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Bump, Set, Spiked: Determining Whether the National Collegiate Athletic Association Is a Recipient of Federal Funds under Title IX

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Bump, Set, Spiked: Determining Whether the National Collegiate Athletic Association Is a Recipient of Federal Funds Under Title IX

National Collegiate Athletic Ass'n v. Smith[1]

I. INTRODUCTION

Since the enactment of the Education Amendments of 1972,[2] a major issue facing the National Collegiate Athletic Association ("NCAA") and its member schools has been the applicability of Title IX of the Amendments to those organizations. Title IX provides that no organization that operates educational programs may discriminate on the basis of sex if that program receives federal financial assistance.[3] Like many other federal antidiscrimination acts, the main debate under Title IX involves when a particular organization can be deemed to be "receiving" federal financial assistance. While the majority of NCAA member schools receive federal funds, the NCAA as an entity has never been held to be a recipient of federal funds and as such has not been held to the standards established in Title IX.

In *National Collegiate Athletic Ass'n v. Smith*, the United States Supreme Court determined that the NCAA was not a recipient of federal financial assistance by virtue of accepting membership dues from institutions that do receive federal funding.[4] However, the Court left unresolved the issue of whether the NCAA might be a recipient of federal funding under either of two alternative theories proposed by plaintiff Smith. The Court's emphasis on Smith's proposed theories indicates that Title IX coverage of the NCAA may soon be a reality.

II. FACTS AND HOLDING

In 1991, Renee Smith began her college education at St. Bonaventure University.[5] She played volleyball for St. Bonaventure for two seasons between 1991 and 1993, electing not to play the following year.[6] After graduating early from St. Bonaventure, during the 1994-95 athletic year Smith enrolled in a

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1. 525 U.S. 459 (1999).
2. 20 U.S.C. §§ 1681-1688 (1994).
3. 20 U.S.C. §§ 1681-1688 (1994).
4. *Smith*, 525 U.S. at 470.
5. *Id.* at 464. St. Bonaventure University is a member of the NCAA and fields athletic teams in many different NCAA sanctioned sports, including men's and women's basketball and women's volleyball.
6. *Id.*

postgraduate program at Hofstra University, and during the 1995-96 athletic year she enrolled in another postgraduate program at the University of Pittsburgh.[7] During both seasons Smith sought to play intercollegiate volleyball but the NCAA denied her eligibility to participate because of restrictions on the eligibility of postbaccalaureate students.[8] The NCAA's Postbaccalaureate Bylaw, an exception to the general NCAA rule that only undergraduate students can participate in intercollegiate athletics, states that a postgraduate student-athlete may participate in intercollegiate athletics only if she seeks to participate at the same institution that awarded her an undergraduate degree.[9] At Smith's request, both Hofstra University and the University of Pittsburgh petitioned the NCAA to waive the restrictions, and each time the NCAA refused.[10]

In August 1996, Smith filed suit against the NCAA alleging that its refusal to grant her a waiver to play intercollegiate athletics at Hofstra University and the University of Pittsburgh was based on sex, in violation of Title IX of the Education Amendments of 1972.[11] Specifically, she alleged that the NCAA discriminated on the basis of sex by granting more postgraduate athletic waivers to male student-athletes than to female student-athletes.[12] The NCAA moved to dismiss Smith's Title IX complaint, arguing that the complaint failed to allege that the NCAA was a recipient of federal financial assistance and therefore was

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7. *Id.*

8. *Id.*

9. *See* NCAA, 1993-94 MANUAL, Bylaw 14.1.8.2, at 123. The full Postbaccalaureate Bylaw states:

> A student athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a United States baccalaureate degree or its equivalent), a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution, or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable five-year or 10-semester period set forth in 14.2.

Id.

