

NOTES

TITLE IX AND INTERCOLLEGIATE ATHLETICS: ADDUCING CONGRESSIONAL INTENT

"He applies his words to all uses, except to the indication of his mind."
— Jonathan Swift, *Gulliver's Travels*.

Title IX of the Education Amendments of 1972¹ prohibits, with a few limited exceptions, sex discrimination in any education program or activity receiving federal financial assistance.² In 1975, the Department of Health, Education, and Welfare, pursuant to its statutory authority,³ issued regulations concerning specific education programs, including intercollegiate athletics. These regulations,⁴ which became effective in July, 1975, were designed to

¹ Education Amendments of 1972 §§ 901-907, 20 U.S.C. §§ 1681-1686 (1976).

² Section 901, the substantive section of Title IX, provides, in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except . . ." Education Amendments of 1972 § 901(a), 20 U.S.C. § 1681(a) (1976). Nine statutory exemptions to § 901(a)'s coverage follow. Among the specific exemptions included are ones for religious schools, military schools, social fraternities, father-son and mother-daughter activities, and beauty pageant scholarships. *See id.* at §§ 901(a)(1)-(9).

³ Education Amendments of 1972 § 902, 20 U.S.C. § 1682 (1976). Section 902 provides in relevant part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. 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, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. . . .

Id. (Emphasis in the original.)

⁴ 34 C.F.R. § 106 (1982). The regulations initially appeared at 34 C.F.R. § 86 (1975), but were recodified in connection with the establishment of the Department of Education. HEW's functions under Title IX were transferred in 1979 to the newly created Department of Education by § 301(a)(3) of the Department of Education Organization Act, 20 U.S.C. § 3441(a)(3) (Supp. V 1981). Because the majority of the regulations were originally issued by HEW, but were enforced in most of the cases considered by both HEW and the Department of Education, herein-

implement the statute's broad prohibition against sex discrimination. In the past few years several cases⁵ and commentaries⁶ have focused on what should be the proper scope of these regulations. Particularly at issue has been whether or not the term "federal financial assistance" of section 901, the substantive section of Title IX, encompasses indirect federal aid and, if so, what constitutes the "program or activity" funded for the purposes of regulation and fund termination under section 902, the enforcement section of Title IX.

The Department, interpreting its mandate broadly, has construed the phrase "federal financial assistance" to include funds received indirectly by a school, including grants and loans paid directly to students but which ultimately are received by the school.⁷ Thus, the Department has asserted that it has the authority under section 902 not only to investigate all of a school's programs, but also to terminate funds if a program is found to be in non-compliance with its regulations, even if the school enrolls only one student who receives federal aid.⁸ The Department's position has been challenged most recently in two cases involving alleged sex discrimination in intercollegiate athletic programs.⁹ In both cases, the universities charged with the discrimination moved for summary judgment on the grounds that the Department had exceeded its authorization from Congress in promulgating such sweeping regulations.¹⁰

after the generic term "Department" will be used to refer to both agencies unless greater specificity is warranted.

⁵ See, e.g., *Hillsdale College v. HEW*, 696 F.2d 418 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3704 (U.S. March 16, 1983) (No. 82-1538); *Iron Arrow Honor Soc'y v. Schweiker*, 652 F.2d 445 (5th Cir. 1981), *vacated*, 102 S. Ct. 3475 (1982), *aff'd on rehearing sub nom. Iron Arrow Honor Soc'y v. Heckler*, 702 F.2d 549 (5th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3028 (U.S. Aug. 8, 1983) (No. 83-118); *Rice v. Presidents and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *Wort v. Vierling*, No. 82-3169 (C.D. Ill. May 28, 1982); *Bennett v. West Texas State Univ.*, 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd*, 698 F.2d 1215 (5th Cir. 1983), *petition for cert. filed*, 51 U.S.L.W. 3775 (U.S. Apr. 6, 1983) (No. 82-1683); *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983).

⁶ See, e.g., Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34 (1977); Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49 (1976); Comment, *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenge*, 1976 B.Y.U.L. REV. 133 [hereinafter cited as Comment, *Ultra Vires Challenge*]; Comment, *Half-Court Girls Basketball Rules: An Application of the Equal Protection Clause and Title IX*, 65 IOWA L. REV. 766 (1980); Note, *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof,"* 78 MICH. L. REV. 608 (1980).

⁷ 34 C.F.R. § 106.2(g)(1)(ii) (1982). The regulation defines federal financial assistance, in relevant part, as: "(1) A grant or loan of Federal financial assistance, including funds made available for: . . . (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity." *Id.*

⁸ See *University of Richmond v. Bell*, 543 F. Supp. 321, 324-25 (E.D. Va. 1982). For a thorough explication of the review and termination process see Note, *Title IX and Intercollegiate Athletics: HEW Gets Serious About Equality in Sports?*, 15 NEW ENG. L. REV. 573, 575-76 (1980).

⁹ *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982); *Haffer v. Temple Univ.*, 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd per curiam*, 688 F.2d 14 (3d Cir. 1982).

¹⁰ *Richmond*, 543 F. Supp. at 325; *Haffer*, 524 F. Supp. at 532.

In *University of Richmond v. Bell*,¹¹ the district court for the Eastern District of Virginia granted the University's motion for summary judgment, ruling that the Department had ascribed an overbroad scope to Title IX in the regulations, contrary to Congressional intent.¹² The issue, according to the court, was whether the program in question received *direct* federal financial assistance.¹³ The court held that because the university had received no federal funds specifically earmarked for its athletic programs, the Department could not legally investigate the alleged discrimination in the athletic department.¹⁴

In *Haffer v. Temple University*,¹⁵ however, the district court for the Eastern District of Pennsylvania, in an opinion that was summarily affirmed by the Court of Appeals for the Third Circuit,¹⁶ denied defendant's motion for summary judgment, ruling that Congress had intended that *indirectly* aided or benefited programs be covered under Title IX.¹⁷ Because Temple obtained approximately one-tenth of its annual operating budget from various federal sources,¹⁸ the court determined that its athletic department had indirectly benefited from this federal aid.¹⁹ According to the court, this funding allowed the University to release resources to the athletic department that would have otherwise gone to higher priority programs.²⁰ The court ruled, alternatively, that Temple's athletic department had received direct federal assistance, within the meaning of section 901, because some student-athletes received Basic Educational Opportunity Grants (BEOG's) while other students, who worked for the athletic department, had part of their wages paid through federal work-study grants.²¹

This note evaluates the reasoning and conclusions of the *Richmond* and *Haffer* courts in light of the guidelines established by the Supreme Court for

¹¹ 543 F. Supp. 321 (E.D. Va. 1982).

¹² *Id.* at 327.

¹³ *Id.* at 327 n.10.

¹⁴ *Id.* at 332-33.

¹⁵ 524 F. Supp. 531 (E.D. Pa. 1981).

¹⁶ *Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982).

¹⁷ 524 F. Supp. at 536.

¹⁸ *Id.* at 532. In 1980-81 this aid included over \$10 million in financial aid awarded to Temple students, and almost \$20 million in direct federal grants and contracts. Brief for Plaintiffs-Appellees at 1-2, *Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982). Aid received in prior years still benefiting the university in 1980-81 included over \$7 million in grants for the construction and renovation of classrooms and low interest loans to finance the construction of dormitories. *Id.* at 2.

¹⁹ *Haffer*, 524 F. Supp. at 538.

²⁰ *Id.*

²¹ *Id.* at 540. In addition to the BEOG program, 20 U.S.C. § 1070a (1976), and the College Work Study Program, 42 U.S.C. § 2751 (1976), the court cited as other sources of direct federal assistance the Supplemental Educational Opportunity Grant (SEOG) Program, 20 U.S.C. §§ 1070b-1070b-3 (1976), the National Direct Student Loan (NDSL) Program, 20 U.S.C. §§ 1087aa-1087ff (1976), and the Guaranteed Student Loan (GSL) Program, 20 U.S.C. §§ 1071-1087-4 (1976). The last two programs have been held to be outside the coverage of Title IX as contracts of insurance under a section 902 exemption. *Grove City College v. Bell*, 500 F. Supp. 253, 268-69 (W.D. Pa. 1980) *rev'd* on other grounds, 687 F.2d 684 (3d Cir. 1982). This ruling was not contested by the Department on appeal, so the circuit court did not rule on the issue. 687 F.2d at 690 n.10.

Title IX analysis in a recent case, *North Haven Board of Education v. Bell*.²² Section I provides a brief historical background of Title IX and the regulations which were issued to implement the Title. Section II examines the two lower court decisions to determine the bases for their differing results. In section III, the note examines the *North Haven* decision and extracts from it the guidelines to be followed in Title IX statutory interpretation. Section IV, applying the guidelines extracted from *North Haven*, studies the available legislative and post-enactment history for evidence of Congress' intent in passing Title IX, especially as regards the coverage of intercollegiate athletics. It is submitted that the legislative history of Title IX demonstrates that Congress intended athletic programs receiving indirect federal funding to be subject to the strictures of Title IX. Finally, this note concludes that the result reached by the *Haffer* court is the one most consonant with Congressional intent.²³

I. HISTORY OF TITLE IX

A. Congressional Action and Enactment

Title IX grew out of hearings held in 1970, by a special House subcommittee, on sex discrimination in education.²⁴ Although the proposal on which the hearings were convened never emerged from the committee,²⁵ the hearings did provide Congress with evidence of a clear pattern of discrimination against women in higher education.²⁶ In response to this evidence, Senator Bayh introduced an amendment in August 1971 to the Senate's aid to higher education bill²⁷ that contained many of the essential provisions of Title IX.²⁸

Senator Bayh's amendment was defeated when the Senate sustained a ruling by the Chair that the amendment was not germane to the bill being con-

²² 456 U.S. 512 (1982).

²³ See *infra* notes 248-254 and accompanying text.

²⁴ See *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcommittee on Education of the House Committee on Education and Labor*, 91st Cong., 2d Sess. (1970).

²⁵ § 805, H.R. 16098, 91st Cong., 2d Sess. (1970). The section would have modified Title VI of the Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1976 & Supp. IV 1980) by adding the word "sex" to section 601; would have extended the protections of Title VII, 42 U.S.C. § 2000e (1976 & Supp. IV 1980), to employees of educational institutions; and would have given the Civil Rights Commission jurisdiction over gender discrimination claims. *North Haven*, 456 U.S. at 523 n.13. Section 805 was deleted from the bill because its sponsors were fearful of attempts to restrict the coverage and enforcement of Title VI if it was opened for amendment. *Id.* at 546-47 (Powell, J., dissenting).

²⁶ See *North Haven*, 456 U.S. at 523 n.13; Comment, *Ultra Vires Challenge*, *supra* note 6, at 140-42.

²⁷ S. 659, 92d Cong., 1st Sess., 117 CONG. REC. 30,155-58 (1971).

²⁸ The amendment stated, in pertinent part:

No person in the United States shall, on the grounds of sex . . . be subject to 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. . . .

Id. at 30,156. For a more detailed explication of the bill see Comment, *Ultra Vires Challenge*, *supra* note 6, at 143-44.

sidered.²⁹ In February 1972, however, Senator Bayh introduced a somewhat modified version of his original provision as a floor amendment during debate on the Education Amendments of 1972.³⁰ The amendment was adopted that day on a voice vote.³¹ The amendment was virtually identical to a house bill, H.R. 7248,³² which had been introduced the previous year. Congress subsequently resolved several differences in conference, and on June 8, 1972 adopted the conference version as Title IX of the Education Amendments of 1972.³³

B. *The Title IX Regulations*

Following Title IX's enactment, HEW began work on the regulations as authorized by section 902.³⁴ In June 1974, two years after enactment of the bill, the Department published its proposed Title IX regulations.³⁵ An immediate public outcry ensued. During the comment period the Department found itself deluged by almost 10,000 comments on the proposed regulations.³⁶ Though only two sections of the proposed regulations pertained to intercollegiate athletic programs,³⁷ an overwhelming majority of the comments contained objections to these two sections.³⁸ One section of the proposed regulations contained a general prohibition against sex discrimination in athletic programs, but permitted separate teams to be operated according to sex when the selec-

²⁹ 117 CONG. REC. 30,415 (1971). Had the bill gone to a vote on the merits, it appears it would have passed. *Id.* at 30,414 (remarks of Senator Allen). Senator Bayh made a crucial parliamentary error, however, when he failed to object to a unanimous-consent request on the germaneness issue. *Id.* at 30,515 (remarks of Presiding Officer). Had he objected, he would have prevented the germaneness rule from applying and the amendment would have remained appropriate on the pending bill. *Id.* Thus, for want of an objection, the nation's entire course of discrimination prohibition may well have been changed, for the amendment under consideration was considerably broader in its prohibition than is Title IX, in that it prevented all sex discrimination in every part of any school which accepted any amount of federal aid.

³⁰ Amendment 874 of the Education Amendments of 1972, 94th Cong., 1st Sess., 118 CONG. REC. 5802-03 (1972).

³¹ 118 CONG. REC. 5815 (1972).

³² H.R. 7248, 92d Cong., 1st Sess., 117 CONG. REC. 39,248 (1971).

³³ The conference action is reported in S. REP. NO. 798, 92d Cong., 2d Sess. 221-22, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2608, 2671-72. For the text of the statute see *supra* notes 2-3 and *infra* note 60.

