

# The Catholic Lawyer

---

Volume 32  
Number 3 *Volume 32, Number 3*

Article 8

---

October 2017

## OGC Issues Roundtable

John Liekweg

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Education Commons](#), and the [Labor and Employment Law Commons](#)

---

### Recommended Citation

John Liekweg (1989) "OGC Issues Roundtable," *The Catholic Lawyer*. Vol. 32 : No. 3 , Article 8.  
Available at: <https://scholarship.law.stjohns.edu/tcl/vol32/iss3/8>

This Diocesan Attorneys' Papers is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# OGC ISSUES ROUNDTABLE

JOHN LIEKWEG, Esq., NCCB/USCC

For recently enacted laws, let me give you a little background. On the first item, in 1981, as part of the Gramm-Rudman-Hollings Budget Reconciliation Act, the Office of Management and Budget was successful in inserting a provision that put a tuition cap on private schools that wanted to participate in child nutrition and school lunch programs. The effect of that tuition cap was that if the average tuition at a private school exceeded \$1,500, that school and its students were not eligible to participate in the federally subsidized school lunch and child nutrition programs in which our schools have been participating in since the late 1940's.

As tuitions rose, more and more of our schools were being knocked out of the program; so our office, along with the Office of Government Liaison, worked very hard to get it removed. After a battle which lasted six years we were successful in getting it removed this past spring.

The next item is the Civil Rights Restoration Act of 1987. To give you a little background, the purpose of that Act was to reverse the 1984 Supreme Court decision in *Grove City College v. Bell*. In *Grove City College* the Supreme Court held that Title IX, which prohibits discrimination on the basis of sex in educational programs receiving federal financial assistance, only applied to the particular program within an institution which actually received the federal assistance. Soon after the decision there was a massive legislative campaign to reverse the narrow interpretation of the meaning of the word "program." After being tied up in Congress for four years, the proposed Restoration Act was finally passed in early 1988.

Essentially, what the Restoration Act does is add a definition of the term "program" to four different civil rights statutes. Those statutes are Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act which prohibits discrimination on the basis of handicap in federally assisted programs, and the Age Discrimination Act which prohibits discrimination on the basis of age in federally assisted programs.

In the Restoration Act a complex definition of "program" was added to each of the four statutes. The Act reverses the Supreme Court's more

narrow interpretation of "program" and, at least as applied to private entities that receive federal assistance, takes a much broader view. Basically, the way it will work in the private sector is that if you are receiving federal assistance you fall within basically one of two categories. In the first category the extent of the coverage of these four statutes will depend on whether or not the organization or the corporation is principally engaged in either education, health care, housing, social services, or parks and recreation. If you have a corporation that is principally engaged in any of those activities, then the entire corporation would be subject to coverage under the four statutes. In the second category if you have a corporation that receives some federal assistance and is not principally engaged in one of those five enumerated activities, then only the separate geographical location that actually receives the assistance will be covered.

When the Restoration Act was first introduced, the Bishops were generally supportive of the principle that there should be broad application of the civil rights statutes. But there was some concern, particularly in three areas, and we were ninety percent successful in getting changes in the legislation as it went through. Let me briefly point out those areas.

The most important and the most prominent area had to do with abortion. In 1975, when the final regulations under Title IX of the Education Amendments of 1972 were issued, they required entities receiving federal assistance to treat abortion the same way as pregnancy in employee and student health and benefit programs. Title IX also contained a religious tenet exception which would have relieved educational institutions controlled by religious organizations from compliance if there was a conflict with religious tenets.

When the Bishops reviewed the Restoration Act, they were concerned that if new legislation did not deal with the abortion regulations or get rid of them, we, in effect, would have codified the regulations so that non-religious or other kinds of entities would be under a federal mandate, as a condition for receiving federal assistance, to provide and pay for abortion services.

This issue held up the legislation for the better part of three or four years. Through the good efforts of Senator Danforth, Representative Tauke, and many others who worked on the issue, we drafted an amendment which was adopted by both the House and the Senate. In effect, the amendment provides that under Title IX no entity would be required to pay or provide abortion benefits or services.

The second area in which we had a concern was the religious tenet exception under Title IX which exempted educational institutions controlled by a religious organization where the application of Title IX would be inconsistent with the religious tenets of that organization. On its face, the exemption only applied to educational institutions. We were concerned that because Title IX could be applied to other than educational

institutions, that any institution or entity controlled by a religious organization should also qualify for the religious tenet exception. We were successful in getting that into the legislation. That proved to be less controversial than the Danforth amendment on abortion.

