# VI. SELECTED TITLE IX PRACTICE ISSUES

BREAKING DOWN BARRIERS

## A. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Title IX plaintiffs need not exhaust administrative remedies before bringing private actions. This was made explicit in *Cannon v. University of Chicago*, where the court stated that "[b]ecause the individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time, it makes little sense to require exhaustion."[349] Given this unequivocal pronouncement, it is not surprising that the issue has sparked little debate. Indeed, defendants arguing that exhaustion is required for athletics claims have been described as "out in left field."[350]

## B. STATUTES OF LIMITATIONS

### 1. ADMINISTRATIVE COMPLAINTS

Title IX incorporates the procedural rules promulgated under Title VI, including the time period for filing administrative complaints.[351] Under these rules, administrative complaints must be filed within 180 days of the discriminatory act, unless the Department of Education extends the time for filing.[352]

### 2. JUDICIAL PROCEEDINGS

The 180-day requirement does not apply to judicial proceedings. As the Third Circuit has explained, "'The practical difficulties facing an aggrieved person who invokes administrative remedies are strikingly different,' from the difficulties which face an aggrieved person seeking judicial relief."[353] In judicial proceedings, the statute of limitations to be applied is that of the state "cause of action most similar to the plaintiff's Title IX claim."[354]

[349] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 706 n.41 (1979); *see also id.* at 687 n.8 (noting that HEW, the Department of Education's predecessor agency, does not require exhaustion of administrative remedies); *supra* notes 72-78 and accompanying text for a more thorough discussion of *Cannon*.

[350] *Horner v. Ky. High Sch. Athletic Ass'n*, No. C-92-0295-L(J), memorandum opinion at 2 (W.D. Ky. Jan. 11, 1993); *accord Zentgraf v. Tex. A & M Univ.*, 492 F. Supp. 265, 268 (S.D. Tex. 1980) ("In pursuing a private action [under Title IX], individual plaintiffs are not required to exhaust their administrative remedies before filing suit."); *cf. Morgan v. U.S. Postal Serv.*, 798 F.2d 1162, 1165 (8th Cir. 1986) (affirming that Title IX does not include an exhaustion requirement but declining, for other reasons, to extend the principle to § 504 of the Rehabilitation Act); *Greater L.A. Council on Deafness, Inc. v. Cmty. Television of S. Cal.*, 719 F.2d 1017, 1021 (9th Cir. 1983) (holding that exhaustion is not required under § 504 of the Rehabilitation Act because § 504 incorporates Title IX's administrative procedures and the Supreme Court has found these to be inadequate); *Shuttleworth v. Broward County*, 639 F. Supp. 654, 658 (S.D. Fla. 1986). Note that it is the requirement for exhaustion that has led some courts to say that individuals making claims of employment discrimination, as opposed to other types of claims under Title IX, must file them under Title VII rather than Title IX. *See, e.g., Lakoski v. James*, 66 F.3d 751, 754 (5th Cir. 1995); *see also supra* note 49 for discussion of exhaustion of remedies for Title VII and Title IX claims.

[351] 34 C.F.R. § 106.71 (2006). The Title VI rules appear at 34 C.F.R. §§ 100.6-100.11 and 34 C.F.R. Part 101.

[352] 34 C.F.R. § 100.7(b) (2006).

[353] *Bougher v. Univ. of Pittsburgh*, 882 F.2d 74, 77 (3d Cir. 1989) (quoting *Burnett v. Gratan*, 468 U.S. 42, 51 (1984)) (statute of limitations applicable to administrative proceedings inapposite to judicial proceedings).

[354] *Bougher*, 882 F.2d at 77; *see also Minor v. Northville Pub. Schs.*, 605 F. Supp. 1185, 1199-1200 (E.D. Mich. 1985) ("Title IX of the Educational [sic] Amendments of 1972 does not contain a statute of limitations. To ascertain the proper statute of limitations, the Court must look to the most analogous statute."). The same rule applies under Title VI and § 504. *See, e.g., Andrews v. Consol. Rail Corp.*, 831 F.2d 678, 683 (7th Cir. 1987) (§ 504); *Raggi v. Wegmans Food Mkts., Inc.*, 779 F. Supp. 705, 706 (W.D.N.Y. 1991) (§ 504); *Baker v. Bd. of Regents of State of Kan.*, 721 F. Supp. 270, 274-75 (D. Kan. 1989) (Title VI).

There is some debate regarding the criteria for determining the most analogous state statute. In *Bougher v. University of Pittsburgh,* the court relied on the state statute of limitations applied in cases brought under 42 U.S.C. §§ 1981 and 1983.[355] In *Minor v. Northville Public Schools*, the court concluded that the most analogous statute was "obviously" the state civil rights act, whose limitations period had lapsed by the time the plaintiff filed her complaint.[356] Regardless of what statute is found analogous, the state limitations period borrowed must "be[] consistent with the policies underlying the federal rights of action."[357] Because these standards vary by state, and this discussion offers only a cursory review, counsel would be well-advised to carefully consider the question of the applicable statute of limitations.

