No. _____

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; JENNIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs.

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

Respondent.

APPENDIX ACCOMPANYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2383

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

Appellant

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,

Appellee

No. 80-2384

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

Appellees

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,

Appellant

Opinion of the Court of Appeals,
August 12, 1982

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(Civil Action No. 78-1293)

Argued June 21, 1982
Before: GARTH, BECKER, *Circuit Judges*
and MUIR, *District Judge**
(Opinion Filed August 12, 1982)

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Opinion of the Court of Appeals,
August 12, 1982

OPINION OF THE COURT

GARTH, *Circuit Judge.*

This appeal involves the Department of Education's authority to enforce Title IX of the Education Amendments of 1972,[1] against a college which receives no direct funds from the federal government, but whose students receive federal grants. The district court granted Grove City College's motion for summary judgment and refused to permit the termination of Basic Educational Opportunity Grants to students at the College, holding that the Title IX enforcement regulations were invalid. We reverse.

I.

A.

Title IX proscribes gender discrimination in education programs and activities receiving federal financial assistance. Title IX "contains two core provisions." *North Haven Bd. of Educ. v. Bell,* 50 U.S.L.W. 4501 (1982). Section 90(a) of the 1972 Act contains a program-specific ban of sex discrimination:

> 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.* . . .

20 U.S.C. §1681 (emphasis added).

Under section 902, each agency awarding federal financial assistance "other than a contract of insurance or guaranty" to any education program or activity is authorized to promulgate regulations to insure compliance with section 901(a). If

[1] Pub. L. No. 92-318, §§901-07, 86 Stat. 373-75.

compliance cannot be secured by voluntary means, section 902 authorizes the termination of federal funds to the program in which noncompliance is found. 20 U.S.C. §1682.[2]

The Department of Education is the primary administrator of federal financial assistance to education.[3] Pursuant to its

[2]Section 902 provides in relevant part:

> Each Federal department and agency which is empowered to extend financial assistance to any education program or activity by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section [901(a)] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law. . . .

[3]Originally the Department of Health, Education and Welfare had primary responsibility for administering federal assistance to education. This action was brought against the Department of Health, Education and Welfare, since it had issued the administrative order under Title IX terminating assistance to students attending Grove. Subsequently, when the Department of Education was established to take over the education functions of HEW, Title IX enforcement authority was 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. The Secretary and Department of Education were substituted as defendants in this action by order of the Clerk of this Court.

Unless further specificity is demanded by the context, the defendants, including the Department of Health, Education and Welfare and any successor will be referred to as "the Department."

regulations, 34 C.F.R. §106.4(a), the Department requires each recipient of federal aid to file an Assurance of Compliance as a means of securing adherence to Title IX.[4] Under the Assurance in use at the time of this case was filed, the recipient agreed that it would

> [c]omply, to the extent applicable to it, with Title IX . . . and all requirements imposed by . . . the Department's regulation . . . 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. . . .[5]

In addition recipients provided basic information about their programs, including a "self-evaluation" under Title IX (A. 18).

[4] 34 C.F.R. §106.4(a) provides in relevant part:

> Every application for Federal financial assistance for any education program or activity shall as [a] condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.

[5] The Assurance of Compliance currently in use provides that the applicant "will comply with . . . Title IX . . . which prohibits discrimination on the basis of sex in education programs and activities receiving federal financial assistance."

B.

Grove City College (Grove) is a private co-educational institution of higher education affiliated with the United Presbyterian Church and located in Grove City, Pennsylvania. Approximately 2,200 students attend Grove (A. 33). One hundred forty of Grove's students are eligible to receive Basic Educational Opportunity Grants (BEOGs) appropriated by Congress and allocated by the Department pursuant to 20 U.S.C. §1070a. Three hundred forty-two of Grove's current students have obtained Guaranteed Student Loans (GSLs).[6] Other than through the BEOG or GSL programs, Grove receives no federal or state financial assistance.[7]

BEOGs are paid by the Department directly to the eligible students attending Grove. Grove, however, executes the institutional section to the students' BEOG applications and certifies data involving the student applicants' costs and enrollment status so that the students might receive federal financial assistance.[8]

[6]Under the student loan program, a GSL is provided by a private lending institution which lends funds directly to the student. The GSLs are guaranteed by the Commonwealth of Pennsylvania. In turn, the United States, guarantees 80% of the Commonwealth's obligation. The federal government pays interest subsidies on these loans. 20 U.S.C. §1077.

[7]In its brief, Grove has explained its policy in refusing refunds:

> Since its founding in 1876, the College, as an integral part of its philosophy, steadfastly refused any form of government funding. . . .
>
> . . .The College also informed HEW that it has always refused to accept financial assistance from any governmental source since to do so would compromise its independence.

Brief for Appellants, No. 80-2383, at p. 3-4.

[8]There are two methods of disbursement of BEOGs. Under the Regular Disbursement System, the Department advances the funds to the educational institution, which then either pays the student by check or credits the grant against the student's account. 34 C.F.R. §§690.71, 690.78. Under the Alternative Disbursements System, the grants are mailed directly to the students after the institution makes the appropriate certification. 34 C.F.R. 690.91. Grove's participation in the BEOG program involves the latter method of alternative disbursement.

In July, 1976 the Department began efforts to secure an Assurance of Compliance from Grove based upon the receipt of BEOGs and GSLs by Grove students. Grove refused to execute the Assurance, asserting that it received no federal financial assistance. The Department then initiated administrative proceedings to terminate grants and loans to students attending Grove.

After an administrative hearing, an Administrative Law Judge (ALJ) concluded that Grove was a recipient of federal financial assistance within the meaning of Title IX and that the allocation of BEOG's and GSL's could be terminated for Grove's refusal to execute an Assurance of Compliance. Since Grove conceded that it did not file an Assurance of Compliance, the ALJ entered an order prohibiting the payment of BEOG's or GSL's to students attending Grove.

C.

On November 29, 1978, Grove, joined by four student BEOG and GSL recipients,[9] commenced this suit. The plaintiffs sought an order which would declare void the Department's termination of BEOG and GSL assistance. Additionally, they sought to enjoin the Department from requiring Grove to file an Assurance of Compliance as a condition of preserving its eligibility in the BEOG and GSL programs. Finally, the complaint sought a declaration that the anti-sex discrimination regulations promulgated by the Department went beyond the authority contained in Title IX, or alter-

[9]According to their affidavits, for academic year 1978-79, student plaintiff Marianne Sickafuse received a BEOG totaling $408, Kenneth Kockenberry received a BEOG totaling $654 and a GSL totaling $2,000, Jenifer Smith received a GSL for $1,000, and Victor Vouga received a GSL totaling $2,500 (A. 58, 76, 95, 97). In affidavits, the student plaintiffs each represented that without these funds "I will be unable to continue in attendance at [Grove City College] the college of my choice" (A. 59, 77, 96, 99).

natively, that those regulations were unconstitutional as applied to Grove. Cross-motions for summary judgment were filed on the basis of affidavits and the administrative record (A. 30, 101).

D.

In an amended opinion on June 26, 1980 the district court granted Grove's motion for summary judgment and denied the cross-motion of the Department. Although the Court agreed with the Department that BEOGs and GSLs constituted "federal financial assistance" to Grove within the meaning of Title IX, it concluded that the Department could not terminate federal assistance to Grove City students because of Grove's refusal to sign an Assurance of Compliance.

The district court set forth several alternative rationales for its conclusions. First, the court held that 20 U.S.C. §1682, which denies Title IX enforcement authority with respect to "a contract of insurance or guarantee," precluded the Department from terminating GSLs.[10] Second, the court concluded that the Department could not require Grove to sign an Assurance of Compliance since subpart E of the Department's regulations which prohibit discrimination in employment was held to be invalid. Alternatively, the court held that the Department had unlawfully terminated Grove's federal financial assistance based solely upon Grove's refusal to sign the Assurance. The court concluded that such a termination is authorized by Title IX only upon an actual finding of sex discrimination (A. 134-38), a finding which the Department had not made. Finally, the

[10]In the district court, the Department claimed that the furnishing of GSLs, as well as BEOGs, made Grove a recipient of federal financial assistance so that it became subject to Title IX. As noted in text, the district court held that GSLs were contracts of guarantee within the exception to section 902(a). On appeal the Department does not contest the district court's conclusion. Brief for the Department at 2 n.2. Thus, the issue of GSLs is not presented on this appeal.

court held that the Department was barred by the due process clause of the fifth amendment from terminating the BEOGs without first affording hearings to all students who would be adversely affected (A. 132-133).

The court's final amended order (1) declared that the Assurance of Compliance form (HEW Form 639A) was invalid; (2) enjoined the Department from using the Assurance of Compliance form; (3) enjoined the termination of financial assistance to the plaintiffs unless actual sex discrimination was proved at an administrative hearing with notice to all those affected by the proceeding; and (4) enjoined the termination of GSL's to students.

The Department's appeal, No. 80-2384, and Grove's cross-appeal, No. 80-2383 followed.[11]

II.

At the outset, we consider Grove's cross-appeal because a threshold question on this appeal is whether Grove, which has refused all federal financial assistance, nevertheless is to be considered a recipient of such assistance within the meaning of section 901(a) because its students receive federal grants.

The Department has construed the phrase "federal financial assistance" to include educational grants paid to students, and, thus, received indirectly by the schools which they attend. The regulation defines federal financial assistance in relevant part as

> (1) A grant or loan of Federal financial assistance, including funds made available for:
>
> * * *
>
> (ii) 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.*

[11] Grove's cross-appeal was filed to preserve its contention that the mere acceptance of BEOGs by Grove's students did not bring Grove within Title IX, as a recipient of federal financial assistance.

34 C.F.R. §106.2(g)(1)(ii).

The Department's regulations further define a "recipient" of federal financial assistance:

> (h) *"Recipient"* means . . . any person, to whom Federal financial assistance is extended directly *or through another recipient and which operates an education program or activity which receives or benefits from such assistance*, including any subunit, successor, assignee, or transferee thereof.

30 C.F.R. §106.2(h)

Thus, the Department maintains that Grove is a "recipient" because students attending Grove receive federal monies in the form of BEOGs which monies are used to pay their educational expenses at Grove.

Grove challenges the Department's inclusion of BEOGs within the scope of "federal financial assistance" under section 901(a). According to Grove, the phrase "federal financial assistance" refers only to direct payments to institutions or educational programs, and, thus, does not include educational grants paid to students when the educational institution involved plays no role in choosing the beneficiaries or designating amounts of aid. Answering Brief for Appellants at 7, n.6. Since BEOGs are paid to students based on eligibility requirements determined by the federal government, Grove contends Title IX is not implicated.

A.

In determining the scope of Title IX, we begin with the statutory language itself. *North Haven Board of Education v. Bell*, 50 U.S.L.W. 4501 (1982). The language of section 901(a) extends Title IX's coverage to "any education program or activity receiving Federal financial assistance. . . ." Hence, by its all inclusive terminology the statute appears to encompas *all* forms of federal aid to education, direct or indirect.

Grove, however, argues that the statute has no application to it. Section 901, argues Grove, applies to "any . . . program or activity receiving federal financial assistance," and it must be conceded, contends Grove, that it "receives" no such assistance. Although Grove acknowledges that it benefits from federal aid which its students receive, Grove claims that this is insufficient to bring Grove's activities within the ambit of Title IX. In effect, Grove reads the statute as pertaining only to direct aid and not to indirect assistance.

Giving Title IX the broad reading that its remedial purpose dictates, *see North Haven,* 50 U.S.L.W. at 4503, we cannot agree with the manner in which Grove interprets §901(a) or with its conclusion that §901(a) is limited solely to direct assistance.

B.

The enactment of Title IX in 1972 was the culmination of efforts over several years to ban gender discrimination in the field of education. Patterned after Title VI of the Civil Rights Act of 1964, which proscribes discrimination by reason of race, color, religion, or national origin, "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." *Cannon v. University of Chicago,* 441 U.S. 677, 696 (1979).[12] Indeed, the legislative history reveals that Title IX was designed to fill the gap left by Title VI of the Civil Rights Act of 1964, which did not prohibit discrimination based on sex. *See, e.g.,* 118 Cong. Rec. 5807 (1972) (Remarks of Senator Bayh).

[12]Title VI provides:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §2000d.

In addition, the provision authorizing administrative enforcement of Title IX through termination or refusal of federal aid is virtually identical to the administrative enforcement provisions found in Title VI. *Compare* 20 U.S.C. §1682 (Title IX) *with* 42 U.S.C. §2000d-1 (Title VI).

Just as Title VI was structured so that federal monies would not be expended in *any* fashion[13] which would subsidize racial discrimination,[14] so too, was the use of federal funds proscribed for the support of educational institutions that discriminated on the basis of sex.

Indeed, in *Cannon v. University of Chicago,* 441 U.S. 677, 704 (1978), the Supreme Court recognized that Title IX, like Title VI, was designed "to avoid the use of federal resources to support discriminatory practices. . . ." The legislative history of Title IX amply supports this conclusion.

C.

In 1971, the provisions embodying Title IX were first introduced by Senator Bayh as an amendment to S. 659, 92d Cong., 1st Sess. (1971), the Education Amendments of 1971. A major feature of S. 659 was the establishment of the Basic Educational Opportunity Grant program. Speaking in support of the amendment, Senator Bayh stated:

[13]During the floor debates on the 1964 Civil Rights Act, Senator Humphrey stressed:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in *any* fashion which *encourages, entrenches, subsidizes, or results* in racial discrimination.

110 Cong. Rec. 6543 (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963) (emphasis added). *See also* 110 Cong. Rec. 7054-55 (1964) (remarks of Sen. Pastore).

[14]The legislative history of Title VI clearly indicates that it was intended to cover indirect assistance programs, including educational programs. For example, Congressmen Poff and Cramer introduced a partial list of programs which would be embraced by Title VI. See H. R. Rep. No. 914 (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. At least two of the programs on the list involve grants or awards to students. See 42 U.S.C. §242d(b) (1970) (repealed Pub. L. 94-484, §503(b)(1976) (graduate training for physicians, engineers, nurses and other professional personnel providing for grants to individuals or institutions); 20 U.S.C. §461-65 (graduate fellowships). *But see* Note, *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof,"* 78 Mich. L. Rev. 608 (1980).

> The bill deals with equal access to education. Such access should not be denied because of poverty or sex. If we are going to give all students an equal education, women must finally be guaranteed equal access to education. . . .
>
> [i]t does not do any good to pass out hundreds of millions of dollars if we do not see that the money is applied equitably to over half our citizens.

117 Cong. Rec. 30412 (1971). The same sentiments were expressed in the House. 117 Cong. Rec. 39252 (1971)[15]

Statements made during the 1971 debates on Senator Bayh's proposal demonstrate that the funds subject to Title IX encompassed virtually all federal assistance to education, including BEOG grants to students. Supporting Senator Bayh's amendment to the Bill which provided for the establishment of the BEOG program, S. 659, Senator McGovern stated:

> I urge the passage of [Senator Bayh's] amendment to assure that *no* funds from S. 659, the Omnibus Education Amendments Act of 1971, be extended to any institution that practices biased admissions or educational policies.

117 Cong. Rec. 30,158-59 (1971) (emphasis added).

Similarly, when Senator Bayh was asked what type of aid might be subject to termination under Title IX, he responded, "We are cutting off *all* aid that comes through the Department of Health, Education and Welfare. . . ." 117 Cong. Rec. 30408 (1971).

[15]The floor debates in the House and Senate, while meager, are still the most authoritative source of Title IX legislative history. *See* North Haven, 50 U.S.L.W. at 4504. In the Senate, Title IX was introduced as a floor amendment, so no Committee report discusses its provisions. By the same token, in the House, little insight was given by the Committee Report which accompanied H. R. 7248 (The Higher Education Act of 1971), a Bill which contained a prohibition of gender discrimination in federally funded education programs. *See* H. R. Rep. No. 554, 92 Cong. 1st Sess. (1971) *reprinted in* (1972 U.S. Code Cong. & Ad. News 2462, 2511-12. The differences between the House and Senate versions, none of which are relevant here, were resolved in the Conference on the Education Amendments of 1972. *See* S. Conf. Rep. No. 798, 92d Cong. 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2608.

Although Senator Bayh's 1971 amendment was not adopted, he reintroduced his amendment to S.659 on February 28, 1972 and the amendment was adopted that day. See 118 Cong. Rec. 5815 (1972).[16] It is that amendment that was ultimately enacted as Title IX, and which is involved in this appeal.[17] While it is true that the legislative history makes no explicit reference to "indirect" financial assistance such as student grants, the 1971 debates make it clear that Congress' overriding objective in enacting Title IX, that is, to withhold public funds from an institution which engages in sex discrimination, was to deny to discriminating institutions all such financial support, direct or otherwise. Thus, as we construe the legislative history it is consistent with the Department's position that Title IX applies to any institution which receives indirect or direct federal financial assistance. In light of Congress' intent which we have gleaned from the legislative history of Title IX, we are satisfied that monies which are paid to students, who in turn use those funds for their education, constitute no less a part of a college's revenues than federal monies paid directly to the institution itself.

This being so, the Department was well within its authority when it defined "recipient" to include any institution which receives federal financial assistance "through another recipient." 34 C.F.R. §106.2(h). Grove thus became a "recipient" within the regulations when it received federal monies that had been granted to its students for their use in educational pursuits.

[16]In introducing the 1972 amendment, Senator Bayh stated that it provided a "comprehensive approach which incorporated . . . the key provisions of my earlier amendment. . . ." 118 Cong. Rec. 5808 (1972).

[17]Senator Bayh's 1971 amendment never came to a vote on the floor of the Senate because it was named nongermane to S.659. See 117 Cong. Rec. 30415 (1971).

Although there were some differences between Senator Bayh's 1971 proposal and his amendment that was actually adopted in 1972, these differences do not undermine our conclusion that the 1971 debates demonstrate that Title IX, as enacted, was intended to cover both direct and indirect financial aid.

D.

In addition to contemporaneous legislative history, the post-enactment history of Title IX provides further evidence that BEOGs come within the scope of "federal financial assistance."

After the Department published its final Title IX regulations on June 4, 1975, (40 Fed. Reg. 24128) they were submitted to Congress for review pursuant to §431(d)(1) of the General Education Provisions Act, Pub. L. 93-380, 88 Stat. 567, as amended, 20 U.S.C. §1232(d)(1). This statutory provision affords Congress the opportunity to examine an agency regulation and, if it finds the regulation "inconsistent with the Act from which it derives its authority. . . ," Congress is enabled to disapprove the regulation by a concurrent resolution. If no such concurrent resolution is passed within 45 days of the submission of the regulation to Congress, the regulation becomes effective.

During the Congressional review of the Title IX regulations, the subject of indirect aid was specifically addressed. Legislators were explicitly informed by HEW Secretary Weinberger that the Department construed "federal financial assistance" to include indirect student assistance programs:

> 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 [then HEW General Counsel] says the court case [*Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975)] 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. 481-484 (1975) ("Postsecondary hearings").

