Title IX and Its Funding Termination Sanction: Defining the Limits of Federal Power over Educational Institutions

I. Introduction

Title IX of the Education Amendments of 1972[1] was designed to "eliminate . . . discrimination on the basis of sex in any education program or activity receiving Federal financial assistance."[2] Title IX contains two core provisions: the first containing the general language prohibiting sex discrimination,[3] and the second delineating the possible sanctions for noncompliance with its regulations.[4] Title IX authorizes all federal agencies which provide financial assistance to educational institutions to issue regulations to ensure compliance with the statute's provisions.[5] Regulations promulgated by the Department of Health, Education and Welfare (HEW)[6] have been the focus of most of the post-enactment legislative and judicial activity regarding Title IX. Federal agencies providing funding to educational institutions are authorized by Title IX to (1) terminate or refuse to grant continued assistance, and (2) utilize any other means authorized by law, including injunctive and declaratory relief, to effect compliance with Title IX provisions by recipients of federal aid.[7]

The United States Supreme Court, in *North Haven Board of Education v. Bell*,[8] drew attention to that portion of the sanction provision

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[1]20 U.S.C. §§ 1681-1686 (1982). Title IX provides: "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," with certain exceptions. These exceptions include, among others, private undergraduate school admissions, 20 U.S.C. § 1681(a)(1); religious schools, 20 U.S.C. § 1681(a)(3); traditionally one-sex schools, 20 U.S.C. § 1681(a)(5); and schools maintaining separate living facilities for men and women, 20 U.S.C. § 1686.

[2]34 C.F.R. § 106.1 (1983).

[3]20 U.S.C. § 1681.

[4]20 U.S.C. § 1682.

[5]*Id.*

[6]The Department of Health, Education, and Welfare's responsibilities for educational institutions under Title IX were transferred to the Department of Education by the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668, 677 (1979) (codified at 20 U.S.C. § 3441(a)(3) (1982)). The Department of Health and Welfare was then reorganized as the Department of Health, and Human Services. This Note will refer to the appropriate agency as HEW to avoid confusion. HEW regulations governing Title IX are codifed at 34 C.F.R. §§ 106-106.71 (1983).

[7]20 U.S.C. § 1682.

[8]456 U.S. 512 (1982). The Supreme Court held that: (1) employment discrimination comes within Title IX's prohibition; and, (2) regulations promulgated in connection with Title IX were valid in light of the fact that the agency's authority under Title IX to promulgate regulations and enforce compliance is subject to a program-specific limitation.

which states that termination of assistance "shall be limited in its effect to the particular program, or part thereof, in which . . . noncompliance has been . . . found."[9] The Court concluded that a federal agency's authority to promulgate regulations and impose sanctions under Title IX is subject to this "program-specific" limitation.[10] The Court expressly declined the task of defining "program," providing little guidance to subsequent courts charged with interpreting its meaning under Title IX.[11] A review of recent federal court decisions on the subject reveals some fundamental differences in the treatment of such issues as who is a "recipient" of federal financial assistance, and what a "program" entails.[12]

The HEW regulations and their application by that agency have been the subject of great controversy in recent years, and have been challenged under varied circumstances by "recipient" institutions.[13] Two distinct factual settings have prompted recurrent disputes in the federal courts: (1) where an educational institution has received federal funds indirectly through payment of tuition and housing fees by students participating in federally funded aid programs,[14] and (2) where the institution has received federal funds directly, but has not earmarked the funds for the specific discriminatory activity within the institution.[15]

In the first situation, the preliminary issue is whether the institution is actually a "recipient" of federal financial assistance, since any benefits

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[9]20 U.S.C. § 1682.

[10]456 U.S. at 536-37.

[11]*Id.* at 540.

[12]A broader and more flexible reading of the statutory language is found in decisions from the Third and Fifth circuits. Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549 (5th Cir. 1983), *vacated as moot*, 104 S. Ct. 373 (1984); Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), *aff'd*, 104 S. Ct. 1211 (1984); Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982). Other circuits have adopted a narrower approach. *E.g.*, Hillsdale College v. Department of Health, Educ. & Welfare, 696 F.2d 418 (6th Cir. 1982), *vacated,* 104 S. Ct. 1673 (1984) (for further consideration in light of the Supreme Court's opinion in *Grove City*); Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 102 S. Ct. 1976 (1982); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982).

[13]Numerous institutions have challenged HEW's findings that such entities are "recipients" of federal financial assistance when no funding has been received by the institution directly. *See, e.g.*, Hillsdale College v. Department of Health, Educ. & Welfare, 696 F.2d 418 (6th Cir. 1982). A second challenge has been based on the contention that the assistance to an institution may not be terminated when only one subpart has been found to employ discriminatory practices. *See, e.g.*, Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982).

[14]*See, e.g.*, Hillsdale College v. Department of Health, Educ. & Welfare, 696 F.2d 418 (6th Cir. 1982) (finding the institution to be a "recipient" but only the loan and grant program to be subject to regulation); Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982) (finding the institution to be a "recipient").

[15]*See, e.g.*, Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549 (5th Cir. 1983) (terminating funds to university due to honor society's discriminatory practices); Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982) (terminating funds to university due to athletic department's discriminatory practices).

are received indirectly through the students.[16] The second issue is the proper sanction to be applied; HEW's approach has been to seek termination of the students' financial assistance.[17] This Note suggests that this approach is misguided, because it punishes the students rather than the institution fostering the discriminatory activity. This Note further proposes that HEW seek compliance in these cases through injunctive and declaratory actions rather than through the termination sanction, in order to reach the root of the problem without undermining higher education.

In the second situation, where the institution has received direct financial assistance but has not earmarked the funds for the specific discriminatory program or activity, the primary issue is what constitutes a "program"[18] pursuant to the termination sanction. Some courts have supported HEW's "institutional" approach that assistance to the entire institution may be terminated even though the discriminatory activity has been confined to one facet of the institution,[19] such as intercollegiate athletics.[20] Other courts have adhered to a narrower interpretation of "program," a "programmatic" approach which extends termination of assistance only to the particular subpart of the institution in question.[21] This Note supports the broad and flexible interpretation of "program" offered by HEW for strict enforcement of Title IX policies, which prevents institutions from exempting themselves from Title IX coverage by failing to earmark funds for the use of the discriminatory activity.

This Note examines the legislative history of Title IX and recent judicial interpretations of Title IX provisions, specifically regarding what constitutes a "recipient" and a "program" under the statute. This Note derives a logical construction of these provisions and proposes differing applications of Title IX sanctions to the two recurrent factual settings in Title IX cases.

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[16]*See* cases cited *supra* note 13.

[17]*Id.*

[18]20 U.S.C. § 1682 limits the effect of sanction regulations to "the particular program, or part thereof" in which noncompliance has been found. This language was termed the "program-specific" limitation of Title IX's power by the Supreme Court in North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982). *See supra* notes 8-10 and accompanying text.

[19]HEW's approach has been referred to as "institutional" because it supports the proposition that an institution's assistance may be terminated upon the finding that it contains a discriminatory subunit. This position has been directly buttressed by Grove City College v. Bell, 687 F.2d 684, 700 (3d Cir. 1982) and Haffer v. Temple Univ., 688 F.2d 14, 17 (3d Cir. 1982).

[20]34 C.F.R. § 106.41 (1983). For an incomplete sampling of the debate over athletics, see *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the Comm. on Education and Labor*, 94th Cong., 1st Sess. 46, 71, 123 (1975) [hereinafter cited as *Postsecondary Hearings*]. *See also* Comment, *HEW's Final "Policy Interpretation" of Title IX and Intercollegiate Athletics*, 6 J.C. & U.L. 345 (1980)

[21]*See* cases cited *supra* note 12. This position has been termed the "programmatic," approach because it draws a narrow and specific view of "program" which generally does not encompass an entire institution.

II. Title IX Legislation: Its Origin and Purpose

Title IX grew out of hearings on gender discrimination in education held in 1970 by a special House subcommittee on education.[22] The final version was presented as a floor amendment by Senator Birch Bayh in 1972.[23] Title IX was designed to fill a void left by Title VI of the Civil Rights Act of 1964,[24] which does not address sex discrimination but prohibits discrimination on the basis of race, color, religion, and national origin. Title IX also focuses only on educational programs, while Title VI encompasses all phases of federally funded programs. Summarizing his proposal, Senator Bayh stated:

> Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs. . . . [T]he heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions. Enforcement powers include fund termination provisions—and appropriate safeguards—parallel to those found in Title VI of the 1964 Civil Rights Act.[25]

A. Title VI as a Guideline

Title IX was explicitly modeled after and contains virtually identical language to certain corresponding sections of Title VI.[26] "[T]he setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI."[27] Therefore, the legislative history of Title VI is helpful in determining Congress' intent when it enacted Title IX, even though "[i]t is Congress' intention in 1972, not in 1964, that is of significance in interpreting Title IX."[28]

That section of Title VI which authorizes termination of funds only

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[22]*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. (1970).

[23]118 Cong. Rec. 5,802-5,823 (1972) (amendment presented by Senator Bayh).

[24]42 U.S.C. §§ 2000d to 2000d-6 (1982).

[25]118 Cong. Rec. 5,803 (1972).

[26]Section 901 and section 902 of Title IX are nearly identical to § 601 and § 602, respectively, of Title VI of the Civil Rights Act of 1964. *Compare* 20 U.S.C. §§ 1681(a), 1682 (1982) *with* 42 U.S.C. §§ 2000d, 2000d-1 (1982).

