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THE CIVIL RIGHTS RESTORATION ACT OF 1987: LEGAL
ANALYSIS OF S. 557

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ABSTRACT

The Senate in January 1988 passed S. 557 with amendments to "restore the...broad institution-wide application" of certain federal civil rights laws in the wake of the U.S. Supreme Court ruling in Grove City College v. Bell. This report discusses the background and contents of this legislation.

THE CIVIL RIGHTS RESTORATION ACT OF 1987: LEGAL
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I. Introduction

As in prior years, there are before the 100th Congress two bills, S. 557 and H.R. 1214, designed to "restore the...broad institution-wide application" of certain federal civil rights laws in the wake of the U.S. Supreme Court ruling in Grove City College v. Bell.¹ On May 20, 1987 the Senate Committee on Labor and Human Resources amended and reported out S. 557.² Then on January 28, 1988 the U.S. Senate amended and passed the reported version of S. 557. As of the date of this report, H.R. 1214 was still under committee consideration and had yet to come to the floor of the House for debate and a vote. For the purposes of this analysis, the focus will be on the Senate approved version of the legislation.

The "Civil Rights Restoration Act of 1987" (or "bill" hereinafter) was introduced by Senator Kennedy et al. on February 19, 1987. The Court in Grove City ruled that the prohibition on sex discrimination in Title IX of the Education Amendments of 1972³ applied only to the particular education program or activity that received federal funds, not to the entire institution. While limited to Title IX, Grove City College has potential implications as well for three other laws -- Title VI of the 1964 Civil Rights Act,⁴ the Age

¹ 465 U.S. 555 (1984).

² S. Rep. No. 100-64, 100th Cong., 1st Sess. (1987).

³ 20 U.S.C. 1681 et seq.

⁴ 42 U.S.C. 2000d et seq.

Discrimination Act of 1975,⁵ and section 504 of the Rehabilitation Act of 1973⁶ -- that ban discrimination on the basis of race, age, and handicap in federally assisted programs. Basically, the bill seeks to overturn this judicial interpretation by proposing an amendment to Title IX and these other laws defining the term "program or activity" to include the entire state or local government department or agency, or other public or private entity through which federal financial assistance is delivered to its "ultimate beneficiaries."

The U.S. Senate approved the reported version of S. 557 after adding two amendments pertaining to abortion and a clarifying amendment concerning section 504 of the Rehabilitation Act. The measure passed by a vote of 75 to 14. This report will 1) review the Supreme Court ruling in Grove City, as well as the significant court decisions which preceded and followed it, and 2) analyze the legal implications of S. 557, as amended and passed by the Senate on January 28, 1988.

II. Judicial Interpretations Defining the Scope of Federal Civil Rights Act Coverage

Early on, the federal government by regulation had asserted broad authority to enforce Title VI and IX against discrimination in all aspects of the operation of an aided institution or entity when federal funds were provided to any of its activities.⁷ In adopting this "institution-wide" approach, the regulations took a broad view of the program-specific ban of

⁵ 42 U.S.C. 5101 et seq.

⁶ 29 U.S.C. 794.

⁷ See, 45 C.F.R. 106.31 (1984)(Title IX regulations); 45 C.F.R. 80.1 (1984)(Title VI regulations).

Titles VI and IX, and the related fund termination sanction in those laws which is limited to "the particular program, or part thereof" affected by discrimination.⁸ In 1982, however, the U.S. Supreme Court seemed to undermine this approach when it found, in North Haven Board of Education v. Bell,⁹ that both the government's regulatory authority to prohibit discrimination by federal aid recipients, and the power to remedy discrimination by the termination of funds, to be program specific under Title IX. Then, in Grove City College v. Bell,¹⁰ the Court appeared to close the door on institution-wide coverage of Title IX, and by implication in other similar laws, when it rejected the distinction between earmarked and non-earmarked funds and adopted a "purpose and effect" test of what constitutes a "program."

In Grove City College, the Supreme Court aligned itself with the apparent majority of lower courts that had narrowly construed program specificity under Title IX.¹¹ Grove City College, a private, coeducational, liberal arts

⁸ 20 U.S.C. 1682 (Title IX); 42 U.S.C. 2000d-1 (Title VI).

⁹ 456 U.S. 512 (1982).

¹⁰ 465 U.S. 512 (1984).

¹¹ These pre-Grove City College decisions found Congress intended for Title IX to apply to the discrete parts of the educational institutions receiving aid, such as "athletic programs," "work-study programs," or "math departments," rather than the institution as a whole. See, e.g., Othen v. Ann Arbor School Board, 507 F. Supp. 1376 (E.D.Mich. 1981), aff'd, 699 F.2d 309 (6th Cir. 1983)(Department of Education may not prohibit sex discrimination in athletics unless the athletics department received direct, earmarked, federal assistance); University of Richmond v. Bell, 543 F. Supp. 321 (E.D.Va. 1982)("the question in every case should be whether the program or activity," athletics in that case, "received direct federal financial assistance."); Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982)(receipt of work-study funds did not bring the entire institution within Title IX coverage); Hillsdale College v. HEW, 696 F. 2d 418 (6th Cir. 1982)(students' receipt of BEOG grants does not place an entire institution within Title IX or support application of regulation requiring assurance of compliance).

At the appellate level, only the Third and Fifth Circuits seemed to adopt

institution affiliated with the Presbyterian Church, had consistently refused all forms of governmental financial assistance. Because 140 of its 2,000 students were eligible for Basic Educational Opportunity Grants (BEOGs), however, and 342 had received Guaranteed Student Loans (GSLs), the Department of Education in 1977 requested that the college execute an assurance of compliance with Title IX. Grove City College refused on the ground that any aid its students received constituted federal financial assistance only to the students and not to the college. The Department initiated administrative proceedings to terminate the grants and loans to Grove City College students. Concluding that the college was a recipient of federal financial assistance and was thus subject to regulation under Title IX, the Administrative Law Judge (ALJ) ordered termination of the students' BEOGs and GSLs. In a suit filed by Grove City College and four of its students, a federal district judge agreed that the college was a recipient of federal financial assistance within the meaning of Title IX.¹² On appeal, the U.S. Court of Appeals for the Third Circuit affirmed, reasoning that since BEOGs ultimately become part of the school's general operating budget, the institution itself must be deemed a

an institution-wide approach to Title IX coverage prior to Grove City College. See, Iron Arrow Honor Society v. Schweiker, 652 F.2d 445 (5th Cir. 1981), vacated and remanded, 458 U.S. 1102 (1982)(state university support of all-male honor society tainted all school activities for Title IX purposes); Haffer v. Temple University of the Commonwealth System of Higher Education, 524 F. Supp. 531 (E.D.Pa. 1981), aff'd per curiam, 688 F.2d 14 (3d Cir. 1982)(university athletic department benefitted from federal financial assistance and was subject to Title IX by virtue of the university's receipt of any federal funds, including aid to students). Significantly, however, after Grove City College, the district court in Haffer in effect reversed itself, and dismissed all Title IX claims except one relating to the allocation of athletic scholarships. Haffer v. Temple University, No. 80-1362, (unreported order)(E.D.Pa. 1985).

