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Relationship of Civil Rights Issues to Education and Taxation

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RELATIONSHIP OF CIVIL RIGHTS ISSUES TO EDUCATION AND TAXATION

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My topic this morning, the relationship of civil rights issues to education and taxation, is very broad and covers many complex and controversial issues. In the past year, our office has received numerous inquiries concerning the obligations and liabilities of Catholic schools in the area of civil rights. We have also seen opponents of assistance to private school children increasingly raise civil rights issues as part of their opposition. This tactic has surfaced in relation to the various new proposals for federal legislation and the congressional review of the proposed revenue procedure on racial nondiscrimination published by the Internal Revenue Service (IRS). These developments suggest the need for a review of the relationship between education and civil rights legislation as applied to Catholic schools.

In the time allotted, it would be impossible to discuss in depth the various civil rights issues which arise in connection with education and taxation. Instead, my discussion will focus on the applicability of certain federal civil rights requirements of church-related educational institutions. Particular attention will be given to Title VII of the Civil Rights Act of 1964, the various statutory requirements associated with participation in federal programs, and the IRS nondiscrimination proposal for tax exempt schools.

Before addressing the particular statutes, it would be useful to identify the interests of the parties involved. The interests of the Church are twofold. First, the Church has a long history of interest and concern in the area of social justice and in the protection of the rights of individuals, particularly the poor and oppressed. This concern recently has been ex-

pressed in the bishop's pastorals on racism and the handicapped.[1] Second, the Church must be free to exercise its educational ministry without unduly burdensome restraints and unnecessary interference.

The interest of the federal government in the elimination of discrimination and the promotion of equality clearly is manifest in numerous statutes, agency regulations, and executive orders. It also should be noted that every state has enacted legislation designed to protect minority and other groups from unlawful discrimination. Finally, employees and students of Catholic schools have obvious interests in being treated justly.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

In recent years, situations have arisen in which parochial school employees have alleged that a school's personnel actions or policies are discriminatory. The allegations usually arise in the context of a termination or some other disciplinary action. If the basis of the alleged discrimination is race, religion, or sex, the complainant may file a complaint with the Equal Employment Opportunity Commission (EEOC) alleging a violation of Title VII.[2] Generally, Title VII makes it unlawful for employers to discriminate on the basis of race, color, religion, sex, or national origin. Ultimately, litigation may be initiated to resolve the dispute. A threshold question which must be resolved concerns the application of Title VII to employment practices in Catholic schools. To answer this question, one must examine Title VII and the decisions construing its application to religious institutions.

STATUTORY LANGUAGE

The language of Title VII clearly is intended to apply to religious schools. Although it does not contain a blanket exemption, Title VII does contain two provisions which limit its applicability in situations involving the employment of persons of a particular religion by religious institutions.

Section 702[3] states, in relevant part, that Title VII does not apply to a religious educational institution with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of its activities.

Section 703[4] provides, in pertinent part, that a school may lawfully

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[1] *Brothers And Sisters To Us—U.S. Bishops' Pastoral Letter On Racism In Our Day*, National Conference of Catholic Bishops (1979); *Pastoral Statement of U.S. Catholic Bishops on Handicapped People*, National Conference of Catholic Bishops (1978).

[2] 42 U.S.C. § 2000e to 2000e-17 (1976 & Supp. III 1979).

[3] 42 U.S.C. § 2000e-1 (1976).

[4] 42 U.S.C. § 2000e-2(e) (1976).

hire employees of a particular religion if such school is owned, supported, controlled, or managed by a particular religion or if the curriculum of the school is directed toward the propagation of a particular religion.

The applicability of sections 702 and 703 is limited to situations involving allegations of religious discrimination made against a religious institution. The EEOC adopted this interpretation which is consistent with the explicit language of the statute. Thus, while affording protection in situations involving allegations of religious discrimination, the statutory language of these sections will not afford protection for a religious school in situations involving allegations of race or sex discrimination.

