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No. 82-792

In the Supreme Court of the United States

OCTOBER TERM, 1983

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

v.

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

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

BRIEF FOR THE RESPONDENTS

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

CHARLES J. COOPER
Deputy Assistant Attorney General

JOHN H. GARVEY
Assistant to the Solicitor General

BRIAN K. LANDSBERG
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether Grove City College operates an "education program or activity receiving Federal financial assistance" under Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 (a)), and is thus subject to a Department of Education regulation requiring it to execute an "Assurance of Compliance" with Title IX.

2. Whether the Department of Education may terminate federal financial assistance to Grove City College under the Basic Educational Opportunity Grant statute, 20 U.S.C. (Supp. V) 1070a, if the College refuses to execute an Assurance of Compliance.

3. Whether the application of Title IX regulations to Grove City College infringes the First Amendment rights of the College or its students.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A44) is reported at 687 F.2d 684. The opinion of the district court (Pet. App. A45-A88) is reported at 500 F. Supp. 253. The decision of the Administrative Law Judge (Pet. App. A89-A98) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A99-A100) was entered on August 12, 1982. The petition for a writ of certiorari was filed on November 9, 1982, and was granted on February 22, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

1. The First Amendment to the United States Constitution is set forth at Pet. App. A101.

2. Sections 901(a) and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682, are set forth at Pet. App. A101-A105.

3. Relevant portions of the Basic Educational Opportunity Grant statute, 20 U.S.C. (Supp. V) 1070a, are set forth at App. A, *infra*, 1a-4a.

4. Relevant Title IX regulations of the Department of Education—34 C.F.R. 106.2, 106.4, and 106.11—are set forth at Pet. App. A106-A108, A110-A111.[1]

5. Relevant Basic Educational Opportunity Grant regulations—34 C.F.R. 690.1, 690.3-690.7, 690.53, 690.61-690.64, 690.71-690.85, and 690.91-690.96—are set forth at App. B, *infra*, 5a-24a.

STATEMENT

Petitioners, Grove City College ("Grove City" or "the College") and four of its students who received Basic Educational Opportunity Grants ("BEOGs") and Guaranteed Student Loans ("GSLs"), brought this suit in November 1978 for declaratory and injunctive relief prohibiting the Department of Health, Education, and Welfare ("HEW")[2] from terminating federal financial assistance received by the College under the BEOG and GSL statutes. HEW had threatened termination under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, because the College refused to comply with

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[1] The Title IX regulations which appear in the petitioners' appendix are those promulgated by the Department of Health, Education and Welfare in 1975. They were recodified, without substantive change, at 34 C.F.R. Part 106 on May 9, 1980 in connection with the establishment of the Department of Education. Despite occasional anachronisms, we will refer throughout to the currently effective regulations and statutory provisions.

[2] HEW's functions under Title IX with respect to BEOGs and GSLs 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. We will refer to both HEW and the Department of Education as "the Department."

HEW regulations by executing an Assurance of Compliance with Title IX.[3]

1. Basic Educational Opportunity Grants (20 U.S.C. (Supp. V) 1070a) were established by the Education Amendments of 1972 (Pub. L. No. 92-318, 86 Stat. 248), which amended the Higher Education Act of 1965[4] to provide grants enabling students to pursue an undergraduate degree. The BEOG program is "viewed as the foundation upon which all other Federal student assistance programs are based." S. Conf. Rep. No. 92-798, 92d Cong., 2d Sess. 167 (1972). A maximum amount is established for the grant.[5] The amount that the student or his family can reasonably be expected to contribute is subtracted from the maximum grant. 20 U.S.C. (Supp. V) 1070a(a)(2)(A)(i). In addition, the grant cannot exceed a certain fraction of the cost of attendance at the student's institution. 20 U.S.C. (Supp. V) 1070a(a)(2)(B)(i). "[C]ost of attendance" is defined to include tuition and fees, room and board, and an allowance for books, supplies, and miscellaneous expenses. See 20 U.S.C. (Supp. V) 1089(d).[6]

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[3] The Assurance of Compliance (HEW Form 639) that Grove City was asked to execute is reproduced at Pet. App. A124-A129. The current form, adopted by the Department of Education in 1980, is reproduced as an appendix to the government's brief filed in response to the petition in *Hillsdale College* v. *Department of Education*, No. 82-1538.

[4] The Higher Education Act of 1965 (Pub. L. No. 89-329, 79 Stat. 1232-1236) had provided Educational Opportunity Grants (20 U.S.C. (Supp. II 1965-1966) 1061-1069), the forerunner of the Supplemental Educational Opportunity Grant ("SEOG") program enacted in 1972 (20 U.S.C. (& Supp. V) 1070b *et seq.*). Both are campus-based programs in which the institution applies for funds from which it makes grants to eligible students. Grove City College does not participate in the SEOG program.

[5] The 1980 amendments to the statute raised the ceilings, over a period of several years, to $2600 for the 1985-1986 award year. 20 U.S.C. (Supp. V) 1070a(a)(2)(A)(i).

[6] Insofar as it applies to BEOGs, 20 U.S.C. (Supp. V) 1089(d) has been superseded by a series of statutes that in effect leave the

The program is administered through regulations promulgated by the Secretary of Education. 20 U.S.C. (Supp. V) 1070a(b)(3)(A).[7] To obtain a grant, the student must file an application containing the information and assurances the Secretary deems necessary. 20 U.S.C. (Supp. V) 1070a(b)(2).

The Secretary has established two procedures for computing and disbursing grants. Under the Regular Disbursement System ("RDS") the institution computes the grant amount, using criteria established by regulation, and distributes it to the student or credits the student's account (34 C.F.R. 690.78(a)). The Secretary estimates the amount the institution will need for grants, and advances that sum to the institution (34 C.F.R. 690.74). In the alternative, if the institution wishes, the Secretary will calculate and disburse the grants directly to students under the Alternate Disbursement System ("ADS"). 34 C.F.R. 690.91-690.96.

Under both systems the institution must certify that the student meets eligibility requirements for a BEOG (34 C.F.R. 690.4), is making satisfactory progress in his course of study, and is not in default on (or does not owe a refund on) any federal grant or loan. 34 C.F.R. 690.75, 690.94. The institution must also attempt to resolve any errors on the Student Eligibility Report submitted to it by the student (34 C.F.R. 690.77, 690.94(4)(b)), inform the Department or take appropriate action if a student withdraws or is expelled (34 C.F.R. 690.78(c), 690.95(a)), and maintain records relating to BEOGs (34 C.F.R. 690.83, 690.96).

2. A large number of Grove City students finance their education, in part, with federal grants and loans. Grove

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definition of the term to the Secretary. Pub. L. No. 97-301, Section 3, 96 Stat. 1400; Pub. L. No. 97-161, 96 Stat. 22; Pub. L. No. 97-92, Section 121(2), 95 Stat. 1197; see 34 C.F.R. 690.51-690.58.

[7] The statute assumes that schools will be involved in the computation and administration of grants. See, *e.g.*, 20 U.S.C. (Supp. V) 1094, 1096.

City has elected to participate in the Alternate Disbursement System, so that BEOGs are mailed to students after the institution makes appropriate certifications.[8]

The Department's regulations define *"Federal financial assistance"* as (34 C.F.R. 106.2(g)(1); emphasis added):

> (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.*

The regulations also define a *"Recipient"* of federal assistance as (34 C.F.R. 106.2(h)):

> [A]ny 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 * * *.

Because Grove City is thus a "recipient" of "Federal financial assistance," the Department requested that it file an Assurance of Compliance with Title IX, as required by 34 C.F.R. 106.4. After the College had refused on five occasions to sign the required assurance, the Department began enforcement proceedings. An administrative hearing was held, at which the sole issue was whether the College was a recipient of federal financial assistance.[9] The College acknowledged that it routinely

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[8] Although Grove City refused to execute an Assurance of Compliance with Title IX, it did execute an "'Agreement Regarding Institutional Participation in the Guaranteed Student Loan Program,'" pledging that "it would maintain records and establish policies consistent with maintaining the integrity of federally guaranteed student loans" (J.A. A23).

[9] There was no issue, and hence no evidence, concerning actual discrimination by the College. See Administrative Transcript ("Tr.") 11-12.

executed the institutional sections of BEOG application forms, and certified data concerning applicants' costs of education and enrollment status so that its students might receive BEOG assistance (Tr. 136, 178, 192-196, 199). See 34 C.F.R. 690.94-690.96.[10] Evidence at the hearing showed that approximately 50% of the College's operating budget comes from student tuition payments, and that some 140 students were BEOG recipients (Tr. 202; Pet. App. A7).[11] The College's president testified that the College "will not duplicate" aid its students receive through BEOGs (Tr. 189).

The administrative law judge ("ALJ") concluded that the College received federal financial assistance within the meaning of Title IX, and was thus required to execute an Assurance of Compliance. The ALJ entered an order terminating assistance until the College "satisfies the Department that it is in compliance" with the Department's Title IX regulations (Pet. App. A97).

3. The College then filed this action.[12] On cross-motions for summary judgment, the district court held that the College did not have to sign an assurance insofar as it required compliance with Subpart E (employment discrimi-

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[10] A student applying for a BEOG must submit an affidavit, with the concurrence of the certifying educational institution, that the grant "will be used solely for expenses related to attendance" at the institution (Tr. 57-58, 150). A College official thus certified "the tuition, room, and board costs charged to" two of the student petitioners (Marianne Sickafuse and Kenneth Hockenberry) (J.A. A61, A64).

[11] Marianne Sickafuse used her BEOG "to pay various educational expenses, including money [she] borrowed to pay tuition at the semester['s beginning" (J.A. A62).

[12] The College was joined by four student BEOG and GSL recipients. Since GSLs are no longer at issue (see note 14, *infra*), it would appear that Jenifer Smith and Victor Vouga, who received only GSLs, have no further interest in the case. The record does not reflect whether Marianne Sickafuse and Kenneth Hockenberry are still enrolled at the College. We are informed by the Department of Education that they no longer receive BEOGs.

nation) of the Title IX regulations, since employment was beyond the scope of Title IX and the regulations were, in that regard, invalid (Pet. App. A76-A78).[13] The court also held that termination of assistance is a permissible remedy only where actual sex discrimination has been found (*id.* at A79).

4. The court of appeals reversed those determinations.[14] It observed that the language of Section 901(a), the legislative history, and relevant case law all indicated that an institution whose students paid for their education with federal aid was a recipient of federal financial assistance within the meaning of Title IX (Pet. App. A11-A22). Judge Garth and Judge Muir (sitting by designation) also concluded that in such cases the institution as a whole was a covered "program or activity" (*id.* at A23-A31). Judge Becker found this conclusion unnecessary to the decision. Since the College was required to sign an assurance if it conducted any covered "program," the court was in his view not required to define the outer contours of possible coverage (*id.* at A40-A44).

Turning to the regulations, the court noted (*id.* at A34-A35) that this Court had, since the district court's decision, upheld the validity of Subpart E in *North Haven Board of Education* v. *Bell*, 456 U.S. 512 (1982). The court of appeals went on to hold that Section 902 of Title IX permitted termination of assistance, not just upon proof of actual discrimination, but for any refusal to comply with valid departmental regulations (Pet. App. A35-A38). The court also rejected Grove City's argument that compliance with Title IX would infringe the First Amendment rights of the College and its students (*id.* at A32-A33).

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[13] This Court later upheld the validity of Subpart E. *North Haven Board of Education* v. *Bell*, 456 U.S. 512 (1982).

[14] The Department did not appeal from the district court's determination (Pet. App. A75-A76) that GSLs—as "contract[s] of insurance or guaranty"—are excluded from Title IX coverage by Section 902, 20 U.S.C. 1682.

SUMMARY OF ARGUMENT

I. Grove City College operates an "education program or activity receiving Federal financial assistance" within the meaning of Title IX. It is thus required to execute an Assurance of Compliance with the nondiscrimination requirements of that title.

A. The College "receiv[es]" federal funds paid out in the form of Basic Educational Opportunity Grants. The purpose of the grants is to enable students to pay their Grove City tuition and expenses. The grants are measured by the cost of attendance at Grove City—defined as charges for tuition, fees, room, board, and similar expenses. A student's receipt of grant funds is contingent on his continued attendance, and reduced by the amount he (or his family) can contribute to the cost of attendance. In sum, the grant money is in fact used to pay for the student's education at Grove City. It is of little import that the student, not Grove City, is named as the payee of the federal check. Petitioners themselves admit that "assistance which is provided through another recipient to an educational program or activity is * * * within the scope of Title IX coverage" (Br. 17 n.17).

The "education program or activity" that receives these federal grants is the College's financial aid program, and it is that program that must comply with the requirements of Title IX. Consequently, subjecting schools whose students receive federal aid to the requirements of Title IX satisfies the statute's program-specific nature.

The statutory purposes of Title IX require that it be held to reach schools whose students receive federal financial aid. The BEOG program—whether under RDS or ADS—represents a substantial contribution to and subsidy for the College's financial aid and scholarship program. And Congress clearly intended that the entire "program or activity" into which federal money is channeled should be conducted in a nondiscriminatory fashion.

B. The legislative history of Title IX shows that Congress intended to eliminate sex discrimination in the pro-

vision of financial aid by schools that received federal funds for that purpose. The provision that was enacted as Title IX originated as an amendment to a bill whose most important feature was the creation of BEOGs. The Senate and House debates repeatedly show specific concern with discrimination by colleges in the provision of financial aid. Given that concern, and the general architecture of the bill, it seems clear that Congress intended schools receiving BEOG funds to be subject to Title IX.

C. Subsequent legislative action confirms the 1972 Congress's intent that colleges whose students receive BEOGs not be exempt from Title IX. Congress has reviewed and declined to disturb the very regulations that cover Grove City in this case; the Senate has rejected an amendment designed to exempt recipient schools from the requirements of Title IX; and Congress has repeatedly reenacted the BEOG statute, fully aware that recipient schools were being required to comply with Title IX.

D. The legislative history of Title VI—on which Title IX is modeled—also supports the conclusion that Grove City is subject to Title IX.