³⁴ See *supra* note 3.

³⁵ 39 Fed. Reg. 22,228-40 (1974).

³⁶ 40 Fed. Reg. 24,128 (1975). See Cox, *supra* note 6, at 40; Comment, *Ultra Vires Challenge*, *supra* note 6, at 145-46.

³⁷ Proposed C.F.R. section 86.38 was the major substantive section applying to athletics. Proposed C.F.R. section 86.35 dealt with athletic scholarships.

³⁸ 40 Fed. Reg. 24,128 (1975). Then Secretary Weinberger was quoted as saying: "I had not realized until the comment period that athletics is the single most important thing in the United States." Cox, *supra* note 6, at 34 (quoting N.Y. Times, June 27, 1975, at 16, col. 4). See also, Weinberger, *Reflections on the Seventies*, 8 J. COLL. & U.L. 451, 458-59 (1981) ("probably the single most controversial application of the Title IX regulations respecting educational programs was to intercollegiate athletics.").

tion for the teams was based upon competitive skill.³⁹ This section also required "affirmative efforts" by schools to provide women with equal athletic opportunities and support, and to inform women of the opportunities available to them at the school.⁴⁰ It further required each institution to make an annual survey of the sports in which participation was desired by members of both sexes.⁴¹ In response to the objections, HEW withdrew the proposed regulations in an effort to address some of the perceived problems, most notably, the annual survey requirements and the lack of an exemption for separate teams in contact sports.⁴²

A year later, in June 1975, HEW published its final, revised, Title IX regulations.⁴³ Although the regulations had been altered to some extent, their basic thrust remained the same. Section 106.41 is the major substantive section of the regulations applicable to intercollegiate athletics.⁴⁴ It contains *inter alia* a

³⁹ See Cox, *supra* note 6, at 40.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 40-41.

⁴³ 40 Fed. Reg. 24,128 (1975) (codified at 45 C.F.R. § 86 (1975)).

⁴⁴ 34 C.F.R. § 106.41 (1982). This section provides, in pertinent part:

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to tryout for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports included boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not

general provision prohibiting sex discrimination in any athletic program, including club or intramural athletics, administered by a "recipient"⁴⁵ of federal assistance; a provision governing the instances when separate-sex teams will be allowed; and a requirement that "equal athletic opportunity" shall be provided members of both sexes. Section 106.37(c) provides rules for the awarding of athletic scholarships.⁴⁶ Following Presidential approval,⁴⁷ the regulations were laid before Congress for a period of 45 days, pursuant to section 431(d)(1) of the General Education Provisions Act.⁴⁸ This "laying before" provision was designed to afford Congress an opportunity to examine regulations prior to their becoming effective. If Congress found the regulations inconsistent with its intent, it could disapprove them by concurrent resolution, rendering them void. If no such resolution were adopted prior to the expiration of the 45 day period, the regulations would automatically become effective.⁴⁹ Despite the introduction of several resolutions of disapproval in both Houses of Congress,⁵⁰ none were passed, and the Title IX regulations went into effect on July 21, 1975.

constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams of one sex in assessing equality of opportunity for members of each sex.

Id.

⁴⁵ For purposes of Title IX, a recipient is defined as:

Any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.2(h) (1982)

⁴⁶ 34 C.F.R. § 106.37(c) (1982). This regulation states:

(1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.

Id.

⁴⁷ See *infra* notes 224-26 and accompanying text.

⁴⁸ General Education Provisions Act, *as amended*, 20 U.S.C. § 1232(d)(1) (Supp. V 1981).

⁴⁹ See *Hearings on S. 2106 Before the Senate Committee on Post Secondary Education of the Committee on Education and Labor*, 94th Cong., 1st Sess. 1-3 (1975). Congress could have adopted a resolution disapproving only specific parts of the regulation while allowing the rest to become effective, thereby excising only what it believed were the overbroad sections. *Id.* at 95-96 (remarks of Sen. Buchanan); *id.* at 122 (remarks of Sen. Brown).

⁵⁰ See S. Con. Res. 52, 94th Cong., 1st Sess., 121 CONG. REC. 22,940 (1975); H.R. Con. Res. 330, 94th Cong., 1st Sess., 121 CONG. REC. 21,687 (1975); H.R. Con. Res. 329, 94th Cong., 1st Sess., 121 CONG. REC. 21,687 (1975); H.R. Con. Res. 311, 94th Cong., 1st Sess., 121 CONG. REC. 19,209 (1975); H.R. Con. Res. 310, 94th Cong., 1st Sess., 121 CONG. REC. 19,209 (1975); S. Con. Res. 46, 94th Cong., 1st Sess., 121 CONG. REC. 17,300 (1975). For a discussion of these resolutions see *infra* notes 190-247 and accompanying text.

II. LEGAL CHALLENGES TO TITLE IX REGULATIONS

In two recent court cases, the validity of these Title IX regulations has come under attack in the context of alleged discrimination in intercollegiate athletic programs. In both *University of Richmond v. Bell* and *Haffer v. Temple University* the regulations were challenged as being beyond the scope of the regulatory authority granted to the Department in Title IX. Although the courts were faced with essentially identical issues, they reached decidedly different results.

A. University of Richmond v. Bell

The litigation in *University of Richmond v. Bell* arose when the University filed suit in federal district court seeking to enjoin the Department from proceeding with an investigation of the University's athletic department. The Department had begun its investigation in response to a complaint it had received from students at the University alleging sex discrimination in the University's athletic department. The University of Richmond is a private university consisting of several separate schools and colleges, including two coordinate single-sex undergraduate liberal arts colleges. The two schools are separate administratively,⁵¹ though students at both colleges attend most of their classes together. The university athletic department oversees both intercollegiate and club sports for all students within the university. Funding for the athletic department is drawn from sports revenue, gifts, and the general funds of the university. The athletic department receives no direct federal financial assistance.⁵²

In February 1981, the Department notified the University that it had received a complaint which alleged that there was sex discrimination in the athletic department.⁵³ The notification stated that the Department had conducted a review of the allegations and, based upon the University's receipt of a \$1900 federal Library Resource Grant, the Department had determined that it had authority to investigate the complaint.⁵⁴ The University, through its counsel, responded by requesting clarification and questioning the propriety of the investigation.⁵⁵ The Department responded by informing the University that it planned a week-long on-site review of the University's athletic program, and requested that the University answer a lengthy informational question-

⁵¹ *Richmond*, 543 F. Supp. at 322-23. The two schools maintain separate admissions offices, hold separate graduations, and provide many auxiliary services separately. *Id.*

⁵² *Id.* at 323.

⁵³ *Id.*

⁵⁴ *Id.* The University had received grants of \$1900 (1980-81) and \$1200 (1981-82) under the College Library Resources Program, 20 U.S.C. § 1029 (Supp. V 1981). By statute, the funds must be used exclusively to purchase library materials. 543 F. Supp. at 323 n.1.

⁵⁵ 543 F. Supp. at 323.

naire prior to the review.⁵⁶ The University refused the request and questioned the Department's authority to investigate the athletic department.⁵⁷

In response, the Department asserted that the University's receipt of any federal funds, directly or indirectly, required its compliance with Title IX.⁵⁸ Noting that the University had received, during the 1980-81 school year, money from its students' BEOG's, National Direct Student Loans (NDSL's), Supplementary Educational Opportunity Grants (SEOG's), work-study grants, and Department of Education grants, as well the direct Library grant, the Department maintained that the University was required to comply with the provisions of Title IX in all its educational programs and activities, including its athletic programs. The Department cautioned that failure to comply with the information request would result in enforcement proceedings.⁵⁹ The University informed the Department of its continued refusal to comply with the information request and filed suit pursuant to section 903 of Title IX⁶⁰ seeking injunctive and declaratory relief.⁶¹ The Department held the investigation in abeyance, pending the outcome of the suit.⁶²

The University moved for summary judgment, arguing that Title IX is "program specific" and consequently applies only to those "programs or ac-

⁵⁶ *Id.* The request covered all aspects of the athletic program including its budgets, practice schedules and transportation policies, as well as lists of teams, locker room, and training facilities. *Id.* at 323 n.3.

⁵⁷ *Id.* at 323. The University also stated that the request was unduly lengthy and burdensome, possibly in excess of the Department's investigative authority, and was on a request form which had not been previously submitted for approval to the Office of Management and Budget as required in 42 U.S.C. § 3509 (1976). *Id.*

⁵⁸ *Id.* at 323-24 n.5. The letter which the Department sent to the University stated, in relevant part: "Whether a particular education program or activity receives federal funds is not determinative of coverage of that program or activity by title IX. Rather, the determination is based on whether the "recipient" institution receives, either directly or indirectly, "Federal financial assistance" which benefits its programs and activities." *Id.*

⁵⁹ *Id.* at 324.

⁶⁰ *Id.* at 333. Education Amendments of 1972 § 903, 20 U.S.C. § 1683 (1976) provides: Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of the title.

Id.

⁶¹ 543 F. Supp. at 332-33. The University sought an injunction prohibiting the Department from proceeding with the investigation of the University and from initiating the enforcement proceedings. *Id.* at 333. It further sought a declaration that the regulations were invalid and unauthorized by the statute. *Id.* at 332-33.

⁶² *Id.* at 324.

tivities" that receive *direct* federal financial assistance.⁶³ The regulations, according to the University, were *ultra vires*⁶⁴ and unlawful to the extent that they attempted to regulate programs that did not receive direct federal assistance.⁶⁵ The Department, stressing that a court should defer to the implementing agency's statutory interpretation,⁶⁶ reasserted its position that the indirect receipt of federal funds is sufficient to bring a university within the reach of Title IX.⁶⁷ On this basis, the Department cross motioned for a summary judgment declaring the regulations valid and the proposed investigation lawful.⁶⁸

In denying the University's request for declaratory relief, the district court did not invalidate the regulations outright as courts had done in several previous Title IX cases.⁶⁹ The *Richmond* court did, however, grant the University's motion for injunctive relief and enjoined the Department both from proceeding with the investigation of the University and from commencing enforcement proceedings against the University because of the University's refusal to comply with the information requests.⁷⁰ Moreover, the court enjoined the Department from investigating any school within its jurisdiction, absent a showing that the program or activity being investigated was the recipient of direct federal funding.⁷¹ In so deciding, the court narrowly construed the Department's authority under Title IX.

The crucial question for the *Richmond* court was whether the "program" in question received *direct* federal financial assistance.⁷² The court held that any

⁶³ *Id.* at 324-25.

⁶⁴ For a discussion of this concept as it applies to the instant situation see generally Comment, *Ultra Vires Challenge*, *supra* note 6, at 150-84.

⁶⁵ 543 F. Supp. at 324.

⁶⁶ For an analysis of the policy reasons behind this general practice see Comment, *Ultra Vires Challenge*, *supra* note 6, at 151-52. See also *North Haven*, 456 U.S. at 522 n.12.

⁶⁷ 543 F. Supp. at 325. The court noted that the regional director of the Office of Civil Rights (who was in charge of the investigation and was a co-defendant in the suit) suggested, in his deposition, that the receipt of even \$1.00 in federal aid by a university would subject all its programs or activities to the Department's authority. *Id.*

⁶⁸ *Id.*

⁶⁹ See, e.g., *Bennett v. West Texas State Univ.*, 525 F. Supp. 77, 80 (N.D. Tex. 1981) ("To the extent that the regulations attempt to apply the strictures of Title IX on an institutional basis, the regulations are invalid."); *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376, 1391 (E.D. Mich. 1981). For courts of appeals had previously rejected assertions that Title IX applied to employment practices and had invalidated the regulations as unauthorized by the statute. See *Seattle Univ. v. HEW*, 621 F.2d 992 (9th Cir. 1980), *vacated sub nom. United States Dept. of Educ. v. Seattle Univ.*, 102 S. Ct. 2264 (1982); *Romeo County Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979); *Junior College Dist. of St. Louis v. Califano*, 597 F.2d 119 (8th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979); *Isleboro School Comm. v. Califano*, 593 F.2d 424 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

⁷⁰ 543 F. Supp. at 333.

⁷¹ *Id.*

⁷² 543 F. Supp. at 327 n.10. Similar conclusions have been reached in two other recent Title IX cases involving the athletic regulations. See *Bennett v. West Texas State Univ.*, 525 F. Supp. 77, 81 (N.D. Tex. 1981) ("in order for strictures of Title IX to be triggered, the federal financial assistance must be direct."); *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376, 1389 (E.D. Mich. 1981) ("direct federal financial aid to specific education programs or activities is re-

attempt by the Department to regulate or inspect any "program" which is not directly federally funded is unlawful and beyond the scope of Title IX and Congress' intent.⁷³ In reaching its decision, however, the court never addressed the central issue in the case: it did not attempt to discern Congress' intent with respect to indirect funding as a basis for jurisdiction. Rather, the court merely noted the existence of the program-specific limitations embodied in sections 901 and 902, which provide that the prohibition and termination provisions are limited in effect to programs or activities "receiving Federal financial assistance."⁷⁴ Absent a determination of whether Congress, in using this language, intended indirectly funded programs to come within the ambit of Title IX, however, the court would seem to have had no basis to support its ruling that only directly funded programs are covered by the statute's proscriptions.