The statute itself provides no explicit protection for a religious institution where, for religious reasons or reasons related to the religious mission of the institution, the institution takes action which precipitates an allegation of sex or race discrimination. There are few reported decisions applying Title VII to religious institutions in this context and these cases have produced mixed results.

A line of cases in the Fifth Circuit, beginning with *McClure v. The Salvation Army*,[5] has limited the application of Title VII in situations involving religious organizations. In holding that Title VII did not apply to the employment relationship between a church and its minister, the *McClure* court stated that such an application constitutes an encroachment into an area of religious freedom forbidden by the free exercise clause of the first amendment. Rather than holding Title VII unconstitutional as applied, the court held that Congress, through the nonspecific wording of the provisions of Title VII, did not intend to regulate the employment relationship between a church and its minister. It is significant to note that the court in *McClure* did not rely on the exemption for religious institutions found in section 702.

Two years later in *Simpson v. Wells Lamont Corp.*,[6] the Fifth Circuit, relying on *McClure*, refused to apply civil rights statutes to the termination of a pastor by a church and affirmed the dismissal for lack of subject matter jurisdiction. Although *Simpson* is not a Title VII case, it is significant because it resolved a conflict between first amendment rights and civil rights in favor of first amendment rights.

In *EEOC v. Mississippi College*,[7] the district court held that the EEOC had no authority to investigate a charge of sex discrimination against a privately owned and operated religious college. In reaching this conclusion the court relied upon *McClure* and the Seventh Circuit decision in *Catholic Bishop of Chicago v. NLRB*.[8]

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[5] 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).
[6] 494 F.2d 490 (5th Cir. 1974).
[7] 451 F. Supp. 564 (S.D. Miss. 1978).
[8] 559 F.2d 1112 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979).

The most recent case in the Fifth Circuit is *EEOC v. Southwestern Baptist Theological Seminary.*[9] In *Southwestern,* the EEOC brought suit to establish jurisdiction over the Seminary and to compel its submission of an annual report form required by the Commission. Holding that the Seminary could not be forced to submit the form, the court stated that application of Title VII to any aspect of the employment relationship existing between the Seminary and its employees infringed upon the free exercise clause of the first amendment. The court added that enforcement of Title VII claims against a seminary based upon race, sex, or national origin, even in the absence of doctrinal reasons, would inevitably lead to excessive governmental entanglement with religion with respect to the determination of the good faith and legitimacy of religious grounds asserted as a defense to a *prima facie* case of discrimination.

The decision in *Southwestern* conflicts in one respect with an earlier New York decision, *Whitney v. Greater New York Corporation of Seventh-Day Adventists.*[10] In *Whitney,* a typist-receptionist alleged discrimination on the basis of race following her termination. The court rejected a first amendment free exercise defense, noting that nothing in the record indicated that the termination was based on doctrinal policies or that the relationship between the church and its clerical help was so close to the heart of the church administration so as to be protected by the first amendment. The court indicated that the *McClure* decision was limited by its facts to situations involving the church-minister relationship.

In a recent California case, *EEOC v. Pacific Press Publishing Association,*[11] a United States district court rejected a broad-based first amendment defense asserted in response to a sex discrimination charge filed by a secretary employed by a nonprofit publishing corporation affiliated with a church. The court did not see any first amendment problem with the regulation of the employment of a secretary performing a secular function.

I am aware of only one reported case involving a Title VII claim against a Catholic school. In that case, *Dolter v. Wahlert High School,*[12] an unmarried teacher at a Catholic high school was terminated for immorality after she became pregnant. The court, in denying the motion to dismiss, rejected the school's contention that the first amendment prevented jurisdiction over the claim. While conceding that the school could prescribe a code of moral conduct for its teacher, the court noted that it still would be required to determine whether the moral code had been applied equally to males and females. The court stated that to decide

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[9] 485 F. Supp. 255 (N.D. Tex. 1980).
[10] 401 F. Supp. 1363 (S.D.N.Y. 1975).
[11] 482 F. Supp. 1291 (N.D. Cal. 1979).
[12] 483 F. Supp. 266 (N.D. Iowa 1980).

such strictly sex-based discrimination issues would not to any degree entangle the court in the defendant's religious mission, doctrines or activities.

