No. 82-792

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1982

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GROVE CITY COLLEGE, *et al.*,
*Petitioners,*

v.

T. H. BELL, *et al.*,
*Respondents.*

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**On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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The Equal Opportunity Advisory Council (EEAC), with the written consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Petitioners.[1]

### INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscrim-

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[1] The consents of all parties have been filed with the Clerk of the Court.

inatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Although most of EEAC's members are not directly subject to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (Title IX), the Court's decision in this case can be expected to bear importantly on employers such as EEAC's members that are subject to other similar statutory provisions. For example, many of EEAC's members participate in federally subsidized programs of various types and therefore are subject to Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504)—a statute which, like Title IX was modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* Thus, in *LeStrange v. Consolidated Rail Corporation*, 687 F.2d 767 (3d Cir. 1982), No. 82-862, *pet. for cert. granted*—a case concerning the jurisdictional scope of Section 504 relative to employment—Judge Adams' concurring opinion states that the result was compelled, in part, by the Third Circuit's decision in the instant matter in which:

> . . . [T]his court concluded that an entire educational institution is brought within the definition of "program," and therefore subject to regulation under Title IX, if it receives any fed-

> eral aid, and that aid is general or indirect and not specifically earmarked for a particular educational function within the institution.

687 F.2d at 777. Accordingly, EEAC's members have a substantial interest in the issue presented here for the Court's consideration; that is, whether Title IX applies to a college which receives no direct federal financial assistance for any program or activity and, if so, whether the institution's entire operations or only those specific programs in which the beneficiaries of federal financial assistance participate are subject to Title IX.[2]

## STATEMENT OF THE CASE

The Department of Health, Education, and Welfare (HEW) seeks to terminate federal grants and guaranteed loans to students attending Grove City College because of the College's failure to execute HEW's Assurance of Compliance Form.[3] The form required the College to acknowledge that it was operating federally funded educational programs and was therefore subject to all regulations implementing

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[2] Because of its interest in issues arising out of Title IX and Section 504, EEAC filed briefs as Amicus Curiae in the Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *University of Texas v. Camenisch*, 101 S. Ct. 1830 (1981); *North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912 (1982); and *Consolidated Rail Corporation v. LeStrange*, No. 82-862, *pet. for cert. granted.*

[3] HEW's functions under Title IX were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678. For purposes of editorial simplicity, this brief will refer to HEW throughout since the relevant actions were taken by HEW prior to the reorganization.

Title IX. Because the College received no direct federal assistance of any kind to operate programs or activities, it refused to complete the form. Following a hearing, an HEW administrative law judge (ALJ) found the College to be out of compliance with HEW's Title IX regulations solely because of its refusal to execute the Assurance.[4] Accordingly, the ALJ ordered termination of the student's grants and loans in 1978.

The College and several affected students initiated a lawsuit seeking judicial review of the ALJ's decision and order. The district court granted the plaintiff's motion for summary judgment, holding that HEW could not terminate federal assistance to the students because the College refused to sign the Assurance of Compliance. Although the trial court found that the student aid constituted federal financial assistance within the meaning of Title IX, it held, *inter alia*: (1) Title IX does not provide enforcement authority to "contract[s] of insurance or guarantee"; and (2) Title IX only permits termination upon an actual finding of sex discrimination. HEW appealed the district court's decision.

The Third Circuit agreed with the trial court that Grove City was a recipient of federal financial assistance even though it received no direct federal monies, but reversed the district court in all other respects. In relevant part, the appellate court held that the receipt of federal grants and loans and their subsequent payment to Grove City rendered the Col-

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[4] At the time of the decision of the trial court, HEW's Title IX regulations appeared at 45 C.F.R. Part 86. They were recodified in connection with the establishment of the Department of Education, 45 Fed. Reg. 30802 (May 9, 1980), and are now found at 34 C.F.R. Part 106.

lege subject to Title IX as a recipient of federal financial assistance. It concluded that Section 901(a) of Title IX encompassed "*all* forms of federal aid to education, direct or indirect." Pet. App. A-11 (emphasis in original). Contrary to the holdings of several other courts, the Third Circuit also held that the mere receipt by students of federal funds thereby subjected the entire college to Title IX. In doing so, it specifically rejected Grove City's argument that upholding HEW's jurisdiction in this case is incompatible with the explicit program-specific limitation contained in Title IX.