Even assuming that the court was correct in its determination that only directly funded programs are covered by Title IX, it is of particular interest that the court never defined exactly what constituted an "education program" for the purposes of the statute, despite its heavy reliance on the program-specific limitation of the statute.⁷⁵ Furthermore, the court failed to define "education program" even after noting that the Supreme Court had similarly failed to define the term in *North Haven*.⁷⁶ Without a definition of "education program," however, it would seem to be impossible to determine exactly what constituted direct funding to a program for purposes of Title IX. Instead of specifically defining the term, the *Richmond* court, through its references to programs "earmarked for direct Federal Funding,"⁷⁷ seems to have implicitly adopted a common sense definition. Under this definition it appears that an athletic department is one program, a law school is another program, and a political science research project is still another program. Accordingly, unless funds received by a university were earmarked for a particular "program," the Department would be unable to assert jurisdiction.

The importance of this approach cannot be overemphasized. By defining "program" in this fashion, the court precluded the Department from asserting

quired before the strictures of Title IX can be applied.").

⁷³ 543 F. Supp. at 327. "The [Department's] practice in this matter under the guise of their regulations is contrary to the language of the governing statute, the intent of Congress in enacting Title IX, and the program specific ruling in *North Haven*." *Id.*

⁷⁴ *Id.* at 325. "No person shall . . . be subject to discrimination in any education program or activity receiving Federal financial assistance. . . ." Education Amendments of 1972 § 901, 20 U.S.C. § 1681 (1976); "such termination . . . shall be limited in its effect to the particular program, or part thereof, in which noncompliance has been found . . ." *Id.* at § 902, 20 U.S.C. at § 1682. See *supra* notes 2-3.

⁷⁵ The court focused solely on the word "program," having decided that "activity" was a mere redundancy and not important in and of itself. 543 F. Supp. at 327 n.10.

⁷⁶ *Id.* at 326. In *North Haven*, however, the Court was not faced with the question of exactly what constituted an "education program or activity" for purposes of Title IX, as neither school had objected to the investigation on grounds that the activities in question were not federally funded. *North Haven*, 456 U.S. at 540.

⁷⁷ See *Richmond*, 543 F. Supp. at 328; *id.* at 331; *id.* at n.17.

jurisdiction over the University by virtue of the receipt of federal money given to its students through the various federally administered grant and loan programs. These general funds are never earmarked for a specific program, but instead go into the general operating budget of a university for the school's administrators to spend as they see fit. For these funds to have become a basis of jurisdiction for a Department investigation, the court would have had to have adopted a broader definition of "program" for the purpose of these non-earmarked funds. Because the court was unwilling to accept the proposition that the "program" funded by these funds was the University per se, the receipt of these funds could not provide a jurisdictional basis for an investigation.

In its argument in *Richmond*, the Department had relied upon the case of *Bob Jones University v. Johnson*,⁷⁸ where an institutional approach had been accepted previously for purposes of Title VI enforcement.⁷⁹ In *Bob Jones*, a district court was faced with the question of whether money from Veteran's Administration loans which ultimately was received by a fundamentalist university which engaged in racially discriminatory practices constituted "federal financial assistance" for the purposes of Title VI.⁸⁰ In holding that the loans did constitute federal assistance, the *Bob Jones* court determined that the mode of payment to the ultimate beneficiary was irrelevant. So long as the federal funds went ultimately to the university, the university was held to be subject to the strictures of Title VI.⁸¹ The Department asserted that a similar approach was warranted in the *Richmond* case with respect to the BEOG and loan funds received by the University from its students.⁸² The Department further argued that because the money so received went to the University generally, and not to any specific program, then all of the University's programs were subject to the strictures of Title IX.

The *Richmond* court dismissed the Department's reliance on *Bob Jones*, however, noting that Title VI concerned race discrimination while Title IX concerned only sex discrimination, and thus lacked the former's constitutional scope.⁸³ Similarly, the court rejected the contention that the Department had

⁷⁸ 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (5th Cir. 1975).

⁷⁹ *Id.* Because Title IX was explicitly modeled on Title VI, Title VI litigation had been considered relevant authority in previous Title IX cases. That has now been changed by the Supreme Court's decision in *North Haven*. See *infra* notes 163-68 and accompanying text.

⁸⁰ Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1976 & Supp. IV 1980).

⁸¹ 396 F. Supp. at 603. The court noted that:

Whether the cash payments are made to a university and thereafter distributed to eligible veterans rather than the present mode of transmittal is irrelevant, since the payments ultimately reach the same beneficiaries and the benefit to the university would be the same in either event. To argue otherwise would be to suggest that the applicability of Title VI turns on the role of a university as an exchange. . . . No rational distinction with respect to Title VI coverage can be made on this basis.

Id. at 603-04.

⁸² 543 F. Supp. at 323 & n.5.

⁸³ *Id.* at 328. "The broad reading in *Bob Jones* is not necessary in this case dealing with Title IX. Title IX lacks the constitutional scope of Title VI." *Id.*

jurisdiction over the athletic department because the athletic department benefited from funds received by the University directly from various federal sources. The Department had argued that the receipt of these federal funds allowed other University funds to be used by the athletic department. The court, however, dismissed this argument by noting that the aid, if any, was indirect.⁸⁴ Finally, the court rejected the Department's argument that in order to enforce the regulations, it must be able to investigate the University to determine whether the athletic department is a "program or activity" receiving federal funding. The court dismissed this argument, characterizing it as "double-talk and sophistry," and an attempt to revive the institutional approach through language manipulation—or as the court phrased it, "the same old racoon with another ring around its tail."⁸⁵

Thus, the district court in *Richmond* denied the Department's motion for summary judgment, while partially granting the University's motion. The court ruled that an athletic program must receive funds directly from the federal government before it can be held to compliance with Title IX's proscriptions against sex discrimination. The court did so, however, without addressing the central issue of the case: namely, whether or not Congress intended indirectly aided programs to come under the proscriptions of Title IX when it enacted the statute. Furthermore, the court never explicitly ruled what constituted an "education program" for purposes of the statute, thereby precluding any attempt to determine whether or not a "program" is receiving direct federal financial assistance.

B. Haffer v. Temple University

Plaintiffs, eight women students at Temple, a private university, filed a class action claiming that Temple discriminated against women in its intercollegiate athletic program in violation of Title IX and the implementing regulations.⁸⁶ Temple moved for summary judgment, asserting that the regulations

⁸⁴ *Id.* at 328-29. See also *Bennett v. West Texas State Univ.*, 525 F. Supp. 77, 80-81 (N.D. Tex. 1981) ("Plaintiff's contention . . . that the athletic programs of the University are directly benefitted by federal financial assistance because those programs received funds that would otherwise be diverted without the infusion of federal monies . . . is not well taken."); *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376, 1389 (E.D. Mich. 1981) ("Plaintiff argues that the school board receives federal impact aid which is put into the general fund and that this benefits the athletic program. The court rejects the plaintiff's argument that (this) . . . brings it within the ambit of Title IX . . ."). But see *Hillsdale College v. HEW*, 696 F.2d 418, 424 (6th Cir. 1982); *Iron Arrow Honor Soc'y v. Hufstедler*, 499 F. Supp. 496, 503 (S.D. Fla. 1980), *aff'd sub nom.* *Iron Arrow Honor Soc'y v. Schweiker*, 652 F.2d 445 (5th Cir. 1981), *vacated*, 102 S. Ct. 3475 (1982), *aff'd on rehearing sub nom.* *Iron Arrow Honor Soc'y v. Heckler*, 702 F.2d 549 (5th Cir. 1983) ("As a matter of law . . . this regulation, though it may reach activities once-removed from direct federal assistance, is nevertheless useful and necessary to the effectuation of Title IX."); *Wort v. Vierling*, No. 82-3169, slip op. at 4 (C.D. Ill. 1982) ("Because of the integral relationship between NHS and the school-recipient and its faculty, NHS would not exist without the school itself. . . . Accordingly, Title IX is applicable to this case.")

⁸⁵ 543 F. Supp. at 331.

⁸⁶ *Haffer*, 524 F. Supp. at 532. Temple maintains separate athletic programs for men

were invalid because the claimed coverage was beyond the scope of Congress' intent in enacting Title IX.⁸⁷ Specifically, Temple argued that (1) the terms "program" and "activity" refer solely to the component parts of an institution, so that Temple as a whole could never be deemed a program or activity for purposes of Title IX; (2) Title IX applies only to directly funded component programs; and (3) the regulations are invalid insofar as they attempt to cover component programs which do not receive direct federal funding.⁸⁸

Plaintiffs asserted that the regulations were indeed valid and that Temple was subject to their strictures. According to affidavits, Temple received approximately ten percent of its annual operating budget from federal sources,⁸⁹ although none of the federal funds were earmarked for the intercollegiate athletic program.⁹⁰ Plaintiffs' primary contention was that this extensive federal funding, which reached throughout the University, was sufficient in and of itself to subject Temple to the constraints of Title IX in all its education programs, including intercollegiate athletics.⁹¹ Alternatively, Plaintiffs argued that Temple's athletic department received direct federal financial assistance in three separate forms: (1) as federal grants and loans to its student-athletes; (2) as federal assistance for the construction and renovation of facilities used by the athletic program, including dormitories used by student-athletes and campus buildings used for athletic award functions; and (3) as salaries of athletic department employees paid under federally funded work-study and CETA programs.⁹²

In its opinion, the district court focused on the meaning of the phrase "programs or activities receiving federal financial assistance" found in section 901. The court determined that the validity of the regulations in question turned on the intent of Congress in using the word "receiving."⁹³ After a substantial review of Title IX's legislative history, the court concluded that Temple's in-

and women. *Id.* at 532 n.1. They have separate budgets, administrations, and coaches. *Id.* The suit and motions concerned Temple's total involvement in intercollegiate athletics. *Id.* Plaintiffs contended *inter alia* that Temple was not in compliance with the provision of 34 C.F.R. § 106.41, which mandated proportional spending on intercollegiate athletic programs, as women comprised 42 percent of all athletes at Temple yet received only 13 percent of all funds spent on athletics. *Id.* at 532.

⁸⁷ *Id.* at 532.

⁸⁸ Brief *Amici Curiae* in Support of Plaintiffs-Appellees at 2-3, *Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982).

⁸⁹ Brief for Plaintiffs-Appellees, *supra* note 18, at 1. For the 1980-81 school year this aid amounted to almost \$20 million in direct federal grants and contracts. *Id.* at 2. In addition, Temple students received over \$10 million in federal financial aid, which ultimately was received by Temple as tuition payments and student fees. *Id.* at 1-2. Further, in prior years Temple had received federal grants of over \$7 million to finance construction and renovation of classrooms. *Id.* at 2. Substantial amounts of low-interest, long-term loans had also been received, and were still being repaid, to finance the construction of dormitories. *Id.*

⁹⁰ *Haffer*, 524 F. Supp. at 532.

⁹¹ Brief for Plaintiffs-Appellees, *supra* note 18, at 40.

⁹² *Id.* at 3-10, 41.

⁹³ *Haffer*, 524 F. Supp. at 532-33.

tercollegiate athletic program is an education program "receiving federal financial assistance" and thus subject to the dictates of both Title IX and the regulations.⁹⁴

According to the court, "[i]t is obvious from a full reading of the legislative history of the statute that Congress approved of the broad scope of Title IX, and specifically its application to intercollegiate athletic programs."⁹⁵ The court discounted the usefulness of the available pre-enactment history for its determination because it found the history of the bill through enactment ambiguous.⁹⁶ In the post-enactment period, however, the court found at least six attempts to amend Title IX to exclude, in whole or in part, coverage of athletic programs or to limit coverage solely to directly funded programs, all of which had been defeated.⁹⁷ Furthermore, the court found two instances where Congress had amended Title IX to exclude from its coverage certain educational programs.⁹⁸

Based upon its reading of the relevant legislative and post-enactment history, the district court reached two conclusions. First, the court concluded that Congress was aware that programs which received indirect funding were regarded as within Title IX's coverage, and approved that interpretation.⁹⁹ Second, because of the tremendous furor that the proposed regulations created before and during the "laying before" period,¹⁰⁰ the court determined that Congress could not have been unaware of the hot debate over the proposed coverage of indirectly funded athletic programs.¹⁰¹ If Congress had not intended Title IX to cover these programs, it could have disapproved the regulations.¹⁰² At the very least, Congress could have amended Title IX to exclude athletics from its scope as it had done for several other indirectly funded education programs.¹⁰³ Because Congress took no action of disapproval, however, the court ruled that Congress thereby, implicitly at least, approved of the regulations as they stood.¹⁰⁴ Consequently, the court ruled that Temple's

⁹⁴ *Id.* at 533-34.

⁹⁵ *Id.* at 534.

⁹⁶ *Id.*

⁹⁷ *Id.* at 534-35. For a discussion of the attempts to exclude athletics from Title IX and the reasons for their defeat see *infra* notes 187-248 and accompanying text.

⁹⁸ 524 F. Supp. at 535. In 1974 Congress amended Title IX to exclude from its coverage the membership practices of social fraternities and sororities, YMCA's and YWCA's, the Girl and Boy Scouts, the Camp Fire Girls, and traditionally single-sex voluntary youth service organizations. 20 U.S.C. § 1681(a)(6) (1976). In 1976 Congress excluded American Legion-sponsored Boys and Girls State and Nation Programs, father-son and mother-daughter banquets, and beauty pageant scholarships. 20 U.S.C. § 1681(a)(7)-(9) (1976).

