St. Mary's Law Journal

Volume 16 | Number 4 Article 11

12-1-1985

Education - Title IX - Receipt by Private College Students of Basic Educational Opportunity Grants Constitutes Federal Financial Assistance to the Specific Program Benefited Thereby Requiring Compliance with Title IX Symposium on Education Law - Case Note.

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CASENOTE

EDUCATION—TITLE IX—Receipt By Private College Students of Basic Educational Opportunity Grants Constitutes Federal Financial Assistance to the Specific Program Benefited Thereby Requiring Compliance With Title IX

Grove City College v. Bell,
__ U.S. __, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984).

Grove City College, a private, coeducational, liberal arts institution, had, throughout its history, consistently declined any direct state or federal financial assistance.[1] Many students enrolled at Grove City College, however, had received Basic Educational Opportunity Grants (BEOG), under the Alternate Disbursement System of the Department of Education (Department).[2] Based on this fact, the Department determined that Grove City College was a recipient of federal financial assistance and ordered the college to file an Assurance of Compliance under section 902 of Title IX of the Education Amendments of 1972.[3] When Grove City College refused to

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1. *See* Grove City College v. Bell, __ U.S. __, __, 104 S. Ct. 1211, 1214, 79 L. Ed. 2d 516, 523 (1984).

2. *See id.* at __, 104 S. Ct. at 1214-15, 79 L. Ed. 2d at 523; *see also* 20 U.S.C. § 1070a (1982). The BEOG is a grant from the federal government to college students to aid in financing a student's education. *See id.* The grants are based on student financial need. *See id.* § 1070a(2). There are two methods of disbursement of BEOGs. *See* 34 C.F.R. § 690 (1983). Under the Regular Disbursement System, the Secretary of Education and the educational institution enter into an agreement in which the Secretary estimates the amount the institution will need for grants. The Secretary advances that sum to the institution, whereupon the institution selects eligible students and distributes the grants. *See id.* §§ 690.71-.85. Under the Alternate Disbursement System, the Secretary and the educational institution enter into an agreement in which the institution makes appropriate certifications to the Secretary, and the Secretary calculates and distributes the grant awards directly to eligible students. *See id.* §§ 690.91-.96.

3. *See* Grove City College v. Bell, __ U.S. __, __, 104 S. Ct. 1211, 1215, 79 L. Ed. 2d 516, 523-24 (1984); *see also* 20 U.S.C. § 1682 (1982). Section 1682 states:

Each Federal department and agency which is empowered to extend Federal financial

comply, the Department initiated administrative proceedings against the college.[4] An administrative law judge[5] issued an order terminating federal financial assistance until Grove City College corrected its noncompliance with Title IX.[6] Grove City College and four of its students then filed suit against the Secretary of Education in the District Court for the Western District of Pennsylvania to contest the Department's order.[7] The district court held

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

Id. Pursuant to this statute, the Department of Education promulgated regulations requiring institutions to submit an Assurance of Compliance to the Assistant Secretary of Education for each education program or activity receiving federal financial assistance. *See* 34 C.F.R. § 106.4 (1983). The Assurance states that the education program or activity receiving assistance is being operated in compliance with Title IX. *See id.* If the Assurance of Compliance submitted is not satisfactory to the Assistant Secretary, the Department may terminate assistance to the education program or activity until it corrects its noncompliance. *See id.*

4. *See* Grove City College v. Bell, __ U.S. __, __, 104 S. Ct. 1211, 1215, 79 L. Ed. 2d 516, 524 (1984). The Department initiated administrative proceedings under the Administrative Procedure Act. *See* 5 U.S.C. §§ 551-559 (1982) (general law for all administrative proceedings).

5. *See* 5 U.S.C. § 3105 (1982). This section requires administrative agencies to appoint administrative law judges needed for proceedings conducted in accordance with 5 U.S.C. §§ 556-557 (1982). *See id.* § 3105. Section 556 provides that administrative law judges are to preside over hearings conducted by administrative agencies. *See id.* § 556. Section 557 provides that the decision of the administrative law judge at the agency hearing is the decision of the agency conducting the hearing. *See id.* § 557.

6. *See* Grove City College v. Bell, __ U.S. __, __, 104 S. Ct. 1211, 1215, 79 L. Ed. 2d 516, 524 (1984).

