



National Council on the Handicapped

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STATEMENT OF: THE NATIONAL COUNCIL ON THE HANDICAPPED

BY: LEX FRIEDEN, EXECUTIVE DIRECTOR

BEFORE THE: U.S. SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

DATE: APRIL 1, 1987

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The National Council on the Handicapped appreciates this opportunity to present its views on the principles espoused in the proposed Civil Rights Restoration Act. The views I am expressing today are those of the Council and not the Administration. The Administration's views will be presented by the Departments of Justice and Education. As you are aware, the Council is an independent Federal agency comprised of 15 members appointed by the President and confirmed by the Senate. Congress has statutorily charged the Council with reviewing all laws, programs and policies of the Federal Government which affect persons with disabilities and making such recommendations as it deems necessary to the President, the Congress, the Rehabilitation Services Administration, the National Institute on Disability and Rehabilitation Research, and other Federal agencies and officials. Although many government agencies relate to the needs and concerns of people with disabilities, the National Council on the Handicapped is the only Federal

agency with such cross-cutting responsibility for disability issues -- regardless of age, disability type, employment potential, economic need, or other individual circumstances.

In its 1986 report to Congress and the President, Toward Independence, the Council commented on the central premise of the proposed Civil Rights Restoration Act:

... any person or agency that wishes to obtain Federal grant funds should be required to avoid or cease discriminating in all of its activities. Conversely stated, the Federal Government should not provide financial assistance to any person or agency that engages in discrimination in any part of its operations or activities.

(Topic Paper on "Equal Opportunity Laws," Appendix, p. A-9)

In pursuing its statutory mandate of advising the Congress and the President on disability issues, the Council has held forums with people with disabilities all around the country. Time after time, individuals with disabilities have told the Council about the egregious discrimination they encounter in their daily lives -- discrimination in jobs, in elementary and secondary education, in higher education, in health services, in recreation, in transportation, in housing, in public accommodations, in obtaining the benefits of public programs and services, and in virtually every other facet of American life. On numerous occasions, Americans with disabilities have declared to the Council that their number one priority is for strong and comprehensive civil rights laws protecting them from discrimination based upon their disabilities. That such views are representative of Americans with disabilities generally is underscored by one of the findings of the 1986 Harris nationwide poll of disabled Americans; Louis Harris and Associates reported

as follows:

When it comes to how disabled persons should be treated under the law, a near consensus emerges. Three out of every four (75%) disabled persons believe that civil rights laws that protect minorities against discrimination should also protect them. Only 17% disagree.

(Louis Harris and Associates, Survey of Disabled Americans, p. 112)

The primary Federal statute prohibiting discrimination on the basis of handicap, Section 504 of the Rehabilitation Act of 1973, has had a tremendous impact in reducing discrimination against persons with disabilities. Since the decision of the Supreme Court of the United States in Grove City College v. Bell in 1984, however, the effect of Section 504 has been significantly blunted. In the case of Consolidated Rail Corporation v. Darrone (104 S.Ct. 1248 (1984)), decided on the same day as the Grove City ruling, the Supreme Court announced that the limitations upon civil rights coverage established in Grove City apply to Section 504 cases as well (104 S.Ct. at p. 1255). The Darrone case involved a claim of discrimination in employment. In the Council's opinion, this suggests that the limitations established in Grove City are not confined to the context of higher education.

The Council is aware of numerous types of situations affected adversely by the limitations imposed by the Grove City and Darrone rulings. Examples include:

- o A man with multiple sclerosis was fired because of his disability from a job in a state office of probation and parole which receives substantial Federal grants, but not for the specific program in which the man worked.

- o A college athlete is not allowed to participate in the intramural basketball program because of a visual impairment; the intercollegiate program of the college athletic program receives substantial amounts of Federal financial assistance and the student is the recipient of Federal student loans.

o A person who once had an epileptic seizure was excluded from a state job because of a rule against hiring people with a history of epilepsy; the department where the job is located receives Federal grants, but these funds cannot be traced directly to the program in which the individual applied for a job.

o A public school teacher is refused a teaching position because she has a visual impairment; the school system receives a variety of Federal funds, which can even be traced to the particular school, but the music department in which the particular job was located does not receive Federal funds.

In each of these situations, the individuals with disabilities would have been protected from discrimination prior to the Grove City decision, but now they are left without recourse under Section 504 against the blatant and despicable acts of discrimination they have suffered.

If our Nation's commitment to equality of opportunity for its citizens is to have any meaning, the Council believes that Congress must restore Section 504 and other civil rights laws to the breadth of coverage that they had prior to the Grove City and Darrone decisions. The Council has noted, in its Toward Independence report, that, even without the Grove City narrowing of the scope of Section 504, persons with disabilities have much less protection against discrimination than under civil rights laws protecting other groups. At some time in the future, the Council intends to provide this Committee with its views regarding a more comprehensive approach to prohibiting the discrimination faced by persons with disabilities. But the Council believes that an absolutely necessary first step is to return the scope of coverage of Section 504 and the other civil rights laws to their status before the Supreme Court's ruling in the Grove City case.

