No. 98-84

In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

v.

R. M. SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether respondent's amended complaint adequately alleged a basis for imposing liability on the National Collegiate Athletic Association for a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*

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INTEREST OF THE UNITED STATES

The United States Department of Education extends financial assistance to educational programs and activities and is authorized by Congress to ensure compliance with Title IX, 20 U.S.C. 1682, in the operation of those programs and activities. Pursuant to that authority, the Department of Education has issued regulations enforcing Title IX, 34 C.F.R. Pt. 106, including regulations that define a recipient, 34 C.F.R. 106.2(h), and regulations that address the conduct of intercollegiate athletics, 34 C.F.R. 106.41. The United States Department of Health and Human Services (HHS) provides federal financial assistance to the National Youth Sports Program Fund, an entity that respondent has relied on as a basis for alleging that the National Collegiate Athletic Association (NCAA) receives federal financial assis-

tance. HHS has also issued a regulation defining a recipient that tracks the definition issued by the Department of Education. 45 C.F.R. 86.2(h). The United States Department of Justice coordinates the enforcement of Title IX by executive agencies. Exec. Order No. 12,250, 3 C.F.R. 298 (1981); 28 C.F.R. O.51. The Department of Justice also has authority to enforce Title IX in federal court upon a referral by an agency that extends federal assistance to an education program or activity.

STATEMENT

1. Petitioner NCAA is an unincorporated association comprised of public and private colleges and universities, and "is responsible for promulgating rules governing all aspects of intercollegiate athletics, including recruiting, eligibility of student-athletes, and academic standards." Pet. App. 3a. The member institutions agree to abide by and enforce those rules. *Ibid.* One of petitioner's eligibility rules is NCAA Bylaw 14.1.8.2 (the Postbaccalaureate Bylaw), which prohibits student-athletes from participating in intercollegiate athletics at a postgraduate institution other than the one from which they received their undergraduate degree. *Id.* at 3a-4a.

In the fall of 1991, respondent Renee M. Smith enrolled in St. Bonaventure University and became a member of its Division I intercollegiate volleyball team. Pet. App. 3a. Respondent played intercollegiate volleyball at St. Bonaventure during the 1991-1992 and 1992-1993 seasons, but she elected not to play in the following year. *Ibid.*

Respondent graduated from St. Bonaventure in two-and-one-half years and enrolled in a post-graduate program at Hofstra University that was not offered at St. Bonaventure. Pet. App. 3a. Having used only two years of her eligibility, respondent sought to play on Hofstra's intercollegiate volleyball team during the 1994-1995 season. *Ibid.* Peti-

tioner denied respondent eligibility to play based on its Postbaccalaureate Bylaw. *Ibid.* In 1995, respondent entered a post-graduate program at the University of Pittsburgh that was not offered at St. Bonaventure. *Ibid.* Respondent sought to play on Pittsburgh's intercollegiate volleyball team during the 1995-1996 athletic season, but petitioner again denied her eligibility to play based on the Postbaccalaureate Bylaw. *Ibid.* Respondent was in good academic standing and in compliance with all other NCAA eligibility requirements for the 1994-1995 and 1995-1996 athletic seasons. *Id.* at 4a.

Both Hofstra University and the University of Pittsburgh sought waivers from petitioner to allow respondent to participate in intercollegiate volleyball. Pet App. 4a. In each case, petitioner refused to waive its bylaw. *Ibid.*

2. a. In August 1996, respondent filed a pro se complaint against petitioner alleging, *inter alia*, that petitioner's refusal to waive its Postbaccalaureate Bylaw excluded her from participating in intercollegiate sports at Hofstra University and the University of Pittsburgh on the basis of her sex, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* Pet. App. 4a. Title IX provides in relevant part that "[n]o 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). Petitioner did not allege that the Postbaccalaureate Bylaw facially discriminates on the basis of sex. Instead, she alleged that petitioner had systematically granted waivers from its eligibility rules in a sexually discriminatory manner. Compl. 4.[1]

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[1] Respondent also asserted a Sherman Act claim and a state contract law claim. Pet. App. 4a. The district court dismissed the Sherman Act claim for failure to state a claim upon which relief could be granted, and

Petitioner filed a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss respondent's Title IX claim on the ground that respondent had not alleged, and could not allege, that petitioner is a recipient of federal financial assistance. Mot. to Dis. 2. Although petitioner did not seek summary judgment, it attached an affidavit from its Executive Director for Financial and Business Services, which asserted that petitioner receives no federal financial assistance. Mot. to Dis., Exh. A, at 2. That affidavit also stated that the National Youth Sports Program Fund administers a federally funded program to provide underprivileged high school students with summer sports programs on college campuses, and that petitioner assists in administering that grant. *Ibid.* The affidavit denied that petitioner was a recipient of that grant. *Ibid.*

Respondent filed a brief in opposition to the motion to dismiss. In it, she argued that petitioner is covered by Title IX because (1) petitioner "enacts legislation to govern and operate intercollegiate athletics, which is an educational program or activity," (2) petitioner "benefits greatly when students receive federal financial aid," since "student-athletes might not otherwise be financially able to participate in athletic programs," and (3) "although the income may not go directly back to [petitioner], the funding may ultimately be paid from the member institution[s] to [petitioner] in membership dues or other fees." Br. in Opp. to Mot. to Dis. 6.

