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AUTHOR Reynolds, Wm. Bradford
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ABSTRACT

H.R. 5490 (98th Congress, Second Session) has been offered as an answer to the Supreme Court's ruling in "Grove City College v. Bell" (1984) that Title IX's sex discrimination prohibitions are program-specific, not institution-specific. It would also amend three other statutes prohibiting discrimination in Federally funded programs on grounds of race, age, or handicap. H.R. 5490, however, goes well beyond its openly-stated purpose. The most troubling ambiguities and complexities in the proposed language are the following: (1) the definition of "recipient" of Federal financial assistance recognizes few limits; it is so broad that, for example, if a State received a Federal block grant for educational purposes, all political subdivisions of the State would likely be brought under the Federal Government's civil rights oversight responsibilities; (2) the existing enforcement options of the four statutes would be considerably expanded so that, for example, a worthwhile program operated in a nondiscriminatory manner could be terminated because the Federal funds going to it provide "support" for another, nonfunded, discriminatory program; and (3) administration would be a nightmare, as H.R. 5490 gives all funding agencies statutory responsibility to regulate all the programs, activities, and subunits of a recipient; the law would effectively remove existing boundaries of agency jurisdiction to conduct compliance reviews and complaint investigations and impose regulatory requirements. (CMG)

Department of Justice

TESTIMONY

OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE

HOUSE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

AND

HOUSE COMMITTEE ON EDUCATION AND LABOR

CONCERNING

H.R. 5490 - "CIVIL RIGHTS ACT OF 1984"

May 22, 1984

Mr. Chairman and Members of the Judiciary and the Education and Labor Committees, I welcome this opportunity to appear before you today to present the views of the Department of Justice on H.R. 5490, the "Civil Rights Act of 1984."

Introductory Remarks

Let me preface my remarks on the proposed legislation by stating first my personal intolerance -- and the abiding intolerance of the President, the Vice-President, the Attorney General and every other member of this Administration -- of discriminatory conduct, in whatever form and however manifested, against any person on account of race, color, sex, national origin, handicap, religion or age. The nondiscrimination principle -- embodied in the ideal of a Nation blind to color and gender differences -- is at the center of America's historic struggle for civil rights. Accordingly, ours has been a profound and unwavering commitment to ensuring every citizen an equal opportunity to compete fairly for the benefits our Nation has to offer -- no matter how he or she might be grouped by reason of personal characteristics having no bearing on individual talent or worth. And, whenever discrimination interferes with that legal and moral command -- whether it be viewed by others as benign or pernicious -- the Administration has not hesitated to bring the full force of the law down on the discriminator.

There is another principle that this Administration has been every bit as vigilant in protecting, the principle of Federalism that is at the foundation of our Nation's dedication to the ideals of self-government and individual freedom. We have, therefore, resisted unnecessary and overly intrusive expansion of federal power, particularly when the federal intrusion unduly impedes state and local governments' efforts to deal effectively with regional and local problems that most directly affect citizenry at the state and local levels.

H.R. 5490, as currently drafted, poses a tension -- in my view, an unnecessary tension -- between these two important principles of equal opportunity and limited federal involvement in state and local affairs. That, in itself, is not remarkable, since it has always been the case that Federal laws directed at protecting the civil rights of all Americans necessarily intrude on the domain of State and local law enforcement. The Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, the Education Amendments of 1972, the Rehabilitation Act of 1973, to mention but a few, along with the various amendments to each of these statutes, bring into focus the tension I have mentioned. Heretofore, however, Congress has undertaken -- through thorough and extensive deliberations, comprehensive hearings, open and

rigorous floor debate, and the amendment process -- to insure that the Federal role in the civil rights arena is as comprehensive as necessary to satisfy the need (based on congressional findings) for strong Federal protections against discrimination (i.e., the Voting Rights Act of 1965), but not so overly intrusive as to usurp unnecessarily legitimate State and local prerogatives (i.e., the Federal funding statutes that cover only those "programs or activities" receiving Federal financial assistance).

We would hope, and expect, that Congress would put "The Civil Rights Act of 1984" (H.R. 5490) through the same close scrutiny, and subject it to the same rigors of an open and freewheeling debate (in Committees and on the floor of the House and Senate) that has been the strength of past enactments of civil rights legislation. Let me explain why, in the Department of Justice's view, it is critically important that this process not be short-circuited.

The Grove City Decision

H.R. 5490 has been offered as a modest amendment of existing statutes, intended not to break new ground, but only to overturn the Supreme Court's recent decision in Grove City College v. Bell, 104 S.Ct. 1211 (1984), to the limited extent that the Court held Title IX of the Education Amendments of 1972 to be program-specific in its coverage.

