DOCUMENT RESUME

ED 231 298 HE 016 352

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TITLE	Department of Justice Enforcement of Civil Rights Laws with Respect to Institutions of Higher Learning. Statement before the Subcommittee on Postsecondary Education, Committee on Education and Labor, House of Representatives and the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives.
INSTITUTION	Department of Justice, Washington, D.C.
PUB DATE	18 May 83
NOTE	29p.
PUB TYPE	Legal/Legislative/Regulatory Materials (090) -- Viewpoints (120)
EDRS PRICE	MF01/PC02 Plus Postage.
DESCRIPTORS	Black Colleges; *Civil Rights Legislation; *College Desegregation; Compliance (Legal); *Court Litigation; Disabilities; Federal Government; Federal Legislation; Federal Programs; *Federal State Relationship; Government Role; *Government School Relationship; Higher Education; Legal Responsibility; Sex Discrimination
IDENTIFIERS	Civil Rights Act 1964; Department of Education; *Department of Justice; *Reagan Administration; Rehabilitation Act 1973 (Section 504); Title IX Education Amendments 1972

ABSTRACT

The Reagan Administration's record in enforcing the civil rights statutes that apply to higher education are reviewed by Assistant Attorney General Reynolds of the Department of Justice. Attention is directed to cases under the jurisdiction of Title VI of the Civil Rights Act, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1974. The Louisiana higher education case, settled in September of 1981, is cited as an example of the Department of Justice's efforts to enforce Title VI through the following goals: to improve offerings at historically black institutions, and to attract students of the other race to traditionally black and traditionally white institutions. The Adams v. Bell case and the Justice Department's litigation with the North Carolina higher education system are also briefly addressed. Some of the Title IX cases discussed are: North Haven v. Bell, Grove City College v. Bell, and University of Richmond v. Bell. Finally, five Section 504 cases are noted. The Department has sent to all federal agencies a prototype regulation for enforcing Section 504 in federally conducted programs. An appendix on the investigatory activities of the Department of Education is included. (SW)

Department of Justice

STATEMENT

OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE THE

SUBCOMMITTEE ON POSTSECONDARY EDUCATION
COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

AND THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

DEPARTMENT OF JUSTICE ENFORCEMENT OF CIVIL RIGHTS LAWS WITH RESPECT TO INSTITUTIONS OF HIGHER LEARNING

ON

MAY 18, 1983

Mr. Chairman and Members of the Subcommittees, I welcome the opportunity to discuss this Administration's accomplishments in enforcing the civil rights statutes that apply to higher education.

The Department of Justice has several responsibilities under laws banning discrimination by institutions of higher learning. The Department has independent litigating authority under two statutes, Titles IV and VII of the 1964 Civil Rights Act, 42 U.S.C. 2000d and 2000e. Title IV authorizes the Attorney General to bring suit, in certain instances, to remedy discrimination based on race, color, religion, national origin or sex in public educational institutions. The Department has used this statute both to attack vestiges of racial discrimination which remain in some higher education systems and to attack sex discrimination. Title VII prohibits discrimination in employment based on race, color, national origin or sex. The Department of Justice has jurisdiction under Title VII over public employers, and has used this jurisdiction to attack discriminatory employment practices by institutions of higher learning. In addition, we have authority under Title IX of the 1964 Civil Rights Act, 42 U.S.C. 2000h-2, to intervene in cases presenting allegations of Equal Protection Clause violations based on race, color, religion, sex, or national origin, and have done so in two cases alleging sex discrimination by colleges.

The Department also has important enforcement authority tied to federal financial assistance. Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000c, Title IX of the Education Amendment of 1972, 20 U.S.C. 1681, and Section 504 of the Rehabilitation Act of 1974, 29 U.S.C. 794, all prohibit various forms of discrimination in federally assisted programs or activities. Funding agencies enforce these statutes by negotiation, administrative fund termination proceedings, and by referral to the Department of Justice for commencement of a suit for injunctive relief.

