

# **BREAKING DOWN BARRIERS**

A Legal Guide To Title IX  
and Athletic Opportunities



The National Women's Law Center is a Washington-based nonprofit organization that has worked for 35 years to expand opportunities and eliminate barriers for women and their families, with a major emphasis on women's education and employment opportunities, health, and family economic security.

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### **Disclaimer**

While the text of and citations for *Breaking Down Barriers* are, to the best of the authors' knowledge, current as of the date of release of this Manual, there may well be subsequent developments, including legislative or administrative action and court decisions, that could alter the information provided herein. This Manual does not constitute legal advice; individuals and organizations considering legal action should consult with their own counsel before deciding on a course of action.

*Breaking Down Barriers* is dedicated to the memory of Jeffrey F. Liss, formerly Co-Managing Partner of DLA Piper in the United States. His invaluable leadership, extraordinary legal skills, and passionate commitment to *pro bono* work and to social justice will be sorely missed but not forgotten.



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## APPENDIX

The enclosed CD contains sample legal materials relevant to Title IX cases. These are the documents on the CD:

1. Letter from the National Women’s Law Center to Andrew W. Nussbaum, Esq. and Roger Thomas, Esq., Regarding Title IX Issues in Prince George’s County Public High Schools (November 22, 2004)
2. Complaint filed by Women’s Law Project against the University of Pennsylvania, United States Department of Education, Office for Civil Rights, Region III (May 25, 1994)
3. Class Action Complaint, *Choike v. Slippery Rock University*, United States District Court for the Western District of Pennsylvania (May 9, 2006)
4. Class Action Complaint, *Barrett v. West Chester University*, United States District Court for the Eastern District of Pennsylvania (September 4, 2003)

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5. Preliminary Statement of Complaint, *Daniels v. School Board of Brevard County*, Case No. 97-1463-CV-ORL-22A, United States District Court for the Middle District of Florida (December 8, 1997)
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7. Plaintiffs’ Opposition to Defendants’ Motion to Dismiss Pursuant to FRCP 12(b)(1) and (6), *Communities for Equity v. Michigan High School Athletics Association*, Case No. 1:98-CV-479, United States District Court for the Western District of Michigan (June 29, 2001)
8. Interrogatories, *Haffer v. Temple University*, Civil Action, No. 80-1362, United States District Court for the Eastern District of Pennsylvania (February 28, 1983)
9. Plaintiff’s First Request for Production of Documents, *Sabel v. Danbury Public School District*, Case No. 3:97CV-02022 RNC, United States District Court for the District of Connecticut (March 2, 1998)
10. Motion for a Temporary Restraining Order and Rule to Show Cause Why a Preliminary Injunction Should Not Issue, *Choike v. Slippery Rock University*, Civil Action No. 2:06-cv-00622, United States District Court for the Western District of Pennsylvania (May 11, 2006)
11. Plaintiff’s Proposed Findings of Fact and Conclusions of Law, *Choike v. Slippery Rock University*, Civil Action No. 2:06-cv-00622 United States District Court for the Western District of Pennsylvania (June 30, 2005)
12. Commitment to Resolve between Prince George’s County Public Schools and the National Women’s Law Center (September 2006)
13. Settlement Agreement and Mutual General Release, *Jackson v. Birmingham Board of Education*, CV-01-BE-1866-S, United States District Court for the Northern District of Alabama (November 28, 2006)
14. Consent Decree, *Jackson v Birmingham Board of Education*, CV-01-BE-1866-S, United States District Court for the Northern District of Alabama (November 30, 2006)



# I. INTRODUCTION

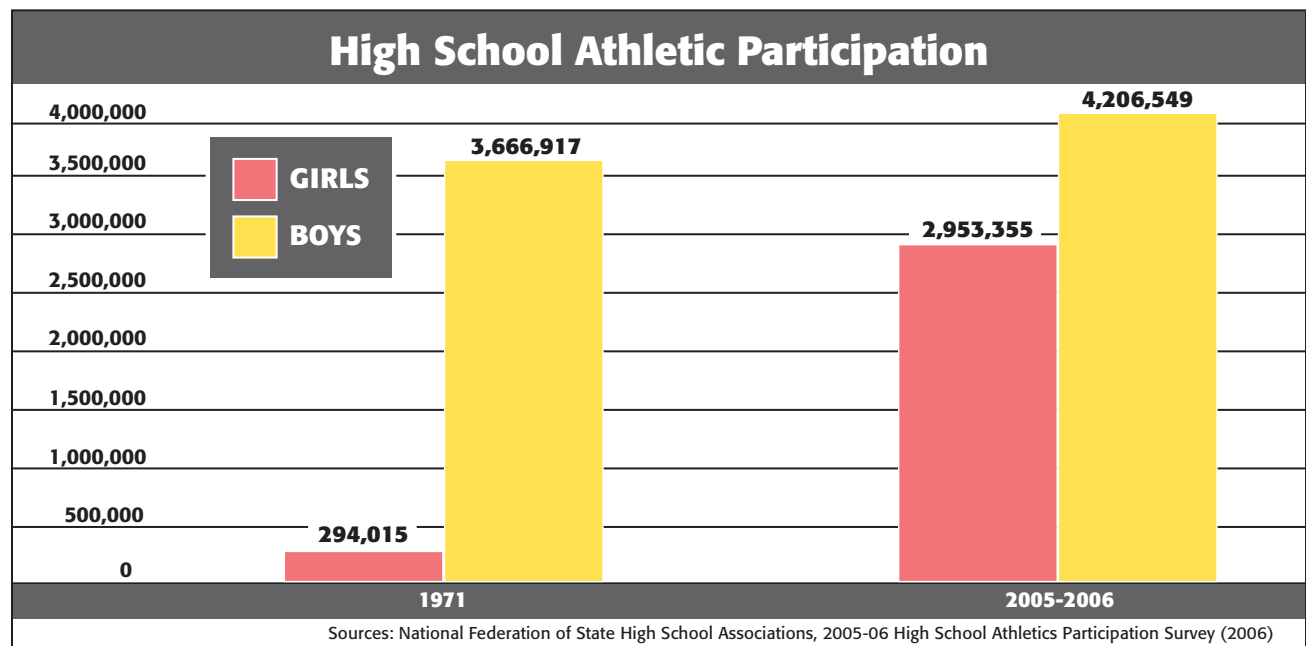
BREAKING DOWN BARRIERS





Title IX of the Education Amendments of 1972 is the primary federal law barring sex discrimination in all facets of education, including sports programs. Title IX requires that members of both sexes have equal opportunities to participate in sports and receive the benefits of competitive athletics. It also requires that athletic scholarships be allocated equitably and that men and women be treated fairly in all aspects of sports programming.

Since the enactment of Title IX 35 years ago, women’s participation in intercollegiate sports has skyrocketed. Title IX has led to greater opportunities for girls and women to play sports, receive scholarships, and obtain other important benefits that flow from sports participation. When Congress passed Title IX in 1972, fewer than 32,000 women participated in college sports.<sup>1</sup> Women received only 2 percent of schools’ athletic budgets, and athletic scholarships for women were nonexistent. Today, the number of college women participating in competitive athletics exceeds 166,000<sup>2</sup> – more than five times the pre-Title IX rate, proof that interest often reflects opportunity. Title IX also has had a significant impact on female athletic opportunities at the high school level. Before Title IX, fewer than 300,000 high school girls played competitive sports.<sup>3</sup> By 2006, that number had climbed to 2.95 million.<sup>4</sup>



<sup>1</sup> National Women’s Law Center, “Debunking the Myths about Title IX and Athletics” (2006), available at <http://www.nwlc.org/pdf/DebunkingMyths.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> National Federation of State High School Associations, 2005-06 High School Athletics Participation Survey (2006).

These advances in athletic opportunities have created significant health, emotional, and academic benefits for women and girls and have promoted responsible social behaviors, greater success in school, and enhanced personal skills. Title IX – the law responsible for these advances – has been widely heralded, and its implementing policies have been consistently supported by Congress and uniformly upheld by the nation’s federal appellate courts.

Yet, despite Title IX’s considerable successes, the playing field is far from level for female athletes. Sex discrimination in athletics remains a serious nationwide problem, and women’s athletics programs still lag behind men’s programs. Young women are systematically denied an equal opportunity to participate in, and reap the many benefits of, athletics competition. Although women are over half the undergraduates in our colleges and universities, female athletes are still just 42 percent of college varsity athletes nationwide. In fact, female participation in intercollegiate sports remains *below* pre-Title IX male participation: while 170,384 men played college sports in 1971-72, only about 166,000 women play college sports today. Furthermore, while 53 percent of the students at Division I schools are women, female athletes in Division I receive only 32 percent of the dollars spent to recruit new athletes, 37 percent of total athletics expenditures, 45 percent of the total athletic scholarships, and 44 percent of the opportunities to play intercollegiate sports.<sup>5</sup> These numbers plainly show that spending on men’s sports continues to far outweigh spending on women’s sports.

Limited opportunities to participate, fewer scholarship dollars, inferior athletic equipment and facilities: these enduring problems mean that Title IX remains as important as ever to removing the barriers women and girls face in sports. Moreover, while other avenues are available to pursue the equitable treatment of women and girls in athletics, efforts to enforce Title IX’s prohibition against sex discrimination, including through litigation brought by parents, students, and coaches, has developed into a particularly effective tool in the battle to secure gender equity in athletics.

This second edition of *Breaking Down Barriers* is a guide to asserting Title IX claims challenging athletics discrimination. It provides a concise introduction to the enforcement of Title IX by private parties, with a focus on the rights of student-athletes. It is an important resource primarily for plaintiffs and their attorneys, but also for university and other school counsel; university, middle, and high school administrators; women and girls in athletics; and others who are interested in familiarizing themselves with the governing legal principles.

<sup>5</sup> “Debunking the Myths,” *supra* note 1.



In using *Breaking Down Barriers*, keep several points in mind:

- The law in this area continues to develop. While the text and citations are, to the best of our knowledge, current as of the date *Breaking Down Barriers* went to press in Spring 2007, there may well be subsequent developments that could alter the governing legal principles of Title IX.
- *Breaking Down Barriers* is a review of Title IX's prohibition against athletics discrimination and not a general federal law or practice manual. As a result, it does not address procedural, jurisdictional, or other substantive legal principles that are not particular to Title IX, although these principles may have important ramifications for Title IX cases. Examples include class action practice and the law prohibiting employment discrimination. Other resources should be consulted regarding these issues.
- While *Breaking Down Barriers* primarily addresses sex discrimination in intercollegiate athletics, Title IX also applies to elementary, middle, and secondary school competitive athletics programs (in addition to physical education, club, and intramural athletics). Many of the issues raised in connection with competitive athletics are the same at both the secondary and post-secondary levels. For example, the analysis of discrimination in the allocation of participation opportunities and the support and treatment of student-athletes applies to all educational levels. However, there are other issues of concern, principally in the elementary, middle, and secondary school context (such as the obligations of state athletic governing bodies and the rights of young women and men to play on opposite-sex teams), which are not addressed fully here.
- The courts are not the only avenue for pursuing the fight against sex discrimination in athletics, although they have been instrumental in opening up opportunities for many young women. Other options include working through an institution's internal processes, filing complaints with federal or state administrative agencies, or using media and public education strategies. In addition, lawsuits may not be necessary to achieve equality for female athletes who confront inequality in athletic programs at the high school level. School systems are often willing to correct inequalities through settlement agreements without the need for a lawsuit.
- Individuals and organizations considering legal action should consult with their own counsel before deciding on a course of action. *Breaking Down Barriers* is intended to provide information on legal developments related to Title IX. It should not be construed as legal advice or a legal opinion on specific facts.



# Title IX

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.

## A Legislative History of Title IX

**1972 Title IX enacted** to provide “solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.” President Richard Nixon signed Title IX into law on June 23, 1972.

**1974 Javits Amendment** adopted, charging the Department of Health, Education, and Welfare with issuing Title IX regulations. The Department received approximately 10,000 comments in response to its proposed regulations.

**1975 Title IX Regulations** published, and Congress given 45 days to pass a concurrent resolution disapproving of them. During those 45 days, Congress held hearings focused on the athletics regulations, thoroughly establishing the pattern of discrimination against women in competitive athletics:

- “Ohio State spent 1,300 times more for their men’s athletics program than for women’s sports.” (Rep. McKinney);
- At the University of Minnesota, “men [on the swim team were] guaranteed their way paid to nationals if they [qualified] . . . . The women’s swim team sold ‘T’ shirts to raise \$450 to send [a female athlete who qualified] to the national event . . . . Three qualified women swimmers stayed home.” (Kathy Kelly, President, United States National Student Association); and
- “Women’s teams are still forced to sell cookies to pay for uniforms and travel funds, although they may have a more successful record than their male counterpart, which flies to their tournaments.” (Lynn Heather Mack, Executive Director, Intercollegiate Association of Women Students).

**1979 Policy Interpretation** published in the Federal Register by the Department of Health, Education, and Welfare's Office for Civil Rights. The Policy Interpretation detailed the factors to consider in assessing athletics programs' compliance with Title IX, including the three-part participation test.

**1980 Investigator's Manual** published by the Office for Civil Rights to provide guidance to its athletics investigators. The version currently in use was issued in 1990.

**1986 Civil Rights Remedies Equalization Act** enacted to expressly waive states' sovereign immunity under the Eleventh Amendment for actions under Title IX and similar statutes.

**1987 Civil Rights Restoration Act** enacted in response to the Supreme Court's ruling in *Grove City College v. Bell*. The Act broadly defined the terms "program" and "activity" as encompassing every part and program of any school, college, or university that receives federal assistance for any purpose. Remarks by senators and representatives in support of the Act highlighted Title IX's early successes in reducing sex discrimination:

- "I personally do not know of any Senator in the Senate – there may be a few, but very few – who does not want Title IX implemented so as to continue to encourage women through America to develop into Olympic athletes." (Sen. Hatch);
- "The participation of women in sports in high schools and colleges has soared since the enactment of Title IX . . . . But suddenly, on February 28, 1984, all of our progress against discrimination in each of these areas was placed at risk by the decision of the Supreme Court of the United States in the case known as *Grove City College v. Bell*." (Sen. Kennedy); and
- "Prior to the Grove City case, everyone – and I mean Republican, Democrat, conservative, liberal; Gerald Ford, Richard Nixon, Jimmy Carter, right up until the Reagan administration – thought that the Title IX regulations meant institution-wide coverage. And this, very frankly, is how we finally were able to get universities and other educational units, schools, high schools, to give equal treatment to women in athletics. This was the opening wedge." (Sen. Packwood).

**1996 Policy Clarification** issued by the Office for Civil Rights. The 1996 Clarification provided additional guidance and examples to educational institutions on how to comply with the three-part participation test outlined in the Policy Interpretation.

**2003 Further Clarification** issued by the Office for Civil Rights. The 2003 Clarification reaffirmed the Office's dedication to the three-part test and its enforcement, and it stated that cutting teams was disfavored as a method for complying with Title IX.

**2005 Additional Clarification** issued by the Office for Civil Rights. The 2005 Clarification addressed methods of surveying students to assess athletic interests and abilities under prong three of the three-part participation test.



# II. TITLE IX BASICS

BREAKING DOWN BARRIERS







Title IX of the Education Amendments of 1972 (Title IX)<sup>6</sup> prohibits sex discrimination in any educational program or activity receiving federal financial assistance. It provides in pertinent part: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>7</sup> While Title IX’s scope goes well beyond athletics, it provides the primary federal cause of action against sex discrimination in athletics in education.<sup>8</sup>

Title IX is enforceable administratively, principally through the U.S. Department of Education and its Office for Civil Rights (OCR),<sup>9</sup> with the ultimate remedy of defunding the offending institution of all federal funds.<sup>10</sup> It is also enforceable in the courts through a private right of action, the subject of *Breaking Down Barriers*.

## A. TITLE IX’S COVERAGE OF ATHLETICS

Despite the brevity of its language, Title IX was intended to cover a broad range of educational activities, including all facets of school athletics programs. Congress, the Department of Education, and the courts have repeatedly confirmed this. Chapter III addresses the Title IX analytical framework for athletics discrimination claims in detail; the material below provides a brief history of the arguments made concerning Title IX’s application to athletics, as well as an introduction to the basic policy documents and court decisions that have shaped the development of the law in this area. As is clear from the legislative history, administrative guidance, and judicial interpretations discussed below, Title IX has always been intended to apply broadly to ensure equal opportunity in all aspects of athletics.

<sup>6</sup> 20 U.S.C. §§ 1681-87 (1988), as amended by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687).

<sup>7</sup> 20 U.S.C. § 1681(a).

<sup>8</sup> There are other legal claims available to challenge athletics discrimination. Federal constitutional claims may be brought against state actors pursuant to 42 U.S.C. § 1983, while employment claims may also be brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Equal Pay Act, 29 U.S.C. § 206(d). Claims may also be available under state law, including both state constitutional and statutory provisions.

<sup>9</sup> The OCR both investigates complaints and conducts compliance reviews. Complaints may be brought by any interested party. If the OCR finds a violation, it will seek to resolve the problem through a conciliation process with the offending institution. If the OCR is not able to reach an acceptable agreement, it has the authority to refer cases for enforcement proceedings either through the Department of Education or the Department of Justice. The OCR has rarely taken this course. See *generally* Office for Civil Rights, Department of Education, OCR Case Resolution and Investigation Manual, May 2005, *available at* <http://www.ed.gov/about/offices/list/ocr/docs/ocrcrm.html>.

<sup>10</sup> 20 U.S.C. § 1682. No educational institution has, to date, lost federal funding due to a Title IX violation.

## 1. ENACTMENT OF TITLE IX

Title IX was enacted as an amendment to the Education Amendments of 1972, which amended the Higher Education Act of 1965. According to the Department of Health, Education, and Welfare (HEW), the agency originally charged with enforcing Title IX, “[T]he legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions.”<sup>11</sup> As the principal Senate sponsor, Senator Birch Bayh, explained, Title IX was designed to be “a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.”<sup>12</sup>

As initially conceived, Title IX would simply have added the word “sex” to the broad prohibition against race and national origin discrimination of all types by recipients of federal funds in Title VI of the Civil Rights Act of 1964.<sup>13</sup> However, hearings held on the subject of sex discrimination primarily focused on education.<sup>14</sup> Accordingly, a provision more narrowly tailored to address sex discrimination in education was introduced in 1971 and was eventually enacted as Title IX. Despite its application to a more limited range of recipients, however, Title IX was always intended to cover the broadest range of educational activities, including athletics. Subsequent legislative history confirms this point.

## 2. POST-ENACTMENT EFFORTS TO LIMIT TITLE IX’S APPLICABILITY TO ATHLETICS

While there were limited references to intercollegiate athletics during the debates surrounding the enactment of Title IX,<sup>15</sup> it was not until shortly after Title IX was passed that intercollegiate athletics became a major focus of congressional debate. During the mid-1970s, Congress defeated several attempts to limit Title IX’s application to intercollegiate athletics. The first was the Tower Amendment, offered in 1974, which would have exempted revenue-producing sports from Title IX’s discrimination analysis.<sup>16</sup> Congress rejected this amendment,

<sup>11</sup> U.S. Department of Education Athletic Guidelines; Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,423 (1979) (hereinafter Policy Interpretation), available at <http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html>.

<sup>12</sup> 118 CONG. REC. 5804 (1972) (remarks of Sen. Bayh).

<sup>13</sup> 42 U.S.C. § 2000d (1988).

<sup>14</sup> *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor on § 805 of H.R. 16098*, 91st Cong., 2d Sess. (1970).

<sup>15</sup> See 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh on privacy in athletic facilities); 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh noting that proposed Title IX will not require co-educational football teams).

<sup>16</sup> 120 CONG. REC. 15,322-23 (1974) (statements of Sen. Tower); see also Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,413.

instead adopting the Javits Amendment,<sup>17</sup> which charged HEW with issuing Title IX regulations covering, *inter alia*, intercollegiate athletics. In formulating these regulations, HEW was required to “consider . . . the nature of particular sports.”<sup>18</sup>

### 3. PROMULGATION OF REGULATIONS

In 1974, HEW proposed regulations that addressed sex discrimination under Title IX, including sex discrimination in athletics. The agency received approximately 10,000 comments in response to its proposed regulations,<sup>19</sup> many of which addressed the athletics provisions.<sup>20</sup> After final regulations, which incorporated many of these comments, were published in 1975,<sup>21</sup> Congress held extensive hearings that focused on the athletics regulations.<sup>22</sup> Substantial evidence was introduced into the record regarding the pervasive nature of sex discrimination in intercollegiate athletic programs and the need for Title IX to address the problem. In addition to the statements of the principal sponsors of Title IX in both the House and the Senate,<sup>23</sup> testimony of many other witnesses established a thorough record of widespread discrimination against women in competitive athletics.<sup>24</sup>

<sup>17</sup> *S. Conf. Rep. No. 1026*, 93d Cong., 2d Sess. 4271 (1974). The Javits Amendment became part of the Education Amendments of 1974, Pub. L. 93-380, Title VIII, § 844, 88 Stat. 484,612 (1974). HEW was given thirty days from the date of the enactment to issue regulations.

<sup>18</sup> Education Amendments of 1974, § 844.

<sup>19</sup> *Sex Discrimination Regulations, Hearings Before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. and Labor*, 94th Cong., 1st Sess. 438 (1975) (hereinafter *Sex Discrimination Regulations Hearings*) (testimony of Casper Weinberger, Secretary of the Department of Health, Education and Welfare).

<sup>20</sup> As Secretary Weinberger testified, “With regard to athletics, I have to say, Mr. Chairman and members of the committee, I had not realized until the comment period closed that the most important issue in the United States today is intercollegiate athletics, because we have an enormous volume of comments about them.” *Id.* at 439.

<sup>21</sup> 40 Fed. Reg. 24,128 (1975) (these regulations currently appear at 34 C.F.R. Part 106 (2006)).

<sup>22</sup> HEW’s final regulations were subjected to congressional oversight pursuant to § 431 of the General Education Provisions Act. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 531-32 (1982). At that time, Congress could prevent implementation of the regulations by enacting, within 45 days of their issuance, a concurrent resolution disapproving them. *Id.* The procedure laid out in the General Education Provisions Act was subsequently invalidated by the Supreme Court in *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>23</sup> See, e.g., *Sex Discrimination Regulations Hearings*, *supra* note 19, at 165-66 (statement of Rep. Mink, principal House sponsor, that intercollegiate programs were intended to be covered by Title IX) and at 171, 179 (statements of Sen. Bayh, principal Senate sponsor, that eradication of discrimination in athletic programs is an essential component of eliminating discrimination against women at all levels of education).

<sup>24</sup> See, e.g., testimony of Rep. McKinney, *id.* at 197 (noting that the average educational institution spends far less on women’s athletics than on men’s; for instance, “Ohio State University spent 1,300 times more for their men’s athletic program than for women’s sports”); Laurie Mabry, President, Ass’n of Intercollegiate Athletics for Women, *id.* at 135-36 (citing statistical evidence that, on average, women’s athletics received less than 2 percent of the total intercollegiate athletic budget in 1974-75); Kathy Kelly, President, U.S. Nat’l Student Ass’n, *id.* at 77-78 (describing differences in treatment of men’s and women’s swim teams at University of Minnesota during the 1973-74 school year; for instance, “men are guaranteed their way paid to nationals if they [qualify] . . . . The women’s swim team sold ‘T’ shirts to raise \$450 to send [a female athlete who qualified] to the national event . . . . Three qualified women swimmers stayed home.”); Lynn Heather Mack, Executive Director, Intercollegiate Ass’n of Women Students, *id.* at 305 (“Women’s teams are still forced to sell cookies to pay for uniforms and travel funds, although they may have a more successful record than their male counterpart which flies to their tournaments.”); Norma Raffel and Margaret Dunkle, Women’s Equity Action League, *id.* at 283-304 (testimony regarding discrimination against girls and women in sports); Nellie Varner, Nat’l Ass’n of State Univ. and Land Grant Colleges, American Council on Education, and Ass’n of American Univs., *id.* at 418 (“We certainly believe that athletics are an integral part of the educational process of educational institutions; we also know that gross discrimination has existed in athletic programs for women institutions of higher education and that change in this area of campus life is necessary”). *But see* Darrell Royal, President, American Football Coaches Ass’n, *id.* at 46-66; John Fuzak, President, Nat’l Collegiate Athletic Ass’n, *id.* at 98-122. Similar evidence of discrimination in college athletics was presented at Title IX hearings held in the Senate Subcommittee on Education in September 1975. *Prohibition of Sex Discrimination, 1975, Hearings Before the Subcomm. on Education of the Comm. on Labor and Public Welfare on S. 2106*, 94th Cong., 1st Sess. 49-150 (1975) (hereinafter *Hearings on S. 2106*). The testimony revealed discrepancies in the opportunity to receive coaching and in other benefits and opportunities, such as the quality and amount of equipment, access to facilities and practices times, publicity, medical, and training facilities, and housing and dining facilities. See *Hearings on S. 2106* at 56 (testimony of Margy DuVal, President, Intercollegiate Ass’n of Women Students, noting disparities in funding and treatment of male and female students at various institutions; for instance, “[a]t Ohio State University, where men operate on a \$6 million budget, the female swimmers use the pool from 6:30am to 9:30am . . . when men don’t want it”).

Among the bills introduced during the 45 days given to Congress to disapprove the regulations were concurrent resolutions to disapprove the regulations in their entirety,<sup>25</sup> as well as resolutions to disapprove the regulations insofar as they applied to athletics.<sup>26</sup> Congress passed none of these resolutions. Thus, the Title IX regulations went into effect on an extensive and explicit record of sex discrimination in intercollegiate athletics and reflect the intent of Congress to apply the law proactively to eradicate the barriers limiting women's opportunities in sports.

#### **4. DEVELOPMENT OF THE POLICY INTERPRETATION AND SUBSEQUENT CLARIFICATIONS**

Three years after issuing the regulations and following the receipt of numerous complaints alleging discrimination in postsecondary athletics, HEW's OCR proposed a policy interpretation "to provide a framework within which . . . complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs."<sup>27</sup> After the proposed policy guidance was published, HEW received "[o]ver 700 comments reflecting a broad range of opinion" and "visited eight universities . . . to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses."<sup>28</sup> Also following the comment period, the OCR representatives "met for additional discussions with many individuals and groups, including college and university officials, athletic associations, athletic directors, women's rights organizations, and other interested parties."<sup>29</sup>

The final Policy Interpretation reflects many of the comments as well as information gathered from the campus interviews.<sup>30</sup> It sets out in detail the operative rules for determining whether an athletic program is in violation of Title IX. The Policy Interpretation also documents evidence of discrimination against women in intercollegiate athletics, as both a historic phenomenon and a continuing practice. It explicitly discusses the depth and breadth of the problem, addressing discrimination in participation opportunities<sup>31</sup> as well as "the

<sup>25</sup> See S. Con. Res. 46, 121 CONG. REC. 17,301 (1975); H. Con. Res. 310, 121 CONG. REC. 19,209 (1975).

<sup>26</sup> See S. Con. Res. 52, 121 CONG. REC. 22,940 (1975); H. Con. Res. 311, 121 CONG. REC. 19,209 (1975).

