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## The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics

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# The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics

Diane Heckman\*

*The basic discovery about any people is the discovery of  
the relationship between its men and its women.*

—Pearl S. Buck<sup>1</sup>

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<sup>1</sup> PEARL S. BUCK, *OF MEN AND WOMEN* 20 (2d ed. 1971).

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### INTRODUCTION: THE “GLASS SNEAKER” STILL EXISTS

This Article examines the prisms of Title IX of the Education Amendments of 1972 (hereinafter “Title IX”),<sup>2</sup> the federal gender discrimination statute applicable to educational programs and activities, as it celebrates its thirtieth anniversary. It portrays Title IX’s application to athletics through traditional curriculum educational programs as well as extracurricular athletic activities, including promoting equal opportunity for the recipient students and student-athletes, as well as the attendant athletic personnel. Remarkably, three decades after Title IX’s passage, the “glass sneaker”<sup>3</sup> continues to exist, limiting participation opportunities and benefits for female athletes<sup>4</sup> and athletic department positions,

<sup>2</sup> 20 U.S.C. §§ 1681–1688 (2000). This statute may now be cited as the “Patsy Takemoto Mink Equal Opportunity in Education Act.” Pub. L. 107-255, 2002 H.J. Res. 113 (approved Oct. 29, 2002). President Richard M. Nixon signed Title IX into law on June 23, 1972. President Nixon had purportedly made a concerted effort to have the first woman appointed to the bench of the Supreme Court. Reportedly, the former president uttered to Attorney General John Mitchell, “I don’t think a woman should be in any government job whatever . . . mainly because they are erratic. And emotional. . . . I lean to a woman only because, frankly, I think at this time, John, we got to pick up every half a percentage point we can.” Jeffrey Rosen, *Reichburg’s the One!*, N.Y. TIMES, Nov. 4, 2001, § 7 at 15, col. 1 (reviewing JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* (2001)).

<sup>3</sup> The author coined this term to represent the glass ceiling for female students’ participation in athletic endeavors and the rather meager employment positions of females in athletics. See Diane Heckman, *Women and Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 63 (1992).

<sup>4</sup> See *infra* note 49 and accompanying text.

including coaches.<sup>5</sup> The term “glass sneaker” reflects that, while impressive strides have been made for female students since Title IX’s inception thirty years ago, females are still imbued with the attitude that athletic employment, participation opportunities, and benefits are a gift and not an entitlement.

The Title IX statute heralds: “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>6</sup> In addition to the statute, there are implementing regulations,<sup>7</sup> a policy interpretation,<sup>8</sup> and myriad other official documents<sup>9</sup> governing this area. To prove a *prima facie* Title IX case, the plaintiff must establish that: (1) an educational program or activity is involved;<sup>10</sup> (2) the defendant entity is a recipient of federal funds;<sup>11</sup> and (3) discrimination occurred on the basis of sex in the provision or non-provision of the educational program or

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<sup>5</sup> See *infra* Part III.B.

<sup>6</sup> 20 U.S.C. § 1681(a).

<sup>7</sup> Department of Education [DOE] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance [hereinafter Title IX Regulations], 34 C.F.R. pt. 106 (2002) (originally promulgated by the Department of Health, Education, and Welfare).

<sup>8</sup> Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics [hereinafter Policy Interpretation], 44 Fed. Reg. 71,413 (Dec. 11, 1979).

<sup>9</sup> See, e.g., DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS [OCR], TITLE IX INVESTIGATOR’S ATHLETICS MANUAL (1990); OCR, *Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test* (1996), <http://www.ed.gov/offices/OCR/docs/clarific.html>.

<sup>10</sup> 20 U.S.C. § 1681(a). See also *Sternberg v. U.S.A. Nat’l Karate-Do Fed’n*, 123 F. Supp. 2d 659 (E.D.N.Y. 2000) (deciding whether an Olympic program constituted an educational program); Diane Heckman, *Title IX Tapestry: Threshold and Procedural Issues*, 153 EDUC. L. REP. 849, 855–56 (2001) (addressing, in detail, recent case law concerning Title IX threshold procedural issues, including whether an “educational” program or activity was involved).

<sup>11</sup> 20 U.S.C. § 1681(a). See also Civil Rights Restoration Act of 1987, Pub. L. 100-259, 20 U.S.C. § 1688 (2000) (legislatively overturning *Grove City College v. Bell*, 465 U.S. 555 (1984) (utilizing a narrow definition of whether a program or activity had received federal funds)); *Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459 (1999) (holding that the National Collegiate Athletic Association [NCAA] was not subject to Title IX jurisdiction due to its receipt of contributions *supra* from member colleges and universities, who had received federal funds); Heckman, *supra* note 10, at 854–55 (discussing *Smith*).

activities.<sup>12</sup> The statute did not enunciate whether an individual could assert a private Title IX cause of action,<sup>13</sup> whether section 1983 causes of action<sup>14</sup> are preempted by Title IX,<sup>15</sup> or which statute of limitations should be used.<sup>16</sup> There have been no legislative changes to alleviate these concerns, resulting in extensive litigation.<sup>17</sup> Many of the issues, especially the awarding

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<sup>12</sup> 20 U.S.C. § 1681(a).

<sup>13</sup> See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (allowing a private right of action in a sexual harassment case involving peer sexual harassment); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (sanctioning a private right of action in a sexual harassment case involving a teacher and student); Heckman, *supra* note 10, at 852–53.

<sup>14</sup> 42 U.S.C. § 1983 (2000). This statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or the proper proceeding for redress.