10. National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 464 (1999).

11. *Id. See* 20 U.S.C. §§ 1681-1688 (1994). Smith's complaint also stated claims under the Sherman Act and state contract law. *Smith*, 525 U.S. at 464. The district court dismissed the Sherman Act claim and declined to retain jurisdiction over the state law claim. Smith v. National Collegiate Athletic Ass'n, 978 F. Supp. 213, 218-20 (W.D. Pa. 1997). The Third Circuit affirmed the dismissal of the Sherman Act claim, Smith v. National Collegiate Athletic Ass'n, 139 F.3d. 180, 187 (3d Cir. 1998), and the Supreme Court denied certiorari on that issue. Smith v. National Collegiate Athletic Ass'n, 525 U.S. 872 (1998).

12. *Smith*, 525 U.S. at 464-65.

not subject to suit under Title IX.[13] In response Smith argued that because the NCAA governs the federally funded intercollegiate athletic programs of its member institutions, that these programs were educational in nature, and the NCAA benefits financially from the federal funds received by its members, the NCAA was subject to suit under Title IX.[14]

The district court granted the NCAA's motion and dismissed Smith's suit, concluding that the alleged connection between the NCAA and the federal financial assistance of its member institutions was "too far attenuated" to maintain a Title IX claim.[15] Smith then sought leave to amend her complaint to add Hofstra University and the University of Pittsburgh as defendants, and to allege both that the NCAA receives federal funding through another recipient and also that the NCAA operates an educational program or activity that benefits from the receipt of this funding.[16] The district court denied Smith's motion as moot because the case had already been dismissed.[17]

The Third Circuit reversed the district court's refusal to grant Smith leave to amend her complaint because Smith's proposed amended complaint "would have been sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would have survived a motion to dismiss."[18] The NCAA subsequently appealed to the Supreme Court.[19]

The Supreme Court granted certiorari[20] to determine "whether a private organization that does not receive federal financial assistance is subject to Title IX because it receives payments from entities that do."[21] Smith argued that member dues were sufficient to bring the NCAA within the reach of Title IX.[22] Smith also proposed two alternative theories for why the NCAA should be subject to Title IX.[23] First, she contended that the NCAA received federal funds

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13. *Id.*

14. *Id.*

15. *Id.* (quoting *Smith*, 978 F. Supp. at 219-20).

16. *Id.* The National Youth Sports Program Fund receives federal funds in connection with the National Youth Sports Program, an entity that the NCAA created that conducts summer programs on college campuses around the country, but from which the NCAA contends it is distinct. The National Youth Sports Program Fund receives assistance from a Community Services Block Grant through the Department of Health and Human Services. Brief for the United States as Amicus Curiae Supporting Respondent, National Collegiate Athletic Ass'n v. Smith, 1998 WL 858534 (Dec. 8 1998) (No. 98-84).

17. National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 465 (1999).

18. Smith v. National Collegiate Athletic Ass'n, 139 F.3d. 180, 190 (3d Cir. 1998).

19. *Smith*, 525 U.S. at 465.

20. National Collegiate Athletic Ass'n v. Smith, 524 U.S. 982 (1998).

21. *Smith*, 525 U.S. at 465.

22. *Id.*

23. *Id.* at 469-70.

both directly and indirectly through the National Youth Sports Program.[24] Second, Smith argued that when a recipient of federal funds cedes authority over a federally funded program to another entity, the controlling entity becomes amenable to Title IX regardless of whether the controlling entity receives federal funding itself.[25] The Supreme Court held that the NCAA was not subject to Title IX simply because it receives funds from members who do receive federal funding.[26] However, the Court declined to discuss whether the NCAA would be subject to Title IX under either of the alternative theories proposed by Smith because the issues were not raised in the lower courts.[27]

III. LEGAL BACKGROUND

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any educational program or activity that receives federal financial assistance.[28] Similar to other federal antidiscrimination acts,[29] the main legal controversy regarding Title IX has been over the scope of Title IX and its applicability in different situations. While there are many issues that arise in the course of Title IX litigation, this Note is limited to the examination of when a private program or organization is deemed to be "receiving" federal financial assistance.

The debate over the applicability of Title IX can be divided into two schools of thought: (1) the program-specific approach, and (2) the institution-wide approach.[30] Under the program-specific approach, Title IX is applicable only to the specific program within the organization that receives federal

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24. *Id.* at 469. *See supra* note 16 and accompanying text.

