

# LEADERSHIP CONFERENCE EDUCATION FUND

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### IN BRIEF...

Opposition continues to mount to Attorney General Meese's campaign to gut the Executive Order on affirmative action. But the issue is not yet resolved (pages 1 - 3). A number of Jewish and civil rights organizations -- which have differing views on the use of race or sex conscious numerical measures -- uniformly support the numerical goal remedy imposed by the lower court in an affirmative action case before the Supreme Court (pages 3 - 4). Sweeping impact of Grove City decision made evident by Education Department memorandum (pages 4 -5). New fair housing legislation introduced to strengthen the enforcement provisions of the Fair Housing Act (page 5 - 7). House Committee report levels withering criticism against the civil rights performance of the Department of Education (pages 7 - 12). Appellate Court upholds decision allowing the Norfolk, Va. school district to curtail its desegregation plan in a ruling that could affect school desegregation nationwide (pages 12 - 14). Justice Department is supporting the position of employers in two precedent-setting sex discrimination cases before the Supreme Court (pages 14 - 16).

### THE STATUS OF THE EXECUTIVE ORDER ON AFFIRMATIVE ACTION

Opposition by business leaders, local governments, unions, civil rights and religious groups continues to mount against Attorney General Edwin Meese's campaign to gut the Executive Order on affirmative action. But the issue is not yet resolved. Since last August the Department of Justice has been seeking to revise the Executive Order which requires the tens of thousands of employers awarded federal contracts to take positive steps, including establishing goals and timetables, to include qualified minorities and women in their workforce. Mr. Meese has proposed a revision of the Executive Order which would eliminate goals and timetables as a requirement. While a recast Meese draft says that businesses can adopt goals and timetables voluntarily, the proposal would not provide a legal basis for the use of such goals, and thus would expose employers who used them to lawsuits. Secretary of Labor William Brock has been waging a valiant fight to retain the Executive Order's goals and timetables requirement.

Reportedly, Meese, Brock, and White House Chief of Staff Donald T. Regan have met on several occasions to attempt to reach a compromise on the issue. Mr. Regan has insisted that a consensus recommendation be forwarded to the President. Meese and Brock have failed to reach an agreement in these meetings, and a White House official was quoted as saying "I don't see anybody in this building pushing to get this issue onto the President's desk. I see Ed Meese pushing. I see Brad Reynolds pushing. But I don't see anybody here pushing" (New York Times, January 30, 1986, B9).

Mr. Meese, and Assistant Attorney General for Civil Rights Wm. Bradford Reynolds have insisted that the goals and timetables requirement has been abused by the Office for Federal Contract Compliance Programs, which enforces the Executive Order, and has been enforced as rigid quotas. This assertion is made although the regulations implementing the order specifically state that "Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable..." Joseph N. Cooper, Director of OFCCP, has responded that the 1965 order enforced by his office specifically forbids the use of quotas, and that he would come down hard on any employer found doing otherwise. "Nobody's ever put any cases before me that involve quotas, I'm still waiting. I don't see them" (Wash. Post, Jan. 23, 1986, A7). The number of actual debarments of companies for failure to comply with the Executive Order suggests that overzealous enforcement of the order is not a reality: During the Carter administration there were thirteen debarments, and there have been two during the current administration. Moreover, several Department of Labor studies published during the Reagan Administration have demonstrated conclusively that goals and timetables have not led to quotas. For example, The Impact of Affirmative Action, prepared by Jonathan S. Leonard under contract with the Department of Labor, established that goals and timetables have a measurable and significant impact in improving the employment of minorities and women; that the goals established by contractors were not being met with the rigidity of quotas; and that debarment actions or other sanctions were not being imposed because the goals were not being met.

Supporters of the Executive Order say if there are isolated incidents of someone using quotas, the Administration simply has to enforce the Order. There is no reason to change the Order.

In January, the National Black Republican Council (the official auxiliary of the Republican National Committee) passed a resolution supporting the existing Executive Order, and opposing the revisions proposed by the Department of Justice. Similarly, the Council of 100, an independent organization of Black Republicans, in a letter to the President expressed support for the current order.

Mr. President, the proposed change in the Executive Order on Affirmative Action being pushed by some members of your administration is a change that will be harmful and destructive to the interest of Council of 100 members, American Blacks and the future of our country. We fear that the proposed change will be the trigger that aborts the development of Black businesses and employment and could unleash another era of discrimination against vulnerable Americans.

#### Consequences of a Decision to Weaken the Executive Order

Supporters of the Executive Order assert that if the President agrees to the Meese proposal, there will be a Bob Jones type political firestorm that would politically harm President Reagan and congressional Republicans, many of whom are up for reelection this year. Further, Republican and Democratic Senators and Representatives have already drafted legislation to codify the existing Executive Order, if it becomes necessary. An acrimonious legislative battle between the Administration and Congress could seriously disrupt an already crowded 1986 legislative calendar and endanger current legislative priorities. Representative Hamilton Fish (R-NY), the ranking minority member of the Judiciary Committee in a letter to William Brock wrote:

If the Executive Order is weakened, please know that I and many other

Congressional Republicans will lead the charge to codify the present law on goals and timetables. Hopefully, especially in light of an already crowded Congressional calendar and many legislative priorities, including the President's, we will not have to pursue such a course of action. But, if the order is undermined, we will have no choice.