*Id.*

<sup>15</sup> Compare *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749 (2d Cir. 1998) (holding that Title IX does subsume a § 1983 cause of action), and *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857 (7th Cir. 1996) (holding that Title IX does subsume a Section 1983 cause of action), with *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996) (holding that both can coexist), and *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997) (holding that both can coexist). See also *Norris v. Norwalk Pub. Schs.*, 124 F. Supp. 2d 791 (D. Conn. 2000) (concluding that Title IX does subsume a § 1983 action); Heckman, *supra* note 10, at 860–61.

<sup>16</sup> See *Doe v. Howe Military Sch.*, 227 F.3d 981, 988 (7th Cir. 2000) (finding that the female plaintiff did not commence her lawsuit within two years of her turning eighteen (the age of majority) in this jurisdiction); Heckman, *supra* note 10, at 862–64. Other issues such as proper party plaintiffs and defendants have also arisen. See, e.g., *Morgan v. City of New York*, 166 F. Supp. 2d (S.D.N.Y. 2001) (finding that a mother does not have a Title IX cause of action for sex discrimination concerning benefits denied to her daughter in the Choir Academy of Harlem but granted to the nationally known Boys Choir of Harlem, Inc.); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 743 (W.D. Mich. 2000) (“Individuals who exercise administrative control over an entity which is subject to Title IX liability may be sued in their official capacity. . . . This is because official capacity suits represent another way of pleading an action against the entity represented by the individuals.”). But see *Hartley v. Parnell*, 193 F.3d 1263 (11th Cir. 1999) (holding that a school superintendent was entitled to qualified immunity in a student’s claim of sexual harassment based on her complaint of sexual abuse by a teacher); *Hayut v. State Univ. of N.Y.*, 127 F. Supp. 2d 333 (N.D.N.Y. 2000) (holding that Title IX legislation is aimed at redressing sex discrimination against the educational institution, rather than the individual). See Heckman, *supra* note 10, at 862–64.

<sup>17</sup> See Heckman, *supra* note 10.

of monetary damages,<sup>18</sup> and whether those damages should be compensatory<sup>19</sup> or punitive,<sup>20</sup> remain unsettled.

Shadowing the federal statute is the Fourteenth Amendment's Equal Protection Clause,<sup>21</sup> since classifications are being made based on the gender of individuals. In *United States v. Virginia*,<sup>22</sup> the Supreme Court determined that the Virginia Military Institute (VMI), a public single-sex military school, which had a Title IX statutory exemption, violated the plaintiffs' Fourteenth Amendment Equal Protection Clause because VMI specifically

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<sup>18</sup> See, e.g., *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992) (holding that monetary damages were permissible when intentional discrimination was proven); *Gebser*, 524 U.S. at 285–86 (calling into question whether Title IX should allow for unlimited monetary damages since Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1994) [hereinafter Title VII], another federal statute prohibiting sex discrimination in employment, had a cap of \$300,000); *Grandson v. Univ. of Minn.*, 272 F.3d 568, 571 (8th Cir. 2001) (holding that proof of prior notice to the university is required to recover monetary damages), *cert. denied*, 122 S. Ct. 1910 (2002); *Horner v. Ky. High Sch. Athletic Ass'n*, 206 F.3d 685 (6th Cir. 2000) (directing that proof of intentional discrimination is required to obtain monetary damages); *Doe v. Univ. of Ill.*, 138 F.3d 653, 678 (7th Cir. 1998) (“Although *Franklin* holds that there is an implied private right of action for damages to enforce Title IX, . . . it does not command the inferior courts to award damages in problematic cases before school districts know what is expected of them.”) (citation omitted); *Alston v. Va. High Sch. League, Inc.*, 144 F. Supp. 2d 526 (W.D. Va. 2001) (granting each of the named female student-plaintiffs \$17,000 in damages for failure to properly align female teams in the appropriate season); Angela Vicari, *Title IX Victory in Virginia*, WOMEN'S SPORTS EXPERIENCE, Sept./Oct. 2000, at 15 (discussing the *Alston* jury award); *infra* text accompanying notes 106–119, 127.

<sup>19</sup> See Heckman, *supra* note 10, at 866–67.

<sup>20</sup> On November 15, 2002, the Fourth Circuit ruled, in *Mercer v. Duke University*, 50 Fed. Appx. 643 (4th Cir. 2002), that punitive damages were not available against a private university in a case where the jury awarded a female student \$2 million in punitive damages. See also *infra* text accompanying note 65. For earlier cases discussing punitive damages, see, e.g., *Landon v. Oswego Unit Sch. Dist. # 308*, 143 F. Supp. 2d 1011 (N.D. Ill. 2001) (disallowing punitive damages in a Title IX lawsuit against a local school board); *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467 (D.N.H. 1997) (allowing punitive damages); *Collier v. William Penn Sch. Dist.*, 956 F. Supp. 1209 (E.D. Pa. 1997) (finding that punitive damages cannot be recovered against a school district).

<sup>21</sup> U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”). See also *Orr v. Orr*, 440 U.S. 268 (1979); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973).