25. *Id.* at 469-70. The United States filed an amicus curiae brief in support of Smith's alternative contentions that the NCAA should be subject to Title IX. *Id.* The Government supported all of Smith's contentions, including that the NCAA was a recipient of federal funds through the National Youth Sports Program. *Id.*

26. *Id.* at 468-70.

27. *Id.* at 470.

28. *See* 20 U.S.C. §§ 1681-1688 (1994). Title IX states: "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." 20 U.S.C. § 1681(a) (1994).

29. *See* 29 U.S.C. § 794(a) (1994) (prohibiting discrimination under the Rehabilitation Act on the basis of disability in "any program or activity receiving federal assistance"); 42 U.S.C. § 2000d (1994) (prohibiting race discrimination in "any program or activity receiving Federal financial assistance"); 42 U.S.C. § 6102 (1994) (prohibiting discrimination on the basis of age in "any program or activity receiving Federal financial assistance").

30. *See* Brian L. Porto, Annotation, *Suits By Female Athletes Against Colleges and Universities Claiming That Decisions To Discontinue Particular Sports or To Deny Varsity Status To Particular Sports Deprive Plaintiffs of Equal Educational Opportunities Required By Title IX*, 129 A.L.R. FED. 571 (1996).

funding.[31] Under the institution-wide approach, if any program within an organization receives federal financial assistance, then the entire organization is subject to Title IX regulation.[32] These two tests lead to vastly different results.

During the 1970s and much of the 1980s, courts applied the program-specific approach to Title IX questions.[33] Efforts to change this policy came to the forefront in *Haffer v. Temple University*.[34] In *Haffer*, eight female undergraduates brought suit against Temple University claiming that the University's disproportionate spending on men's athletic programs violated Title IX.[35] Temple argued that although the University as a whole received federal funds, its athletic program received no earmarked federal funding and consequently was not subject to Title IX.[36] The Third Circuit upheld the district court's application of the institution-wide approach and held that Temple University's athletic department was subject to Title IX regulation because other programs at the University benefitted from federal funds.[37] The Third Circuit based its decision on *Grove City College v. Bell*,[38] a Third Circuit ruling that was decided while *Haffer* was pending.[39] The Third Circuit's application of the institution-wide approach to Title IX issues was subsequently addressed by the Supreme Court in *Grove City College v. Bell*.[40]

Grove City was the first case in which the Supreme Court addressed the applicability of Title IX to an institution that did not directly receive federal funding.[41] Grove City College was a private institution that received no direct state or federal financial assistance, but did enroll students who received Basic Educational Opportunity Grants, ("BEOGs")[42] under the Department of

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31. *Id.*

32. *Id.*

33. *Id. See generally* Hillsdale College v. Department of Health, Educ. & Welfare, 737 F.2d. 520 (6th Cir. 1982) (lower court opinion vacated for reconsideration under the standards established in *Grove City College v. Bell*, 687 F.2d 684 (3rd Cir. 1982)); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (private university's attempt to block a Department of Education investigation into its athletic department); Brunswick Sch. Bd. v. Califano, 449 F. Supp. 866 (S.D. Me. 1978) (program-specific approach applied to federal employment practices mandate under Title IX involving pregnancy and high school teachers).

34. 688 F.2d 14 (3d Cir. 1982).

35. *Id.* at 15.

36. *Id.*

37. *Id.* at 17.

38. 687 F.2d 684 (3d Cir. 1982).

39. *Haffer*, 688 F.2d at 17.

40. 465 U.S. 555 (1984).

41. However, the Court had previously examined Title IX's language and legislative history and determined that an agency's right to issue or terminate funds under Title IX was subject to the "program-specific limitations of §§ 901 and 902." North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 538 (1982).