<sup>27</sup> Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,413.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 71,419-20.

<sup>30</sup> *Id.* at 71,413.

<sup>31</sup> See Appendix A – "Historic Patterns of Intercollegiate Athletics Program Development," Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,419. The Policy Interpretation demonstrates, for instance, although women accounted for 48 percent of national undergraduate enrollment, they represented only 30 percent of intercollegiate athletes. It further explains that "[t]he historic emphasis on men's intercollegiate athletic programs has also contributed to existing differences in the number of sports and scope of competition offered men and women." *Id.*

absence of a fair and adequate level of resources, services, and benefits” for women’s athletics.<sup>32</sup>

A policy clarification issued by the OCR on January 16, 1996 (the 1996 Clarification), explains the Policy Interpretation’s equal participation opportunities requirement in more detail.<sup>33</sup> To prepare the final document, the OCR issued a draft to more than 4,500 interested parties on September 20, 1995, and took into consideration over 200 written comments. The 1996 Clarification also responded, in part, to a request from two members of Congress that the OCR clarify how institutions could comply with particular aspects of the three-part participation test set forth in the Policy Interpretation. This request originated in May 1995 hearings held by the Post-Secondary and Lifelong Learning Subcommittee of the U.S. House of Representatives’ Committee on Economic and Educational Opportunities. The hearings included criticism of the three-part test from two institutions that had been found in violation of Title IX – Brown University and Eastern Illinois University.<sup>34</sup>

On July 11, 2003, the OCR issued a letter further clarifying certain issues related to Title IX’s three-part participation test (the 2003 Clarification).<sup>35</sup> The 2003 Clarification was issued following the Department of Education’s creation of a Commission on Opportunity in Athletics in June 2002, which was asked to investigate and report on whether the longstanding Title IX compliance standards, laid out in the Policy Interpretation and the 1996 Clarification, should be changed. Although the Commission recommended extensive changes to the Department’s Title IX athletics policies that would have substantially limited opportunities for women,<sup>36</sup> the Department declined to adopt any of those recommendations, recognizing the broad support throughout the country for the goals and spirit of Title IX. The OCR thus issued the 2003 Clarification to reaffirm the standards set forth in the Policy Interpretation and the 1996 Clarification and to “strengthen Title IX’s promise of nondiscrimination in the athletic programs of our nation’s schools.”<sup>37</sup>

<sup>32</sup> *Id.*

<sup>33</sup> See Office for Civil Rights, Department of Education, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996) (hereinafter 1996 Clarification), available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html>.

<sup>34</sup> For a more detailed discussion of the attacks on the three-part test in Congress, see Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POLICY 51, 69-74 (Spring 1996).

<sup>35</sup> See Office for Civil Rights, Department of Education, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (June 11, 2003) (hereinafter 2003 Clarification), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>.

<sup>36</sup> See U.S. Dep’t of Educ., Secretary’s Commission for Opportunity in Athletics, *Open to All: Title IX at Thirty*, Washington, D.C., 2002, available at <http://www.ed.gov/about/bdscomm/list/athletics/report.html>. But see *Minority Views on the Report of the Commission on Opportunity in Athletics*, Feb. 2003, available at [http://www.womenssportsfoundation.org/binary-data/WSF-ARTICLE/pdf\\_file/944.pdf](http://www.womenssportsfoundation.org/binary-data/WSF-ARTICLE/pdf_file/944.pdf).

<sup>37</sup> See 2003 Clarification, *supra* note 35.

On March 17, 2005, without prior notice or opportunity for public comment, the OCR issued yet another policy document, this time retrenching from some of the commitments it had made in the 2003 Clarification.<sup>38</sup> Although the 2005 Clarification has yet to be tested in court, there are substantial questions about whether it authorizes practices that courts would find to be consistent with applicable statutory and constitutional standards. These questions are discussed in Chapter III.

## 5. SUPREME COURT INTERPRETATIONS OF THE SCOPE OF TITLE IX

The Supreme Court has addressed the scope of Title IX in several seminal decisions. Most of these interpretations have confirmed and applied Title IX's broad scope. Indeed, in the most notable instance in which the Court narrowed the coverage of Title IX, Congress overturned the Court's interpretation by passing an amendment to the law.

### a. Title IX's Broad Application to All Programs and Activities: *Grove City College v. Bell* and the Response of Congress

In *Grove City College v. Bell*,<sup>39</sup> the Supreme Court narrowly interpreted Title IX's "program or activity" language to apply only to those specific programs or activities within an institution that directly received federal financial assistance.<sup>40</sup> The decision effectively insulated intercollegiate athletics departments from Title IX claims.<sup>41</sup>

Congress overruled the *Grove City* decision by enacting the Civil Rights Restoration Act of 1987 (the Restoration Act).<sup>42</sup> The Restoration Act defines the terms "program" and "activity" broadly, bringing each and every part and program of a school, college, or university within Title IX's purview if the institution receives federal assistance for any purpose.<sup>43</sup>

<sup>38</sup> See Office for Civil Rights, Department of Education, Additional Clarification of Intercollegiate Athletics Policy. Three-Part Test (Mar. 17, 2005) (hereinafter 2005 Clarification), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html/>

<sup>39</sup> 465 U.S. 555 (1984).

<sup>40</sup> *Id.* at 570-73. The only form of federal financial aid plaintiff Grove City College received was federally guaranteed students loans. The Court thus restricted application of Title IX to the college's financial aid program.

<sup>41</sup> See *Bennett v. West Tex. State Univ.*, 799 F.2d 155, 159 (5th Cir. 1986) (dismissing all Title IX claims including those implicating athletic scholarship awards); *Haffer v. Temple Univ.*, No. 80-1362 (E.D. Pa. Feb. 14, 1985) (order dismissing all Title IX claims except those involving discrimination in the award and allocation of athletic scholarships); *O'Connor v. Peru State Coll.*, 605 F. Supp. 753, 760-61 (D. Neb. 1985), *aff'd*, 781 F.2d 632 (8th Cir. 1986) (no recovery for nontenured instructor on sex discrimination claim under Title IX where division at state college for which she worked received no direct federal funds).

<sup>42</sup> 20 U.S.C. § 1687 (1988).

<sup>43</sup> For a discussion of this issue, see *Cohen v. Brown Univ.*, 809 F. Supp. 978, 982-83 (D.R.I. 1992) (*Cohen I*), *aff'd*, 991 F.2d 888 (1st Cir. 1993) (*Cohen II*). At least one court failed to notice the existence of the Restoration Act following its enactment. See *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 700 F. Supp. 269 (W.D. 1988) (adopting program-specific approach and failing to mention Restoration Act). The decision, was later vacated in an unreported order. See *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, No. 84-648 (W.D. Pa. Aug. 17, 1989).

Congress made clear that this broad coverage reflected its original intent in enacting Title IX and that the Court’s *Grove City* analysis significantly misinterpreted the purposes of the law. The congressional debates associated with the Restoration Act reflect a remarkable consensus that Title IX should provide redress for the serious problem of sex discrimination in competitive athletics. Numerous senators and representatives expressly relied on Title IX’s early successes in reducing sex discrimination in athletics as a compelling reason for the enactment of the Restoration Act.<sup>44</sup> Because Title IX’s current applicability to intercollegiate athletics is principally based in the Restoration Act, these debates not only ratified the remedial intent of the Congress that initially enacted Title IX, but also are properly viewed as contemporaneous legislative history of the Title IX that exists today.<sup>45</sup>

### **b. Title IX’s Application to Employment: *North Haven Board of Education v. Bell***

In *North Haven Board of Education v. Bell*,<sup>46</sup> the Supreme Court upheld the Title IX regulations that prohibit gender-based employment discrimination. These provisions, which were part of the original Title IX regulations promulgated in 1975, were challenged as being beyond the scope of the HEW’s authority. The Supreme Court rejected the argument that these regulations exceeded the agency’s authority, explaining, in language with applicability well beyond the facts of the particular case, that “[t]here is no doubt that ‘if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.’”<sup>47</sup> Accordingly, the Court held that “Section 901(a)’s broad directive that

<sup>44</sup> See, e.g., Remarks of Sen. Riegle, 130 CONG. REC. S2267 (daily ed. Mar. 2, 1984); Joint Explanation by Sen. Kennedy and Sen. Packwood of Civil Rights Act of 1984, 130 CONG. REC. S4585-86 (daily ed. Apr. 12, 1984) (the Civil Rights Act of 1984 was the precursor to the Restoration Act); Remarks of Sen. Stevens, 130 CONG. REC. S4601 (daily ed. Apr. 12, 1984); Remarks of Rep. Coleman, 130 CONG. REC. H6806 (daily ed. June 25, 1984) (“Before Title IX became law, sex discrimination was an open, accepted practice on many campuses. Among the problems . . . [a]thletic scholarships for women were virtually nonexistent . . . One of the best examples of women gaining equal access in education thanks to Title IX has been in the area of athletics.”); Remarks of Rep. Kaptur, 130 CONG. REC. E3492 (daily ed. Aug. 8, 1984); Remarks of Sen. Hatch, 130 CONG. REC. S11,253 (daily ed. Sept. 17, 1984) (“I personally do not know of any Senator in the Senate – there may be a few, but very few – who does not want Title IX implemented so as to continue to encourage women throughout America to develop into Olympic athletes.”); Remarks of Sen. Kennedy, 130 CONG. REC. S11,448 (daily ed. Sept. 19, 1984) (“The participation of women in sports in high schools and colleges has soared since the enactment of Title IX . . . But suddenly, on February 28, 1984, all of our progress against discrimination in each of these areas was placed at risk by the decision of the Supreme Court of the United States in the case known as *Grove City College against Bell*.”); Remarks of Sen. Exon, 130 CONG. REC. S12,423 (daily ed. Sept. 29, 1984); Remarks of Sen. Byrd, 130 CONG. REC. S12,642 (daily ed. Oct. 2, 1984); Remarks of Rep. Simon, 130 CONG. REC. E4164 (daily ed. Oct. 2, 1984); Remarks of Sen. Hatfield, 130 CONG. REC. S13,249 (daily ed. Oct. 3, 1984); Remarks of Sen. Chaffee, 133 CONG. REC. S2243 (daily ed. Feb. 19, 1987); Remarks of Sen. Packwood, 134 CONG. REC. S168 (daily ed. Jan. 27, 1988) (“Prior to the *Grove City* case, everyone – and I mean Republican, Democrat, conservative, liberal; Gerald Ford, Richard Nixon, Jimmy Carter, right up until the Regan administration – thought that the Title IX regulations meant institution-wide coverage. And this, very frankly, is how we finally were able to get universities and other educational units, schools, high schools, to give equal treatment to women in athletics. This was the opening wedge.”); Remarks of Rep. Schroeder, 134 CONG. REC. H592 (daily ed. Mar. 2, 1988); Remarks of Sen. Mitchell, 134 CONG. REC. S2738 (daily ed. Mar. 22, 1988); Remarks of Sen. Mikulski, 134 CONG. REC. S2741 (daily ed. Mar. 22, 1988).

<sup>45</sup> See *Cohen II*, 991 F.2d at 901 (relying in part on the Restoration Act debates in analyzing congressional findings regarding Title IX).

<sup>46</sup> 456 U.S. 512 (1982).

<sup>47</sup> *Id.* at 521 (quoting *U.S. v. Price*, 383 U.S. 787, 801 (1966)) (alteration in original)).

'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students."<sup>48</sup> Thus, employment discrimination is covered under both Title IX and Title VII.<sup>49</sup>

The Court also noted that the failure of Congress to disapprove of the Title IX regulations creates the inference that "it considered those regulations consistent with legislative intent."<sup>50</sup> This analysis provides useful support for the athletics regulations as well as the employment regulations at issue in *North Haven*. It also buttresses the argument that the Policy Interpretation properly effectuates congressional intent. While there was no disapproval process for the Policy Interpretation, the Interpretation was in effect when Congress passed both the Civil Rights Restoration Act and other amendments to Title IX,<sup>51</sup> supporting the inference that Congress considered it consistent with legislative intent.

### **c. Title IX's Application to Retaliation: *Jackson v. Birmingham Board of Education***

In *Jackson v. Birmingham Board of Education*, the Supreme Court held that individuals who protest sex discrimination and who are then punished by their schools as a result of their protest may sue under Title IX to challenge the retaliation.<sup>52</sup> In reaching this result, the Court emphasized Title IX's broad scope and held that retaliation based on an individual's complaints of sex discrimination is a form of differential treatment that amounts to discrimination on the basis of sex.<sup>53</sup> The Court also emphasized that protection from retaliation extends to all individuals who protest discrimination, whether or not that discrimination was directed against those individuals in the first instance. Indeed, the Court recognized that plaintiffs such as the girls' high school basketball coach who brought suit in *Jackson* are often "better able [than students] to identify discrimination" and may be the "only effective adversar[ies] of discrimination."<sup>54</sup>

<sup>48</sup> *Id.* at 520.

<sup>49</sup> Some courts have held, however, that Title IX claims that are also cognizable under Title VII must be brought under Title VII to ensure adherence to Title VII's administrative exhaustion requirements. See, e.g., *Lowery v. Tex. A&M Univ.*, 117 F.3d 242 (5th Cir. 1997); *Morris v. Wallace Cmty Coll. – Selma*, 125 F. Supp. 2d 1315 (S.D. Ala. 2001); see also *infra* note 98.

<sup>50</sup> 456 U.S. at 530-35.

<sup>51</sup> See *infra* notes 82-86 and accompanying text for discussion of the Civil Rights Remedies Equalization Act.

<sup>52</sup> 544 U.S. 167 (2005).

<sup>53</sup> *Id.* at 174-77.

<sup>54</sup> *Id.*



Accordingly, any plaintiff - a student, coach, teacher, or other employee - can bring a retaliation claim under Title IX, even if the retaliatory action was not based on the plaintiff's own sex.<sup>55</sup>

The Court also recognized that allowing retaliation claims under Title IX is essential to ensure that the law's protections become effective. "Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished."<sup>56</sup> Moreover, the Court stated, "[W]ithout protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied."<sup>57</sup>

## B. DEFINITION OF RECIPIENT

All educational institutions that receive federal funds – including public and some private elementary and secondary schools and virtually all colleges and universities – are subject to Title IX.<sup>58</sup> The Supreme Court has confirmed that those funds need not be received directly. In *Grove City College v. Bell*, for example, the Court held that the fact that students of the college received federally guaranteed student loans was sufficient to subject the school to coverage under Title IX.<sup>59</sup> In *National Collegiate Athletic Association v. Smith*,<sup>60</sup> moreover, the Court held that an entity qualifies as a recipient of federal funds when it receives federal aid either itself or through an intermediary.<sup>61</sup>

The Court has also made clear that entities receiving only the benefit of federal funds, rather than the funds themselves, cannot be subjected to Title IX on that basis alone. In *Smith*, the Court held that the National Collegiate Athletic Association (NCAA) could not be treated as a recipient of federal funds, and therefore subject to Title IX, by virtue of its collecting dues from member institutions that themselves received federal funds. The Court

<sup>55</sup> *Id.* at 174-77.

<sup>56</sup> *Id.* at 181.

<sup>57</sup> *Id.*

<sup>58</sup> See 20 U.S.C. § 1681(a).

<sup>59</sup> See 465 U.S. 555, 573-4 (1984).

<sup>60</sup> 525 U.S. 459 (1999).

<sup>61</sup> *Id.* at 466-69 (relying on *Grove City Coll. v. Bell*, 465 U.S. 555 (1984), and *Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1998)). The latter case has been superseded by enactment of a statute, the Air Carrier Access Act, under which there is an implied private right of action for disabled air travelers. See *Love v. Delta Air Lines*, 310 F.3d 1347, 1358 (11th Cir. 2002).

stated that “[a]t most, the Association’s receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage.”<sup>62</sup>

But the Court *has* recognized that there may be circumstances in which entities will be covered by Title IX even absent a direct link to federal aid. In *Smith*, the Court left open the possibility that the NCAA is subject to Title IX because its member institutions, which are recipients of federal funds, have ceded controlling authority over their federally funded athletics programs to the NCAA.<sup>63</sup>

This theory of coverage was adopted by the court in *Communities for Equity v. Michigan High School Athletic Association*.<sup>64</sup> The court held that “any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid.”<sup>65</sup> It noted that a contrary ruling would encourage recipients of federal funds to transfer control over those funds to others; this could potentially permit both parties to avoid Title IX liability and therefore “would allow federal funds to promote gender discrimination so long as the recipients of those funds empowered someone else to promulgate the discriminatory policies.” According to the court, the meaning and purpose of Title IX did not warrant “such a formalistic interpretation.”<sup>66</sup> After holding the “controlling authority” theory to be legally viable, the court found that the Michigan High School Athletic Association clearly exercises such controlling authority over schools with respect to the scheduling of sports seasons because it sets the beginning and closing dates of a season and the dates of championship tournaments, and punishes those who play the sport outside of these designated dates; in addition, no school or schools has the power to change the seasons apart from seeking action within MHSAA.<sup>67</sup>

<sup>62</sup> 525 U.S. at 468.

<sup>63</sup> The Court also remanded the case for further factual development on the question of whether the NCAA directly or indirectly received federal financial assistance through the National Youth Sports Program (NYSP) it administered. *Id.* at 469. Through the NYSP, the NCAA directs federal funds to projects across the nation aimed at establishing sports programs for economically disadvantaged youth. See <http://www.nyscorp.org/nysp/home.html>. The NCAA’s authority over members’ sports programs and its involvement in the NYSP were addressed in *Smith v. NCAA*, 266 F.3d 152 (3rd Cir. 2001). The Third Circuit held that having authority over members’ sports programs does not subject the NCAA to Title IX because NCAA members may choose not to follow NCAA rules, and are not therefore wholly controlled by the NCAA. *Id.* at 155-57. The Court also held that involvement in the NYSP would subject the NCAA to Title IX if the plaintiff could provide factual support for her allegations that the NCAA effectively controlled the NYSP. *Id.* at 161-62. These findings applied to the NCAA alone and are not necessarily applicable to evaluating whether any state *high school* association controls athletics programs of its member schools.

<sup>64</sup> 178 F. Supp. 2d 805 (W.D. Mich. 2001), *aff’d* 377 F.3d 504 (6th Cir. 2004).

<sup>65</sup> *Id.* at 851 (citing *Comtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 80 F. Supp. 2d 729, 735 (W.D. Mich. 2000)).

<sup>66</sup> 178 F. Supp. 2d at 852. The court also held that the “controlling authority” theory is consistent with the contractual nature of Congress’ Spending Clause power to set conditions for the use of federal funds. It reasoned that the Michigan High School Athletic Association essentially “accepts the conditions in which member schools must operate when it implicitly contracts with the federal government to become responsible for organization of interscholastic athletic programs funded in part by federal resources.” *Id.*

<sup>67</sup> *Id.* at 855.

The court also held that MHSAA was a state actor for purposes of a constitutional claim under 42 U.S.C. § 1983 because (1) it had a large public school membership; (2) it received revenue from gate receipts and broadcast fees that would otherwise have gone to public member schools; (3) its representative council included a representative of the state superintendent; (4) its employees were eligible for the state retirement system; and (5) it exercised adjudicative power over public member schools by establishing rules and enforcing sanctions.<sup>68</sup> The court relied on *Brentwood Academy v. Tennessee Secondary School Athletic Association* in its analysis of the state action issue.<sup>69</sup> The plaintiff in *Brentwood*, a private school, argued that the defendant, a statewide athletic association of public and private member schools, was a state actor for purposes of § 1983 because of its close involvement with state school officials and its public member schools.<sup>70</sup> The Supreme Court agreed that the association was pervasively entwined with state officials and public schools, listing among the evidence the association’s funding by public member schools, the association’s receipt of ticket revenue, and the involvement of association employees in the state retirement system.<sup>71</sup>

## C. PRIVATE RIGHT OF ACTION

Although Title IX as enacted provided explicitly only for administrative enforcement of the law by the OCR, Congress and the federal courts have recognized that, for individuals to be effectively protected under the statute, they must also be able to pursue their claims in court.

In *Cannon v. University of Chicago*,<sup>72</sup> the Supreme Court’s first decision directly addressing Title IX, the Court held that Title IX includes an implied private right of action without any requirement that administrative remedies be exhausted. As a result, aggrieved individuals can directly enforce their Title IX rights in court without first bringing their claims before an administrative agency. The Court’s decision rested in large part on its determination that Title IX was expressly modeled on Title VI of the Civil Rights Act of 1964 and should thus generally track Title VI interpretations.<sup>73</sup> The Court determined that by the time “Title IX was

<sup>68</sup> *Id.* at 847.

<sup>69</sup> 531 U.S. 288 (2001).

<sup>70</sup> *Id.* at 293-94. Many state athletic associations may well be subject to constitutional claims as state actors under *Brentwood*.

<sup>71</sup> *Id.* at 298-300. The Supreme Court is hearing another aspect of the *Brentwood* case during the current term and has been asked to revisit the state action issue.

<sup>72</sup> 441 U.S. 677 (1979).

<sup>73</sup> *Id.* at 694-98.

enacted, the critical language in Title VI had already been construed as creating a private remedy.<sup>74</sup> Accordingly, the Court determined that Congress must have intended a similar enforcement scheme for Title IX.

The Court also found that a private right of action was critical to achieve Congress's intent "to provide individual citizens effective protection against [discriminatory] practices."<sup>75</sup> As the Court recognized, the statutory defunding remedy is often not as well-suited to achieve this purpose as is a private right of action.<sup>76</sup> In addition, the Court found that deficiencies in the administrative process – which continue to limit the efficacy of administrative relief today – supported both the existence of a private remedy and the refusal of Congress to impose an exhaustion requirement.<sup>77</sup> First, inadequate resources leave the government unable to address all Title IX violations. Further, individual complainants do not have the right to participate in the investigation and enforcement of their complaints, the agency is not required to provide relief to the individual complainant as part of the compliance agreements it obtains, and the agency can opt not to investigate a particular complaint. *Cannon's* discussion of the limitations of the administrative process remains particularly applicable to the question of the proper deference due by the courts to the OCR resolutions of complaints and compliance reviews.<sup>78</sup>

The Court subsequently decided, in a unanimous opinion in *Franklin v. Gwinnett County Public Schools*,<sup>79</sup> that a monetary damages remedy is available under Title IX in cases of intentional discrimination. The Court relied on the well established principle that all remedies are presumed to be available to accompany a federal right of action "unless Congress has expressly indicated otherwise."<sup>80</sup> As the Court stated, "Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe."<sup>81</sup>

<sup>74</sup> *Id.* at 696.

<sup>75</sup> *Id.* at 704. The Supreme Court affirmed *Cannon's* reasoning in *Jackson*. It stated that a private right of action was necessary to ensure that individuals would be fully protected from retaliation for protesting discrimination. 544 U.S. at 173-74.

<sup>76</sup> See *id.* at 704 n.37.

<sup>77</sup> *Id.* at 706 n.41 & 708 n.42. Deficiencies in the administrative process have been cited by courts in holding that a plaintiff's ability to sue under Title IX does not supplant the ability to bring a simultaneous claim under 42 U.S.C. § 1983 for constitutional violations arising from the same set of facts. But there is a circuit split on that issue. Compare *Cmtys. for Equity v. Mich. High Sch. Athl. Ass'n*, 459 F.3d 676, 690 (6th Cir. 2006), and *Seamons v. Snow*, 84 F.3d 1226, 1234 (10th Cir. 1996), with *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756-59 (2d Cir. 1998), and *Pfeiffer v. Marion Center Area Sch. Dist.*, 917 F.2d 779, 789 (3rd Cir. 1990).

<sup>78</sup> See *infra* note 389 and accompanying text, suggesting that given the lack of procedural protections, little if any deference should be extended to the OCR determinations.

<sup>79</sup> 503 U.S. 60 (1992).

<sup>80</sup> *Id.* at 66.

<sup>81</sup> *Id.* at 75.

Moreover, Congress has confirmed that damages are available against state defendants. In 1986, Congress enacted the Civil Rights Remedies Equalization Act (CRREA),<sup>82</sup> which expressly waives a state's sovereign immunity under the Eleventh Amendment for actions under Section 504 of the Rehabilitation Act, Title VI, Title IX, and other similar statutes.<sup>83</sup> Title IX and CRREA were passed, at least in part, pursuant to the power of Congress under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause.<sup>84</sup> As the Supreme Court has recognized, Congress clearly and unequivocally has the power to waive states' Eleventh Amendment immunity when it enacts statutes under this constitutional power.<sup>85</sup> Furthermore, Congress is independently authorized to require states to waive their immunity as a condition of receipt of federal funds. Following enactment of the CRREA, therefore, state defendants in Title IX claims may not benefit from Eleventh Amendment rights if they accept federal funds.<sup>86</sup>

<sup>82</sup> 42 U.S.C. § 2000d-7 (2007).

<sup>83</sup> In *Atascadero State Hosp. v. Scanlon*, the Supreme Court held that, in the absence of an express waiver, the Eleventh Amendment barred suits in federal courts for monetary damages against state agencies arising under § 504 of the Rehabilitation Act. 473 U.S. 234, 246 (1985). By direct implication, *Atascadero* applied to the other civil rights federal funding statutes, including Title IX. Congress responded by enacting the Civil Rights Remedies Equalization Act.

<sup>84</sup> Although the Supreme Court has not decided the source of congressional power for enacting Title IX, see *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 n.8 (1992), the legislative history and purpose of Title IX and CRREA demonstrate that they were enacted at least in part pursuant to Congress' enforcement powers under the Fourteenth Amendment. See, e.g., *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (recognizing twin purposes of Title IX "to avoid the use of federal resources to support discriminatory practices," and "to provide individual citizens effective protection against those practices"). Even if Title IX was also enacted pursuant to Congress' Spending Clause powers, it can be simultaneously grounded in the Fourteenth Amendment, as the Supreme Court has long recognized multiple sources of constitutional authority for a given legislative enactment. See, e.g., *Griffin v. Breckenridge*, 403 U.S. 88, 107 (1971).

For statements in the legislative record supporting the Fourteenth Amendment as a basis of congressional authority for Title IX and the CRREA, see 110 CONG. REC. 6553 (1964) (statement of Sen. Douglas); 110 CONG. REC. 1529 (1964) (statement of Rep. McCulloch); 110 CONG. REC. 1519 (1964) (statement of Rep. Celler); 110 CONG. REC. 1512 (1964) (statement of Rep. Madden); 118 CONG. REC. 5982 (1972) (statement of Sen. Gambrell); 118 CONG. REC. 5166 (1972) (statement of Sen. Griffin); 132 CONG. REC. 28,624 (1986); 131 CONG. REC. 22,346 (1985) (remarks of Sen. Cranston).

<sup>85</sup> See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 59 (1996).

<sup>86</sup> See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 672 (1974) (a state may effectively waive its Eleventh Amendment immunity by participating in a program for which Congress has conditioned participation on such a waiver). Note that sovereign immunity applies only to state defendants, not to private entities or local public schools. Moreover, sovereign immunity protects state defendants only from damages, not from injunctive relief.