## SUMMARY OF ARGUMENT

The Third Circuit construed Title IX to provide HEW with regulatory and enforcement authority to terminate federal grants and loans to students in circumstances in which the educational institution did not apply for federal funds and had no role in the use or distribution of unearmarked federal funds to the intended student beneficiaries. The appellate court was incorrect for several reasons. First, the language of Section 901(a) of Title IX, 20 U.S.C. § 1681(a), is limited to the disbursement of federal funds to intended beneficiaries participating in the federally supported programs. *Cannon v. University of Chicago*, 441 U.S. 677, 690-693 (1979). Second, application of the Department of Health Education, and Welfare's (HEW) Assurance requirement and termination of all student grants and loans because of the Petitioners' failure to fulfill the requirement, violates the program specific scope of Section 901 and the pinpoint termination procedures of Section 902. Third, Congress understood when it enacted Title IX that its nondiscrimination provisions did not apply to direct payments to students from the federal government.

Finally, this Court in *North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912 (1982), made clear that HEW's regulatory and enforcement authority were program specific. Thus, the policies underlying Title IX require that HEW ascertain which programs administered by the recipient for the benefit of students received direct federal assistance and that HEW limit its enforcement authority to those programs.

## ARGUMENT

### ENFORCEMENT OF HEW'S ASSURANCE FORM REQUIREMENT AGAINST AN INSTITUTION WHICH NEITHER SEEKS NOR RECEIVES DIRECT FEDERAL FINANCIAL ASSISTANCE BY TERMINATING ALL LOANS AND GRANTS TO STUDENTS IS IN EXCESS OF HEW'S AUTHORITY BECAUSE IT IS INCONSISTENT WITH TITLE IX'S PROGRAM SPECIFIC SCOPE, ITS PINPOINT TERMINATION PROVISIONS AND THE DECISIONS OF THIS COURT.

#### A. The Language of Title IX Expressly Limits the Statute's Application to those Specific Programs Receiving Financial Assistance.

Title IX applies only to those educational programs or activities that receive direct federal assistance. Although written broadly, Section 901(a), 20 U.S.C. § 1681, addresses itself only to sex discrimination against the participants and the beneficiaries of federally assisted programs. The discrimination prohibition is stated unequivocally and unambiguously:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any education program or activity receiving Federal financial assistance* . . . . (Emphasis added.)

The wording chosen by Congress makes unmistakably explicit that Section 901 is designed to protect from sex discrimination only those persons for whose benefit the federally funded programs are established. *Cannon v. University of Chicago*, 441 U.S. 677, 691-693 (1979); *Brunswick School Board v. Califano*, 449 F. Supp. 866, 870 (D. Maine 1978), *aff'd sub nom. Isleboro School Committee v. Califano*, 593 F.2d 424 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979); *Romeo Community Schools v. HEW*, 438 F. Supp. 1021, 1031 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

Title IX's enabling provision—Section 902, 20 U.S.C. § 1682—limits the agency's authority to promulgate rules, regulations, or orders to those programs receiving federal financial assistance. It provides in relevant part that:

> Each Federal department . . . which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title *with respect to such program or activity* by issuing rules, regulations, or orders . . . . (Emphasis added.)

The program-specific scope of Title IX is further reinforced in Section 902 by its enforcement provision which is limited to particular programs or activities that receive federal aid. That is:

> [S]uch termination or refusal shall be limited to the particular political entity, or part thereof . . . and shall be *limited in its effect to the particular program or part thereof, in which such noncompliance has been found.* (Emphasis added.)

The clear program specific focus of Title IX, as supported by its legislative history, has been recognized by this Court. Thus, in *North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912, 1926 (1982), the Court concluded that: "an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902."