The district court dismissed respondent's Title IX claim, Pet. App. 29a-33a, on the ground that respondent had failed to allege in her complaint that petitioner is a recipient of federal financial assistance, *id.* at 31a. The court further

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exercised its discretion to dismiss the state contract claim under 28 U.S.C. 1367. Pet. App. 5a. The court of appeals affirmed the dismissal of the Sherman Act claim, *id.* at 5a-12a, and this Court denied certiorari, No. 98-107. Only respondent's Title IX claim is at issue here.

concluded that the "'connections' with federal funding listed in Plaintiff's Opposition Brief * * * are too far attenuated to qualify Defendant NCAA as a recipient of federal funds." *Id.* at 31a-32a.

b. Respondent sought leave to file an amended complaint to add new allegations and to add Hofstra University and the University of Pittsburgh as parties. Mot. to Amend Compl. The amended complaint alleged that "[t]he NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." Amended Compl. 7. The amended complaint also alleged that Hofstra University and the University of Pittsburgh are recipients of federal funds. *Ibid.* Finally, the amended complaint alleged that petitioner violated Title IX by discriminating on the basis of sex in denying her a waiver to participate in an activity receiving federal funds, and that Hofstra University and the University of Pittsburgh violated Title IX by enforcing petitioner's decision to deny eligibility. *Ibid.*

Petitioner opposed the motion to amend on the ground that respondent's new allegations were simply a different way of asserting what she had already asserted in her brief opposing the dismissal of her complaint. Suggestions in Opp. to Mot. to Amend Compl. 4. The district court denied respondent's motion to amend her complaint "as moot, the court having granted defendant's motion to dismiss on May 20, 1997." Pet. App. 35a-36a.

3. The court of appeals reversed the district court's denial of respondent's motion for leave to amend her complaint. Pet. App. 1a-20a. The court held that respondent's motion was not "moot" because a district court has discretion to grant leave to amend even after it has dismissed a complaint. *Id.* at 17a-18a. The court of appeals also held that, while a motion for leave to amend may be denied based on

the ground of futility, the district court could not have justifiably denied respondent's proposed amendment on that basis. *Id.* at 18a-19a. The court of appeals reasoned that respondent's allegation that "[petitioner] receives dues from member institutions, which receive federal funds * * * would be sufficient to bring [petitioner] within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss." *Id.* at 19a.

In reaching that conclusion, the court of appeals noted that, in *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597, 606-607 (1986), this Court "drew a distinction between those entities which indirectly *benefit from* federal assistance and those that indirectly *receive* federal assistance, holding that only those [that] *receive* federal funds are within the statute." Pet. App. 15a. The court of appeals, however, declined to "apply the *Paralyzed Veterans* Court's definition of 'recipient.'" *Ibid.* The court of appeals understood a Title IX regulation issued by the Department of Education to define "recipient" to include an entity that "'operates an educational program or activity which *receives* or *benefits*' from federal funds," *ibid.* (quoting 34 C.F.R. 106.2(h)), and it concluded that "[a]pplication of *Paralyzed Veterans* here would render the regulatory definition of 'recipient' under Title IX a nullity." Pet. App. 15a-16a. The court of appeals also concluded that petitioner is "not merely an incidental beneficiary of federal funds," *id.* at 16a, since it "essentially acts as a 'surrogate'" of its members "with respect to athletic rules," *id.* at 14a.[2]

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[2] In her appellate brief, respondent asserted that the grant of federal funds to the National Youth Sports Program also made petitioner a recipient of federal funds. C.A. Br. 5, 22. The court of appeals did not address that argument.

SUMMARY OF ARGUMENT

The court of appeals' holding that petitioner is a recipient of federal assistance is based on the application of an incorrect legal standard. Because respondent's proposed amended complaint states a claim for relief against petitioner, however, the court of appeals' judgment permitting respondent to file her amended complaint should be affirmed.

A. This Court's decisions in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), and *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), establish the standards for determining whether an entity is a recipient of federal financial assistance. Entities that indirectly receive federal assistance through an intermediary are recipients, while entities that only benefit economically from federal assistance are not. In holding that petitioner's receipt of dues from members makes petitioner a recipient, however, the court of appeals declined to apply that analysis. The court understood a regulation issued by the Department of Education to define a recipient to include an entity that operates an educational program that receives *or* benefits from federal funds, and it concluded that applying this Court's definition of recipient would render that regulation a nullity.

The court of appeals misinterpreted the regulation. The regulation mandates the same inquiry that is required by this Court's decisions. Because the court of appeals never undertook that inquiry, its holding that petitioner's receipt of dues makes it a recipient is tainted by legal error.