Modifying the Order would also result in a spate of lawsuits, as presently compliance with the Executive Order helps protect companies from lengthy and costly Title VII employment discrimination lawsuits. The abandonment of goals and timetables could also lead to more judicially-imposed quotas. And, companies operating in more than one state could become subject to as many as 50 different sets of state and local affirmative action regulations, a very costly and confusing legal morass.

### Prognosis

While it is extraordinary that supporters of the Executive Order have been able to stave off the Meese Order for over seven months, no one should assume that the battle is over. Despite the overwhelming bipartisan consensus on behalf of the Executive Order, including 69 Senators, the Republican leaders of the House and the Senate, most key business leaders, a substantial number of Reagan Cabinet members, and over 200 civil rights organizations, Mr. Meese may still circumvent the established decision-making process, meet with the President privately and convince him to sign the revised Executive Order which would effectively gut the program.

If when you receive the MONITOR, a decision is still pending, write or call the President to express your support for the Executive Order (202/456-1414). Also, contact Secretary of Labor William Brock and thank him for his efforts (202/523-8271).

### JEWISH & CIVIL RIGHTS GROUPS SUPPORT AFFIRMATIVE ACTION IN CASE BEFORE THE SUPREME COURT

A number of Jewish and civil rights organizations including the NAACP Legal Defense and Educational Fund, Inc., the American Jewish Congress, the American Jewish Committee, the NAACP, the Mexican American Legal Defense Fund, the Puerto Rican Legal Defense Fund, and the Asian American Legal Defense Fund have filed a friend of the court brief in Local 28, Sheet Metal Workers, 753 F.2d 1172 (2nd. Cir.), cert. granted, 54 U.S.L.W. 3191 (U.S. Oct. 7, 1985)(No. 84-1656). Significant is the fact that while these organizations have differing views on the use of race or sex-conscious numerical measures, they uniformly support the race-conscious remedy imposed by the court in this case -- a goal of 29 percent nonwhite union members by 1987.

### Background

The case involves a long-running effort to get a sheet metal workers' local to comply with court orders requiring an end to practices which excluded and discriminated against black workers. The local, its apprenticeship committee, and the contractors' association, appealed from several district court orders which found the local in contempt, imposed both compensatory and coercive fines, and adopted an amended affirmative action plan which included a nonwhite union membership goal of 29 percent to be achieved by July 31, 1987. The court found the union had engaged in a pattern and practice of racial discrimination, and a campaign of evasion and resistance to the court orders (See the December 1985 MONITOR).

The Brief

The amicus brief states that the organizations object "to the attempt of the Solicitor General to label as 'quotas' any and all affirmative numerical remedies, regardless of whether those remedies may be essential to eliminate and correct discrimination ..." Further, the amici argue that "for almost twenty years federal district judges responsible for framing decrees to enforce Title VII have concluded that the use of numerical remedies was necessary to redress, prevent or deter discrimination under the circumstances of the specific cases before them ... To hold, as petitioners urge, that Title VII absolutely forbids such remedies, would raise serious questions about the enforceability of Title VII itself."

The Department of Justice sued the union in 1971 and the Equal Employment Opportunity Commission replaced the DOJ as counsel for the U.S. shortly thereafter. EEOC consistently supported the goal requirement until December 1985 when the agency changed its position and signed onto the Department of Justice's brief opposing the numerical remedy. This is another example of this Administration attempting to reverse the civil rights policies of previous administrations, Republican and Democratic. It has been the consistent policy of the EEOC to use affirmative action goals, and the EEOC presently maintains Guidelines which encourage employers to use affirmative action goals.

The case was argued along with another affirmative action case, Vanguards v. City of Cleveland, 753 F.2d 479 (6th Cir.), cert. granted, 54 U.S.L.W. 3191 (U.S. Oct. 7, 1985) (No. 84-1999) on February 25, 1986. An opinion is expected by the summer.

SWEEPING IMPACT OF GROVE CITY DECISION MADE EVIDENT BY EDUCATION DEPARTMENT MEMORANDUM

The potentially sweeping impact of the Grove City decision was made evident by a Department of Education memorandum that recently surfaced. In Grove City v. Bell, \_\_\_ U.S. \_\_\_, 104 S.Ct. 1211 (1984), the Supreme Court found that Title IX's prohibition against sex discrimination extended only to the specific program or activity receiving the funds, and not to the entire recipient institution or entity. Further, since all the civil rights statutes relating to federal funds use the same language to describe coverage, the decision applies as well to the civil rights statutes prohibiting discrimination based on race, disability and age. In a recent development, Assistant Secretary for Civil Rights Harry Singleton on December 30, 1985, his final day in office, issued a policy statement requiring that OCR follow-up on discrimination complaints only when the alleged discrimination occurred in the individual project or class that receives federal funds. Responding to a decision by the Civil Rights Reviewing Authority in In the Matter of Pickens County School District, Docket No. 84-IX-11 (See December 1985 MONITOR), the Secretary's memorandum states that "Elementary and secondary education is not, for purposes of analyzing jurisdiction under Chapter 2 [Block Grant Education Program], a single function." Thus, if block grant funds are used to teach metric education, only the classroom in which the program is taught is covered by the civil rights statutes. Phyllis McClure of the NAACP Legal Defense Fund, responded: "It trivializes civil rights enforcement because they [federal officials] now have to trace every single dollar down to some infinitesimally small unit just to see if they have jurisdiction" (Washington Post, Feb. 28, 1986, A2). Phil Kiko, Attorney-Adviser with OCR, stated that the memorandum has established agency-wide policy with regard to block grant funds. While Department officials indicated that they were simply following

the Grove City decision as interpreted by the Reviewing Authority, the Assistant Secretary could have appealed the decision to the Secretary of Education.