[27]*Postsecondary Hearings, supra* note 20, at 170 (comments of Senator Bayh).

[28]North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 529 (1982).

if the federally assisted program engaged in discriminatory activity has been commonly referred to as the "pinpoint" provision.[29] This provision was designed to balance the need to prevent federal financing from being employed to advance discrimination against the fear that the termination sanction would be exercised in a vindictive or capricious manner.[30] Some members of Congress expressed concern, for example, that funding to an entire state might be terminated if only a single school remained segregated, adversely affecting innocent beneficiaries of federal financial assistance.[31] The effort to pinpoint the effect of the termination sanction was developed as an essentially geographic stricture, yet retained a broad applicability to prevent the use of federal monies for the advancement of discrimination.[32]

The "pinpoint" provision and the references to "recipients" of federal financial assistance in Title VI produced interpretive conflicts similar to those later created by the corresponding provisions in Title IX. *Bob Jones University v. Johnson*[33] is often cited as authority for the proposition that an institution is a recipient of federal funds when the student is the actual payee of the federal check. In *Bob Jones*, HEW had ordered that eligible veterans enrolled at Bob Jones University could not receive veterans' educational benefits because the university engaged in racially discriminatory practices.[34] The university unsuccessfully sought injunctive relief from that order, arguing that since the assistance was paid directly to students, the university was not a recipient of federal financial assistance and therefore was not subject to Title VI.[35] The district court's rejection of this reasoning was based upon the broad remedial purpose of Title VI and on the fact that the university had actually benefited from federal assistance through payments to the students.[36]

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[29]*See* Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D. S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

[30]The Supreme Court, in Lau v. Nichols, 414 U.S. 563, 565 (1974), emphasized the importance of preventing federal monies from being put to invidious uses. The fear of vindictive or punitive fund cutoffs, on the other hand, was expressed by Congress prior to enactment of Title VI. *E.g.*, 110 CONG. REC. 7,062 (1964) (comments of Senator Pastore).

[31]*See, e.g.*, 110 CONG. REC. 8,507-08 (1964) (comments of Senator Smathers) (Title VI "would punish a whole area, a whole State, a whole group, because of the sins of one.").

[32]*Id.* at 11,942.

[33]396 F. Supp. 597 (D. S.C. 1974).

[34]*Id.* at 598-99.

[35]*Id.* at 601-02.

[36]The *Bob Jones* court found that the university benefited in two distinct ways: First, payments to students "releas[ed] institutional funds which would, in the absence of federal assistance, be spent on the student"; and second, the participation of these students who would not have enrolled in the absence of federal aid "enlarg[es] the pool of qualified applicants upon which [the school] can draw for its educational program." 396 F. Supp.

Board of Public Instruction v. Finch[37] addressed the issue whether the federal government, under Title VI, can cut off all federal funds for an institution when only one program within that institution has discriminated. In *Finch*, HEW terminated all funding to a school district which contained eight public schools and received assistance under three federal grant programs.[38] Although the court found that across-the-board termination may be proper in some instances, it required HEW to "make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory."[39] Some commentators have suggested that the *Finch* approach is narrow and unworkable because an institution which does not apportion its funds to specific programs is not subject to termination of assistance under *Finch* unless all programs of the institution are found to be discriminatory.[40] Indeed, some later decisions have found a broader interpretation of "program" under Title VI to be a more efficacious means of eliminating discrimination, by focusing on the nature of the specific activity and the experience of HEW in dealing with it.[41]

Although decisions regarding the scope and limitations of regulatory power under Title VI are by no means dispositive of any Title IX issues, they do provide a broader basis for analysis of legislative intent and judicial policy in Title IX cases.[42] The rationale for a broad reading of Title VI applies equally to Title IX: it achieves the objective of Title IX to prohibit the use of any federal funding to advance sex discrimination in educational institutions.

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at 602-03 (footnotes omitted). The court concluded, "Whether the cash payments are made to a university and thereafter distributed to eligible veterans rather than the present mode of transmittal is irrelevant, since the payments ultimately reach the same beneficiaries and the benefit to a university would be the same in either event." *Id.* at 603.

[37]414 F.2d 1068 (5th Cir. 1969).

[38]*Id.* at 1070-71.

[39]*Id.* at 1079. This approach has been termed the "infection theory." *See* Note, *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof,"* 78 MICH. L. REV. 608, 624 (1980).

[40]*See* Comment, *Board of Public Instruction v. Finch: Unwarranted Compromise of Title VI's termination Sanction*, 118 U. PA. L. REV. 1113, 1115, 1116 (1970) [hereinafter cited as *Finch Comment*]; Note, *Administrative Cutoff of Federal Funding Under Title VI: A Proposed Interpretation of "Program,"* 52 IND. L.J. 651, 652 (1977).

[41]*E.g.*, Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (defining "program" broadly enough to encompass an entire state); Georgia v. Mitchell, 450 F.2d 1317 (D.C. Cir. 1971) (finding cutoff to entire state appropriate).

[42]*But see* Note, *Title IX Sex Discrimination Regulations: Impact on Private Education*, 65 KY. L.J. 656, 668-80 (1977) [hereinafter cited as *Private Education Note*] (arguing that Title VI decisions rested upon wholly different constitutional and statutory grounds than did Title IX decisions).

B. *The Purpose and Intent of Title IX*

Title IX was intended to be a powerful weapon with which the federal government could attack discrimination on the basis of sex in educational institutions.[43] Senator Bayh, the author of Title IX:

> It is . . . an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.[44]

In order to serve the purpose of Title IX best, the administrative agencies must be able to wield the threat of fund termination in the most effective manner. However, Title IX, like Title VI, was necessarily written in general terms because it applies to a varied group of aid recipients. Therefore, in order to enforce the terms of the statute properly, there must be flexibility in the interpretation of Title IX provisions.

Because Title IX originated as a floor amendment, the preenactment legislative history is sparse, and Senator Bayh's statements made on the day of the amendment are "the only authoritative indications of congressional intent regarding the scope of [Title IX]."[45] Therefore, much of the analysis centers on the statutory language itself and the post-enactment legislative history of Title IX.

The two core provisions of Title IX are at the center of the controversy concerning the reach of the statutory language. Section 901(a) of Title IX provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[46] Numerous institutions have resisted regulation under Title IX on the grounds that they do not "receive" federal financial assistance in any direct sense, and therefore do not come within the prohibitory language of section 901.[47]

Congress has given federal agencies the power to enforce this prohibition by authorizing regulations which may include provisions for termination of financial assistance or for enforcement "by any other means authorized by law."[48] The pivotal language of section 902 of Title IX, which contains this authorization, states that the effect of the termination sanction must be limited to the "particular program, or part

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[43]*See* Cannon v. University of Chicago, 441 U.S. 677, 704 (1978); 118 CONG. REC. 5,807-08 (1972).

[44]118 CONG. REC. 5,808 (remarks of Senator Bayh).

[45]North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 527 (1982).

[46]20 U.S.C. § 1681 (1982). *See supra* note 1.

[47]*See supra* note 13.

[48]20 U.S.C. § 1682.

thereof'' in which the noncompliance has been found.[49] Because of the general nature of the statutory language, interpretations of ''program'' have ranged from the specific federal grant program, through which a university received funds[50] to an entire university.[51] The Supreme Court directed its attention to this language in *North Haven Board of Education v. Bell.*[52]

III. *North Haven*—The Supreme Court's Adoption of the ''Program-Specific'' Limitation

In *North Haven*, the petitioners were two federally funded public school boards threatened with enforcement proceedings for violation of section 901 of Title IX with respect to employment practices. They brought separate actions seeking declaratory and injunctive relief on the ground that section 901 was not intended to apply to employment practices.[53] The district court in each case granted a motion for summary judgment for the school board.[54] The Second Circuit Court of Appeals reversed in a consolidated appeal.[55] The court of appeals held that section 901 was intended to prohibit employment discrimination and that HEW's corresponding Subpart E regulations were consistent with section 902 of Title IX.[56]

On writ of certiorari, the Supreme Court affirmed the decision of the court of appeals. The Court found specifically that (1) employment discrimination in educational institutions comes within the ambit of Title IX's prohibition, and (2) the Subpart E regulations promulgated by HEW prohibiting employment discrimination in educational institutions in connection with Title IX are valid.[57] While Title IX's coverage of discrim-

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[49]20 U.S.C. § 1682 provides:

> 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, [t]hat . . . compliance cannot be secured by voluntary means.

[50]*E.g.,* Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981).

[51]*E.g.,* Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982).

[52]*North Haven*, 456 U.S. 512, was the first case in which the Supreme Court addressed the scope of Title IX since it initially recognized a personal right of action under Title IX in Cannon v. University of Chicago, 441 U.S. 677 (1978).

[53]456 U.S. at 517.

[54]*Id.* at 518.

[55]*Id.* at 519; *see* North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773 (2d Cir. 1980).

[56]629 F.2d at 778.