Contrary to several other federal courts of appeals and district courts,[5] the Third Circuit misapplied this Court's unambiguous holding in *North Haven* that a federal agency's regulatory and enforcement authority is program specific. The appellate court erred for two reasons. First, it misconstrued the legislative history leading to the enactment of Title IX and applied an "institutional" rather than "program specific" approach to HEW's regulatory and enforcement authority. Pet. App. A-13 to A-15. By adopting this faulty analysis, the appellate court erroneously concluded that "as we construe the legislative history it is consistent with the Department's position that Title IX applied to any institution which receives indirect or direct federal financial assistance." Pet. App. A-15. Second, it repeats its first error and misreads this Court's decision in *North Haven* as "im-

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[5] *See Hillsdale College v. HEW*, 696 F.2d 418 (6th Cir. 1982); *Dougherty City School System v. Bell*, 30 FEP Cases 1307 (5th Cir. 1982); *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 102 S. Ct. 1976 (1981); *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982); *Bennett v. West Texas State University*, 525 F. Supp. 77 (N.D. Tex. 1981), 81-1398 (5th Cir., January 31, 1983) (unpublished), *pet. for cert. pending*, No. 82-1683; *Othen v. Ann Arbor School Board*, 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd on other grounds*, 699 F.2d 309 (6th Cir. 1983).

plicitly adopting an institutional approach to the concept of program." Pet. App. A-25 (footnote omitted). By doing so, it broadly interprets program to mean "an entire integrated institution where indirect, unearmarked funding is involved." Pet. App. A-28.

In sum, the effect of the Third Circuit's decision is to contravene the clear intent of Congress, as interpreted by this Court, that Title IX's regulatory and enforcement authority to eliminate sex discrimination in federally funded program is program specific. *See University of Richmond v. Bell*, 543 F.2d 321, 329 (E.D. Va. 1982) ("Were the Court to adopt Plaintiff's argument [that unearmarked student aid constitutes a direct benefit to athletic programs], the programmatic instruction of Title IX would be rendered nugatory, because every program activity at the university would be subject to Title IX.").

### B. The Legislative History of Title IX Confirms that Congress Intended to Utilize a "Programmatic" Rather Than "Institutional" Approach to Regulation and Enforcement of Title IX.

As this Court recognized in *Cannon v. University of Chicago*, 441 U.S. 677, 694 & n.16 (1979), Title IX was modeled after Title VI. The description of the benefited class in Section 901 of Title IX is identical to that in Section 601 of Title VI, 42 U.S.C. § 2000d, except that the word "sex" is substituted for the words "race, color, or national origin" found in Title VI. *Id.* Both statutes described the scope of their nondiscrimination provisions to be to "any . . . program or activity receiving federal financial assistance." *Compare* 20 U.S.C. § 1681(a) *with* 42 U.S.C. § 2000d. Neither defines "program or activity", but Section 901(c), 20 U.S.C. § 1681(c), defines "educational institution" as:

> [A]ny public or private preschool, elementary, or secondary school, or any institution of vocational professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units such term means each such school, college, or department.

Thus, under Title IX, subunits of a college or university may be regarded as an "institution" if they are administratively separate units. Finally, Title VI and Title IX adopt the same administrative scheme for terminating federal financial assistance "in the particular program [or activity], or part thereof" in which discrimination against intended beneficiaries by the recipient institution occurs. *Compare* 20 U.S.C. § 1682 *with* 42 U.S.C. § 2000d-1.

As this Court observed in *North Haven*, 102 S. Ct. at 1919 & n.13, Title IX evolved as a result of two different proposals by Senator Bayh. The first, introduced in August 1971 as S.659, 92d Cong., 1st Sess., was substantially different from Title IX as enacted. Although Senator Bayh stated that "[t]hese provisions are identical to those provided under Title VI of the 1964 Civil Rights Act," (117 Cong. Rec. 30156), a comparison of his amendment and Title VI shows that the scope of his proposal was institutional rather than program specific, and unlike Title VI, the proposal contained no pinpoint termination provision.[6] In relevant part, S.659 provided:

> No person in the United States shall, on the ground of sex, be excluded from participation

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[6] *Compare* 20 U.S.C. § 2000d-1 *et seq.* with S.659 at 117 Cong. Rec. 30404 (1971).

> in, be denied the benefits of or be subject to discrimination under any program or activity conducted *by a public institution* of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance for any education program or activity . . . . (Emphasis added.)