<sup>22</sup> 518 U.S. 515 (1996).

excluded female students. The case is notable since the Court embraced pivotal language utilizing the intermediate standard in addressing equal protection claims based on sex discrimination.<sup>23</sup> The next issue on the horizon is whether an individual may assert a Title IX cause of action against a state entity or state actor without abridging the Eleventh Amendment.<sup>24</sup>

Title IX celebrated its silver anniversary on June 23, 1997.<sup>25</sup> During the first twenty-five years of Title IX, the Supreme Court confined itself to only four substantive decisions. In this introductory period, the Court rendered decisions in *Cannon v. University of Chicago*,<sup>26</sup> holding there is a private right of action to

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<sup>23</sup> *Id.* at 531–33 (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action. . . . Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is ‘exceedingly persuasive.’ The burden of justification is demanding and it rests entirely on the State. . . . The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”).

<sup>24</sup> The Eleventh Amendment protects the sovereign immunity of states and would bar equitable as well as monetary relief from the states. U.S. CONST. amend. XI. *See also* *Morris v. Wallace Cmty. Coll.-Selma*, 125 F. Supp. 2d 1315, 1335 (S.D. Ala. 2001) (“Whether an entity other than the state itself partakes of the state’s Eleventh Amendment immunity depends on whether it is an ‘arm of the state.’”), *aff’d*, 34 Fed. Appx. 388 (11th Cir. 2002). Factors to determine whether an entity is an arm of the state include: the definitions of “state” and “political subdivision,” the state’s degree of control over the entity, and the fiscal autonomy of the entity, which may include what entity would be responsible for paying judgments against the sued entity. *Id.* *See also* Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7(a)(1)(1994) (expressly abrogating Eleventh Amendment immunity for states in a Title IX action). Congress has the authority, under its Spending Clause power, to eliminate state sovereign immunity in this fashion. *See, e.g.*, *Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Horner v. Ky. High Sch. Athletic Ass’n*, 206 F.3d 685, 689 (6th Cir. 2000); *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997); Heckman, note 10, at 856–60.

<sup>25</sup> *See* Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391 (1997).

<sup>26</sup> 441 U.S. 677 (1979). *See also* *Alexander v. Sandoval*, 532 U.S. 275, 279–80 (2001) (“In *Cannon v. University of Chicago*, the Court held that a private right of action existed to enforce Title IX. . . .”) (citation omitted); *Morse v. Republican Party of Va.*, 517 U.S. 186, 231 (1996) (“Our holding in *Cannon*, that Title IX . . . created a private right of action for victims of discrimination in education, relied heavily on the fact that during the

enforce this law; *North Haven Board of Education v. Bell*,<sup>27</sup> upholding the validity of certain Title IX regulations; *Grove City College v. Bell*,<sup>28</sup> holding that even if an educational program does not directly receive federal funds, Title IX still applies; and *Franklin v. Gwinnett County Public Schools*,<sup>29</sup> articulating that monetary damages may be available in a Title IX lawsuit when intentional discrimination is established. The subsequent influx of Title IX lawsuits can be traced to this last decision. Since 1997, the Supreme Court has issued three new Title IX decisions, which examined student sexual harassment actions against educational institutions due to actions of teachers,<sup>30</sup> reviewed sexual harassment actions against educational institutions involving peer sexual harassment,<sup>31</sup> and explored Title IX's scope, specifically whether the National Collegiate Athletic Association (NCAA) is included.<sup>32</sup> Parties have been appealing Title IX cases to the Supreme Court in record numbers.<sup>33</sup>

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1960s the Court had consistently found such remedies notwithstanding the absence of an express direction from Congress.”).

<sup>27</sup> 456 U.S. 512 (1982).

<sup>28</sup> 465 U.S. 555 (1984).

<sup>29</sup> 503 U.S. 60 (1992). *See also* *Lane v. Pena*, 518 U.S. 187, 196 (1996) (“In *Franklin*, we held only that the implied private right of action under Title IX . . . supports a claim for monetary damages.”); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) (“[W]e held in *Franklin* that the right of action under Title IX . . . included a claim for damages.”).

<sup>30</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

<sup>31</sup> *Davis v. Monroe County, Ga. Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>32</sup> *Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459 (1999). *See also* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001) (holding that a state high school athletic association is within Title IX’s scope).

Nor do we think there is anything to be said for the Association’s contention that there is no need to treat it as a state actor since any public school applying the Association’s rules is itself subject to suit under § 1983 or Title IX. If Brentwood’s claim were pushing at the edge of the class of possible defendant state actors, an argument about the social utility of expanding that class would at least be on point, but because we are nowhere near the margin in this case, the Association is really asking for nothing less than a dispensation for itself.

*Id.* at 304–05 (citation omitted).

<sup>33</sup> *See, e.g.*, *Grandson v. Univ. of Minnesota*, 272 F.3d 568 (8th Cir. 2001) (equal opportunity: female student-athletes), *cert. denied*, 122 S. Ct. 1910 (2002); *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380 (5th Cir. 2000) (sexual harassment: teacher-student), *cert. denied*, 531 U.S. 1073 (2001); *Boulahanis v. Bd. of Regents*, 198 F.3d 633 (7th Cir. 1999) (equal opportunity: male and female student-athletes), *cert. denied*, 530 U.S. 1284



This Article, while addressing seminal decisions of the past thirty years, concentrates on recent decisions, and is divided into three major topics. Part I examines the governing regulations. Part II discusses equal opportunity on behalf of student-athletes. Part III explores sex discrimination in educational employment, and, specifically, the unresolved issue of whether Title IX affords a separate cause of action to safeguard against sex discrimination vis-à-vis utilizing other federal anti-discrimination statutes.<sup>34</sup>