[57]456 U.S. at 530, 539.

inatory practices in employment is not directly within the subject matter of this Note, the Court's reasoning supporting its conclusion in favor of the validity of the HEW regulations deserves some attention. Pointing to the "program-specific" nature of Title IX, the Court found that the authority of federal agencies to promulgate regulations under section 902 is also limited by a "program-specific" restriction.[58]

The Court began with the statutory language of Title IX, noting that both sections 901 and 902 limit Title IX's coverage to those educational programs or activities receiving federal financial assistance.[59] The Court reasoned that regulations promulgated by agencies such as HEW may not be broader than the area encompassed by the "program-specific" limitation itself.[60] The Court relied on that portion of section 902 which states that agencies are "'authorized and directed to effectuate the provisions of section 901 *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.'"[61] Second, the Court found that the legislative history of Title IX "corroborates" its program-specific nature.[62] The Court pointed out that Congress failed to adopt several proposed amendments to Title IX which would have enlarged its scope to proscribe all discriminatory practices of an institution rather than merely sex discrimination, or that would not have limited the sanctions to programs receiving federal financial assistance.[63] The Court thus construed the term "program" broadly when it recognized this "program-specific" limitation.

Finally, the Court acknowledged that judicial interpretation of the corresponding sections of Title VI legislation had been "program-specific," citing *Board of Public Instruction v. Finch*.[64] The court in *Finch* required, prior to a cut off of funding, specific findings of fact indicating that a particular program was either administered in a discriminatory manner, or was so affected by discriminatory practices that it thereby became discriminatory.[65] The Supreme Court's general reference to *Finch*, however, indicates that its reliance on that decision was limited to a recognition that both Title VI and Title IX fit the Court's broad notion of program-specificity. The Court did not implicitly or expressly endorse the rationale of the *Finch* decision.

The Court offered negligible guidance as to the scope of the term "program" in its "program-specific" limitation. "[W]hether termination

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[58]*Id.* at 536-37 (addressing the language of § 902 which limits the sanction effects to the discriminatory "program or part thereof" as a "program-specific" limitation).

[59]*Id.* at 537.

[60]*Id.* at 536-37.

[61]*Id.* at 537 (citing 20 U.S.C. § 1682) (emphasis by the Court).

[62]*Id.*

[63]*Id.* at 537-38.

[64]414 F.2d 1068 (5th Cir. 1969).

[65]*Id.* at 1079. *See supra* notes 37-40 and accompanying text.

of petitioners' federal funds is permissible under Title IX is a question that must be answered by the District Court in the first instance. Similarly, we do not undertake to define 'program' in this opinion.''[66] It is significant that, at the time of the Court's refusal to indicate the breadth of Title IX sanction powers, several of the disputes leading to diametric interpretations of the sanction provision by federal courts had already erupted.[67] The referral to the task of defining the extent of the ''program'' in *North Haven* to the district court indicates that the Court recognized that Title IX provisions should be interpreted with flexibility, depending upon the circumstances of each case.

At first glance, it appears anomalous that the focus of *North Haven* was a broad expansion of Title IX regulatory powers to the employment sector of the educational institutions,[68] while adoption of the accompanying regulations was restricted by the caveat that all such regulations be applied in a ''program-specific'' manner.[69] However, the broad manner in which the Court addressed the limitation merely reinforced the principle that Title IX provisions may not be applied to entities outside the reach of federal monies. Addressing the extent of Title IX coverage, the Court stated, ''There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.''''[70] The Court also followed the principle that an agency's statutory construction is presumed to have accurately discerned the legislative intent when it has been ''fully brought to the attention of the public and the Congress,'' and the latter has not sought to alter that interpretation.''''[71] Therefore, HEW's construction of Title IX must be accorded the deference it is due. The principles fostered by the *North Haven* decision, that Title IX provisions have a far-reaching effect and that the courts should defer to HEW's construction of Title IX legislation, provide valuable guidance in analyzing who is a ''recipient'' of federal funding under the statute, and to what ''programs'' the Title IX sanctions apply.

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[66]456 U.S. at 539-40.

[67]*E.g.*, Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981) (addressing the dispute whether an educational institution is an educational program); Romeo Community Schools v. Department of Health, Educ. and Welfare, 600 F.2d 581 (6th Cir. 1979) (acknowledging the debate concerning whether Title IX applies to employees of educational institutions as well as to students); Bennett v. West Texas State University, 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd*, 698 F.2d 1215 (1983) (discussing the issue whether indirect federal financial aid brings a program within the ambit of Title IX).

[68]The depth of the Court's analysis of prior and post-enactment legislative history indicates the Court's expansive attitude in extending Title IX's control to the employment sector.

[69]456 U.S. at 536-37.

[70]*Id.* at 521 (citing cases advocating principles of broad statutory interpretation).

[71]*Id.* at 535 (quoting United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979), quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940)).

IV. *Grove City*: A Step Backward

In its recent decision in *Grove City College v. Bell*,[72] the Supreme Court dealt a crippling blow to the enforcement of Title IX as it originally was intended. A majority of the Court upheld the findings of the court of appeals that (1) "recipients" of federal funds under Title IX include those institutions which receive funding indirectly through tuition payments by student participants in federal grant and aid programs,[73] and (2) failure by such institutions to comply with requests for assurances of compliance under the statute warrants termination of funding to that institution or program.[74] The troubling portion of the decision, however, is Part III, in which a plurality of the Court concluded that

> the receipt of BEOGs [Basic Educational Opportunity Grants] by some of Grove City's students does not trigger institution-wide coverage under Title IX. In purpose and effect, BEOGs represent federal financial assistance to the College's own financial aid program, and it is that program that may properly be regulated under Title IX.[75]

The remaining Justices criticized this element of the decision as an unnecessary "advisory opinion"[76] and as an interpretation of the statutory language which ignores the primary purposes for which Title IX was enacted.[77] Indeed, the Court's narrow interpretation provides an unnecessary restraint on the strength of Title IX sanctions.

The controversy over the status of Grove City College as a "recipient" of federal funding arose when HEW attempted to secure a Title IX Assurance of Compliance from the college.[78] Grove City College received no direct funding from the federal government,[79] but its students did receive aid under the Basic Education Opportunity Grant (BEOG)[80]

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[72]104 S. Ct. 1211 (1984).

[73]*Id.* at 1219-20.

[74]*Id.* at 1222.

[75]*Id.*.

[76]*Id.* at 1225 (Stevens, J., concurring).

[77]*Id.* at 1226 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

[78]The Assurance of Compliance provides that the recipient "will comply with . . . Title IX . . . which prohibits discrimination on the basis of sex in education programs and activities receiving federal financial assistance." 687 F.2d 684, 688 n.5 (3d Cir. 1982).

[79]687 F.2d at 689. In its brief at the appellate level, Grove City explained its policy in refusing federal funds: "Since its founding in 1876, the College, as an integral part of its philosophy, steadfastly refused any forms of government funding . . . since to do so would compromise its independence." *Id.* at n. 7.

[80]*Id.* at 688. One hundred forty of Grove City's students were eligible to receive BEOG's, out of a total enrollment of 2,200. *Id.* There are two methods of disbursement of BEOG's. Under the Regular Disbursement System, the institution serves as a conduit of funding between the federal agency and the students. 34 C.F.R. §§ 690.71, 690.78 (1983). Under the Alternate Disbursement System, funds are disbursed directly to the students. 34 C.F.R. § 690.92 (1983).

and Guaranteed Student Loan (GSL)[81] programs sponsored by HEW. When Grove City refused to execute an Assurance of Compliance, HEW initiated administrative proceedings to terminate grants and loans to students attending the college. An order was entered prohibiting the payment of federal funds to students of Grove City, and the college sought a declaration that the termination order was void.[82] The district court held for Grove City, basing its decision upon the alternate grounds that (1) HEW's regulations proscribing discrimination in employment by educational institutions pursuant to Title IX were invalid,[83] and (2) a termination of federal financial assistance is authorized only upon an express finding of discrimination, which was absent in *Grove City*.[84]

The Court of Appeals for the Third Circuit reversed, finding that Grove City was a "recipient" under Title IX and thus was required to file an Assurance of Compliance form.[85] The court relied upon the legislative history of the statute and comparisons with Title VI[86] to support its determination that federal financial assistance paid to students, who in turn use the funds to pay for their education, "constitute[s] no less a part of a college's revenues than federal monies paid directly to the institution itself."[87] Based on this determination, the court found that HEW had acted within its authority when it defined "recipient" in its regulations to include any institution which receives federal financial assistance "through another recipient."[88] Grove City, therefore, became a "recipient" pursuant to HEW regulations when it received or benefited from federal funds that had been granted to its students for their use in educational endeavors.

The court of appeals also concluded that funds may be terminated for failure to file an Assurance of Compliance when required, even in the absence of an express finding of discrimination.[89] The court noted that section 902 of Title IX expressly authorizes HEW to terminate federal financial assistance "in order to secure compliance with any regulatory requirement designed to effectuate the objectives of Title IX."[90]

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[81] 687 F.2d at 688. Three hundred forty-two of Grove City's students had obtained GSL's. *Id.* Under the Guaranteed Student Loan Program, private lending institutions lend funds directly to the students, with interest paid by the federal government. *See generally,* 34 C.F.R. § 682.100 (1983).

[82] 687 F.2d at 689.

[83] *Id.* at 690. Note that North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982), expressly endorsed the validity of the regulations governing employment in light of the program-specific limitation. *See supra* note 8.

[84] 687 F.2d at 690.

[85] *Id.* at 693.

[86] *Id.* at 691-96.

[87] *Id.* at 693.

[88] *Id.*

[89] *Id.* at 703.