¹² Grove City College v. Harris, 500 F. Supp. 253 (W.D.Pa. 1980).

federal aid recipient.¹³

On review, the Supreme Court agreed that by admitting BEOG eligible students, the College was "receiving federal financial assistance" for purposes of Title IX. However, a 6 to 3 majority ruled that because they "augment the resources that the College itself devotes to financial aid," the college's student financial aid program alone was the "program or activity" assisted from BEOG funds, and therefore only that program could be regulated under Title IX.¹⁴ It rejected the argument that BEOGs received by students "free up" the college's own resources for use elsewhere and thereby constitute aid to the entire institution. There was no evidence for this in the record, and in any event, the majority felt that such an "economic ripple effects" theory was inconsistent with the program-specific language of the statute. Moreover, even conceding that "substantial portions of the BEOGs received by Grove City's students ultimately find their way into the College's general operating budget," the "purpose and effect" of BEOGs was to enable the institution to enroll students who otherwise would not have been able to afford higher education. Because the primary effect of BEOGs is thus to increase the funds available for financial aid, the Court held that Grove City College's financial aid program was the "program or activity receiving federal financial assistance" within the meaning of Title IX. Accordingly, the college could be required to execute an assurance of compliance with respect to its financial aid program, and its failure to do so would warrant termination of federal assistance to its students.

By narrowly construing "program or activity" as used in Title IX, the

¹³ Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982).

¹⁴ 465 U.S. 555 (1984).

Court rejected the institution-wide approach where categorical or earmarked federal assistance is involved. It left unresolved, however, the status of institution-wide civil rights coverage where general unrestricted financial assistance to a grant recipient is involved. Nor did Grove City College provide much practical guidance as to how the "purpose and effect" standard should be applied to determine which programs and activities are receiving federal financial assistance and are thus subject to regulation under Title IX and the other program-specific civil rights statutes.

The principle of program specificity was once again at issue when the Supreme Court reviewed the D.C. Circuit Court of Appeals ruling in U.S. Dep't of Transportation v. Paralyzed Veterans.¹⁵ The appellate court there had held that section 504 of the Rehabilitation Act barred discrimination in the on-board treatment of handicapped individuals by commercial airlines even though the carriers received no direct federal subsidies. The law covered the carriers, said the appeals court panel, because they benefit so "pervasively" from federal assistance to the airports and in the form of federal aid traffic control centers. The court reasoned further that its decision was not inconsistent with Grove City College because all commercial air transportation facilities, including the aircraft themselves, are a federally assisted "program or activity" for purposes of the federal civil rights laws.

By a vote of 6 to 3, the Supreme Court reversed. It held that while the airlines benefit from federal grants to the airports they use, and from the federally operated air traffic control system, they are not covered by section 504 unless they actually "receive" federal financial assistance. Justice Powell, writing for the Court, noted that under the 1970 Airport and Airway

¹⁵ 106 S.Ct. 2705 (1986).

Development Act and its successor statute, federal funds for airport development go directly to airport operators. "Thus, the recipient for purposes of § 504 is the operator of the airport and not its users." Congress, he continued, "limited the scope of § 504 to those who actually 'receive' federal financial assistance because it sought to impose § 504 coverage as a form of contractual cost of the recipient's agreement to accept federal funds."¹⁶ Nor did the federally operated air traffic control system constitute "federal financial assistance" under section 504; rather, it is a federally conducted program "that has many beneficiaries but no recipients."¹⁷

Justice Marshall, joined in dissent by Justices Brennan and Blackmun, felt the proper inquiry was not whether commercial airlines "receive" federal assistance, but whether they are in a position to "exclude handicapped persons from the benefit of, or...subject them to discrimination under any program or activity receiving Federal assistance." In the dissenters' view, they are and should be subject to the Act.

As might be expected, the lower federal courts since Grove City College have for the most part continued this judicial trend of strict adherence to program specificity under Title IX and related laws. One prominent approach applies the "program or activity" standard from the perspective of the aided institution. Thus, the relevant "program" is most often the educational department in which the plaintiff teaches or is a student, and the inquiry is whether that department receives any federal funds. For example, in Zagrillo v. Fashion Institute of Technology,¹⁸ the district court required that a

¹⁶ Id. at 2711.

¹⁷ Id. at 2715.

¹⁸ 601 F. Supp. 1346 (S.D.N.Y. 1985).

direct "nexus" be shown between the complaining faculty member's department and federal money because "[u]nder [Grove City College], Title IX covers only those programs that receive federal financial assistance." Similarly, in Moire v. Temple University School of Medicine,¹⁹ a medical student had her sexual harassment claim against the physician supervising her psychiatric clerkship dismissed because neither he nor the clinic for which he worked received federal assistance. The court did concede, however, that Temple University, which is federally aided, "might be liable under Title IX to the extent that it condoned or ratified any invidiously discriminatory conduct."²⁰

Bennett v. West Texas State University²¹ was a class action alleging sex discrimination in the entire athletic program of the university, including athletic scholarships. The university received federal assistance in the form of BEOGs or "Pell Grants," some of which went to student athletes, college work-study, federal subsidies for physical facilities, and unrestricted revenue sharing funds. Following Grove City College, however, the Fifth Circuit found that the federal grants to students were assistance to the financial aid office, and that the benefit to the athletic department of the other federal funds received by the university was "merely incidental." "This type of 'trickledown' benefit is just the type that Grove City explicitly ruled did not trigger Title IX coverage." The court of appeals distinguished "indirect

¹⁹ 613 F. Supp. 1360 (E.D.Pa. 1985).

²⁰ See, also, Pratol v. Londa, No. CV-87-2041 (slip opinion)(E.D.N.Y. October 14, 1987) where the district court in dismissing the sexual harassment suit by a federally aided student against the defendant Stenotype Academy held that "even assuming that plaintiff used her federal assistance to pay for her education at defendant Academy, she still fails to state a cause of action under Title IX, because plaintiff does not allege that she was discriminated against in connection with defendant Academy's financial aid program."

²¹ 799 F.2d 155 (5th Cir. 1986).

recipients" of federal aid, which are covered by Title IX, from "indirect beneficiaries," which are not, in terms of the congressional purpose behind the program and rejected any application of the "infection theory" of Title IX liability.

Under some interpretations, there is even a possibility that only the narrowest or least inclusive subdivision within a department or educational institution may be a "program" for Title IX purposes, and that programs may not overlap or be parts of larger programs. Dictum in the court's opinion in Storey v. Board of Regents,²² for example, opined whether the "program" would be the Department of Poultry Sciences or the College of Agriculture and Life Sciences before deciding, for other reasons, that Title IX created no private right of action for employment discrimination. A similar implication may be found in Mabry v. State Board for Community College and Occupational Education,²³ where the court denied the Title IX claim of a female instructor who claimed she was discriminatorily fired from her teaching position in physical education, public speaking, and first aid at a state junior college. The plaintiff had argued that because those courses are "core requirements" for degrees in programs that receive federal funds, Title IX applies. But the district court disagreed, based on evidence that:

...no unrestricted federal financial assistance was received by the college or through the board; that no federal financial assistance was received by the college or through the board that was specifically designated for, or allocated to the physical education or language instructional program areas or the Standard Red Cross First Aid and Personal Safety course at Trinidad; that the college did receive federal financial assistance in other education program areas, but that the assistance received

²² 604 F. Supp. 1200 (W.D.Wisc. 1985).