The Supreme Court of the United States has noted recently that discrimination against persons with disabilities is often rooted in "simple prejudice," "archaic attitudes and laws," and "erroneous but nevertheless prevalent perceptions about the handicapped" (School Board of Nassau County v. Arline, slip op. at pp. 4-5). There have been concerns about the implications of the Civil Rights Restoration Act as it applies to discrimination against persons with disabilities.

One concern is that employers are opposed to statutory prohibitions of employment discrimination against persons with disabilities. Louis Harris and Associates recently conducted a national poll of employers (representing equal subgroups of small, medium, and large businesses) to determine their opinions on such issues. By a substantial majority, employers recognized the need and indicated their support for nondiscrimination provisions protecting individuals with disabilities.

Three-fourths of company managers interviewed reported that they believe that persons with disabilities often encounter job discrimination, and over 70% stated that civil rights laws should protect persons with disabilities.

A related concern is that it is very burdensome for employers to provide equal employment opportunities for persons with disabilities. The recent Harris poll of employers has reaffirmed prior studies that have consistently found that persons with disabilities make good or better than average employees. Based upon employers' responses, the Harris organization concluded, "Overwhelming majorities of managers give disabled employees a good or excellent rating on their

overall job performance," and further, "Nearly all disabled employees do their jobs as well or better than other employees in similar jobs." Employees with disabilities were rated as good or better than their nondisabled counterparts in regard to willingness to work hard, reliability, attendance and punctuality, productivity, desire for promotion, ability to take supervision, and leadership ability.

What about the costs of employing a person with a disability? Are job modifications for employees with disabilities very costly? The Council has examined existing studies of workplace accommodations provided for individuals with disabilities and concluded that accommodations are usually minor and inexpensive (see Toward Independence, Appendix, p. A-48). A 1982 Department of Labor study of workplace accommodations concluded that accommodation is "no big deal." The Harris poll of employers verifies the results of the earlier studies; the poll found large majorities of managers (approximately 75%) reporting that the costs of making accommodations are not expensive. While nearly one-half of companies reported that they had made some worksite modifications, an overwhelming majority stated that the costs of accommodations rarely drives the cost of employing a person with a disability above the average range of costs for other employees.

Some have argued that "Mom and Pop grocery stores" and "corner drugstores" will be saddled with the duty to make extensive and prohibitively expensive modifications of their premises to achieve accessibility for persons with

disabilities. Such hypotheticals are based upon a serious misunderstanding of Section 504 and its application. In the first place, Section 504, with or without the Restoration Act, applies only to recipients of Federal financial assistance. Suggestions that the acceptance of food stamps could trigger the application of Section 504 are totally groundless. The Council has never heard nor been apprised of any case in which Section 504 coverage was predicated upon the receipt of food stamps by a small business.

Secondly, those small businesses that do qualify as recipients of Federal financial assistance are subject to the "small provider" exceptions of Section 504. Since their original issuance, Section 504 regulations have included provisions exempting small providers (i.e., agencies with fewer than fifteen employees) from certain requirements, including the obligation to make significant alterations to existing facilities to achieve accessibility and to comply with recordkeeping and reporting requirements. This exception for small providers is specifically retained in the current version of the Restoration Act as it relates to Section 504.

The specter of Section 504 placing onerous and excessive burdens upon small businesses is further dispelled when one understands that Section 504 only requires reasonable modifications. Both the regulations and the court cases that have applied Section 504 have made it clear that the statute only requires the making of reasonable accommodations and alterations for the benefit of an individual with a disability;

unduly burdensome or unreasonable changes are not required by Section 504.

Finally, the Council wishes to note that many businesses, including Mom and Pop grocery stores and corner drugstores, have been willing to make their facilities accessible to and usable by persons with disabilities. Such changes have not proven to be exorbitantly expensive nor disruptive to business. Making facilities architecturally accessible benefits not only persons with disabilities but also many other customers, including elderly individuals, people pushing strollers and shopping carts, pregnant women, and many others. The Council is aware that many States and local governments have seen fit to mandate architectural accessibility as part of their building codes and ordinances. Obviously, architectural accessibility is not an impossible or unachievable goal.

In the Council's view, our entire society benefits from initiatives to secure increased opportunities for persons with disabilities. At the very least, citizens with disabilities are entitled to have Section 504 -- the primary statute that protects them from discrimination -- restored to the scope of coverage that it had prior to the Grove City decision.

UNITED STATES SENATE

COMMITTEE ON LABOR AND HUMAN RESOURCES

HEARING ON S. 557

THE CIVIL RIGHTS RESTORATION ACT OF 1987

MARCH 19, 1987

TESTIMONY SUBMITTED

BY

TED KENNEDY, JR.

