No. 82-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH and VICTOR E. VOUGA,
Petitioners,

v.

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education.

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

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE [1]

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights for all Americans. The Committee has, over the past 20 years, enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor. The Committee's membership today includes past Presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers.

[1] Letters from counsel for the parties consenting to the submission of this brief have been filed with the Clerk.

The Lawyers' Committee has had a longstanding interest in eliminating sex discrimination in education and has consistently sought vigorous enforcement of Title IX of the Education Amendments of 1972.[2] In 1975, the Committee established a Federal Education Project, which has worked to eliminate sex bias and stereotyping in the vocational education programs which are offered by most of the nation's school districts. Research and observation by the Project indicate that there has been progress, over the last decade, in opening up opportunities for female students to learn the skills which can lead to highly paid jobs traditionally viewed as "male only" and from which women were often barred. The antidiscrimination requirements of Title IX—which have been interpreted to apply to all of a recipient school system's vocational curricula, even though federal Vocational Education Act funds constitute less than 20% of total program expenditures at the secondary school level—have contributed significantly to this progress.

Thus, the narrow approach to Title IX coverage proposed by the petitioners could jeopardize the achievement of fully equal opportunity for women in education and employment. The ruling sought by petitioners also would have grave implications for the scope of the antidiscrimination requirement in Title VI of the 1964 Civil Rights Act.[3] This possibility equally prompts the Committee's interest in the present case, for Title VI has been a criti-

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[2] For example, the Committee filed an *amicus curiae* brief in *Cannon v. University of Chicago*, 441 U.S. 677 (1979) supporting the right of the petitioner in that case to bring a private suit to enforce Title IX.

[3] This Court has recognized in several recent rulings that Title IX was patterned after Title VI, a broad prohibition of racial discrimination in federally assisted programs; similar language in the two statutes is construed in a similar fashion absent contrary indications in the law or legislative history. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 529 (1982); *Cannon v. University of Chicago*, 441 U.S. at 694-98.

cal element of the civil rights gains made during the past two decades.

Over the course of its work in the field of education, the Lawyers' Committee has come to realize that discrimination on the basis of race or sex is a serious impediment to equal opportunity for students, faculty and other staff members, whether or not that discrimination manifests itself within a particular constituent part of an educational institution that is formally designated as the "recipient" of an "earmarked" federal grant or contract. Titles VI and IX were enacted, in part, to insure that federal financial assistance made available by the Congress for *educational* programs does not subsidize discriminatory activities. Petitioners' interpretation of the scope of Title IX, which would permit an educational institution to receive funds made available by the federal government and to use those funds for its basic operating expenses, without undertaking any concomitant obligation to eliminate discriminatory practices, would thus be contrary to the purposes of Title IX.

SUMMARY OF ARGUMENT

I

The Third Circuit correctly held that Grove City College is a recipient of "Federal financial assistance" within the meaning of Title IX. The language of the statute, its administrative construction, and both its legislative and post-enactment history support the ruling below. An educational institution is subject to Title IX because it is a recipient of "Federal financial assistance" when it participates in a program under which the students whom it certifies are enrolled at its facilities receive federal funds, in amounts based in part upon the institution's tuition and related charges, and the students are required to use those funds "solely for expenses related to attendance or continued attendance at such institution."

II

The court below also correctly upheld the Department of Education's regulation requiring that Grove City College, like other recipients of Federal financial assistance, execute a written Assurance of Compliance with applicable substantive Title IX regulations of the Department, as a precondition to the award of BEOG grants to Grove City students. Both the Assurance and the Title IX regulations explicitly refer to and incorporate the statutory requirement of "program specificity," and both must therefore be sustained on the basis of this Court's reasoning in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982). Furthermore, because BEOG student grants are intended to, and do support the entire educational program offered by Grove City College, on the facts of this case the entire institution is subject to Title IX's prohibition against discriminatory treatment because of sex.

ARGUMENT

I

GROVE CITY COLLEGE IS A RECIPIENT OF FEDERAL FINANCIAL ASSISTANCE FOR PURPOSES OF TITLE IX BECAUSE ITS STUDENTS RECEIVE FEDERAL EDUCATIONAL GRANTS BASED UPON THEIR MATRICULATION AT THE SCHOOL

A. The Language of Title IX Does Not Limit its Coverage to Agencies or Institutions Receiving Direct Cash Payments from the Federal Government; and the Language and Structure of the BEOG Program Compel the Conclusion that Grants to Grove City College Students are a Form of "Federal Financial Assistance" to the Institution

Petitioners contend that Title IX is wholly inapplicable to Grove City College because the school does not "receiv[e] Federal financial assistance" within the meaning of § 901(a) of Title IX of the Education Amendments of

1972, 20 U.S.C. § 1681 *et seq.* ("Title IX").[4] According to petitioners, this conclusion follows from the fact that the College does not request direct cash payment from the federal government[5] of the student assistance funds that make it possible for the individual petitioners to attend the institution.[6] However, this construction is inconsistent with the plain language of the statute.[7]

The term "Federal financial assistance," which first appeared in Title VI of the 1964 Civil Rights Act,[8] is

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[4] Grove City College has not itself sought federal grant or contract funds. Many students at Grove City, however, do receive funds from the federal government under the Basic Educational Opportunity Grant ("BEOG") program, 20 U.S.C. § 1070a, which they must use to pay for tuition, room and board, and other expenses related to their attendance at the College. *See* 20 U.S.C. § 1091(a)(5).

[5] *See* Pet. Br. at 14-17. Apparently the College foregoes the additional funds to which it would be entitled under federal law based upon the receipt of BEOG grants by its students, *see* 20 U.S.C. § 1070e. (Pet. Br. at 26 n.24.)

[6] *See Grove City College v. Harris*, 500 F. Supp. 253, 257 (W.D. Pa. 1980) (Amended Findings of Fact made by district court in this case).

[7] "Our starting point in determining the scope of Title IX is, of course, the statutory language." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982).

