2217

No. 82-792

In the Supreme Court of the United States

OCTOBER TERM, 1982

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

v.

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

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Grove City College is a recipient of "Federal financial assistance," as that term is used in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and is thus subject to the requirement that it execute an "Assurance of Compliance" with Title IX.

2. Whether the application of Title IX regulation to the College infringes the First Amendment rights of the College or its students.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Constitution, statutes and regulations:

Page

Constitution, statutes and regulations—Continued:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-44) is reported at 687 F.2d 684. The opinion of the district court (Pet. App. A-45 to A-86) is reported at 500 F. Supp. 253.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1982. The petition for a writ of certiorari was filed on November 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Grove City College ("Grove City" or "the College") and several of its students brought this action seeking a declaratory judgment that the College is not subject to Title IX of the Education Amendments of 1972, 20

U.S.C. 1681 *et seq.* ("Title IX"), and an injunction prohibiting the Department[1] from terminating federal grants paid to students at the College.

1. A substantial number of Grove City's students use federal grants to help finance their education at Grove City. The Basic Educational Opportunity Grant program (BEOG), 20 U.S.C. (Supp. V) 1070a, provides grants of up to $1800 to those students who meet the program's family income and need standards. Grove City does not wish to participate directly in the receipt and distribution of federal funds; its students therefore participate in the BEOG program through the "alternate disbursement system" (ADS), which allows grants to be paid directly to students following certification by the College.[2] The applicable Title IX regulation, 45 C.F.R. 86.2(g)(1)(1979), includes within its definition of "Federal financial assistance" grants extended directly to students for payment to an institution. Therefore, in July 1976, the Department undertook to obtain from the College the "assurance" (required by 45 C.F.R. 86.4 (1979)) that it would comply, "to the extent applicable to it, with Title IX * * * and all applicable" regulations (Pet. App. A-126).

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[1]As noted in the petition for writ of certiorari (page 2 n.1), at the time petitioners filed their complaint, the Department of Health, Education and Welfare (HEW) was responsible for the administration of Title IX regulations relating to the federal programs involved here. These functions of HEW under Title IX were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677-678. Like petitioners, we refer to HEW and the Department of Education as "the Department."

[2]Compare 45 C.F.R. 190.91 (1979) (ADS) with 45 C.F.R. 190.71 (1979) (regular disbursement system). Like petitioners (see Pet. 2 n.1, 3 n.4), we cite to the earlier version of the regulations, found at 45 C.F.R. Following establishment of the Department of Education, these regulations were recodified in 34 C.F.R.

After the College repeatedly refused to execute the assurance form, the Department instituted administrative enforcement proceedings. After a hearing,[3] an administrative law judge ruled (Pet. App. A-89 to A-98) that the College was a recipient of federal financial assistance within the meaning of Title IX and that its failure to execute the Assurance of Compliance constituted a violation of the Title IX regulations. The administrative law judge ordered the Department to terminate assistance for Grove City students under the BEOG and Guaranteed Student Loan programs until the College "satisfi[ed] the Department that it is in compliance" with Title IX (*id.* at A-97).

In November 1978, the College and several of its students filed this action in the United States District Court for the Western District of Pennsylvania. On cross-motions for summary judgment, the district court upheld the classification of Grove City College as a recipient of federal financial assistance for purposes of Title IX (Pet. App. A-67 to A-74). However, the district court on a variety of grounds excused the College from signing the Assurance of Compliance, and it enjoined the Department from terminating federal assistance to the College.[4] Both the Department and the College appealed.

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[3]The sole issue at the hearing was whether the College was a recipient of federal financial assistance. Because the question whether there was actual discrimination by the College was not at issue, neither party offered evidence on that subject.

[4]First, the district court held that, although Guaranteed Student Loans constitute federal financial assistance within the meaning of Section 901 of Title IX, 20 U.S.C. 1681, they cannot be terminated because they are a "contract of insurance or guaranty" within the meaning of Section 902 (Pet. App. A-69 to A-70, A-75 to A-76). On appeal the Department did not take issue with this portion of the district court judgment. Second, the court concluded that the portions of the Department's regulations relating to employment discrimination were invalid, so that the College could not be required to sign an assurance

2. The court of appeals affirmed in part and reversed in part. It affirmed the district court's conclusion that federal student aid made the College a recipient of federal financial assistance within the meaning of Title IX. In support of its conclusion, the court of appeals cited the language of the statute (Pet. App. A-11 to A-12), the contemporaneous legislative history (*id.* at A-12 to A-15), post-enactment legislative action (*id.* at A-16 to A-20), and case law under Title VI of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000d *et seq.* (Pet. App. A-21 to A-22).

