National Council on the Handicapped
800 Independence Avenue, S.W.
Suite 814
Washington, DC 20591
202-433-3846

An Independent Federal Agency

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TO: Members of the Disability Community

FROM: Robert L. Burgdorf Jr. *RLB* *(handwritten initials)*
Attorney / Research Specialist

SUBJECT: Clarification Regarding Council's Equal Opportunity Law Proposal

One of the central recommendations in the National Council on the Handicapped's report, Toward Independence, is for the enactment of a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap. The purpose and elements of such a law are described in 6 of the Council's major legislative recommendations in Toward Independence, and discussed in more detail in a 60-page paper in the Appendix to the report. The Council has become aware of certain questions, misconceptions, and concerns about its equal opportunity law proposal, resulting largely from misinformation and a lack of understanding of the details of the Council's proposal. The purpose of this memo is to briefly clarify certain issues and to dispel any confusion that may have arisen about the nature and intent of the Council's proposal of a comprehensive equal opportunity law for persons with disabilities.

1. The Council's proposal of a comprehensive equal opportunity law reflects the views of many consumer organizations, commentators, public officials, and a strong consensus of persons with disabilities around the country.

Calls for broad civil rights protection for persons with disabilities have been around since at least the early seventies, when Senator Hubert Humphrey and Representative Vanik introduced bills in Congress to that effect. The need for Federal statutory protection against discrimination on the basis of handicap was one of the major themes that emerged from the White House Conference on Handicapped Individuals in 1977. Many of the national consumer organizations representing persons with disabilities have formally endorsed the concept of strong Federal laws to protect their members from discrimination. Recently, many of the national organizations have refined their goals in this regard from a call for simply adding handicap to the grounds of discrimination prohibited under the civil Rights acts to a recognition that a more customized solution is needed. On June 6, 1985, the Association for Retarded citizens, the American Council of the Blind, the Association of Children with Learning Disabilities, the Disability Rights Center, the

National Easter Seal society, the Paralyzed Veterans of America, the National Network of Learning Disabled Adults, and the National Association of Private Residential Facilities for the Mentally Retarded, joined with the American Coalition of citizens with Disabilities in endorsing a statement prepared for congressional testimony, which declared:

> it is our conclusion that current Title VII standards are not adequate to effectively address and remedy discrimination on the basis of handicap. The necessity for expanding the scope of coverage of handicap discrimination laws to make them coextensive with the coverage of other civil rights laws should be pursued in a manner which guarantees that the legal standards to be applied will be tailored to provide clear and effective remedies to the types of discrimination faced by Americans with disabilities.

Commentators have also called for broader and clearer laws prohibiting discrimination against persons with disabilities; numerous journal articles, some with such titles as "Mending the Rehabilitation Act of 1973" and "Rehabilitating section 504 after Southeastern," have examined the shortcomings of current laws prohibiting discrimination against persons with disabilities, and have argued for the enactment of more comprehensive and definitive statutes.

The Council sought very extensive input from individuals with disabilities before deciding to make its equal opportunity law proposal. In 1984, after consulting with more than 2,000 members of the disability community, conducting meetings in each of the 50 states and the District of Columbia, and obtaining input from representatives or prominent members of a large number of organizations dealing with all types of disabilities, the Council issued its National Policy for Persons with Disabilities. In the National Policy, the Council called for "a comprehensive, internally unified body of disability-related law which guarantees and enforces equal rights and provides opportunities for individuals with disabilities." In "consumer forums" conducted by the Council in connection with its quarterly meeting persons with disabilities have continued to underscore the need for comprehensive nondiscrimination protection.

In Toward Independence, after substantial additional efforts to obtain consumer and expert input (described *in* the Introduction to the Report), the Council responded to its statutory mandate to provide legislative recommendations and spelled out the need for a comprehensive and enforceable equal opportunity law for individuals with disabilities. That the Council was accurately representing the views of its grass roots constituency is confirmed by the results of the recent Harris Poll which found that 75% of Americans with disabilities believe that civil rights protections should be available to persons with disabilities on an equal par with such protections for other minorities. Only 19% of individuals with disabilities are opposed to such expanded civil rights coverage.