Such limited enforcement of the civil rights statutes will continue until the Civil Rights Restoration Act is passed. Accordingly, the Leadership Conference on Civil Rights has renewed an intensive grassroots/media/lobbying campaign to gain passage of the Civil Rights Restoration Act in the House immediately.

Amendments to Title IX regarding abortion and expansion of the religious tenet exception continue to bog down the bill. Sponsors of the bill and the Leadership Conference remain insistent that the only purpose of the measure is to restore the coverage of our basic civil rights statutes and that all amendments which would change substantive law must be opposed. They have stated that restoration is not only the sole purpose of the measure, but the glue that holds the bill together. Supporters of the bill fear that if the restoration principle is undermined, the bill will unravel and die.

Examples of complaints closed by OCR because of the Grove City decision follow.

On January 25, 1985, Ms. K in a complaint filed with the Department of Education alleged that M.T.D. Business College, San Francisco, California discriminated against her on the basis of race in providing student services, and when it dismissed her from the program. The school receives federal monies through student financial aid, e.g., Pell grants which provide financial aid to low-income students. On March 6, 1985 the Department of Education advised Ms. K that while the Grove City decision provided the Department with jurisdiction to investigate financial aid and admissions issues when institutions receive federal student assistance aid, it did not provide jurisdiction to investigate the issues involved in her complaint i.e., grading, make up tests, and dismissal. Accordingly, the Department closed the case without investigating the allegations (Case File No. 09-85-2031).

Ms. C filed a complaint with the Department of Education on March 25, 1985 alleging discrimination on the basis of handicap status 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. The staff of Menninger offered to carry her to the workshop, but she refused as she found this demeaning and unprofessional. The Department found that while the Foundation received federal monies from ED, neither the Voluntary Controls Program nor the Biofeedback Workshop was part of the funded program. Lacking jurisdiction to investigate because of the Grove City decision, ED closed the case (Case File No. 07-85-4014).

#### FAIR HOUSING LEGISLATION INTRODUCED IN CONGRESS

Senators Charles McC. Mathias, Jr. (R-MD) and Edward M. Kennedy (D-MA) have introduced new legislation to strengthen the enforcement provisions of the Fair Housing Act (Title VIII of the Civil Rights Act of 1968), and to broaden the protected classes to include disabled persons and families with children. The bill represents a renewal of the longstanding effort to strengthen fair housing enforcement. A companion bill has been introduced in the House by

Representatives Hamilton Fish, Jr. (R-NY), and Don Edwards (D-CA).

### The Need for the amendments

The Mathias-Kennedy bill is a response to widespread evidence that families who encounter racial discrimination in the housing market do not have an effective remedy. While the Fair Housing Law enacted by Congress in April 1968 prohibits discrimination in the rental, sale, marketing, and financing of the Nation's housing, public and private, the only effective means of enforcement is through the courts which is a long and costly process. The Department of Housing and Urban Development has primary responsibility for the enforcement of the Fair Housing Act, but "is significantly hampered in its power to require compliance with Title VIII because if it finds discrimination, it can use only informal methods of conference, conciliation, and persuasion to bring about compliance" (See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974 Volume II To Provide...For Fair Housing (December 1974)). Failing in these efforts, HUD's only recourse is to refer the case to the DOJ for litigation. HUD cannot issue cease and desist orders and it cannot initiate litigation against parties it determines are practicing discrimination. Under the Act, the Department of Justice is authorized "to bring suit against any person or group of persons believed to be engaged in a pattern or practice of housing discrimination" (To Provide...For Fair Housing). But the law does not authorize the Department to bring suit to redress an isolated instance of discrimination. And, fair housing advocates have been critical of the Department of Justice's enforcement policies during the Reagan Administration.

...[T]he Department of Justice, the one Government agency that has true enforcement powers -- the power to institute litigation -- has so curtailed its activities that it is no longer a major factor in fair housing enforcement. Indeed, for more than 1 year after the Reagan administration took office, the Department of Justice did not file a single fair housing law suit. In the nearly 3 years since the Reagan administration assumed office, Justice has filed a total of six fair housing law suits, only one of which can be said to be of any potential importance measured by the standard of either establishing a significant legal precedent or bringing about some kind of institutional reform (Martin E. Sloane, "Federal Housing Policy and Equal Opportunity," U.S. Commission on Civil Rights, A Sheltered Crisis: The State of Fair Housing in the Eighties (September 1983)).