Subsequently, Senator Bayh made a second proposal in February 1972 that conformed his first proposal to H.R. 7248, which was a marked up version of Title VI. Thus, while the language of Senator Bayh's first proposal deviated from the actual wording of Title VI's, his second amendment, like the House bill, was identical to the first three sections of Title VI, which have a program specific scope.

The Third Circuit, however, failed to recognize the differences between Senator Bayh's first and second proposals. Accordingly, the appellate court's reliance on the legislative history associated with Senator Bayh's first proposal to support its conclusions that Congress intended (1) that Title IX encompass indirect financial assistance and (2) that Title IX provides authority to withhold all direct or indirect financial assistance to discriminating institutions because the entire institution is automatically the funded program, are ill-founded.[7]

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[7] Furthermore, the court of appeals' conclusion that Congress intended indirect federal assistance to be within the scope of Title IX, as shown by the failure of Congress to adopt bills and amendments specifically designed to limit Title IX to direct financial assistance, is equally erroneous. Likewise, the failure of Congress to disapprove HEW's Title IX regulations should not be taken as any indication of their validity. Thus, 20 U.S.C. § 1232 expressly provides that failure of Congress to disapprove regulations promulgated by

This construction of the program specific scope of Title IX is confirmed by the legislative history of Title VI, from which the "program and activity" language is derived.[8] During the debates on the 1964 Civil Rights Act, concern was continually expressed that Title VI would permit intervention into every aspect of the operations of recipients. In response to those concerns, Title VI was redrafted to make it program specific, and the floor statements in both Houses confirm this intent.[9] It was clearly understood that "recipient of the grant is the one in charge of the program or activity . . . [and] [i]t is the program that is administered that would be cut off."[10]

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HEW is not evidence of approval and creates no presumption of validity. Moreover, whereas Title IX was considered and voted on by the entire Congress, hearings before a committee of Congress reviewing regulations hardly constitutes a statement of Congress' intent when it enacted Title IX. *Cf. Tennessee Valley Authority v. Hill,* 437 U.S. 153, 190 (1978) (Repeal of acts of Congress by implication are not favored especially where such an implication is based on committee inaction).

[8] As stated above, Title VI and Title IX use the same words in Sections 601 and 901 to describe their coverage. Since the words used are derived from Title VI, their meaning as reflected in Title VI's legislative history is relevant in determining its scope and meaning of Section 901. *See Cannon,* 441 U.S. at 694 n.16 ("The genesis of Title IX also bears out its kinship with Title VI").

[9] *See* 110 Cong. Rec. at 1518-19, 21 (remarks of Rep. Celler; *id.* at 1542 (remarks of Rep. Lindsay); *id.* at 1602 (remarks of Rep. Mathias); *id.* at 2480-81 (remarks of Rep. Ryan); *id.* at 6545 (remarks of Sen. Humphrey); and *id.* at 7060 (remarks of Sen. Pastore).

[10] Hearings Before the House Committee on Rules, 88th Cong., 2d Sess. (1964) at 141 (remarks of Rep. Celler); *see also id.* at 142-144, 197-198 (remarks of Rep. Celler).

Moreover, in response to a request from Representative Celler, chairman of the House Judiciary Committee, concerning a list of programs and activities involving federal financial assistance within the scope of H.R. 7152 (which was later given greater specificity in section 601 of the Dirksen-Mansfield substitute), Deputy Attorney General Katzenbach stated:

> A number of programs administered by federal agencies involve direct payments to individuals possessing a certain status . . . . [T]o the extent that there is financial assistance . . . *the assistance is to an individual and not to a "program or activity" as required by Title IX.*[11]
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> * * * *
>
> The impact of Title VI is further limited by the fact that it relates only to participation in, receipt of benefits of, or discrimination under, a federally assisted program. As to each assisted program or activity, therefore, Title VI *will require an identification of those persons whom Congress regarded as participants and beneficiaries, and in respect of whom the policy declared by Title VI would apply.*[12]

This understanding that Title VI did not include direct payments to individuals was reaffirmed by Senator Ribicoff, one of two authors of the version of Title VI passed by the House of Representatives:

> The individual who receives a direct payment has a right. It is nothing to do with Federal assistance to the individual, but a direct pay-

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[11] *Hearings on H.R. 7152 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963) (letter from Deputy Attorney General Katzenbach to Rep. Celler) at 2773.