While the agencies which extend federal assistance are primarily responsible for insuring that the recipients of that assistance honor the prohibitions of Titles VI and IX and Section 504, the Department of Justice also has an important role to play. First, we represent the agencies in court challenges to their enforcement of these statutes. Such challenges include appeals from fund termination proceedings, injunctive suits by recipients, and suits by other interested parties. Second, Executive Order 12250 commissions us to coordinate all agencies' efforts to enforce civil rights statutes tied to federal assistance. Third, as mentioned above, we have authority to sue recipients of federal funds when federal agencies refer cases to us.

As my testimony will indicate, the Department has accomplished much under these several statutes. We have attacked the vestiges of racial discrimination which exist in the higher

education systems of several states. We have vigorously defended the Department of Education's efforts to investigate allegations of sex discrimination in the employment practices of several institutions of higher learning. And, while it has been determined that the antidiscrimination funding statutes do not give the Government the authority always to address the entire range of practices of recipients of federal assistance, they plainly do provide the Government with the ability to reach and eliminate unlawful discrimination in all federally assisted programs or activities. To that end, both through litigation and our coordination efforts under E.O. 12250, the Justice Department has been, and continues to be, a strong ally in the Federal agencies' persistent efforts to remove discrimination from all funded programs.

Since the categories under which we have jurisdiction are easily severable, I will discuss each separately, and will address the specific questions you raised in your letter as I address each subject.

1. Title VI. As you know, Title VI states:

> No person in the United States shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Department of Education administers most federal assistance to colleges and universities, and so our litigation in this area depends primarily on actions of that agency.

When this Administration first took office, the Department of Justice had Title VI litigation pending against the higher education systems of two states, Louisiana and Mississippi. Both had been referred to us by HEW some years ago. Each case alleged that the states had established dual systems of higher education by discriminatorily creating segregated colleges and maintaining them as predominantly white and predominantly black institutions even after Brown v. Board of Education. Since such systemic discrimination in the admissions practices, as well as all other phases of college administration, necessarily segregates students on the basis of race in all federally funded campus activities, elimination of discrimination in each federally assisted "program or activity" requires systemwide relief.

In enforcing Title VI we seek to ensure quality desegregated higher education. Our goals are twofold: First, to enhance educational offerings at historically black institutions which have suffered terribly from the discriminatory allocation of public resources. Second, to attract both to traditionally black and traditionally white institutions students of the other race. In this endeavor, enhanced educational quality and desegregation are complementary aims.

In September of 1981, we entered into a consent decree settling the Louisiana higher education case. This decree, copies of which I have previously provided the Committees, embodies the

goals just mentioned. For example, at Grambling State University the decree provides for a new school of nursing; for joint degree programs with the LSU Medical Center in the fields of physical therapy, rehabilitation counseling, and medical technology; for masters degree programs in public administration, teaching, social work and criminal justice; and for an M.B.A. degree program in cooperation with Louisiana Tech. Similarly wideranging curriculum enhancements were required for the New Orleans and Baton Rouge campuses of Southern University.

The decree also includes a faculty development program designed to improve the quality of instruction at Grambling and Southern. Improvements in existing facilities and the construction of certain new facilities at those predominantly black institutions are mandated under the decree as well. In order to promote funding adequate to meet the operating needs of Grambling and Southern, the decree provides for a review of the state appropriations formula and a special appropriation of $1 million to be used for the general enhancement of those institutions.

Under the decree predominantly white institutions employ a variety of techniques to increase other-race enrollments. Considerable emphasis has been placed on programs designed to inform students of available educational opportunities and to recruit other-race students. Developmental or remedial educational programs have been utilized to reduce black attrition rates. Cooperative efforts

between geographically proximate institutions are required, including faculty and student exchanges and joint decree programs. These and other measures that we have adopted help to ensure equal access for all students, regardless of race, to a quality educational institution of their own choosing.

We have declined, however, to impose racial quotas for students or faculty. As in every field, the goal of nondiscrimination in higher education is paramount. Each individual has a right under the Constitution to be judged on the basis of his or her qualifications, background, skills and talents, and not merely as a member of a particular racial group. Quotas are fundamentally inconsistent with this principle. As a matter of both law and policy, they deserve no place among the arsenal of weapons used to fight discrimination -- the very evil they perpetuate.

