

# Application of Title IX to School Athletic Programs

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## NOTE

### THE APPLICATION OF TITLE IX TO SCHOOL ATHLETIC PROGRAMS

Since the enactment of title IX of the Education Amendments of 1972, considerable controversy has surrounded the statute's application to school athletic programs. Title IX forbids discrimination based on sex in "any education program or activity receiving federal financial assistance."<sup>1</sup> In 1975, the Department of Health, Education, and Welfare (HEW) issued regulations applying title IX specifically to athletics.<sup>2</sup> In those regulations, HEW interpreted the statute as extending to athletic programs in any institution receiving federal money, whether or not the money is used directly in the program.<sup>3</sup> At the time the regulations were issued, commentators reached varying conclusions about the validity of the regulations and the future impact of title IX in general on school athletics.<sup>4</sup>

Federal courts have also reached differing conclusions as to the statute's scope.<sup>5</sup> Some courts have used an institutional approach, applying title IX to any program in an institution receiving federal aid; other courts have taken a programmatic approach, limiting title IX to individual programs receiving federal aid.<sup>6</sup>

This Note analyzes the problems of determining title IX's scope and suggests a framework for resolution of the issue. The Note concludes that to effectuate the purpose of title IX, the statute must reach athletic programs in any school whose athletic program derives a substantial benefit either directly or indirectly from the federal assistance.<sup>7</sup>

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<sup>1</sup> 20 U.S.C. § 1681 (1976).

<sup>2</sup> See 45 C.F.R. § 86.41 (1975).

<sup>3</sup> The regulations in 45 C.F.R. § 86.41(a) (1975) extend the prohibition against sex-based discrimination to any "recipient" of federal financial assistance. "Recipient," as defined in 45 C.F.R. § 86.2(h) (1975), refers to an institution receiving the assistance. The HEW interpretation, therefore, is an institutional one.

<sup>4</sup> See, e.g., Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34 (1977) (arguing for a broad application of title IX to intercollegiate athletics); Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49 (1976) (title IX does not apply to athletic programs); Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 TEX. L. REV. 103 (1974) (arguing for the so-called benefiting approach to title IX); Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254 (1979) (arguing for more demanding regulations under title IX).

<sup>5</sup> See *infra* notes 42-64 and accompanying text.

<sup>6</sup> See *infra* notes 8-22 and accompanying text.

<sup>7</sup> See *infra* notes 65-103 and accompanying text.

I  
BACKGROUND

A. Legislative History of Title IX

The legislative history of title IX does not clarify the proper scope of application of title IX to a school's athletic program. The conflict is over whether the statute should apply only to particular programs within a school (the "programmatically" approach), or whether it is meant to encompass any program run by a school receiving federal money (the "institutional" approach).<sup>8</sup> The issue is particularly important in the area of athletics, because many schools that receive federal money do not apply any of that money directly to their athletic programs.<sup>9</sup> Under the programmatic approach to title IX, these schools' athletic programs would not be required to comply with the statute, while under the institutional interpretation, the programs would be within title IX's scope.

It is difficult to find in the legislative history specific discussion of the meaning of the words "program or activity" as used in title IX.<sup>10</sup>

<sup>8</sup> Four courts have decided the issue in the context of athletics. *See infra* notes 42-64 and accompanying text.

<sup>9</sup> According to the present Athletic Director of Cornell University, Michael Slive, this is generally true in the nation's colleges. Federal financial assistance does not normally go specifically to athletic programs.

<sup>10</sup> During congressional debate over Senator Bayh's original version of title IX, Senator Dominick asked Senator Bayh about the meaning of "any program or activity":

Mr. DOMINICK. The provisions on page 1, under section 601, refer to the fact that no one shall be denied the benefits of any program or activity conducted, et cetera.

The words "any program or activity," in what way is the Senator thinking here? Is he thinking in terms of dormitory facilities, is he thinking in terms of athletic facilities or equipment, or in what terms are we dealing here? Or are we dealing with just educational requirements?

I think it is important, for example, because we have institutions of learning which, because of circumstances such as I have pointed out, may feel they do not have dormitory facilities which are adequate, or they may feel, as some institutions are already saying, that you cannot segregate dormitories anyway.

But suppose they want to segregate the dormitories: can they do it?

Mr. BAYH. The rulemaking powers referred to earlier, I think, give the Secretary discretion to take care of this particular policy problem. I do not read this as requiring integration of dormitories between the sexes, nor do I feel it mandates the desegregation of football fields. What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, nor that the men's locker room be desegregated.

117 CONG. REC. 30407 (1971). The version of title IX at issue during this exchange differed from the one eventually enacted, *see infra* note 11 and accompanying text, and did not involve the issue discussed in this Note. When discussing his amended version six months later, Senator Bayh stated that "the heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds." 118 CONG. REC. 5803 (1972). This comment was part of his general discussion of title IX as a means of "clos[ing] loopholes" in antidiscrimination legislation. *Id.* His use of the word "programs" appears to have no real significance.

