Oklahoma Law Review

Volume 36 | Number 3

1-1-1983

# Discrimination: The Remedial Scope of Title IX of the Education Amendments of 1972, as Interpreted in Grove City College and Richmond University

Kelsey Lynne McNaught

such abuse by a prosecutor to go unremedied and encourages misrepresentation by the prosecutor as to his intent at the time of such conduct. The benefit of uniformity could well have been accomplished by a more clear definition of the overreaching standard as set forth in the previous cases, and such a decision would have entailed less cost to the protection afforded by the double jeopardy clause.

*Steven Paul Shreder*

## Discrimination: The Remedial Scope of Title IX of the Education Amendments of 1972, As Interpreted in *Grove City College* and *Richmond University*

Section 901 of Title IX of the Education Amendments of 1972[1] provides that: "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. . . ."[2] This legislation is intended to discourage sex-based discrimination under any educational program or activity receiving federal financial assistance. This apparently clear mandate, however, has provoked extensive controversy and judicial discord. At the center of the dispute is the question of program specificity and direct versus indirect aid. Is Title IX "program-specific" and therefore only enforceable against particular programs receiving federal aid? How shall a "program" for Title IX purposes be defined?[3] Must the federal financial assistance go *directly* to a particular program to bring it within the purview of Title IX?

This note will discuss these questions in view of two of the most recent federal cases in this area. *Grove City College v. Bell*[4] and *University of Richmond v. Bell*.[5] The legislative history of Title IX and prior case law will also be considered.

### *Facts in Grove City College*

Grove City College is a private coeducational college affiliated with the United Presbyterian Church. It is located in Grove City, Pennsylvania. Some 2,200 students attend Grove City College, of which 140 are eligible to receive Basic Educational Opportunity Grants (BEOGs). BEOGs are appropriated by

1. Pub. L. No. 92-318, tit. IX, 86 Stat. 373, *codified in* 20 U.S.C. §§ 1681-86 (1972) and scattered sections of 42 U.S.C. § 29 (1972).

2. 20 U.S.C. § 1681 (1972).

3. *See* Note, *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof,"* 78 MICH. L. REV. 608 (1980).

4. 687 F.2d 684 (3d Cir. 1982).

5. 543 F. Supp. 321 (E.D. Va. 1982).

Congress and allocated by the Department of Education. Grove City College receives no other federal or state financial assistance.[6]

In July 1976 the Department of Education began efforts to secure an assurance of compliance from Grove City College, based on its students' receipt of BEOGs.[7] Grove City College refused, contending that the receipt of BEOGs did not constitute "federal financial assistance" within the meaning of Title IX. The College's position was that BEOGs paid to students did not establish *direct* federal financial assistance to Grove City College and that, therefore, it was not subject to Title IX regulation. At this point, the Department of Education brought administrative proceedings to terminate federal grants (BEOGs) to the College's students.

After an administrative hearing, an administrative law judge concluded that Grove City College was a recipient of "federal financial assistance"[8] within the meaning of Title IX and that the allocation of BEOGs could be terminated for the school's refusal to execute an assurance of compliance. Grove's administration admitted that the school had not filed the assurance, and the administrative law judge entered an order terminating BEOG funds.

On November 29, 1980, Grove City College, joined by four students, brought suit against the Department of Education. In an amended opinion, on June 26, 1980, the district court granted Grove's motion for summary judgment and denied the cross-motion of the Department. The Department's appeal followed. The United States Court of Appeals for the Third Circuit reversed, holding that Grove was a recipient of federal financial assistance within the meaning of Title IX.

Grove City College asserted that BEOGs should not be included within the scope of federal financial assistance because the phrase refers only to *direct* aid to *particular programs*, not to educational grants paid to students. Grove argued that federal financial assistance in the form of BEOGs is incompatible with the requirement that enforcement of Title IX be "program-specific." In Grove's view, Title IX's reference to "program" or "activity" indicates that the Act's provisions cannot apply on a generalized, nonprogrammatic, or institutional basis. Grove reasoned that because the BEOGs its students receive cannot be tied to particular programs, the College cannot, under the

6. Initially, the Department of Education also cited Grove's students' receipt of Guaranteed Student Loans as "federal financial assistance." The district court found that GSLs were "contracts of guarantee" within the exception to § 902. On appeal, the Department does not contest the district court's conclusion.