B. The court of appeals' judgment should nonetheless be affirmed because respondent's amended complaint states a claim for relief against petitioner. In particular, respondent not only alleged that petitioner excluded her from an education program on the basis of sex, but also that petitioner

"receives federal financial assistance through another recipient." Those allegations, if proven, would establish that petitioner is a recipient of federal assistance under this Court's decisions and that petitioner violated respondent's rights under Title IX. Since the allegations in the amended complaint state a claim for relief, the district court abused its discretion in denying respondent leave to file her amended complaint.

That conclusion is particularly warranted in the circumstances presented here because respondent's amended complaint encompasses a claim that petitioner receives federal assistance indirectly through a grant made by HHS to the National Youth Sports Program Fund, an entity created by petitioner. That grant has led two courts to find an issue of fact as to petitioner's status as a recipient, and HHS has issued two letters finding that petitioner is a recipient based on that grant. Those judicial and administrative determinations reinforce the conclusion that respondent should be given an opportunity to prove the allegation in her amended complaint that petitioner receives federal assistance through another recipient.

C. The court of appeals' judgment should be affirmed on another ground as well. Petitioner's amended complaint sought to add Hofstra University and the University of Pittsburgh as parties, alleged that they are recipients of federal assistance, and alleged that petitioner acted to exclude her on the basis of sex from participating in intercollegiate athletics at those assisted colleges. Those allegations are sufficient to state a claim for relief, regardless of whether petitioner is itself a recipient.

The text of Title IX is most naturally read as extending its prohibition on sex-based discrimination in federally assisted programs not only to recipients but also to any other entity to which a recipient has ceded controlling authority over a program. While recipients are the principal class of entities

that may not subject an individual to discrimination under a federally assisted program, they are not the only ones. When a recipient cedes controlling authority over a program receiving assistance to another entity, and that entity subjects an individual to discrimination under the program, the entity ceded authority violates Title IX. That is what respondent alleges happened here.

Permitting a private right of action in such circumstances furthers Title IX's central purposes of avoiding the use of federal resources to support discriminatory practices and of providing individual citizens with effective protection against those practices. Because petitioner has been ceded effective control over eligibility determinations at member schools, and is in the best position to know whether those determinations are infected with discrimination, it should not escape liability if the eligibility determinations reflect a pattern of discrimination. Moreover, if only member schools could be liable, it would mean that, when a member detects discrimination and is unable to persuade petitioner to change or waive its rules, its only option would be to withdraw from the NCAA. That would leave victims of discrimination without an effective remedy and deprive innocent third parties of intercollegiate athletic opportunities as well. Permitting a remedy against petitioner avoids those harsh consequences and also provides a mechanism for stopping discrimination at its source before it becomes entrenched at member schools.

The application of Title IX in the circumstances presented here does not raise any notice issue since the premise of respondent's suit is that petitioner is responsible for its own intentional discrimination. And no constitutional issue is raised because Congress has authority to reach the conduct of anyone who threatens "the integrity and proper operation of [a] federal program." *Salinas* v. *United States*, 118 S. Ct. 469, 475 (1997).

Finally, the right of action that respondent seeks to enforce is not affected by *Paralyzed Veterans*. That case holds only that coverage does not extend past recipients to beneficiaries. The Court did not purport to address the entirely different question whether an entity that has been ceded controlling authority over a program receiving federal assistance violates Title IX when it subjects an individual to discrimination under that program.

ARGUMENT

RESPONDENT'S AMENDED COMPLAINT STATES A CLAIM FOR RELIEF UNDER TITLE IX

A. The Court Of Appeals' Holding That Petitioner Is A Recipient Is Tainted By Legal Error

The court of appeals held that petitioner's receipt of dues from member institutions of higher education that receive federal funds is sufficient to establish that petitioner is a recipient of federal funds. Pet. App. 16a. That holding is based on the application of an incorrect legal standard.

1. This Court has twice addressed the question of when an entity may be treated as a recipient of federal financial assistance. In *Grove City College* v. *Bell*, 465 U.S. 555, 563-569 (1984), the Court held that an institution of higher education is a recipient of federal funds subject to coverage under Title IX when it enrolls students who receive federal student aid grants that must be used for educational purposes. The Court explained that the text of Title IX draws no distinction between aid that is received directly from the federal government and aid that is received indirectly through students or other intermediaries. *Id.* at 564 & n.12. The Court also stressed that one of the express purposes of the student aid grant program was to provide federal assistance to institutions of higher education. *Id.* at 566.

In *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), the Court

addressed the scope of coverage under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibits discrimination on the basis of disability under federally funded programs in substantially the same terms that Title IX uses to prohibit discrimination on the basis of sex. The Court held that airlines are not recipients of federal funds that are received directly by airports for use in airport construction projects. The Court rejected the contention that airlines can be viewed as recipients because many of the projects constructed with federal funds are especially beneficial to them. 477 U.S. at 606-607. The Court reasoned that the text of Section 504 "covers those who receive the aid, but does not extend as far as those who benefit from it." *Id.* at 607. The Court also emphasized that tying the scope of Section 504 to those who benefit economically from federal assistance would result in almost "limitless coverage." *Id.* at 608.