It seems that the court has overlooked a very important point, that is, in order to determine whether the school applies its moral code equally, the court must identify and examine the code, the reasons for its application or nonapplication in different situations, and ultimately determine the good faith of the school's stated reason for termination on moral grounds. It was precisely this sort of governmental involvement which disturbed the Seventh Circuit in the *Catholic Bishop of Chicago* case, in which it was held that the first amendment barred the National Labor Relations Board (NLRB) from exercising jurisdiction over diocesan secondary schools.

In *NLRB v. Catholic Bishop of Chicago,*[13] the Supreme Court recognized serious first amendment questions arising from inquiries into the good faith of administrative positions based upon religious beliefs. In *Grace Brethren Church v. State of California,*[14] a United States district court, in the context of a challenge to the Federal Unemployment Tax Act, held that this type of inquiry, by itself, involved an impermissible entanglement of the state with the church in violation of the first amendment.

In situations involving ministers and religious schools, the Fifth Circuit decisions have limited the applicability of Title VII. In other jurisdictions, courts have rejected first amendment challenges involving secretarial positions and, in at least one case, a challenge advanced by a teacher. Finally, case law in other areas, namely the *Catholic Bishop of Chicago* decision and the unemployment cases, can be used to support a first amendment defense to certain Title VII claims.

In completing the Title VII discussion, it must be emphasized that Catholic schools are subject to Title VII in matters concerning allegations of race and sex discrimination. Where a school's actions or policies are based on religious principles, or where the application of the statute may seriously interfere with the religious mission of the school, such application will raise serious first amendment questions. Appropriate first amendment defenses, therefore, should be raised. If a bona fide occupational qualification is involved, or a legitimate nondiscriminatory purpose forms the basis for the action taken, these alternative defenses should be asserted. Use of these defenses will provide the tribunal with the means to avoid both the constitutional issues and a direct confrontation between the first amendment and the civil rights of employees.

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[13] 440 U.S. 490 (1979).

[14] No. 79-93 (C.D. Cal. Sept. 21, 1979).

CIVIL RIGHTS OBLIGATIONS UNDER FEDERAL ASSISTANCE PROGRAMS

Children enrolled in Catholic schools are eligible to participate in a variety of federal programs. In some instances, Catholic schools themselves are eligible to participate. The participation of the children or the school in such programs will result in the imposition of obligations under the several federal statutes which prohibit discrimination in programs receiving federal financial assistance. The extent of the obligation will depend upon the type of program and the nature of the participation involved.

Before discussing the nature of the participation involved, it is first necessary to identify and describe the relevant statutes, their application, and their enforcement.

Catholic schools primarily are concerned with three statutes which prohibit discrimination in programs or activities receiving federal financial assistance. They are:

1. Title VI of the Civil Rights Act of 1964[15] which prohibits discrimination on the basis of race, color, or national origin.
2. Title IX of the Education Amendments of 1972[16] which prohibits discrimination on the basis of sex in educational programs.
3. Section 504 of the Rehabilitation Act of 1973[17] which prohibits discrimination against otherwise qualified handicapped individuals.

Of these three statutes, only Title IX contains explicit exemptions applicable to Catholic schools. Title IX does not apply to admission policies of elementary and secondary schools (with the exception of vocational institutions), nor does it apply to educational institutions controlled by a religious organization if the application of Title IX would be inconsistent with the religious tenets of such organization.

Except for some special considerations contained in Title IX, the basic language and structure of all three statutes is similar. Generally, the operative language reads as follows:

> No person shall, on the basis of [race, sex, handicap] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

This basic language is rather general in nature and does not describe with any specificity what does, or does not, constitute discrimination. Each federal agency authorized to extend financial assistance is required to issue regulations implementing the statutory language. Basically, the Department of Health, Education and Welfare (HEW) (now Health and

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[15] 42 U.S.C. § 2000d to 2000d-6 (1976 & Supp. III 1979).
[16] 20 U.S.C. § 1681 (1976).
[17] 29 U.S.C. § 794 (1976 & Supp. III 1979).

