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# PROGRAM SPECIFICITY AND SECTION 504: MAKING THE BEST OF A BAD SITUATION

*Marc Charmatz\**  
*and Sarah Geer\*\**

## I. INTRODUCTION

Section 504 of the Rehabilitation Act of 1973<sup>1</sup> is intended to be a broad, remedial civil rights statute protecting disabled people from discrimination in "any program or activity receiving federal financial assistance."<sup>2</sup> The statute prohibits discriminatory conduct based on handicap in a variety of contexts: employment; elementary and secondary education; post-secondary education; and health, welfare, and social services.<sup>3</sup>

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1. 29 U.S.C. § 794 (1982) (as amended). The statute provides in relevant part:

No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Post Service.

*Id.*

2. The "single overriding purpose" of Congress in enacting both § 504 and analogous civil rights statutes was to insure that the funds of the United States were not used to support discriminatory practices. *United States v. Baylor Univ. Medical Center*, 736 F.2d 1039, 1042-43 (5th Cir. 1984) (Medicare and Medicaid payments constitute federal financial assistance triggering the antidiscrimination provisions of § 504), *cert. denied*, 105 S. Ct. 958 (1985); *see also* *Arline v. School Bd.*, 772 F.2d 759, 763 (11th Cir. 1985) (finding tuberculosis to be a "handicap" within the meaning of the Rehabilitation Act), *aff'd*, 55 U.S.L.W. 4245 (Mar. 3, 1987). But *see Foss v. City of Chicago*, where the court observed:

[N]either the Rehabilitation Act nor the Revenue Sharing Act are statutes which have as a single goal bringing an end to discrimination like, for example, Title VII of the Civil Rights Act. Rather, the antidiscrimination sections of these statutes, like those of Title VI or Title IX of the Civil Rights Act, seek to strike a balance between the federal policy against discrimination and the various policy goals which give rise to federal funding.

640 F. Supp. 1088, 1909 (N.D. Ill. 1986). For a review of the legislative history regarding efforts to eliminate discrimination against handicapped persons, *see Alexander v. Choate*, 469 U.S. 287, 295-96 (1985).

3. Federal agency regulations implementing § 504 include 28 C.F.R. §§ 42.1-.540 (1986) (Department of Justice); 29 C.F.R. §§ 32.1-31.51 (1986) (Department of Labor); 32 C.F.R. §§ 56.1-56.10 (1986) (Department of Defense); 34 C.F.R. §§ 104.1-104.61 (1986) (Department of Education); 45 C.F.R. §§ 84.1-84.61 (1986) (Department of Health and Human Services); 49 C.F.R. §§ 27.1-27.67 (1986) (Department of Transportation). These regulations, following

Section 504 is modeled after two statutes containing virtually identical language, Title VI of the Civil Rights Act of 1964<sup>4</sup> (prohibiting discrimination based on race) and Title IX of the Education Amendments of 1972<sup>5</sup> (prohibiting discrimination based on sex). Although the language of these statutes appears to create a broad umbrella of civil rights protection, barriers to section 504 compliance abound.

Victims of discrimination need to be aware of obstacles to enforcement of section 504. Part of the problem of enforcing section 504 is that the law has been in a state of flux, primarily because courts are divided over definitions of the various terms in the statute. There is disagreement as to which types of disabilities are protected by the statute,<sup>6</sup> who is an "otherwise qualified" handicapped person,<sup>7</sup> what is a reasonable accom-

the model established by the Department of Health, Education and Welfare, set out general principles of nondiscrimination as well as specific sections dealing with architectural barriers, educational programs, employment, and health, welfare and social services, as appropriate for the types of financial assistance provided by federal departments.

4. Pub. L. No. 88-352, § 601, 78 Stat. 252 (1964) (codified at 42 U.S.C. §§ 2000d-2000d-6 (1982)).

5. Education Amendments of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 373 (codified at 20 U.S.C. § 1681(a) (1982)).

6. Congress defined "handicapped individual" in 1974 for purposes of § 504 and the other provisions of Title V of the Rehabilitation Act, as follows: A "handicapped individual" is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having an impairment." 29 U.S.C. § 706(7)(B) (1982); see 45 C.F.R. § 84.3(j)(1) (1986) and 29 C.F.R. § 1613.702(a) (1986) for examples of regulations adopting a similar definition.

In *Arline*, the Eleventh Circuit ruled that tuberculosis is a handicap. 772 F.2d at 764. That decision, which may be a precursor to whether Acquired Immune Deficiency Syndrome (AIDS) is also a handicap, will be reviewed by the Supreme Court during the 1986-87 term. See *supra* note 2. Several other courts have addressed the definition of "handicapped individual" in varying contexts. *Torres v. Bolger*, 781 F.2d 1134 (5th Cir. 1986) (left-handedness is not a physical or mental impairment under the Act); *Oesterling v. Walters*, 760 F.2d 859 (8th Cir. 1985) (varicose veins are not a handicap within meaning of Rehabilitation Act because major life activities not impaired); *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985) (while cross-eyed condition may be a physical impairment, it does not substantially limit the person's major life activities); *Pridemore v. Legal Aid Soc'y*, 625 F. Supp. 1171 (S.D. Ohio 1985) (plaintiff's cerebral palsy was not so severe as to interfere with his functioning, and thus he was not a handicapped person).

7. The term "otherwise qualified" is not defined in the Rehabilitation Act, but was the subject of the first United States Supreme Court decision dealing with § 504. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). The Court stated that to be "otherwise qualified" an applicant must meet all of the program's requirements in spite of the handicap. In *Davis*, although the hearing impaired woman was a "handicapped person," she did not meet the college's standards for admission and she was therefore not within the Act's protected class of "otherwise qualified handicapped individuals."

Cases of interest in this area include: *Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981) (medical school applicant not qualified because of psychological problems); *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (proper analysis for the court is

modation, what is the distinction between lawful reasonable accommodation and unlawful affirmative action,<sup>8</sup> whether a private right of action is available,<sup>9</sup> what types of damages are available,<sup>10</sup> whether the statute reaches only intentional discrimination,<sup>11</sup> and what constitutes federal financial assistance under the Act.<sup>12</sup>

This Article addresses the most pernicious new obstacle recognized by courts to proving a violation of section 504: what constitutes a "pro-

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to first determine if a student with cerebral palsy should be considered handicapped, and second, whether the student is otherwise qualified for the residency position at university hospital and is being denied that position solely on the basis of that handicap); *Norcross v. Sneed*, 573 F. Supp. 533 (W.D. Ark. 1983), *aff'd*, 755 F.2d 113 (8th Cir. 1985) (blind applicant for librarian job was "otherwise qualified," but was not discriminated against when more qualified librarian was hired); *Strathie v. Department of Transp.*, 547 F. Supp. 1367 (E.D. Pa. 1982), *vacated and remanded*, 716 F.2d 227 (3d Cir. 1983) (hearing impaired person "otherwise qualified" to operate school bus).

8. The term "reasonable accommodation" does not appear in § 504, but it is referred to in § 401 of the Rehabilitation Act, dealing with discrimination on the basis of handicap in federal employment. 29 U.S.C. § 791 (1982). The § 504 regulations provide for reasonable accommodations in employment. *See* 45 C.F.R. § 84.21 (1986). There is no doubt that § 504 requires federal recipients to make reasonable accommodations in their programs and activities. *See Alexander v. Choate*, 469 U.S. 287 (1985); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985).

9. One of the first barriers raised to enforcement of § 504 was whether a private right of action existed without having exhausted administrative remedies. Federal agencies that provide federal financial assistance have adopted regulations establishing administrative procedures for termination of federal funds. In a series of decisions concerning the triad of civil rights statutes (e.g., the Civil Rights Act of 1964, the Rehabilitation Act of 1973 and the Education Amendment of 1972), the Supreme Court struck down the requirement that complainants exhaust these administrative remedies before bringing an action in federal court. The Court ruled in favor of a private cause of action under § 504, *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984); under Title VI, *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582 (1983); under Title IX, *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Administrative enforcement of civil rights claims is unwieldy, time-consuming and ineffective. The ability to go directly into the judicial system is a significant victory for plaintiffs.

10. In *Atascadero State Hosp. v. Scanlon*, 469 U.S. 1032 (1985), the Court ruled that the states had not waived their sovereign immunity under the eleventh amendment in accepting federal funds under the Rehabilitation Act, and thus monetary damages were not available against the states. *See Sullivan v. University of Miss. Medical Center*, 617 F. Supp. 554 (S.D. Miss. 1985) (where agency of state charged with discrimination of the handicapped, eleventh amendment bars suit for retroactive monetary damages).

11. *See Alexander*, 469 U.S. at 299 (assuming "without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped").

12. "Federal financial assistance" is not defined in the statute, but the Department of Health, Education and Welfare regulations define the term to mean:

[A]ny grant, loan, contract (other than a procurement contract or a contract of in-

gram or activity" receiving federal financial assistance.<sup>13</sup> No statute has comprehensively defined these terms.<sup>14</sup>

Three recent Supreme Court cases, *Grove City College v. Bell*,<sup>15</sup> *Consolidated Rail Corp. v. Darrone*,<sup>16</sup> and *United States Department of Transportation v. Paralyzed Veterans of America*,<sup>17</sup> have defined "program or activity" so as to restrict coverage under the civil rights acts to

insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

- (1) Funds;
- (2) Services of Federal personnel; or
- (3) Real and personal property or any interest in or use of such property, including:
  - (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and
  - (ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

45 C.F.R. § 84.3(h) (1986). For an early discussion, see *Cook v. Budget Rent-A-Car Corp.*, 502 F. Supp. 494 (S.D.N.Y. 1980) (receipt of funds under automobile rental contracts with federal government does not constitute federal financial assistance).

13. The phrase "program or activity" occurs in other related statutes, but this Article is limited to the antidiscrimination language in § 504. Numerous statutes have defined situations where funding in whole or in part is deemed "programs or activities" receiving federal financial assistance. *See, e.g.*, 15 U.S.C. § 3151(a) (1982) (Full Employment and Balanced Growth Act prohibits discrimination on the basis of handicap in any program or activity funded under the Full Employment and Balanced Growth Act); 20 U.S.C. § 1089 (1982) (prohibiting discrimination against blind people in federally funded education programs and activities); Job Training Partnership Act, 29 U.S.C. § 1577(a)(1) (1982) (providing that programs and activities otherwise financially assisted under the Act are considered to receive federal financial assistance for purposes of applying § 504); 29 U.S.C. § 1577(a)(2) (1982) (prohibiting exclusion from participation in, denial of benefits of, and denial of employment and other discrimination on the basis of handicap in programs receiving federal funds under the Job Training Partnership Act); State and Local Fiscal Assistance Act of 1976, 31 U.S.C. § 6716(b)(2) (1982) (prohibits discrimination based on handicap in any program or activity funded under the Act); Omnibus Budget Reconciliation Act of 1981, 42 U.S.C. § 300x-7 (1982) (prohibits discrimination based on handicap in programs or activities funded under preventive health and health services block grants); 42 U.S.C. § 300y-9(a)(1) (1982) (primary care block grants); 42 U.S.C. § 708(a)(1) (1982) (maternal and child health care services block grants); 42 U.S.C. § 5309(a) (1982) (community development programs); The Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§ 6011, 6063(b)(5)(C) (1982); 42 U.S.C. § 9906(a) (1982) (community services block grants); Domestic Volunteer Service Act Amendments of 1978, 42 U.S.C. § 5057(c)(1) (1982) (applies nondiscrimination provisions in Title V of the Rehabilitation Act to applicants and volunteers under the Domestic Volunteer Service Act).

14. There is scant legislative history dealing with the definition of the word "activity." The only congressional discussion of the term suggests that the words "program" and "activity" were synonymous. *See* 110 CONG. REC. 2487 (1964) (remarks of Rep. Celler).

15. 465 U.S. 555 (1984) (mere fact that college enrolled students who received federal financial aid, while the school itself received no federal funding, was not sufficient to extend Rehabilitation Act coverage to entire institution).

16. 465 U.S. 624 (1984) (suit for employment discrimination may be maintained under § 504 Rehabilitation Act even if primary purpose of federal assistance received by employer was not to promote employment).

17. 106 S. Ct. 2705 (1986) (limiting nondiscriminatory language of Act to recipients, such

an unprecedented extent. Prior to *Grove City*, courts and commentators generally assumed that a broad interpretation of "program or activity" was correct: all parts of an institution were subject to section 504 if any one part received federal financial assistance for any purpose.<sup>18</sup> Although not every component of a recipient might receive federal dollars, it was assumed the institution as a whole benefitted from financial assistance to any of its subparts. Commentators have characterized aspects of this analysis as the "taint" theory, the "infection" theory, the "benefit" theory, and the "institution" approach.<sup>19</sup> By contrast, in *Grove City*, the Court adopted a narrow approach. It required identification of the specific program that actually received federal dollars prior to imposing any civil rights obligations on the institution.

This Article does not look back to the events leading up to these three decisions, except for illustrative purposes, and does not attempt to relitigate the issues. Other commentators have delivered harsh appraisals of the *Grove City* decision and its effects.<sup>20</sup> We also do not engage in analysis of the legislative proposals to cure the *Grove City* decision that were introduced in Congress within days of the decision.<sup>21</sup> It has now

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as operators of airport who are in a position to accept or reject obligations as part of decision to receive federal funds, and not imposing duty on users, such as commercial airlines).