The Court also rejected the contention that airlines are recipients under the reasoning of *Grove City*. The Court stated that, "[w]hile *Grove City* stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid." 477 U.S. at 607.

This Court's decisions therefore draw a firm distinction between an entity that is an intended recipient that indirectly receives federal financial assistance through an intermediary and an entity that merely benefits economically from federal funding. The former is subject to coverage, while the latter is not. See also *Grzan* v. *Charter Hosp. of N.W. Ind.*, 104 F.3d 116, 119-120 (7th Cir. 1997) (employees who receive wages from a direct recipient of federal assistance are beneficiaries of the assistance, not indirect recipients); *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782,

785-788 (6th Cir. 1996) (railroads are indirect recipients of funds appropriated for use in improving railway-highway crossings where funds are allocated to States, the States distribute the funds to railroads to make the improvements, and the railroads then own the improvements).

2. Under *Grove City* and *Paralyzed Veterans*, petitioner's receipt of dues from its members that receive federal funding could constitute federal financial assistance to petitioner only if Congress intended for petitioner to be a recipient of one of the grants provided to member schools. See 34 C.F.R. Pt. 100, App. A (listing grants to institutions of higher education). That does not mean that petitioner would have to be identified in a particular grant statute as an intended recipient. It does mean, however, that petitioner must be among the class of entities that the particular grant is intended to reach. See, *e.g.*, 34 C.F.R. 106.2(h) (providing that the term "recipient" includes any "subunit, successor, assignee, or transferee" of a recipient). If petitioner merely benefits from a grant to member schools, the dues petitioner receives from members would not represent federal financial assistance to petitioner.

For example, the extension of federal funding to an institution of higher education for one program or activity may free up an institution's money for use elsewhere and thereby facilitate the payment of dues to petitioner. That would make petitioner a beneficiary of the federal assistance that its member institutions receive. As this Court made clear in *Paralyzed Veterans* and *Grove City*, however, that kind of economic ripple effect is not a sufficient basis for concluding that petitioner is a recipient of federal funds. *Paralyzed Veterans*, 477 U.S. at 607-608; *Grove City*, 465 U.S. at 572-573.

3. In holding that petitioner's receipt of dues makes it a recipient, the court of appeals declined to "apply the *Paralyzed Veterans* Court's definition of 'recipient.'" Pet. App.

15. The court understood a Title IX regulation issued by the Department of Education to define "recipient" to include an entity that "'operates an educational program or activity which *receives* or *benefits*' from federal funds," *ibid.* (quoting 34 C.F.R. 106.2(h)), and it concluded that "[a]pplication of *Paralyzed Veterans* here would render the regulatory definition of 'recipient' under Title IX a nullity." Pet. App. 15a-16a.

The court of appeals, however, misinterpreted the Department of Education's regulation. That misinterpretation stems from the court's omission of crucial language from its description of the regulation. The regulation provides in relevant part that a "recipient" includes 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." 34 C.F.R. 106.2(h) (emphasis added). As the phrase omitted by the court of appeals makes clear, operating an education program that benefits from federal assistance is not sufficient by itself to make an entity a recipient. To qualify as a recipient, an entity must also be one "to whom Federal financial assistance is extended directly or through another recipient." Consistent with *Paralyzed Veterans* and *Grove City*, the Department of Education interprets that latter requirement to mean that entities that indirectly receive federal assistance through an intermediary are recipients, but that entities that merely benefit from federal assistance are not.

The regulation, promulgated in 1975, defined a "recipient" of federal assistance as an entity which receives federal assistance, and operates a program which itself "receives *or benefits from* such assistance." The purpose of including "benefits" as well as "receives" was to provide coverage of virtually all programs of an entity receiving assistance, and to avoid the necessity of tracing funds through an institution

to a particular program. That language did not, however, eliminate the separate requirement in the regulation that, in order to qualify as a recipient, an entity must receive federal assistance and not merely benefit from it. The court of appeals therefore erred in relying on that language to support its conclusion that the regulation adopts a more expansive definition of recipient than that set forth in *Paralyzed Veterans*.

In any event, as the result of events subsequent to the promulgation of the regulation, the Department of Education no longer finds it necessary to rely on the "benefits" language for coverage of a program that benefits from federal funds but does not receive them. First, in *Grove City*, the Court rejected that approach to coverage as "inconsistent with the program-specific nature of" Title IX. 465 U.S. at 572. The Court held that Title IX does not necessarily cover all the operations of a recipient. Instead, the Court held that coverage is limited to the particular programs receiving assistance, and the relevant "program" receiving assistance is defined in terms of the particular grant statute at issue. *Id.* at 571-574.