### 3. TOLLING

A few Title IX cases have directly addressed the issue of tolling.[358] In *Doe v. Petaluma City School District,* the plaintiff brought a sexual harassment claim under Title IX. The court held, "[I]n the absence of a federal statute of limitations, federal courts borrow not only the applicable state statute, but also the rules for its tolling, unless to do so would be 'inconsistent with the federal policy underlying the cause of action under consideration.'"[359] Similarly, in Title VI and § 504 actions, courts generally agree that "state law on tolling . . . must be followed if a state statute of limitations is being borrowed, unless the tolling rules are inconsistent with federal law or with the policy which the federal law seeks to implement."[360]

[355] *Bougher*, 882 F.2d at 77-78; *see Taylor v. Regents of Univ. of Cal.*, 993 F.2d 710, 712 (9th Cir. 1993) (holding that the one-year state limitations period applicable to § 1983 actions also applies to Title VI claims); *Chambers v. Omaha Pub. Sch. Dist.* 536 F.2d at 225 n.2, 228-30 (8th. Cir. 1976) (applying Nebraska statutory limitations period of three years for actions based on federal statutes without limitations provisions, including a Title VI claim); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1566 (N.D. Cal. 1993), *overruled on other grounds,* 54 F.3d 1447 (9th Cir. 1995) (drawing on § 1983 and Title VI cases in holding that California's one-year personal injury statute applies to Title IX claims); *Henrickson v. Sammons*, 434 S.E.2d 51 (Ga. 1993) (following the majority of federal courts in holding § 504 actions to be analogous to personal injury cases for limitations purposes); *Raggi*, 779 F. Supp. at 707-09 (by analogy to § 1983, finding the most appropriate New York limitations period for § 504 claims to be the three-year period for personal injuries); *Lewis v. Russe,* 713 F. Supp. 1227, 1232 (N.D. Ill. 1989) (holding that all claims founded on Civil Rights Acts, including Title VI, are governed by Illinois' five-year statute of limitations for causes of action based on statutes without explicit limitations provisions), *dismissed*, No. 88 C 8684, 1990 U.S. Dist. LEXIS 8364 (N.D. Ill. July 9, 1990), *aff'd*, 972 F.2d 351 (7th Cir. 1991).

[356] *Minor*, 605 F. Supp. at 1200.

[357] *Beard v. Robinson,* 563 F.2d 331, 334 (7th Cir. 1997); *accord Chambers,* 536 F.2d at 225 (selecting state statute of limitations that "best effectuates the federal policy underlying federal claims").

[358] *See Monger v. Purdue Univ.,* 953 F. Supp. 260 (S.D. Ind. 1997) (stating that "tolling of the statute for Title IX and § 1983 claims [] depends on Indiana law"); *Seneway v. Canon McMillan Sch. Dist.,* 969 F. Supp. 325 (W.D. Pa. 1996) (stating that "[b]ecause Pennsylvania's statute of limitations for personal injuries is applicable to the plaintiff's claims in this matter, the court must also borrow Pennsylvania's tolling statute").

[359] *Doe,* 830 F. Supp. at 1568 (quoting *Alexopulos v. S.F. Unified Sch. Dist.,* 817 F.2d 551, 555 (9th Cir. 1987)).

[360] *Baker*, 721 F. Supp. at 275; *accord Raggi,* 779 F. Supp. at 709 ("Where the court has 'borrowed' the statute of limitations from New York state law, it must also apply New York state tolling provisions," provided those provisions are consistent with the policies underlying the federal law).

A few courts have held that a limitations period will not be tolled while a claimant pursues administrative or internal institutional remedies. In *Beasley v. Alabama State University*, an Alabama statute of limitations was not tolled on a Title IX claim because the OCR remedies pursued by the plaintiff were permissive and not mandatory.[361] In *Raggi v. Wegmans Food Markets*, the statute of limitations was not tolled because New York law did not require a plaintiff to exhaust state law claims before filing under the Rehabilitation Act.[362]

The common law doctrine of disability, however, which provides that the limitations period does not run against a minor, may provide an argument for tolling the statute of limitations in Title IX cases involving minors. In *Doe v. Petaluma,* the plaintiff was in junior high school when the alleged harassment occurred. Rejecting the defendants' statute of limitations defense, the court held that the "Title IX claims were tolled due to Jane's minority."[363]

## C. STANDING TO SUE

Whether a particular student has standing to bring a Title IX claim against his or her school for sex discrimination in athletics[364] may depend on whether he or she seeks to expand participation opportunities for additional athletes or to challenge inequities in the treatment or scholarships provided to current athletes.

[361] 3 F. Supp. 2d 1325, 1343 (M.D. Ala. 1998).

