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.[275] 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.[276] 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.[277]

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.[278] 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.

275 *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)).

276 *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.

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

278 *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[279] and instated[280] 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."[281]

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,[282] or (2) a plaintiff is unlikely to suffer future injury from the type of discrimination alleged in the complaint.[283]

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.

279 *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).

280 *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).

281 *Roberts II*, 998 F.2d at 833.

282 *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).

283 *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,"[284] 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.[285]

Accordingly, the Tenth Circuit approved the order reinstating the softball team.[286]

284 *Cohen II*, 991 F.2d at 906.

285 *Roberts II*, 998 F.2d at 833-34.

286 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.[287] "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."[288]

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.[289] 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."[290]

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.[291] 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."[292] While the First Circuit upheld the preliminary injunction reinstating

287 *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).

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

289 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.

290 *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")).

291 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.

292 *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.[293] 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."[294]

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.[295] 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.[296] The district court ordered Brown to upgrade the women's gymnastics, fencing, skiing, and water polo teams to university-funded varsity status.[297] 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.[298] 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

293 *Id.*

294 *Id.* at 907.

295 *Cohen III*, 879 F. Supp. at 214.

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

297 *Id.*

298 *Id.* at 188.

do not. We believe that the harm emanating from lost opportunities for the plaintiffs are likely to be irreparable.[299]

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."[300] In such circumstances, the relation back doctrine, which preserves the merits of a claim for judicial resolution, is properly invoked.[301] This is especially true when "a decision rendered by the court would affirmatively impact other would-be plaintiffs, and would not be futile."[302]

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.[303] 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."[304]

299 *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).

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

301 *Id.*

302 *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.

303 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.

304 *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.[305] 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."[306]

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.[307] 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.[308] 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.[309] This order was subsequently affirmed by the Sixth Circuit.[310]

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

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

306 *Id.*

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

308 *Id.* at 697-98 (summarizing district court opinion).

309 *Id.*

310 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.[311]

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.[312] 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.[313] 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.[314] 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.[315] 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.[316]

311 *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.

312 *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).

313 678 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).

314 *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.").

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

316 *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.[317] 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,[318] 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.[319] "[P]unitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract."[320] 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.[321]

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"[322] and is thus subject to the Barnes analysis. Prior to Barnes, some federal courts interpreted *Franklin* as allowing for both compensatory and punitive damages;[323] on the other hand, at least one court noted that the status of the law in this respect was unclear.[324] 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,[325] 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.[326]

317 *Barnes v. Gorman*, 536 U.S. 181 (2002).

318 *Id.* at 187.

319 *Id.*

320 *Id.*

321 *Id.* at 188.

322 *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).

323 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).

324 *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").

325 *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).

326 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,[327] 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.*[328] 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.[329]

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.[330] 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

327 "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).

328 532 U.S. 598 (2001).

329 *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).

330 *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*.[331] 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.[332] 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.[333] 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"[334] – 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."[335] 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.[336]

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.

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

332 *Id.* at 201.

333 *Id.* at 204.

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

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

336 *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.[337]

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.[338] In the agreement, PGCPS agreed to ensure compliance with Title IX by each individual middle and high school in the county.[339] 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.[340] 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.[341]

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

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

339 *Id.*

340 *Id.* at 2-11.

341 *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*,[342] 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.[343] In *Camacho v. City of La Puente*,[344] 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,[345] the

342 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).

343 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).

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

345 *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.[346] And in *Camacho v. City of La Puente*, the city promised to promote a girls' softball clinic.[347]

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

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.

346 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.

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

348 *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).