[8] Petitioners suggest that the language enacted as Title VI represents a narrowing of a broader, earlier legislative proposal; and that Congress intended thereby to exclude from Title VI coverage all recipients of what petitioners term "indirect" assistance. (Pet. Br. at 29-30.) This overlooks the fact that in § 602 of Title VI, Congress specifically excluded two forms of financial assistance: contracts of insurance or guaranty. The addition of specific exclusions from the generic term "Federal financial assistance" in the final version of the statute eliminates the basis for any inference that other kinds of "Federal financial assistance," whether "direct" or "indirect," would not trigger coverage. *See North Haven*, 456 U.S. at 521-22 ("the absence of a specific exclusion . . . among the list of exceptions tends to support the Court of Appeals' conclusion that Title IX's broad protection . . . does extend . . .").

deliberately broad and covers the multitude of different arrangements by which the federal government may provide aid or support to an institution or agency.[9] Nothing in the language of the statute supports petitioners' view that the particular institutional entity, through which the "education program or activity receiving Federal financial assistance" is administered, must itself be the applicant for assistance or must receive a Treasury Department draft of funds in order to trigger Title IX coverage.[10] It is sufficient that the "education program or

[9] This is hardly surprising, in light of the Congressional purpose to insure "that public funds, to which all taxpayers of all races contribute, not be spent *in any fashion which encourages, subsidizes, or results in* racial discrimination." 110 Cong. Rec. 6543 (1964) (Sen. Humphrey, quoting from President Kennedy's message to Congress of June 19, 1963, *reprinted in* 1963 U.S. Code Cong. & Ad. News 1527, 1534) (emphasis added).

[10] Petitioners' interpretation of the statute would by its logic exclude from Title IX coverage a local school district which participated only in federal programs administered through the States. Petitioners disavow this result (*see* Pet. Br. at 17 n.17) but they do not explain how their position is consistent with their argument that Grove City College is not subject to Title IX because the Treasury Department sends its BEOG checks to individual students rather than to the institution.

Petitioners' concession is clearly correct. It has never been doubted, for example, that Title VI and Title IX apply to local school districts which obtain federal funds from their state educational agencies under the government's largest program of aid to elementary and secondary education, Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.*, formerly Title I of the Elementary and Secondary Education Act of 1965. *See, e.g., Lau v. Nichols*, 414 U.S. 563 (1974); *Board of Public Instruction v. Finch*, 414 F.2d 1068, 1071 (5th Cir. 1969) (receipt of Title I [then known as Title II] funds under 20 U.S.C.A. §§ 241a-m (Supp. 1969)).

Petitioners' attempted distinction of state-administered programs rests upon their contention that BEOGs do not amount to "Federal financial assistance" to an institution of higher education if the grants are paid to its students under the Alternate Disbursement System (*see* Pet. Br. at 17 n.17). This argument in turn incorporates a basic misreading of the grant statute. *See* text at pp. 7-8 *infra*.

activity" administered by the institution receive the assistance in some fashion.[11]

The language and structure of the BEOG statute confirm our view that the Department of Education's award of grants to Grove City students, upon certification by the College of their enrollment, makes the school subject to the coverage of Title IX.

The purpose of the federal higher education assistance programs, including BEOGs, is "to assist in making available the benefits of postsecondary education to eligible students . . . in institutions of higher education . . . ." 20 U.S.C. § 1070(a).[12] Since there must be both a student and an educational institution in order for postsecondary education to be "ma[de] available," and since grants are awarded to students based upon (a) certification of a student's matriculation at such an institution, 20 U.S.C. § 1070a(a)(1)(A); 34 C.F.R. § 690.94(a)(3) (1982) and (b) determination of financial need based upon the actual costs of attendance at the certifying institution,

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[11] This Court recently declared in *North Haven*, 456 U.S. at 521, that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language."

[12] More specifically, BEOGs are designed to:

> (i) . . . meet in academic year 1985-1986, 70 per centum of a student's *cost of attendance* not in excess of $3,700; and (ii) in combination with reasonable parental or independent student contribution and supplemented by the programs authorized under subparts 2 and 3 of this part, will meet 75 per centum of a *student's cost of attendance, unless the institution determines that a greater amount of assistance would better serve the purposes of section* [1070].

20 U.S.C. § 1070a(a)(1)(B) (emphasis added). This specific elaboration of purpose for BEOGs was added to the Higher Education Act in 1980. Prior to that time, the statute contained only the general "purpose" language of § 1070(a) quoted in text, but the amount of BEOG awards was still determined with reference to an institution's tuition and other charges. Petitioners' claims concerning the scope of Title IX coverage are the same, as we understand them, under either the pre- or post-1980 versions of the law.

20 U.S.C. § 1070a(a)(2), it is obvious that Congress intended the BEOGs program to make "Federal financial assistance" available to institutions of higher education selected by eligible students.

Petitioners' assertions that the College does not receive "Federal financial assistance" because Grove City students need not use their BEOG funds for the school's costs but "may" use the funds "for virtually any purpose" (Pet. Br. at 5 n.9) simply blinks legality, as well as reality. The statute not only ties the amount of a grant to the actual costs at the particular institution which a student chooses to attend, but it also requires a statement (which must be filed "with the institution of higher education which the student intends to attend, or is attending"[13]) stating that the grant "will be used solely for expenses related to attendance or continued attendance at such institution." 20 U.S.C. § 1091(a)(5).[14] Thus, BEOG awards flow through the student to the higher educational institution.[15]

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[13] The statement filed with the school provides assurance to the institution that a student or admittee will be able to meet the costs of his or her attendance during the school year to which the BEOG is applicable.

[14] The current statutory language was added in 1980, but the requirement of filing a statement or affidavit to this effect was contained in the original BEOG legislation. *See* Pub. L. No. 92-318, § 139C, *reprinted in* 1972 U.S. Code Cong. & Ad. News 335.

In any event, on this record there is no issue. Individual petitioners admitted, and the district court found, that without their BEOG awards each would be unable to attend Grove City College. *See* 500 F. Supp. at 257.