We are presently negotiating with Mississippi officials in an effort to settle that longstanding litigation. Last year the Department of Education requested us to take enforcement action under Title VI against the Alabama and Ohio systems of public higher education. Pursuant to Congress' express policy preferring voluntary compliance, we have been actively negotiating with those systems in an effort to remedy constitutional violations.

Adams v. Bell, cited in your request, is a suit against the Department of Education. The court's decision requires the Department of Education to enforce Title VI by negotiating with

specified states -- including Kentucky and Virginia -- concerning their higher education systems. The Department of Education can better respond to inquiries about the status of these negotiations.

Four attorneys from the Civil Division are assigned to represent the Department of Education in the Adams litigation. The number of attorneys the Civil Rights Division assigns to Title VI higher education cases varies with the complexity of the litigation or negotiations. While on occasion as many as ten attorneys may work on a higher education case, routinely about five attorneys are assigned to them.

Finally, your letter asks about the status of "the consent decree[] in North Carolina (pursuant to P.E. Bazemore, et al. and United States of America, et al. v. Friday)." The Bazemore case is not a higher education case. It addresses employment discrimination by North Carolina's agricultural extension service. Officials of the North Carolina State University were named only because the agricultural extension service is tangentially connected to the state's land grant college program. In any event, while the district court ruled against the Government at the trial level, we are presently pursuing an appeal in the United States Court of Appeals for the Fourth Circuit.

The Department's litigation with the North Carolina higher education system is styled North Carolina v. HEW. A few years

ago North Carolina sued HEW to enjoin administrative proceedings the agency had initiated. Following extended negotiations, a comprehensive settlement was reached between the state, its colleges and universities and the Department of Education. While the Department of Education is plainly better suited to discuss details of that settlement with you, I should note in passing that the North Carolina settlement served in many respects as the model for our higher education settlement in Louisiana and contained a number of the same features I described earlier in connection with the Louisiana consent decree. You should also know that the North Carolina federal district court approved the settlement involving that State's higher education institutions. However, a separate challenge filed by the NAACP Legal Defense Fund in the D.C. federal courts -- which was unsuccessful in the district court -- is presently pending in the United States Court of Appeals for the D.C. Circuit.

2. Title IX. Title IX of the Education Amendments of 1972 states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

As with Title VI, our enforcement activity under this provision is necessarily conducted in close cooperation with the

Department of Education. The principal issue we have addressed is the legal one involving the question of the statute's coverage.

The first major effort of this Administration under Title IX was the North Haven v. Bell case. Although the case did not deal directly with higher education, it was a significant Title IX case with direct impact on institutions of higher education. In that case, we argued before the Supreme Court that Congress intended to prohibit sex discrimination in employment in any federally assisted education program or activity, whether or not the primary purpose of funding was to aid in the employment of personnel for the financially assisted program. The Court ruled along the lines of our brief, thereby significantly enhancing Title IX as a vehicle for addressing sex discrimination in employment in institutions of higher education -- as well as other areas affected by Title IX. In fact, prior to the decision in North Haven, we had sought Supreme Court review of two higher education cases in which courts enjoined federal administrative action against Seattle University and the Junior College District of St. Louis. After North Haven, the injunctions were lifted.

We have also broadly construed the types of assistance which may subject a recipient to Title IX review. We recently filed briefs with the Supreme Court in Grove City College v. Bell, No. 82-792, and Hillsdale College v. Department of Education, No. 82-1538. In both cases, the colleges contend that

because the only federal aid they receive is student aid, the institutions are not "recipients" of federal aid and therefore are not subject in any way to Title IX. We argued successfully in the lower federal courts in both cases that the college's receipt of federal student aid put the college in the position of receiving a form of federal financial assistance within the meaning of Title IX. Supreme Court review was sought and the Court granted the college's petition for a writ of certiorari in the Grove City case; briefs are due to be filed by the parties this summer.