The bill originally introduced by Senator Bayh specifically applied to programs in institutions receiving federal assistance.<sup>11</sup> In light of this language compliance with title IX undoubtedly would have been mandated in all programs in a recipient institution. The institutional language in the first proposal, however, did not appear in the bill as enacted.<sup>12</sup> This omission may reflect some congressional intent to restrict title IX's applicability on a program-by-program basis.<sup>13</sup> On the other hand, legislative history following enactment of title IX suggests a slightly different approach. Several proposals to exempt athletics from title IX failed to gain significant support.<sup>14</sup> One particularly revealing example was an amendment proposed by Senator Tower,<sup>15</sup> which would have excluded athletics completely from title IX coverage. Senator Tower later modified his proposal to exclude only revenue-producing sports,<sup>16</sup> but Congress voted not to approve the Senator's amendment.

Passage of section 844 of the Education Amendments of 1974<sup>17</sup> also bears upon congressional understanding of title IX. In passing the provision, Congress apparently assumed that title IX applied to athletics, because section 844 required the Secretary of HEW to publish regulations regarding athletics within thirty days.<sup>18</sup> Under a strictly programmatic reading of the statute, such regulations would have been unnecessary because athletics would have been almost entirely excluded from the statute's reach.<sup>19</sup> This evidence suggests that Congress envisioned some relationship between athletics and title IX.

The regulations that HEW issued in 1975 interpreted title IX in a

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<sup>11</sup> The exact language of that original proposal prohibited sex discrimination "under any program or activity conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance for any education program or activity . . ." 117 CONG. REC. 30156 (1971).

<sup>12</sup> The statute as enacted prohibits sex discrimination "under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (1976).

<sup>13</sup> See Kuhn, *supra* note 4, at 64.

<sup>14</sup> See Amend. 390 to S. 2657, 94th Cong., 2d Sess., 122 CONG. REC. 28144 (1976) (defining federal financial assistance as that received directly from the federal government); Amend. 389 to S. 2657, 94th Cong., 2d Sess., 122 CONG. REC. 28136 (1976) (redefining program or activity to include only curriculum requirements); S. 2146, 94th Cong., 1st Sess., 121 CONG. REC. 23845 (1975) (limiting title IX coverage to programs directly receiving federal assistance); S. 2106, 94th Cong., 1st Sess., 121 CONG. REC. 22775 (1975) (reintroducing revenue-producing exception); S. Con. Res. 46, 94th Cong., 1st Sess., 121 CONG. REC. 17300 (1975) (disapproving proposed federal regulations); Amend. 1343 to S. 1539, 93d Cong., 2d Sess., 120 CONG. REC. 15322 (1974) (excluding revenue-producing sports from title IX).

<sup>15</sup> See 120 CONG. REC. 15322-23 (1974).

<sup>16</sup> See *id.*

<sup>17</sup> Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 612.

<sup>18</sup> See Kuhn, *supra* note 4, at 75-76. Kuhn argues that this amendment, relied on by HEW to support its interpretation of title IX, does not in fact indicate that Congress intended title IX to apply to athletics. She claims that Congress understood that the amendment would apply only if a court ruled that title IX extended to athletics.

<sup>19</sup> See Cox, *supra* note 4, at 36 n.15.

strictly institutional manner.<sup>20</sup> In view of the considerable controversy over the scope of title IX in relation to athletics,<sup>21</sup> HEW's broad interpretation of the statute is significant. This is especially true because after the issuance of the regulations, Congress did not invalidate them as it could have under its statutory power to review title IX regulations.<sup>22</sup> Taken as a whole, then, the legislative history provides no clear indication of how the issue should be resolved.

## B. Case Law Under Title IX and Analogous Statutes

Case law under title IX and analogous civil rights statutes is similarly ambiguous. Language contained in both title VI of the Civil Rights Act of 1964<sup>23</sup> and section 504 of the Rehabilitation Act of 1973<sup>24</sup> is identical to that of title IX,<sup>25</sup> and the same issue has arisen under these statutes.

Under title VI, for example, courts have differed sharply over whether the statute applies on a programmatic or institutional basis. In *Bob Jones University v. Johnson*,<sup>26</sup> 221 students received federal assistance under a Veterans Administration program.<sup>27</sup> In holding that this fact alone brought the university as a whole within title VI, the court emphasized the manner in which these grants benefited the whole school.<sup>28</sup> More recently, in *Yakin v. University of Illinois*,<sup>29</sup> the plaintiff sued under title VI after he was terminated from the school's Ph.D. program in psychology. The court rejected the university's argument that the case did not fall within the scope of the statute because neither the psychology department nor a special Program for Graduate Education Opportunity in which the plaintiff participated received federal money,<sup>30</sup> and specifically held that "it does not matter whether the University, the Department or the GEO program receives the federal financial assistance."<sup>31</sup>

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<sup>20</sup> See *supra* notes 2-3 and accompanying text.

