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July 19, 1979

ATTORNEY GENERAL OPINION NO. 79- 150

Mr. John J. Conard, Executive Officer  
Kansas State Board of Regents  
Suite 1416, Merchants National Bank Tower  
Topeka, Kansas 66612

Re: Section 504 of the Rehabilitation Act of 1973---Section 3(b) of Executive Order 11914---Resulting power of HEW to withhold federal funds from state universities under noted provisions.

Synopsis: The Secretary of HEW has the authority to direct withholding of federal funds from the programs and activities of Kansas state colleges and universities which are conducted in derogation of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). Such authority derives from Executive Order 11914 and 45 C.F.R. Parts 84 and 85.

Dear Mr. Conard:

You inquire whether HEW has "legal authority to threaten the withholding or to actually withhold the granting of federal funds by all of the other federal agencies that normally and historically deal with our universities?" The issue relates to the Board of Regents' attempt to bring Kansas state universities into compliance with Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and also to the effect on the Board of Executive Order 11914 (1976) which dictates enforcement of that act.

It is to be emphasized the congressional act you address constitutes federal law and will be defined and tested in the federal courts. There is a dearth of such authority to date, but an attempt will be made to define parameters as they exist. No federal case addresses the precise inquiry you make.

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) reads as amended:

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Though Congress enacted this provision in 1973, the Secretary of HEW did not promulgate rules and regulations to execute the intention of Congress until several years later. In fact, not until Executive Order 11914 (Apr. 28, 1976) which directed implementation of Section 504 of the Rehabilitation Act of 1973 and a federal district court case, Cherry v. Mathews, 419 F.Supp. 922 (July, 1976), did the rules begin to approach a final draft.

Executive Order 11914 authorized enforcement of Section 504 through, among other remedies, the withholding of federal funds. The order provides in pertinent part:

(b) If voluntary compliance cannot be secured by informal means, compliance with section 504 (this section) may be effected by the suspension or termination of, or refusal to award or continue, Federal financial assistance or by other appropriate means authorized by law, in accordance with standards and procedures established pursuant to this order.

By what authority does the president issue an executive order? Presidential power is vested by Art. II of the U. S. Constitution which states in pertinent part:

... the executive Power shall be vested in a President . . . ;  
that he shall take Care that the Laws be faithfully executed  
.....

Therein, the U. S. Constitution vests in the president the power to see the laws are faithfully executed. It also makes clear he is not the lawmaker. Congress is. However, a president's order may direct that congressional policy be executed in a manner prescribed by Congress--just as Executive Order 11914 directs enforcement of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). See 3 U.S.C. Sec. 301 and Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The Executive Order at issue clearly meets constitutional dictates and bears effect of law in directing enforcement of an act drafted by Congress.

In the Cherry decision the U. S. District Court for the District of Columbia found the Rehabilitation Act's discrimination prohibitions were not intended to be self-executing and concluded the Secretary of HEW was required under the Act to promulgate regulations effectuating Section 504. Further, rather than

establish a date by which final regulations must issue, the federal court retained jurisdiction over the matter to assure no further unreasonable delays would affect the promulgation of regulations under Section 504. Cherry v. Mathews, supra, p. 924. The rules and regulations were subsequently issued by the Secretary of HEW. 45 C.F.R. Parts 84 and 85 (the latter refers specifically to Executive Order 11914).

The reader should refer to the cited rules and regulations, as to set them out in detail would serve no useful purpose here. Of particular interest may be those sections wherein "Program Accessibility" (Subpart C and the more complete comment in Appendix A), "Federal Agency Responsibilities" (Subpart A, Sec. 85.5 Enforcement, Sec. 85.6 Interagency cooperation, Sec. 85.56 Program Accessibility and more complete comments in Appendix A). Suffice it to say, the rules and regulations so promulgated were found reasonably related to the purposes of the enabling legislation in Howard v. Friendswood Independent School Dist. 454 F.Supp. 634 (D.C. Tex. 1978).

Based on the foregoing, it is clear the implementation of the Rehabilitation Act of 1973 comported with procedural dictates. Pursuant to Section 504 of the Act, Congress rendered unlawful discrimination against handicapped persons, solely by reason of handicap, by exclusion from participation or benefits under "any program or activity receiving Federal financial assistance." 29 U.S.C. 794. The president, though he could not draft the law, was empowered to enforce it and did through Executive Order 11914.

Under the act and rules, the Secretary of HEW is the individual charged with rulemaking and enforcement. As demonstrated, he came by that charge lawfully.

The next inquiry is by what means may he enforce the Act?

The language authorizing withholding of federal funds has been previously cited. Executive Order 11914, Section 3(b). However, the very next subparagraph states:

(c) No such suspension or termination of, or refusal to award or continue, Federal financial assistance shall become effective unless there has been an express finding, after opportunity for a hearing, of a failure by the recipient of, or applicant for, Federal financial assistance to comply with the requirements adopted pursuant to this order; however, such suspension or termination of, or refusal to award or continue Federal financial assistance shall be limited in its effect to the particular program or activity or part thereof with respect to which there has been such a finding of noncompliance. (Emphasis added.)

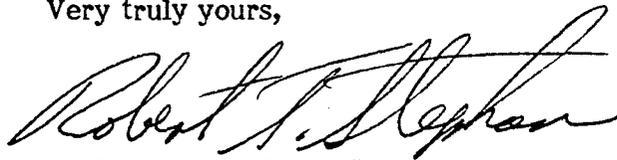
This subsection is further explained in the previously cited rules and regulations 45 C.F.R. Part 85, Subpart A entitled "Enforcement" (Sec. 85.5) and "Interagency Cooperation" (Sec. 85.6). The clear intent, as set out in the comments, is to

coordinate efforts among involved agencies in discovering the discriminatory acts addressed by Section 504 (29 U.S.C. 794). Whatever practices adopted by the agencies to effectuate this end may not exceed the authority granted. Therefore, we conclude the emphasized language allows withholding of federal funds only from noncomplying programs and activities.

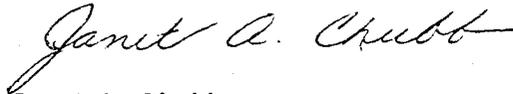
In conclusion, our answer to your inquiry is first, the Secretary of HEW has the authority to direct the withholding of federal funds from our state colleges and universities if their programs or activities are conducted in derogation of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and Executive Order 11914, and, secondly, only those federal funds which relate to noncomplying activities or programs may be withheld. Therefore, the financial effect may be more limited than your inquiry anticipates. Only federal case law which is lacking at present will enlighten us.

We regret the delay in sending this opinion to you and hope it satisfactorily answers your questions. If this office may be of further assistance, please do not hesitate to contact us.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Janet A. Chubb  
Assistant Attorney General

RTS:BEM:JAC:MC