2. The Council's proposal in no way undercuts or is inconsistent with the civil Rights Restoration Act legislation.

The Council's recommendation of a comprehensive equal opportunity law for persons with disabilities is fully consistent with the efforts of civil rights groups to enact legislation such as the civil Rights Restoration Act. The Restoration Act seeks to undo the "program or activity" limitation upon civil Rights laws resulting from the Supreme Court's decision in Grove city College v. Bell, and the Court's indication in Consolidated Rail corporation v. Darrone that the Grove City limitations apply to section 504 of the Rehabilitation Act. The Council's proposal and the proposed Restoration Act share the same overall goal of assuring that laws prohibiting discrimination have broad coverage. The specific focus of the two proposals is somewhat different: the Restoration Act -- to remove the narrow program or activity limitation upon civil rights measures covering Federally funded activities under Grove City; and the Council's proposal -- to correct a variety of shortcomings and limitations in the statutory protections afforded to persons with disabilities. These two measures are in no way contradictory, and the Council's proposal represents no suggestion that the disability community should abandon or reduce its commitment to the passage of civil Rights Restoration legislation. As the Council noted in its Appendix paper on the equal opportunity recommendations, lithe Federal Government should not provide financial assistance to any person or agency that engages in discrimination in any part of its operations or activities."

3. The Civil Rights Restoration Act does not attempt to address many serious shortcomings of current laws prohibiting discrimination on the basis of handicap.

The Civil Rights Restoration Act aims to correct a very specific problem -- the limitation of the scope of laws prohibiting discrimination by Federal grantees to only the particular "program or activity" that receives the Federal funds. It seeks to restore "institutionwide coverage" of Federal grant recipients. The Restoration Act does not seek to correct the many other deficiencies of and limitations upon Federal statutes that prohibit discrimination on the basis of handicap. If enacted, the Restoration Act will assure that Federal grantees will be prohibited from discriminating on the basis of sex, race, color, religion, age, and handicap in any part of their operations. Such broad coverage of grantees is obviously an important aspect of achieving comprehensive protection against discrimination for persons with disabilities. The enactment of the Restoration Act will not, however, address the many other severe restrictions upon civil rights protections for persons with disabilities. Nor will the Restoration Act wrestle with many of the problems and deficiencies with current standards of

nondiscrimination on the basis of handicap. The Council's recommendation of a comprehensive equal opportunity law reflects its attempt to address problems with both a restricted scope of coverage and inadequate standards of nondiscrimination under current laws, as identified by persons with disabilities, advocates, and consumer organizations around the country.

4. Current laws prohibiting discrimination on the basis of handicap have substantial deficiencies and limitations, and are not commensurate in coverage or effectiveness with other types of nondiscrimination laws.

The Council's topic paper describing its equal opportunity law proposal discusses a number of problems with the scope of coverage of current statutes and with the language, interpretation, and enforcement of current laws prohibiting discrimination against people with disabilities. The following provides a brief outline of some of the shortcomings described in the Council's analysis:

A. Problems with the Scope of Coverage

Current statutes, including Section 504:

- are not enforceable against the states or state agencies in Federal courts (under Supreme Court's ruling in Atascadero State Hospital v. Scanlon)
- not co-extensive with interstate commerce clause coverage of other types of nondiscrimination laws (all employers engaged in an industry affecting commerce having 15 or more employees are prohibited from discriminating on the basis of race, color, sex, or national origin, but not on the basis of handicap)
- do not prohibit housing discrimination commensurate with other types of nondiscrimination laws (Federal Fair Housing Act broadly prohibits housing discrimination in housing on the basis of race, color, religion, sex, and national origin, but not handicap)
- do not prohibit discrimination in public accommodations (Title II of the civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, or national origin in a broad range of public accommodations)
- have not required the Federal government to use only nondiscriminatory hotels, airlines, trains, rental car companies, and conference facilities
- do not prohibit discrimination by Federal licensees (under Supreme Court's decision in Community Television of So. Cal. v. Gottfried)