<sup>21</sup> See *supra* note 4 and accompanying text.

<sup>22</sup> See generally 20 U.S.C. § 1232(d) (1976).

<sup>23</sup> 42 U.S.C. § 2000(d) (1976) (title VI).

<sup>24</sup> 29 U.S.C. § 794 (1976).

<sup>25</sup> See *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979) ("Title IX was patterned after Title VI of the Civil Rights Act of 1964.") (footnote omitted); see also 118 CONG. REC. 5807 (1972) (remarks of Sen. Bayh).

<sup>26</sup> 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

<sup>27</sup> See 396 F. Supp. at 600.

<sup>28</sup> See *id.* at 602-03. There are two significant aspects of the case in relation to the scope of title IX. First, the federal financial assistance found to satisfy title VI in *Bob Jones University* consisted of aid accruing directly to 221 students; it did not go directly to the institution. Second, the broad notion of benefit described by the court has obvious implications for title IX analysis.

<sup>29</sup> 508 F. Supp. 848 (N.D. Ill. 1981).

<sup>30</sup> See *id.* at 850.

<sup>31</sup> *Id.*; see also *Flanagan v. President of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976) (title VI applied to alleged discrimination in financial aid awards even though scholarship program received no federal assistance).

In contrast is the programmatic approach adopted in *Board of Public Instruction v. Finc!*.<sup>32</sup> In considering the school board's challenge to HEW's decision to terminate federal funds, the court emphasized that termination decisions must be made on "a program by program basis."<sup>33</sup>

Two recent decisions under section 504 of the Rehabilitation Act of 1973, which contains language identical to that of title IX, have interpreted the statute to prohibit discrimination against handicapped persons in institutions receiving federal assistance, and not merely in the particular programs receiving that assistance.<sup>34</sup> Significantly, both cases involved alleged discrimination within the schools' athletic programs. The schools argued unsuccessfully that they were exempt from section 504 because the athletic departments received no federal funds.<sup>35</sup> Because these cases involved athletic programs, the policy considerations are similar to those arising under title IX.

Courts have also faced the problem of interpreting title IX's apparently program-specific language in contexts other than athletics. In deciding whether title IX covers employment practices in educational institutions, the Supreme Court recently held in *North Haven Board of Education v. Bell*<sup>36</sup> that title IX does apply to employment discrimination.<sup>37</sup> Although the Court emphasized the program-specific nature of title IX, it nevertheless upheld federal regulations that appeared to apply on an institutional basis.<sup>38</sup> Before *North Haven*, some courts had used the language of title IX to bolster their conclusion that federal regulations purporting to govern employment are invalid.<sup>39</sup> These cases suggested that

<sup>32</sup> 414 F.2d 1068 (5th Cir. 1969).

<sup>33</sup> *Id.* at 1078-79. The court's approach is in direct conflict with HEW's subsequent regulations. For a discussion of the case in relation to the regulations, see Kuhn, *supra* note 4, at 68-69.

<sup>34</sup> *Wright v. Columbia Univ.*, 520 F. Supp. 789 (E.D. Pa. 1981); *Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. 948 (D.N.J. 1980).

<sup>35</sup> In *Poole*, the South Plainfield Board of Education refused to allow a student with only one kidney to participate in the school wrestling program. The Board argued that the interscholastic sports program received no federal financial assistance. The court relied primarily on HEW's interpretation as evidenced by the regulations in finding a violation of § 504. *See Poole*, 490 F. Supp. at 950-51. In *Wright*, the plaintiff was a Columbia University student who was denied the opportunity to play football for his school because of a visual handicap. The court relied on the federal regulations and to a large extent on social policy in its decision. *See Wright*, 520 F. Supp. at 792; *infra* notes 67-71 and accompanying text.

<sup>36</sup> 102 S. Ct. 1912 (1982).

<sup>37</sup> *See id.* at 1913.