In addition to discussing the coverage of Title IX over employment practices, the North Haven decision confirmed that Title IX enforcement activities must be "program specific" -- that is, they must address discrimination occurring in the specific programs or activities receiving federal assistance. As a result of that directive from the High Court, the Departments of Education and Justice have worked together to bring the enforcement efforts in this area in line with the program-specific requirement. Department of Education's Assurance of Compliance regulation, for example, no longer is construed as having application to an institution as a whole, but only to those federally assisted programs at the institution. Moreover, as part of the Justice Department's coordination role under the federal funding statutes, we are independently analyzing Title VI and Section 504 coverage in light of North Haven and the circuit court decisions both before and after North Haven that have interpreted the statutes as being program-specific.

In this regard, you have asked that I discuss University of Richmond v. Bell. There, the University sued the Secretary of Education to enjoin the Department from investigating allegations that the University discriminated against women in its intercollegiate athletic program. The government counterclaimed that the University's failure to turn over requested information violated Title IX and the University's own assurances of compliance that it signed when it received federal assistance. The district court enjoined the investigation, holding that no allegation had been made, nor any evidence introduced, to indicate the University's intercollegiate athletic program did in fact receive direct federal financial assistance, and therefore the federal government had no authority under Title IX to investigate the allegation of sex discrimination.

Both the Justice Department and the Department of Education carefully reviewed the district court decision and decided not to appeal. As the court noted, the University received only federal student aid and a federal library grant. Totally absent from the case was proof, or even a suggestion, that the alleged discrimination affected any specific programs which received federal financial assistance. This deficiency, in our view, made federal investigation in this case improper under the standard established in North Haven requiring that federal enforcement of Title IX be program specific.

In this connection, it should be noted that Congress did not, in enacting Title IX, give the Government unrestricted authority to investigate sex discrimination in educational institutions generally. The plain language of the statute makes this clear. A comparison of Section 901 and Section 904 shows that the latter provision is institution-wide in scope, in contrast to the program-specific nature of section 901. The Supreme Court relied on this very comparison in its North Haven ruling. Moreover, the legislative history of Title IX reveals that the program-specific limitation was needed in the statute in order to secure passage. The intent of Congress was that the Government assure itself that the action it seeks to investigate under Title IX occurs in a federally assisted program or activity before the investigation is undertaken.

As you may know, after the Government decided not to appeal the Richmond decision, I exchanged letters with the Civil Rights Commission discussing the case. In these letters I explained the basis, in some detail, for the Government's decision not to appeal the Richmond case. This determination was, of course, based on the particulars of the litigation and the specific court ruling. It in no way signaled a relaxation of our enforcement commitment under the anti-discrimination statutes covering federally assisted programs or activities. I have furnished to the Committees copies of this correspondence.

In addition, earlier this year, at the request of Secretary Bell, the Civil Rights Division of the Department of Justice, following discussions with the Secretary and members of his staff, and an exchange of enforcement information, prepared a memorandum discussing the impact of North Haven on the scope of an agency's investigatory authority under Title VI, Title IX, and Section 504. This memorandum undertakes to deal with the practical implications of the "program specific" limitation in these statutes in some detail. Rather than repeat the contents of the memorandum, I have attached a copy to this testimony.

Another sex discrimination case which was pending when we took office was United States v. Massachusetts Maritime Acadamy. That case, in which we alleged that the school refused to admit women as cadets, was filed under Title IV of the 1964 Civil Rights Act, 42 U.S.C. 2000c-6. After we put on our case in the summer of 1982, the court denied defendant's motion to dismiss the case. The court recessed the trial, and has scheduled it to resume on May 31.

3. Section 504. Section 504 states:

> No otherwise qualified handicapped individual in the United States as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

The issues presented in the enforcement of 504 are similar, but not always identical, to those presented in a Title VI or Title IX case. As the statute is drafted, additional questions have frequently arisen regarding, for example, whether a handicapped person is "otherwise qualified" for a particular federally assisted program or activity, or the extent to which the program in question should undergo needed alteration in order to accommodate handicapped participants. Whenever such issues are presented, the Government's responsibility is to see to it that handicapped individuals are afforded the maximum benefit and consideration required by law.

