

# Memorandum



Subject Department of Education Proposal to Amend Definition of "Federal Financial Assistance"	Date December 8, 1981
To The Attorney General	From John Roberts Special Assistant to the Attorney General

The Department of Education has proposed to amend the definition of "federal financial assistance" in regulations issued under Title VI, Title IX, and §504 of the Rehabilitation Act of 1973. These statutes provide that no person shall, on the basis of race (Title VI), sex (Title IX), or physical handicap (§504) "be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." Current regulations provide that educational institutions are covered by these anti-discrimination provisions even if the only "federal financial assistance" they receive is through federally financed student loan programs, such as Pell grants. The Department of Education proposed regulations would provide that an institution would not be deemed to be receiving federal financial assistance, and thus covered by the anti-discrimination statutes, merely because students attending the institution receive federal assistance in the form of loans.

The basic question is whether the proposed regulations are consistent with the legislative intent behind Title VI, Title IX, and §504 of the Rehabilitation Act. This is currently the subject of litigation, both in the Grove City and the Hillsdale College cases. Title IX, adopted in 1972, and §504, adopted in 1973, are substantially identical to Title VI, which was enacted in 1964. The present question was not specifically addressed in the legislative history of Title VI. The original civil rights bill conditioned coverage on "direct or indirect financial assistance". Without any explanation, the "direct or indirect" language was dropped from the final bill. This offers at least some support for the current Department of Education position that indirect assistance, such as student loans, should not trigger coverage. The best conclusion, however, seems to be that the legislative history was vague and certainly does not provide a definitive answer, one way or the other.

As noted, Title IX and §504 were modeled on Title VI. The ambiguity in the legislative history of Title VI thus carried over into Title IX and §504. Indeed, the strongest arguments which are made by those who favor coverage rely not on the legislative history of enactment of Title IX and §504, but rather on subsequent legislative history. Specifically, oversight hearings were conducted in 1975 on the regulations in question, and Congress failed to take advantage of the opportunity to repudiate the administrative position. Furthermore, in 1976 Senator McClure sponsored an amendment to Title IX which would have precluded the position that student loans trigger coverage. This was not enacted. Although these two events have some probative value, the Supreme Court has frequently cautioned against using subsequent legislative history to ascertain the intent of a previous Congress. The Court has also frequently cautioned against discerning legislative intent based on the inaction of Congress.

Aside from scattered fragments of legislative history, therefore, the argument against the Department of Education's proposed regulations is primarily that they would overturn a long-established administrative interpretation of the statutes. This argument will carry weight with some courts, but is certainly not strong enough to prevent us from arguing the contrary. The leading decision supporting the current regulations, i.e., ruling that financial aid to students is sufficient to trigger coverage for the institution, is Bob Jones University v. Johnson, 396 F. Supp. 597 (D. S.C. 1974), affirmed per curiam, 529 F. 2d 514 (CA 4 1975). This decision was heavily relied upon by the District Court in the Grove City College case. The decision, however, is only that of a district judge -- the per curiam affirmance by the 4th Circuit was not a considered treatment of the issues. The Bob Jones case has been given far greater prominence than it deserves by the proponents of the current regulations.

The Department of Education proposed regulations apply only to Pell grants under the alternate disbursement system and the guaranteed student loan program. Pell grants under the regular disbursement system are provided directly to the institution, which then distributes the monies to eligible students. Under the alternate disbursement system, the institution does not disburse the monies, which are rather sent directly to the students. Under all of these programs, the institution plays some role in administering the loan program, but it probably cannot be said that the institution receives federal financial assistance simply because of its role in administering these programs.

In sum, the question whether Congress intended in enacting Title VI, Title IX, and §504 to cover institutions whose only federal financial assistance was in the form of loans received by their students is a close one. It cannot be said with confidence that courts will uphold the proposed regulations if they are adopted, because courts may choose to rely on the longstanding administrative interpretation to the contrary, or the inaction of Congress in the face of this interpretation and cases such as Bob Jones. On the other hand, the case has not been made that the legislative history clearly bans Education's proposed change, and therefore I recommend acceding to it.