Statement of the U.S. Commission on Civil Rights on Civil Rights Enforcement in Education

June 1983

U. S. COMMISSION ON CIVIL RIGHTS

The U. S. Commission on Civil Rights is a temporary independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;

- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;

- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration.

- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;

- Submit reports, findings, and recommendations to the President and the Congress.

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The U.S. Commission on Civil Rights views with growing concern administration efforts to reduce Federal civil rights enforcement in education. The Supreme Court recently repudiated such efforts in Bob Jones University v. U.S. and Goldsboro Christian Schools v. U.S. There are indications the Departments of Education and Justice still seek to limit longstanding equal educational opportunity guarantees. Their policies, unless promptly reversed, could jeopardize fundamental civil rights protections under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

Title VI, Section 504, and the Age Discrimination Act prohibit discrimination on the basis of race, color, national origin, handicap, and age in all federally assisted programs. Title IX prohibits sex discrimination in education programs assisted by Federal funds. These laws include specific Federal enforcement requirements. Agencies must establish and enforce policies consistent with the purposes of the laws. If recipients of Federal funds, despite all negotiation efforts, refuse to comply voluntarily with civil rights laws, agencies must terminate funding or enforce their policies by other means, such as requesting the Justice Department to bring suit.

Congress enacted these strong measures to ensure Federal taxpayer dollars in no way support discrimination and to provide victims of discrimination effective relief. The Commission foresees a potential crisis, similar to the crisis in Bob Jones, in which the administration would not defend established policies to carry out these objectives.

In the Bob Jones case, the Justice Department dropped its defense of the 10-year policy denying tax exemptions to racially discriminatory private schools. It said the tax laws would have to be amended before the policy could be enforced. Congress and the Supreme Court rejected this narrow reading of the existing laws. Nevertheless, there was an effective voice for established Federal enforcement authority in the case only because the Court appointed a special counsel to fulfill the Government's proper role.

Justice now has suggested civil rights laws would have to be amended before other established nondiscrimination policies can be enforced. The policies at issue also are before the Supreme Court, in Grove City College v. Bell. Failure to support them could have wide implications for Federal civil rights enforcement. The administration must decide whether to defend established policies, avoid a defense through legal technicalities, or, as in Bob Jones, default by early July, when its brief is due.

The immediate issue in Grove City is the extent of the Education Department's authority to enforce Title IX in higher education. The case raises larger issues, however. Nearly 30 Federal agencies have Title IX enforcement responsibilities. In addition to higher education, the law covers elementary, secondary, and adult education, as well as various

federally-supported training programs. Moreover, it is linked by language, legislative history, and case law to Title VI, Section 504, and the Age Discrimination Act. A whole fabric of civil rights protections thus could be affected by Grove City.

Under policies established in Education Department regulations, Title IX covers any education program or activity receiving or benefiting from Federal financial aid. This includes programs assisted by the tuition and fees students pay with Federal grants and loans. It also includes programs aided by funds authorized for other purposes, such as Federal research grants and contracts. The Department may investigate any unassisted program whose discriminatory practices may result in discrimination in--or "infect"--an assisted program. Fully enforced, these policies, which parallel Title VI and Section 504 policies, would prevent Federal financial support for discriminatory practices, as Congress intended.

The Title IX policies were adopted in 1975 after long and thorough consideration. Nearly 10,000 individuals and organizations outside the Executive branch, including the Commission, participated in the review process. The policies withstood Congressional scrutiny, including extensive hearings and attempts to change them through limiting amendments. They have been successfully defended for many years during Republican and Democratic administration alike. No definitive court ruling has invalidated them. Nevertheless, Education and Justice have taken subtle steps toward reversing them.

In April 1982, for example, the Departments dropped their defense, in Grove City, of the Education Department's authority to enforce Title IX by terminating Guaranteed Student Loans. The Commission supported the Government's former position that such loans are not, like contracts of insurance and guaranty, exempt from Titles VI and IX. The Commission expressed concern about the policy change. The Assistant Attorney General for Civil Rights said a more restrictive policy had not been adopted; the Departments merely had decided how to act in a particular case. That decision, however, paved the way for a pending regulatory change in this area.

Decisions about other cases already have narrowed Title IX enforcement in some parts of the country. In September 1982, for example, the Departments chose not to appeal University of Richmond v. Bell. This ruling, by the Federal District Court for the Eastern District of Virginia, limited Title IX investigations to programs directly receiving Federal funds specifically "earmarked" for them. All programs supported by Federal student aid were shielded from Title IX enforcement. Many other programs assisted by Federal funds also were exempted from review, as were unassisted programs the Department formerly could investigate under the "infection" theory. The Commission pointed out these serious inconsistencies with established policies, prevailing case law, and basic administrative procedures. The Education Department's Assistant Secretary for Civil Rights also criticized the ruling and warned it could hamstring enforcement operations. Education and Justice, nevertheless, accepted the decision and endorsed its reasoning.

In December 1982, Education and Justice chose not to appeal another restrictive ruling, the Sixth Circuit Court of Appeals' decision in Hillsdale College v. Department of Health, Education, and Welfare. This decision, affecting Michigan, Ohio, Kentucky, and Tennessee, also limited Title IX protections to directly assisted programs. Schools assisted only by Federal student aid could deny women equal opportunity in particular courses of study, other professionally related activities, counseling, health services, housing, and many other aspects of campus life. The Assistant Attorney General also endorsed this ruling.