[12] *Id.* at 2774.

> ment. Direct payments are not covered in any way by Title VI .

110 Cong. Rec. 8424 (1964). *See also id.* at 8426 (remarks of Sen. Ribicoff).

Witnesses testifying during the hearings on HEW's Title IX regulations also understood that "program or activity" was limited to the direct beneficiaries of programs funded under specific grant statutes.[13] More significantly, however, as previously noted, Senator Bayh's first Title IX proposal contained an institutional rather than program specific approach and would have applied to "any" program or activity of an educational institution receiving federal funds. Had the Senate adopted such an institutional approach, then there might be some justification for the decision reached by the court below. In revising his bill to conform to the House version of Title IX, however, Senator Bayh narrowed his proposal so as to adopt the program specific language found in Title VI and the House bill. Moreover, Senator Bayh understood that even with respect to his first proposal that Title IX would not apply to direct payments to students:

> It is unquestionable in my judgment, that this would not be directed at specific assistance that was received by individual students . . . .

117 Cong. Rec. 30408 (1971).[14]

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[13] *See, e.g., House Title IX Hearings* at 645-61 (Testimony of Dr. Peter Muirhead on behalf of HEW).

[14] *See also Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor,* 94th Cong., 1st Sess. 183 (1975).

That Congress did not intend to apply Title IX in circumstances in which the student received the federal assistance directly from the federal government is logical. The purpose of Title IX is to protect women who are the intended beneficiaries in federally assisted programs or activities. As the legislative history for Title VI shows, Congress has consistently used the words "program" and "activity" to designate those projects that are federally funded under specific statutory authority such as federal education grant statutes. For example, Title I of the Elementary and Secondary Education Act, 20 U.S.C. § 241a-m, of 1965—the largest program of federal assistance below the college level—provides payments shall be made only "for programs and projects . . . designed to meet special educational needs of educationally deprived children." [15] It is the beneficiaries of such grant programs that Title IX is designed to protect from discriminatory practices of educational institutions directly receiving such funds. Where, as here, a college does not directly receive federal assistance and thereby has no role in distributing the federal funds to the student beneficiaries, there is no program or activity within the meaning of Title IX. Thus, Grove City is neither an applicant for nor a recipient of federal financial assistance.[16] Further-

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[15] *See* Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 Geo. L. J. 49, 63 (1976) and the federal education grant statutes described therein.

[16] Because Grove City is neither an applicant for or recipient of federal financial assistance, HEW's Assurance requirement does not apply. *See* 45 C.F.R. § 864. Indeed HEW's regulations expressly contemplate that the application for federal financial assistance include an assurance from the applicant or recipient. *Id.* Since Grove City has not applied for

more, because Congress precisely defined educational institution in Section 901(c), this "strongly indicates that it did not equate education program with educational institution." *Rice v. President and Fellows of Harvard College*, 663 F.2d 336, 338 (1st Cir. 1981). Here, no nexus has been established between the purpose of Title IX to protect intended beneficiaries from sexual discrimination by recipients administering federal grant programs and the programmatic scope of Title IX to support HEW's enforcement of its regulations.[17] Accordingly, Title IX's prohibitions are inapplicable in this case.

**C. Termination of All Student Loans and Grants Is Inconsistent with Title IX's Pinpoint Termination Provision.**

By adopting the identical administrative scheme for terminating federal financial assistance under Title IX as under Title VI, Congress made a conscious decision to limit enforcement of Section 901 to the particular education "program or activity [of]

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federal assistance, it can not be deemed a recipient and, accordingly, Title IX does not apply.