In response to this Departmental interpretation, Senator Helms introduced a proposed concurrent resolution that would have disapproved the regulation because it did not limit the application of Title IX to programs and activities directly receiving "federal financial assistance." *See* S. Con. R. 46, 121 Cong. Rec. 13300 (1975). In addition, several other proposed concurrent resolutions were introduced that would have disapproved the regulation in its entirety. *See* H.R. Con. Res. 310 (Rep. Martin) 121 Cong. Rec. 19209 (1975); H. Con. Res. 329 (Rep. O'Hara), 121 Cong. Rec. 21687 (1975); H.R. Con. Res. 330 (Rep. O'Hara), 121 Cong. Rec. 21687 (1975). No "disapproval" resolution was passed by either House.

Although Congress' failure to pass any of the concurrent resolutions does not definitively establish that it considered those regulations to be consistent with, and authorized by, Title IX, it does lend weight to the argument that coverage of BEOGs was intended, especially since the Department's construction of the phrase "federal financial assistance," was specifically brought to the attention of Congress.[18] The failure of Congress to pass a resolution disapproving the Department's "indirect aid" regulation is particularly significant, since Congress did not hesitate in amending §901 when it disagreed

[18]Grove argues that we should accord no weight to Congress' failure to disapprove the Department's regulations. This argument rests on 20 U.S.C. §1232(d)(1) which provides, in part, that the failure of Congress to adopt a concurrent resolution disapproving a final regulation should not be construed as approval of the regulation.

However, that provision in 20 U.S.C. §1232(d)(1) was enacted approximately four months after the Department's regulations went into effect. *See* Pub. L. No. 94-142 §7(a)(1) (enacted November 29, 1975). Moreover, in its decision upholding subpart E of the Department's regulations, the Supreme Court concluded that the failure of Congress to pass disapproving resolutions was a factor to consider in interpreting section 901 of Title IX. *See North Haven,* 50 U.S.L.W. 4506-07 (1982).

with the Department respecting the scope of that section.[19] Indeed, Congress has declined to enact new legislation that was specifically designed to accomplish the result which Grove urges upon us. On the very day that the 45-day review period for the Department's regulation expired, Senator Helms introduced a bill that would have provided that "Title IX shall apply only to programs and activities which *directly* receive Federal financial assistance." S. 2146, 94th Cong., 1 Sess. (1975); *see* 121 Cong. Rec. 23845-23847 (1975) (emphasis added). Congress took no action on the Helms bill.

Subsequently, in 1976 Senator McClure proposed a similar amendment to Title IX that provided: "For purposes of this chapter, federal financial assistance received, means assistance received by the institution directly from the federal government." 122 Cong. Rec. 28144 (1976). In his statement in support of this proposal, Senator McClure made it apparent that had his amendment passed, Grove's interpretation of Title IX would undoubtedly be correct. Senator McClure stated:

> The particular abuse in this instance, the one that I am seeking to correct here . . . Hillsdale College, [is] subjected to Federal controls by way of student assistance or a GI grant to a student. Hillsdale College has gone to great pains to avoid any appearance of Federal support. They have not participated in Federal aid programs. They desire to be completely independent of the Federal taxpayer in the support of the institution. They are being subjected to Federal control because some student may have Federal assistance. My amendment would simply say that it has to be a direct Federal assistance before they are subjected to the HEW regulations at all.

[19]Prior to the period of regulatory review, but after the Department had published its regulations for comment, Congress enacted legislation excepting social fraternities, sororities, and voluntary youth organizations from the reach of section 901. Pub. L. No. 93-568; §3(a), 88 Stat. 1862 (1974). In 1976, Congress enacted three additional exceptions to section 901's coverage. *See* Pub. L. No. 94-482, §412 (1976) (codified at 20 U.S.C. §1681(a)(7) (9). (Boy or girl conferences, father son or mother daughter activities, and beauty pagent scholarship awards).

122 Cong. Rec. 28145 (1976).

These remarks brought forth an immediate and vigorous response from Senator Pell, the prime Senate sponsor of the educational opportunity grant programs included in the Education Amendments of 1972. Senator Pell declared:

> [T]he enactment of this amendment would mean that no funds under the basic grant program [i.e., the BEOG 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.

Similarly, Senator Bayh, the Senate sponsor of the language that was ultimately enacted as Title IX, vigorously announced his opposition to Senator McClure's amendment. The correct interpretation of Title IX, according to Senator Bayh, was the Department's construction that "federal financial assistance" included BEOGs, since student grants *benefited* the educational institution.

> The House committee studied this [Departmental] interpretation. I emphasized at that time that Title IX, which dealt with discrimination so far as women are concerned, is parallel in its language and enforcement expectations with Title VI of the Civil Rights Act. The courts have held that Title VI * * * does apply if a student received Federal aid. *If a student is benefited, the school is benefited.* It is not new law; it is tradition, 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. 28145-28146 (1976) (emphasis added).

On that same day, soon after the remarks by Senators Pell and Bayh, Senator McClure's proposed amendment to Title IX was defeated by a 50 to 30 vote.

Although postenactment history is not always accorded controlling weight, *see Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 (1979) (concluding that subsequent isolated statements by individual legislators or committee members "cannot substitute for a clear expression of legislative intent at the time of enactment"), here, where the Department's interpretation of "federal financial assistance" has been directly brought to Congress' attention, Congress' specific rejection of proposed legislation that would have overturned that interpretation provides a substantial indication that it was Congress' intent to include BEOG's within the coverage of section 901. Indeed, in *North Haven Bd. Of Educ.*, which upheld the Department's Title IX regulation governing employment discrimination, the Supreme Court relied, as we do here, on the post-enactment history of Title IX. In so doing, the Court stated:

> Although postenactment developments cannot be accorded "the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX . . ." 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 in other respects, then presumably the legislative intent has been correctly discerned."

50 U.S.L.W. at 4507 (citations omitted). *Accord, Cannon v. University of Chicago*, 441 U.S. 677, 687 n. 7 (1979).

E.

A case under Title VI which supports our conclusion that Grove is a recipient of federal aid within the meaning of Title IX, is *Bob Jones University v. Johnson,* 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

In *Bob Jones,* the Department had ordered that eligible veterans enrolled at Bob Jones University could not receive veterans' educational benefits because the University engaged in racially discriminatory practices. The University then sought injunctive relief from that order, arguing that, since the benefits were paid directly to veterans, it was not the University which received federal financial assistance, and, therefore, the University was not subject to Title VI. The district court rejected the University's argument and dismissed the injunction. It held that VA educational benefits, even though paid directly to students, constituted federal financial assistance to the University within the purview of Title VI.

The *Bob Jones* court based its reasoning on the broad remedial purpose of Title VI and the fact that the University benefited in two distinct ways from the payment made to student veterans. First, ' payments to veterans . . . releas[e] institutional funds which would, in the absence of federal assistance, be spent on the student." 396 F. Supp. at 602. Second, "the participation of veterans who — but for the availability of federal funds — would not enter the educational programs . . . enlarg[es] the pool of qualified applicants upon which [the school] can draw for its educational program." Id. at 603. Finally, in holding that indirect veterans' educational benefits were subject to Title VI, the *Bob Jones* court stated:

> Whether the cash payments are made to a university and thereafter distributed to eligible veterans rather than the present mode of transmittal is irrelevant, since the payments ultimately reach the same beneficiaries and

> the benefit to a university would be the same in either event. To argue otherwise would be to suggest that the applicability of Title VI turns on the role of a university as an exchange. . . . No rational distinction with respect to Title VI coverage can be made on this basis.

Id. at 603-04. *See also McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court) (disallowing tax deductions for contributions to racially segregated fraternal organizations as such deductions constitute federal financial assistance under Title VI.)

The decision in *Bob Jones* figured importantly in the postenactment history of Title IX. During the debates on the McClure amendment in 1976, *see supra*, which would have limited the coverage of Title IX solely to "direct" federal financial assistance, Senator Bayh specifically referred to the *Bob Jones* decision under Title VI.

> [T]he inclusion of students who get Federal assistance is not unique. If we followed this route [in amending Title IX] then the next step is to repeal Title VI of the Civil Rights Act because the court has held in other civil rights matters that if a student gets assistance from the Federal Government the university itself is assisted.
>
> The case of Bob Jones University against Johnson is a specific case in question.

122 Cong. Rec. 28145 (1976).

The district court here relied almost solely on the *Bob Jones* analysis when it concluded that indirect federal financial assistance, i.e. BEOGs, brought Grove within the coverage of Title IX. Our discussion of the statute, its legislative history, post-enactment events, and the *Bob Jones* decision has led us to the same conclusion. Thus, we are satisfied that the district court did not err in this ruling.

III.

Section 901 of Title IX also provides that the ban against sex discrimination is restricted to an "education *program or activity* receiving Federal financial assistance." 20 U.S.C. §1681. In addition, §902 limits the Department's authority to terminate federal funding to "the *particular program,* or part thereof" which does not comply with the regulatory requirements. 20 U.S.C. §1682.

Grove argues that construing "federal financial assistance" as including BEOGs is necessarily incompatible with, and mutually exclusive of the statutory requirement that enforcement of Title IX be "program specific." According to Grove, Title IX's reference to "program" or "activity" clearly indicates that the Act's prohibition of sex discrimination cannot apply on a generalized, nonprogrammatic, or institutional basis. Instead, Grove claims that only those programs or activities for which Federal funds are specifically earmarked, are made subject to the Act, and it is only those particular programs or activities from which federal assistance can be withheld in the event violations are found within the particular identified program. From that conclusion, Grove reasons further that because indirect student assistance, such as BEOG grants, cannot be tied to any specific program or activity at an educational institution, Grove cannot, consistent with the program specificity requirement, be a "recipient of federal financial assistance," and, thus, Grove argues, it is not subject to Title IX. In essence, Grove contends that subjecting an entire institution to the requirements of Title IX only by reason of its students' receipt of BEOGs, runs counter to Congress' expressed intent, which limits the application of Title IX to specific programs or activities.

We concede, as we must, that Title IX's provisions, on their face, are program-specific. *See North Haven,* 50 U.S.L.W. at 4507.[20] We cannot agree, however, that Congress intended to limit the purpose and operation of Title IX by a narrow and illogical interpretation of its program-specific provisions. Rather, we believe that Congress intended that full scope be given to the non-discriminatory purpose that Title IX was enacted to achieve, and that the program-specific terms of Title IX must therefore be construed realistically and flexibly. By so doing, contrary to Grove's argument, complete accommodation can be achieved between the concepts of "indirect federal financial assistance" and "program-specific" requirements.

A.

We have previously noted that Title IX is a counter-part of Title VI and is to be similarly interpreted. Like its Title VI counterpart, Title IX also requires that any withdrawal of federal funding must be restricted to the particular acitivity or program in which discrimination is found. It is apparent from the legislative debates that the legislators were profoundly concerned with the possibility of arbitrary and overbroad funding terminations. Fears were expressed during the Title VI debates that an unlimited termination sanction invoked by reason of an isolated violation might result in wholesale cut-off of federal assistance to an entire state thereby affecting state

[20] In *North Haven*, the Supreme Court held that, "[A]n 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." 50 U.S.L.W. at 4507.

The Court, however, then held that the employment regulations promulgated under Title IX conformed to the program-specific requirement. It is significant, however, that the court did not attempt to define the contours of "program" in its opinion. Thus, to this extent, *North Haven* does not control our decision.

programs unrelated to, and not identified with, the discriminatory practices.[21]

As we understand these legislative concerns, the legislators did not contemplate that separate, discrete, and distinct components or functions of an integrated educational institution would be regarded as the individual programs, to which sections 901 and 902 refer. Whatever the legislators did contemplate by their use of the term "program or activity" we can be certain of only two things: (1) "program or activity" was never intended to be defined in the narrow and restrictive manner urged by Grove, and (2) the precise meaning, content, and parameters of "program" as it applies to the issue presented here have never been established.

Substantiating our view that to date little definitional content has been given to the term program, is the Supreme Court's recent Title IX decision in *North Haven*. In that case, although implicitly adopting an institutional approach to the concept of program,[22] the Supreme Court nevertheless, left to the district court the determination of what constituted the "program" and the extent of the permissible termination of federal funds.

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[21] As Senator Ribicoff stated:

> [I]f there were discrimination in one school district which refused to desegregate, we certainly would not wish to cut off public assistance or cut off road programs. Under Title VI we would deal with each program separately and apply Title VI only where the discrimination occurs.

110 Cong. Rec. 7067 (1963). *Accord,* 110 Cong. Rec. 11942 (1964) (remarks of Attorney General Kennedy); 110 Cong. Rec. 2059, (1964) (remarks of Sen. Pastore); Comment, Board of Public Instruction v. Finch: *Unwarranted Compromise of Title VI's Termination Sanction,* 118 U. Pa. L. Rev. 1113, 1116-24 (1970) [hereinafter cited as Finch Comment].

[22] We note that Justice Powell's interpretation of the majority opinion in *North Haven* indicates that the Court, in validating the Department's employment regulations, had inclined towards an institutionalized application of Title IX, rather than an ear-marked program approach. Justice Powell so argues because the majority opinion includes within Title IX's coverage, employees such as secretaries, guidance counselors, and janitors, who were not participants in any separate, identifiable grant program. *See North Haven,* 50 U.S.L.W. 4508 n.3 (Powell, J., dissenting op.).

Indeed, legal commentators and the few courts confronted with the need to define "program" have recognized that neither the statutes, by their terms, nor the legislative history resolve the question of what constitutes the "program or activity." *See, e.g., Finch Comment,* 118 U. Pa. L. Rev. at 1116-24; Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools, 53 Texas L. Rev. 103, 107-13 (1974); Note, School Desegregation and the Office of Education Guidelines,* 55 Geo. L. J. 325, 344-45 (1966); *Haffer v. Temple University,* 524 F. Supp. 531 (E. D. Pa. 1981), *appeal pending,* No. 82-1049 (3d Cir.).[23] *See also* Note, *supra* note 14.

B.

However "program" may be defined when a *direct* federal grant is involved (an issue not presented here), we are not persuaded that where non-earmarked or *indirect* funding is involved, those statutes proscribing discrimination should be rendered ineffective and without force. As was argued by amicus American Association of University Women, in its supplemental letter memorandum:

[23]Grove relies on the decision in Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068 (5th Cir. 1969), a Title VI case. In *Finch,* HEW had terminated Federal financial assistance to the Taylor County Elementary and Secondary Public School District for its failure to comply with HEW guidelines governing desegregation. The court vacated the termination order and remanded the case to HEW, because HEW had failed to make findings that any of the programs receiving Federal aid had been affected by racial discrimination. The court noted that the school system was receiving money under three federal grant statutes for three specific activities — supplementary education centers, adult education, and education of children from low income families. Each grant statute, concluded the court, constituted the program for purposes of Title VI, 414 F.2d at 1077.

We do not find the decision in *Finch* to be helpful or dispositive of the issues presented by this appeal. *Finch* involved neither across-the-board assistance for general educational purposes nor indirect federal financial assistance. Nor was the Finch court required to go beyond the particular grants in aid there at issue, in determining the contours of the program affected.

> However the Supreme Court ultimately defines "program", it cannot conclude that the more general the scope and purpose of the funding, the more restrictive the coverage of this remedial civil rights statute will be. That result would be logically inconsistent. Yet Grove City asks this court to decide that an institution whose entire purpose is educational is exempt from coverage when it is financed with federal funds that can be used for virtually any educational purpose instead of a clearly limited function. The absurd result if this approach is followed to its logical conclusion is that general higher education aid would never bring the college under Title IX coverage because no specific program within the College would be earmarked to benefit from the federal funding.

American Association of University Women Memorandum, at p. 5-6.

The same principle is implicit in the formula of one legal commentator who defined "program" along these lines:

> [I]f two programs, one receiving federal aid directly and one not, are both administered by the same local agency for the education of essentially the same group of students, and if the funding of the former facilitates the latter by freeing funds for its use, or if discrimination in the latter affects the former by inhibiting or prohibiting a student's participation in that program, then both will be considered part of the same program for purposes of bringing the latter within the reach of Title IX.

Todd, *supra*, 55 Texas L. Rev. at 112.[24] *See also* Note, *supra* note 14, at 624.

[24] Under Title VI, the former Office of Education regarded a school district's educational system as a single entity or program because discrimination in any particular component of the school program would obviously affect and taint the entire system. It was suggested that any narrower interpretation of a "program" would make it impossible to terminate aid to a school district because each dollar of assistance would have to be related to discriminatory practices. Note, *supra*, 55 Geo. L. J. at 344-45.

The view that non-earmarked or indirect federal funding brings within the definition of "program" an entire integrated institution is supported by the decision in *Haffer v. Temple University,* 524 F. Supp. 531 (E.D. Pa. 1981), *appeal pending,* No. 82-1049 (3d Cir.). That case involved the question of whether Temple University's intercollegiate athletic program was subject to Title IX even though no federal funds have been earmarked for athletics. Temple conceded that it received substantial federal financial assistance for other educational purposes. Nevertheless, Temple argued that "its intercollegiate athletic program is exempt from the requirements of Title IX because it receives no federal funds earmarked for the use of that program", and that "the implementing regulations are invalid insofar as they cover programs or activities that 'benefit from' federal financial assistance but do not recieve earmarked funding." 524 F. Supp. at 532.

In the *Haffer* opinion, then Chief Judge Lord analyzed the pertinent legislative history and concluded that, during the statutorily mandated Congressional review of the Department's regulations, the major focus of controversy centered on whether intercollegiate athletics were covered by Title IX. *See* Hearings on Title IX Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. 46, 66, 98, 304 (1975) [hereinafter Postsecondary Hearings]; *Haffer* at 536. However, despite the vigorous debate over whether the regulations included athletics, Congress passed no disapproving resolution.[25]

[25]See text *supra*, typescript at 15-17 discussing Congressional authority to review and disapprove regulations.

We note that Senator Bayh, in his testimony before the House Committee reviewing regulations, stated:

> Those [objecting to the regulation's application of Title IX to athletics] argue that (1) the scope of Title IX is narrow and defined only to include those education programs that received direct federal financial assistance, and (2) since athletics is not an educational program in direct receipt of federal aid, Title IX cannot and should not apply.

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Additionally, the court emphasized that after enactment of Title IX, numerous attempts were made to amend it so as to exclude from the Act's coverage, in whole or in part, intercollegiate athletics.[26] All these attempts were defeated.

Judge Lord thereupon denied Temple's motion for summary judgment. In denying that motion, he reasoned:

> Logic supports a broad reading of Title IX and supports upholding the validity of the regulations. Congress explicitly amended Title IX to exclude social fraternities and sororities from its coverage. I cannot imagine what possible federal funds could have been earmarked for these programs. If such indirectly (if at all) benefitted programs were never intended to be covered by Title IX, it is inexplicable that Congress felt the need to exempt them specifically on another basis. Congressional consideration of the proposed regulations focused almost exclusively on coverage of athletic programs. Indeed, many opponents of such coverage viewed Title IX as the possible death knell of college sports. If intercollegiate athletic programs, which almost never receive direct federal funding, were not intended to be covered, why was this a burning issue in consideration of the regulations?