The Fair Housing Act of 1986 would strengthen HUD's enforcement mechanism by providing an administrative remedy that proponents say is simple and inexpensive. If HUD determines that a complaint of housing discrimination is valid and is unable to resolve the complaint through conciliation, the agency will file a charge on behalf of the complainant with an administrative law judge. The complainant has the right to intervene in the hearing, and the decision of the administrative law judge may be appealed to the federal court of appeals for the circuit in which the discriminatory practice is alleged to have occurred. If discrimination is found by the administrative law judge, equitable and declaratory relief (including orders requiring the respondent to sell or rent the house to the complainant) as well as compensatory and punitive damages may be awarded. Similar types of administrative enforcement procedures are used by 28 other federal agencies and departments. The bill also provides for an application for an order to hold a house off the market while the case is being decided.

Introduction of the bill comes at a time when "the U.S. Department of Housing and Urban Development estimates that there are more than two million instances of racial housing discrimination each year. Only 4,500 complaints are ever filed with HUD or similar state and local agencies because of the lack of confidence citizens have in the existing conciliation process." Only 20 percent of the complaints that are filed are successfully resolved.

#### Other reforms

The bill would add "familial status" as a protected class to protect families with children from discrimination. A study prepared for HUD "showed that in 1980, 76 percent of the rental apartment units in the country had exclusionary policies to keep out families with children. Twenty-six percent of all rental units totally excluded children and another 50 percent restricted the number of children or the age or sex of children in a unit or imposed similar sorts of restrictions which limited occupancy by families with children (Carol Golubock, "Housing Discrimination Against Families with Children: A Growing Problem of Exclusionary Practices," A Sheltered Crisis). Studies have also shown a greater prevalence of discrimination in some areas of the country where the housing market is tight, and in newly constructed rental units. For example, a study of five major cities in California found exclusion rates ranging from 50 to 71 percent except in San Francisco which prohibits familial discrimination. In Dallas newly constructed rental units excluded children 85 percent of the time, while 51 percent of older apartments had such policies. Moreover, such discrimination has a greater impact on women and minorities as "they are more likely to be renters and to have children in their care than are nonminorities and men."

The bill would also extend protection to disabled persons permitting "reasonable modifications to a rental apartment or house by a handicapped person, at his or her expense, in order to make access to the unit by that person or persons substantially equal." The expense must be borne by the renter, and if the landlord requests the renter "must return the unit to its original condition when he or she vacates." This provision may limit the housing stock of accessible units, and may pose too difficult a financial burden for many people with disabilities to meet. The Leadership Conference on Civil Rights' Housing Task Force plans to work with the Congress to assure that the final language of the bill addresses these issues. Senator Mathias in introducing the legislation noted that "with our continued emphasis on deinstitutionalization, more and more disabled persons ... will be seeking independent living in residential settings. Denial of housing to disabled persons will continue their dependency on family and institutional care at high dollar and social costs."

Similar legislation passed the House in 1980, but died in the Senate due to filibuster. Since then the outlook for passage of fair housing legislation has been dimmed by this Administration's opposition to the administrative law judge remedy. The Administration apparently favors an amendment to provide for magistrates to review cases. The Administration also opposes including families with children as a protected class. An Administration bill is to be introduced by Senator Dole as a courtesy to the Administration.

#### DEPARTMENT OF EDUCATION ENFORCEMENT FOUND LAX

The House Committee on Government Operations on December 30, 1985 issued a report levelling withering criticism against the civil rights performance of

the Department of Education. The report was approved by 28 members of the 39 member committee, including four Republicans, among them Frank Horton (R-NY), the ranking Republican member of the committee. Eleven members, all Republicans, issued separate views saying that the majority was overly critical and did not take due account of the difficulties of OCR's task and some of its achievements.

To the extent that the Committee's investigation and oversight hearings can assist OCR in the pursuit of its mission in the future, we can be supportive. However, in the case of this report, the Committee has gone to great lengths to paint a very bleak picture of enforcement activity at OCR... [N]oticeably absent from the report is any mention of the improved performance record OCR has achieved in recent years...

The report was based on investigatory hearings held by the House Subcommittee on Intergovernmental Relations and Human Resources, and a review of more than 75 cases investigated by OCR which involve race, sex, and handicap discrimination.

### Background

OCR has responsibility for enforcement of federal statutes which prohibit discrimination in all education programs and activities which receive federal funds: Title VI of the Civil Rights Act of 1964 (race, color, national origin), Title IX of the Education Amendments of 1972 (sex), Section 504 of the Rehabilitation Act of 1973 (handicap), and the Age Discrimination Act of 1975. These laws cover all State Education Agencies, 15,480 school districts, 3,300 colleges and universities, 10,000 proprietary institutions as well as institutions such as libraries and museums (see Committee Report).

OCR investigates charges of discrimination when individuals or groups file complaints with the Department. In Fiscal Year 1984, 1,928 such complaints were filed with OCR. OCR also initiates compliance reviews based upon information gained from surveys OCR conducts. Since 1966 OCR has collected public school enrollment data by race, and more recently by sex, disability and English language proficiency, through the Elementary and Secondary School Civil Rights Survey. In Fiscal Year 1984, 212 compliance reviews were conducted.