II. The court of appeals properly concluded that the Department could terminate BEOGs flowing to Grove City when the College refused to execute an Assurance of Compliance. Both the form and the regulation requiring its execution (34 C.F.R. 106.4(a)) are program-specific, applying "only to an 'education *program or activity* for which [Grove City] receives or benefits from Federal financial assistance'" (Pet. App. A42; emphasis in original). And there is no warrant in the statute or its history for petitioners' contention that funds may be terminated only upon a showing of actual discrimination. The assurance-of-compliance regulation is an integral part of a scheme for voluntary enforcement of Title IX—a scheme that would be completely frustrated if the petitioners' contentions were accepted.

III. The application of Title IX to the College does not infringe the First Amendment rights of the College or its students. The federal government has the power to fix the terms upon which it dispenses federal largesse, and neither schools nor their students are required to accept such aid.

ARGUMENT

I. GROVE CITY COLLEGE OPERATES AN "EDUCATION PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE" WITHIN THE MEANING OF TITLE IX

The principal issue in this case is a simple one. It is whether Grove City College must sign a Department of Education form stating that it will comply with Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, insofar as that statute applies to the College. Section 901(a) of Title IX (20 U.S.C. 1681(a)) declares (emphasis added):

> 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 * * *.

In this case the relevant "Federal financial assistance" is Basic Educational Opportunity Grants. Petitioners argue that because that assistance reaches Grove City only indirectly (through its students), and because the College has only a modest role in the distribution of BEOG funds, it conducts no "program or activity receiving" federal aid within the meaning of Title IX, and consequently that it need not sign the form.

This contention ignores the fact that the BEOG program directly subsidizes a financial aid program for the College; it does (at federal expense) precisely what the College does (at its own expense) through its own financial aid and scholarship program. The College's financial

aid program is therefore clearly a "program or activity receiving Federal financial assistance." The legislative history of Title IX supports this conclusion. In attaching Title IX to the statute creating BEOGs in 1972, Congress expressed particular concern that colleges were engaging in sex discrimination when handing out student financial aid, and that the federal government supported such discrimination by subsidizing student aid programs. Subsequent action by Congress has reemphasized its intent that colleges should be considered "recipients" of federal assistance when their students' education is paid for with federal financial aid funds. A similar conclusion emerges from the legislative history of Title VI, on which Title IX is in large part based.

A. When The Federal Government Pays Students' Tuition And Expenses, It Provides Assistance To The College's Financial Aid Program

Petitioners argue that requiring Grove City to sign an Assurance of Compliance is inconsistent in two ways with the language of Title IX. They argue first that the College is not "receiving" federal financial assistance within the meaning of Section 901 when its students pay for their education with BEOGs. Second, they claim that treating the College as a recipient of federal assistance is inconsistent with the "program or activity" restriction found in Title IX. Both of these arguments are without merit.

1. Petitioners' first argument (Br. 14-18) is that the Department's regulation, defining "recipient" as one who "receives or benefits" from federal financial assistance (34 C.F.R. 106.2(h)), is unfaithful to the more restrictive language used by Congress in Section 901.[15]

[15] It is possible, as petitioners and several amici demonstrate, to conjure up meanings of the phrase "receives or benefits" that are inconsistent with Title IX. But it is frivolous to argue that "the landlord" and "the neighborhood tavern" are covered by Title IX because they may benefit from BEOG funds (Pet. Br. 32); or that

In fact, the regulations define the statutory term ("receiving") in an entirely sensible and natural way. The purpose of BEOGs is to pay for the education students get at Grove City. The grants are measured by the "cost of attendance" at Grove City. Congress has defined that cost as the students' charges for tuition, fees, room, board, and similar expenses. (See page 3 & note 6 *supra*.) The students' receipt of money is conditioned on continued attendance and satisfactory progress in their studies. 34 C.F.R. 690.94. Money that a student (or the student's family) can contribute toward the cost of attendance is subtracted from the amount of the BEOG, 20 U.S.C. (Supp. V) 1070a(a)(2)(A)(i), so that grants effectively *must* be used to pay for the students' education.[16] Not surprisingly, evidence at the administrative hearing in this case showed—and petitioners seem to concede—that Grove City's students use their BEOGs for just that purpose. See note 11, *supra*; Pet. Br. 10, 14.

It is unimportant that Grove City is not named as the payee of the checks issued by the federal government. Petitioners acknowledge that "assistance which is provided through another recipient to an educational pro-

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"a college is a recipient of federal financial assistance if it enrolls students who receive food stamps" (MSLF and AAPICU Br. 10). Neither the landlord nor the neighborhood tavern "operates an education program or activity" (34 C.F.R. 106.2(h)). Nor can food stamps, unlike BEOGs, be considered "Federal financial assistance * * * *extended* directly or through another recipient" to some "education program or activity" (*ibid.*; emphasis added). The very purpose of BEOGs, unlike food stamps, is to pay the cost of students' education.

[16] In the case of other forms of federal student aid disbursed by the school, the money may be simply credited to the student's account with the institution. See, *e.g.*, 34 C.F.R. 674.16(f)(2) (National Direct Student Loans); 34 C.F.R. 676.16(e)(2) (Supplemental Educational Opportunity Grants); 34 C.F.R. 690.78(a) (BEOG—Regular Disbursement System).

The 1981 regulations cited by petitioners (Br. 5 n.9), which broadened the allowable costs of attendance, have been revoked. 46 Fed. Reg. 37862 (1981).

gram or activity is * * * within the scope of Title IX coverage" (Br. 17 n.17). That is so, they say, when a college receives federal funds via a state agency. Petitioners offer no reason why a different interpretation is warranted when the college receives federal funds via its students. The language of Title IX "requires only federal assistance—not payment—to a program or activity for Title [IX] to attach." *Bob Jones University* v. *Johnson*, 396 F.Supp. 597, 602 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975).[17]

2. Petitioners next argue (Br. 18-21) that treating Grove City as a recipient of federal assistance is inconsistent with the "program or activity" restriction found in Title IX. The plurality opinion in the court of appeals in this case concluded that "[b]ecause 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" (Pet.

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[17] Petitioners state at one point (Br. 21) that "students' use of their grant funds at educational institutions are payments for services rendered rather than assistance"—as if this distinguished BEOGs from other federal funds received by a college. But petitioners' proposal is really only another way of saying that Congress expected a certain kind of return on the federal investment in education, and that characterization aptly describes any kind of federal "assistance." When a school receives federal money for "chemistry research" (Pet. Br. 20), Congress wants the school's chemistry faculty to devote time and effort to chemistry research. When Congress gives money to the states for vocational education, and the states pass it on to counties, cities, or school districts, Congress intends that the ultimate recipients will "develop and carry out * * * programs of vocational education * * *." 20 U.S.C. 2301(3); cf. 110 Cong. Rec. 13126-13128, 13130 (1964) (remarks of Sen. Ribicoff); *id.* at 13418 (remarks of Sen. Keating) (local government subrecipients of financial aid to education are subject to Title VI). The issue is no different when Congress supplements a college's financial aid program with BEOG money that flows back to the school: Congress's purpose is that the money be used for the education of the student beneficiaries.

App. A31; footnote omitted).[18] Apparently convinced that the choice is between such institution-wide coverage and no coverage at all, petitioners contend that the latter outcome is necessary if the program-specific language of Title IX is to be given any meaning. In fact, the dilemma petitioners pose does not exist.

a. We believe that the court of appeals plurality's expansive interpretation of the scope of Title IX coverage does not properly construe the statute as interpreted by this Court in *North Haven*, *supra*. The plurality reasoned that BEOG funds received by the College can be put to use anywhere in the school, and that a rule requiring the tracing of those monies would render the termination sanction ineffective (Pet. App. A31). The plurality also concluded that BEOG funds, wherever used, free up money for use elsewhere in the school (*id.* at A27, A28-A29 n.25).

Accepting either of these lines of analysis would wholly obliterate the "program or activity" limitation contained in Sections 901 and 902 (20 U.S.C. 1681, 1682). Most colleges and universities in the United States receive some federal funds by way of student aid. Since Title IX coverage does not depend on the *amount* of federal aid received,[19] the proposition advanced by the court of appeals would mean that if one student paid for his education with one dollar of BEOG funds, the entire school

[18] The government's brief in the court of appeals, filed shortly before this Court's decision in *North Haven*, *supra*, argued that the Title IX "regulations *are* program specific. * * * [T]he regulation implicitly provides that the mere receipt of some federal assistance by an educational institution does not necessarily subject all of its practices to the prohibitions of Section 901 of Title IX and the implementing regulations. Questions may arise in particular cases concerning how to define 'program or activity' with respect to particular practices * * *. However, those issues are not present here." Brief for the Appellees-Cross-Appellants at 30 (emphasis in original).

[19] Coverage is instead limited by the "program or activity" rule, which confines coverage to the assisted portion of the school's operations.

would automatically be subject to Title IX.[20] That in turn would suggest that all employees at virtually all institutions of higher education in the country are covered by the Subpart E regulations, notwithstanding this Court's explicit direction in *North Haven* that those regulations not be given such universal application. 456 U.S. at 535-540.

Further, the analysis of the court of appeals would apply with equal force even to federal funds earmarked for a particular use. If a school is given a grant to buy hardware for its computer science program, that federal money "frees up" the school's own funds for use in other programs and activities no less than BEOGs do. The consequence of the Third Circuit's devotion to economic realities is thus that the receipt of any federal money for any purpose brings the entire school within the ambit of Title IX. But as this Court stressed in *North Haven*, both the ban on sex discrimination in Section 901(a) (20 U.S.C. 1681(a)) and the fund-termination sanction authorized by Section 902 (20 U.S.C. 1682) are limited to the assisted program or activity. The Court pointed out that Congress "failed to adopt proposals that would have prohibited *all* discriminatory practices of an institution that receives federal funds" (456 U.S. at 537), and quoted Senator Bayh's statement that the " 'effect of termination of funds is limited to the particular entity and program in which such noncompliance has been found' " (*ibid.*).

In sum, the question of Title IX coverage should be resolved not by following to the end the economic ripples generated by federal aid, but by a common-sense discern-

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[20] The court of appeals suggested (Pet. App. A32 n.28) that that draconian conclusion might be avoided if schools were to adopt "financial Chinese wall[s]" to channel the flow of federal monies within their operations. We think it unlikely, however, that if Congress had intended institution-wide coverage, it would have countenanced evasion of that obligation by the simple expedient of a change in accounting systems.

ment of what, in the most natural way, can be considered the educational "program or activity" assisted by federal aid.

b. Under that approach, we believe that the natural candidate as the "program or activity" of Grove City assisted by federal student aid is the College's entire financial aid program (including any financial aid dispensed from non-federal funds).

This solution sensibly accords with conventional nomenclature and organizational and budgetary practices at educational institutions. Virtually all such institutions have something *called* a financial aid (or "scholarship") program, administered by a financial aid office. The budget of such an office is normally a separate budgetary item. See, *e.g.*, *Reauthorization of the Higher Education Act and Related Measures: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 96th Cong., 1st Sess., Pt. III, 422 (1979). The purpose of the program is specific and well-recognized: it enables schools to recruit students who otherwise could not afford to attend. Funds are commonly raised for the financial aid program from alumni and friends, and earmarked for that program. Federal aid to students can be seen as a subsidy of that program without in any way offending the program-specific nature of Title IX.

c. Petitioners' argument that Grove City conducts no federally assisted program or activity (because it does not itself distribute BEOG funds) rests on their assumption that the sole purpose of Title IX is to prevent schools from discriminating in the disbursement of federal money. It is true that, in the majority of federal student aid programs, funds are disbursed by the college itself to students selected by the school on the basis of the relevant criteria.[21] And petitioners concede (Br. 20 & 21 n.19)

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[21] In addition to BEOG funds under RDS, this is true for the following types of assistance: Supplemental Educational Opportunity Grants, 20 U.S.C. (& Supp. V) 1070b, 1070b-2(b); National Direct Student Loans, 20 U.S.C. (Supp. V) 1087aa, 1087cc(a);

that a college like Hillsdale College (see note 41, *infra*)—which has "campus-based loan and grant programs [and] * * * disburse[s] federal funds to eligible students"—is for that reason covered by Title IX.

The reason for applying Title IX in such cases is obvious: colleges may discriminate in dispensing the federal funds. But a college intent on discriminating can do so even under the Alternate Disbursement System for BEOGs. Under ADS the college, though it does not disburse federal funds, must certify that student applicants are making satisfactory progress in their courses of study (34 C.F.R. 690.94) and meet the eligibility requirements for BEOGs (34 C.F.R. 690.4)—matters not always determinable according to fixed criteria, and thus open to discriminatory administration.[22]

In any event, petitioners' argument takes too narrow a view of Congress's Title IX concerns. Congress did wish to prevent schools from putting identifiable federal dollars to discriminatory uses. But Congress was also concerned about federal participation in discriminatory college programs even where specific federal funds were not tainted. As Representative Mink stated in 1975:

> It is difficult to trace the Federal dollars precisely. A narrow interpretation of title IX would render the law meaningless and virtually impossible either to enforce or to administer. For example, the slide projector in one classroom might be purchased with title I ESEA money, while the slide projector in the adjacent room was not. It surely is not the intent of

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Fellowships for Graduate and Professional Study, 20 U.S.C. (Supp. V) 1134d, 1134f; and College Work Study Programs, 42 U.S.C. (Supp. V) 2751, 2753.

[22] Moreover, the fact that there are limited opportunities to discriminate in handling BEOGs under ADS is simply a consequence of the regulations now in effect. As we noted above (note 7), Congress assumed that colleges would be involved in the administration of BEOGs, and left the details of that involvement up to the Department.

> Congress to prohibit sex—or race or national origin—discrimination in the room with the title I projector, while allowing it in the adjacent room.

Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 166 (1975) ("*1975 Hearings*").