# III. ELEMENTS OF TITLE IX'S PROHIBITION AGAINST SEX DISCRIMINATION IN ATHLETICS

BREAKING DOWN BARRIERS







## A. SOURCES OF AUTHORITY

Because the statutory language of Title IX does not specifically address athletics – or almost any other particular substantive area – the primary sources for the specific contours of Title IX’s prohibition of sex discrimination in athletics are the Title IX regulations, 34 C.F.R. §§ 106.41 (athletics generally) and 106.37(c) (athletic scholarships); the Policy Interpretation;<sup>87</sup> the 1996 Clarification, as well as later Clarifications;<sup>88</sup> and the developing case law. A less authoritative source is the OCR’s Title IX Athletics Investigator’s Manual, last revised in 1990.<sup>89</sup> Parties may also seek to rely on Letters of Findings (LOFs) issued by the OCR in individual investigations as well as on other policy documents and letters publicly issued by the OCR (e.g., regarding scholarships and cheerleading).<sup>90</sup> Compliance with the gender equity rules of the NCAA or of any other conference, association, or governing body is not a defense to a Title IX claim.

<sup>87</sup> Policy Interpretation, *supra* note 11, 44 Fed. Reg. 71,413 (Dec. 11, 1979). See *Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ.*, 263 F. Supp. 2d 82, 96 (D.D.C. 2003) (noting that courts considering Title IX cases accord considerable deference to “[the Department of Education’s] interpretation of the statute, as manifested in the 1975 Regulations and 1979 Policy Interpretation”), *aff’d*, 366 F.3d 930 (D.C. Cir. 2004), *cert denied*, 545 U.S. 1104 (2005).

<sup>88</sup> See 1996 Clarification, *supra* note 33; see also 2003 Clarification, *supra* note 35; 2005 Clarification, *supra* note 38. The 2005 Clarification was issued without notice or input and may violate the statute, as well as the Equal Protection Clause. See *infra* pages 29-30 for further discussion regarding the 2005 Clarification.

<sup>89</sup> Office for Civil Rights, Department of Education, Title IX Athletics Investigator’s Manual (April 1990) (hereinafter the Investigator’s Manual), available at [http://eric.ed.gov/ERICDocs/data/ericdocs2/content\\_storage\\_01/0000000b/80/23/24/ef.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/23/24/ef.pdf); see *infra* notes 373-389 and accompanying text for a discussion of the relative weight to be given these various documents.

<sup>90</sup> See, e.g., Letter from Harry A. Orris, Director, Cleveland Office, Midwestern Division, Office for Civil Rights, Department of Education, to Suzanne M. Martin, Assistant Director, Mich. High Sch. Athletic Ass’n (Oct. 18, 2001) (hereinafter 2001 Cheerleading Letter); Letter from Dr. Mary Frances O’Shea, National Coordinator for Title IX Athletics, Office for Civil Rights, Department of Education, to David V. Stead, Executive Director, Minn. State High Sch. League (Apr. 11, 2000) (hereinafter 2000 Cheerleading Letter); Letter from Dr. Mary Frances O’Shea, National Coordinator for Title IX Athletics, Office for Civil Rights, Department of Education, to Nancy S. Footer, General Counsel, Bowling Green State Univ. (July 23, 1998) (hereinafter Scholarship Clarification).

<sup>91</sup> See 34 C.F.R. § 106.6(c) (2006) (“The obligation to comply with [Title IX] is not obviated or alleviated by any rule or regulation of any . . . athletic or other . . . association.”); see also *Kelley v. Bd. of Trs.*, 832 F. Supp. 237, 240 n.5 (C.D. Ill. 1993) (Big Ten Conference “gender equity” requirement does not preempt Title IX).

# Sources of Information about Title IX

## **Statutory Text**

- Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-87 (2006).
- Civil Rights Restoration Act of 1987 (Restoration Act), 20 U.S.C. § 1687 (2006).

## **Implementing Regulations**

- 34 C.F.R. Part 106 (2006)

## **Policy Interpretation, OCR Manual, and Clarifications**

- U.S. Department of Education Athletic Guidelines; Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,423 (1979) (Policy Interpretation)
- Office for Civil Rights, Department of Education, Title IX Athletics Investigator's Manual (April 1990)
- Office for Civil Rights, Department of Education, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (January 16, 1996) (1996 Clarification)
- Letter from Dr. Mary Frances O'Shea, National Coordinator for Title IX Athletics, Office for Civil Rights, Department of Education, to Nancy S. Footer, General Counsel Bowling Green State University (July 23, 1998) (Scholarship Clarification)

- Office for Civil Rights, Department of Education, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (June 11, 2003) (2003 Clarification)
- Office for Civil Rights, Department of Education, Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Part Three (March 17, 2005) (2005 Clarification)

### **OCR Policy Letters**

- Letter from Harry A. Orris, Director, Cleveland Office, Midwestern Division, Office for Civil Rights, Department of Education, to Suzanne M. Martin, Assistant Director, Michigan High School Athletic Association (October 18, 2001) (2001 Cheerleading Letter)
- Letter from Dr. Mary Frances O’Shea, National Coordinator for Title IX Athletics, Office for Civil Rights, Department of Education, to David V. Stead, Executive Director, Minnesota State High School League (April 11, 2000) (2000 Cheerleading Letter)

## B. THE TITLE IX ATHLETICS FRAMEWORK

The Title IX regulations provide that “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise discriminated against in any interscholastic, intercollegiate, club or intramural program”<sup>92</sup> Implementation of this regulation is prescribed by the Policy Interpretation, which considers three basic areas in analyzing whether students have been subjected to prohibited discrimination in athletics:<sup>93</sup>

- the allocation of participation opportunities,<sup>94</sup>
- athletic financial aid, and
- all other athletic benefits and opportunities.<sup>95</sup>

A violation in any one of these areas will give rise to a violation of the statute,<sup>96</sup> and a strong record of compliance in one area cannot be used to offset a violation in another.<sup>97</sup> Title IX also prohibits employment discrimination and covers coaches, athletics personnel, and other employees.<sup>98</sup>

<sup>92</sup> 34 C.F.R. § 106.41(a) and (c) (2006).

<sup>93</sup> Although the discussion in this chapter refers predominantly to intercollegiate varsity athletics, the general principles related to participation and equal treatment claims also apply at the elementary and secondary education levels, as well as to club and intramural sports.

<sup>94</sup> Participation opportunities refer to the number of individual participation slots that are available to students and not the number of teams that may be offered. See *infra* notes 120-28 and accompanying text regarding conventions for counting participants.

<sup>95</sup> See *infra* notes 191-248 and accompanying text regarding the analysis of discrimination for this third category which includes, *inter alia*, scheduling, travel, facilities, coaching and all other benefits that are typically provided to varsity athletes.

<sup>96</sup> Courts have consistently rejected defendants’ arguments that a plaintiff must make out a violation in *each category* in order to prevail on a Title IX claim. See, e.g., *Roberts v. Colo. State Univ.*, 998 F.2d 824, 828 (10th Cir. 1993) (hereinafter *Roberts II*) (holding that violation of § 106.41(c)’s participation requirements alone states a violation of Title IX); *Cohen II*, 991 F.2d at 897 (“[A]n institution can violate Title IX even if it meets the ‘financial assistance’ and ‘athletic equivalence’ standards.”); *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1511 (D. Colo. 1993) (hereinafter *Roberts I*) (“[A] violation of Title IX may be shown by proof of a substantial violation in any one of the three major areas of investigation set out in the Policy Interpretation.”); *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 584 (W.D. Pa. 1992) (predicting plaintiffs’ success on Title IX claims under § 106.41(c)(1) alone, *mot. to modify order denied*, 7 F.3d 332 (3d Cir. 1993); *Cohen I* 809 F. Supp. at 989 (stating that “a finding of violation under Title IX may solely be limited to § 106.41(c)(1)”).

<sup>97</sup> See, e.g., *Cohen II*, 991 F.2d at 897 (“[A]n institution that offers women a smaller number of athletic opportunities than the statute requires may not rectify that violation simply by lavishing more resources on those women or achieving equivalence in other respects.”).

<sup>98</sup> See *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982). *Breaking Down Barriers* will not address issues of employment discrimination in any detail. As a general matter, however, the Title IX prohibition of employment discrimination tracks the prohibition established under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988). See, e.g., *Blundell v. Wake Forest Univ. Baptist Med. Ctr.*, 2006 U.S. Dist. LEXIS 11713, \*31 (M.D.N.C. Mar. 15, 2006) (stating that “because there are fewer cases concerning Title IX, courts have applied the judicial interpretations of Title VII as to Title IX claims”); see also *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 896 (1st Cir. 1988) (applying “the substantial body of case law developed under Title VII to assess the plaintiff’s [employment discrimination] claims under . . . Title IX”); *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987) (“Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX’s substantive standards. . . .”); *O’Connor v. Peru State Coll.*, 781 F.2d 632, 642 n.8 (8th Cir. 1986) (finding teacher’s Title IX complaints regarding work conditions, insofar as duplicating Title VII claims, to be redundant); *Nagel v. Avon Bd. of Educ.*, 575 F. Supp. 105, 106 (D. Conn. 1983) (implying that standards governing Title IX and Title VII are the same). *But see Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997) (holding no private right of action for employment discrimination under Title IX). Note that there is a circuit split on the issue of whether employment discrimination claims that are covered under both laws must be brought under Title VII so as to require exhaustion of administrative remedies. See *supra* note 49.

The Department of Education and the courts have developed a clear and analytic framework to evaluate claims of discrimination under Title IX. This framework is described in the following sections.<sup>99</sup>

## C. PARTICIPATION OPPORTUNITIES

### 1. THE BASIC TITLE IX PRINCIPLE

The law's requirement that participation opportunities be allocated in a nondiscriminatory manner is set forth in 34 C.F.R. § 106.41(c)(1), which requires that "the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." The Policy Interpretation<sup>100</sup> and 1996 Clarification<sup>101</sup> expand on the regulatory language to provide more details on the analytical approach.<sup>102</sup>

The introductory language of the Policy Interpretation requires institutions to "take into account the nationally increasing levels of women's interests and abilities" and prohibits "disadvantag[ing] the members of an underrepresented sex" when determining the extent of student demand for athletics.<sup>103</sup> Even today, women remain significantly underserved in access to participation opportunities.

<sup>99</sup> Due to the development of the analytical framework for evaluating Title IX participation claims, institutions may not rely on the burden-shifting framework or evidentiary standards developed for Title VII disparate treatment claims to defend Title IX athletics claims. The Title VII disparate treatment framework was developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Soc'y v. Hicks*, 113 S. Ct. 2742, 2746 (1993). The Policy Interpretation and the 1996 Clarification set out the complete and coherent framework for analyzing discrimination in participation. As the First Circuit explained in rejecting a Title VII analogy on burden of proof questions, "[I]n our view, there is no need to search for analogies where, as in the Title IX milieu, the controlling statutes and regulations are clear." *Cohen II*, 991 F.2d at 901 (noting and rejecting analysis adopting Title VII disparate treatment standards in *Cook v. Colgate Univ.*, 802 F. Supp. 737, 743-51 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993)). The court proceeded to describe the Policy Interpretation's three-part participation test as "inhospitable to the specialized choreography of presumption and production upon which the Burdine/McDonnell Douglas burden-shifting framework depends." *Cohen II*, 991 F.2d at 902. It concluded that, "excepting perhaps in the employment discrimination context, the Title VII burden of proof rules do not apply in Title IX cases." *Id.* (citations omitted). The Tenth Circuit has concurred that "Title IX and its implementing regulations offer enough guidance in setting the burden of proof that application of the Title VII model in that regard is not necessary." *Roberts II*, 998 F.2d at 833 n.14. This is not a question simply of form. The "legitimate nondiscriminatory reason" defense under Title VII gives defendants a broader avenue of defense than is offered by the three-part test. Thus, defenses under Title VII are irrelevant under Title IX.

<sup>100</sup> See Policy Interpretation, *supra* note 11.

<sup>101</sup> See 1996 Clarification, *supra* note 33.

<sup>102</sup> Both the regulation and the Policy Interpretation also address discrimination in levels of competitive opportunities. See 34 C.F.R. § 106.41(c)(i); Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418. Because, as a general rule, men and women at the same school participate at the same competitive level (e.g., Division I or II), claims of discrimination in this regard may not arise with frequency. Since the Policy Interpretation is framed conjunctively (institutions must provide both participation opportunities and competitive schedules in a nondiscriminatory fashion) discrimination in either area provides an independent basis for a claim. See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418; *Cohen I*, 809 F. Supp. at 990-91.

<sup>103</sup> See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,417.

## Effective Accommodation of Students' Interests and Abilities: The Three-Part Participation Test

To achieve compliance with Title IX's requirement to provide equal participation opportunities, an institution must show one of the following:

1. Intercollegiate-level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. When the members of one sex have been and are underrepresented in intercollegiate athletics, the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
3. When the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing expansion such as that cited above, it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

### 2. THE THREE-PART TEST

An institution is permitted, though not required, to offer sex-segregated teams.<sup>104</sup> The analytical framework for participation claims – the “three-part test” – was thus designed specifically and only for athletics, to enable the OCR and the courts to measure equality of opportunity when a school controls and selects the athletic opportunities to be given separately to men and women.

The three-part test, which has been uniformly upheld by the courts,<sup>105</sup> begins, but does not end, with a comparison of the percentage of female athletes and the percentage of female students enrolled at an institution.<sup>106</sup> To achieve compliance with Title IX's requirement to provide equal participation opportunities, an institution must consider and satisfy one of the following:

1. Whether intercollegiate-level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

<sup>104</sup> See *id.*

<sup>105</sup> Every federal appellate court to consider the Department of Education's Title IX's athletics policies has held that they are entitled to deference. See *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996) (*Cohen IV*); *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 288 (2d Cir. 2004) (deferring to Policy Interpretation); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993) (according deference to HEW's interpretation of the regulations); *Pederson v. La. State Univ.*, 213 F.3d 858, 880 (5th Cir. 2000); *Horne v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 273 (6th Cir. 1994) (establishing itself as the first court to adopt the three-part test as a measure for determining compliance in athletic participation opportunities at the high school level); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1046 (8th Cir. 2002); *Neal v. Bd. of Trs.*, 198 F.3d 763, 771 (9th Cir. 1999); *Roberts II*, 998 F.2d at 828-29; cf. *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82, 95-96 (D.D.C. 2003), *aff'd*, 366 F.3d 930 (D.C. Cir. 2004), *cert. denied*, 545 U.S. 1104 (2005).

<sup>106</sup> See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418; see also Elisa Hatlevig, *Title IX Compliance: Looking Past the Proportionality Prong*, 12 SPORTS LAW J. 87 (Spring 2005) (laying out the framework of the three-part test).

2. Where the members of one sex have been and are underrepresented among intercollegiate athletics, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.<sup>107</sup>

The Department of Education has repeatedly stated that institutions need comply with only one of the three prongs of the three-part test.<sup>108</sup> As it reiterated in the 2003 Clarification, “[E]ach of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored.”<sup>109</sup>

### **a. The Three-Part Test: First Prong**

The first prong of the three-part test asks whether the athletic participation opportunities for male and female students are provided in numbers that are “substantially proportionate” to their respective enrollments.<sup>110</sup> If, for example, 51 percent of an institution’s undergraduate students are female, the institution will have complied with Title IX’s participation requirements if about 51 percent of its athletes are also female. The first prong thus reflects a fundamental principle of equality: equal opportunity exists when every student on campus, regardless of sex, has an equal chance to participate in sports.

Courts have unanimously ruled that the burden is on the plaintiff to establish noncompliance with Prong One of the test – *i.e.*, to show that the school is not offering substantially proportionate opportunities to both sexes.<sup>111</sup> If the plaintiff fails, the institution will be found in compliance.<sup>112</sup> If, however, the plaintiff establishes that the two rates are not substantially proportionate, the institution may still be found in compliance with Title IX’s participation requirements if it satisfies one of the other two prongs of the test.

<sup>107</sup> Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418.

<sup>108</sup> See 1996 Clarification, *supra* note 33.

<sup>109</sup> 2003 Clarification, *supra* note 35.

<sup>110</sup> Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418.

<sup>111</sup> See *Roberts II*, 998 F.2d at 829 n.5; *Cohen II*, 991 F.2d at 901; *Roberts I*, 814 F. Supp. at 1511; *Favia*, 812 F. Supp. at 584; *Cohen I*, 809 F. Supp. at 992.

<sup>112</sup> See *Roberts II*, 998 F.2d at 829; *Cohen II*, 991 F.2d at 897-98.

**Definition of “Substantial Proportionality”:** In general, Prong One requires a close fit between female and male enrollment and female and male athletic participation. The 1996 Clarification makes clear that a five-percentage-point disparity between female enrollment and participation is not substantially proportionate.<sup>113</sup> Courts have considered differentials ranging from 10.6 percent to 20 percent and have found that these clearly do not meet the substantial proportionality standard.<sup>114</sup> If the number of additional opportunities that would be provided if exact parity were achieved is not sufficient to sustain a viable team, however, the institution will be considered compliant with Title IX.<sup>115</sup>

In no case has it yet been found that a university has achieved substantial proportionality between enrollment and participation rates.<sup>116</sup> Because a finding of discrimination is institution specific, institutions are not excused by the fact that other institutions’ ratios of participation to enrollment are worse than their own.<sup>117</sup> Evidence that disparities are statistically significant may be helpful in proving substantial disproportionality,<sup>118</sup> but is not required.<sup>119</sup>

**Definitions of “Students” and “Participants”:** The Department looks at full-time undergraduate students in determining enrollment.<sup>120</sup> Participants are defined as those athletes:

1. Who are receiving the institutionally sponsored support normally provided to athletes competing at the institution involved – e.g., coaching, equipment, medical, and training room services – on a regular basis during a sport’s season; and

<sup>113</sup> See 1996 Clarification, *supra* note 33. In 2003, the Commission on Opportunity in Athletics recommended that “substantial proportionality” be considered to be met if an institution was within seven percentage points of a fifty-fifty split on athletic opportunities. See *Open to All*, *supra* note 36. This recommendation was vigorously opposed in the Minority Report to the Commission’s Report and the OCR rejected the recommendation in the 2003 Clarification.

<sup>114</sup> See *Roberts I*, 814 F. Supp. at 1513 (disparity of 10.6 percent not substantially proportionate); see also *Pederson*, 213 F.3d at 878 (20 percent disparity not substantially proportionate); *Bryant v. Colgate Univ.*, No. 93-CV-1029, 1996 U.S. Dist. LEXIS 8393, \*31 (N.D.N.Y. June 11, 1996) (13.2 percent disparity not substantially proportionate); *Favia*, 812 F. Supp. at 585 (19.1 percent disparity not substantially proportionate); *Cohen I*, 809 F. Supp. at 991 (11.6 percent disparity not substantially proportionate); Investigator’s Manual, *supra* note 89, at 24 (“For example, if the enrollment is 52 percent male and 48 percent female, then, ideally, about 52 percent of the participants in the athletic program should be male and 48 percent female.”).

<sup>115</sup> See 1996 Clarification, *supra* note 33.

<sup>116</sup> In fact, data available pursuant to the Equity in Athletics Disclosure Act, Pub. L. 103-382, § 360B, 108 Stat. 3518, 3967-71 (1994), codified at 20 U.S.C. § 1092(g) (2007), suggest that the vast majority of colleges and universities have not achieved substantial proportionality. See *infra* Chapter VII for a discussion of the Equity in Athletics Disclosure Act.

<sup>117</sup> See *Roberts I*, 814 F. Supp. at 1513 (“[I]f defendants are found by this Court to be in violation of Title IX, the fact that CSU’s participation statistics are better than those of other schools is of no legal consequence. The issue of whether other universities are complying with Title IX is for other courts to decide based upon individualized allegations and independent findings of fact.”); see also *Roberts II*, 998 F.2d at 830 (“[A] 10.5% [sic] disparity . . . is not substantially proportionate. The fact that many or even most other educational institutions have a greater imbalance than CSU does not require a different holding.”).

<sup>118</sup> See *Roberts II*, 998 F.2d at 830 (crediting evidence of statistical significance); *Roberts I*, 814 F. Supp. at 1513 (same).

<sup>119</sup> See, e.g., *Favia*, 812 F. Supp. at 585 (finding absence of substantial proportionality without particular showing of statistical significance); *Cohen I*, 809 F. Supp. at 991 (same).

<sup>120</sup> See 1996 Clarification, *supra* note 33.



2. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
3. Who are listed on the eligibility or squad lists maintained for each sport; *or*
4. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.<sup>121</sup>

As a general rule, all persons on a team's squad or eligibility list as of the date of first competition are counted as participants, even if they do not receive athletically related financial aid (e.g., walk-ons) or do not actually compete in games.<sup>122</sup> The Department also counts athletes who compete on teams sponsored by an institution even when the team is required to raise some or all of its operating funds.<sup>123</sup> Furthermore, an athlete who participates in more than one sport is counted separately for each team on which he or she participates.<sup>124</sup>

The Department has also made clear that, when counting participants, institutions may not count unfilled slots to satisfy their equal opportunity obligations.<sup>125</sup> As courts have recognized, Title IX requires equity in real, not illusory, participation opportunities.<sup>126</sup> If institutions were allowed to count unfilled slots, they could evade the requirements of Title IX by making slots nominally available and then failing to engage in the recruitment or support necessary to fill those slots.

Finally, when counting participants in varsity sports, "club teams will not be considered to be intercollegiate teams except in those instances where they regularly participate in varsity competition."<sup>127</sup> While many schools offer club or intramural teams, these teams typically are not part of the varsity program, receive little or no support from the institution, and compete only against similar teams from other schools. While Title IX prohibits discrimination in club sports,<sup>128</sup> in analyzing the distribution of competitive opportunities, defendants typically cannot argue that female participation on club teams should be counted as part of the female share of varsity participation opportunities for purposes of the three-part test.

<sup>121</sup> See *id.*, citing Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415.

<sup>122</sup> See 1996 Clarification, *supra* note 33. As the OCR explained in the 1996 Clarification, the significant benefits of athletics participation, such as coaching, training, equipment, locker rooms and intangible benefits, do not depend on their cost to an institution or whether an athlete competes.

<sup>123</sup> See *id.*

<sup>124</sup> See *id.* However, with respect to the allocation of scholarships, athletes are counted only once. See discussion of Athletic Financial Assistance, *infra* notes 174-90 and accompanying text.

<sup>125</sup> See 1996 Clarification, *supra* note 33. In 2003, the Commission on Opportunity in Athletics recommended that institutions be allowed to count all available slots, whether or not filled, to determine compliance with Prong One. See *Open to All*, *supra* note 36. The OCR rejected the Commission's recommendation that institutions be allowed to count unfilled slots. See 2003 Clarification, *supra* note 35.

<sup>126</sup> See, e.g., *Cohen v. Brown Univ.*, 879 F. Supp. 185, 202-04 (D.R.I. 1985) (hereinafter *Cohen III*).

<sup>127</sup> Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,413 n.1.

<sup>128</sup> In other words, male and female students must have equal opportunities to play in club and intramural sports. The three-part test is used to evaluate whether an institution has complied with Title IX in this regard.

**Definition of “Sport”:** The OCR determines whether an activity is a sport and, thus, whether participants in that activity can be counted as athletes, on a case-by-case basis. In making that determination, however, the OCR provides a long list of factors to consider, including:

- (1) whether selection for a team is based on objective factors related primarily to athletic ability;
- (2) whether the activity is limited to a defined season;
- (3) whether the team prepares for and engages in competition in the same way as other teams in the athletic program with respect to coaching, recruitment, budget, try-outs and eligibility, and length and number of practice sessions and competitive opportunities;
- (4) whether the activity is administered by the athletic department; and
- (5) whether the primary purpose of the activity is athletic competition and not the support or promotion of other athletes.

Other relevant evidence regarding whether an activity is part of an institution’s athletic program includes:

- (1) whether organizations knowledgeable about the activity agree that it should be recognized as a sport;
- (2) whether the activity is recognized as part of the interscholastic or intercollegiate athletic program by the athletic conference to which the institution belongs and by organized state and national interscholastic or intercollegiate athletic associations;
- (3) whether state, national, and conference championships exist for the activity;
- (4) whether a state, national, or conference rule book or manual has been adopted for the activity;
- (5) whether there is state, national, or conference regulation of competition officials along with standardized criteria upon which the competition may be judged; and
- (6) whether participants in the activity/sport are eligible to receive scholarships and athletic awards (e.g., varsity awards).<sup>129</sup>

<sup>129</sup> See 2000 Cheerleading Letter, *supra* note 90 (presuming that drill teams and cheerleading are not sports, but reiterating that classification of such activities is done on a case-by-case basis). In response to an inquiry by the Michigan High School Athletic Association (MHSAA) as to whether competitive cheerleading would be considered a sport under Title IX, the OCR recommended that MHSAA collect proof that high schools throughout the state administer competitive cheerleading programs, have similar team selection criteria and competition opportunities, maintain separate sideline cheerleading programs, and provide varsity letter eligibility requirements. In keeping with this guidance, the OCR stated that competitive cheerleading could not be classified as a sport under Title IX without proof that MHSAA’s practices were also applied by other athletic programs in the broad geographic area. See 2001 Cheerleading Letter, *supra* note 90.

**Cutting of Men's Teams:** While courts recognize that institutions cannot devote infinite resources to athletics,<sup>130</sup> the Department of Education has explicitly stated that cuts to men's teams are a disfavored means of complying with Prong One.<sup>131</sup> Indeed, as the Department and courts have repeatedly recognized, Title IX does not require or encourage any cuts to men's teams.<sup>132</sup>

### **b. The Three-Part Test: Second Prong**

Under the second prong of the test, a school can show that it is offering equal participation opportunities by showing "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of [the underrepresented] sex."<sup>133</sup> The institution must meet both components of this test.

An institution can demonstrate a *history* of program expansion by showing, among other things, its:

- record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented gender;
- record of increasing the number of participants in intercollegiate athletics who are members of the underrepresented sex; and
- affirmative responses to requests by students or others for addition or elevation of sports.<sup>134</sup>

A *continuing* practice of program expansion can be established through evidence of:

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.<sup>135</sup>

<sup>130</sup> See, e.g., *Kelley*, 35 F.3d at 269; *Roberts II*, 998 F.2d at 830; *Cohen II*, 991 F.2d at 898 n.15.

<sup>131</sup> See 2003 Clarification, *supra* note 35.

<sup>132</sup> See, e.g., *Kelley*, 35 F.3d at 265; see also *infra* notes 263-68 and accompanying text.

<sup>133</sup> Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418. The underrepresented gender is typically women. See, e.g., National Collegiate Athletic Association, 2003-04 *Gender Equity Report* (Sept. 2006).

<sup>134</sup> See 1996 Clarification, *supra* note 33.

<sup>135</sup> See *id.*

The burden of proof is on the defendant to establish both components of program expansion.<sup>136</sup> To date, no defendant has sustained its burden in this regard. Courts have specifically rejected arguments that (1) schools should get credit for teams established over ten years previously;<sup>137</sup> (2) promises to expand women’s programs at some unspecified future date constitute the requisite expansion;<sup>138</sup> (3) proportionally smaller cuts for women than men satisfy the requirements of Prong Two;<sup>139</sup> or (4) improvement in the *quality* of existing opportunities alone represents program expansion.<sup>140</sup> In addition, courts have rejected the contention that financial problems excuse an institution from continuing to expand athletics opportunities. A school claiming that it is complying under Prong Two cannot use the cost of program expansion as a defense for failing to meet this obligation.<sup>141</sup>

The hypothetical fact patterns presented by the OCR in its 1996 Clarification suggest that an institution may comply with Prong Two by adding a team every few years that responds to the developing interests of the underrepresented sex.<sup>142</sup> In addition, the examples indicate that dropping an existing team for the underrepresented sex for reasons other than a lack of interest or ability is inconsistent with program expansion under Prong Two.