⁹⁹ 524 F. Supp. at 536.

¹⁰⁰ See *supra* notes 47-49 and accompanying text.

¹⁰¹ 524 F. Supp. at 536.

¹⁰² *Id.*

¹⁰³ See *supra* note 98.

¹⁰⁴ 524 F. Supp. at 536. Effective August 21, 1975, Congress amended § 431(d)(1) of the General Education Provisions Act to provide that failure to disapprove regulations does not constitute a finding of consistency with legislative intent regarding the underlying statute. 20 U.S.C.

receipt of indirect general aid was sufficient to subject it to Title IX's guidelines, which had been promulgated validly.¹⁰⁵ The court did qualify its opinion in one respect, however, noting in dicta that the amount of funding must be a reasonable amount; merely *de minimus* federal aid would not subject a university as a whole to the strictures of Title IX.¹⁰⁶

As an alternative holding, the court also ruled that Temple's athletic department received *direct* federal assistance through the machinations of the various federal aid programs which granted financial aid to student-athletes and athletic department employees.¹⁰⁷ According to the court, this direct assistance included funds received by athletic department employees under the work-study program; work-study and CETA funds for employees of the University radio station, which broadcast athletic contests; federal grants and loans received by student-athletes at the University; and federal funds used for the construction and maintenance of buildings utilized by the athletic department and student-athletes.¹⁰⁸ Thus, because it determined that Congress had intended that indirectly aided programs come under Title IX's proscriptions and, alternatively, because it determined that Temple received direct federal aid, the court denied Temple's motion for summary judgment.

Temple appealed the court's denial of its motion to the Third Circuit Court of Appeals, where a three judge panel affirmed in a *per curiam* opinion.¹⁰⁹ In its appeal, Temple had requested certification of a question which challenged the district court's interpretation of the phrase "education program or activity receiving Federal financial assistance."¹¹⁰ In its opinion, the Court of Appeals upheld the lower court's interpretation of the statutory language, ruling that it was bound, according to internal policy, by another Third Circuit panel's decision in a prior Title IX case.¹¹¹

§ 1232(d) (Supp. V 1981). The amendment took effect, however, after the regulations had become effective. The rules in effect at the time when Congress was considering the athletic regulations support the implication that Congress, by its inaction, approved of the Department's interpretation contained therein. 524 F. Supp. at 536 n.10.

¹⁰⁵ 524 F. Supp. at 541.

¹⁰⁶ *Id.* at 540.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982).

¹¹⁰ *Id.* at 16. The exact question certified asked:

Whether the phrase "education program or activity receiving Federal financial assistance" as used in Section 901 . . . includes programs or activities, such as Temple University's intercollegiate athletics program, which do not themselves receive earmarked Federal financial assistance, if such programs or activities benefit from the receipt of Federal financial assistance by other parts of the University and/or by students enrolled at the University.

Id.

¹¹¹ *Id.* at 16 n.6. "Opinions of one panel of this Court are binding on subsequent panels. See 3d Cir. Internal Operating Procedures, Rule VIII(C)." *Id.*

The decision in this prior case, *Grove City College v. Bell*,¹¹² had come down after oral arguments had been heard on Temple's appeal.¹¹³ The issue in *Grove City* was whether a private college which received no direct federal funds, but whose students received federal grants under the BEOG program, was covered by Title IX.¹¹⁴ After analyzing the statute, its legislative history, and the relevant case law, the *Grove City* appellate court concluded that Title IX was indeed triggered when students receive BEOG funds which are subsequently channelled to an educational institution.¹¹⁵ The court also determined that when Title IX applies to a school by virtue of money received through its students, then the "program" funded for purposes of the statute is the entire university, because to rule otherwise would defeat the purpose of the statute.¹¹⁶

¹¹² 687 F.2d 684 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983).

¹¹³ *Haffer*, 688 F.2d at 16.

¹¹⁴ 687 F.2d at 687. *Grove City* presents a unique factual situation. Grove City College is a private co-educational Pennsylvania college affiliated with the United Presbyterian Church. *Id.* at 688. The college had, since its founding, refused to accept any form of direct governmental financial assistance. *Id.* at 689 n.7. Of the college's approximately 2,200 students, some 140 received some funds under the BEOG program, while 342 received aid through the GSL program. *Id.* at 688. The students received the funds directly from the lending institution after the college had certified the validity of their educational costs and enrollment status. *Id.* at 689 n.8. In July, 1976 the Department attempted to secure from the College an Assurance of Compliance that the College was in compliance with Title IX. *Id.* at 689. The College refused to execute the Assurance, asserting that it received no federal assistance for purposes of Title IX. *Id.* The Department then initiated administrative proceedings, pursuant to section 902, to terminate the federal grants and loans given to the students attending the College. *Id.*

After a hearing, an Administrative Law Judge concluded that the College was a recipient of federal financial assistance for purposes of Title IX, and that the loans and grants to the students could be terminated because of the college's refusal to execute the Assurance. *Id.* As the College continued to refuse to execute the Assurance, the judge issued an order terminating the aid to the students. *Id.* In November, 1978, Grove City, joined by several of its student-recipients, filed suit seeking an injunction to prevent the Department from terminating the students' aid and to enjoin the Department from requiring the school to execute the assurance. *Id.* They also sought a judgment declaring the regulations void as beyond the statutory grant of authority, or alternatively, unconstitutional as applied to the College. *Id.* Cross motions for summary judgment were filed based on affidavits and the administrative record. *Id.*

The district court granted Grove City's motion for summary judgment and denied the cross motion of the Department. *Grove City College v. Harris*, 500 F. Supp. 253, 274 (W.D. Pa. 1980). Although the court agreed that the BEOG's and GSL's received by the College's students constituted "federal financial assistance" to Grove City for purposes of Title IX, *id.* at 266, it ruled that the Department could not terminate assistance to students, based on the College's failure to sign the Assurance, absent proof of actual sex discrimination. *Id.* at 268-72.

The Department's appeal, and Grove City's cross appeal followed. 687 F.2d at 690. The Department appealed from the judgment, while the College cross-appealed to preserve its contention that the acceptance of federal aid by its students did not bring the College within the ambit of Title IX. *Id.* at 690 n.11.

¹¹⁵ 687 F.2d at 698-700. *Accord*, *Hillsdale College v. HEW*, 696 F.2d 418, 430 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3704 (U.S. March 16, 1983) (No. 82-1538).

¹¹⁶ 687 F.2d at 698. "However 'program' may be defined when a *direct* federal grant is involved . . . we are not persuaded that when non-earmarked or *indirect* funding is involved, those statutes proscribing discrimination should be rendered ineffective and without force." *Id.* But see *Hillsdale College v. HEW*, 696 F.2d 418, 430 (6th Cir. 1982). In *Hillsdale*, the Sixth Circuit was

The *Haffer* appellate court, relying on the *Grove City* appellate decision, ruled that the district court in *Haffer* had concluded correctly that Temple's athletic department had received federal financial assistance within the meaning of Title IX, because money received as general funds by the University freed nonfederal funds which could then be allocated to the athletic department.¹¹⁷ The appellate court expressed no opinion, however, concerning the lower court's alternative holding that the athletic department was covered by Title IX because some of the federal funding was closely connected to the athletic department.¹¹⁸

The decisions of the various federal courts regarding the validity of the Title IX athletic regulations are in conflict. The athletic sections of the regulations are now invalid in several judicial districts;¹¹⁹ valid and narrowly construed in the Eastern District of Virginia;¹²⁰ valid, binding, and broadly applied in Pennsylvania, New Jersey and Delaware, the area under the jurisdiction of the Third Circuit;¹²¹ and in doubt everywhere else. Recently, in the case of *North Haven Board of Education v. Bell*,¹²² the Supreme Court established guidelines for the interpretation of Congressional intent in Title IX cases. Because of the importance of the *North Haven* decision in this area, and because the parties in both *Richmond* and *Haffer* were unable to brief their arguments fully in light of *North Haven*,¹²³ the next section will be devoted to an analysis of the Supreme Court's opinion in *North Haven*. This note will then evaluate the available legislative and postenactment history in light of the guidelines that have been established by the Court for Title IX interpretation.¹²⁴ Finally, the *Richmond* and *Haffer* decisions will be reexamined to determine which is more consonant with both Congressional intent in enacting Title IX⁵ and the Supreme Court's guidelines regarding the interpretation of that intent.¹²⁵

faced with a set of facts essentially identical to those in *Grove City*. In its opinion, the *Hillsdale* court ruled that student aid was sufficient to bring a university within the purview of Title IX, *id.*, but that the only program subject to regulation by virtue of this money was the grant and loan program itself. *Id.* Thus, the Department could not terminate the student aid because the Assurance of Compliance covered the entire college and not just the student grant and loan programs. *Id.*

¹¹⁷ *Haffer v. Temple Univ.*, 688 F.2d 14, 17 (3d Cir. 1982).

¹¹⁸ *Id.* at 17 n.9. The circuit court did not need to decide this question, because its disposition on the other issue made resolution of the direct funding issue unnecessary. See *supra* notes 107-08 and accompanying text.

¹¹⁹ This invalidity is by virtue of the decisions in *Bennett v. West Texas State Univ.*, 525 F. Supp. 77 (N.D. Tex. 1981) and *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376 (E.D. Mich. 1981).

¹²⁰ This is by virtue of *Richmond*, 543 F. Supp. 321.

¹²¹ This is by virtue of *Haffer*, 688 F.2d 14.

¹²² 456 U.S. 512 (1982).

¹²³ The parties in both cases were able, however, to submit memoranda addressing the implications of *North Haven* to their positions. See *Richmond*, 543 F. Supp. at 333 n.19; Letter Memorandum of Plaintiffs-Appellees at 1, *Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982).

¹²⁴ See *infra* notes 171-248 and accompanying text.

¹²⁵ See *infra* notes 249-52 and accompanying text.

III. *NORTH HAVEN BOARD OF EDUCATION v. BELL*

In *North Haven Board of Education v. Bell*,¹²⁶ the Supreme Court was faced with a challenge to the Department's Title IX "subpart E" regulations, which concern the employment practices of educational institutions.¹²⁷ The *North Haven* decision is significant in several respects, most notably because the Supreme Court adopted what was then the minority position in holding that the Title IX regulations were valid as promulgated. Furthermore, the Court altered the manner in which Congressional intent was determined in Title IX cases, discounting not only the relevance of Title VI's legislative and enforcement history, but also the import of Senator Bayh's abortive attempt to introduce his 1971 amendment, both of which had been relied upon heavily in previous Title IX cases. Although the Court, in *North Haven*, was not concerned with Title IX's athletic regulations *per se*, the Court's opinion did establish the basic guidelines for determining Congressional intent in enacting Title IX.

Petitioners in *North Haven* were two Connecticut public school boards, the North Haven Board of Education and the Trumbull Board of Education.¹²⁸ The two school boards brought separate suits in federal district court challenging the Department's authority to issue the Subpart E regulations.¹²⁹ In their suits, which were joined on appeal, both petitioners asserted that Congress did not intend Title IX to reach employment practices.¹³⁰ Because the two district court cases are similar factually, only the *North Haven* district court proceedings will be discussed in the text.¹³¹

The litigation in *North Haven* arose out of a complaint filed with the Department in January 1978 by Elaine Dove, a tenured teacher in the North Haven school system, alleging that the school board had violated Title IX by refusing to rehire her after a one year maternity leave.¹³² The Department

¹²⁶ 456 U.S. 512 (1982).

¹²⁷ 34 C.F.R. §§ 106.51-.61 (1982);

¹²⁸ 456 U.S. at 517.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ The facts in the *Trumbull* case can be quickly stated. In October 1977, Linda Potz, a former guidance counselor in the Trumbull school system, filed a complaint with the Department against the Trumbull Board of Education. 456 U.S. at 518. The complaint alleged that the school board had discriminated against her with respect to job assignments, working conditions, and contract renewal. *Id.* After an investigation, which the school board cooperated with, the Department determined that the board had violated Title IX and directed the board to take corrective action, including the reinstatement of Potz with back pay. *Id.* Specifically, the investigation revealed that the school board had required Potz to perform secretarial tasks not required of the male counterparts; had demeaned her in the eyes of her co-workers and counselees; had required her to falsify a Title IX compliance report concerning her job duties and work load; and had fired her solely because of her sex. Brief for Respondent Linda Potz at 2, *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982). The school board then filed suit in district court, contending the regulations were invalid and seeking injunctive and declaratory relief identical to that granted in the *North Haven* case. 456 U.S. at 518. Once again the district court agreed that the Department had exceeded its statutory grant of authority and granted the relief sought. *Id.*

¹³² 456 U.S. at 517.

processed the complaint, claiming authority by virtue of subpart E of its regulations, and initiated an investigation into the school board's employment practices.¹³³ As part of its investigation, the Department requested from the school board certain information concerning its policies on hiring, seniority, leaves of absence, and tenure.¹³⁴ The school board refused to comply with the information request, arguing that the Department lacked authority under Title IX to regulate employment.¹³⁵

After the Department notified the board that it was considering administrative enforcement proceedings, the school board filed suit seeking a declaratory judgment that the Subpart E regulations were beyond the scope of the Department's statutory authority, and an injunction forbidding the Department from initiating funding termination proceedings.¹³⁶ The district court, agreeing with the school board that Title IX was not intended to reach employment practices, invalidated the regulations and enjoined the Department from initiating termination proceedings.¹³⁷

A. *The Circuit Court Opinion*

The two cases were consolidated on appeal, and the Court of Appeals for the Second Circuit reversed.¹³⁸ After finding the language of section 901 unclear and inconclusive, the appellate court examined the available legislative history, and concluded that Title IX was indeed intended to prohibit employment discrimination.¹³⁹ The court also determined that the Subpart E regulations were consistent with section 902, ruling that the "pinpoint termination provision" of section 902 applied only to fund terminations *per se*, and did not limit the Department's authority to issue regulations prohibiting sex discrimination in educational employment.¹⁴⁰ Furthermore, if on investigation the Department determined that there were funds which would be subject to termination going to a school, the Department would not be required, prior to the termination, to specify which particular programs receiving financial assistance were covered by the regulations.¹⁴¹ Because the Department had not exercised its termination authority with respect to the two school boards, however, the court declined to decide whether or not the Department could do so in these cases. Instead, it remanded the cases for a determination of whether the school boards had violated the regulations, and, if so, what remedies were appropriate.¹⁴² The school boards then petitioned the Supreme Court for certiorari.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 518.