7. *See* Grove City College v. Harris, 500 F. Supp. 253, 256 (W.D. Pa. 1980), *rev'd sub*

that the Department could not terminate federal aid to the students.[8] The Third Circuit Court of Appeals reversed, holding that the Department had acted properly when it terminated federal financial assistance to the students and the college.[9] Grove City College and the four students appealed to the United States Supreme Court seeking a reversal of the Third Circuit's decision.[10] Held—*Affirmed.* Receipt by private college students of BEOGs constitutes federal financial assistance to the specific program benefited, thereby requiring compliance with Title IX.[11]

Title IX of the Education Amendments of 1972 was enacted to prohibit discrimination based on sex in any education program or activity receiving federal financial assistance.[12] To enforce this primary objective, Title IX

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nom. Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), *aff'd*, __ U.S. __, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984). Grove City's refusal to complete an Assurance of Compliance was based on conscience and principle. *See id.* at 255. Grove City College contended that its participation in the BEOG program did not cause it to be a "recipient of Federal financial assistance" and that an interpretation of Title IX which allowed its application to the college was overbroad. *See id.* at 255.

8. *See* Grove City College v. Harris, 500 F. Supp. 253, 273 (W.D. Pa. 1980), *rev'd sub nom.* Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), *aff'd*, __ U.S. __, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984).

9. *See* Grove City College v. Bell, 687 F.2d 684, 705 (3d Cir. 1982), *aff'd*, __ U.S. __, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984).

10. *See* Grove City College v. Bell, __ U.S. __, __, 104 S. Ct. 1211, 1216, 79 L. Ed. 2d 516, 525 (1984).

11. *See id.* at __, 104 S. Ct. at 1215, 79 L. Ed. 2d at 523.

12. *See* 20 U.S.C. § 1681(a) (1982). The section provides, in pertinent part: "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 . . . ." *Id.* The legislative history of Title IX is sparse because the statute was introduced as a floor amendment, and there are no committee reports discussing its provisions. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523-30 (1982) (explains history of Title IX). Title IX was introduced into the Senate by Senator Bayh during debate on the Education Amendments of 1972. *See* 118 CONG. REC. 5803 (1972). The purpose of Title IX was "to avoid the use of federal resources to support discriminatory practices" and to provide citizens with "effective protection against those practices." *See* Cannon v. University of Chicago, 441 U.S. 677, 704 (1979); *see also* 117 CONG. REC. 39,252 (1971) (statement of Rep. Minton); 118 CONG. REC. 5806-07 (1972) (statement of Sen. Bayh). Title IX is modeled after Title VI of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000d (1982). Title VI reads in pertinent part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* As a result of the similarity in statutory construction and purpose between Titles IX and VI, the courts may look to the legislative history of Title VI and case law construing it to aid in interpreting Title IX. *See* Cannon v. University of Chicago, 441 U.S. 677, 696-99 (1979); Hillsdale College v. Department of H.E.W., 696 F.2d 418, 427 (6th Cir. 1982), *vacated*, __ U.S. __, 104 S. Ct. 1673, 80 L. Ed. 2d 149 (1984). *See generally* Note, *The Program Specific Reach of Title IX*, 83 COLUM. L. REV. 1210, 1222-26 (1983) (discussion of legislative histories of Titles VI and IX). Many cases have dealt with the types of claims covered by Title IX. *See, e.g.*, Brunswick

provides that the controlling agency, the Department of Education,[13] may secure compliance with its provisions by terminating assistance to non-complying institutions.[14] The Department also has the authority to promulgate and enforce regulations, pursuant to Title IX, that must be complied with by educational institutions receiving federal financial assistance.[15] One such regulation requires that educational institutions receiving federal financial assistance file an Assurance of Compliance.[16] The Assurance states that the education program or activity receiving federal monies is being operated in compliance with the provisions of Title IX and the regulations promulgated pursuant to the statute.[17]

The regulations and requirements arising out of Title IX apply to any education program or activity which receives federal financial assistance.[18]

School Bd. v. Califano, 449 F. Supp. 866, 870 (D. Me. 1978) (Title IX protects direct beneficiaries of or participants in federally aided education programs), *aff'd,* 593 F.2d 424 (1st Cir.), *cert. denied,* 444 U.S. 972 (1979); Alexander v. Yale Univ., 459 F. Supp. 1, 6 (D. Conn. 1977) (female student who received poor grade in course due to rejection of male professor's sexual demands protected by Title IX); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530 (1982) (Title IX protects persons employed by federally aided education programs). *But see, e.g.,* O'Connor v. Board of Educ., 545 F. Supp. 376, 384 (N.D. Ill. 1982) (female prohibited from playing on boy's basketball team at junior high school not allowed claim under Title IX); Alexander v. Yale Univ., 459 F. Supp. 1, 3 (D. Conn. 1977) (female student who suffered great emotional stress on learning another female student was subject of sexual harassment did not have claim under Title IX); Trent v. Perritt, 391 F. Supp. 171, 173 (S.D. Miss. 1975) (high school regulation prohibiting only males from wearing long hair did not constitute sex discrimination under Title IX).