Second, in response to *Grove City*, Congress enacted the Civil Rights Restoration Act of 1987 (Restoration Act), 20 U.S.C. 1687 *et seq.*, which reversed the part of *Grove City* that limited Title IX's coverage to the specific "programs" receiving assistance. The new statute defines "program or activity" as "all of the operations of * * * a college, university, or other postsecondary institution, or a public system of higher education * * * any part of which is extended Federal financial assistance." 20 U.S.C. 1687(2)(A). The Restoration Act establishes a similar form of institution-wide coverage for entities that are principally engaged in the business of providing certain public services, and for institutions that are created by two or more covered entities. 20 U.S.C. 1687(3)(A)(ii) and (4). The definition of "program" in

the Restoration Act supersedes the definition of "program" adopted in *Grove City*, establishing coverage for all programs of a recipient institution. It "does not change in any way who is a recipient of federal financial assistance," S. Rep. No. 64, 100th Cong., 1st Sess. 28 (1987), or "overrule or alter" this Court's holding in *[Paralyzed Veterans]*," *id.* at 29.

In view of those developments, the Department of Education now relies on the Restoration Act, rather than the "benefits" language, to define the programs as to which recipients have Title IX obligations. For that reason as well, the court of appeals erred in relying on that language as support for its conclusion that petitioner's receipt of dues makes it a recipient.

4. In holding that petitioner's receipt of dues is sufficient to make it a recipient of federal assistance, the court of appeals also relied on petitioner's unique relationship with its member schools. Pet. App. 16a. The court noted that petitioner essentially acts as a surrogate for its members in establishing rules for intercollegiate athletics, while the airlines in *Paralyzed Veterans* had no authority with respect to the operation of the airports' construction projects. *Id.* at 14a, 16a.

Petitioner's role in governing intercollegiate athletics at member schools may be relevant to the inquiry that must be made in deciding whether petitioner is an indirect recipient of federal assistance by virtue of the dues that it receives from member schools, but it does not fully answer that inquiry. That inquiry must examine not only petitioner's role, but also the intended purposes of the assistance extended by Congress to petitioner's members. Because the court of appeals never made the inquiry required by *Grove City* and *Paralyzed Veterans*, its holding that petitioner's receipt of dues makes it a recipient of federal assistance is tainted by legal error.

B. Respondent's Proposed Amended Complaint Adequately Alleged That Petitioner Is A Recipient

Although the court of appeals committed legal error in its assessment of the significance of petitioner's receipt of dues, its judgment permitting respondent to amend her complaint should nonetheless be affirmed. Since respondent's amended complaint adequately alleged that petitioner is a recipient, the district court abused its discretion in refusing to permit respondent to amend her complaint.

1. The district court denied respondent's motion to amend her complaint on the ground that the dismissal of respondent's complaint made the motion "moot." Pet. App. 36a. That explanation is facially inadequate. Even after a complaint is dismissed, a district court has authority to grant leave to amend a complaint. Indeed, Federal Rule of Civil Procedure 15(a) instructs that such leave "shall be freely given." A district court may deny leave to amend where the proposed amendment would be futile—*i.e.*, where the amendment would not survive a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). Leave to amend may also be denied on such grounds as "undue delay, bad faith or dilatory motive[,] repeated failure to cure deficiencies by amendments previously allowed, [and] undue prejudice to the opposing party." *Ibid.* A district court does not have discretion, however, to simply deny such a motion on the ground that a previous dismissal of the action renders the motion moot.

2. The district court's action also cannot be justified on the theory that granting respondent leave to amend would have been futile. The standards for resolving that issue are the same that apply when deciding whether a complaint may be dismissed for failure to state a claim. 3 J.W. Moore, *Moore's Federal Practice* ¶ 15.08[4], at 15-81 (D.R. Coquil-

lette et al. eds., 2d ed. 1996). Respondent's allegations in her amended complaint therefore must be accepted as true, and leave to amend may be denied only "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984). Moreover, since respondent was proceeding pro se in the district court, her allegations must be held to "less stringent standards than formal pleadings drafted by lawyers." *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (per curiam).

Judged by those standards, respondent's amended complaint stated a claim for relief against petitioner under Title IX. In particular, respondent alleged not only that petitioner excluded her from an education program on the basis of her sex, but also that petitioner "receives federal financial assistance through another recipient." Amended Compl. 7. Those allegations, if proven, would establish that petitioner is a recipient of federal assistance under this Court's decisions in *Paralyzed Veterans* and *Grove City*, and that petitioner violated respondent's rights under Title IX.

Nor does it matter that the amended complaint does not contain any details concerning how respondent proposes to prove that petitioner receives funding through another recipient. With exceptions not relevant here, the Federal Rules "do not require a claimant to set out in detail the facts upon which he bases his claim." *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957). Instead, they require only that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Respondent's allegation that petitioner receives federal assistance through another recipient is sufficient to satisfy that standard.