[362] *Raggi*, 779 F. Supp. at 709; *accord Andrews*, 831 F.2d at 684 (finding that § 503 does not require exhaustion of administrative remedies before commencing suit under § 504); *see also Chambers*, 536 F.2d at 230-31 (stating that an administrative Title VI claim did not toll the statute of limitations for actions under 42 U.S.C. §§ 1981 and 1983, since such administrative review was not a prerequisite to actions under these civil rights statutes).

[363] *Doe*, 830 F. Supp. at 1569; *cf. Blake v. Dickason*, 997 F.2d 749 (10th Cir. 1993) (holding that, since plaintiff was a minor at the time the § 1983 violation occurred, "any statute of limitations for her personal claims were tolled until her 'age of disability' terminated on her eighteenth birthday"); *Kurazawa v. Mueller*, 545 F. Supp. 1254, 1259 (E.D. Mich. 1982) (holding that the minor plaintiff in a § 1983 action "had until one year [the governing state limitations period] following his eighteenth birthday to file suit"), aff'd, 732 F.2d 1456 (6th Cir. 1984).

[364] Courts have typically rejected athletic coaches' attempts to bring lawsuits challenging sex discrimination in school athletic programs when those lawsuits are brought only on behalf of the students participating in such programs. *See Hankinson v. Thomas County Sch. Dist.*, No. 6:04-CV-71 (HL), 2005 U.S. Dist LEXIS 25576, at *10 (M.D. Ga. Oct. 28, 2005) ("As Plaintiff has no legal interest in this claim and seeks to rest the claim on the rights of others, Plaintiff does not have standing to bring a Title IX claim on behalf of the students participating in the softball program."); *Weaver v. Ohio State Univ.*, 71 F. Supp. 2d 789, 798 (S.D. Ohio 1998); *Deli v. Univ. of Minn.*, 863 F. Supp. 958, 962 n.2 (D. Minn. 1994). *But see Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005) ("[C]oaches . . . are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators."). However, there is nothing to prevent coaches from suing based on injury to *themselves* (e.g., to their reputation as coaches) that results from discrimination against their teams.

### 1. STANDING FOR PARTICIPATION CLAIMS

Courts have uniformly recognized that female students who seek to participate in a sport at a level not offered by their school have standing to bring a program-wide participation claim.[365] In *Pederson v. Louisiana State University*, the Fifth Circuit applied this principle to a case involving a female plaintiff who had tried out for but failed to make a soccer team.[366] The court first held that a student does not lose standing to bring a participation claim if she fails to secure a position on a particular team. A plaintiff must have an injury in fact, but the injury need not be of such a precise level. Instead, the Fifth Circuit analogized to equal protection jurisprudence in which an injury in fact is the imposition of a barrier to equal treatment, but not the inability to obtain a specific outcome.[367] A student with standing to bring a participation claim under Title IX therefore "need only demonstrate that she is 'able and ready' to compete for a position on [an] unfielded team," not that she would ultimately be successful in competing for such a position.[368] Second, the court held that a plaintiff with standing to sue need not show that her school offers a men's team in the same sport. To require such a showing improperly delves into the merits of a plaintiff's case regarding effective accommodation of her interest in athletics.[369]

### 2. STANDING FOR SCHOLARSHIP AND EQUAL TREATMENT CLAIMS

While students seeking additional participation opportunities need not be current school athletes to bring a participation claim, courts have held that student-plaintiffs must already participate in the school's athletic program in order to challenge inequities in scholarships and the treatment of athletes. Two decisions of the United States District Court for the Northern District of New York held that, while club athletes may assert participation claims, they do not have standing to challenge sex discrimination in the treatment and benefits provided to current varsity athletes.[370] In both cases, the plaintiffs were club athletes who participated in sports not offered at the varsity level, and argued that their universities violated Title IX

[365] *See, e.g., Bryant,* 1996 U.S. Dist. LEXIS 8393, at *18-19.

[366] *Pederson v. La. State Univ.,* 213 F.3d 858 (5th Cir. 2000).

[367] *Id.* at 871.

[368] *Id.*

[369] *Id.* at 870. Standing to bring participation claims may be different for individual than class actions because an individual action may be dismissed if the plaintiff graduates from school during the pendency of the litigation. See *supra* notes 291-302 and accompanying text for discussion of individual versus class action relief.

[370] *Bryant*, 1996 U.S. Dist LEXIS 8393, at *1; *Boucher v. Syracuse Univ.,* No. 95-CV-620, 1996 U.S. Dist. LEXIS 8392, at *1 (N.D.N.Y. June 12, 1996). The Second Circuit upheld the District Court's ruling on the *Boucher* plaintiffs' standing without discussion. *See Boucher v. Syracuse Univ.,* 164 F.3d 113, 116 (2d Cir. 1999).

by providing more financial assistance and better programs and services to male than to female varsity athletes.[371] The court dismissed these claims, ruling that club athletes could not assert the scholarship and treatment claims of female varsity athletes because club athletes were not personally injured by sex discrimination at the varsity level.[372] Varsity athletes, not club athletes, were held to have standing to assert claims for discrimination in the treatment and scholarships they receive.