OCR must conduct its investigations within certain timeframes and follow procedures mandated by the U.S. District Court for the District of Columbia in the ongoing Adams case. Initiated by the NAACP Legal Defense Fund in 1970 to compel enforcement of Title VI, Adams now includes Title IX and Section 504. On March 11, 1983, the latest order in the case was issued strengthening the procedural and timeframe requirements. The Federal Government is seeking dismissal of the case, arguing in part that plaintiffs do not even have standing to challenge defendants' abdication of their civil rights enforcement responsibility. Standing is the legal requirement that a plaintiff suing must show that (s)he has sustained or is in immediate danger of sustaining a direct injury or harm to his or her interest.

When OCR determines that a violation of a civil rights law has occurred, it can seek to cutoff federal funds to the offending institution by bringing the case before an administrative law judge or it can refer the case to the Department of Justice to file suit against the institution.



The House Committee's Findings

OCR and the DOJ have failed to obtain complete enforcement remedies in cases where serious violations of law were found.

Between July 1981 and July 1985, OCR found 2,000 violations of law, but referred only 27 cases for a hearing before an administrative law judge. Thirteen of the 27 "administrative cases" have been closed. An additional 24 cases have been referred to the Department of Justice. Of these, sixteen are idle, five have been referred back to OCR, two were resolved through consent decrees, and a suit was filed in one case and is currently pending. It is notable that action was taken in 23 of the 27 "administrative cases," and 18 of the 24 "DOJ cases" only after the March 1983 Adams order set deadlines for securing compliance in pending cases.

The Dillon County School District #2, South Carolina case (#04-77-3005) is one of the most egregious examples of OCR's failure to pursue enforcement. The school district had historically operated a segregated system, and OCR had on three occasions between 1977 and 1982 found the system in violation of Title VI in its assignment of students to segregated classes based on "ability grouping." As late as February 1982 OCR "found that there were still a number of racially identifiable classes ... 64 of the total 231 classes in the district were racially identifiable (27.7 percent)." The case was referred to DOJ on June 23, 1983 and referred back to OCR by DOJ on May 24, 1984. Assistant Attorney General Bradford Reynolds in referring the case back to OCR wrote "we have concluded that no further action by this Department in this matter is warranted at this time." At the Subcommittee's second hearing on September 11, 1985, then Assistant Secretary for Civil Rights Harry M. Singleton testified that OCR had taken no further action although 15 months had passed since DOJ declined to take action in the case.

Similar conditions exist in three cases where OCR found valid claims of discrimination based upon sex, and referred the cases to DOJ. In all three cases DOJ "refused to bring suit on the grounds that there was only one identifiable victim and there was no pattern of discrimination." In the Dayton Ohio Public School case (#15-76-0070) a high school teacher filed a complaint with OCR alleging that she had been denied an administrative position due to her sex. In the Anna Jonesboro Community High School District #81 case (#04-78-0043), OCR had found a violation of Title IX in the demotion of a female administrator to a teaching position. A third case, Malcolm-King: Harlem College Extension (#02-83-2007), involved the "school's failure ... to renew the contract of a male counselor ... based on the counselor's sex."

OCR has not taken any action in these cases declined by DOJ, although the agency "is not absolved of its duty to enforce the law simply because the Department of Justice declined to act on the cases referred" (Committee Report).

The committee investigation also found that OCR had accepted settlements which "did not adequately address the issues presented by OCR." For example, OCR found the Petaluma, California school district in violation of Title IX because

...The District had maintained a pattern and practice of discrimination against women in consideration and appointment of administrators...[P]rior to 1976, only two of 39 administrators in the District were female and ... by 1982-83, the number of females had increased to only three. By

contrast, in 1981-82, approximately 32 percent of administrative positions in California schools were held by women. Buttressing the statistical data was evidence showing specific instances of District officials discouraging women from applying for positions for which they were qualified (including instances of stereotypic statements to women about their marital or parental status); examples of highly qualified women being denied even an interview for vacancies; preselection of males; departure from the District's identified procedures for evaluation of and selection from among applicants for vacancies; the District's adoption of criteria for selection after applications had been received; and the consistent use of highly subjective criteria to rate and select applicants.

The Petaluma school district eventually proposed a settlement. A key provision of the district's settlement sought to ensure that women were included in the job selection process. OCR found this provision, although proposed by the district, "overly complicated" and "unnecessary intrusion by OCR into the administration of the school district." The committee report states:

The committee finds the justification for softening the settlement insufficient. OCR had investigated the district, aggressively pressed for a voluntary settlement, and then began an administrative enforcement action to cut off all Federal funds to the district. Certainly, these actions would be intrusive, albeit legitimate and necessary for enforcing the civil rights laws. In comparison, a settlement proposed by the district itself hardly seems intrusive and, in fact, was a good faith attempt to correct illegal discrimination.

OCR ignored the internal findings of its Quality Assurance Staff, and instead of acting on the Service's recommendations, disbanded it.

The Quality Assurance Staff was established "to review investigations and policies to ensure that OCR operated properly, and that its actions were supportable by the civil rights laws and DOEd's own regulations." The last major task of QAS was a review of 116 cases closed by the regional offices in May and June of 1983. The review found an error and defect rate of 28 percent, and a report was issued containing 11 recommendations for improving operations. The committee investigation found that QAS had raised "numerous serious and important concerns about the handling of OCR investigations." However, the Assistant Secretary for Civil Rights did not even respond to the findings and recommendations, and considered the group a nuisance. The committee report states:

...[H]is main reaction to the findings was to disband QAS, without replacing it with an organized system to monitor the internal workings of OCR. He appointed a task force, whose membership he could not recall and, which, after more than a year, had not issued any formal recommendations about quality assurance. Based on the evidence, the committee concludes that when Mr. Singleton received negative reports from QAS, he failed to examine them in accordance with good management practices.