[15] It is also patently wrong to assert, as do petitioners, that there is only an "attenuated nexus between [Education] Department-administered funds and the College" (Pet. Br. at 47) because under the BEOG program Alternate Disbursement System, the "only role which the College plays . . . is supplying requested information to the scholarship or loan-granting organization . . . ." (Pet. Br. at 3-4.) Institutions whose students receive BEOG awards must not only certify their attendance in good standing but must notify fed-

The interpretation here advanced was adopted in *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975),[16] holding that school was a recipient of "Federal financial assistance" within the meaning of Title VI under a Veterans Administration program strikingly similar to the BEOG program.[17] While this Court has never decided the

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eral officials of a student's change in enrollment status, as well as maintain certain records and make them available to federal officials upon request for audit purposes. *See* 43 Fed. Reg. 20922, 20927-28 (May 15, 1978); 44 Fed. Reg. 5258 (Jan. 25, 1979); 34 C.F.R. §§ 690.94, 690.95, 690.96 (1982). In addition, since 1980 these institutions have had mandatory obligations to provide information to all prospective and admitted students about all financial assistance programs available, 20 U.S.C. § 1092, and to enter into a specific "program participation agreement" with the Secretary of Education, 20 U.S.C. § 1094(a); 34 C.F.R. § 668.11 (1982).

[16] Petitioners' argument that *Bob Jones* is inapposite because that case involved race discrimination in the admissions process and because Title IX lacks the constitutional scope of Title VI (Pet. Br. at 35-36) is without merit. The *Bob Jones* decision is based on a common-sense interpretation of the language of Title VI and analysis of how the government aid to students in that case assisted the university. The court cited the constitutional scope of Title VI merely as an additional, but by no means the central, argument for its conclusion. The fact that the case involved discrimination in the admissions process was not the determinative factor in the court's conclusion that the school received Federal financial assistance.

[17] As the court there recognized,

> The method of payment does not determine the result; the literal language of Section 601 requires only federal assistance —not payment—to a program or activity for Title VI to attach . . . .
>
> [A]ll that is necessary for Title VI purposes is a showing that the infusion of federal money through payments to veterans assists the educational program of the school.

396 F. Supp. at 602, 603 n.22. Petitioners criticize the ruling below and, implicitly, the *Bob Jones* court (upon whose decision the Third Circuit relied in part) on the ground that it equated "receiving" federal financial assistance with "benefiting" from such assistance. (Pet. Br. at 15-17.) However, a careful reading of both

precise issue, its rulings in other areas demonstrate that the formal mechanism by which assistance is made available is not legally controlling. For example, in *Norwood v. Harrison*, 413 U.S. 455 (1973), the Court concluded that a state program for the loan of textbooks to schoolchildren cannot constitutionally provide textbooks to students attending racially discriminatory private schools since

> [f]ree textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves. An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the state, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination.

Id. at 463-65 (citation and footnote omitted). Similarly, in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), a New York law providing tuition reimbursements to parents of children attending nonpublic schools was overturned on the ground that the statute had the effect of subsidizing and advancing the religious mission of sectarian schools and thus violated the Establishment Clause. The Court dismissed the argument made by proponents of the statute that since the aid was granted to parents and not to the schools, the Constitution was not violated: "[T]he effect of the aid is unmistakably to pro-

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opinions indicates that both courts considered whether the schools "benefited" from the award of educational grants to their students as a means of determining whether the schools were "assisted," not whether they were "recipients." Here, the BEOG awards made it possible for the individual petitioners to attend Grove City College (*see* note 14 *supra*) and assisted the school in receiving payment of tuition and related charges for these students.

vide desired financial support for nonpublic, sectarian institutions." *Id.* at 783.[18]

B. This Construction of the Statutory Language Accords with its Consistent Interpretation by the Department of Health, Education & Welfare and the Department of Education

Since passage of Title VI and Title IX, respectively, the federal agencies responsible for their implementation have consistently interpreted these provisions to apply to institutions of higher education whose students receive scholarship or loan assistance to enable them to attend the schools. Appendix A to the initial Title VI regulations,[19] which identified programs to which the regulations were applicable, included several making assistance available through payments to students,[20] and the current listing

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[18] While *Nyquist* was distinguished in *Mueller v. Allen*, 51 U.S.L.W. 5050 (U.S. June 29, 1983) (upholding, under the Establishment Clause, a state law provision making tax deductions for certain educational expenditures available to parents of both public and private school students), the Court recognized that the tax deductions constituted governmental assistance to the schools, since they were available only for specified educational expenses such as tuition. *See id.* at 5053. The Minnesota scheme survived an Establishment Clause challenge because its "primary effect" was not to aid parochial schools—not because there was no aid at all to parochial schools. *See id.* at 5053-54.

[19] "The Justice Department, which had helped draft the language of Title VI, participated heavily in preparing the regulations." *Guardians Ass'n v. Civil Service Comm'n*, 51 U.S.L.W. 5105, 5115 (U.S. July 1, 1983) (Marshall, J., dissenting) (footnotes omitted).

[20] *See* 29 Fed. Reg. 16298, 16304 (December 4, 1964); 45 C.F.R. at 93-94 (1967); *see also Grove City College v. Bell*, 687 F.2d 684, 691-92 n.14 (3d Cir. 1982). For example, under Title II of the NDEA the federal government made capital contributions to separate student loan funds to be established and administered by institutions of higher education—not to the schools themselves. The loan funds were to be used only for specified purposes and their assets could not be transferred to the institutions except under circumstances explicitly detailed in the statute. *See* §§ 201, 204-06,

of programs covered by Title VI includes both BEOGs and NDEA loans.[21] Similarly, the Title IX regulations initially issued by the Department of Health, Education & Welfare (and all succeeding versions of those regulations promulgated by HEW or the Department of Education) explicitly define "Federal financial assistance" to include:

> Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.[22]

This contemporaneous and consistent interpretation of the statutory provisions[23] is entitled to great deference, especially on the issue of the administrative agency's scope of authority. *See Guardians Association v. Civil Service Commission*, 51 U.S.L.W. 5105, 5108 text at nn.13, 14 (U.S. July 1, 1983) (opinion of White, J.), and case cited; *id.* at 5115-16 (Marshall, J., dissenting), and cases cited; *id.* at 5122 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting), and cases cited.[24]

NDEA, *reprinted in* 1958 U.S. Code Cong. & Ad. News 1898-1902. Nevertheless, the Congress recognized that the loan funds would "materially assist institutions of higher education to retain their more competent students who need financial assistance in order to continue their studies." H.R. Rep. No. 2157, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S. Code Cong. & Ad. News 4731, 4738.