- o do not address problems of discrimination in interstate travel or in insurance

- o may not apply to discrimination in medical treatment (under circuit Court's decision in United States v. University Hosp. State U. of New York)

B. Problems with Current statutory Language, Interpretation, and Enforcement

Current statutes prohibiting discrimination on the basis of handicap, including section 504, have the following types of deficiencies:

- o absence of a reasonable accommodation requirement and standards (courts and administrative agencies have inconsistently interpreted extent of duty to accommodate)

- o failure to spell out the elements of nondiscrimination (duty to remove barriers not specified; duty to eliminate discriminatory selection criteria and eligibility requirements not specified; inconsistent interpretations by courts and administrative agencies)

- o use of word "solely" in the statutory language (not in other types of nondiscrimination laws; implication that discrimination on the basis of handicap is not illegal if in conjunction with some other type of rationale)

- o use of concept of "otherwise qualified" in the statutory language (not in other types of nondiscrimination laws; allows discriminatory qualifications to obscure fact that people with disabilities are discriminatorily excluded)

- o use of eligibility category "handicapped individual" (other types of laws do not establish an eligible class, but simply prohibit discrimination "on the basis of ... "; creates need to prove that one is "handicapped" in order to invoke the statutory protection)

- o failure to clearly distinguish between nondiscrimination and affirmative action (has lead to confusion in court decisions and administrative interpretations)

- o no private right of action for discrimination by Federal contractors

- o limited application and enforcement of duty to remove architectural, transportation, and communication barriers

- misassignment of duty to enforce section 501 (should be EEOC responsibility, but 1984 amendments say Office of Personnel Management)

- problems with Federal agency enforcement of section 504 (including delays in issuing regulations and weak provisions of prototypes and regulations)

5. <u>The Council's proposal does not call for the repeal of current nondiscrimination statutes, nor for the automatic invalidation of existing regulations.</u>

A concern has been expressed that the Council's proposal of a comprehensive equal opportunity law might backfire and actually lead to less protection from discrimination on the basis of handicap than exists under current laws and regulations. This misconception is apparently based upon a mistaken premise that the Council's recommendation entails a repeal of Section 504 and other Federal disability laws, and will necessitate all Federal agencies to start from scratch to devise new nondiscrimination regulations.

The Council's proposal does not contemplate the repeal of Section 504 and similar statutes. The Council's proposed equal opportunity law would, if enacted, follow the pattern of previous handicap nondiscrimination laws that have legislated stronger measures without repeal of the prior statute. Thus, for example, the Federal statute (dating from 1948) that authorized the Civil Service commission to prescribe rules prohibiting discrimination on the basis of physical handicap was not repealed when Sections 501 and 504 were passed in 1973, even though the latter statutes were stronger and broader.
Similarly, Federal regulations and courts had held that section 501 implicitly imposed a nondiscrimination requirement upon Federal agencies, but such a requirement under section 501 was not invalidated when Congress added an express Federal agency nondiscrimination mandate to section 504 in 1978. Various other Federal statutes passed at later dates have overlapped the coverage of section 504 by prohibiting discrimination on the basis of handicap in such funding programs as Revenue Sharing, various block grants, the Full Employment and Balanced Growth Act, and the Job Training Partnership Act. There are various other examples of statutes passed at different dates that provide overlapping prohibitions of discrimination on the basis of handicap, such as 20 U.S.C. section 1684 (1976), which prohibits discrimination against blind people in Federally funded education programs or activities -- an area that clearly is within the coverage of section 504.