3. Petitioner seeks to justify the district court's action on the theory that the allegation in the amended complaint that petitioner receives federal assistance through another fed-

eral recipient simply refers to petitioner's receipt of dues. Pet. Br. 7. But there is no reference to dues in respondent's amended complaint, nor does her brief in support of her motion for leave to file an amended complaint refer to dues. The only place in which respondent referred to dues was in her legal memorandum opposing petitioner's motion to dismiss her original complaint. Respondent was entitled to have the sufficiency of her amended complaint judged by the allegations in that complaint, not by a legal memorandum explaining one basis for a previous complaint. *Hishon*, 467 U.S. at 73; see also *Bartholet* v. *Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992); *Car Carriers, Inc.* v. *Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985). Since the amended complaint sufficiently alleged that petitioner is a recipient of federal funds, the district court abused its discretion in failing to grant respondent leave to file that amended complaint.

4. That conclusion is particularly warranted in the circumstances presented here, because the record contains more than the bare allegation in the proposed amended complaint. Respondent's allegation that petitioner receives federal assistance through another recipient encompasses a claim that petitioner receives federal assistance indirectly by virtue of a grant made by HHS to the National Youth Sports Program Fund (Fund), an entity created by petitioner. In the district court, the HHS grant was put in issue by petitioner's affidavit denying that it would support a finding that petitioner is a recipient, and in the court of appeals respondent argued that the grant supports the claim in her complaint that petitioner receives federal funds through another recipient.

Moreover, this precise grant has led two district courts to find an issue of fact as to petitioner's status as a recipient of federal assistance, and to deny motions for summary judgment filed by petitioner on that issue. In *Bowers* v. *National*

Collegiate Athletic Ass'n, 9 F. Supp. 2d 460, 492-494 (D.N.J. 1998), a case in which plaintiff alleged that petitioner discriminated on the basis of disability in violation of Section 504 of the Rehabilitation Act, the district court concluded that "there are genuine questions of material fact as to whether the NCAA receives federal funds through the [Fund] or whether the NCAA is intertwined with the [Fund] such that it cannot be considered separate." *Id.* at 494. The court specifically cited evidence that: (1) an NCAA committee administers the National Youth Sports Program; (2) the powers of the Fund are limited by the Council of the NCAA; (3) the Executive Director of the NCAA and the Chair of the NCAA committee sit on the Board of the Fund; (4) all members of that Board are employees of the NCAA or the NCAA committee; (5) the Fund must report annually to the NCAA Council; (6) upon dissolution of the Fund, its assets are to be distributed to the NCAA; and (7) the NCAA's Executive Director referred to the Fund as one of the NCAA's best kept secrets. *Ibid.*

In *Cureton* v. *National Collegiate Athletic Ass'n*, No. Civ. A. 97-131, 1997 WL 634376, at * 2 (E.D. Pa. Oct. 9, 1997), a case in which plaintiff alleged that petitioner had discriminated on the basis of race in violation of Title VI, the district court held that "[i]f the National Youth Sports Program fund is nothing more than a sham to disguise the NCAA's use of federal funds for its own benefit, then the NCAA does receive federal financial assistance." The court concluded that "[t]his determination can neither be made nor refuted based upon the present record before the court." *Ibid.*

The Office of Civil Rights of HHS has also issued two letters finding that petitioner is a recipient of federal assistance by virtue of the grant to the Fund. The letters state that "[t]he NCAA * * * is a recipient of Federal financial assistance through a Community Services Block Grant from this Department." Letter from John W.

Halverson, Regional Manager, Office for Civil Rights, to Frank R. Soda 1 (Nov. 8, 1994); see also Letter from John W. Halverson, Regional Manager, Office for Civil Rights, to Frank R. Soda 1 (Mar. 10, 1998).

Those judicial and administrative determinations reinforce the conclusion that respondent's motion to amend her complaint should not have been denied as futile. Respondent should be given an opportunity to prove the allegation in her amended complaint that petitioner receives federal assistance through another recipient.

C. Respondent's Amended Complaint Adequately Alleged A Violation Of Title IX Even If Petitioner Is Not A Recipient

Respondent's amended complaint also added allegations that would make petitioner liable to respondent whether or not petitioner itself is a recipient of federal assistance. In addition to alleging that petitioner is a recipient, respondent's amended complaint sought to add Hofstra University and the University of Pittsburgh as defendants, alleged that they are recipients of federal assistance, and alleged that petitioner acted with them to exclude her on the basis of sex from participating in intercollegiate athletics at those federally assisted colleges. Amended Compl. 7. Those allegations are sufficient to state a claim for relief under Title IX, regardless of whether petitioner is itself a recipient. The court of appeals' judgment permitting respondent to amend her complaint should be affirmed for that reason as well.

1. The text of Title IX firmly supports the conclusion that petitioner's liability does not depend solely on whether it is a recipient. Title IX provides in relevant part that "[n]o 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). As that statutory text makes clear, Title IX was not

drafted "simply as a ban on discriminatory conduct by recipients of federal funds." *Cannon* v. *University of Chicago*, 441 U.S. 677, 691-692 (1979). Instead, the "unmistakable focus" of the statutory text is on the protection of "the benefited class." *Id.* at 691. The text itself does not specifically identify the class of potential violators. But given the focus of the text on protection for the individual, and the absence of any language limiting the class of violators to recipients, Title IX is most naturally read as extending its prohibition on sex-based discrimination in federally assisted programs not only to recipients but also to any other entity to which a recipient has ceded controlling authority over a program.