[17] The Sixth Circuit in *Romeo Community Schools v. HEW*, 600 F.2d 581, 584 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979), has cogently observed:

> The concern of this particular statute is not with all discrimination against persons in any way connected with educational institutions which receive federal funds. Rather, it reaches only those types of disparate treatment which manifest themselves in exclusion from, denial of benefits of, or otherwise result in discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance . . . ." Unless the discrimination relates to a program or activity which receives federal funding, it is not prohibited by § 1681.

any recipient" with termination of federal funds "limited to the particular political entity, or part thereof," if in fact there was discrimination to intended beneficiaries of such programs or activities. 20 U.S.C. § 1682. Thus, federal assistance to program "A" cannot be terminated because of a finding of discrimination in program "B". As a corollary, a remedy for the aggrieved is not available unless the complainant participated in a program which received federal assistance and was the intended beneficiary of that assistance.

Termination of student loans and grants in this case because of Grove City's failure to complete the Assurance Form turns the statute around. Under the Third Circuit's decision, the acceptance by an educational institution of a student who has received unearmarked federal assistance outside its auspices subjects the entire institution and all of its programs to Title IX's prohibitions. This interpretation is erroneous. Thus, inconsistent with the plain meaning of the words used in Section 902 and its legislative history, HEW's regulations broadly cut across all programs of an institution irrespective of whether there was a federal program or whether the particular program was supported by federal funds.

Again, the flaw in the Third Circuit's interpretation of the meaning of the language in Section 902—Title IX's enforcement provision—is supported by the legislative history of the identical provision found in Title VI.[18] During the Congressional hearings on the 1964 Civil Rights Act, the question frequently arose as to whether assistance to one program could be cut off because of a finding of discrimination in

[18] *See* Kuhn at 65-67.

another. The Administration's cabinet-level representatives' consistent answer was that it could *not*.[19] A reading of the floor debates on Title VI in both Houses, moreover, reinforces the conclusion that under no circumstances would discrimination in one program justify action with respect to any other program.

During House debate on H.R. 7152, the enforcement authority of Title VI was not completely understood. To clarify the situation, Congressman Mathias brought to his colleagues' attention Attorney General Kennedy's assurance during committee hearings that any termination of assistance would be "as specific and particular as it possibly could be" and he highlighted that this certainty was the understanding of the members of the Committee in working on the bill.[20]

When the House bill, H.R. 7152 reached the Senate, the Senate floor leader for Title VI emphasized that "[p]articipation in one program would not justify the exaction of a nondiscrimination assurance concerning some other program." [21] Similarly, Sena-

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[19] *See Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary,* ser. 4, pt. II, 88th Cong., 1st Sess. (1963) at 1543 (colloquy between Representative Meader and HEW Secretary Celebrezze that the withholding of funds from one program cannot be used as a means of combatting discrimination in another program); *Hearings on H.R. 7152, as amended by Subcomm. No. 5, Before the House Comm. on the Judiciary,* ser. 4, pt. IV, 88th Cong., 1st Sess. (1963) at 2685, 2766. Attorney General Kennedy indicated that the termination of assistance be limited to the particular program and location where the discrimination exists.

[20] 110 Cong. Rec. 2486 (1964) (remarks of Rep. Mathias).

[21] *Id.* at 7059 (remarks of Sen. Pastore).

tor Ribicoff pointed out that "[u]nder no circumstances" would discrimination in one program justify any action with respect to any other program.[22] These repeated assurances that assistance in one program could not be terminated because of a finding of discrimination in another program were made prior to the inclusion in Title VI of the pinpoint termination provision found in Section 602, 42 U.S.C. § 2000d-1, which limits any termination of federal assistance to the "particular program, or part thereof," in which the discrimination is found.

When the final version of the 1964 Civil Rights Act was proposed in the Senate, in the form of the Dirksen-Mansfield substitute, Title VI contained the program specific provision. As explained in the Senate debates, "[t]he new language will ensure that Federal funds will be cut off for only those political entities or particular programs or parts of programs in which discrimination is practiced." [23] Moreover, Senator Humphrey, floor leader for the Civil Rights Act, stated that the revisions clarified that "any termination shall affect only the particular program, or part thereof," in which discrimination occurs and such termination "will be restricted to the particular subdivision" in which discrimination is found.[24] Finally, House Judiciary Chairman Celler confirmed Senator Humphrey's interpretation when he appeared before the House Rules Committee to describe the

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[22] *Id.* at 7067 (remarks of Sen Ribicoff).