Footnote continued from preceding page

> This objection to the coverage of programs which receive [illegible] direct benefits from federal support — such as athletics — is directly at odds with the Congressional intent to provide coverage for exactly such types of clear discrimination. For example, although federal money does not go directly to the football programs, federal aid to [illegible] 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.

Postsecondary Hearings at 171.

[26] *See* 524 F. Supp. at 634-35.

Id. at 541. *See also Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. 948 (D.N.J. 1980) (holding that section 504 of the Rehabilitation Act of 1973, which contains the same program-specific provisions at Title IX, applies to all activities of a public school system receiving federal funds); *Wright v. Columbia University,* 520 F. Supp. 789 (E.D. Pa. 1981) (same holding with respect to activities of a University).[27]

[27]Grove relies on a number of decisions that have concluded that the program-specific requirement restricted Title IX's coverage to those programs or activities for which federal funds were specifically earmarked.

Most of these decisions, however, were reached in the context of deciding whether Title IX's employment regulations were invalid. *See, e.g.*, Seattle University v. HEW, 16 F.E.P. 719 *aff'd* 621 F.2d 992 (9th Cir. 1980); Islesboro School Committee v. Califano, 593 F.2d 424 (1st Cir.), *cert. denied,* 444 U.S. 972 (1979); Junior College District of St. Louis v. Califano, 597 F.2d 119 (8th Cir.), *cert. denied,* 444 U.S. 972 (1979); Dougherty County School System v. Harris, 622 F.2d 735 (5th Cir. 1980). *(See also* text, *infra*, at typescript 33 & n.29.)

The Supreme Court has subsequently vacated the decision in *Seattle University* and *Dougherty* for further consideration in light of North Haven Bd. of Educ. v. Bell, *see* United States Department of Education v. Seattle University, 50 U.S.L.W. 3934 (1982); Bell v. Dougherty County School System, 50 U.S.L.W. 3934 (1982).

In light of the Supreme Court's decision in *North Haven* and its further action in *Seattle University* and *Dougherty*, we conclude that the analysis of the program-specific requirement found in these cases on which Grove relies is questionable and we decline to follow it.

Similarly, we decline to follow Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981), Bennett v. West Texas State University (N.D. Texas 1981), and Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981). *Othen* and *Bennett* involved decisions, contrary to *Haffer*, that Title IX does not cover intercollegiate athletics. Both decisions relied heavily on the pre-*North Haven* employment regulation cases, as did *Rice*.

We also reject the reasoning and holding of University of Richmond v. Bell, No. 81-0406R (E.D. Va. July 8, 1982), which enjoined the Department from investigating the University's athletic department or any educational program or activity not the recipient of *direct* federal financial assistance, even though the financial assistance which the University received included National Direct Student Loans, BEOGs, Supplemental Educational Opportunity Grants, and a Library Resource Grant.

Where the federal government furnishes indirect or non-earmarked aid to an institution, it is apparent to us that the institution itself must be the "program." Were it otherwise, and if it had to be demonstrated that each individual component of an integrated educational institution had in fact received the particular monies for a particular purpose, no termination sanction could ever effectively be imposed.

We conclude that the remedy to be ordered for failure to comply with Title IX is as extensive as the program benefited by the federal funds involved. Because the federal grants made to Grove's students necessarily inure to the benefit of the entire College, the "program" here must be defined as the entire institution of Grove City College.[28] Thus, Grove is incorrect in claiming that the program-specific provisions of the statute preclude Title IX coverage when indirect aid is involved.

[28]Judge Becker's concurrence is admirable in its desire to avoid defining what is the "program" in this case. We would agree that had Grove not raised the issue of whether "indirect federal funding" and "program specificity" are mutually exclusive, we would not be obliged to address that issue in this opinion. Instead, we could have relied wholly on Grove's failure to execute the Assurance of Compliance. However, Grove's main, and indeed its only, argument of any merit was that because Title IX is program specific, it could not apply to Grove, since the "indirect aid" received by Grove was not aid to a specific program, but aid to the entire college. *See typescript at 22-23 supra.* At oral argument, Grove contended that to hold indirect aid to be financial assistance, thereby making the entire college the "program," would directly contradict the intention of Congress to limit the application of Title IX to specific programs and activities receiving federal financial assistance within an institution. Indeed, it likened the concepts of "indirect aid" and "program specificity" to oil and water.

Despite Judge Becker's claims that we ought not to address anything other than Grove's refusal to execute the Assurance of Compliance, he too agrees that we must respond to Grove's primary argument that "program specificity cannot co-exist with a construction of Title IX that subjects Grove to regulation because of its receipt of [non-earmarked] BEOG funds." Concurring op. typescript at 3. He would answer that argument precisely as did the *amicus* in its brief which we have quoted, *see* typescript

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IV.

The last issue raised by Grove in its appeal is that the Department cannot require it to comply with Title IX because enforcement of the regulations would unreasonably curtail the College's freedom of association and that of the students. Grove asserts that both it, and its students, have a protected right to associate in an academic community free from unreasonable governmental intrusion. According to Grove, the Department's enforcement of Title IX would impermissibly interfere with the College's autonomy and the values which it seeks to promote among its students.[29] Assuming, without

- *Footnote continued from preceding page*

at 26, *supra*. The answer thus given in the concurring opinion is no different than the answer we have been obliged to provide, and which appears in text above. Our answer, which also subscribed to the *amicus'* argument, and Judge Becker's endorsement of that argument, reveal no difference in the conclusions reached: namely, that where indirect, non-earmarked funding is involved, the "program" necessarily must embrace the entire college. Moreover, just as we have concluded that we are obliged to answer Grove's argument, Judge Becker also recognizes that this argument made by Grove must be answered.

Contrary to Judge Becker's fears, nothing that we have said in this opinion would foreclose further inquiry in a situation in which "for policy reasons [a college] builds a financial '[C]hinese wall' around a [particular] department or school." Concurring op. typescript at 3. Significantly, this case, does not present a factual configuration which would support theories involving such a "financial Chinese wall" or its corollary, *direct* financial aid to a particular program. As a consequence, no such argument was ever advanced by Grove, nor could it have been.

[29]Grove describes its philosophy in the following manner:

> Since its founding, Grove City College has professed deeply held beliefs regarding the proper role of the individual, government and private education. For over a century, the College has steadfastly maintained a strict independence from governmental funding, holding that the ideals embodied in its educational philosophy draw their essence from the practice of institutional self-sufficiency and autonomy. A similar philosophy guides the political and economic teaching of the College's faculty. Moreover, the College has continued its strong espousal of religious principles. Although it is not controlled or operated by any church, it retains its Christian conscience. It does not discriminate; it does maintain its programs to give equal opportunity to students, faculty and staff. The College has undertaken to do what is morally right without government compulsion.
>
> Brief for Grove City College, No. 80-2384, at 35.

deciding, that Grove has demonstrated a protected associational right, we believe that the reasoning found in a recent decision of the Supreme Court which addressed a federal-state cooperative program for the developmentally disabled, disposes of Grove's argument. *Pennhurst State School v. Halderman,* 451 U.S. 1 (1981. Justice Rehnquist, writing for the Court, stated:

> [O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. . . [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.

451 U.S. at 17 (citation omitted).

Congress has the same power to impose conditions on the use of funds granted to private educational institutions as it has when federal funds are granted to states. *Bob Jones University v. Johnson,* 396 F. Supp. 597, 606 (D.S.C. 1974), *aff'd mem.,* 529 F.2d 514 (4th Cir. 1975). In any event, we find it difficult to understand how the first amendment associational rights of Grove and Grove's students are infringed, since both Grove and the students are free to avoid the conditions imposed by Title IX by ending their participation in the BEOG program.

Moreover, the first amendment does not provide private individuals or institutions the right to engage in discrimination. Thus, neither Grove nor its students can assert an alleged first amendment right to be free of the strictures of Title IX's prohibitions of gender discrimination and also claim the right to continued federal funding. *Cf. Bob Jones,* 396 F. Supp. at 607 (Free exercise clause and freedom of association provide no right against termination of federal funding based on Bob Jones's racially discriminatory practices).

V.

After concluding that Grove was subject to Title IX, the district court ruled that Grove's refusal to execute an Assurance of Compliance did not justify the Department's action in terminating funds paid to Grove's students under the BEOG program. The Department appealed this ruling.

A.

First, the district court held that Grove could not be required to sign an Assurance of Compliance, because subpart E of the regulation, which prohibits discrimination in employment[30] was held by the district court to be invalid. According to the district court, Title IX did not authorize the Department to proscribe employment discrimination in educational institutions. Four Courts of Appeals reached the same conclusion.[31] Only the Second Circuit concluded that subpart E was valid. *North Haven Bd. of Educ. v. Hufstedler*, 629 F. 2d 773 (2d Cir. 1980)

[30] *See* 34 C.F.R. §§106.51-106.61 ("Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited").

[31] *See* Seattle University v. HEW, 621 F.2d 992 (9th Cir.), *vacated and remanded for further consideration in light of North Haven sub nom.* United States Dept. of Ed. v. Seattle Univ., 50 U.S.L.W. 3934 (1982); Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir.), *cert. denied*, 443 U.S. 972 (1979); Junior College Dist. v. Califano, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); Isleboro School Comm. v. Califano, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979). *See also* Kneeland v. Bloom Township High School Dist. 484 F. Supp. 1280 (N.D. Ill. 1980); McCarthy v. Burkholder, 448 F. Supp. 41 (D.Kan. 1978).

In Dougherty County School System v. Harris, 622 F.2d 735 (5th Cir. 1980), *vacated and remanded for further consideration in light of North Haven sub nom.* Bell v. Dougherty City School System, 50 U.S.L.W. 3934 (1982), the Fifth Circuit declined to rule that Title IX did not reach employment discrimination in educational institutions, but held that the subpart E regulation was facially invalid on the grounds that its coverage was not program specific — *i.e.*, that the regulation reached employment practices in programs or activities not receiving "federal financial assistance."

Since the district court's decision, the Supreme Court has resolved this issue by affirming the Second Circuit's decision. *See North Haven Bd. of Educ. v. Bell,* 50 U.S.L.W. 4501 (1982). As a consequence, there is no need for us to make an independent examination of the cases and legislative history for it has now been definitively determined that Title IX does reach discrimination in educational employment.

Since the district court incorrectly concluded that the employment discrimination regulations (subpart E) were void, so much of the district court's order which declared the Assurance of Compliance form invalid and which enjoined the Department from requiring Grove to sign the Assurance of Compliance is in error, and must be reversed.

B.

In addition to declaring the Assurance of Compliance form invalid, the district court's order also enjoined the Department from terminating the payment of monies under the BEOG program until the Department proved that Grove was actually engaged in gender discrimination. The district court concluded that §902 of the Act, 20 U.S.C. §1682, did not authorize the Department to terminate federal financial assistance just because an institution has refused to execute an Assurance of Compliance.

Section 902 of the Act provides the Department with the authority to enforce Title IX's ban against gender discrimination. By its very terms, section 902[32] authorizes the Department to terminate federal financial assistance in order to secure compliance with any regulatory requirement designed to effectuate the objectives of Title IX. Accordingly, the Department provided that, as a condition of approval of federal financial assistance, an assurance from a recipient that it would not discriminate is required. Moreover, by regulation the Department was to specify the form that assurance would take. 34 C.F.R. §106.4(c).

[32]The relevant text of section 902 is reproduced in n. 2 *supra.*

The form prescribed did little more than identify the type of institution applying for federal funds. (A. 18). It required minimal information respecting grievance procedures in the event of complaints, and a statement of self-evaluation concerning the practices of the institution. Primarily it committed the recipient of funds to comply with Title IX and its regulations. As such it constituted a threshold device facilitating the enforcement of Title IX's objectives.

Thus, the assurance regulations, when read in conjunction with section 902, authorize the Department to terminate federal financial assistance upon a recipient's failure to execute an Assurance. We are satisfied that Title IX authorizes the promulgation of the assurance regulation and that the Department can therefore properly condition its grant or denial of funds upon adequate representations that the recipient will not discriminate.

Case law upholding parallel regulations and enforcement measures under Title VI of the Civil Rights Act of 1964 bolsters our conclusion that section 902 gives the Department authority to terminate funding when a recipient fails to comply with the assurance requirement. Section 902 was patterned after section 602 of the 1964 Act and the wording of the two provisions is virtually identical.[33]

In *Gardner v. State of Alabama*, 385 F.2d 804 (5th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968), HEW had terminated approximately $1,000,000 of funds under five separate federal assistance programs after the State of Alabama failed to execute an Assurance that it would undertake efforts to end racial discrimination in federally assisted programs. Alabama raised various objections to the assurance requirement all of which were rejected by the Court. The Court concluded that

[33] A counterpart of the instant assurance requirement was promulgated under Title VI at 45 C.F.R. 80.4. *See* 42 U.S.C. 2000d-1.

"the Secretary in issuing [the assurance] regulation was clearly acting within its [sic] rule making power conferred upon it [sic] by statute." 385 F.2d at 817 n.8. *See also United States v. El Camino Community College Dist.*, 600 F.2d 1258, 1260 (9th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980) ("in exercising its investigatory powers . . . HEW must have substantial latitude in scrutinizing policies and practices of the institution that may have a discriminatory impact on the intended beneficiaries of assistance").

As we read the district court's opinion in this case, it apparently believed that no authority existed for withholding financial assistance where the recipient refused to file an assurance as a matter of conscience and where no evidence of sex discrimination appeared in the record (A. 31). We conclude the district court erred in this respect.

Grove was given the choice of complying with the conditions of Title IX and the regulations promulgated thereunder or foregoing the benefits of federal funds. Grove chose not to comply, and the Department appropriately suspended the student grants through which Grove received the benefits of these monies. *Cf. Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981). Thus, by enjoining the Department from terminating the BEOGs based on Grove's refusal to file an Assurance and additionally by requiring evidence of actual discrimination, the district court erred.

C.

The district court also enjoined the Department from terminating funds under the BEOG program without affording students who would be adversely affected by such a termination notice and an opportunity to participate in a full administrative hearing. According to the district court, this requirement was mandated by the due process clause of the fifth amendment. We conclude the due process clause imposes no such requirement.

In *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), HEW had decertified a nursing home and ordered the termination of all Medicare and Medicaid assistance for patients at that home. In a suit brought by the home and six patients who were Medicare and Medicaid beneficiaries, the Supreme Court held that HEW was not required to afford due process hearings to patients as a prerequisite to disqualifying the home. In so doing the Court stated:

> [The grant program] clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified. Second, although the regulations do protect patients by limiting the circumstances under which a *home* may transfer or discharge a Medicaid recipient, they do not purport to limit the Government's right to make a transfer necessary by decertifying a facility. Finally, since decertification does not reduce or terminate a patient's financial assistance, but merely requires him to use it for care at a different facility, regulations granting recipients the right to a hearing prior to a reduction in financial benefits are irrelevant.

> In holding that these provisions create a substantive right to remain in the home of one's choice absent specific cause for transfer, the Court of Appeals failed to give proper weight to the contours of the right conferred by the statutes and regulations. As indicated above, while a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified.

447 U.S. at 785-86 (footnotes omitted).

O'Bannon is dispositive of the due process issue raised here. We perceive no difference between the impact on the students when the Department terminated Grove as an eligible education program and the impact on the patients when HEW decertified the nursing home in *O'Bannon*. If the *O'Bannon* patients had no enforceable expectation of continued benefits to pay for care at Town Court when that nursing home was decertified, neither would Grove's students have an enforceable expectation of receiving grants to attend Grove, after Grove's participation in the BEOG program was ended.

Each student receiving a BEOG has separately been found entitled to receive federal assistance on the basis of personal need and of his or her family's financial status. *See* 34 C.F.R. 690 Subparts C and D. Nothing in the Department's termination of Grove would detract from the individual eligibility of any student to receive a grant. But, as was true in *O'Bannon*, a student at Grove has no right to continued federal benefits to pay for his education at an institution that has not qualified by meeting the conditions for federal assistance. Thus, we reject the claim of the student plaintiffs that a due process hearing was required.

VI.

We have concluded that Grove is a recipient of federal financial assistance within the meaning of Title IX, even though that assistance is received indirectly through its students, who are the beneficiaries of federal grants. Second, we have concluded that the Assurance of Compliance form (HEW form 639A) was authorized and was valid. Finally, we have concluded that the Department was within its authority in terminating federal financial assistance to the students and to Grove for Grove's failure to execute and file, in accordance with the regulations, the Assurance of Compliance form.

Hence, so much of the district court's order, from which Grove appealed at No. 80-2383, and which held that Grove was a "recipient" within the meaning of Title IX, will be affirmed. So much of the district court's order, from which the Department appealed at No. 80-2384, and which invalidated the Assurance of Compliance form, and enjoined the Department from using that form and from terminating student BEOGs, will be reversed.

Accordingly, we will reverse so much of the district court's order of June 26, 1980, as is inconsistent with this opinion and with our holdings, and we will remand the case to the district court for the entry of an appropriate order consistent with this opinion.

BECKER, *Circuit Judge*, concurring in the judgment and in all but Part III of the opinion:

I agree with the result reached by the majority. I write separately because of the unnecessary breadth of the majority's opinion, which effectively decides cases not before this panel but which are or will someday be before this Court.

Part III of the majority opinion deals primarily with the question whether construing "federal financial assistance" to include BEOGs is necessarily incompatible with, and mutually exclusive of, the statutory requirement that enforcement of Title IX be "program-specific." The majority answers this question by concluding that when the federal government furnishes indirect or non-earmarked aid to an institution, the institution itself must be the "program" for purposes of Title IX. (Majority typescript op. at 30). That conclusion is unnecessary to the decision of this case. The controversy here does not implicate the application of Title IX to specific programs or activities within Grove's curriculum. Instead, the essential issue merely concerns Grove's refusal to execute the Assurance of Compliance. As a result, this case involves only a challenge to the facial validity of the Assurance of Compliance, and we need not pose the question raised by *Haffer v. Temple University*, 524 F. Supp. 531 (E.D. Pa. 1981), *appeal pending*, No. 82-1049 (3d Cir.), whether a particular program within a university which has executed the Assurance of Compliance may be regulated under Title IX.[1] The majority's conclusion in Part III C thus is *dictum*.