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(2000); *Bruneau v. S. Kortright Cent. Sch.*, 163 F.3d 749 (sexual harassment: student-student), *cert. denied*, 526 U.S. 1145 (1999); *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999) (sexual harassment related), *cert. denied*, 528 U.S. 1181 (2000); *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069 (9th Cir. 1999) (employment: termination of female women's head basketball coach), *cert. denied*, 528 U.S. 1022 (1999); *Floyd v. Waiters*, 171 F.3d 1264 (11th Cir. 1999) (sexual harassment), *cert. denied*, 528 U.S. 891 (1999); *Oona R.-S. v. Santa Rosa City Schs. McCaffrey*, 122 F.3d 1207 (9th Cir. 1998) (sexual harassment: teacher-student and student-student), *cert. denied*, 526 U.S. 1154 (1999); *Smith v. Metro. Sch. Dist., Perry Township*, 128 F.3d 1014 (7th Cir. 1997) (sexual harassment: teacher-student), *cert. denied*, 528 U.S. 951 (1998); *N. Lawrence Cmty. Sch. Corp. v. Mary M.*, 131 F.3d 1220 (7th Cir. 1997) (sexual harassment: teacher-student), *cert. denied*, 524 U.S. 952 (1998); *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997) (sexual harassment), *cert. denied*, 522 U.S. 1114 (1998); *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996) (sexual harassment: student-student), *cert. denied*, 519 U.S. 861 (1996); *Brine v. Univ. of Iowa*, 90 F.3d 271 (8th Cir. 1996) (education employees generally: termination of dental hygienist program at the university), *cert. denied sub nom. Brine v. Iowa Bd. of Regents*, 519 U.S. 1149 (1997); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 969 (9th Cir. 1996) (sexual harassment: university policy), *cert. denied sub nom. Beeman v. Cohen*, 520 U.S. 1140 (1997); *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996) (equal opportunity on behalf of female student-athletes), *cert. denied*, 520 U.S. 1186 (1997); *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996) (sexual harassment: teacher-student), *cert. denied*, 520 U.S. 1265 (1997); *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995) (education employees generally: termination), *cert. denied sub nom. Lakoski v. Univ. of Tex., Med. Branch at Galveston*, 519 U.S. 947 (1996); *El-Attar v. Miss. State Univ.*, 68 F.3d 468 (5th Cir. 1995) (education programs generally), *cert. denied*, 516 U.S. 1094 (1996); *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995) (sexual harassment: outside organization's presentation to students), *cert. denied*, 516 U.S. 1159 (1996); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (sexual harassment: teacher-student), *cert. denied sub nom. Lankford v. Doe*, 513 U.S. 815 (1994); *Kelley v. Bd. of Trs. of the Univ. of Ill.*, 35 F.3d 265 (7th Cir. 1994) (equal opportunity: male student-athletes), *cert. denied*, 513 U.S. 1128 (1995); *Roberts v. Col. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993) (equal opportunity: female student-athletes), *cert. denied*, 510 U.S. 1004 (1993); *Williams v. Bethlehem Sch. Dist.*, 998 F.2d 168 (3d Cir. 1993) (athletics: cross-over case), *cert. denied*, 510 U.S. 1043 (1994).

<sup>34</sup> See Diane Heckman, *On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545 (1997). Neither the Title IX statute nor

I. TITLE IX GENERAL APPLICATION REGULATIONS,  
INCLUDING THE GOVERNANCE OF PHYSICAL EDUCATION CLASSES

While courts have robustly addressed the constitutionality of the Title IX regulations in the past,<sup>35</sup> there has been no new case law within the past decade. There have been no changes to any of the regulations since their enactment in 1975.<sup>36</sup> A handful of regulations set forth certain procedural items, such as the designation of a Title IX coordinator;<sup>37</sup> the publishing of a Title IX notice,<sup>38</sup> and the adoption and publishing of grievance procedures to handle Title IX complaints internally within the educational institution.<sup>39</sup>

In the past thirty years, there have been no major decisions addressing traditional educational curriculum.<sup>40</sup> There are

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implementing regulations refer explicitly to sexual harassment, although the courts have implied its application within Title IX's coverage. This Article will not address Title IX sexual harassment.

<sup>35</sup> Title IX Regulations, 34 C.F.R. pt. 106 (2002). *See also* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) (finding regulations involving educational employment were constitutional); Yellow Springs Exempted Vill. Sch. Dist. v. Ohio High Sch. Ass'n, 443 F. Supp. 753, 759 (S.D. Ohio 1978) (finding the regulations violated the Due Process Clause of the Fifth Amendment), *rev'd*, 647 F.2d 651 (6th Cir. 1981); Nat'l Collegiate Athletic Ass'n v. Califano, 444 F. Supp. 425 (D. Kan. 1978) (providing the first challenge to the new regulations brought by the NCAA, which originally only covered male intercollegiate athletes), *rev'd*, 622 F.2d 1282 (10th Cir. 1980); Leffel v. Wis. Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978) (providing the only decision not reversed on appeal to find any of the Title IX regulations were unconstitutional in violation of the Fourteenth Amendment's Equal Protection Clause).

<sup>36</sup> 34 C.F.R. pt. 106. It remains to be seen, however, whether there will be changes as a result of the 2003 Department of Education's Commission on Opportunity in Athletics report. *See infra* notes 43–44.

<sup>37</sup> *See id.* § 106.8; Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 639 (1999) (disregarding the female student's argument that the school board had not provided its employees with instruction to eradicate peer sexual harassment); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291–92 (1998) (noting that the failure to comply with the Title IX regulations did not automatically equate with a substantive violation of Title IX); Heckman, *supra* note 10, at 852–53.

<sup>38</sup> *See* 34 C.F.R. § 106.9.