In this regard, our enforcement of Section 504 is necessarily shaped in large measure by court decisions interpreting the statute. The lead case is, of course, Southeastern Community College v. Davis, involving the Supreme Court's only extensive discussion of 504. That unanimous decision offers substantial and binding guidance on the manner in which the statute should be enforced. Since the case involved a post-secondary institution, its effect on the enforcement of 504 in those institutions is apparent. Moreover, certain of the Court's language plainly has broader implications. Its characterization of Section 504 as a nondiscrimination, not an "affirmative action", statute (442 U.S. at 411) clearly has general applicability. So, too, does the Court's acknowledgement that a recipient's obligation to accomodate handicapped interests

may well not demand program alterations of such magnitude that they would result in an "undue financial and administrative hardship" to the recipient (442 U.S. at 412).

It is, of course, one thing to state the general principle; it is quite another to insure its proper application in different factual settings. Our litigation effort has attempted to strike the proper balance that is fully sensitive to the interest of the handicapped complainants, on the one hand, and faithful to the intended reach of the statute, on the other hand. To this end, we argued in Nelson v. Thornburgh, that Section 504 required the provision of a reader for a blind welfare case worker by the State of Pennsylvania. In another case, Peck v. County of Alameda, we supported reimbursement to a deaf juror of the costs of a sign language interpreter used during the trial in which the juror participated. And more recently, in Georgia Association of Retarded Citizens v. McDaniel, we advised a federal appeals court that, contrary to some lower court decisions, Davis did not require invalidation of the Department of Education's Section 504 regulations dealing with procedural safeguards available to handicapped children receiving an elementary and secondary public education.

On another front, we also filed an amicus brief in the Supreme Court in University of Texas v. Camenisch, No. 80-318, giving implicit recognition to a private right of action under Section 504. In addressing the issue in that case - whether

a deaf college student was entitled under 504 to an interpreter - this Administration set out its view that complying with 504 may indeed require expenditures by the recipient of federal assistance, and that interpreter's services are the type of auxiliary needs which colleges covered by 504 could well, in proper circumstances, be compelled to provide. The precise "line drawing" that must take place under Section 504 in such cases will invariably turn on the facts of particular cases, and general pronouncements in this area are thus of little value. We will continue to look primarily to the courts for guidance in shaping Section 504 enforcement, participating where appropriate in an effort to assist the judiciary in making these difficult decision of statutory interpretation.

You also asked specifically about our coordination activities under Executive Order 12250. Those activities span the spectrum of federal assistance statutes, including more than 50 code provisions in addition to Titles VI and IX and Section 504. In light of this wide-ranging responsibility, our enforcement plans plainly cannot be directed only at institutions of higher learning, but must respond to civil rights offenses of whatever kind or variety in all programs or activities receiving federal financial assistance.

It is true that our regulatory review efforts have since 1981 concentrated most heavily on Section 504. During the past 18 months, we have approved 10 different agency regulations

addressing the requirements of 504 in federally assisted programs. We also undertook an extensive study of the 504 coordination regulations for federally assisted programs, at the conclusion of which it was decided not to issue a notice of proposed rule-making soliciting comments on proposed regulatory revisions, but rather to leave in place the existing coordination regulations and seek, where necessary, to obtain clarification through the courts. At the same time, we have sent to all federal agencies a prototype regulation for enforcing Section 504 in federally conducted programs. We have previously provided the Committees a copy of the prototype. Such guidance was desperately needed since most agencies have yet to issue any regulations in this area, despite the fact that the "federally conducted" amendment to Section 504 was added in 1978. Our hope, and expectation, is that, with the prototype regulation, most executive agencies will be able to publish their own 504 NPRM for federal programs in the very near future.