ON BEHALF OF:

Alexander Graham Bell Association for the Deaf
American Academy of Child and Adolescent Psychiatry
American Association of University Affiliated Programs
American Association on Mental Deficiency
American Council of the Blind
American Diabetes Association
American Disabled for Accessible Public Transportation
American Foundation for the Blind
American Occupational Therapy Association
American Physical Therapy Association
American Speech-Language-Hearing Association
ACLD, An Association for Children and Adults with Learning Disabilities
Association on Handicapped Student Service Programs
 in Postsecondary Education
Association for Retarded Citizens/US
Association for the Education of Rehabilitation Facility Personnel
Center for Law and Social Policy
Child Welfare League of America
Conference of Educational Administrators Serving the Deaf
Cornelia deLange Syndrome Foundation
Council for Exceptional Children
Council of State Administrators of Vocational Rehabilitation
Cystic Fibrosis Foundation
Disability Rights Center
Disability Rights Education and Defense Fund
Disabled American Veterans
Disabled But Able to Vote
Epilepsy Foundation of America
Facing the Challenge
Federation for Children with Special Needs
Goodwill Industries of America
Handicapped Organized Women
International Association of Psychosocial Rehabilitation Services
Mental Health Law Project
National Alliance for the Mentally Ill
National Association of the Deaf
National Association of Developmental Disabilities Councils
National Association for Parents of the Visually Impaired
National Association of Private Residential Facilities
 for the Mentally Retarded
National Association of Protection and Advocacy Systems
National Association of State Mental Health Program Directors
National Association of State Mental Retardation Program Directors
National Center for Law and the Deaf
National Council on Independent Living
National Council on Rehabilitation Education
National Down Syndrome Congress
National Easter Seal Society

National Head Injury Foundation
National Industries for the Severely Handicapped
National Mental Health Association
National Multiple Sclerosis Society
National Neurofibromatosis Foundation
National Organization for Rare Disorders
National Organization on Disability
National Recreation and Park Association
National Rehabilitation Association
National Society for Children and Adults with Autism
National Spinal Cord Injury Association
Paralyzed Veterans of America
People First International
SKIP -- Sick Kids (Need) Involved People
Spina Bifida Association of America
Tourette Syndrome Association
United Church of Christ National Commission on Persons with Disabilities
United Cerebral Palsy Associations
World Institute on Disability

Mr. Chairman and Members of the Committee: Thank you for the opportunity to speak before the Committee today on S. 557, the Civil Rights Restoration Act of 1987. I am speaking on behalf of my organization, Facing the Challenge and sixty-five national organizations which are dedicated to securing equal opportunity for the 36 million Americans who have disabilities.

Today I represent people who have all types of disabilities -- people who are visually impaired, deaf, physically disabled, mentally retarded and people who have hidden disabilities such as epilepsy, cancer, head injury and mental illness. No matter what our disability is, we all have experienced some form of discrimination and we all depend on Section 504 to provide basic protections to guarantee our civil rights in federally assisted and conducted programs.

The passage of Section 504 in 1973 was a historic event for all disabled Americans. For the first time Congress recognized that people with disabilities, like minorities and women, were subject to discrimination and were entitled to basic civil rights protections -- the promise of equal citizenship.

This represented a major shift in disability public policy and a fundamental challenge to traditional notions about disability. No longer would the invisibility of disabled people be taken for granted in this country and no longer would a life of charity be the only option for people with disabilities.

Historically the inferior economic and social status of disabled people was accepted as an inevitable consequence of their disability. Section 504's anti-discrimination language demonstrates Congress' understanding that many of the problems disabled people face are not inevitable but are instead the result of discriminatory policies and practices.

Since the enactment of Section 504 American society has been transformed. Disabled people are no longer "out of sight, out of mind", shut away in institutions, nursing homes and segregated schools and programs. Because of Section 504, people with disabilities are beginning to take their place in the mainstream of American life. The gains are impressive -- but we are only just beginning -- the path to equality is long.

We are here today because we believe that the Supreme Court's Grove City College decision hopelessly obstructs this path. Let me emphasize that there is no doubt that the Grove City decision fully applies to Section 504 and that it extends beyond education.

It is astounding to me that some still claim that the negative effects of Grove City will be cured by narrow legislation which addresses only Title IX or only education programs. We must remember that the same day the Court issued the Grove City decision, it also issued Consolidated Rail Corporation v. Darrone. This was a Section 504 case involving employment discrimination

by a railway corporation. The Court explicitly held that its narrow interpretation of "program and activity" in Grove City applied with full force to Section 504.

Employers, like other members of the general public, hold stereotypes and prejudices about disabled people which impede their ability to objectively evaluate the qualifications of applicants or workers with disabilities. Stereotypes and prejudices rather than handicaps themselves are the most potent barriers to equal employment opportunity. Often the image of what disabled people "should do" or "can do" has no basis in reality.

In a recent survey of 23 local government jurisdictions the following medical standards were revealed:

All cities and counties impose restrictions of various kinds regarding the hiring of persons with past or present epileptic conditions...

None of the jurisdictions was willing to hire blind applicants...

The written standard for one jurisdiction prohibits the hiring of an amputee for any job unless he or she makes use of a prosthesis, even though it may not be required for success on the job...

Another county will not hire an applicant for any job if he or she has lost a leg, regardless of the job-relatedness of this impairment...

Many jurisdictions exclude applicants with a history of cancer.

I have talked to hundreds of disabled people who have been denied jobs for which they were qualified, because of antiquated and archaic medical standards and medieval attitudes and stereotyping, people who are denied admission to education programs -- pre-school to postsecondary because "someone" had determined that they could not be educated and thousands of people who are literally prisoners in their homes because there is no accessible transportation -- and perhaps the most significant of all are those who have been silenced --- thousands who accept as their fate the inaccessibility and discrimination which denies them the right to move in society -- to contribute -- to belong.