<sup>39</sup> *See id.* § 106.8. *See, e.g.*, Kracunas v. Iona Coll., 119 F.3d 80, 89 (2d Cir. 1997) (“Although [the college] maintained a sexual harassment policy that complied with the requirements of 34 C.F.R. § 106.8, the mere existence of reasonable complaint procedures does not insulate [the college] from liability for sexual harassment claims.”).

<sup>40</sup> *See, e.g.*, Murray v. N.Y. Univ. Coll. of Dentistry, 57 F.3d 243 (2d Cir. 1995) (affirming district court's dismissal of plaintiff's Title IX sexual harassment action for

regulations pertaining to the conduct of physical education classes;<sup>41</sup> however, they have yielded no case law addressing the composition or administration of physical education classes.

On the administrative front, the Department of Education's Office for Civil Rights (OCR) oversees Title IX cases. Historically, the OCR has maintained a low profile in advocating Title IX. Preceding Assistant Secretaries include: Clarence Thomas (Reagan Administration), now an Associate Justice of the Supreme Court; Michael Thomas (George Bush Administration); and Norma Cantu (Clinton Administration). During 2001, President George W. Bush nominated Gerald A. Reynolds for Assistant Secretary of the OCR and appointed him to the position in March 2002.<sup>42</sup> On June 27, 2002 (four days after the thirtieth anniversary of Title IX), Secretary Roderick R. Paige announced the formation of a fifteen-person "Commission on Opportunity in Athletics" to study Title IX and its application to athletics and

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failure to state a claim on which relief can be granted); Pfeiffer v. Sch. Bd. for Marion Ctr. Area, 917 F.2d 779 (3d Cir. 1990) (affirming district court's finding that plaintiff was denied access to NHS for engaging in premarital sex, not because of her pregnancy, and, therefore, Title IX did not provide relief); Darian v. Univ. of Mass. at Boston, 980 F. Supp. 77 (D. Mass. 2000) (denying a pregnant nursing student's claim that she was subject to Title IX discrimination where she alleged her difficult pregnancy interfered with her courses); Middlebrooks v. Univ. of Md. at Coll. Park, 980 F. Supp. 824 (D. Md. 1997) (holding that a female student terminated from a doctorate program, after failing to pass a minimum number of qualifying tests, did not establish a prima facie Title IX case), *aff'd*, 166 F.3d 1209 (4th Cir. 1999); Hall v. Lee Coll., Inc., 932 F. Supp. 1027 (E.D. Tenn. 1996) (ruling there was no violation of Title IX where a female coed was suspended for violating this private college's policy prohibiting pre-marital sex, absent evidence that males would not have been similarly suspended); Ivan v. Kent State Univ., 863 F. Supp. 581 (N.D. Ohio 1994) (granting summary judgment against a plaintiff claiming Kent State discriminated against her by issuing her a grade of incomplete after she became pregnant), *aff'd*, 92 F.3d 1185 (6th Cir. 1996); Andriakos v. Univ. of S. Ind., 867 F. Supp. 804 (S.D. Ind. 1992) (granting summary judgment against a male plaintiff's Title IX claim of sex discrimination by a nursing school professor), *aff'd*, 19 F.3d 21 (7th Cir. 1994); Heckman, *supra* note 34, at 552-55 (elaborating on these decisions).

<sup>41</sup> 34 C.F.R. § 106.31-34. The regulations permit gender segregated physical education classes when the activity involves a contact sport. *Id.* § 106.34. This tracks the language found in Title IX regulations governing extracurricular athletic activities that allows separate teams. *See id.* § 106.41(b).

<sup>42</sup> DOE, *Reynolds to Direct the Office for Civil Rights* (June 25, 2001), <http://www.ed.gov/PressReleases/06-2001/06252001a.html>.

directed the release of a report by January 31, 2003.<sup>43</sup> The reason for the compressed timeframe is unknown. Public hearings were held in Atlanta, Georgia; Chicago, Illinois; Colorado Springs, Colorado and San Diego, California. The commission's non-binding report was issued on February 28, 2003.<sup>44</sup>

## II. EQUAL OPPORTUNITY ON BEHALF OF STUDENT-ATHLETES

Title IX has become synonymous with expanding participation opportunities for female student-athletes.<sup>45</sup> While there is no constitutional requirement that any educational institution provide extracurricular athletic opportunities, Fourteenth Amendment and Title IX concerns may arise when separate athletic programs are provided for males and females. The two main issues pertaining to student-athletes and prospective student-athletes are: (1) whether

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<sup>43</sup> See Mike Allen & Valerie Strauss, *Panel Named To Study Title IX; Law's Fairness To Be Examined*, WASH. POST, June 28, 2002, at A27; Michael Dobie, *Entitlement?*, NEWSDAY (N.Y.), Nov. 24, 2002, at B16-19; Charles McGrath, *The Way We Live Now: 9/15/02: A Whole New Ballgame*, N.Y. TIMES, Sept. 15, 2002, § 6, at 21-22; DOE, *Secretary's Commission on Opportunity in Athletics*, at <http://www.ed.gov/inits/commissionsboards/athletics/index.html> (last visited Mar. 18, 2003) (providing transcripts of the town meetings). Remarkably, the commission was not directed toward interscholastic athletics.

