifying medical technologists within section 504 coverage); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (University's intercollegiate athletic program not subject to title IX coverage because it did not receive Federal financial assistance).

Moreover, the Committee Report incorrectly cites some cases in support of the proposition that the scope of Federal jurisdiction is broader than the assisted program. For example, Board of Public Instruction of Taylor County v. Finch, 414 F.2d

1068 (5th Cir. 1969) does not "assume[] and endorse[] institution-wide coverage. . . ." as the Committee Report at 10 says it does. Indeed, the Supreme Court has cited this case as support for the "program-specific" reading of these statutes. North Haven Board of Education v. Bell, 456 U.S. 512, 538 (1982). Likewise, a reading of the Finch holding itself does not indicate anything but a "program-specific" conclusion. The Committee Report misleadingly suggests that 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) supports institution-wide coverage under title VI. Committee Report at 10. That case dealt with a public school system-wide desegregation remedy where there was a constitutional claim at issue. The scope of title VI was not discussed in the opinion. The Committee Report is also misleading about 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). The Committee Report states the holding as "(Title VI investigation of entire College appropriate.)" Committee Report at 10. The court's decision that an agency's investigatory authority -- as distinguished from its regulatory authority -- is broader than programs covered by title VI is not inconsistent with the program-specific scope of that statute. An agency has some authority to investigate more broadly than the federally-assisted programs or activities in order to determine whether discrimination is occurring in those assisted programs or activities. The agency, however, may only regulate -- and seek remedial action in -- those federally-assisted programs or activities.

Further, the court's decision in Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. (1976)), that nonfederally-assisted financial aid dispensed in a law school built with Federal assistance is covered by title VI, is fully reflective of the program-specific scope of title VI. That activities occurring within buildings constructed with Federal financial assistance are themselves covered, for a period of time, by virtue of such construction aid, is fully consistent with the program-specific reach of title VI. This case provides no support for a scope of coverage beyond program-specificity.

Ironically, while continuing to assert in the caption that case law supported "broad" coverage before Grove City, even the sponsors had to admit in the last paragraph of this section on case law that this was not the whole story: "Judicial recognition of institution-wide coverage waned only after the Supreme Court opinion in North Haven [Board of Education v. Bell, 456 U.S. 512 (1982)]." Committee Report at 11. Of course, proponents of overbroad Grove City legislation have stated since the Grove City decision that Executive branch and judicial interpretation had clearly and consistently been "institution-

wide" in scope. The Committee Report, thus, belies the bill's findings on this point. Their belated admission that judicial rulings were at best split and trending toward the program-specific interpretation reflected in Grove City should give real pause in accepting the same proponents' assertion that this bill merely "restores" the scope of prior coverage. Even their admission does not fully acknowledge the facts: decisions in at least three Federal courts of appeal had, prior to North Haven, ruled that these statutes were program-specific.

The Committee Report also incorrectly states that since S. 557 defines the term "program or activity," rather than replacing it with the term "recipient," as was attempted by an overly expansive bill in the 98th Congress, S. 557 represents a "very different" approach from the earlier bill. Committee Report at 4.

In fact, S. 557 effectively defines the concept of "recipient" as well as the term "program or activity." The term "program or activity" is, in effect, defined as "all of the operations of" a list of entities. The entities delineated by the four sections following the phrase "all of the operations of" are, in effect, the "recipients" under the bill. Moreover, as mentioned earlier, these twin definitions function in many respects as the "trickle-up," "trickle-down," and "trickle-around" theories of this bill's predecessor in the 98th Congress. For example, covering a nursing home which receives no Federal aid because a different nursing home in the same "chain" receives Federal aid is "trickle-up," "trickle-down," and "trickle-around" coverage. Similarly applying these statutes to an entire private entity engaged in certain activities delineated in paragraph (3) or covered by the catch-all paragraph (4), including all plants, facilities, and divisions of a business, even though only one program at one facility or plant receives Federal aid, constitutes such coverage.

The Committee Report suggests, implicitly, that agency definitions of the term "recipient" survive enactment of S. 557 Committee Report at 24. As just noted, however, S. 557, in effect, clearly defines recipients in its four operative subparagraphs. Further, the suggestion that one can superimpose agency definitions of "recipient" on these four subparagraphs is inherently incredible -- it would lead to a chaotic situation in which coverage under the bill could be even further broadened by Federal bureaucracies and judges.

For example, the Department of Education's title IX regulation currently defines "recipient" as: "any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through

another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof." 34 C.F.R. § 106.2(h).[18]

It is obvious from a reading of S. 557 that this agency's regulatory definition, which covers many of the same categories as the definition of "program or activity" in S. 557, is superseded by the four operative paragraphs of the bill and cannot be read together with those paragraphs sensibly.

S. 557 completely rewrites the "scope" provisions of these four civil rights statutes. Accordingly, the Committee Report's remark that, "[t]he bill does not change in any way who is a recipient of federal financial assistance" is a gross misstatement. Committee Report at 28; see also id. at 32. As has been mentioned earlier, a whole host of new entities and never before covered activities in both the public and private sectors will be covered for the first time.

Similarly, the Committee Report's discussion of "ultimate beneficiaries" is very misleading. Committee Report at 24-25. It relies on current agency definitions of "recipient" as excluding "ultimate beneficiaries," generically, from coverage. It also relies on past practices. The bill, however, completely rewrites the "scope" provisions of these four civil rights statutes and the bill itself is utterly unclear as to who is an ultimate beneficiary. (See this letter's discussion of farmers, at pages 22-25, supra.) Moreover, it is a patently false reading of section 7 of the bill to state that, "[n]othing 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.'" Committee Report at 25. In fact, section 7, the text of which is not even included in the Committee Report, states: "Nothing in the amendments made by this Act shall be construed to extend the application of the Acts so amended to ultimate beneficiaries of Federal financial assistance excluded from coverage before the enactment of this Act" (emphasis added).

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[18]"Recipients" are often defined in agency regulations, but these definitions do not set forth the parameters of coverage. Rather, they define those responsible for adherence to the requirements of these cross-cutting civil rights statutes in their federally-assisted programs.

Thus, while the bill appears to seek to "grandfather" the pre-Grove City ultimate beneficiaries as of the date of S. 557's enactment -- unsuccessfully, in our view -- those who are ultimate beneficiaries of programs enacted after S. 557 becomes law are not excluded by section 7. Thus, if S. 557 becomes law, individual beneficiaries of social welfare programs enacted thereafter would be covered -- for the first time.

For all of the reasons stated herein, we strongly recommend against enactment of S. 557.

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