Further, the court of appeals rejected Grove City's argument that, since federal student aid is not earmarked for any specific educational activity, applying Title IX to this case would necessarily be inconsistent with the "program-specific" nature of Title IX. Two members of the panel went on to conclude, in extensive dicta, that when the federal government furnishes non-earmarked aid to an institution, the institution as a whole is the "program" receiving federal financial assistance (Pet. App. A-23 to A-31). Judge Becker, the third member of the panel, found this conclusion to be unnecessary to the decision. Judge Becker noted simply that non-earmarked student aid is not necessarily incompatible with program specificity and 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" (*id.* at A-43).

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that it would comply with those provisions (*id.* at A-76 to A-78). But see *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982) (upholding the validity of the employment regulations). Third, the court held that under the Due Process Clause of the Fifth Amendment the Department may not terminate BEOGs without first affording hearings to all students who would be adversely affected (Pet. App. A-78 to A-79). Finally, the court concluded that termination could not be based upon refusal to sign an assurance, but must rest upon a finding of actual discrimination (*id.* at A-79 to A-84).

The court of appeals also rejected Grove City's argument that compliance with Title IX would infringe upon the First Amendment rights of the College and its students, holding that Congress has the power to impose reasonable conditions upon grants of federal financial assistance (Pet. App. A-32 to A-33). In any event, since both the College and its students could avoid the requirements of Title IX by forgoing federal assistance, the court concluded that their constitutional rights were not infringed (*id.* at A-33).

The court of appeals also held that, in view of this Court's intervening decision in *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), upholding the validity of the Department's regulations applying Title IX to employees, the district court's holding that the invalidity of those regulations excused the College from executing the assurance could not stand (Pet. App. A-34 to A-35). In addition, the court of appeals concluded that the district court erred in holding that assistance could be terminated only upon a finding of actual discrimination. It found that the Department's regulation requiring the execution of an Assurance of Compliance was valid. Consequently, since the statute permits termination for failure to comply with any regulation designed to effectuate the objectives of Title IX, failure to execute the assurance was a proper basis for termination (*id.* at A-35 to A-37). Finally, the court of appeals held (*id.* at A-38 to A-39) that the district court's order enjoining the Department from terminating student aid without affording hearings to affected students was inconsistent with this Court's ruling in *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980), and therefore must be reversed.

ARGUMENT

Petitioners devote virtually all of their attention to an issue that is not presented by this case — the meaning of the concept of "program specificity" under Title IX. As Judge

Becker observed in his concurring opinion (Pet. App. A-40 to A-44), much of the discussion of program specificity in the opinion of the other two panel members is quite unnecessary to the decision reached by the court; in effect, petitioners seek to have this Court review statements that constitute dictum. Those statements are inappropriate for review, because they have no effect on the outcome of the case.

The actual holding of the court of appeals is that Grove City must file the Assurance of Compliance required by the Title IX regulations because the College is a recipient of federal financial assistance within the meaning of Title IX by virtue of its participation in the Department's BEOG program. This holding does not conflict with any decision of this Court or with the decision of any other court of appeals. Moreover, petitioners offer little argument or authority in support of a challenge to the holding.[5] Thus, the decision of the court below does not warrant further review.

1. Petitioners do not seriously dispute the court of appeals' holding that the language of Title IX and its legislative history (Pet. App. A-11 to A-20), as well as case law interpreting the analogous provision of Title VI of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000d *et seq.*

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[5]The cases cited by petitioners do not address the question whether an institution can be a recipient of federal financial assistance by virtue of participation in a federal student aid program. In *Rice* v. *President & Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982), the issue was whether alleged sex discrimination in the award of grades was supported by federal assistance. In the three district court opinions cited by petitioner (Pet. 11, 15), the question was whether intercollegiate athletics constituted a program or activity receiving federal financial assistance. Finally, in *Board of Public Instruction* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969), the issue was whether all types of federal financial assistance could be terminated after a finding that a school district had violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000d *et seq.*

(Pet. App. A-21 to A-22), support the conclusion that Grove City, as an indirect recipient of federal funds through the BEOG student aid program, is a recipient of federal financial assistance within the meaning of Title IX. That conclusion is consistent with the holding of the one other court of appeals that has been squarely confronted with the issue. See *Hillsdale College* v. *HEW*, No. 80-3207 (6th Cir. Dec. 16, 1982).[6] In that case, the Sixth Circuit concluded that Hillsdale College, which receives no federal financial aid except through its participation in student aid programs, is a recipient of federal financial assistance within the meaning of Title IX.[7] No court of appeals has held that participation by a college or university in the BEOG program is insufficient to bring it within the coverage of Title IX.

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[6]We have provided copies of the Sixth Circuit's opinion in *Hillsdale College* to the Court and to counsel for petitioners.

As pointed out in that opinion (at 1 n.*), Judge Cecil concurred in that opinion prior to his death on November 26, 1982.