People with disabilities prefer equal opportunity to special treatment and charity. Consider for example the woman who has had epilepsy since 1965, who was denied employment by a large corporation solely on the basis that the company had a blanket policy preventing anyone with epilepsy from being hired for that particular job;

Or, the young woman who is visually impaired and who was accepted into dental school but was denied auxiliary aids . She was forced to drop out. She then reenrolled in a dental school that provided her with an accommodation. She is now completing her studies and is on the Dean's List;

Or, the group home which was denied zoning permits because the local zoning commission did not want people who are mentally

retarded living in a certain part of town;

Or the man who was denied a job in a drug treatment center because he was deaf.

Prior to the Grove City decision each of these cases would have been investigated by the appropriate administrative agency or would have been litigated in court. But instead, each case was either dropped by the administrative agency or dismissed by the courts.

This does not begin to tell the story. The Congressional mandate which provided broad anti-discrimination protection to 36 million Americans with disabilities is being destroyed by the courts and the federal agencies charged with its enforcement because of the Grove City decision.

Court and agency decisions such as the ones I mentioned require the disabled individual or the regulatory agency to trace the federal dollar to the discriminatory act. Federal agencies now spend taxpayers' dollars following the flow of federal dollars instead of doing what the law requires them to do -- investigate complaints of discrimination.

Is this what this Committee and Congress intended when you passed Section 504 in 1973?

In the last four years I have traveled across this country talking to people with disabilities and parents of disabled children about their lives. I am here to report that, contrary to what the Reagan Administration believes, we do not live in

a discrimination-free society and contrary to what Mr. Reynolds stated during the hearing in the 99th Congress, we are not at the "brink of victory" in securing integration and equal opportunity for all Americans with disabilities.

Disabled people continue to be the most unemployed, underemployed, and the poorest citizens in this nation. The cost of employment discrimination is tremendous to disabled individuals and to society at large.

Now is the time for Congress to act. For three years opponents of this bill have clouded the issues. The 36 million disabled Americans I speak for today cannot wait any longer. We are not asking Congress to extend any protections. We are only asking Congress to stop the practice of federal dollars being used to support discrimination.

A decade of great progress for disabled Americans has come to a halt and the promise of equal citizenship extended by Congress in 1973 is still unfulfilled and will continue to be stripped away by the courts and federal agencies if the Civil Rights Restoration Act is not passed by this Congress.

WRITTEN TESTIMONY
SUBMITTED BY THE
DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

On S. 557 "Civil Rights Restoration Act of 1987

Senate Committee on Labor
and Human Resources —

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Mr. Chairman and Members of the Subcommittee, my name is Arlene Mayerson and I am the Directing Attorney of the Disability Rights Education and Defense Fund (DREDF). DREDF is a national organization dedicated to securing equal opportunity to 36 million disabled Americans.

I appeared before Congress in 1984 and 1985 to express the importance of overruling the Grove City College decision and restoring the basic civil rights of minorities, women, disabled people and the elderly. I am attaching copies of my previous testimony which fully sets forth the legislative history of Section 504 and the administrative interpretations which were endorsed by Congress. This history clearly demonstrates Congress' original intent that Section 504 broadly prohibits discrimination by recipients of federal funds.

Today I would like to supplement previous testimony to highlight the devastating effect that the Supreme Court's decision in Grove City has had and will continue to have in assuring equal opportunity to disabled Americans. The promise of Section 504 cannot be fulfilled until Grove City College is overturned by Congress.

First, let me emphasize that there is no doubt that Grove City is applicable in full force to Section 504 and that it extends beyond education. It is quite astounding to me that there are those who still claim that the negative effects of Grove City will be cured by narrow legislation which addresses only Title 9 or only education programs. The same day that the Court handed down Grove City, it issued Consolidated Rail Corporation v. Darrone, 104 S. Ct. 12248 (1984). Darrone was a Section 504 case involving employment discrimination by a railroad. The Court explicitly held that its narrow interpretation of "program and activity" in Grove City applied with full force to Section 504.

THE IMPACT OF GROVE CITY ON ADMINISTRATIVE ENFORCEMENT OF SECTION 504 AND OTHER CIVIL RIGHTS LAWS

The Office for Civil Rights in the Department of Education (OCR/ED) and its counterpart in the Department of Health and Human Services (OCR/HHS) are two of the agencies primarily responsible for enforcement of the civil rights laws narrowed by Grove City, and therefore examples of the effect of the Supreme Court's decision from these agencies are illustrative of the general crisis Grove City has caused. Each of these agencies executes its administrative enforcement duty through the investigation of citizens' complaints, periodic compliance reviews, corrective action agreements (where a violation has been found), and monitoring of these agreements. If voluntary compliance is not achieved, the agency may refer cases to an Administrative Law Judge (ALJ) for a hearing. This hearing is

the first step in the process which can lead to termination of federal financial assistance if discrimination is proven. The decision of the ALJ can be reviewed by the Civil Rights Reviewing Authority of each agency. Agencies also have the option of referring matters to the Department of Justice for a possible lawsuit.