This canvass of our enforcement activities is obviously not intended to be exhaustive. It is, however, representative of the kinds of things we are doing under the several civil rights statutes I have mentioned. As my testimony of a little over one week ago before the Subcommittee on Civil and Constitutional Rights substantiated, our record is an impressive one of which we can be proud. It demonstrates an unflagging commitment

to ferret out and eliminate unlawful discrimination in all of its ugly forms, wherever it might be found. That is the battle for all of us to fight -- together, not separately -- if we are to prevail.

Thank you. I will be happy to answer any questions.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 15, 1983

The Honorable T. H. Bell
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D. C. 20202

Dear Mr. Secretary:

Enclosed is the Memorandum we discussed concerning investigatory activities of the Department of Education under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681) and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). I would be pleased to discuss this matter with you further if you have additional questions following review of the enclosure.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: Daniel Oliver
Barry Singleton

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 15, 1983

MEMORANDUM

The civil rights statutes, Title VI (42 U.S.C. 2000d), Title IX (20 U.S.C. 1681), and Section 504 (29 U.S.C. 794), provide the Department of Education (hereinafter the "Department") with authority to regulate and investigate recipients of financial aid from the Department on a program-specific basis. Based on the Department's descriptions of its financial assistance programs, it appears that the Department's funding statutes fall into three broad categories: (1) assistance to a specific program of a recipient, as determined by the statute's particularized purpose(s) and the use of the Federal financial assistance by the recipient; (2) general assistance to recipients; and (3) assistance for the construction of facilities. The purpose of this memorandum is to explore programmatic enforcement procedures within each of these categories.

Investigatory Responsibilities

The obvious starting point in the Department's investigatory process is with receipt of an allegation of discrimination, or upon submission of evidence giving rise to a reasonable belief that discrimination is occurring at an institution. In the normal course, it is presumed that the Department can ascertain from its own funding records whether financial assistance is being provided to the purportedly offending institution, and, if so, under what funding program or programs. The enforcement experience of the Civil Rights Division under the various Federal assistance statutes confirms that this basic record information is readily available in most instances and easily ascertainable.

If the challenged institution is not one receiving Federal financial assistance under a Department program, the alleged discriminatory behavior cannot be investigated by the Department's Office of Civil Rights (OCR). This conclusion does not foreclose a private action by the complainant, nor does it immunize the institution from possible investigation by another Federal agency (e.g., Office of Revenue Sharing) if that agency is providing financial assistance.

Assuming Department funding under one or more of its financial assistance programs, OCR's investigatory authority is shaped by the nature, purpose and use of the particular kind of assistance provided to the recipient. It is in this connection that the several categories of funding statutes become important.

A. Specific Assistance Programs. A recipient receiving Federal financial assistance under specific, particularized assistance programs of the Department may, under the above civil rights statutes, only be regulated and investigated in those programs. 1/

Examples of the proper approach to enforcement of civil rights protections under these statutes include: a recipient which receives only adult education assistance (20 U.S.C. 1203) may only be regulated and investigated in the operation of its adult education program; a recipient which receives assistance only for its library (e.g. under the College library resources program (20 U.S.C. 1022-24) or the public library services program (20 U.S.C. 352054)) may only be regulated and investigated in the operation of its library; a recipient which receives assistance for its bilingual vocational education program (20 U.S.C. 2411-21) may only be regulated and investigated in the operation of its bilingual vocational education program; a recipient which receives only work study funds (42 U.S.C. 2753) or Pell grant funds (20 U.S.C. 1070a) may only be regulated and investigated in its student financial aid activities. 2/

1/ A recipient receiving Federal financial assistance under more than one program administered by the Department may be regulated and investigated in all such programs.

2/ For a listing of additional specific assistance statutes, see Appendix A, infra.