## D. DEFERENCE DUE AGENCY INTERPRETATIONS OF THE TITLE IX REGULATIONS

While Title IX regulations are clearly entitled to substantial deference by the courts,[373] there are a variety of sometimes inconsistent agency interpretations of the regulations. These include the Policy Interpretation, the various Clarifications issued by the OCR, the Investigator's Manual, Letters of Findings, and numerous OCR policy memoranda and directives. Questions regarding the relative persuasive value of the various interpretations have arisen.

### Deference Due Agency Interpretations of Title IX Regulations

**1979 Policy Interpretation:** Published in the Federal Register after extensive notice and comment period. Entitled to substantial deference, according to United States Circuit Courts of Appeals.

**1996 Policy Clarification:** Published after extensive notice and comment period. Entitled to controlling deference, according to the United States Court of Appeals for the Eighth Circuit.

**2005 Additional Clarification:** Issued without notice and comment, and not yet tested in courts. Arguably not entitled to deference.

**Investigator's Manual and Other Internal Policy Documents:** Issued without notice and comment, and published only internally by the Office for Civil Rights. Not entitled to deference when in conflict with the Policy Interpretation.

**Letters of Findings:** Issued only with regard to a particular athletic program. Generally not entitled to deference because, according to the United States Supreme Court, the administrative complaint process is severely limited.

371 *Bryant*, 1996 U.S. Dist. LEXIS 8398, at*1, *Boucher*, 1996 U.S. Dist LEXIS 8398, at *1-3.

372 *See Bryant,* 1996 U.S. Dist. LEXIS 8398, at *15-18; *Boucher*, 1996 U.S. Dist. LEXIS 8398, at *7-10; *see also Pederson*, 912 F. Supp. at 904.

373 *See Cohen II,* 991 F.2d at 845 ("The degree of deference [to the regulation] is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX. See Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974)"); *see also Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (holding that where Congress has explicitly delegated responsibility to an agency, the regulation deserves "controlling weight"); *Batterton v. Francis,* 432 U.S. 416, 425 (1977); *Alvarez-Flores v. INS,* 909 F.2d 1, 3 (1st Cir. 1990)." The Supreme Court also noted in *North Haven Board of Education v. Bell* that Title IX regulations can be understood to accurately reflect congressional intent because Congress specifically rejected challenges to the regulations. *See* 456 U.S. at 537-38.

## 1. THE POLICY INTERPRETATION

The 1979 Policy Interpretation is an authoritative source of guidance about Title IX's athletics requirements. Published in the Federal Register following an extensive notice and comment process,[374] and in effect since its initial promulgation in 1979,[375] it is an official agency interpretation of the regulations entitled to, as the First Circuit stated, "substantial deference."[376] Every federal appellate court to consider the Policy Interpretation has agreed.[377]

## 2. POLICY CLARIFICATIONS

The 1996 Clarification, which the OCR provided in order to further explain elements of the three-part participation test, is also entitled to substantial deference. According to the Eighth Circuit, "Controlling deference is due [the 1996 Clarification]" because it is the Department of Education's own reasonable construction of the regulations that it is charged with enforcing.[378] Further, the 1996 Clarification was subject to the same notice and comment process as the Policy Interpretation.[379] Moreover, the 1996 Clarification is fully consistent with, and does not change, the 1979 Policy Interpretation.

On the other hand, there is a serious question regarding the 2005 Clarification. Instead of being subject to the extensive notice and comment process that applied to the 1996 Clarification, the 2005 policy was issued without any public notice or opportunity for input.[380] Moreover, the 2005 Clarification represents an abrupt change in longstanding

[374] *See also supra* notes 27-32 and accompanying text; Policy Interpretation, *supra* note 11 44 Fed. Reg. at 71,413; *Udall v. Tallman*, 380 U.S. 1, 4, 17 (1965) (in deferring to agency interpretation of its regulation, finding it significant that such interpretation had been made a matter of public record); *Fed. Labor Relations Auth. v. U.S. Dep't of the Navy*, 966 F.2d 747, 762 (3d Cir. 1992) (refusing to defer to agency interpretation because it had not been published in a manner sufficient to put the public on notice).

[375] The fact that Congress expressed no displeasure at all with the Policy Interpretation during the four years that the Civil Rights Restoration Act was under consideration also creates a strong inference that the Policy Interpretation properly expressed Congress' view of the Title IX prohibitions. *See supra* notes 42-45 and accompanying text.

[376] *Cohen II*, 991 F.2d at 896-97. In support of this proposition, the court cited *Martin v. OSHRC*, 499 U.S. 144, 150-51 (1991), and *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988).