Title IX, as you know, bars discrimination on account of sex, in any education "program or activity" receiving Federal financial assistance. The Supreme Court in Grove City ruled that a college which enrolled students receiving Basic Educational Opportunity Grants ("Pell Grants") was subject to Title IX coverage, but that the prohibition against sex discrimination applied, not to the college as a whole, but only to the federally funded program at the college -- in this instance, the student aid program.

Much has been said since Grove City about the Court's so-called "new interpretation" of Title IX, and considerable impetus for the current congressional interest in amending that statute comes from an assumption that the Court's pronouncement of Title IX as program-specific legislation altered the state of the law.

Simply to set the record straight, I would point out that the Court's "programmatic" reading of Title IX represents no change in the law. While some Federal agencies had previously pursued a more expansive reading of the statute -- one contemplating institution-wide coverage of Title IX -- the fact is that, before Grove City, every court of appeals except the Third Circuit in the Grove City case itself had construed Title IX to be program-specific in coverage. 1/ Indeed, as to the parallel Federal

1/ E.g., Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982), vacated and remanded, (cont'd)

funding statutes dealing with race discrimination (Title VI of the Civil Rights Act of 1964) 2/ and with handicap discrimination (Section 504 of the Rehabilitation Act of 1973), 3/ they, too, had consistently been interpreted by the Federal appellate courts as program-specific. Thus, testimony provided to these Committees regarding, for example, the dramatic strides made by women in college athletics since Title IX was enacted in 1972 should properly be evaluated with the clear understanding that those strides were made under a program-specific statute, understood as such and consistently so interpreted by the Federal courts.

The Supreme Court in Grove City simply directed the Third Circuit court of appeals -- which alone among federal appellate courts had construed Title IX to have institution-wide coverage -- to get in line with existing judicial authority in this area, including earlier Supreme Court precedent. 4/

1/ (cont'd)
52 U.S.L.W. 3700 (U.S. March 26, 1984) in light of Grove City College v. Bell, 104 S. Ct. 1211 (1984); Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Othen v. Ann Arbor School Board, 507 F. Supp. 1376 (E.D. Mich. 1982), aff'd 699 F.2d 309 (6th Cir. 1983).

2/ E.g., Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969).

3/ E.g., Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1980). See also Consolidated Rail Corp. v. Darrone, 52 U.S.L.W. 4301 (U.S. Feb. 28, 1984).

4/ North Haven Board of Education v. Bell, 456 U.S. 512 (1982).

Nonetheless, we agree with many Members of Congress that there are sound policy reasons for Congress to consider an amendment to Title IX that will change its programmatic coverage to institution-wide coverage. In fact, I was accurately reported as stating as much immediately following the Court's announcement of the Grove City decision. A bill currently pending in the House, H.R. 5011, introduced earlier by Congresswoman Schneider, would effectively accomplish this objective by making Title IX coverage apply to the educational institution as a whole in the event that any of its education programs or activities receive (directly or indirectly) Federal financial assistance. That is, in my view, the best way to accomplish the stated purpose of amending Title IX, and it is an approach that this Administration can fully support. Indeed, Congress might well wish to consider expanding H.R. 5011 so that its institution-wide coverage pertains to discrimination on account of race, age and handicap, as well as on account of sex.

The Approach of H.R. 5490

H.R. 5490 takes a far more expansive approach than the original Schneider bill, H.R. 5011. Thus, H.R. 5490 would amend not only Title IX, but also three other civil rights statutes prohibiting discrimination in federally-funded programs: Title VI of the Civil Rights Act of 1964 (race discrimination); Section

504 of the Rehabilitation Act of 1973 (handicap discrimination); and the Age Discrimination Act of 1975 (age discrimination). As a consequence, the education nexus that defined Title IX coverage is not an essential feature of the proposed amendment. Of much greater concern, however, is the bill's departure from the existing statutes' programmatic approach, a departure that sweeps much wider than the institution-wide formulation in H.R. 5011 and embraces a coverage formula tied to an expansive definition of "recipient" that recognizes few (if any) limits. In sum, the proposed amendment goes well beyond the articulated need for a change in the law that was voiced so often after Grove City.