18. Reliance on this approach can be found in *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967), where the school board refused to allow black children of Air Force members to attend its schools. The court found that since the school system accepted federal financial assistance for the maintenance and operation of its schools, it "brought its school system within the class of programs subject to the Section 601 [of the Civil Rights Act of 1964] prohibition against discrimination." *Id.* at 852.

In *Lau v. Nichols*, 414 U.S. 563 (1974), the Court found that discriminatory impact was sufficient to establish a claim under Title VI where the school district received federal financial assistance. See 45 C.F.R. § 80.5(b) (1986).

19. See, e.g., Czapanskiy, *Grove City College v. Bell: Touchdown or Touchback?*, 43 MD. L. REV. 379, 385-98 (1984); Note, *Grove City College v. Bell And Program-Specificity: Narrowing The Scope Of Federal Civil Rights Statutes*, 34 CATH. U.L. REV. 1087, 1096-111 (1985); Comment, *The Discrimination Statutes And The Supreme Court's 'Program' For Confusion: Consolidated Rail Corp. v. Darrone; Grove City College v. Bell; North Haven Board of Education v. Bell*, 17 CONN. L. REV. 629, 639-44 (1985).

20. See, e.g., Czapanskiy, *supra* note 19, at 406-11; Comment, *supra* note 19, at 658-61; Note, *Grove City College v. Bell: A Proposal to Overturn the Supreme Court's Narrow Construction of Title IX's Sex Discrimination Prohibition*, 19 LOY. L.A.L. REV. 235, 249-55 (1985).

21. In an effort to reverse the effects of *Grove City*, bills were quickly introduced in the 98th Congress to clarify congressional intent. See, e.g., S. 2568, 98th Cong., 2d Sess. (1984), entitled "The Civil Rights Act of 1984." This bill would have deleted the phrase "program or activity" and substituted the term "recipient" as defined in the regulations implementing the civil rights statutes. See 45 C.F.R. § 84.3(f) (1986). "The effect of this change is to prohibit an entire institution or entity from discriminating if any of its parts receives federal funds." 130 CONG. REC. S4586 (daily ed. Apr. 12, 1984). The companion bill was H.R. 5490, 98th Cong., 2d Sess. (1984).

Following introduction of the legislation, the *Washington Post* quoted President Reagan

been more than two years since these proposals appeared, and they are not yet near passage.<sup>22</sup> We cannot afford to wait for these proposed amendments to the civil rights statutes to become law.

Instead, this Article starts with the notion that at least for the foreseeable future, advocates will need to "live with it." While section 504 may be lessened in scope, it still remains a viable remedy for handicap discrimination for a substantial number of victims. The practice of law on behalf of disabled clients will require new energy and creativity to work around the judicially imposed restraints, but the parameters of the

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as saying that the legislation "is so broad that it actually would open the door to federal intrusion in local and state governments and in any manner of ways beyond anything that has ever been intended by the Civil Rights Act. That kind of legislation we would oppose." *Congress moves to counteract Supreme Court's ruling in Grove City College v. Bell*, 8 MENTAL & PHYSICAL DISABILITY L. REP. 323 (May-June, 1984).

The House passed H.R. 5490 overwhelmingly on June 26, 1984. 130 CONG. REC. H7017-18 (daily ed. June 27, 1984). Its sponsors claimed that the broad coverage of the statutes would be restored and that the entire institution would be liable for discriminatory behavior as originally intended by Congress. However, the Senate shelved the House bill, and it was not enacted into law. 130 CONG. REC. S12,642 (daily ed. Oct. 3, 1984). See generally Brejcha, *Grove City College v. Bell: Restricting the Remedial Reach of Title IX*, 16 LOY. U. CHI. L.J. 319, 348-51 (1985); Garvey, *The "Program or Activity" Rule in Antidiscrimination Law: A Comment on S. 272, H.R. 700, and S. 431*, 23 HARV. J. ON LEGIS. 445 (1986); Note, *supra* note 20.

22. In 1985, more bills were introduced in the Senate relevant to this issue. Senate Bill 431, the Civil Rights Restoration Act of 1985, did not delete "program or activity," but defined it broadly to mean:

[A]ll of the operations of a department or agency of a State or of a local government; or . . . the entity of such State or local government that distributes such assistance and each such department or agency . . . to which the assistance is extended . . . ; [or] a university or a system of higher education; or . . . a local educational agency . . . ; [or] . . . a corporation, partnership, or other private organization; or . . . any other entity determined in a manner consistent with [other programs].

S. 431, 99th Cong., 1st Sess. 131 (1985), *reprinted in* 131 CONG. REC. S1303 (daily ed. Feb. 7, 1985).

Senate Bill 272 was similar to S. 431, but limited its effect to educational institutions. The bill has been supported by the Reagan administration, but it has been strongly opposed by members of Congress who claim that courts would narrowly interpret the civil rights statutes in non-educational settings. According to this bill, the phrase "program or activity" as applied to educational institutions would mean "the educational institution." S. 272, 99th Cong., 1st Sess. (1985), *reprinted in* 131 CONG. REC. S637 (daily ed. Jan. 24, 1985).

Hearings were held on S. 431 by the Senate Committee on Labor and Human Resources, Subcommittee on Education, on July 17, 1985. See *Legislative and Regulatory Developments, Update on Grove City College v. Bell legislation*, 9 MENTAL & PHYSICAL DISABILITY L. REP. 376-77 (Sept.-Oct. 1985). On the House side, the House companion bill, H.R. 700, was ordered reported out of the Judiciary Committee on May 22, 1985, and was ordered reported out of the Education and Labor Committee on May 21, 1985, with an amendment relating to the funding of abortions. *Id.* This amendment provided that the bill did not "grant or secure or deny any right" to abortion. *Id.* There has been no success in enacting this legislation since these actions.

three Supreme Court decisions can be reconciled to retain a good deal of the civil rights protections contained in the three statutes.

## II. OVERVIEW OF *GROVE CITY*, *DARRONE* AND *PVA*

### A. *The Statute and the Regulations*

The three civil rights statutes, Title VI, Title IX, and section 504, contain the same limitation: they only apply to "any<sup>23</sup> program or activity receiving federal financial assistance."<sup>24</sup> The statutes are alike in one other respect: they adopt similar administrative enforcement mechanisms.<sup>25</sup> Federal funds may be cut off only to that part of an organization, i.e., the program or activity, that actually receives federal funds.<sup>26</sup>

The statutes also contain significant differences. First, Title IX applies only to "education" programs. No such limitation is imposed by

23. The word "any" implies unlimited coverage, but no court has construed this term. Instead, the courts have looked to the limitations of the phrase "program or activity."

24. See, e.g., 20 U.S.C. § 1681(a) (1982) (Title IX); 29 U.S.C. § 794 (1982) (§ 504); 42 U.S.C. §§ 2000d-2000d-6 (1982) (Title VI).

25. Compare 20 U.S.C. § 1682 (1982), 29 U.S.C. § 794a (1982), and 42 U.S.C. § 2000d-1 (1982). The administrative enforcement mechanism is set out in the regulations to Title VI, 45 C.F.R. §§ 80.6-80.10, 81.1-81.131 (1986), 34 C.F.R. §§ 100.6-100.10, 101.1-101.131 (1986). The enforcement policies of the federal agencies have been a constant concern to civil rights groups. See COMMITTEE ON GOVERNMENT OPERATIONS, 99th Cong., 1st Sess., Twenty-fourth Report, INVESTIGATION OF CIVIL RIGHTS ENFORCEMENT BY THE OFFICE FOR CIVIL RIGHTS AT THE DEPARTMENT OF EDUCATION (Comm. Print 1985).

26. Title VI and Title IX utilize the following language to empower federal agencies with regulatory authority: "Each Federal department and agency which is empowered to extend Federal financial assistance to any *program or activity* . . . is authorized and directed to effectuate the provisions of [§ 2000d or § 1682] of this title with respect to such *program or activity* by issuing rules, regulations, or orders of general applicability. . . ." 42 U.S.C. § 2000d-1 (emphasis added); see also 20 U.S.C. § 1682 which has essentially the same language but is limited to any "education program or activity." Section 504 requires the promulgation of regulations but does not use the phrase "program or activity" in setting forth that requirement. 29 U.S.C. § 794 (1986). That requirement is implied through § 794a's incorporation by reference of Title VI's enforcement scheme. 29 U.S.C. § 794a (1986).

Title VI and Title IX use the phrase "program or activity" in specifying fund termination procedures:

Compliance with any requirement adopted pursuant to this section may be affected (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, . . . 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 provided by law . . . [In the case of fund termination], the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the *program or activity* involved a full written report of the circumstances and the grounds for such action.

42 U.S.C. § 2000d-1; 20 U.S.C. § 1682 (emphasis added) (section 504 incorporates the remedies set forth in Title VI, presumably including the above provision); 29 U.S.C. § 794a.



Title VI or section 504. Second, section 504 narrows its scope to discrimination based "solely" on the individual's handicap. Third, section 504 was expanded in 1978 to apply to federally conducted activities, e.g., "any program or activity conducted by any Executive agency or by the United States Postal Service."<sup>27</sup> Title VI and Title IX have not been similarly extended.

Finally, the 1978 Amendments make section 504 available "to any person aggrieved by any act or failure to act *by any recipient* of Federal assistance . . ."<sup>28</sup> This is arguably the most important distinction between section 504 and the other statutes. By its terms, this language applies the statute to the recipient itself, rather than to any program or activity of that recipient. It thus appears to create an institution-wide remedy. Since this phrase does not appear in Title IX, its meaning was not discussed in *Grove City College v. Bell*.<sup>29</sup> Curiously, neither does the Court in *Consolidated Rail Corp. v. Darrone*<sup>30</sup> nor in *United States Department of Transportation v. Paralyzed Veterans of America*<sup>31</sup> address this point.

The section 504 regulations adopted by the United States Department of Health, Education and Welfare (HEW)<sup>32</sup> do not define "program or activity."<sup>33</sup> Instead, the regulations seem to adopt an

27. P.L. No. 95-602, § 119, 92 Stat. 2982 (1978) (codified as amended at 29 U.S.C. § 794 (1982)). See 124 CONG. REC. 3966 (1978) (remarks of Rep. Jeffords) (The 1978 amendment "simply extends the coverage of Section 504 to include any department or agency of the federal government.").

28. P.L. No. 95-602, § 120, 92 Stat. 2982 (1978) (codified at 29 U.S.C. § 794a (1982) (emphasis added)).

29. 465 U.S. 555 (1984).

30. 465 U.S. 624 (1984).

31. 106 S. Ct. 2705 (1986).

32. Following the decision in *Cherry v. Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976), HEW was designated the agency responsible for coordinating implementation of § 504 by all federal departments. Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976) (nondiscrimination with respect to the handicapped in federally assisted programs). HEW's education programs were transferred to the Department of Education in 1980 under the Education Reorganization Act, 20 U.S.C. § 3441 (1982). The § 504 coordination function was transferred to the United States Department of Justice by Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980).

33. The Department of Health and Human Services (HHS) and the Department of Education regulations under Title VI both provide the following definition of "program":

The term "program" includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training, rehabilitation, housing, or other services, whether provided through employees of the recipient of Federal financial assistance or provided by others through contracts or other arrangements with the recipient, and including work opportunities and cash or loan or other assistance to individuals), or for the provision of facilities for furnishing services, financial aid or other benefits to individuals. The services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any services, financial aid, or other benefits

institution-wide approach. The nondiscrimination prohibitions apply to "recipients,"<sup>34</sup> as well as to programs or activities.<sup>35</sup>

However, the majority in *Grove City* overlooked similar language applying the Title IX regulation to "recipients."<sup>36</sup> The Court's reading of the Title IX regulations as program-specific was the basis for similar holdings in *Darrone* and *PVA*.

provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property or other resources required to be expended or made available for the program to meet matching requirements or other conditions which must be met in order to receive the Federal financial assistance, and to include any services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance or such non-Federal resources.

34 C.F.R. § 100.13(g) (1986) (Education); see also 45 C.F.R. § 80.13(g) (1986) (HHS), which has essentially the same language but includes within its definition of program any program, project or activity for the provision of services, etc., pertaining to health and welfare in addition to education, training, rehabilitation and housing.

The Title VI, Title IX and § 504 regulations issued by the Department of Health and Human Services and the Department of Education do not define "program or activity" although they implicitly use an institutional approach particularly in the assurance requirement. See 34 C.F.R. §§ 100.4, 104.5 & 106.4 (1986); 45 C.F.R. §§ 80.4, 84.5 & 86.4 (1986). Other agencies, however, have defined "education program or activity" in their Title IX regulations. For example, according to the Department of Agriculture's regulation: "Education program or activity" means: (1) Every program or activity operated by an educational recipient; and (2) Every program or activity operated by other recipients where a significant purpose of the financial assistance is education. 7 C.F.R. § 15a.2(q) (1986).

34. "Recipient" is broadly defined as "any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity . . . to which Federal financial assistance is extended directly or through another recipient." 45 C.F.R. § 84.3(f) (1986).

35. See 45 C.F.R. § 84.4(b)(1) (1986) which provides that

[a] recipient, in providing any aid, benefit, or service, may not directly or through . . . other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service. . . ." See also 45 C.F.R. § 84.4(b)(4) (1986) ("A recipient may not . . . utilize criteria or methods of administration . . . that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap. . ."). But see 45 C.F.R. § 84.11 (1986), which applies to "discrimination in employment under any program or activity," and 45 C.F.R. §§ 84.31, 84.41 (1986), which apply to education "programs and activities that receive or benefit from federal financial assistance and to recipients that operate or that receive or benefit from federal financial assistance for the operation of such programs or activities.