A small number of the specific assistance statutes administered by the Department, while not constituting a general grant in aid to the recipient, do encompass multiple programs or activities of the recipient. In such case, the recipient's application should delineate the specific programs for which Department assistance is being requested, and a presumption thus attaches that all programs so identified in the application do indeed receive federal aid. Unless the Department has independent knowledge that only certain of these programs are receiving Departmental assistance, or a showing is made by the recipient that a listed program is nonfunded -- which would in either event rebut the presumption -- the Department may regulate and investigate all such programs. 3/

B. General Aid Programs. When the Federal financial assistance that the Department provides is in the form of a general grant or general aid that is not earmarked for particularized programs, all the programs and activities of the recipient fulfilling the broad purposes of the assistance statute are presumed to be covered by the applicable civil rights laws. In order for a recipient in such circumstances to avoid Department investigation of any of its programs, evidence sufficient to rebut the presumption as to that particular program(s) must be forthcoming. Once the Department is satisfied that the identified program(s) does not in fact receive any of the Federal financial assistance going to the recipient in the form of general aid, further investigation in that area is foreclosed as being outside the coverage of the civil rights statutes.

3/ An example of a multiple program assistance statute is 20 U.S.C. 3231, which provides for bilingual education assistance to a school district that may be used for, inter alia, elementary and secondary bilingual education programs, adult bilingual education programs, and preschool bilingual education programs, and requires the recipient to list the activities for which it wishes to receive assistance. If a school district lists in its application only elementary and secondary bilingual education programs, the presumption is that they alone receive Federal funds and are subject to Department scrutiny. If, on the other hand, the adult and preschool bilingual education programs are listed on the application as well, then all the listed programs are presumed to be within the coverage of the civil rights statutes, subject to rebuttal only to the extent it can be shown that those programs are in fact not receiving federal funds.

For example, if the Department determines that a local educational agency receives impact aid funds (20 U.S.C. 236-44), the Department may presume that all of the elementary and secondary programs and activities of the school district receive Federal financial assistance. 4/ Therefore, it may regulate and investigate all such programs and activities except to the extent that the recipient demonstrates some of its programs do not receive such funds. A similar analysis obtains for recipients of Federal financial assistance for developing institutions (20 U.S.C. 1051, see 20 U.S.C. 1052(a)(1)(D)). The Department may assert jurisdiction over all academic, administrative, and student service activities of such a recipient under the same rebuttable presumption mentioned above. 5/

C. Construction Programs. The Department also provides construction funds to institutions to assist in the building or renovating of school facilities. In such circumstances, the civil rights Federal funding laws permit the Department to reach discrimination in all of the programs and activities conducted within the wholly or partially funded buildings, whether they were built for athletics or philosophy. The Department administers a number of such construction assistance statutes including those under the federal impact aid program (20 U.S.C. 631; id. 646); Higher Education Act (20 U.S.C. 1132c); and Library Services and Construction Act (20 US.C. 355a).

CONCLUSION

Congress undertook through Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1973 to reach discrimination based on race, sex and handicap, respectively,

4/ Other programs conducted by the local educational agency beyond the scope of the broad purposes of the impact aid statute would not be covered.

It should also be noted that Congress did not intend that the termination of Federal financial assistance under general aid programs be wholesale in nature. Only the portion of the general federal aid used in the part of the recipient's programs where discrimination has occurred may be cut-off. This may involve a pro-rata termination of Federal financial assistance if the precise amount of Federal financial assistance involved cannot be determined.

5/ For a listing of other general assistance statutes, see Appendix B, infra.

in any program or activity receiving Federal financial assistance. The Supreme Court held in North Haven Board of Education v. Bell, 50 U.S.L.W. 4501, 4507 (1982), that the program-specific nature of those crosscutting discrimination statutes must be faithfully observed in their implementation and enforcement. 6/

Thus, where, as the court held in University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va., 1982), the desired investigation involves a program (i.e., athletics) other than the one (i.e., student financial aid) receiving Federal funds under a specific assistance statute (i.e., Pell Grants), the Department cannot conduct such an investigation without first establishing that the challenged program (i.e., athletics) receives Federal funding. It is only when the institution receives a general Federal grant that the Department can indulge the presumption of comprehensive programmatic coverage for investigatory purposes, subject of course to rebuttal by the recipient as to any program not actually receiving Federal assistance.

One important caveat needs to be added. In the educational arena, particularly, discrimination in an institution's admissions' policy necessarily infects all programs and activities of the college or university. In view of this reality, claims of discrimination in the student admissions area, if reasonably grounded, provide adequate basis for the Department to investigate the admissions program even when it is not funded, so long as any of the institution's other programs or activities receives Federal financial assistance.