The negative impact of Grove City can be seen in the OCR's of both of these agencies at every level of the enforcement process described above. In fact, the Department of Education has embraced the Court ruling with such vigor that a lawsuit has been filed against them alleging incorrect, inconsistent, and overly restrictive interpretations of Grove City. For example, dozens of cases have been closed by these agencies based on Grove City. Over twenty of these cases were Section 504 cases and most of these involved allegations of employment discrimination. In fact, the impact of Grove City on disabled persons' protection against employment discrimination is particularly severe. Section 504 is the only federal law prohibiting employment discrimination against otherwise qualified disabled persons. Since the Supreme Court decision, this protection has evaporated. Closure of Title IX cases has been even more severe than closure of Section 504 cases, and all of these statistics are merely fractional representations of the number of cases that have been closed in all of the federal agencies and will be closed in the future due to Grove City.

A crucial yet overlooked problem is the fact that many more cases have been delayed or suspended due to Grove City. Following the Supreme Court's decision, OCR/ED and OCR/HHS suspended a tremendous number of investigations and cases in order to review agency jurisdiction in light of Grove City. Many of these suspensions affected cases that had already been within the OCR process for years. This burdensome review has been made more complex and lengthy due to the fact that many regional OCR offices have sent the more difficult cases to their national offices for a determination of the Grove City jurisdictional issue. Defendants and potential defendants in these cases have taken full advantage of the situation and many consistently and adamantly raise Grove City as an absolute defense to the allegation in question and they even use the decision to protest further investigation by OCR. These tactics and resulting requests to OCR's to "justify" their jurisdiction in light of Grove City have compounded delays in investigation and enforcement proceedings with the result that justice delayed has truly become justice denied.

OCR/HHS cases involving hospitals are a good example of the very problem. In more than ten cases, hospitals have raised the Grove City decision as a defense. All of these cases involve allegations of employment discrimination brought by disabled employees. Much like schools, hospitals argue that the section of the hospital in which the complainant worked (e.g., the

medical records center or the laundry) receives no federal funds and thus is not covered by Section 504. Though investigations have proceeded in many of these cases, hospitals have caused serious delays and also continue to preserve the option of pressing the jurisdictional issue should they be found in violation of Section 504.

Delays and losses of otherwise compelling cases have also begun to take place at the administrative hearing level. By April 1985, for example, 12 cases in which the Grove City decision was used as a jurisdictional defense had been referred by OCR/ED to administrative law judges. In all of these cases, four of which were Section 504 cases, the OCR established a violation of law and was unable to obtain voluntary compliance. There have been decisions in at least two of these cases. In one case involving a joint Section 504 and Title IX complaint, OCR initially found that the school board failed to renew the contract of a disabled teacher because of her disability, and used an employment application which improperly inquired into the applicant's health, physical "defects" and marital status. The District received federal funds in the form of Impact Aid, which OCR found sufficient to make the school's employment decision subject to the Civil Rights laws. Nonetheless, the judge interpreted Grove City to require the opposite conclusion. He stated that OCR did not have jurisdiction to bring or maintain the action because the teacher was not employed in a "program or activity receiving federal funds." (See, In The Matter of Lauderdale County School District, Docket No. 84-504/IX-8, April 23, 1985.)

In another case, OCR/ED conducted a compliance review of a public school system determined that the tracking system used by the County was discriminatory and moved for an order to terminate funding, after being unable to obtain voluntary compliance from the school board. The administrative law judge denied the order, but not because he had examined and disagreed with the Department's conclusions as to discrimination. Rather, he interpreted Grove City to require proof that the federal funds were spent specifically on the tracking system, and not simply to support the school system generally. (See In The Matter of Mecklenberg County Public Schools, No. 84-VI-2, Slip Op. June 2, 1985) (Title VI).

At every level, this alarming situation is repeating itself. Even those cases in which OCR asserted jurisdiction despite Grove City and won at the administrative hearing level seem to be in danger at the Civil Rights Reviewing Authority level. In The Matter of Pickens County School District, Docket No. 84-IX-11, October 25, 1985, is the first interpretation of Grove City by a Reviewing Authority. In Pickens County, the Reviewing Authority held that "if the physical education classes are receiving federal financial assistance, the department would have authority to terminate [Chapter 2] funds." However, the

Reviewing Authority found that the OCR did not meet its burden of establishing the fact that the physical education classes are a program or part of a program receiving federal financial assistance. The Reviewing Authority rejected OCR's contention that Chapter 2 funds are unearmarked aid, holding that "consolidation did not destroy the separate identity of these programs. Each of the programs earmarks funds for a particular program." The Reviewing Authority (ED) dismissed the enforcement proceeding against Pickens County. The disastrous impact of this decision has been compounded by the fact that OCR/ED's Assistant Secretary Singleton has decided to follow Pickens and use it as a guide for national OCR/ED policy. (Four other Section 504 cases are currently pending before the Reviewing Authority of the Department of Education.)

This description of the present situation with regard to the impact of Grove City on administrative enforcement is merely a static overview. The effects of Grove City up to this point are only a small sample of the larger problems that are looming. As time passes, more complaints will be limited, closed or never filed due to the Grove City decision and its chilling effect. For example, the effect on OCR-initiated compliance reviews is only beginning to be felt as OCR/ED and other OCR's narrow their investigations to "programs or activities" in whose budgets OCR can identify federal dollars and thus be certain of their jurisdiction. Ultimately, this type of policy decision is as damaging as the many cases closed and lost due to Grove City.