[23] *Id.* at 12689 (remarks of Sen. Saltonstall).

[24] *Id.* at 12714-15 (remarks of Sen. Humphrey). See also *id.* at 13377 (remarks of Sen. Ribicoff).

Senate amendments to the bill, stating that "aid to a particular program, will not be cut off because one part of the program or institution is being operated in violation of the law." [25]

This view of legislative history of Title VI has been affirmed by the courts. In *Bd. of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir. 1969), the Fifth Circuit held that programs could not be condemned by association. The court refused "to assume, contrary to the express mandate of [the statute], that defects in one part of the school system automatically infect the whole." 414 F.2d at 1074. Thus, funds under Title VI are not to be denied or terminated in a federally assisted program unless there is an express finding of discrimination in a particular program. *Accord, Gatreaux v. Romney*, 457 F.2d 124, 128 (7th Cir. 1972) (federal assistance to model cities program unrelated to housing cannot be terminated because of discrimination in a low-rent housing program).

The legislative history of Title VI makes clear, therefore, what is evident from the statutory language—federal assistance in one program cannot be terminated because of a finding of discrimination in another program. There is, moreover, no remedy available unless the complainant was the intended beneficiary of that assistance. *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 674-676 & n.4 (8th Cir. 1980), *cert. denied*, 449 U.S. 892 (1980).[26]

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[25] *Hearing on H. Res. 789 Before the House Comm. on Rules*, 88th Cong., 2d Sess. (1964) at 6.

[26] *See also Simpson v. Reynolds Metal Co.*, 629 F.2d 1226, 1233 n.12 (1980); and *Trageser v. Libbie Rehabilitation Cen-*

These Title VI standards apply to Title IX. Although Senator Bayh's first proposal adopted an institutional rather than pinpoint termination procedure,[27] his second proposal adopted the House bill's Section 902 language. In doing so, Senator Bayh incorporated the pinpoint termination procedure found in Section 602 of Title VI. Moreover, as noted by this Court in *North Haven*, HEW "recognized that § 902 limited its authority to terminate funds to particular programs that were found to have violated Title IX" and that HEW expressly adopted the Fifth Circuit's decision in *Finch*. 102 S. Ct. at 1927.

Accordingly, in adopting Section 902 as the mirror image of Section 602, Congress made a conscious decision to limit enforcement of Section 901 to the particular educational "program or activity" receiving federal funds. This means, for example, that Title I funds can only be terminated if there is discrimination in a Title I program, and only to that part of the educational institution in which the discrimination occurred. Moreover, federal assistance to a Title I program cannot be terminated because of discrimination in a program funded under the Vocational Educational Act, 20 U.S.C. §§ 1241-1391.

Termination of all student grants and loans because Grove City did not complete the Assurance Form is inconsistent with Title IX's program specific scope and pinpoint termination provisions. Thus,

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*ter*, 590 F.2d 87, 89 (4th Cir. 1978), *cert. denied*, 442 U.S. 977 (1979). *But see LeStrange v. Consolidated Rail Corp.*, 687 F.2d 767 (3d Cir. 1982), No. 82-862, *pet. for cert. granted.*

[27] *See* 117 Cong. Rec. 30408 (1971) (colloquy between Senators Dominick and Bayh).

under HEW's application of Title IX and the Third Circuit's interpretation, only if an educational institution is completely self-supporting—receives no direct or indirect federal assistance—would it be exempt from the Assurance Form requirement. Derivatively, every program and the entire institution is covered by Title IX if only one student receives federal support. Such a result is absurd, especially as here, where the educational institution has consciously attempted to avoid federal entanglements through direct financial assistance for any of its programs. Because, as discussed above, an entire institution is not subject to Title IX's strictures if one program receives federal aid, then it is beyond debate that the receipt of unearmarked federal loans or grants by 1, 5, 10, 50 or 200 students which the college has no role in administering does not bring the entire institution under Title IX.[28] To do so completely rewrites the statute.