<sup>136</sup> See *Roberts II*, 998 F.2d at 830 n.8; *Cohen II*, 991 F.2d at 902; *Barrett v. West Chester Univ.*, No. 03-CV-4978, 2003 U.S. Dist. LEXIS 21095, \*17-18 (E.D. Pa. Nov. 12, 2003) (stating that the plaintiffs bear the burden with respect to the first prong and, if that burden is met, the burden shifts to the defendant to establish the second prong); *Roberts I*, 814 F. Supp. at 1511; *Favia*, 812 F. Supp. at 584; *Cohen I*, 809 F. Supp. at 992.

<sup>137</sup> See *Roberts II*, 998 F.2d at 830 (affirming lower court finding that expansion in the 1970s, which was not maintained subsequently, fails to satisfy the “continuing expansion” test); *Cohen II*, 991 F.2d at 903 (“While a university deserves appreciable applause for supercharging a low-voltage athletic program in one burst rather than powering it up over a longer period, such an energization, once undertaken, does not forever hold the institution harmless.”); *Barrett*, 2003 U.S. Dist. LEXIS 21095, at \*23 (finding that, although “there are no fixed intervals of time within which an institution must have added participation opportunities . . . periods in excess of a decade are too long to constitute continued expansion”) (internal citations omitted); *Roberts I*, 814 F. Supp. at 1514 (“Although the Court agrees that the eight women’s teams currently offered by CSU are an improvement over the non-existent state of women’s teams prior to 1970, the Court cannot accept defendants’ conclusion that the mere fact that CSU now offers women’s teams is evidence of program expansion for women.”); *Favia*, 812 F. Supp. at 585 (past expansion of women’s athletic opportunities does not neutralize more recent cuts); *Cohen I*, 809 F. Supp. at 991 (“With respect to the ‘program expansion’ prong, evidence has shown that Brown does not have a *continuing* practice of program expansion for women athletes, even though it can point to impressive growth in the 1970s.”) (emphasis in original).

<sup>138</sup> See *Boucher v. Syracuse Univ.*, 164 F.3d 113, 116 (2d Cir. 1999) (finding that a Title IX claim by female athletes against a university is not moot where the university had promised to establish a varsity women’s softball team by the next year but had not yet done so); *Favia*, 812 F. Supp. at 585.

<sup>139</sup> See *Roberts II*, 998 F.2d at 830 (“[T]he ordinary meaning of the word ‘expansion’ may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men’s and women’s sports programs.”); *Roberts I*, 814 F. Supp. at 1514 (“CSU cannot show program expansion for women solely by pointing to increases in the percentage of women athletes caused by reducing the number of men athletes. CSU must either demonstrate actual expansion in women’s athletic programming or establish that it has considered and improved upon the underrepresented status of women athletes when reductions in athletic programs became necessary in the past.”).

<sup>140</sup> See *Cohen I*, 809 F. Supp. at 991. Improvements in the quality of athletics opportunities are relevant to the equality of treatment and benefits provided to athletes, but they are not a defense to the inequitable allocation of participation opportunities.

<sup>141</sup> See *Roberts I*, 814 F. Supp. at 1518; *Favia*, 812 F. Supp. at 583, 585; *Cook*, 802 F. Supp. at 750.

<sup>142</sup> See 1996 Clarification, *supra* note 33.

### c. The Three-Part Test: Third Prong

An institution that has failed to provide substantially proportionate opportunities to its male and female students, and that cannot show a history and continuing practice of program expansion for the underrepresented sex, may nonetheless be found in compliance with Title IX's participation requirements if "it can be demonstrated that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program."<sup>143</sup> If a court case revolves around the institution's compliance with the third prong, the burden will likely be on the plaintiff to establish unmet interest and ability on the part of the underrepresented sex by a preponderance of the evidence.<sup>144</sup> Although there is a strong argument that defendants should carry the burdens of both production and persuasion with regard to their claims to have met female students' interests and abilities,<sup>145</sup> in the absence of any decisions on this subject, plaintiffs would be well advised as a cautionary matter to be prepared to sustain the burden of persuasion.

Courts have uniformly interpreted this language in accordance with its plain meaning, asking whether there are members of the underrepresented sex (almost always, but not necessarily, women) who have the interest and ability to compete but are not given the opportunity.<sup>146</sup> Some institutions have argued that men are "inherently" more interested in participating in athletics than are women and that the proper analysis should weigh the *relative* interests and abilities of men and women generally in the undergraduate student body; the courts have unanimously rejected this argument.<sup>147</sup> Under this discredited analysis, which relies on precisely the kind of stereotypes Title IX was enacted to eliminate, Prong Three would require only that the allocation of participation opportunities reflect that relative ratio of interest and ability, rather than the "full" accommodation of women's interests and abilities that is in fact anticipated under this prong. The First Circuit's analysis of why this argument is wrong is instructive:

<sup>143</sup> Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418.

<sup>144</sup> See *Cohen II*, 991 F.2d at 902; 2005 Clarification, *supra* note 38 (stating that the burden lies on the students or the OCR, in the case of an OCR investigation, to establish by a preponderance of the evidence that an institution is not in compliance with part three of the test). In administrative cases, the 1996 Clarification indicates that the burden is on the defendant to show that there is no unmet interest. But see 2005 Clarification (shifting burden to plaintiff to demonstrate unmet interest if e-mail survey results in presumption of compliance for university). See *infra* notes 153-54 and accompanying text for discussion of why the approach set forth in the 2005 Clarification is inconsistent with Congress' intent.

<sup>145</sup> *Cf. Sharif*, 709 F. Supp. at 361 (burden on defendant to establish "educational necessity" defense in Title IX challenge to discriminatory use of standardized test).

<sup>146</sup> See *Cohen II*, 991 F.2d at 898 ("If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test."); see also *Roberts II*, 998 F.2d at 831-32 (relying on *Cohen II* to reach the same conclusion).

<sup>147</sup> Courts have also rejected the argument that if an educational institution provides scholarships to female athletes, this is enough to satisfy the obligation of accommodating their interests and abilities. See *Favia*, 812 F. Supp. at 585 (noting that assisting women athletes in transferring and honoring their scholarships despite cutting their teams is not "full and effective accommodation").

Brown argues that DED's [Department of Education's] Policy Interpretation ... goes so far afield that it countervails the enabling legislation. Brown suggests that, to the extent students' interests in athletics are disproportionate by gender, colleges should be allowed to meet those interests incompletely as long as the school's response is in direct proportion to the comparative levels of interest. Put bluntly, Brown reads the "full" out of the duty to accommodate "fully and effectively." It argues instead that an institution satisfactorily accommodates female athletes if it allocates athletic opportunities to women *in accordance with the ratio of interested and able women to interested and able men*, regardless of the number of unserved women or the percentage of the student body that they comprise. . .

We think that Brown's perception of the Title IX universe is myopic. The fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender. Rather, the law requires that, in the absence of continuing program expansion (benchmark two), schools either meet benchmark one by providing athletic opportunities in proportion to the gender composition of the student body...or meet benchmark three by *fully* accommodating interested athletes among the underrepresented sex....<sup>148</sup>

According to the OCR, an institution will be in compliance with Prong Three unless there is a sport for the underrepresented sex which meets all of the following conditions: "(a) unmet interest sufficient to sustain a varsity team in the sport(s), (b) sufficient ability to sustain an intercollegiate team in the sport(s), and (c) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region."<sup>149</sup>

**Assessing Interest:** With regard to measuring the interest of the underrepresented sex under Prong Three, longstanding OCR policy makes clear that institutions have the obligation to consider multiple factors, including:

<sup>148</sup> *Cohen II*, 991 F.2d at 899 (emphasis in original). Because enrollment-wide distribution of interests and abilities is not relevant to the inquiry, survey or other evidence purporting to compare male and female ability and interest in athletics across the student body also should not be relevant. If the institution has not achieved substantial proportionality and cannot show a continuing history of program expansion, only the unmet interest and abilities of members of the *underrepresented* gender will be considered. See also *Neal*, 198 F.3d at 768-69 (discussing and agreeing with the *Cohen* analysis).

<sup>149</sup> See 1996 Clarification, *supra* note 33; see also *Barrett*, 2003 U.S. Dist. Lexis 21095, at \*26-28 (finding that evidence of long-term participation in competitive gymnastics, testimony from coaches regarding athletes' ability, and opportunity to qualify and compete in national championship competitions are sufficient to demonstrate athletes' ability as required by the third part of the accommodation test).

- requests by students and admitted students that a particular sport be added or upgraded to varsity status;
- requests that an existing club sport be elevated to intercollegiate team status;
- student participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators, and others regarding interest in particular sports;
- results of any interviews and questionnaires of students and admitted students regarding interests in particular sports; and
- past participation by admitted students in particular interscholastic sports.<sup>150</sup>

While each of the above factors focuses on current or admitted students, participation rates in high school or community sports in areas from which the institution draws its student body may also demonstrate unmet interest in a sport not offered by the institution. When an institution refuses to offer a sport that draws substantial participation in such programs and seeks to comply under Prong Three, the OCR will require the institution to prove that its current or admitted students are *not* interested in that sport. In addition, under the 1996 Clarification, the OCR expects institutions to complete periodic nondiscriminatory assessments of their students' interests and abilities to make themselves aware of unmet interest in particular sports.<sup>151</sup>

Moreover, the recent elimination of a viable team for the underrepresented sex will create a presumption that an institution is not in compliance with Prong Three. That presumption is rebuttable only with "strong evidence" that sufficient interest, ability, or competition no longer exists to support the team.<sup>152</sup>

In March 2005, the OCR issued an additional clarification on assessing interests and abilities under Prong Three. The 2005 Clarification allows institutions to comply with Prong Three if no unmet interest is found among the underrepresented sex based solely on an e-mail survey of current and admitted students.<sup>153</sup> Many, including the National Collegiate Athletic Association, have argued that the 2005 Clarification is inconsistent with Title IX and longstanding OCR policy for several reasons. Some of these reasons include: surveys alone are insufficient to determine female student athletes' interests; surveys often merely measure the existence of past discrimination, not the interest that would be demonstrated if additional

<sup>150</sup> See 1996 Clarification, *supra* note 33 (providing that "unmet sufficient interest" is gauged by examining, among others, these six factors).

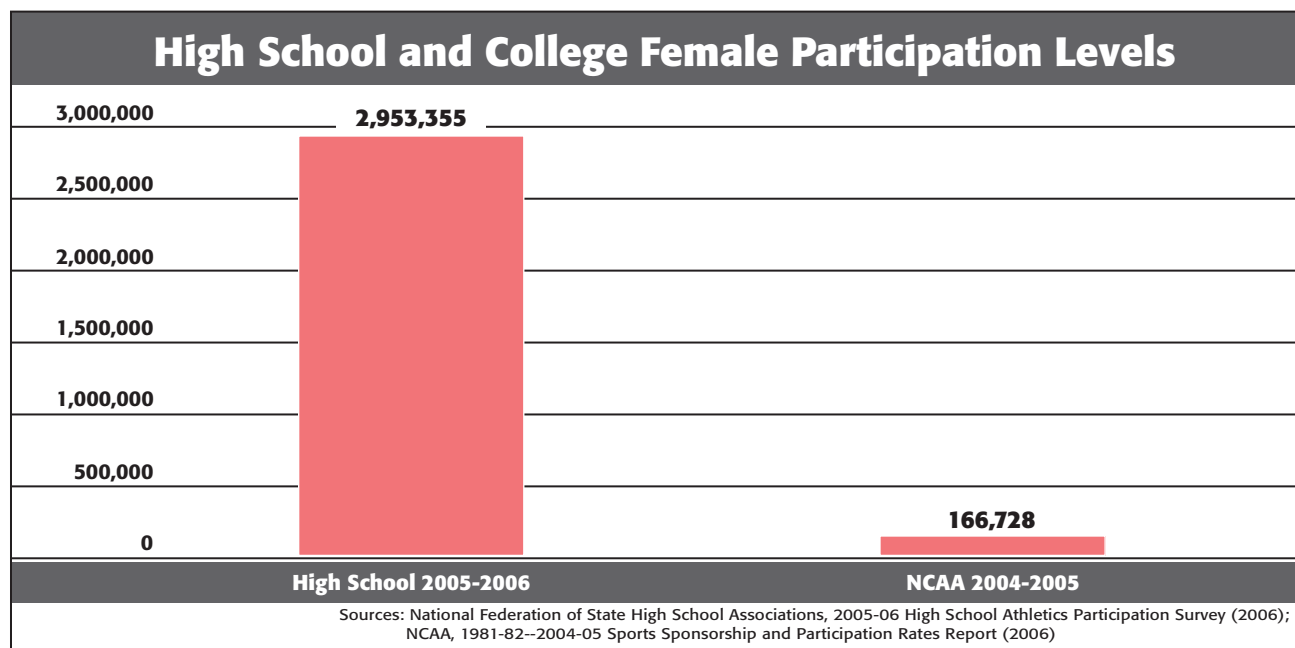
<sup>151</sup> See *id.*

<sup>152</sup> See *id.*

<sup>153</sup> See 2005 Clarification, *supra* note 38.

opportunities were made available; the non-response rate for e-mail surveys tends to be high, so it is unreasonable to count non-response as lack of interest; and reliance on surveys of only current or admitted students' interests ignores the fact that schools create teams by recruiting athletes and that students interested in a sport not offered by a school are unlikely to attend that school.

The validity of the 2005 Clarification has not yet been tested in court, and, given the longstanding contrary interpretation in the 1996 Clarification, the weight a court would give to the 2005 Clarification is highly questionable. Moreover, the NCAA has urged rescission of the 2005 Clarification, and several institutions already have agreed not to utilize the methods authorized by the document.<sup>154</sup> In light of these factors, institutions may be better served by following the policy set forth in the 1996 Clarification, and female students would be well advised not to accept that an institution has complied with Prong Three merely because it has conducted an e-mail interest survey.



<sup>154</sup> See Nat'l Collegiate Athletic Ass'n Executive Committee Resolution, April 2005, available at <http://www.ncaa.org/wps/portal>; see also, e.g., Letters from Princeton University, Columbia University, Yale University and Brown University to Ms. Katie Yakulis (stating that institutions have no intent of relying on survey authorized by 2005 Clarification) (on file with the National Women's Law Center). For further discussion of the ways in which the 2005 Clarification is likely to violate Title IX, see "Title IX 'Clarification': What's at Stake," available at <http://nwlrc.org/pdf/whatsatstake.pdf>.



**Assessing Ability:** When considering whether underrepresented students have sufficient ability to form a varsity team, Prong Three focuses on the *potential*, not actual, ability of current and admitted students. A poor competitive record or the inability of interested students to currently compete at the same level as varsity athletes does not demonstrate a lack of such potential.<sup>155</sup> Indications of ability include:

- the athletic experience and accomplishments – in interscholastic, club, or intramural competition – of underrepresented students interested in playing the sport;
- participation in other sports, intercollegiate or otherwise, that may demonstrate skill or abilities that are fundamental to the particular sport being considered;<sup>156</sup>
- self-assessment of the ability to compete in a particular interscholastic varsity sport;
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team;
- tryouts in the particular sport in which there is an interest;
- other direct observations of participation in the particular sport being considered; and
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students have the potential to sustain a varsity team.<sup>157</sup>

The 2005 Clarification allows institutions assessing ability to rely exclusively on a female student's self-assessment of her own abilities to discharge their obligations.<sup>158</sup> But in responding to an e-mail survey, a female athlete may significantly underestimate her own ability and incorrectly indicate that she does not have the skill necessary to compete on a varsity team. Thus, it is risky for schools to rely solely upon e-mail surveys because those surveys are unlikely to measure potential ability.

<sup>155</sup> See 1996 Clarification, *supra* note 33; *Favia*, 812 F. Supp. at 585 (implying that the success of a team is not relevant to assessing its level of competitive ability by noting that, “[A]lthough the field hockey team had a poor win/loss record, this ... likely is the negative effect of lack of funding, scholarships, and staff”); see also *Cook*, 802 F. Supp. at 748 (finding unrealistic the expectation that the members of the women's ice hockey team would have “varsity team abilities” in light of the fact that their talents had not been nurtured as they would have been had they been treated as a varsity team).

<sup>156</sup> A female student athlete's participation in other sports may be relevant in assessing her ability to participate in a particular sport since she does not need to have played the precise sport at issue in order to have the ability to compete in it in the future.

<sup>157</sup> See 1996 Clarification, *supra* note 33.

<sup>158</sup> See 2005 Clarification, *supra* note 38.

**Assessing Reasonable Expectation of Competition:** If there is sufficient interest and potential ability to sustain a team not currently offered, an institution fails Prong Three unless there is no reasonable expectation of competition in its normal competitive region. The normal competitive region includes schools in the geographic area where the institution normally competes, even if the institution does not currently compete against those schools. In addition, institutions may have an obligation to actively encourage the development of competition where opportunities for the underrepresented sex within their competitive region have been limited.<sup>159</sup> Fostering student interests and abilities are at the core of Prong Three, and institutions must respond regularly to students' developing interests. Otherwise, the third prong is meaningless.<sup>160</sup>

In addition, competition need not be currently available at the level at which other teams at an institution compete.<sup>161</sup> The proper standard is found in the Policy Interpretation, which asks whether there is "a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions."<sup>162</sup> Thus, the NCAA's failure to sponsor a championship in a particular sport would not be dispositive of "a reasonable expectation of intercollegiate competition."<sup>163</sup>

### 3. PARTICIPATION OPPORTUNITIES: ADDITIONAL POINTS

Additional points to keep in mind in analyzing the three-part participation test described above include the following:

#### a. Equal Cuts

Cutting the same number of men's teams as women's teams does not provide a defense to a Title IX claim if an institution cannot satisfy one of the prongs of the three-part test. As the First Circuit stated, "Even balanced use of the budget-paring knife runs afoul of Title IX where, as here, the fruits of a university's athletic program remain ill-distributed after

<sup>159</sup> See 1996 Clarification, *supra* note 33.

<sup>160</sup> See Jerry R. Parkinson, *Grappling With Gender Equity*, 5 WM. & MARY BILL RTS. J. 75, 132 (1996).

<sup>161</sup> *Cf. Favia*, 812 F. Supp. at 585 (noting that, even though there was no NCAA-sponsored gymnastics championship, the gymnastics team still had quality competition).

<sup>162</sup> Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418; see also *Cohen II*, 991 F.2d at 898 (requiring a level of interest and ability sufficient to sustain a viable team and ensure a reasonable expectation of intercollegiate competition for that team before mandating its creation); *Cohen I*, 809 F. Supp. at 992 (same).

<sup>163</sup> See *Favia*, 812 F. Supp. at 585 (refusing to accept lack of NCAA championship as justification for jettisoning women's gymnastics team); *cf. Cook*, 802 F. Supp. at 747 (finding Colgate's excuse of the lack of NCAA championship for women's ice hockey to be a pretext for discrimination).

the trimming takes place.”<sup>164</sup> Furthermore, under the second prong of the test, cuts in men’s programs will not be considered as evidence of a history or continuing practice of program expansion for the underrepresented sex.<sup>165</sup>

Moreover, the OCR explained in the 2003 Clarification that cutting or reducing teams in order to demonstrate Title IX compliance is a disfavored practice. The OCR therefore has stated that it will officially discourage the practice and seek other remedies when negotiating compliance agreements.<sup>166</sup>

### **b. Number of Teams**

The number of teams offered to men and women is irrelevant in analyzing whether there is discrimination in the opportunity to play sports. Students have protected rights; teams do not.<sup>167</sup> The relevant analysis is whether students have equal opportunities to play, not how those opportunities are grouped among teams. Thus, the question asked under Title IX is whether an institution has complied with the three-part test in providing participation opportunities to individual students; there is no requirement that schools provide the same number of teams to men and women.

### **c. Participation Opportunities in Like Sports**

The Policy Interpretation separately addresses the responsibilities of institutions that offer a particular sport to members of one sex only. As a general matter, there is no requirement that an institution offer any particular sport.<sup>168</sup> However, when a sport is offered to members of one sex, an institution is obligated to offer the sport to members of the other sex if it is a contact sport<sup>169</sup> and:

- 1) the opportunities for the excluded sex have historically been limited, and

<sup>164</sup> *Cohen II*, 991 F.2d at 906 (refusing to offset university’s cutting of two women’s teams with contemporaneous cutting of two men’s teams); see also *Barrett*, 2003 U.S. Dist. LEXIS 21095, at \*12-13.

<sup>165</sup> See 1996 Clarification, *supra* note 33.

<sup>166</sup> See 2003 Clarification, *supra* note 35.

<sup>167</sup> See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,422 (“Title IX protects the individual as a student-athlete, not as a basketball player, or swimmer.”).

<sup>168</sup> *Id.* at 71,417-18.

<sup>169</sup> Contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact. See 34 C.F.R. § 106.41 (b) (2006).

- 2) there is sufficient interest and ability among the members of the excluded sex to sustain a viable team and there is a reasonable expectation of intercollegiate competition.<sup>170</sup>

If a non-contact sport is involved, in addition to meeting the two foregoing requirements, there must also be a showing that:

- 3) members of the excluded sex do not possess sufficient skill to be selected for a single integrated team or to compete actively on such a team if selected.<sup>171</sup>

As a general matter, Title IX permits sex-integrated teams but does not require them when selection is based on competitive skills or when the sport involved is a contact sport. This is because the law recognizes that women must have meaningful opportunities to compete. An institution cannot avoid liability simply by asserting that a men's team is open to women without also showing that the women are meaningful participants.

However, once an institution permits a member of one sex to try out for a team maintained for the other sex, that person cannot be subject to discrimination. For example, in *Mercer v. Duke University*, a female athlete was allowed to try out for the university's football team. Although she did not initially make the team, she served as the team's manager and regularly attended practices. In the 1995 season, she was selected by the players to participate in a major football game. During that game, she kicked the winning 28-yard field goal, giving her team a victory. The coach later made her a member of the team. However, the coach did not allow her to attend summer camp, refused to let her dress for games or sit on the sidelines, and gave her fewer opportunities to participate in practices. She filed a claim against the university and the coach, alleging sex discrimination in violation of Title IX.<sup>172</sup> The Fourth Circuit held that because the university allowed her to try out for its football team, made her a member of the team, and then discriminated against her by excluding her from participation in the sport on the basis of her sex, she had stated a claim under Title IX.<sup>173</sup>

<sup>170</sup> See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418.

<sup>171</sup> See *id.*; *Horne*, 43 F.3d at 274.

<sup>172</sup> See *Mercer v. Duke Univ.*, 190 F.3d 643 (4th Cir. 1999).

<sup>173</sup> See *id.* at 648.

## D. ATHLETIC FINANCIAL ASSISTANCE

### 1. THE BASIC TITLE IX PRINCIPLE

Under Title IX, female and male shares of athletic financial aid must be substantially proportionate to the female and male shares of participation opportunities at educational institutions. Title IX's implementing regulations specify that to the extent an educational institution provides athletic financial aid, "it must provide reasonable opportunities for (athletic scholarship awards) for members of each sex in proportion to the number of students of each sex participating in . . . intercollegiate athletics."<sup>174</sup> The Policy Interpretation provides that in determining compliance under this portion of the regulation, the OCR will employ a financial comparison in which it divides the amount of aid available for the members of each sex by the numbers of male or female athletes and compares the results.<sup>175</sup> A college or university is in compliance with Title IX regulations if this comparison results in "substantially" equal amounts to male and female athletes or if the disparity can be explained by a legitimate, nondiscriminatory factor.<sup>176</sup>

In a July 23, 1998 letter from the OCR to the General Counsel of Bowling Green University, the OCR clarified that "[i]f any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the 'substantially proportionate' requirement."<sup>177</sup> The letter concludes, "Where a college does not make a substantially proportionate allocation to sex-segregated teams, the burden should be on the college to provide legitimate, nondiscriminatory reasons for the disproportionate allocation. Therefore, the use of statistical tests will not be helpful in determining whether a disparity in the allocations for the two separate athletic scholarship budgets is discriminatory."<sup>178</sup>

<sup>174</sup> 34 C.F.R. § 106.37(c) (2006). Athletic financial aid includes not only scholarship grants, but also loans, work-related assistance, or other types of non-grant aid made available to students based on their status as athletes. See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415; Investigator's Manual, *supra* note 89, at 15.

<sup>175</sup> See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415.

<sup>176</sup> See *id.*; see also discussion of legitimate nondiscriminatory factors, *infra* notes 186-90 and accompanying text.

<sup>177</sup> See Scholarship Clarification, *supra* note 90.

<sup>178</sup> See *id.*

## 2. FINANCIAL AID: ADDITIONAL POINTS

Other important points involving discrimination in athletic financial assistance include:

### a. Relationship Between Financial Aid and Participation Violations

It is not yet resolved whether a financial aid violation is present if the female proportion of aid matches the female share of participation but the female share of participation is found to have been discriminatorily reduced. The OCR takes the view that there is not a scholarship violation if scholarship aid is proportionate to participation, regardless of the existence of a participation violation.<sup>179</sup> The only court to have addressed this issue suggested in dicta that in some instances the contrary conclusion should be reached.<sup>180</sup>

### b. Total Scholarship Dollars Are Proper Comparison

In determining compliance, the relevant inquiry focuses on the overall dollar amount of financial aid, rather than the number of scholarships.<sup>181</sup> That is, an institution may award full and partial scholarships in different proportions to male and female athletes so long as total financial aid dollars are substantially proportionate to participation levels. Although neither the Title IX regulations nor the Policy Interpretation defines what level of variance demonstrates a Title IX violation, the 1998 OCR letter discussed above requires that the percentages of total athletic scholarship dollars awarded to male and female athletes be within one percent, or one scholarship (whichever is greater), of their respective athletic participation rates, absent any legitimate, nondiscriminatory reasons.<sup>182</sup> Thus, for example, if 42 percent of a school's athletes are women, then the school will be in compliance with Title IX if it (a) provides between 41 and 43 percent of its total athletic scholarship dollars to those athletes, or (b) the variation between the total scholarship dollars provided to women and their participation rate is greater than 1 percent but less than the total amount of one scholarship offered by the institution.<sup>183</sup>

<sup>179</sup> See Investigator's Manual, *supra* note 89, at 14-15.

<sup>180</sup> See *Haffer*, 678 F. Supp. at 538-39.

<sup>181</sup> See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415 ("This section does not require a proportionate number of scholarships for men and women or individual scholarships of equal value.").

<sup>182</sup> See Scholarship Clarification, *supra* note 90 (making clear that the OCR will no longer apply the "Z" and "T" tests, which were structured to provide a basis for determining whether any differences in the proportion of financial or average awards were statistically significant, and therefore Title IX violations); see also Investigator's Manual, *supra* note 89, at 153-59.