13. *See* 20 U.S.C. § 3441 (1982). Power to promulgate and enforce regulations pursuant to Title IX was transferred from the Department of Health, Education, and Welfare to the Department of Education in 1979. *See id.*

14. *See id.* § 1682.

15. *See id.* § 1682 (Department authorized to issue and enforce rules and regulations to effectuate Title IX's provisions).

16. *See* 34 C.F.R. § 106.4(a) (1983). This provision states:

> Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

Id.

17. *See id.*

18. *See* 20 U.S.C. § 1681 (1982); *see also* Brunswick School Bd. v. Califano, 449 F. Supp. 866, 869 (D. Me. 1978) (recognizing Title IX protects students and other participants in education programs receiving federal aid), *aff'd,* 593 F.2d 424 (1st Cir.), *cert. denied,* 444 U.S. 972 (1979); Romeo Community Schools v. United States Dep't of H.E.W., 438 F. Supp. 1021, 1023

The Department, pursuant to its authority under Title IX,[19] has defined federal financial assistance as government aid extended to educational institutions or to students making payments to the institution.[20] Direct assistance, such as grants made directly to the institution,[21] and indirect assistance, such as grants awarded to students to finance their education at the institution,[22] come within the definition of federal financial assistance.[23] The Department has also, pursuant to its authority under Title IX, defined "recipient" of federal financial assistance as any education program or activity that receives or benefits from federal funds.[24] In applying this definition, the courts have held that there is no difference between direct and indirect aid in determining whether an institution is a recipient of federal financial assistance.[25]

Title IX's application to recipients of federal financial assistance is program specific in that it bans sex discrimination in any education program or activity receiving such assistance.[26] In addition, it limits the Department's

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(E.D. Mich. 1977) (Title IX covers students in programs receiving federal funds), *aff'd,* 600 F.2d 581 (6th Cir.), *cert. denied,* 444 U.S. 972 (1979); Kneeland v. Bloom Township High School Dist., 484 F. Supp. 1280, 1282 (N.D. Ill. 1980) (Title IX prohibition against sex discrimination applies to education programs receiving federal funds).

19. *See* 20 U.S.C. § 1682 (1982) (Department has authority to promulgate regulations to aid in enforcing Title IX).

20. *See* 34 C.F.R. § 106.2(g)(1)(ii) (1983). This provision states that federal financial assistance is a grant or loan of federal monies for "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. *See id.*

21. *See* Haffer v. Temple Univ., 524 F. Supp. 531, 540 (E.D. Pa. 1981) (federal funds granted directly to college constitute federal financial assistance), *aff'd,* 688 F.2d 14 (3d Cir. 1982).

22. *See* Norwood v. Harrison, 413 U.S. 455, 463-64 (1973) (textbooks given to students constitute federal financial assistance to the school, although indirect).

23. *See* 34 C.F.R. § 106.2(g)(1)(ii) (1983).

24. *See id.* § 106.2(h). This regulation states:

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

Id.

25. *See, e.g.,* Mueller v. Allen, __ U.S. __, __, 103 S. Ct. 3062, 3069, 77 L. Ed. 2d 721, 730 (1983) (statute allowing parents tax deduction for children's elementary and secondary school costs comparable to aid to schools); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 783 (1973) (tuition reimbursements given parents of children in private schools held to constitute aid to schools); Hillsdale College v. Department of H.E.W., 696 F.2d 418, 429-30 (6th Cir. 1982) (student receipt of federal student loans and grants constituted aid to school), *vacated,* __ U.S. __, 104 S. Ct. 1673, 80 L. Ed. 2d 149 (1984).

26. *See* 20 U.S.C. § 1681 (1982); *see also* 34 C.F.R. § 106.1 (1983) (recognizes that Title

authority to terminate financial assistance to the particular program which fails to comply with the regulations.[27] The definition of program, however, has never been adequately determined by a court.[28] Some courts have interpreted program under Title IX narrowly by holding that Title IX only applies to specific programs receiving federal financial assistance within an institution and not to the entire institution.[29] Alternatively, in at least two cases, program has been given a broad interpretation, with the court holding that Title IX applies to an entire institution rather than the specific program directly benefited.[30]

In *Grove City College v. Bell,*[31] the United States Supreme Court addressed the issue of whether student receipt of federal financial assistance

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IX is program specific). Several cases interpreting Title IX have recognized that Title IX is program-specific. *See, e.g.,* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 514 (1982) (Title IX is program-specific prohibition of discrimination based on sex); Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549, 552 (5th Cir.)(Title IX's prohibition of sex-based discrimination is program-specific), *vacated as moot,* __ U.S. __, 104 S. Ct. 373, 78 L. Ed. 2d 58 (1983); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376, 1381 (E.D. Mich. 1981) (Title IX is program-specific act), *aff'd,* 699 F.2d 309 (6th Cir. 1983). *See generally* Note, *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof",* 78 MICH. L. REV. 608, 617-25 (1980) (discussion of Title IX's program-specific character).