[377] *See McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 288 (2d Cir. 2004) (deferring to Policy Interpretation); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1046-47 (8th Cir. 2002) (according controlling deference to Policy Interpretation); *Pederson* 213 F.3d at 879 ("The proper analytical framework for assessing a Title IX claim can be found in the Policy Interpretations to Title IX…"); *Neal v. Bd. of Trs. of The Cal. State Univs.*, 198 F.3d 763, 770 (9th Cir. 1999) (*Cohen IV*) ("[This Court must] defer properly to the interpretation of Title IX put forward by the administrative agency that is explicitly authorized to enforce its provisions"); *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996) (citing *Cohen II*, 991 F.2d at 895-97 ("[T]he applicable regulation … deserves controlling weight … [and] the Policy Interpretation warrants substantial deference…"); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 274-75 (6th Cir. 1994) (quoting *Cohen*, 991, F.2d at 889) (enforcing the Policy Interpretation); *Kelley v. Bd. of Trustees, Univ. of Ill.*, 35 F.3d 265-70 (7th Cir. 1994) (citation omitted) ("This Court must defer to an agency's interpretation of its regulations if the interpretation is reasonable, a standard the policy interpretation at issue here meets"); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 827 (10th Cir. 1993) *(Roberts II); Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 171 (3d Cir. 1993).

[378] *Chalenor*, 291 F.3d at 1046-47; *see also Neal*, 198 F3d at 771.

[379] *See supra* notes 27-32 and accompanying text; *see also supra* note 34 and accompanying text.

[380] *Cf. Sommer v. Vanguard Group*, 461 F.3d 397, 400 (3d Cir. 2006) (holding that Department of Labor opinion letters not subject to notice and comment are not entitled to deference but are persuasive); *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48, 51 (2d Cir. 2006) (holding that Department of Labor memorandum, under *Christensen v. Harris County*, 529 U.S. 576 (2000), was not entitled to deference because it was merely provided to employees as guidance on how the Department would interpret a particular regulation), *cert. granted, Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 853 (2007).

Department policies that had been reaffirmed, by the same administration, less than two years previously.[381] And, for all the reasons discussed previously in Chapter 3, the 2005 Clarification authorizes action that is arguably inconsistent with Title IX and the Policy Interpretation.[382] Thus, the validity of the 2005 Clarification, while not yet tested in court, is subject to vigorous challenge.[383]

### 3. THE INVESTIGATOR'S MANUAL AND OTHER INTERNAL POLICY DOCUMENTS

The Title IX Athletics Investigator's Manual, issued by the OCR in 1990 to replace an earlier 1980 version, is an agency document that was not subject to public notice and comment and was only internally published.[384] It was designed to give guidance to OCR investigators as they address complaints and undertake compliance reviews regarding athletics discrimination. While courts have considered provisions in the Manual,[385] insofar as there are inconsistencies between the Manual and the Policy Interpretation, the Policy Interpretation should take precedence.[386] This principle also applies to any inconsistencies between the Policy Interpretation and any other internal agency policy statements, directives, memoranda, etc., which are often the positions only of particular individuals within the agency.

### 4. LETTERS OF FINDINGS

In some cases, there will have been Letters of Findings (LOFs) or other OCR findings issued regarding the particular athletic program at issue. Through these LOFs, the agency may have approved the challenged institutional practices and policies. Courts are not bound by the agency findings,[387] which may not substitute for the independent judicial inquiry guaranteed by *Cannon*. As the Court found in *Cannon*, the administrative complaint

[381] Agency decisions are evaluated under an arbitrary and capricious standard of review, pursuant to which a court can strike down a decision that is a "clear error in judgment." *See Motor Vehicles Mfrs. v. State Farm Ins. Co.,* 463 U.S. 29, 43 (1983) (stating that a decision may be arbitrary and capricious if "the agency has relied on factors which Congress did not intend it to consider").

[382] *See supra* note 38.

[383] *Cf. Chevron,* 467 U.S. at 844 ("[R]egulations are given controlling authority unless they are arbitrary, capricious, *or manifestly contrary to the [enabling] statute.")* (emphasis added).

[384] Investigator's Manual, *supra* note 89. As a result, the Manual is not entitled to deference from the courts that is accorded to Title IX regulations, but instead is merely "entitled to respect" to the extent that it has "the power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *see also Sommer*, 461 F.3d at 400 (holding that Department of Labor opinion letters, under *Christensen*, are not entitled to deference but are persuasive); *Coke*, 462 F.3d at 51 (holding that Department of Labor memorandum, under *Christensen*, was not entitled to deference because it was merely provided to employees as guidance on how the Department would interpret a particular regulation), *cert. granted, Long Island Care at Home, Ltd. v. Coke,* 127 S.Ct. 853 (2007).

[385] *See, e.g., Roberts II.,* 814 F. Supp. at 1512-13; *Cohen I.,* 809 F. Supp. at 978, 984.