<sup>183</sup> Unlike the clear and explicit guidance provided by the OCR, recent case law provides little or no guidance regarding Title IX compliance with respect to athletic scholarships. See, e.g., *Grandson v. Univ. of Minn.*, 272 F.3d 568, 576 (8th Cir. 2001) (holding that efforts university made in fulfilling its commitments under compliance agreement with the OCR precluded a finding that disproportionately low athletic scholarships awarded to women showed that university was deliberately indifferent to its overall compliance obligations under Title IX, including 34 C.F.R. § 106.37(c)); *Beasley v. Ala. State Univ.*, 966 F. Supp. 1117 (M.D. Ala. 1997), *aff'd Beasley v. Ala. State Univ.*, 3 F. Supp. 2d 1304, 1335 (M.D. Ala. 1998) (applying the "Z" test, which has since been effectively abandoned by the OCR).

### **c. In-State and Out-of-State Scholarships**

As a general matter, institutions may point to the differential value of in-state and out-of-state scholarships granted by public institutions as a factor explaining their failure to offer substantially equal assistance to their male and female athletes.<sup>184</sup> Historically, this was problematic because universities kept scholarship expenditures for females low by requiring that a high percentage of female athletes be in-state residents whose in-state scholarships would be less costly, while imposing no similar restrictions on male athletes. But this practice is now clearly prohibited.<sup>185</sup> Thus, differences in athletic aid attributable to the difference between in-state and out-of-state tuition will be permissible as long as they are not part of an overall practice designed to limit the availability of out-of-state scholarships for female athletes.

### **d. Legitimate Nondiscriminatory Factors**

Disparities in levels of financial assistance may be permissible if they are based on legitimate, nondiscriminatory factors.<sup>186</sup> The Policy Interpretation gives two examples of such factors. As noted above, the first is the uneven distribution of in-state and out-of-state scholarships between male and female athletes not attributable to different policies regarding the availability of those scholarships by sex. The second is a discrepancy in scholarship expenditures for the period of time necessary to phase in scholarships when a new team is established.<sup>187</sup> In this situation, institutions may want to stagger the scholarships provided over the first four years that the new team is in existence so that all of the scholarships are not committed in the first year.<sup>188</sup> While the Policy Interpretation permits this approach, it will apply, at a maximum, only for the first four years of a team's existence. After that time, the desire to stagger scholarships will not justify disparate scholarship levels between men and women.

<sup>184</sup> See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415.

<sup>185</sup> See Investigator's Manual, *supra* note 89, at 20; see also Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415 ("At public institutions, the higher costs of tuition for students from out-of-state may in some years be unevenly distributed between men's and women's programs. These differences will be considered nondiscriminatory if they are not the result of policies or practices which disproportionately limit the availability of out-of-state scholarships to either men or women.").

<sup>186</sup> See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415.

<sup>187</sup> See *id.*

<sup>188</sup> A number of settlement agreements include scholarship phase-ins for new teams. See *infra* notes 338-49 and accompanying text for discussion regarding settlements.

A financial disparity may also be explained by legitimate efforts undertaken to comply with other Title IX requirements, such as participation requirements,<sup>189</sup> or by unexpected fluctuations in the participation rates of males and females.<sup>190</sup> The OCR's Scholarship Clarification cautions, however, that if an educational institution asserts a nondiscriminatory justification for a disparity in the allocation of athletic scholarship funds, it must be prepared to show that its rationale is reasonable and does not reflect underlying discrimination.

## **E. EQUIVALENCE IN OTHER ATHLETIC BENEFITS AND OPPORTUNITIES**

### **1. THE BASIC TITLE IX PRINCIPLE**

Independent of its requirements that institutions provide equal participation opportunities and equitable allocation of athletic scholarships, Title IX also mandates that institutions provide equal treatment in all other aspects of their male and female athletics programs. The Title IX regulation sets out ten program components that should be considered in assessing whether this standard has been met. These components serve as examples and are not exhaustive.<sup>191</sup> They include, in addition to the effective accommodation of interests and abilities and scholarships discussed above, the following:

- equipment and supplies;
- scheduling of games and practice times;
- travel and per diems;
- opportunities to receive coaching and tutoring;
- assignment and compensation of coaches and tutors;
- locker rooms and practice and competitive facilities;
- medical and training facilities and services;
- housing and dining facilities and services; and
- publicity.<sup>192</sup>

<sup>189</sup> See Scholarship Clarification, *supra* note 90, citing *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1005-06 (S.D. Iowa 1995), a reverse discrimination case brought by male wrestlers which held that the scholarship regulation "was never intended to prevent schools from allocating resources in a way designed to encourage participation by the underrepresented gender."

<sup>190</sup> See *id.* For instance, a disparity may be explained if an athlete who had accepted an athletic scholarship decided at the last minute to enroll at another school.

<sup>191</sup> See 34 C.F.R. § 106.41(c) (2006) ("the Director will consider, among other factors," the enumerated categories); see also Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415 ("This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office for Civil Rights."). Non-enumerated categories such as support services are thus the proper subject of inquiry, and the list of categories may vary with the particular case.

<sup>192</sup> See 34 C.F.R. § 106.41(c)(1)-(10).



The Policy Interpretation includes discussions of each of these program components.<sup>193</sup> Similar analyses are found in the Investigator’s Manual.<sup>194</sup> In addition, discrimination in the recruitment of athletes, while not explicitly referenced in the regulation, is specifically prohibited under the Policy Interpretation.<sup>195</sup>

According to the Policy Interpretation, the appropriate analysis to determine equivalence in athletic benefits and opportunities compares the:

availability, quality and kind of benefits, opportunities and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any difference is negligible.<sup>196</sup>

There is no requirement that women’s and men’s programs be mirror images of each other, and Title IX does not require that the same benefits be provided to women’s and men’s teams in the same sports. As the Policy Interpretation states, “The Department does not want and does not have the authority to force universities to offer identical programs to men and women,”<sup>197</sup> and the relevant inquiry involves equality program wide. Nonetheless, a significant disparity between men’s and women’s teams in the same sport may well reflect a program-wide disparity. In addition, a disparity in one of the program components listed above may alone be substantial enough in and of itself to constitute a violation.<sup>198</sup>

Title IX requires equal treatment among male and female club athletes, just as it requires equal opportunity for men and women within a varsity athletic program. Club and varsity sports are treated separately under the regulations, recognizing that such programs involve different levels of competition.<sup>199</sup> Therefore, equal treatment violations are assessed by comparing teams at the same level of competition with respect to athletic benefits.<sup>200</sup>

<sup>193</sup> See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,416-17.

<sup>194</sup> See Investigator’s Manual, *supra* note 89, at 29-102.

<sup>195</sup> See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,417.

<sup>196</sup> *Id.* at 71,415

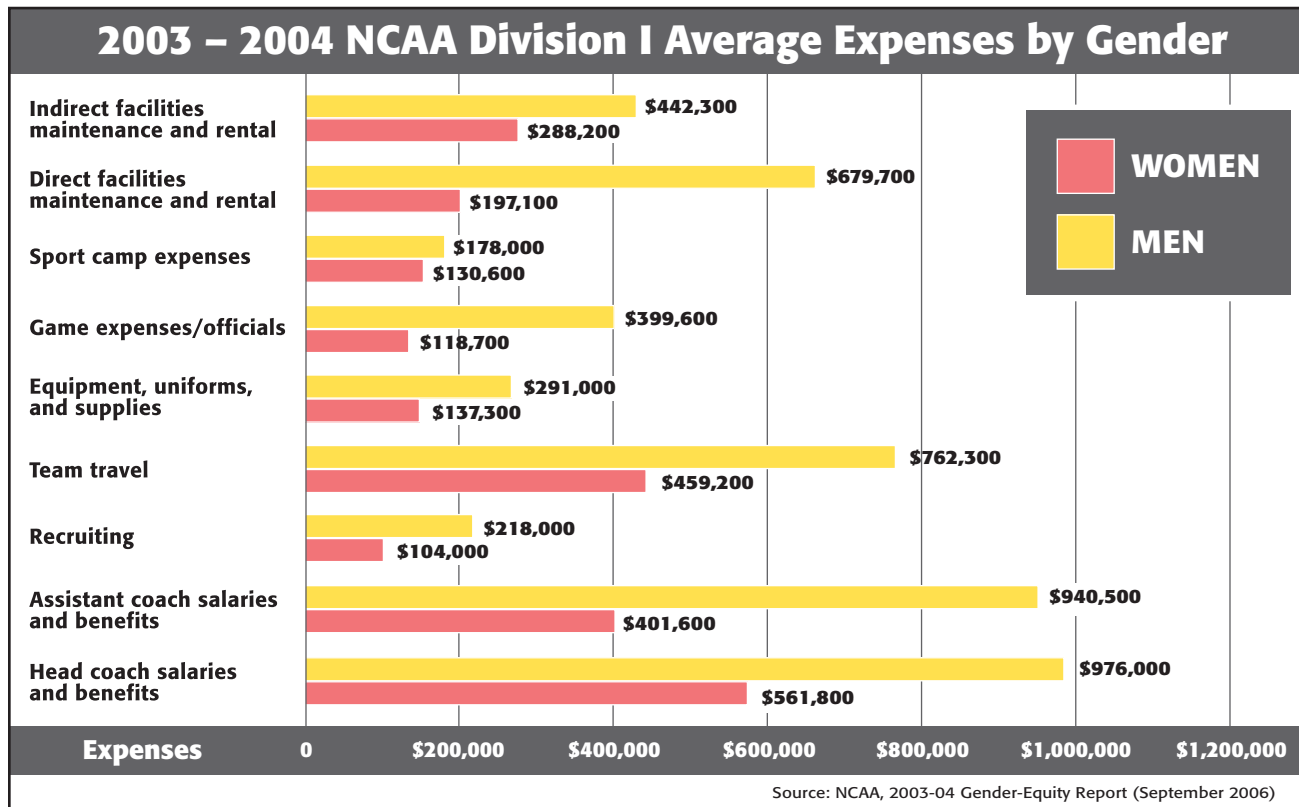
<sup>197</sup> Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,421. The Policy Interpretation states that “neither the statute nor the regulations calls for identical programs for male and female athletes. Absent such a requirement, the Department cannot base noncompliance upon a failure to provide arbitrarily identical programs, either in whole or in part.” It also rejects the argument that compliance should typically be measured by sport-specific comparisons. *Id.* at 71,422.

<sup>198</sup> See *id.* at 71,417.

<sup>199</sup> The Policy Interpretation analyzes club teams as varsity teams only if they “regularly participate in varsity competition.” Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,314-13 n.1.

<sup>200</sup> See, e.g., *Bryant*, 1996 U.S. Dist. LEXIS 8393 at \*18 (holding that female athletes failed to establish an injury within their level of competition).

Cases alleging inequities in athletics program benefits are very fact specific. Examples of decisions addressing discrimination in the treatment of student-athletes under Title IX are set forth below.



***Inequities in Equipment, Fields, and Facilities:*** In *Daniels v. School Board of Brevard County*,<sup>201</sup> the district court issued a preliminary injunction ordering the School Board of Brevard County to remedy a number of inequalities faced by the girls’ softball program, including the lack of an electronic scoreboard, batting cage, bleachers, adequate signs to publicize games, bathroom facilities, concession stand/press box/announcer’s box, field maintenance, and lighting.<sup>202</sup> The court specifically noted the importance of having lighting

on the field because it gave the team more flexibility to schedule practices and because the ability to host nighttime games “affects spectator attendance, parental involvement, and player and spectator enjoyment.”<sup>203</sup>

<sup>201</sup> 985 F. Supp. 1458 (M.D. Fla. 1997) (addressing inequities at Merritt Island High School).

<sup>202</sup> *Daniels*, 985 F. Supp. at 1460-61.

<sup>203</sup> *Id.* at 1461; see also *Landow v. Sch. Bd. of Brevard County*, 132 F. Supp. 2d 958 (M.D. Fla. 2000) (issuing preliminary injunction requiring the school board to develop a plan to remedy unequal treatment of girls’ softball team). Defense counsel in *Landow* suggested that the plaintiffs made “mountains out of molehills” in making their complaints. The court responded that “matters that might otherwise be accurately characterized as molehills can assume mountainous proportions when viewed from the perspective of someone who is already subjected to disparate treatment. In other words, persons who already perceive that they are viewed with less esteem than their peers understandably may consider with resentment and suspicion circumstances and conduct that might ordinarily seem less sinister.” *Id.* at 967.

In *Mason v. Minnesota State High School League*,<sup>204</sup> the district court refused to dismiss a suit alleging inequities in the facilities used for the boys' and girls' state hockey tournament.<sup>205</sup> The court held that the plaintiffs, girls' high school hockey players, established an issue of material fact as to whether the venue for their state hockey tournament (an arena at the University of Minnesota) was inferior to the venue for the boys' state hockey tournament (the Xcel, where the Minnesota National Hockey League team played).<sup>206</sup> Compared to the Xcel, the University of Minnesota arena had a smaller seating capacity, smaller locker rooms, and no capacity for video replay on the scoreboard.<sup>207</sup> The court noted that the Minnesota State High School League held two other girls' tournaments at Xcel, showing that the Xcel had the potential to host smaller crowds, and said that crowd size may influence the allocation of resources only when it "does not limit the potential for women's athletic events to rise in spectator appeal."<sup>208</sup> The court held that there were issues of material fact as to whether the venue for the girls' tournament was inferior and left the determination of inequities to the factfinder.<sup>209</sup>

***Inequities in Scheduling of Seasons:*** Several lawsuits at the high school level have challenged the scheduling of sports seasons. Scheduling of games is one of the factors listed in the Title IX regulations, and the Title IX Athletic Investigator's Manual specifically discusses assessing the season of sport and length of season as part of this component.<sup>210</sup> After Title IX's enactment, educational institutions scrambled to add more girls' sports to athletic programs, and some institutions scheduled the girls' sports seasons so as not to conflict with existing boys' sports.<sup>211</sup> As a result, girls were scheduled to play their sports in nontraditional and less advantageous seasons.

<sup>204</sup> No. 03-6462, 2004 U.S. Dist. LEXIS 13865 (D. Minn. July 15, 2004).

<sup>205</sup> *Mason*, 2004 U.S. Dist. LEXIS 13865, at \*17 (D. Conn. July 15, 2004).

<sup>206</sup> *Id.* at \*15.

<sup>207</sup> *Id.* at \*5.

<sup>208</sup> *Id.* at \*14.

<sup>209</sup> In addition to its analysis of Title IX, the court in *Mason* seemingly also made findings under the Equal Protection Clause, stating that the defendant did not show that the gender classification was "exceedingly persuasive." *Mason*, 2004 U.S. Dist. LEXIS 13865, at \*12. Other cases have also addressed athletics inequities under legal authorities beyond Title IX. See, e.g., *Blair v. Wash. State Univ.*, 740 P.2d 1379 (Wash. 1987) (Washington State Equal Rights Amendment); *Haffer v. Temple Univ.*, 678 F. Supp. 517 (E.D. Pa. 1987). *Haffer* was originally brought under Title IX, but all non-scholarship Title IX claims were dismissed following the Supreme Court's decision in *Grove City Coll. v. Bell*. See *Haffer*, 678 F. Supp. at 522 n.2. Since Temple is a state school, equal protection claims were substituted and the case proceeded under a constitutional theory of discrimination. The case went to trial several weeks after the Restoration Act was passed but was settled without a ruling on plaintiffs' motion to reinstate the Title IX claims. *Haffer* is still particularly helpful because it tracks the Title IX regulatory categories and thus provides a model for Title IX cases. See *id.*, 678 F. Supp. at 530-34.

<sup>210</sup> 34 C.F.R. § 106.41(c)(3); see Investigator's Manual, *supra* note 89.

<sup>211</sup> See *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805 (W.D. Mich. 2001), *aff'd* *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 377 F.3d 504 (6th Cir. 2004), *vacated by Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 1012 (2005), *reaffirmed by Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006), *cert. denied*, *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 2007 U.S. LEXIS 3813 (2007); *Alston v. Va. High Sch. League*, 144 F. Supp. 2d 526, 538 (W.D. Va. 1999).

In *Communities for Equity v. Michigan High School Athletic Association*, the U.S. Court of Appeals for the Sixth Circuit held that such scheduling is discriminatory.<sup>212</sup> Specifically, it found, among other things, that the athletic association scheduled six girls' sports, and no boys' sports, in seasons when girls could not participate in club programs, when recruiters were not able to watch the girls play, and when the girls' teams could not be nationally ranked. These conditions made it harder for girls to obtain scholarships and deprived them of opportunities enjoyed by boys who played the same sports in the traditional or advantageous season.<sup>213</sup> The Sixth Circuit ultimately held that the scheduling violated the Equal Protection Clause, Title IX, and Michigan state law, rejecting the athletic association's proffered justifications as insufficient to satisfy applicable legal standards.<sup>214</sup>

Other cases have also addressed the scheduling of sports seasons. In *Alston v. Virginia High School League*, the Virginia High School League (VHSL) scheduled the girls' seasons in such a way that when certain schools were reclassified into different divisions, some girls' sports conflicted, and the girls who played in both sports were forced to choose between them.<sup>215</sup> Because no boys' sports faced this dilemma when reclassifications occurred, the court denied VHSL's motion for summary judgment, finding an issue of material fact as to whether the inequity was substantial.<sup>216</sup> A federal jury eventually delivered a verdict in favor of the plaintiffs, finding that the VHSL's scheduling of seasons violated Title IX and awarding \$187,000 in damages.<sup>217</sup>

<sup>212</sup> The Sixth Circuit originally decided *Communities for Equity* based on the Equal Protection Clause. *Cmtys. for Equity*, 377 F.2d at 506. The Supreme Court granted certiorari to review the case, then vacated the judgment and remanded to the Sixth Circuit in light of its decision in *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), in which it held that an enforcement mechanism under the Telecommunications Act of 1996 precluded relief under § 1983. See *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 1012 (2005). In 2006, the Sixth Circuit concluded that the plaintiff could seek relief for constitutional claims under 42 U.S.C. § 1983 as well as under Title IX, and once again concluded that the scheduling of seasons resulted in unequal treatment of women in comparison to men, this time basing its decision on Title IX, the Equal Protection Clause, and Michigan's Elliott-Larsen Civil Rights Act. See *Cmtys. for Equity*, 459 F.3d at 691-97, cert. denied, *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 2007 U.S. LEXIS 3813 (2007). There is a circuit court split on the issue of whether a plaintiff can seek relief under both 42 U.S.C. § 1983 and Title IX. See *supra* note 77.

<sup>213</sup> *Cmtys. for Equity*, 377 F.3d at 506-10.

<sup>214</sup> *Id.* at 512-13; see also *Cmtys. for Equity*, 459 F.3d at 691-97. But see *Ridgeway v. Mont. High Sch. Ass'n*, 633 F. Supp. 1564, \*1581 (D. Mont. 1986) (scheduling girls' basketball and volleyball outside their traditional seasons was substantially related to the governmental objectives of maximizing student participation, availability of coaching staff, availability of officials, availability of facilities, and team support). *Ridgeway* is of little use in analyzing equal treatment claims, however, because the court did not address whether boys in Montana faced the same disadvantages as girls. In addition, the Montana Department of Labor and Industry later ordered the Montana High School Association to move girls' volleyball and girls' basketball to their traditional seasons. See *Ries v. Mont. High Sch. Ass'n*, No. 9904008792 (Mont. Dept. of Labor and Industry, Aug. 11, 2000).

<sup>215</sup> *Alston v. Va. High Sch. League, Inc.*, 144 F. Supp. 2d 526, 528 (W.D. Va. 1999).

<sup>216</sup> *Id.* at 536. The scheduling affected approximately forty to seventy girls every other year. *Id.*

<sup>217</sup> *Alston v. Va. High Sch. League*, No. 97-0095-C (W.D. Va.); see Judith Evans, *Court Rules Against VHSL: Nontraditional Girls Sports Seasons Seen as Discriminatory*, WASH POST, July 21, 2000, at D06.

In *McCormick v. School District of Mamaroneck*, girls who played soccer at two high schools were not able to play in the state championships because their season was scheduled in the spring and the state championships were held in the fall, when all other girls' soccer teams in the state played.<sup>218</sup> The boys' soccer teams at the plaintiffs' schools played in the fall and were eligible for the state championships.<sup>219</sup> Noting that the Policy Interpretation lists the opportunities to engage in available pre-season and post-season competition as a factor in determining equivalence under Title IX,<sup>220</sup> the court held that scheduling girls' soccer in the spring violated Title IX because it denied the girls the opportunity to play in the state championship, while the boys were not denied this opportunity. The Court also noted that the scheduling decisions sent a message to the girls that they were not expected to succeed.<sup>221</sup>

## 2. EQUIVALENCE IN SUPPORT AND TREATMENT: ADDITIONAL POINTS

Points to keep in mind regarding the analysis of the nondiscriminatory treatment of student-athletes include the following:

### a. Per Capita Equity in Spending

Although there is no requirement of per capita equity in expenditures, the fact finder "may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex."<sup>222</sup> In other words, it is not the amount of money spent, but what the money buys, that determines whether disparities are discriminatory. Often there will be a direct relationship between expenditures and treatment. For example, if more is spent on travel for male than female athletes, the likely explanation is that the men are traveling further and/or in better style. Either difference could well state a violation.

<sup>218</sup> *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 280 (2d Cir. 2004).

<sup>219</sup> *Id.* at 281.

<sup>220</sup> *Id.* at 289, citing Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,416.

<sup>221</sup> *Id.* at 294-95. There is no independent right to participate in state championships; there is a right to equal treatment. The court suggested that one possible remedy was to alternate seasons so that one year boys would play in the spring and not go to the state championship and the next year the girls would not attend. The defendant's argument that the boys and their parents would not stand for this arrangement illustrated the plaintiff's point: "If the schools think that [what] we are asking for is not important, I have a suggestion: try to move the boys' soccer to the spring and see what they do." *Id.* at 298 n.22.

<sup>222</sup> 34 C.F.R. § 106.41(c) (2006); see also Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,420; *accord Cohen II*, 991 F.2d at 896 n.9 (quoting regulation); *Cohen I*, 809 F. Supp. at 994 (noting that although disparities in expenditures alone do not violate Title IX, they are relevant to evaluating whether an institution has complied with § 106.41(c)).

Different expenditures on other items, such as uniforms or equipment, may or may not suggest differential treatment. For instance, football uniforms are more expensive than swimsuits. Among the questions to consider in this context are whether male and female athletes are treated equally with respect to quality of the uniforms they are provided, how often uniforms are replaced, the availability of practice uniforms and/or warm-up clothing, and who is responsible for laundering the uniforms and other athletic clothing.

## **b. Coaching and Tutoring**

The provisions addressing coaching and tutoring create two sets of rights: those of the coaches and tutors to not be discriminated against themselves in connection with their compensation and assignment, and those of the student-athletes to receive nondiscriminatory coaching and tutoring.<sup>223</sup> Title IX's subpart E regulations<sup>224</sup> confer the full range of employment protections on coaches and tutors, as well as on other employees of athletics departments.<sup>225</sup>

In addition, discrimination against coaches may be actionable as discrimination against their teams. For example, discrimination against coaches in compensation or assignment policies and practices may be a violation of the Title IX rights of the students they coach, regardless of the coach's gender, if it "den[ies] male and female athletes coaching of equivalent quality, nature, or availability."<sup>226</sup> As a corollary, given that Title IX bars retaliation,<sup>227</sup> coaches and other employees are also protected, regardless of their own gender, if they are penalized for protesting Title IX violations against their teams or for attempts to rectify inequalities between men's and women's athletics.<sup>228</sup>

<sup>223</sup> See 34 C.F.R. § 106.4 1(c)(5) and (6).

<sup>224</sup> See 34 C.F.R. §§ 106.51-61.

<sup>225</sup> Notwithstanding the language in the Policy Interpretation that the Department of Education does not have jurisdiction over the employment practices of covered programs, Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,416 n.6, the Department has enforced these regulations, in coordination with the Equal Employment Opportunity Commission, since the Supreme Court's decision in *North Haven Bd. of Educ. v. Bell*. See 456 U.S. 512 (1982). The Policy Interpretation's language predates the Supreme Court's decision in *North Haven* and has never been adjusted.

<sup>226</sup> See 34 C.F.R. § 106.51; Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,416; Investigator's Manual, *supra* note 89 at 58 (indicating that lower compensation for coaches in women's program could negatively affect female athletes and constitute a violation); see also Equal Opportunity Employment Commission Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions (October 29, 1997) (stating that sex of student-athletes is not a gender-neutral factor justifying a salary disparity for male and female coaches), available at <http://www.eeoc.gov/policy/docs/coaches.html>.

<sup>227</sup> See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). In this case, the plaintiff, a public school teacher and girls' basketball coach, received negative work evaluations and was removed from his coaching position after he complained to his supervisors about the lack of adequate funding, equipment, and facilities for the girls' basketball team. *Id.* In upholding the retaliation claim under Title IX, the Court stated that "it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint." *Id.* at 179. For further discussion see *supra* notes 52-57 and accompanying text.

<sup>228</sup> See *id.*; 34 C.F.R. § 100.7(e) (2005), as applied to Title IX by 34 C.F.R. § 106.71 (2006) (importing Title VI procedures to prohibit retaliation for the assertion of rights guaranteed by Title IX).

### **c. No Exception for Football or Other “Revenue-Producing” Sports**

There is absolutely no exemption for, or different treatment permitted of, football, “revenue producing sports,” or any other subset of teams.<sup>229</sup> The Policy Interpretation also explicitly rejects any argument that “major” and “minor” sports should be compared only with each other. It explains that:

no subgrouping of male or female students (such as a team) may be used in such a way as to diminish the protection of the larger class of males and females in their rights to equal participation in educational benefits or opportunities. Use of the “major/minor” classification does not meet this test where large participation sports (e.g., football) are compared to smaller ones (e.g., women’s volleyball) in such a manner as to have the effect of disproportionately providing benefits or opportunities to the members of one sex.<sup>230</sup>

### **d. Permissible Explanations for Disparities**

There may be permissible, nondiscriminatory explanations for certain disparities.<sup>231</sup> The Policy Interpretation, for example, makes several references to the unique demands of football. While not all differences will be discriminatory, it is important to look carefully at asserted “nondiscriminatory” reasons and not take them at face value.<sup>232</sup> For example, an institution may claim that football, because of a high injury rate, needs the largest per-capita complement of trainers. In this example, it is important to look at the treatment of other high-injury sports, such as women’s gymnastics. An institution may also claim that high event management expenditures on football or men’s basketball are justified by the unique nature of those sports. Event management expenditures for women’s sports that may draw equally to – or outdraw – these men’s sports should be carefully reviewed; moreover, the institution’s allocation of promotion, publicity, and marketing resources to women’s sports must also be analyzed to see if women’s sports are drawing smaller crowds because of reduced resources in these areas.<sup>233</sup>

<sup>229</sup> See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,421.

<sup>230</sup> *Id.* at 71,422. Similarly, if a greater percentage of male than female athletes are included in a university’s top “tier” of teams, it will not be a defense that benefits and resources are allocated according to the tier in which a team is placed.

<sup>231</sup> See *id.* at 71,415-16.