²³ 597 F. Supp. 1235 (D.Colo. 1984).

was not to pay the salaries of instructors employed within the program areas in which Mabry taught.²⁴

A somewhat broader approach may be evident in O'Connor v. Peru State College,²⁵ which defined the relevant Title IX "program or activity" in terms of the purpose of Congress in making the particular funds available and the parts of the educational institution for which they could have been used. In O'Connor a former physical education instructor and women's basketball coach claimed that her firing was a violation of Title IX. The college was a recipient of a "Title III grant" for student and faculty research by which, the court found, Congress intended to aid the institution's entire "academic" program, including physical education. Because the plaintiff's dismissal, however, was the direct result of her coaching, not her teaching duties, and was thus not related to "academics," it was outside of Title IX. "Even though at Peru State athletics is administratively a part of the physical education division, we do not believe that intercollegiate sports, while important to the higher education experience, constitutes 'academics' within the contemplation of Title III." Thus, although defeating plaintiff's claim, the O'Connor court seemed to shift the focus away from an inquiry into actual funding status to whether the program or activity complained of was eligible for federal funding received by the institution.

One Title IX court has held since Grove City College that it is not enough that the defendant is an educational institution but that the claim asserted must relate to an educational aspect of the institution. In Walters v.

²⁴ Id. at 1239.

²⁵ 781 F.2d 632 (8th Cir. 1986).

President and Fellows of Harvard College²⁶ an employee of the Building and Grounds Department of Harvard sued under Title IX alleging that during her employment she was harassed and intimidated and eventually forced to quit her job because of sex. Specifically, she argued that the reference to "education program or activity" in Title IX should be read to include "that area of activity which is involved in the process of providing a center for learning and training" and that buildings and grounds maintenance is such an activity. The court, however, rejected this contention:

Although the Supreme Court left open the question of what constitutes an "educational program" within the meaning of the statute, North Haven, supra, at 540, the phrase is clearly intended to convey something more directly related to the delivery of educational services than the purely custodial services provided by the Building and Grounds Department here. There is no need to put a strained interpretation on the statutory language of Title IX when Congress has enacted an adequate remedy for these workers under Title VII [of the 1964 Civil Rights Act].²⁷

Despite obvious similarities in language and structure of the two Acts, some courts prior to Grove City College distinguished the reach of Title IX from the racial discrimination prohibition of Title VI of the 1964 Civil Rights Act, noting in justification that race classifications under the Constitution are to be more strictly scrutinized than sex classifications.²⁸ Another reason may be that much early Title VI litigation concerned state sanctioned racial segregation within educational or other federally funded institutions, rather than more narrowly confined violations. As such, the institutional approach may have been more common in the Title VI context because the decision to deny

²⁶ 601 F. Supp. 867 (D.Mass. 1985).

²⁷ Id. at 869.

²⁸ E.g., Othen v. Ann Arbor School Board, 507 F. Supp. 1376, 1387 (E.D.Mich. 1981), aff'd, 609 F.2d 309 (6th Cir. 1983).

blacks admission necessarily meant that no component program could be conducted free of discrimination.²⁹

Since Grove City College at least one federal court has affirmed that "Title VI is broader in scope than Title IX." In United States v. Texas³⁰ the plaintiffs sought to enjoin the State's use of a Pre-Professional Skills Test (PPST) to screen students for admission to teacher education courses because of the test's adverse impact on black and Hispanic candidates. The district court granted the motion for preliminary injunction finding a likelihood of success on the merits. Despite the fact that "no federal funds have been channelled to PPST activity," the court concluded that Title VI is broader than Title IX as interpreted by Grove City College, and that "the PPST is clearly part of the program of teacher education in Texas, and the teacher program receives federal funds."

As to the argument that Title VI does not apply to the defendants' use of the PPST because no federal funds are used to administer the PPST, defendants' citation to [Grove City College] is particularly inapposite.... Defendants, by their own contention that the PPST is used to improve the quality of students in teacher education programs, link

²⁹ Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), aff'd mem., 529 F.2d 514 (4th Cir. 1975)(VA student aid was assistance to the university and all its programs were subject to Title VI); Flanagan v. President & Director of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976)(federal construction grants and loans and interest subsidies obliged the college "to refrain from discriminating on the basis of race in providing any service, financial aid, or other benefit to its Law Center students."); Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967)(receipt of federal aid for maintenance of school buildings incompatible with denying admission to blacks and a violation of Title VI); United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967)(Title VI authorized HEW to insure that no race discrimination occurs in any school that receives federal financial assistance). But, cf., Stewart v. New York University, 430 F. Supp. 1305 (S.D.N.Y. 1976)(federal grants and loans for dormitory construction does not trigger Title VI coverage of law school admissions policy).

³⁰ 628 F. Supp. 304 (E.D.Tex. 1985).

the PPST inextricably to the teacher education program itself. Grove City v. Bell does not support a contention that federal money would have to be spent on every specific item in a program in order for that item to be covered by Title IX. Accordingly, the defendants' argument that, because no federal money is spent on the PPST, there is no Title VI coverage to redress discrimination relating to the PPST, has no merit.³¹

More recently, however, the Eleventh Circuit in U.S. v. State of Alabama³² specifically relied on Grove City College and the Paralyzed Veterans case to reject a broad "systemic" challenge by the federal government to racial segregation in Alabama's public colleges and universities. The United States there claimed that the state had since 1953 pursued racially discriminatory student enrollment and faculty hiring practices which, coupled with continued underfunding of its historically black universities, had unlawfully perpetuated a racially dual system of higher education. The complaint did not specify which programs or activities received federal funds or in what manner these programs or activities were discriminatory. Instead the government simply argued that because the entirety of Alabama's higher education system was "permeated with discrimination," the ten public institutions within the state and their governing bodies constituted a "program or activity receiving federal financial assistance." In rejecting this approach, the appeals court stated:

Title VI mandates a more rigorous analysis of the federal assistance received by defendants than was undertaken below. Under the United States' theory of the case, it was sufficient that some defendants received some federal assistance. The United States presented no evidence, and the trial court made no findings, detailing which programs and activities within these defendant institutions received federal funding. Because of this failure to identify the particular federally assisted programs being affected, the United States could not show how the actions of defendants

³¹ Id. at 322.

³² 828 F.2d 1532 (11th Cir. 1987).

rendered these programs discriminatory. Such detailed showings are necessary to satisfy the program specificity requirement of Title VI.

The court thus held that the government's complaint could not stand but would have to be redrawn "to make the requisite showing of which particular programs or activities received federal funding and how these programs were discriminatory."³³

Finally, note that the program specificity requirement of section 504 of the Rehabilitation Act has likewise produced a welter of decisions which, particularly since Grove City College, have largely embraced a more restrictive approach.³⁴ In the one post-Grove City College case to consider the scope of "program or activity" under the 1975 Age Discrimination Act, Stephandis v. Yale University,³⁵ the district court also adhered to a relatively strict requirement of program specificity. The plaintiff there joined age and handicap discrimination claims against Yale for denying him admission as a

³³ Id. at 1550-51.

³⁴ See, e.g., Brown v. Sibley, 650 F.2d 760, 769-70 (5th Cir. 1981)(federal funding of organization's counseling service and warehouse construction did not subject broom construction shop to section 504); Doyle v. University of Alabama in Birmingham, 680 F.2d 1323 (11th Cir. 1982)(federal funding of some university programs does not subject program employing plaintiff to section 504); Jacobson v. Delta Airlines, Inc., 742 F.2d 1202 (9th Cir. 1984), cert. dismissed, 471 U.S. 1062 (1985)(federal funding of airline's small community services did not subject carrier to section 504); Foss v. City of Chicago, 640 F. Supp. 1088 (N.D.Ill. 1986), aff'd, 817 F.2d 34 (7th Cir. 1987)(federal funding of Chicago Fire Department's first aid training for residents, emergency preparedness and disaster services and advanced education program did not trigger application of section 504 to entire department); Chaplin v. Consolidated Edison Co., 628 F. Supp. 143 (S.D.N.Y. 1986)(federal funding of company's special trainee employees subjects only Specialized Training Department to section 504, not entire company); Bachman v. American Soc'y of Clinical Pathologists, 577 F. Supp. 1257 (D.N.J. 1983)(federal funding of organization's alcohol abuse activities does not subject organization's certification activities to federal regulation under section 504).