Precisely the same incongruity can occur in the operation of a school's financial aid program. When Congress authorized BEOG funding for needy students' educational expenses, it undertook a financial burden that colleges would otherwise have shouldered alone through their scholarship and financial aid programs. As Grove City's president testified in this case, the College now "will not duplicate" aid its students receive through BEOGs (Tr. 189). By paying such costs Congress thus provides assistance to a school's financial aid program in the same way it provides assistance to a fine arts program by paying for slide projectors. See *Hillsdale College* v. *Department of Health, Education & Welfare*, 696 F.2d 418, 429-430 (6th Cir. 1982), petition for cert. pending, No. 82-1538. But "[i]t surely is not the intent of Congress to prohibit sex * * * discrimination in the room [where federal aid is handed out to incoming students], while allowing it in the adjacent room [where the school's own scholarship funds are disbursed]." Rather, Congress intended that the entire "program or activity" into which federal money is channeled should be conducted in a nondiscriminatory fashion *even so far as the school's own money is concerned.*[23]

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[23] For this reason, petitioners read the phrase "program or activity" too narrowly when they argue (Br. 20) that "the concept of a recipient program or activity under Title IX must be coextensive with the scope of the underlying grant statute." In fact, the language of the statute unmistakeably refers in Section 901 to the relevant "program or activity" *at the school*. Thus it speaks of "any education program or activity *receiving* Federal financial assistance" (20 U.S.C. 1681(a); emphasis added); of "any program or activity *of* any secondary school or educational institution" (20

There is still another aspect to the problem of discrimination in the administration of BEOGs. Even if such grants are administered under ADS, a school can exercise a veto against beneficiaries on the basis of sex by discriminating on the basis of sex in its admissions.[24] The school, though it plays only a limited role in disbursement, can thus deny women applicants the benefit of federal financial aid by refusing them the education it is meant to buy.[25] Even if the school receives no other form

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U.S.C. 1681(a)(7)(B); emphasis added (cf. *id.* section 1681(a)(7)(A) ("[a]ny program or activity *of* the American Legion") (emphasis added)); and of "any federally *supported* program or activity" (20 U.S.C. 1681(b); emphasis added).

This point also sheds light on why the court of appeals erred in reading the "program or activity" language too broadly. The court argued that *North Haven*, *supra*, "implicitly adopt[ed] an institutional approach to the concept of program" (Pet. App. A25; footnote omitted). The Third Circuit relied, for that conclusion, on a footnote in Justice Powell's dissent criticizing the majority for extending coverage beyond "employees who directly participate in a federal program, *i.e.*, teachers who receive federal grants" (456 U.S. at 542 n.3). As the text above makes clear, however, coverage of such employees by no means entails "an institutional approach to the concept of program * * *." If the federal government subsidizes the chemistry program by paying for the construction of a chemistry building, the recipient school may not discriminate against female chemistry teachers even if their salaries are all paid out of the school's own funds. It is, on the other hand, equally inconsistent with Title IX's "program or activity" language to say that the federal grant for the chemistry building makes the entire college a covered "program."

[24] Title IX applies generally to the admissions policies of professional and graduate schools, and *public* undergraduate schools. 20 U.S.C. 1681(a)(1); see also 20 U.S.C. 1681(a)(2) and (5); *Mississippi University for Women* v. *Hogan*, No. 81-406 (July 1, 1982). Grove City College's admissions policies would thus be exempt.

[25] See *Rice* v. *President & Fellows of Harvard College*, 663 F.2d 336, 339 n.2 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982) ("One who is discriminated against in seeking admission is denied access to all educational programs and activities within an institution, and the entire body of programs within the school is tainted."); ;

of federal financial assistance, such discrimination in admissions can carry over to the BEOG program; Title IX coverage insures that BEOGs are not—in this indirect way—disbursed in a discriminatory manner.

To summarize: applying Title IX to Grove City's financial aid and scholarship program as a whole satisfies the statute's program-specific nature. It also helps effectuate the statutory purpose even though the federal grants do not go directly to the College: it prevents direct and indirect discrimination in the use of federal funds, and assures that the federal government does not contribute to a discriminatory educational program.

B. The Legislative History Of Title IX Shows That Congress Intended To Eliminate Sex Discrimination In The Provision Of Financial Aid By Recipients Of Federal Funds

The legislative history of Title IX supports the conclusion that Grove City's financial aid program is "receiving Federal financial assistance." In the Education Amendments of 1972—which created the BEOG program—Congress simultaneously enacted Title IX, in part because of its concern that colleges were engaging in sex discrimination when handing out student financial aid, and that the federal government supported such discrimination through its assistance to student aid programs.

Board of Public Instruction v. *Finch*, 414 F.2d 1068, 1078 (5th Cir. 1969) (Title VI) ("If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper."); *Othen* v. *Ann Arbor School Board*, 507 F. Supp. 1376, 1387-1388 (E.D. Mich. 1981); *Bob Jones University* v. *Johnson*, *supra* (Title VI).

Some courts have extrapolated from this principle of an admissions-veto the more general theory that discrimination in one program or activity can "infect" other programs—including federal student aid programs. *Iron Arrow Honor Society* v. *Heckler*, 702 F.2d 549 (5th Cir. 1983), petition for cert. pending, No. 83-118. That is, of course, not a matter that the Court need reach in this case.

1. *House*

a. The movement toward what became Title IX began in 1970, when a special House subcommittee on education chaired by Representative Green conducted hearings on discrimination against women. *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess., Pts. 1 & 2 (1970) ("*1970 Hearings*"). The bill considered during these hearings (H.R. 16098, 91st Cong., 2d Sess. § 805 (1970)) would have amended Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) to include a prohibition against sex discrimination. Although the hearings covered a broad range of topics, special attention was devoted to the problems of women students, specifically including discrimination in admissions and in the provision of financial aid. Those who addressed those problems concluded that a federal solution was appropriate, given the pervasive nature of federal assistance to colleges and universities.

Representative May, for example, stated (*1970 Hearings, supra*, Pt. 1, at 235):

> Discrimination upon the basis of sex has been going on for so long with respect to the students that it's criminal. Here we have this scholarship money—much of it, please bear in mind, is federal—going to students. Which students receive this scholarship money is decided upon by the individual colleges and universities—where there are often quota restrictions on women recipients. Thus, we find ourselves faced with a situation wherein federal funds are subsidizing discriminatory opportunities—and there is no way to get it back!

In a similar vein, Representative Mink stated (*id.* at 433):

> Scholarships and other forms of financial assistance are also distributed on a discriminatory basis, making it more difficult for women to afford a higher education.

Representative Griffiths argued (*1970 Hearings, supra*, Pt. 2, at 739):

> Many universities and colleges * * * discriminat[e] against women * * * by applying quotas for women in admission to both undergraduate and graduate training programs. They discriminate against them in awarding scholarships and providing financial assistance.

She added (*id.* at 740):

> 2,174 universities and colleges received $3,367 million from the Federal Government in fiscal year 1968. * * * Should the Federal Government close its eyes to such unjust discrimination and continue to provide the billions of dollars that help to support those unjust practices? [26]

The same problems were addressed by numerous other witnesses before the Committee.[27]

b. Although the 1970 proposal never emerged from committee, in the next year Representative Green introduced H.R. 7248, 92d Cong., 1st Sess. (1971), which contained a separate prohibition (Title X) against sex discrimination in federally assisted education programs and activities. Other provisions in the bill extended funding provided by the Higher Education Act of 1965 (Pub. L. No. 89-329, 79 Stat. 1219), including student assistance

[26] Representative Griffiths cited figures on federal financial assistance from a report by the National Science Foundation, *Federal Support to Universities and Colleges, Fiscal Year 1968*, No. NSF 69-32 (Sept. 1969).

[27] See, *e.g.*, *1970 Hearings, supra*, Pt. 1, at 31 (Statement of Jean G. Ross); *id.* at 185, 187 (Fabian Linden, *Women in the Labor Force*); *id.* at 217-218, 231 (Ann Scott, *The Half-Eaten Apple*); *id.* at 301, 306 (statement of Bernice Sandler); *id.* at 313-314 (letter from Nancy Dowding to George Schultz); *1970 Hearings, supra*, Pt. 2, at 645-656 (testimony of Peter Muirhead); *id.* at 801-804 (*Women in the University of Chicago, Report of the Committee on University Women*).

in the form of educational opportunity grants, guaranteed student loans, and work-study. See H.R. Rep. No. 92-554, 92d Cong., 1st Sess. 3-4, 15-34 (1971).

Most of the debate on Title X focused on the effect it would have on undergraduate admissions (117 Cong. Rec. 39248-39261 (1971)). But it was clearly understood that schools which accepted federal student aid would be covered by the nondiscrimination provision. When Representative Erlenborn proposed exempting undergraduate admissions from the bill, he said (117 Cong. Rec. 39260 (1971)):

> In the same bill where we are holding out the prospect of putting Federal funds in every institution of higher education so that every institution will then come under the terms of title X, we are then saying "but if you take this money or any other Federal funds we are then going to determine for you what your administration practice should be."

Speaking in support of Representative Erlenborn's amendment, Representative Steiger said (117 Cong. Rec. 39257 (1971)):

> [U]nder the bill, under the titles which we have gone over before, we have in effect allowed the local financial assistance officers to have a rather broad sweep of powers in their right to pick and choose those who should receive aid which could work against low-income students, but in this one we now are going to say that it is the Federal policy that you cannot discriminate because of sex. This dichotomy confuses me[:] on [the] one hand we grant latitude and autonomy while on the other limiting autonomy.

When the bill was reported out of committee, the Supplemental Views subscribed to by several members noted that "[f]ederal dollars now constitute over 20% of the total budget of our higher education system. Most of these dollars *flow to institutions through* research contracts, *student assistance programs*, and categorical pro-

grams related to specific national objectives." H.R. Rep. No. 92-554, *supra*, at 244 (emphasis added).

Although H.R. 7248 was passed by the House in 1971 —and the Senate passed S. 659, its own version of the higher education bill—no legislation was agreed on in that session.[28]

c. The views of the House in 1970 and 1971 are of course not authoritative with respect to Congress's intentions when it later adopted Title IX. But they do offer valuable evidence of the House's ultimate concerns and objectives. There can be no doubt that one of the House's reasons for wanting to forbid sex discrimination in higher education was the belief that women were treated unfairly in the distribution of financial aid. It is also clear that the House saw federal student assistance programs as a form of aid to colleges themselves. Finally, it was contemplated that the receipt of federal student aid money would subject a school to the nondiscrimination requirements of the House bills.

2. *Senate*

a. In 1971 Senator Pell introduced the Education Amendments of 1971 (S. 659, 92d Cong., 1st Sess.), which contained what he called "a radical approach to Federal aid to education, in that it provides, as a matter of right, a basic educational opportunity grant * * * to every student pursuing a postsecondary education at an institution of higher education." 117 Cong. Rec. 2008 (1971). S. 659 had numerous other objectives (see *id.* at 29339-29341), but what chiefly made the bill "landmark in nature" was "the unprecedented principle of an

[28] H.R. 7248 was amended in several respects, passed by the House (117 Cong. Rec. 39354, 39374 (1971)), and laid on the table when S. 659, amended by substitution of the House language, was passed in lieu. 117 Cong. Rec. 39374 (1971). This bill was sent back to the Senate, referred to its Committee on Labor and Public Welfare, and reported back to the Senate with recommendations for further amendments. S. Rep. No. 92-604, 92d Cong., 2d Sess. 1-2 (1972).

assured minimum level of support for every American who seeks a postsecondary education" (*id.* at 29342, 29344 (remarks of Sens. Pell, Prouty, and Proxmire)). Senator Bayh described the "Pell bill" as "the most far-reaching program of Federal aid to higher education ever debated in [the Senate]" (117 Cong. Rec. 30156 (1971)).[29]

It was this bill that Senator Bayh proposed to amend by adding what became Title IX. 117 Cong. Rec. 30155, 30403 (1971). When introducing his amendment, Senator Bayh stated (*id.* at 30403):

> Now we are attempting to establish access to higher education as a basic Federal right. By establishing a minimum level of scholarship assistance for each needy student who wishes to pursue postsecondary education, we hope to break forever the bonds that have tied generation upon generation to the ghettoes and economic backwaters of America.
>
> But as we seek to help those who have been the victims of economic discrimination, let us not forget those Americans who have been subject to other, more subtle but still pernicious forms of discrimination. * * * Today I am submitting an amendment to this bill which will guarantee that women, too, enjoy the educational opportunity every American deserves.

Senator Bayh's proposed amendment did not contain a program-specific limitation; its primary focus (insofar as it affected students) was on "admission to * * * educational facilities" (*ibid.*). See 117 Cong. Rec. 30406 (1971) (remarks of Sen. Bayh); *id.* at 30407 (remarks of Sen. Dominick); *id.* at 30409 (remarks of Sen. Gurney); *id.* at 30410 (remarks of Sen. Byrd). In the event discrimination occurred in admissions programs, Senator Bayh suggested that his amendment would authorize

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[29] In the Education Amendments of 1980, Congress redesignated the "basic educational opportunity grants" as "Pell grants." 20 U.S.C. (Supp. V) 1070a(a)(1)(C).

termination of all assistance, including Pell grants (*id.* at 30408; emphasis added):

> Mr. DOMINICK. What type of aid the recipient might be getting would be cut off? * * *
>
> Mr. BAYH: We are cutting off *all* aid that comes through the Department of Health, Education, and Welfare * * *.[30]

Senator Bayh's explanation was confirmed by Senator McGovern, who said (117 Cong. Rec. 30158-30159 (1971); emphasis added):

> I urge the passage of this amendment to assure that *no funds from S. 659* * * * be extended to any institution that practices biased admissions or educational policies.

The Presiding Officer ruled that the amendment was not germane, and his ruling was sustained (*id.* at 30412, 30415).[31]

b. On February 28, 1972, Senator Bayh introduced an expanded version of his 1971 amendment (now designated Amendment No. 874 and proposed as an additional

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[30] Petitioners quote this same exchange in support of their claim that student aid was not considered to be "Federal financial assistance" (Br. 24-25). It is true that Senator Bayh went on to say that "this would not be directed at specific assistance that was being received by individual students, but would be directed at the institution" (117 Cong. Rec. 30408 (1971)). But it seems clear from the context that Senator Bayh meant simply that the student would be free—as he is free today—to receive federal financial assistance in order to attend another university, even if the institution to which he first applied was denied the benefit of such funds because it discriminated. See pages 33-34, *infra*.