If that is, indeed, the congressional desire, if it is Congress' intent to enact new legislation that significantly expands the current laws addressing Federal civil rights enforcement, that effort can be most constructively accomplished, we think, by openly acknowledging the more expansive purpose underlying H.R. 5490 and forthrightly describing its full reach -- which, by design, goes well beyond simply undoing the effects of Grove City. In this manner, the complexities, ambiguities and inconsistencies in the proposed language can be subjected to thorough review in both Houses and thus profit from the collective wisdom of the Congress. Let me briefly discuss some of the most troublesome concerns:

1. Definition of "Recipient." H.R. 5490 deletes the phrase "program or activity" from the existing statutes and substitutes in its place the word "recipient." Thus, the four statutes would prohibit discrimination "by any recipient of" Federal financial assistance, not just discrimination within a recipient's federally funded programs or activities.

The bill includes a definition of "recipient" that the sponsors claim is "drawn from" existing federal regulatory definitions of that term under Title VI, Title IX and Section 504. That claim is partially correct, although a "recipient," as used in the existing regulatory scheme, is subject to coverage only as to its funded "programs or activities;" by contrast, under H.R. 5490, a "recipient" is to be covered in its entirety. Beyond that, it should be pointed out that the bill's definition of "recipient" goes farther than any of the present regulatory definitions, adding at the end the new clause: "or which receives support from the extension of federal financial assistance to any of its subunits." Thus, the bill's definition, in its entirety reads:

> the term 'recipient' means --
>
> > (1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

> (2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,
>
> to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

There is, admittedly, ample room for debate as to the exact breadth of this language. No definition of "receives support" is included in the bill and, thus far, statements by the sponsors and by witnesses at these hearings have provided little guidance as to the true legislative intent.

At a minimum, it seems clear that the term "recipient" is at least broad enough to insure coverage of an educational institution where federal funds are provided to one or more of its programs or activities, and thus the Supreme Court's programmatic interpretation of Title IX in Grove City would be overturned. It appears, however, that the definition of recipient would also reach all campuses of a multi-campus university (i.e., University of California) if any federal funds went to just one campus, or to students (through a Pell Grant) enrolled at only one college campus. Also, federal funds going to an undergraduate program would, under H.R. 5490, seemingly include all graduate programs within Title IX coverage, even though there was no federal financial assistance at the graduate level.

Less clear is the intended scope of coverage under H.R. 5490 with respect to a college or university's commercial property. Rental property occupied by students or faculty would seem to be covered. But, also within reach of the broad recipient definition could well be university housing space rented to persons who are neither faculty nor students, or, for that matter, other commercial activities not associated with education, so long as it can be maintained that the non-educational enterprise "receives support" from the college or university that is in some aspect extended Federal financial assistance. Such an interpretation not only brings into play Title IX, but also Title VI, the Age Discrimination Act, and Section 504. Thus, for example, the regulatory requirement to make facilities accessible to handicapped individuals would, under H.R. 5490, apparently apply to the non-educational ventures of a university as well as to those associated with its educational activities.

Nor does that necessarily define the outer limits of coverage. As H.R. 5490 is written, when Federal financial assistance is extended to a "subunit" (not defined) of a larger "entity" (not defined), the larger entity itself -- whether it be public or private -- can be viewed as the "recipient" if it is deemed to have "receive[d] support from" (not defined) the federal funds going to the subunit. Thus, if a federal agency extends federal assistance to a State university system, all other State departments or agencies -- whether or not they are

educational or perform an education service -- would presumably be brought within the coverage of the four statutes because the State "receives support" from the Federal assistance to the university system. The clear contemplation appears to be that this "trickle up" theory of coverage will permit -- indeed perhaps require -- Federal agencies to investigate claims of discrimination against a nonfunded component of State government if some other component is funded.

For example, if a county water department receives a grant from the Environmental Protection Agency (EPA) to study the county's sewer needs, H.R. 5490 would appear to provide that all of the county's operations are subject to all four civil rights statutes since the federal financial assistance can be said to give "support" to the county. Should EPA receive a complaint alleging discrimination in part of the county's operations that received no separate federal funds -- e.g., the county's road maintenance -- under the bill, EPA would presumably have the responsibility to deal with the allegation of discrimination, even though that agency has no knowledge or expertise in this area (it would fall within the province of the Department of Transportation).

There is, as well, a "trickle down" theory of coverage under the proposed "recipient" definition. If the large entity receives Federal financial assistance, all subunits

are swept within the coverage provisions -- whether funded or not and whether or not they "receive support" from the funding. Thus, a federal block grant to the State for educational purposes would likely bring all political subdivisions of the State under the civil rights oversight responsibilities of the Federal government. Since there is no state that can claim it operates entirely free from Federal financial assistance, the extent of Federal intrusiveness into State and local affairs under H.R. 5490 seems to be virtually complete. And, both the "trickle up" and "trickle down" theories apply with equal force to private commercial ventures and enterprises.