6/ To similar effect are: Dougherty County School System v. Bell, No. 78-3384 (11th Cir., Dec. 20, 1982); Hillsdale College v. HEW, No. 80-3207 (6th Cir., Dec. 16, 1982); Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir., 1981); Brown v. Bibley, 650 F.2d 760 (5th Cir., 1981); Board of Public Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir., 1969); Othen v. Ann Arbor School Board, 507 F. Supp. 1376, 1383 (E.D. Mich. 1981), aff'd on other grounds, No. 81-1259 (6th Cir., Feb. 2, 1983); Mandel v. HEW, 411 F. Supp. 542 (D. Md. 1976), aff'd en banc by an equally divided court, 511 F.2d 1273 (4th Cir.), cert. denied. 439 U.S. 862 (1978).

We would not expect this analysis to occasion much change in the Department's current investigation practices. To the extent it becomes necessary to better tailor future investigatory efforts to discrete funded programs -- rather than launching a broad-based inquiry of the institution as a whole -- that is a statutory mandate recognized by the U.S. Supreme Court, and we can hardly afford to ignore it.

W. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

APPENDIX A

Other specific assistance statutes administered by the Department of Education include: grants for the disadvantaged including those going to local educational agencies (20 U.S.C. 2711; id. 3803(a)(1)(A)), state agency program for migrants 20 U.S.C. 3803(a)(2)(A)), handicapped (20 U.S.C. 3803(a) (2)(B)), neglected and delinquent (20 U.S.C. 3803(a)(2)(C)), state administration (20 U.S.C. 2844), evaluation and studies (20 U.S.C. 1226b); migrant education (20 U.S.C. 2561); state grants pursuant to 20 U.S.C. 3811 et seq., Secretary's discretionary fund (20 U.S.C. 3851), inexpensive book distribution (20 U.S.C. 3851(b)(1)), arts in education (20 U.S.C. 3851(b)(2)), alcohol and drug abuse education (20 U.S.C. 3851(b)(3)), law-related education (20 U.S.C. 3001-03), discretionary projects (20 U.S.C. 3851(a)); training and advisory services (42 U.S.C. 2000c-3), Follow Through (Part B, Headstart Follow-Through Act), Ellender Fellowships; women's educational equity programs (20 U.S.C. 3341-48), bilingual education training grants (20 U.S.C. 3261), bilingual desegregation grants (20 U.S.C. 3261); individual Indian education programs (20 U.S.C. 241aa; id. 3385; id. 1211a), individual education for the handicapped programs (20 U.S.C. 1411; id. 1419; id. 1422; id. 1421; id. 1424; id. 1423; id. 1424a; id. 1451-52; id. 1433; id. 631; id. 632; id. 634; id. 1431; id. 1432; id. 1434; id. 1418); individual rehabilitation services and handicapped research programs (29 U.S.C. 720(b)(1); id. 730; id. 770; id. 780; id. 796; id. 711(c); id. 774; id. 776); individual vocational and adult education programs (20 U.S.C. 2330-34; id. 2350-56; id. 2303, id. at 2401-02; id. 2370; id. at 2380; id. at 2305; id. 2302(d); id. 11; id. 1203); individual student financial assistance programs (20 U.S.C. 1070b) id. 1987aa; id. 1070c); individual higher and continuing education programs (20 U.S.C. 1070d; id. 1070e1; id. 20 U.S.C. 1221e-1(b)(2); id. 20 U.S.C. 1133; id. 1121; id. 1130; id. 1134d; id. 1134; id. 1134L; id. 1134n; id. 1135a-3); libraries and learning resources (20 U.S.C. 355e; id. 1022-24; id. 1031-34; id. 1041-46).

APPENDIX B

Other general aid programs include certain assistance to new community colleges under the Fund for the Improvement of Postsecondary Education program (20 U.S.C. 1135a-2) and aid to land grant colleges (7 U.S.C. 321-2a).

DOJ-1983-05