No. 82-792

In the Supreme Court of the United States

OCTOBER TERM, 1983

GROVE CITY COLLEGE, INDIVIDUALLY AND ON BEHALF OF ITS STUDENTS, ET AL., PETITIONERS

v.

TERREL H. BELL, SECRETARY OF EDUCATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE POST-ARGUMENT MEMORANDUM AND POST-ARGUMENT MEMORANDUM FOR THE FEDERAL RESPONDENTS

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Pursuant to Rule 35.6 of the Rules of this Court, the Solicitor General, on behalf of the federal respondents, moves for leave to file the annexed post-argument memorandum.

This case was argued on November 29, 1983. At the oral argument, numerous questions were addressed from the Bench to both counsel. The government is concerned by the fact that some of these questions may indicate uncertainty on the part of the Court with respect to the actual nature of the statutory scheme created by Congress for the distribution of Basic Educational Opportunity Grants and with respect to the status of the two different distribution systems currently in use for those grants. We hope in this memorandum to dispel any possible confusion created by the failure of counsel to clarify this matter at oral argument.

We are also concerned about indications from questions from the Bench that there may be uncertainty whether the government's position on how to define the relevant "program or activity" in this case is consistent with the government's approach to that question in the case argued immediately after this case, *Consolidated Rail Corp.* v. *Darrone*, No. 82-862. We seek to dispel any confusion that may exist with a few brief comments in this memorandum.

Respectfully submitted.

PAUL M. BATOR
*Acting Solicitor General**

DECEMBER 1983

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*The Solicitor General has recused himself from further participation in this case.

TABLE OF AUTHORITIES

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POST-ARGUMENT MEMORANDUM FOR THE FEDERAL RESPONDENTS

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1. Questions directed to counsel at oral argument of this case — together with possible intimations drawn from some expressions used by counsel for petitioners — have generated a concern on the part of the government that there may exist some misunderstanding as to the statutory scheme created by Congress with respect to the distribution of Basic Educational Opportunity Grants (BEOGs) — the grants whose characterization, for purposes of Title IX, is at issue in this case. We are particularly concerned by the suggestion — perhaps implied in some questions from the Bench and in some of petitioners' counsel's remarks — that *Congress* could not have regarded BEOGs as "Federal financial assistance" to a college because *it* provided that the funds could be distributed, not to the college, but directly to students through an Alternate Disbursement System (ADS) rather than the Regular Disbursement System (RDS).

2. We think it important for this case that it be understood that the ADS system — under which Grove City students apply directly to the Secretary for BEOGs, and the Secretary (after certification by Grove City) calculates the awards and sends them directly to the students — was *not* created by Congress and is *not* in any way required or affirmatively contemplated by the statute. The forerunner of the current ADS system was created in 1974 by the Secretary — two years after the passage of Title IX — in part as an accommodation to schools, like Grove City, that did not wish to be heavily embroiled in the administration of the program. See 39 Fed. Reg. 9995 (1974) (proposed regulations); 39 Fed. Reg. 41800 (1974) (final regulations).[1] The vast majority of schools involved in the BEOG program *themselves* receive and distribute BEOG funds to eligible students under the RDS system. Whether to administer the program through one system or the other, or to give colleges a choice between the two, is a matter entirely within the administrative discretion of the Secretary. 20 U.S.C. (Supp. V) 1070a(b)(3)(A). The statute in no way specifies the administrative mechanism to be used in distributing these funds and leaves that matter to regulations to be issued by the Secretary. It is thus misleading to think of Congress as having *legislated* in contemplation of a bifurcated distribution system — with some schools on the ADS system and some on the RDS system.

3. The assumption that a school "receives" federal financial assistance if it is on the RDS system but not if it is on the ADS system must, therefore, be analyzed in light of the fact that it would make the applicability of Title IX wholly

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[1]Another, and perhaps more important, purpose for adopting the ADS system was the Department's perception that some schools "were not capable [of] properly administering the disbursement of [BEOG] funds under the Regular Disbursement System." 43 Fed. Reg. 20925 (1978).

subject to the administrative discretion of the Secretary. If the Secretary were to abolish the ADS system tomorrow —as he clearly could — then, on that assumption, Grove City would either have to acknowledge the application of Title IX or would have to reject all BEOG funds. Per contra, that assumption also implies that the Secretary could render Title IX inapplicable to the entire BEOG program by the simple administrative device of making the ADS system the sole system for distributing the funds.

4. We are also concerned about intimations at argument that members of the Court may believe the government is taking inconsistent positions concerning what program "receives" federal financial assistance — a question that clearly concerned the Court not only in this case but also in the case argued immediately in its wake. *Consolidated Rail Corporation* v. *Darrone,* No. 82-862 (argued Nov. 29, 1983). The government's position is that if the government gives an institution a truly *unrestricted* grant, and the terms of the grant permit it to be used for any purpose whatever, presumptively the entire institution is the relevant "program." Cf. 20 U.S.C. (Supp. V) 1051 *et seq.* By contrast, when the government gives an institution BEOGs (to hand out under the RDS system), those funds are *restricted* in the sense that the school must use them for scholarships — that is, for recruiting students regardless of means. The funds are intended to be, and have the economic effect of providing, a subsidy to Grove City's financial aid and scholarship program. (The situation is no different when BEOGs are handed out under the ADS system. The funds are again used for the purpose of recruiting to the school the most desirable students; the government simply relieves the school of the administrative burden of dispensing the money.) It is a form of double-counting to follow the funds further, and say that any activities for which the student

beneficiary pays are *also* federally assisted.[2] By specifying that the obligations imposed in Title IX were to be program-specific (20 U.S.C. 1681(a)), Congress intended the federal government not to follow the ripple effects of federal money as far as the funds could be traced. What it demanded, instead, was that the federal obligation a school incurred should be confined to the specific program that federal funds were intended to assist. In this case the government has provided money designed to aid Grove City in its ability to admit impecunious students, and the assisted program is the College's scholarship and financial aid program.

For the foregoing reasons and the additional reasons stated in our principal brief and at oral argument, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL M. BATOR
Acting Solicitor General

DECEMBER 1983

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[2]The monies students (including BEOG-funded students) pay to Grove City as tuition constitute operating revenues, but it is a mistake to think of them as "unrestricted" in the same sense as an unearmarked general gift to Grove City. These funds are obligated funds, because a school must provide specific educational services with them — instruction, meals, dormitory space, and books.