[21] 34 C.F.R. at 312-13 (1982).

[22] 40 Fed. Reg. 24128, 24137 (§ 86.2(g)(1)(ii)) (June 4, 1975); 34 C.F.R. § 106.2(g)(1)(ii) (1982).

[23] Unlike in *North Haven, see* 456 U.S. at 522 n.12, 538 n.29, the administrative agencies have not changed their position with respect to the portions of the regulations relevant to this discussion.

[24] Petitioners focus on the "or benefits from" language contained in the Title IX regulations' definition of "recipient." (Pet. Br. at 16-17.) The critical portion of the regulation, however, is its characterization as a "recipient" of an entity to which assistance is extended "through another recipient." That portion of the regulation is identical to the original Title VI regulation. *Compare*

C. The Legislative History of Title IX and that of Title VI Supports the Conclusion that Title IX Applies to Grove City College Because Its Students Were Awarded BEOGs

The legislative history of Title IX and of the statute on which it was modeled, Title VI, provides further support for the conclusion that the BEOG grants awarded to Grove City students are sufficient to bring that institution within the purview of Title IX.

1. *The Legislative History of Title IX*

Senator Bayh introduced the original version of Title IX as an amendment to S. 659, 92d Cong., 1st Sess. (1971), the Education Amendments of 1971. Senator McGovern urged passage of the Bayh amendment ". . . to assure that no funds from S. 659 . . . be extended to any institution that practices biased admission or educational policies." 117 Cong. Rec. 30158-59 (1971).[25] Senator Mc-

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40 Fed. Reg. 24128, 24137 (§ 86.2(h)) (June 4, 1975) *with* 29 Fed. Reg. 16298 (December 4, 1964), as corrected by 29 Fed. Reg. 16988 (December 11, 1964) (§ 80.13(h)); *compare* 34 C.F.R. § 106.2(h) (1982) *with* 34 C.F.R. § 100.13(h) (1982). Moreover, when the Title IX regulations were promulgated in final form the *Bob Jones University v. Johnson* decision, which articulated a "benefit from" test to determine whether a school was a recipient of "assistance" under Title VI (*see* p. 9 & nn.16, 17 *supra*) had been issued. The Department of Health, Education & Welfare relied upon this interpretation by the court when it added the "benefit from" language to the definition of "recipient." *See Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 481 (1975).

[25] Contrary to what petitioners argue (*see* Pet. Br. at 22-23), many of the remarks of legislators regarding the 1971 amendment, including those of Senator McGovern quoted above, are equally applicable to the 1972 Bayh amendment, which became Title IX. Senator Bayh said in presenting his 1972 amendment: "Now I am coming back with this comprehensive approach which incorporates . . . the key provisions of my earlier amendment." 118 Cong. Rec. 5808 (1972). Although the wording of the 1972 amendment differs in many respects from the wording of the 1971 proposed amend-

Govern's remarks directly applied to the BEOG program, which was part of S. 659.

Although the antidiscrimination provisions did not come to a vote that year, in 1972 Senator Bayh reintroduced them in a modified form and secured their passage. Prior to their enactment, however, Senator Bentsen offered an amendment seeking to exempt traditionally single-sex public undergraduate institutions from Title IX coverage. In describing the purpose of his amendment, Senator Bentsen demonstrated his understanding that Title IX applied when grants were made to students to support their attendance at college. Referring to a particular single-sex institution, he observed:

> If Federal funds are cut off, it is the students who will suffer. This university now receives over $250,000 in educational opportunity grants; it receives $83,000 for college work-study programs.

118 Cong. Rec. 5814 (1972). *See also* H.R. Rep. No. 92-554, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2584 ("Federal dollars now constitute over 20% of the total budget of our higher

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ment, the concept at issue, "recipient of Federal financial assistance," was part of both amendments. The differences between the two versions which petitioners point out are not relevant to interpreting the term "recipient." For example, petitioners emphasize that the 1971 amendment did not reach private undergraduate schools, and based upon this fact, assert that comments during the 1971 floor debates concerned "public institutions which were unquestionably receiving substantial direct federal assistance and were not intended to apply to private undergraduate institutions like Grove City." (Pet. Br. at 23.) But petitioners cite no floor statements or other authority to support either their characterization of Congressional intent or their surmise of Congressional knowledge about funding patterns. In fact, when in 1972 Title IX was enacted in a form applicable to private as well as public institutions, it was accompanied by a Committee report and supplemental views which recognized the major support provided to all higher education institutions by the federal government. *See* text *infra*.

education system. Most of these dollars *flow to institutions through* research contracts, *student assistance programs*, and categorical programs . . . .") (emphasis added) (Supplemental Views).

Thus, during the Committee and floor consideration of Title IX, Senators and Congressmen recognized that the statute would apply to educational institutions receiving federal assistance through BEOG grants to their students. Petitioners have been unable to discover any clear indications to the contrary in the legislative history, and obviously if Congress had wished to limit the coverage of Title IX to educational institutions receiving cash payments from the federal government, it could have done so explicitly. Moreover, the legislative history reflects the intent of Congress to enact a statute which would prevent ". . . the use of federal resources to support discriminatory practices," *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).[26]

Petitioners cite an exchange between Senator Dominick and Senator Bayh during the debates over the 1971 amendment which, they argue, "strongly suggests" that the amendment was not intended to cover assistance received directly by students. (*See* Pet. Br. at 24-25.) Senator Bayh's statements during this exchange, which concerned the type of a recipient's aid that could be cut off under Title IX, are at best ambiguous. Petitioners assume that Senator Bayh meant that his amendment would not allow cutting off of student aid, but the more plausible reading of his comments is that as a matter of law,

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[26] *See* 117 Cong. Rec. 39252 ("Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access") (remarks of Rep. Mink); *id.* at 39253 ("Neither the President nor the Congress nor the conscience of the nation can permit money which comes from all the people to be used in a way which discriminates against some of the people") (remarks of Rep. Sullivan, quoting President Nixon).

the Secretary would have the power to cut off student aid but as a matter of good judgment would most probably not do so.[27] In order to support their interpretation of the exchange, petitioners are forced to hypothesize that "Senator Bayh later changed his mind" on this issue. (Pet. Br. at 25 n.23.)