42. Basic Educational Opportunity Grants, or Pell Grants, were designed by

Education's Alternate Disbursement System.[43] The Supreme Court affirmed the Third Circuit's ruling that the indirect receipt of federal funds by Grove City through its students receipt of BEOGs was sufficient to bring the college within the scope of Title IX.[44] However, the Court specifically rejected the institution-wide approach applied by the Third Circuit.[45] The Court stated that Title IX should be applied using a program-specific approach and that Grove City's financial aid department, as the only department receiving the federal BEOG monies, should be the only program at Grove City required to comply with Title IX.[46] Because BEOGs are not "unrestricted grants" that a college can use for any purpose, but are grants designed to make college available to students who cannot afford it, the Court held that the federal money provided to Grove City only implicated the university's financial aid department under Title IX.[47]

In 1987, Congress, unhappy with the Supreme Court's limited view of Title IX in *Grove City*, passed the Civil Rights Restoration Act of 1987.[48] The Act was designed specifically by Congress to "restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered."[49] The Act overturned *Grove City* and extended Title IX coverage to entire organizations, so long as any part of an organization operates an educational program and receives federal financial assistance.[50] Hence, the Act spelled the end of the program-specific approach to Title IX questions.[51]

Congress to assist students in paying for a post secondary education. *See* 20 U.S.C. § 1070(a) (1994).

43. *Grove City*, 465 U.S. at 559. Under the Alternate Disbursement System, BEOG monies are paid directly to institutions on behalf of eligible enrolled students. *See* 20 U.S.C. § 1070a(a)(1) (1994).

44. *Grove City*, 465 U.S. at 563-70.

45. *Id.* at 572-73.

46. *Id.* at 573-74.

47. *Id.* at 573.

48. 20 U.S.C. § 1687 (1994).

49. Pub. L. No. 100-259 § 2, 102 Stat. 28 (1988).

50. *See* 20 U.S.C. § 1687 (1994). The Civil Rights Restoration Act of 1987 has been construed consistently with this intent. *See, e.g.*, Williams v. School Dist. of Bethlehem, 998 F.2d. 168, 171 n.3 (3d Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994) (Title IX applied to all programs in the school district despite the limited scope of federal funding); Cohen v. Brown Univ., 991 F.2d 888, 894 (1st Cir. 1993) (Title IX applied to the entire university even though only specific programs received federal monies).

51. This point is further reiterated by Title IX regulations promulgated by the Department of Education. A "recipient" of federal funds is defined as:

> [A]ny 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

Between its decisions in *Grove City* and *Smith*, the Supreme Court had only one occasion to specifically address Title IX.[52] However, the Court had discussed the broader issue of when an organization is deemed to be "receiving" federal financial assistance. In *United States Department of Transportation v. Paralyzed Veterans of America*,[53] the question was whether extensive federal financial assistance provided to airports and the federally operated air traffic control system, was sufficient to make Section 504 of the Rehabilitation Act applicable to commercial airlines.[54] Paralyzed Veterans of America argued that while commercial airlines did not directly receive federal funding, airport operators converted the federal funds they received into facilities that were for the direct economic benefit of the airlines; thus, the commercial airlines were "indirect recipients" of federal aid.[55] Furthermore, Paralyzed Veterans of America argued that *Grove City* stood for the proposition that federal financial assistance could be either direct or indirect.[56]

The Supreme Court ruled that the *Grove City* decision "does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid."[57] The Supreme Court also rejected the reasoning of the District of Columbia Circuit that airports and airlines were so "inextricably intertwined" that the nexus between them made the airlines liable as recipients of federal funds.[58] The Court concluded that the determination of whether a program is a "recipient" of federal funds is to be determined by the scope of the grant statute, not by "hypothetical collective concepts" like commercial air travels.[59]

Athletic associations, like the NCAA, present a similar problem to that of *Paralyzed Veterans*. Specifically, the question is whether an association's receipt of dues from members who operate educational programs and receive federal financial assistance is enough to bring the association within the reach of Title IX. In *Horner v. Kentucky High School Athletic Ass'n*,[60] the Sixth

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such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.2(h) (1998).

52. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 66-69 (1992) (holding that Title IX does imply a private right of action for individuals seeking remedies under the statute).

53. 477 U.S. 597 (1986).

54. *Id.* at 599. Rehabilitation Act § 504 was the precursor to the Americans with Disabilities Act and was designed to prevent discrimination against individuals with disabilities in federally funded programs. *See* 29 U.S.C. § 794 (1994).