³⁵ 652 F. Supp. 110 (D.Conn. 1986).

student on three different occasions to the Graduate English Department. A Yale grant officer testified that based on her records the English Department had received no federal funds but that several English faculty members had received grants from the National Endowment for the Humanities to participate in the Yale Summer Program. The Summer Program was unrelated to the English Department and did not involve Yale students. Based on this evidence, the court concluded that "plaintiff could not meet his threshold burden that the specific program which allegedly discriminated against him received federal financial assistance."

Coverage under the nondiscrimination provisions is the 'contractual cost' agreed to by a recipient in return for receiving and using federal financial assistance. [citation omitted]. However, to trigger that coverage under acts containing program-specific funding language, the teaching of Grove City and its progeny requires that the program accused of discrimination must be a recipient of federal financial assistance at the time of the alleged discrimination.³⁶

Accordingly, the court dismissed the suit.

III. The Institution-wide Approach of S. 557

The foregoing discussion illustrates that notwithstanding the program-specific emphasis in these statutes, the federal government before Grove City had asserted broad authority to bar discrimination in all aspects of the operation of an aided institution or entity when federal funds supported any of its activities. However, as noted, the lower federal courts were largely divided on the issue of program specificity versus institution-wide coverage. In Grove City, the Supreme Court aligned itself with the apparent majority of lower court decisions that had opted for a narrow construction of program-

³⁶ Id. at 113.

specificity under Title IX.

S. 557 as passed by the Senate, on the other hand, states a policy in favor of "broad, institution-wide application" of the law and would effectuate this policy by adding a new statutory definition of "program or activity" to each of the four laws discussed above. Accordingly, each of those laws would be amended to include the following provision:

For the purposes of this title, the term 'program or activity' and 'program' mean all of the operations of--

- (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
- (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
- (2)(A) a college, university, or other post-secondary institution, or a public system of higher education; or
- (B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;
- (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--
 - (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
 - (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
- (B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or
- (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 901 to such operation would not be consistent with the religious tenets of such organization.

The Senate approved the reported version of S. 557 with three amendments-- two concern abortion and the third is a clarification of coverage for the handicapped (with contagious diseases) in the employment context. The Weicker Amendment provides that no provision of S. 557 or amendment made by it shall be

construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal funds to perform or pay for an abortion.³⁷ The Danforth Amendment specifically provides that Title IX of the 1972 Education Act Amendments shall not be interpreted "to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion." It also prohibits the imposition of a penalty on any person who is "seeking or has received any benefit or service related to a legal abortion."³⁸ The Humphrey-Harkin Amendment clarified that for purposes of sections 503 and 504 of the Rehabilitation Act relating to employment, coverage does not extend to an individual "who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job."³⁹ There was very little debate concerning this amendment to the Rehabilitation Act. A colloquy between Senators Humphrey and Harkin indicates that the amendment is intended to address an issue comparable to the one faced by Congress in 1978 with regard to coverage of alcohol and drug abusers under section 504 of the Rehabilitation Act. This discussion between the two senators also emphasizes that this amendment does nothing to change the current laws concerning reasonable accommodation as it applies to individuals with handicaps who cannot perform their jobs.⁴⁰

³⁷ 134 Cong. Rec. S 211 (daily ed. January 28, 1988).

³⁸ Id. at S 225.

³⁹ Id. at S 256.

⁴⁰ Id. at S 256-257.

As reported and passed by the Senate, this bill contains two provisions which should be noted because they bear on the application of this measure should it become law. First, Section 4, which would amend the Rehabilitation Act, provides that "small providers," as that term is defined by regulation,⁴¹ are relieved of any obligation under the bill "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."⁴² Then, Section 7 of the bill would codify an interpretation presently found in agency regulations that nondiscrimination requirements apply only to recipients that administer federal funds for the benefit of others, not the "ultimate beneficiaries of Federal financial assistance" themselves.⁴³

The Senate Report for S. 557 offers an explanation for both the "small provider" and "ultimate beneficiaries" exceptions. With respect to "small providers," the Senate Report states:

...The regulations allow for a flexible approach by recipients in making programs accessible to handicapped persons in the most integrated setting. Recipients may, for example, redesign equipment, reassign classes or services to accessible facilities, or assign aides to handicapped persons.... Where other methods of achieving compliance are ineffective to render programs accessible, a recipient is required to make structural changes in its facilities.

However, in the case of a small health, welfare, or other social service provider, a special last resort "small provider" exception is available under current regulations. It is a limited exception available only to small provider, defined as one with fewer than fifteen employees. If such small providers cannot render their programs accessible by any means other than making significant alterations to their facilities, they may, after consultation with the handicapped person seeking its services, and with no resulting additional obligations to the handicapped person, refer the person to another provider whose facilities are accessible. Before a small

⁴¹ 29 C.F.R. 32.3 (1984) (Department of Labor regulations).

⁴² Section 4 of S. 557, as reported and passed.

⁴³ Section 7 of S. 557, as reported and passed.

provider makes such a referral, it must determine that the other provider's program is, in fact, accessible and that the other provider is willing to provide the services. See 45 C.F.R. 84.22 (c). The drafters of these regulations believed this "last resort" referral provision was appropriate "...to avoid imposition of additional costs in the health care area, to encourage providers to remain in the Medicaid program, and to avoid imposing significant costs on small, low-budget providers such as day-care centers or foster homes." See 45 C.F.R., Pt. 84, App. A, Analysis of Final Regulation.⁴⁴

In explaining the meaning of "ultimate beneficiaries" in this legislation, the Senate Report states:

Nothing in S. 557 would prohibit recipients of new forms of federal financial assistance created after enactment of the bill from being exempted from coverage as "ultimate beneficiaries," where the type of aid and the nature of the recipient is analogous to the existing categories of "ultimate beneficiaries."⁴⁵

Examples of "ultimate beneficiaries" include persons who receive social security benefits, Medicare and Medicaid benefits, and food stamps.⁴⁶ In addition, the Senate Report makes it clear that farmers who receive crop subsidies are "ultimate beneficiaries" and are not subject to Title VI, Title IX, the Rehabilitation Act, or the Age Discrimination Act.⁴⁷ Daniel Marcus, former HEW Deputy General Counsel and former General Counsel for the Department of Agriculture, testified in the 99th Congress:

...The basic language of Title VI and the other anti-discrimination statutes, barring discrimination in programs or activities receiving federal financial assistance, has never been interpreted to reach the activities or actions of ultimate beneficiaries of federally financed programs, such as farmers, social security beneficiaries or welfare recipients. This understanding, which is embodied in a number of agency regulations...reflects the basic purpose of those laws. In enacting these laws, Congress was not concerned with regulating the

⁴⁴ Id. at 23.

⁴⁵ Id. at 24.

⁴⁶ Id.