7. The Department of Education is the primary administrator of federal financial assistance to education. The Department requires that each recipient file an assurance of compliance as a means of assuring adherence to Title IX. 34 C.F.R. § 106.4(a).

8. The Department has construed the phrase "federal financial assistance" to include educational grants paid to students, and thus, recieved indirectly by the schools which they attend. The Department defines federal financial assistance in part as: "(1) A grant or loan of Federal financial assistance, including funds made available for: . . .

"(ii) Scholarships, loans, grants, wages or other funds extended to any entity, or extended directly to such students for payment to that entity." 34 C.F.R. § 106.2(g)(1), (ii).

program-specificity requirement, be a "recipient" within the meaning of Title IX and is exempt from Title IX regulation.[9]

The court disagreed, finding that "[c]omplete accommodation can be achieved between the concepts of 'indirect federal financial assistance' and 'program-specific' requirements."[10] The court's decision rests on a broad interpretation of Title IX that gives full scope to its "non-discriminatory purpose."[11]

### *Facts in University of Richmond*

The University of Richmond is a private university consisting of several separate schools and colleges, including two coordinate undergraduate liberal arts colleges: Richmond College for men and Westhampton College for women. Students from both colleges attend classes together; however, the two colleges maintain separate graduation exercises and provide many separate auxiliary services. The Athletic Department at the University of Richmond provides intercollegiate and club sports for both men and women. It is funded separately from other programs at the University, and its budget is drawn from sports revenues, gifts, and general funds of the University. The Athletic Department receives no direct federal financial assistance.

In a letter dated February 6, 1981, the Department of Education notified the University of Richmond that the Office of Civil Rights (OCR) had received a sex discrimination complaint in the University's athletic program. OCR's authority to investigate the University of Richmond's athletic program was based upon the University's receipt of National Direct Student Loans, Basic Educational Opportunity Grants (BEOGs), Supplemental Educational Opportunity Grants, College Work Study, and Department of Education Grants. The Department requested certain information in reference to the University's athletic program.

In another letter dated March 31, 1981, the Department stated OCR's authority to investigate the University's athletic program under Title IX:

> Whether a particular education program or activity directly receives Federal funds is not determinative of the coverage of that program or activity by Title IX. Rather, the determination is based on whether the "recipient" institution receives, either directly or indirectly "Federal financial assistance" which benefits its programs and activities. *See Bob Jones University v. Johnson*, 396 F. Supp.

9. *Grove* relies on several prior cases: University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981); Bennett v. West Texas State Univ., 525 F. Supp. 77 (N.D. Tex. 1981). *Othen* and *Bennett* relied heavily on employment regulation cases, which are questionable in light of a recent Supreme Court decision, North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982). A discussion of discrimination in employment under Title IX is beyond the scope of this note.

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

11. *Id.*

597 (D.S.C. 1974), aff'd per curiam, 529 F.2d 514 (4th Cir. 1975); *Grove City College v. Harris*, 500 F. Supp. 253 (W.D. Pa. 1980).[12]

The Department contended that although most of the financial assistance was paid directly to the students and not to the University itself, the receipt of federal funds is conditional upon the student's enrollment in an approved institution of higher education. In this sense, the institution is the ultimate beneficiary of the funds that enable students to attend the institution and to pay tuition and other educational expenses. The University of Richmond also received direct grants under the College Library Resources Program[13] in the amount of $1,900 (1980-81) and $1,200 (1981-82). By virtue of the direct grants extended to the University and the receipt of federal funds by its students, the University must comply with the antidiscrimination provisions of Title IX in all of its educational programs and activities, including athletics. The Department cautioned that if Richmond failed to comply with the investigation, the Department would bring enforcement proceedings.

The University of Richmond informed OCR of its refusal to comply with the investigation and supply the data requested, and filed an action seeking injunctive and declaratory relief. The United States District Court for the Eastern District of Virginia granted the University of Richmond summary judgment and enjoined the Department of Education from commencing enforcement proceedings against the University. The Department was also enjoined from investigating "any program or activity at an educational institution located within the jurisdiction of this Court absent a showing that the program or activity is the recipient of direct federal financial assistance."[14]

The decisions in *Grove City College* and *University of Richmond* are diametrically opposed. The broad interpretation given Title IX's provisions in *Grove City College* cannot be reconciled with the narrow "program-specific" requirement articulated in *University of Richmond*. To assess the wisdom of these conflicting opinions, the legislative history of Title IX, as well as prior case law, must be examined.