55. *Paralyzed Veterans*, 477 U.S. at 606.

56. *Id.* at 606-07.

57. *Id.* at 607.

58. *Id.* at 610.

59. *Id.* at 611.

60. 43 F.3d 265 (6th Cir. 1994).

Circuit held that the Kentucky High School Athletic Association ("Association") was a recipient of federal funds under Title IX.[61] The court based its decision on two factors: (1) that Kentucky law defined actions of the Association as actions of the Kentucky State Board for Elementary and Secondary Education, which itself was subject to Title IX; and (2) that the Association received dues from member schools that received federal funds.[62] While not basing its decision solely on the receipt of dues from federally funded members, the *Horner* court did advance the idea that this concept would be significant in future determinations regarding the applicability of Title IX to athletic associations.[63] The Supreme Court was confronted with this question in *Smith*.

IV. THE INSTANT DECISION

The unanimous opinion of the Court in *Smith* first examined the language of Title IX and the Civil Rights Restoration Act and concluded that if any part of the NCAA received federal assistance, then all NCAA operations would be subject to the requirements of Title IX.[64] The Court then examined its holdings in *Grove City* and *Paralyzed Veterans* to clarify the circumstances under which an entity would qualify as a recipient of federal funds.[65] The Court also examined the Third Circuit's decision not to apply the "recipient" of federal funds definition established in *Paralyzed Veterans*.[66] The Court reasoned that by interpreting Section (h) of the regulation to extend Title IX coverage to beneficiaries of federal funding as well as recipients, the Third Circuit did not give effect to the entire text of Section 106.2(h).[67] The Court held that the first part of Section 106.2(h) of the regulations, defining a recipient as any entity "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," was in accord with the precedents established in

61. *Id.* at 272. In *Horner*, female high school student athletes in the State of Kentucky sued the athletic association and the State Board for Elementary and Secondary Education alleging that the refusal of the athletic association to sanction girls' interscholastic fast-pitch softball as a varsity sport was discrimination against females in violation of Title IX. *Id.* at 268.

62. *Id.* at 272.

63. The Court has also recently agreed to examine Title IX's applicability to state high school athletic associations based on the state action doctrine under 42 U.S.C. § 1983 (1994). *See* Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n, 180 F.3d 758 (6th Cir. 1999), *cert. granted*, 120 S. Ct. 1156 (2000).

64. National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 465-66 (1999).

65. *Id.* at 466-69.

66. *Id.* at 467-69. *See supra* note 49 and accompanying text.

67. *Smith*, 525 U.S. at 468.

Grove City and *Paralyzed Veterans,* and Title IX coverage was not triggered when an entity merely benefits from federal funding.[68]

The Court further stated that the mere receipt of member dues by the NCAA demonstrated, at most, that the NCAA indirectly benefits from the federal assistance provided to its members, and that this alone, without more, was not sufficient to trigger Title IX coverage.[69] The Court also explained that while "evident" distinctions exist between the relationship of airlines and airports in *Paralyzed Veterans* and the relationship between the NCAA and its members,[70] those distinctions were not relevant to the "narrow" issue of "whether an entity that receive[d] dues from recipients of federal funds [was] for that reason a recipient itself."[71]

Finally, the Court declined to address the two alternative theories proposed by Smith to bring the NCAA under the umbrella of Title IX: (1) whether the NCAA receives federal funding through the National Youth Sports Program, and (2) whether the NCAA's control over its member schools' athletic programs renders it a recipient of federal funds.[72] While acknowledging that the NCAA may receive funds through the National Youth Sports Program,[73] the Court nevertheless declined to address Smith's alternative theories because they were not decided by the lower court.[74]

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68. *Id.*

69. *Id.*

70. The NCAA is "created by and comprised of" schools that receive federal funds and governs those schools with respect to their athletic rules and regulations. The Third Circuit urged that this relationship is "qualitatively different" from that of airlines and airports. Smith v. National Collegiate Athletic Ass'n, 139 F.3d 180, 188-89 (3d Cir. 1998).