Pursuant to its regulations, 34 C.F.R. §106.4(a), the Department requires each recipient of federal aid to file an Assurance of Compliance as a means of securing adherence to Title IX. Under the Assurance in use at the time this case was filed, the recipient agrees that it will

> [c]omply, to the extent applicable to it, with Title IX . . . and all requirements imposed by . . . the Department's regulation . . . to the end that, in accordance with Title

[1] One reason for our concern about dealing with that question is that the issue raised in *Haffer* and *University of Richmond v. Bell*, No. 81-0406-R (E.D. Va. July 8, 1982), regarding whether the receipt of federal assistance subjects the entire institution to Title IX regulation, is highly controversial. In *University of Richmond*, Judge Warriner has dubbed the theory adopted in *Haffer* the "benefits" or "infection" theory. After surveying the same cases cited in the majority's note 27, he rejected *Haffer*, concluding that its approach was aberrational. The majority has pronounced that *Haffer* is correct and that the reasoning of the other courts is infirm. *See* Majority typescript at 30, n. 27.

> 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. . . .[2]

Our decision in this case must be guided by *North Haven Bd. of Educ. v. Bell,* 50 U.S.L.W. 4501 (1982), in which the Court examined the program-specificity of regulations governing employment discrimination in recipient schools. The critical paragraph of the Court's discussion of the program-specificity issue states:

> Examining the employment regulations with this restriction in mind, we nevertheless reject petitioner's contention that the regulations are facially invalid. Although their import is by no means unambiguous, we do not view them as inconsistent with Title IX's program-specific character. The employment regulations do speak in general terms of an educational institution's employment practices, but they are 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 assistance. . . ." (emphasis original) (footnote omitted).

50 U.S.L.W. at 4507. The Court's discussion applies with equal force to this case. By its very terms, the Assurance of Compliance is program-specific, for it applies only to an "education *program or activity* for which the Applicant receives or benefits from Federal financial assistance. . . ." (emphasis supplied). The termination of assistance to Grove is equally program-specific, for the Department took this action only in response to

[2] The Assurance of Compliance currently in use is not materially different. *See* Majority Opinion n. 5.

Grove's refusal to assure, by executing the Assurance of Compliance, that it would not discriminate on the basis of sex in any program or activity receiving federal financial assistance.

I agree that it is necessary for us to respond to Grove's contention that program-specificity cannot coexist with a construction of Title IX that subjects Grove to regulation because of its receipt of BEOG funds not earmarked for use in any specific program at the institution. In response to Grove's argument, I would endorse the passage from the *amicus curiae* brief of the American Association of University Women quoted in the majority's opinion (Majority typescript op. at 26). The conclusion of that passage -- that it is incorrect to contend that the more general the scope and purpose of the funding the more restrictive the coverage of this remedial civil rights statute -- is an effective shield against the contention that non-specific and non-earmarked BEOGs are necessarily incompatible with Title IX's program-specificity. The majority, however, turns this shield into a sword and reaches the conclusion, certainly dispositive of this case but nonetheless unnecessary to its disposition, that recipt of non-earmarked federal assistance transforms the entire institution into a "program" for purposes of Title IX.

I am concerned that the majority's overbroad decision will foreclose inquiry responsive to specific facts in cases in which a college or university, for policy reasons independent of a concern about Title IX regulation, builds a financial "chinese wall" around a department or school so that a particular program or activity is not funded out of the same pool into which federal assistance has been poured. My judicial experience has taught me that one cannot prejudge the kind of record or arguments that will be developed in future cases.

Whether or not it is a long step from my analysis to the conclusion reached in Part III-C by the majority, it is a significant step, and one that ought not to be taken except in the context of a record or relevant legal arguments requiring that a decision on the point be made.[3]

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

[3]Part III also purports to address the argument that because indirect student assistance, such as BEOG grants, cannot be tied to any specific program or activity at an educational institution, Grove cannot, consistent with the program-specificity requirement, be a "recipient of federal assistance," and, thus subject to Title IX. I do not here address the majority's treatment of that argument. Grove's status as a "recipient" is settled by the legislative history and by *North Haven*, as is ably demonstrated by Part II of the majority opinion.

AMENDED OPINION AND ORDER OF THE DISTRICT COURT JUNE 26, 1980.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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

Plaintiffs,

vs.

PATRICIA HARRIS, Secretary of the United States Department of Health, Education and Welfare; ROMA J. STEWART, Director of the United States Office for Civil Rights,

Defendants.

CIVIL ACTION NO. 78-1293

AMENDED PRELIMINARY STATEMENT, FINDINGS OF FACT, CONCLUSIONS OF LAW, DISCUSSION AND ORDER

Preliminary Statement

This litigation was generated by the initiation of a compliance proceeding against Plaintiff, Grove City College alone, (hereinafter referred to as "College") under Title IX of the Education Amendments of 1972, (20 U.S.C. 1681 *et seq.)* and the regulations of the Department of Health, Education and Welfare, (hereinafter referred to as "HEW") 45 C.F.R. Parts 80, 81 and 86 as promulgated by the then Secretary of HEW, Joseph Califano.

Amended Opinion and Order of the District Court, June 26, 1980

In July of 1977, Secretary Califano requested that the College execute HEW Form 639A, which is captioned, "*Assurance of Compliance with Title IX of the Education Amendments of 1972, and the Regulation Issued by the Department of Health, Education and Welfare in Implementation Thereof*". (See Exhibit "A" to Plaintiffs' Complaints for a copy of said form)

HEW insisted that the College must execute Form 639A, and contended that since a good number of the College's students received Basic Education Opportunity Grants, (hereinafter referred to as ("BEOG") and Guaranteed Student Loans, (hereinafter referred to as "GSL") and because these programs were financed with Federal funds and were used by the students to defray educational expenses, that the College was caused to be a "recipient" of Federal financial assistance as that term is defined in 45 C.F.R. Part 86, and the College was therefore duty-bound to execute Form 639A.

Further, the Secretary contended that if the College refused to execute this form, the College and the students at the College would no longer be allowed participation in the GSL and BEOG Programs pursuant to §902 of Title IX (Title 20 U.S.C. §1682). There was no allegation or proof offered by HEW that the College was, in fact, guilty of discrimination on the basis of sex in any manner whatsoever.

The College contended that it was not a recipient of Federal financial assistance by virtue of the GSL and BEOG Programs, and to the extent that HEW's regulations deemed the College to be such a recipient, they were an invalid extension of the statute, and that in any event, the HEW regulations were overbroad because they were not limited to regulating those programs that received Federal financial assistance. In addition, the College claimed the HEW has promulgated regulations which, as applied to Plaintiffs, exceed the scope of

§§ 901 and 902 of Title IX, (20 U.S.C. §§ 1681, 1682) and that said regulations of HEW as the same were applied to the College, violate the First and Fifth Amendments to the Constitution of the United States. The College, on the basis of conscience and principle, refused to execute the *Assurance of Compliance with Title IX.*

Thereupon, HEW initiated a compliance proceeding, and subsequently, an administrative hearing was held before HEW Administrative Law Judge, Albert Feldman, on March 10, 1978, in Philadelphia, Pennsylvania. It is important to note that only the College was named as a respondent, and none of the College's students were parties and they were not otherwise represented at the administrative proceeding even though over three hundred of them had a direct interest in the outcome of that hearing.

In his opinion, dated September 18, 1978, Judge Feldman did not address the College's constitutional arguments, ruling that his authority was restricted to determining whether the College complied with HEW's regulations. Significantly, however, Judge Feldman stated on page 9, of his decision that:

> "There was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance with Title IX. This refusal is obviously a matter of conscience and belief."

And, Judge Feldman further wrote on page 9, of his decision:

> "There is, very clearly, given to the Director a total and unbridled discretion to require any certificate of compliance that he may desire, whether the same be reasonable, or, to reasonable men, unreasonable. There are no guidelines. There is no necessary continuity, as from one Director to a successor Director whose opinions as to what constituted compliance might be totally different from those of his predecessor."

> "The Administrative Law Judge is not persuaded by any of the cases cited that this authority in the regulations has been struck down. Under the circumstances, the regulations being binding upon the Administrative Law Judge, he must rule in accordance therewith. The Director is given unlimited discretion so that the Administrative Law Judge has no authority to rule and is powerless to rule either that the regulations are unconstitutional or that the regulations exceed the statutory authority."

See in the matter of *Grove City College*, Docket No. A-22, P. 9 (HEW Administrative Proceeding, Sept. 15, 1978). (Initial Decision)

Since the College conceded that it did not sign the Assurance of Compliance required by the regulations, Judge Feldman found that the College was not in compliance. He, therefore, ordered that students who attended the College were ineligible to receive BEOG's or GSL's, and the following is the full text of the Final Order as drafted by Judge Feldman, and as adopted by the Secretary:

> "IT IS HEREBY ORDERED:
>
> 1. Federal financial assistance administered by the Department of Health, Education and Welfare under the following authorization is to be terminated and refused to be granted to the respondent institution:
>
> a) Basic Education Opportunity Grant Program, 20 U.S.C. §1070a.
>
> b) Guaranteed Student Loans Program, 20 U.S.C. §1071 *et seq.*
>
> 2. Additional Federal financial assistance which the respondent institution would be eligible to receive, either from the Department or through the Commonwealth of Pennsylvania, but for its non-compliance with Title IX, is to be refused to be granted.

3. This termination and refusal to grant or continue Federal financial assistance shall remain in force until the respondent institution corrects its noncompliance with Title IX and satisfies the Department that it is in compliance.

4. This initial Decision and Order shall become final unless, within twenty (20) days after mailing the initial Decision and Order, either party submits exceptions to the Reviewing Authority in accordance with 45 C.F.R. §81.102.

/s/ ALBERT P. FELDMAN
Albert P. Feldman
Administrative Law Judge

Date: September 15, 1978"

Pursuant to 45 C.F.R. §81.104, Judge Feldman's Order became final on October 14, 1978. On November 29, 1978, Plaintiffs commenced this suit.

In the action before this District Court, the Plaintiffs are Grove City College, and four of its students, namely, Marianne Sickafuse, Kenneth J. Hockenberry, Jennifer S. Smith and Victor E. Vouga.

The Plaintiffs allege that their action arises under Title IX of the Educational Amendments of 1972, 86 Stat. 373, as amended, 88 Stat. 1862 (1974), 90 Stat. 2234 (1976), 20 U.S.C. §1681 *et seq.* ("Title IX"). Plaintiffs further allege that this Court has jurisdiction for review purusant to Title IX, 20 U.S.C. §1682; The Administrative Procedure Act, 5 U.S.C. §701 *et seq.;* The Federal Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; 28 U.S.C. §1331 and 28 U.S.C. §1361.

The Plaintiffs request this Court to find that the aforestated Order of the Secretary of HEW requiring the College to execute the Assurance of Compliance or in the alternative suffer the

termination of the BEOG and GSL benefits to the College's students, including the individual Plaintiffs, is null and void and of no legal effect.

In due course, HEW filed an Answer to the Complaint filed by the Plaintiffs in this case.

The Plaintiffs responded by filing what their attorneys have described as a "Motion for Judgment on the Pleadings", with supporting affidavits pursuant to Rule 12 of the F.R.C.P., but this Court will treat the Motion as one for Summary Judgment pursuant to Rule 12c and Rule 56 of F.R.C.P.

The Defendant HEW thereupon filed a cross-motion for Summary Judgment.

There are no disputed and/or triable questions of material fact noticed by this Court, the parties have briefed and argued their respective points, and the matter is ripe for a decision by this Court.

The sub-issues of law that must be decided in order to determine the validity of the administrative Order in question are as follows:

1) Does this Court have jurisdiction to presently adjudicate this case?
2) Does Title IX of the Educational Amendments of 1972, Title 20 U.S.C. §§1681 *et seq.* apply to Plaintiff Grove City College and/or to the four individual Plaintiffs in this case, and if so, to what extent?
3) Do HEW's regulations (45 C.F.R., Part 86) which purport to implement Title IX of the Educational Amendments of 1972, Title 20 U.S.C. §§1681 *et seq.* unlawfully exceed the statutory authority and legislative purposes of the sex discrimination provisions of the said Educational Amendments of 1972 in the area of:

a) Subject matter coverage:
   A. As to Grove City College?
   B. As to the individual student Plaintiffs?
b) Enforcement coverage:
   A. As to Grove City College?
   B. As to individual student Plaintiffs?

4) Are HEW's regulations in this case 45 C.F.R., Part 86) unconstitutionally applied to:
   a) Grove City College?
   b) The individual student Plaintiffs?

5) Should Grove City College be required to execute the Assurance of Compliance?

6) Should the BEOG and/or the GSL assistance programs for the students be terminated?

AMENDED FINDINGS OF FACT

1. Grove City College ("College") is a private co-educational institution of higher education, affiliated with the United Presbyterian Church, located in Grove City, Pennsylvania, and chartered as an educational institution under the laws of the Commonwealth of Pennsylvania.

2. Marianne Sickafuse, a resident of Pennsylvania, is a full-time student at the College, who is a recipient of a Basic Educational Opportunity Grant (BEOG) totaling $400.00, for the academic year 1978-79. Said student will be unable to continue to attend this College of her choice without the receipt of said financial assistance and will be irreparably harmed, if said grant is terminated as it relates to the College.

3. Kenneth J. Hockenberry, a resident of New Jersey, is a full-time student at the College, who is a recipient of a Basic Educational Opportunity Grant (BEOG) totaling $600.00, as well as a Guaranteed Student Loan (GSL) totaling $2,000.00, for the academic year 1978-79. Said student will be unable to

continue to attend this College of his choice without the receipt of said financial assistance and will be irreparably harmed, if said grant and loan is terminated as it relate to the College.

4. Jennifer S. Smith, a resident of Pennsylvania, is a full-time student at the College, who is a recipient of a Guaranteed Student Loan (GSL) totaling $1,000.00, for the academic year 1978-79. Said student will be unable to continue to attend this College of her choice without the receipt of said financial assistance and will be irreparably harmed, if said loan is terminated as it relates to the College.

5. Victor E. Vouga, a resident of Wisconsin, is a full-time student at the College, who is a recipient of a Guaranteed Student Loan (GSL) totaling $2,500.00, for the academic year 1978-79. Said student will be unable to continue to attend this College of his choice without the receipt of said financial assistance and will be irreparably harmed, if said loan is terminated as it relates to the College.

6. Defendant, Patricia Harris, (the "Secretary") is the Secretary of the Department of Health, Education and Welfare, ("HEW") and HEW is administered under the supervision and direction of Defendant Secretary, Patricia Harris.

7. Defendant, Roma J. Stewart, successor to original Defendant, David Tatel, is the Director of the Office for Civil Rights, ("OCR") the Division of HEW responsible for enforcement of Title IX. The Office for Civil Rights is administered now under the supervision and direction of Defendant Roma J. Stewart.

8. Title IX of the Education Amendments of 1972, (20 U.S.C. §§1681 *et seq.)* provides, *inter alia:*

> a) No person in the United States shall, on 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 . . . (20 U.S.C. §1681(a).

9. In enforcing the non-discrimination requirements of Title IX, each Federal department and agency which is empowered to terminate Federal financial assistance, *other than assistance involving contract of insurance of guaranty,* is authorized to issue rules, regulations and orders. (20 U.S.C. §1682) Pursuant to this authority, the Secretary has issued regulations establishing certain requirements for recipients of Federal financial assistance administered under the auspices of HEW. In addition, the Secretary has designated the Director of OCR as his chief enforcement officer under Title IX. 45 C.F.R., Part 86 (1977).

10. The Secretary's regulations have defined Federal financial assistance to include funds made available for:

> (i) The acquisition, construction, renovation restoration or repair of a building or facility or any portion thereof; and
>
> (ii) 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;
>
> (2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.
>
> (3) Provision of the services of Federal Personnel.
>
> (4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.
>
> (5) Any other contract, agreement or argument which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty. 45 C.F.R. 86.2(g)(1) (1977).

11. The Secretary's regulations have defined a recipient of Federal financial assistance as follows:

> (h) "Recipient" means any State or political subdivision thereof, or any instrumentality of a State of political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee or transferee thereof. 45 C.F.R. 86.2(h) (1977)

12. The Secretary requires that an Assurance of Compliance (Form 639) with Title IX be executed by all educational institutions which it considers to be recipients of Federal financial assistance, or for all institutions which are applicants for Federal financial assistance. 45 C.F.R. 86.4 (1977)

13. This Assurance of Compliance is not limited to any specific educational program or activity carried out by the recipient or applicant, but requires a contractual guarantee that the signatory educational institution will comply with all regulations issued by HEW pursuant to Title IX without limitation, including subpart E of the same. (See Exhibit "A" attached to the Complaint).

14. Currently the aforementioned regulations include, *inter alia*, those concerning employment, housing, athletics, health services, counseling and employment assistance to students. 45 C.F.R. subparts D & E (1977).

15. The College receives no Federal or State financial aid, and more particularly, receives no financial aid either from HEW or the Commonwealth of Pennsylvania, except such financial assistance that is received by the College through the BEOG program, and the GSL program.

16. One hundred forty of the College's students, including Kenneth J. Hockenberry and Marianne Sickafuse are eligible to receive Basic Educational Opportunity Grants (BEOG's) appropriated by Congress and allocated by the Secretary pursuant to 20 U.S.C. §1070a.

17. One of the College's functions with respect to BEOG's is to certify that students applying for the grants are matriculating at the College.

18. BEOG's are distributed by the Secretary directly to students, including students such as Kenneth J. Hockenberry and Marianne Sickafuse, without participation of the College, other than to make the required certification referred to in Paragraph 17 of these Findings of Fact.

19. Three hundred forty-two of the College's current students, including Kenneth J. Hockenberry, Jennifer S. Smith and Victor E. Vouga, have obtained loans (GSL's) from private lending institutions or banks which are guaranteed by the Commonwealth of Pennsylvania. The United States, in turn, guarantees eighty (80%) per cent of the Commonwealth's obligation. The interest due upon these loans is paid directly to the private lending institutions or banks for a limited period of time by the United States through the Secretary pursuant to provisions of the Guaranteed Student Loan Program (GSL), 20 U.S.C. §§1071 *et. seq.*

20. One of the College's functions with respect to the GSL program is to certify a student's enrollment and the College's own current schedule of educational expenses.

21. GSL funds are distributed to students, including students such as Kenneth J. Hockenberry, Jennifer S. Smith and Victor E. Vouga, without participation of the College, other than to make the required certification referred to in Paragraph 20 of these Findings of Fact.

22. During July 1976, the Secretary requested the College to execute an Assurance of Compliance as required by 45 C.F.R. §86.4 (1977), requiring *inter alia,* assurance that the College was operating federally-funded educational programs in compliance with Title IX and all applicable HEW regulations (45 C.F.R. Part 86) implementing Title IX.

23. The College refused to execute HEW's Assurance of Compliance on the grounds that it receives no Federal financial assistance, [and that HEW regulations 45 C.F.R. Subpart E is unlawfully being applied to the College.]

24. Pursuant to 45 C.F.R. Parts 80, 81 and 86 (1977), the Secretary began administrative proceedings to declare the College and thereby its students, including Marianne Sickafuse, Kenneth J. Hockenberry, Jennifer S. Smith and Victor E. Vouga, ineligible to receive BEOG's, GSL's and any other Federal financial assistance administered by the Secretary while said students are attending Grove City College. However, said students *were not* made parties to said proceeding and *were not* given an opportunity to be heard.