[386] *See* cases cited *supra* notes 373, 377. It is also important that provisions from the Manual not be taken out of context. *Cf. Roberts I,* 814 F. Supp. at 1512 (rejecting defendant's selective reading of Investigator's Manual).

[387] *See, e.g., Roberts I,* 814 F. Supp. at 1515-16 (rejecting the OCR's conclusion that Colorado State was in compliance with Title IX).

process is a severely limited one: the OCR has inadequate resources to fully investigate every case; individual complainants do not have the right to participate in the investigations of their complaints or even to assure that their evidence or witnesses are considered; the agency has no obligation to provide relief to an individual complainant; and no record is made.[388] As a result, LOFs are treated as of little persuasive value.[389]

# E. PROOF OF INTENT IN TITLE IX ATHLETICS CASES

## 1. CLAIMS BASED ON SEX-SEGREGATED ATHLETICS PROGRAMS

Virtually all athletics cases involve intentional discrimination, and in the great majority - if not all - of them, intent will be established as a matter of law by the facial sex-based classification of separate men's and women's programs and the allocation of disparate benefits and opportunities based on sex. Simply put, due to the sex-segregated nature of sports programs, any differing treatment of men's and women's teams by an educational institution constitutes intentional discrimination. In *Neal v. Board of Trustees,* the Ninth Circuit explained this principle as it applied in the context of a participation claim:

> [A]thletic teams are gender segregated, and universities must decide beforehand how many athletic opportunities they will allocate to each sex. As a result, determining whether discrimination exists in athletic programs *requires* gender-conscious, group-wide comparisons. Because men are not 'qualified' for women's teams (and vice versa), athletics require a gender conscious allocation of opportunities in the first instance.[390]

The principle is equally applicable with regard to claims involving discrimination in the allocation of scholarships or in the treatment of men's and women's teams. In *Communities for Equity v. Michigan High School Athletic Association,* for example, the district court recognized that given the sex-segregated nature of athletics programs, any discrimination in these programs by an educational institution is by definition "intentional."[391] This analysis was also applied in *Haffer v. Temple University,* where the court found that intent was demonstrated by the very existence of "Temple's explicit classification of intercollegiate athletic teams on the basis of gender."[392]

[388] *Cannon*, 441 U.S. at 706 n.41.

[389] This is also true if a defendant attempts to introduce LOFs from other cases in which the OCR has approved conduct putatively worse than that alleged in the case in which defendant is charged.

[390] 198 F.3d at 772 n.8 (9th Cir. 1999) (emphasis in original); *see also Barrett,* 2003 U.S. Dist. LEXIS 21095, at *1, 13 (E.D. Pa. Nov. 13, 2003) (holding that because university considered gender on the face of its decision to eliminate the women's gymnastics team, its action was intentional); *Leffel v. Wis. Interscholastic Athletic Ass'n*, 444 F. Supp. 1117, 1121 (E.D. Wis. 1978) (holding that rule prohibiting girls from playing on boys' teams when there is either no team or no comparable team for girls "is intentional discrimination, i.e., for what they deem to be legitimate purposes, the defendants intentionally treat boy and girl athletes differently"); *cf. Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia,* 877 F. Supp. 634, 675 (D.D.C. 1994) (holding that "when a classification is expressly defined in terms of gender, an inquiry into intent is unnecessary"); *Canterino v. Barber*, 564 F. Supp. 711, 714 (W.D. Ky. 1983) (recognizing that the Supreme Court does not require an inquiry into intent "in the context of sex discrimination in cases attacking explicit gender-based classifications," and explaining that "it is not necessary to determine intent to classify by gender when the classification itself is defined in those terms") (citations omitted).

[391] 178 F. Supp. 2d. 805, 856 (W.D. Mich. 2001).

[392] 678 F. Supp. 517, 527 (E.D. Pa. 1987).

These precedents recognize that intent under the law means a defendant's intent to treat men and women differently, regardless of the defendant's subjective motive or ignorance of the law.[393] In particular, there is no requirement to show discriminatory animus, malice or any other evidence of motive, whether benevolent or invidious.[394] The Fifth Circuit in *Pederson* applied this principle after the university had failed to effectively accommodate its female athletes based on its outdated views about women and sports and the university's confusion regarding the practical requirements of Title IX.[395] The *Pederson* court explained that the university's "ignorance about whether they are violating Title IX does not excuse their intentional decision not to accommodate effectively the interests of their female students by not providing sufficient athletic opportunities."[396] The court further explained that "intentional" simply means that the defendant's actions were not accidental; the institution "need not have intended to violate Title IX, but need only have intended to treat women differently."[397] The Fifth Circuit finally concluded that an institution's decision not to provide equal athletic opportunities for its female students because of paternalism and stereotypical assumptions about their interest and abilities constitutes intentional gender discrimination.[398] Citing well established Supreme Court precedent, the court observed that classifications based on "archaic" assumptions are facially discriminatory, and that "actions resulting from an application of these attitudes constitutes [sic] intentional discrimination."[399]