27. *See* 20 U.S.C. § 1682 (1982) (termination authority of Department limited to particular program receiving federal funds which fails to comply with requirements of Title IX).

28. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 540 (1982) (Supreme Court did not undertake to define program).

29. *See, e.g.,* Hillsdale College v. Department of H.E.W., 696 F.2d 418, 430 (6th Cir. 1982) (student receipt of financial aid resulted in federal financial assistance to student loan and grant program, not entire institution), *vacated,* __ U.S. __, 104 S. Ct. 1673, 80 L. Ed. 2d 149 (1984); Rice v. President & Fellows of Harvard College, 663 F.2d 336, 339 (1st Cir. 1981) (federal aid to law school work study program did not constitute federal aid to entire law school for purposes of Title IX), *cert. denied,* 456 U.S. 928 (1982); University of Richmond v. Bell, 543 F. Supp. 321, 333 (E.D. Va. 1982) (federal library resource grant received by school did not grant Department power to regulate and investigate school's athletic program).

30. *See* Grove City College v. Bell, 687 F.2d 684, 700 (3d Cir. 1982), *aff'd,* __ U.S. __, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984). The Third Circuit found that in the case of student receipt of federal grants the program to be defined is the entire institution. *See id.* at 700; *see also* Haffer v. Temple Univ., 524 F. Supp. 531, 538 (E.D. Pa. 1981), *aff'd,* 688 F.2d 14 (3d Cir. 1982). In *Haffer,* the court held the receipt of federal funds by the school activated Title IX coverage prohibiting sex discrimination in the entire institution, including the athletic program which received no federal funds. *See id.* at 538. The court offered an example of the abuses it was trying to prevent with its decision:

> A university . . . cannot use federal money to support one . . . program, such as the law school, run that program in perfect compliance with . . . Title IX, transfer nonfederal money from the law school budget to the budget of another program, such as the medical school, and deny . . . women admission to the medical school.

See id. at 538.

31. __ U.S. __, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984).

brings an entire educational institution under Title IX regulation.[32] The majority determined that the BEOGs received by students at Grove City College constituted aid to the college.[33] The Court found that the aid, though indirect, triggered Title IX coverage because the statute makes no distinction between direct and indirect aid.[34] The majority held, however, that, under the facts before the court, Title IX only applied to the student financial aid program.[35] In reaching this conclusion, the majority stated that the BEOGs benefited the financial aid program,[36] but there was no evidence that the federal aid received by the students resulted in the diversion of funds from the financial aid program to other areas within the institution.[37] The majority reasoned that Congress intended the term program to be given a narrow interpretation and thus limited the Act's protection to the specific program benefitted.[38] This holding affirmed the Department's right to terminate BE-

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32. *See id.* at __, 104 S. Ct. at 1214, 79 L. Ed. 2d at 523. The Court stated the issues before it as follows:

> [W]e must decide, first, whether Title IX applies at all to Grove City College . . . . If so, we must identify the 'education program or activity' at Grove City that is 'receiving Federal financial assistance' and determine whether federal assistance to that program may be terminated solely because the College violates the Department's regulations by refusing to execute an Assurance of Compliance with Title IX. Finally, we must consider whether the application of Title IX to Grove City infringes the First Amendment rights of the College or its students.

Id. at __, 104 S. Ct. at 1214, 79 L. Ed. 2d at 523.

33. *See id.* at __, 104 S. Ct. at 1220, 79 L. Ed. 2d at 529. The Court found that the BEOGs were indirect aid to the college. *See id.* at __, 104 S. Ct. at 1220, 79 L. Ed. 2d at 529.

34. *See id.* at __, 104 S. Ct. at 1218-20, 79 L. Ed. 2d at 528-29. The Court, citing Senator Bayh's statement that Title IX permits termination of all aid from the department controlling federal financial assistance to education, found that the language of Title IX contained no distinction between direct and indirect assistance. *See id.* at __, 104 S. Ct. at 1218-20, 79 L. Ed. 2d at 528-29. In addition, the Court found that the legislative history of Title IX makes no such distinction either. *See id.* at __, 104 S. Ct. at 1218-20, 79 L. Ed. 2d at 528-29. Title IX's postenactment history was also examined. The Court noted that regulations promulgated pursuant to Title IX, which were very broad and included direct and indirect assistance, were laid before the Congress for determination of whether they were consistent with congressional intent. *See id.* at __, 104 S. Ct. at 1219, 79 L. Ed. 2d at 529. None of the regulations was disapproved, thus showing that the regulations were consistent with congressional intent. *See id.* at __, 104 S. Ct. at 1219, 79 L. Ed. 2d at 529.