Recipients are the principal class of entities that may not subject an individual to discrimination under a federally assisted program. They are not, however, the only ones. When a recipient cedes controlling authority over a program receiving assistance to another entity, and that entity subjects an individual to discrimination under the program, that entity violates Title IX, regardless of whether it is a recipient itself. Respondent's allegation that petitioner has used its controlling authority over intercollegiate athletics at Hofstra University and the University of Pittsburgh to subject her to gender-based discrimination under those federally assisted programs therefore states a claim for relief under Title IX.[3]

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[3] There is an important difference between the scope of petitioner's obligation as a controlling authority and the scope of its obligations if it is found to be a recipient itself. If petitioner is a recipient, all of its operations are covered by Title IX. See 20 U.S.C. 1687(3)(A)(ii) (establishing institution-wide coverage for entities that principally provide educational services); 20 U.S.C. 1687(4) (establishing institution-wide coverage for institutions created by two or more covered entities). If petitioner is not a recipient, it is covered by Title IX only to the extent that it exercises controlling authority over the intercollegiate athletic programs at member schools.

2. That commonsense reading of Title IX furthers its central purposes—"to avoid the use of federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704. Several considerations support that conclusion.

First, petitioner not only has the power to establish the rules governing eligibility for intercollegiate athletics at member schools, it also administers those rules by making individual eligibility and waiver determinations for its member schools. Member schools have an obligation to implement the decisions made by petitioner; they do not make the rules or the determinations themselves. Because petitioner has been ceded effective control over eligibility determinations for intercollegiate athletics, it is the entity most responsible for any discrimination that enters into those determinations.

Second, while petitioner reviews waiver requests from all member schools, each individual school has experience with only a limited number of those requests. Petitioner is therefore in a far better position than member schools to determine whether its rules are being applied in a discriminatory manner. Indeed, because of the limited information available to member schools, they could implement discriminatory decisions by petitioner without even being aware of it. Since petitioner is the party with the most access to information about whether eligibility determinations are infected with discrimination, and indeed the party whose pattern of decision-making is challenged by the claim of discrimination, petitioner should not escape liability if the eligibility determinations reflect a pattern of discrimination.

Third, if a member detects discrimination in petitioner's rules, and is unable to persuade petitioner to change or waive them, its only option is to withdraw from the NCAA. Since petitioner has a virtual monopoly on intercollegiate

athletics, a school that has withdrawn from the NCAA in order to satisfy its own Title IX obligations could no longer offer intercollegiate athletic opportunities to its students. That would leave victims of discrimination without an effective remedy and deprive innocent third parties of intercollegiate athletic opportunities as well. Those harsh consequences may be avoided if victims of petitioner's discrimination may seek relief against petitioner directly.

Finally, because of its unique power over intercollegiate athletics, discrimination by petitioner in the administration of its rules has the capacity to result in discrimination at numerous member schools simultaneously. Permitting a private right of action against petitioner provides a mechanism for stopping discrimination at its source before it becomes entrenched at member schools.

We do not suggest that only petitioner may be sued for discrimination that it causes at member schools. A member school remains liable for any discriminatory decision of petitioner's that it implements. See 34 C.F.R. 106.6(c) (recipient's duty to comply with Title IX is not "obviated or alleviated by any rule or regulation of any * * * athletic or other league"). For the reasons discussed above, however, if petitioner is the source of the discrimination and uses its power over member schools to implement that discrimination, a remedy against petitioner is more appropriate and efficacious than a remedy against member schools.

3. The conclusion that non-recipients can, in some circumstances, be targets of a private right of action is also consistent with the rest of the statutory scheme. Title IX contains a prohibition on discrimination in 20 U.S.C. 1681, and two express mechanisms for administrative enforcement of that prohibition—the fund-termination remedy set forth in 20 U.S.C. 1682(1), and enforcement "by any other means authorized by law" set forth in 20 U.S.C. 1682(2). The private right of action has been derived from 20 U.S.C. 1681.

Only the fund-termination remedy of Section 1682(1) contains a limitation to recipients of federal assistance; no such limitation appears in the basic prohibition, the derivative private right of action, or the "any other means" enforcement mechanism of Section 1682(2). The logical inference is that Title IX's most drastic sanction is reserved for recipients of federal assistance, but that Title IX's other enforcement mechanisms may be invoked against any entity with controlling authority over a program that subjects individuals to discrimination under that program. Such entities include not only recipients but also entities that have been ceded controlling authority over a program by a recipient.[4]

In addition, this Court has previously recognized that the private right of action and administrative fund cut-off are complementary remedies, and that the private right of action may often provide an effective and appropriate remedy in situations where a fund cut-off would not. *Cannon*, 441 U.S. at 704-706. For example, the Court has noted that one gap in enforcement filled by the private right of action is the isolated and nonsystematic case of discrimination, which is not well suited for fund cut-off, *ibid.*, and which may present a case where the only possible benefit to the victim of discrimination consists of damages, *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992). A similar gap in enforcement exists here. A private right of action against a non-recipient that has been ceded controlling authority over a program helps to fill a gap in Title IX enforcement that

[4] The regulations issued by the Department of Education impose obligations only on recipients. 34 C.F.R. Pt. 106. The regulations do not address whether Title IX imposes an obligation on other entities when they exercise authority over a program receiving assistance. With respect to that issue, this brief reflects the joint views of the Department of Education, the Department of Health and Human Services, and the Department of Justice.

would be left if Title IX's enforcement scheme were limited to the fund-termination remedy.