<sup>38</sup> *See id.* at 1926-27; *see also* 45 Fed. Reg. 30962 (1980). Although the Court explicitly declined to define "program" under title IX, its discussion of the statute's program-specific nature suggests that a strictly institutional interpretation of title IX is untenable. *See* 102 S. Ct. at 1926-27. The Court insisted that any application of title IX and the federal regulations be consistent with the programmatic nature of the statute. *See id.*

<sup>39</sup> *See generally* *Dougherty County School Sys. v. Harris*, 622 F.2d 735, 736-37 (5th Cir. 1980) (strictly programmatic approach applied in a fund-termination case under title IX; federal regulations invalid because they purport to prohibit sex discrimination in any program in an institution receiving federal money, thus exceeding the statutory authority of title

the regulations exceed the authority of title IX because the statute covers only specific programs, and not institutional policies like employment practices.<sup>40</sup> Other title IX cases involving nonathletic contexts such as employment policy, however, have adopted a broader, institutional reading of the statute.<sup>41</sup>

### C. Athletic Programs and Title IX

It is within this context of uncertainty over the scope of title IX that the question of the extent of the statute's applicability to athletics arises. Case law, like the legislative history, does not provide definitive guidance in analyzing the problem of applying title IX to school athletic programs. Recent sex discrimination suits brought in federal court have raised issues with significant implications for the administration of school athletic programs.

*Othen v. Ann Arbor School Board*,<sup>42</sup> involved a title IX action in which the plaintiff alleged that his daughter had been dropped from the school's golf team because of her sex.<sup>43</sup> The school board claimed that it was not subject to the statute because its athletic program received no

IX), *vacated*, 102 S. Ct. 2264 (1982) (remanded for reconsideration in light of *North Haven Board of Educ. v. Bell*, 102 S. Ct. 1919 (1982)); *Romeo Community Schools v. HEW*, 438 F. Supp. 1021 (E.D. Mich. 1977) (criticized in *North Haven v. Hufstедler*, 629 F.2d 773, 785 (2d Cir. 1980)), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979).

<sup>40</sup> The court in *Romeo*, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979), held that HEW does not have authority under title IX to regulate employment. It based its decision in part on the program-specific nature of the language in title IX:

HEW's authority to terminate federal funds for non-compliance with § 1682 is "limited in its effect to the particular program, or part thereof, in which such non-compliance has been found." . . .

This limitation on HEW's enforcement power is implicitly a limitation on HEW's authority to regulate as well. HEW cannot regulate the practice of an educational institution unless those practices result in sex discrimination against the beneficiaries of some federally assisted education program operated by the institution. The focus of § 1681—elimination of sex discrimination in federally funded education programs—must be the focus of HEW's regulations under § 1682 as well. To this extent, HEW's regulatory power is also "program specific."

*Id.* at 1033.

<sup>41</sup> See, e.g., *Grove City College v. Bell*, 687 F.2d 684, 692-93 (3d Cir. 1982) (institutional approach applied; government loans and grants to students brought the college under title IX); *Iron Arrow Honor Soc'y v. Hufstедler*, 499 F. Supp. 496 (S.D. Fla. 1980), *aff'd*, 652 F.2d 445 (5th Cir. 1981) (University of Miami honor society challenged validity of regulation under title IX; regulation upheld with language of an institutional approach, emphasizing indirect benefits to programs within an institution), *vacated*, 102 S. Ct. 3475 (1982) (remand for reconsideration in light of *North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912 (1982)).

<sup>42</sup> 507 F. Supp. 1376 (E.D. Mich. 1981).

<sup>43</sup> See *id.* at 1378. Originally, the plaintiff sought a temporary restraining order allowing his daughter to play for the golf team and a permanent injunction prohibiting sex discrimination in selection of the team's members. After this relief was denied, the plaintiff filed an amended complaint alleging violations of title IX and state law. In the meantime, the school established a separate golf team for girls and the plaintiff abandoned all claims except one for

direct federal financial assistance.<sup>44</sup> The plaintiff argued for an institutional approach to title IX in order to hold the school board to the requirements of the statute. The court, however, opted for a programmatic interpretation,<sup>45</sup> relying primarily upon the language of the statute and finding further support in both the legislative history and case law under title VI and title IX.<sup>46</sup>

In *Bennett v. West Texas State University*,<sup>47</sup> a class action brought by six female athletes at West Texas State University, the school argued that its athletic program received no direct federal financial assistance and thus was not subject to title IX regulations.<sup>48</sup> The court, however, accepted the defendant's programmatic interpretation of title IX using analysis similar to that used in *Othen*.<sup>49</sup> The court also rejected the plaintiff's contention that the school's athletic program benefited from federal financial assistance in the form of loans and grants to students and funds for dormitories and dining halls.<sup>50</sup> In so doing, it rejected the argument that indirect benefits to an athletic program may bring it within title IX.

In *University of Richmond v. Bell*,<sup>51</sup> the school sought injunctive and declaratory relief to prevent the Department of Education from investigating its athletic program for title IX compliance. The court, relying heavily upon the "program-specific" dicta found in the Supreme Court's discussion of title IX in *North Haven*,<sup>52</sup> rejected an institutional approach to the statute: "Defendants have failed entirely to establish a nexus between federal financial assistance and the athletic program at [the University]."<sup>53</sup> Thus, the court held that the Department was not

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attorney's fees. See generally 42 U.S.C. § 1988 (1976). Thus, the court was forced to decide the issues under title IX in order to rule on the claim for attorney's fees. *Id.* at 1378-79.