[7]The Sixth Circuit also concluded that the Department could not require Hillsdale College to execute an Assurance of Compliance so long as the assurance would be applied to the entire college rather than to particular programs receiving federal funds. The *Hillsdale* court misapprehended the Department's position. The Department does not take the position that execution of an assurance acknowledges coverage of an entire institution regardless of the nature of the federal financial assistance received by that institution. The Department believes that assurances of compliance must be written and construed so as not to apply automatically to an institution as a whole, but only to those programs and activities of an institution that receive federal financial assistance. Petitioners' contention that the Department is applying different standards to educational institutions in different circuits (Pet. 18-19) is, therefore, incorrect. *University of Richmond* v. *Bell*, 543 F. Supp. 321 (E.D. Va. 1982), cited by petitioners in support of their contention, did not raise the question whether the Department could require execution of an Assurance of Compliance; in that case the school had already executed an Assurance.

Instead of addressing the meaning of federal financial assistance under Title IX, petitioners focus on the dicta of two judges in part III of the majority opinion below. To the extent that those dicta suggest that all activities of the institution are covered whenever any student receives any federal funds (because the entire institution automatically becomes the funded "program"), there is serious doubt whether they can be reconciled with this Court's statements in *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 24-28. They are also inconsistent with the decisions of several other courts of appeals. See *Hillsdale College* v. *HEW*, *supra*; *Dougherty County School System* v. *Bell*, No. 78-3384 (5th Cir. Dec. 20, 1982); *Rice* v. *President & Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982).[8]

Nevertheless, this is not, in our view, the proper case in which to resolve inconsistencies in statements by the courts of appeals concerning the meaning of the program-specific limitation found in Title IX. The narrow question before the court of appeals was whether Grove City is a recipient of federal financial assistance and is thus subject to the requirement that it execute an Assurance of Compliance. The ruling that receipt by its students of federal student aid makes Grove City such a recipient is clearly correct and not seriously controverted.[9] That ruling does not warrant

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[8]See also *University of Richmond* v. *Bell*, *supra*; *Bennett* v. *West Texas State University*, 525 F. Supp. 77 (N.D. Tex. 1981), appeal pending, No. 81-1398 (5th Cir.); *Othen* v. *Ann Arbor School Board*, 507 F. Supp. 1376 (E.D. Mich. 1981), appeal pending, No. 81-1259 (6th Cir.).

[9]The court of appeals was also clearly correct in rejecting Grove City's argument that in cases involving indirect or unearmarked federal aid, any application of Title IX would *necessarily* violate requirements of program specificity, and that therefore there is no program at Grove City that could be subject to Title IX coverage. No court of appeals has accepted any such argument. But the panel's further conclusion, that

review; and this case does not provide an appropriate occasion for review of wider issues relating to program specificity.[10]

2. Petitioners suggest (Pet. 15-16) that subjecting the College to Title IX may infringe the First Amendment rights of the College and its students to academic freedom. The suggestion is without merit. As the court of appeals recognized (Pet. App. A-32 to A-33), Congress has the power to fix the terms upon which it disburses federal financial assistance (e.g., *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981)), and the requirement that such assistance not be spent in furtherance of sex discrimination is undoubtedly a reasonable requirement. So long as the College is free to avoid the conditions by withdrawing from the BEOG program, and students are free to attend the College, albeit without the aid of federal grants, no one's constitutional rights have been violated. See *Norwood* v. *Harrison*, 413 U.S. 455, 461-463 (1973); *North Carolina* v. *Califano*, 445 F. Supp. 532, 535-536

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the entire institution is the only possible candidate for a program subject to Title IX coverage in such a situation, is far broader than necessary to decide this case. As Judge Becker noted, narrower interpretations of program specificity are available. See also *Hillsdale College* v. *HEW*, *supra*, slip op. 22, 23-24 (college's participation in federal student aid program subjects its student loan and grant program to Title IX requirements).

[10]Since *Grove City*, the Third Circuit has decided *Haffer* v. *Temple University*, 688 F.2d 14 (1982). The panel in *Haffer* applied the dictum from *Grove City* and held that the university's participation in the BEOG program was sufficient to subject the entire university, including its intercollegiate athletics program (which did not receive any direct federal grants), to Title IX coverage. The resulting conflict among the courts of appeals as to the proper interpretation of program specificity is, however, not presented in this case.

(E.D. N.C. 1977), aff'd mem., 435 U.S. 962 (1978). Petitioners' contention does not warrant further review.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11]Petitioners also present for review the question whether the Department may terminate assistance because of a college's refusal to execute an Assurance of Compliance, rather than because of a finding of actual discrimination; but this question is not discussed in the body of the petition. The court of appeals' conclusion on this point is consistent with a Title VI case decided before the passage of Title IX, *Gardner* v. *Alabama*, 385 F.2d 804 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968), and does not conflict with any decision of this Court or any court of appeals. Thus this question does not warrant review.