36. The Court stated that

[t]he regulations apply, by their terms, "to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance." 34 C.F.R. § 106.11 (1982) (emphasis added). These regulations . . . "conform with the limitations Congress enacted in §§ 901 and 902."

*Grove City*, 465 U.S. at 574 (quoting *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 539 (1982)) (emphasis in original).

### B. Prior Case Law

Prior to *Grove City College v. Bell*,<sup>37</sup> the issue of the scope of section 504 centered on numerous Title IX<sup>38</sup> and section 504<sup>39</sup> cases dealing with employment. This series of appellate court cases was reversed when the Supreme Court ruled in *North Haven Board of Education v. Bell*,<sup>40</sup> and *Consolidated Rail Corp. v. Darrone*,<sup>41</sup> that plaintiffs alleging sex and handicap discrimination could maintain actions for employment discrimination even if the aid received by the employer was not primarily intended to promote employment. In both cases, since the lower courts made determinations on grounds unrelated to the issue of "program or activity," the cases had to be remanded.<sup>42</sup>

Lower courts were strongly divided on the correct interpretation of

37. 465 U.S. 555 (1984).

38. Numerous Title IX decisions had found no private action for employment discrimination unless the plaintiff could demonstrate that the primary purpose of the federal aid was to promote employment. See, e.g., *Daughtery County School Sys. v. Harris*, 622 F.2d 735 (5th Cir. 1980); *Seattle University v. HEW*, 621 F.2d 992 (9th Cir. 1980); *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979); *Isleboro School Community v. Califano*, 593 F.2d 424 (8th Cir.), cert. denied, 444 U.S. 972 (1979).

39. Likewise, federal appeals courts found no private action for employment unless the primary purpose of the aid was to promote employment. See, e.g., *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981); *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672 (8th Cir. 1979); *Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979). To be sure, there were hints of things to come. Thus, in *Simpson v. Reynolds Metal*, the Seventh Circuit noted that § 504

does not, as plaintiff seems to contend, generally forbid discrimination against the handicapped by recipients of federal assistance. Instead, its terms apparently require that the discrimination must have some direct or indirect effect on the handicapped persons in the program or activity receiving federal financial assistance. To be actionable, the discrimination must come in the operation of the program or manifest itself in a handicapped individual's exclusion from the program or a diminution of the benefits he would otherwise receive from the program.

629 F.2d 1226, 1232 (7th Cir. 1980). And in *Brown*, the Fifth Circuit noted that a handicapped individual had standing only if he could show that the program or activity with which he was involved, or from which he was excluded, itself received or was directly benefitted by federal financial assistance. "[T]he receipt of federal financial assistance by a multiprogram entity, for specific application to certain programs or activities does not, without more, bring all of these multiple programs or activities within the reach of Section 504." *Brown*, 650 F.2d at 767.

40. 456 U.S. 512 (1982).

41. 465 U.S. 624 (1984).

42. The dissent in *North Haven Board of Education v. Bell* suggested that a claim could be dismissed on program specificity grounds if the employer could show "that the complaining employees' salaries were not funded by federal money, that the employees did not work in an education program that received federal assistance, or that the discrimination they allegedly suffered did not affect a federally funded program." 456 U.S. 512, 540 (1982) (Powell, J., dissenting) (footnote omitted).

the word "program."<sup>43</sup> The most expansive judicial definition involved a finding that the institution as a whole must comply with the antidiscrimination statutes if any part of the institution received federal financial assistance.<sup>44</sup> This approach is most appropriate when an institution receives general unrestricted or non-earmarked funds.<sup>45</sup> In such a situation, the "program" which receives the federal aid is the institution itself.<sup>46</sup>

Other courts analyzed the effect of federal financial aid to one part of an institution, on the institution as a whole, or on other institutional parts.<sup>47</sup> Coverage under the civil rights statutes only occurred if the other parts of the institution "benefitted" from the federal aid. For example, in *Bob Jones University v. Johnson*,<sup>48</sup> the court struck down racially discriminatory admissions policies. The court found that the entire university received federal financial assistance because individual students received federal veteran's benefits and student loans. Since students participated in programs offered by the university, the entire university was a "program" for purposes of Title VI enforcement.<sup>49</sup>

Another group of decisions concerned discriminatory programs affecting activities which receive federal funding. These cases established

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43. See generally Czapanskiy, *supra* note 19, at 384-98 and Comment, *supra* note 19, at 639-44 for a discussion of judicial theories.

44. This is also the approach that would be adopted by most of the bills introduced in Congress to overturn the *Grove City* decision.

45. See *Haffer v. Temple Univ.*, 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982) (intercollegiate athletic program covered by Title IX although it did not receive earmarked federal funds).

46. See *Garrity v. Gallen*, 522 F. Supp. 171, 213 (D.N.H. 1981) (§ 504 requires that federally funded state program, viewed in its entirety, be available to all classes of handicapped people, and noting the "intolerable burden" that would be imposed by requiring an attempt to "identify precisely which federal funds flow to which activities and programs within [the school]."); *Wright v. Columbia Univ.*, 520 F. Supp. 789, 792 (E.D. Pa. 1981) (federally funded institutions not permitted "to dissect themselves, at whim, into discrete entities, to allocate federal dollars into programs which cannot discriminate against handicapped persons, and to free privately obtained funds from those programs and instead to channel such money into programs purportedly immune from § 504 strictures.").

47. See *infra* notes 48-49 and accompanying text and notes 59-60 and accompanying text.

48. 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975).

49. *Id.* at 602-03. Courts had held that a remedy may be sought where a discriminatory program does not receive federal funds if the program is benefitted at least indirectly by federal financial assistance. For example, in *Poole v. South Plainfield Board of Education*, 490 F. Supp. 948, 951 (D.N.J. 1980), the court held § 504 applicable because federal aid "to any program in a school system releases local money for other uses, thereby benefitting those programs that are not direct beneficiaries of the federal aid." *Accord* *Wright v. Columbia Univ.*, 520 F. Supp. 789, 792 (E.D. Pa. 1981) ("[t]o the extent that the University receives federal funding, component entities thereof benefit indirectly through the reallocation of funds received from other sources.").

the "infection" doctrine or the "tainted program" theory.<sup>50</sup> *Board of Public Instruction v. Finch*<sup>51</sup> illustrates the concept that a subunit of a recipient is covered by the civil rights statutes if it is infected by a discriminatory environment.<sup>52</sup> In an administrative proceeding against a local school board, the Department of Health, Education and Welfare found that the school district was not conducting desegregation of its schools at an acceptable pace.<sup>53</sup> As a result, the Department ordered termination of all federal funds to the entire school district. The termination of funds affected the school system's adult education program which had been receiving federal financial assistance.<sup>54</sup> In response to the school board's challenge to the administrative ruling, the Fifth Circuit held that adult education, rather than the school as a whole, was the "program" for purposes of Title VI, and remanded the case for an administrative finding of which programs were either "administered in a discriminatory manner, or . . . so affected by discriminatory practices elsewhere in the school system that [they] thereby bec[ame] discriminatory."<sup>55</sup>

The "infection theory" is slightly more expansive. It extends civil rights protections not only to the primary beneficiaries of federal aid, but also to others who are in such a position that discrimination against them necessarily affects direct program beneficiaries. The theory was used primarily to extend Title IX coverage to school employees as well as to students. For example, in *Caufield v. Board of Education*,<sup>56</sup> Title IX was extended to female teachers, after the Second Circuit found that students would be affected by gender discrimination against their teachers.<sup>57</sup>

The most narrow interpretation of "program or activity" attempts to pinpoint the part of the institution that receives the financial assistance. This approach was seen in *Hillsdale College v. Department of Health, Education & Welfare*,<sup>58</sup> where the trial court determined that because Hillsdale College received federal assistance through its student

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50. See *supra* text accompanying note 19.

51. *Finch*, 414 F.2d 1068 (5th Cir. 1969).

52. See Comment, *supra* note 19, at 641; see also *infra* notes 62-66 and accompanying text.

53. *Finch*, 414 F.2d at 1070.

54. *Id.* at 1070-71.

55. 414 F.2d at 1079.

56. 486 F. Supp. 862 (E.D.N.Y. 1979), *aff'd*, 632 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

57. See *Iron Arrow Honor Soc'y v. Heckler*, 702 F.2d 549 (5th Cir.), *vacated as moot*, 464 U.S. 67 (1983). This theory is no longer necessary since *North Haven Board of Education v. Bell* extends Title IX coverage to teachers. 456 U.S. 512, 520 (1982).

58. 696 F.2d 418, 428-29 (6th Cir. 1982), *vacated*, 466 U.S. 901, *on remand*, 737 F.2d 520 (6th Cir. 1984).

financial aid program, the entire college had to operate in compliance with Title IX. The court of appeals overturned the finding that the entire entity had to operate in compliance with Title IX, because this approach would "contravene the program-specific nature of Title IX."<sup>59</sup> The appeals court was concerned that the structure of Title IX would be meaningless if every program at the college had to comply with Title IX.<sup>60</sup>

### C. *The Grove City Decision*

Grove City College is a small, private coeducational school that receives federal funds in the form of Pell Grants, formerly known as Basic Educational Opportunity Grants (BEOGs),<sup>61</sup> granted to eligible students.<sup>62</sup> Because Grove City College decided to limit its involvement with federal regulation and oversight, it declined any other form of federal assistance. The college chose instead to use the Department of Education's Alternate Disbursement System for receipt of BEOG funds. Under this system, the college does not receive a check from the federal government for eligible students, or even engage in screening students' eligibility to receive federal funds. The college's only contact with the funding system is in accepting the funds from the individual students who receive BEOG checks.

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59. *Id.* at 424; see also *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982), where the Department of Education was enjoined from investigating allegations of discrimination against women in the athletics department, because that department had not received any "direct" financial assistance. *Accord* *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981). The *Brown* court held that it was insufficient "simply to show that some aspect of the relevant overall entity or enterprise receives . . . some form of input from the federal fisc. A private plaintiff . . . must show that the program or activity with which he or she was involved . . . itself received or was directly benefitted by Federal financial assistance." *Brown*, 650 F.2d at 769; see also *Rice v. President & Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982).

60. *Hillsdale College*, 696 F.2d at 428. The appellate court reasoned that under the trial court's interpretation, "every program or activity of an educational institution that accepts students who receive federal assistance would be subject to regulation under Title IX." *Id.* Consequently, the effect of any university discrimination in any non-federally funded program "would be to terminate *all* student federal financial assistance." *Id.* (emphasis in original). The court concluded that Hillsdale College was not subject to Title IX because the Act did not compel this result. *Id.* Thus, it did not have to comply with Title IX or the regulations of the Department of Health, Education and Welfare.

61. See 20 U.S.C. § 1070(a) (1982) (authorization of grants for college tuition of financially needy students).

62. Although some of the college's students receive Guaranteed Student Loans (GSLs), the Department of Education did not appeal from the portion of the district court's decision holding that GSLs are federal financial assistance within the meaning of Title IX. Instead, the Department of Education appealed the decision that GSLs are not subject to Title IX because they are expressly exempt as contracts of insurance or guaranty. *Grove City College v. Bell*, 687 F.2d 684, 690 n.10 (3d Cir. 1982), *aff'd*, 465 U.S. 555 (1984).

When Grove City College refused to sign a Title IX Assurance of Compliance, the Department of Education initiated enforcement proceedings against the school. After an administrative law judge ruled that the college did receive federal financial assistance, and that the BEOGs must be terminated, the college sought declaratory relief.<sup>63</sup>

The Supreme Court stated that the major issue in *Grove City* was identifying the "education program or activity" of the college that can properly be characterized as "receiving" federal assistance through grants to some of the students attending the college.<sup>64</sup> The grant money was held to be federal financial assistance to the college,<sup>65</sup> even though it was issued in the names of students under the Alternative Distribution System.<sup>66</sup> The majority took the narrow view that the "program" receiving federal assistance was the financial aid office, not the institution as a whole. First, the fact that federal financial assistance added to college resources did not determine the "program," even though the funds became a part of the college's general budget. Second, the fact that federal funds received in one program might free up the college's general resources did not make the entire college a recipient. There was no evidence of reallocation of resources. "Most federal education assistance has economic ripple effects throughout the aided institution, and it would be difficult, if not impossible, to determine which programs or activities derive such indirect benefits."<sup>67</sup> In other words, simply because one de-

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63. The district court agreed with the Department of Education that Basic Educational Opportunity Grants (BEOGs) constituted federal financial assistance, but the court reversed the administrative decision, holding that proof of gender discrimination under Title IX was a prerequisite to termination of the grant program. *Grove City College v. Harris*, 500 F. Supp. 253, 270-73 (W.D. Pa. 1980), *rev'd*, 687 F.2d 684 (3d Cir. 1982), *aff'd*, 465 U.S. 555 (1984). The Court of Appeals for the Third Circuit reversed, holding that indirect as well as direct aid triggers compliance with Title IX, and that such aid makes the institution itself the program. The college's failure to issue an Assurance of Compliance justified termination of federal aid to the school. *Grove City*, 687 F.2d at 705.

64. 465 U.S. 555, 558-59 (1984).