OCR now relies on a "good faith" standard, rather than actual achievements, in measuring the success of desegregation plans.

In evaluating the success of States in eliminating their segregated dual systems of higher education, OCR will assess the "good faith" efforts of the States rather than the extent to which they have actually met the objectives

contained in the plans. The committee report states: "Based on past court decisions, it appears that the good faith standard does not adhere to the intent of Congress." Further, the report cites a Congressional Research Service legal analysis of the good faith standard as it applies to local school desegregation.

Based on a review of applicable Supreme Court precedent ... at least since the 1968 ruling in Green v. County School Board, the watchword of the Court's jurisprudence has been "effectiveness," and the measure of any plan's success is the degree to which it produces actual desegregation. This appears to be echoed in those lower court decisions which, in their determination of a school district's unitary status, have uniformly required that in addition to "good faith efforts," the actions of school officials pursuant to a plan "must actually achieve a school system clear of every residue of past official discrimination." Accordingly, to the extent that the revised DOJ guidelines seem to substitute a "good faith" test for a standard which measures unitary status in terms of actual progress towards desegregation goals, as set by administrative or court decree, they may be at odds with judicial practice under prevailing constitutional law. However, sufficient ambiguity exists in the area that any firm conclusions may have to await further judicial action.

The committee found that good faith efforts which were not successful in eliminating segregation were not sufficient to meet the requirements of the civil rights statutes.

Despite insufficient resources, OCR has not used all funds appropriated by Congress for the enforcement of federal civil rights laws.

The committee found that more than \$20 million appropriated by Congress for civil rights enforcement between FY 1980 and 1985 was either returned to the Treasury or spent on activities unrelated to OCR's civil rights responsibilities. The funds were not spent appropriately during a period when OCR's staff shortages prevented the office from effectively enforcing the Nation's civil rights laws.

#### Committee Recommendations

The Committee report recommends that OCR develop enforcement guidelines to determine which cases should be pursued administratively and which cases should be referred to the DOJ for suit. The guidelines should require that OCR and DOJ "consult and determine in a fixed period of time which cases should be referred to DOJ. Referring matters to DOJ that the Department does not consider worthy of enforcement is a pointless and inefficient exercise." Additionally, the committee recommended that guidelines be developed to ensure that settlements for the resolution of discrimination complaints "are in accord with civil rights laws and DOEEd regulations," and "that violations of law be corrected before any settlements are accepted." The report also recommends that OCR "not rely solely on the good faith standard in measuring the success of desegregation plans." The report states:

Good faith efforts to correct illegal discrimination which are unsuccessful do not satisfy the requirements of Title VI. The committee believes that if Title VI violations continue, and the vestiges of de jure segregation remain in an educational system, then the violations must be corrected, regardless of the good faith in which a given desegregation plan was

implemented. Desegregation efforts should not be discontinued based on good faith, but should end only when OCR finds that violations of Title VI no longer exist.

Interested persons should write to the House Subcommittee on Intergovernmental Relations and Human Resources, B372 Rayburn House Office Building, Washington, D.C. 20515, for a copy of the report: Investigation of Civil Rights Enforcement by the Office for Civil Rights at the Department of Education. After reviewing the report, you should feel free to share your comments with Representative Ted Weiss, Chair of the Subcommittee or Representative Jack Brooks, Chair of the Committee on Government Operations.

#### NORFOLK, VIRGINIA ALLOWED TO CURTAIL DESEGREGATION PLAN

On February 6, the 4th U.S. Circuit Court of Appeals, finding that 15 years after implementing a court-ordered school desegregation plan the system had eliminated all vestiges of segregation, upheld a district court ruling allowing the city of Norfolk to end the busing of elementary school children for desegregation purposes. The ruling allows the school board to implement its "neighborhood school plan" for 35 elementary schools, 10 of which will become "virtually all black." The Appeals Court stated "our holding is a limited one, applicable only to those school systems which have succeeded in eradicating all vestiges of de jure segregation. In those systems the school boards and not the federal courts will run the schools, absent a showing of an intent to discriminate." Despite the judges' efforts to narrow the decision, opponents and proponents of the decision alike suggested that the ruling could affect school desegregation nationwide.

#### Background

Historically, the Norfolk school board had operated a racially segregated public school system pursuant to state law. After the Brown decision, a group of black school children filed suit in 1956 to desegregate the system, and the Department of Justice intervened on the side of the black school children. In response to the Supreme Court's decision in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) in which a unanimous court approved a comprehensive desegregation holding that bus transportation is "a normal and accepted tool of educational policy," the Norfolk school system was ordered "to consider the use of all techniques for reassignment, including pairing or grouping of schools, noncontiguous attendance zones, restructuring of grade levels and the transportation of pupils" (Brewer v. School Board of City of Norfolk, Virginia, 456 F.2d 943 (1972)). Accordingly, in the 1971-72 school year, a school desegregation plan which included the pairing and clustering of schools and the busing of students was implemented. As a result of the plan, in that school year none of the 53 elementary schools was over 90 percent black, and only four were over 70 percent black. The case was dismissed by the district court in February 1975.