### *Legislative History of Title IX*

Prior to Title IX, students attempting to contest interscholastic discrimination relied on the equal protection clause of the fourteenth amendment.[15] The early case of *Brenden v. Independent School District 742*[16] illustrates the equal protection approach. Two high school girls brought an action under the equal protection clause challenging a regulation enjoining females from participating with males in interscholastic athletics. The court held that the regulation was

12. University of Richmond v. Bell, 543 F. Supp. 321, 323-24 n.5 (E.D. Va. 1982).

13. 20 U.S.C. § 1029 (1972).

14. University of Richmond v. Bell, 543 F. Supp. 321, 333 (1982).

15. Martin, *Title IX and Intercollegiate Athletics: Scoring Points for Women*, 8 OHIO N.U.L. REV. 481, 484 (1981).

16. 477 F.2d 1292 (8th Cir. 1973).

arbitrary and unreasonable and violative of equal protection. There were several other pre-Title IX cases that relied on an equal protection theory.[17] However, on close examination, the constitutional cause of action proves unsatisfactory. First, a successful claim based on constitutional protection would have to meet certain standards. The existence of state action or federal involvement could create a jurisdictional problem.

The proper standard of review might also limit the success of an equal protection claim. Courts generally have not applied strict scrutiny, the most exacting standard, to gender-based classifications. This is because gender-based classifications are not considered suspect, as are classifications such as those based on race or national origin.[18] Finally, one commentator notes: "Courts have generally not scrutinized teams closely to determine if girls' and boys' teams are actually equivalent. Thus, separate-and-unequal opportunities may satisfy the constitutional standard."[19]

Congress apparently was not satisfied that the equal protection clause provided a firm enough foothold to discourage sex-based discrimination and, in 1972, enacted Title IX to eradicate gender-based discrimination in education.[20] Title IX was based on Title VI, the Civil Rights Act of 1964, which proscribes discrimination by reason of race, color, religion, or national origin, and the drafters of Title IX assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.[21] Title VI provides: "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[22] The provision in Title VI authorizing administrative enforcement of Title VI through termination or refusal of federal aid is identical to administrative enforcement provisions found in Title IX.[23]

During floor debates on the 1964 Civil Rights Act, Senator Hubert Humphrey stressed: "[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in *any fashion which encourages, entrenches, subsidizes or results* in racial discrimination."[24] In *Cannon v. University of Chicago*, the Supreme Court stated that Title IX, like Title VI, was designed "to avoid the use of federal resources to support discriminatory practices."[25]

17. *See* Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972).

18. Martin, *supra* note 15, at 484-85.

19. Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 58-59 (1977).

20. 20 U.S.C. § 1681 (1972).

21. Cannon v. University of Chicago, 441 U.S. 677, 696 (1979). (*Cannon* is primarily recognized for its holding that a private cause of action exists under Title IX.)

22. 42 U.S.C. § 2000d (1977).

23. *Compare* 20 U.S.C. § 1682 (1972) (Title IX) *with* 42 U.S.C. § 2000d(1) (1977) (Title VI).

24. 110 CONG. REC. 6543 (1964) (Sen. Humphrey quoting President Kennedy's message to Congress, June 19, 1963), *quoted in* Grove City College v. Bell, 687 F.2d 684, 691 n.13 (3d Cir. 1982) (emphasis added).

25. 441 U.S. 677, 704 (1978).

Although Title IX was modeled after Title VI, there are some differences between them. Legislatures and courts, along with the general populace of American society, perceive sex discrimination as less onerous or less invidious than discrimination based on race, color, or national origin.[26] Consequently, unlike Title VI, Title IX contains exemptions and deferments reflecting significant popular as well as judicial indecision.[27] The hesitancy of some courts to give Title IX its full remedial impact reflects this indecision.