2. *The Legislative History of Title VI*

Since Title IX is closely and deliberately patterned after Title VI,[28] the legislative history of Title VI provides insight into how to interpret Title IX. This legislative history is consistent with Title IX coverage of educational institutions whose students receive BEOGs.

As previously noted, Senator Hubert Humphrey, a primary sponsor of the 1964 Civil Rights Act, argued in floor debate on the Act that "[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent *in any fashion which encourages, subsidizes, or results* in racial discrimination," 110 Cong.

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[27] Petitioners advance an even less supportable reading of Senator Bayh's 1975 colloquy with Representative Quie during hearings on the Title IX regulations. (Pet. Br. at 25.) Senator Bayh first said he simply did not know the answer to Rep. Quie's coverage question, but "would have to look it up." He then echoed his 1971 answer to Senator Dominick by stating that "generally" student aid was not terminated as a penalty for uncorrected discrimination. Finally, Senator Bayh told Mr. Quie that he had not heard the argument for coverage based on student assistance to which Quie referred. What these statements teach about Congressional intent in 1972 is highly questionable.

[28] Senator Bayh, the prime sponsor of Title IX, described the relation between the two statutes as follows:

> Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by Title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of Title VI.

118 Cong. Rec. 5807 (1972).

Rec. 6543 (1964) (emphasis added). The then Secretary of HEW, Anthony Celebrezze, testified before the House Judiciary Committee that Title VI would allow cut-off of federal contributions to student loan funds under the National Defense Education Act, 20 U.S.C. § 401 *et seq.* *Civil Rights Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess. 1541 (1963). Congressmen Poff and Cramer, expressing their opposition to passage of the Act, drew up a list of programs that would be covered by Title VI which included programs involving grants or awards to students. *See* H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) (Separate Minority Views of Hon. Richard H. Poff and Hon. William Cramer) *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391, 2471-73.[29] Petitioners cite no expressions of disagreement by legislators with these descriptions of the scope of Title VI.

Instead, petitioners merely make generalized claims that such indications of student assistance coverage in the Title VI legislative history are inapplicable to Title IX. As we describe in the margin, these claims are without merit.[30] Thus, the legislative history of Title IX and

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[29] The list included 42 U.S.C. § 242g (1970) (repealed by Pub. L. No. 94-484, § 503(b) (1976)) (grants to individuals or institutions for graduate training for physicians, engineers, nurses and other professional personnel) and 20 U.S.C. §§ 461-65 (graduate fellowships).

[30] First, petitioners argue that because Title IX is more limited in scope than Title VI, "[s]ome broad pronouncements in the Title VI legislative history simply do not apply to Title IX." (Pet. Br. at 28.) Aside from failing to point out what these broad pronouncements are, petitioners ignore the fact that the broad goals underlying Title IX—goals similar to those of Title VI—also sparked similarly broad pronouncements. (*See* the remarks of Senator McGovern and Representatives Mink and Sullivan, *supra* p. 13 and note 26.)

Second, petitioners claim that there is some significance to the fact that the BEOG program was not in existence at the time when

Title VI, interpreted in light of the clear remedial purpose of both statutes, supports a broad reading of Title

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Title VI was enacted and that federal funds under the student assistance programs then extant went first to educational institutions ". . . which had the discretion to choose the ultimate student beneficiary." (Pet. Br. at 29.) We have previously observed both that NDEA loan monies were placed in special funds and not in institutional accounts, and also that when NDEA was enacted, Congress recognized that the loans would assist institutions as well as students (*see* note 20 *supra*). While the BEOG program does have a different administrative structure from programs in effect in 1964, it is nevertheless similar in the sense that institutions have a role in selecting grant recipients because they make admittance decisions and are in possession of student financial information revealing whether or not an applicant will need financial aid in order to meet the institution's costs. There is no basis for petitioners' assumption that Congress would have excluded BEOGs from Title VI had the program existed in 1964—especially in light of the defeat of post-1975 attempts to so limit Title IX, *see* pp. 20-21 *infra*.

Third, petitioners make much of differences between the original and final versions of Title VI. (*See* Pet. Br. at 29-30.) We addressed this point in note 8 *supra*.

Fourth, petitioners cite a number of instances when legislators stated that Title VI would not cover direct payments to individuals. (*See* Pet. Br. at 31-33.) In context, these remarks are best understood to relate to entirely different sorts of programs than BEOGs. The instant case differs from a situation in which a college enrolls students receiving food stamps, child welfare payments, or other non-education benefits. *See* Brief of *Amici Curiae*, Mountain States Legal Foundation and American Association of Presidents of Independent Colleges and Universities, at 9-10. Participation in a student aid program is contingent upon the student's being in attendance at an educational institution. The other benefit programs provide individual assistance regardless of whether the person goes to school and thus are not intended to assist educational institutions.

Finally, petitioners argue that student assistance under the BEOG program is virtually unrestricted and the nexus between student receipt of the funds and assistance to the institution therefore is attenuated. (*See* Pet. Br. at 33.) We have noted previously that the use of BEOG awards by students is far more narrowly circumscribed than petitioners admit. *See* p. 8 *supra*. The nexus between BEOG awards to students and aid to institutions is strong, direct, and clear.