[A]ll issues in this action have been disposed of...[T]he board has satisfied its affirmative duty to desegregate, ... racial discrimination through official action has been eliminated...and the...system is now unitary.

Between 1971 and 1983 the student population decreased by 37 percent (21,290) with white students accounting for 90 percent of the decline (19,259). School desegregation accounted for the loss of between 6000 and 8000 white students,

and for the last five years the student population has held steady at approximately 35,000. By 1981, there were seven elementary schools over 70 percent black, and in 1983 the school board voted to end the busing of elementary school children for school desegregation purposes.

In response a suit was filed in May 1983 on behalf of black school children, alleging that the plan "would segregate a substantial percentage of Norfolk's black elementary school students into ten racially isolated schools in violation of the Fourteenth Amendment to the Constitution." The district court judge upheld the constitutionality of the plan and plaintiffs appealed. The Department of Justice filed an amicus curiae brief in the Fourth Circuit supporting the position of the School Board and the Fourth Circuit upheld the decision of the District Court. The School System has 35,375 students, of whom 59 percent are black. There are 20,000 elementary school students. Under the neighborhood school plan, ten elementary schools will have a black enrollment over 98 percent, and two will have a black enrollment over 70 percent. Two schools will have a white enrollment over 80 percent.

The appellate court found:

We agree with the district court that the evidence reveals that Norfolk's neighborhood school assignment plan is a reasonable attempt by the school board to keep as many white students in public education as possible and so achieve a stably integrated school system. It also represents an attempt to improve the quality of the school system by seeking a program to gain greater parental involvement. While the effect of the plan in creating several black schools is disquieting, that fact alone is not sufficient to prove discriminatory intent.

#### RESPONSE TO THE DECISION

Henry L. Marsh III, the primary attorney for the plaintiffs, has indicated that he will appeal the case to the Supreme Court. "The struggle started in Norfolk in 1956, and it still goes on... We will continue to fight to resist the resegregation of the children in Norfolk. I think it will encourage other school districts to try the same thing, and if it's not reversed, it will subject millions of black children to racial segregation all over the country." William Bradford Reynolds, Assistant Attorney General for Civil Rights issued a prepared statement:

It is time in Norfolk -- as in many other school districts around the country that have sustained for years good faith compliance with court-ordered desegregation plans --to restore to the local authorities full responsibility for running their public schools. The court's ruling in this case achieves this result and is a much needed breath of fresh air in our continuing efforts to achieve meaningful desegregation that is more fully sensitive to the educational needs of public school students not only in Norfolk but throughout the country.

The Assistant Attorney General indicated that there may be more than 150 school districts eligible to end their court-ordered school desegregation plans because of the Norfolk case. He characterized the case as "an outline of procedures a school system must follow to free itself from court desegregation decrees." While, Mr Reynolds stated that the Department of Justice would not seek "to launch a campaign against busing," he indicated that the Department would have discussions with school districts declared

unitary by the courts, and that such districts probably have no reason to delay efforts to end court-ordered desegregation plans. According to statistics released by the DOJ, of the 530 school desegregation cases Justice is involved in, 164 have been declared unitary (primarily in Georgia and Alabama). William L. Taylor, director of the Center for National Policy Review and counsel in numerous school desegregation cases, indicated that the decision told school districts, for the first time, that they could institute plans whose effect would be resegregation (Washington Post, Feb. 19, 1986, A14).

Julius Chambers, Director-Counsel for the NAACP Legal Defense Fund, in noting Justice's position in the case, stated:

Its position stands as the starkest proof possible of the real intention of the Reagan Administration with respect to school desegregation -- namely to reverse 30 years of painstakingly built progress.

In discussing the impact of the decision in human terms, William Taylor said "There are black children living in Norfolk in total racial isolation who through the school desegregation plan had been able to escape that isolation. Test scores for many of these children have risen. This opportunity has now been closed off, and they will return to a life of racial isolation."

#### SEX DISCRIMINATION CASES BEFORE THE SUPREME COURT

The Justice Department is supporting the position of employers in two precedent-setting sex discrimination cases before the Supreme Court.

##### Justice Opposes State Benefits for Pregnant Workers

The Justice Department, reversing the position it took in a case ten years ago, has sided with employers in a lawsuit involving state-required benefits for pregnant workers. The case, California Savings and Loan Association v. Guerra, 758 F.2d 390 (9th Cir. 1985), cert. granted 54 U.S.L.W. 3460 (U.S. Jan. 13, 1986) (No. 85-494), was brought by California Savings and Loan, after one of its employees filed a complaint with a California state agency alleging that the bank had not allowed her an unpaid pregnancy leave as required by California state law. The bank attempted to avoid complying with the state law by asserting in federal court that the California statute mandating job reinstatement after a four month unpaid pregnancy leave conflicts with the federal Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000 e (k) (the PDA). The federal law, which was enacted to put an end to rampant job discrimination against pregnant women, provides that women disabled by pregnancy shall be treated the same for employment purposes as all other employees similar in their ability or inability to work.