<sup>44</sup> COMM'N ON OPPORTUNITY IN ATHLETICS, "OPEN TO ALL": TITLE IX AT THIRTY (2003), [http://www.ed.gov/pubs/titleixat30/title9\\_report.pdf](http://www.ed.gov/pubs/titleixat30/title9_report.pdf). Two members of the commission, Julie Foudy and Donna de Varona, issued a minority report. MINORITY VIEWS ON THE REPORT OF THE COMMISSION ON OPPORTUNITY IN ATHLETICS (2003), [http://www.womenssportsfoundation.org/binary-data/WSF\\_ARTICLE/pdf\\_file/944.pdf](http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/944.pdf). Secretary of Education Rod Paige made a statement indicating that the Department of Education would only move forward on recommendations unanimously approved by the commission. Press Release, DOE, Paige Issues Statement Regarding Final Report of Commission on Opportunity in Athletics (Feb. 26, 2003), <http://www.ed.gov/PressReleases/02-2003/02262003a.html>.

<sup>45</sup> The phenomenal attendance records at the 1999 World Cup, which the United States women's soccer team—composed of former collegiate players—won, was an outgrowth of Title IX. See Jeannine Guttman, *Covering Women's Sports Better*, PORTLAND PRESS HERALD, April 23, 2000, at 1C (noting that the game broke "all attendance records for women's sports and [set] TV viewership records"). Cf. *Neal v. Bd. Trs. Cal. State Univ.*, 198 F.3d 763, 773 (9th Cir. 2000) ("And the victorious athletes understood as well as anyone the connection between a 27-year-old statute and tangible progress in women's athletics."); *Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996) ("Title IX has changed the face of women's sports as well as our society's interest in and attitude toward women athletes and women's sports.").

equal opportunity must be provided when separate teams are provided for males and females, and if so, what constitutes equal opportunity; and (2) whether students of one sex must be permitted to try-out and participate on the other sex's team ("cross-over") if only one team is offered. Two Title IX regulations deal with athletics, 34 C.F.R. § 106.41 (athletics generally),<sup>46</sup> and 34 C.F.R. § 106.37(c) (distribution of athlete scholarships).<sup>47</sup> One circuit court explained, "The drafters of these regulations recognized a situation that Congress well understood: Male athletes had been given an enormous head start in the race against their female counterparts for athletic resources, and Title IX would prompt universities to level the proverbial playing field."<sup>48</sup> The regulation governing "athletics generally" was the most frequently attacked of all the Title IX regulations during the last decade. The statistics for male and female NCAA students at Division I member schools are 47% male students and 53% female students; compared to 59% male student-athletes and 41% female student-athletes, which represents the highest percentage ever reported for this category; and the corresponding figures of 57% of athletic scholarships for male student-athletes compared to 43% of athletic scholarships for female student-athletes.<sup>49</sup>

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<sup>46</sup> See Heckman, *supra* note 25, at 397–400.

<sup>47</sup> See *infra* Part II.C.

<sup>48</sup> Neal, 198 F.3d at 767.

<sup>49</sup> See 1999–00 NCAA GENDER-EQUITY REPORT 9 (2002), [http://www.ncaa.org/library/research/gender\\_equity\\_study/1999-00/1999-00\\_gender\\_equity\\_report.pdf](http://www.ncaa.org/library/research/gender_equity_study/1999-00/1999-00_gender_equity_report.pdf); *id.* tbl. 7, at 20. The study provides detailed information as to the respective divisions: Divisions I, II and III, with a further breakdown of the subdivisions within Division I (Division I-A, which contains the highest profile national collegiate athletic programs; Division I-AA; and Division I-AAA). While the study provides overall statistics for the percentage of students overall, it does not present the corresponding overall percentage of NCAA student-athletes, as opposed to the figures for the respective divisions. In Division I, for males, the average operating expenses equated to \$882,100 (64%); for females, the average operating expenses equated to \$486,200 (36%). *Id.* In Division I, for males the average recruiting expenses equated to \$184,200 (68%); for females, the average recruiting expenses equated to \$85,900 (32%). *Id.* See also *infra* note 168 for the average expenditures for athletic scholarships.

*A. Cross-Over Cases*

The term “cross-over case” is commonly used to describe a case when an individual of one sex competes or wants to compete on an athletic team consisting of members of the other sex. The Title IX regulations permit the operation of separate sex teams in certain situations, specifically when participation is based on competitive skill or when the team competes in a “contact” sport.<sup>50</sup> The latter was one of the primary issues litigated during the first twenty-five years of Title IX’s existence on the interscholastic level. The regulations allow for separate teams or preclusion of one sex from participating on the team composed of members of the other sex when the sport is a contact sport.<sup>51</sup> Contrast this with New York, which has issued state regulations pertaining to interscholastic athletics for grades seven through twelve, conditionally allowing females to participate on all-boys teams regardless of whether a female team is offered or not offered.<sup>52</sup>

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<sup>50</sup> 34 C.F.R. § 106.41(b) (2002).

- a) *General.* 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 be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
- b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

*Id.* § 106.41(a)–(b). *See also* *Horner v. Ky. High Sch. Athletic Ass’n*, 206 F.3d 685, 693 (6th Cir. 2000) (“All [Title IX] and the implementing regulations require is equality of athletic opportunity. The statute does not require gender balance. Further, in certain instances, separate teams for males and females are allowed.”) (citing Title IX and 34 C.F.R. § 106.41(b)).

<sup>51</sup> 34 C.F.R. § 106.41(b).