The final area where the Bishops instructed us to seek corrective amendments was in what we call the area of institutional separability. We were concerned that if Parish X participated in a federal program, the diocese itself or other parishes in the diocese, whether or not they actually received any federal assistance, would be subject to the requirements of the four statutes because the one parish participated in a federal program. Basically what we wanted was pretty much achieved. The one area in which we were not as successful as we hoped to be was in the area of educational institutions. The Act is clear on its face that entire educational systems will be subject to the requirements of the four statutes if any part of the system receives or participates in a federally assisted program. The Act does not define the term "system." We are going to have to wait for regulations to see how "system" will be defined. My concern is that as the legislative process played itself out, it was clear that the people on the other side of the issue were viewing Catholic schools as a "system" and that could cause some concern for some of our operations.

By and large we were ninety percent successful in getting what we wanted in the Restoration Act. As a practical matter I think it may be some time before you feel any impact of the Act in your local operations. We still have to go through the regulation process and that could be lengthy. It always takes time for some of these things to filter down, but sooner or later this Act is going to affect anyone who receives or participates in a federally assisted program.

Let me touch briefly on a couple of pieces of pending legislation. The first is H.R. 5, the omnibus education bill. In effect, among other things, it would reauthorize Chapter I and Chapter II of the Education Consolidation Improvement Act of 1981. This is the first time since *Aguilar v. Felton* that we have had an opportunity through legislation to try to address some of the problems that arose after that decision.

One thing we learned immediately after *Felton* was that in a number of areas our eligible students were not receiving services. Although, by and large, this administration has been good in addressing complaints, sometimes it took a long time for those complaints to be resolved. Another concern we had was that one of the routine answers from the local educational agencies as to why they were not providing required services was that they did not have the money to develop new delivery systems, e.g., mobile vans, lease arrangements, and other things.

In the current legislation we were able to get three amendments that should somewhat help to relieve these concerns. First, there is a specific provision under Chapter I which authorizes \$40 million for expenditures

to provide alternative delivery systems in Fiscal 1989. If the statute works the way it was drafted, and the way the legislative history was developed, that money will have to be used for the purposes of providing alternative delivery systems which increase participation. Safeguards were included so that the local educational agencies just do not get this money and spend it along with everything else. Hopefully, it will have the desired effect.

We were also successful in adding an amendment which provides that the Secretary for the Department of Education develop written guidelines and procedures to handle complaints involving allegations of failure to provide equitable services to private school children. Prior to this Act there was somewhat of a complaint procedure but it was never really formalized in regulations. We are hopeful that with regulations that set out how you go about filing a complaint and where you file it, some of these complaints should be resolved in a more timely fashion. As an added measure we were also successful in getting into the statute an 120 day timeline in which complaints must be resolved. We are hopeful that these new provisions will send a message to public officials that these complaints need to be taken seriously and need to be resolved in a timely fashion. I know that some of these complaints can go on forever and I am not naive enough to think that having something in the statute is going to cure all the problems. But we are hopeful it will provide for a more expedited means of handling these complaints.

I would also like to address briefly new legislation entitled the Act for Better Child Care Services of 1987. It is a comprehensive bill designed to improve the quality and availability of affordable child care services. Child care is an important issue for the Bishops and they generally support the need for legislation to provide these services for people who need it. This bill provides for \$2.5 billion. The Conference, as I indicated, is generally supportive of this kind of legislation but with this particular bill we have run into a serious problem that we are now trying to work out. Basically, at the eleventh hour just before the bill was introduced, two new sections were added. The first section dealt specifically with how sectarian institutions would be able to participate in the programs authorized by the Act. I will not go into all the details, but to put it simply, the new section would effectively codify parts of the *Lemon* test. We have objected strenuously to this and we are hopeful that we will be able to work something out on this issue.

In the second area, some non-discrimination provisions were added to the bill. One of those provisions would have effectively, at least for the purposes of this Act, eliminated the existing exemption in Title VII which allows religious corporations or religious employers to give preference to their own members in hiring practices. This was the issue in the *Amos* case discussed this morning. We are working on this and, hopefully, we

will be able to resolve this problem.

Turning briefly to the asbestos question, I would like to point out that the Conference is working actively with other school organizations in trying to get some legislative relief for the October 1988 deadline for schools to adopt their management plans to deal with any asbestos problems. We are thinking in terms of a one-year, maybe a little more, extended deadline. Hopefully we will get some kind of relief on that deadline, what it will be and in what form is not clear.

Similarly, we are also lobbying to get more money for asbestos abatement programs. Congress put the responsibility on the schools to abate the asbestos problems, but they have never really fully funded what they have authorized for these kinds of programs. We are looking for \$125 million, which is not that much but it is a lot more than we have now.