[90] *Id.*

A majority of the Supreme Court affirmed, finding that indirect receipt of federal funding triggers Title IX coverage,[91] and that a refusal to execute an Assurance of Compliance warrants termination of federal assistance.[92] Unfortunately, the Court did not stop at that point, but went on to analyze the "program-specific" nature of Title IX. The Court concluded that the receipt of federal loans and grants by a college's students does not invoke institution-wide coverage under Title IX.[93] Thus, the *only* unit of Grove City College forced to comply with non-discrimination standards after this decision was the student financial aid department of the school. As suggested by the Justices' separate opinions, the Court decided an issue which was not in dispute;[94] the controverted issue was whether Grove City College could be required to execute an Assurance of Compliance with Title IX, a form which merely certifies that the college complies with Title IX "'to the extent applicable to it.'"[95] Moreover, the Court ignored the broad remedial purpose of Title IX in its analysis, and apparently endorsed a narrow interpretation of "program" which directly contravenes Congress' intent in enacting Title IX.[96]

The next two sections of this Note analyze the definition of "recipient" of federal funding under Title IX, and the definition of "program" to which the statutory sanctions for noncompliance apply. Each section concludes with a discussion of the effect of the Supreme Court's *Grove City* decision on the interpretation of such statutory language.

V. The Initial Question—What Constitutes a "Recipient" of Federal Financial Assistance?

Only recipients of federal financial assistance are required to comply with the provisions and regulations of Title IX.[97] The regulations define "recipient" as any organization, entity, or 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."[98] Federal assistance to education includes direct

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[91] 104 S. Ct. at 1220.

[92] *Id.* at 1222.

[93] *Id.*

[94] *Id.* at 1225, 1227 n.1 (Stevens, J., concurring; Brennan and Marshall, JJ., concurring in part and dissenting in part).

[95] *Id.* at 1215; *see supra* note 78.

[96] 104 S. Ct. at 1227 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

[97] *See* 20 U.S.C. § 1681 (1982).

[98] 34 C.F.R. § 106.2(h) (1983) (emphasis added). The complete definition of "recipient," as promulgated by HEW, reads as follows:

> [A]ny 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

grants to universities and to students in the form of scholarships, loans, or funds made available for the purchase or renovation of real or personal property; services provided by federal personnel; and a variety of other contracts, agreements, or arrangements designed to assist the education program or activity.[99] Courts and commentators have offered many different answers to the question of what constitutes a "recipient." This section examines the legislative history and courts' differing constructions of "recipient," and concludes with an analysis of the Supreme Court's construction of the term in *Grove City*.

A. Legislative History of "Recipient"

The legislative history of Title IX reflects the clear intention that indirect aid to an institution is sufficient to bring that entity within the ambit of Title IX. In the 1971 debates regarding the proposed education amendments of which Title IX was a part, Senator Bayh referred to the BEOG program,[100] by which educational institutions benefit indirectly through the students' payment of tuition, housing, and other fees, when he stated, "It does not do any good to pass out hundreds of millions of dollars if we do not see that the money is applied equitably to over half our citizens."[101] Senator McGovern, urging the passage of the Title IX amendment, recognized its assurance that no funds whatsoever would be extended to institutions fostering discriminatory practices.[102]

The postenactment legislative history of Title IX supports the conclusion that indirect aid constitutes "federal financial assistance." In response to HEW's interpretation of the statute, Senators Helms and McClure proposed resolutions that would have limited Title IX's reach to those funds received directly by the educational institution.[103] Congress, however, declined to pass these amendments, even though other portions of the statute were being amended at the time of the proposed resolutions.[104] Senator McClure's attempt to alter the indirect aid coverage of Title IX met with substantial resistance, typified by Senator Pell's remarks: "While these dollars are paid to students they flow through and ultimately go to institutions of higher education, and I do not

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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. (emphasis added).

[99] 34 C.F.R § 106.2(g) (1983).

[100] *See supra* note 80.

[101] 117 CONG. REC. 30,412 (1971). The same sentiments were expressed in the House. 117 CONG. REC. 39,252 (1971).

[102] 117 CONG. REC. 30,158-59 (1971).

[103] *See* 121 CONG. REC. 23,845-47 (1975); 122 CONG. REC. 28,144-47 (1976).

[104] *See* Grove City College v. Bell, 687 F.2d 684, 694 (3d Cir. 1982) (recognizing that Congress had not hesitated to amend Title IX when it did not agree with HEW interpretations).

believe we should take the position that these Federal funds can be used for further discrimination based on sex."[105] These comments were echoed by Senator Bayh, who emphasized that if the student benefits by federal aid, the school likewise benefits. The proposed amendment was defeated by a substantial margin.[106]

The legislative history thus reflects Congress' intent that the term "recipient" under Title IX is to be construed broadly. A broad construction of "recipient" is consonant with the objective of Title IX to prohibit the use of any federal financial assistance, either direct or indirect, to promote discrimination.

B. Judicial Construction of "Recipient"

The decision of the court of appeals in *Grove City*[107] supports HEW's approach[108] that a "recipient" is an entity which receives or benefits from federal financial assistance by either direct or indirect means. The court held that "[it is] clear that Congress' overriding objective in enacting Title IX, that is, to withhold public funds from an institution which engages in sex discrimination, was to deny to discriminating institutions all such financial support, *direct or otherwise.*"[109]

The appellate court's analysis of "recipient" in *Grove City* was patterned after the *Bob Jones* decision under Title VI, the "parent" statute of Title IX.[110] The *Bob Jones* court found that a university benefits in at least two ways from federal aid to students. First, payments to students release funds of the institution which would otherwise be expended on the students.[111] Second, the participation of students who would not enroll in the educational programs in the absence of federal financial assistance "enlarge[s] the pool of qualified applicants upon which [the school] can draw for its educational program."[112] The *Grove City* appellate court pointed out that legislative references to *Bob Jones* subsequent to Title IX's enactment buttressed its reliance upon the *Bob Jones* interpretation of "recipient."[113]

Other courts have held, albeit reluctantly, that institutions in situations similar to that of Grove City College are "recipients" under Title IX, but have refused to subject the institutions as a whole to Title IX

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[105]122 CONG. REC. 28,145 (1976) (remarks of Senator Pell).

[106]*Id.* at 28,148 (proposed amendment defeated by a 50 to 30 vote).

[107]687 F.2d 684 (3d Cir. 1982).

[108]*See supra* note 98 and accompanying text.

[109]687 F.2d at 693 (emphasis added) (relying on the 1971 debates over the original Title IX amendment proposed by Senator Bayh).

[110]*Id.* at 695 ("A case under Title VI which supports our conclusion that Grove is a recipient . . . is *Bob Jones University.*").

[111]Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 602 (D. S.C. 1974).

[112]*Id.* at 603 (footnote omitted).

[113]687 F.2d at 696 (citing Senator Bayh's comment at 122 CONG. REC. 28,145 (1976)).

regulatory power.[114] These courts have reasoned that regulations which purport to subject entire institutions to the strictures of Title IX exceed the statutory authority granted HEW by Congress.[115] In *Hillsdale College v. Department of Health, Education and Welfare,*[116] the college had never received any federal financial assistance, but several of its students did receive aid under various federal programs,[117] including the BEOG[118] and GSL[119] programs. Federal financial aid to Hillsdale's students was terminated after the college failed to execute an Assurance of Compliance. Hillsdale sought review of the order terminating the aid. The court found, in part, that Hillsdale College was a "recipient" of the aid to its students, but that only the student loan and grant program within the college was subject to Title IX regulation.[120] The court concluded that the regulation which required the institution to execute an Assurance of Compliance as a condition to receipt of student loans was invalid, because it was being applied by HEW to an entire college.[121]

Although the *Hillsdale* court vigorously refuted that Title IX regulations apply to an entire institution, it conceded that an express finding of discrimination by an educational institution or its subparts is not a prerequisite to a termination of funding to that institution.[122] HEW has express authority, through section 902 of Title IX, to terminate assistance in order to secure compliance with any regulatory requirement designed to effectuate the objectives of Title IX.[123] The completion of an annual Assurance of Compliance form falls squarely within the meaning of that portion of Title IX. Therefore, recipients of federal aid may be required to comply with investigative regulations like the Assurance of Compliance requirement independent of their susceptibility to penalties for noncompliance with Title IX's central prohibition of sex discrimination.

Both the legislative history and relevant case law have thus applied

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[114]*See* Hillsdale College v. Department of Health, Educ. & Welfare, 696 F.2d 418 (6th Cir. 1982); Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981).

[115]*E.g.*, Hillsdale College v. Department of Health, Educ. & Welfare, 696 F.2d 418, 424 (6th Cir. 1982).

[116]696 F.2d 418 (6th Cir. 1982). This decision was vacated, 104 S. Ct. 1673 (1984), for further consideration in light of the Supreme Court's opinion in *Grove City*. However, the *Hillsdale* court's interpretation of "recipient" is consistent with that of the Supreme Court. *See supra* note 73 and accompanying text. Accordingly, *Hillsdale* is discussed in this Note as an example of a judicial approach to the definition of "recipient."

[117]Hillsdale College students secured loans or grants under the National Direct Student Loan (NDSL) Program and the Supplementary Educational Opportunity Grants (SEOG) Program, in addition to the BEOG and GSL Programs. 696 F.2d at 420.

[118]*See supra* note 80.

[119]*See supra* note 81.

[120]696 F.2d at 430. The Supreme Court reached a similar conclusion in *Grove City*. *See supra* note 75 and accompanying text.

[121]696 F.2d at 430.