<sup>52</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 135.4(c)(7)(ii)(c) (2003). A review panel rules on the student’s “fitness” to participate in mixed competition for certain sports

In recent years, there continues to be little judicial action involving cross-over cases.<sup>53</sup> In *Barnett v. Texas Wrestling Ass'n*,<sup>54</sup> female members of two high school varsity coed wrestling teams were banned from competing against male wrestlers by the state interscholastic wrestling association.<sup>55</sup> The district court ruled that there was no liability based on the Title IX regulation, 34 C.F.R. § 106.41(b), which clearly identifies wrestling as a “[t]he quintessential contact sport.”<sup>56</sup> Nonetheless, the females’ request for injunctive relief was granted predicated on violation of the Fourteenth Amendment Equal Protection Clause.

If a sport was deemed a contact sport, then the presumption under the regulations was that the other sex may be legally excluded from participation. In *Mercer v. Duke University*,<sup>57</sup> a female place kicker alleged sex discrimination when she was not selected for the football team, one of the specifically enumerated contact sports in the Title IX regulations.<sup>58</sup> The parties did not

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(which goes beyond Title IX’s enumerated “contact” sports). The review panel consists of the school physician and a physical education teacher appointed by the principal and, if desired, a physician appointed by the student. Decisions will be based on majority vote. *Id.* § 135.4(c)(7)(ii)(c)(2). The identified sports are baseball, basketball, boxing, wrestling, field hockey, football, ice hockey, lacrosse, rugby, soccer, softball, speedball, team hand ball, and power volleyball (where the height of the net is set at less than eight feet). *Id.* While the fitness criteria is another barrier to female participation, female student-athletes are beginning to participate on these teams in New York, and cannot be automatically excluded as a student can under Title IX. Where separate teams are offered for males and females, then females may participate on all-male teams; however, males may be prohibited from being on all-female teams. *Id.* § 135.4(c)(7)(ii)(c)(3). When only one team is provided in a particular sport, females may participate on all-male teams; however, males may be prohibited “upon a finding that such participation would have a significant adverse effect.” *Id.* § 135.4(c)(7)(ii)(c)(4).

<sup>53</sup> See Heckman, *supra* note 25, at 398 n.34 (listing cross-over decisions involving both females and males).

<sup>54</sup> 16 F. Supp. 2d 690 (N.D. Tex. 1998). See also *Adams v. Baker*, 919 F. Supp. 1496 (D. Kan. 1996).

<sup>55</sup> *Barnett*, 16 F. Supp. at 692.

<sup>56</sup> *Id.* at 694–95.

<sup>57</sup> 32 F. Supp. 2d 836 (M.D.N.C. 1998), *rev'd*, 190 F.3d 643 (4th Cir. 1999). Heather Sue Mercer reportedly did not want to sue Duke, but only wanted an apology. During August 2001, Ashley Martin would go on to become the first female to score a point in a Division I football game, where she kicked two extra points for Jacksonville State University, located in Alabama. See Assoc. Press, *Female Kicker Breaks Gender Barrier*, N.Y. TIMES, Aug. 31, 2001, § D, at 6, col. 1.

<sup>58</sup> 34 C.F.R. § 106.41(b) (2002).

contest that football at the university was a coed team, although no females had ever participated on the team. The North Carolina district court granted the university's motion for summary judgment, determining that the regulation did not contain an exception for any particular position that may not require physical contact.<sup>59</sup> On appeal, the Fourth Circuit Court unanimously reversed the district court's determination reinstating the case.<sup>60</sup> It reviewed the "separate teams" subsection and noted that Duke University had allowed this female to try-out for a decidedly coed contact sport team. The Fourth Circuit recognized that subsection (a) and subsection (b) of the regulation "stand in a symbiotic relationship to one another."<sup>61</sup>

We therefore construe the second sentence of subsection (b) as providing that in non-contact sports, but not in contact sports, covered institutions *must* allow members of an excluded sex to try out for single-sex teams. Once an institution has allowed a member of one sex to try out for a team operated by the institution for the other sex in a contact sports, subsection (b) is simply no longer applicable, and the institution is subject to the general anti-discrimination provision of subsection (a).<sup>62</sup>

On remand, the eight-person North Carolina jury awarded Mercer \$1 in compensatory damages and \$2 million in punitive damages.<sup>63</sup> The verdict represents the first case awarding punitive damages in a Title IX athletics-related case. During 2001, the North Carolina district court judge rejected the university's motion for judgment as a matter of law.<sup>64</sup> On appeal, the Fourth Circuit

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<sup>59</sup> *Mercer*, 32 F. Supp. 2d at 840. Although football rules insulate a place kicker from direct contact, incidental contact may occur.

<sup>60</sup> *Mercer v. Duke Univ.*, 190 F.3d 643 (4th Cir. 1999).

<sup>61</sup> *Id.* at 646.

<sup>62</sup> *Id.* at 647–48 (emphasis supplied). "Where, as here, however, the university invites women into what appellees characterize as the 'traditionally all-male bastion of collegiate football,' . . . we are convinced that this reading of the regulation is the only one permissible under law." *Id.* at 648.

<sup>63</sup> *Mercer v. Duke Univ.*, 181 F. Supp. 2d 525, 535 (M.D.N.C. 2001), *vacated in part by* 50 Fed. Appx. 643 (4th Cir. 2002).