IX. Applying Title IX to Grove City College is consistent with the Congressional purposes underlying Title IX.

D. The Post-enactment History of Title IX Demonstrates the Congressional Intent to Apply Title IX to Institutions Assisted Through Direct Student Grants

In *North Haven*, this Court, in interpreting Title IX, stressed the importance of post-enactment developments. *See* 456 U.S. at 535. *Accord*, *Bob Jones University v. United States*, 51 U.S.L.W. 4593, 4600-01 (U.S. May 24, 1983); *Guardians Association v. Civil Service Commission*, 51 U.S.L.W. 5108 text at n.14 (opinion of White, J.); *id.* at 5116 (Marshall, J., dissenting). An examination of the post-enactment history of Title IX shows that Congress knew that HEW interpreted Title IX to encompass educational institutions whose students received federal BEOG grants, approved that interpretation, and allowed it to stand although it amended Title IX in other respects on several occasions.[31]

In 1975, HEW submitted its recently promulgated Title IX regulations to Congress for review pursuant to § 431(d)(1) of the General Education Provisions Act, 20 U.S.C. § 1232(d)(1). (This statute provided Congress with an opportunity to disapprove a regulation by concurrent resolution[32] if it found that the regulation was ". . . inconsistent with the Act from which it derives its authority.") Included among the regulations were HEW's definitions of "Federal financial assistance" and "recipient." *See* p. 12 & n.24 *supra*. During hearings on the regulations, HEW Secretary Weinberger brought the

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[31] *See* Pub. L. No. 93-568, § 3, 88 Stat. 2138 (1974); Pub. L. No. 94-482, § 412, 90 Stat. 2234 (1976).

[32] *But see INS v. Chadha*, 51 U.S.L.W. 4907 (U.S. June 23, 1983). The constitutional infirmity of the legislative veto provision of course does not affect the relevance of the 1975 review of the Title IX regulations as an indication of Congressional intent or post-enactment ratification of the agency's interpretation.

matter of coverage of student assistance directly to the legislators' attention:

> Our view was that student assistance, assistance that the Government furnishes, that goes directly or indirectly to an institution is Government aid within the meaning of Title IX. If it is not, there is an easy remedy. Simply tell us it is not. We believe it is and base our assumption on that.
>
> As Mr. Rhinelander [HEW General Counsel] says the court case [*Bob Jones University v. Johnson*] confirms this belief.

Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 484 (1975). None of the concurrent resolutions to disapprove the Title IX regulations which were introduced in the House passed that body.

In the other chamber, Senator Helms attempted to persuade his colleagues that the Department's interpretation was incorrect but he failed to do so. His proposed resolution disapproving regulations that were not limited in application to programs and activities directly receiving federal financial assistance never reached the Senate floor for a vote. S. Con. Res. 46, 94th Cong., 1st Sess., 121 Cong. Rec. 17300 (1975).[33] Senators Helms also proposed a bill that would have limited application of Title IX to direct recipients of federal funds (S. 2146, 94th Cong., 1st Sess., 121 Cong. Rec. 23847 (1975)). It was never passed.

In 1976, Senator McClure renewed the attempt to limit Title IX by introducing an amendment defining federal financial assistance as assistance that an institution re-

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[33] This Court remarked in *North Haven*: "[T]he relatively insubstantial interest given the resolutions of disapproval that were introduced [including the Helms resolution] seems particularly significant since Congress has proceeded to amend § 901 when it has disagreed with HEW's interpretation of the statute." 456 U.S. at 534 (footnote omitted).

ceives directly from the federal government. 122 Cong. Rec. 28144. The stated purpose of the amendment was to eliminate HEW regulation of institutions where ". . . the only Federal involvement is the aid that a student may get." *Id.* Senator Pell, the major Senate sponsor of the provisions of the Education Amendments of 1972 providing for educational opportunity grants, challenged the McClure proposal: "[T]he enactment of this amendment would mean that no funds under the basic grant program would be covered by Title IX. While these dollars are paid to students they flow through and ultimately go to institutions of higher education and *I do not believe we should take the position that these Federal funds can be used for further discrimination based on sex.*" *Id.* at 28145 (1976) (emphasis added).[31] The McClure amendment was rejected. *Id.* at 28147.

The post-enactment history of Title IX thus shows that Congress realized that HEW interpreted Title IX to encompass educational institutions whose students received BEOGs. Congress' rejection of legislative challenges to that interpretation, when viewed in light of its willingness to amend Title IX in other respects, strongly supports the conclusion that Title IX coverage of schools assisted by the BEOG grant program is in accord with Congressional intent. As this Court remarked in *North Haven*:

> Where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute

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[31] Senator Bayh supported Senator Pell: "The courts have held that Title VI of the Civil Rights Act does apply if a student receives Federal aid. If a student is benefited, the school is benefited. It is not new law; it is traditional, and I think in this instance it is a pretty fundamental tradition, that we treat all institutions alike as far as requiring them to meet a standard of educational opportunity equal for all of their students." 122 Cong. Rec. 28145-46 (1976).

in other respects, then presumably the legislative intent has been correctly discerned."

456 U.S. at 535 (citations omitted).

II

AS A RECIPIENT OF FEDERAL FINANCIAL ASSISTANCE THROUGH THE BEOG PROGRAM, GROVE CITY COLLEGE MAY PROPERLY BE REQUIRED TO EXECUTE AN ASSURANCE OF COMPLIANCE WITH TITLE IX

Petitioners' second major argument is that Grove City College may not be required to execute the Department of Education's Assurance of Compliance ("Assurance")[35] because the school would thereby be submitting to institution-wide Title IX coverage in violation of the statute's "program specificity," *see North Haven*, 456 U.S. at 536. This argument fails for two reasons: first, the Assurance and the applicable regulations meet *North Haven*'s test of program specificity; and second, because BEOGs assist the institution's entire program, Title IX applies to that entire program.

A. The Title IX Assurance and Applicable Regulations Are "Program-Specific" as Required by *North Haven*

In *North Haven*, this Court held that not only the funding termination provisions of § 902, but also that section's grant of regulatory authority to the Department of Education and the § 901 prohibition against sex discrimination, are "program-specific." 456 U.S. at 536-38. It is thus apparent that the Assurance which the Department of Education requires that Grove City execute, and the portions of the Title IX regulations applicable thereto, must be examined to determine if they are consistent with Title IX's program specificity.