Moreover, the standards that apply to assessing an institution's liability for damages in sexual harassment claims – actual notice and deliberate indifference[400] – should have no

[393] *See Int'l Union v. Johnson Controls,* 499 U.S. 187, 199 (1991) (in Title VII case, holding that "[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates"); *see also Bangerter v. Orem City Corp.,* 46 F.3d 1491, 1501 (10th Cir. 1995) (noting that absence of malevolent intent does not convert facially discriminatory policy into a neutral policy with discriminatory effect); *Innovative Health Sys,.v. City of White Plains,* 931 F. Supp. 222 (S.D.N.Y. 1996), *aff'd* 117 F.3d 37 (2d Cir. 1997) (holding ordinance against group home for disabled was discriminatory on its face even though not motivated by ill will); *Lenihan v. City of N.Y.,* 636 F. Supp. 998, 1009 (S.D.N.Y. 1985) (noting that intentional discrimination does not require malice or animus towards females); *U.S. v. Reece,* 457 F. Supp. 43 (D. Mont. 1978) (holding that landlord's refusal to rent to single women because neighborhood was dangerous was intentional discrimination even though not motivated by invidious intent).

[394] Similarly, proof of animus is not required to establish intentional discrimination in challenges to explicit gender-based classifications under the Equal Protection Clause. *See, e.g., Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 724-26 (1982); *Orr v. Orr*, 440 U.S. 268, 278-79 (1979). Under constitutional doctrine, although intent is an element of any violation of the Fourteenth Amendment, proof of animus is required only where plaintiffs challenge facially neutral policies that have a discriminatory impact. *See, e.g., Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 274 (1979).

[395] *Pederson*, 213 F.3d at 880-81.

[396] *Id.*

[397] *Id.* (*citing Local 189, United Papermakers and Paperworkers v. United States,* 416 F. 2d 980, 996 (5th Cir. 1969) (holding that "intent" under Title VII requires only that "the defendant meant to do what he did" and did not behave "accident[ally]")); *United States v. Koon,* 34 F.3d 1416, 1449 (9th Cir. 1994) (applying the same test to constitutional violations), *aff'd in part and rev'd in part on other grounds*, 518 U.S. 81 (1996); *United States v. Balistrieri*, 981 F.2d 916, 936 (7th Cir. 1992) (holding that a defendant need not know he is violating the Fair Housing Act in order to be found to have discriminated).

[398] *Pederson*, 213 F.3d at 880.

[399] *Id.* (*citing United States v. Virginia,* 518 U.S. 515, 533 (1996) (holding that an institution's refusal to admit women is intentional gender discrimination in violation of the Equal Protection Clause because, inter alia, of "overbroad generalizations about the different talents, capacities, or preferences of males and females")); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (warning of dangers posed by gender discrimination based on "archaic and overbroad assumptions").

[400] In *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) and *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), both sexual harassment cases, the Supreme Court held that funding recipients may be held liable for damages for harassment under Title IX, but only if they have "actual notice" of the harassment and are deliberately indifferent to it.

applicability to athletics cases. For one thing, these standards apply, even in context of sexual harassment, only to claims for damages; they are thus irrelevant to claims for injunctive relief, in athletics cases and in all other Title IX challenges. Equally important, moreover, application of a deliberate indifference standard would misconceive the nature of athletics and non-harassment claims. As the Fifth Circuit recognized in *Pederson*, while in sexual harassment cases the issue is "whether the school district should be liable for discriminatory acts of harassment committed by its employees," in athletics discrimination cases, it is the institution *itself* that is discriminating.[401] Thus, according to *Pederson*, the proper test is not whether the institution knew of or is responsible for the actions of others, but whether the institution treated women differently on the basis of their sex by providing them with unequal athletic opportunities.[402] The deliberate indifference standard is simply inapplicable to this inquiry.[403]

## 2. DISPARATE IMPACT CLAIMS

Defendants have sometimes argued that Title IX athletics claims involve disparate impact and are therefore subject to different standards of proof or even to motions that such claims cannot be brought in court at all.[404] But disparate impact theories are typically wholly irrelevant in athletics cases; as discussed above, the vast majority of athletics claims involve not only intentional discrimination but facial gender-based classifications.[405] As a result, arguments about the appropriate approach to disparate impact claims will typically be inapplicable in the context of athletics claims arising under Title IX.[406]

401 *Pederson*, 213 F.3d at 882; *see also Horner*, 206 F.3d at 693 (rejecting the deliberate indifference standard on the grounds that sexual harassment is not analogous to discrimination in Title IX athletics cases).

402 *Pederson*, 213 F.3d at 882. *But see Grandson v. Univ. of Minn.*, 272 F.3d 568 (8th Cir. 2001) (applying the deliberate indifference standard to Title IX athletics case with little discussion).