¹³⁷ *Id.*

¹³⁸ *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 776 (2d Cir. 1980).

¹³⁹ *Id.* at 785.

¹⁴⁰ *Id.* at 785-86.

¹⁴¹ *Id.* at 785.

¹⁴² *Id.*

Because four other Courts of Appeals had invalidated the regulations previously on the grounds that Title IX did not authorize coverage of employment practices,¹⁴³ the Supreme Court granted certiorari to resolve the conflict.¹⁴⁴

B. *The Supreme Court Opinion*

In its *North Haven* opinion, the Supreme Court upheld the validity of the regulations with respect to employment. The Court agreed with both the Court of Appeals for the Second Circuit and the Department that Title IX prohibited sex discrimination against both students and employees.¹⁴⁵ The Court reached this conclusion after an examination of the relevant statutory language, legislative history, and postenactment history.¹⁴⁶ The Court disagreed, however, with the appellate court's interpretation of the program-specific limitation of Title IX. Whereas the lower court had ruled that the program-specific limitation affected only the termination provisions of section 902 and did not affect the authority of the Department to promulgate regulations,¹⁴⁷ the Supreme Court ruled that the authority of the Department to both issue and enforce Title IX regulations was limited by the program-specific language.¹⁴⁸ "Certainly, it makes little sense," the Court stated, "to interpret the statute . . . to authorize an agency to promulgate rules that it cannot enforce."¹⁴⁹ According to the Court, though the regulations may be worded broadly and need not be directed at specific programs, they can be applied validly only to programs that receive federal financial assistance.¹⁵⁰

The import of this ruling is ambiguous. In adopting the program-specific limitation, the Court observed that "Congress failed to adopt proposals that would have prohibited *all* discriminatory practices of an institution that receives federal funds."¹⁵¹ Rather, the prohibition adopted was specifically limited to "programs or activities receiving Federal financial assistance."¹⁵²

¹⁴³ See *supra* note 69.

¹⁴⁴ *North Haven Bd. of Educ. v. Bell*, 450 U.S. 909 (1981).

¹⁴⁵ 456 U.S. at 530.

¹⁴⁶ *Id.* at 520-35.

¹⁴⁷ *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 785-86 (2d Cir. 1980).

¹⁴⁸ 456 U.S. at 536-38. "We conclude, then, that an agency's authority under Title IX to both promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902." *Id.* at 538.

¹⁴⁹ *Id.* at 537.

¹⁵⁰ *Id.* at 536 n.27.

¹⁵¹ *Id.* at 537.

¹⁵² *Id.* The Court noted that the 1971 version of the amendment had prohibited discrimination in all areas of an institution, while the 1972 version, the one ultimately adopted, prohibited discrimination only in federally funded programs. *Id.* The Court found this distinction significant and indicative of a Congressional change of heart with respect to the scope of Title IX. *Id.* It is unclear, however, whether this change was a result of a conscious choice to limit the scope of the statute or merely the by-product of the use of Title VI as the model for what was adopted as Title IX. No reason has apparently ever been given for the change and each alternative seems equally plausible, although, as noted above, the Court has decided the issue in favor of the former. *Id.*

Yet the Supreme Court expressly declined to define "program" in its opinion, leaving the definition to the lower courts on remand.¹⁵³ The Court also had no opportunity to rule on whether indirect funding is sufficient to bring an institution under the aegis of Title IX, and if so, what is the program or activity funded. This was because neither school board had asserted that the complaining employees did not work in an education program that received federal assistance.¹⁵⁴ Rather, the Court merely determined that the regulations themselves required program-specific application, and thus were not facially invalid as had been asserted by the plaintiffs.¹⁵⁵ Thus, the main question plaguing the courts in the athletics contexts were left unanswered in *North Haven*. Several sections of the opinion do provide indications, however, about the proper resolution of the questions.

The most important aspect of the Court's opinion in *North Haven*, for the resolution of Title IX questions, is the procedure the Court established for Title IX interpretation. The starting point in determining the scope of Title IX is, of course, the statutory language.¹⁵⁶ Generally, Title IX must be accorded "a sweep as broad as its language."¹⁵⁷ Because Title IX leaves much undefined, however, a second step, an examination of the legislative history, will likely be necessary in all but the most obvious of cases to clarify the import of the language.¹⁵⁸ Unfortunately, the legislative history itself is, as the Court noted, sparse at best.¹⁵⁹ Thus, additional evidence of the intended scope of Title IX can be obtained from the postenactment history.¹⁶⁰ The Court noted that although postenactment history cannot be given "the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX. . . ." ¹⁶¹ In addition, the Court specifically noted the importance of amendatory bills and legislative hearings on those bills. The Court noted that when an agency's statutory interpretation had been brought to the attention of both the public and the Congress, and Congress had not sought to alter that interpretation, although it had amended the statute in other respects, then presumably the legislative intent had been correctly discerned by the agency.¹⁶²

Also significant for future Title IX cases is the Court's ruling regarding the importance and relevance of Title VI's legislative history and previous en-

¹⁵³ *Id.* at 539-40.

¹⁵⁴ *Id.* at 540.

¹⁵⁵ *Id.* at 538-39.

¹⁵⁶ *Id.* at 520.

¹⁵⁷ *Id.* at 521 (citations omitted).

¹⁵⁸ *See id.* at 530 n.21.

¹⁵⁹ *Id.* at 527. "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted . . . are the only authoritative indications of congressional intent regarding the scope of §§ 901 and 902." *Id.* at 526-27.

¹⁶⁰ *See id.* at 530-35.

¹⁶¹ *Id.* at 535 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 687 n.7 (1979)).

¹⁶² *Id.*

forcement record. In most of the Title IX cases up to and including *North Haven*, much of the attention in both the briefs and opinions had focused on Title VI's legislative history and the manner in which courts had previously interpreted and enforced the title and its implementing regulations.¹⁶³ This was because Title IX had been explicitly and consciously modeled on Title VI.¹⁶⁴ Indeed, the Supreme Court had specifically approved of this approach in a previous Title IX case, *Cannon v. University of Chicago*.¹⁶⁵ In *Cannon*, the Court had noted that "because of their repeated references to Title VI . . . we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX."¹⁶⁶

In *North Haven*, however, the Court reversed itself on this issue by discounting the value of Title VI history in Title IX cases. The Court ruled that Title IV history is of little, if any, use in discerning Congress' intent with respect to Title IX, and that the focus on the history of Title VI in Title IX analysis was in error.¹⁶⁷ According to the Court, "[i]t is Congress' intention in 1972, not in 1964, that is of significance in interpreting Title IX. . . . The meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the extent that the language and history of Title IX do not suggest a contrary interpretation."¹⁶⁸

Finally, the *North Haven* Court ruled that the Title IX regulations should not be given the deference usually allowed an implementing agency's statutory interpretation, because the Department had not consistently interpreted the statute.¹⁶⁹ Indeed, not only had the Department's interpretation of Title IX, as embodied in the regulations, varied from case to case, but the Department also had altered its interpretation as the *North Haven* case had progressed.¹⁷⁰ Thus, in Title IX cases, courts will be allowed greater latitude in determining what the proper statutory interpretation should be than normally would be allowed where the implementing agency had already given its imprimatur to the legislation.

In sum, the Court, in *North Haven*, established a three step process to be used in determining Congressional intent in future Title IX litigation. First, examine the statutory language itself. If the language proves ambiguous, next examine the legislative history of the Act for evidence of what Congress meant when it used the statutory language. Finally, the postenactment history of Title

¹⁶³ See, for example, *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376, 1387-89 (E.D. Mich. 1981); Brief *Amici Curiae*, *supra* note 80, at 11-47; Brief, *supra* note 18, at 13-17, 26-28.

¹⁶⁴ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 (1979).

¹⁶⁵ 441 U.S. 677 (1979).

¹⁶⁶ *Id.* at 697-98.

¹⁶⁷ 456 U.S. at 529.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 538 n.29.

¹⁷⁰ *Id.*

IX may be examined for additional evidence of Congress' intent in passing the statute. In an attempt to determine what should be the proper interpretation of Title IX regarding the coverage of athletics, this note, following the *North Haven* guidelines, will next examine the relevant portions of the statute's legislative and postenactment history. Through this examination, the note will attempt to determine if Congress intended athletic programs, or indeed any indirectly funded programs, to come under the aegis of Title IX.

IV. LEGISLATIVE AND POST-ENACTMENT HISTORY OF TITLE IX: ARE ATHLETIC PROGRAMS COVERED?

In determining whether athletic programs are covered by Title IX, the first step in the *North Haven* approach, direct reference to the statutory language, is of little assistance. Although the statute provides that only a "program or activity receiving Federal financial assistance" is covered by Title IX, "program or activity" is left undefined. "Federal financial assistance" is similarly neglected, while the prospect of indirect funding is completely ignored. Although athletics are not specifically included in the statute, neither are they excluded, as are several other education programs.¹⁷¹ Yet, as was noted in *North Haven*, the fact that some activities were exempted from Title IX's coverage while others were considered and left intact may be persuasive, but it is not conclusive.¹⁷² Consequently, further investigation into legislative intent is necessary.

The second step in the *North Haven* approach, an examination of the statute's legislative history, sheds little light regarding Congress' intent on the statute's coverage of athletics. Because Title IX was introduced as a floor amendment, the available legislative history is sparse.¹⁷³ There are no committee reports, save a few unenlightening sections of the Conference report.¹⁷⁴ In the Senate, there was little floor discussion of the bill or its provisions. The few remarks which are available are largely the prepared remarks of Senator Bayh, and most of these had been inserted into the record subsequent to the amendment's passage.¹⁷⁵

Nevertheless, an examination of the history is of some, albeit limited, benefit. According to the Senator's introductory remarks, the amendment was designed to eliminate, to the fullest extent possible, sex discrimination in education.¹⁷⁶ The prohibition was limited, however, to federally funded educa-

¹⁷¹ See *supra* note 98.

¹⁷² 456 U.S. at 533-35.

¹⁷³ See *supra* note 159.

¹⁷⁴ See, S. Con. Rep. 798, 92d Cong., 1st Sess. 221-22, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2608, 2670-72.

¹⁷⁵ See 121 CONG. REC. 5803-15. The Supreme Court has noted, however, that Senator Bayh's remarks "are the only authoritative indications of congressional intent regarding the scope of §§ 901 and 902." *North Haven*, 456 U.S. at 526-27.

¹⁷⁶ 121 CONG. REC. 5803, 5804. "I urge the Senate to adopt this amendment which [is]

tional programs,¹⁷⁷ although exactly what constitutes federal funding or an educational program was not discussed. The only specific mention of athletics was a passing reference to an anticipated exemption for the integration of "sports facilities," which presumably meant locker rooms.¹⁷⁸ In one exchange, Senator Bayh, responding to a question, noted that: "we are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted. . . . In the area of services, once a student is accepted within an institution, we permit no exceptions."¹⁷⁹ Conceivably the reference to services could be interpreted to apply to athletic programs. A more logical explanation, however, is that the reference was to the traditional areas of services, such as guidance counselors, financial aid, and research facilities.

The record in the House on its sister bill to Senator Bayh's amendment, H.R. 7248,¹⁸⁰ though more developed, is no less ambiguous with respect to the coverage of athletics. Indeed, ambiguity and confusion seemed to be the norm in the discussions on the bill's scope. The coverage of athletics was never discussed specifically. In the bill's introductory statements there is some indication that the word "program" was meant to encompass institutions, and not just individual programs such as school lunches or federal research grants.¹⁸¹ The available remarks, however, are ambiguous and inconclusive. For example, Rep. Boland, in his introductory remarks, noted that "The bill includes title X [the House bill's equivalent of title IX] on discrimination in educational programs. This title reaches beyond higher education and is applicable to all education programs, including elementary and secondary."¹⁸²

Attempts to define "program or activity" and to discern whether indirect funding comes under the aegis of Title IX did arise later to some degree, but the discussion in the few attempts undertaken is less than illuminating. During discussion on an amendment to the bill, for example, Rep. Green, who was the sponsor and floor manager of the bill, and several other Congressmen exchanged opinions about the extent of the coverage of the Title.¹⁸³ A careful

. . . designed to root out, as thoroughly as possible at the present time, the social evil of sex discrimination in education." *Id.* (remarks of Sen. Bayh).