65. All the justices agreed that Title IX coverage was not foreclosed because federal funds are granted to Grove City students rather than directly to one of the educational programs. *Id.* at 569-70. They also generally agreed that due to the college's refusal to execute an Assurance of Compliance, the United States Department of Education was justified in terminating federal assistance to the student financial aid program. *Id.* at 575. The attachment of conditions to the receipt of federal aid did not violate first amendment rights. *Id.*

66. The Court stated that:

Nothing in [the statute] suggests that Congress elevated form over substance by making the application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance. There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the federal government are subject to regulations.

*Id.* at 564.

67. *Id.* at 572. The Supreme Court observed that "[u]nder the Court of Appeals' theory,

partment received earmarked grants did not make the entire college subject to Title IX.<sup>68</sup> Third, the student financial assistance program was *sui generis*, one of a kind.<sup>69</sup> The Third Circuit had compared BEOG funds to non-earmarked aid, since funds were deposited in the school's general operating budget for use in a variety of programs.<sup>70</sup> But the Supreme Court found that BEOG funds were in effect earmarked<sup>71</sup> for the student financial aid program.<sup>72</sup> Finally, the Court noted that unlike other funds, financial aid "increases both an institution's resources and its obligations."<sup>73</sup>

As a result of the nature of the funds and the program-specific nature of Title IX,<sup>74</sup> the only part of the school that could be regulated was the financial aid department.<sup>75</sup> "[W]e have found no persuasive evidence

an entire school would be subject to Title IX merely because one of its students received a small BEOG or because one of its departments received an earmarked federal grant. This cannot be squared with Congress' intent." *Id.*

68. The Court did not rule on the effect that earmarked funds received by one department might have on another department as compared to the entire school.

69. *Grove City*, 465 U.S. at 573.

70. *Grove City*, 687 F.2d at 700.

71. Because the Court drew an express distinction between earmarked aid and non-earmarked aid, the decision is applicable only where the recipient's federal funds are earmarked.

72. *Grove City*, 465 U.S. at 573-74. The Court held that

"[i]n neither purpose nor effect can BEOGs be fairly characterized as unrestricted grants that institutions may use for whatever purpose they desire. The BEOG program was designed, not merely to increase the total resources available to educational institutions, but to enable them to offer their services to students who had previously been unable to afford higher education."

*Id.* at 573.

73. *Id.*

74. Although the statute reached only the financial aid office, it applied to all activities of that program. The Supreme Court observed:

There is no merit to *Grove City*'s argument that the Department may regulate only the administration of the BEOG program. Just as employees who "work in an education program that receive[s] federal assistance," . . . are protected under Title IX even if their salaries are "not funded by federal money," . . . so also are students who participate in the College's federally assisted financial aid program but who do not themselves receive federal funds protected against discrimination on the basis of sex.

*Grove City*, 465 U.S. at 571 n.21 (citations omitted).

75. Two dissenting justices concluded that the entire college institution, not just the financial aid office, should be considered a recipient of federal funds. *Id.* at 599 (Brennan, J., dissenting). The dissent argued that the majority had disregarded

the broad remedial purposes of Title IX that consistently have controlled our prior interpretations of this civil rights statute. Moreover, a careful examination of the statute's legislative history, the accepted meaning of similar statutory language in Title VI, and the postenactment history of Title IX will demonstrate that the Court's narrow definition of "program or activity" is directly contrary to congressional intent.

*Id.* at 583 (Brennan, J., dissenting).

Justice Stevens, in a concurring opinion, noted that the majority opinion was "speculation



suggesting that Congress intended that the Department's regulatory authority follow federally aided students from classroom to classroom, building to building, or activity to activity."<sup>76</sup>

#### D. Consolidated Rail v. Darrone

The original plaintiff in *Consolidated Rail Corp. v. Darrone*<sup>77</sup> filed suit against Consolidated Rail (Conrail), alleging that Conrail discriminated against him on the basis of handicap in violation of section 504. Plaintiff had been terminated from his duties as a locomotive engineer after amputation of his left arm. The issue that reached the Supreme Court was the requirements for bringing a private action under section 504.

The Court's primary holding in *Darrone* was that a handicapped person could maintain a private cause of action under section 504 even if the federal aid received by his employer was not for the primary purpose of promoting employment.<sup>78</sup> The Court also considered which of the defendant's programs were subject to section 504. The decision resulted in a remand of the case to the district court to consider whether in light of *Grove City College v. Bell*,<sup>79</sup> the handicapped person "had sought and been denied employment in a 'program . . . receiving Federal financial assistance.'"<sup>80</sup> The district court had not "develop[ed] [a] record or [made] the factual findings that would be required to define the relevant 'program.'"<sup>81</sup>

The Supreme Court acknowledged that *Grove City* did not provide "particular guidance as to the appropriate treatment of the programs."<sup>82</sup> In particular, the Court noted that *Grove City* dealt with grants of finan-

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rather than evidence" because no detailed factual record had ever been made that would allow a determination of which programs at the college substantially benefitted from the monies. *Id.* at 579-80 (Stevens, J., concurring). He also noted that the Court had overlooked "the fact that the regulation is in the disjunctive; Title IX coverage does not always depend on the actual receipt of federal financial assistance by a given program or activity." *Id.* at 580 (Stevens, J., concurring). According to Justice Stevens, the regulations apply "to every recipient which receives or benefits from Federal financial assistance." *Id.* at 580-81 (Stevens, J., concurring) (quoting 34 C.F.R. § 106.11 (1982)).

76. *Id.* at 573.

77. 465 U.S. 624 (1984).

78. *Id.* at 637.

79. 465 U.S. 555 (1984).

80. *Darrone*, 465 U.S. at 636.

81. *Id.* In a footnote, the Court observed that "Conrail [did] not contest that it receive[d] federal financial assistance within the meaning of § 504. Apparently, the Government's payments to Conrail exceed the fair market value of the securities issued by Conrail to the Government." *Id.* at 636 n.19.

82. *Id.* at 636.

cial aid to students, i.e., earmarked grants, and not with the kind of general funding received by Conrail.<sup>83</sup> Nevertheless, the Court noted that section 504, like Title IX, does not reach all discrimination everywhere, but applies only to federal grant recipients.<sup>84</sup> Furthermore, the ban on discrimination does not necessarily apply to all activities of every recipient of federal funds; rather, the ban is program specific, i.e., the discrimination must relate to the federally funded program or activity.<sup>85</sup>

*E. United States Department of Transportation v.  
Paralyzed Veterans of America*

A divided Supreme Court in *United States Department of Transportation v. Paralyzed Veterans of America*<sup>86</sup> determined that section 504 may be applied only to those few airline companies that are direct recipients of federal financial assistance under the Federal Aviation Act.<sup>87</sup> The fact that air carriers benefit from the federal financial assistance received by airports<sup>88</sup> and the federally controlled air traffic control system was not sufficient to bring them under section 504.<sup>89</sup> According to the Court,

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83. *Id.*

84. *Id.* at 624-26. One commentator noted that the effect of *Consolidated Rail Corp. v. Darrone* was to allow a handicapped person to go to federal court to redress an employment discrimination complaint, while making it more difficult to locate an appropriate party to sue. "The justices made sure that the potential liability for discrimination infractions was narrowly circumscribed around the specific entities utilizing those funds." Parry, *Summary, Analysis, Commentary*, 9 MENTAL & PHYSICAL DISABILITY L. REP. 3 (Jan.-Feb., 1985).

85. *Darrone*, 465 U.S. at 636.

86. 106 S. Ct. 2705 (1986). Precursors to *PVA* were *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984) (airline did not receive federal financial assistance pursuant to government mail contracts); *Angel v. Pan Am. World Airways*, 519 F. Supp. 1173 (D.D.C. 1981) (airline not considered direct recipient of federal funds merely because airport received funds); *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202 (9th Cir. 1984) (payments under contract to carry mail are not federal assistance), *cert. dismissed*, 105 S. Ct. 2129 (1985); *see also Disabled in Action v. Mayor of Baltimore*, 685 F.2d 881 (4th Cir. 1982) (baseball club tenant of stadium partially renovated with federal funds, not recipient of federal funding under § 504).

87. *PVA*, 106 S. Ct. at 2712. The holding in *PVA* should have come as no surprise. The Civil Aeronautics Board had previously decided not to regulate the on-board activities of commercial airlines under Title VI.

None of the agencies concerned with aviation attempted to regulate the on-board activities of commercial airlines under Title VI. Thus, the consistent administrative interpretation of the program-specific language of Title VI and Section 504 has been that it does not cover commercial airlines, unless the airline itself receives subsidies from [the] CAB.

*Id.* at 2709 n.6.

88. *See* the Airport Development Act of 1970, 49 U.S.C. § 1714, *repealed by* Airport and Airway Improvement Act of 1982, 49 U.S.C. §§ 2201-2225 (1982 & Supp. III 1985).

89. *PVA*, 106 S. Ct. at 2712. The Court did not reach the issue of the responsibilities of airports, which are recipients, to prevent discrimination against disabled passengers. Plaintiffs

it was "not difficult to identify the recipient of federal financial assistance . . . . Congress has made it explicitly clear that these funds are to go to airport operators. Not a single penny of the money is given to the airlines."<sup>90</sup>

The Court rejected the argument that the airlines were indirect recipients of funds given to the airports.<sup>91</sup> One key factor identified by the Court was the airlines' lack of involvement in the decision whether to accept or reject federal assistance.<sup>92</sup> Since the airlines had no decision-making authority over those funds, the airlines were beyond the scope of section 504.

The fact that the airlines were "inextricably intertwined"<sup>93</sup> with the airports was not persuasive. Such reasoning would extend section 504 beyond its bounds by including industries that depend on the federal highway system or on the federally-supported port system. "The Court of Appeals' attempt to fuse airports and airlines into a single program or activity is unavailing. It is by reference to the grant statute, and not to

might consider actions against airport operators, alleging discrimination when they contract with or extend benefits to discriminating airline companies. *See Disabled in Action*, 685 F.2d 881 (anti-discrimination policy of the Rehabilitation Act can be fully vindicated by holding the city accountable, without stretching the Act to encompass the city's tenants). *See* 45 C.F.R. § 84.4(b)(1)(v) (1986) and 49 C.F.R. § 27.7(b)(1)(v) (1986), stating that a recipient of federal financial assistance cannot provide financial or other assistance "to an agency, organization or person that discriminates on the basis of handicap in providing any aid, benefit or service to beneficiaries of the recipient's programs." *See* 45 C.F.R. § 84.4(b)(6) (1986) and 49 C.F.R. § 27.7(b)(6) (1986), that forbids discrimination with regard to a service "provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance."

90. *PVA*, 106 S. Ct. at 2711.

91. The *PVA* court cited statements in *Grove City College v. Bell* to the effect that no distinctions between direct and indirect aid were made

in the context of determining whom Congress intended to receive the federal money. . . . It was clear in *Grove City* that Congress' intended recipient was the College, not the individual students to whom the checks were sent from the Government. It was this unusual disbursement pattern . . . that caused us to recognize that federal financial assistance could be received indirectly. While *Grove City* stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid. In this case, it is clear that the airlines do not actually receive the aid; they only benefit from the airport[']s use of the aid.

*Id.* at 2712.

92. *Id.* at 2711. The Court stated that:

By limiting coverage to recipients, Congress imposes the obligations of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to "receive" federal funds. In this case, the only parties in that position are the airport operators.

*Id.*

93. *Id.* at 2713.

hypothetical collective concepts like commercial aviation or interstate highway transportation, that the relevant program or activity is determined."<sup>94</sup>

The Court noted that the federally-operated air traffic control system is not a form of federal assistance to the airlines. "In short, the air traffic control system is 'owned and operated' by the United States. . . . [I]t is a federally conducted program that has many beneficiaries but no recipients."<sup>95</sup>

*Grove City, Darrone, and PVA* create a plethora of new issues, but resolve few of them.<sup>96</sup>

### III. THE AFTERMATH

#### A. Administrative Enforcement

Following the decision in *Grove City College v. Bell*,<sup>97</sup> the United States Department of Education took a new and much more restrictive

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94. *Id.* at 2714. Three dissenting justices found that the appropriate question was not whether commercial airlines receive federal financial assistance, but rather "whether commercial airlines are in a position to 'exclud[e] handicapped persons] from the participation in, . . . den[y them] the benefits of, or . . . subjec[t them] to discrimination under' a program or activity receiving federal financial assistance . . ." *Id.* at 2716 (Marshall, J., joined by Brennan, J., and Blackmun, J., dissenting). According to the dissent:

If commercial airline companies barred the handicapped from traveling on their airlines at all, then that conduct would deny the handicapped the benefits of federally funded and conducted programs and activities relating to the airport and airway system.

. . . [C]ommercial airlines are in a unique position to deny public access to federally funded airport and airway services . . . . [A] critical and obvious benefit of the airport and airway system, for members of the general public, is that it allows them to purchase tickets on airlines and to travel from city to city. . . . Commercial airlines thus necessarily act as gatekeepers [of this system].

*Id.* at 2716-17 (Marshall, J., joined by Brennan, J., and Blackmun, J., dissenting). See *Foss v. City of Chicago*, 640 F. Supp. 1088, 1095 (1986). A fire department's decisions about who to hire and fire controlled who would enjoy the benefits of programs where the individual firemen were the intended recipients and the fire department the beneficiary. "The federal agency could demand wheelchair ramps at airports because the airports were a federally funded program or activity. It could not demand appropriate facilities for the handicapped in airplanes, . . . because the airlines were not recipients of federal funds. If the Rehabilitation Act does not reach airlines in those circumstances, we do not think it can reach the Fire Department here." *Foss*, 640 F. Supp. at 1095.