⁴⁷ Id. at 24-25.

activities of the tens of millions of Americans who are the ultimate beneficiaries of the federal financial assistance, but who in no sense operate a federally-financed program or activity. Rather, Congress was concerned with the state agencies, the educational institutions and others who operate programs or conduct activities providing services to others and who are in a position to injure ultimate beneficiaries through discrimination. In other words, ultimate beneficiaries are to a large extent the people intended to be protected by Title VI and the other anti-discrimination statutes, not the people subjected to those statutes.⁴⁸

This distinction between "recipient" and "ultimate beneficiary," however, would not seem to affect the Grove City holding that federal assistance received directly by a "beneficiary," like the students in that case, may yet subject the "recipient" institution to federal civil rights coverage.

The principal effect of the remaining provisions of S. 557 seems to be to override the limitations on civil rights coverage identified by Grove City. First, it appears to effectively counter Grove City in those situations where federal aid flows, directly or indirectly, to a single unit or department within a recipient, like the college in that case, but does not immediately assist other parts of the institution. In such instances, the entire institution--not, for example, simply the student aid program--would be subject to coverage by the four statutes. In explaining the application of the new definition of "program or activity" in S. 557, the Senate Report states:

When federal financial assistance is extended to any part of a local educational agency (LEA), a system of vocational education, or other elementary or secondary school system, all of the operations of the entire LEA or school system are subject to the requirements of the four civil rights laws. An individual elementary or secondary school which is extended federal financial assistance and which is neither part of an LEA nor part of a school system will be covered in its entirety as an entity which is principally engaged in the business of providing education pursuant to part (3)(A) of the definition of "program or activity" in the bill. For two or more schools to be

⁴⁸ Id. at 25 (quoting from testimony of Daniel Marcus, former Deputy General Counsel, HEW and former General Counsel, Department of Agriculture, 99th Congress).

considered a "school system", there must be some significant linkage between them. Thus, for example, any group of schools whose only connection to one another is that they belong to some umbrella advocacy or membership group, or that they are accredited by one central accrediting agency, would not constitute a school system.

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

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

If federal financial assistance is extended to one of three secondary schools which comprise a system operated by a Catholic Diocese, all of the operations of all three of the schools in the system are covered.⁴⁹

This legislation also provides that whenever any part of a state or local government department or agency is given federal funds, then the entire entity is covered. In addition, the bill covers situations when a unit of a state or local government is extended federal financial assistance and subsequently distributes these funds to another governmental entity. In such cases, all of the operations of the entity which distributes the money as well as all of the operations of the department or agency receiving the funds are covered. The Senate Report explains with the following examples:

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

If the office of a mayor receives federal financial assistance and distributes it to local departments or agencies, all of the operations of the mayor's office are covered along with the departments or agencies which actually get the aid.⁵⁰

S. 557 covers corporations and other private entities in their entirety if they receive federal financial assistance which is extended to them "as a whole" or if they are principally engaged in certain kinds of activities. In

⁴⁹ S. Rep. No. 100-64, supra, at 17.

⁵⁰ Id. at 16.

all other situations, coverage will be limited to the geographically separate facility which receives the federal money. The Senate Report offers the following explanation concerning this entity-wide coverage of corporations, partnerships, private organizations, and sole proprietorships:

Federal financial assistance extended to a corporation or other entity "as a whole" refers to situations where the corporation receives general assistance that is not designated for a particular purpose. Federal financial assistance to the Chrysler Company for the purpose of preventing the company from going bankrupt would be an example of assistance to a corporation "as a whole." Federal aid which is limited in purpose, e.g., Job Training Partnership Act (JPTA) funds, is not considered aid to the corporation as a whole, even if it is used at several facilities and the corporation has the discretion to determine which of its facilities participate in the program. A grant to a religious organization to enable it to extend assistance to refugees would not be assistance to the religious organization as a whole if that is only one among a number of activities of the organization. Further, federal financial assistance that is earmarked for one or more facilities of a private corporation or other private entity when it is extended is not assistance to the entity "as a whole." Nor does S. 557 embody a notion of "freeing up." Federal financial assistance to a corporation for particular purposes does not become assistance to the corporation as a whole simply because receipt of the money may free up funds for use elsewhere in the company.⁵¹

S. 557 specifically provides that coverage can be limited to an entire plant as a geographically separate facility. This provision pertains to when facilities are located in different regions. The Senate Report indicates that "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."⁵² The Report makes clear that if such an entity receives federal money "as a whole," all of its operations at each of its locations have to comply with these laws.

According to the bill, certain types of private sector entities, those "principally engaged in the business of providing education, health care,

⁵¹ Id. at 17-18.

⁵² Id. at 18.

housing, social services, or parks and recreation" are always covered in their entirety if federal financial assistance goes to "any part" of the entity. The Senate Report clarifies, however, that,

Because they are principally religious organizations, institutions such as churches, dioceses and synagogues would not be considered to be "principally engaged in the business of providing education, health care, housing, social services or parks or recreation," even though they may conduct a number of programs in these areas.⁵³

The Senate Report emphasizes that if a corporation, partnership, other private entity, or sole proprietorship is not mainly engaged in one of the aforementioned activities, and receives federal money which is not extended to it "as a whole," then in such case only the full operations of the geographically separate facility will be covered by these civil rights laws. The Senate Report provides examples to illustrate how the new law would be interpreted with respect to corporations and other private organizations:

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

If corporation X is a chain of five nursing homes, federal financial assistance to one of the nursing homes will require compliance with the civil rights laws in all of the operations of all five of the nursing homes, subject to the education limitation in Title IX....
If the Dearborn, Michigan plant of General Motors is extended federal financial assistance for first aid training through the state department of health, all of the operations of the Dearborn plant are covered. (The state health department is also covered as a state agency to which

53 Id.

federal financial assistance is extended.)⁵⁴

S. 557 provides for a "catch-all" category of coverage: any other entity which is established by two or more of the entities described with respect to education, government, and corporations and other private organizations. Entities established as such will be covered in their entirety. The Senate Report sets forth examples to illustrate the meaning of this provision in the bill:

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.... It cannot be a wholly private venture under which limited coverage is the general rule. The governmental or public character helps to determine institution-wide coverage. For example, in a Catholic diocese where 3 parishes receive federal aid, the parishes are geographically separate facilities which receive federal aid, and the diocese is a corporation or private organization of which the parishes are a part. Only the three parishes which receive federal aid are covered by the 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."⁵⁵

The "catch all" provision in part (4) of the definitional section of the

⁵⁴ Id. at 18-19.

⁵⁵ Id. at 19-20.

bill describing what constitutes a "program or activity" does not apply to entities which are described separately in parts (1), (2) and (3). It does apply, however, to entities which are established by two or more entities described in those respective parts of the program or activity definition. To illustrate the way this provision is to be interpreted, the Senate Report states:

It should be added that no coverage of the separate entities which founded the PPP company is obtained under (4). They would be covered only by virtue of any federal financial assistance extended to them as entities. So, if the school district received assistance through a subgrant for the PPP company (or through the state or any other entity), it would be covered under (2). Likewise, if the corporation received assistance through PPP or some other entity, it would be covered by virtue of (3) and the distinctions made in (3) would determine how much of the corporation was covered.⁵⁶

Apart from coverage, there remains the question as to the bill's application with respect to the fund termination sanction or remedy authorized by the current law. Note that the bill would not explicitly modify the remedy provisions of the affected laws, with their emphasis on "pinpointing" the administrative termination of federal funding to the "particular program or...part thereof" where discrimination is found. Significantly, the Senate Report provides:

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

The seminal case dealing with fund termination is Board of Public Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969)....