¹⁷⁷ *Id.* at 5807.

¹⁷⁸ *Id.* "The regulations would allow enforcing agencies to permit differential treatment by sex only—very unusual cases where such treatment is absolutely necessary for the success of the program—such as in . . . sports facilities or other instances where personal privacy must be preserved." *Id.*

¹⁷⁹ *Id.* at 5812.

¹⁸⁰ H.R. 7248, 92d Cong., 1st Sess., 117 CONG. REC. 39,098-99 (1971).

¹⁸¹ *See id.*

¹⁸² *Id.* at 39,099.

¹⁸³ 121 CONG. REC. 39,256 (1971). At one point, trying to clarify what was covered, Rep. Waggoner had the following exchange with Rep. Green:

Mr. Waggoner. Let me clarify a little bit better the point I am trying to make and that is this: This applies, apparently, only to those programs wherein the Federal Government is in part or in whole financing a program or an activity?

reading of the exchanges, however, clarifies nothing. Indeed, they really only serve to make the already murky language of the statute even muddier.¹⁸⁴

Given the limited extent of the relevant legislative history, the third step of the *North Haven* approach is necessary if clarification is to be obtained. Indeed, legal commentators and the few courts that have considered the issue have recognized that neither the statutes nor the available legislative history resolve the question of what is a "program or activity" for purposes of Title IX.¹⁸⁵ Nor does the language or history resolve whether indirect funding subjects a university to the Title IX guidelines, or if athletic programs are to be covered. For answers to these questions a thorough examination of the available postenactment history is required.¹⁸⁶ Fortunately, this inquiry proves to be of significantly greater assistance.

Mrs. Green. With Federal funds.

Mr. Waggoner. That is what I mean, Federal Funds.

Id. Then, a little later on, as Rep. Steiger was attempting to further clarify the previous exchange, the following was said:

Mr. Steiger. In title X the gentleman from Louisiana asked relating to a program on [sic] activities receiving Federal financial assistance, and under the "program on activity" one could not discriminate. That is not to be read, am I correct, that it is limited in terms of its application, that is, title X, to only programs that are federally financed? For example, are we saying that if in the English department they receive no funds from the Federal Government that therefore that program is exempt?

Mrs. Green. If the gentleman will yield, the answer is in the affirmative. Enforcement is limited to each entity or institution and to each program and activity. Discrimination would cut off all program funds within an institution.

Mr. Steiger. So that the effect of title X is to, in effect, go across the board in terms of cutting off of funds to an institution that would discriminate, is that correct?

Mrs. Green. The purpose is of title X is to end discrimination in all institutions of higher education, yes, across the board.

Id.

¹⁸⁴ One commentator concludes that "consideration of the dialogue in toto leads one to no conclusion other than that the relevant legislative history is hopelessly ambiguous." Comment, *Ultra Vires Challenge*, *supra* note 6, at 172. Another commentator, however, has been able to conclude that the passages indicate "that a liberal interpretation of the particular program provision was intended." Cox, *supra* note 6, at 39 n.35.

¹⁸⁵ See, e.g., *Grove City*, 687 F.2d at 698; Kuhn, *supra* note 6, at 73-76; Comment, *supra* note 8, at 578.

¹⁸⁶ The weight that should be accorded the abortive bills and resolutions and the accompanying discussions which constitute the post-enactment history is unclear. The *North Haven* Court has noted that though they cannot be given "'the weight of contemporary legislative history,'" they are nonetheless "'authoritative expressions concerning the scope and purpose of Title IX.'" 456 U.S. at 535 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 687 n.7 (1979)). See *supra* notes 159-62 and accompanying text. In *North Haven*, however, the postenactment history was being used to provide additional evidence of Congress' intent regarding the coverage of employment beyond what was contained in the statutory language and the contemporary history. 456 U.S. at 530-31. Here, on the other hand, the postenactment history is being presented as the only available evidence of congressional intent. Because there is no language or legislative history that addresses the direct-indirect funding and athletics issues, it is submitted that the postenactment history in the instant case should be accorded weight at least as great as it was accorded in *North Haven*. Indeed, as it is the only authoritative guide to congressional intent regarding the two issues, greater weight than was allocated in *North Haven* would seem to be warranted.

A. Indirect Funding and Title IX

In general, the postenactment history of Title IX demonstrates that Congress intended to include indirectly funded programs within the scope of Title IX.¹⁸⁷ Congress was fully aware that in the regulations the Department had construed the phrase "federal financial assistance" to include indirect funding, including student aid. During the mandated Congressional review of the Title IX regulations,¹⁸⁸ the subject was addressed specifically by then HEW Secretary Weinberger in hearings on the regulations:

Our view was that student assistance, assistance that the Government furnishes, that goes directly or indirectly to an institution is Government aid within the meaning of Title IX. If it is not, there is an easy remedy. Simply tell us it is not. We believe it is and base our assumption on that.¹⁸⁹

In response to this proposed interpretation, Senator Helms introduced a resolution, prior to the expiration of the 45 day "laying before" period, that would have disapproved the regulations because they did not limit Title IX application to directly funded "programs or activities," and thereby contravened what Senator Helms believed had been the intent of Congress in enacting Title IX.¹⁹⁰ The resolution was never reported out of committee.¹⁹¹ During the same period, several other resolutions were introduced in both houses of Congress that also would have disapproved the regulations in their entirety, yet none was passed.¹⁹² Although Congress' failure to approve the resolutions does not establish that it considered the regulations to be consistent with Title IX, it does lend weight to that argument.¹⁹³

Further evidence that Congress intended Title IX to cover indirect programs comes from exchanges during the hearings on the regulations.¹⁹⁴ The purpose of the hearings was explained by Representative O'Hara, the chairman of the subcommittee conducting the hearings, who stated that during the hearings, "the regulations will be reviewed solely to see if they are consistent

¹⁸⁷ This is the same conclusion reached by the court in *Huffer*, 524 F. Supp. at 535; see also *Grove City*, 687 F.2d at 693 ("the Department was well within its authority when it defined 'recipient' to include any institution which receives federal financial assistance 'through another recipient.'").

¹⁸⁸ See *supra* notes 48-49 and accompanying text.

¹⁸⁹ *Hearings on Sex Discrimination Regulations Before the Subcommittee on Post Secondary Education of the House Committee on Education and Labor*, 94th Cong., 1st Sess. 484 (1975) [hereinafter cited as 1975 *Hearings*].

¹⁹⁰ S. Con. Res. 46, 94th Cong., 1st Sess., 121 CONG. REC. 17,300-01 (1975).

¹⁹¹ *North Haven*, 456 U.S. at 532 n.22. The Committee on Labor and Public Welfare had met in an executive session to discuss the resolution and decided not to report it to the full Senate. *Id.*

¹⁹² See S. 2146, 94th Cong., 1st Sess., 121 CONG. REC. 23,845 (1975) (Helms amendment to limit coverage of Title IX only to programs directly receiving federal aid. Not passed by Senate.); H.R. Con. Res. 310, 94th Cong., 1st Sess., 121 CONG. REC. 19,209 (1975) (Resolution to disapprove of the regulations in toto. No action taken).

¹⁹³ See *supra* note 104.

¹⁹⁴ 1975 *Hearings*, *supra* note 189.

with the law. . . . to see if the regulation writers have read it and understood it the way the lawmakers intended it to be read and understood."¹⁹⁵

During the discussions and exchanges there was, naturally, some confusion and dissent over what Congress intended when passing Title IX. Several congressmen suggested that the proposed regulations were contrary to what Congress intended.¹⁹⁶ In general, however, the majority of the congressmen and congresswomen appear to have believed that the regulations were consistent with congressional intent.

Support for this generalization can be found at many points in the hearings. At one point, Representative Chisholm, after noting the similarity between the language of Title IX and that of Title VI, wondered aloud whether or not the two statutes should be similarly interpreted.¹⁹⁷ In a follow up question, Representative Quie asked whether Mrs. Chisholm believed Congress had intended athletics to be covered under Title IX, inasmuch as athletic programs received no federal funds directly. Mrs. Chisholm indicated in response her belief that the applicable funding would not have to be direct to be covered.¹⁹⁸ Similar sentiments are echoed later on in the hearings. During Representative Hawkins' questioning of Dr. Fuzak, the then President of the National Collegiate Athletic Association (NCAA), and his associates, Mr. Hawkins challenged the assertions of the witnesses that Congress did not intend athletics to be covered by Title IX. Indeed, Mr. Hawkins went so far as to state his belief, albeit a mistaken one, that the committee report specifically had backed the inclusion of indirectly funded programs, including athletics, within the strictures of Title IX.¹⁹⁹

¹⁹⁵ *Id.* at 1.

¹⁹⁶ For instance, Representative Mottl stated: "As you know, the bureaucrats in HEW are all wet on this proposal. I think a moratorium should be invoked that there can be further study." *Id.* at 48.

¹⁹⁷ *Id.* at 50. Representative Chisholm made the following observation:

Now, since the language of title VI and title IX are so similar, don't you think that the title IX ban against sex discrimination under § 901 must be interpreted in the same way?

I repeat title VI, bars racial discrimination in any program, any kind of educational program that receives federal aid directly or indirectly.

Id.

¹⁹⁸ *Id.* at 53.

Mr. Quie. I was wondering if it could not be possibly construed, as the coaches have suggested, that athletics are not funded in any way by the Federal Government and therefore are outside the scope of the HEW guidelines. I think you have the most expertise on this. . . .

Rep. Chisholm. I am trying to see whether or not the money comes from the Federal Government. . . . I just want to be sure that this is understood because it indicates an indirect source of funding. *It does not have to be a direct thing.*

Id. (emphasis added).

¹⁹⁹ *Id.* at 117-18.

Rep. Hawkins. It seems to me the weight of the argument that is being made relies heavily on the assumption that college athletics, including football, do not re-

From a careful reading of the available postenactment legislative history, the vast majority of which cannot be reprinted here, it is apparent that Congress considered indirect funding to be a source of jurisdiction for the enforcement of Title IX. At the very least, Congress certainly was aware of the issue when the regulations were being considered. Yet Congress took no action to exclude indirectly funded programs from the reach of Title IX and the regulations during the "laying before" period. This Congressional inaction strengthens the presumption in favor of the statutory interpretation embodied in the regulations.²⁰⁰ Senator Bayh, during his testimony on one of the resolutions of disapproval, best summed up what appears to have been the prevailing sentiment in Congress. He stated that: "This objection to the coverage of programs which receive indirect benefits from Federal support — such as athletics — is directly at odds with the congressional intent to provide coverage for exactly such types of clear discrimination."²⁰¹

Not only does the evidence available from the hearings, and the failure of Congress to invalidate the regulations during the "laying before" period,

ceive Federal assistance. Is that the thrust of the argument?

Dr. Fuzak. That is correct, direct Federal assistance.

Rep. Hawkins. Direct.

Dr. Fuzak. That is what title IX says.

Rep. Hawkins. What about indirect? Does it receive any indirect Federal assistance?

Dr. Fuzak. Well, we maintain that it does not get any. . . I think that the language of title IX, though, is very clear in that it says "receiving assistance." We maintain that it does not receive assistance.

Rep. Hawkins. I would agree that is obviously a difficult thing to ascertain, but let's understand to what extent Federal assistance may be available to those who may be involved in athletics and specifically football. Would you say that any of those who participate in football may be receiving work-study, basic opportunity grants or any other help due to assistance programs, involving any of the student assistance programs?

Mr. Marshall. Yes, sir; there are students under various Federal programs, work study, who do participate in athletics, both men and women.

Mr. Brown. I think we are taking a common sense and literal reading of these words. Because there is no Federal assistance to the athletic programs of our institutions this provision does not apply.

Rep. Hawkins. Well, I am not so sure. In the report, we backed up that particular position with respect to assistance which may be indirectly received.

Id. See also *id.* at 65, where Representative Chisholm stated:

One of the things that is very important is that Federal aid to one kind of school activity can be indirect financial aid to other kinds of school activities.

For instance, *the student fees and scholarship programs*, the bonds that are put forth to build school stadiums, to that extent it may not be direct, but it is indirect and it means, therefore, that your university may be indirectly in receipt of public funds.

Then, if this is the case, it would seem to me that you must follow the guidelines.

Id. (emphasis added).

²⁰⁰ See *North Haven*, 456 U.S. at 534-35. "And the relatively insubstantial interest given the resolutions of disapproval that were introduced seems particularly significant since Congress has proceeded to amend § 901 when it has disagreed with HEW's interpretation of the statute." *Id.* at 534.