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[28] In similar fashion, HEW's investigation of employment discrimination complaints under Title IX has been inconsistent with the program specific and pinpoint termination provisions of Title IX. Thus, HEW has not attempted to determine whether there has been discrimination against intended beneficiaries of federal funds or indeed whether the complainant is an intended beneficiary. Moreover, HEW's institutional view of federal assistance has caused it to conduct investigations of employment practices beyond the parameters of the particular program receiving federal assistance. Accordingly, when HEW has found noncompliance in employment practices, it has sought to terminate all federal funds in all programs irrespective of any finding of discrimination of intended beneficiaries and irrespective of that part of the educational institution in which the discrimination occurred. *See, e.g., Dougherty City School System v. Bell,* 30 FEP Cases 1307 (5th Cir. 1982).

The policies underlying Title IX call for a more limited application of HEW's regulatory and enforcement authority. Before it requires completion of an Assurance Form, the program specific scope of Title IX requires that HEW ascertain which program(s) administered by the recipient directly benefited from the federal assistance and to limit the applicability of the Assurance Form to these programs. Because Title IX is designed to protect intended beneficiaries from sex discrimination, the purposes of the statute are not furthered by termination of funds in programs in which there is no evidence of discrimination. *See Dougherty City School System v. Bell*, 30 FEP Cases at 1308 ("Insofar as the department's order defers funding of programs that do not discriminate on the basis of sex, the department's action is ultra vires."). In any event, to the extent that the recipient is found to have discriminated against an intended beneficiary but does not take corrective action, termination of funding is limited to the program in which HEW finds noncompliance. To use procedures other than these violates the program specific scope and pinpoint termination procedures of Title IX.

### D. The Third Circuit's Decision Is Contrary to the Decisions of This Court.

Although Title IX prohibits sex discrimination in any "education program and activity receiving Federal financial assistance," 20 U.S.C. § 1681(a), the court below construed its scope as regulating all practices of the College in circumstances in which Grove City did not directly receive federal assistance; that is, no program was identified which benefited from that assistance. This Court stated, however, in find-

ing a private right of action under Title IX in *Cannon*:

> There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX *with an unmistakable focus on the benefited class*, had written it simply to a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices. (Emphasis added, footnote omitted.)

441 U.S. at 690-693. In doing so, this Court implicitly recognized the program specific nature of the benefited class under Title IX, as well as the inapplicability of Title IX to an educational institution unless the institution as a recipient of federal aid administered a federally funded program to benefit students. Indeed, in *Cannon* the Court specifically found that the "petitioner [student applicant] is clearly a member of that class for whose *special* benefit the statute was enacted." *Id.* at 694 (emphasis added).

In *North Haven*, after reviewing Title IX's language and its legislative history, the Court addressed whether HEW's employment regulations were too broad. While it stated that the "employment regulations do speak in general terms of an educational institution's employment practices," the Court carefully pointed out that "they were limited by the provision that states their general purpose: 'to effectuate Title IX . . . [,] which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education *program or activity* receiving Federal financial assistance . . . .'" 102 S. Ct. at

1926-1927. The Court also noted that HEW in publishing its employment regulations "recognized that § 902 limited its authority to terminate funds to *particular programs* that were found to have violated Title IX." *Id.* at 1927. Thus, rather than adopting an institutional approach to Title IX enforcement, this Court expressly recognized that HEW's regulations must be applied consistent with the program specific limitations Congress enacted in Sections 901 and 902. *Id.*

Moreover, in remanding *North Haven* for further proceedings, the Court identified three factual circumstances which could limit HEW's jurisdiction to investigate employment practices: (1) that the complaining employees' salaries were not funded by federal money; (2) that the employees did not work in an education program that received federal assistance; or (3) that the discrimination they allegedly suffered did not affect a federally funded program. Through these examples the Court reaffirmed the essential ingredients of HEW's authority under Title IX. That is, in order for HEW properly to exercise its jurisdiction, it must show that the recipient educational institution administers a federally funded program in which the benefited class participates or that there has been discriminatory conduct that affects the benefited class. In this case, HEW has established neither and, accordingly, application of the Assurance Form requirement and termination of student grants and loans is in excess of HEW's regulatory and enforcement authority.

## CONCLUSION

The decision of the court of appeals should be reversed and the Court's opinion should make clear that Title IX is program specific and is inapplicable to the Petitioners in this case.

Respectfully submitted,

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