95. *PVA*, 106 S. Ct. at 2715. Since 1978, federally conducted programs have been explicitly covered by § 504. 29 U.S.C. § 794 (1982) (as amended). Airline passengers might consider an action against the air traffic control system itself, on the grounds that it may not contract with or extend its benefits to air line carriers that discriminate on the basis of handicap. See model Department of Justice regulations for federally-conducted programs, 28 C.F.R. §§ 39.101-39.149 (1986).

96. See the discussion, *infra*, in Parts III, IV and V of this Article.

97. 465 U.S. 555 (1984).

approach to enforcement of the nondiscrimination statutes. The analysis was announced by the Department of Education's Civil Rights Reviewing Authority in the case of *In Re Pickens County School District*.<sup>98</sup> The Department questioned whether it had jurisdiction to investigate allegations of discrimination under Title IX in the physical education program operated by Pickens County. Although the school district received federal aid from at least four different programs during the relevant time period,<sup>99</sup> the administrative law judge's examination of whether any of this assistance was "received" by the physical education classes was inconsistent with the *Grove City* decision.<sup>100</sup>

The Department of Education's Civil Rights Reviewing Authority first found that institution wide jurisdiction is not appropriate if more narrowly focused programs can be ascertained.<sup>101</sup> For example, Pickens County receives federal funds under Chapter 2 of the Education Consolidation and Improvement Act of 1981.<sup>102</sup> This block grant program consolidates a number of previously authorized programs into one grant. Although the combination of programs could potentially benefit virtually any activity of a school system,<sup>103</sup> the Department of Education declared

98. *In re Pickens County School Dist. & South Carolina Dep't of Educ.*, No. 84-IX-11 (1985) (Rulings on Exceptions and Final Decision of the Civil Rights Reviewing Authority of the United States Department of Education) [hereinafter *Pickens County*].

99. Federal funding statutes under which the school district received financial assistance from the Department of Education were the Education Consolidation and Improvement Act of 1981, ch. 1 & 2, Pub. L. No. 97-35, 95 Stat. 469 (1981) (current versions at 20 U.S.C. §§ 3811-3863 (1982)); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 774 (1975) (current version at 20 U.S.C. §§ 1400-1461 (1982)); Adult Education Act, Pub. L. No. 91-230, 84 Stat. 159 (1970) (current version at 20 U.S.C. §§ 1201-1213 (1982)); Vocational Education Act of 1963, Pub. L. No. 94-482, tit. II, § 202(a), 90 Stat. 2169 (1976), *repealed by* Carl D. Perkins Vocational Education Act, Pub. L. No. 98-524, 98 Stat. 2435 (1984) (current version at 20 U.S.C. §§ 2301-2461 (Supp. III 1985)).

100. The Administrative Law Judge found that none of the statutes under which the school district received assistance contained programs related to physical education, and therefore the physical education program of the school district did not receive federal financial assistance. *Pickens County*, *supra* note 98, at 5 (citing Initial Decision of the Administrative Law Judge, No. 84-IX-11, Jan. 17, 1985, at 8). The Administrative Law Judge had equated the "program . . . receiving federal financial assistance" with the program designated in the funding statute under which the school district received money. *Pickens County*, *supra* note 98, at 10.

101. *Id.* at 14.

102. 20 U.S.C. §§ 3811-3863 (1982).

103. In a memorandum to all Regional Civil Rights Directors, the Office for Civil Rights stated:

Chapter 2 payments may be used by [a Local Education Agency] at its complete discretion to provide financial aid to any and all elementary and secondary education programs, and to activities to manage or administer the school system. The range of programs for which Chapter 2 funds may be used reaches throughout the school district's programs . . . . Therefore there is a presumption that all of an LEA's programs and activities are subject to OCR's jurisdiction.

that it is necessary to determine the specific purpose for which grant money is given and used before identifying which activities of the school district come within the ambit of the nondiscrimination statutes.<sup>104</sup>

To determine which "program" of a recipient receives federal financial assistance, the Department of Education will look first at the funding statute to determine if the grant is earmarked or nonearmarked.<sup>105</sup> If the grant is earmarked, then the department must ascertain the intended use of the earmarked funds, by reference to "identifiable programs or projects created by Congress."<sup>106</sup> The next step is to identify the specific "program or activity" receiving federal assistance by analyzing the institution's functions and administrative or organizational structure. The Department of Education views "program or activity" as the "functional activity of the institution which promotes the achievement of the earmarked purpose designated in the funding statute."<sup>107</sup> It may or may not be a defined organizational unit of the institution.<sup>108</sup>

### B. Judicial Interpretations

The major precept drawn from the three recent Supreme Court decisions is that the issue of program specificity must be decided case by case, based upon an analysis of the underlying facts surrounding the federal

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Memorandum from Harry M. Singleton, Assistant Secretary for Civil Rights, to Regional Civil Rights Directors (July 31, 1984) (providing an analysis of the *Grove City College v. Bell* decision and guidance on its application to enforcement activities of the OCR) (copy on file at National Ass'n of the Deaf Legal Defense Fund, Washington, D.C.).

104. *Pickens County*, *supra* note 98, at 15-16. Although the school district has wide latitude in how it chooses to use Consolidation Act funds, it must submit an application designating intended uses. Funds must then be used only for those designated purposes. According to the Department of Education, such designated block grant funds become synonymous with "earmarked" federal funds, despite the apparently unlimited scope of the block grant program. Contrast the Department of Education analysis of block grants with the earlier Department of Education memorandum, *supra* note 103, and with the holding in *O'Connor v. Peru State College*, 781 F.2d 632, 639 (8th Cir. 1986).

105. Nonearmarked grants are not addressed by the *Pickens County* decision. *Pickens County*, *supra* note 98, at 17 n.22.

106. *Id.* at 17.

107. *Id.* at 18.

108. The Department of Education gives two illustrations of this point. In a grant received under the Consolidation Act for preparing students to use metric weights and measures, the funds received might be used in a school's science program, or its mathematics program. Either "program" could constitute a functional activity closely related to the teaching of metrics (which is the earmarked purpose of the statutory program). In this example, the program or activity would not necessarily constitute a defined organizational unit. Teachers involved in such a program may teach other subjects as well, and classrooms might be used for other activities. By contrast, a grant for "comprehensive guidance, counseling and testing programs" would usually be received by a career and counseling department, a clearly defined organizational unit. *Id.* at 19-20.

spending.<sup>109</sup> "The primary focus should be on the purposes meant to be served by the particular federal funds received by the institution."<sup>110</sup> As long as some federal funding is alleged, the program specificity issue is not properly the subject of a motion to dismiss prior to full discovery.<sup>111</sup> At the pleading stage, plaintiffs will seldom if ever know the intricacies of a recipient's federal assistance.<sup>112</sup>

While lower courts have dismissed Title IX<sup>113</sup> and Section 504<sup>114</sup> cases on program specificity grounds, reviewing courts<sup>115</sup> have not pro-

109. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 636 (1984) (district court did not "develop the record or make the factual findings that would be required to define the relevant 'program'"); *see also United States v. University Hosp.*, 729 F.2d 144, 151 (2d Cir. 1984), *aff'd sub nom. Bowen v. American Hosp. Ass'n*, 106 S. Ct. 2101 (1986) ("[T]he issue of program specificity cannot be properly analyzed in the abstract, but instead requires a concrete set of facts.").

110. *Grove City College v. Bell*, 465 U.S. 555, 599 (1984) (Brennan, J., joined by Marshall, J., concurring in part and dissenting in part).

111. It may not be resolved even on a motion for summary judgment. *See Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984); *see also University Hosp.*, 729 F.2d at 151.

112. *Byers v. Rockford Mass Transit Dist.*, 635 F. Supp. 1387 (N.D. Ill. 1986); *see also Kamen v. AT&T*, 791 F.2d 1006, 1012 (2d Cir. 1986) (whether a defendant was receiving federal financial assistance "could hardly be known to an outsider, and . . . the relevant information was largely in the control of the defendants"); *Chaplin v. Consolidated Edison Co.*, 579 F. Supp. 1470 (S.D.N.Y. 1984) (plaintiffs entitled to obtain as complete a record as possible before being required to respond to the argument that they have demonstrated an insufficient nexus between the funding received by the defendant and the positions for which they were rejected).

113. *Bennett v. West Texas State Univ.*, 698 F.2d 1215 (5th Cir. 1986); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985); *Zangrillo v. Fashion Inst. of Technology*, 601 F. Supp. 1346 (S.D.N.Y. 1985).

114. *See, e.g., Niehaus v. Kansas Bar Ass'n*, 793 F.2d 1159 (10th Cir. 1986) (state bar association did not directly receive or benefit from any federal financial assistance; fact that two bar related activities, a research entity and prepaid legal services, received federal funding during the period of plaintiff's employment did not constitute receipt of federal funds).

In *Chaplin v. Consolidated Edison Co.*, 628 F. Supp. 143 (S.D.N.Y. 1986), the employer's training department contracted with the federal government through the Comprehensive Employment Training Act (CETA) and Work Incentive Program (WIN). The plaintiff argued that the funds benefitted all units or programs which subsequently employed any of the trainees. *Id.* at 144.

The court found that these funds were not federal financial assistance to the entire operation of the employer. Since only the subsidized training division received federal assistance, the plaintiff could not bring a § 504 claim. "Plaintiffs made no showing that the CETA or WIN funds distributed to [the employer training department] were intended by Congress to have effects as far-reaching on all of Con Ed's operations as do the Medicare . . . statutes specified for hospitals . . ." *Id.* at 145. The court also rejected plaintiff's argument that tax credits received by the employer for capital expenditures on tangible property were federal assistance to all programs within the organization. *Id.* at 146.

115. *See, e.g., Bowen v. American Hosp. Ass'n*, 106 S. Ct. 2101 (1986). In *Bowen*, the Court found "no reason to review the Court of Appeals' assumption that the provision of health care to infants in hospitals receiving Medicare or Medicaid payments is a part of a 'program or activity receiving Federal financial assistance.'" *Id.* at 2111 n.9. In another foot-

vided much guidance on the extent of the nexus required between the "program or activity" receiving federal financial assistance and the plaintiff's involvement in that program.<sup>116</sup> Moreover, it is often difficult to define which program or activity is receiving federal financial assistance.<sup>117</sup> In other words, the law on program or activity is still "quite unsettled."<sup>118</sup>

#### IV. RECEIVING FEDERAL FINANCIAL ASSISTANCE

The remainder of this Article considers some of the creative approaches available to plaintiffs to meet their burden of proving that a program or activity receives federal financial assistance. Although some of this analysis has been adopted by lower courts, these cases are included for illustrative purposes only. The decisions are sometimes reversed on appeal, or not appealed at all. As in the "primary purpose" section 504 employment case, this turbulent area of law will require decisions in a variety of circuits before a definitive analysis of the issues is available.

The inquiry is divided into two parts. "At the outset, . . . Section 504 requires us to identify the recipient of federal assistance."<sup>119</sup> Defend-

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note, the Court noted that interpretive guidelines appended to the final Baby Doe rules prohibit health care providers from discriminating against handicapped infants in reporting instances of parental neglect. "We do not address the question whether reporting, either as a hospital practice or as a requirement of state law, constitutes a 'program or activity receiving Federal financial assistance' under § 504." *Id.* at 2119 n.25.

Justice White, in dissent, noted that the program or activity question was a "fact-specific inquiry." *Id.* at 2125 n.5 (White, J., dissenting). Although the courts below had assumed that the entire hospital was covered by § 504, Justice White considered under what circumstances a hospital neonatal program may be a program or activity receiving federal financial assistance. In the absence of factual development or analysis, he declined to conclude that § 504 would never apply to such programs. *Id.* (White, J., dissenting).

Some courts, while requiring program specificity, have left open the identification of the relevant "program." *See, e.g.,* *Meyerson v. Arizona*, 709 F.2d 1235, 1237 n.1 (9th Cir. 1983) (not reaching the issue of the nexus required between the program receiving federal money and the plaintiff's injury in being excluded from a benefit).

116. *O'Connor v. Peru State College*, 781 F.2d 632, 640 (8th Cir. 1986) ("The application of the program specific requirement in broader contexts since *Grove City* has apparently not been considered in this circuit, and most appellate and district courts which have found it necessary to reach the issue have ruled more by edict than analysis."); *see also Tudyman*, 608 F. Supp. at 742.

117. *See Foss v. City of Chicago*, 640 F. Supp. 1088, 1091 (N.D. Ill. 1986) ("Case law on the subject of what constitutes a federally assisted program or activity . . . does not establish bright line rules on how such characterizations are made.").

118. *Kamen*, 791 F.2d at 1014; *see also Tudyman v. United Airlines*, 608 F. Supp. 739, 742 (C.D. Cal. 1984) ("Defining the appropriate program or activity is not an easy task.").

119. *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 106 S. Ct. 2705, 2711 (1986).



ants in civil rights cases have often claimed that they do not receive federal funds, i.e., that they are not "recipients." Of course, if this is so, plaintiffs have no recourse against them under Title VI, Title IX or section 504. Second, if federal funding in any form is established, it is necessary to define "any program or activity" of the recipient that receives the funds.