25. Following a hearing before an Administrative Law Judge, by decision and Order dated September 18, 1978, ("Order") the College was found to be a recipient of Federal financial assistance. The decision of the Administrative Law Judge further found that ". . . there was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed Assurance of Compliance with Title IX . . .". No sex discrimination was alleged or proved at said hearing.

26. As a consequence of the "Order", the College and thereby its students, including Marianne Sickafuse, Kenneth J. Hockenberry, Jennifer S. Smith and Victor E. Vouga, were declared ineligible to participate in either the BEOG or GSL programs [,while said students are attending Grove City College.]

27. Students attending the College, including Marianne Sickafuse, Kenneth J. Hockenberry, Jennifer S. Smith and Victor E. Vouga, who have already been granted funds under either the BEOG or the GSI programs, will according to the "order", receive no further funds under either program, while said students are attending Grove City College.

28. The "Order" is a final Order of the Secretary. 45 C.F.R. §81.104 (1977).

29. Plaintiffs have exhausted their administrative remedies. 45 C.F.R. §81.106 (1977).

AMENDED CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this controversy.

2. The Order of the Administrative Law Judge is a final Administrative Order that is subject to review by this Court.

3. The regulations issued by HEW entitled *"NON-DISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE"*, 45 C.F.R. Part 86, are final regulations and are subject to judicial review by this Court.

4. The four student Plaintiffs are directly and adversely affected by the Order of the Administrative Law Judge, and to compel them to exhaust administrative compliance procedures under the exigent circumstances of this case would be an inadequate remedy and of no value in resolving the questions concerning HEW's underlying authority to promulgate and enforce compliance with the regulations involved in this case.

5. Title IX of the Educational Amendments of 1972, Title 20 U.S.C. §§ 1681 *et seq.* applies to Plaintiff Grove City College and the two student Plaintiffs, Marianne Sickafuse and

Kenneth J. Hockenberry by virtue of their participation in the Basic Educational Opportunity Grant Program. However, these educational grants can only be terminated after a hearing is held for both College and student recipients and only upon a showing of actual discrimination on the basis of sex in recruitment and admissions and in education programs and activities only.

6. Although the Guaranteed Student Loan Program (GSL) is financial assistance that brings Grove City College under the coverage of Title IX of the Educational Amendments Act of 1972, nevertheless, HEW, pursuant to the express terms of Section 902 of Title IX, is forbidden from terminating the GSL financial assistance to the Plaintiff students as a means of enforcing the anti-sex discrimination provisions of Section 901, Title IX, because this Court finds as a matter of law, that the GSL program is a contract of guaranty. It is unlawful for HEW to terminate an education program or activity aided by financial assistance from the Federal Government which involves a contract of guaranty, in order to enforce compliance with any HEW rule or regulation pertaining to the anti-sex discrimination provisions of Title IX. Even though a GSL program is financial assistance that brings a College under the coverage of Title IX, compliance with said Title must be effectuated, if any enforcement activity is indicated, by "other means authorized by law". (See Section 902, subparagraph 2 of Title IX).

7. HEW's regulations, subpart E, 45 C.F.R. 86.51 through 86.61, inclusive, which regulations purport to address discrimination on the basis of sex in employment in educational programs and activities unlawfully exceed the statutory authority and legislative purposes of the anti-sex discrimination provisions of the Educational Amendments of 1972, and a regulation that requires the College to assure compliance with subpart E is likewise null and void and of no legal effect. 45 C.F.R. 86.4

8. Consequently, HEW cannot properly and/or lawfully require and/or request Grove City College to execute an Assurance of Compliance with regulations that encompass subpart E, for the reason that said regulations in subpart E purport to cover employees of educational institutions who are not protected persons under Title IX.

9. HEW's regulations subparts A, B, C and D (45 C.F.R. 86.1 thru 86.43) apply to the College and also to the four students as persons who are in the class to be protected from sex discrimination under the Act, and as recipients of Federal financial assistance are covered by these regulations. However, all four of these Plaintiff students in any case are entitled to a hearing before their Federal financial assistance can be lawfully terminated. See Title 20 U.S.C. §1682(1).

10. Inasmuch as Marianne Sickafuse and Kenneth J. Hockenberry did not receive a hearing as required by Section 902 of Title IX and by the United States Constitution before their BEOG benefits were terminated, it is the conclusion of this Court that the HEW Order purporting to terminate the BEOG benefits of the student Plaintiffs, (as well as the other College students adversely affected) is declared to be void and of no legal consequence.

11. HEW's regulations (subpart E) in this case are unlawfully applied to Grove City College because they exceed the Congressional mandate. But said regulations would not have been unconstitutional as applied to Grove City College if the Congressional authority and legislative purpose had not been exceeded by HEW's regulations.

12. Although HEW at some future time may properly demand Assurance of Compliance as to subparts C and D of Title IX regulations, HEW on the present state of this record, lawfully cannot impose any sanctions on the students or the College for the College's failure to execute the Assurance of Compliance form as it is presently formulated for the following reasons:

a) The Assurance of Compliance form as presently written, unlawfully concerns itself with discrimination on the basis of sex in the College's employment program, i.e. subpart E of the HEW regulations, (Congress did not intend Title IX to cover this area), and the College cannot be required as a matter of law to fill out this fatally defective form.

b) Both the BEOG and the GSL program, as well as the Title IX legislation were designed to specifically protect and advance the rights of students only, and so as a matter of sound public policy in balancing and considering the interests sought to be protected and advanced by each program, the BEOG program and/or GSL program at a College should not be terminated in any case, unless and until there is a specific finding of sex discrimination at such College. Otherwise, an innocent student would be unfairly punished by the loss of his or her BEOG benefits without receiving any concomitant benefit (i.e. being freed from improper or unseemly sex discrimination) merely because as a matter of conscience the College failed to file a form. Both male and female students would be irreparably harmed by losing their financial aid in a case where there is absolutely no evidence of sex discrimination. (This reasoning applies equally to the GSL program if this Court had not held the GSL programs to be exempt from Title IX enforcement coverage.)

13. HEW's regulations as applied to the four student Plaintiffs are unconstitutional and are otherwise unlawful for several reasons:

a) The four Plaintiffs were deprived of their rights to BEOG and GSL benefits without a hearing of any kind.

b) The four Plaintiffs were denied these rights to BEOG and GSL benefits without a prior determination that sex discrimination, in fact, existed.

c) Plaintiffs Hockenberry, Smith and Vouga, were deprived of their GSL rights without any warrant at all in law inasmuch as these benefits are exempted from termination by Section 902 of Title IX's express provision. (See Title 20 U.S.C. §1682, first paragraph, which exempts from the enforcement provisions of the act loans to students by private banks, etc., when said loans are guaranteed by Federal Government.

14. Inasmuch as Plaintiffs Hockenberry, Smith and Vouga did not receive a hearing as required by the Fifth Amendment to the United States Constitution before their GSL benefits were terminated, and inasmuch as it has been determined by this Court that GSL benefits are exempted from the enforcement provisions of Title IX, it is the conclusion of this Court that the HEW Order purporting to terminate the GSL benefits of the student Plaintiffs, (as well as the other College students adversely affected) is declared to be null and void and of no legal consequence.

15. A document identified as Exhibit P-1, was presented to the Court by the HEW Attorneys via letter dated November 29, 1979. This document, Exhibit P-1, is entitled "Assurance of Compliance with the Deparment of Health, Education and Welfare Regulation under Title VI of the Civil Rights Act of 1964", and purports to be an agreement by Grove City College to comply with the HEW regulations under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* as of June 30, 1965. The Court concludes that this document is irrelevant to this case for the reason that whether the College is sincere or not in its claim that it now refuses to sign the Assurance of Compliance pursuant to Title IX on the basis of "conscience", is immaterial to the decision of this Court in this case.

AMENDED DISCUSSION

This Court now will review the protections and sanctions provided by Title IX prohibiting sex discrimination in educational programs. Title 20 U.S.C. §1681, (Section 901 of Title IX), provides in pertinent part that:

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

Title 20 U.S.C. Section 1682, (Section 902 of Title IX) provides for Federal administrative enforcement by Federal departments and agencies extending Federal financial assistance to any education program by issuance of rules, regulations, or orders of general applicability, "which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance." Sanctions for non-compliance with applicable regulations are specifically set out in §1682:

> "Compliance with any requirement adopted pursuant to this action may be affected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the . . . recipient . . . and shall be limited in its affect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law . . .".

Section 1683 of Title 20 (Section 903 of Title IX), provides for judicial review of agency action taken under §1682.

Pursuant to §1682 (§902 of Title IX), HEW issued final regulations to implement this legislation, namely, 45 C.F.R. Part 86 which became effective on July 21, 1975.

As heretofore noted, the College refused to sign an Assurance of Compliance form containing a contractual obligation to abide by subparts D and E of said regulations. Upon the College's refusal to sign the form, HEW commenced procedures which ended in a final administrative Order terminating the BEOG and GSL assistance to Plaintiff students which obviously includes the termination of all of the Federal financial assistance from these programs which HEW contends was received by the College.

IS THIS MATTER RIPE FOR A JUDICIAL CONSIDERATION BY THIS COURT?

Title 20 U.S.C. §1683 (Title IX) provides for judicial review of final agency action, however, HEW contends that the matter is not ripe for judicial determination. Because it is undisputed that the Administrative Law Judge issued a final Order immediately and adversely affecting the financial interests of hundreds of people, it would be difficult to find a more ripened case for judicial review.

The Plaintiff students, and many other similarly situate at the College by virtue of the administrative Order, face the immediate loss of their Federal educational grant. This aid is absolutely necessary if they are to continue as students at the College of their choice. The material facts in this case are not subject to dispute.

The pure legal issue from the Plaintiffs' point of view is whether this Court can presently determine if HEW has the legal right under Title IX and/or under the United States Constitution in the light of the undisputed facts, to cut off the Federally assisted students' BEOG and GSL programs because of the College's failure to execute a HEW form captioned "Assurance of Compliance".

The question as to the ripeness of the Plaintiffs' challenge to HEW's statutory authority undoubtedly meets both prongs of the *Abbott Laboratories'* test upon which Defendants rely. See 387 U.S. 136, 148-49 (1967). First, in determining whether a claim is appropriate for judicial decision, *Abbott Laboratories* asks whether a purely legal issue is presented to the Court (387 U.S. at 149). Despite HEW's efforts to construe it differently, a purely legal issue is now presented to this Court as was the case in *Abbott Laboratories.* The Court in Abbott Laboratories stated:

> "Both sides moved for summary judgment in District Court, and no claim is made . . . that further administrative proceedings are contemplated . . . both sides have approached this case as one purely of congressional intent, and . . . the Government made no effort to justify the regulation in factual terms."
>
> (See pages 148-149, 87 S. Ct. Page 156, of that Opinion.)

Further, the HEW administrative determination constituted final agency action within the meaning of the Administrative Procedure Act. See 45 C.F.R. 81.104. Plaintiff College presented its challenge to HEW's jurisdiction in the administrative proceeding and has preserved that point on appeal. Consequently, there can be no doubt that the legitimacy of HEW's regulations is at issue here.

With regard to the second prong of the *Abbott Laboratories'* test, it is difficult to imagine a more concrete harm than that which would be presented should this Court decline to rule on HEW's authority to apply the regulations subparts D and E. Because of the impending aid cut-off, the College is confronted with the dilemma of either submitting to regulations which it (and several Courts) believes to be beyond the authority of HEW to enforce or it is threatened with the denial of the BEOG and GSL benefits to its students. If it chooses the former, it will have to undertake the expensive and time-consuming record-

keeping, reporting and other affirmative requirements imposed by subpart E in particular, and then expose itself to further ultra vires proceedings at HEW's pleasure for any alleged sex discrimination in employment at the College, which is precisely the type of direct and immediate harm contemplated by the Supreme Court in *Gardner v. Toilet Goods Association,* 387 U.S. 167, 172-3 (1967). Following HEW's suggestion, that the College simply allow the students' aid to be terminated is tantamount to asking it to give up the right to the judicial review specifically granted by §903 of Title IX, 42 U.S.C. §1683, and without any allegation and/or evidence that sex discrimination against students at said College exists.

More importantly, HEW's assertion regarding ripeness totally ignores the position of Plaintiff students who are the real losers should the aid cut-off occur. Any refusal of this Court to consider Plaintiff students' challenge to HEW's regulatory authority leaves them no opportunity for judicial review in a case where, but for immediate judicial relief, they (the students) will be irreparably damaged without any corresponding social good.

The conclusion of the Supreme Court in *Abbott Laboratories* is thus appropriate here:

> "Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the Plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the Courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar of some other unusual circumstance . . .".

In *Romeo Community Schools v. HEW,* 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd,* 600 F2d 581 (6th Cir.) cert. denied ___ U.S. ___ 100 S. Ct. 467, 62 L.Ed. 2d 388 (1979), HEW also raised ripeness objections when a local school district challenged HEW's authority to promulgate and apply subpart

E (employment) of its Title IX regulations. Despite the fact that administrative proceedings had not been completed and no Order had been issued cutting off aid from the school district, the Sixth Circuit ruled that the case was ripe for judicial resolution, stating:

> "The only issue raised by Plaintiffs' Complaint is Defendants' authority under Title IX to promulgate the regulations contained in sub-part E of 45 C.F.R. §86.1 *et seq.*". Id. at 1028.

In another similar pre-final enforcement case challenging HEW's authority to promulgate and apply its subpart E regulations, the District Court also found HEW's ripeness argument "unpersuasive". *Brunswick School Board v. Califano*, 449 F. Supp. 866 (D. Maine 1978) *aff'd sub nom.* Isleboro School Committee v. Califano, 593 F2d 424 (1st Cir.) cert. denied, ___ U.S. ___, 100 S. Ct. 467, 62 L. Ed 2d 387 (1979). It reasoned as follows:

> "The basic test for determining ripeness involves an examination of whether 'there is a substantial controversy between parties having adverse legal interest, of sufficient immediacy and reality' to warrant a judicial decision . . . Applying this test, the propriety of judicial resolution of the question here presented is manifest. The facts are undisputed; the matter before the Court is of a strictly legal nature . . . There exists a concrete controversy between the parties which is ripe for judicial determination."
>
> 449 F. Supp. at 875 (citations omitted)

See also *Seattle University v. HEW*, 16 FEP Cases 719 W.D. Wash. (1978), *appeal pending*, No. 78-1746 (9th Cir.)

The Third Circuit cases relied on by HEW do not advance its argument and in fact, support Plaintiffs' contention. *A. O. Smith v. F.T.C.*, 530 F.2d 616 (3d Cir. 1976), held that a pre-enforcement challenge based upon the F.T.C.'s lack of power to issue certain regulations was ripe for judicial resolution.

Exxon Corp. v. F.T.C. 588 F.2d 895 (3d Cir. 1978), employing the *Abbott Laboratories'* test, held that a declaratory judgment action even outside of the normal review channels was appropriate to challenge agency action. Plaintiffs' case is even more compelling than those in *Smith* or *Exxon*, both of which were found ripe for judicial consideration.

This Court has jurisdiction to decide the legal issues raised in this proceeding.

IS GROVE CITY COLLEGE BROUGHT UNDER THE COVERAGE OF TITLE IX BY VIRTUE OF ITS STUDENTS' PARTICIPATION IN THE BEOG AND GSL PROGRAMS?

Although it can be reasonably argued otherwise, it is this Court's opinion that Title IX of the Educational Amendments of 1972 apply to Plaintiff Grove City College because the BEOG program (Basic Educational Opportunity Grants), and the GSL program (Guaranteed Student Loan) are Federal financial assistance to the College, and of which assistance the College itself is an ultimate recipient along with the students. See *Bob Jones University v. Johnson* 396 F. Supp 597 (1974) *aff'd* per curiam 529 F. 2d 514 (4th Cir. 1975).

The College and two of said student Plaintiffs, namely, Marianne Sickafuse and Kenneth J. Hockenberry, along with 138 of the College's other students, participate in the BEOG program, which program this Court concludes is covered by Title IX.

The College and three of said student Plaintiffs, namely, Kenneth J. Hockenberry, Jennifer S. Smith and Victor E. Vouga, along with 342 of the College's other students participate in the GSL program which this Court also concludes is covered by Title IX.

Except for the BEOG and GSL programs above referred to, neither the College nor its students participate in any other program or activities which are funded in whole or part by the United States.

Under the BEOG program, the students who attend the College secure Federal funds appropriated by Congress for use in the program directly from the Treasurer of the United States.

Under the GSL program, the Federal Government guarantees the payment of loans and the interest due on said loans made by private lending institutions to students attending the College. Also during the course of said loan, the Government under certain circumstances, makes payments of interest to those lenders.

Upon receipt of either BEOG and/or GSL monies, the student uses his or her grant and/or loan to defray educational costs by direct payment to the College for tuition, food, housing, etc., or by payment to private vendors for such things as books, rent for off-campus housing, etc.

The question now addressed is whether the BEOG program and the GSL program are within the definition of "Federal Financial Assistance" as the term is used in §902 of Title IX, (20 U.S.C. §1681) to mean, in part, "any of the following, when authorized or extended under a law administered by" the Department of Health, Education and Welfare:

"1) A grant or loan of Federal financial assistance, including funds made available for:

(i) 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 . . . .

5) Any other contract, agreement or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty."

Such regulations, in §86.2(h) and (i) thereof, define "Recipient" and "Applicant", respectively, to include therein an institution 'to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance . . . .' (45 C.F.R. 86.2(h) and 'one who submits an application, request or plan required to be approved by' an official of the Department of Health, Education and Welfare, 'or by a recipient, as a condition to becoming a recipient.' (45 C.F.R. 86.2(i))

The College participates indirectly as the final recipient of both Federal BEOG and GSL funds as a student financial aid program funded by the Department of Health, Education and Welfare. Direct grants and loans are made to the students under the BEOG and GSL programs, but the grants and loans are conditioned upon the enrollment of the student at an approved institution of higher education.

HEW contends that signing an Assurance of Compliance is a prerequisite to the continuation of Federal financial assistance provided under the BEOG and the GSL programs and requests that the Federal payments be terminated as to the students using said programs until the College files an Assurance of Compliance. The College defends its refusal to sign the Assurance in part, on the grounds that Federal funds provided for student financial aid are not Federal financial assistance to an education program or activity within the meaning of Title IX, and that the regulations making such student aid programs subject to Title IX exceed HEW's authority under the Act. The College also argues that Title IX as construed and enforced by the Federal regulations is unconstitutional.