²⁰¹ 1975 *Hearings*, *supra* note 189, at 175.

demonstrate a Congressional intent to include indirect funding within the ambit of Title IX, but Congress also has taken specific action to ensure that the Department's interpretation regarding indirect funding as a source of Title IX coverage remains in effect. Subsequent to the effective date of the regulations, Senator McClure proposed two amendments to Title IX designed to define, in the statute, the terms "education program or activity"²⁰² and "Federal financial assistance."²⁰³ The latter amendment would have defined "Federal financial assistance" as "assistance received by the institution directly from the federal government."²⁰⁴ In his introductory remarks, Senator McClure stated that this amendment, number 390, "deals with the regulations issued under title IX and seeks to restrict some of the overreach of the regulations as they relate to sex discrimination in colleges. The statute does not require the breadth or the reach of the regulations."²⁰⁵ Later in his remarks, the Senator implied that the majority of Congress believed that the regulations were too expansive, but the majority was being frustrated in its attempt to disapprove the regulations.²⁰⁶ This frustration, the Senator asserted, was occurring because the resolutions of disapproval were routinely referred to committees and subcommittees for hearings, the members of which favored the existing interpretation and thus worked to keep the resolutions from being introduced on the floor.²⁰⁷ The Senator apparently misread the will of the majority, however, for later that same day his amendment was defeated 50-30.²⁰⁸

The debate on the McClure amendment illuminates what Congress intended Title IX to encompass, or at least what Congress believed, in 1976, Title IX should encompass. During debate, Senator McClure noted that schools were being deemed subject to Title IX because they were receiving indirect assistance, and he stated that his amendment would mandate that a school receive direct funding before it could be subjected to the statute's prescriptions.²⁰⁹ This statement brought an immediate response from Senator

²⁰² Amend. 389, 94th Cong., 2d Sess., 122 CONG. REC. 28,136 (1976) ("education programs or activity means such programs or activities as are curriculum or graduation requirements.")

²⁰³ Amend. 390, 94th Cong., 2d Sess., 122 CONG. REC. 28,144 (1976).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* The Senator stated:

Those of us who would have them put back into the context of the original congressional enactment are faced with the frustration of a committee that desires to overreach, but is not expressive of the will of the majority of Congress. That is absolutely the case in this particular matter, because there is no question that Congress did not intend the length and breadth of the regulations under title IX.

Id.

²⁰⁸ *Id.* at 28,148.

²⁰⁹ *Id.* at 28,145. During debate, Senator McClure noted that colleges "are being subjected to Federal control because some student may have Federal assistance. My amendment would simply say that it has to be direct Federal assistance before they are subjected to the HEW

Pell, who stated that "the enactment of this amendment would mean that no funds under the basic grant program [BEOG] would be covered by Title IX."²¹⁰ Senator Pell argued that these funds should not be allowed to support discrimination, as this would frustrate the statute's broad policy of preventing any federal funds from being used to support sex discrimination.²¹¹ Similar sentiments were later expressed by Senator Bayh during further discussion on the amendment. The correct interpretation, according to Senator Bayh, was that the construction as advanced in the regulations was consistent with congressional intent. He summarized his beliefs by noting: "If a student is benefited, the school is benefited. It is not new law: it is traditional."²¹²

regulations at all." *Id.* The Senator was referring to the case of Hillsdale College which, though the college had steadfastly refused all direct federal aid during its existence, had been adjudged subject to Title IX because some of its students had received federal loans and grants. *See* In the Matter of Hillsdale College and State of Michigan, Docket No. A-7 (HEW administrative proceeding, Aug. 23, 1978), *rev'd sub nom.* Hillsdale College v. HEW, 696 F.2d 418 (6th Cir. 1982).

²¹⁰ 122 CONG. REC. at 28,145.

²¹¹ *Id.* Senator Pell stated: "While these dollars are paid to students they flow through and ultimately go to institutions of higher education, and I do not believe we should take the position that these Federal funds can be used for further discrimination based on sex." *Id.*

²¹² *Id.* at 28,145-46. It should be noted, however, that Senator Bayh was not always as certain that student aid constituted a basis for Title IX jurisdiction. During the 1975 Hearings he was questioned on the issue. After he had apparently asserted that student aid did constitute a basis for Title IX jurisdiction Representative Quie sought clarification.

Rep. Quie. Are you then saying that the mere fact that an institution accepts students who receive Federal assistance does not bring them under title IX.

Sen. Bayh. My distinguished colleague is usually very astute. Maybe I am having difficulty understanding just what he is directing his attention at. I don't think we have ever had an effort to cut off, say, scholarship students under the GI bill. You can take that scholarship and go anyplace you want to. That hasn't ever been used as leverage.

Rep. Quie. I am talking about whether the Department . . . has overstepped its bounds in claiming that an institution is conducting a program or activity financed by the Federal Government if a student is receiving Federal aid to attend that program or those programs.

Sen. Bayh. You know, I just don't know. I would have to look that up if you would like; perhaps you know. That is not generally the kind of penalties that are meted out, as I am sure you realize.

Rep. Quie. But I have heard it claimed that that is one of the reasons why they have jurisdiction.

Sen. Bayh. I have not.

Id.

This discussion is ambiguous. Senator Bayh appears to have been considering the decision in the then recent case, *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), where the court, because of the University's racially discriminatory practices, allowed the Department to terminate Veterans' Administration loans to students who were attending Bob Jones University. *Id.* at 608. The court ruled that the loans were not being terminated to the students *per se*, because the students remained eligible to receive the loans if they decided to attend another university. *Id.* at 602. The students merely could not use the money to attend a discriminating institution. *Id.*

The exchange between Senator Bayh and Representative Quie, taken in this context, can be read to imply that Senator Bayh did not believe that funds could be cut off to students, but could be deferred until such time as they were to attend a qualifying institution. It does not necessarily imply that the Senator doubted that the funds could be a basis for Title IX juris-

One additional bit of postenactment history sheds light on what Congress assumed Title IX encompassed. In 1977 Senators Helms and McClure introduced a bill which would have specifically excluded student aid as a basis for Title IX jurisdiction.²¹³ The bill provided that any money which an institution received on behalf of or from students "shall not be construed as Federal financial assistance for any purpose under any Act of Congress or any executive Order. . . ."²¹⁴ No action was taken on the bill, however.

Combining all of the available material, the weight of the evidence in the postenactment history suggests one interpretation: Congress did intend that indirect funding, including student aid, bring a program under the aegis of Title IX. Not only was indirect funding assumed to be a sufficient basis for jurisdiction, but it also was considered specifically and kept as a basis for jurisdiction.²¹⁵ Thus, when the Department issued the regulations, it correctly interpreted Congressional intent regarding indirect funding.

B. *Title IX and Intercollegiate Athletics*

As noted previously, the sections of the regulations covering intercollegiate athletics were the most controversial and provoked the most debate and concern both within and without Congress.²¹⁶ Not only were the proposed regulations subject to much public debate, but a plethora of bills and resolutions was introduced concerning the athletics section of the final regulations. Consequently, there is a wealth of postenactment history that specifically addresses the question of whether Congress intended athletics to be covered by Title IX.

The first bill concerning the athletics regulations was introduced even before the proposed regulations were published. On May 20, 1974, almost a month before the proposed regulations were first published, Senator Tower introduced an amendment to Title IX which would have excluded individual intercollegiate sports from its scope to the extent that a sport provided the institution with gross receipts or donations necessary to support that sport.²¹⁷ This exemption would have eliminated the revenue generated by the major revenue-producing sports, mainly football and men's basketball, from the regulations' strictures requiring proportional spending among the sexes for athletics. In a speech in support of his amendment, the Senator pointed out his belief that Congress had not intended Title IX to extend to intercollegiate athletics when

tion. " 'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.' " L. CARROLL, *THROUGH THE LOOKING GLASS*, ch. 6 (1872).

²¹³ S. 1361, 96th Cong., 1st Sess., 123 CONG. REC. 11,890 (1977).

²¹⁴ *Id.* at 11,897.

²¹⁵ See *supra* notes 202-12 and accompanying text.

²¹⁶ See *supra* notes 36-38 and accompanying text.

²¹⁷ S. Amend. 1343, 93d Cong., 2d Sess., 120 CONG. REC. 15,322 (1974).

it had adopted the statute.²¹⁸ After the Senator accepted an amendment offered by Senator Mondale directing the Commissioner of Education to publish proposed regulations for all of Title IX within 30 days, Senator Tower's amendment was adopted on a voice vote.²¹⁹ During the House-Senate conference, however, Senator Tower's amendment was modified to read that the Secretary of HEW shall publish, within 30 days, Title IX regulations, "which shall include with respect to intercollegiate athletics reasonable provisions considering the nature of particular sports."²²⁰

The Department has maintained that the amendment, as adopted, provides clear support for its position that Title IX was intended to cover athletics.²²¹ Various commentators have also attempted to attach significance to either the passage of the amendment or to the change introduced in conference. For instance, one commentator has suggested that the genesis of the amendment does not support the implication that Congress intended Title IX to cover athletics.²²² Another commentator has suggested that the amendment gave the Department explicit statutory authority to regulate intercollegiate athletics.²²³ Because of the ambiguity surrounding both the language and the history of this section, however, neither offers any aid in attempting to discern congressional intent regarding athletics.

The record of activities after the proposed regulations were issued is more helpful, however. Before the Department could send the final proposed regulations to Congress for the "laying before" period, they had to be approved by the president.²²⁴ In his letter of transmittal to Congress, President Ford approved the regulations *in toto*, despite being urged not to do so.²²⁵ More impor-

²¹⁸ *Id.* at 15,323. The senator stated that: "according to my recollection and detailed, recent investigation, I do not believe that Congress intended title IX to extend to intercollegiate athletics. . . ." *Id.*

²¹⁹ *Id.*

²²⁰ Education Amendments of 1974 § 844, 20 U.S.C. § 1681 (1976).

²²¹ In discussing the authority of HEW to promulgate regulations for Title IX, then HEW Secretary Weinberger noted:

An Amendment to the Education Amendments of 1974 was introduced by Sen. John Tower on the floor of the Senate specifically exempting from Title IX revenue from revenue-producing intercollegiate athletics. The "Tower Amendment" was deleted by the conference committee and was, in effect, replaced by the so-called "Javits Amendment." The Javits language, which was enacted, requires that H.E.W.'s Title IX regulation contain reasonable provisions on intercollegiate athletics taking into account "the nature of the particular sport."

Any legal doubt that athletics are covered has thus been resolved."

Note, *Sex Discrimination and Intercollegiate Athletics*, 61 IOWA L. REV. 420, 468 n.269 (quoting *The Chronicle of Higher Educ.*, April 7, 1975 at 11-12).

²²² Kuhn, *supra* note 6, at 75.

²²³ Note, *supra* note 8, at 579-81.

²²⁴ Education Amendments of 1972 § 902, 20 U.S.C. § 1682 (1976). Section 902 provides: "no such rule, regulation, or order shall become effective unless and until approved by the President." *Id.*

²²⁵ See Frohnmayer, *Title IX: Education Amendments of 1972*, 2 J. COLL. & U. L. 49, 59 (1973).

tantly, he specifically noted in the letter that the Department of Justice had advised him that the athletics sections were indeed consistent with Congressional intent regarding athletics.²²⁶

The President's approval of the athletics sections of the regulations was later echoed in hearings on a resolution which was introduced to disapprove of the regulations only to the extent that they mandated coverage of employment.²²⁷ In his statement before the subcommittee conducting the hearings, Representative O'Hara, the sponsor of the resolution, stated that it was the opinion of the committee members who had been charged with examining the proposed regulations, that the athletics sections were entirely consistent with Congressional intent. He noted that this conclusion was reached despite the belief by several members of the committee, including himself, that Congress' decision to cover athletics was unwise as a policy matter.²²⁸

Most of the discussion during the 1975 hearings on the regulations and their consistency with congressional intent concerned the coverage of athletics.²²⁹ The members of the subcommittee conducting the hearings were aware of the concerns of the various lobbyists and witnesses that the language of the statute was susceptible to several interpretations regarding the inclusion of athletics. Representative Buchanan at one point stated: "We may have a special problem in terms of athletics. If so, it is my profound hope that the committee won't take the position which would interpret away title IX, but that we

²²⁶ Letter from President Ford to Congress (July 21, 1975), reprinted in *S. 2106 to Amend Title IX: Hearings Before the Subcommittee on Education of the Committee of Labor and Public Welfare*, 94th Cong., 1st Sess. 188-89 (1975). The letter stated:

As you know, the Department spent almost three years in developing this Regulation. I personally reviewed it with Secretary Weinberger and received advice from the Department of Justice before approving it, as required.

The effect of the Regulation on intercollegiate and other athletic activities has drawn more public comment than any other aspect. Many believe that the Regulation should not apply to intercollegiate athletics. *I am advised, however, that this would not be consistent with the law Congress passed.*

Id. (emphasis added).

²²⁷ *H. Con. Res. 330: Hearings Before the House Subcommittee on Post Secondary Education of the Committee of Education and Labor*, 94th Cong., 1st Sess. (1975).

²²⁸ *Id.* at 9. Representative O'Hara stated:

Mr. Chairman, let me get back to the key issues involved. . . . There are, Mr. Chairman, two charges which have been directed at the resolution of disapproval which I believe must be exposed here and now, not as honest differences of approval, but as downright misstatements.

The resolution of disapproval, Mr. Chairman, has no relevance to the so-called athletic issue. We looked at the athletic regulation along with the rest of the set of regulations, and whatever our individual conclusions about its wisdom or its importance, *there was no finding of inconsistency with regard to that regulation.*

I have reservations about the wisdom of those regulations, and I have introduced legislation to clarify the law in this respect. But that is a very different thing from disapproving the regulations.

Id. (emphasis added).