[122]*Id.*

[123]20 U.S.C. § 1682.

a broad construction of the term "recipient" in order to prohibit the use of any federal aid to promote discriminatory practices. The Supreme Court upheld this broad reading of "recipient" in *Grove City College v. Bell.*

C. Grove City: *The Supreme Court Recognizes The "Indirect Recipient"*

A majority of the Supreme Court, in Part II of its *Grove City* opinion, provided a well-reasoned analysis of the meaning of "recipient" under Title IX,[124] and had "little trouble concluding that Title IX coverage is not foreclosed because federal funds are granted to . . . students rather than directly to one of the College's educational programs."[125]

The Court began by addressing the structure and language of the Education Amendments of 1972,[126] in which Congress both created the BEOG program and invoked the nondiscrimination requirements of Title IX. Based on the connection between Title IX and the BEOG program, and based on Congress' express concern with potential discrimination in the administration of student financial aid programs, the Court stated that "it would indeed be anomalous to discover that one of the primary components of Congress' comprehensive 'package of federal aid' . . . was not intended to trigger coverage under Title IX."[127] The Court pointed out that nothing in section 901 indicates that Congress intended to condition its proscription of sex discrimination upon the manner in which the program or activity receives federal assistance.[128] The Court endorsed the finding of the court of appeals that Title IX encompasses all forms of federal assistance, whether direct or indirect, and reiterated the need expressed in *North Haven* to "accord Title IX a sweep as broad as its language."[129]

In further support of its conclusion that federal aid to institutions through their students or by other indirect means places the institutions within the ambit of Title IX coverage, the Court cited several statements made by congressmen contemporaneously with the enactment of Title IX; these statements reflected a legislative awareness that student assistance programs created by the Education Amendments of 1972 would provide significant economic aid to colleges and universities.[130] Additionally, the Court recognized, in its analysis of Title IX's postenactment legislative history, that Congress had had several opportunities to amend

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[124]104 S. Ct. at 1216-20.

[125]*Id.* at 1220.

[126]*Id.* at 1216-17.

[127]*Id.* at 1217.

[128]*Id.*

[129]*Id.* (citing North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

[130]*Id.* at 1218-19.

the statute to refute HEW's broad approach to Title IX coverage in its regulations, but had failed to do so, even though other portions of the statute were amended.[131]

Once it is determined that a particular institution is a recipient of federal financial assistance through either direct or indirect benefits, the means of implementation and enforcement of Title IX's prohibition should logically be as broad as the legitimate end which Title IX serves. However, the scope of the power to sanction noncomplying programs has been the subject of such extensive criticism that its effect has been unnecessarily restricted, largely due to the conflicting interpretations of the term "program."

VI. Defining "Program": Safeguard or Unwarranted Defense?

Recipients of federal assistance face the ultimate sanction for violation of Title IX provisions, termination of federal funding. However, the statute limits the cutoff of federal assistance to the particular "program, or part thereof" in which noncompliance is found.[132]

This "program-specific" limitation has been applied to recipient institutions in markedly different ways. HEW's approach has been termed "institutional" since it supports the position that an entire institution may constitute the "program" for purposes of Title IX.[133] While some courts advocate the HEW approach,[134] others adhere to the opposite view, sometimes referred to as a "programmatic" approach,[135] only refers to the specific subpart in which discrimination has been positively identified. This section examines the disparate interpretations of "program" in light of the legislative history of Title IX, and discusses the impact of the Supreme Court's overly restrictive and controversial construction of the statutory language.

A. The Legislative History of "Program, or Part Thereof"

Legal commentators and a handful of federal courts faced with the task of defining the parameters of "program" have recognized that "neither the statutes, by their terms, nor the legislative history resolve the question of what constitutes the 'program.'"[136] Sparse as it may be,

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[131] *Id.* at 1219.

[132] 20 U.S.C. § 1682.

[133] *See supra* note 19 and accompanying text. It should be noted, however, that in its briefs filed in *Grove City*, HEW inexplicably changed its position to support the Supreme Court's narrow interpretation of "program." 104 S. Ct. at 1216 n.10. As Justice Brennan pointed out, this shift in policy lessens the deference that may be accorded HEW's interpretation. 104 S. Ct. at 1237 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

[134] *See supra* note 19 and accompanying text.

[135] *See supra* note 21 and accompanying text.

[136] *See, e.g., Finch Comment, supra* note 40, at 1116; Todd, *Title IX of the 1972*

the concurrent and post-enactment legislative history is worthy of some attention.

It has been noted previously that Title IX found its origin in Title VI and is to be interpreted in a similar manner.[137] The so-called "pinpoint" provision of Title VI[138] was incorporated as a last-minute response to the fears that an unlimited funding cutoff provision might foster vindictive or capricious exercises of its power over programs unrelated to, and not identified with, the discriminatory activity.[139]

This limitation was apparently included in Title VI with the intent that it would provide a primarily geographic stricture on the funding termination sanction.[140] The inclusion of the "pinpoint" provision dispelled the fears of several congressmen that an entire state could be subjected to the cutoff of federal financial assistance as a result of discrimination by one program within the state.[141] Significantly, Congress did not express any reservations that federal funding to an institution should not be terminated when that institution contains only one discriminatory subpart or program rather than an institution-wide discriminatory policy. The framers of Title VI, therefore, apparently intended to limit the reach of its regulatory control only to the extent necessary to prevent harm to entities which are separate from and unrelated to the discriminatory "program."

The post-enactment history of Title IX parallels this reasoning. During congressional review of HEW regulations, the controversy centered on the relation of Title IX to intercollegiate athletics.[142] Several unsuccessful attempts were made to exempt such athletic programs from the Act's coverage.[143] Senator Bayh, testifying before the House Committee reviewing the regulations, declared:

> [A]lthough federal money does not go directly to the football programs, federal aid to any of the school system's programs frees other money for use in athletics. . . . Without federal aid a school would have to reduce program offerings or use its resources more efficiently. . . . If federal aid benefits a discriminatory program by freeing funds for that program, the aid assists it.[144]

Education Amendments: Preventing Sex Discrimination In Public Schools, 53 TEX. L. REV. 103, 107-13 (1974).

[137]*See supra* notes 26-27 and accompanying text.

[138]*See supra* notes 29-32 and accompanying text.

[139]*See* 110 CONG. REC. 7,067 (1964) (remarks of Senator Ribicoff); *accord*, 110 CONG. REC. 11,942 (1964) (remarks of Attorney General Kennedy); 110 CONG. REC. 7,059 (1964) (remarks of Senator Pastore); *Finch Comment, supra* note 40, at 1116-24 (1970).

[140]*See* Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549, 557 (5th Cir. 1983).

[141]*Id.*

[142]*Postsecondary Hearings, supra* note 20, at 46, 66, 98, 304 (1975).

[143]*Id.*

[144]*Id.* at 171.

These excerpts reflect the view of Congress that programs receiving nonearmarked funding through an institution benefited from the general financial assistance received by the entire institution and are subject to Title IX regulation. Since the benefits these programs receive cannot be separated from the general flow of aid to the institution for sanction purposes, the logical and most efficacious means to force compliance with Title IX is to eliminate the source of aid, the financial assistance to the institution itself. If the source of aid is not eliminated, the institution is permitted to contravene the underlying policy of Title IX by using federal assistance to advance discriminatory practices, while asserting the program-specific nature of the statutory language as an unwarranted defense to the sanction powers of Title IX.[145]

Two conclusions may be drawn from the legislative history of Title IX: (1) the precise definition and parameters of "program" have never been established, and (2) Congress never intended the statutory language to be interpreted in so narrow and restrictive a manner as to curtail the effectiveness of Title IX sanctions.

B. Judicial Construction of "Program, or Part Thereof"

The courts have been divided over the breadth to afford the sanction powers of Title IX. While some courts have subscribed to the broad or "institutional"[146] approach espoused by HEW, others have adhered to the narrow or "programmatic" approach.[147] The former approach comports more closely with the legislative intent of Title IX and closes loopholes in the effectiveness of Title IX which may occur when the "programmatic" approach is taken.

1. Institutional Approach.—The principal cases upholding a broad reading of "program" are the decisions of the Third Circuit Court of Appeals in *Grove City College v. Bell*,[148] and *Haffer v. Temple University*.[149] In *Grove City*, the appellate court examined the legislative history of Title IX, and found that "the legislators did not contemplate that separate, discrete, and distinct components or functions of an integrated educational institution would be regarded as the individual programs."[150] The court reasoned that the proscriptive force of the statute should not be rendered impotent by an overly technical reading of Title IX's language simply because indirect or nonearmarked funding is in-

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[145]A similar argument was presented by the American Association of University Women (AAUW) in its supplemental letter memorandum to the appellate court in Grove City College v. Bell, 687 F.2d 684, 698 (3d Cir. 1982).

[146]*See supra* note 19. The "institutional" terminology originated with references to the position taken by the court in *Bob Jones* under Title VI. *See supra* note 36.

[147]*See supra* note 12.

[148]*See supra* notes 78-90 and accompanying text.

[149]688 F.2d 14 (3d Cir. 1982).