This Court finds that payments by HEW under both the BEOG and the GSL programs are Federal financial assistance received by the College under the regulations. (See 45 C.F.R. 86.2(g) (1) (ii) and 86.2(g) (5). They are grants of Federal funds

and/or loans guaranteed by Federal funds either extended to the College for payment to or on behalf of students admitted to the College or extended directly to students for payment to the College. The College is a "recipient" of such Federal financial assistance (See 45 C.F.R. 86.2(h). This financial assistance helps students pay for their education at the College by defraying their costs of tuition, books, room and board and other expenses incurred in attending said institution. Since funds are provided which the College would otherwise have to supply from its own resources, the total funds available to the College to carry on its education programs and activities are increased. The Federal programs such as the BEOG program and the GSL program, also allow students to attend the College who would otherwise not have the financial means to do so, and so enlarge the population on which the College can draw for students. The College contends that the financial assistance given to the College's students under both the BEOG and GSL programs is financial aid extended directly to students and is not financial assistance to the College and so such aid is outside the purview of Title IX, since it is the student who is the "recipient" of such financial assistance and not the College.

The construction of Title IX as adopted in this Opinion, that is, with respect to whether the College is a "recipient" of Federal financial assistance and the definition of "Federal Financial Assistance" itself is authorized and persuasively supported by the case *Bob Jones University v. Johnson,* 306 F. Supp. 597 (D.S.C. 1974), *aff'd per curiam,* 529, F.2d 514 (4th Cir. 1975), a case arising under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et. seq.*) The wording of §901(a) of Title IX, 201 U.S.C. §1681(a), is virtually identical to §601 of Title VI, and it is undeniable that decisions construing Title VI are pertinent to the construction of Title IX.

Bob Jones involved the payment of veterans' benefits to veterans attending Bob Jones University. The University had a policy of denying admission to unmarried nonwhite students and providing for expulsion of students who dated members of any race other than their own. Administrative proceedings were instituted against Bob Jones University after it refused to sign an Assurance of Compliance with Title VI. Following an evidentiary hearing, all VA assistance to Bob Jones University was terminated and the right of veterans assistance was denied to veterans who applied to attend Bob Jones University in the future. 396 F. Supp at 599-600.

The Court held that a University which enrolled students who received direct cash payments under Federal assistance programs for veterans conditioned upon the veterans' pursuit of an approved course of study at an approved educational institution, was a recipient of "Federal Financial Assistance" within the meaning of Title VI. The cash payments received by the veterans in *Bob Jones* were like the student aid extended herein in that they were utilized to meet education expenses including tuition, books, subsistence and equipment costs. The Court, in rejecting the claim that direct payments to students were not covered by Title VI, stated, 396 F. Supp at 601-202:

> "Plaintiffs argue that because the Federal cash payments go directly to the veteran, it is the veteran who is beneficiary of the VA programs, not Bob Jones. The method of payment does not determine the result; the literal language of §601 requires only Federal assistance — not payment — to a program or activity for Title VI to attach. The appropriate questions are (1) whether the federally subsidized veteran participates in a "program or activity", and, if so, (2) whether that program or activity is "receiving Federal financial assistance". The facts in this case project an affirmative answer as to both questions."

The Court found that the payments were not unrestricted grants, but were tied directly to the veterans' participation in an approved education activity, and therefore, *Bob Jones* was conducting a program or activity subject to Title VI. 396 F. Supp at 602. The Court further found that the Federal cash payments did render financial assistance to *Bob Jones'* Education Program. The Federal payments to veterans released institutional funds which would, in the absence of this Federal assistance, have been spent on students. The fact that veterans could enter educational programs because of the availability of Federal funds was also viewed as benefiting *Bob Jones* by enlarging its pool of qualified applicants. 396 F. Supp at 602-603. The Court finally noted that the broad language of Title VI should be interpreted in the remedial context in which it was presented to Congress. Thus, narrow readings of Title VI coverage were found inappropriate. *Id.* at 604.

It can be argued that this case is different from *Bob Jones* because of the fact that payment of benefits under the G.I. Bill in *Bob Jones* was first made directly to the institution and then changed so as to be made to the student while the student aid programs in which the College participates have always involved payments directly to the student. In fact, this distinction was considered irrelevant by the *Bob Jones'* Court which stated the following, 396 F. Supp. at 603-604:

> "Whether the cash payments are made to a university and thereafter distributed to eligible veterans rather than the present mode of transmittal is irrelevant, since the payments ultimately reach the same beneficiaries and the benefit to a university would be the same in either event. To argue otherwise would be to suggest that the applicability of Title VI turns on the role of a university as an exchange. It would hold, for example, that the reach of Title VI extends to the VA Administered Vocational Rehabilitation Act, 29 U.S.C. § 31, since Federal tuition payments are made directly to the

> schools under the Act, but not to the other VA educational benefits statutes because payments under those statutes flow to a university through the veterans. No rational distinction with respect to Title VI coverage can be made on this basis."

In another context, the validity of tuition grants and other aid to students attending private racially segregated schools, under the Equal Protection Clause of the Constitution, the Courts have not adopted the restrictive construction of governmental financial assistance advanced by the College. Cf. e.g., *Brown vs. South Carolina State Board of Education*, 296 F. Supp. 199 (D.S.C. 1968), *aff'd per curiam* 393 U.S. 222 (1968); *Poindexter vs. Louisana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam* 389 U.S. 571 (1968); *Lee vs. Macon County Board of Education*, 267 F. Supp 458 (E.D. Ala. 1967), *aff'd sub. nom. Wallace vs. United Stated*, 389 U.S. 215 (1967); *Griffin vs. State Board of Education*, 239 F. Supp 560 (E.D. Va. 1965). In *Norwood vs. Harrison*, 413 U.S. 455, 463-464 (1973), a case involving the validity of a state program of lending textbooks to children attending racially segregated private schools, the Court stated:

> "Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves (cases omitted). 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."

See also, *Committee for Public Education and Religious Liberty vs. Nyquist*, 413 U.S. 756, 784 (1973), where it was held that "the effect of the aid is unmistakably to provide desired financial support for non-public sectarian instructions" when New York State made tuition reimbursement payments to parents, rather than to the schools directly.

There is, of course, one significant difference between *Bob Jones* and the present case. In Bob Jones, discrimination was found in the admission policy of the school which precluded some blacks from ever attending the institution. Thus, all programs and activities of the institution were affected by the discrimination and the termination of tuition payments to the institution was not inconsistent with the provisions of Title VI, 42 U.S.C. 2000d-1, which is similar to §902, of Title IX, 20 U.S.C. 1682, which stipulates that termination shall be limited in effect to the particular program in which noncompliance has been found.

In this case the College is coeducational, and there is no evidence of sex discrimination as discussed in other parts of this Opinion. It is the firm belief of this Court that termination of the BEOG student aid payments and/or the GSL payments is not the proper remedy for coercing the College into filing an Assurance of Compliance where there is no allegation or evidence of sex discrimination, and where the students who are receiving BEOG and GSL benefits will be punished needlessly for no good purposes.

(This Court has been greatly aided in this part of the Opinion by the cogent reasoning of the Administrative Law Judge in the case of *Hillsdale College and State of Michigan*, HEW Docket No. A-7).

DOES THE GSL PROGRAM OF THE COLLEGE INVOLVE "CONTRACTS OF GUARANTY" WHICH CANNOT BE TERMINATED BY HEW AS A MEANS OF ENFORCING HEW'S RULES AND REGULATIONS PERTAINING TO THE ANTI-SEX DISCRIMINATION PROVISIONS OF TITLE IX?

It is concluded by this Court that HEW has no power to terminate the College's GSL program as a means of enforcing its rules and regulations pertaining to the anti-sex discrimination provisions of Section 901 of Title IX.

The Guaranteed Student Loans are obtained from private lenders and are available to students enrolled in eligible educational institutions. An eligible educational institution is generally a public or non-profit institution of higher education (i.e., beyond secondary education), or a vocational school legally authorized by the State to provide a program of education and accredited by a recognized accrediting agency. 45 C.F.R. 177.11. Where the proper showing of financial need is made, the Government in addition to guaranteeing the loan, will also pay the interest on the loan during the time the borrower serves in the armed forces or is unemployed or is attending a graduate or fellowship program. 45 C.F.R. 177.21(b). It can be argued that these interest payments make the program more than a contract of guaranty and bring the entire loan within the purview of the enforcement provisions of Title IX. The payments of interest, however, are not made to the student for payment to the College, nor are they made to the College. They are made to the lender. The only payment made to the student is the loan which we conclude is exempted from termination as a means of enforcing Title IX. The loan itself is disbursed from funds provided by the lender and not, as in the case of the other programs, by the Government. The interest payment appears to be a part of the contract of guaranty with the lender, and to come within the exemption set

forth in Section 902 of Title IX. For concurrence, see the Administrative Proceeding initiated in the Department of Health, Education and Welfare, *In the Matter of Hillsdale College and State of Michigan,* Docket A-7. This Court concludes that the GSL program is exempted from the operation of the enforcement provisions of Section 902 of Title IX specifically by the act itself, and hence, the order of the Administrative Law Judge terminating this program as a means of enforcing HEW regulations is void and is of no legal effect.

IS THE COLLEGE REQUIRED TO EXECUTE AND FILE WITH HEW, THE ASSURANCE OF COMPLIANCE?

Even though participation in the BEOG program and the GSL program brings the College within the substantive provisions of Section 901 of Title IX, it is the conclusion of this Court that the College is not bound to execute and file the Assurance of Compliance form for the reason that said form requires compliance with HEW's regulations subpart E, 45 C.F.R. 86.51 through 86.61, inclusive, which regulations purport to address discrimination on the basis of sex in employment in educational programs and activities sponsored by the College. The HEW regulation, subpart E is an unlawful extension of the statutory authority and legislative purposes of the anti-sex discrimination provisions of the Educational Amendments of 1972, and regulation 45 C.F.R. §86.4, which requires the College to assure its compliance with said unlawful regulations (subpart E) is likewise unlawful and of no legal force or effect as applied in this case.

The College should not be forced to abide by an unlawful and invalid regulation, such as, subpart E and be compelled to assure compliance therewith.

The First Circuit is *Islesboro School Committee v. HEW*, 593 F.2d 424 (1st Cir) *cert denied*, ____ U.S. ____, 100 S. Ct. 467, 62 L. Ed. 2d 387 (1979) has thoroughly addressed this question. We agree with the First Circuit's disposition of the issue and adopt the decision of that Court.

The First Circuit accurately noted that the plain language of §1681(a) does not include employment discrimination, and after a thorough analysis of the legislative history, the First Circuit also determined that the intent of Congress was not to "embrace prohibitions against sex discrimination in employment" via §1681(a). *Id.* at 428.

Because we agree with the First Circuit, and because it has addressed HEW's arguments thoroughly, we decline to add an unnecessary and essentially duplicative discussion of these issues. See also in accord the following cases:

Romeo Community School v. HEW, 438 F. Supp 1021 (E.D. Mich 1977), *aff'd*, 600 F.2d 581 (6th Cir) cert. *denied*, ____ U.S. ____, 100 S. Ct. 467, 62 L. Ed 2d 388 (1979); *Junior College College District of St. Louis v. Califano*, 455, F. Supp 1212 (E.D. Mo. 1978), *aff'd*, 597 F. 2d 119 (8th Cir), *cert. denied*, ____ U.S. ____, 100 S. Ct. 407, 62 L. Ed 2d 388 (1979); *North Haven Board of Education v. Califano*, 19 FEP Cases 1505 (D. Conn. 1979), *appeal pending*, No. 79-6136 (2d Cir.); *Auburn School District v. HEW*, 19 FEP Cases 1504 (D.N.H.) (1979) *appeal dismissed*, No. 79-1261 (1st Cir. 1980); *University of Toledo v. HEW*, 464 F. Supp 693 (N.D. Ohio (1979)); *Board of Education of Bowling Green v. HEW*, 19 FEP Cases 457 (N.D. Ohio, 1979); *Dougherty County School System v. Califano*, 19 FEP Cases 688 (M.D. Ga. 1978), *appeal pending* No. 78-3384 (5th Cir.); *McCarthy v.Burkholder*, 448 F. Supp. 41 (D. Kan. 1978); *Seattle University v. HEW*, 16 FEP Cases 719, (W.D. Wash. 1978), *appeal pending*, No. 78-1746 (9th Cir).

Since the Assurance of Compliance requires that the College abide by all of HEW's Title IX implementing regulations, the College by signing the Assurance, would be bound to abide by subpart E, which has been totally invalidated by a number of cases hereinabove cited. For this reason alone, the College cannot be compelled to sign an Assurance to comply with an unlawful HEW regulation.

WHAT ARE THE RIGHTS OF THE PLAINTIFF STUDENTS IN THIS CASE?

This Court has concluded as a matter of law, that all four of the Plaintiff students were entitled to prior notice and a hearing before their benefits could be lawfully terminated by HEW under the circumstances of this case.

There is no doubt that BEOG and GSL benefits are a matter of statutory entitlement to the four student Plaintiffs. Here it is clear that these four student Plaintiffs will suffer grievous loss if these benefits are terminated. This Court can take judicial notice of the fact that a college education is of inestimable value to a person who is about to enter the labor force of this country. The affidavits of the student Plaintiffs state that they cannot continue going to the College of their choice if the BEOG and/or GSL funds are terminated. This Court can take judicial notice of the fact, and it is undisputed that it is very difficult for students to transfer from one College to another without losing both valuable time and credit for courses of study already taken. It is obvious and beyond argument that important governmental interests are advanced by encouraging our young citizenry to improve their productivity and earning capacity by obtaining some higher education. Clearly it is important to the future of our Nation to bring within the reach of our less economically favored young citizens the same opportunities that are available to the "well-to-do" to participate meaningfully in the life or our country. This Court is of

the opinion that the Constitutional guarantees of due process require a hearing before a student's rights to BEOG or GSL benefits may be terminated as was attempted by HEW in this case. See *Goldberg v. Kelly*, 397 U.S. 254. Further, see §902 of Title IX, (Title 20 U.S.C. §1682) which requires a hearing before termination of Federal financial assistance to any program can occur. Further, due process of law demands that all interested parties should be given prior notice and an opportunity to be heard, before being deprived of educational financial benefits accorded to them by law. See *Goldberg v. Kelly*, cited supra.

DID CONGRESS INTEND TO ALLOW HEW TO TERMINATE A STUDENT'S BEOG AND/OR GSL BENEFITS WITHOUT A SHOWING THAT SEX DISCRIMINATION ACTUALLY EXISTED AT THE INSTITUTION IN QUESTION?

The BEOG and GSL programs and the Title IX legislation were designed and enacted to specifically protect and advance the rights of students only as a matter of sound congressional public policy. In balancing and considering the interests sought to be protected and advanced by each program, the BEOG and/or GSL programs at a College should not be terminated in any case unless and until there is a specific finding of sex discrimination at such College, otherwise an innocent student would be unfairly punished by the loss of his or her BEOG or GSL benefits without receiving any concomitant benefit (i.e. being freed from the unholy effects of sex discrimination). For an example, as in the case at bar, because the College failed to file a form as a matter of conscience, both male and female students, (although total innocent of any wrongdoing) will be irreparably harmed by losing their financial aid, and in a case where there is absolutely no evidence of sex discrimination. Certainly, Congress never intended such an absurd result. Rules of practice, regulations and procedures are devised to promote the ends of justice, not to defeat them. See *Hormel v. Helvering*, 312 U.S. 552, 557.

In discussing Title VI, a parallel provision dealing with racial discrimination, the Court of Appeals for the Fifth Circuit noted that Congress did not intend to terminate Federal financial assistance except as to activities which were actually discriminatory or segregated, and that Congress did not intend to harm innocent beneficiaries of programs (such as the students in the case at bar) not tainted by discriminatory practices.

The Appeals Court is quoted more specifically as follows:

> "The action of HEW in the proceeding below was clearly disruptive of the legislative scheme. The legislative history of 42 U.S.C.A. §2000d-1.
>
> (§602 of the Act) indicates a Congressional purpose to avoid a *punitive* as opposed to a therapeutic application of the termination power. The procedural limitations placed on the exercise of such power were designed to insure that termination would be "pinpoint (ed) * * * to the situation where discriminatory practices prevail." 1964 U.S. Code Cong. & Adm. News, p. 2512. As said by Senator Long during the Senate debate:
>
> "Proponents of the bill have continually made it clear that it is the intent of Title VI not to require wholesale cut-offs of Federal funds from all Federal programs in entire States, but instead to require a careful case-by-case application of the principle of nondiscrimination to those particular activities which are actually discriminatory or segregated." 110 Cong. Rec 7103 (1964)
>
> "(4) It is important to note that the purpose of limiting the termination power to 'activities which are actually discriminatory or segregated' was not for the protection of the political entity whose funds might be cut-off, but for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices."
>
> See *Board of Public Instruction of Taylor County Florida v. Finch*, 414 F. 2d 1068, 1075.

Again, in the case of *Seattle University v. HEW*, the Court was concerned about enforcing a HEW rule under Title IX that was not being used to protect the rights of the students, but would, in fact, result in harming the very persons it was designed to protect. See 16 FEP Cases 719 at 721, where the Court states:

> "An analysis of 20 U.S.C. §1682 (§902 of Title IX) buttresses the conclusions that (1) employees of an educational institution are not protected persons under §1681, and (2) the prohibitory scope of §1681 is "program specific". First, §1682 grants Federal agencies like HEW, only one method of directly enforcing compliance with Title IX: . . . termination of or refusal to grant or to continue assistance under such program or activity to any recipient (found to be in noncompliance) . . ."
>
> "In the case of employment discrimination, this sanction is of limited enforcement value and has little or no justification, since the funds provided by HEW to create programs and activities which are designed to educate students who participate in them, a cut-off of HEW funding would necessarily *punish* the students. *Punishment of students* in the affected programs is a particularly anomolous result since the sanction is not being imposed for the purpose of enforcing their rights. An ironic result of the imposition of this sanction is that with the program's funding cut-off, the teachers and other employees who staff the program may be laid off. Since it is doubtful that Congress intended to resort to such an arbitrary enforcement measure to protect employee rights, it is similarly doubtful that Congress intended by §1681 to protect employees at all. On the other hand, in a situation where students or other direct beneficiaries of federally funded programs are themselves the victims of discrimination in that program, the cut-off of funds has obvious justification and enforcement value."

Unpublished Opinion and Order of the District Court, June 26, 1980

In *Romeo Community Schools vs. U.S. Department of Health* the United States Court of Appeals for the Sixth Circuit was also concerned about causing innocent students to suffer for no good reason in a Title IX situation. The Court of Appeals declared at 600 F. 2d 581, 584 (1979):

> "Though the regulation by which HEW seeks to enforce Title IX's prohibition against discrimination speaks of other means authorized by law, it is clear that discontinuance of Federal financial assistance is the means of effecting compliance which is most available to HEW and the primary means contemplated by the enforcement provision contained in §1682. When the sanction is applied one result is that the students, who are engaged in the federally funded activities, suffer. This may be a reasonable burden for the students to bear when the object is to prevent or put an end to discrimination against students. However, it is unreasonable to assume that Congress intended for students in a school system to be deprived of the benefit of Federal funding as a means of enforcing individual rights of teachers and other school employees. This is particularly true in view of the fact that the same bill included the amendments which gave school employees direct and superior remedies for sex discrimination provided in Title VII of the 1964 Civil Rights Act. These remedies involve no loss of student benefits."