<sup>44</sup> See *id.* at 1380. The plaintiff did not contest the defendant's assertion that none of the school district's federal funding went to athletics. See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> See *id.* at 1381-87. The court placed particular emphasis in this context on § 1682 and § 1684 of title IX. Section 1682 provides the statutory authority for title IX regulations and also for termination of financial assistance to serve as an enforcement power. The section is programmatic in its language. See 20 U.S.C. § 1682 (1976). Section 1684, on the other hand, deals with persons with impaired vision and is institutional in its language. See 20 U.S.C. § 1684 (1976). The court in *Othen* reasoned that this is evidence of congressional awareness of the distinction between the two approaches.

<sup>47</sup> 525 F. Supp. 77 (N.D. Tex. 1981).

<sup>48</sup> See *id.* at 78.

<sup>49</sup> See *id.* at 78-80. The court relied on the language in 20 U.S.C. §§ 1681, 1682 and 1684. See *id.* It also found support in a number of title IX cases considering whether employment practices are within the statute. See *id.* at 79-80. The main issue in cases involving employment practices is whether employees are a protected class under title IX. Some courts have relied on title IX's programmatic language in these cases to limit the statute's applicability. See *supra* notes 36-38 and accompanying text.

<sup>50</sup> See 525 F. Supp. at 80-81.

<sup>51</sup> 543 F. Supp. 321 (E.D. Va. 1982).

<sup>52</sup> See *id.* at 325-27.

<sup>53</sup> *Id.* at 331.

authorized to investigate the school's athletic program.<sup>54</sup>

Despite these decisions, the Third Circuit in *Haffer v. Temple University*<sup>55</sup> applied a different approach. The district court had adopted an institutional approach to title IX, finding support in the legislative history and case law.<sup>56</sup> The court held that despite the absence of direct assistance to athletics, because Temple received federal financial assistance in other ways, the statute controlled the school's athletic program.<sup>57</sup> Significantly, the district court went further and found that even under a programmatic approach, Temple's athletic program would be subject to title IX because of the nexus between the federal assistance to Temple and the athletic program.<sup>58</sup> The court offered as examples federal financial assistance for the salaries of employees in the program, financial aid to student athletes, and federal money for construction of school facilities used by the athletic program at times.<sup>59</sup> This aspect of the decision is in direct contrast to the *Bennett* court's analysis.<sup>60</sup>

The Third Circuit affirmed the district court's conclusions.<sup>61</sup> Relying exclusively on its own decision less than a month earlier in *Grove City College v. Bell*,<sup>62</sup> the court adopted the institutional view, interpreting the program or activity referred to in title IX as Temple University as a whole.<sup>63</sup> The court concluded, therefore, that the athletic program necessarily fell within title IX and declined to address the district court's suggestion that the close connection between the federal financial assistance and Temple's athletic program brought the school within title IX even under a programmatic approach.<sup>64</sup>

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<sup>54</sup> See *id.* at 327. The court also rejected the benefits approach to title IX in this context, relying on *Othen* and *Bennett*. See *id.* at 328-29.

<sup>55</sup> 688 F.2d 14 (3d Cir. 1982).

<sup>56</sup> 524 F. Supp. 531 (E.D. Pa. 1981).

<sup>57</sup> See *id.* at 532-33.

<sup>58</sup> See *id.* at 540. The court based its holding on alternative grounds. The court suggested that the institutional and programmatic approaches would both produce the same result. See *id.* This is an expansion of the programmatic approach adopted in *Othen* and *Bennett* because of its broad interpretation of the phrase "receiving federal financial assistance." See *supra* notes 42-50 and accompanying text.

<sup>59</sup> See 524 F. Supp. at 540.

<sup>60</sup> 525 F. Supp. 77 (N.D. Tex. 1981).

<sup>61</sup> 688 F.2d 14 (3d Cir. 1982).

<sup>62</sup> 687 F.2d 684 (3d Cir. 1982). *Grove City* invoked the authority of the Department of Education to enforce title IX against a college that, as part of its philosophy, refuses all forms of federal financial assistance, but whose students participate in federal loan and grant programs. The court held that despite the program-specific language of the statute that the Supreme Court had emphasized in *North Haven*, the aid to *Grove City* students brought the school as a whole within title IX: "Because the federal grants made to *Grove's* students necessarily inure to the benefit of the entire College, the 'program' here must be defined as the entire institution of *Grove City College*." *Id.* at 700 (footnote omitted). This conclusion, based on an institutional approach, compelled the result in *Haffer*.

<sup>63</sup> See 688 F.2d at 17.