Human Resources) has taken the lead in interpreting the statutory language and the development of regulations. Not surprisingly, the implementing regulations have provided a very broad interpretation to the statutory language in favor of the protected groups.

I will not attempt to describe what acts do or do not constitute discrimination. Rather, my intent is to focus on the procedural aspects of the statutes and regulations. In other words, how and to what extent does a school become subject to the statutes and the regulations.

The first step in determining the applicability of the statutes is to identify the federal programs in which either the school or its students participate. Once the programs are identified, one then must look to the regulations issued by the agencies administering them. Although each agency is required to publish its own regulations in the area of civil rights, the regulations generally conform to those issued by HEW. For this reason, when referring to agency regulations in this discussion, I will refer to the HEW regulations.

Generally, the regulations are drafted and interpreted by federal agencies as broadly as possible. This results in agency assertion of jurisdiction over virtually every aspect of an institution's operations. While there have been recent successful challenges to the broad approach taken in the regulations, the regulations have not been amended and the agencies apparently intend to continue enforcing them.

The key to understanding the regulations is found in the application sections and the definitions of recipient and federal financial assistance.

The Title IX[18] and Section 504[19] regulations state that they apply to every recipient and to each educational program or activity that receives or benefits from such assistance. Under this language the regulations become applicable in two ways: first, they apply to all recipients; second, they apply to any program or activity receiving federal financial assistance. It is significant to note that the statutory language on its face appears to limit applicability to programs or activities receiving federal financial assistance. Thus, by adding the status of recipient as a triggering condition, the scope of the regulations significantly is broadened beyond the apparent reach of the statutory language.

The definition of recipient is critical because the regulations are written in terms of the recipient's obligations and responsibilities. Thus, if an institution is classified as a recipient, it will be subject to the full impact of the regulations. In addition to being prohibited from engaging in discriminatory conduct in any part of their operations, recipients are required to provide assurances of nondiscrimination, give public notice of

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[18] 45 C.F.R. § 86.11 (1980).
[19] 45 C.F.R. § 84.2 (1980).

nondiscrimination, adopt grievance procedures, conduct self-evaluations, and take remedial action if necessary.

A recipient generally is defined as including any institution or organization to which federal financial assistance is extended directly or through another recipient. Federal financial assistance includes grants and loans to students, funds, and the service of federal personnel.

Situations can arise in which Catholic schools will be considered recipients of federal financial assistance. For example, if a Catholic school applies for, and receives a federal grant under an energy or food program, it will be considered a recipient subject to the regulations of the federal agency administering the grant.

Schools not receiving federal financial assistance are not considered recipients simply because they enroll students who participate in a federally assisted program. For example, a school which participates in no federal programs but which has students who receive services under a Title I Elementary and Secondary Act Program operated by the local public school district is not considered a recipient.

Even though the school is not considered a recipient, the school will be indirectly subject to the substantive requirements of the regulations. This occurs because of a provision in the regulations prohibiting recipients, in this case the local public school district, from assisting agencies or organizations which discriminate against beneficiaries, in this case students, of the recipient's programs.[20] What this means, in effect, is that the school cannot discriminate against students so long as its students participate in federal programs. The local public school district generally has the responsibility to ensure that students participating in its programs are not subjected to discrimination.

I am not aware of any reported cases interpreting the application of the regulations to Catholic schools in this kind of situation. A Title IX complaint, however, has been filed recently in Philadelphia, naming the superintendent of the Archdiocesan Board of Education as one of the defendants. This case should provide some guidance with respect to how the judicial system will apply the antidiscrimination statutes to Catholic schools.

As indicated earlier, the regulations, in certain situations, have been challenged successfully as extending beyond the intent of the statutes. At least three federal courts of appeals and numerous lower courts have held that the employment provisions of the Title IX regulations are invalid.[21]

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[20] *See* 45 C.F.R. § 84.4(b)(v) (1980); 45 C.F.R. § 80.3(b)(2) (1980).