### A. General Discussion

Grove City College received federal financial assistance "indirectly," in the form of grants to students rather than grants to the College. Consolidated Rail Corporation received federal financial assistance in the form of purchase of stock by the government at more than fair market value, as well as funds for retraining programs and employee termination programs. *Grove City College v. Bell*<sup>120</sup> is seen as providing an "expansive reading" of when an entity has received federal financial assistance.<sup>121</sup> This view is not altered in *Consolidated Rail Corp. v. Darrone*<sup>122</sup> or *United States Department of Transportation v. Paralyzed Veterans of America*.<sup>123</sup>

"Recipient" and "federal financial assistance" have been broadly defined in the federal regulations,<sup>124</sup> and broadly interpreted by the courts.<sup>125</sup> Virtually any extension of value from the federal government is seen as "federal financial assistance."

There are a few exceptions to this rule. The grant of a television broadcast license is not federal financial assistance to a broadcaster.<sup>126</sup>

120. 465 U.S. 555 (1984).

121. *Tudyman v. United Airlines*, 608 F. Supp. 739, 743 (C.D. Cal. 1984).

122. 465 U.S. 624 (1984).

123. 106 S. Ct. 2705 (1986).

124. See 45 C.F.R. §§ 84.3(f), 84.3(h) (1986). Federal financial assistance is defined as any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of federal personnel; or (3) Real and personal property or any interest in or use of such property, including: (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and (ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

*Id.*

125. See, e.g., *PVA*, 106 S. Ct. at 2712 n.11, where the Court noted that "financial" assistance can take "nonmoney form" such as property improvements. "The Supreme Court has rejected attempts to read limitations into the term [federal financial assistance] which are not apparent on the face of Section 504." *Arline v. School Bd.*, 772 F.2d 759, 763 (1985) (citing *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 632 (1984)), *aff'd*, 55 U.S.L.W. 4245 (Mar. 3, 1987); see also *Grove City*, 465 U.S. at 563.

126. *Community Television v. Gottfried*, 459 U.S. 498 (1983).

The use of the federal air traffic control system is not federal financial assistance to airlines.<sup>127</sup> In one recent case, a federal district court found that an individual, rather than his employer, was the recipient of federal programs.<sup>128</sup>

For purposes of section 504, the recipient "is the entity that receives the money"<sup>129</sup> or other items of value under the grant statute. A recipient should not be confused with beneficiaries or users of the programs that the recipient operates. The airlines in *PVA* were not recipients of federal funds. Instead, they were found to be merely users of airport facilities. Although the airlines benefitted from the improved airport facilities, they did not actually "receive" the funds or the improvements, and thus were not subject to section 504.<sup>130</sup>

### B. Types of Federal Financial Assistance

The judicial guidelines issued to date on receipt of federal financial assistance are tied to different "types" of aid. Several of the cases distinguish between funding that is direct and that which is indirect.

#### 1. Direct assistance

Identifying the institution or entity which receives direct grants of federal financial assistance is usually a relatively simple task. The recipi-

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127. *PVA*, 106 S. Ct. at 2715 (1986); see also *Chaplin v. Consolidated Edison Co.*, 628 F. Supp. 143, 146 (S.D.N.Y. 1986) (federal tax credit for capital improvements does not subject Con Ed to in-depth regulation).

128. *Foss v. City of Chicago*, 640 F. Supp. 1088, 1095 (1986). The fire department's refusal to rehire a fireman was not actionable under § 504 because the department was not a recipient of federal funds under the Federal Death Benefits program, part of the Public Safety Officers' Benefit Act of 1976, which was directed to employees of fire and police departments and their dependents, rather than the departments as a whole. The department was also not a recipient under the Fire Academy program established by the Federal Fire Prevention and Control Act of 1974, directed toward reducing the rate of death, injury and property loss from fires. No funds actually reached any fire departments as a result of either program, and no fire department was free to accept or reject either program. Although both programs benefitted the fire department, the plaintiff was considered the recipient under the programs and the fire department a beneficiary.

129. *PVA*, 106 S. Ct. at 2712 n.11.

130. "The statute covers those who receive the aid, but does not extend as far as those who benefit from it." *Id.* at 2712. The airlines were not the "parties" who had contact with the government relative to the funds. Thus, they were not in a position to accept or to reject the federal aid, and they were not in a position to terminate their participation in the federal grant program and thus avoid the requirements of the civil rights statutes if the requirements became too onerous. "Under the program specific statutes, Title VI, Title IX and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision." *Id.* at 2711.

ent is the organization which receives the federal benefits and which expends them for the purpose for which they were authorized.

Most federal funding is classified as "categorical" or "earmarked"; it is targeted to a specific goal.<sup>131</sup> Congress often makes it explicitly clear where the funds are intended to go. Recipients are accountable to the federal funding agency, and subject to audit to assure that the funds are actually expended for the purpose for which they were granted.

Other funds are classified as unrestricted in use, or "non-earmarked." Examples of unrestricted grant programs are Revenue Sharing<sup>132</sup> and impact aid to school districts.<sup>133</sup>

Although the issue of who or what is a recipient under such programs is usually straightforward, funds are often channeled through intermediaries, such as the states. They are then allocated by the states to local governments or other entities, which must apply to the state (rather than to the federal agency) for assistance. The state is considered both a recipient,<sup>134</sup> and a "mere conduit" of funds to the local entity.<sup>135</sup>

131. As far back as 1964, the U.S. Attorney General prepared a compilation identifying programs which he believed might be affected by Title VI. 110 CONG. REC. 8359-61 (1964). At hearings on Title VI, the Secretary of H.E.W. provided a list of department-funded programs that would bring a recipient within its scope. See *Civil Rights Hearings Before Subcomm. of the House Comm. on the Judiciary*, 88th Cong., 1st Sess., pt. II, 1537-38 (1963).

A few examples of categorical programs are: Education of the Handicapped Act, 20 U.S.C. §§ 1411-1420 (1982) (assisting states and localities to provide free appropriate public education to all handicapped children); Head Start Act of 1981, 42 U.S.C. §§ 9831-9852 (1982) (assistance in improving planning and in conducting educational programs for pre-school children to provide school readiness skills); Uniform Mass Transit Act, 49 U.S.C. §§ 1601-1618 (1982) (assistance to local jurisdictions in establishing and maintaining efficient mass transportation systems).

132. State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (1972) (codified as amended at 31 U.S.C. §§ 6701-6724 (1982)) (The Revenue Sharing Act).

133. Educational Agencies Financial Aid Act, ch. 1124, tit. I, § 2, 64 Stat. 1100 (1950) (codified as amended at 20 U.S.C. §§ 231-246 (1982)). Impact aid payments to school districts provide general aid to meet the recipient's general operating expenses. It is granted to local jurisdictions because of the negative effect of the federal government's presence in the jurisdiction. The funds are intended to compensate the school district for the cost of serving children whose parents reside or work on federal property, which is not subject to local property taxes. Impact aid may be used for any purpose, and the funds are usually deposited in the general fund of the recipient school district. According to one court, impact aid given to a school district qualifies as federal financial assistance under § 504. *Arline v. School Bd.*, 772 F.2d 759, 763 (1985), *aff'd*, 55 U.S.L.W. 4245 (Mar. 3, 1987). The question of whether impact aid is federal financial assistance was presented for review in the petition for certiorari filed in *School Board v. Arline*, but the Court declined to review this issue. 106 S. Ct. 1633, 1634 (1986).

134. One commentator has suggested that the test to determine a "recipient" is who or what has the real decision-making authority over the use of federal funds. States supervising the use of federal funds for their hospitals, institutions, welfare programs and other activities

## 2. Indirect assistance

Entities may also receive indirect federal financial assistance. For recipients, this may open a "can of worms," but for civil rights advocates the result is far more appetizing. The indirect recipient approach provides an opportunity for creative lawyering.

As noted, when federally funded programs are administered by state agencies, the federal funds pass through state control under a federally-approved state plan to public and private local recipients.<sup>136</sup> There is little doubt that Congress intended these federal funds to be received by the various service providers. Therefore, hospitals, other health care facilities, school districts and vocational rehabilitation programs, among other entities, will be considered indirect "recipients" even if the checks they receive are issued by state rather than by federal agencies.

A few examples illustrate the breadth of potential coverage based on indirect assistance. In *Graves v. Methodist Youth Services*,<sup>137</sup> a court found that a private social service agency was a federal recipient since the agency was dependent upon federal aid through a state agency.<sup>138</sup> This was analogous to the receipt of federal funds by Grove City College through its students. In both cases, federal funds were received "through another recipient."<sup>139</sup>

The Medicaid program is another example of indirect federal assistance.<sup>140</sup> Federal assistance under Medicaid goes to a state, which contributes funds and administers the program for health care for the poor

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are thus responsible for eliminating discrimination. See Parry, *The Burger Era Comes to a Close*, 10 MENTAL & PHYSICAL DISABILITY L. REP. 252, 257 (1986).

135. The students at Grove City College were "mere conduits of the aid to its intended recipient," the college. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 106 S. Ct. 2705, 2712 (1986).

136. Several examples of such disbursement patterns are the Education of the Handicapped Act, 20 U.S.C. §§ 1401-1461 (1982); Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1982 & Supp. III 1985); 42 U.S.C. § 1396 (1983) (Medicaid program) and Title XX of the Social Security Act, 42 U.S.C. § 1397 (1982).

137. 624 F. Supp. 429 (N.D. Ill. 1985).

138. The private agency received 84.3% of its funds through a state agency. The money received from the state was reimbursement by the federal government under Title XX of the Social Security Act. 42 U.S.C. § 1397 (1982). It was not the property of the state at the time of distribution. When the private agency received this funding from the state, the private agency received indirect federal funding.

139. 45 C.F.R. § 84.3(f) (1986).

140. 42 U.S.C. § 1396 (1986). Under Medicare Part A, certain hospitals directly receive federal funds for treatment of certain aged and disabled persons. 42 U.S.C. §§ 1395c, 1395d (1982).

and disadvantaged.<sup>141</sup>

Those who contract with a recipient may become indirect recipients of federal financial assistance. *Frazier v. Board of Trustees of Northwest Mississippi*,<sup>142</sup> concerned a private contractor's respiratory therapy services which were integral to the operation of a hospital receiving federal financial assistance. By virtue of the relationship that linked both parties' revenues to the receipt of Medicare and Medicaid funds, the contractor also received federal financial assistance. The court noted that it was "not bound, however, to the formalisms of the contractual method of payment in analyzing the reality of [the contractor's] financial nexus to [the hospital]."<sup>143</sup>

The Court noted that the private company kept weekly tallies of the number of Medicaid and Medicare patients treated in the department. Both the hospital and the contractor reaped a percentage benefit of revenues generated by Medicare and Medicaid patients. The Court stated that:

Unlike the hospital's privately-contracted mower of lawns, sweeper of floors, or supplier of aspirin, Lifetron [the contractor] contributes in a direct and tangible way to the hospital's claims for reimbursement under Medicare and Medicaid. That the federal check does not bear Lifetron's name is no answer to the fact that the check would not have been written at all were it not for Lifetron's performance as a de facto subdivision of Northwest [the hospital].<sup>144</sup>

Like *Grove City College v. Bell*,<sup>145</sup> where the federal funds were issued to the students rather than directly to the program or activity of the college

[t]he fact that a respiratory therapist patient's Medicare or Medicaid payments are remitted first to [the hospital] and then to Lifetron does not launder those monies: the company is as much a recipient of the funds as the hospital, which would not have reaped that portion of its federally funded revenue but for the provision of services by Lifetron.<sup>146</sup>

The suit in *Frazier* is unlike the suit in *United States Department of*

141. *United States v. Baylor Univ. Med. Center*, 736 F.2d 1039, 1044-47, 1049 (5th Cir. 1984) (Medicare/Medicaid payments are federal financial assistance for purposes of § 504).

142. 765 F.2d 1278 (5th Cir. 1985).

143. *Frazier*, 765 F.2d at 1289.

144. *Id.* at 1290.

145. 465 U.S. 555 (1984).

146. *Id.*

*Transportation v. Paralyzed Veterans of America*,<sup>147</sup> in which the Court's inquiry was whether the commercial airlines, which compare to the contractor, "received" federal monies. In *PVA*, the airlines received no aid; in *Frazier*, the monies actually received by the contractor were in part federal financial assistance, i.e., Medicare and Medicaid.

## V. "ANY PROGRAM OR ACTIVITY"

### A. General Discussion

There is a restrictive component to the decision in *Grove City College v. Bell*<sup>148</sup> decision. The Supreme Court did not find that student aid grants constituted assistance to the entire college. Instead, it held that the "program or activity" which received federal financial assistance was merely the student financial aid program.<sup>149</sup>

After a "recipient" has been identified, the remaining issue is to determine which of its programs or activities receive federal financial assistance.<sup>150</sup> Two distinct approaches have been adopted by the courts.

### B. The Organizational Approach

Some courts have adopted an "organizational" perspective, examining whether a department or division receives federal financial assistance in its own name. The obvious fear following *Grove City College v. Bell*<sup>151</sup>

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147. 106 S. Ct. 2705 (1986).

148. 465 U.S. 555 (1984).