<sup>64</sup> See *id.*

## II ANALYSIS

Neither the strictly programmatic nor the strictly institutional approach to title IX reconciles the language of the statute with the goal of eliminating sex discrimination in education when federal funds are somehow used to effect the discrimination.<sup>65</sup> To achieve the purposes of title IX, courts should require a clear connection between federal assistance to the institution and the athletic program. This inquiry will help ensure that the challenged program is benefiting from the federal assistance. This analysis does not necessitate a finding that the federal aid goes directly to the athletic program, but that federal assistance to other programs in the school or to students at the school<sup>66</sup> has a significant effect on school athletics. This approach requires a factual inquiry in each case to determine the school's reliance on federal aid and the extent to which the athletic program benefits from the aid. When that benefit is substantial, a plaintiff alleging sex discrimination should be able to rely on title IX. This method of analysis offers advantages over both a strict programmatic approach and a strict institutional approach.

The strongest argument for the strict programmatic approach adopted in *Bennett*<sup>67</sup> and *Othen*<sup>68</sup> is the clear language of section 1681, which forbids sex discrimination in "any education program or activity receiving Federal financial assistance."<sup>69</sup> Analyzing this phrase in conjunction with the program-specific wording of the termination provision of section 1682,<sup>70</sup> reveals the support for the strictly programmatic approach.<sup>71</sup> Despite the persuasiveness of this argument, such an approach is undesirable because it conflicts with the spirit of title IX<sup>72</sup> and unnecessarily limits its scope.

Athletic programs are an integral part of a school's educational program, and discrimination in athletics has a pervasive impact on the school as a whole. This analysis has been used in race-discrimination

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<sup>65</sup> The language clearly requires the presence of federal financial assistance. The enforcement mechanism—termination of federal money—indicates the desire to eliminate federally financed discrimination. See 20 U.S.C. §§ 1681, 1682 (1976).

<sup>66</sup> See *supra* notes 26-28 and accompanying text.

<sup>67</sup> 525 F. Supp. 77 (N.D. Tex. 1981).

<sup>68</sup> 507 F. Supp. 1376 (E.D. Mich. 1981).

<sup>69</sup> See *supra* note 12; see also *Bennett v. West Texas State Univ.*, 525 F. Supp. at 79; *Othen v. Ann Arbor School Bd.*, 507 F. Supp. at 1381-82.

<sup>70</sup> See *supra* note 46.

<sup>71</sup> See *supra* notes 29-30 and accompanying text.

<sup>72</sup> Compare this view with that expressed in Note, *supra* note 4, at 1264-69 (emphasizing "the underlying power of sport as a social institution" *id.* at 1267). The Note suggests that title IX was meant to reduce sex-role stereotyping in education and, as a result, in society as a whole. See *id.* at 1266. Under this view, it is especially important that title IX be interpreted broadly with respect to athletic programs because schools have traditionally emphasized male sports.

cases to justify fund termination under title VI,<sup>73</sup> and applies here as well. To deny the protections of title IX to female athletes is to sanction discrimination in a significant school activity.

Furthermore, distinguishing between the policy of a school athletic department and the policy of the institution as a whole is often difficult. For example, in *Wright v. Columbia University*,<sup>74</sup> the court pointed out that it was Columbia University as an institution, rather than the athletic program itself, that denied a handicapped student the right to play football.<sup>75</sup> The implication is that it is not realistic to view an athletic program as completely independent of the institution. Decisions about athletic policy are often made by the school administrators, and not by the athletic department alone. For instance, if a school athletic department decides to institute new teams for women, the board of trustees or the president often must approve the proposal. Because of the fungibility of money, the strictly programmatic approach also creates the possibility that a school will be able to avoid the reach of title IX by channeling private funds into sensitive areas, and reserving federal money for those programs that do not discriminate.<sup>76</sup>

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<sup>73</sup> See *Othen*, 507 F. Supp. at 1387. The *Othen* court suggested that sex discrimination in athletics differs from racially discriminatory admissions policies in that the latter affects all programs within the institution:

Charges which allege sex discrimination against an educational institution or system regarding only one program or activity force the court to look with more particularity at the "program and activity" language of Title IX than is required where a charge of racial discrimination has been made against the institution as a whole.

. . . Since most Title VI cases that have enforced agency regulations respecting termination of federal financial assistance have involved racial discrimination on an institution-wide basis, the various courts' affirmances of full funding cut-offs in those cases are not helpful to indicate ways in which the court should respond in this kind of case.

*Id.* In *Dougherty County School Sys. v. Harris*, 622 F.2d 735 (5th Cir. 1980), the court rejected the idea that sex discrimination in isolated programs affects an entire institution: "[W]e cannot find sanction in the statute for [the Secretary of HEW's] conclusion that any discrimination in an entire school system so taints the system as to permit termination of all federal aid even though federally assisted programs are administered impeccably." *Id.* at 737.

<sup>74</sup> 520 F. Supp. 789 (E.D. Pa. 1981).