[31] Senator Bayh, appealing the Chair's ruling, said (117 Cong. Rec. 30412 (1971)):

> This amendment relates directly to the central purpose of the bill being debated.
>
> The bill deals with equal access to education. Such access should not be denied because of poverty or sex.
>
> * * * * *

"Title X" to S. 659).[32] Unlike Senator Bayh's 1971 proposal the 1972 version was clearly "program-specific"—*i.e.*, its prohibition reached only educational programs or activities receiving federal financial assistance, and it limited "termination of funds * * * to the particular entity and program in which * * * noncompliance has been found" (118 Cong. Rec. 3937, 5807 (1972) (remarks of Sen. Bayh)). The change was not, however, intended to narrow the concept of what constitutes "receipt" of federal aid, or to exempt schools whose students receive federal grants.[33] Any other conclusion would be

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[32] The Senate Committee on Labor and Public Welfare, after considering the House's amendments to S. 659 (see note 28, *supra*), reported the bill out on February 7, 1972 with recommendations for further amendments. S. Rep. No. 92-604, 92d Cong., 2d Sess. (1972). As reported out of committee, S. 659 was entitled "The Education Amendments of 1972."

[33] Senator Bayh's 1972 amendment took the same view of "receiving Federal financial assistance" as his 1971 amendment. Schools whose students' education is paid for with BEOGs are still considered *recipients*. On the other hand, the *scope of coverage* of recipient schools was significantly altered by the new "program or activity" limitation. The 1972 amendment provided, in terms identical to the language ultimately enacted, that "termination * * * 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" (118 Cong. Rec. 3938 (1972)). As Senator Bayh stated (*id.* at 5807), "[M]y amendment * * * would prohibit discrimination on the basis of sex in federally funded education programs. * * * The effect of termination of funds is limited to the particular entity and program in which such noncompliance has been found * * *." See *North Haven*, *supra*, 456 U.S. at 537-538.

This conscious change to a rule of program specificity would have been nothing more than a formal exercise if one adopted the court of appeals' conclusion that "the 'program' here must be defined as the entire institution of Grove City College" (Pet. App. A31). The prevalence of BEOGs (created by the very Act to which Title IX was appended) and other forms of federal student aid means that

indeed surprising, since one of the primary purposes of Bayh's amendment was to eradicate discrimination in the provision of student financial aid.

In announcing Amendment No. 874, Senator Bayh stated: "I have introduced * * * an amendment which would deal in a comprehensive way with sex discrimination in education—in admissions, *scholarship programs*, faculty hiring, and the pay of professional women" (118 Cong. Rec. 3935 (1972); emphasis added).[34] Senator Bayh elaborated on those concerns by introducing a prepared statement dealing with the three primary targets of his amendment: "A. DISCRIMINATION IN HIRING AND PROMOTION OF FACULTY AND ADMINISTRATORS"; "B. DISCRIMINATION IN SCHOLARSHIPS"; and "C. DISCRIMINATION IN ADMISSIONS" (*id.* at 3935-3940). Several days later Senator Bayh introduced, as "particularly relevant to my amendment No. 874," an article addressing at some length discrimination in the provision of financial aid (*id.* at 5654, 5656). It noted that (*ibid.*; footnotes omitted):

> [W]omen constitute about 43% of all students receiving national defense loans, 49% of students benefiting from the work-study college program, 40.2% of those receiving equal opportunity grants and 36.5% of those participating in the guaranteed loan program.
>
> Complaints of discrimination have centered upon financial assistance for graduate study. * * * In 1969 women represented 33% of the graduate student population; they received 28% of the awards given under the NDEA Title IV fellowship program for graduate students and 29.3% of graduate academic awards under NDEA Title VI.

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there are few if any cases involving higher education to which the "program or activity" limitation could apply if unearmarked student financial aid triggered institution-wide coverage.

[34] Senator McGovern had noted the same issues several weeks earlier (118 Cong. Rec. 274 (1972)).

When Amendment No. 874 was called up for debate on February 28, 1972, Senator Bayh summarized it thus: "The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions. Enforcement powers include fund termination provisions" (118 Cong. Rec. 5803). He then addressed each of these problems at more length. Regarding "discrimination in scholarships" he said (*id.* at 5805):

> Although documentation of discrimination in scholarship aid is less conclusive than in other areas, a recent study by the Education Testing Service found that although men and women need equal amounts of financial aid in college, the average awards to men are $215 higher than to women.

See also 118 Cong. Rec. 5807, 5808 (1972). He continued (*id.* at 5809):

> In the 35 most selective schools in the country * * * women comprise 29.3 percent of entering freshmen in 1970; although men and women need equal amounts of financial aid in college, the average awards to men are significantly higher than awards to equally qualified women. For example, the average single awards such as scholarships, loans, or jobs in an institution, to a man student in 1970 was $760, and to a woman student $518.
>
> If we look at the broader types of financial assistance—various packaged awards, such as grants with jobs, or loans—it shows that the average such package award in 1969-70 to the average man student was $1,465 and to the average women student it was $1,173.
>
> I do not think we have any evidence at all to support the contention that it costs less to clothe, house, feed, and educate a woman. Yet there is obvious discrimination when it comes to passing out the scholarship dollars.

See also *id.* at 5810 (paper on *The Status of Women*); *id.* at 5813 (letter from The National Federation of Business and Professional Women's Clubs, Inc.).[35]

That the Senate viewed schools as "receiving Federal financial assistance" when their students got federal aid was explicity recognized in debate on Senator Bentsen's perfecting amendment to Amendment No. 874. Senator Bentsen proposed that the admissions practices of traditionally single-sex public undergraduate schools be exempted from the nondiscrimination rule (118 Cong. Rec. 5814 (1972)). In explaining the need for his amendment, he pointed out that Texas Woman's University, which was forbidden by state law from admitting male students, received "over $250,000 in educational opportunity grants" and "$83,000 for college work-study programs" (*ibid.*). The effect of Amendment No. 874, he argued, would be to subject the University to Title IX coverage because of that assistance. Senator Bentsen's amendment was agreed to. 118 Cong. Rec. 5815 (1972).

Senator Bayh's Amendment No. 874 was passed by the Senate on the same day it was introduced (118 Cong. Rec. 5815 (1972)). The House and Senate conferees, meeting on their differing versions of S. 659 (see note 28, *supra*), adopted "the substance of the Senate" BEOG program, which was "viewed as the foundation upon which all other Federal student assistance programs are based." S. Conf. Rep. No. 92-798, *supra*, at 167. Differences about the final form of Title IX related only to exceptions not relevant here. *Id.* at 221-222.

c. The Senate's deliberations, like the House's, focused specifically on the problem of discrimination in college financial aid programs. The debates show a serious concern with colleges' handling of federal student aid ("national defense loans," "work-study," "equal opportunity grants," "NDEA Title IV," "NDEA Title VI" (118

[35] See also National Commission on the Financing of Postsecondary Education, *Financing Postsecondary Education in the United States* 148 (Dec. 1973).

Cong. Rec. 5656 (1972)). Senator Bayh's explanations of his own amendment also address a broader problem—not the handling of identifiable *federal* dollars, but the administration of college financial aid programs *generally*. He repeatedly stated that one of the purposes of Title IX was to "cover[] discrimination in * * * scholarship aid" (*id.* at 5807).

It seems clear that the Senate intended Title IX to regulate recipient schools insofar as they administered federal student aid dollars. But as the discussion of Senator Bentsen's amendment illustrates, Title IX was intended to do more. It was to govern recipient institutions not just with respect to the disbursement of specifically identifiable *federal* monies, but also with respect to the other activities of the relevant educational "program or activity." The federal government was to end the practice of subsidizing the discrimination practiced by the entire program or activity.

The final—and compelling—point about the legislative history of Title IX is architectural rather than linguistic. Title IX was an amendment to a bill whose most important feature was the creation of BEOGs. The sponsor of Title IX stated that his amendment "relate[d] directly to the central purpose of the bill" (117 Cong. Rec. 30412 (1971)). Given that direct connection, it defies belief that Congress meant to permit discrimination to exist in the financial aid programs of schools whose students are subsidized by BEOG grants.

C. Subsequent Legislative Action Confirms Congress's Intent That Title IX Should Apply To Colleges Whose Students Receive BEOGs

"Although postenactment developments cannot be accorded 'the weight of contemporary legislative history'" (*North Haven*, *supra*, 456 U.S. at 535), certain "subsequent events * * * lend credence to the [Department's] interpretation" of the phrase "'program or activity receiving Federal financial assistance'" (456 U.S. at 537). Congress reviewed the regulations extending Title IX

coverage to colleges like Grove City, and chose to leave them undisturbed. Congress also considered and rejected legislation specifically designed to exempt schools receiving only federal student assistance. Finally, Congress has repeatedly reenacted the BEOG statute with full awareness that such aid triggers Title IX coverage.

1. Pursuant to the direction of Section 902 (20 U.S.C. 1682) HEW promulgated sex discrimination regulations. The regulations provided, in terms identical to those now in effect, that "*Federal financial assistance*" includes "[a] grant or loan of Federal financial assistance, including funds made available for * * * [s]cholarships, loans, [and] grants * * * extended directly to * * * students for payment to" a college. 40 Fed. Reg. 24137 (1975); cf. 34 C.F.R. 106.2(g)(1). They also stated that the term "*Recipient*" includes "any public or private * * * 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 * * *." 40 Fed. Reg. 24137 (1975); cf. 34 C.F.R. 106.2(h).

As required by Section 902, the regulations were submitted to President Ford for his approval. They were then transmitted to the Speaker of the House and the President of the Senate, pursuant to Section 431(d)(1) of the General Education Provisions Act, 20 U.S.C. (1970 ed. Supp. IV) 1232(d)(1).[36] Under Section 431(d) the regulations would become effective 45 days after transmittal unless Congress, by concurrent resolution, found that they were inconsistent with the authorizing statute and disapproved them.

The House held six days of hearings during which HEW Secretary Weinberger specifically addressed the Department's conclusion that the term "Federal financial assistance" covered federal aid to students. *1975 Hear-*

[36] This section was made applicable to Title IX regulations by Section 431(a) of the same statute. 20 U.S.C. (1970 ed. & Supp. IV 1974) 1232(a).

ings, supra, at 481-484.[37] In response to a question by Representative Quie, Secretary Weinberger said (*id.* at 484):

> 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 [the HEW General Counsel] says, the court case confirms this belief.[38]

Senator Bayh was asked during the hearings whether the Department had "overstepped its bounds in claiming that an institution is conducting a program or activity financed by the Federal Government if a student is receiving Federal aid to attend that program" (*1975 Hearings, supra*, at 182). He answered that he did not know, and

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[37] Representative O'Hara, chairman of the subcommittee, stated (*1975 Hearings, supra*, at 412):

> I always used to think, until I became chairman of this subcommittee, that student assistance was student assistance, and after I proposed changes in it and started to hear from institutions I discovered it was a disguised institutional assistance and not student assistance.
>
> * * * [T]here is an institutional aid aspect, because whenever someone proposes changing a program a little bit they immediately hear from institutions saying: Wait a minute, your change will hurt our kind of institution or would help some other kinds of institutions.

[38] Secretary Weinberger was referring to *Bob Jones University v. Johnson*, *supra*, which construed the parallel provisions of Title VI in an analogous context. There 221 of some 4500 students in the university were receiving Veterans Administration ("VA") benefits. Like Grove City, Bob Jones refused to execute an Assurance of Compliance required by the VA before approving the university's educational programs towards which VA benefits could be applied. The university contested coverage on the ground that it was not itself a direct recipient of federal financial assistance, since benefits were paid by the VA directly to students in a way similar to the Alternate Disbursement System for BEOGs. The district court rejected that argument. 396 F. Supp. at 603.

would have to look into the question (*ibid.*).[39] He did point out that the student could "take that scholarship and go anyplace [he] want[ed] to" (*id.* at 181). When asked the same question, Secretary Weinberger stated that "the Federal financial assistance *to that institution* might well be cut off. * * * I don't think you would take the assistance away *from the student* who was denied admission[;] * * * you would let him take it and use it somewhere where there was not a violation" (*id.* at 482; emphasis added).

Resolutions were introduced in both Houses of Congress to disapprove the regulations in their entirety. S. Con. Res. 46, 94th Cong., 1st Sess. (1975), see 121 Cong. Rec. 17300 (1975); H.R. Con. Res. 310, 94th Cong., 1st Sess. (1975), see 121 Cong. Rec. 19209 (1975). Neither was passed.[40]

2. In 1976 Congress rejected legislation specifically aimed at exempting schools receiving student aid from Title IX controls. Senator McClure introduced an amendment to Section 901 providing that, for purposes of Title IX, "federal financial assistance received means assistance received by the institution directly from the federal government." 122 Cong. Rec. 28144 (1976). By way of justification for his amendment, Senator McClure noted (*id.* at 28145) that Hillsdale College had been subjected

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[39] Senator Bayh later defended the Department's conclusion that colleges are recipients of "Federal financial assistance," opposing an amendment which would effectively have removed student aid from the reach of Title IX. See pages 35-36, *infra*.

[40] Approximately four months after the regulations went into effect, Congress amended 20 U.S.C. (1970 ed. Supp. IV) 1232(d)(1), to say that failure to adopt a concurrent resolution disapproving a final regulation should not "be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding." Pub. L. No. 94-142, Section 7(b), 89 Stat. 796. But as this Court noted in *North Haven*, "the postenactment history * * * does indicate that Congress was made aware of the Department's interpretation of the Act * * *."

to Title IX because some of its students received Federal assistance.[41]

Both Senator Bayh and Senator Pell opposed the amendment. Senator Pell noted that (122 Cong. Rec. 28145 (1976)):

> [w]hile 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.

Senator Bayh argued that the Department had properly interpreted the statute when it promulgated the regulations in 1975, and that a reversal of its interpretation would thwart the purposes of Title IX. He stated (122 Cong. Rec. 28145-28146 (1976)):

> 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 receives Federal aid.[42] If a student is benefited, the school is benefited. It is not new law; it is traditional, and I think in this

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[41] Hillsdale College, an amicus in this case, was found by the Department after an administrative hearing to have violated Title IX by refusing to sign an Assurance of Compliance. Like Grove City, Hillsdale does not apply for federal aid, but one-fourth of its students in 1978 financed their education through the use of Federal grants and loans. *Hillsdale College* v. *Department of Health, Education, & Welfare, supra*, 696 F.2d at 420. On appeal of the fund termination order, the Sixth Circuit agreed with the Department that Hillsdale is a recipient of federal financial assistance (696 F.2d at 424, 430). It nevertheless found the Assurance of Compliance form, as interpreted and applied by the Department, to be invalid (*id.* at 430). The court therefore reversed the Department's order terminating assistance (*ibid.*).