### *Direct Versus Indirect Aid*

In 1971, Senator Birch Bayh introduced a forerunner to Title IX as an amendment to the Elementary and Secondary Education Act of 1965.[28] Senator Bayh stated:

> The bill deals with equal access to education. Such access should not be denied because of poverty or sex. If we are going to give all students an equal education, women must finally be guaranteed equal access to education . . . .
>
> [I]t does not do any good to pass out hundreds of millions of dollars if we do not see that the money is applied equitably to over half of our citizens.[29]

Debates over Senator Bayh's proposal indicate that funds coming under the amendment were intended to include virtually every type of federal assistance, direct or indirect, including BEOGs administered to students (as is the case in *Grove City College*). Supporting Senator Bayh's position, Senator George McGovern stated: "I urge the passage of Senator Bayh's amendment to assure that *no funds*. . . [b]e extended to *any institution* that practices biased admissions or educational policies."[30] Similarly, when Senator Bayh was asked what type of aid might be subject to cancellation of funds under Title IX, he replied, "We are cutting off all aid that comes through the Dept. of Health, Education and Welfare."[31]

26. *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights For Women*, 80 YALE L.J. 871 (1971). For a general discussion of sex discrimination focusing on the historically different legal treatment of sex and race discrimination, *see* Johnson & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*. 46 N.Y.U.L. REV. 675, 738 (1971).

27. *See* Buek & Orleans, *Sex Discrimination—A Bar to Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1, 3 (1973).

28. *See* 117 CONG. REC. 30,155-57 (1971), where Senator Bayh proposed Title IX as an amendment to the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 236-244 (1970).

29. 117 CONG. REC. 30,412 (1971), *quoted in* Grove City College v. Bell, 687 F.2d 684, 692 (3d Cir. 1982).

30. 117 CONG. REC. 30,158-59 (1971) (emphasis added).

31. 117 CONG. REC. 30,408 (1971), *quoted in* Grove City College v. Bell, 687 F.2d 684, 692 (3d Cir. 1982). "The Department of Health, Education and Welfare" being referred to here. The Department of Education has replaced HEW as administrator of Title IX by authority of section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678 1979.

The 1971 amendment was not adopted, but a substantially similar amendment was submitted and adopted on February 28, 1972.[32] Senator Bayh stated that the second version provided a "comprehensive approach which incorporated . . . the key provisions of my earlier amendment . . . ."[33] This second version is Title IX as it is known today.

Legislative history supports the contention that Congress intended Title IX, as was its forerunner Title VI, to be broadly construed. The court in *Grove City College* stated:

> While it is true that the legislative history makes no explicit reference to "indirect" financial assistance such as student grants, the 1971 debates make it clear that Congress' overriding objective in enacting Title IX, that is, to withhold public funds from an educational institution which engages in sex discrimination, was to deny to discriminating institutions all such financial support, direct or otherwise. Thus, as we construe the legislative history it is consistent with the Education Department's position [in *Grove City College*], that Title IX applies to any institution which receives *indirect* or *direct* federal financial assistance.[34]

Post-enactment history of Title IX further indicates that indirect assistance such as BEOGs come within the scope of federal financial assistance under Title IX. On June 4, 1975, the Department of Education published its final Title IX regulations[35] and submitted them to Congress for review. The process of review gives Congress the opportunity to assess an agency's regulations fully to determine whether the regulations are consistent in purpose with the act from which the agency derives its authority. If Congress finds the regulations inconsistent with the act in question, Congress can disapprove the regulations by a concurrent resolution. If no such resolution is passed within forty-five days of the submission to Congress, the regulations become effective.[36] During congressional review of Title IX regulations, indirect aid was specifically brought to the attention of members of Congress. Then HEW Secretary Weinberger told congressmen that the Department construed "federal financial assistance" to include indirect assistance programs. He stated:

> Our view was that student assistance, assistance that the Government furnishes, that goes *directly* or *indirectly* to an institution is Government aid within the meaning of Title IX. If it is not, there is an easy remedy. Simply tell us it is not. We believe it is and base our assumption on that.[37]

32. 118 CONG. REC. 5808 (1972).

33. *Id., quoted in* Grove City College v. Bell, 687 F.2d 684, 692 (3d Cir. 1982).

34. Grove City College v. Bell, 687 F.2d 684, 692-93 (3d Cir. 1982) (emphasis added).

35. 40 Fed. Reg. 24,128 (1975).

36. 20 U.S.C. § 1232(d)(1) (1977).

37. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education & Labor*, 94th Cong., 1st Sess. 481-84 (1975), *quoted in* Grove City College v. Bell, 687 F.2d 684, 693 (3d Cir. 1982) (emphasis added).

Several concurrent resolutions were proposed, including a resolution by Senator Jesse Helms that would have disapproved Title IX regulations because they did not limit application of Title IX to programs and activities directly receiving federal financial assistance.[38] Other proposed regulations disapproved of the regulations entirely.[39] Neither house passed a "disapproval" resolution. Impliedly, then, Congress considered the regulations within the scope of the statute.

A leading case supporting the indirect aid analysis of the Department of Education is *Bob Jones University v. Johnson*,[40] a Title VI case.[41] In *Bob Jones University*, the Department denied eligible veterans enrolled at the University veterans' benefits because the University engaged in racially discriminatory practices. The University, like Grove City College, argued that because the individual students received the aid in the form of veterans' benefits, Bob Jones University was not a "recipient" of "federal financial assistance" within the meaning of Title VI and hence was not subject to Title VI regulation.

The court in *Bob Jones University* rejected this argument. It found that the University was a recipient of federal financial assistance because it benefited by the veterans' payments. The court stated: "payments to veterans . . . [release] institutional funds which would, in the absence of federal assistance, be spent on the student."[42] The court also stated that "the participation of veterans who—but for the availability of federal funds—would not enter the educational programs . . . [enlarges] the pool of qualified applicants upon which the school can draw for its educational program."[43] Finally, the court concluded: "[W]hether 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."[44] The court went on to distinguish between a situation such as *Bob Jones University* in which cash payments made by the government to an individual are "expressly conditioned upon this pursuit of an approved course of study at an approved educational institution,"[45] and a situation in which cash payments to an individual "may be utilized without restriction, and which are not dependent upon an individual beneficiary's partipation in any program or activity."[46] In the former situation, payments are specifically tied to the

38. S. Con. Res. 46, 94th Cong., 1st Sess., *reprinted in* 121 CONG. REC. 13,300 (1975).

39. H.R. Con. Res. 310, 94th Cong., 1st Sess., *reprinted in* 121 CONG. REC. 19,209 (1975); H. Con. Res. 329, 94th Cong., 1st Sess., *reprinted in* 121 CONG. REC. 21,687 (1975); H.R. Con. Res. 330, 94th Cong., 1st Sess. *reprinted in* 121 CONG. REC. 21,687 (1975).

40. 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

41. Congress intended Title IX to be construed as Title VI, its legislative forerunner. See text accompanying notes 21-25 *supra*.

42. 396 F. Supp. 597, 602 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

43. *Id.* at 603.

44. *Id.* at 603, 604.

45. *Id.* at 602.

46. *Id.*

beneficiary's participation in an educational program or activity, bringing these payments within the scope of federal financial assistance under Title VI.

The court of appeals in *Grove City College* relied heavily on the *Bob Jones University* analysis when it concluded that indirect federal financial assistance (in the form of BEOGs) brought Grove City College within the purview of Title IX. The court of appeals, in its agreement with the Department of Education, articulates a well-founded decision based on the statutory language of Title IX, its legislative history, post-enactment events, and the *Bob Jones University* decision.

### *Program Specificity*

The other major controversy presented in the two cases is that of program-specificity. Grove City College and Richmond University both contended that Title IX would apply only to a particular program receiving direct federal financial assistance.[47] The court in *University of Richmond* agreed. The court in *Grove City College* did not.

The Title IX regulations[48] are at the heart of the dispute concerning its interpretation and application. The regulations are divided into five major subparts and forty-three sections. The two sections pertinent to *Grove City College* and *University of Richmond* are the definitional section and the section indentifying the general coverage of the regulation.

The regulations define "federal financial assistance" to include not only direct funds extended to a university but also loans, grants, scholarships, or funds extended to *students* for *payment* to the institution.[49] Thus the BEOGs paid to students at Grove City College would be within the scope of Title IX. The regulations define "recipient" as any entity (1) that recieves federal financial assistance from the government or another *recipient*, and (2) that "operates an educational program or activity which receives or *benefits* from such assistance."[50]

The Department of Education contends that all educational programs benefit if any single program receives federal financial assistance because that assistance releases institutional funds for use in other programs.[51] This rationale underlies both the *Bob Jones University* and *Grove City College* decisions. The educational program and activities of both institutions are benefited by the federal grants allotted to student recipients. Bob Jones University and Grove City College are entities (1) receiving federal financial assistance from the govern-

47. Grove City College v. Bell, 687 F.2d 684, 690-91 (3d Cir.) (1982); University of Richmond v. Bell, 543 F. Supp. 321, 324-25 (E.D. Va. 1982).