DESCRIPTIONS OF DEPARTMENT OF EDUCATION/OCR COMPLAINTS CLOSED DUE TO GROVE CITY

The many injustices caused by the Grove City decision and its enforcement by agencies and the courts cannot be adequately conveyed by simply quoting the number of complaints closed, delayed, denied or never investigated, due to this decision. Though it would be impossible to describe the facts in all of the cases negatively affected by Grove City in a brief article, it is worthwhile to provide summaries of some of the 504 cases closed by one agency, the Department of Education. Whether the case in question was closed because the specific unit in question was not in receipt of federal funds or because OCR found it impossible to satisfy Grove City's standard with regard to tracking federal monies to the alleged discrimination in question, the results are uniformly unjust. The specific facts of these cases speak louder than general descriptions can about the unfair nature and devastating impact of the Grove City decision on disabled Americans.

Docket No.Respondent01-84-4006Massachusetts Department of Youth Services

Mr. X claimed he was discriminated against by the Massachusetts Department of Youth Services on the basis of his handicap status. Mr. X alleged that although he passed the exam for "supervising group worker" and was ranked first on the list for such a position, he was not given a supervisory position with reasonable accommodation for his disability. In a May 9, 1984 letter to the complainant, OCR/ED stated that the complaint did "not appear to involve an ED funded program or activity." Though the Department of Youth Services receives federal funds through the Chapter I program, these programs are supervised by private vendors or the Mass. Bureau of Institutional schools. As a result, the Department of Youth Services' custodial program where complainant applied for the position was deemed not to be in receipt of federal funds.

03-84-2040University of Charleston

Mr. X, a maintenance worker at the University of Charleston in West Virginia, filed a complaint with OCR/ED alleging employment discrimination based on disability. The University's lawyers told OCR that it received no federal funds for maintenance and therefore OCR had no authority to investigate. Since 1979 the University of Charleston has received approximately \$3,376,182 in federal funds from the Department of Education, including \$472,940 in federal student aid in the 1983-84 school year. OCR put this complaint on "policy hold" because it could not link the allegation of discrimination to a specific, federally funded program.

04-77-0042DeKalb Community College

In 1977, Mr. X filed a complaint against DeKalb Community College with ED and the Office of Federal Contract Compliance Program (OFFCP) alleging that the institution failed to renew his teaching contract for the 1977-78 academic year because of his epileptic seizures, in violation of Section 504. Since the initial complaint was filed with OFFCP, ED deferred its investigation to them. In May of 1983, OFFCP found that while the complaint was valid, they lacked jurisdiction. In May 1984, OCR/ED informed the complainant that because of Grove City, OCR/ED also lacked jurisdiction. OCR/ED established that the school received federal money through ED in the form of student financial aid, but they could not determine that the monies were used in the department where Mr. X was employed.

07-82-1017Central Midwestern Regional Educational
Laboratory, Inc. (CEMREL)

Parents X and Y filed a complaint against CEMREL alleging that the Child Center of Our Lady of Grace (CC) discriminated against their disabled child by failing to provide her and other disabled children a free appropriate public education, and also by retaliating against the child after the complaint was brought. Though OCR/ED found that CC did receive federal monies in the form of Title VI-B grants, they informed the parents that the Grove City decision rendered those funds irrelevant in terms of triggering 504 coverage for CC in general.

07-85-4015Menninger Foundation

Ms. X filed a complaint with OCR/ED in 1985 alleging discrimination on the basis of handicap against the Menninger Foundation, Topeka, Kansas. Specifically, she stated that she enrolled in a Biofeedback Workshop offered by the Voluntary Controls Program at the Menninger Foundation, but the facilities were not accessible to mobility-impaired individuals. OCR/ED found that while the Foundation received federal monies from ED, it concluded, pursuant to Grove City, that neither the Voluntary Controls Program nor the Biofeedback Workshop was part of the funded program. OCR/ED closed this case.

09-83-4003Arizona Department of Corrections

Mr. X filed a complaint against the Arizona Correctional Training Center alleging he was fired from his job on the basis of his handicap. ED found that the Department of Corrections, which operates the Correctional Training Center, received federal financial assistance from ED through the Arizona Department of Education. The Department of Corrections not only received approximately \$500,000 a year under Title VI, Part B of the Education of the Handicapped Act, but also received federal vocational education funds during the period of the complaint. Despite these findings, OCR/ED held that there was no jurisdiction since the complainant was not employed in, nor had any substantial contact with, any of the specific educational programs which received the federal funds. ED referred the case to the Department of Justice which closed it for lack of jurisdiction.

09-84-4013County of Plumas, Local Agency Formation
Commission and Plumas County Planning
Department (LAFC & PCPD)

In March 1984 Ms. X filed a complaint against LAFC & PCPD, alleging discrimination on the basis of handicap and sex in her

termination as a Commission clerk in 1983. She reapplied for the position when announced, but was not selected. OCR/ED's March 1984 letter to Ms. X stated that although ED monies went through the Office of the Plumas County Superintendent of Schools, no monies went to her particular office, hence no jurisdiction existed.

15-85-4002Michigan Department of Corrections

Mr. X alleged that the Department of Corrections denied him employment as a parole/probation agent because of the fact that he was blind. OCR/ED closed the case without ever investigating it. OCR/ED found that while the Department of Corrections received ED monies, the Bureau of Field Services, which employs parole/probation officers, did not receive ED monies directly.