[42] Senator Bayh was referring to *Bob Jones University* v. *Johnson, supra* note 38.

> 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.

The amendment was rejected.

3. The statutory authorization for BEOGs, first enacted together with Title IX in 1972, has since been renewed, with amendments but in the same basic form, in 1976, 1978, and 1980. Pub. L. No. 94-482, Section 121(a), 90 Stat. 2091; Pub. L. No. 95-566, Section 2, 92 Stat. 2402; Pub. L. No. 96-374, Section 402(a), 94 Stat. 1401. The history of the reenactments make clear both Congress's and the university community's understanding that BEOGs (and similar student aid programs) are a critical source of institutional support.[43] Indeed, Representative Ford called them "the primary means through which Federal support is provided to institutions of postsecondary education." *Reauthorization of the Higher Education Act and Related Measures: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 96th Cong., 1st Sess., Pt. 3, 400 (1979); see *id.* at Pt. 4, 2.

Congress has been aware that the Department considered such aid to trigger Title IX coverage of recipient institutions. In 1975 it reviewed and declined to disapprove the Department's regulations directing that result. The Department's Title VI regulations were also amended in 1973 to include, in their Appendix, the provision that student receipt of BEOGs subjected institutions to Title VI coverage. See 34 C.F.R. Part 100 app. A. And although there is no comparable Title IX appendix of covered programs, the Commissioner of Education reiterated before a House subcommittee in 1978 that student receipt of federal education grants led to both Title VI and Title IX coverage. *Middle Income Student Assistance Act: Hearings on H.R. 10854 Before the Subcomm. on*

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[43] An index of such statements and testimony is attached at App. C, *infra*.

Postsecondary Education of the House Comm. on Education and Labor, 95th Cong., 2d Sess. 222-223 (1978).

This consistent post-enactment history underscores what is already clear from the language and history of Title IX. As this Court stated in *North Haven*, *supra*, 456 U.S. at 535:

> 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."

D. The Legislative History Of Title VI Supports The Conclusion That Colleges "Receiv[e] Federal Financial Assistance" When The Federal Government Pays For The Education Of Their Students

Petitioners argue (Br. 28-33) that the legislative history of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*—on which Title IX was in large part based (see *Cannon* v. *University of Chicago*, 441 U.S. 677, 696 (1979))—also demonstrates a congressional intent to exempt from nondiscrimination laws assistance paid directly to student beneficiaries. In fact, the history of Title VI shows that Congress intended that title to reach schools whose students receive direct federal aid for their education.

Title VI expresses the national policy that "discrimination on the ground of race * * * shall not occur in connection with programs and activities receiving Federal financial assistance" (H.R. Rep. No. 914, 88th Cong., 1st Sess. 25 (1963)). As is true in the case of Title IX, Congress did not expressly define the phrase "receiving Federal financial assistance."[44] The legislative history nonetheless shows that Congress recognized its application to colleges like Grove City.

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[44] Opponents of Title VI noted this omission. 110 Cong. Rec. 9084, 9094 (1964) (remarks of Sen. Gore); *id.* at 13382, 13415 (remarks of Sen. McClellan).

The application of Title VI to a vast array of programs, including many in the field of education, was noted in both the legislative hearings and floor debates. Appearing before a House subcommittee, HEW Secretary Celebrezze provided a list of HEW programs that would be covered by Title VI. *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 1537-1538 (1963) ("*1963 Hearings*"). The list included "Loans to college students" and "National defense fellowships." Secretary Celebrezze also stated that Title VI would authorize HEW to withhold NDEA scholarships from students who attended segregated universities (*id.* at 1541).[45]

In the Senate, both opponents and supporters of the bill approved by the House indicated that Title VI would apply to schools whose students received direct federal education payments. Senator McClellan, describing programs that would be subject to Title VI, noted that the National Defense Education Act authorized "direct loans to college students and private schools, fellowships for graduate students and grants and contracts with private institutions" (110 Cong. Rec. 13388 (1964)). And in response to a question by Senator Gore about why religious discrimination was not forbidden, Senator Ervin noted that under the National Defense Education Act,

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[45] Secretary Celebrezze stated that "[a]ll our payments are to the institution, and if the institutions are going to be segregated * * * we will not give them funds." *1963 Hearings*, *supra*, at 1541. He then assented to Rep. Rodino's statement that Title VI gave "broad and sweeping power" to "withhold funds in most any program that you administer where there is direct or indirect financial assistance" (*id.* at 1542).

Petitioners note (Br. 29-30) the omission of the language "direct or indirect" in the bill that emerged from the committee after Celebrezze's testimony. Petitioners cite nothing in the legislative history to support their interpretation of this change. At least one Senator commenting on the bill approved by the House expressly rejected petitioners' contention that the bill excluded indirect funding from Title VI. See 110 Cong. Rec. 9084 (1964) (remarks of Sen Gore).

Congress made grants to individuals for tuition at religious schools (*id.* at 9088). Senator Ervin clearly envisioned that such grants would subject religious schools to Title VI coverage.

Many congressmen referred in floor debates to lists (prepared by the Library of Congress and the Department of Justice) of the kinds of federal aid affected by Title VI.[46] Some involved the payment of government funds to the student's institution. Other listed programs, however, involved or had statutory authority for direct payments to students. *E.g.*, National Defense Fellowships (20 U.S.C. (1958 ed. & Supp. V 1959-1963) 461-465), Foreign Language Fellowships (20 U.S.C. (1958 ed.) 511(b)), Public Health Traineeships (42 U.S.C. (1958 ed. & Supp. V 1959-1963) 242d), and National Science Foundation Fellowships (42 U.S.C. (1958 ed. & Supp. V 1959-1963) 1869).

The various comments collected by petitioners about Title VI's application to individual beneficiaries do not support the conclusion that Grove City is not a recipient of federal assistance. Remarks by Senator Humphrey (110 Cong. Rec. 6545 (1964)) and a letter from Attorney General Kennedy (*id.* at 10075-10076) suggest that people collecting social security and farmers getting direct federal aid would not be subject to Title VI. Obviously Title VI was not designed to authorize cutting off funds to these individual recipients if they engaged in racial discrimination.[47] Similarly, a letter from Deputy Attorney General Katzenbach states that an *individual* who receives direct federal payments such as social security would not be a "program or activity" under Title VI.

[46] See, *e.g.*, 110 Cong. Rec. 13131 (1964) (list prepared by Library of Congress and introduced by Sen. Gore); *id.* at 13381-13382 (list prepared by the Department of Justice and introduced by Sen. McClellan); *id.* at 7085 (list of affected education programs presented by Sen. Sparkman); see also H.R. Rep. No. 914, *supra*, at 104-106 (Separate Minority Views of Reps. Poff and Cramer).

[47] 110 Cong. Rec. 6545 (1964) (Sen. Humphrey); *id.* at 10076 (Attorney General Kennedy).

1963 Hearings, *supra*, at 2773. But these comments are not relevant to the issue whether Grove City receives federal financial assistance by virtue of the award of BEOGs to its students. The types of aid referred to in Katzenbach's letter and by Senator Ribicoff on the Senate floor (110 Cong. Rec. 8424 (1964)) involved unrestricted payments from the government to individuals. They are altogether different from BEOGs, which are conditioned on a student's enrollment and continuing study in the educational institution that certifies eligibility for the grants.[18]

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[18] See page 4, *supra*.

Petitioners claim (Br. 33) that Title VI was not intended to apply to the War Orphans' Educational Assistance Act, Pub. L. No. 85-857, 72 Stat. 1192 (codified at 38 U.S.C. 1701 *et seq.*). But it is by no means clear that Senator Humphrey's statement cited by petitioners (110 Cong. Rec. 11848 (1964)) refers to the educational benefits provided by the Act. It is in fact more likely that Senator Humphrey had in mind a number of provisions for unrestricted payments directly to individuals that are analogous to Social Security payments. See 38 U.S.C. (1958 ed. & Supp. V 1959-1963) 401 *et seq.* (dependency and indemnity compensation to widows, children, and parents for service-connected death of veteran); 38 U.S.C. (1958 ed. & Supp. V 1959-1963) 531-543 (payment of pensions for non-service-connected disability or death to children or widow of veteran).

Even if Senator Humphrey had referred to the War Orphans' Educational Assistance Act, it is open to doubt whether his conclusion of Title VI's inapplicability was universally shared. The Veterans Administration determined that Title VI applied to this program in regulations issued in 1968. 33 Fed. Reg. 10516 (1968). And in *Bob Jones University* v. *Johnson*, *supra*, the court affirmed the Veterans Administration's reliance on these regulations to conclude that a university was subject to Title VI if it enrolled veterans receiving educational benefits analogous to those provided by the War Orphans' Educational Assistance Act.

II. THE DEPARTMENT MAY PROPERLY TERMINATE ASSISTANCE TO GROVE CITY BECAUSE IT REFUSED TO EXECUTE AN ASSURANCE OF COMPLIANCE WITH TITLE IX

Petitioners argue that even if Grove City does receive federal financial assistance and is subject to the requirements of Title IX, the court of appeals erred in upholding termination of student grants when the College refused to execute an Assurance of Compliance. They claim (Br. 38-42) that the Department's Form 639 by its terms is inconsistent with the program-specific limitation of Title IX. They also argue (Br. 42-47) that student assistance cannot be terminated absent proof of actual discrimination. Both of these contentions are without merit.

A. The Department's Assurance Requirement Is Consistent With The Program-Specific Limitation Of Title IX

As was true of the employment discrimination regulations upheld in *North Haven*,[49] the Assurance of Compliance form (see note 3, *supra*) and the Department's assurance regulation are consistent with the program-specific limitation on Title IX coverage. Form 639 itself simply requires an applicant for assistance to state that it will "[c]omply, *to the extent applicable* to it, with Title IX * * * and all *applicable* requirements imposed by * * *

[49] The Court in *North Haven* concluded (456 U.S. at 538) that the employment regulations were not "inconsistent with Title IX's program-specific character" because they were limited by 34 C.F.R. 106.1 (1980), which states their general purpose:

> to effectuate title IX[,] * * * which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance * * *.

The Court also noted that "HEW's comments accompanying publication of its final Title IX regulations * * * indicated its intent that the Title IX regulations be interpreted in" a program-specific fashion. 456 U.S. at 538-539.

regulation" (Pet. App. A126; emphasis added). The explanation accompanying the form declares "that each education program or activity operated by the applicant * * * to which Title IX * * * [and the regulations] *apply* [must] be operated in compliance with [the regulations]" (Pet. App. A130; emphasis added). The regulations require an assurance "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" (34 C.F.R. 106.4(a); emphasis added). The phrase "this part" refers to the Title IX regulations in their entirety, which are restricted in their application to "each education program or activity operated by [a] recipient which receives or benefits from federal financial assistance" (34 C.F.R. 106.11).

Subpart D of the Title IX regulations (34 C.F.R. 106.31-106.42), which "sets forth the general rules with respect to prohibited discrimination in educational programs and activities" (40 Fed. Reg. 24128 (1975)), deals separately with various programs operated by institutions of higher education: "Housing" (34 C.F.R. 106.32), "Access to course offerings" (34 C.F.R. 106.34), "*Financial assistance*" (34 C.F.R. 106.37; emphasis added), "Athletics" (34 C.F.R. 106.41), and so on. It includes no indication that schools subject to the directives of Section 106.37 ("Financial assistance") are thereby covered by all other provisions in the regulations. As Judge Becker noted in his concurring opinion in the court of appeals: "[T]he 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'" (Pet. App. A42; emphasis in original).

It is true, as petitioners point out (Br. 39-40 & n.40), that HEW Secretary Weinberger at the 1975 Hearings gave a more expansive view of the scope of the Title IX regulations than is now justified in light of this Court's decision in *North Haven*. See *1975 Hearings*,

supra, at 438, 485. But in *North Haven* this Court specifically referred to Weinberger's testimony and noted that the Department's views with respect to program specificity had "fluctuated" (456 U.S. at 539 n.29); it nonetheless found the regulations consistent with Title IX's program-specific character. Since that decision the Department has adhered to the Court's recommended reading of the regulations, which is entirely consistent with their explicit terms.[50] We see no reason to reconstruct for the assurance requirement an interpretation rejected by this Court and the Department, and out of step with the language of the statute.

B. Title IX Authorizes Termination Of Federal Assistance When A Recipient Refuses To Execute An Assurance Of Compliance

1. The Department of Education furnishes financial assistance to thousands of educational institutions. The passage of Title IX, like the earlier enactment of Title VI and the later adoption of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. (Supp. V) 794), imposed on the Department an obligation to ensure that federal assistance not be granted to recipients who engage in unlawful discrimination. Section 902 of Title IX directs the Department (20 U.S.C. 1682):

> to effectuate the provisions of section [901] * * * by issuing rules, regulations, or orders of general

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[50] As we stated in our response to Hillsdale College's petition for a writ of certiorari in No. 82-1538 (Brief for the Federal Respondents at 9):

> The Department does not contend that execution of an assurance acknowledges Title IX coverage of an entire institution regardless of the nature of the federal financial assistance. Rather, the Department agrees with the court of appeals that Title IX's nondiscrimination requirements apply only to those educational programs and activities of an institution that receive federal financial assistance. Accordingly, assurances of compliance must also be written and construed in a program-specific manner.

> applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance * * *. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of * * * 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 * * * or (2) by any other means authorized by law * * *.

The Department—like other federal agencies with large grant programs[51]—has adopted regulations requiring recipients to assure compliance with the nondiscrimination statutes and their implementing regulations.

The good faith representations provided by the Assurance of Compliance are intended to substitute, as a threshold matter, for departmental inspections and other more intrusive methods of enforcement. As HEW Secretary Weinberger testified, when Congress reviewed the Department's regulations in 1975 (*1975 Hearings*, *supra*, at 464-465):

> We chose [an approach] that requires the universities and colleges, first of all, to examine the law and the regulation and, second, to see if they are in compliance and keep the data to help in enforcement and help them answer charges or complaints that may be made by individuals and, third, to set up some kind of internal grievance procedure of their own so we can minimize the Federal enforcement effort and get the best kind of enforcement, which is voluntary compliance.
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> * * * * *
>
> [W]e believed voluntary enforcement and provisions that * * * direct the colleges to get enforcement of this kind o[n] their own are preferable to

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[51] See, *e.g.*, 7 C.F.R. 15.4 (DOA); 14 C.F.R. 1250.104 (NASA); 22 C.F.R. 141.4 (DOS); 22 C.F.R. 209.5 (AID); 29 C.F.R. 31.6 (DOL); 38 C.F.R. 18.4 (VA); 40 C.F.R. 7.6 (EPA); 45 C.F.R. 611.4 (NSF); 49 C.F.R. 21.7 (DOT).