35. *See id.* at __, 104 S. Ct. at 1221-22, 79 L. Ed. 2d at 530.

36. *See id.* at __, 104 S. Ct. at 1222, 79 L. Ed. 2d at 532.

37. *See id.* at __, 104 S. Ct. at 1222, 79 L. Ed. 2d at 532. The Court recognized that substantial portions of students' BEOGs reach Grove City's general operating budget, but asserted there was no finding of any persuasive evidence that Congress intended that Title IX apply to the entire institution. *See id.* at __, 104 S. Ct. at 1222, 79 L. Ed. 2d at 532.

38. *See id.* at __, 104 S. Ct. at 1221, 79 L. Ed. 2d at 531. The Court stated that it found no persuasive evidence of a congressional intent that the requirements of Title IX apply to the entire institution due to students' receipt of federal aid. *See id.* at __, 104 S. Ct. at 1222, 79 L. Ed. 2d at 531.

OGs to Grove City College's students if the Financial Aid Department failed to execute an Assurance of Compliance.[39] Additionally, the Court concluded such regulation did not infringe upon the first amendment rights of Grove City College or its students.[40]

Justice Brennan, concurring in part, dissented on the issue of the narrow reading given Title IX by the majority.[41] He argued that earlier decisions of the Supreme Court had established a broad reading of Title IX.[42] The legislative history of Title IX was cited as demonstrating Congress' intent to cover an entire institution whenever an educational program within the institution was receiving federal financial assistance.[43] Justice Stevens, concurring in part and in the result, refused to join in the majority's holding that the program receiving federal financial assistance was solely the student financial aid program because such a holding constituted an advisory opinion predicated on speculation.[44] Justice Powell concurred in the holding of the Court, but expressed his belief that the case against Grove City College was

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39. *See id.* at __, 104 S. Ct. at 1222-23, 79 L. Ed. 2d at 533. The Court held that the Assurance of Compliance requested by the Department was consistent with Title IX's program-specific requirements, and the student financial aid program at Grove City College was required to execute an Assurance. *See id.* at __, 104 S. Ct. at 1222, 79 L. Ed. 2d at 532.

40. *See id.* at __, 104 S. Ct. at 1223, 79 L. Ed. 2d at 533. The Court recognized that Congress does not violate the first amendment rights of the college or its students when it attaches clear and reasonable conditions to federal funds that educational institutions are not required to accept. *See id.* at __, 104 S. Ct. at 1223, 79 L. Ed. 2d at 533.

41. *See id.* at __, 104 S. Ct. at 1226-36, 79 L. Ed. 2d at 537-51 (Brennan, J., concurring in part & dissenting in part).

42. *See id.* at __, 104 S. Ct. at 1226-31, 79 L. Ed. 2d at 537-43 (Brennan, J., concurring in part & dissenting in part). Justice Brennan argued that a broad interpretation of Title IX was required based on two prior Supreme Court rulings: *North Haven Bd. of Educ. v. Bell,* which held that employment was protected by Title IX and recognized the need to interpret Title IX broadly, and *Cannon v. University of Chicago,* which held that there was a private cause of action under Title IX and recognized Title IX's broad scope. *See id.* at __, 104 S. Ct. at 1226, 79 L. Ed. 2d at 537 (Brennan, J., concurring in part & dissenting in part) (citing North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982), and Cannon v. University of Chicago, 441 U.S. 677, 699 (1979)).

43. *See id.* at __, 104 S. Ct. at 1227-29, 79 L. Ed. 2d at 538-40 (Brennan, J., concurring in part & dissenting in part). Justice Brennan recognized three points: the Supreme Court's recognition that Title IX is to be given a broad interpretation, the postenactment history of Title IX, and congressional intent that there be no difference between direct and indirect financial aid. *See id.* at __, 104 S. Ct. at 1226-35, 79 L. Ed. 2d at 537-48 (Brennan, J., concurring in part & dissenting in part).