<sup>75</sup> See *id.* at 792. The court recognized that athletic-department policy is often dictated by school administration:

Clearly, Columbia has consistently represented to plaintiff that the University as a whole, not the limited entity of the athletic program, was the official decisionmaker. Therefore, even accepting Columbia's argument that Section 504 does not apply to the football team as a discrete entity which does not receive federal funds, the Section obviously applies to the University which made this ultimate decision. Consequently, if plaintiff was the victim of discrimination based upon his handicap, the University, not the athletic program, is the party responsible therefor.

*Id.* This problem would clearly exist in many athletic-department policies that lead to claims of sex discrimination.

<sup>76</sup> Moreover, to accept defendant's argument would allow major institutions receiving substantial amounts of federal aid to dissect themselves, at whim, into discrete entities, to allocate federal dollars into programs which cannot dis-

Another problem arises when the school's athletic program is financially self-supporting. Successful football and basketball programs in major universities sometimes produce enough revenue to exist independently of outside financial sources.<sup>77</sup> Although a clear connection between federal assistance to the university and the athletic program is less apparent,<sup>78</sup> an extension of the reasoning suggested in *Wright*<sup>79</sup> is appropriate. The success of a major university's athletic program reflects on the reputation of the university as a whole. The teams represent the university in competition and are dependent upon the support of alumni who represent other university programs in their professional lives. Furthermore, the teams' ability to attract athletes to the university partly depends upon the reputation of the entire university, as well as on the reputation of its athletic program. Finally, even if an athletic department is financially independent, its policy still may be subject to review by the school's president and trustees. For these reasons, viewing the financially independent athletic department as a wholly separate entity is illogical. Accordingly, a title IX plaintiff should be able to rely on title IX when a sufficiently close connection exists between federal financial assistance, the school, and the athletic program.

Although the strictly institutional approach of *Haffer*<sup>80</sup> is well suited to title IX's overall objective of eliminating sex discrimination in institutions receiving federal financial aid, the approach cannot be reconciled with the program-specific language of the statute.<sup>81</sup> Furthermore, the institutional approach is clearly inadequate in those cases in which federal assistance to the school is completely unconnected with the athletic program. In *University of Richmond v. Bell*,<sup>82</sup> for example, the Department of Education based its authority to investigate charges of sex discrimina-

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criminate against handicapped persons, and to free privately obtained funds from those programs and instead to channel such money into programs purportedly immune from Section 504 strictures.

520 F. Supp. at 792; *see also* Cox, *supra* note 4, at 37 ("A federal grant to a university's biology department, for example, could benefit the athletic program by freeing university funds for sports programs.")

<sup>77</sup> *See* Cox, *supra* note 4, at 37 & n.21.

<sup>78</sup> Cox argues that self-supporting athletic departments should not be exempt from title IX:

An exception for self-supporting programs would permit institutions that operate athletic programs at only a slight deficit to become exempt from Title IX merely by cutting back or eliminating non-revenue producing sports activities. A university could, for example, eliminate all financially dependent women's teams and avoid Title IX in the very area the statute was designed to affect.

Cox, *supra* note 4, at 37. Despite the persuasiveness of this argument, the statute requires that federal funds be involved in some way.

<sup>79</sup> 520 F. Supp. 789 (E.D. Pa. 1981).

<sup>80</sup> 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982).

<sup>81</sup> *See* 20 U.S.C. § 1682 (1976).

<sup>82</sup> 543 F. Supp. 321 (E.D. Va. 1982).

tion in the athletic program on the University's receipt of a \$1,900 grant from the College Library Resources Program.<sup>83</sup> By statute, the funds could only be used to purchase designated library materials.<sup>84</sup> These limitations on the grant made it obvious that the athletic department received no benefit; this clearly was not a case in which federal funds received by the university would in turn release university funds for athletic department use.

The approach of *Stewart v. New York University*<sup>85</sup> is superior to both the programmatic and the institutional approaches. *Stewart* involved a title IX challenge to a law school's admissions policy. In holding that the plaintiff failed to state a claim under title IX, the court determined that the connection between federal funds used to construct a law school dormitory and the law school admissions policy was insufficient.<sup>86</sup> This approach may also usefully be applied to claims alleging sex discrimination in athletic programs. The requirement of a clear connection between federal financial assistance to the institution and the athletic program ensures that the program has in some way benefited from federal aid, and also satisfies title IX's purpose without requiring a strained reading of the statute's language.

Application of this approach to the title IX cases previously discussed<sup>87</sup> demonstrates its merits. In *Othen*,<sup>88</sup> for example, the school board showed that its federal financial assistance in the form of federal impact aid<sup>89</sup> amounted to only .12% of its total budget in 1979.<sup>90</sup> This small amount of federal aid could hardly have affected the athletic program in any significant way.<sup>91</sup> Thus, the result in *Othen* might not change under the proposed approach.