Under the Taylor ruling, Federal funds earmarked for a specific purpose would not be terminated unless discrimination was found in the use of those funds or the use of the funds was infected with discrimination elsewhere in the operation of the recipient. In the

⁵⁶ Id. at 20.

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.⁵⁷

In Board of Public Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969), the Fifth Circuit spoke precisely on the issue of the program-specific limitation in Title VI. In Finch, the court refused "to assume...that defects in one part of a school system automatically infect the whole." Id. at 1074. It also stated that "the purpose of the Title VI cutoff is best effectuated by separate consideration of the use or intended use of funds under each grant statute." Id. at 1078. However, the court did go on to say, in what may be considered dictum, that although "there will...be cases from time to time where a particular program, within a state, within a county, within a district, even within a school..., is effectively insulated from otherwise unlawful activities," termination of federal funds is proper if they are "administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment." Id. This subsequently became known as the "infection" theory. Thus, what the Fifth Circuit seemed to be saying in Finch was that a broad-based termination of federal aid is permissible under Title VI if the funded programs were affected by the discriminatory practices.⁵⁸

IV. Legal Analysis of the Weicker and Danforth Amendments Regarding Abortion

The abortion issue with respect to the Civil Rights Restoration Act arose

⁵⁷ Id.

⁵⁸ In terms of actual disposition, the U.S. Court of Appeals for the Fifth Circuit vacated a Department of Health, Education, and Welfare (HEW) order terminating all federal financial assistance to the board, requiring instead that the agency look to each board program receiving federal funds to see if that particular program was in violation of Title VI. Board of Public Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969).

because of a provision in the regulations for Title IX of the Education Amendments of 1972. Title IX broadly prohibits discrimination on the basis of sex in any "education program or activity" that receives federal financial assistance. This absolute bar is subject to several exceptions relating to admissions, but once a student is admitted, there can be no sex-based discrimination. Also, as observed, Title IX contains an enforcement mechanism identical to that in Title VI of the 1964 Civil Rights Act, which delegates rulemaking authority to grantmaking agencies of the federal government, and provides for administrative proceedings and sanctions against funding recipients that refuse to voluntarily comply with nondiscrimination requirements.⁵⁹

Notably, the statute makes no mention of abortion and the subject arises in this context only because of regulations promulgated by the Department of Education under the Title. Those regulations require educational institutions receiving federal assistance to treat pregnancies and termination of pregnancies the same as other temporary disabilities for the purposes of student and employee leave policies and health benefits.⁶⁰ Thus, for example, in order to comply with the regulations, if the institution presently offers health services or insurance to its employees or students, it must provide coverage for abortions in the same manner as any other disabling injury or illness. In addition, the regulations more generally prohibit a federally aided institution from discriminating against any student because she is pregnant or has had an abortion.⁶¹

⁵⁹ See 20 U.S.C. 1681 et seq.

⁶⁰ 34 C.F.R. 106.40(b)(4), (5).

⁶¹ 34 C.F.R. 106.40(b)(1).

The Senate Labor and Human Resources Committee rejected an anti-abortion amendment that would have added a new section to Title IX. The Senate Report explains:

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

Title IX does not now require any institution to perform abortions and no abortions would be mandated if S. 557 were enacted. This bill does not expand abortion rights. Religiously-controlled organizations will continue to be able to apply for, and receive, an exemption from Title IX requirements where compliance with those requirements would violate their religious tenets. For example, a religiously controlled university that wished to exclude insurance coverage of abortions from an otherwise comprehensive student health insurance policy, could seek a religious exemption. Additionally, the U.S. Catholic Conference's former general counsel...stated in a legal analysis in 1985 that neither the House nor Senate bill "would create any new abortion rights." (Although the analysis was of a previous version of the bill, it did not differ on this point.) Title IX covers only students and employees and does not reach the public at large. Therefore, claims that the bill would require hospitals to provide abortion services to the general public are false.⁶²

The abortion issue, however, did not disappear when S. 557 came up for consideration on the Senate floor. Two amendments relating to abortion were passed by the Senate. The Weicker Amendment provides that:

No provision of this Act or any amendment made by this Act shall be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal Funds to perform

⁶² S. Rep. No. 100-64, supra, at 26-27.

or pay for an abortion.⁶³

Senator Weicker explained that he was offering this amendment to clarify that the Civil Rights Restoration Act (S. 557) was neutral with respect to abortion. He pointed to a statement from the Senate Report indicating that this legislation does not mandate abortions.⁶⁴ Senator Weicker went on to explain that his amendment was really unnecessary:

But, to reassure those who are concerned that our bill will require institutions or hospitals to perform or pay for abortions through their health insurance plans, we offer this amendment.

This amendment does not change the substantive language of title IX--in fact it does not amend title IX. Title IX does not mention abortion now, and we do not alter that.

For those religiously controlled institutions, including hospitals which operate educational programs receiving Federal aid, the exemption in title IX will continue to be available. As everyone is aware after the debate this morning, that exemption allows such institutions to be exempt from those portions of the title IX regulations which are offensive to their religious tenets. No institution has ever been denied such an exemption.⁶⁵

In the floor debate concerning the meaning of the Weicker Amendment, Senator Danforth argued that it does nothing to the Civil Rights Restoration Act to resolve the concerns of many that this legislation could require institutions to pay for and perform abortions. He quoted from a legal opinion he had which said of the Weicker proposal:

The proposed amendment declares that the Civil Rights Restoration Act itself does not require the funding or performance of abortions. It is silent, however, on the possibility...that Title IX and regulations promulgated under its authority could require the funding or performance of abortions.

Moreover, since the Civil Rights Restoration Act would overturn the Supreme Court's decision in the Grove City case and thus extend the reach of Title IX, the danger would remain, despite the proposed amendment, that institutions newly brought under the authority of

⁶³ 134 Cong. Rec. S 267 (daily ed. January 28, 1988).

⁶⁴ Id. at S 211 (Senator Weicker quoting from S. Rep. No. 100-64 at 26).

⁶⁵ Id.

Title IX would also be required to fund or perform abortions for students, employees and even the general public....⁶⁶

Senator Danforth also offered the opinion of the Justice Department which was in agreement that the Weicker Amendment does nothing to address the abortion issue.⁶⁷ The Justice Department stated:

In order to render Title IX abortion neutral, Title IX itself must be amended. The language you are offering is the most appropriate and effective way to achieve that essential goal.⁶⁸

In defense of his Amendment, Senator Weicker responded:

Title IX applies only to students and employees. It is incorrect that the reach of title IX could ever reach the general public. So the Senator's contention that title IX can force hospitals to perform abortions for the general public is false.

Second, hospitals which have a federally assisted education program do come under the reach of title IX; and to the extent that they are religiously controlled, they can receive an exemption.

So let us do away with the fact that anybody is going to be forced to perform abortions on the public. That is not the case.⁶⁹

Senator Weicker went on to point out that Senator Danforth's concerns could be addressed by having the Administration change the Title IX regulations. He saw no place for an abortion amendment in the Civil Rights Restoration Act, and the Weicker proposal makes clear that S. 557 has nothing to do with abortion.

Senator Weicker stated:

If this body wishes, they can pass these two different amendments and they will achieve two different results.

The Weicker amendment, if passed, will guarantee no change in the law vis-a-vis abortion.