44. *See id.* at __, 104 S. Ct. at 1225, 79 L. Ed. 2d at 536 (Stevens, J., concurring in part & concurring in the result). Justice Stevens argued that the Court did not have to hold that Title IX applied only to the student financial aid program. *See id.* at __, 104 S. Ct. at 1225, 79 L. Ed. 2d at 536 (Stevens, J., concurring in part & concurring in the result). The Assurance of Compliance requires only that Grove City comply with Title IX to the extent applicable to it, and since the Secretary construes that statute as applicable only to the financial aid program, the Court need only rule on whether Grove City is required to file an Assurance of Compli-

an example of government overzealousness.[45]

In *Grove City,* the Supreme Court adopted a narrow interpretation of the statutory phrase "education program or activity" by holding that coverage of Title IX was limited to the student financial aid program.[46] The Court began its analysis of Title IX's program-specific language by stating that if Grove City College had participated in the BEOG program through the Regular Disbursement System, the specific education program or activity which received federal financial assistance would be the student financial aid program.[47] The only difference between the Regular and Alternate Disbursement Systems was one of means, with the result being the same under either method.[48] The Court reasoned that BEOGs administered through the Alternate Disbursement System must, therefore, also benefit only the student financial aid program.[49]

The Court failed to cite any authority, however, to support this fundamental assertion.[50] The purpose of the BEOG is to assist eligible students in meeting the costs of a postsecondary education, not to benefit a college's student financial aid program.[51] When a student receives a BEOG, the money is used to pay educational expenses, including tuition, room and board, books and supplies, and other expenses.[52] The result of the BEOG program is that federal monies are distributed throughout a school.[53] The student financial aid office is merely a conduit through which federal monies pass to students for meeting education costs.[54] The Court stated that the fact that federal funds reach the college's general operating budget cannot

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ance. *See id.* at __, 104 S. Ct. at 1225, 79 L. Ed. 2d at 536 (Stevens, J., concurring in part & concurring in the result).

45. *See id.* at __, 104 S. Ct. at 1223-24, 79 L. Ed. 2d at 534-35 (Powell, J., concurring).

46. *Compare id.* at __, 104 S. Ct. at 1222, 79 L. Ed. 2d at 532 (narrow holding applying Title IX only to specific program benefited) *with* Haffer v. Temple Univ., 524 F. Supp. 533, 540 (broad holding applying Title IX to entire university, including athletic program which received no federal aid), *aff'd,* 688 F.2d 14 (3d Cir. 1982).

47. *See* Grove City College v. Bell, __ U.S. __, __, 104 S. Ct. 1211, 1220-21, 79 L. Ed. 2d 516, 530-31 (1984).

48. *See id.* at __, 104 S. Ct. at 1221, 79 L. Ed. 2d at 531.

49. *See id.* at __, 104 S. Ct. at 1221, 79 L. Ed. 2d at 531.

50. *See id.* at __, 104 S. Ct. at 1220-21, 79 L. Ed. 2d at 530-31.

51. *See* 20 U.S.C. § 1070 (1982). This provision establishes the BEOG and states that the purpose of the BEOG is to provide eligible students with the means necessary to meet the costs of postsecondary education. *See id.; see also* 34 C.F.R. § 690.1 (1983); S. REP. NO. 882, 94th Cong., 2d Sess. 10, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 4713, 4722.

52. *See* OFFICE OF STUDENT FINANCIAL ASSISTANCE, U.S. DEP'T OF EDUC., FEDERAL STUDENT FINANCIAL AID HANDBOOK 9-13 (1984).

53. *See id.* at 9-13.

54. *See id.* at 22 (student financial aid office processes financial aid applications and disburses financial aid awards to students).

subject Grove City College to institution-wide coverage.[55] This statement cannot be reconciled with the Supreme Court's earlier recognition of Title IX's purpose of avoiding the use of federal resources to support discriminatory practices.[56]

The intent of Congress regarding the phrase "education program or activity" has been examined by several courts.[57] The Supreme Court has previously recognized that Title IX is to be given a broad scope.[58] In *Grove City,* however, the Supreme Court narrowed the scope of Title IX relying only on a sparse legislative history and no case law.[59] In response, Senator Kennedy has introduced the Civil Rights Act of 1984 into Congress with the purpose

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55. *See* Grove City College v. Bell, __ U.S. __, __, 104 S. Ct. 1211, 1222, 79 L. Ed. 2d 516, 532 (1984). The Court cites to no authority supporting its narrow interpretation of Title IX. *See id.* at __, 104 S. Ct. at 1222, 79 L. Ed. 2d at 532. Previously, however, the Court had recognized the need to "accord [Title IX] a sweep as broad as its language." *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (quoting United States v. Price, 383 U.S. 787, 801 (1966)). The Court adopted a broad interpretation of Title IX in holding that it applied to employment discrimination in education. *See id.* at 530. The Court based its broad decision on an analysis of Title IX's language, legislative history, and postenactment history. *See id.* at 520-35.