> setting up a large Government police force to go in and gather its own data and do its own rather rigid enforcement.

2. Petitioners' contention that the Department may terminate assistance only after a finding of actual discrimination has no basis in the language of Section 902, which authorizes termination to effect "[c]ompliance with *any* requirement adopted pursuant to this section" (emphasis added). It would, moreover, completely frustrate the regulations' emphasis on voluntary compliance. Recipient institutions could simply ignore the demands of the statute and gamble that the inadequacy of enforcement resources would insulate them from sanctions. They could fail to establish the grievance procedure required by 34 C.F.R. 106.8. They could also—without fear of termination—withhold from the Department the information necessary for it to establish a violation.[52]

It is true (see Pet. Br. 42-43, 47) that termination of assistance should be a remedy of last resort. It is also important that recipients be afforded procedural safeguards, such as the public hearing provided by Section 902, before termination is effected (see Pet. App. Br. 45). But the Department in this case attempted to secure voluntary compliance with the assurance regulation on five different occasions (Tr. 33) before initiating enforcement proceedings. A hearing was then held, and an express finding made on the record that Grove City had failed to comply with the regulation. At the hearing Grove City had the opportunity to contest its coverage under Title IX, and it is now exercising its right to appeal the adverse determination of that issue. It cannot seriously be argued that the hearing process here was a "meaningless formality" (Pet. Br. 45).[53]

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[52] 34 C.F.R. 106.71 adopts certain Title VI regulations, including one that requires a recipient to keep records and provide access to records by Department officials involved in an investigation. 34 C.F.R. 100.6.

[53] Petitioners' argument that termination punishes innocent students for no good reason (Br. 47) proves too much. It will always

Petitioners rely heavily on the legislative history of Title VI for their contention that termination is improper absent a showing of actual discrimination. They point (Pet. Br. 43-46) to statements by proponents of that title designed to allay fears about the harshness of the termination remedy. See, *e.g.*, 110 Cong. Rec. 6749 (1964) (remarks of Sen. Humphrey). But those statements, made before any agency rulemaking was undertaken, prove little. Their focus on the most obvious of the rulemaking powers granted by Title VI—the power to adopt substantive nondiscrimination requirements—implies no intention to deny agencies the usual authority to prescribe regulations necessary to carry out their enforcement functions.

Petitioners' discussion of Title VI omits to mention that identical regulations under that law were upheld several years before Title IX was adopted. Like Section 902 of Title IX, Section 602 of Title VI (42 U.S.C. 2000d-1) authorizes each agency administering federal financial assistance to promulgate implementing regulations and to effect "[c]ompliance" with any such "requirement" by termination of assistance. The Title VI counterpart of 34 C.F.R. 106.4 was promulgated the same year Title VI was enacted. 45 C.F.R. 80.4 (1964). In *Gardner* v. *Alabama*, 385 F.2d 804 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968), HEW terminated five separate federal assistance programs when Alabama refused to execute the required assurance. The court of appeals found the "procedure of submitting an assurance form to be particularly appropriate" as a monitoring and enforcement mechanism, and "clearly * * * within * * * [the] rule-making power conferred * * * by statute" (*id.* at 817 & n.8). Accordingly it concluded that "[s]ince Alabama is presently in a state of noncompliance with

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be the case that termination of assistance will affect students innocent of any wrongdoing. Yet Congress determined that such a remedy was appropriate in order to ensure that federal funds were not used to support discrimination.

this regulation, the validity of the order * * * terminating funds * * * must be upheld" (*id.* at 817.)[54]

In any event, the issue in this case is not whether the 1964 Congress envisioned the adoption of an assurance-of-compliance regulation under Title VI. It is whether the 1972 Congress—acting after the Title VI regulation had been in effect for eight years and approved in *Gardner*—authorized a similar provision under Title IX. Petitioners point to no evidence in Title IX's legislative history suggesting the contrary. And Senator Bayh's introductory remarks emphasize that Congress understood the effect of its action. He stated (118 Cong. Rec. 5807 (1972)):

> Under this amendment, each Federal agency which extends Federal financial assistance is empowered to issue implementing rules and regulations effective after approval of the President. * * * Failure to comply with the regulations may result in the termination of funding.
>
> * * * * *
>
> The provisions have been tested under title VI of the 1964 Civil Rights Act for the last 8 years so that we have evidence of their effectiveness and flexibility.

III. THE APPLICATION OF TITLE IX TO THE COLLEGE DOES NOT INFRINGE THE FIRST AMENDMENT RIGHTS OF THE COLLEGE OR ITS STUDENTS

Petitioners argue (Br. 47-50) that conditioning federal funding on compliance with Title IX's prohibition against sex discrimination infringes First Amendment rights of

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[54] See also *United States* v. *New Hampshire*, 539 F.2d 277 (1st Cir.), cert. denied, 429 U.S. 1023 (1976) (upholding reporting requirement as a valid enforcement mechanism under Title VII); *United States* v. *El Camino Community College District*, 600 F.2d 1258, 1260 (9th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) (HEW is entitled to considerable latitude to collect data needed to fulfill its regulatory tasks under Title VI). Cf. *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507-509 (1943).

the College and its students to academic freedom and freedom of association.[55]

This Court has recognized some limits on state regulation of wholly privately funded institutions;[56] but it is well established that the government may attach reasonable conditions to grants of federal financial assistance that educational institutions are free to refuse. *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143 (1947); see *Regan* v. *Taxation With Representation*, No. 81-2338 (May 23, 1983).[57] As the Court pointed out in *Norwood* v. *Harrison*, 413 U.S. 455, 462 (1973), "[I]t is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must * * * receive state aid." The College has every right to return to its former policy of abstinence, decline to certify BEOG applications for students, and thereby refrain from supplementing its financial aid budget with federal grants; there is therefore no need to consider whether an outright ban on sex discrimination would be an unconstitutional interference by the federal government with the College's right to

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[55] Although Grove City College is affiliated with the Presbyterian Church, petitioners do not contend that the College's refusal to assure compliance with Title IX is based upon any religious tenet.

[56] For example, a state may not prohibit an individual from obtaining a private education either by making public education compulsory, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), or by pervasive regulation of the private school which effectively denies its right to exist, *Farrington* v. *Tokushige*, 273 U.S. 284, 298 (1927).

[57] Contrary to petitioners' assertion (Br. 41 & note 41), the Title IX regulations do not become illegally ambiguous merely because they do not spell out which of Grove City's programs or activities is covered by Title IX. Unlike *Pennhurst State School & Hospital* v. *Halderman*, *supra*, in this case the statute and regulations clearly apply to all programs or activities receiving federal financial assistance.

academic freedom. Cf. *Runyon* v. *McCrary*, 427 U.S. 160, 175-179 (1976); *Norwood* v. *Harrison*, *supra*, 413 U.S. at 461-463.[58] Similarly, students are free to take their federal grants to a school that complies with Title IX or, by refusing federal assistance in financing their education, to attend Grove City College.[59] Thus, the First Amendment rights of the College and its students have in no way been infringed.

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[58] A decision of that question would require considerably more specific allegations of the nature of federal interference than petitioners have offered. Petitioners contend that "the Department asserts control over the College's day-to-day operations, threatening to destroy its autonomy and eliminate its unique characteristics" (Br. 47). But all that the Department has asserted in this case is that the College must sign Form 639 and comply with Title IX and its regulations insofar as they apply—*i.e.*, in the operation of the College's student financial aid program. It is unlikely that those duties would touch in any way upon the College's ability to maintain freedom of teaching, research, and publication. Nor is the requirement that the College not discriminate on the basis of sex inconsistent with the school's professed ideals. See Pet. Br. 48. Thus, it may be doubted whether this case—even if it involved straightforward regulation rather than conditions attached to federal assistance—would involve any substantial issue of institutional academic freedom. See Finkin, *On "Institutional" Academic Freedom*, 61 Tex. L. Rev. 817 (1983).

[59] See also *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532, 535-536 (E.D. N.C. 1977), *aff'd*, 435 U.S. 962 (1978).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

CHARLES J. COOPER
Deputy Assistant Attorney General

JOHN H. GARVEY
Assistant to the Solicitor General

BRIAN K. LANDSBERG
Attorney

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APPENDIX A

20 U.S.C. (Supp. V) § 1070a. Basic educational opportunity grants: amount and determinations; applications

(a) Pell grants; basic grant formula; reduction schedule; limitations; period of receipt of basic grants; noncredit and remedial courses

(1)(A) The Secretary shall, during the period beginning July 1, 1972, and ending September 30, 1985, pay to each eligible student (defined in accordance with section 1091 of this title) for each academic year during which that student is in attendance at an institution of higher education, as an undergraduate, a basic grant in the amount for which that student is eligible, as determined pursuant to paragraph (2).

(B) The purpose of this subpart is to provide a basic grant that (i) as determined under paragraph (2), will meet in academic year 1985-1986, 70 per centum of a student's cost of attendance not in excess of $3,700; and (ii) in combination with reasonable parental or independent student contribution and supplemented by the programs authorized under subparts 2 and 3 of this part, will meet 75 per centum of a student's cost of attendance, unless the institution determines that a greater amount of assistance would better serve the purposes of section 1070 of this title.

(C) Basic grants made under this subpart shall be known as "Pell Grants".

(2)(A)(i) The amount of the basic grant for a student eligible under this part shall be—

(I) $1,900 for academic year 1981-1982,
(II) $2,100 for academic year 1982-1983,
(III) $2,300 for academic year 1983-1984,

(IV) $2,500 for academic year 1984-1985, and
(V) $2,600 for academic year 1985-1986,

less an amount equal to the amount determined under section 1089 of this title to be the expected family contribution with respect to that student for that year.

* * * * *

(B)(i) The amount of a basic grant to which a student is entitled under this subpart for any academic year shall not exceed—

(I) 50 per centum of the cost of attendance (as defined under section 1089(d) of this title) at the institution at which the student is in attendance for that year, when the maximum grant is less than or equal to $1,900;

(II) 55 per centum of such cost of attendance when the maximum basic grant is more than $1,900 but is less than $2,100;

(III) 60 per centum of such cost of attendance when the maximum basic grant is at least $2,100 but is less than $2,300;

(IV) 65 per centum of such cost of attendance when the maximum basic grant is at least $2,300 but is less than $2,600; and

(V) 70 per centum of such cost of attendance when the maximum basic grant is $2,600.

(ii) No basic grant under this subpart shall exceed the difference between the expected family contribution for a student and the cost of attendance at the institution at which that student is in attendance. If with respect to any student, it is determined that the amount of a basic grant plus the amount of the expected family contribution for that student exceeds the cost of attendance for that year, the amount of the basic grant shall be reduced until the combination of expected family contribution and the amount of the basic grant does not exceed the cost of attendance at such institution.

(iii) No basic grant shall be awarded to a student under this subpart if the amount of that grant for that student as determined under this paragraph for any academic year is less than $200. Pursuant to criteria established by the Secretary by regulation, the institution of higher education at which a student is in attendance may award a basic grant of less than $200 upon a determination that the amount of the basic grant for that student is less than $200 because of the requirement of division (i) and that, due to exceptional circumstances, this reduced grant should be made in order to enable the student to benefit from postsecondary education.

(iv) Repealed. Pub. L. 96-374, title IV, § 402(c)(3), Oct. 3, 1980, 94 Stat. 1402

(3) The period during which a student may receive basic grants shall be the period required for the completion of the first undergraduate baccalaureate course of study being pursued by that student at the institution at which the student is in attendance. * * *

* * * * *

(b) Payments; insufficient available funds, entitlements; excess funds

(1) The Secretary shall from time to time set dates by which students must file applications for basic grants under this subpart.

(2) Each student desiring a basic grant for any year must file an application therefor containing such information and assurances as the Secretary may deem necessary to enable him to carry out his functions and responsibilities under this subpart.

(3)(A) Payments under this section shall be made in accordance with regulations promulgated by the Secretary for such purpose, in such manner as will best accomplish the purposes of this section.

* * * * *

(c) Agreements by institutions of higher education with Secretary to disburse amounts to students

Any institution of higher education which enters into an agreement with the Secretary to disburse to students attending that institution the amounts those students are eligible to receive under this subpart shall not be deemed, by virtue of such agreement, a contractor maintaining a system of records to accomplish a function of the Secretary.

(d), (e). Repealed. Pub. L. 96-374, title IV, § 402(h), Oct. 3, 1980, 94 Stat. 1404

APPENDIX B

Subpart A—Scope, Purpose and General Definitions

34 C.F.R. 690.1 Scope and purpose.

The Pell Grant Program awards grants to help financially needy students meet their costs of postsecondary education.

* * * * *

34 C.F.R. 690.3 Special terms.

(a) Eligible program: An undergraduate program of education or training which—

(1) Admits as regular students only persons who—

(i) Have a high school diploma.

(ii) Have a General Education Development Certificate (G.E.D.) or a State certificate received after passing a State-authorized examination which the State recognizes as the equivalent of a high school diploma, or

(iii) Are beyond the age of compulsory school attendance in the State in which the institution is located, and have the ability to benefit from the education or training offered; and

(2) (i) Leads to a bachelor, associate or undergraduate professional degree,

(ii) Is at least a two-year program which is acceptable for full credit toward a bachelor degree,

(iii) Is at least a 1 year program leading to a certificate or degree, which prepares students for gainful employment in a recognized occupation. (A 1-year program is defined in 34 CFR Part 668, Subpart A), or

(iv) Is, for a proprietary or postsecondary vocational institution, at least a six-month program leading to a certificate or degree, which prepares students for gainful employment in a recognized

occupation. (A six-month program is defined in 34 CFR Part 668, Subpart A).

* * * * *

(c) *Regular student*: A person who enrolls in an eligible program at an institution of higher education for the purpose of obtaining a degree or certificate.

* * * * *

34 C.F.R. 690.4 Eligible student.

(a) A student is eligible to receive a Pell Grant if the student—

(1) Is a regular student.