48. 39 Fed. Reg. 22,227 (1974). Under section 902, each agency awarding federal financial assistance "other than a contract of insurance or guaranty" to any education program or activity is authorized to promulgate regulations to ensure compliance with section 901(A). 20 U.S.C. § 1682 (1972).

49. 45 C.F.R. § 86.2(g) (1975).

50. *Id.* § 86.2(h) (emphasis added).

51. Comment, *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U.L. REV. 133, 150 (1976) [hereinafter cited as Comment].

ment *or another recipient*, and (2) operating an educational program or activity which receives or *benefits* from such assistance.[52] The schools are receiving assistance from another "recipient," the students, and are benefiting from it. The word "benefit" is crucial because it demonstrates that the regulations have expanded the statutory language of Title IX to include a "benefit" theory. Not only is "any educational program or activity receiving Federal financial assistance"[53] covered, but any educational program or activity that *benefits* from federal financial assistance is subject to Title IX regulation. As the court in *Bob Jones University* stated:

> Payments to veterans enrolled at approved schools serve to defray the costs of the educational program of the schools thereby releasing institutional funds which would, in the absence of federal assistance, be spent on the student. . . . [B]ob Jones' participation in the . . . [N]ational Defense Student Loan program (NDSL) relieved the university from the burden of committing its assets to loans to eligible students.[54]

Legal commentators also advocate a broad interpretation of Title IX. One commentator suggests that "federal financial assistance" connotes a *benefit conferred* rather than a specific amount of money given to a particular program. This commentator points out that Congress' power to regulate its spending is plenary, and it is well within the authority of Congress to place reasonable restrictions upon a school's use of federal financial assistance. This includes indirect benefits derived from federal funding upon a particular school's athletic department, even though that particular program may not be receiving funds directly.[55]

Another commentator says that although federal funds may not go directly to a football program, for instance, federal aid to any of the school's other programs frees money for use in athletics.[56] The commentator goes on to suggest that "without federal aid a school would have to reduce program offerings or use its resources more efficiently. The Act [Title IX] speaks of federal financial assistance. If federal aid benefits a discriminatory program by freeing funds for the program, the aid assists it."[57]

The court in *University of Richmond*, based upon its support of strict construction of the program-specific provision of Title IX, sees the Title IX regulations as an *ultra vires* act by HEW and the Department of Education.[58] The court contends that the benefit theory articulated in the Title IX regula-

52. *See* 45 C.F.R. § 86.2(h) (1975).

53. 20 U.S.C. § 1681 (1972).

54. 396 F. Supp. 597, 603 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

55. Note, *Title IX and Intercollegiate Athletics: HEW Gets Serious About Equality in Sports?*, 15 NEW ENG. L. REV. 573, 589-90 (1980).

56. Note, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination In Public Schools*, 53 TEX. L. REV. 103, 110 (1974).

57. *Id.* at 110.

58. University of Richmond v. Bell, 543 F. Supp. 321, 325 (E.D. Va. 1982). For further discussion, *see* Comment, *supra* note 51.

tions extends too far beyond the authorizing statute.[59] This is a weak argument. In resolving an *ultra vires* challenge, courts must construe the authorizing statute to determine if the regulations in question are unauthorized. Yet it is often the administrative regulation itself that serves as an interpretation of the underlying statute.[60] The interpretation of a statute by the agency charged with its administration is entitled to deference.[61] Also, as mentioned, Congress had forty-five days in which to pass a disapproval resolution of Title IX regulations; neither house passed such a resolution. Congress could not have been unaware of the heated debate over coverage of indirectly funded athletic programs.[62] HEW received an unprecedented 9,700 comments on the proposed Title IX regulations.[63] It appears that if Congress had not intended Title IX to cover indirectly funded athletic programs, the intense media and congressional scrutiny of the regulations on athletics would have led to a congressional resolution of disapproval. This did not occur.