4. Permitting a private right of action against petitioner is also consistent with the principle that entities should not be subjected to liability under Title IX without adequate notice. See *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1997-1999 (1998). Respondent does not seek to hold petitioner liable for discrimination committed by others; rather, respondent seeks to hold petitioner liable for its own alleged discrimination in the administration of its rules. The text of Title IX provides sufficient notice to petitioner that it had an obligation not to use its authority over an education program receiving federal assistance to subject an individual to intentional sex-based discrimination under that program. See *Franklin*, 503 U.S. at 74-75 (A "notice problem does not arise in a case such as this, in which intentional discrimination is alleged."); see also *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985) (federal funding statute need not "prospectively resolve every possible ambiguity concerning particular applications").

If petitioner did not wish to subject itself to Title IX obligations on the basis of its relationship to member institutions that receive assistance, it could have refrained from exercising controlling authority over intercollegiate athletics at those institutions. Once petitioner assumed that controlling role, it also assumed an obligation not to use its controlling authority to discriminate on the basis of sex against individuals seeking access to intercollegiate athletic programs at those institutions.

5. Petitioner contends (Br. 26) that it cannot be liable because it did not enter into a contract with a federal funding agency in which it promised not to discriminate. The text of Title IX, however, is not framed exclusively in contract terms, and a contractual commitment not to discriminate is not a precondition to application of the statute.

If a contract analogy were needed, the relevant one would be to the tort of intentional interference with a contract. Restatement (Second) of Torts § 766 (1979) (one who intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract is subject to liability to the other). When an entity which has been ceded controlling authority over a recipient requires the recipient to act in a discriminatory manner, it effectively causes the recipient to breach its agreement with the federal funding agency. Moreover, when an entity created by recipients makes and enforces rules for recipients, it is on ample notice that it cannot do so in a way that subjects an individual to discrimination under the programs of the recipients.

6. Because petitioner received adequate notice of Title IX's obligations, petitioner's contention (Br. 18) that "[l]ack of notice is a basic constitutional impediment" to applying Title IX to its alleged conduct is without merit. Nor is there any other basis for challenging the constitutionality of Title IX as applied to petitioner's alleged conduct. Congress has constitutional authority to reach the conduct of anyone who threatens "the integrity and proper operation of [a] federal program." See *Salinas* v. *United States*, 118 S. Ct. 469, 475 (1997) (upholding constitutionality of a statute that prohibits the acceptance of bribes by employees of state and local agencies that receive federal funds as applied to a case in which a county received funds for the operation of a jail and the sheriff and deputy sheriff at the jail accepted bribes in violation of the statute). Since petitioner's actions, if discriminatory, pose a threat to the integrity and proper operation of the federally assisted programs at member schools, Congress had constitutional authority to subject petitioner to liability for such discrimination.

7. Finally, subjecting non-recipients that have been ceded controlling authority over federally assisted programs to coverage under Title IX is not in conflict with this Court's decision in *Paralyzed Veterans*. There are statements in that opinion that support petitioner's argument that federal funding statutes like Title IX apply only to recipients of federal financial assistance. 477 U.S. at 605-606. The context of those statements makes clear, however, that the Court was addressing only whether coverage should extend past recipients to beneficiaries. The Court did not purport to address the entirely different question whether an entity that has been ceded controlling authority over a program receiving federal assistance violates Title IX when it subjects an individual to discrimination under that program. Indeed, the Court took pains to explain that "[t]he only issue before us is the Court of Appeals' conclusion that § 504 applies to commercial airlines *as recipients* of federal financial assistance." *Id.* at 604 (emphasis added). Because the airlines did not have controlling authority over the federally assisted airport programs, the question at issue here simply was not presented in *Paralyzed Veterans*.

Equally important, the Court's crucial concern in *Paralyzed Veterans* was that expanding the funding statutes to reach beneficiaries of federal assistance would have resulted in "almost limitless coverage"—a result that was clearly at odds with Congress's intent. 477 U.S. at 608-609. The situation here is fundamentally different. The class of non-recipients that has been ceded controlling authority over programs receiving assistance is limited, and permitting a private right of action against such entities when they subject persons to discrimination under those programs advances the purposes of Title IX.[5]

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[5] This case does not present the question whether Title IX creates a private right of action against an individual who acts in derogation of

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1998

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policies established by a recipient or another entity with controlling authority over a program. Such individual-capacity suits raise very different considerations from those implicated here.