71. National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 469 (1999).

72. *Id.* at 469-70.

73. *Id.* at 470 nn.6-7. Two district courts have held that the National Youth Sports Program's relationship to the NCAA created a genuine issue of fact as to whether the NCAA was a recipient of federal financial assistance. *See* Bowers v. National Collegiate Athletic Ass'n, 91 F. Supp. 2d 460, 494 (D.N.J. 1998) (denying motion for summary judgment on a Rehabilitation Act suit against the NCAA because genuine questions of fact existed concerning whether the NCAA received federal money through the National Youth Sports Program); Cureton v. National Collegiate Athletic Ass'n, No. CIV.A.97-131, 1997 WL 634376, at *2 (E.D. Pa. Oct. 9, 1997) (refusing summary judgment in a Title VI action against the NCAA). The Department of Health and Human Services has also issued two letter determinations that the NCAA is a recipient of federal financial assistance through the Department's grant to the National Youth Sports Program Fund. *Smith,* 525 U.S. at 470 n.7.

74. *Smith,* 525 U.S. at 470. Smith's alternative theories were alluded to in her brief to the Third Circuit. *Id.* at 470 n.6.

V. COMMENT

The Supreme Court's decision in *Smith* appears consistent with precedent, but leaves many important questions about the reasons for the Court's holding unanswered. Moreover, the Court appears to have left open the possibility of Title IX application to the NCAA. Given the Court's inadequate basis for its decision, it is unclear exactly what impact *Smith* will have on future Title IX cases.

The *Smith* decision affirmed the language of the Supreme Court's decision in *Paralyzed Veterans*. Specifically, in order to bring a private organization under the umbrella of federal law—Title IX, the Rehabilitation Act, or other similar laws relating to federally funded activities—a potential plaintiff must show that the private organization does not merely "benefit" from federal financial assistance, but actually receives such assistance, either directly or indirectly. In *Paralyzed Veterans*, the benefits received were the facilities and runways that the airports constructed with federal grant money and provided to commercial airlines for their use. In *Smith*, the benefits received by the NCAA were the monetary dues paid by member schools to whom federal financial assistance was extended. This is an important, yet tenuous, distinction. While airlines benefit from the conversion of federal financial assistance into facilities, the NCAA benefits directly by receiving money from its member schools. Still, the Supreme Court refused to extend the application of Title IX to any organization that receives money from members that receive federal financial assistance. Such a broad application of Title IX would yield almost "limitless coverage" to private groups and organizations.[75] The Supreme Court's decision in *Smith* expounds the rationale of *Paralyzed Veterans* and yet changes little about the current policy of Title IX application.

However, whether Title IX could apply to the NCAA in future cases remains an open question. The Supreme Court made clear in *Smith* that a member school's receipt of federal funds was not a sufficient basis for bringing the NCAA under Title IX. However, the Court in *Smith* did hint as to how Title IX might be applied to the NCAA in the future. While unable to rule on Smith's two alternative theories because they were not addressed by the lower court, the Court sets out at length in a footnote the apparently strong allegations that the NCAA does receive federal financial assistance directly through the National Youth Sports Program.[76] Furthermore, the Court hinted that with the right

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75. *Id.* at 467.

76. *Id.* at 470. The Court cited the decision in *Bowers v. National Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460, 493-94 (D.N.J. 1998), which notes the following evidence concerning the National Youth Sports Program: (1) that an NCAA committee administers the National Youth Sports program; (2) that the powers of the fund are limited by the NCAA; (3) that the executive director of the NCAA and the chair of the NCAA committee sit on the board of the fund; (4) that all members of the board are employees of the NCAA or the NCAA committee; (5) that the fund must report annually

judicial vehicle, Title IX coverage could possibly be extended to the NCAA in a future case. Less than one month after *Smith*, that case may have arrived.