The Danforth Amendment, if passed, will radically change the law by repealing the executive branch's regulations. So those who have been arguing for no change are the perpetrators of change. And maybe

⁶⁶ 134 Cong. Rec., supra, at S 213 (Senator Danforth quoting from a legal opinion from the law firm of Dewey, Ballantine, Bushy, Palmer & Wood).

⁶⁷ Id.

⁶⁸ Id. (quoting from the Department of Justice Opinion).

⁶⁹ Id. at S 214.

that is what the body wants. I do not.⁷⁰

Senator Weicker emphasized that his proposal is a mere reaffirmation of existing law. His amendment does not affect the Title IX statute or its regulations.

The Danforth Amendment specifically provides that:

Nothing in this title shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.⁷¹

Senator Danforth explained that he was offering this proposal to directly amend Title IX and its accompanying regulations which deal with the termination of pregnancy. In his statement justifying the amendment, Senator Danforth said:

Regulations under title IX of the education amendments identified sex discrimination with the refusal to perform or to provide abortions. The bill in its present form expressly ratifies those regulations. No language in a committee report to the contrary undoes the expressed language in the bill itself. So if we in the Senate want to ratify a regulation that identifies refusal to perform abortions with sex discrimination, and if we want to extend that interpretation throughout universities, to university hospitals, to hospitals that have internship programs flowing out of those universities, and to other hospitals which have any teaching program at all, if we want that kind of expanded interpretation, then vote against the Danforth amendment.

I think it would be an absolute outrage for the Senate, the Congress to force on Georgetown or Notre Dame or the city of St. Louis or wherever a policy that under the Hyde amendment we do not support ourselves.

We do not fund abortions. We have made that decision. I do not understand why the Senate at this point should force even church-related colleges and hospitals to do what we will not do ourselves.⁷²

Arguing in opposition to the Danforth proposal, Senator Packwood contended

70 Id.

71 Id. at S 225.

72 Id. at S 226.

that the issue involved was not really concern for the independence of religious educational institutions, but was rather for cutting back on a woman's right to an abortion. He stated:

So if you want to get out from under these regulations you have no difficulty. You can apply for an exemption and it will be granted.

I think the issue here is not religious exemption. The issue really boils down as to whether or not you really do think a woman is entitled to make a choice for herself whether she wants an abortion, whether she happens to be a student at Oregon State University, or whether she happens to be a woman who is a housewife or whether she happens to be a woman who is working in the lumber mill or a lawyer. Whether she happens to be going to a public university or a private university that is not religiously affiliated and takes substantial amounts of money from the Government--and most are happy to take money from the Government if they can get it in most cases--can she be denied the right not to have the university perform the abortion, but to provide the access to it under a student health plan?...

According to Dewey, Ballantine if the Civil Rights Restoration Act is enacted, educational institutions could be required to fund abortions; hospitals that engage in educational activities could be required; hospitals could be required to perform abortions; educational institutions and hospitals associated with a religious institution could fail to qualify under the act's religious exemption.

Mr. President, that has never happened. No institution that has applied for a religious exemption has ever failed to get it. No court has ever yet imposed on any institution the fears that the Senator from Missouri has expressed.⁷³

Senator Packwood viewed the Danforth proposal as a first step in the direction of whittling away at a woman's right to an abortion.

Senator Heinz rose in support of the Danforth Amendment because of his concern that without it the Civil Rights Restoration Act might expand the abortion right. He explained:

However, as I read the language of the bill in the context of its legislative history and its implementing regulations, I am concerned that there is considerable uncertainty about how the courts or administering agencies would construe this legislation.

I share the concern that S. 557 could expand the scope of title IX and its prohibitions on discrimination on the basis of abortion in

⁷³ Id. at S 234.

two ways. First, it could conceivably expand the reach of these regulations within institutions to cover college and university health insurance plans at any institution that receives Federal funds, directly or indirectly, regardless of whether that health insurance plan receives direct Federal funding.

Second, and more importantly, there is reason to believe it could expand the reach beyond the confines of the educational institutions to any hospital which operates "Federal assisted education programs or activities." It is my understanding that under S. 557, if a hospital participates in a program of nursing or medical education in affiliation with a university or medical school and that educational institution receives any Federal assistance whatever, the hospital is brought within the scope of title IX. At a minimum, this may result in the hospital having to provide abortion insurance coverage to residents, interns, nursing students, and teaching staff. More importantly, an institution's refusal either to provide insurance coverage or to perform abortions would equal--for purposes of title IX--"sex discrimination." The institution would stand in violation of the statute.⁷⁴

Senator Heinz and other supporters of the Danforth Amendment expressed concern that certain "religious" institutions with lay boards may not be able to get the religious exemption and thus would have to comply with the abortion provision in the Title IX regulations. Opponents of the Danforth proposal argued that religious exemptions just had to be applied for and were usually granted. A long list of exemptions that had been granted in the past was submitted for the record by Senator Packwood.⁷⁵

Both the Weicker Amendment and the Danforth Amendment were passed by the Senate. The Weicker proposal provides that nothing in the Civil Rights Restoration Act affects the abortion right. In contrast, the Danforth measure directly addresses the abortion issue with respect to Title IX and the specific provision in its regulations concerning the coverage for the termination of pregnancy in student and employee health plans if the institution extends coverage to similar temporary disabilities. The Danforth Amendment repeals

⁷⁴ Id. at S 236.

⁷⁵ Id. at S 232-234.

that requirement in the Title IX regulations. Thus, it seems to settle the issue in favor of a broad statutory repeal of any and all regulatory interpretations of Title IX as bearing on abortion or abortion-related services.

The Danforth Amendment specifically states that "Nothing in this title shall be construed to require or prohibit any person, or public or private entity..." to provide for or pay for services related to abortion. It appears to be a wholesale withdrawal of Title IX as authority for any abortion regulation. As such, not only does it address the concerns of the Amendment's backers that the Civil Rights Restoration Act not effectively expand federal regulatory authority over abortion under Title IX, but it also invalidates the current regulations as they specifically apply to federally funded educational programs and activities. The Amendment, however, does not prohibit funded institutions from continuing, with respect to students and employees, whatever abortion policies they wish to pursue, consistent of course with constitutional and other constraints imposed by state and federal law.

The Danforth Amendment presumably inhibits the courts as well as federal departments and agencies from relying on Title IX as a source of federal authority for enforcement of abortion rights and policies. But it in no way restricts the judiciary in the enforcement of federal abortion policies predicated on other federal statutes and constitutional guarantees. The measure also provides that no penalty can be imposed on any one who is seeking or has received any service related to a legal abortion. Presumably, this provision is directed at the discrimination issue; however, the Amendment uses the term "penalty" instead of a phrase clearly stating a "ban on discrimination" against women who are seeking or who have had a legal abortion.

The impact of the Danforth Amendment is not easily measured largely because of the dearth of information concerning the type and extent of pregnancy and abortion benefits presently available to women in a higher educational setting. One consulting group doing research in this area found that despite the current provision in the Title IX regulations, only about 15 to 25 per cent of four year schools in the U.S. provided for pregnancy related matters, and the termination of pregnancy or abortion. This group also found that among the 1,300 two year schools in the country there was hardly any coverage of abortion.⁷⁶

V. Legal Analysis of the Hatch Amendments Regarding the Coverage of Religious Organizations

Before voting on the bill's passage, the Senate rejected two amendments proposed by Senator Hatch concerning the coverage of S. 557 with respect to religious institutions. The broader of these, Hatch Amendment No. 1384, would have added a section barring coverage of each of the four federal civil rights laws "to any part of a church, synagogue, or other religious institution or organization, if such part does not receive Federal financial assistance."⁷⁷ The other, Hatch Amendment No. 1386, was more narrowly designed to clarify that the current religious exemption in Title IX was to include not only religiously controlled entities but also those "closely identified with the tenets of" a religious organization.⁷⁸ The latter proposal had been offered and rejected by a 5 to 11 vote of the Senate Committee which "determined that it is unnecessary

⁷⁶ Congressional Quarterly at 255 (February 6, 1988).