<sup>232</sup> See *id.*

<sup>233</sup> See *Haffer*, 678 F. Supp. at 529-30 (in denial of defendant’s motion for summary judgment, acknowledging plaintiffs’ evidence regarding a link between certain expenditures and revenues).

One explanation for certain disparities that has been rejected by a court is the inconvenience to athletic program administration. In *McCormick v. School District of Mamaroneck*, for instance, the defendant school districts argued that it was not possible to schedule the girls' soccer season in the spring when the state tournament was held because there would be a lack of field space, a new coach would need to be hired, and there might be a shortage of officials.<sup>234</sup> The court held that these were not sufficient reasons to justify the inferior treatment of girls.<sup>235</sup>

### **e. Booster Clubs and Outside Funding**

The fact that booster clubs or donors may contribute disproportionately more funds to certain men's sports does not constitute a defense to less favorable treatment of female athletes, although it is often offered as one. There are two reasons for this conclusion.

First, with the passage of the Civil Rights Restoration Act, institutions can no longer justify discriminatory treatment based on different funding sources.<sup>236</sup> As the Restoration Act made clear, Title IX prohibits discrimination in all programs and activities of an institution that receives any federal funds, regardless of how a particular program or activity is funded.<sup>237</sup> The fact that there may be different funding sources for different teams is irrelevant to the institution's obligation to ensure equal treatment for the male and female sports programs it sponsors. The OCR concurs in this analysis. According to the Investigator's Manual:

<sup>234</sup> *McCormick*, 370 F.3d at 297.

<sup>235</sup> *Id.* But see *Ridgeway v. Mont. High Sch. Ass'n*, 633 F. Supp. 1564 (D. Mont. 1986) (in Title IX and Equal Protection case, court did not order that girls' basketball and volleyball be moved to their traditional seasons because the placement of the seasons were substantially related to the governmental objectives of maximizing student participation, availability of coaching staff, availability of officials, availability of facilities, and team support). The Montana High School Association was later ordered by the Montana Department of Labor and Industry to move girls' volleyball and girls' basketball to their traditional seasons. *Ries v. Mont. High Sch. Ass'n*, No. 9904008792 (Mont. Dept. of Labor and Industry, Aug. 11, 2000).

<sup>236</sup> See *supra* notes 42-45 and accompanying text for discussion of the Restoration Act.

<sup>237</sup> See 20 U.S.C. § 1687 (2005); 2003 Clarification, *supra* note 35.



[W]here booster clubs provide benefits or services that assist only teams of one sex, the institution shall ensure that teams of the other sex receive equivalent benefits and services. If booster clubs provide benefits and services to athletes of one sex that are greater than what the institution is capable of providing to athletes of the other sex, then the institution shall take action to ensure that benefits and services are equivalent for both sexes.<sup>238</sup>

That an institution may receive dedicated funds for certain teams or purposes in no way affects its responsibility to treat all of its student-athletes in a nondiscriminatory fashion. The court in *Daniels* agreed when it rejected the argument that the school district could not be held responsible for the fundraising efforts of the booster clubs.<sup>239</sup> The court said, “[T]he [booster club] funding system is one to which Defendant has acquiesced; Defendant is responsible for the consequences of that approach.”<sup>240</sup> Thus, while institutions are not barred from accepting booster club funds, they must take steps to ensure that those funds do not contribute to any inequality in the treatment of male and female teams. So, for example, schools can spread booster funds equitably between male and female programs or procure or allocate additional funds to ensure that teams that do not receive booster funding receive equal treatment.

Second, under the “significant assistance” regulation,<sup>241</sup> institutions may not “[a]id or perpetuate discrimination against any person by providing significant assistance to any agency, organization or person which discriminates on the basis of sex in providing any aid, benefit, or service to students or employees.” The theory of the regulation is that an institution that provides significant assistance to an independent, but discriminatory, entity essentially adopts the discriminatory policies as its own.<sup>242</sup> Thus, when male and female athletes are treated differently as the result of booster club contributions to a male or female team, an institution will be liable if it has provided any kind of “significant assistance” (e.g., lists of alumni or parent names and addresses, office services) to that booster club.

<sup>238</sup> Investigator’s Manual, *supra* note 89, at 5; see also *Cohen I*, 809 F. Supp. at 996 (concluding that “all monies spent by Brown’s Athletic Department, whether originating from university coffers or from the Sports Foundation [booster club] must be evaluated as a whole under § 106.41(c”).

<sup>239</sup> *Daniels*, 985 F. Supp. at 1462.

<sup>240</sup> *Id.* The Eighth Circuit in *Chalenor v. University of North Dakota* affirmed this notion in stating that outside funding cannot relieve an educational institution of its Title IX obligations, stating that “[o]nce a university receives a monetary donation, the funds become public money, subject to Title IX’s legal obligations in their disbursement.” 291 F.3d at 1042, 1048 (8th Cir. 2002).

<sup>241</sup> 34 C.F.R. § 106.31(b)(6) (2006).

<sup>242</sup> See, e.g., *Iron Arrow Honor Soc’y v. Heckler*, 702 F.2d 549, 561 (5th Cir. 1983) (“All federal programs ... are necessarily infected by what amounts to a general and overriding policy of the University. This infection results from the University’s close historical ties with Iron Arrow [an all-male, prestigious honor society].”), *vacated on other grounds*, 464 U.S. 67 (1983).

## f. Recruitment

As the Department of Education has made clear, the regulatory requirement that recipients of federal funds “provide equal athletic opportunity for members of both sexes”<sup>243</sup> includes nondiscrimination in the recruitment of student athletes.<sup>244</sup> This prohibition applies to the athletic recruiting practices of all institutions receiving federal funds and is not limited by the Title IX statutory provision that exempts the admissions practices of private undergraduate institutions from Title IX requirements.<sup>245</sup> This is because “[t]he athletic recruitment practices of institutions often affect the overall provision of opportunity to male and female athletes”<sup>246</sup> already enrolled as students. Accordingly, in *Cohen I*, the court explained that, as a result of a three-to-one differential in recruiting expenditures in favor of the male athletes, “[T]he bottom line is that Brown knows full well that the two women’s teams will not be able to effectively compete at an intercollegiate level without . . . recruitment assistance.”<sup>247</sup> Similarly, in *Roberts II*, the court held that “insofar as recruiting is integral to team development, it is a core coaching function. Under the Title IX regulations, defendant would not be permitted to hobble a coach’s efforts to improve his or her team.”<sup>248</sup>

## F. FUNDING CONSTRAINTS ARE NOT A DEFENSE

A defense frequently asserted by educational institutions in athletics discrimination cases is that they simply do not have the funds necessary to end the discrimination alleged. However, lack of funds is not a cognizable defense under Title IX.<sup>249</sup> A school experiencing financial difficulties has the flexibility to make adjustments as long as the adjustments do not violate Title IX.<sup>250</sup>

<sup>243</sup> 34 C.F.R. § 106.41(c) (2006).

<sup>244</sup> Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415 (“Section 86.41(c) [now § 106.41(c)] also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this Section also addresses recruitment of student athletes and provision of support services.”); *id.* at 71,417 (“compliance will be assessed by examining the recruitment practices of the athletic programs for both sexes to determine whether the provision of equal opportunity will require modification of those practices.”); see also *Cohen I*, 809 F. Supp. at 997 (“Recruitment is not listed under § 106.41(c), but is considered a target area in the Policy Interpretation.”).

<sup>245</sup> 20 U.S.C. § 1681(a)(1) (2007).

<sup>246</sup> Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,417.

<sup>247</sup> *Cohen I*, 809 F. Supp. at 993.

<sup>248</sup> *Roberts II*, 998 F.2d at 834. *But see* Investigator’s Manual, *supra* note 89, at 100 (suggesting recruitment violations will not be found without violations of athletic financial assistance or accommodation of athletics interests and abilities).

<sup>249</sup> See, e.g., *Roberts I*, 814 F. Supp. at 1518 (“[A] financial crisis cannot justify gender discrimination.”); *Favia*, 812 F. Supp. at 585, *mot. to modify order denied*, 7 F.3d 332 (3d Cir. 1993) (finding that financial concerns alone cannot justify gender discrimination); *Cook*, 802 F. Supp. at 750 (“[I]f schools could use financial concerns as a sole reason for disparity of treatment, Title IX would become meaningless.”); *Haffer*, 678 F. Supp. at 530 (finding that financial concerns alone cannot justify gender discrimination).

<sup>250</sup> See, e.g., *Kelley*, 35 F.3d at 269; *Roberts II*, 998 F.2d at 830 (“We recognize that in times of economic hardship, few schools will be able to satisfy Title IX’s effective accommodation requirement by continuing to expand their women’s athletic programs . . . Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men’s and women’s athletic participation rates become substantially proportionate to their representation in the undergraduate population.”); *Cohen I*, 991 F.2d at 898 n.15 (“Title IX does not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent).”).

# IV. CHALLENGES TO THE THREE-PART TEST

BREAKING DOWN BARRIERS





Educational institutions that have been sued for noncompliance with Title IX, as well as male plaintiffs who have challenged their schools' decision to eliminate their teams, have argued that the Title IX participation regulation<sup>251</sup> and subsequent policy documents, particularly the Policy Interpretation's three-part participation test (as written and/or as applied), constitute illegal affirmative action and/or quotas in violation of Title IX and the Equal Protection Clause. To date, every federal appellate court addressing the issue has uniformly rejected such allegations.<sup>252</sup> As the First Circuit has stated unequivocally:

No aspect of the Title IX regime at issue in this case – inclusive of the statute, the relevant regulation, and the pertinent agency documents – mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.<sup>253</sup>

The following sections explain the arguments that rebut the principal challenges that have been raised.

## **A. QUOTAS ARE INAPPLICABLE IN THE CONTEXT OF ATHLETICS**

Arguments that the three-part test imposes quotas or mandates discrimination against men have been held to be wholly misplaced in the sex-segregated context of athletics. This is because, in athletics, it is educational institutions themselves that in the first instance determine how many fixed participation opportunities they will provide to men and how many they will provide to women. As a result, the three-part test simply provides the means for an institution to evaluate whether it has allocated these explicitly sex-segregated opportunities consistent with Title IX's non-discrimination requirements. As the First Circuit stated, the test provides a measure of whether discrimination exists; it in no way requires quotas or affirmative action:

<sup>251</sup> 34 C.F.R. § 106.41(c)(1) (2006).

<sup>252</sup> See, e.g., *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608 (6th Cir. 2002) (holding that university's elimination of the men's wrestling, soccer, and tennis teams did not violate Title IX or the Equal Protection Clause); *Chalenor v. Univ. of N.D.*, 291 F.2d 1042 (8th Cir. 2002) (finding no violation of Title IX when university eliminated men's wrestling team); *Pederson v. La. State Univ.*, 213 F.3d 858, 878 (5th Cir. 2000) (rejecting university's argument that Title IX's proportionality prong requires quotas); *Boulahanis v. Bd. of Regents*, 198 F.3d 633 (7th Cir. 1999) (finding no violation of Title IX or the Equal Protection Clause when university eliminated the men's soccer and wrestling programs); *Neal v. Bd. of Trs. of the Ca. State Univs.*, 198 F.3d 763 (9th Cir. 1999) (finding no violation of Title IX or Equal Protection Clause when university reduced number of spots on men's wrestling team); *Cohen v. Brown Univ.*, 101 F.3d 155, 170, 177 (1st Cir. 1996) (rejecting university's argument that Title IX's three-part test imposes quotas in violation of Title IX or Constitution).

<sup>253</sup> *Cohen v. Brown Univ.*, 101 F.3d 155, 170 (1st Cir. 1996) (*Cohen IV*).

[B]ecause gender-segregated teams are the norm in intercollegiate athletics programs, athletics differs from admissions and employment in analytically material ways. In providing for gender-segregated teams, intercollegiate athletics programs necessarily allocate opportunities separately for male and female students, and, thus, any inquiry into a claim of gender discrimination *must* compare the athletics participation opportunities provided for men with those provided for women. . . .

Rather than create a quota or preference, this unavoidably gender-conscious comparison merely provides for the allocation of athletics resources and participation opportunities between the sexes in a non-discriminatory manner.<sup>254</sup>

Accordingly, a “talismanic incantation of ‘affirmative action’ has no legal application” to cases concerning an educational institution’s compliance with Title IX’s participation requirements.<sup>255</sup>

For these reasons, courts have rejected the argument that the three-part test runs afoul of Section 1681(b) of Title IX, which prohibits requiring schools to grant preferential treatment based on a statistical imbalance between men and women.<sup>256</sup> As the First Circuit has stated, the “three-part test is, on its face, entirely consistent with Section 1681(b) because the test does not require preferential or disparate treatment” for either men or women.<sup>257</sup> The test merely implements the fundamental principle, embodied in Title IX as in other federal anti-discrimination laws, that “a significant gender-based statistical disparity may indicate the existence of discrimination.”<sup>258</sup> In recognition of this principle, Section 1681(b) explicitly allows the “consideration . . . of statistical evidence tending to show that . . . an imbalance [between men and women] exists with respect to” participation in educational programs and activities. Nothing in the three-part test does more than what is permitted under the statute, and nothing in it creates any affirmative action plan, much less an unlawful one.

<sup>254</sup> *Id.* at 177 (emphasis in original); see also, e.g., *Neal*, 198 F.3d at 772-73 n.8 (stating that because sports teams are gender-segregated, “determining whether discrimination exists in athletics programs requires gender-conscious, group-wide comparisons”) (emphasis in original).

<sup>255</sup> *Cohen IV*, 101 F.3d at 170. The *Cohen IV* court also rejected the argument that women’s athletics opportunities should be allocated based on any argument that the relative levels of interest and ability of men and women differ and that the three-part test thus awards women greater numbers of participation slots than those to which they are legally entitled. According to the court, “to allow a numbers-based lack-of-interest defense to become the instrument of further discrimination against the underrepresented gender would pervert the remedial purpose of Title IX.” *Id.* at 179-80; see also notes 146-148 and accompanying text.

<sup>256</sup> 20 U.S.C. § 1681(b) provides that:

Nothing contained in subsection (a) of this section shall be interpreted to require any education institution to grant preferential or disparate treatment to the members of one sex on account of any imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area. Provided, that this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipts of the benefits of, any such program or activity by the members of one sex.

Section 1681(b) was designed to “prohibit quotas in university admissions and hiring, based upon the percentage of individuals of one gender in a geographical community,” *Cohen IV*, 101 F.3d at 175 (citing the legislative history), not to govern the administration of athletics or other programs within the university. In the first instance, therefore, it is clear that the section is simply inapplicable in the context of athletics.

<sup>257</sup> *Cohen IV*, 101 F.3d at 175 (emphasis in original).

<sup>258</sup> *Id.* at 171; accord *Pederson*, 213 F.3d at 878.

## **B. THE THREE-PART TEST PROVIDES THREE SEPARATE MEANS TO COMPLY WITH TITLE IX'S PARTICIPATION REQUIREMENTS**

The federal courts to consider the question have uniformly recognized that the three-part test is flexible and provides schools with three separate and distinct options for complying with Title IX's requirement to provide equal participation opportunities to men and women. As the district court noted in *National Wrestling Coaches Association v. United States Department of Education*:

[U]nder Title IX, as enforced by DOE, educational institutions select from a range of options when choosing how to comply with the statute and its regulations while meeting their academic and athletic goals with limited resources . . . . Flexibility, as well as First Amendment considerations embodied within the notion of academic freedom, is central to the Title IX statutory and regulatory framework.<sup>259</sup>

Thus, under the three-part test, while schools may, and some do, provide athletic opportunities to male and female athletes in proportion to their representation in the student body, the second and third parts of the test explicitly state that they need not do so if they have made and are making efforts to improve opportunities or are otherwise accommodating the interests of their female athletes. The fact that the first part of the three-part test relies on numerical comparisons thus does not convert that prong – or any other part of the test – into a requirement for quotas or affirmative action. Those comparisons simply represent the “starting point for analysis” of whether an educational institution has met its non-discrimination obligations.<sup>260</sup>

Indeed, the Department of Education itself has stressed that the three-part test provides three separate means to meet Title IX's requirements:

<sup>259</sup> *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 263 F. Supp. 2d 82, 87 (D.D.C. 2003) (*Nat'l Wrestling Coaches Ass'n I*).

<sup>260</sup> *Cohen IV*, 101 F.3d at 171; see also *Neal*, 198 F.3d at 771 n.7 (“[T]he OCR’s three-part [participation] test gives universities two avenues other than substantial proportionality for bringing themselves into Title IX compliance . . . .”); *Kelley*, 35 F.3d at 271 (“[T]he [Title IX] policy interpretation does not . . . mandate statistical balancing. Rather the policy interpretation merely creates a presumption that a school is in compliance with Title IX and the applicable regulation when it achieves such a statistical balance. Even if substantial proportionality has not been achieved, a school may establish it is in compliance by demonstrating either that it has a continuing practice of increasing the athletic opportunities of the underrepresented sex or that its existing programs effectively accommodate the interests of that sex.”); *Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265, 275 (6th Cir. 1994) (same); *Roberts II*, 998 F.2d at 829 (same).

[W]ith respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations. All three prongs have been used successfully by schools to comply with Title IX, and the test offers three separate ways of assessing whether schools are providing equal opportunities to their male and female students to participate in athletics. . . .

[E]ach of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored. The Department will continue to make clear, as it did in its 1996 Clarification, that “[i]nstitutions have flexibility in providing nondiscriminatory participation opportunities to their students . . . .”<sup>261</sup>

Studies confirm that the flexibility of the three-part test is not merely theoretical and that educational institutions have, in fact, used each of the prongs of the test to comply with Title IX. Between 1994 and 1998, for example, of the 74 OCR cases involving Title IX’s participation requirements, only 21 schools, or less than one-third, were found in compliance under the proportionality prong. Over two-thirds of the schools were found by the OCR to be in compliance under the second or third prongs of the test.<sup>262</sup>

## C. NONE OF THE PRONGS OF THE THREE-PART TEST REQUIRES CUTS TO MEN’S TEAMS

### Attitudes toward Title IX May 2007

**Favor Title IX**  
82%

**Oppose Title IX**  
15%

*Source:* Polling by The Mellman Group, May 2007. The Mellman Group conducted a national survey of 1000 likely voters, who were interviewed by telephone May 22-24, 2007. To ensure an unbiased sample, random-digit-dialing techniques were used and respondents screened for being likely voters. The margin of error for this survey is +/-3.1 percent at the 95 percent level of confidence. The margin of error is higher for subgroups.

<sup>261</sup> 2003 Clarification, *supra* note 35.

<sup>262</sup> United States General Accounting Office (GAO), No. 01-128, *Gender Equity: Men’s and Women’s Participation in Higher Education*, December 2000, at 40.



Courts and the Department of Education have also recognized that none of the prongs of the three-part test requires cuts to men’s teams. As the Ninth Circuit has stated, “Every court, in construing the Policy Interpretation and the text of Title IX, has held that a university may bring itself into compliance by increasing athletic opportunities for the underrepresented gender . . . or by decreasing athletic opportunities for the overrepresented gender.”<sup>263</sup>

Indeed, the Department of Education has made clear that “the elimination of teams is a disfavored practice” to comply with Title IX.<sup>264</sup> The Department’s admonition recognizes that if they choose to comply with Prong One, educational institutions may reach proportionality by adding opportunities for women; they need not decrease opportunities for men. And the treatment of men’s teams is irrelevant to Prongs Two and Three of the test, the alternatives for schools that do not comply with Prong One. Institutions cannot comply with Prong Two – the showing of a history and continuing practice of expanding opportunities for the underrepresented sex – by cutting or capping men’s teams. Similarly, opportunities for men are immaterial to Prong Three, which – assuming the school has *not* offered opportunities to women that are substantially proportionate to their enrollment levels – asks whether the current athletic program nonetheless fully and effectively accommodates women’s interests and abilities.

Moreover, courts have repeatedly held that neither Title IX nor the three-part test requires or encourages the cuts to men’s teams that have been challenged. As the district court for the District of Columbia noted, “[F]actors external to the regulatory scheme come into play in athletic decision-making, including the desire to achieve a particular competitive level, availability of athletes with high school competition experience, and spectator interest.”<sup>265</sup>

It is for these reasons that the United States Court of Appeals for the District of Columbia Circuit recently upheld a district court opinion rejecting the National Wrestling Coaches Association’s attempt to sue the Department of Education directly to challenge the three-part test.<sup>266</sup> The courts held that plaintiffs in the case, a coalition of wrestlers whose teams had been eliminated by their schools, lacked standing to sue the Department because the three-part test was not the cause of their injury.<sup>267</sup> As the district court held, the plaintiffs offered nothing to demonstrate that their programs would be reinstated if the three-part test were struck down:

<sup>263</sup> *Neal*, 198 F.3d at 769-70 (emphasis in original); see also *Roberts II*, 998 F.2d at 830; *Cohen II*, 991 F.2d at 898 n.15; *Horner*, 43 F.3d at 275; *Kelley*, 35 F.3d at 269; *Boulahanis*, 198 F.3d at 638-39; *Miami Univ. Wrestling Club*, 302 F.3d at 615-16; *Chalenor*, 291 F.3d at 1048-49. If, however, a university *does* choose to reduce opportunities for men as a means of complying with the law, that decision does not offend constitutional principles. See *infra* notes 270-274 and accompanying text.

<sup>264</sup> See 2003 Clarification, *supra* note 35.

<sup>265</sup> *Nat’l Wrestling Coaches Ass’n I*, 263 F.Supp. at 89; see also *Kelley*, 35 F.3d at 269 (“In making his recommendation, [the university’s Athletic Director] evaluated all 19 sports offered by the University against seven criteria: (1) whether or not the Big Ten Conference and the National Collegiate Athletic Association sponsored a championship in the sport; (2) the tradition of success of the sport at the University; (3) the level of interest and participation in the sport at the high school level; (4) the adequacy of the University’s facilities for the sport; (5) the level of spectator interest in the sport; (6) gender and ethnic issues; and (7) the cost of the sport.”); *Boulahanis*, 198 F.3d at 637 (“for universities, decisions about cutting or adding athletic programs are based on a consideration of many factors”).

<sup>266</sup> *Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*, 366 F.3d 930 (D.C. Cir. 2004) (*Nat’l Wrestling Coaches Ass’n II*).

<sup>267</sup> *Id.* at 942.

Plaintiffs have not alleged, beyond conclusory assertions, that the Three Part Test represents a “substantial factor” in third party decision-making . . . . In fact, plaintiffs appear to concede the point by acknowledging that even if the Court granted the relief requested, plaintiffs and their opponents would still be arguing their respective positions to educational institutions . . . which would, in turn, continue to make discretionary determinations with respect to capping, cutting and adding teams based on a number of factors including those set forth in the 1975 Regulations, as well as factors separate and apart from Title IX and its attendant regulations.<sup>268</sup>

## **D. INSTITUTIONS’ ACTIONS TO PROVIDE EQUAL OPPORTUNITY FOR THEIR MALE AND FEMALE STUDENTS MEET APPLICABLE LEGAL STANDARDS**

Even where universities have chosen to reduce men’s opportunities to come into compliance with Title IX, courts have uniformly made clear that those decisions do not offend either statutory or constitutional standards. In *Kelley v. Board of Trustees of the University of Illinois*, for example, the Seventh Circuit rejected the claims of male swimmers whose team had been cut by the university. The court upheld the district court’s finding that since the men’s share of participation opportunities was substantially greater than their share of undergraduate enrollment, the men had suffered no Title IX violation. The court went on to hold that the university had not violated the Equal Protection Clause: “While the effect of Title IX and the relevant regulation and policy interpretation is that institutions will sometimes consider gender when decreasing their athletic opportunities, this limited consideration of sex does not violate the Constitution.”<sup>269</sup>

<sup>268</sup> See *Nat’l Wrestling Coaches Ass’n I*, 263 F. Supp. 2d at 83-84. Plaintiffs’ appeals in the case were fruitless. *Nat’l Wrestling Coaches Ass’n v. Dep’t. of Educ.*, 366 F.3d 930 (D.C. Cir. 2004) (affirming dismissal of suit). On June 6, 2005, the United States Supreme Court denied certiorari in the case, 545 U.S. 1104 (2005), thereby leaving undisturbed the courts’ conclusion that Title IX could not be blamed for the loss of men’s athletic opportunities.

<sup>269</sup> *Kelley*, 35 F.3d at 272.

The courts have recognized that applicable constitutional standards<sup>270</sup> are satisfied whether educational institutions choose to comply with Title IX by reducing opportunities for men or by adding opportunities for women. In *Kelley*, the court rejected the plaintiffs' argument that a university cannot constitutionally comply with Title IX by eliminating men's athletic programs and must instead continuously expand opportunities for the underrepresented gender.<sup>271</sup> The court reasoned as follows:

[Title IX's] avowed purpose is to prohibit educational institutions from discriminating on the basis of sex. And the remedial scheme established by Title IX and the applicable regulations and policy interpretation are clearly substantially related to this end. Allowing a school to consider gender when determining which athletic programs to terminate ensures that in instances where overall athletic opportunities decrease, the actual opportunities to the underrepresented gender do not. And since the remedial scheme here at issue directly protects the interests of the disproportionately burdened gender, it passes constitutional muster.<sup>272</sup>

<sup>270</sup> Gender-based classifications are subject to heightened scrutiny under the Equal Protection Clause. *United States v. Va.*, 518 U.S. 515, 532-33 (1996). Of course, the three-part test itself is gender neutral, favoring neither men nor women but protecting members of the "underrepresented sex." Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,417-18. As the First Circuit has recognized:

In characterizing Title IX as benefiting *only* women, Brown takes a rather isthmian view of the world at large. After all, colleges that have converted from exclusively female enrollment to coeducational enrollment face situations inverse to Brown's. In such a setting, the men's athletic program may well be underdeveloped, or underfunded, or both, while fiscal retrenchment offers no reprieve. Under these circumstances, Title IX would protect the athletic interests of men as the underrepresented sex.

*Cohen II*, 991 F.2d at 900 n.17 (emphasis in original). The *Cohen II* court went on to state that "even if we were to assume, for argument's sake, that the [Title IX] regulation creates a gender classification slanted somewhat in favor of women, we would find that no constitutional infirmity. It is clear that Congress has broad powers under the Fifth Amendment to remedy past discrimination." *Id.* at 901.

<sup>271</sup> *Kelley*, 35 F.3d at 272.

<sup>272</sup> *Id.*

A similar argument was made in *Boula hanis v. Board of Regents*, in which the male athletes claimed that:

[W]hen viewed in isolation, the elimination of men’s wrestling and men’s soccer only served to decrease opportunities for men without providing any additional opportunities for women. As such, the plaintiffs-appellants contend that increased opportunities for women cannot be the important government objective justifying the sex-based discrimination by the University.<sup>273</sup>

Again, the court held that the “elimination of sex-based discrimination in federally-funded educational institutions is an important government objective, and the actions of Illinois State University in eliminating the men’s soccer and men’s wrestling programs were substantially related to that objective.”<sup>274</sup>

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For all of the foregoing reasons, arguments that the three-part test mandates quotas or affirmative action, or otherwise violates Title IX or the Constitution, must be rejected.

<sup>273</sup> *Boula hanis*, 198 F.3d at 639.