²²⁹ See generally 1975 Hearings, *supra* note 189.

may make some specific legislative changes."²³⁰ Yet the members of the committee saw no need to propose changes to Title IX to clarify the language of the statute. Rather, from the members' statements, it is apparent that they assumed that athletics were covered under the statute as written.²³¹ Indeed, although during the hearings the NCAA and various University administrators, coaches, and professors urged the committee members to issue a statement of disapproval, the members refused to do so.

After it became apparent that the House was not going to disapprove the athletics sections of the regulations, several members of the Senate introduced resolutions to induce the Senate to voice its disapproval of the athletics sections. The Senate resolutions, however, fared no better than their counterparts in the House. Senator Laxalt introduced one such resolution.²³² In his introduction, he asserted that the regulations regarding athletics "greatly exceed the intent of Congress and are inconsistent with the expressed language of title IX."²³³ Senator Laxalt noted that the language mandated that only programs receiving federal financial assistance were covered under the statute.²³⁴ He further noted that there was not a college athletic department anywhere in the country that directly received federal funding, and then stated his belief that: "The intercollegiate athletics provisions of the regulations are thus inconsistent with the statute in that they impose requirements on college programs not receiving Federal assistance."²³⁵ The Senator also specifically noted that the Department was interpreting the statute to include student loans and grants within the term "federal financial assistance," and intended to subject a university's athletic program to Title IX's guidelines on the basis of its students having accepted these federal funds.²³⁶ He concluded that the Department had "both exceeded the scope of its authority and contravened the intent of Congress expressed in the provisions of title IX," and urged disapproval of the two athletics sections of the regulations.²³⁷ Senator Laxalt's resolution was not acted upon.²³⁸

²³⁰ *Id.* at 95.

²³¹ See *id.* at 186 (remarks of Rep. Blouin) ("I think . . . that the legislation's intent is clear, to balance off the institutional educational opportunities of athletics."); *id.* at 177-78 (remarks of Rep. Brademas) ("it is well-settled that statutes such as the one under consideration require a clean bill of health for the entire educational institution, not just the part of the institution that is directly receiving assistance . . . [and] athletics would be included, would be covered by the regulations under consideration."); *id.* at 182-83 (remarks of Rep. Chisholm) ("Although the furor has been centered around intercollegiate sports activity, I think title IX embraces much more than just sports."); *id.* at 184 (remarks of Rep. Simon) ("I agree with your conclusion that HEW acted properly; this is within its scope."); *id.* at 184-85 (remarks of Rep. Buchannan).

²³² S. Con. Res. 52, 94th Cong., 1st Sess., 121 CONG. REC. 22,940 (1975).

²³³ *Id.*

²³⁴ *Id.* at 22,940-41.

²³⁵ *Id.* at 22,941.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *North Haven*, 456 U.S. at 532 & n.22.

On the same day that Senator Laxalt introduced his resolution, he and Senators Tower, Bartlett, and Hruska introduced a bill, S. 2106, to amend Title IX.²³⁹ The bill was very similar in design to the amendment which Senator Tower had previously introduced,²⁴⁰ and would have exempted from Title IX's coverage the revenues produced by specific sports to the extent that the funds produced did not exceed the amount budgeted by the school for that sport.²⁴¹ After the regulations had already become effective, two days of hearings were held on the bill.²⁴² During the hearings, Senator Hruska, though noting his personal doubt about the intent of Congress with respect to coverage of athletics, stated that the bill did not challenge the application of Title IX to athletics generally, as the majority of Congress had already acquiesced in the Department's interpretation.²⁴³ "Should S. 2106 become law, Title IX would continue to apply to all other aspects of intercollegiate athletics . . . I cannot emphasize too strongly the limited scope of this bill."²⁴⁴

Others echoed the belief that Title IX mandated coverage of athletics. The ever present Senator Bayh argued against reporting the bill to the full committee, stating: "The question before this subcommittee today is whether the Congress should retreat from the full commitment it has given to provide equal educational opportunity for women in athletics."²⁴⁵ A representative of HEW noted that "it is clear that the statute covered athletic programs offered by educational institutions,"²⁴⁶ while Senator Pell stated his opinion that Congress had already decided the issue when it declined to pass any of the resolutions of disapproval which had been placed before it.²⁴⁷ The bill was never reported out of the subcommittee.

It is apparent from the bills which were introduced and the discussions on those bills that Congress was fully aware of both the Department's interpretation of Congressional intent as embodied in the regulations, and of the consequences of allowing that interpretation to stand. Congress was given several opportunities to either disapprove the regulations or amend the statute, yet declined to do so. It did, however, amend the statute several times to exclude other programs which, if they received any funding at all, received only in-

²³⁹ S. 2106, 94th Cong., 1st Sess., 121 CONG. REC. 22,777 (1975).

²⁴⁰ See *supra* text accompanying notes 217-23.

²⁴¹ 121 CONG. REC. 22,777.

²⁴² See *S. 2106 Hearings*, *supra* note 226.

²⁴³ *Id.* at 7. "As [Senator Tower] emphasized, S. 2106 does not challenge the application of Title IX to intercollegiate athletics, although I have serious doubts about the intent of Congress in that regard." *Id.*

²⁴⁴ *Id.* at 7-8.

²⁴⁵ *Id.* at 46.

²⁴⁶ *Id.* at 170 (remarks of Assistant Secretary Kurtzman).

²⁴⁷ *Id.* at 1. "I think it is important to state here that title IX was enacted in 1972, and it is the law. Regulations were issued, regulations which the Congress could have disapproved of, yet did not." *Id.*

direct federal funding.²⁴⁸ Consequently, the conclusion is inescapable that Congress did intend Title IX to reach intercollegiate athletics and that the Department correctly interpreted the intent of Congress when it promulgated the regulations.

V. AFTERMATH AND IMPLICATIONS

The authority given the Department of Education by Title IX must be interpreted broadly if the statute is to be administered as Congress intended it to be. The statute was enacted to prevent federal funds from being used to support sex based discrimination in education. Congress intended funds indirectly received by educational institutions, including money which was initially received by students from the government, to fall within the prohibition. There are several reasons for reaching this conclusion. Congress was appraised fully of both the Department's interpretation regarding the use of indirect funds as a basis for jurisdiction, and of the inclusion of athletic programs under that jurisdictional basis. Congress also was fully aware of the extent of the opposition to the Department's interpretation. Yet Congress took no steps to exclude athletics from Title IX coverage. Quite the contrary, it defeated several resolutions and bills which would have specifically excluded athletics, or at least portions thereof, from Title IX's coverage. Yet, Congress was not hesitant to amend the statute when it did decide that the Department's regulations had in fact gone beyond the scope of the authorization. Consequently, the regulations regarding indirectly funded programs in general, and athletic programs specifically, are within the scope of the statutory grant of authority.

Returning to the two major cases considered in this note, it is apparent that the *Haffer* decision is the one most consonant with both congressional intent and the approach established by the Supreme Court in *North Haven* for discerning that intent. The *Haffer* court correctly determined that the primary question for decision was whether the athletic program was a "program or activity receiving Federal financial assistance" for purposes of Title IX. Although the *Haffer* district court reached its decision before *North Haven* had been decided, the *Haffer* court anticipated the approach of the Supreme Court decision. Finding the statutory language ambiguous, the *Haffer* court conducted a review of both the pre- and postenactment legislative history and concluded that it was obvious that "Congress approved of the broad scope of Title IX, and specifically its application to intercollegiate athletic programs."²⁴⁹

In contrast, although the *Richmond* court had the *North Haven* decision before it, it failed to analyze the statute using the *North Haven* approach. The *Richmond* court noted that it made its determination following "careful consideration of the briefs, stipulated facts, and relevant authority."²⁵⁰ Although the

²⁴⁸ See *supra* note 98.

²⁴⁹ *Haffer*, 524 F. Supp. at 534.

²⁵⁰ *Richmond*, 543 F. Supp. at 327.

briefs presumably made some mention of the legislative and postenactment histories, the court failed to address either in its opinion. Instead, the court merely determined that Congress intended only specific "educational programs" to be covered, without offering any justification for its determination. Furthermore, the court never defined exactly what constituted an "educational program" for purposes of Title IX. Rather, the court focused on the nature of the funding, ruling that Congress intended only directly funded "programs," whatever they might be, to fall within the ambit of Title IX.²⁵¹ This emphasis on direct funding as the sole Title IX jurisdictional basis is not a correct interpretation of Congressional intent, as expressed in hearings and debates on the issue. Accordingly, it is apparent that the *Haffer* decision is the one consistent with Congressional intent and is the one which should be followed in future Title IX cases.²⁵²

There are still several questions which remain unanswered, however. One question is: What amount of aid should be required to subject a school to the mandates of Title IX? Should more than a *de minimus* amount be necessary? or should any amount, no matter how small, suffice to require Title IX compliance? It is unlikely, however, that this question will come up in a university context, for it is doubtful that many higher education institutions would be able to have many students forego their BEOG's, GSL's and NDSL's and still have them be able to attend school. Because of the pervasiveness of these federal grant and loan programs, which qualify as indirect aid to a school under the regulations, most colleges and universities will continue to be held to compliance with Title IX. It is submitted, however, that if force is to be given to the statute's broad policy objective, preventing *any* federal money from being used to support discrimination, a school's receipt of any amount of federal aid, *de minimus* or not, should suffice to bring it within the ambit of the statute.

A more troublesome question is what result should ensue if a university builds a financial "chinese wall" around its athletic department, or a small portion of the department, so that the athletic department is not funded out of the same pool of resources that the student loans and grants have gone into? It is conceivable, albeit unlikely, that a university could establish a separate de-

²⁵¹ *Id.* at 333.

²⁵² In general, the *Haffer* decision comports with the restrictions and guidelines established in *North Haven*. The *Richmond* court dismissed in a sentence the district court's opinion in *Haffer*, 543 F. Supp. at 328, and focused almost exclusively on the program-specific limitation of section 901 and *North Haven*, ruling that the Department had contravened that limitation in promulgating the regulations. *Id.* at 327. Because the Supreme Court declined to define "program or activity" for purposes of Title IX, however, the program-specific limitation is a paper tiger. All that is necessary to comply with the limitation is to define "program" as encompassing the whole institution when indirectly received general funds are alleged as the source of departmental jurisdiction. See *Grove City*, 687 F.2d at 698-99; *Haffer*, 524 F. Supp. at 541. To the extent, however, that the district court in *Haffer* suggests that the Department's regulatory authority is broader than its termination authority, 524 F. Supp. at 533-34, its opinion has been superceded by the Supreme Court's ruling to the contrary in *North Haven*. See 456 U.S. at 535-36.

partment that would house only the major revenue-producing sports and have that department be funded solely from event fees and alumni donations. Moreover, the university could fully cover the tuition and living expenses of its athletes from this separate department's funds and thus obviate need for its student-athletes to accept federal financial aid. Without any nexus between this separate department and general federal funds provided to the university, the Department would be hard pressed to meet the program-specific limitation established by the Supreme Court in *North Haven*.

Although the likelihood that such a situation will occur is remote, in the event that it does, the Department should be allowed to interpret its mandate as allowing it to cover such a situation. As has been seen, Congress was unable to anticipate that the coverage of athletics would be challenged, much less that a wall around an athletic department might be created. Thus, it is obvious that Congress will not have prescribed the correct treatment of all possible structural permutations which a university could conceive. Given the broad scope of the statute, however, the Department should be granted sufficient leeway under the statute to reach unusual situations. Form should not be allowed to triumph over substance. In the event a university does create such a wall, it is submitted that the Department should be allowed to treat it as a sham, and require Title IX compliance despite the existence of the wall. This result would be preferable to allowing a university to escape compliance with the statute through structural maneuvers.

Finally, assuming the Department will be able to reach a university through the financial aid which its students receive, what should be the penalty meted out should the university not remedy its sex discrimination problems? Section 902 authorizes the Department to either terminate or refuse to continue funding in the event of a failure of a recipient to comply with the regulations.²⁵³ It is submitted that the latter alternative should be exercised when students' funds are involved. Although the termination of funding to a university's current recipients could be an effective tool in persuading it to comply with the regulations, such a result could work tremendous harm upon students who are not responsible for the discrimination. A better alternative would be a refusal by the Department to allow prospective students to qualify for aid, with the requirement that the school advertise this restriction prominently in its catalogues and recruiting information. The school would be given the same incentive to comply with the regulations, but the severe impact that immediate termination would have on current students would be eliminated. This procedure would comport with Congress' desire that fund termination only be used as a last resort where less drastic measures have failed because of the severe impact termination has on students.²⁵⁴

²⁵³ See *supra* note 3.

²⁵⁴ See *Cannon v. University of Chicago*, 441 U.S. 677, 704-6 nn.38-40; *Hillsdale College v. HEW*, 696 F.2d 418, 437 (6th Cir. 1982) (Edwards, C.J., dissenting); *Haffer*, 524 F. Supp. at 533-34.

CONCLUSION

Title IX was enacted to prevent any federal funds from being used to support sex discrimination in education. Following the *North Haven* approach to Title IX analysis, this note has determined that Congress intended that indirectly received funds, such as student grants and loans, fall within the statute's prohibition. This intent is evidenced in both the contemporary legislative history and the postenactment history of the statute. Because the decision of the *Haffer* court is the one most consonant with that intent, it should be followed in future Title IX cases involving the athletic regulations.

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