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[35] The Assurance of Compliance is a written acknowledgement by a recipient of Federal financial assistance that it will operate its education programs or activities in a manner consistent with applicable Title IX regulations. 34 C.F.R. § 106.4 (1982).

North Haven provides guidance in this examination. There, the Court reviewed Subpart E (Employment) of the Title IX regulations and found it to be adequately program-specific. The Court held that although the "employment regulations do speak in general terms of an educational institution's employment practices, . . . they are limited by the provision that states their general purpose"—§ 106.1 of the Title IX regulations, which refers to the "program or activity" language in the statute. *Id.* at 538. *See* 34 C.F.R. § 106.1 (1982). In addition, the Court noted, the Department's comments accompanying publication of its final Title IX regulations, by citing *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969), indicated the agency's intent that the regulations be interpreted in a program-specific manner. *North Haven*, 456 U.S. at 538-39.

Applying the *North Haven* analysis to the present case, it is clear that the regulations and the Assurance itself, HEW Form 639, conform to the program-specific language of the Title IX statute. Under the Assurance, an institution receiving federal assistance pledges to "[c]omply, *to the extent applicable to it*, with Title IX . . . and all requirements imposed by . . . the Department's regulations . . . to the end that, in accordance with Title IX . . . no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any *education programs or activity* for which the applicant receives or benefits from federal financial assistance." HEW Form 639 (emphasis added). The Assurance, by limiting compliance to "the extent" Title IX applies to the institution and to "programs or activity," explicitly announces its conformity with the statute's program-specificity.

In addition, the regulations limit the institution's obligation to comply with Title IX to "each education *program or activity* operated by the applicant or recipient and to which this part [the Title IX regulations] applies." 34 C.F.R. § 106.4(a) (1982) (emphasis added). Finally,

these portions of the regulations are also subject to the general purpose section, § 106.1, which this Court found adequately program-specific in *North Haven*, 456 U.S. at 538.

Just as this Court in *North Haven* rejected claims that the employment regulations of Title IX were inconsistent with the statute's program-specificity, so too, must the Court reject petitioners' claims that the Assurance and regulations are not program-specific.[36] As the Court explained, "regulations may be broadly worded and need not be directed at specific programs—as long as they are applied only to programs that receive federal funds." 456 U.S. at 536 n.27.[37]

B. Because BEOG Grants Provide Assistance to the Entire Program of Grove City College, that Entire Program of the Institution is Covered by Title IX

We have suggested above that the Court is not required in this case to attempt a general definition of "program or activity," as the term is used in § 901(a), because,

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[36] All that is at issue in this case is the Assurance. The Department has not made any findings concerning the program(s) or activity(ies) at Grove City College which are covered by Title IX or its regulations. Neither the district court nor the ALJ deemed it necessary to address the meaning of "program or activity" in relation to Grove City. Thus, we agree with Judge Becker, concurring below, that it was unnecessary for the panel majority to explore the subject.

[37] Petitioners' argument that the Department may not terminate federal funding to a recipient which refuses to execute an Assurance is baseless. The Assurance requirement is well within the agency's authority under § 902 to adopt regulations "of general applicability." As the Third Circuit panel noted, the Assurance not only identifies the type of institution applying for federal aid, but also asks the school to provide information respecting grievance complaint procedures, requires a statement of self-evaluation concerning the practices of the institution, and places the recipient on notice that it must comply with Title IX and its regulations. 687 F.2d at 703. As such, the Court of Appeals found that the Assurance constituted a threshhold device facilitating the enforcement of Title IX's objectives. *Id.*

just as in *North Haven*, the Assurance and regulations are adequately limited by the program-specificity concept.[38] Even if the Court does not rest upon this ground, however, it should affirm the judgment below since under the specific facts of this case, the Third Circuit was correct in holding that all of Grove City College is subject to Title IX's prohibition against sex discrimination.[39]

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[38] In *North Haven*, two local boards of education sought declaratory and injunctive relief in situations where the Department of Education had begun complaint investigations. Although the investigation stage is much further along the continuum of the enforcement scheme than the point at which an institution is asked to complete an Assurance, this Court did not find it necessary to define "program or activity."

[39] We recognize that in *North Haven* this Court apparently rejected a reading of § 901(a) which would extend its reach to an entire institution in every instance. 456 U.S. at 537. There is no need to revisit that determination in the present case. But there is likewise no basis upon which to conclude, as petitioners argue, that by implication the Court in *North Haven* was holding that § 901(a) could *never* reach an entire institution.

Petitioners offer no coherent interpretation of § 901(a). On the one hand, they suggest that the statutory language must refer to something less than the entire program of an institution (*see* Pet. Br. at 14-15). On the other hand, petitioners concede (*id.* at 20 n.18) the validity of the "infection" theory of *Board of Public Instruction v. Finch*, which holds that federal funds may be terminated under Title VI if discrimination in other areas of a recipient's operations "infects" a federally supported categorical program. Necessarily, then, the scope of § 901(a) must be at least broad enough to reach any part of a recipient's operations which, if conducted in a discriminatory manner, might "infect" a "program or activity receiving Federal financial assistance," as petitioners narrowly define that term. *Cf. Iron Arrow Honor Society v. Heckler*, 702 F.2d 549 (5th Cir. 1983).

Thus, to use an example proffered by petitioners (*see* Pet. Br. at 20), if a university received federal funds to support a program of research and instruction in chemistry (to advance an overall Congressional goal of increasing the nation's supply of qualified scientists), it would clearly be a violation of Title IX if the school permitted women to enroll in that program but required that they

In Part I of this brief, we described the purposes of the Higher Education Act in general and the BEOG program specifically. *See* p. 7 *supra*. BEOGs provide students with the means to obtain undergraduate degrees, and assist institutions of higher education to provide the necessary instruction and related services and activities to that end.[40] The system of channeling aid through the student, and of allowing the student to select the institution which he or she will attend, provides a means of preserving the institutional autonomy sought by Grove City College (*see* Pet. Br. at 47-50). At the same time, it necessarily means that BEOG funds, which must be used for tuition, fees and other expenses associated with attendance at the school that the student has chosen, support whatever functions or activities the *institution* determines to offer as part of undergraduate education.