(2) Is enrolled as at least a half-time undergraduate student at an institution of higher education;

(3) Is enrolled in an eligible program as a regular student, as defined in § 690.3; and

(4) (i) Is a U.S. citizen or National, * * *

* * * * *

34 C.F.R. 690.5 Duration of student eligibility.

A student is eligible to receive a Pell Grant for the period of time required to complete the first undergraduate baccalaureate course of study being pursued by that student.

34 C.F.R. 690.6 Pell Grant payments from more than one institution.

A student will not be entitled to receive Pell Grant payments concurrently from more than one institution or from the Secretary and an institution.

34 C.F.R. 690.7 Institutional eligibility.

(a) (1) An institution of higher education is eligible to participate in the Pell Grant Program if it—

(i) Meets the appropriate definition set forth in 34 CFR 668, Subpart A,

(ii) Enters into a program participation agreement with the Secretary, and

(iii) Complies with that agreement and with the applicable provisions of 34 CFR Part 668 of this title, "Student Assistance General Provisions."

(2) If an institution becomes eligible during an award year, a student enrolled and attending that institution will be eligible to receive a Pell Grant for the payment period during which the institution became eligible and any subsequent payment period.

(b)(1) An institution of higher education becomes ineligible to participate in the Pell Grant Program if it no longer meets the applicable definition set forth in Part 668 of this title, or if its eligibility is terminated under the procedures set forth for terminating institutions in Part 668 of this title.

(2) If an institution becomes ineligible during an award year, an eligible student who was attending the institution and who submitted a valid SER to the institution, or to the Secretary if the institution participates under the Alternate Disbursement System (ADS), before the date the institution became ineligible, will be paid a Pell Grant for that award year for—

(i) The payment period that the student completed before the institution became ineligible, and

(ii) The payment period in which the institution became ineligible.

(c) An institution participating in the program under ADS which becomes ineligible must provide the Secretary with the name and enrollment status of each student who applied for and was determined eligible for a Pell Grant who was attending the institution when its eligibility was terminated.

(d) An institution participating in the program under the Regular Disbursement System which becomes ineligible must supply to the Secretary—

(1) The name and enrollment status of each eligible student who, during the award year, submitted a valid SER to the institution before it become ineligible.

(2) The amount of funds paid to each Pell Grant recipient for that award year.

(3) The amount due to each student eligible to receive a Pell Grant through the end of the payment period; and

(4) An accounting of the Pell Grant expenditures for that award year to the date of termination.

* * * * *

Subpart E—Costs of Attendance

34 C.F.R. 690.51 Allowable costs of attendance—general.

(a) Except as provided in §§ 690.54-690.58, a student's cost of attendance means—

(1) The tuition and fees charged to a full-time undergraduate student for an academic year by the institution he or she is attending as determined under § 690.52;

(2) Room and board costs for an academic year as determined under § 690.53; and

(3) An allowance of $400 for books, supplies, and miscellaneous expenses for an academic year.

(b) An institution must be able to justify and document the cost of attendance figures established under this subpart.

* * * * *

Subpart F—Determination of Pell Grant Awards

34 C.F.R. 690.61 Submission process and deadline for Student Eligibility Report (SER).

(a)(1) A student applies for a Pell Grant by submitting a valid "Student Eligibility Report" (SER) to his or her institution or to the Secretary, if that institution is participating in the Pell Grant Program under the Alternate Disbursement System (ADS).

(2) The SER is considered valid only if all information used in the calculation of the eligibility index is complete and accurate when the application was signed. Institutions are entitled to rely on SER information except under conditions set forth in § 690.77.

(b) Except as noted in § 690.77, to receive a Pell Grant, a student who enrolls before May 1 of an award year must submit the SER to his or her institution on or before May 31 of that award year.

A student who enrolls for the first time in the award year on or after May 1 of that award year may submit the SER to the institution on or before June 30 of that award year.

(c) A student attending an institution participating in the Pell Grant Program under the ADS has an additional ten days to submit the SER to the Secretary: June 10 for those who enroll before May 1, and July 10 for those who enroll on or after May 1.

(d) A student who submits an SER to an institution when he or she is no longer enrolled and eligible for payment at that institution may not be paid a Pell Grant.

* * * * *

Subpart G—Administration of Grant Payments—Regular Disbursement System

34 C.F.R. 690.71 Scope.

This subpart deals with program administration by an institution of higher education that has entered into an agreement with the Secretary to calculate and pay Pell Grant awards.

34 C.F.R. 690.72 Institutional agreement—Regular Disbursement System (RDS).

(a) The Secretary may enter into an agreement with an institution of higher education under which the institution will calculate and pay Pell Grants to its students. The agreement will be on a standard form provided by the Secretary and will contain the necessary terms to carry out this part.

(b) The Secretary will send a Payment Schedule for each award year to an institution that has entered into an agreement under paragraph (a) of this section.

34 C.F.R. 690.73 Termination of agreement—Regular Disbursement System.

(a) Termination by the Secretary. The Secretary may terminate the agreement with an institution by giving—

(1) 30 days written notice; or

(2) Less than 30 days written notice if it is necessary to prevent the likelihood of a substantial loss of funds to the Federal government or to students.

(b) Information provided. The institution must provide the following information to the Secretary if the Secretary terminates the agreement:

(1) The name and enrollment status of each eligible student who submitted a valid SER to the institution before the termination date;

(2) The amount of funds the institution paid to Pell Grant recipients for the award year in which the agreement is terminated;

(3) The amount due to each student eligible to receive a Pell Grant through the end of the award year; and

(4) An accounting of Pell Grant expenditures to the date of termination.

(c) Termination by the institution. The institution may terminate the agreement by giving the Secretary written notice. The termination becomes effective on June 30 of that award year. The institution must carry out the agreement for the remainder of the award year.

(d) Termination because of a change in ownership which results in a change of control. The agreement automatically terminates when an institution changes ownership which results in a change of control. The Secretary will enter into an agreement with the new owner if the institution complies with requirements set forth in Subpart B of the Student Assistance General Provisions (34 CFR Part 668).

(e) If an agreement is terminated, the institution's eligibility as discussed in § 690.7 is not terminated but the Secretary will pay an institution's students ONLY if the institution enters into an ADS agreement (See § 690.92.).

34 C.F.R. 690.74 Advancement of funds to institutions.

The Secretary will advance funds for each award year, from time to time, to RDS institutions, based on his or her estimate of the institution's need for funds to pay Pell Grants to its students.

34 C.F.R. 690.75 Determination of eligibility for payment.

(a) An institution may pay a Pell Grant to a student only after it determines that the student—

(1) Meets the eligibility requirements set forth in § 690.4;

(2) Is maintaining satisfactory progress in his or her course of study;

(3) Is not in default on any National Defense/Direct Student Loan made by that institution or on any Guaranteed Student Loan or Parent Loan for Undergraduate Students (PLUS) received to meet the cost of attendance at that institution; and

(4) Does not owe a refund on a Pell Grant, a Supplemental Grant or a State Student Incentive Grant received to meet the cost of attending that institution.

(b)(1) Before making any payment to a student, the institution must confirm that he or she continues to meet the criteria set forth in paragraph (a) of this section.

(2) However, if an eligible student submits an SER to the institution and becomes ineligible before receiving a payment, the institution must pay the student only the amount which it determines could have been used for educational purposes before the student became ineligible.

(c) If an institution determines at the beginning of a payment period that a student is not maintaining satis-

factory progress, but reverses itself BEFORE the end of the payment period, the institution may pay a Pell Grant to the student for the entire payment period.

(d) If an institution determines at the beginning of a payment period that a student is not maintaining satisfactory progress, but reverses itself AFTER the end of the payment period, the institution may neither pay the student a Pell Grant for that payment period nor make adjustments in subsequent Pell Grant payments to compensate for the loss of aid for that period.

(e) Conditions under which students who are overpaid grants may continue to receive Pell Grants are [as] follows:

(1) Overpayment of a Pell Grant. If an institution makes an overpayment of a Pell Grant to a student, it may continue to make Pell Grant payments to that student if (i) the student is otherwise eligible; and (ii) it can eliminate the overpayment in the award year in which it occurred by adjusting the subsequent Pell Grant payments for that award year.

(2) Overpayment of a Pell Grant due to institutional error. In addition to the exception provided in paragraph (e)(1) of this section, if the institution makes an overpayment of Pell Grant to a student as a result of its own error, it may continue to make payments to that student if;

(i) The student is otherwise eligible, and

(ii) The student acknowledges in writing the amount of overpayment and agrees to repay it in a reasonable period of time.

(3) Overpayment on a Supplemental Grant. An institution may continue to make Pell Grant payments to a student who receives an overpayment on a Supplemental Grant if:

(i) The student is otherwise eligible, and

(ii) It can eliminate the overpayment by adjusting subsequent financial aid payments (other than Pell Grants) in the same award year in which it occurred.

(f) An institution, in determining whether a student is in default on a loan made under the Guaranteed Student Loan Program or the PLUS Program, may rely upon the student's written statement that he or she is not in default unless the institution has information to the contrary.

(g) Conditions under which students who are in default on loans made for attendance at that institution may receive Pell Grants are as follows:

(1) Guaranteed Student Loans and Parent Loans for Undergraduate Student (PLUS). An institution may pay a Pell Grant to a student who is in default on a Guaranteed Student Loan or a PLUS Loan if the Secretary (for federally insured loans) or a guarantee agency (for a loan insured by that guarantee agency) determines that the student has made satisfactory arrangements to repay the defaulted loan.

(2) National Defense Direct Student Loan. An institution may pay a Pell Grant to a student who is in default on a National Defense Direct Student Loan made at that institution, if the student has made arrangements, satisfactory to the institution, to repay the loan.

(3) The Secretary does not consider a loan made under the National Defense Student Loan, National Direct Student Loan, Guaranteed Student Loan, or Parent Loans for Undergraduate Students Program which is discharged in bankruptcy to be in default for purposes of this section.

(h) For purposes of this section, an overpayment of a grant means that a student received payment of a grant greater than the amount he or she was entitled to receive.

34 C.F.R. 690.76 Frequency of payment.

(a) In each payment period, an institution may pay a student at such times and in such installments as it determines will best meet the student's needs.

(b) Only one payment is required if a portion of an academic year occurring within one award year is less than three months.

(c) The institution may pay funds due a student for any completed period in one lump sum. The student's enrollment status will be determined according to work already completed.

34 C.F.R. 690.77 Verification of information on the SER—withholding of payments.

(a)(1) The Secretary may require that a student verify the information submitted on the application and included on the SER, by submitting appropriate documentation to the institution or to the Secretary.

(2) The Secretary may also require that the institution withhold payment of a student's grant until the institution or the Secretary determines that the student has supplied the correct information.

(b) If any institution believes that any information on the SER used in calculating the student's expected family contribution is inaccurate, or if the application is chosen by the Secretary for verification, the institution must request that the student verify the information on the SER.

(c) The Secretary will establish and publish—

(1) Procedures to be used in verifying information for selected students ("Validation Procedures"), and

(2) The conditions under which payments will be made for these students.

(d)(1) If a student makes a correction which results in a change in his or her expected family contribution, the student must submit the SER to the institution, and the institution must recalculate the student's award based on the verified SER. Any overpayment must be repaid by the student.

(2) If the documentation requested by the institution under this section does not verify the information on the SER, or if the student does not correct the SER, the institution must forward the student's name, social security number and other relevant information to the Secretary in accordance with the procedures referenced in paragraph (c) of this section.

(e) A student corrects an SER by—

(1) Providing accurate information on the SER;

(2) Getting the appropriate signatures on the SER; and

(3) Re-submitting the SER to the Secretary.

(f) If an institution has documentation which indicates that the information used to calculate the student's expected family contribution on the SER is inaccurate, it may not pay a Pell Grant for any award year until the student corrects the error or verifies the data.

(g) If an institution believes, but cannot document, that inaccuracies exist on the SER, it may not withhold payments unless authorized by the Secretary. These cases must be forwarded to the Secretary.

(h)(1) If the Secretary requests documentation, the student must comply within a time period set by the Secretary.

(2)(i) If the student provides the requested documentation on time, he or she will be eligible for Pell Grant payments based upon the verified SER.

(ii) If the verified SER is submitted to the institution after the appropriate deadline as specified in § 690.61, but within an established time period to be determined by the Secretary, the student may be paid only up to the amount withheld because of the verification process.

(3) If the student does not provide the requested documentation within the established time period—

(i) The student will forfeit the Pell Grant for the award year,

(ii) Any grant payments received must be returned to the Secretary, and

(iii) No further Pell Grant applications will be processed for that student until documentation has been provided or the Secretary decides there is no longer need for documentation.

34 C.F.R. 690.78 Method of disbursement—by check or credit to student's account.

(a) The institution may pay a student either directly by check or by crediting his or her account with the institution. The institution must notify the student of the amount of money he or she can expect to receive, and how he or she will be paid.

(b)(1) The institution may not make a payment to a student for a payment period until the student is registered for that period.

(2) The earliest an institution can directly pay a registered student is 10 days before the first day of classes of a payment period.

(3) The earliest an institution can credit a registered student's account is 3 weeks before the first day of classes of a payment period.

(c) The institution must return to the Pell Grant account any funds paid to a student who, before the first day of classes—

(1) Officially or unofficially withdraws, or

(2) Is expelled.

(d)(1) If an institution pays a student directly, it must notify him or her when it will pay the Pell Grant award.

(2) If a student does not pick up the check on time, the institution must keep that check for 15 days after the date the student's enrollment for that award year ends.

(3) If the student has not picked up the check at the end of the 15 day period, the institution may credit the student's account for any amount owed to it for the award year.

(4) A student forfeits the right to receive the proceeds of the check if he or she does not pick up the check by the end of the 15 day period.

(5) Notwithstanding paragraph (d)(4) of this section, the institution may, if it chooses, pay a student who did not pick up the check, through the next payment period.

34 C.F.R. 690.79 Educational purpose statement.

(a) An institution may not pay a Pell Grant unless the student files a statement of educational purpose with the institution in which the student declares that he or she will use Pell Grant funds solely for educational expenses connected with attendance at the institution.

(b) The Secretary considers the following statement as satisfying this requirement.