THE COURTS AND SECTION 504 AFTER GROVE CITY

Though the balance of the damage caused by the Grove City decision has taken place in the area of administrative enforcement of Section 504, or lack thereof, the courts have also begun to incorporate Grove City's restrictive interpretation of "program or activity receiving federal financial assistance into Section 504 cases as well as Title IX, Title VI and Age Discrimination Act cases.

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

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

Jacobson, the court ruled that a program-specific approach was in order, and thus the case must be limited to the work study program only.

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

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

Russel v. Salve Regina College, C.A. No. 85-96 28-S U.S. Dist. Ct. of R.I., Slip Opinion, November 17, 1986

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

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

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

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

Receipt of CETA and WIN training grants did not suffice to invoke coverage of the entire company. The court held that coverage is limited to persons participating in the training programs.

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

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

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

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

CONCLUSION

There can be no doubt that Grove City is serving to defeat the original intent of Congress in passing the nation's civil rights laws. As President Kennedy stated when he transmitted the first of these statutes to the Congress:

Simple justice requires that public funds to which all taxpayers of all races contributed not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.

This same commitment of "simple justice" was extended to disabled Americans in 1973. Once again disabled Americans turn to Congress to reaffirm the basic principles of equal opportunity through passage of S. 557, which is nothing more than a clarification of Congress' long-standing intent that recipients of federal funds are prohibited from engaging in discriminatory practices.

We urge you not to turn your backs on 36 million disabled Americans, who are only now beginning to have the opportunity to participate in our society free of discrimination.

Thank you for your consideration.



Department of Justice

REMARKS

OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

CONFERENCE ON DISABILITY POLICY:
THE STATE OF THE NATION INSTITUTE FOR THE STUDY
OF EXCEPTIONAL CHILDREN AND YOUTH
OF THE
UNIVERSITY OF MARYLAND

TUESDAY, MAY 12, 1987
1:15 P.M.
CAPITOL HILL QUALITY INN
WASHINGTON, D.C.

I am delighted to be able to participate with you today at this conference on the state of disability policy in our nation. I am especially pleased with the broad focus of this conference. All too often our energies in shaping legal policy as civil rights advocates are narrowed by the adversarial nature of the judicial process. This conference represents a chance to stand back, to re-examine the policies that have been created, and, if necessary, to reformulate long-term goals or more immediate objectives.

For almost the past six years, I have worked on disability rights issues from the vantage point of the Justice Department's Civil Rights Division. I have witnessed close-up the many faces of discrimination that are set against persons with handicaps. Over 35 million people in this country are disabled by reason of some physical or mental handicapping condition. Of course, the mere existence of these handicapping conditions does not, for the overwhelming majority of these individuals, prevent them from interacting freely with others in society, or from performing the tasks that others perform on a daily basis. But, persons with handicaps are all too often not allowed to participate because of stereotypical notions held by others in society -- notions that have, in large measure, been created by ignorance and maintained by fear.

It is precisely these sorts of antiquated attitudes that have for too long stood in the doorway, blocking people with disabilities from entering the mainstream of American life. The

question for this conference is how to forge an effective, all-out assault on the existing stereotypes. . Certainly attitudinal changes cannot be simply commanded or even legislated out of existence. No particular court order or single piece of legislation can alone change longstanding perceptions or misperceptions; regrettably, attitudes can only be reshaped gradually. One of the keys to this reshaping process is to increase contact between and among disabled people and their able-bodied peers. And an essential component of that effort is the development of a comprehensive set of laws supported by a comprehensible set of regulations, that all work together to promote the integration of disabled people into our communities, schools, and work places.

You have heard this morning about existing Federal civil rights laws, their strengths, weaknesses, and the gaps in coverage among them. A consensus that appears to be emerging is, quite candidly, that Federal disability programs - both civil rights statutes and Federal grant programs - are flawed. Various studies and reports have found these programs to be fragmented, duplicative, and even counterproductive.

This Administration is aware of, and concerned about, these problems. Officials from different agencies -- including the Departments of Justice, Education, Health and Human Services, and the Office of Management and Budget -- have been working quietly together with representatives of disabled citizens in an effort to identify specific problem areas and develop discrete, effective

policy initiatives. We have come to recognize existing Federal programs as a patchwork quilt in need of caring and careful repair. There are indeed gaps in coverage, and other failures, that "cry out" for a Federal response to the needs of disabled citizens -- a response that is at one time cohesive, coordinated, and comprehensive. The desired objective is a Federal disability policy that contributes to the independence and dignity of all disabled persons, allowing them to enjoy the birthright of all Americans.

There is, however, a cautionary note to be sounded. In recent years, the legislative strategy pursued by many (both within and outside the disability community) has endeavored to sweep within a single piece of legislation all manner of demands advanced by fragile coalitions of interest groups. Such overly ambitious efforts have faltered for the most part because, understandably, multiple pieces of the intricate puzzle do not fit together as neatly as originally anticipated. Moreover, against the demands of Gramm-Rudman-Hollings, Congress is becoming increasingly leery about passing vaguely-worded, expansive legislation that leaves to another day the difficult questions of funding and resource allocation among new programs.