56. *Compare* Grove City College v. Bell, __ U.S. __, __, 104 S. Ct. 1211, 1222, 79 L. Ed. 2d 516, 531-32 (1984) (although substantial portions of federal aid received by school reaches general operating budget, Title IX only prevents sex discrimination in student financial aid program) *with* Cannon v. University of Chicago, 441 U.S. 677, 704 (1979) (purpose of Title IX to avoid using any federal resources to support discrimination).

57. *See* Haffer v. Temple Univ., 524 F. Supp. 531, 538 (E.D. Pa. 1981), *aff'd,* 688 F.2d 14 (3d Cir. 1982). The college received direct federal financial assistance and the school's athletic program received no direct federal funds, but since the court found that the entire institution was the program benefited, the court held that the athletic program was subject to Title IX coverage. *See id.* at 538; *see also* Rice v. President & Fellows of Harvard College, 663 F.2d 336, 339 (1st Cir. 1981) (aid received by law school work study program constituted aid to that particular program only), *cert. denied,* 456 U.S. 928 (1982); University of Richmond v. Bell, 543 F. Supp. 321, 327 (E.D. Va. 1982) (federal grant to library did not constitute aid to any other program or division of university). *See generally* Note, *Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language With Its Broad Remedial Purpose,* 51 FORDHAM L. REV. 1043, 1059-61 (1983) (discussion of interpretation of Title IX's program-specific language).

58. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (Title IX must be accorded a broad sweep).

59. *See* Grove City College v. Bell, __ U.S. __, __, 104 S. Ct. 1211, 1221, 79 L. Ed. 2d 516, 532 (1984). The legislative history does show that Title IX was intended to have a broad reach, as evidenced by Senator Bayh's statement that Title IX's broad objective was to "root out" sex discrimination as thoroughly as possible. *See* 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh). The impact of Title IX was to be "far reaching." *See id.* at 5808 (statements of Sen. Bayh). Senator Bayh's statements, being those of the bill's sponsor, are an authoritative guide to the statute's construction. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526-27 (1982). There is still no specific evidence in the legislative history of exactly what is meant by "education program or activity." *See id.* at 520-21. However, it should be noted that Congress did not disapprove of the broad rules and regulations promulgated pursuant to Title

of clarifying that body's intent.[60] The proposed act is intended to prevent the anticipated effects of the *Grove City* decision.[61] The main effect feared is that since there is now no federal law comprehensively prohibiting sex discrimination in education which receives federal assistance, an institution such as Grove City College could discriminate against women in many of its programs.[62] For example, an English professor could offer after class tutoring only to men, and women's intercollegiate athletics teams could receive less money than men's teams in the same sports.[63] This discrimination could exist inspite of the fact that the financial aid office is covered by Title IX.[64]

Title IX is not the only antidiscrimination provision affected by the *Grove City* decision.[65] Title VI of the Civil Rights Act of 1964,[66] which prohibits

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IX. *See* Grove City College v. Bell, __ U.S. __, __, 104 S. Ct. 1211, 1219, 79 L. Ed. 2d 516, 529 (1984).

60. *See* S. 2568, 98th Cong., 2d Sess., 130 CONG. REC. 4582-88 (1984). This bill would replace the phrase "program or activity" in Title IX with the word "recipients," thus removing the program-specific language from the statute. *See id.* at 4588. The purpose of the proposed act is to reverse the decision in *Grove City* because that decision was narrower than Congress intended. *See* 130 CONG. REC. 4585 (1984) (statement of Sen. Kennedy). Evidence that the Supreme Court's decision in *Grove City* was inconsistent with congressional intent could be found in the statement of Senate Majority Leader Robert Dole: "Everyone wants to reverse the Grove City decision. I don't know of any senator who doesn't want to reverse the Grove City decision." *See* N.Y. Times, Sept. 30, 1984, at 13, col. 4. The Civil Rights Act of 1984 was approved by the House of Representatives in June 1984, and the Senate suspended consideration of the Act in 1984, at the end of the second session of the 98th Congress. *See* Wall St. J., Oct. 3, 1984, at 3, col. 2.

61. *See* 130 CONG. REC. 4585-86 (1984) (statement of Sen. Kennedy) (*Grove City* decision will allow sex discrimination in programs which receive federal financial assistance). The Civil Rights Act of 1984 is evidence that the Supreme Court's decision in *Grove City* did not comport with congressional intent. *See id.* at 4585. Where a former statute, such as Title IX, is amended, some courts have held that the amendment is good evidence of the legislature's intent in enacting the original statute. *See* Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980) (views of subsequent congresses are entitled to significant weight in determining legislative intent); *see also* Russ v. Wilkins, 624 F.2d 914, 924 (9th Cir. 1980) (subsequent legislation declaring intent of previous enactments should be given due consideration). *But see* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980) (subsequent legislative history rarely overrides statute's reasonable interpretation).