<sup>274</sup> *Id.*; see also *Neal*, 198 F.3d at 770 (finding no violation of Title IX or Equal Protection Clause as a result of university’s decision to cap men’s athletic opportunities). As the courts have recognized, “a holding that universities cannot achieve substantial proportionality by cutting men’s programs is tantamount to a requirement that universities achieve substantial proportionality through additional spending to add women’s sports programs. This result would ignore the financial and budgetary constraints that universities face.” *Boula hanis*, 198 F.3d at 638.

# V. REMEDIES IN TITLE IX ATHLETICS CASES

BREAKING DOWN BARRIERS





Plaintiffs in Title IX cases have sought – and courts have exercised broad leeway in fashioning – an array of remedies in both individual and class actions challenging violations of the Title IX athletics requirements.<sup>275</sup> The Supreme Court supported this approach in *Franklin v. Gwinnett County Public Schools*, where the Court concluded that a “damage remedy is available for an action brought to enforce Title IX” based on the well-established principle that, in the absence of a specific limitation, federal courts may award “all appropriate remedies” to correct violations of federal law.<sup>276</sup> The Supreme Court reasoned that Congress intended to provide a broad mechanism for addressing inequality, relying on two amendments to Title IX that made remedies both at law and at equity available for violations.<sup>277</sup>

While the Court’s reasoning in *Franklin* supports a wide range of remedies, there is some question with respect to the availability of punitive damages.<sup>278</sup> This chapter reviews injunctive remedies, such as the reinstatement or instatement of a team, and then addresses the availability of compensatory damages, punitive damages, and attorneys’ fees. Finally, the chapter analyzes several unique remedies obtained through settlement agreements.

<sup>275</sup> *Cohen II*, 991 F.2d at 888,906 (1st Cir. 1993), *aff’d on remand*, 879 F. Supp. 185 (D.R.I. 1995) (*Cohen III*), *aff’d in part, rev’d in part*, 101 F.3d 155 (1st Cir. 1996) (*Cohen IV*). In *Cohen IV*, the First Circuit explained that it is “established beyond peradventure that, where no contrary legislative directive appears, the federal judiciary possesses the power to grant any appropriate relief on a cause of action appropriately brought pursuant to a federal statute.” 101 F.3d at 185 (quoting *Cohen II*, 991 F.2d at 901). The First Circuit also observed, however, that “we are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations.” *Cohen IV*, 101 F.3d at 185 (quoting *Cohen II*, 991 F.2d at 906 (citing *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 795 (1st Cir. 1992); *Lamphere v. Brown Univ.*, 875 F.2d 916, 922 (1st Cir. 1989))).

<sup>276</sup> *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66, 76 (1992) (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)). In *Franklin*, a former high school student sought damages from her high school for failing to stop a teacher from harassing her. *Id.* at 63-65. In recognizing its authority to fashion an appropriate remedy, the Court made no distinction between compensatory and punitive damages. *Id.* at 65-76.

<sup>277</sup> *Franklin*, 503 U.S. at 72 (quoting 42 U.S.C. § 2000d-7(a)(2)).

<sup>278</sup> See *Barnes v. Gorman*, 536 U.S. 181 (2002) (punitive damages not available under the Americans with Disabilities Act or the Rehabilitation Act); *Mercer v. Duke Univ.*, 50 Fed. Appx. 643 (4th Cir. 2002) (punitive damages not available under Title IX).

## A. INJUNCTIVE RELIEF

### 1. AVAILABILITY OF SPORT-SPECIFIC RELIEF FOR PARTICIPATION CLAIMS

When courts have found a Title IX participation violation, they have both reinstated<sup>279</sup> and instated<sup>280</sup> teams. Such injunctive relief is appropriate even if monetary damages are also awarded. In *Roberts II*, for example, the state argued that the plaintiffs were not entitled to any injunctive remedy because they had settled their damages claim. The state’s argument was based on the maxim that remedies at equity are available only where remedies at law are inadequate. The Tenth Circuit rejected this argument, holding that “we draw no such conclusion. Plaintiffs’ damages action is not before us, and we do not presume to know for what they are being compensated. However, insofar as defendant’s continuing violation of Title IX operates to deprive plaintiffs of the opportunity to play softball, we believe monetary relief alone is inadequate. The district court correctly ordered an equitable remedy.”<sup>281</sup>

Plaintiffs seeking sport-specific relief should carefully consider whether to pursue individual or class-wide claims. Courts may be unwilling to award injunctive relief to an individual if (1) a plaintiff’s athletic eligibility expires during the course of the litigation,<sup>282</sup> or (2) a plaintiff is unlikely to suffer future injury from the type of discrimination alleged in the complaint.<sup>283</sup>

In the class action setting, however, defendants have consistently argued that because Title IX does not guarantee the right to participate on a specific team, courts should not order sport-specific relief, such as the instatement or reinstatement of a particular team.

<sup>279</sup> *Roberts I*, 814 F. Supp. at 1519 (softball); *Favia*, 812 F. Supp. at 585 (gymnastics and field hockey), *mot. to modify order denied*, 7 F.3d 332 (3d Cir. 1993); *Cohen I*, 809 F. Supp. at 1001 (gymnastics and volleyball); *Barrett*, 2003 U.S. Dist. LEXIS 21095 (granting preliminary injunction to reinstate the women’s gymnastics team; settlement agreement resulted in a permanent reinstatement).

<sup>280</sup> *Cook v. Colgate Univ.*, 802 F. Supp. 737, 751 (N.D.N.Y. 1992) (creation of women’s varsity ice-hockey team), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993). In 1996, a federal district court certified a new class of women ice hockey players, and in 1997 the parties entered into a settlement agreement that ensured that women’s varsity ice hockey would receive support commensurate with the university’s other non-emphasized varsity teams. See *Bryant v. Colgate Univ.*, 1996 U.S. Dist. LEXIS 8393 (granting motion for class certification); *Bryant v. Colgate Univ.*, No. 93-CV-1029, 1997 U.S. Dist. LEXIS 21518 (N.D.N.Y. Jan. 16, 1997) (entering settlement agreement).

<sup>281</sup> *Roberts II*, 998 F.2d at 833.

<sup>282</sup> *Beasley v. Ala. State Univ.*, 3 F. Supp. 2d 1325, 1343-44 (M.D. Ala. 1998) (claim for injunctive relief moot where plaintiff’s NCAA eligibility had expired).

<sup>283</sup> *Simpson v. Univ. of Colo.*, 372 F. Supp. 2d 1229, 1245 (D. Colo. 2005) (concluding that plaintiffs do not have standing to seek injunctive relief because they have not demonstrated they are likely to suffer future injury from the type of sex discrimination alleged in the complaint).



Rather, these defendants have argued, once a violation is found, that they should be able to develop their own plan to bring the institution into compliance. Because different objections to injunctive relief have been met with different levels of success in individual versus class actions, the discussion of such relief is bifurcated in this section.

### **a. Individual and Single Team Actions**

While courts have acknowledged that “Title IX does not require institutions to fund any particular number or type of athletic opportunities,”<sup>284</sup> they have also recognized that individual plaintiffs are entitled to have their injuries redressed. As the Tenth Circuit explained in rejecting Colorado State’s argument that the district court should not have reinstated the women’s softball team but should have let the university determine the appropriate reordering of its athletic program:

The district court’s order of relief directly responds to the harms plaintiffs have sustained, and the relief they have requested, as individuals. Plaintiffs are former members of a terminated varsity program, seeking reinstatement of their team because of defendant’s failure to comply with Title IX. The Supreme Court has recognized that in reaching Title IX’s goal of protecting private citizens against discriminatory practices, there are situations in which “it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself . . . the burden of demonstrating that an institution’s practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate.” *Cannon*, 441 U.S. at 705. This is such a situation. “The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible, but is also fully consistent with – and in some cases even necessary to – the orderly enforcement of [Title IX].” *Id.* at 705-06. The district court correctly provided plaintiffs with individual relief. Had the district court allowed defendant to devise its own plan for Title IX compliance, it would, in effect have been forcing plaintiffs to become unwilling representatives in a class action suit they chose not to bring.<sup>285</sup>

Accordingly, the Tenth Circuit approved the order reinstating the softball team.<sup>286</sup>

<sup>284</sup> *Cohen II*, 991 F.2d at 906.

<sup>285</sup> *Roberts II*, 998 F.2d at 833-34.

<sup>286</sup> The Tenth Circuit also recognized that the relief granted to individual students is not of indefinite duration. Relying on *United States v. Swift & Co.*, 286 U.S. 106 (1932) (holding that under certain changed circumstances a court order is subject to modification), it noted that Colorado State could seek modification of the lower court’s order if it were to alter its athletic program in such a way as to achieve substantial proportionality or if all of the plaintiffs had transferred or graduated. *Roberts II*, 998 F.2d at 834; see also *Cook v. Colgate Univ.*, 992 F.2d 17, 20 (2d Cir. 1993) (vacating as moot order instating a women’s varsity ice hockey team because all of the plaintiffs would graduate before the order took effect); *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993) (considering request to modify order based on changed circumstances doctrine).

Plaintiffs should recognize, however, that individual actions may have limited effectiveness because the length of a plaintiff's eligibility to participate in the relevant athletic program may limit the availability of injunctive relief. Courts have held that injunctive relief is unavailable if the plaintiff's eligibility expires during the course of litigation.<sup>287</sup> "Article III of the United States Constitution requires that a plaintiff's claim be live not just when [plaintiff] first brings suit, but throughout the litigation."<sup>288</sup>

A plaintiff's finite period to pursue injunctive relief has been used to expedite litigation in some circumstances. At least one court cited the limited time in which a plaintiff would be eligible to participate in team sports as a rationale for granting preliminary injunctions reinstating athletic teams in advance of a full trial on the merits.<sup>289</sup> Other courts have suggested that "a student's claim may not be rendered moot by graduation if he or she sued in a 'representational capacity' as the leader of a student organization."<sup>290</sup>

## b. Class Actions

Courts have been more reluctant to grant sport-specific relief in class actions addressing the program-wide denial of equal opportunity to participate in varsity athletics.<sup>291</sup> In *Cohen II*, for example, the First Circuit favorably noted the district court's conclusion that "if it ultimately finds Brown's athletic program to violate Title IX, it will initially require the University to propose a compliance plan rather than mandate the creation or deletion of particular athletic teams."<sup>292</sup> While the First Circuit upheld the preliminary injunction reinstating

<sup>287</sup> See *Cook v. Colgate Univ.*, 992 F.2d 17 (2d Cir. 1993) (vacating order requiring equal athletic opportunities for female players because all of the plaintiffs would have graduated before the next hockey season, rendering their action moot); *Beasley v. Ala. State Univ.*, 3 F. Supp. 2d 1325, 1343-44 (M.D. Ala. 1998) (holding that plaintiff's claim for injunctive relief was moot because (1) she failed to certify a class and (2) she could no longer benefit from an order requiring the university to comply with the mandates of Title IX because her NCAA eligibility had expired).

<sup>288</sup> *Beasley*, 3 F.Supp. 2d at 1344 (internal quotation omitted).

<sup>289</sup> In *Barrett v. West Chester Univ.*, the court issued a preliminary injunction reinstating the women's gymnastics team because "[p]reventing the 2004 season from moving forward will deny players one of only four competitive seasons at the college level. Several of the players are in their final year of school and would be denied their last opportunity to compete. Only the reinstatement of the gymnastics program could avoid this harm." 2003 U.S. Dist. LEXIS 21095, at \*47.

<sup>290</sup> *Cook*, 992 F.2d at 20 (citing *Brandon v. Bd. of Educ. of Guilderland Cent. Sch. Dist.*, 635 F.2d 971, 973 n.1 (2d Cir. 1980) (representatives of "Students for Voluntary Prayer")).

<sup>291</sup> Class actions on behalf of athletes in a specific sport or sports, e.g., a class of swimmers or gymnasts seeking the reinstatement or instatement of their particular team and not program-wide relief, should be analyzed in the same manner as individual actions on this point.

<sup>292</sup> *Cohen II*, 991 F.2d. at 906.

two women's varsity teams, it made clear that Brown's compliance plan need not necessarily involve the two teams that were the subject of the preliminary injunction and could involve decreasing opportunities for male students.<sup>293</sup> In such circumstances, a sport-specific order would come into play only if the voluntary plan was determined to be inadequate to achieve compliance with the statute. As the court explained, "specific relief [would be] most useful in situations where the institution, after a judicial determination of non-compliance, demonstrates an unwillingness or inability to exercise its discretion in a way that brings it into compliance with Title IX."<sup>294</sup>

The subsequent history of the Cohen litigation illustrates the process envisioned by the First Circuit. In *Cohen III*, the district court held that Brown had in fact violated Title IX and ordered the university to submit a comprehensive compliance plan.<sup>295</sup> Brown submitted such a plan, but the district court found a number of flaws and chose to fashion a specific remedy to avoid the elimination of men's teams.<sup>296</sup> The district court ordered Brown to upgrade the women's gymnastics, fencing, skiing, and water polo teams to university-funded varsity status.<sup>297</sup> Brown appealed, and the First Circuit disagreed with the district court's decision to substitute its own specific relief; instead, it afforded Brown the opportunity to submit a revised compliance plan.<sup>298</sup> The plaintiffs objected to the revised compliance plan and, as discussed below, the case was ultimately settled in 1998 – although attorneys' fees were litigated for another five years, resulting in litigation spanning more than eleven years.

The approach advocated by the First Circuit in *Cohen* is by no means uniformly applied in other jurisdictions. Other courts have been more sensitive to the immediacy of plaintiffs' rights to equal participation opportunities in athletics. In *Favia*, for example, in analyzing the injunctive relief requested by a class of female students at Indiana University of Pennsylvania (IUP), the court ordered reinstatement of the women's gymnastics and field hockey teams, noting that:

By cutting the women's gymnastics and field hockey teams, IUP has denied plaintiffs the benefits to women athletes who compete interscholastically: they develop skill, self-confidence, learn team cohesion and a sense of accomplishment, increase their physical and mental well-being, and develop a lifelong healthy attitude. The opportunity to compete in undergraduate interscholastic athletics vanishes quickly, but the benefits

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 907.

<sup>295</sup> *Cohen III*, 879 F. Supp. at 214.

<sup>296</sup> *Cohen IV*, 101 F.3d at 187 (describing district court's order).

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 188.

do not. We believe that the harm emanating from lost opportunities for the plaintiffs are likely to be irreparable.<sup>299</sup>

As with individual actions, a question as to standing has arisen when Title IX litigation is so protracted that a named plaintiff graduates (or otherwise loses her athletic eligibility) and would no longer benefit from the injunctive relief she seeks. As one court has stated, “[T]he mere protractedness of [a] lawsuit should not vitiate a named plaintiff’s capacity to vindicate the broad remedial purpose of Title IX. Defendant institutions should not be encouraged to engage in foot-dragging to stave off injunctive remedies.”<sup>300</sup> In such circumstances, the relation back doctrine, which preserves the merits of a claim for judicial resolution, is properly invoked.<sup>301</sup> This is especially true when “a decision rendered by the court would affirmatively impact other would-be plaintiffs, and would not be futile.”<sup>302</sup>

## 2. RELIEF TO ENSURE EQUAL TREATMENT OF TEAMS

In recent cases, issues have arisen beyond the instatement or reinstatement of a team and have involved the disparate treatment women’s teams often experience. Generally, courts have broad authority to take the necessary steps to assure equality in the treatment of men’s and women’s teams. In *Roberts I*, for example, the district court addressed Colorado State University’s (CSU) failure to comply in a timely fashion with the permanent injunction reinstating the women’s softball team by ordering CSU to hire a coach, obtain a field, provide equipment and uniforms, undertake recruiting, and prepare for a fall exhibition season. The Tenth Circuit upheld almost every requirement set forth in the district court’s order.<sup>303</sup> In rejecting defendant’s argument that the court was impermissibly “micromanaging” the CSU athletics program, the Tenth Circuit explained that “[u]nder the broad sweep of Title IX, the district court has the power to ensure that the reinstated softball program receives all the incidental benefits of varsity status.”<sup>304</sup>

<sup>299</sup> *Favia*, 812 F. Supp. at 583 (class action brought on behalf of female athletes and all present and future IUP women students or potential students who participated, sought to participate, or were deterred from participating in intercollegiate athletics sponsored by IUP).

<sup>300</sup> *Beasley v. Ala. State Univ.*, 966 F. Supp. 1117, 1127 (M.D. Ala. 1997).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* As discussed above, the plaintiff in *Beasley* was subsequently held to lack standing to pursue injunctive relief because she did not preserve her class claims, and her individual eligibility to participate in collegiate athletics had expired. See *Beasley*, 3 F. Supp. 2d at 1343-44.

<sup>303</sup> The appellate court reversed only the requirement that the team play a fall exhibition season, finding that this was not a necessary element of varsity status. *Roberts II*, 998 F.2d at 834-35.

<sup>304</sup> *Id.* at 834 (citation omitted).

Issues have also recently arisen concerning the seasons in which boys' and girls' teams play. For example, the Second Circuit recently affirmed a district court's holding that the decision of two school districts in New York to schedule girls' soccer in the spring and boys' soccer in the fall, thereby denying the girls' teams the opportunity to compete in regional and state championships, violated Title IX.<sup>305</sup> The Second Circuit, however, modified the district court's injunction so as not to require a compliance plan to permanently move girls' soccer to the fall. Rather, the Second Circuit held that the school districts could comply with Title IX by alternating the fall soccer season between the girls and the boys – as long as the girls were scheduled in the upcoming fall. According to the Second Circuit, the "relevant inquiry is whether girls and boys are given equal opportunities for post-season competition – not whether the sports are scheduled in the same season."<sup>306</sup>

Similarly, in *Communities for Equity v. Michigan High School Athletics Association*, plaintiffs challenged the Michigan High School Athletic Association's (MHSAA) policy of scheduling girls' sports in disadvantageous, non-traditional seasons.<sup>307</sup> After finding that this scheduling violated the Equal Protection Clause of the Fourteenth Amendment, Title IX, and Michigan's Elliot-Larsen Civil Rights Act, the district court required the submission of a proposed compliance plan.<sup>308</sup> When the MHSAA proceeded to file an inadequate proposal, the district court issued an order offering the MHSAA three scheduling options. The MHSAA amended its proposed plan to reflect one of the options offered by the district court, reversing the seasons of various women's and men's teams.<sup>309</sup> This order was subsequently affirmed by the Sixth Circuit.<sup>310</sup>

### 3. ADDITIONAL EQUITABLE RELIEF

Athletics claims may implicate some forms of monetary relief that are not damages relief, such as the award of scholarships that have been denied as a result of discrimination or reimbursement for amounts that plaintiffs have expended to pay coaches when their institution has denied them equitable access to coaching services for their teams. Like back pay awards under Title VII, these are forms of equitable relief and should be analyzed

<sup>305</sup> *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 301-02 (2d Cir. 2004).

<sup>306</sup> *Id.*

<sup>307</sup> See *Cmtys. for Equity v. Mich. High Sch. Athletics Ass'n*, 459 F.3d 676 (6th Cir. 2006).

<sup>308</sup> *Id.* at 697-98 (summarizing district court opinion).

<sup>309</sup> *Id.*

<sup>310</sup> The district court's order was initially affirmed by the Sixth Circuit in *Cmtys. for Equity v. Mich. High Sch. Athletics Ass'n*, 377 F.3d 504 (6th Cir. 2004). The Supreme Court subsequently granted the Association's petition for certiorari, and vacated and remanded for consideration of the Court's opinion in *Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005). *Mich. High Sch. Athletics Ass'n v. Cmtys. For Equity*, 544 U.S. 1012 (2005). On remand, the Sixth Circuit held that Title IX did not preclude recovery under § 1983 and re-affirmed the district court's order. *Cmtys. For Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006). This opinion does not address the propriety of the district court's order rejecting MHSAA's initial compliance plan because MHSAA had failed to amend its notice of appeal to include the subsequent order. *Id.*

accordingly. Additionally, equitable relief may, as appropriate, include provisions for training, establishment of policies, or other forms of institutional action to prevent future discrimination.

## B. COMPENSATORY DAMAGES

As indicated above, the Supreme Court in *Franklin v. Gwinnett County Public Schools* held that a damages remedy is available in an action to enforce Title IX. There is no impediment to the coexistence of claims for both monetary and injunctive relief.<sup>311</sup>

The Supreme Court indicated in *Franklin* that plaintiffs must demonstrate intentional discrimination to recover monetary damages. Under federal civil rights laws, intentional discrimination has always been defined as synonymous with different or disparate treatment, regardless of the motivation behind the disparate treatment.<sup>312</sup> Moreover, in the athletics context, as the Court explained in *Haffer*, intent is “provided by [the] explicit classification of intercollegiate athletic teams on the basis of gender.”<sup>313</sup> Thus, plaintiffs who prove a Title IX disparate treatment violation should not need to meet any additional standard to recover damages.

Some courts, however, have employed questionable standards in assessing a plaintiff’s entitlement to monetary damages. For example, one court held that plaintiffs were not entitled to monetary damages because they were aware of ice hockey’s status as a club sport when they enrolled at the university and elected to spend their own money to compete at a club level.<sup>314</sup> The Sixth Circuit also held that proof of discriminatory intent is required to recover monetary damages under Title IX when a facially neutral policy is challenged under a disparate impact theory.<sup>315</sup> Finding that the plaintiffs had failed to establish any violation of Title IX, let alone an intentional one, the court declined to adopt any test for the proof of intent for purposes of damages.<sup>316</sup>

<sup>311</sup> See *Franklin*, where the Court observed that in the absence of a monetary damages remedy, the plaintiff, a victim of sexual harassment who was no longer a student at the defendant school, would receive no relief at all. 503 U.S. at 76.

<sup>312</sup> See, e.g., *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994) (citing *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582 (1983), for the proposition that intentional discrimination is treated as synonymous with discrimination resulting in disparate treatment, which contrasts with disparate impact).

<sup>313</sup> 678 F. Supp. at 527; see also *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 male and female athletes differently).

<sup>314</sup> *Cook*, 802 F. Supp. at 751 (“Being aware of the circumstances, [plaintiffs] voluntarily expended time, money and effort to the program. Despite the hardships, players reaped the benefits which outweighed any losses. The experiences were worth the money.”).

<sup>315</sup> *Horner v. Ky. High Sch. Athletic Ass’n*, 206 F.3d 685, 689-93 (6th Cir. 2000).

<sup>316</sup> *Id.* The court suggested in dicta that the standards for intent might include “deliberate indifference” or “discriminatory animus.” *Id.* at 693 n.4. “Deliberate indifference” was the standard adopted by the Supreme Court in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-292 (1998), and *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999), to evaluate a school’s liability for damages for sexual harassment of its students. The standard is entirely inapplicable to the question of injunctive relief in any type of Title IX claim. And to apply it to claims for damages outside the context of harassment misconceives the nature of athletics and other Title IX claims, which typically involve disparate treatment (and, indeed, facial discrimination). But even were it to be assumed that the standard applied to damages claims beyond sexual harassment cases, see *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. at 181, it would likely be satisfied as a matter of law in athletics cases, when officials make institutional decisions to operate sex-segregated athletics programs and to treat men’s and women’s teams differently.

## C. PUNITIVE DAMAGES

Recent case law concerning the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 may substantially affect Title IX plaintiffs seeking punitive damages. In 2002, the Supreme Court held in *Barnes v. Gorman* that punitive damages may not be awarded in private actions brought to enforce section 202 of the ADA or section 504 of the Rehabilitation Act.<sup>317</sup> Because the remedies for violations of these laws are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act,<sup>318</sup> the Court's analysis relied heavily on Title VI jurisprudence. Reasoning that the authority of Congress to enact Title VI stemmed from the Spending Clause of the United States Constitution, the Court applied the law of contracts in determining the scope of remedies.<sup>319</sup> "[P]unitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract."<sup>320</sup> Nor, according to the Court, could an institution's agreement to expose itself to liability for punitive damages be fairly inferred from its agreement to accept federal funds.<sup>321</sup>

Although *Barnes* has not been definitively held to apply to Title IX, the Fourth Circuit concluded in an unpublished opinion in 2002 that punitive damages are not available for private actions brought to enforce Title IX because Title IX is "also modeled after Title VI and is interpreted and applied in the same manner as Title VI"<sup>322</sup> and is thus subject to the *Barnes* analysis. Prior to *Barnes*, some federal courts interpreted *Franklin* as allowing for both compensatory and punitive damages,<sup>323</sup> on the other hand, at least one court noted that the status of the law in this respect was unclear.<sup>324</sup> Thus, while it can be argued that *Barnes* is inconsistent with *Franklin*, in which the Supreme Court reaffirmed the well-established principle that all remedies are available to correct violations of federal law unless Congress expressly indicates otherwise,<sup>325</sup> plaintiffs should be aware that there is a question as to whether punitive damages may be obtained in a private action to enforce Title IX.<sup>326</sup>

<sup>317</sup> *Barnes v. Gorman*, 536 U.S. 181 (2002).

<sup>318</sup> *Id.* at 187.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 188.

<sup>322</sup> *Mercer v. Duke Univ.*, 50 Fed. App. at 643-44 (4th Cir. 2002) (citing *Barnes*, 122 U.S. at 184-86, and *Gebser*, 524 U.S. at 286).

<sup>323</sup> For example, in 1999, the Ninth Circuit reinstated a \$150,000 punitive damages judgment in a Title IX lawsuit. *Ernst v. W. States Chiropractic Coll.*, No. 97-36115, 97-36210, 1999 U.S. App. LEXIS 28500, at \*2 (9th Cir. Nov. 1, 1999) (reinstating award of punitive damages); see also *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1194 (1st Cir. 1994) (interpreting the *Franklin* presumption of a full remedy to allow for punitive damages for violation of the implied right of action under a parallel act to Title IX).

<sup>324</sup> *Canty v. Old Rochester Reg'l Sch. Dist.*, 54 F. Supp. 2d 66, 69 (D. Mass. 1999) (unclear whether the *Franklin* Court meant to include punitive damages against municipal entities as part of "all available remedies").

<sup>325</sup> *Franklin*, 503 U.S. at 70-71; Charles L. Rombeau, *Constitutional Development: Barnes v. Gorman and Mercer v. Duke University: The Availability of Punitive Damages in Title IX Litigation*, 6 U. PA. J. CONST. L. 1192, 1204 (2004).

<sup>326</sup> The murky status of the law in this regard could unfortunately serve as an incentive for schools to risk violations of Title IX, choosing to pay compensatory damages if challenged. *Id.* at 1192.