The Third Circuit Court of Appeals in *Haffer v. Temple University* has held that Title IX applies to any educational program that benefits from federal funds, even though the benefit may be indirect.[64] The court in *Haffer* states: "Logic supports a broad reading of Title IX and supports upholding the validity of the [Title IX] regulations."[65]

Another possible theory supporting a broad reading of Title IX, as articulated in *Grove City College*, is that an educational program under Title IX should be defined as the entire institution in question. The *Grove* court states:

> We conclude that the remedy to be ordered for failure to comply with Title IX is as extensive as the program benefited by the federal funds involved. Because the federal grants made to Grove's students necessarily inure to the benefit of the entire college, the "program" here must be defined as the entire institution of Grove City College. Thus, Grove is incorrect in claiming that the program-specific provisions of the statute preclude Title IX coverage when indirect aid is involved.[66]

Two Title VI cases, *Lau v. Nichols*[67] and *Bossier Parish School Board v. Lemon*,[68] support this theory. In these cases the courts, like the court in *Grove*, took the position that the respective school districts provided a unitary education program. This approach is attractive because it negates the *ultra*

59. 543 F. Supp. at 325.
60. Comment, *supra* note 51, at 151.
61. 2A C. SANDS, SUTHERLAND'S STATUTORY CONSTRUCTION § 49.05 (4th ed. 1973).
62. Haffer v. Temple Univ. 524 F. Supp. 531, 536 (E.D. Pa. 1981).
63. Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 40 (1977), *quoted in* Haffer v. Temple Univ., 524 F. Supp. 531, 536 (E.D. Pa. 1981).
64. Haffer v. Temple Univ., 524 F. Supp. 531, 539 (E.D. Pa. 1981).
65. *Id.* at 541.
66. Grove City College v. Bell, 687 F.2d 684, 700-01 (3d Cir. 1982).
67. 414 U.S. 563 (1974).
68. 370 F.2d 847 (5th Cir. 1967).

*vires* issue. If a university were deemed to offer a unitary program, the *ultra vires* issue would be resolved; there would be no difference between an institution and a program and no disparity between the institutional approach of the Title IX regulations and the programmatic approach that courts, such as the one in *Richmond*, argue Title IX mandates.[69]

### *An Intermediate Approach*

The Fifth Circuit has articulated an "intermediate approach" for resolving the issues of direct/indirect aid and program specificity in *Board of Public Instruction v. Finch*,[70] a Title VI case. In *Finch*, the court held that all funding to several programs of a local public school district could not be discontinued without a showing of discrimination within each particular program (HEW had instituted a blanket cutoff of aid to the district upon a finding that a single program was discriminatory). However, the court noted that programs may be so *interrelated* that a program guilty of no overt discrimination may be "infected by a discriminatory environment" and subject to termination of federal aid.[71] This has been labeled the "infection theory."[72] Tainted programs are those that are "so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory."[73] One legal commentator notes of this "infection" theory: "Tainting" is really just the obverse of "benefiting."[74] In either case a program not directly receiving federal aid can be brought within the ambit of Title IX by a crucial link to a directly aided program. The commentator goes on to point out that the use of "tainting" and "benefiting" concepts would fulfill an important element of the purpose behind Title IX and would also be in accord with the congressional intent that the federal government withhold support, even indirect support, from discriminatory programs.[75]

### *Conclusion*

The courts must ultimately decide how broad the power of the Department of Education will be to terminate federal funds under Title IX. Perhaps the most striking criticism of the narrow program-specific view articulated in *University of Richmond* is its illogical conclusion that the more general the funding, the more restrictive the coverage. This result defeats the broad remedial purpose of Title IX. The better approaches are those articulated in *Grove City College* and *Finch*. An expansive reading of Title IX must be adhered to in order to vindicate its original purpose—to eradicate sex

69. Comment, *supra* note 51, at 180.
70. 414 F.2d 1068 (5th Cir. 1969).
71. *Id.* at 1078-79.
72. *See* Islesboro School Comm. v. Califano, 593 F.2d 424, 430 (1st Cir. 1979).
73. United States v. Ruthstein, 414 F.2d 1068, 1079 (7th Cir. 1969).
74. Note, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination In Public Schools*, 53 TEX. L. REV. 103, 111 (1974).
75. *Id.* at 112.