149. See *Bennett v. West Texas State Univ.*, 799 F.2d 155 (5th Cir. 1986). Title IX applied to only the student financial aid program by virtue of its receipt of (BEOG) funds. Any benefit received by the athletics department was "merely incidental." *Id.* at 158. In dictum, the court extended the holding in *Grove City College v. Bell*, 465 U.S. 555 (1984), to mandatory student fees paid in part by federal funds, federal work study money and federal subsidies for physical facilities. *Id.*

150. Some courts have had no trouble in finding that a plaintiff in a Title VI action has met the burden of showing that a program or activity receives federal financial assistance. *United States v. Texas*, 628 F. Supp. 304, 321 (E.D. Tex. 1985), *rev'd*, 793 F.2d 636 (5th Cir. 1986) ("It is undisputed that Texas receives federal financial assistance for its education programs, . . ."). In some cases, defendants have stipulated away the issue. See, e.g., *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984) (teaching position at issue was part of program assisted by Education of All Handicapped Children Act Funds).

Program specificity is not a significant issue when a plaintiff alleges discrimination in admission to an educational institution. Discrimination in admission practices or standards pervade an entire educational institution, since a student who is denied admission is *ipso facto* denied access to every program or activity conducted by that institution. See *Rice v. President & Fellows of Harvard College*, 663 F.2d 336, 339 n.2 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982) ("One who is discriminated against in seeking admission is denied access to all educational programs and activities within an institution, and the entire body of programs within the school is tainted.").

151. 465 U.S. 555 (1984).

was that courts would find the relevant program or activity to be the smallest organizational unit of the recipient. To an extent, that fear has become a reality, with some courts looking to the very smallest subunits of a recipient to determine which is the program or activity at issue.<sup>152</sup>

### C. *The Congressional Intent Approach*

A second approach, emphasized by the Supreme Court, is a "congressional intent" scheme,<sup>153</sup> which looks at the congressional goal in making available particular federal funds.<sup>154</sup> The Court in *Grove City College v. Bell*<sup>155</sup> analyzed the "purpose and effect" of the funding statute, the statute itself, the statutory language and legislative history of Title IX and the federal regulations prohibiting discrimination.<sup>156</sup> The Court found that Congress intended BEOG money to supplement the College's financial aid program, rather than to benefit the institution as a whole.<sup>157</sup>

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152. See *Bennett v. West Texas State Univ.*, 799 F.2d 155, 159 (5th Cir. 1986) (financial aid office rather than athletics department was relevant "program" despite the fact that athletic scholarships were administered by the student financial aid office); *Storey v. Board of Regents*, 604 F. Supp. 1200, 1201 n.1 (W.D. Wis. 1985) (whether the relevant program was the Department of Poultry Sciences as compared to the College of Agricultural and Life Sciences); *Mabry v. State Bd. for Community Colleges*, 597 F. Supp. 1235, 1239 (D. Colo. 1984) (school received federal assistance but no funds were specifically designated for or allocated to the physical education department) (Title IX).

153. A congressional intent approach should not be confused with the "primary purpose" controversy that plagued civil rights advocates in employment cases under Title IX and § 504. See *supra* notes 38-39. First, those cases dealt with a misinterpretation of statutory language, limiting federal oversight to employment practices where the primary objective of the Federal financial assistance is to provide employment. 29 U.S.C. § 795(a)(2) (1982); 42 U.S.C. § 2000d-3 (1982). Since *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), there is no such limitation under § 504. The law applies to every "program" which receives federal money, regardless of the "primary purpose."

Second, there was no liability under the "primary purpose" test unless the plaintiffs themselves were beneficiaries of federal funding. Plaintiffs had to show that federal monies were used for their salaries. But § 504 and Title IX cases apply to "programs." Plaintiffs asserting claims under § 504 need not be connected with the aspects of the program that receive federal assistance. See *Grove City College v. Bell*, 465 U.S. 555, 571 n.21 (1984) (Title IX would apply to any applicant for student aid, not merely to those who apply for BEOG aid); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 540 (1982) (Title IX applies to all employees, not merely to employees whose salaries are paid with federal financial assistance).

154. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 106 S. Ct. 2705, 2711 (1986). The Court looked at the "purpose of the disbursements" and at what "Congress intended" and what "Congress recognized" in enacting statutes affecting airports. *Id.*

155. 465 U.S. 555.

156. Presumably, an analysis would also consider the legislative history of the funding statute and federal agency regulations implementing the funding statute.

157. *Grove City*, 465 U.S. at 573-74. In his concurring and dissenting opinion, Justice Brennan agreed that congressional intent in authorizing federal financial assistance is relevant to the determination of "program or activity." However, he concluded that BEOG monies were

Courts using this approach have found the “‘relevant program or activity’ to encompass all parts—but only those parts—of the entity in which the monies could have been used.”<sup>158</sup> This does not require a court to examine where the funds were actually spent, and how they were actually used. In other words, “it is Congress’ intent in authorizing the aid that controls.”<sup>159</sup>

Congressional intent can be either broad or narrow. In *Jacobson v. Delta Airlines, Inc.*,<sup>160</sup> an airline received federal funds to encourage service to small communities. The appellate court held that section 504 was not applicable to the airline company because the federal funds were not intended to benefit its general passenger service.<sup>161</sup> This holding represents a narrow interpretation of congressional intent.

Other statutes have been determined to encompass broad policy goals. For example, in *O’Connor v. Peru State College*,<sup>162</sup> the appellate court found that Congress intended Title III of the Higher Education Act to include improvement of “academic quality.”<sup>163</sup> Therefore, “academics” was the “program or activity” benefitted by federal funding of student and faculty research.<sup>164</sup>

#### D. Institution-Wide Coverage

Using either of the approaches discussed above, it is possible to find that the civil rights statutes reach every activity of an institution. The

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intended by Congress to benefit the institution in its entirety. He found it unnecessary to decide whether Title IX’s reach would be the same when more targeted aid was being received by an institution. “For such cases, it may be appropriate to examine carefully not only the purposes but also the actual effects of the monies received.” *Id.* at 600 n.13 (Brennan, J., concurring in part and dissenting in part).

158. *O’Connor v. Peru State College*, 781 F.2d 632, 641 (8th Cir. 1986) (emphasis in original).

159. *Id.* at 641 n.7.

160. 742 F.2d 1202, 1211 (9th Cir. 1984), *cert. dismissed*, 105 S. Ct. 2129 (1985).

161. *See Foss v. City of Chicago*, 640 F. Supp. 1088 (N.D. Ill. 1986). Although plaintiff’s former employer received some revenue sharing funds, the funds were for training and death benefit programs that had no connection with plaintiff’s employment.

162. 781 F.2d 632 (8th Cir. 1986).

163. 20 U.S.C. § 1057 (1982).

164. This broad statement of purpose was still not sufficient to reach plaintiff’s complaint of discrimination, which concerned her coaching rather than her teaching duties. *O’Connor*, 781 F.2d at 642. The court found that “academics” did not include “intercollegiate sports.” *Id.*; *see also United States v. Texas*, 628 F. Supp. 304 (E.D. Tex. 1985), *rev’d*, 793 F.2d 636 (5th Cir. 1986). Plaintiffs challenged the Pre-Professional Skills Test (PPST) for teachers, which was alleged to discriminate against minority students enrolled in teacher education courses. The state contended that no federal funds were used to administer the test. The Court held that Title VI does apply, because “the PPST is clearly part of the program of teacher education in Texas, and the teacher program receives federal funds.” *Id.* at 322.



Supreme Court in *Grove City College v. Bell*<sup>165</sup> did not reject institution-wide coverage in general, but only on the facts of that case.<sup>166</sup> In fact, the Court seemed to contemplate that non-earmarked grants would trigger institution-wide coverage.<sup>167</sup> Typical non-earmarked grants include impact aid,<sup>168</sup> revenue sharing funds,<sup>169</sup> and block grants.<sup>170</sup>

### 1. Impact aid

The Eleventh Circuit in *Arline v. School Board* addressed the question whether an entire school system was the recipient of an impact aid program.<sup>171</sup> The issue arose when a teacher suffering from tuberculosis brought suit when she was fired after the school district discovered that she was in ill health. Although the federal impact aid constituted only a small portion of the school system's budget,<sup>172</sup> it was added to the school system's general fund, from which teachers' salaries were paid.<sup>173</sup> Thus,

165. 465 U.S. 555 (1984).

166. *Id.* at 570. See *O'Connor v. Peru State College*, 781 F.2d 632, 641 n.7 (8th Cir. 1986) ("The Supreme Court did not reject institution-wide coverage in general, but only on the facts of the case."); see also *Tudyman v. United Airlines*, 608 F. Supp. 739, 743 (C.D. Cal. 1984).

167. *Grove City*, 465 U.S. at 573.

168. School Assistance in Federally Affected Areas Act, 20 U.S.C. § 237 (1982).

169. State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (1972) (codified as amended at 31 U.S.C. §§ 6701-6724 (1982)) (The Revenue Sharing Act).

170. An example of a block grant is Chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3811-3863 (1982).

Under the Reagan administration, an attempt was made to reduce federal involvement in state and local affairs. One proposal was to consolidate many categorical programs into "block grants," under which state and local recipients would have discretion in how to expend federal dollars, within the general purpose of the block grant. Such grants are provided "without strings," either unrestricted or for a purpose so general that the recipient is deemed to have discretion in how to use the funds.

Many of the proposed block grant programs were rejected after forceful opposition from the public, including many civil rights advocates who feared a reduced commitment to civil rights enforcement. It is ironic that after *Grove City*, a block grant approach to federal funding might have the effect of increasing, rather than reducing, overall compliance with the civil rights statutes.

171. 772 F.2d 759, 763 (11th Cir. 1985), *aff'd*, 55 U.S.L.W. 4245 (Mar. 3, 1987). The court rejected defendant's argument that impact aid was not federal assistance, but was more analogous to land taxes, since it was calculated on the basis of federal ownership of land and served as a substitute for tax payments the school system would have received if the land had been privately owned. "[T]he federal government's exemption from local taxes left it with no legal obligation to give impact aid. Its choice to assist local entities . . . renders its assistance no less a subsidy than any other form of aid that it dispenses." *Id.* at 762.

172. Defendant received \$39,000 in impact aid, approximately 0.3% of the entire school budget. *Id.* at 761 n.6.

173. *Id.* at 761. Compare the court's treatment of non-earmarked impact aid with its analysis of specifically targeted funds. The teacher introduced evidence that the school received funds under Title I of the Elementary and Secondary Education Act, 20 U.S.C. §§ 2701-2854 (1982 & Supp. III 1985), now superseded by Chapter 1 of the Education Consolidation and

she argued that the recipient of the "program" was the entire school system subjecting the school system to regulation under section 504.

The school district responded by arguing that the teacher could not show that the impact aid funded a program or activity in which she was employed. Rejecting the school district's theory, the appellate court reasoned:

Under their [defendants'] theory, it was not sufficient for plaintiff to show that the impact funds were non-earmarked monies which were deposited into the school board's general revenue fund to be used as it saw fit and that her salary was paid out of that fund. They argue that she must also show that the impact monies were actually used to fund her salary, since "the School Board might have elected to use those funds to pay for a program which would have had to be eliminated if the impact funds had been cut off." This argument strains credulity. Such a theory would impose on the plaintiff the impossible burden of tracing money that is virtually untraceable under accounting procedures which commingle funds in a general account before outlay are made. It also misconceives the relevant 'program' in this case. . . . *Once the federal money was deposited into its general fund, all activities paid out of that fund became subject to Section 504.*<sup>174</sup>

Impact aid is received by many school districts, since federally-owned property is ubiquitous. Even though the amount of impact aid may be miniscule, it may nevertheless trigger coverage of the entire school district. Therefore, it is a potentially valuable source of jurisdiction for civil rights plaintiffs.<sup>175</sup>

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Improvement Act of 1981, 20 U.S.C. §§ 3801-3876 (1982 & Supp. III 1985), which provided monies to schools attended by significant numbers of children from low income families. *Arline*, 772 F.2d at 761 n.5. Unlike impact aid, these funds were segregated from the general budget. They were used only to pay the salaries of Title I teachers and to purchase only Title I program supplies. The plaintiff pointed out that her job entailed significant involvement with the Title I program in the form of day-to-day conferences with Title I teachers about those of her students who were involved in the program, but the appeals court did not rule on the issue in light of its decision on impact aid. *Id.* at 761. The district court had concluded that Title I money would not give rise to a cause of action, since the plaintiff was not employed for purposes of Title I or in a Title I program. *Id.*

174. *Arline*, 772 F.2d at 763 (emphasis added).

175. See *Bradford v. Iron County C-4 School Dist.*, 36 Fair Empl. Prac. Cas. (BNA) 1296 (E.D. Mo. 1984). A school district received non-earmarked funds representing federal payments for students who lived on federal lands and for minerals extracted from mines within the geographical limits of the school district. The funds were placed within the school district's general revenues. The court stated that:

## 2. Revenue sharing

Until recently, Revenue Sharing funds were an important source of federal financial assistance for plaintiffs claiming discrimination by local governments.<sup>176</sup> Unlike a narrowly defined categorical grant program, Revenue Sharing funds were given to state<sup>177</sup> and local governments in ways that allowed them maximum flexibility in choosing how the funds would be used, with a minimum of involvement by the federal government.<sup>178</sup> The discretionary aspect of this source of funding meant that plaintiffs could argue that the federal government's intent in providing the funds was non-restricted. The local government as a whole, rather than any subdivision, was the intended beneficiary.