## D. ATTORNEYS' FEES

Although attorneys' fees are available to a prevailing party in Title IX litigation,<sup>327</sup> obtaining such fees has become more challenging in the wake of the Supreme Court's decision in *Buckhannon Board of Care Home, Inc. v. West Virginia Department of Health and Human Resources*.<sup>328</sup> In *Buckhannon*, the Supreme Court rejected the "catalyst theory," which nine of the federal circuits had relied on in deciding whether to award attorneys' fees pursuant to federal civil rights statutes. Under the "catalyst theory," a plaintiff qualified as a "prevailing party" if he or she could demonstrate a causal connection between bringing the suit and a corresponding change in the defendant's conduct, even if that change was the product of an informal settlement. *Buckhannon* held that a "prevailing plaintiff" must achieve some form of judicial imprimatur of success, such as an enforceable judgment on the merits or a court-ordered consent decree, in order to obtain attorneys' fees. As a consequence, attorneys' fees will not be awarded in the event of a private settlement, unless such fees are negotiated as part of the settlement or the settlement is subject to oversight by the court.<sup>329</sup>

In the most recent of the court opinions in *Cohen v. Brown University*, the district court held there was "no doubt plaintiffs are a prevailing party" because they succeeded in obtaining a preliminary injunction that required Brown to reinstate two varsity teams and barred Brown from making further reductions in women's varsity sports, defended that preliminary injunction on appeal, proved Brown's violation of Title IX at trial, and successfully opposed Brown's petition for certiorari to the Supreme Court.<sup>330</sup> Plaintiffs were ultimately awarded \$228,286 in attorneys' fees.

### Gender Equity

"Gender equity is an atmosphere and a reality where fair distribution of overall athletic opportunity and resources are proportionate to women and men and where no student-athlete, coach or athletic administrator is discriminated against in any way in the athletic program, on the basis of gender. That is to say, an athletic program is gender equitable when the men's sports program would be pleased to accept for its own the overall participation, opportunities and resources currently allocated to the women's program and vice versa."

Source: Gender Equity Statement, NCAA Gender Equity Task Force, 1992

<sup>327</sup> "In any action or proceeding to enforce . . . [T]itle IX . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ." 42 U.S.C.A. § 1988 (b) (West 2003).

<sup>328</sup> 532 U.S. 598 (2001).

<sup>329</sup> *Buckhannon* could discourage the early settlement of disputes since it requires a court-ordered judgment or consent decree for an individual to be designated a prevailing party. Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L. J. 519, 521 (2003).

<sup>330</sup> *Cohen v. Brown Univ.*, R.I. C.A. No. 92-197, N.H. C.A. No. 99-485-B, 2001 U.S. Dist. LEXIS 22438, at \*18-19 (D. R.I. Aug. 10, 2001 (*Cohen V*)).



More recently, the Fourth Circuit confronted the issue of what constitutes reasonable attorneys' fees in *Mercer v. Duke University*.<sup>331</sup> In addition to the punitive damages discussed above, the district court awarded nominal damages and \$350,000 in attorneys' fees to Mercer, a former kicker for Duke's football team who sued the university for discriminating against her on the basis of her gender in violation of Title IX.<sup>332</sup> While the award of nominal damages sufficed to make Mercer a "prevailing party," the court struggled to determine what constituted reasonable attorneys' fees for the plaintiff, since the reasonableness inquiry requires the court to consider the extent of the plaintiff's success.<sup>333</sup> The Fourth Circuit noted that in *Farrar v. Hobby*, the Supreme Court had stated that for a prevailing party who recovered only nominal damages, "the only reasonable fee is *usually* no fee at all"<sup>334</sup> – a statement the Fourth Circuit read to mean that attorneys' fees *will* be appropriate in some circumstances for such plaintiffs. Applying the standard advocated by Justice Sandra Day O'Connor in *Farrar* for "determining whether attorneys' fees are warranted in a nominal-damages case," the Fourth Circuit considered "[1] the extent of relief, [2] the significance of the legal issue on which the plaintiff prevailed, and [3] the public purpose served by the litigation."<sup>335</sup> Noting the importance of the legal issue on which Mercer prevailed and the public purpose served by the litigation, the Fourth Circuit upheld the award of attorneys' fees.<sup>336</sup>

## E. SETTLEMENTS

Plaintiffs who elect to settle Title IX claims frequently obtain relief that reflects the remedies discussed above. Due to the cooperative nature of the settlement process, plaintiffs may also be able to obtain specific and/or far-reaching relief that might be more difficult to obtain in court. For example, the settlement process provides plaintiffs with an opportunity to focus agreements on popular sports and inadequate facilities, as opposed to litigating the compliance plans developed by educational institutions. Settlements may also enable individual plaintiffs to obtain the type of systemic relief more typically available in class actions. The following section summarizes some of the types of relief negotiated in settlements in Title IX athletics cases.

<sup>331</sup> 401 F.3d 199 (4th Cir. 2005) (punitive damages vacated).

<sup>332</sup> *Id.* at 201.

<sup>333</sup> *Id.* at 204.

<sup>334</sup> *Id.* (quoting *Farrar v. Hobby*, 506 U.S. 103, 115 (1992)) (emphasis in original).

<sup>335</sup> *Id.* (quoting *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring)) (internal quotations omitted).

<sup>336</sup> *Id.* at 208-09.

## 1. BROAD-BASED RELIEF

Some individuals and groups challenging specific instances of discrimination have been able to negotiate broad-based settlement agreements that require educational institutions to ensure program-wide compliance with Title IX. In *Jackson v. Birmingham Board of Education*, for example, the plaintiff – who had challenged retaliation against him for protesting discrimination against the girls’ basketball team he coached – was able to secure not only make-whole relief for himself, but also wide-ranging reforms to the athletics program that was the subject of his original complaint. Specifically, the Birmingham Board of Education agreed to take all steps necessary to ensure that the Birmingham school system is free from discrimination on the basis of sex in all of its schools and further agreed to (1) appoint a Title IX Coordinator at each school; (2) conduct annual compliance reviews; and (3) submit compliance reports to an independent monitor.<sup>337</sup>

Similarly, in the summer of 2006, the National Women’s Law Center (NWLC) entered into a comprehensive county-wide agreement with the Prince George’s County Public Schools (PGCPS) to settle claims arising initially from inequities in the county’s treatment of girls’ softball teams.<sup>338</sup> In the agreement, PGCPS agreed to ensure compliance with Title IX by each individual middle and high school in the county.<sup>339</sup> Among the provisions, the agreement requires PGCPS to provide equal opportunities and funding for girls’ athletics at both the high school and middle school levels; provide a number of improvements to the girls’ softball fields, including the installation of protective fencing, backstops, dugouts, storage sheds, and batting cages; and provide equal scheduling of games and practice times, equipment, supplies and uniforms, publicity, and locker rooms for boys’ and girls’ teams.<sup>340</sup> A significant component is PGCPS’s agreement to produce and report data that will show the progress it has made toward these goals. Data will include participation rates, funding received, plans for expenditures of funds, and outlines of the steps PGCPS has taken toward ensuring Title IX compliance.<sup>341</sup>

<sup>337</sup> *Jackson v. Birmingham Bd. of Educ.*, No. 01-BE-1866-S (N.D. Ala. Nov. 30, 2006) (Consent Decree).

<sup>338</sup> Prince George’s County Public Schools Title IX Agreement, *available at* <http://www.nwlc.org/pdf/PGCPSAgreement.pdf>.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 2-11.

<sup>341</sup> *Id.* at 13.

## 2. AGREEMENTS FOCUSED ON SPECIFIC SPORTS

In numerous cases, plaintiffs may be able to focus settlement agreements on the particular sports that plaintiffs would like to see added to the school's athletics program. In *James v. Virginia Polytechnic Institute and State University*,<sup>342</sup> for example, the university agreed to offer women's varsity lacrosse and varsity softball teams on a specific schedule. Plaintiffs may also be able to negotiate for the addition or improvement of specific athletics facilities. In *James*, for example, the university committed not only to improving women's participation opportunities, but to establishing a new facility for women's varsity softball.<sup>343</sup> In *Camacho v. City of La Puente*,<sup>344</sup> moreover, the city agreed to provide the girls' softball league with exclusive use of a softball field at the only city park for the duration of the 2004 recreational season, with future plans for the city to build a second softball field for the girls' softball league's exclusive use during the recreational season.

Agreements can also provide for relief that goes beyond what might be readily ordered by a court. As discussed above, for example, the settlements in the *Jackson and Prince George's County* cases provide for regular reporting designed to ensure that school systems make adequate progress toward Title IX compliance. In nine athletics lawsuits settled in the federal district courts in the State of Oklahoma between 1996 and 2000,<sup>345</sup> the

<sup>342</sup> No. 94-0031-R (W.D. Va. Apr. 12, 1995) (entry of settlement order); see also, e.g., *Haffer v. Temple Univ.*, No. 80-1362 (E.D. Pa. Sept. 6, 1988) (entry of consent order) (university committed to add women's crew and swimming teams); *Cohen v. Brown Univ.*, No. 1:92-CV-00197-PJB (D.R.I. Aug. 9, 1998) (approval of settlement agreement) (university committed to upgrading women's water polo from club to donor-funded varsity status and to guarantee funding for women's gymnastics, fencing, skiing, and water polo for a specified number of years).

<sup>343</sup> No. 94-0031-R (W.D. Va. Apr. 12, 1995) (entry of settlement order requiring Virginia Tech to: (1) achieve a female varsity athletic participation rate within three percentage points of female enrollment by the end of 1996-97 and continuing through 2000-01; (2) offer women's varsity lacrosse in 1994-95; (3) offer women's varsity softball not later than 1995-96; (4) ensure that no later than 1997-98 and continuing through 2000-01, female athletes received a share of total athletic scholarships that was within five percentage points of female enrollment; (5) provide facilities and other benefits and support to female athletes comparable to those provided to male athletes; and (6) establish a new facility for women's varsity softball to be completed in Spring 1966).

<sup>344</sup> No. CV 03-7507 (MMM) (MANx) (C.D. Cal. Feb. 27, 2004) (entry of Stipulation of Settlement and Proposed Order).

<sup>345</sup> *Keesee v. Holdenville Pub. Schs.*, No. 6:00-CV-00008-MB (E.D. Okla. Aug. 17, 2000) (order for settlement agreement); *McCartney v. Chouteau Pub. Schs.*, 99-CV-0660 BU(J) (N.D. Okla. June 27, 2000) (filing of settlement agreement); *Craig v. Apache Pub. Schs.*, No. CIV-99-581-C (W.D. Okla. June 2, 2000) (filing of settlement agreement); *Martin v. Sperry Pub. Schs.*, No. 98-CV-416-H(J) (N.D. Okla., Jan. 6, 2000) (filing of settlement agreement); *Black v. Norman Pub. Schs.*, No. 5:96-CV-01846-C (W.D. Okla. May 20, 1998) (order for settlement agreement); *Goff v. Noble Pub. Schs.*, No. 5:97-CV-00049-M (W.D. Okla. Jan., 5, 1998) (order for settlement agreement); *Gilbert v. Inola Pub. Schs.*, No. 4:97-CV-00020-seh (N.D. Okla. May 8, 1998) (notice of settlement agreement); *Bull v. Tulsa Pub. Schs.*, No. 4:96-CV-00180-seh (N.D. Okla. June 6, 1997) (filing of consent decree); *Randolph v. Owasso Pub. Schs.*, No. 4:96-CV-00195-TCK (N.D. Okla. Oct. 2, 1996) (filing of consent decree).

settlements obligated the school districts to establish a system of accounting for expenditures on male and female sports teams, including contributions from booster clubs.<sup>346</sup> And in *Camacho v. City of La Puente*, the city promised to promote a girls' softball clinic.<sup>347</sup>

Settlements can thus provide both traditional and creative relief. They can also contain provisions for educational institutions to cover plaintiffs' attorneys' fees and costs.<sup>348</sup>

### **When negotiating settlement agreements, consider including these provisions to ensure future compliance:**

- Appointment of a Title IX Coordinator at each school
- Written annual compliance reports by school
- Submission of compliance reports to an independent monitor
- Disclosure of compliance report data to public

## **F. CONCLUSION**

In sum, the availability of specific remedies in Title IX cases is still a developing area that may influence plaintiffs' decisions on whether, where and how to commence an action. Plaintiffs should consider challenging any purported limitations on remedies because such limitations are not supported by the text of the statute and are not consistent with the Supreme Court's holding in *Franklin*. In addition, limitations on relief undermine the effective protection of the law because they may discourage aggrieved parties from pursuing their rights under Title IX. Indeed, if plaintiffs' ability to obtain monetary damages, punitive damages, and attorneys' fees is curtailed, the ability to enforce Title IX is likely to be significantly undermined and limited.

<sup>346</sup> The settlements also required the school districts to: (1) construct or renovate softball fields and ensure that girls' softball teams received the same treatment as boys' baseball teams; (2) provide equipment, supplies and uniforms to female and male athletes on an equitable basis; (3) schedule games and practice times on an equitable basis; (4) expand participation opportunities for female students at elementary and middle school levels; (5) conduct student interest surveys to determine girls' interest in additional sports; (6) provide girls with equal access to weight training facilities and ensure that coaches receive proper education regarding the value of strength conditioning for girls; (7) provide girls' teams with locker room facilities comparable to those supplied to boys; (8) establish a comparable ratio of coaches to students for male and female teams; (9) commit to equitably promoting and publicizing girls' sports teams; and (10) provide Title IX education for coaches, teachers, and administrators.

<sup>347</sup> No. CV 03-7507 (MMM) (MANx) (C.D. Cal. Feb. 27, 2004) (entry of Stipulation of Settlement and Proposed Order).

<sup>348</sup> See *Haffer*, No. 80-1362 (E.D. Pa. Sept. 1988) (settlement included an attorneys' fee award to plaintiff of \$700,000); *Kiechel v. Auburn Univ.*, No. 93-V-474-E (M.D. Ala. July 19, 1993) (settlement included an award of \$80,000 in attorneys' fees); *Camacho v. City of La Puente*, No. CV 03-7507 (MMM) (MANx) (C.D. Cal. Feb. 27, 2004) (settlement included an award of \$11,000 in attorneys' fees).

# 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.”<sup>349</sup> 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.”<sup>350</sup>

## 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.<sup>351</sup> 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.<sup>352</sup>

### 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.”<sup>353</sup> 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.”<sup>354</sup>

<sup>349</sup> *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*.

<sup>350</sup> *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.

<sup>351</sup> 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.

<sup>352</sup> 34 C.F.R. § 100.7(b) (2006).

<sup>353</sup> *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).

<sup>354</sup> *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.<sup>355</sup> 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.<sup>356</sup> Regardless of what statute is found analogous, the state limitations period borrowed must “be[] consistent with the policies underlying the federal rights of action.”<sup>357</sup> 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.<sup>358</sup> 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.’”<sup>359</sup> 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.”<sup>360</sup>

<sup>355</sup> *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).

<sup>356</sup> *Minor*, 605 F. Supp. at 1200.

<sup>357</sup> *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”).

<sup>358</sup> 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”).

<sup>359</sup> *Doe*, 830 F. Supp. at 1568 (quoting *Alexopoulos v. S.F. Unified Sch. Dist.*, 817 F.2d 551, 555 (9th Cir. 1987)).

<sup>360</sup> *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.<sup>361</sup> 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.<sup>362</sup>

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."<sup>363</sup>

## 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<sup>364</sup> 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.

<sup>361</sup> 3 F. Supp. 2d 1325, 1343 (M.D. Ala. 1998).

<sup>362</sup> *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).

<sup>363</sup> *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).

<sup>364</sup> 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.<sup>365</sup> 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.<sup>366</sup> 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.<sup>367</sup> 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.<sup>368</sup> 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.<sup>369</sup>

## 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.<sup>370</sup> 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

<sup>365</sup> See, e.g., *Bryant*, 1996 U.S. Dist. LEXIS 8393, at \*18-19.

<sup>366</sup> *Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000).

<sup>367</sup> *Id.* at 871.

<sup>368</sup> *Id.*

<sup>369</sup> *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.

<sup>370</sup> *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.<sup>371</sup> 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.<sup>372</sup> 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,<sup>373</sup> 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.

<sup>371</sup> *Bryant*, 1996 U.S. Dist. LEXIS 8398, at\*1; *Boucher*, 1996 U.S. Dist. LEXIS 8398, at \*1-3.

<sup>372</sup> 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.

<sup>373</sup> 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,<sup>374</sup> and in effect since its initial promulgation in 1979,<sup>375</sup> it is an official agency interpretation of the regulations entitled to, as the First Circuit stated, "substantial deference."<sup>376</sup> Every federal appellate court to consider the Policy Interpretation has agreed.<sup>377</sup>

## 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.<sup>378</sup> Further, the 1996 Clarification was subject to the same notice and comment process as the Policy Interpretation.<sup>379</sup> 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.<sup>380</sup> Moreover, the 2005 Clarification represents an abrupt change in longstanding

<sup>374</sup> 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).

<sup>375</sup> 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.

<sup>376</sup> *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).

<sup>377</sup> 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).

<sup>378</sup> *Chalenor*, 291 F.3d at 1046-47; see also *Neal*, 198 F.3d at 771.

<sup>379</sup> See *supra* notes 27-32 and accompanying text; see also *supra* note 34 and accompanying text.

<sup>380</sup> 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.<sup>381</sup> 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.<sup>382</sup> Thus, the validity of the 2005 Clarification, while not yet tested in court, is subject to vigorous challenge.<sup>383</sup>

### 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.<sup>384</sup> 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,<sup>385</sup> insofar as there are inconsistencies between the Manual and the Policy Interpretation, the Policy Interpretation should take precedence.<sup>386</sup> 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,<sup>387</sup> which may not substitute for the independent judicial inquiry guaranteed by *Cannon*. As the Court found in *Cannon*, the administrative complaint

<sup>381</sup> 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").

<sup>382</sup> See *supra* note 38.

<sup>383</sup> 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).

<sup>384</sup> 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).

<sup>385</sup> See, e.g., *Roberts II*, 814 F. Supp. at 1512-13; *Cohen I*, 809 F. Supp. at 978, 984.

<sup>386</sup> 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).

<sup>387</sup> 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.<sup>388</sup> As a result, LOFs are treated as of little persuasive value.<sup>389</sup>

## 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.<sup>390</sup>

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."<sup>391</sup> 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."<sup>392</sup>

<sup>388</sup> *Cannon*, 441 U.S. at 706 n.41.

<sup>389</sup> 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.

<sup>390</sup> 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).

<sup>391</sup> 178 F. Supp. 2d. 805, 856 (W.D. Mich. 2001).

<sup>392</sup> 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.<sup>393</sup> In particular, there is no requirement to show discriminatory animus, malice or any other evidence of motive, whether benevolent or invidious.<sup>394</sup> 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.<sup>395</sup> 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."<sup>396</sup> 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."<sup>397</sup> 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.<sup>398</sup> 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."<sup>399</sup>

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

<sup>393</sup> 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).

<sup>394</sup> 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).

<sup>395</sup> *Pederson*, 213 F.3d at 880-81.

<sup>396</sup> *Id.*

<sup>397</sup> *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. Balistreri*, 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).

<sup>398</sup> *Pederson*, 213 F.3d at 880.

<sup>399</sup> *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").

<sup>400</sup> 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.<sup>401</sup> 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.<sup>402</sup> The deliberate indifference standard is simply inapplicable to this inquiry.<sup>403</sup>

## 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.<sup>404</sup> 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.<sup>405</sup> 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.<sup>406</sup>

<sup>401</sup> *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).

<sup>402</sup> *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).

<sup>403</sup> 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.

<sup>404</sup> 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.

<sup>405</sup> 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.

<sup>406</sup> 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.<sup>407</sup> 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.”<sup>408</sup> 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.”<sup>409</sup> 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.<sup>410</sup>

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.<sup>411</sup> The burden then shifts back to the plaintiff to show that the institution’s asserted reason is a pretext for retaliation.<sup>412</sup>

<sup>407</sup> 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.

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

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

<sup>410</sup> 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).

<sup>411</sup> *Meeks*, 15 F.3d at 1021 (calling this burden on the employer “exceedingly light”).

<sup>412</sup> *Id.*



# VII. LEGISLATIVE DEVELOPMENTS: THE EQUITY IN ATHLETICS DISCLOSURE ACT

BREAKING DOWN BARRIERS





# Equity in Athletics Disclosure Act

*The EADA and its implementing regulations require every coeducational institution of higher education that receives federal funding through Title IV of the Higher Education Act and operates an intercollegiate athletics program to prepare an annual report disclosing information on the resources and opportunities allocated to male and female students and athletes. The report must disclose:*

- Numbers of male/female participants
- Total operating expenses for men's and women's sports
- Numbers of male/female head coaches
- Numbers of male/female assistant coaches
- Amount of athletic scholarship dollars allocated to males/females
- Salaries for coaches
- Amount of recruiting dollars allocated to males/females

In 1994, Congress enacted the Equity in Athletics Disclosure Act (EADA).<sup>413</sup> The EADA was premised on congressional findings that female athletes continue to face blatant discrimination in intercollegiate athletics.<sup>414</sup> In enacting the EADA, Congress recognized that participation in athletics plays an important part in the education of American youth and concluded that knowledge about how an institution allocates opportunities and resources would help students, as well as the general public, to make informed judgments about that institution's commitment to gender equity in athletics.<sup>415</sup>

The EADA and its implementing regulations apply to every coeducational institution of higher education that receives federal funding through Title IV of the Higher Education Act (HEA) and operates an intercollegiate athletics program.<sup>416</sup> Such institutions must prepare an annual report<sup>417</sup> disclosing information on the resources and opportunities allocated to male

<sup>413</sup> Pub. L. 103-382, § 360B, 108 Stat. 3518, 3967-71 (1994), codified at 20 U.S.C. § 1092(g) (2007). The EADA was enacted on October 20, 1994, as part of the Improving America's Schools Act of 1994, which amended the Higher Education Act of 1965.

<sup>414</sup> See *id.* at § 360B(b).

<sup>415</sup> *Id.*

<sup>416</sup> 34 C.F.R. § 668.47(a) (2006).

<sup>417</sup> The first reports required under the EADA were due no later than October 1, 1996; in subsequent years, disclosure reports are due no later than October 15. See 34 C.F.R. § 668.41(g)(1)(i).

and female students and athletes. The annual disclosure report must include the following information: the enrollment and participation data for male and female students; the total operating expenses<sup>418</sup> attributable to each men's and women's team; information on the gender and full- or part-time status of all coaches for each team and the number of assistant coaches provided to each team; the total amount and ratio of athletic scholarship dollars awarded to male and female athletes overall; the aggregate amount of recruiting expenditures for all men's teams and all women's teams; the total revenue<sup>419</sup> generated by all men's teams and all women's teams; and the average salaries of head coaches and assistant coaches for men's teams and women's teams.<sup>420</sup> By October 15 of each year, the institutions must make this information available to the public and to the Department of Education, which then disseminates the information on its website, [www.ope.ed.gov/athletics](http://www.ope.ed.gov/athletics).<sup>421</sup>

These reports must be made available, on request, to students, potential students, and the public at large. The regulations do not specify where the reports are to be made available, but simply require that they be "easily accessible to students, prospective students, and the public,"<sup>422</sup> and that they be provided "promptly"<sup>423</sup> when requested. All students must be informed of their right to request such information, but the regulations do not specify how this must be done.<sup>424</sup> Although the regulations require the reports to be provided without charge to students and prospective students, other members of the public may be charged a fee to cover copying expenses only.<sup>425</sup>

<sup>418</sup> Operating expenses are defined narrowly under the EADA to mean "expenditures on lodging and meals, transportation, officials, uniforms and equipment." 20 U.S.C. § 1092(g)(5); 34 C.F.R. § 668.47(b)(ii). Improvements to facilities, administrative overhead, guarantees paid to opposing teams and various other expenditures are not included.

<sup>419</sup> Total revenue is broadly defined in the regulations to include "appearance guarantees and options, an athletic conference, tournament or bowl games, concessions, contributions from alumni and others, institutional support, program advertising and sales, radio and television, royalties, signage and other sponsorships, sports camps, State or other governmental support, student activity fees, ticket and luxury box sales, and any other revenues attributable to intercollegiate athletic activities." 34 C.F.R. § 668.47(b)(5). However, because the EADA requires reporting of total revenue, rather than net revenue, it is not possible to determine from the disclosure reports whether a program is actually profitable. Moreover, because the expenditures required to be disclosed under the EADA do not reflect the actual costs of operating athletics programs, such as facilities maintenance and improvements, crowd control, concession costs, appearance fees, capital expenditures and overhead costs, the disclosure reports tend to make many programs look more economically viable than they actually are.

<sup>420</sup> See 20 U.S.C. § 1092(g)(1); 34 C.F.R. § 668.47(c).

<sup>421</sup> Higher Education Amendments of 1998, Pub. L. 105-244, § 486, 112 Stat. 1581, 1745-46 (1998), codified at 20 U.S.C. § 1092(g)(4)(1); 34 C.F.R. § 668.41(g)(1)-(2).

<sup>422</sup> 34 C.F.R. § 668.41(g)(1)(i). Under the Secretary's interpretation, this obligation would be satisfied by making copies of the report available in athletic offices, admissions offices, libraries, or via electronic mail. Student Assistance General Provisions, 60 Fed. Reg. 61,424, 61,426 (Nov. 29, 1995) (to be codified at 34 C.F.R. pt. 668).

<sup>423</sup> 34 C.F.R. § 668.41(g)(1)(i).

<sup>424</sup> According to the Secretary, publication of a notice once a year in a widely distributed institutional publication, such as a college catalog, registration materials, athletic publications or a separate notice to all students, would meet this requirement. Student Assistance General Provisions, 60 Fed. Reg. at 61,426.

<sup>425</sup> *Id.*

Enforcement authority for the EADA rests with the Department of Education, which has authority to enforce the EADA in the same manner that it enforces other provisions of the HEA.<sup>426</sup> Violations of the EADA are punishable by a variety of sanctions, including possible fines, limitations, suspension, or termination of participation in Title IV HEA programs.<sup>427</sup> All enforcement actions for EADA violations must be initiated by the Department of Education, in accordance with the requirements governing enforcement of the HEA generally. The EADA is not enforceable in court by individuals seeking the information. Violations of the EADA should be reported to the Department of Education.

Although the EADA does not cover elementary and secondary school athletics programs, Congress has begun to explore the possibility of requiring disclosure at this level. In 2003 and 2007, bills were introduced in the Senate to require the collection of similar information on athletics programs from coeducational secondary schools.<sup>428</sup> Similar bills were introduced in the House of Representatives in 2005 and 2007.<sup>429</sup>

<sup>426</sup> See 20 U.S.C. § 1092(g)(4)(C).

<sup>427</sup> See 34 C.F.R. §§ 668.81-.89 (2006).

<sup>428</sup> S. 518, 110th Cong. (2007); S. 282, 108th Cong. (2003).

<sup>429</sup> H.R. 901, 110th Cong. (2007); H.R. 595, 109th Cong. (2005).





# VIII. CONCLUSION

BREAKING DOWN BARRIERS





Developing case law has substantially sharpened the scope of and analysis for Title IX's prohibition of discrimination in athletics. While some issues are yet to be resolved, the courts have set clear standards governing many of the rights of female athletes and the responsibilities of education institutions. Moreover, the growing number of settlement agreements provides additional important guidance for the resolution of these issues.

Litigation has proven to be an essential tool in the fight to secure gender equity in athletics and will likely continue to play a key role. Much work remains to achieve gender equity in athletics programs. The evidence shows that women still lag in participation opportunities, scholarships, budgets, and other aspects of sports programming. Hopefully, however, the lessons to be learned from plaintiffs' successes in courtrooms across the country will not be lost on the education community. When female athletes are not forced to resort to the courts to vindicate their rights, and colleges and universities, high schools and middle schools, conferences and governing bodies choose, voluntarily, to come into compliance with the law, Title IX will truly have achieved its promise.