[150]Grove City College v. Bell, 687 F.2d. 684, 697 (3d Cir. 1982).

volved.[151] A narrow reading of "program" in cases involving nonearmarked funding would render Title IX ineffective:

> "[A]n institution whose entire purpose is educational [would be] exempt from coverage when it is financed with federal funds that can be used for virtually any educational purpose instead of a clearly limited function. The absurd result if this approach is followed to its logical conclusion is that general higher education aid would never bring the college under Title IX coverage because no specific program within the College would be earmarked to benefit from the federal funding."[152]

The appellate court concluded that the "remedy to be ordered for failure to comply with Title IX is as extensive as the program benefitted"; and that where indirect or nonearmarked funding is provided to an institution, the institution itself constitutes the "program."[153]

In *Haffer*, as in *Grove City*, the university received a substantial amount of nonearmarked federal funding.[154] The *Haffer* court was presented not with a failure to execute an Assurance of Compliance, but with an allegation of discrimination.[155] The Temple University athletic department was alleged to have fostered discriminatory practices, and was found to be a "recipient" of aid because federal money sent to the university freed nonfederal funds which were then allocated to the athletic department.[156] The *Haffer* court, relying on an analysis similar to that in *Grove City*, held that where the federal government furnishes nonearmarked aid to an institution, the institution itself is the "program" pursuant to Title IX.[157]

In *Iron Arrow Honor Society v. Heckler*,[158] the court authorized the termination of funding to the University of Miami in Florida because of the discriminatory nature of one of its honor societies, but relied upon a different rationale from that of the *Grove City* and *Haffer* decisions. The court analogized the effect of the honor society's male-only policy to the pervasive nature of a discriminatory admissions policy, finding that such practices "subtlely [sic] undermine the self-worth of

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[151] *Id.* at 698.

[152] *Id.* (citing AAUW memo; *see supra* note 145).

[153] *Id.* at 700.

[154] Haffer v. Temple Univ., 688 F.2d 14, 15-16 (3d Cir. 1982). Temple University received substantial sums of federal monies on a direct and indirect basis, yet the school did not earmark those funds for its allegedly discriminatory athletic department. *Id.*

[155] *Id.* at 15.

[156] *Id.* at 17.

[157] *Id.*

[158] 702 F.2d 549 (5th Cir. 1983). *Iron Arrow* was vacated as moot, 104 S. Ct. 373 (1984). The university had issued a policy statement that it would not permit Iron Arrow to resume its discriminatory practices on campus even if the honor society succeeded in its lawsuit. 702 F.2d at 552. Nonetheless, the *Iron Arrow* decision merits discussion; it presents an analysis distinct from the "institutional" or "programmatic" approaches. *See infra* notes 159-62 and accompanying text.

women who participate in these programs."[159] The court distinguished those cases which have taken a "programmatic" approach on the grounds that such decisions did not address an institution's "pervasive practices that go beyond discrete academic or non-academic programs."[160] Expressly denying any reliance on a "benefit" or "freeing up of funds" theory, or on any "institution as program" theory,[161] the *Iron Arrow* court concluded that because of the society's close historical ties with the university, the discriminatory practices of the society were attributable to the university itself.[162] At first glance, one might conclude that the court's primary criterion for defining the bounds of the "program" for purposes of Title IX was the pervasive nature of the institution's practices in which discrimination was found to exist. However, the court emphasized that its holding is not to be "construed as an implicit ruling that practices involving less crucial issues automatically fail to subject a university to Title IX's sanctions," and that its nonreliance on specific approaches is not to be taken as any indication of disapproval.[163] The *Iron Arrow* decision thus supports the principle announced by the appellate court in *Grove City*, that the means of enforcing Title IX must be as broad as the program benefitted.

2. *Programmatic Approach.*—Prior to the Supreme Court's decision in *Grove City*, the principal case opposing the view that an institution may constitute a "program" under Title IX was *Hillsdale College v. Department of Health, Education and Welfare.*[164] In *Hillsdale*, the Sixth Circuit Court of Appeals held that the specific grant program and not the institution itself constituted the "program" pursuant to the statutory language of Title IX.[165] The *Hillsdale* court noted that Title IX originated in a floor amendment which did not include a "program-specific" limitation, and that no discussion or explanation was given for its appearance in the final version of the statute.[166] The court asserted that this change in language indicated a shift by Congress from an "institutional" to a "programmatic" approach.[167] It may be argued, however, that the "program-specific" limitation was inserted in Title IX for the same reasons that it was inserted in Title VI: to avoid the danger of wholesale funding cutoffs.[168]

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[159] 702 F.2d at 562.

[160] *Id.* at 563.

[161] *Id.* at 564.

[162] *Id.* at 564-65.

[163] *Id.* at 564 n.27.

[164] 696 F.2d 418 (6th Cir. 1982). *Hillsdale* was vacated for further consideration in light of the Supreme Court's opinion in *Grove City*. 104 S. Ct. 1673 (1984).

[165] *Id.* at 430.

[166] *Id.* at 425-26.

[167] *Id.* at 426.

[168] *See supra* notes 30-31 and accompanying text.

The *Hillsdale* court attempted to distinguish *Bob Jones University v. Johnson*,[169] which articulated the "institutional" approach under Title VI, on two grounds. First, the court stated that *Bob Jones* involved an express finding of discrimination, while no allegation was made that Hillsdale had discriminated in any manner.[170] Second, the *Hillsdale* court asserted that the *Bob Jones* decision rested on a constitutional footing in addition to the statutory language of Title VI, while the *Hillsdale* case involved no constitutional issues.[171] The presence of a potential constitutional basis for the decision, however, does not lessen the potency of the statutory grounds.

Chief Judge Edwards offered a strong dissent to the *Hillsdale* majority's narrow interpretation of "program," noting Congress' intention that Title IX be a powerful means of achieving equal rights for women.[172] Judge Edwards expressly endorsed the "institutional" approach set forth by the appellate court in *Grove City*, emphasizing that effective enforcement procedures are crucial to the achievement of the objectives for which Title IX was created.[173] He concluded, "Simple justice [and] recognition of Title IX's basic and broad remedial purpose . . . dictate that I dissent from my colleagues' disturbingly narrow interpretation of this remedial statute."[174] Judge Edwards' criticism may be applied to other decisions which read the "program-specific" limitation narrowly, without due recognition of the underlying policies of Title IX.[175]

Two principles may be gleaned from analysis of the relevant case law. First, HEW and those courts which have read "program" to include an institution, when the institution receives assistance, have correctly discerned the underlying policy of Title IX to prevent the use of any federal funds for the advancement of discrimination. Second, the enforcement power granted to federal agencies must be as extensive as the assistance received in order to effectuate that policy. Without this extensive enforcement power, Title IX sanctions for noncompliance are little more than empty threats. Unfortunately, the Supreme Court's overly narrow interpretation of "program" in *Grove City* severely limits the intended remedial effect of Title IX upon sex discrimination in educational institutions.

C. Grove City: *The Supreme Court Muddies The Waters*

The Supreme Court's narrow interpretation of "program" in *Grove City*, limiting Title IX coverage to the college's financial aid program

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[169]396 F. Supp. 597 (D. S.C. 1974). *See supra* notes 33-36 and accompanying text.

[170]696 F.2d at 429. The court recognized, however, that Title IX does not provide that funds may be cut off only upon a finding of actual discrimination. *Id.* at 430.

[171]*Id.* at 429.

[172]*Id.* at 431 (Edwards, C.J., dissenting).

[173]*Id.* at 436-37.

[174]*Id.* 437. *Cf.* cases cited *supra* note 67.

[175]*See supra* note 67.

even though the federal aid to students benefited the entire college, "may be superficially pleasing to those who are uncomfortable with federal intrusion into private educational institutions, but it has no relationship to the statutory scheme enacted by Congress."[176] The Court would have done far more to effectuate the intent of Congress had it refused to define the term "program" under Title IX, as it had done in *North Haven Board of Education v. Bell*.[177] Several aspects of the Court's decision in *Grove City* raise serious questions about the depth of the Court's analysis in reaching such a restrictive conclusion.

The Court observed first that had Grove City College taken part in the BEOG program through the Regular Disbursement System (RDS),[178] it would have "no doubt" that the "program" for Title IX purposes would not have been the college, but rather its financial aid program because the assistance would have been "earmarked" for the recipient's financial aid program.[179] The Court then reasoned that Grove City's participation in the Alternate Disbursement System (ADS)[180] required no different result because, although Grove City did not distribute students' awards, BEOG's clearly enlarged the resources that the college devoted to financial aid.[181]

Assuming, arguendo, that the Court is correct in its finding that the two disbursement systems are equivalent in effect under Title IX, the Court's statement that "the fact that federal funds eventually reach the College's general operating budget cannot subject Grove City to institutionwide coverage"[182] is difficult to reconcile with its earlier broad interpretation of "recipient" which expressly included indirect recipients of federal monies.[183] It seems anomalous and inconsistent to "accord Title IX a sweep as broad as its language"[184] in defining "recipient" of federal assistance, while limiting the effect of Title IX's proscription of sex discrimination to the college's financial aid program, an entity which exists solely to disburse financial assistance within the institution. The college is then free, according to the Court's interpretation, to discriminate in its admissions, academic, or athletic programs without fear of Title IX sanctions, so long as it does not discriminate in its financial aid program. The "absurdity" of this result was aptly illustrated by Justice Brennan in his separate opinion:

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[176]Grove City College v. Bell, 104 S. Ct. 1211, 1226 (1984) (Brennan and Marshall, JJ., concurring in part and dissenting in part).

[177]*See supra* notes 53-71 and accompanying text.

[178]34 C.F.R. §§ 690.71, 690.78 (1983). The DSR program involves actual disbursement by the institution. *See supra* note 80.

[179]104 S. Ct. at 1220-21.

[180]*Id.* at 1221. *See supra* note 80.