[21] Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); Junior College Dist. of St. Louis v. Califano, 455 F. Supp. 1212 (E.D. Mo. 1978), *aff'd*, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1980); North Haven Bd. of Educ. v. Califano, 19 Fair Empl. Prac. Cas. 1505 (D. Conn.

Two federal courts of appeals and one state court similarly have held that section 504 does not apply to employment situations.[22] Generally, the federal agencies have taken the position that these cases were decided erroneously and therefore have not amended their regulations.

It should be noted that enforcement through agency administrative procedures is not the only remedy available to victims of discrimination. Private causes of action to enforce these statutes have been recognized by the federal courts. In at least one case a private cause of action for damages has been recognized.[23]

Before opening the floor to questions I will update the developments concerning the revenue procedure proposed by the IRS relating to racial nondiscrimination policies in private schools.[24] The procedure originally was proposed by the IRS in August, 1978 and generated a substantial amount of controversy during the latter part of 1978 and throughout 1979. There have been two developments since our meeting last year.

First, an amendment was added to the appropriations bill for the Treasury Department stating, in effect, that the IRS could not spend any appropriated funds to implement the proposed revenue procedure.[25] This prohibition on expenditures expires at the end of September, 1980. Congress has the procedure under consideration and likely will offer again some sort of prohibition on expenditures as an amendment. If Congress fails to act, the IRS will be free to publish a procedure in final form.

Second, the class action suit filed in 1976, which prompted the IRS to propose the revenue procedure, was dismissed by the United States district court in Washington. The dismissal has been appealed to the court of appeals.[26]

This concludes my remarks and I will open up the floor to questions at this time.

1979); Auburn School Dist. v. HEW, 19 Fair Empl. Prac. Cas. 1504 (D.N.H. 1979), *appeal dismissed*, No. 79-1216 (1st. Cir. 1980); University of Toledo v. HEW, 464 F. Supp. 693 (N.D. Ohio 1979); Board of Educ. v. HEW, 19 Fair Empl. Prac. Cas. 457 (N.D. Ohio 1979); Dougherty School Sys. v. Califano, 19 Fair Empl. Prac. Cas. 688 (M.D. Ga. 1978); McCarthy v. Burkholder, 448 F. Supp. 41 (D. Kan. 1978); Seattle Univ. v. HEW, 16 Fair Empl. Prac. Cas. 719 (W.D. Wash. 1978).

[23] Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672 (8th Cir. 1980), *cert. denied*, 449 U.S. 938 (1981); Trageser v. Libbie Rehab. Center, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979); Zorich v. Tynes, 372 So. 2d 133 (Fla. Dist. Ct. App. 1979).

[24] Patton v. Dumpson, 498 F. Supp. 933 (S.D.N.Y. 1980).

[25] 43 Fed. Reg. 37,296 (1978); 44 Fed. Reg. 9,452 (1979).

[26] The General Appropriations Act of 1980, Pub. L. No. 96-74, § 615, 93 Stat. 559.

[27] Wright v. Miller, 480 F. Supp. 790 (D.D.C. 1979).

James Gallagher, Philadelphia, Pennsylvania: I think I should inform you concerning the Philadelphia case just mentioned because it is rather interesting. There was an action started some months ago by certain individuals because there is no competition between the winners of the girls Catholic basketball teams and the girls public high school teams. There is a game between the champions of the boys in the Catholic and the public schools. As a result certain individuals started an action to restrain one of the playoff games between the boys' teams because we did not have a comparable game between the girls' teams. It did not name the archdiocese, or the school district. It named a number of individuals in the Philadelphia district. There was a hearing in the district court, in which a number of witnesses were produced. There was no question that this game did not occur. We did not have these games and the judge was baffled. He finally denied the injunction on technical grounds. The dispute continued almost up to the day of the game. The day before the game, at 4 p.m., the judge said he was going to refuse the injunction. He wrote a brief opinion in which he said, *inter alia*, that the proper parties were not there; the archdiocese was not there, yet the matter had to be cured. So a new action of which you have just learned was started against everyone, including all the members of the diocesan school board. My partner, Tom Harper, was one such member. Everyone was sued. I understand that they are going to carry the decision of the federal judge to the court of appeals because they consider this appealable. In fact, I think it has already been appealed.