Moreover, all successors and assignees or transferees of a "recipient" become, under H.R. 5490, recipients in their own right. Thus, the bill could be construed so that federal food stamp programs would subject participating supermarkets and local grocery stores to federal civil rights compliance reviews and complaint investigations. Pharmacies and drug stores that participate in medicare/medicaid programs could also be "recipients," as could the "transferee" of an individual's social security check who, upon acceptance of such payment, would have (albeit unwittingly) signed an open invitation to federal enforcers to enter and investigate. While there have been pronouncements by some members of Congress on the Senate side that the amendments are not intended to have such scope, the bill's language fails

to preclude so broad a reading. Indeed, the express exclusion from coverage afforded by the existing regulations to "ultimate beneficiaries" of federal aid (28 C.F.R. § 42.102(f)) was not carried over in the statutory definition of "recipient," and thus the reach of the statute that I have suggested seems likely.

2. Enforcement Provisions. In addition to expanding the substantive coverage of the nondiscrimination funding statutes, H.R. 5490 also substantially alters -- albeit again without any degree of clarity or precision -- the standards and methods of enforcing these statutes.

The bill would retain the existing enforcement options for the four statutes: Federal agencies would enforce either by fund termination by the particular Federal funding agency or by referral to the Department of Justice for litigation ("any other means authorized by law"); private parties would continue to have a private right of action. The scope of these enforcement mechanisms is measurably expanded, however.

As to the fund termination provisions, H.R. 5490 replaces the current "pinpoint" language -- which limits fund termination to the particular program that has been discriminatorily conducted -- with new language providing for termination of "the particular assistance which supports" the discrimination (emphasis added). The ambiguity introduced by the "supports" phrase opens the way for a possible interpretation of the four statutes

that would permit fund termination of a worthwhile and needy program which has never been operated in a discriminatory manner because the federal funds going to it provide "support" for another nonfunded program involved in unlawful discrimination. The new termination provision also admits of the argument that any federal assistance which goes to the entity as a whole necessarily "supports" the discrimination of the component parts and is thus invariably vulnerable to fund cutoff.

This broad potential for eliminating federal assistance programs would severely undermine the original intent of the program-specific limitation in Title VI, which "was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices." Board of Public Instruction v. Finch, 414 F.2d 1068, 1075 (5th Cir. 1969) (emphasis by the court). Nor does this broad interpretation appear to be consistent with the overall context of the "supports" phrase in the bill itself, the focus of which is ostensibly on limiting, rather than expanding, the scope of funding termination as a sanction for noncompliance. Nevertheless, the bill does not specify in what respect a federal grant to one entity could be deemed to "support" discrimination committed by related entities and consequently implicate the vicarious termination requirement.

It has been stated that such a broad construction of the bill's new language was never anticipated. If, however, Congress truly intends, as some profess, to retain the "pinpoint" approach, the current language of the four statutes unambiguously requires the more modest fund termination remedy and there would appear to be no good reason to alter this formulation.

The alternate enforcement capability through litigation, which is available both to the Government and to private litigants, is also expanded by H.R. 5490. Unlike the existing statutes -- where the Federal government's authority to proceed in court (and a private litigant's jurisdiction in court) is no more extensive than its authority to proceed in fund termination proceedings (North Haven Board of Education v. Bell, supra) -- H.R. 5490 disregards this limitation, providing broader judicial enforcement capabilities than are available administratively. If a federal agency seeks to enforce through fund termination, it can, at most, under H.R. 5490, reach only those practices that are supported by federal funds. Yet, on referral of the same matter to the Department of Justice for litigation (or if a private litigant is in court by way of private right of action), the bill contemplates that all the activities of a recipient, its subunits, subdivisions, instrumentalities and transferees, are reachable by the court -- even when there is no conceivable link between the violation and the

federally funded activity. Thus, the Department of Justice (and private litigants) can seek to enjoin activity that plainly would not be subject to fund cutoff by the funding agency. The proliferation of lawsuits that will undoubtedly come from passage of such legislation cannot be overstated, and should prompt some consideration by Congress whether so open-ended an invitation to private attorneys general to add measurably to our already overcrowded Federal court dockets will ultimately enhance or impede civil rights enforcement, as so expanded by H.R. 5490.