[181]104 S. Ct. at 1221.

[182]*Id.*

[183]*See supra* notes 124-31 and accompanying text.

[184]104 S. Ct. at 1217.

> The Court thus sanctions practices that Congress clearly could not have intended: for example, after today's decision, Grove City College would be free to segregate male and female students in classes run by its mathematics department. This would be so even though the affected students are attending the College with the financial assistance provided by federal funds. If anything about Title IX were ever certain, it is that discriminatory practices like the one just described were meant to be prohibited by the statute.[185]

The Court impliedly supported the termination of funding to an entire institution when federal assistance is "nonearmarked," as suggested by the court of appeals.[186] The Court, however, distinguished between nonearmarked aid and student financial aid programs, stating that the latter are "*sui generis*."[187] This unexplained conclusion contradicts the Court's earlier finding that Title IX "contains no hint that Congress perceived a substantive difference between direct institutional assistance and aid received by a school through its students."[188] The Court, therefore, offered no plausible justification for its asserted distinction.

The Court rejected the theory that funds received by students through the BEOG program "free up" the college's resources for other uses, suggesting that 1) no evidence was introduced in *Grove City* that federal assistance received by Grove City students resulted in the diversion of the institution's funds to other programs; and, 2) the assumption that Title IX applies to programs receiving an increased portion of an institution's resources as a result of federal aid to other programs within the institution is "inconsistent with the program-specific nature of the statute."[189] Regarding the first proposition, even the Court recognized that substantial portions of the BEOG assistance received by Grove City students ultimately found their way to the institution's general operating budget and were used to "provide a variety of services to the students through whom the funds pass."[190] As for the perceived inconsistency between the court of appeals' assumption and Title IX's program-specific nature, the Court focused upon the difficulty in determining which programs or activities receive indirect benefits from federal assistance earmarked for use elsewhere.[191] The Court did not refute the assertion that other programs received indirect benefits from aid to one specific program or activity, but stated only that it is extremely difficult to determine which programs to "police" under Title IX. The simple answer, and the answer which most effectively carries out the intent of Congress,

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[185] *Id.* at 1236 (Brennan and Marshall, JJ., concurring in part and dissenting in part).
[186] *See supra* notes 150-53 and accompanying text.
[187] 104 S. Ct. at 1221.
[188] *Id.* at 1217.
[189] *Id.* at 1221.
[190] *Id.* at 1222.
[191] *Id.* at 1221.

is to expose the entire institution to Title IX coverage. The "Department's regulatory authority" need not "follow federally aided students from classroom to classroom"[192] because the institution has the necessary control over its individual programs to correct their actions or force compliance with Title IX. Yet, "policing" by the institution itself becomes less likely when a relatively small amount of assistance or exposure to sanctions is at stake.

The Supreme Court has repeatedly failed to recognize that termination of federal financial assistance to an entire institution is not the only sanction available for noncompliance with Title IX.[193] In many instances, the less severe remedies of injunctive and declaratory relief are preferable to the harsh results achieved through aid termination.[194] Ironically, the Court in *Grove City* appears to have been deeply concerned about providing an overbroad and intrusive definition of "program," yet the decision it reached had a devastating impact upon several students of Grove City College. Those students must have found cold comfort in the advice that they may take their aid and pursue an education elsewhere,[195] leaving Grove City College free to choose between the welfare of numerous students and compliance with a federal statute.

Justice Powell, joined by Justices Burger and O'Connor in a concurring opinion, lamented the *Grove City* decision as "an unedifying example of overzealousness on the part of the Federal Government."[196] Justice Powell noted the harsh effect that termination of assistance has upon student recipients of aid, and he emphasized that Grove City College had not discriminated in the slightest degree;[197] but even Justice Powell overlooked the possibility of sanctions other than termination of assistance as a more acceptable solution to the issues in *Grove City*.

VII. Application of Title IX Sanction Powers to Common Incidents of Noncompliance

Although the ambit of Title IX regulatory power should be as extensive as the assistance received directly or indirectly by recipient institutions, there may be circumstances where less drastic actions than funding termination will provide an adequate and more equitable means toward elimination of the noncompliance. This section addresses two recurrent situations under Title IX in which varied degrees of remedial measures are advised.

A. The Indirect Recipient

Both direct and indirect recipients of federal assistance are subject

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[192] *Id.* at 1222.

[193] *See infra* notes 198-206 and accompanying text.

[194] *Id.*

[195] 104 S. Ct. at 1223.

[196] *Id.* at 1223 (Powell, Burger and O'Connor, JJ., concurring).

[197] *Id.* at 1224.

to the full force of Title IX sanction efforts. The ultimate sanction of fund termination, however, has been misapplied in the case of the indirect recipient as the decision in *Grove City* demonstrates.[198] Quite frequently, the institution which is classified as a recipient because of federal aid received by its students receives no other direct aid from the government.[199] As a result, the student bears the brunt of the sanction by having her loan or grant withdrawn, while the institution, ostensibly the target of the sanction, has felt little of its impact. Of course, an institution whose students are unable to obtain federal aid may deem it necessary to provide some assistance from its own treasury in order to keep its enrollment at a maximum. However, the greatest and most immediate impact of the termination of assistance to the indirect recipient is clearly upon the student.

Despite its vigorous efforts to curb sex discrimination, HEW has overlooked the most efficacious means at its disposal to do so without erecting barriers to students' educational pursuits. Section 901 of Title IX provides that compliance with the statute "may be effected" by termination of funding or "by any other means authorized by law."[200] Adoption of the remedies of declaratory and, particularly, injunctive relief would be "authorized by law" and would be contained in the permissive grant of authority to fashion remedies.[201] Injunctive relief against an indirect recipient would be desirable because the discriminatory practices of the institution could be halted without adversely affecting the students who depend upon federal assistance to continue their education. The deterrent effect would then be focused upon the party that actually committed the wrong, the discriminatory institution. When an injunction is issued against an institution to cease its discriminatory practices, the "teeth" of this remedial measure are found in the contempt powers of the court. It is therefore unlikely that HEW would need to resort to a termination of assistance if injunctive relief were sought from the outset.

The Supreme Court, in *Cannon v. University of Chicago*,[202] observed in dictum that the funding termination sanction of Title IX can be severe in some instances. The Court noted the availability of alternative methods for ensuring compliance with Title IX.[203] The Supreme Court's observations in *Cannon* buttress the conclusion that "Congress intended the use of measures less severe than total fund cutoff where the statutory

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[198] *See supra* notes 192-96 and accompanying text.

[199] *See supra* note 79.

[200] 20 U.S.C. § 1682.

[201] Hillsdale College v. Department of Health, Educ. & Welfare, 696 F.2d 418, 437 (6th Cir. 1982) (Edwards, C.J., dissenting).

[202] 441 U.S. 677, 705 nn. 38 & 39 (1979).

[203] *Id.*

objectives of Title IX could be furthered by less heroic means."[204]

HEW should continue its vigorous attack on the discriminatory activities of indirect recipients of federal aid, yet adopt an approach more rationally related to its objectives by seeking injunctive relief against noncomplying institutions prior to invoking the termination sanction. An amendment to its regulations to that effect, while not required, would reduce the tension that has built up between HEW and the private university.[205]

Institutions which desire to remain unregulated may provide loan or grant programs exclusive of the federal system. Those institutions which rely on federal student aid will be deemed indirect "recipients" of federal aid within the ambit of Title IX. The simplest advice to such institutions would be to comply with regulations and eliminate intra-scholastic discrimination policies in accordance with Title IX.

B. The Direct Recipient

A different set of arguments pertains to the direct recipient of federal assistance which does not specifically earmark its funding for the particular discriminatory program within the institution.[206] While the termination sanction is certainly authorized and likely advised in many instances, there may be specific circumstances which would make the exercise of the "ultimate" sanction inequitable even in this situation. For example, State College may receive $1,000,000.00 in federal grants for its building fund, which is subject to revocation upon the finding that the food services department in one dormitory has followed discriminatory hiring policies. Although State College will have the opportunity to correct its practices prior to the cutoff of any funds,[207] the disparate gravity of the offense and the remedy is alarming.

On the other hand, educational institutions generally exert substantial control over the operations policies of their subparts, and should be fully capable, therefore, of halting the discriminatory activity when given the opportunity to do so prior to a fund cutoff. Moreover, termination of funding to an institution receiving direct aid has a lesser impact upon the innocent student than termination of funding to an institution receiving only indirect aid. Where the institution receives direct aid, the effect of a fund cutoff is not limited to the students who were receiving

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[204]Hillsdale College v. Department of Health, Educ. & Welfare, 696 F.2d 418, 437 (6th Cir. 1982).

[205]*See Private Education Note, supra* note 42.

[206]*E.g.*, Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982).

[207]20 U.S.C. § 1682 requires specific administrative processes prior to invocation of the termination sanction, including 1) the government's initial duty to attempt resolution of the violation through conciliation, 2) notice to the recipient of any adverse finding, 3) opportunity for hearing, 4) thirty days' advance notice to the congressional committees with responsibility for the laws under which the funds were provided, and 5) the right to judicial review of any decision to terminate funding.

federal aid, but instead is spread evenly across the student body when the institution is forced to raise tuition rates or other fees to account for lost revenues. Where the institution receives only indirect aid, the students receiving aid feel the sanction's impact when their federal aid is cut off completely.