403 Indeed, even if the deliberate indifference standard were found to apply, *cf. Jackson v. Birmingham Bd. of Educ.*, 544 U.S. at 81 (noting that individuals "may not bring suit under [Title IX] unless the recipient has received "actual notice" of the discrimination," and citing *Gebser*), it would be satisfied as a matter of law in athletics cases by the institution's decision to operate sex-segregated athletics programs and to treat men's and women's teams differently.

404 *See Cmtys. for Equity,* 178 F. Supp. 2d at 849 (holding that defendants were incorrect in characterizing plaintiffs' claims as involving disparate impact). Arguments that Title IX disparate impact claims should be dismissed are premised on *Alexander v. Sandoval,* 532 U.S. 275 (2001), in which the Court held that plaintiffs lack a private right of action to challenge policies with a racially disparate impact under Title VI of the Civil Rights Act of 1964. The Court reasoned that because Title VI itself bars only intentional discrimination, claims that policies have a disparate impact arise only from the Title VI regulations and not from the statute and therefore are not subject to the implied right of action that attaches to the statute. It can be questioned whether *Sandoval* applies to Title IX disparate impact claims. *See infra* note 407.

405 *See supra* notes 390 and 393 and accompanying text. The only types of athletics complaints that even arguably involve allegations of disparate impact are those in which an institution's facially neutral rule, applied to all athletes across the board, disproportionately affects either male or female teams. If, for example, a university had a policy of assigning trainers to the teams that sustained the most injuries, and if men's teams sustained more injuries than women's teams, female athletes could challenge the resulting reduction in their access to trainers under a disparate impact theory.

406 In any event, it can be argued that any assertion – based on *Alexander v. Sandoval,* 532 U.S. 275 (2001) – that disparate impact claims cannot be brought in court is wholly inapplicable to Title IX in the first instance. *Sandoval* was brought under and based on the case law applicable to Title VI, including *Guardians*, which held that Title VI itself bars only intentional discrimination. *See Guardians Ass'n v. Civil Serv. Comm'n,* 463 U.S. 582 (1983). However, no such case law exists with regard to Title IX. Furthermore, Congress reviewed the regulations under Title IX, so it can be argued that those regulations – which reflect a prohibition on disparate impact discrimination – reflect Congress' intent with regard to the prohibitions of the statute. *See North Haven,* 456 U.S. at 537-38 (Title IX regulations can be understood to accurately reflect congressional intent because Congress specifically rejected challenges to the regulations).

# F. RETALIATION CLAIMS

The Supreme Court has recently recognized a private right of action under Title IX for plaintiffs who protest sex discrimination and suffer retaliation as a result.[407] To make out a retaliation claim, a plaintiff must initially show: "(1) that she engaged in statutorily protected expression; (2) that she suffered an adverse . . . action; and (3) that there is some causal relation between the two events."[408] The first element is satisfied with proof that the plaintiff complained about Title IX violations at his or her institution. The second element is satisfied with proof that the plaintiff's employment or status as a student was affected - *e.g.*, that a plaintiff employee was dismissed or demoted, or that a plaintiff who is a student was barred from participating on a team or harassed by a coach. Courts interpret the third element broadly; it will be satisfied with proof that "the protected activity and the negative . . . action are not completely unrelated."[409] In *Donnellon v. Fruehauf Corp.*, the Eleventh Circuit held that the mere fact that only a short period of time had elapsed between the protected expression and an adverse action offered sufficient proof of relatedness.[410]

In the typical case, once the plaintiff has made out a *prima facie* case of retaliation, the institution must provide a legitimate, nondiscriminatory reason for the adverse decision to which the plaintiff has been subjected.[411] The burden then shifts back to the plaintiff to show that the institution's asserted reason is a pretext for retaliation.[412]

[407] *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). For a more thorough discussion of *Jackson, see supra* notes 51-56 and accompanying text.

[408] *Meeks v. Computer Assocs. Int'l,* 15 F.3d 1013, 1021 (11th Cir. 1994); *see Jackson*, 544 U.S. at 173-74, 184.

[409] *EEOC v. Reichhold Chem., Inc.*, 988 F.2d 1564, 1571-72 (11th Cir. 1993); *see Meeks*, 15 F.3d at 1021.

[410] *See Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 601 ("The short period of time, however, between the filing of the discrimination complaint and the plaintiff's discharge belies any assertion by the defendant that the plaintiff failed to prove causation."). *But see Booth v. Birmingham News Co.*, 704 F. Supp. 213, 215-16 (N.D. Ala. 1988) (holding that the mere passage of a short period of time is insufficient proof of relatedness when there are intervening factors such as a discrimination claim settlement or an assignment).

[411] *Meeks*, 15 F.3d at 1021 (calling this burden on the employer "exceedingly light").

[412] *Id.*