With respect to Revenue Sharing funds, one court found that the

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It would be equitable, and in keeping with Congressional intent, to erect a presumption that every program within an institution that received unrestricted federal funds is "receiving federal financial assistance." Defendants would be able to rebut this presumption with proof that these specific unrestricted funds were not spent on the program or activity in which the plaintiff participated . . . . It is proper that defendant should bear this burden, because they are in the best position to know where they spent their general revenues. Any other position would create the anomalous result that the more general the federal funding, the less protection handicapped individuals would be afforded. This result would be in clear violation of Congress' intent to provide the most assistance to handicapped individuals that the expenditure of federal dollars could provide.

*Id.* at 1299.

176. More than 39,000 local governments received funds under the Revenue Sharing Act. More than 30,000 of these jurisdictions receive no federal funds except through Revenue Sharing. U.S. DEP'T OF THE TREASURY, ANNUAL REPORT OF THE OFFICE OF REVENUE SHARING, FISCAL YEAR 1985. Therefore, the only avenue for claims under § 504 against most local governments is through Revenue Sharing.

In addition to being a source of federal financial assistance, the Revenue Sharing Act itself prohibits discrimination on the basis of handicap under § 504. 31 U.S.C. § 6716(b)(2) (1982). Because Revenue Sharing has not been reauthorized, plaintiffs can no longer rely on this source of funding to trigger civil rights statutes.

177. Until 1980, Revenue Sharing funds were allocated to both state and local governments. The 1980 reauthorization of the Revenue Sharing Act virtually eliminated payments to state governments. *See* State and Local Fiscal Assistance Act Amendment of 1980, Pub. L. No. 96-604, 94 Stat. 3517 (1980).

178. Under the original legislation, recipient governments were limited to expending funds for operation and maintenance in eight "priority" categories including: public safety, transportation, libraries, social services and financial administration. Recipients were required to hold public hearings and to report on their planned use of Revenue Sharing monies for any non-capital improvement project. This restriction was removed in the 1976 reauthorization of the Act and recipient governments were given total flexibility in the use of funds, subject only to State and local law. *See* State and Local Fiscal Assistance Amendment of 1976, Pub. L. No. 94-488, 90 Stat. 2341 (1976). The 1983 reauthorization even eliminated the requirement to conduct public hearings at which citizens might suggest possible uses for Revenue Sharing funds. *See* Local Government Fiscal Assistance Amendment of 1983, Pub. L. No. 98-185, 97 Stat. 1309 (1983). Recipient governments do not designate proposed or actual use of Revenue Sharing funds on their applications.

local government in its entirety was the recipient program or activity. The suit in *Henning v. Village of Mayfield Village* was brought by a village police dispatcher under section 504.<sup>179</sup> The plaintiff was employed by Village of Mayfield as a full-time dispatcher. Originally, dispatchers worked fixed shifts and Mr. Henning worked the night shift. The village subsequently converted the fixed shifts into rotating shifts. As a result of his handicap, the plaintiff complained that he was unable to work rotating shifts. When the village refused to allow him to work a fixed shift, the plaintiff filed an action alleging that this refusal constituted discrimination under section 504.<sup>180</sup> He offered evidence that Revenue Sharing funds were used for payment of engineering fees for the reconstruction and resurfacing of a road, the implementation of a tool and equipment rental program for the benefit of village residents, purchase of police vehicles, maintenance of traffic signals and for the purchase of communications equipment.<sup>181</sup> The court stated:

[B]ecause the city receives funds to be used as it determines and does so for so many different purposes, it cannot be found that the programs or activities receiving funds should be limited to a small specific use such as to provide employment for dispatchers. Instead the program or activity considered to be receiving financial assistance for the purposes of the Rehabilitation Act of 1973 must be the Village of Mayfield itself. It is not important that in one specific year funds are not used for the police department. The funds may be allocated there the next year. A decision that the Village is the program or activity receiving the financial assistance prevents discrimination against handicapped persons from occurring only in the years funds are allocated to the police department.<sup>182</sup>

Compare *Henning* with another case in which a city chose to focus its undesignated Revenue Sharing funds on particular programs. In *Foss v. City of Chicago*, a fireman brought suit under section 504 alleging discrimination due to his handicap.<sup>183</sup> The fire department refused to allow plaintiff Foss to return to work after he suffered a loss of consciousness on the job as a result of a handicap.

The city received federal Revenue Sharing funds but none of the funds were allocated to the fire department. However, the fire depart-

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179. 610 F. Supp. 17 (N.D. Ohio 1985).

180. *Id.* at 18.

181. *Id.* at 19.

182. *Id.*

183. 640 F. Supp. 1088, 1089 (N.D. Ill. 1986).

ment did receive federal funds via federal block grants and other specific programs for job training of low income residents as emergency medical technicians, training emergency volunteer fire fighters, and for providing death benefits for firefighters should they be killed in the line of duty.<sup>184</sup> The court dismissed the fireman's suit, reasoning that none of the funds were actually allocated to the city fire department.<sup>185</sup> Further, the court noted that the funds the fire department did receive had no connection to the plaintiff's employment.<sup>186</sup> The *Foss* court held that "it makes sense" to limit section 504 to the recipient's actual use of non-earmarked funds.

If Congress or the granting agency intended the funds for a particular purpose, then the relevant program or activity will in most cases be the one delineated by Congress in the statute and its legislative history, or by the agency in its terms for the grant. . . . If the funds are not "earmarked," but rather their use is left to the recipient's discretion, then it makes sense to define the program or activity not only by the nature of the federal grant, but also in part by what the recipient did with the federal money.<sup>187</sup>

There is no sound basis for the *Foss* court's view that actual use defines "program or activity" with respect to non-earmarked funding.<sup>188</sup> This contradicts *Grove City*, *Darrone*, and *PVA*, which all held that the controlling factor is congressional intent as to permissible uses of the funds.

The explicit congressional goal in Revenue Sharing was to give autonomy over funding decisions to local governments. The federal gov-

184. *Id.* at 1089-90.

185. *Id.* at 1095.

186. *Id.*

187. *Id.* at 1092 (citations omitted).

188. The court may have confused the § 504 prohibitions against discrimination with the similar, though not identical prohibition in the Revenue Sharing Act. Although the Revenue Sharing Act incorporates § 504, it goes on to state that recipient governments charged with violations have the burden of proving that the program or activity in question is not federally assisted. 31 U.S.C. § 6716(c)(1) (1982 & Supp. III 1985). *Foss* seized on this shifting burden of proof to justify a narrower application of § 504 under Revenue Sharing, based on actual use of federal funds.

The plaintiff's job is merely to show that a governmental unit receives revenue sharing funds. If so, the court should presume that all of its programs and activities are federally funded. The governmental unit, however, may rebut that presumption with clear and convincing evidence that no federal dollars reached the program or activity in question.

*Foss*, 640 F. Supp. at 1093. The shifting burden of proof language suggests that a recipient's actual use of funds may determine which of its activities are subject to non-discrimination requirements. This quirk in the law is absent from, and inconsistent with, other civil rights statutes.

ernment has no interest in the actual use of Revenue Sharing funds. It does not request information about proposed or actual use in grant applications or in reporting procedures. Therefore, the "program" receiving the federal assistance is the local government itself, rather than any of the myriad of specific activities in which it engages. Even *Foss* acknowledged that to hold otherwise is to permit local governments to engage in a "shell game" of sheltering federal money in discrete programs while discriminating with impunity in the rest of their activities.<sup>189</sup>

In practice, few governments will be able to trace their federal dollars after they are deposited into general funds. Therefore, although the *Foss* court has suggested that governments may attempt to insulate their discriminatory activities from federal control, in most cases non-earmarked funds will reach every activity of a recipient government.

### 3. Medicare/Medicaid

Institution-wide coverage may also be the case with respect to Medicare/Medicaid. Courts have held that participating hospitals are recipients of federal financial assistance.<sup>190</sup> The program to which the civil rights apply may be the entire institution, in its provision of medical services.<sup>191</sup> Even the somewhat contrary view that only the inpatient and emergency room services are "programs" still enhances coverage, particularly since the handicapped patient need not be a Medicaid or Medicare recipient to have a cause of action.<sup>192</sup>

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189. *Id.* at 1092.

190. *NAACP v. Medical Center*, 599 F.2d 1247, 1248 n.4 (3d Cir. 1979); *Bob Jones Univ. v. Johnson, Inc.*, 396 F. Supp. 597, 603 n.21 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

191. *United States v. University Hosp.*, 575 F. Supp. 607 (D.N.Y. 1983), *aff'd*, 729 F.2d 144 (2d Cir. 1984). The Second Circuit assumed without deciding that neither the United States nor the hospital was entitled to summary judgment on the issue since many material facts had not been developed.

For example, the record does not reveal the total amount of federal medicare and medicaid funds the hospital has received, directly or indirectly, or more importantly, how those funds are allocated among the various "programs" or "activities" that the hospital may conduct.

729 F.2d 144, 151 (2d Cir. 1984). The record was devoid of evidence as to how the hospital was organized, either internally or as a part of a network of state affiliated institutions. The Supreme Court did not disturb this ruling.

192. *See United States v. Baylor Univ. Medical Center*, 736 F.2d 1039, 1046-47 (5th Cir. 1984), where the court compared the similar program of BEOG benefits at issue in *Grove City*, and found no meaningful distinction between federal aid granted directly to an institution, and federal aid received by an institution by virtue of the participation of eligible individuals in its program. The court determined that all such benefits are federal financial assistance; the "program" receiving them depends on the facts of the case.

## VI. CONCLUSION

The congressional intent approach advocated in this Article considers the lessons emanating from the Supreme Court decisions in *Grove City College v. Bell*,<sup>193</sup> *Consolidated Rail Corp. v. Darrone*,<sup>194</sup> and *United States Department of Transportation v. Paralyzed Veterans of America*.<sup>195</sup> Equally important, this approach preserves the overriding goal of the civil rights statutes: to assure to the maximum reach of federal authority that tax-supported programs do not engage in discrimination.

The congressional intent approach is not without flaws. Congressional intent, as we have seen, can be either broad or narrow. But such an approach seeks to eliminate twin evils that might otherwise doom many civil rights claims.

First, plaintiffs should not be drawn into a controversy over how recipients actually use their federal financial assistance.<sup>196</sup> This argument is irrelevant, since the controlling issue is the scope of congressional intent in providing the funding. Plaintiffs will inevitably be at a disadvantage in such an argument. Despite discovery, the information and the decision-making authority concerning actual use of funds is in the control of defendants.

Second, recipients cannot be permitted to define "any program or activity" on their own terms, simply by using an organization name identified by grant writers. The result would be a "shell game," at least for non-earmarked funding. Recipients with budgetary procedures solely within their own control could effectively insulate programs from the non-discrimination requirements.<sup>197</sup>

One court considered this point "most troubling" but concluded that Congress had seen fit to give a defendant the "opportunity to structure its conduct in such a way to avoid being subject to the antidiscrimination provisions of the Rehabilitation Act . . . ."<sup>198</sup> This makes a mockery of the civil rights laws.

A congressional intent approach places the program specificity issue in a classic legal framework. Courts and lawyers are accustomed to re-

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193. 465 U.S. 555 (1984).

194. 465 U.S. 624 (1984).

195. 106 S. Ct. 2705 (1986).

196. This may be a relevant issue in administrative proceedings commenced by federal agencies to terminate federal financial assistance to programs or activities of a recipient for non-compliance with the civil rights statutes. The fund termination procedures are clearly limited "to the particular program, or part thereof, in which such noncompliance" is found. 45 C.F.R. § 80.8(c) (1986) (emphasis added).

197. *Foss v. City of Chicago*, 640 F. Supp. 1088, 1092 (N.D. Ill. 1986).

198. *Id.* at 1096.

viewing the language of federal statutes and their legislative history. "At the outset, . . . we look to the terms of the underlying grant statute."<sup>199</sup> Courts also generally defer to executive interpretations as seen through federal agency regulations implementing a congressional enactment.

If we were writing on a clean slate, the argument would be that *Grove City* was inapplicable to section 504. This civil rights statute is available to "any [handicapped] person aggrieved by any act or failure to act by any recipient of Federal assistance."<sup>200</sup> The Civil Rights Restoration Act arguably does no more than what Congress has already accomplished in the 1978 Amendments.

Legislation remains the best answer to the present dilemma concerning the definition of "program or activity." Until a legislative cure is forthcoming, courts will fumble with this issue\* Many recent opinions are characterized by strained analysis of "earmarked" versus "non-earmarked," actual use versus intended use, and other code words. In the meantime, although billions of federal dollars are distributed, victims are uncertain whether they can effectively challenge discriminatory conduct. They are forced to go through hoops to establish jurisdiction, before the merits of their allegations are subject to scrutiny.

To make sense out of the chaos, courts must return to what they claim to know best: interpreting congressional intent. This is where the focus should have been all along, and if recipients take advocates off course, we will have to get back on the right track.

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199. *PVA*, 106 S. Ct. at 2710. Justice Powell has often and aptly stated that "the starting point of any inquiry into the application of the statute is the language of the statute itself." *Id.* His reasoning is particularly significant given the fact that he has authored the majority opinions in so many § 504 cases. See *Atascadero State Hosp. v. Scanlon*, 469 U.S. 1032 (1985); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). He also authored concurring opinions in *Grove City College v. Bell*, 465 U.S. 555 (1984), and *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983).

200. 29 U.S.C. § 794a(2) (1982) (emphasis added).

\* [Editors Note: On March 19, 1987 and April 1, 1987 various handicapped individuals and authorities in the field of disability law testified before the United States Senate Committee on Labor and Human Resources concerning S.R. 557, the Civil Rights Restoration Act of 1987].



