

and Age Discrimination Act regulations of the Agencies, and promote consistent and adequate enforcement of these statutes by the Agencies.¹

DATES: Effective September 25, 2003.

FOR FURTHER INFORMATION CONTACT:

Merrily A. Friedlander, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, (202) 307-2222 voice, (202) 307-2678 TTY, (202) 307-0595 fax.

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SUPPLEMENTARY INFORMATION:

Overview

On December 6, 2000, the Agencies published a notice of proposed rulemaking (NPRM) in the **Federal Register** (65 FR 76460) proposing to amend the regulations governing nondiscrimination on the basis of race, color, national origin, handicap, and age to conform with the Civil Rights Restoration Act of 1987, Pub. L. 100-259 ("CRRA").

The Agencies are amending their civil rights regulations to conform to provisions of the CRRA regarding the scope of coverage under civil rights statutes they administer. These statutes include Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d, *et seq.* ("Title VI"); section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 ("section 504"); and the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101, *et seq.* ("Age Discrimination Act"). Title VI prohibits discrimination on the basis of race, color, and national origin in all programs or activities that receive federal financial assistance; section 504 prohibits discrimination on the basis of disability in all programs or activities that receive federal financial assistance;

and the Age Discrimination Act prohibits discrimination on the basis of age in all programs or activities that receive federal financial assistance. (Note that the CRRA does not affect coverage under federal employment nondiscrimination statutes, such as Title VII of the Civil Rights Act of 1964, Title I of the Americans with Disabilities Act, and the Age Discrimination in Employment Act.)

Background Information

The principal conforming change amends each of these regulations to add a definition of "program or activity" or "program" that reflects the statutory definition of "program or activity" or "program" enacted as part of the CRRA. We believe that adding this statutory definition to the regulatory language is the best way to avoid confusion on the part of beneficiaries, recipients, government entities, and other interested parties about the scope of civil rights coverage. These amendments also conform to a final rule under Title IX of the Education Amendments of 1972, as amended, to establish common regulations for 21 federal agencies published on August 30, 2000, 65 FR 52857. That common rule incorporated the statutory definitions of "program or activity" and "program" enacted as part of the CRRA.

When originally issued and implemented, the Agencies' civil rights regulations were interpreted by the Agencies to mean that acceptance of federal assistance by a recipient resulted in broad coverage of an entity. The Supreme Court, however, interpreted "program or activity" in restrictive terms. *Grove City College v. Bell*, 465 U.S. 555, 570-74 (1984). The Court concluded in *Grove City College* that federal student financial assistance provided to a college established jurisdiction under Title IX only over the college's financial aid program, not the entire college. Since Title IX was patterned after Title VI, this interpretation significantly narrowed the prohibitions of Title VI and two other statutes based on it: the Age Discrimination Act and section 504. *See* S. Rep. No. 100-64, at 2-3, 11-16, *reprinted in* 1988 U.S.C.C.A.N. at 3-5, 13-18. Following the Supreme Court's decision in *Grove City*, the Agencies changed their interpretation, but not the language, of the governing regulations to be consistent with the Court's restrictive, program-specific definition of "program or activity."

In 1988, Congress enacted the CRRA to restore the prior consistent and long-standing executive branch interpretation and "broad, institution-wide

application" of those laws as previously administered. *See* S. Rep. No. 100-64, at 4, *reprinted in* 1988 U.S.C.C.A.N. at 6. Congress enacted the CRRA in order to remedy what it perceived to be a serious narrowing by the Supreme Court of a longstanding administrative interpretation of the coverage of these laws. At that time, the Agencies reinstated their broad interpretation to be consistent with the CRRA, again without changing the language of the regulations. To the extent there was any inconsistency between the language of the regulations and the language of the CRRA, it was and remains the Agencies' interpretation that the CRRA superseded the regulations and, therefore, the regulations must be read in conformity with the CRRA. This interpretation was consistent with the understanding of Congress as expressed in the legislative history of the CRRA that the statutory definition of "program or activity" would take effect immediately without the need for federal agencies to amend their existing regulations. S. Rep. No. 100-64, at 32, *reprinted in* 1988 U.S.C.C.A.N. at 34.

These regulatory amendments are designed to address an issue recently raised by the Third Circuit Court of Appeals in *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999). The Third Circuit determined that, because the Departments of Health and Human Services and Education did not amend their Title VI regulations after the enactment of the CRRA, application of the Departments' Title VI regulations to disparate impact discrimination claims is "program specific" (*i.e.*, limited to the particular program receiving federal financial assistance), rather than institution-wide (*i.e.*, applicable to all of the operations of the institution regardless of the use of the federal funds). *See id.* at 114-16. As noted above, however, the Agencies have, since the passage of the CRRA, consistently interpreted the coverage of their Title VI regulations to reach those programs that fall within the broad statutory definition of "program or activity." The *Cureton* decision thwarts clearly expressed congressional intent by giving continued effect to a judicial interpretation that Congress intended to override. In any event, the regulatory changes address the concerns raised by the Third Circuit in that the regulations would track the CRRA's statutory language and apply to both disparate impact and disparate treatment forms of discrimination. ("Disparate treatment," *i.e.*, intentional discrimination, refers to policies or practices that treat individuals differently based on their

¹ Since the publication of the Notice of Proposed Rulemaking (NPRM), the Federal Emergency Management Agency (FEMA) has become a component of the Department of Homeland Security (DHS). DHS published its Interim Final Rules for Title VI, Section 504, and Title IX of the Education Amendments of 1972 in the **Federal Register** on March 6, 2003. 68 FR 10904 (to be codified at 6 CFR part 21). Those rules reflect the Civil Rights Restoration Act's broadened definitions of "program" "Program or activity." FEMA is continuing as part of this rulemaking because the DHS regulations provide that "[t]he provisions published by this part shall be effective for all components of the Department, including all Department components that are transferred to the Department, except to the extent that a Department component already has existing title VI regulations." 6 CFR 21.1. Similar language is included in DHS' Title XI and section 504 regulations.