3. Administrative Concerns. Nor can one overlook the serious administrative complexities that H.R. 5490 presents to the Federal agencies. The testimony last week of Dr. George Roche, President of Hillsdale College, captures the dimension of the problem with this apt description of the bill's effect (Roche Testimony, at p.4):

> Schools and colleges, hospitals and clinics, agencies of state and local government, large corporations and the corner grocery store, all would be subjected to vague anti-discrimination fishing expeditions by federal enforcement officials operating in a climate of perpetual suspicion and often without clear jurisdictional boundary even between one federal enforcement office and the next.

Agency regulations and paperwork requirements imposed under the four existing civil rights statutes are currently onerous in many respects. H.R. 5490, which would give all funding agencies authority -- indeed, the statutory responsibility

-- to regulate all the programs, activities, and subunits of a recipient, will remove existing boundaries of agency jurisdiction to conduct compliance reviews and complaint investigations and impose regulatory requirements. The result, particularly for universities and state and local governments that typically receive funding from many agencies, would likely be multiple compliance reviews as well as multiple reporting and other regulatory requirements. Complainants could file with several agencies, resulting in duplication of effort and inefficiency in the operation of federal civil rights enforcement. Further, because agencies would be statutorily responsible for the activities of its federally funded and unfunded components, agency expertise in the operation of programs and activities that they do fund would no longer promote the avoidance of inappropriate requirements.

There is no procedure contemplated by the bill for interagency referrals that might serve to alleviate the concern over inexpert or duplicative agency complaint investigations. Nor is it clear, even under some agency referral systems, how the fund termination provision would operate if the discriminatory activity existed in a nonfunded component, as investigated by a referral agency, and there developed a disagreement as to whether the federal funds "supported noncompliance." No attention appears to have been given to this set of complexities by the draftsmen of H.R. 5490.

Closing Remarks

The foregoing observations are intended only to highlight some of the existing difficulties with the bill as drafted. If the aim of Congress is to reshape Federal civil rights enforcement so as to assign to the Federal government pervasive oversight responsibility in the public and private sectors with respect to discrimination on account of race, sex, age and handicap, such a legislative undertaking should be carefully considered, fully debated, and cautiously constructed. There is, at present, nowhere near the Federal involvement in State and local affairs that will be required under H.R. 5490. Nor can it honestly be maintained that legislation designed to overturn Grove City by making Title IX coverage -- even if expanded to include race, age and handicap -- institution-wide warrants such intrusive Federal activity.

While Congress may well conclude that such legislation is in the Nation's best interest, it should do so fully cognizant (1) that the additional costs of Federal enforcement under a bill as comprehensive as H.R. 5490 can be staggering; (2) that the current regulatory regime is inadequate to the task and will necessarily need to be revised and likely expanded; (3) that the paperwork requirements can only increase (and probably dramatically); (4) that with new legislation so dramatically different from the existing statutes invariably comes considerable litigation, leaving the law unsettled for some years; and (5) that

whatever shape the Federal funding statutes might ultimately take, this body must, for constitutional purposes, define with precision what conditions it is imposing on the grant of federal funds to states so that, as "recipients," states "can knowingly decide whether or not to accept those funds" as so conditioned. Pennhurst State School v. Halderman, 451 U.S. 1, 24 (1981).

It is therefore important to remove ambiguities, to tailor H.R. 5490 to its stated purpose -- whether that be to overturn Grove City or to expand dramatically the existing civil rights enforcement mechanism -- and to carefully craft the proposed bill with full attention to the complexities of the undertaking.

The Department of Justice's review of the foreseeable effects of H.R. 5490 leads us to conclude that the sweeping scope of the language proposed in the bill provides a much broader application than simple reversal of the Grove City decision -- broader, indeed, than extending institution-wide coverage under Title IX to race, age and handicap discrimination as well. We are concerned that the unsettling ambiguities in the bill that I have discussed have not been fully considered by these Committees or adequately addressed in introductory statements of the bill's sponsors. The perhaps unintended ramifications of the bill are certain, at best, to create

confusion in recipients, agencies, and courts. At worst, they may include unwarranted interference with important state prerogatives and even lead to adverse judicial decisions as to their enforceability.

The Department of Justice stands ready to assist the Judiciary and Education and Labor Committees in formulating a bill more closely aligned with Congress' stated objective. If the purpose is simply to overturn the Grove City "programmatic" interpretation of Title IX, we would suggest that a bill more closely tailored to achieving that result is H.R. 5011, introduced by Congresswoman Schneider and cosponsored by some 141 Members of the House. If a broader purpose is involved, such as insuring that Title IX's institution-wide coverage protects as well against race, age and handicap discrimination, we are prepared to work with Congress to accomplish the desired end in precise, clear terms that leave no room for speculation as to the real thrust of the legislative effort.

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

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