⁷⁷ 134 Cong. Rec. S 147-48 (daily ed. January 27, 1988).

⁷⁸ Id. at S 206.

and unwise to change the standard for the religious tenet exception."⁷⁹
 Accordingly, the Senate Committee version of S. 557 simply carried forward existing Title IX law which, unlike the other civil rights laws affected by the bill, contains an explicit statutory exemption for the operations of any entity "controlled by a religious organization if the application" of Title IX "would not be consistent with the religious tenets of such organization."⁸⁰

The first of these amendments, No. 1384, was prompted by its proponents' stated concern that churches, as any "partnership, or other private organization," would be subjected by the bill to institution-wide civil rights coverage if they are financially assisted by the federal government in any program or activity. Accordingly, Senator Hatch argued that without his amendment a church or synagogue that received any form of federal social welfare funding, i.e. for homeless shelters or hot meals for the elderly programs, could be regulated for civil rights compliance even with respect to their ministerial or religious functions.

Moreover, because the meals programs could constitute Federal aid, the entire church or synagogue, including its prayer rooms and other purely religious elements, would be subject to the gamut of Federal regulation and its accompanying burdens and restrictions, including: Paperwork, onsite compliance reviews, the need to accommodate persons with contagious diseases, expensive accessibility rules, affirmative action requirements, and much more.⁸¹

Senator Hatch thus contended that the "resulting fear of potential liability" could deter religious organizations from pursuing useful community functions.⁸²

⁷⁹ S. Rep. No. 100-64, supra, n. 2 at p. 27.

⁸⁰ See 20 U.S.C. 1681(a)(3).

⁸¹ Id. at S 148.

⁸² Id. at S 149.

Opponents of the Hatch measure, however, countered that this was a misinterpretation of the bill which, in their view, provides for institution-wide coverage of religious or any other private organization only where the assistance is extended to the institution "as a whole" or where the organization is "principally engaged" in certain activities designated by the bill. Thus, in the scenario posed by Senator Hatch, Senator Kennedy argued that civil rights coverage would attach only to the homeless shelter or meals program being funded, not the entire institution, because "a religious organization which receives limited purpose assistance will be covered only as to the 'geographically separate' facility--to which the assistance is extended."⁸³ According to this view, the Hatch Amendment was unnecessary. Suffice it to say that while the opponents' interpretation may find stronger textual support in the bill, ambiguities in the legislative language make the matter far from certain. In any event, the first Hatch Amendment was defeated by a 36 to 56 vote on the Senate floor.⁸⁴

The next vote on the religious organization issue came a day later when Senator Hatch again proposed an amendment, this time to broaden the current religious exemption in Title IX to educational institutions "closely identified with the tenets of" a religious organization but without affecting the application of the other three laws covered by the Grove City bill. The main impetus behind the second Hatch Amendment, No. 1386, may have been twofold. First, it may have provided some additional assurance to religious institutions, mainly the Catholic Church, on the abortion issue. More generally, however, as made explicit by the debate, the amendment met the

83 Id.

84 Id. at S 155.

objection of its proponents to the current Title IX religious exemption which they argued, because of its reliance on the "control" factor, was outmoded by the increasing financial and administrative independence of most religious educational institutions. As explained by Senator Hatch:

When [Title IX] was adopted, many educational institutions were controlled by religious organizations. Today, this direct nexus is not quite so clear. Today, many of these institutions, while they retain their identity with religious tenets, are controlled by governing boards, a majority of whose members are lay persons. Similarly, many such institutions receive less financial support from religious organizations than they did in the past. They are, therefore, outside the scope of the existing test.⁸⁵

Thus, the amendment was necessary, proponents claimed, to "satisf[y] the intent of Congress when it adopted the 'religious tenets' exemption to title IX in 1972."⁸⁶

At the same time, Senator Hatch made clear his intention that the exemption was narrowly designed to apply to Title IX and would not insulate institutions from the prohibitions on race, age, and handicap discrimination in the other laws affected by the bill. Moreover, he asserted, "the amendment would not allow an institution to be exempted in its entirety. It would only exempt a policy of the institution that is based on its religious tenets to the

⁸⁵ Id. at S 206 (daily ed. January 28, 1988). See, also, remarks of Senator Hatfield:

In 1972, the vast majority of these schools were directly controlled by church denominations, catholic dioceses and other religious organizations. . . . However, the form of association between these religious entities and their private colleges and universities has evolved over the last 16 years. . . . Today, many of these educational institutions, while still holding to their religious beliefs and doctrine, are controlled by lay boards and have additional resources of funding beyond the religious organization. Id. at S 207.

⁸⁶ Remarks of Senator Hatfield, id. at S 207.

extent that the policy conflicts with Title IX."⁸⁷ In other words, the amendment was apparently intended to insulate educational institutions from sex discrimination coverage only to the extent that a specific practice or policy dictated by religious conscience was in conflict with Title IX, not to confer total institutional immunity. This narrow scope accords with the approach of the current Title IX exemption.⁸⁸ Finally, also like the current law, Senator Hatch indicated that the exemption would not be automatic but would be granted by the Department of Education only upon request and supporting documentation.

Critics of the amendment argued that Title IX waivers for religious institutions were intended to apply in only the most needful circumstances; that the record of implementation of the current exemption indicated no need for further expansion; and that to do so, particularly in the absence of an articulated definition of the "closely identified" standard would invite circumvention of the law by hundreds of schools and colleges.⁸⁹ With the issues so joined on the Senate floor, the second Hatch Amendment on religious organization coverage by S. 557 was defeated by a vote of 39 to 56.

VI. Conclusion

S. 557 with amendments as passed on the Senate floor is presently awaiting action in the House where it reportedly will be called up under a special rule on March 2, 1988.⁹⁰ At the same time, the House companion bill, H.R. 1214, remains lodged in the House Education and Labor and Judiciary

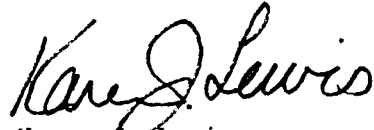
⁸⁷ Id. at S 206.


⁸⁸ See 45 C.F.R. 86.12 (1987).

⁸⁹ See, e.g., Remarks of Senators Stafford, Kennedy, Levin, and Weicker, 134 Cong. Rec. S 208-10 (daily ed. January 28, 1988).

⁹⁰ See 134 Cong. Rec. D152 (daily ed. February 26, 1988).

Committees where the bill was jointly referred and no action has been taken. The House measure and Senate bill as reported are substantially identical with the exception of "two minor technical amendments" added in Senate Committee to clarify the bill's application. In the last Congress, however, legislation to overturn the Grove City College case, H.R. 700, stalled as the same two House committees were unable to resolve their differences over "abortion neutralizing" language similar to the Danforth Amendment to S. 557. Accordingly, it is unclear what fate awaits the bill when the House takes it up.


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