These overlapping nondiscrimination requirements have and do coexist in the law. The process by which they are applied involves an eventual superseding of the earlier, weaker standard by the later, stronger one. The less explicit statute is not repealed or invalidated, but its importance wanes because stronger protection is available from another statutory source. If the two statutes deal with the same area, compliance with the more stringent requirement eventually becomes the prevalent standard.

Where nondiscrimination requirements are enforced by Federal agencies, the enactment of a stronger statute is evidenced in due course by the emergence of more stringent nondiscrimination requirements in the agencies' regulations. The passage of the comprehensive equal opportunity law proposed by the Council will not mean, however, that existing regulations will be instantly and automatically invalidated. On the contrary, current section 504 regulations will continue to set minimum nondiscrimination requirements for activities that they cover. To the extent that portions of current regulations provide adequate measures for eliminating discrimination against persons with disabilities in compliance with the comprehensive law, they will not have to be changed. Regulations will have to be changed, however, if they provide <u>inadequate</u> protection against such discrimination, in light of standards of nondiscrimination established in the proposed equal opportunity law. And additional regulations will be required to address new areas of coverage under the broadened scope of the proposed statute.

To the extent that amendments or new regulations are needed, the equal opportunity law will provide much more explicit standards of nondiscrimination, and much less opportunity for agency circumvention, than under current much less explicit laws. In short, under the Council's proposal, current regulations would not lapse, nor be weakened, but would be amended or expanded through the rulemaking process as necessary to implement the more explicit, broader, and stronger standards of nondiscrimination imposed by the new law.

6. <u>The Council's proposal does not involve the elimination or weakening of current affirmative action programs</u>.

A concern has been expressed that the Council's call for a strong and comprehensive equal opportunity law for persons with disabilities somehow undercuts affirmative action programs under Sections 501 and 503 of the Rehabilitation Act. Such a concern is totally unfounded. Nowhere in <u>Toward Independence</u> nor in the Appendix is there any statement suggesting an attack upon affirmative action programs or a recommendation that such programs or their statutory basis be cut back. On the contrary, the Council's recommendations in the area of employment support a wide range of efforts including return-to-work programs, supported work programs, transition from school to work programs, Targeted Jobs Tax Credits, job training programs, and

job development and placement activities, all of which seek to provide special efforts to promote the increased employment of individuals with disabilities.

The suggestion that strengthening nondiscrimination laws somehow entails a retreat from affirmative action programs is directly contrary to the specific example provided by sections 501 and 504. Section 501 has imposed an affirmative action requirement upon Federal government employment since its enactment. In 1978, Congress amended section 504 to add activities of the Federal government to its coverage. No court has ever held, and to my knowledge no one has ever suggested, that by strengthening the nondiscrimination mandate Congress intended to weaken the affirmative action requirement. It is equally illogical to suggest that the Council's call for a comprehensive and enforceable nondiscrimination statute implicitly constitutes a proposal to eliminate affirmative action programs. Nothing in Toward Independence nor any other action by the Council supports such an unlikely inference.

7. The Council has recommended enactment of a comprehensive equal opportunity law with the hope and expectation that the disability community and supporters of the disability community in Congress will work with the Council to develop a strategy and schedule for the introduction and advancement of such legislation.

The National Council is aware that none of the recommendations in Toward Independence are self-actualizing. If the Council's proposals are to be implemented, it will be because a significant portion of the disability community agrees with particular recommendations and works effectively to have an appropriate legislative proposal drafted, introduced at the right time, and shepherded through the legislative process. The Council complied with its statutory mandate to deliver legislative recommendations to the President and Congress. The Council's proposal of a comprehensive equal opportunity law can be a very important milestone in the establishment of the rights of persons with disabilities. The Council hopes that members of the disability community, both in leadership roles and at the grassroots levels, will concur with the Council's recommendation, and will work with Council and appropriate legislative personnel to cooperatively devise a legislative strategy and timelines for the drafting, introduction, and passage of such a law guaranteeing equal opportunities for all people with disabilities.