Statement of Educational Purpose

I declare that I will use any funds I receive under the Pell Grant program solely for expenses connected with attendance at

_____

(Name of Institution)

(Date) _____

(Signature) _____

34 C.F.R. 690.80 Recovery of overpayments.

(a)(1) The student is liable for any overpayment made to him or her.

(2) Also, the institution is liable for an overpayment it makes to a student if the regulations indicate that the payment should not have been made. The institution must restore those funds to the Pell Grant account even if it cannot collect the overpayment from the student.

(b) If an institution makes an overpayment for which it is not liable, it must help the Secretary recover the overpayment by—

(1) Making a reasonable effort to contact the student and recover the overpayment; and, [if] unsuccessful,

(2) Providing the Secretary with the student's name, social security number, amount of overpayment, and other relevant information.

34 C.F.R. 690.81 Recalculation of a Pell Grant award.

(a) Change in expected family contribution. (1) If the student's expected family contribution changes the institution must recalculate the Pell Grant Award.

(2) Except as provided in § 690.77(h)(ii), the institution must adjust the award and pay the student the amount he or she is entitled to for the award year if the expected family contribution is recalculated because of—

(i) A clerical or arithmetic error under § 690.15, or

(ii) Extraordinary circumstances which affect the expected family contribution under § 690.39 and § 690.48.

(3) If a student's expected family contribution is recalculated because of a correction of the information requested under § 690.12 or § 690.77, the student's Pell Grant for the award year must be adjusted. Where possible, the adjustment must be made within the same award year.

(4) If the recalculation takes place in a subsequent award year, the student will be

(i) Eligible to receive payment unless prohibited under the provisions of § 690.77(h) and

(ii) Required to return any overpayment at the time of recalculation.

(b) Change in enrollment status.

(1) If an institution decides that a student's enrollment status has changed during a payment period, it may (but is not required to) establish a policy under which the student's award may be recalculated.

(2) If such a policy is established, it must apply to all students.

(3) If a student's award is recalculated, the institution determines the total amount the student is entitled to for the entire payment period by taking into account—

(i) The portion of the payment period at the original enrollment status;

(ii) The portion of the payment period at the new enrollment status; and

(iii) Any change in the student's cost of attendance.

34 C.F.R. 690.82 Fiscal control and fund accounting procedures.

(a)(1)(i) An institution must receive and process all Pell Grant funds through one identifiable bank account.

(ii) This account may be an existing one (preferably one maintained for Federal funds) if the institution maintains adequate accounting records to account for the Pell Grants funds separately from the other funds in that account.

(iii) At no time may the Pell Grant funds in this bank account be less than the balance indicated in the institution's accounting records for these funds.

(2) The institution must account for the receipt and expenditure of Pell Grant funds in accordance with generally accepted accounting principles.

(b) A separate bank account for Pell Grant funds is not required. However, the institution must notify any bank in which it deposits Pell Grant funds of all accounts in that bank in which it deposits Federal funds. This notice can be given by either:

(i) Including in the name of the account the fact that Federal funds are deposited therein; or

(ii) Sending a letter to the bank listing the accounts in which Federal funds will be deposited. A copy of this letter must be retained in the institution's files.

(c) Except for funds received under § 690.10, funds received by an institution under this part are held in trust for the intended student beneficiaries and may not be used or hypothecated for any other purpose.

34 C.F.R. 690.83 Maintenance and retention of records.

(a) Each institution must maintain adequate records which include the fiscal and accounting records that are required under § 690.82 and records indicating—

(1) The eligibility of all enrolled students who have submitted a valid SER to the institution;

(2) The name, social security number, and amount paid to each recipient;

(3) The amount and date of each payment;

(4) The amount and date of any overpayment that has been restored to the program account;

(5) The "Student Eligibility Report" for each student;

(6) The student's cost of attendance;

(7) How the student's full or part-time enrollment status was determined; and

(8) The student's enrollment period.

(b)(1) The institution must make the records listed in paragraph (a) available for inspection by the Secretary's authorized representative at any reasonable time in the institution's offices. It must keep these records for five years after it submits an accounting of each award year's funds to the Secretary.

(2) An accounting of each award year's funds occurs when the institution submits to the Secretary the June 30 Progress Report for that award year. The June 30 Progress Report (ED Form 255-3) is the report on which an institution reports to the Secretary the total amount of money it has expended in the Pell Grant Program during an award year and the total number of Pell Grant recipients at that institution during that award year.

(c) The institution must keep records involved in any claim or expenditure questioned by Federal audit until resolution of any audit questions.

(d) An institution may substitute microfilm copies in lieu of original records in meeting the requirements of this section.

34 C.F.R. 690.84 Submission of reports.

The institution must submit the reports and information the Secretary requires in connection with the funds advanced to it and must comply with the procedures the Secretary finds necessary to ensure that the reports are correct.

34 C.F.R. 690.85 Audit and examination.

(a) Federal audits. The institution must give the Secretary, the Comptroller General of the United States, or

their duly authorized representatives, access to the records specified in § 690.82 and § 690.83 and to any other pertinent books, documents, papers, and records.

(b) Non-Federal audits. The institution must audit or have audited under its direction all Pell Grant Program transactions to determine at a minimum—

(1) The fiscal integrity of financial transactions and reports; and

(2) If such transactions are in compliance with the applicable laws and regulations. Such audits will be performed in accordance with the Department of Education's "Audit Guide" for the Pell Grant Program.

(3) The institution must have an audit performed at least once every two years.

(c) The institution must submit audit reports to the institution's local regional office of the Department of Education's Audit Agency. It must give the Audit Agency and the Secretary access to records or other documents necessary to the audit's review.

Subpart H—Administration of Grant Payments—Alternate Disbursement System

34 C.F.R. 690.91 Scope.

This subpart deals with program administration by an institution of higher education under the Alternate Disbursement System (ADS). Under the ADS, the Secretary calculates and pays the Pell Grant awards.

34 C.F.R. 690.92 Institutional agreement—Alternate Disbursement System (ADS).

(a) Under ADS, the Secretary will calculate and pay Pell Grant awards to students enrolled in an institution which has entered into an agreement to carry out this subpart.

(b) Under this agreement, the institution agrees to:

(1) Complete ED Form 304 for each eligible student as specified in § 690.94; and

(2) Maintain and keep records as specified in § 690.96.

34 C.F.R. 690.93 Change in ownership and change to the Regular Disbursement System (RDS).

(a) Change to RDS. The Secretary may enter into an agreement with an ADS institution which wishes to participate in the program under the Regular Disbursement System. However, the agreement will go into effect July 1 of the succeeding award year.

(b) Termination because of a change in ownership that results in a change in control.

(1) An ADS agreement terminates when an institution changes ownership that results in a change in control.

(2) The Secretary may enter into an agreement with the new owner if the institution complies with the requirements set forth in Subpart B of the Student Assistance General Provisions (34 CFR Part 668).

34 C.F.R. 690.94 Calculation and disbursement of awards by the Secretary of Education.

(a) An eligible student enrolled in an institution participating in the Pell Grant Program under the ADS applies to the Secretary for a Pell Grant according to the following procedures:

(1) The student submits an SER to his or her institution and obtains an ED Form 304 from the institution;

(2) The student completes the ED Form 304, including the statement of educational purpose described in § 690.79, and submits it to the institution;

(3) On the ED Form 304 the institution certifies that the student—

(i) Meets eligibility requirements of § 690.4,

(ii) Is maintaining satisfactory progress in his or her course of study,

(iii) Does not owe a refund on grants received for attendance at that institution under the Pell Grant, the Supplemental Grant, or the State Student Incentive Grant Programs, and

(iv) Is not in default on any National Defense/Direct Student Loan made by the institution or on any Guaranteed Student Loan received for attendance at that institution. (In determining whether a student is in default on a GSL, the institution may rely on a written statement provided by the student unless the institution has information to the contrary); and

(4) The institution returns the SER and ED Form 304 to the student, who then submits these documents to the Secretary. Both documents must be received by the Secretary on or before the deadline dates described in § 690.61.

(b) If an institution believes that the information on an SER may be in error, the institution must notify the student and request documentation or correction. Any case not resolved by the institution should be reported to the Secretary.

(c) The Secretary will calculate a student's award in accordance with Subpart F of this part and will pay the student once every payment period.

34 C.F.R. 690.95 Termination of enrollment and refund.

(a) The institution must inform the Secretary of the date when a student officially or unofficially withdraws or is expelled during a payment period for which that student was paid.

(b) A student who officially or unofficially withdraws or is expelled from an institution before completion of 50 percent of a payment period for which he or she has been paid, will refund a prorated portion of the payment as determined by the Secretary.

34 C.F.R. 690.96 Maintenance and retention of records.

(a) An institution under the ADS must establish and maintain for each award year—

(1) Records relating to each Pell Grant recipient's enrollment status, and attendance costs at the institution; and

(2) Records showing when each recipient was enrolled.

(b) The institution must make these records available at the geographic location where the student will receive his or her degree or certificate of course completion, and must keep them for five years from the end of the award year.

(c) The institution will make available to the Secretary, the Comptroller General of the United States, and their authorized representatives, pertinent books, documents, papers, and records for audit and examination during the five year retention period.

(d) An institution may substitute microfilm copies in lieu of original records in meeting the requirements of this section.

APPENDIX C

STATEMENTS BY MEMBERS OF CONGRESS

1. *Higher Education Amendments of 1971: Hearings on H.R. 32, H.R. 5191, H.R. 5192, et al. Before the Special Comm. on Education of the House Comm. on Education and Labor*, 92d Cong., 1st Sess., Pt. 1, 480 (1971) (remarks of Rep. Erlenborn)

2. 117 Cong. Rec. 37787 (1971) (remarks of Rep. Scheuer)

3. 118 Cong. Rec. 6007 (1972) (statement of Sen. Randolph summarizing the report of a study by the Appalachian Regional Commission)

4. S. Rep. No. 94-882, 94th Cong., 2d Sess. 10 (1976)

5. *Oversight Hearings on All Forms of Federal Student Financial Assistance: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 3 (1977) (statement of Chairman Ford)

6. *Higher Education Amendments of 1979: Hearings on S. 1839 Before the Subcomm. on Education, Arts and the Humanities of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess., Pt. 2, 278, 312, 313 (statements of Sens. Stafford, Javits, and Pell)

7. *Reauthorization of the Higher Education Act and Related Measures: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 96th Cong., 1st Sess., Pt. 3, 181-182, 218, 448 (statements of Chairman Ford)

8. *Id.* at 450 (remarks of Rep. Ashbrook)

STATEMENTS BY INSTITUTIONS

1. *Education Amendments of 1971: Hearings on S. 659 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess., Pt. 3, 1506 (1971) (testimony of Dr. Edgar Carlson, Executive Director, Minnesota Private College Council)

2. *Higher Education Amendments of 1971: Hearings on H.R. 32, H.R. 5191, H.R. 5192, et al. Before the Spe-*

cial Subcomm. on Education of the House Comm. on Education and Labor, 92d Cong., 1st Sess., Pt. 1, 151, 162 (1971) (report entitled *The Red and the Black* on the Financial Status, Present and Projected, of Private Institutions of Higher Learning presented by the Association of American Colleges. Using data based upon a survey of 72% of all private 4 year accredited colleges and universities, the report states that "grants directly to students" were the third most frequently preferred type of federal aid, following facilities grants and institutional grants.)

3. *Id.* at 231 (testimony of Dr. Jack E. Brookins, President, Southwestern Oregon Community College)

4. 117 Cong. Rec. 37805 (1971) (statement of Dr. Alice Rivlin, senior fellow, Brookings Institution, reprinted in the Record by Rep. Steiger)

5. *Higher Education Act Amendments of 1976: Hearings on H.R. 3470 and Related Proposals to Amend the Higher Education Act of 1965, as Amended Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st & 2d Sess's. 599-604 (1975 and 1976) (statement of Dr. Howard Bowen on behalf of the Association of American Colleges and the National Council on Independent Colleges and Universities)

6. *Id.* at 584 (1975) (statement by Miles M. Fisher IV on behalf of the National Association For Equal Opportunity In Higher Education)

7. *Oversight Hearings on All Forms of Federal Student Financial Assistance: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 624-625 (1977) (statement of Dr. Reginald Wilson, President, Wayne County Community College, on behalf of the Association of Community and Junior Colleges)

8. *Middle Income Student Assistance Act: Hearings on H.R. 10854 Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 95th Cong., 2d Sess. 141 (1978) (statement of Margaret

Gordon, Carnegie Council on Policy Studies in Higher Education)

9. *Higher Education Amendments of 1979: Hearings on S. 1839 Before the Subcomm. on Education, Arts, and the Humanities of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess., Pt. 2, 320 (1979) (statement of David M. Irwin, representing the State Association Executive Council of the National Association of Independent Colleges and Universities)

10. *Id.* at 614-615, 620 (statement of Dr. Carl Kaysen, Sloan Commission on Government and Higher Education)

11. *Reauthorization of the Higher Education Act and Related Measures: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 96th Cong., 1st Sess., Pt. 3, 253 (1979) (testimony of Richard Ramsden, Vice President, Administration and Finance, Brown University)

12. *Id.* at 422-423 (statement of Alfred B. Bonds, President, Baldwin-Wallace College)

13. *Id.* at 442-443 (statement of Dr. L. Guy Nees, President, Mount Vernon Nazarene College)

14. *Id.* at 531-532 (statement of Paul M. Orehovec, Director of Financial Aid, College of Wooster)

15. *Id.* at 539-540 (statement of Gary Rothman, Director of Student Financial Aid, Mount Vernon Nazarene College)

STATEMENTS BY HEW OFFICIALS

1. *Higher Education Act Amendments of 1976: Hearings on H.R. 3470 and Related Proposals to Amend the Higher Education Act of 1965, as Amended Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st & 2d Sess's. 799-801 (1976) (testimony of Virginia Trotter, Assistant Secretary for Education, HEW, and Virginia Smith, Office of Education, HEW)

2. *Middle Income Student Assistance Act: Hearings on H.R. 10854 Before the Subcomm. on Postsecondary*

Education of the House Comm. on Education and Labor, 95th Cong., 2d Sess. 222-223 (1978) (testimony of Commissioner of Education Ernest Boyer)

3. *Reauthorization of the Higher Education Act and Related Measures: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 96th Cong., 1st Sess., Pt. 3, 43-45, 52, 64-65 (1979) (statement of Michael O'Keefe, HEW)

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