62. *See* 130 CONG. REC. 4586 (1984) (programs in college which benefit from federal financial assistance could discriminate on basis of sex because school receives federal funds from student aid program).

63. *See id.* at 4586.

64. *See* Grove City College v. Bell, __ U.S. __, __ 104 S. Ct. 1211, 1222, 79 L. Ed. 2d 516, 532 (1984). The financial aid office, as the specific program benefited, is the only subunit of the institution which must comply with Title IX's non-discriminatory provisions.

65. *See id.* at 4585-86. Since the *Grove City* decision is based on the interpretation of the statutory language, "program or activity receiving federal financial assistance," all federal statutes with a scope determined by the same program-specific language will be limited by the interpretation used in *Grove City*. *See id.* at 4586.

discrimination on the basis of race, section 504 of the 1973 Rehabilitation Act,[67] which prohibits discrimination on the basis of disability, and the Age Discrimination Act of 1975,[68] which prohibits discrimination on the basis of age, all have program-specific language identical to that of Title IX.[69] The scope of all of these acts could conceivably be limited by reasoning analogous to that used in *Grove City* to allow discrimination in institutions that benefit from federal assistance.[70] The Civil Rights Act of 1984 would amend all of the civil rights statutes by removing the program-specific language from them.[71] The effect of this bill would be to subject an entire institution to coverage under the four affected civil rights acts whenever a subunit of the institution received federal financial assistance.[72] Passage of the Civil Rights Act of 1984[73] will render ineffective the Supreme Court's decision in *Grove City* by broadly defining the scope of benefit of federal assistance to include the entire institution.[74]

The decision in *Grove City* narrowed the scope of Title IX. The effect of the decision is that it is now possible for an education program or activity that receives no direct federal financial assistance, but indirectly benefits from federal aid, to discriminate on the basis of sex without violating any

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66. 42 U.S.C. § 2000d (1982).

67. 29 U.S.C. § 794 (1982). This provision prohibits discrimination based on disability in "any program or activity receiving Federal financial assistance." *See id.*

68. 42 U.S.C. § 6102 (1982). This provision prohibits discrimination based on age in "any program or activity receiving Federal financial assistance." *See id.*

69. *See* 130 CONG. REC. 4586 (1984); *see also* 20 U.S.C. § 1681(a) (1982) (program-specific prohibition of sex-based discrimination in education); 42 U.S.C. § 2000d (1982) (program-specific prohibition of racial discrimination); 29 U.S.C. § 794 (1982) (program-specific prohibition of discrimination based on disability); 42 U.S.C. § 6102 (1982) (program-specific prohibition of age-based discrimination); *see also* 130 CONG. REC. 4596 (1984).

70. *See id.* at 4586. The *Grove City* decision's narrow interpretation of "program or activity" could be used to limit not only Title IX, but also other civil rights statutes. *See id.* at 4586. After *Grove City* was decided, William Bradford Reynolds, Assistant Attorney General for Civil Rights at the Department of Justice, stated that he believed that *Grove City* would apply to other civil rights statutes. *See id.* at 4586. The result of this is that governmental protection from discrimination provided to minorities, the disabled, and the elderly in federally assisted activities will be as limited as the protection provided under Title IX. *See id.* at 4586.

71. *See id.* at 4586. The Act would amend each of the four civil rights statutes by deleting "program or activity" where it appears in each of those statutes and replacing it with "recipient." *See id.* at 4586.

72. *See id.* at 4586. The effect of deleting "program or activity" from each of the four civil rights statutes and replacing it with "recipient" is to prevent an entire institution from discriminating if one or more of its parts is receiving federal funds. *See id.* at 4586.

73. S. 2568, 98th Cong., 2d Sess., 130 CONG. REC. 4588 (1984).

74. *See* 130 CONG. REC. 4585 (1984). "The purpose of the [Civil Rights Act of 1984] . . . is to eliminate the inappropriately restrictive interpretation imposed by the *Grove City* decision and reaffirm the legal safeguards available under these civil rights statutes." *Id.* at 4585.

federal law. This result is in conflict with the purpose of Title IX, which is to prevent the use of federal monies to aid in financing discriminatory practices. The Court's decision also limits the effectiveness of other program-specific civil rights statutes. *Grove City* is based in part on the Court's interpretation of Title IX's legislative history concerning its scope. The Court found a narrow scope reaching only the specific program benefitted; but the introduction of the Civil Rights Act of 1984 shows that legislative intent may be that Title IX be given a broad scope in order to reach the entire institution. Passage of the Civil Rights Act of 1984 would accomplish this result and nullify the legal effect of the *Grove City* decision.

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