Extensive correspondence with the Assistant Attorney General increased the Commission's concern that a major policy reversal had been initiated and could become an accomplished fact without full and open public debate. Although his letters stated that a decision had been made only about Richmond, in fact they suggested general approval of narrow interpretations of Federal civil rights laws and minimized the Third Circuit Court of Appeals' decision upholding broad enforcement authority in Grove City. They implied that the Supreme Court's ruling in North Haven Board of Education v. Bell limited--or "pinpointed"--Title IX to directly assisted education programs.

North Haven, however, did not foreclose broad interpretations of Title IX. The Supreme Court ruled only that Title IX is "program specific." It reserved for future litigation the extent of coverage this term allows. The majority said explicitly, "We do not undertake to define 'program' in this opinion."

The Supreme Court, thus, did not "pinpoint" Title IX. Lower courts have issued a range of opinions on the issue. In these circumstances, the Justice Department could continue supporting established policies based on the broad remedial purposes of Title IX and related civil rights laws. Legislative history and substantial case law, including the North Haven opinion, would support such a position. The Department's arguments to the contrary reflect a policy preference for narrowing Federal civil rights enforcement in education. They raise serious concerns about the role the Department will adopt in litigation to resolve the issue of Title IX coverage and its implications for Title VI, Section 504, and the Age Discrimination Act. Recent developments have reinforced these concerns.

On March 15, the Assistant Attorney General advised the Education Department to adopt standards based on Richmond and Hillsdale for all its civil rights investigations. His memorandum increased doubts about the Justice Department's commitment to defending established Title IX policies in Grove City. Further, it read into North Haven unwarranted restrictions on Title VI and Section 504, as well as Title IX. This demonstrated the major policy changes at work in decisions about particular cases.

The Education Department had reassured the Commission it intended to "stand by" its existing regulations unless some future definitive ruling required a change. The March 15 memorandum, however, suggested the Department was expected to adopt narrower policies across the board

without awaiting a Supreme Court ruling that might uphold established policies. The uses made of North Haven also suggested the decision might be stretched even further to justify "pinpointing" in other federally-assisted programs.

In light of this memorandum, the Commission asked the Secretary of Education whether the Department still was committed to full enforcement of its civil rights regulations except where expressly limited by court orders. The response, received on May 11, reaffirmed the Secretary's earlier statement that the Department is not in the process of rewriting its civil rights regulations. In the April 25 Federal Register, however, the Department announced it would propose revisions to exempt Guaranteed Student Loans and supplementary loans from coverage under those regulations. These plans to change civil rights policy, set in motion last year and not required by any definitive court ruling, were confirmed on May 18 by the Assistant Secretary for Civil Rights. Such inconsistencies between assurances to the Commission and plans announced elsewhere raise questions about the Department's determination to enforce other established civil rights requirements.

The Commission also requested clarification from the Attorney General. Specifically, he was asked whether Justice would defend Education's established regulatory policies in Grove City and, if not, whether and how these policies will receive adequate legal representation. The Attorney General also was asked how Education was to respond to the March 15 memorandum and whether similar standards might be advanced for other

Federal assistance agencies. Some health care benefits, for example, are administered in a manner similar to Federal student aid. The Commission, therefore, inquired whether Justice would seek to limit civil rights enforcement in hospitals assisted by Medicare and Medicaid to the offices that handle those funds.

The Deputy Attorney General's response did not answer these specific questions. It said the Justice Department would defend the Education Department's authority to enforce Title IX in Grove City, but made no reference to defending broad program coverage in the case. Indeed, the letter indicated the Assistant Attorney General speaks for the Department on this issue. His recent testimony before the House Subcommittees on Postsecondary Education and Civil and Constitutional Rights reaffirmed restrictive views of Title VI, Title IX, and Section 504.

Commission testimony before these subcommittees reviewed the drift toward narrower Federal civil rights enforcement policies and their potentially grave implications. The Commission concluded the administration might not encourage the Supreme Court to interpret civil rights laws in education according to their broad remedial purposes unless current policies are reversed before the Grove City brief is due in July. As that date approaches, concerns about the case grow more urgent.

Nothing has happened yet to prevent the administration from defending broad coverage under Title IX and related civil rights laws. The Supreme Court has not "pinpointed" these laws to directly assisted programs. They

do not need to be amended to authorize existing enforcement policies. As in Bob Jones, the only thing now required is adequate Federal enforcement of those policies.

The debate about Title IX coverage has involved complex, sometimes technical, differences between legal experts. It, however, is not a bureaucratic tug-of-war or an academic exercise. The basic issue is whether the Federal government will continue requiring equal opportunity in the vast majority of programs supported by taxpayer dollars or severely limit its ability to combat discrimination. This is not a technical legal question, but a pressing matter of fundamental national policy developed over more than a quarter of a century. Chief Justice Burger recognized as much when he affirmed broad Federal enforcement authority in Bob Jones, saying "racial discrimination in education is contrary to public policy." The Commission believes similar public policy concerns should govern decisions about Federal efforts to eliminate discrimination on other bases and in other areas.

The Commission, therefore, calls upon the President, as it did on January 6, to take the steps necessary to ensure his administration will stand, with its predecessors, for broad and effective civil rights protections. The Commission urges the Solicitor General, who will be responsible for the Government's brief in Grove City, to develop a position based on the full legislative history of Federal civil rights laws in education. Despite current Education and Justice Department preferences, there is convincing evidence Congress intended Title IX and related laws to prevent any Federal financial support for discrimination.

The Commission also encourages continuing and expanded Congressional oversight of civil rights enforcement in this area, as well as others. Full and searching consideration may prevent further changes that would set back this Nation's progress toward equal opportunity.

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