HEW should terminate all assistance to the recipient institution only in those cases where the discriminatory program constitutes a substantial component of the institution or affects its operation to a significant degree. Where such action might create a gross injustice to the institution, or where the individual rights of innocent students are called into question, HEW should consider seriously the initial pursuit of injunctive relief against the noncomplying party.

VIII. The Proposed Civil Rights Act of 1984: An Overpowering Response to *Grove City*

While the Supreme Court's broad construction of "recipient" under Title IX constituted an historic enlargement of federal control over educational institutions, its "program-specific" reading of the statute was seen as a setback for civil rights enforcement. Within hours of the Court's decision in *Grove City*, members of Congress had set out to restore Title IX to its proper dimensions.[208] As one commentator has suggested, however, "[t]he offending portion of the Grove City decision might . . . have been undone by a precisely drafted measure. . . . But Congress reached for a multi-warhead missile instead of a rifle."[209] Senate Bill 2568, introduced by Senator Kennedy on April 12, 1984, and its companion, H.R. 5490, are moving through Congress virtually unopposed. The potentially preemptive effect of this proposed legislation upon the precedents analyzed by this Note dictates at least a cursory examination of its possible effects upon Title IX and related legislation.

A. The Impact of Grove City *on Other Statutory Proscriptions of Discrimination*

The phrase "program or activity," upon which the Supreme Court based its "program-specific" limitation of Title IX, is also included in the statutes which proscribe discrimination on account of race, age, or handicap in federally assisted programs.[210] Therefore, it is likely that the Court's "program-specific" construction of Title IX will be applied to these similarly worded statutes.[211] An important distinction, however,

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[208]S. 2568, 98th Cong., 2nd Sess. (1984); H.R. 5490, 98th Cong., 2d Sess. (1984).

[209]Chester E. Finn, Jr., *Civil Rights in Newspeak*, Wall St. J., May 23, 1984, at 28, col. 1 (Chester Finn is a Professor of Education and Public Policy at Vanderbilt University).

[210]These statutes are the Age Discrimination Act of 1975 (42 U.S.C. §§ 6101-6107 (1982)); Section 504 of the Rehabilitation Act of 1973, as amended in 1978 (29 U.S.C. § 794); and Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d to 2000d-6).

[211]*See, e.g.*, Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981); Simpson v. Reynolds

is that Title IX in its broadest form applies only to educational institutions, while "Title VI, Section 504, and the Age Discrimination Act cover all federally-assisted entities and programs."[212] A similarly narrow construction of those statutes would thus have an impact far exceeding the realm of education.

B. The Intended Effect of the Civil Rights Act of 1984 on Title IX

Senate Bill 2568 was introduced to restore Title IX and its companion statutes "to their intended force and coverage."[213] It would make three basic changes in the statutory language of Title IX: (1) The phrase "education program or activity" is replaced by "education recipient." Thus, Title IX would prohibit discrimination by an "education recipient of"—rather than "under a program or activity receiving"—federal financial assistance.[214] (2) A definition of the term "recipient" is added which would expand substantially the statutory reach of Title IX.[215] (3) The power of federal agencies to enforce Title IX through termination of funding is greatly enlarged.[216]

The result of these changes was aptly related by Senator Packwood as follows: "[A]ny recipient of Federal financial assistance will trigger institutionwide coverage. Lest any critic question our remedial approach, however, the bill will also clarify that only the particular assistance supporting noncompliance will be subject to termination."[217] Although the bill's sponsors claim that it was designed as a limited remedial measure and was not intended to "break new ground,"[218] such expectations may be shallow observations.

1. The New "Recipient."—Title IX now regulates "any education program or activity" receiving "Federal financial assistance."[219] Senate Bill 2568 would amend Title IX to cover any "educational recipient" of such aid. Assistant Attorney General William Bradford Reynolds has argued that the proposed Act does "break new ground," in that currently a Title IX "recipient" is regulated only to the extent of its programs

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Metals Co., 629 F.2d 1226 (7th Cir. 1980); Board of Public Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969); *see also* Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984).

[212]Testimony of Clarence M. Pendleton, Chairman of U.S. Commission on Civil Rights before House Committee on Judiciary and Education and Labor 4 (May 16, 1984).

[213]130 CONG. REC. S.4586, (daily ed. Apr. 12, 1984). Senator Dole, co-sponsor of S. 2568, queried "What difference does it make to a disabled student if the student financial aid office is in compliance with section 504, if none of the school's academic program are accessible?" 130 CONG. REC. S.4590, (daily ed. Apr. 12, 1984).

[214]130 CONG. REC. S.4594 (daily ed. Apr. 12, 1984) (statement of Senator Alan Cranston).

[215]S.2568, 98th Cong., 2d Sess. § 2(b)(2) (1984).

[216]*Id.* § 2(c)(2).

[217]130 CONG. REC. S.4589 (daily ed. Apr. 12, 1984).

[218]*Id.* at S.4590.

[219]20 U.S.C. § 1682 (1982).

or activities receiving assistance, while under S. 2568 "a 'recipient' is to be covered in its entirety."[220] It is the clear intent of the sponsors of S. 2568 that when an institution receives federal assistance for one of its parts or subunits, the institution and not the particular subunit would be the recipient.[221] The entire institution would be covered by Title IX if it receives support from the aided subunit.[222] Under the proposed Act, if one student at a college participated in the BEOG program, the entire college could be covered not only by Title IX, but also by Title VI, section 504, and the Age Discrimination Act.

2. Expanded Enforcement Power of Title IX.—Senate Bill 2568 retains all of the procedural safeguards currently embodied in Title IX.[223] According to existing law, federal agencies' power to terminate funding is limited to the particular program or activity which is found to be in noncompliance, and depends upon a judicial interpretation of the extent of the "program." Senate Bill 2568, however, would allow the agency to terminate any "assistance which supports"[224] the noncompliance, even though the supporting program is innocent. This aspect of the proposed Act presents dangerous potential for unrestrained termination of assistance in instances where other means of forcing compliance would be preferable.

It should be noted that alternatives are available which would achieve the limited objective of overturning the restrictive construction of "program" in *Grove City* without such an all-encompassing and somewhat Orwellian[225] legislative effort. A bill currently pending in the House, H.R. 5011, introduced by Congresswoman Schneider, would make Title IX coverage applicable to the educational institution as a whole in the event that any of its education programs or activities receive direct or indirect federal financial assistance.[226] Of course, as with any proscriptive

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[220]Testimony of William Bradford, Assistant Attorney General, Civil Rights Division, before the House Committee on Education and Labor 8 (May 22, 1984) [hereinafter referred to as Reynolds Testimony].

[221]130 CONG. REC. S.4586 (daily ed. Apr. 12, 1984) (statement of Senator Edward M. Kennedy). Senator Cranston explained S. 2568 as follows:

> Where the Federal financial assistance is provided to an entity itself, either directly from a Federal agency or through a third patry [sic], the whole entity and all of its component parts would be covered by the anti-discrimination ban and suit could be brought against the entity to enjoin discrimination in any of its components, and to recover damages for injuries suffered by reason of discrimination in any component.

Id. at S.4594.

[222]*Id.* "Support" is not defined by the proposed bill. *Id.* at S.4595.

[223]*See supra* note 206.

[224]S. 2568, 98th Cong., 2d Sess. § 2(c)(2)(C) (1984).

[225]Chester E. Finn, Jr., *Civil Rights in Newspeak*, Wall St. J., May 23, 1984, at 28, col. 1.

[226]H.R. 5011, 98th Cong., 2d Sess. (1984). *See also* Senator Packwood's proposal to amend Title IX by "striking out 'education program or activity' and inserting 'education program, activity, or institution.'" S. 2363, 98th Cong., 2d Sess. (1984).

legislation, the fairness of the terms of the bill may not always be consistent with the fairness of its application.

It is hoped that the Civil Rights Act of 1984 will be enacted only after it has been subjected to thorough review in both houses and has profited from the collective wisdom of the Congress.[227] Otherwise, Justice Powell and his associates may indeed be unwilling interpreters of an "unedifying example of overzealousness on the part of the Federal Government."[228]

IX. Conclusion

The administrative power to terminate federal financial assistance to educational institutions under Title IX of the Education Amendments of 1972[229] has raised serious questions as to what parties are "recipients" of federal aid, and to what extent such recipients are subject to remedies for noncompliance with Title IX regulations.

The scope of Title IX was intended to be as extensive as the distribution of federal monies through the various federal agencies to educational institutions. A "recipient" within the meaning of the statute may be one directly receiving a federal check or one that benefits in some indirect manner from federal aid, such as a university whose students participate in federal loan or grant programs.

While the sanctions for noncompliance with Title IX regulations are subject to a "program-specific" limitation, these remedies, including termination of funding, must be applied in a manner which is as broad as necessary to achieve the objective of Title IX, to prevent the use of any federal monies to advance sex discrimination.

The ultimate sanction of a cutoff of funds can be harsh and it may damage the student rather than deter the noncomplying institution when the student is the only direct recipient of aid. Federal agencies should employ other means of enforcement authorized by Title IX, particularly injunctive relief, when the equities of the situation demand such actions. In many other instances, the termination sanction is a necessary vehicle for effectuation of the underlying policy objectives of Title IX.

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[227] *See* Reynolds Testimony, *supra* note 220, at 7.

[228] Grove City College v. Bell, 104 S. Ct. 1211, 1223 (1984) (Powell, Burger and O'Connor, JJ., concurring).

[229] 20 U.S.C. §§ 1681-1686 (1982).