On the other hand, this analysis would probably change the result in *Bennett*,<sup>92</sup> in which the plaintiffs apparently had various depositions to support their contention that the athletic program of West Texas State

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<sup>83</sup> See generally 20 U.S.C. § 1029 (Supp. IV 1980 & Supp. V 1981).

<sup>84</sup> See 20 U.S.C. § 1029(d) (Supp. IV 1980 & Supp. V 1981).

<sup>85</sup> 430 F. Supp. 1305 (S.D.N.Y. 1976).

<sup>86</sup> See *id.* at 1314.

<sup>87</sup> See *supra* notes 42-59 and accompanying text.

<sup>88</sup> 507 F. Supp. 1376 (E.D. Mich. 1981); see *supra* notes 42-46 and accompanying text.

<sup>89</sup> See 507 F. Supp. at 1389-90. Federal impact aid compensates school districts for the loss of tax revenues that results from the presence of federal installations in the area and for the added expense of educating children who enter the district because of the installation. *Id.*; see 20 U.S.C. § 236 (1976) (declaration of policy behind federal impact aid). The court in *Othen* held that "[f]ederal impact aid received by a school district does not constitute the type of federal financial assistance to a specific education program or activity envisioned by Title IX." 507 F. Supp. at 1389.

<sup>90</sup> 507 F. Supp. at 1390.

<sup>91</sup> The court emphasized the insignificance of the amount involved. See *id.* In general, however, nothing in title IX requires a certain minimum amount of federal financial assistance to invoke the statute.

<sup>92</sup> 525 F. Supp. 77 (N.D. Tex. 1981); see *supra* notes 47-50 and accompanying text.

University benefited substantially from the close connection between different types of federal financial assistance and the program.<sup>93</sup> The *Bennett* court found this evidence irrelevant, however, because it rejected the idea that indirect aid to an athletic program could invoke title IX coverage.<sup>94</sup> The court labeled the type of aid involved as "general and nonspecific"<sup>95</sup> and reasoned that any benefit to the athletic program was remote. The court concluded that federal aid designed to benefit students in general or the institution as a whole would not be sufficient to bring specific programs within title IX, even if the programs benefited indirectly from the aid.<sup>96</sup>

The effect of this analysis on the facts of *University of Richmond v. Bell* is unclear.<sup>97</sup> The Department of Education made no attempt to introduce evidence of a connection between federal financial assistance to the University of Richmond and its athletic program.<sup>98</sup> In fact, the Department relied only on a \$1,900 Library Resource Grant and federal assistance in the form of grants and loans to students at Richmond to justify its investigation under title IX.<sup>99</sup> Although this would have sufficed under the strictly institutional analysis urged by the Department, the court accepted the program-specific interpretation of title IX.<sup>100</sup> Thus, other facts may have existed that would have established a close enough connection between the athletic program and federal financial assistance to invoke title IX under the proposed analysis.

In *Haffer*,<sup>101</sup> on the other hand, plaintiffs showed a significant relationship between the \$19,000,000 in federal financial assistance received by Temple and the school's athletic program.<sup>102</sup> While this assistance was indirect in the sense that no funds were specifically earmarked for the athletic program, the program derived some significant benefit from the federal assistance.<sup>103</sup> Undoubtedly when a plaintiff alleging sex discrimination in an athletic program can show this kind of benefit to the program from federal aid, title IX should apply to restrict discriminatory practices within the athletic program.

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<sup>93</sup> See 525 F. Supp. at 80.

<sup>94</sup> See *id.* at 80-81.

<sup>95</sup> *Id.*

<sup>96</sup> See *id.* at 81.

<sup>97</sup> 543 F. Supp. 321 (E.D. Va. 1982).

<sup>98</sup> See *id.* at 331.

<sup>99</sup> See *id.* at 323-24.

<sup>100</sup> See *id.* at 327.

<sup>101</sup> 524 F. Supp. 531 (E.D. Pa. 1981).

<sup>102</sup> See *id.* at 540.

<sup>103</sup> The court in *Haffer* held that at least some of the federal funding going to Temple University was so "closely connected" to the athletic program that it constituted direct assistance for purposes of title IX. *Id.*

## CONCLUSION

Neither the strictly programmatic nor the strictly institutional approach of title IX can successfully meet the goal of eliminating sex discrimination in athletic programs. Courts should instead require a plaintiff alleging sex discrimination to establish a connection between federal assistance to the institution and the athletic program. This analysis will help determine whether the challenged program either directly or indirectly benefits from the federal assistance. When the benefit is substantial, the plaintiff should be allowed to proceed in a title IX suit. Such an approach allows a court to reach a result that satisfies the spirit of title IX without straining the statute's language beyond its logical meaning.

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