Employer organizations including the U.S. Chamber of Commerce have sided with the bank, arguing that special treatment for pregnant women is not lawful under the federal law requiring equal treatment. Feminist groups have split on the issue, with some groups, mostly on the west coast, supporting the California law. These groups argue that, because only women become pregnant, inadequate disability leave disproportionately affects women and is therefore discriminatory. Other groups, including the National Organization for Women, the Women's Legal Defense Fund, the National Women's Law Center and the American Civil Liberties Union, contend that there is no conflict between the

state and federal laws because an employer can comply with both. According to these groups, if the Court finds a conflict, the proper remedy is for the Court to extend the statute to cover all temporarily disabled workers. The Justice Department opposes extension, taking a position contrary to one it espoused in a 1976 case involving state-required benefits for female workers. See Memorandum for United States as Amicus Curiae, Homemakers Inc. v. Division of Industrial Welfare, 509 F.2d 20 (9th Cir. 1974) cert. denied, 423 U.S. 1063 (1976). The Justice Department's current opposition to extension of benefits is expressed in a brief it filed in a Montana case involving a statute similar to the California pregnancy leave statute. See Brief for the United States as Amicus Curiae, Miller-Wohl Co. v. Commissioners of Labor and Industry, 692 P.2d 1243 (Mont. 1984), jurisdictional statement filed, 53 U.S.L.W. 2367 (U.S. Mar. 27, 1985) (No. 84-1545).

The Cal. Fed. case is part of a larger debate over pregnancy in the workplace. The federal Pregnancy Discrimination Act overturned an earlier ruling by the Supreme Court in General Electric Co. v. Gilbert, 429 U.S. (1976), that pregnancy discrimination is not sex discrimination within the meaning of Title VII. But the Pregnancy Discrimination Act requires only that pregnant workers be treated the same as other employees. In the absence of state laws requiring benefits, employers, like the bank in the Cal. Fed. case, who choose to provide inadequate benefits for all workers, may do so without violating the PDA. A bill currently in Congress, H.R. 4300, The Parental and Medical Leave Act of 1986 would remedy this problem by requiring all employers to provide up to twenty-six weeks of unpaid leave for all temporarily disabled employees. The Supreme Court will hear oral argument in the Cal. Fed. case next fall. Along with Cal. Fed., the court may consider Miller-Wohl, the Montana case involving a similar statute.

#### Justice Department Disputes Employer Liability for Sexual Harrassment by Supervisors

In another potentially precedent setting sex discrimination case, the DOJ has supported an employer's position that employers are not necessarily liable under Title VII for sexual harassment by the supervisors they employ. The case, Vinson v. Taylor, 753 F.2d 141 (D.C. Cir.) cert. granted sub nom. Meritor Savings Bank v. Vinson, 54 U.S.L.W. 3223 (U.S. Oct. 7, 1985) (No. 84-1979), is the first sexual harassment case to come before the Supreme Court, and may well determine how sexual harassment claims under Title VII should be treated by the courts and federal agencies.

Michele Vinson, the plaintiff in the case, sued her supervisor and her employer, Capital City Federal Savings and Loan Association, charging that she had been victimized by sex discrimination in the form of sexual harassment by the supervisor. Vinson testified that the supervisor had made sexual advances, claiming that she "owed him" because he had obtained the job for her. According to Vinson, she initially declined, but finally yielded, fearing that continued refusal would jeopardize her employment. Vinson further testified that thereafter the supervisor assaulted her against her wishes, followed her into the ladies room when she was alone, and at times exposed himself to her. The supervisor denied that he had engaged in sexual activity with Vinson.

The appellate court held that sexual harassment that creates a hostile environment for women without specifically conditioning a job or promotion on sexual favors is a form of sex discrimination under Title VII. The court also

ruled that the employer was liable for the supervisor's sexual advances whether or not it knew about the conduct. Guidelines issued by the Equal Employment Opportunity Commission provide substantial support for these rulings. 29 C.F.R. 1604.11 (a), (c) (1984). Finally, the D.C. Court of Appeals held that evidence as to whether a sexual harassment victim's submission was "voluntary" was not admissible in court because it had no bearing on the question of whether the supervisor made the victim's toleration of sexual harassment a condition of employment.

In the Supreme Court, the employer will argue that the appellate court wrongly decided the case. More importantly, the employer will take the position that sexual harassment isn't covered under Title VII at all. Further, the employer, supported by the Justice Department, will urge that employers are not necessarily liable for sexual harassment of employees by the supervisors they employ. This extreme view rejects the Federal Government's own authorized interpretation of Title VII in the EEOC Guidelines, which unambiguously state:

An employer ... is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence 29 C.F.R. 1604.11 (c).

Oral argument in the Vinson case has been scheduled for March 25, and a decision is expected by the summer.

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**LEADERSHIP CONFERENCE ON CIVIL RIGHTS  
ANNUAL MEETING AND DINNER  
MAY 5, 1986  
WASHINGTON, D.C.**

RECIPIENTS OF THE HUBERT H. HUMPHREY AWARD: Senator Charles McC. Mathias (R MD); Congressman Parren Mitchell (D-MD); and Dr. Mary Frances Berry, Commissioner, United States Commission on Civil Rights.

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