The District Court in the *Romeo Case* was very concerned about weighing the benefits the students received in the federally financed program against the potential harm of discrimination when it noted at 438 F. Supp. 1021, 1033 when assessing Title IX as follows:

> "This construction of §1681 is further supported by an analysis of §1682 which defines HEW's enforcement power under the Act. As noted previously, the only sanction permitted under §1682 is a termination of Federal funds to the noncomplying institution. This said termination provision, quite obviously, is of limited

> enforcement value. Imposition of this sanction will not necessarily compel a delinquent school system to modify or eliminate its discriminatory practices, but will necessarily penalize the students involved or enrolled in affected programs. In a situation where the students themselves are the victims of sex discrimination, it is reasonable to assume that Congress balanced the costs and benefits involved and determined that any benefit which students might derive from the education programs financed by HEW was more than outweighed by the sex discrimination in those programs. A termination of Federal aid under these circumstances has obvious justification."

A further point should be apparent to men and women of reason: that Congress did not intend to deprive students of their essential educational benefits where there is no evidence of even an accusation of sex discrimination at the College in question or the cessation of hope.

The *Bob Jones* case does not control this particular aspect of the case at bar. In *Bob Jones* unlike the case at bar, the University was admitted as an undisputed fact that the *Bob Jones* University was openly and avowedly practicing racial discrimination. (See 396 F. Supp. 597, 598, 600, 601.) Further, students and potential students were the object of racial discrimination in the *Jones Case*. In the *Jones Case* it is clear that any benefit that the student received from the Federal financial assistance involved in that case was more than outweighed by the need and policy of eliminating racial discrimination.

So, in the case at bar, if it is the conclusion of this Court that sex discrimination in student programs had been actually proven to exist at Grove City College, HEW would have had the right and duty to terminate the BEOG student financial assistance program as a sanction. Unlike the situation in *Jones*, there is no evidence of any discrimination of any kind whatsoever at Grove City. Therefore, it is very clear that Congress

could not have intended for HEW to draft and enforce regulations which have the direct effect of depriving hundreds of students from receiving BEOG and GSL benefits under the mantle of implementing Title IX, where there is absolutely no evidence or even an allegation of any sex discrimination of any kind whatsoever to justify punishing the very class of persons that the legislation (Title IX) was designed to protect.

As we reflect on the anomalous result that would occur here in this case if we were to accept HEW's contention that innocent students should be punished for no good or legally sufficient reason relating to the extinguishment of on-going sex discrimination, and merely because their College refused to fill out a regulatory form, we are reminded of the admonition of Alexis deTocqueville, in his Classic, "*Democracy in America*", where he warned America about the inherent potential for tyranny of the executive power. All three divisions of our system should remember constantly that the price of freedom is eternal vigilance.

CONCLUSION

This Court is holding that both the Basic Educational Opportunity Grant (BEOG) program and the Guaranteed Student Loan (GSL) program in which the Grove City College students participate are Federal financial assistance to said recipient College which brings it, (the College), within the provision of Title IX, and which Title IX protects students from sex discrimination in all College programs.

Although the Guaranteed Student Loan (GSL) is financial assistance that brings Grove City College under the coverage of Title IX of the Educational Amendments Act of 1972, nevertheless, HEW, pursuant to the express terms of Section 902 of Title IX, is forbidden from terminating the GSL financial assistance to the Plaintiff students as a means of enforcing the anti-sex discrimination provisions of Section 901,

Title IX, because this Court finds as a matter of law that the GSL program is a contract of guaranty. It is unlawful for HEW to terminate an education program or activity aided by financial assistance from the Federal Government which involves a contract of guaranty, in order to enforce compliance with any HEW rule or regulation pertaining to the anti-sex discrimination provisios of Title IX. Even though a GSL program is financial assistance that brings a College under the coverage of Title IX, compliance with said Title must be effectuated, if any enforcement activity is indicated by "other means authorized by law". (See Section 902 subparagraph 2 of Title IX).

This Court is holding that HEW may not lawfully demand that the College execute an Assurance of Compliance with Title IX (HEW Form 639) because said form presently improperly requires the College to abide by the implementing regulations of subpart E, which subpart E relates to whether there is sex discrimination in the College's employment policies. This Court is now holding that HEW by promulgating regulations subpart E, has exceeded the authority granted to it by Congress, and the subpart E regulations are void and of no legal effect.

This Court is not holding that the College is totally exempted from an obligation to execute an Assurance of Compliance under all circumstances. For an example, the College may be properly required to execute such an Assurance if all references to subpart E were excluded from the form, and if the College continues to receive Federal financial assistance of some kind, such as, the BEOG and GSL programs.

This Court is holding that HEW, under no circumstances, can use the sanction of terminating a student's Federal financial assistance (BEOG, for an example) because of the failure of the College to comply with Title IX and/or its implementing regulations unless and until there is a showing of actual sex discrimination involving student programs at the College.

A situation may arise where a BEOG program and/or GSI program is in effect and the College refuses to sign a revised and properly drafted Assurance of Compliance upon request of HEW, and in an instance where there is no available proof of actual sex discrimination in student programs at the College.

As to that hypothetical situation, this Court offers no opinion as to what other legal sanctions, if any, are available to HEW for use against the College. However, it is again repeated that the sanction of terminating BEOG and/or GSI and/or other student financial assistance benefits is not available to HEW in the hypothetical case just hereinbefore related because in the hypothetical case there is no evidence indicating actual sex discrimination in student programs at the College.

AMENDED ORDER

AND NOW, this 26th day of June, 1980, for the reasons hereinbefore set forth, this Court makes the following Order:

IT IS ORDERED that Roma J. Stewart shall be substituted as a Defendant in this case in place of David Tatel, inasmuch as Roma J. Stewart is now the Director of the United States Office for Civil Rights.

The caption of this case shall now read:

Amended Opinion and Order of the District Court, June 26, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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

Plaintiffs

vs.

PATRICIA HARRIS, Secretary of the United States Department of Health, Education and Welfare; ROMA J. STEWART, Director of the United States Office for Civil Rights,

Defendants

CIVIL ACTION NO. 78-1293

IT IS ORDERED that Defendants' Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that HEW Form 639A, as drafted, in July of 1976, is invalid, void and of no effect whatsoever.

IT IS FURTHER ORDERED that the Defendants, and or their successor administrators of the statutes, laws and regulations herinbefore and hereinafter referred to, their agents, employees and persons acting in concert with them are permanently enjoined from doing any of the following:

1. From using HEW Form 639A as the same is presently composed and dratted.

2. From terminating or refusing to grant or attempting to terminate or refusing to grant to any or all of the Plaintiffs Federal financial assistance under the Federal Basic Education Opportunity Grant Program, for any alleged noncompliance with Title IX, and/or the regulations promulgated therewith unless and until sex discrimination involving either admission and recruitment and/or educational programs and educational activities as the same pertain to students only, has been properly proved at a full administrative hearing with full and adequate notice to all persons who may be immediately and adversely affected by said proceeding, and

3. From terminating at any time the Guaranteed Student Loan Program now and/or formerly in effect at Grove City College for any noncompliance and/or any alleged non-compliance with Title IX and/or the regulations promulgated therewith.

/s/ Paul A. Simmons
United States District Judge

INITIAL DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE FOR THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SEPTEMBER 15, 1978.

ADMINISTRATIVE PROCEEDING
IN THE
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

IN THE MATTER OF
GROVE CITY COLLEGE

(HEREINAFTER "RESPONDENT INSTITUTION")

AND

COMMONWEALTH OF PENNSYLVANIA

(HEREINAFTER "RESPONDENT STATE AGENCY")

DOCKET NO. A-22, INITIAL DECISION

COMPLIANCE PROCEEDING PURSUANT TO TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 AND IMPLEMENTING REGULATIONS ISSUED THEREUNDER

DECISION

PRELIMINARY STATEMENT

This action was brought under Title IX of the Education Amendments of 1972, 20 USC §1681 et. seq., and the Regulations of the Department of Health, Education and Welfare (45 C.F.R. Part 86, 45 C.F.R. Parts 80 and 81).

It was alleged:

> That Grove City College, hereinafter referred to as "respondent institution" or "the college", either receives, has applied for, or is eligible to apply for Federal financial assistance for its program of Post Secondary Education from the Commonwealth of Pennsylvania and directly from the Department of Health, Education and Welfare under one or more Acts of the Congress administered by said Department. The college has not submitted to the Department an adequate assurance of compliance with Title IX and its implementing regulations as required by such regulations although it has received timely notice that its failure to do so is in violation of the Regulations and despite the attempt by the Office of Civil Rights, Department of Health, Education and Welfare to obtain compliance. So long as the college fails to submit such assurance of compliance, it is in violation of Title IX and is not eligible to receive the Federal financial assistance described in the Notice.

General Counsel prayed for, in part, an Order terminating, refusing to grant or to continue, and finding respondent college ineligible to receive Federal financial assistance which is administered by the Department directly to the college or through the State agency. The prayer further sought an Order that such termination of or refusal to grant or continue or such ineligibility to receive Federal financial assistance should remain in force until the college satisfies the Director of the Office of Civil Rights that it has complied with the requirements of Title IX of the Education Amendments of 1972 and that it is providing assurance that it will comply in the future fully with all applicable requirements of Title IX and the implementing regulations of Health, Education and Welfare.

Respondent college denied every allegation of the Notice of Hearing and in addition filed additional defenses thereto which included an allegation that the college receives no Federal

financial assistance through Health, Education and Welfare and that Health, Education and Welfare lacks jurisdiction under Title IX of the Education Amendments of 1972, 20 USC §1681 et. seq. to proceed. In addition, there was a challenge to the venue which was changed from the City of Atlanta, Georgia to Philadelphia, Pennsylvania in response to such challenge.

A hearing was held in Philadelphia, Pennsylvania on March 10, 1978, at 9:00 a.m. before Administrative Law Judge Albert P. Feldman, who had been selected by the Civil Service Commission, and was authorized by the chairman of the reviewing authority (Civil Rights), Department of Health, Education and Welfare, to conduct the hearing. Movant was represented by Ms. Barbra Shannon, Allen McDonogh, each of the Office of General Counsel, Region IV, and Fred Marinucci, Office of the Regional Attorney, Philadelphia, Pennsylvania. The respondent college was represented by John B. McCrory.

Witnesses who testified where Howard Bennett, Office of Civil Rights, Health, Education and Welfare; Calixto Marquez, Health, Education and Welfare; and Charles McKenzie, President of Grove City College. In addition, Harriette B. Kuryk, Office of General Counsel, and counsel of record in the case, responded to questions proponded by the Administrative Law Judge to her in her place.

EVALUATION OF THE EVIDENCE AND RATIONALE

The evidence was limited to the Basic Education Opportunity Grant and to the Guaranteed Student Loan, hereinafter sometimes referred to as BEOG and GSL.

The most important evidence in the record, in the opinion of the Administrative Law Judge, is the agreement regarding institutional participation in the guaranteed student loan program, dated July 15, 1975, and signed by President McKenzie of the Grove City College with an implementation

date shown thereon of September 1, 1975. President McKenzie stated in a letter to the Office of Education, Department of Health, Education, and Welfare, dated July 15, 1975, that the college might want to reconsider their participation in both the program as a whole and the agreement in particular. He stated that any withdrawal would occur only under conditions which might give a complete assurance of proper usage of any Federally supplied student loan monies received to that point in time and that the agreement was contingent on any change of status which might occur in the future.

Although the exhibits are limited in number, they are voluminous in size. Therefore, they will not all be recited, nor will the record of the hearing be recited. The evidence shows that students have, in fact, received loans under Federally financed programs. The evidence shows that the college has aided the students in applying for these loans.

The record is replete with records of students enrolled at Grove City College who are receiving student loans.

A substantial portion of the revenue of the college comes from students who receive Federally financed student loans.

While the evidence has been set forth in very brief fashion, certain facts are very evident from the record. The president of the college did enter into an agreement under the guaranteed student program and the college did act under that agreement. It is not reasonable to urge that while aiding the students to obtain loans, the funds from which are either paid to the college or are used to restore the funds which were paid to the college for educational purposes, the college did not receive financial assistance from Federally financed loans.

It appears from the evidence that what is involved is not a contract of insurance or guaranty such as to be subject to the exception of the contract of insurance or guaranty as set forth in §86.2 (g)(5) of the regulations. The evidence shows that the Government not only guarantees the payment of the student loans, but also the Government undertakes and pays interest on the loans to the lender while the student is in school. This would seem to remove this contract from being a contract of insurance or guaranty. The obligation of the Government is more that of a principal than that of an insuror or guarantor.

The decision of the Administrative Law Judge in the matter of Hillsdale College and the State of Michigan, an administrative proceeding in the Department of Health, Education, and Welfare, Docket Number A7, submitted by counsel for the respondent college raised a number of questions, which have been resolved.

Section 86.4 of the Regulations, Assurance Required, shows in Section (a):

> "(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Director, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Director if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with Section 86.3 (a) to eliminate existing discrimination on the basis of sex, or to eliminate the effects of past discrimination whether occuring prior or subsequent to the submission to the Director of such assurance."

> "(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's, or recipient's, subgrantees, contractors, subcontractors, transferees, or successors in interest."

It is appropriate at this point to call attention to the statement shown on the title page of the Grove City College Bulletin (Ex. D4) to wit:

> "NOTICE OF NON-DISCRIMINATION POLICY"
>
> Grove City College, a private educational institution, admits students of any race, color, sex, religion, and national or ethnic origin to all of the rights, privileges, programs, and activities generally accorded or made available to students at the College. Grove City College does not discriminate on the basis of race, color, sex, religion, and national or ethnic origin in the administration of its educational programs, admission policies, scholarship and loan programs, athletics co-curricular activities or other College-administered programs."

This is a notice to anyone who cares to look that the college has a policy of non-discrimination.

It should also be noted that there was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance with Title IX. This refusal is obviously a matter of conscience and belief.

There is, very clearly, given to the Director total and unbridled discretion to require any certificate of compliance that he may desire, whether the same be reasonable, or, to reasonable men, unreasonable. There are no guidelines. There is no necessary continuity, as from one Director to a successor Director whose opinions as to what constituted compliance might be totally different from those of his predecessor.

The Administrative Law Judge is not persuaded by any of the cases cited that this authority in the Regulations has been struck down. Under the circumstances, the Regulations being binding upon the Administrative Law Judge, he must rule in accordance therewith. The Director is given unlimited discretion so that the Administrative Law Judge has no authority to rule and is powerless to rule either that the regulations are unconstitutional or that the regulations exceed the statutory authority.

Section 86.2 of the Regulations, Definitions, shows in Subparagraph (g);

> " 'Federal financial assistance' means any of the following, when authorized or extended under a law administered by the Department: (1)(ii) 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."

Under all of the evidence and under the definition of Federal financial assistance as set forth in the Regulations, there can be no question that the respondent college does in fact receive such Federal financial assistance.

All findings of fact requested to be made which are not included in the following findings of fact are hereby denied.

The agreement between movant and the Commonwealth of Pennsylvania has been approved.

FINDINGS OF FACT

1. Grove City College is a coeducational institution of higher education.
2. The Department of Health, Education and Welfare attempted to obtain an executed assurance of compliance with Title IX, which same was HEW Form 639a.

3. The respondent college has failed and refused to submit an executed assurance of compliance.
4. The Office of Civil Rights has made extensive efforts to secure voluntary compliance but has been unable to do so.
5. During the academic year 1977-78, students enrolled in and attending Grove City College were extended Federal financial assistance for payment to the college.
6. The proceeds of loans under these programs are for the purposes of defraying education costs.
7. Receipts from these loans at Grove City College are paid to the said college to defray education expenses.
8. The respondent institution did agree to participate in the GSL Program.
9. The respondent college has regularly performed administrative functions to insure that its students receive loans under the GSL Program.
10. The respondent college has received financial benefits from its participation in these programs.

ORDER

IT IS HEREBY ORDERED:

1. Federal financial assistance administered by the Department of Health, Education and Welfare under the following authorization is to be terminated and refused to be granted to the Respondent Institution:

a. Basic Education Opportunity Grant Program, 20 U.S.C. §1070a.

b. Guaranteed Student Loans Progam, 20 U.S.C. §1071 *et seq.*

2. Additional Federal financial assistance which the Respondent Institution would be eligible to receive, either from the Department or through the Commonwealth of Pennsylvania, but for its noncompliance with Title IX, is to be refused to be granted.

3. This termination and refusal to grant or continue Federal financial assistance shall remain in force until the Respondent Institution corrects its noncompliance with Title IX and satisfies the Department that it is in compliance.

4. This Initial Decision and Order shall become final unless, within 20 days after mailing of the Initial Decision and Order, either party submits exceptions to the Reviewing Authority in accordance with 45 C.F.R. §81.102.

/s/ Albert P. Feldman
Administrative Law Judge

Date: September 15, 1978

This is to certify that I have today served copies of the within decision upon the parties shown below by mail:

This 15th day of September, 1978.

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Mr. Richard Slippen, Hearing Clerk (Civil Rights)
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Washington, D.C. 20201

/s/ Albert P. Feldman
Administrative Law Judge

JUDGMENT OF THE COURT OF APPEALS, AUGUST 12, 1982.

Judgment of the Court of Appeals, August 12, 1982.

United States Court of Appeals
for the Third Circuit

No.s 80-2383/84

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

Appellant in No. 80-2383

vs.

SHIRLEY M. HUFSTEDLER, Secretary of the United States Department of Education; CYNTHIA G. BROWN, Assistant Secretary of the United States Office for Civil Rights,

Appellants in No. 80-2384

(D.C. Civil No. 78-1293)

Judgment of the Court of Appeals,
August 12, 1982

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GARTH and BECKER, *Circuit Judges;* and MUIR, *District Judge.**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on June 21, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered June 26, 1980, be, and the same is hereby reversed insofar as it is inconsistent with the opinion of this Court and the cause remanded to the said District Court for the entry of an appropriate order consistent with the opinion of this Court. Costs taxed against Grove City College as appellant in C.A. No. 80-2383 and as appellee in C.A. No. 80-2384.

ATTEST:
Sally Mavos
Clerk

August 12, 1982

* Honorable Malcolm Muir, United States District Judge for the Middle District of Pennsylvania, sitting by designation

THE CONSTITUTION OF THE UNITED STATES.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

EDUCATION AMENDMENTS OF 1972, TITLE IX.

20 U.S.C. §1681. Prohibition against sex discrimination — Exceptions

(a) 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, except that:

> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act [enacted June 23, 1972], nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits student of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) This section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 [26 USCS §501(a)], the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.