Let me offer for consideration an alternative approach. There are on the disability agenda any number of discrete policies that can serve as separate legislative building blocks which ultimately add up to a more comprehensive set of protections for

handicapped citizens. I would think a piecemeal legislative strategy could, if carefully devised and ardently pursued, achieve much more, in much less time, and with far more consensus support. Let me flag what I see as some of the more important ingredients.

Perhaps the most glaring omission from coverage in the landscape of disability rights laws is, in my judgment, in the area of employment coverage in the private sector. While persons who work for the Federal government, who work in federally assisted programs or activities, or who work for certain Federal contractors are protected from employment discrimination on the basis of handicap, most other workers are not so protected. There is no parallel in the disability area to title VII of the Civil Rights Act of 1964, the landmark statute that prohibits discrimination on the basis of race, color, national origin, sex, and religion by all employers, both private and public, with 15 or more employees, without regard to their receipt of Federal funds or contracts. I favor the passage of legislation that will duplicate this coverage for disabled persons. Further, I think that such legislation should adopt the now-proven standard under section 504 of the Rehabilitation Act of 1973 - the concept that nondiscrimination includes the requirement that an employer make reasonable accommodation to the known mental or physical impairments of qualified disabled persons as long as making them would not result in an undue hardship on the operations of the employer.

There has been considerable quiet discussion within the Administration on an array of proposals extending the prohibition

of discrimination on the basis of handicap to the private sector. Some suggest amending title VII of the 1964 Civil Rights Act; others favor amending section 504 of the Rehabilitation Act of 1973; and still others argue for creating a new, free-standing piece of legislation. There is as yet no consensus in the Administration on the appropriate vehicle for legislative action nor on the exact scope of the legislation. Consideration of this issue remains, however, a top priority for action at the highest levels of the Administration.

The extension of employment coverage will be even more meaningful when the Administration completes its review of the major disincentives to work found in the Social Security programs. These programs - Medicaid, Medicare, Supplemental Security Income (SSI), and Social Security Disability Insurance (SSDI) - provide income support and health and social services to millions of disabled persons in this country. Unfortunately, the way in which these programs have been structured tends to operate to discourage employment of persons with disabilities. Studies have shown that disabled participants in these programs who could become employed do not seek employment opportunities because their expected salaries will not make up for the loss of health care benefits or social services. Once off the SSI or SSDI rolls, the disabled person is no long eligible for Medicare or Medicaid, despite the fact that the person will not be able to obtain private medical insurance coverage for preexisting conditions

of disability. The Administration is committed to removing major work disincentives in the Social Security system and fostering the return to work of those persons with disabilities with the desire and ability to do so.

Another major gap in coverage in the disability civil rights area is housing. Clearly section 504 forbids discrimination on the basis of handicap in federally assisted housing programs - whether the housing in question is federally assisted public housing operated by recipients of HUD funds, federally-assisted housing for farmers funded by Agriculture's recipients, or federally-assisted housing operated by colleges and universities receiving assistance from the Department of Education. However, most of this country's housing stock is outside the scope of section 504. The lack of appropriate housing for disabled persons often results in unnecessary, and quite expensive, institutionalization of disabled persons and restricts their ability to live in their own community. The Administration now favors, and is actively seeking to have passed, an amendment to the Federal Fair Housing Act that will extend its protections to discrimination on the basis of handicap.

The Department is also in favor of broadening section 504's reach in the education area by responding legislatively to the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984). In Grove City, the Supreme Court interpreted the "program or activity" language in title IX of the Education

Amendments of 1972, a statute parallel to section 504, and found that the statute prohibited discrimination in a program-specific, not an institution-wide, fashion. In light of evidence that this view has left disabled students in the education area - at elementary, secondary, and postsecondary levels - subject to discriminatory practices, the Administration has supported a bill that will extend section 504's reach to all the activities of the educational institution.

There are, of course, other initiatives worthy of consideration -- for example, legislation to ensure that handicapped infants are not denied federally assisted health care services where their parents refuse to allow medically indicated treatment on the basis of handicap; and legislation to provide developmentally disabled persons with federally assisted social services in home and community-based environments, just to mention two. What I want to reemphasize today, however, is our goal: equipping the landscape of Federal disability laws so that it is well-suited for our vision of integrating disabled people into everyday American life for the rest of the 1980's and the decades beyond.

Let me conclude on a positive note by noting a few legislative accomplishments of the past year following the piecemeal strategy I have suggested. Thus, the Federal Aviation Act has been amended to prohibit discrimination on the basis of handicap in air transportation. Congress has made it clear that the Eleventh Amendment to the Constitution does not immunize

states from suit under section 504. The tax deduction for the cost of eliminating architectural and transportation barriers in the tax code has been made permanent. The Education of the Handicapped Act has been extended for three years and now contains stronger provisions concerning early intervention services for infants and toddlers from birth to 2 years of age. Provision has been made for providing attorneys fees under EHA.

The pace of improvements to this nation's system of protections for persons with handicaps is accelerating. Still this Administration shares with many of you an abiding dissatisfaction with the network of protections that currently exist. We seek to make this hodgepodge of laws more comprehensive in scope and complete in their coverage. Our experience over the past six years has demonstrated to us that a surgical approach to legislation -- supporting narrow bills tailored to specific problems -- is not only the prudent approach but ultimately an effective and successful one. We look forward to your support in this endeavor.

Thank You.