In March 1999, the United States District Court for the Eastern District of Pennsylvania decided *Cureton v. National Collegiate Athletic Ass'n*.[77] In *Cureton*, a Title VI[78] action, the court upheld the precedent established in *Smith* and refused to allow the plaintiffs to claim that the NCAA was a recipient of federal funds because of its receipt of dues from its federally funded member institutions.[79] However, the *Cureton* court held that the NCAA was a recipient of federal funds because: (1) the NCAA completely controls the National Youth Sports Program Fund, which is funded through a block grant from the United States Department of Health and Human Services, thereby qualifying the NCAA as an indirect recipient of federal funds; and (2) the federally funded member schools of the NCAA have ceded control over their athletic programs to the NCAA.[80] Hence, less than one month after the Supreme Court's decision in *Smith*, the NCAA was again labeled a recipient of federal funds, this time under one of the alternative theories proposed by Smith.

Where does Title IX go from here? More importantly, where should it go? While universities around the country have been required to restructure their intercollegiate athletic programs to comply with the mandates of Title IX, it was inevitable that the issue of Title IX and its application to the NCAA would eventually arise. To typical sports fans, the difference between their favorite collegiate athletic team and the NCAA may be non-existent. Any discussion of intercollegiate athletics invariably includes references to NCAA tournaments, NCAA eligibility, and NCAA sanctions of member institutions. The NCAA and its member schools are so closely linked, both on the field and in the classroom, that any attempt to distinguish the two is tenuous. While schools need the NCAA to oversee intercollegiate athletics, the NCAA needs member schools to continue to field athletic teams to oversee.

If federal financial assistance to a school's academic program frees up university funds allowing it to field an athletic team, then doesn't the NCAA receive one more member because of federal assistance? Much like individuals whose financial records do not disclose the true extent of their wealth, the legal

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to the NCAA Council; (6) that upon dissolution of the fund, its assets are to be distributed to the NCAA; and (7) that the NCAA's executive director referred to the fund as one of the NCAA's best kept secrets. *See supra* note 16 and accompanying text.

77. 37 F. Supp. 2d 687 (E.D. Pa. 1999).

78. 42 U.S.C. §§ 2000d to 2000d-7 (1994) prohibits racial discrimination in federally funded programs. The district court's decision in *Cureton* was later overruled by the Third Circuit because it held that Title VI was not subject to the same interpretive mandates as Title IX, but the court assumed that the NCAA was subject to Title IX under the facts presented. National Collegiate Athletic Ass'n v. Cureton, 198 F.3d 107 (3d Cir. 1999).

79. *Cureton*, 37 F. Supp. 2d at 694.

80. *Id.* at 694-95.

distinction between the NCAA and its member schools ignores the practical significance of the relationship between the two. With the *Smith* decision, the Supreme Court, by allowing the NCAA to discriminate while subjecting its member institutions to Title IX, creates a large philosophical gap that will have to be filled at some point in the future. The *Cureton* decision is an important first step in filling this gap.

While organizations comprised of members who receive federal financial assistance may be relieved by the Court's ruling in *Smith*, they should also be mindful of its lesson. As the differences between member and overseer become smaller, courts are likely to allow less "benefit" to an organization before they conclude that the organization has received enough of a benefit. While the receipt of dues from federally funded members may not be enough to qualify an organization as a recipient of federal funds, alternative theories appear to be gaining prominence as the courts look to expand the broad, remedial purpose of Title IX and its progeny.

VI. CONCLUSION

In *Smith*,[81] the Supreme Court ruled that organizations that receive dues from members that receive federal financial assistance were not themselves "recipients" of federal financial assistance under Title IX. The decision shielded the NCAA from Title IX requirements in this case, but the Court left the door open as to whether the NCAA may be held amenable under an alternative theory proposed by Smith. While the Court's decision shields some organizations from liability, it does reiterate the institution-wide approach to Title IX application adopted by the Court in *Paralyzed Veterans*.[82] As the distinction between public and private becomes smaller, in order for an organization such as the NCAA to escape the requirements of Title IX, it will be required to show that absolutely no part of its organization receives any federal financial assistance. After the Court's decision in *Smith*, it is unclear whether the NCAA will continue to be able to make such a distinction in future cases.

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81. 525 U.S. 459 (1999).
82. 477 U.S. 597 (1986).