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take a greater number of credits in other courses to earn an M.S. or Ph.D. degree than it required of male students in the program. Similarly, disparate treatment based on sex in such other areas of a program enrollee's necessary contact with the institution as residential accommodations, honors, or extracurricular activities would obviously be proscribed by Title IX.

Petitioners also suggest, citing *Finch*, that "the concept of a recipient program or activity under Title IX must be co-extensive with the scope of the underlying grant statute" (Pet. Br. at 20). We have explained in this footnote why this formula cannot mark the outer limits of § 901(a) under the *Finch* "infection" theory. But even accepting the formula *arguendo* for purposes of this case, it leads to the conclusion (for the reasons stated in the text, *infra*) that all of Grove City's operations are subject to Title IX.

[40] The purpose of the BEOG program is *not*, as petitioners suggest, to enable Grove City College or any other school to operate a student assistance program. There are federal grant-in-aid statutes which do provide such assistance. For example, under 20 U.S.C. § 427 (NDEA), the federal government will loan money directly to an institution to enable it to meet its required 10% match and to establish a student loan fund eligible for federal capital contributions. And under 20 U.S.C. § 1070e, an institution may receive federal payments to defray its expenses in administering BEOGs.

There is no dispute in this case that without their BEOGs, the individual petitioners would be unable to attend Grove City. Hence there is no question that BEOG funds are effectively used to pay tuition and fees charges, and become part of the general operating funds of the college. Absent a showing that it conducts administratively and programmatically separate, specialized activities which are not related to undergraduate education, the costs of which are defrayed from separate funds, and which do not in any way benefit from the BEOG assistance to the school, all of Grove City's operations are subject to Title IX. The entire program of Grove City College is the "education program or activity receiving Federal financial assistance" through BEOGs.

This interpretation of § 901(a), where an institution benefits from its students' BEOG awards, is supported by the statutory framework, the legislative history of Title IX, the similar treatment of general-purpose aid under Title VI, and events following upon the issuance of the initial Title IX regulations in 1975. *First*, § 901(a) also contains a series of specific exclusions from Title IX coverage, many of which cover events or functions which are very unlikely ever to receive earmarked federal support. Unless Congress contemplated that at least in some circumstances (such as where an institution receives assistance for its overall educational program through student aid grants) the scope of § 901(a) would be institutionwide, there would be no reason to enact these provisions.[41] *Second*, the principal sponsor of Title IX, Senator Bayh, explicitly described the broad scope of Title IX, emphasizing that it would reach any part of an institution's operations which could affect federal program participants.[42] *Third*, when Title IX was enacted, at least

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[41] *See Haffer v. Temple University*, 524 F. Supp. 531, 541 (E.D. Pa.), *aff'd*, 688 F.2d 14 (3d Cir. 1982).

[42] When asked whether the language "any program or activity" would reach "dormitory facilities . . . athletic facilities . . . or . . . just educational requirements," Bayh responded that "[w]hat we

one federal court had already construed similar "program or activity" language broadly with respect to an entity receiving general support funds.[43] *Finally*, when Congress reviewed the Title IX regulations issued by the Department of HEW in 1975, there was major controversy and debate over the prohibition of discrimination in extra-curricular athletic programs; however, the regulations were not disapproved and in fact the Senate defeated a series of amendments which would have narrowed the scope of § 901(a)'s prohibition on discrimination.[44]

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are trying to do is provide equal access for women and men students to the educational process and the extra-curricular activities in a school . . . ." 117 Cong. Rec. 30407 (1971).

[43] In *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967), a school district received funds for construction and operations because of the location within the district of an air force base. The court held that acceptance of these "impact aid" funds after enactment of Title VI "brought its school system within the class of programs subject to the section 601 prohibition against discrimination." *Id.* at 852. Senator Bayh indicated in 1975 that the "program or activity" language of Title IX had been intended to parallel the *Bossier Parish* interpretation of Title VI. 121 Cong. Rec. 20468 (1975). *See also Bob Jones University v. Johnson*, discussed *supra* p. 9.

[44] *See* 120 Cong. Rec. 15322 (1974) (Tower amendment to exclude "revenue producing" intercollegiate athletics); 121 Cong. Rec. 23845 (1975) (Helms amendment to exclude programs and activities not receiving direct federal aid); 122 Cong. Rec. 28136 (1976) (McClure amendment to redefine "program or activity" to include only curriculum or graduation requirements). Senator Bayh successfully opposed the amendments on the ground that they would have exempted "areas of traditional discrimination against women that are the reason for the . . . enactment of Title IX [including] . . . scholarship . . . employment . . . and extra-curriculum [sic] activities such as athletics." *Id.* at 28144.

Senator Bayh testified at the House of Representatives hearings on the Title IX regulations in a similar fashion:

> This objection to the coverage of programs which receive indirect benefits from federal support—such as athletics—is directly at odds with the Congressional intent to provide coverage of exactly such types of clear discrimination. For ex-

Petitioners' argument that an educational institution can never be a "program or activity" for purposes of Title IX leads to an absurd result: institutions that receive general support funds such as BEOGs would never be covered by Title IX and would be able to use these funds to support discriminatory programs. There is no evidence that Congress intended to establish such a loophole in Title IX enforcement. Given Congress' intent in enacting Title IX, "program or activity" should be liberally interpreted in a common-sense fashion that best effectuates the purposes of Title IX: to protect citizens from discrimination and to eliminate federal financial support for such discrimination.

The federal government, by providing students at an undergraduate institution with federal educational grants, is also providing the institution as a whole with additional resources which the institution may allocate as it sees fit. In order to effectuate the remedial purposes of Title IX, the Third Circuit's decision that the entire program of Grove City College is the "program or activity receiving Federal financial assistance" should be upheld.

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ample, although federal money does not go directly to the football programs, federal aid to any of the school system's programs frees other money for use in athletics.

Without federal aid a school would have to reduce program offerings or use its resources more efficiently. Title IX refers to federal financial assistance. If federal aid benefits a discriminatory program by freeing funds for that program, the aid assists it.

Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 171 (1975).

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted,

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