(7) this section shall not apply to—

(A) Any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference, or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number of percentage of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title [20 USCS §§1681 et seq.; 29 USCS §§206, 213; 42 USCS §§2000c, 2000c-6, 2000c-9, 2000h-2] of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) For purposes of this title [20 USCS §§1681 et seq.] an educational institution means any 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.

(June 23, 1972, P.L. 92-318, Title IX, §901, 86 Stat. 373; Dec. 31, 1974, P.L. 93-568, §3(a), 88 Stat. 1862; Oct. 12, 1976, P.L. 94-482, Title IV, §412, 90 Stat. 2234.)

20 U.S.C. §1682. Federal administrative enforcement

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 [20 USCS §1681] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

(June 23, 1972, P.L. 92-318, Title IX, §902, 86 Stat. 374.)

TITLE 45 C.F.R. PART 86 — NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

Subpart A — Introduction

45 C.F.R. §86.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93-568, 88 Stat. 1855, and Sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93-380)

45 C.F.R. §86.2 Definitions.

As used in this part, the term —

(a) *"Title IX"* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *"Department"* means the Department of Health and Human Services.

(c) *"Secretary"* means the Secretary of Health and Human Services.

(d) *"Director"* means the Director of the Office for Civil Rights of the Department.

(e) *"Reviewing Authority"* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *"Administrative law judge"* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion therof; and

(ii) 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.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *"Recipient"* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) *"Applicant"* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) *"Educational institution"* means a local educational agency (L.E.A.) as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) *"Institution of graduate higher education"* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) *"Institution of undergraduate higher education"* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) *"Institution of professional education"* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the United States Commissioner of Education.

(n) *"Institution of vocational education"* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semi-skilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(o) *"Administratively separate unit"* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) *"Admission"* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) *"Student"* means a person who has gained admission.

(r) *"Transition plan"* means a plan subject to the approval of the United States Commissioner of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

* * *

45 C.F.R. §86.4 Assurance required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Director, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Director if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with §86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Director of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

* * *

Subpart B — Coverage

45.C.F.R. §86.11 Application.

Except as provided in this subpart, this Part 86 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

* * *

Subpart C — Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§86.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§86.16 and 86.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this Subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

45 C.F.R. §86.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

45 C.F.R. §86.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex

as remedial action pursuant to §86.3(a), and may choose to undertake such efforts as affirmative action pursuant to §86.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart D — Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

45 C.F.R. §86.31 Education programs and activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives of benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for instate fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowship, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Programs not operated by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient;

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

45 C.F.R. §86.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole: (i) Proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686).

* * *

45 C.F.R. §86.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this

regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

* * *

45 C.F.R. §86.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not: (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for

such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or (3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in subparagraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under subparagraph (b)(2)(i) of this paragraph; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and §86.41.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

[40 FR 24128, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

45 C.F.R. §86.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates Subpart E of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

45 C.F.R. §86.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

45 C.F.R. §86.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnaney and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

45 C.F.R. §86.41 Athletics

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

[40 FR 21428, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

ASSURANCE OF COMPLIANCE WITH TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 AND THE REGULATION ISSUED BY THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE IN IMPLEMENTATION THEREOF.

(HEW Form 639)

[PLEASE READ EXPLANATION OF HEW FORM 639 BEFORE COMPLETING THIS DOCUMENT]

Pursuant to 45 C.F.R. §86.4,

_____
(insert name of Applicant or Recipient)
(hereinafter the "Applicant") gives this

assurance in consideration of and for the purpose of obtaining Federal education grants, loans, contracts (except contracts of insurance or guaranty), property, discounts, or other Federal financial assistance to education programs or activities from the Department of Health, Education and Welfare (hereinafter the "Department"), including payments or other assistance hereafter received pursuant to application approved prior to the date of this assurance.

ARTICLE I — TYPE OF INSTITUTION SUBMITTING ASSURANCE

The Applicant is (check the following boxes where applicable):

[ ] A state education agency.
[ ] A local education agency.
[ ] A publicly controlled educational institution or organization.
[ ] A privately controlled educational institution or organization.
[ ] A person, organization, group or other entity not primarily engaged in education. If this box is checked, insert primary purpose or activity of Applicant in the space provided below:

[ ] Claiming a religious exemption under 45 C.F.R. §86.12(b). (If religious exemption is claimed, attach statement by highest ranking official of Applicant identifying the specific provisions of 45 C.F.R. Part 86 which conflict with a specific religious tenet of the controlling religious organization.)

The Applicant offers one or more of the following programs or activities (check where applicable):

[ ] Pre-school
[ ] Kindergarten
[ ] Elementary of Secondary
[ ] Graduate
[ ] Other (such as special programs for the handicapped even if provided on the pre-school, elementary or secondary level). If this box is checked, give brief description below:

[ ] Undergraduate (including junior and community college)
[ ] Vocational or Technical
[ ] Professional

ARTICLE II — PERIOD OF ASSURANCE

This assurance shall obligate the Applicant for the period during which Federal financial assistance is extended to it by the Department.

ARTICLE III — TERMS AND CONDITIONS

The Applicant hereby agrees that it will:

1. Comply, to the extent applicable to it, with Title IX of the Education Amendments of 1972 (R.I. 92-318), as amended, 20 U.S.C. §1681, 1682, 1683, and 1685 (hereinafter, "Title IX"), and all applicable requirements imposed by or pursuant to the Department's regulation issued pursuant to Title IX, 45 C.F.R. Part 86 (hereinafter, "Part 86"), to the end that, in accordance with Title IX and Part 86, no person in the United States 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 program or activity for which the Applicant receives or benefits from Federal financial

assistance from the Department. (This assurance does not apply to sections 904 (prescribing denial of admission to course of study on the basis of blindness) and 906 (amending other laws) of Title IX, 20 U.S.C. 1684 and 1686).

2. Require any person, organization, group or other entity to which it subgrants or with which it contracts, subcontracts or otherwise arranges to provide services or benefits or to assist it in the conduct of any program covered by this assurance, or with which it contracts or otherwise arranges for the use of any facility covered by this assurance to comply fully with Title IX and Part 86 and to submit to the Department an assurance satisfactory to the Director, Office for Civil Rights (hereinafter, the "Director"), to that effect.

3. Make no transfer or other conveyance of title to any real or personal property which was purchased or improved with the aid of Federal financial assistance covered by this assurance, and which is to continue to be used for an education program or activity and where the Federal share of the fair market value of such property has not been refunded or otherwise properly accounted for to the Federal government, without securing from the transferee an assurance of compliance with Title IX and Part 86 satisfactory to the Director and submitting such assurance to the Department.

4. Submit a revised assurance within 30 days after any information contained in this assurance becomes inaccurate.

5. If the Applicant is a state education agency, submit reports in a manner prescribed by the Director under 45 C.F.R. §80.6(b) as to the compliance with Title IX and Part 86 of local education agencies or other education programs or activities within its jurisdiction.

GRIEVANCE PROCEDURES

(Check the appropriate box.)

[ ] Pursuant to 45 C.F.R. §86.8, the Applicant has adopted grievance procedures and designated the following employee to coordinate its efforts to comply with Part 86 and has notified all of its students and employees of these grievance procedures and the following name, address, and telephone number of the designated employee:

_____
(name of employee)

_____
(office address)

_____
(telephone number)

[ ] The Applicant is not presently receiving Federal financial assistance subject to Part 86 and, consequently, has not designated a responsible employee or adopted grievance procedures pursuant to 45 C.F.R. §86.8 but will do so immediately upon award of such assistance and will immediately notify the Director, its students and employees of the name, office address, and telephone number of the employee so designated.

ARTICLE V — SELF EVALUATION

(Check the appropriate box.)

[ ] The Applicant has completed a self-evaluation as required by 45 C.F.R. §86.3(c) and has not found it necessary to modify any of its policies or to take any remedial steps to come into compliance with Part 86.

Assurance of Compliance with Title IX of the Education Amendments of 1972 (HEW Form 639)

[ ] The Applicant has completed a self-evaluation as required by 45 C.F.R. §86.3(c) and has ceased to carry out any policies and practices which do not or may not meet the requirements of Part 86 and is taking any necessary remedial steps to eliminate the efforts of any discrimination which resulted or may have resulted from adherence to such policies and practices.

[ ] The Applicant has not completed the self-evaluation required by 45 C.F.R. §86.3(c) but expects to have it completed by _____.

(insert date)

[ ] The Applicant is not required to conduct a self-evaluation under 45 C.F.R. §86.3(c) since it did not receive any Federal financial assistance to which Part 86 applies prior to July 21, 1976.

_____

(Insert name of Applicant)

Date: _____

By _____

(This document must be signed by an official legally authorized to contractually bind the Applicant.)

_____

(Insert title of authorized official.)

EXPLANATION OF HEW FORM 639, ENTITLED "ASSURANCE OF COMPLIANCE WITH TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 AND THE REGULATION OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE IN IMPLEMENTATION THEREOF."

Section 901 of Title IX of the Education Amendments of 1972 provides that no person 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. Section 902 of Title IX authorizes and directs the Department of Health, Education, and Welfare (hereinafter the "Department") to effectuate the nondiscrimination requirements of section 901 by issuing rules, regulations, and orders of general applicability. Pursuant to section 902, the Department has issued 45 C.F.R. Part 86 (hereinafter "Part 86") which became effective on July 21, 1975.

Section 86.4 of Part 86 requires that every application for Federal financial assistance for any education program or activity shall, as a condition of its approval, contain or be accompanied by an assurance from the applicant satisfactory to the Director of the Office for Civil Rights (hereinafter the "Director") that each education program or activity operated by the applicant and to which Title IX of the Education Amendments of 1972 and Part 86 apply will be operated in compliance with Part 86.

Section 86.4 also provides that the Director will specify the form of the assurance required and the extent to which such assistance will be required of the applicant's subgrantees, contractors, subcontractors, transferees, or successors in interest. Under this authority, HEW Form 639 has been specified as the form of assurance which shall apply to all recipients of and applicants for Federal financial assistance subject to the provision of Title IX and awarded by the Department.

Explanation of HEW Form 639

HEW Form 639 constitutes a legally enforceable agreement to comply with Title IX and all of the requirements of Part 86. Applicants are urged to read Part 86 and the accompanying preamble. The obligation imposed by Title IX and Part 86 are independent of, and do not alter, the obligation not to discriminate on the basis of sex imposed by Title VII of the Civil Rights Act of 1964 (20 U.S.C. §2000e et seq.): Executive Order 11246, as amended; section 799A and 855 of the Public Health Service Act (42 U.S.C. 295h-9 and 298b-2); and the Equal Pay Act (29 U.S.C. 206 and 206 (d)).

PERIOD OF ASSURANCE

HEW Form 639 is binding on a recipient for the period during which Federal financial assistance is extended to it by the Department. With respect to Federal financial assistance used to aid in the purchase or improvement of real or personal property, such period shall include the time during which the real or personal property is used for the purpose of providing an education program or activity. A recipient may transfer or otherwise convey title to real and personal property purchased or improved with Federal financial assistance so long as such transfer or conveyance is consistent with the laws and regulations under which the recipient obtained the property and it has obtained a properly executed HEW Form 639 from the party to whom it wishes to transfer or convey the title unless the property in question is no longer to be used for an education program or activity or the Federal share of the fair market value of such property has been refunded or otherwise properly accounted for to the Federal government.

An applicant or recipient which has submitted an HEW Form 639 to the Director need not submit a separate form with each grant application but may, if the information contained therein remains accurate, simply incorporate by reference the HEW Form 639 already submitted giving the date it was

submitted. On the other hand, a revised HEW Form 639 must be submitted within 30 days after information contained in the submitted form becomes inaccurate, even if no additional financial assistance is being sought.

OBLIGATION OF RECIPIENT TO OBTAIN ASSURANCES FROM OTHERS

If a recipient subgrants, contracts, or otherwise utilizes an individual, organization, or group to assist in the conduct of an education program or activity receiving Federal financial assistance from the Department or to provide services in connection with such a program or activity, the recipient continues to have an obligation to insure that the education program or activity is being administered in a nondiscriminatory manner. Accordingly, the recipient must make sure that the individual, organization, or group in question is complying with Title IX and Part 85 and must secure a properly executed HEW Form 639 to that effect. Similarly, if the recipient leases to another person or organization a facility which was provided or improved with the aid of Federal financial assistance awarded by the Department, and the recipient is still using the facility as part of an education program or activity, it has an obligation to make sure the lessee is complying with Title IX and Part 85 and must secure a properly executed HEW Form 639 from the lessee. For example, if a university owns a gymnasium constructed with the aid of Federal financial assistance from HEW and leases the facility to a private entrepreneur for use in conducting drama classes open to the general public, then the university must secure a properly executed HEW Form 639 from the entrepreneur sponsoring the classes.

Explanation of HEW Form 639

ADMINISTRATIVELY SEPARATE UNITS

If an educational institution is composed of more than one administratively separate unit, a separate HEW Form 639 may be submitted for each unit or one may be submitted for the entire institution. If separate forms are submitted, the administratively separate unit for which the form is submitted should be clearly identified on the first line of HEW Form 639. An "administratively separate unit" is defined as a school department or college of an educational institution (other than a local education agency) admission to which is independent of admission to any other component of such institution. See 45 C.F.R. §86.2(o).

STATE EDUCATION AGENCIES

State education agencies are generally not responsible for running pre-school, kindergarten, elementary, or secondary programs. Such responsibility is generally left to local education agencies although some supervisory authority may be vested with the state education agency. Consequently, most state agencies should not check the boxes for "Pre-school," "Kindergarten," or "Elementary or Secondary" in Article I of HEW Form 639. If the state agency runs special programs for the handicapped, including those on the pre-school, kindergarten, elementary, or secondary level, the box marked "Other" should be checked and the appropriate description inserted in the space provided.

Under Article III, paragraph 5, of HEW Form 639, a state education agency may be called upon from time to time to submit reports necessary to determine Title IX compliance by local education agencies within its jurisdiction. The form and content of such reports will be specified by the Director at the time the request is made.

LETTER FROM ASSISTANT ATTORNEY GENERAL WM. BRADFORD REYNOLDS TO CLARENCE M. PENDLETON, JR., CHAIRMAN OF THE U.S. COMMISSION ON CIVIL RIGHTS, DATED SEPTEMBER 16, 1982.

Office of the Assistant Attorney General
Washington, D.C. 20530

September 16, 1982

Mr. Clarence M. Pendleton, Jr.
Chairman
U.S. Commission on Civil Rights
Washington, D.C. 20425

Dear Penny:

Out of an abundance of caution, the Attorney General has determined that, because of his prior membership on the Board of Regents of the University of California, he should recuse himself from participation in the *University of Richmond* case. I have, therefore, been asked to respond to your August 10 letter inquiring about a possible appeal from the *Richmond* decision.

As you know, the Department of Education (DOEd) and the Department of Justice (DOJ) agreed not to seek appellate review of Judge Warriner's ruling that DOEd lacked authority under Title IX of the Educational Amendments Act of 1972, and its implementing regulations, to investigate Richmond's athletic program. In reaching this conclusion, the views set forth in your August 10 letter were fully considered. While we found ourselves in disagreement with your recommended course of action on this occasion, the wise counsel of the Civil Rights Commission is always valued and we trust that you will continue to share your thoughts and analysis with us on future issues of similar importance.

Letter from Assistant Attorney General

In *Richmond,* we were guided principally by the particulars of the case before us and Judge Warriner's application of existing law to the stipulated facts. The University's athletic program admittedly received no direct federal financial assistance. Nor did DOEd seek to initiate its investigation on the claim that the athletic program was receiving federal funding indirectly. Rather, the jurisdictional nexus for sending federal agents onto Richmond's campus was tied solely to the fact that the University received federal funds through student financial aid programs (i.e., Basic Educational Opportunity Grants; Supplementary Educational Opportunity Grants; Student Worker Wages; Guaranteed Student Loans) and through a single Library Grant.

The position advanced by the then director of DOEd's Office of Civil Rights, and rejected by the district court, was that receipt by Richmond students of even a single dollar of federal funds is sufficient to subject all of the University's programs and activities to Title IX scrutiny — even those programs and activities that receive no federal funds. This interpretation of the statute effectively removes from Title IX the "program specificity" feature that was recognized as an essential component of the legislation in the Supreme Court's decision last Term in *North Haven Board of Education* v. *Bell,* 50 U.S.L.W. 4501 (1982). As there stated: "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. 50 U.S.L.W. at 4507.

In light of the clear language of Sections 901 and 902, the accompanying legislative history, and the Supreme Court's recent pronouncement of the intended scope of Title IX coverage, we found Judge Warriner's opinion to be both analytically and legally sound. Its conclusion that only those University programs and activities shown to be recipients of federal funds are within the reach of Title IX is fully consistent

with the better reasoned judicial precedents in the area. *See Rice* v. *President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981); *Bennett* v. *West Texas State University*, No. 280-0073-f (N.D. Tex., July 27, 1981); *Othen* v. *Ann Arbor School Board*, 507 F. Supp. 1376 (E.D. Mich. 1981).

On this last point, the two recent Third Circuit decisions to the contrary have neither been ignored nor lightly dismissed. See *Grove City Community College* v. *Bell*, No. 81-0406 (July 8, 1982); *Haffer* v. *Temple University*, No. 82-1049 (September 7, 1982). Dictum in *Grove City*, which another Third Circuit panel considered to be controlling in *Temple*, states that the University as a whole can be considered the "program" for the purpose of Title IX coverage once at least one dollar of federal educational funds goes to any student enrolled at the school. In seeking to ascertain from the statute's language and history whether or not Congress intended so expansive an interpetation of the phrase "program or activity," we were satisfied that Judge Warriner's opinion in *Richmond* had the best of it. Accordingly, there was, in the opinion of both DOEd and DOJ, no cause for an appeal of *Richmond* to the Fourth Circuit.

I would in closing add only that this "no appeal" decision suggests no retrenchment of our enforcement responsibilities under Title IX — as some in the political arena have been quick to assert. The *Richmond* opinion in no way tolerates sex discrimination in federally funded programs; nor does it allow DOEd to ignore its Title IX investigatory responsibilities upon receipt of a complaint containing factual allegations of sex bias in a directly aided program. Moreover, if gender-based discriminatory behavior so pervades a nonfunded program that it "infects" a funded program, we read Judge Warriner's opinion as recognizing a DOEd investigatory responsibility in such circumstances.

It is primarily in this respect that we had some differences with your August 10 letter. The "far-reaching" implications that you hypothesized might perhaps flow from the *Richmond* ruling do not, as we read the opinion, follow from the program-specific analysis used by the district court. That DOEd must make a showing that the program or activity to be investigated is indeed a recipient of federal funds seems to us to be neither inappropriate nor unduly burdensome.

I hope that the above discussion satisfactorily explains our decision not to appeal the *Richmond* decision. If you have further questions, we can perhaps further discuss this matter on your next trip to Washington.

Sincerely,

/s/ WM. BRADFORD REYNOLDS
Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: John Hope III