Mr. Liekweg: Is the original order of the court to be appealed?

Mr. Gallagher: I am told it is being appealed, yes, I am told they can do this.

Mr. Liekweg: Well, thank you very much for that information.

Cheathom Hodges, Georgia: John, we had a situation arise from the area of education and go into state services. Where a chaplain is employed on a part-time basis, and is discriminated against primarily because of his faith, would he be protected under EEOC if the employer is receiving funds from LEAA?

Mr. Liekweg: EEOA is a statute that applies to all employment practices as long as the jurisdictional test is met. It is not tied to federal aid. So, under Title VII, I would think that he would have a legitimate complaint.

John Devito, St. Petersburg, Florida: John, in view of the proliferation of alphabet agencies, and the classic story that Brother Gallagher just related, can you see any reason why we should encourage our schools

to enter into these energy grant applications? The twelve assurances that are required include everything from national historic monuments to the EPA, to the Civil Rights Act, to flood insurance and to assurances that we will comply with all regulations which have not yet been written. Those of us who have a problem with disentanglement from the Hill-Burton recapture attempts, are aware of the type of problem that can be anticipated when attempting to get back more money than you were given.

Mr. Liekweg: To answer your question, I think it is primarily a balancing situation. I think there is no doubt that the more one becomes involved in federal programs, the more one will be subjected to some sort of federal regulation. I think (just focusing on the civil rights provisions) that a school or an institution should weigh the benefits of the program against whatever administrative problems and potential liabilities arise from the civil rights statutes. There may be few problems in complying with the civil rights statutes. I am not downplaying the fact that when one accepts some aid one must become involved with the federal agency. Something else that must be kept in mind is the bishops' usually strong position on civil rights, and that the bishops are on the public record as supporting most of the civil rights legislation. Hopefully, if we are to believe and follow what the bishops tell us, then we can avoid allegations of violations of the substantive requirements of these civil rights statutes, but that does not mean that there will be no administrative problems.

Chuck Reynolds, Albuquerque, New Mexico: I have greater concern with respect to section 504 than with civil rights. I am familiar with some of the federal cases which have required public schools to hire diagnosticians to provide support services for handicapped children in the nature of speech therapy, physical therapy, and occupational therapy. The interpretation of section 504 has been that all those support services are required because the exceptional children need them in order to have a minimally sufficient educational program. Is section 504 going to require the parochial school to hire these people?

Mr. Liekweg: As I understand the section 504 regulations, they do make a distinction between what a private school must supply with respect to services and what the public school agency must provide. Generally, if private schools operate a special education program, the regulations do not require them to initiate such a program. There is language in the regulations requiring a school to make some sort of accommodation. What has happened in the public school cases is that the school is sued and there are a number of statutes and motives underlying the suit. It will be section 504, it will be the Education for All Handicapped Children Act, and there will be state and federal constitutional requirements. They all seem to blend together in these public school cases with the result being that the public school systems are given a tremendous obligation to supply services to handicapped children. Section 504 does not cause the

same result in the private schools.

Mr. Reynolds: I think that every state constitution has a provision providing a right to an education. Are you saying that we are saved because constitutional provisions do not apply to the Catholic schools?

Mr. Liekweg: Basically, that is what I am saying, but again, the state, or the public school system must abide by state constitutional requirements. In some cases, there are federal constitutional requirements. There are D.C. cases which support that premise. There are also the requirements under the Education for All Handicapped Children Act. Those three alone place many obligations on public school districts. If one focuses on section 504 as it applies to the Catholic schools, one will not become involved in all of the other requirements. I think that is what happens in the public school cases. They all seem to be lumped together. The result is that the public school must do something.