<sup>64</sup> *Id.* at 525.



ruled recently that punitive damages were not recoverable in a Title IX action.<sup>65</sup>

### *B. Equal Opportunity*

Another subdivision of the Title IX regulations, 34 C.F.R. § 106.41(c), mandates “equal opportunity”<sup>66</sup> in the provision of interscholastic and intercollegiate athletic programs where separate programs are provided for males and females based on the first enumerated program area listed.<sup>67</sup> Remarkably, despite the

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<sup>65</sup> *Mercer*, 50 Fed. Appx. at 643. The Fourth Circuit reached its conclusion based on an intervening Supreme Court decision in *Barnes v. Gorman*, 536 U.S. 181 (2002) (concluding that punitive damages were not available in private causes of action seeking redress based on two federal civil rights laws prohibiting disability discrimination which relied on Title VI of the Civil Rights Act of 1964 [hereinafter Title VI]). The Fourth Circuit noted that Title IX was predicated upon Title VI; thus, the court reached the same conclusion for a Title IX action. *Mercer*, 50 Fed. Appx. at 643.

<sup>66</sup> 34 C.F.R. § 106.41(c) (2002).

- c) *Equal Opportunity*. A recipient that operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
  - (2) The provision of equipment and supplies;
  - (3) Scheduling of games and practice time;
  - (4) Travel and per diem allowance;
  - (5) Opportunity to receive coaching and academic tutoring;
  - (6) Assignment and compensation of coaches and tutors;
  - (7) Provision of locker rooms, practice and competitive facilities;
  - (8) Provision of medical and training facilities and services;
  - (9) Provision of housing and dining facilities and services;
  - (10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

*Id.*

<sup>67</sup> See Diane Heckman, *The Explosion of Title IX Legal Action in Intercollegiate Athletics During 1992–93: Defining the “Equal Opportunity” Standard*, 1994 DETROIT C. L. REV. 953 (discussing in-depth the quartet of significant equal opportunity cases all commenced by female student-athletes: *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996); *Roberts v. Colo. State Univ.*, 998 F.2d 824 (10th Cir. 1993); and *Favia v. Univ. of*

passage of thirty years, the legal discourse has centered almost exclusively on the first program area delineated.

### 1. Female Olympic Athletes

In a fascinating case of first impression, a New York federal district court ruled, in *Sternberg v. U.S.A. National Karate-Do Federation*,<sup>68</sup> that Title IX applies to American Olympic athletes involved with the Karate-Do Federation, a national governing body. The court found that an educational program or activity was involved and that the defendant was a recipient of federal funds.<sup>69</sup> The Karate-Do Federation did not receive any direct federal funding, however, in 1999 the United States Olympic Committee provided over \$40 million to all national governing bodies, including the Karate-Do Federation.<sup>70</sup>

### 2. Female Student-Athletes

During the early 1990s, females struggled to obtain or maintain sports teams.<sup>71</sup> The battle over when female varsity teams must be retained or club teams elevated to varsity status was fought on the intercollegiate level. The inquiry into the appropriate benefits and conditions afforded to female sports teams has recently begun judicial exploration in the interscholastic arena.<sup>72</sup>

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Ind. at Pa., 7 F.3d 332 (3d Cir. 1993); *Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17 (2d Cir. 1993)). The First Circuit decision in the *Cohen* case—addressing the issuance of a preliminary injunction against the University and expounding on a permanent injunction issued against the University—has emerged as the bellwether decision in the past thirty years on the issue of providing equal opportunity to student-athletes. *Cohen*, 101 F.3d at 155.

<sup>68</sup> 123 F. Supp. 2d 659 (E.D.N.Y. 2000).

<sup>69</sup> *See id.* at 662.

<sup>70</sup> *See id.* at 663.

<sup>71</sup> *See Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 2000) (“Title IX has enhanced, and will continue to enhance, women’s opportunities to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics.”); *Sternberg*, 123 F. Supp. 2d at 663; Heckman, *supra* note 67, at 966–94.

<sup>72</sup> *See* 34 C.F.R. § 106.41(c)(2)–(10) (2002). Gender equity is still woefully lacking in media coverage, whether it is television, print, or radio broadcasting. *See infra* note 147 (regarding the CBS contract with the NCAA to televise the men’s Division I basketball tournament (without also broadcasting the women’s basketball tournament)). Rarely are women featured on the back pages of the sports coverage in newspapers, and most papers

## a) Intercollegiate Athletics

The two pivotal actions during the last few years in this area<sup>73</sup> were the Supreme Court's denial of certiorari in *Cohen v. Brown University*,<sup>74</sup> the leading case in the area of athletics equal opportunity, and decision in *National College Athletic Ass'n v. Smith*.<sup>75</sup> The *Cohen* case, originally commenced during 1992, was brought by female student-athletes on the women's varsity

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report male teams' scores without any gender identification, e.g., "Maryland beats Indiana," whereas the female teams are specifically identified as the "girls" basketball team. *Sports Illustrated* has historically been dismal when it comes to featuring female athletes on the cover of this magazine; instead, it continues to vamp its "swimsuit issue" with a female model (routinely not even a female athlete) on its cover. During 1999, a new magazine was launched, *Sports Illustrated for Women*. See Keith L. Alexander, "Women's Sports" Folds as Niche Gets Redefined, USA TODAY, July 3, 2000, at 8B. The magazine is now defunct. See David Carr, *Time Inc.'s Closing Sports Illustrated for Women*, N.Y. TIMES, Oct. 17, 2002, § C, at 7. Female sportscasters for men's athletic events and even on the nightly news sports section also remain in small supply. It was not until 1987 that Gayle Sierens became the first woman to do play-by-play in a NFL game, see Tom Weir, *20th Century: This Day in Sports*, USA TODAY, Dec. 27, 1999, at 3C; in 1996, Robin Roberts became the first woman to anchor a network NFL studio show. Donna Lopiano, *The Year of the Woman in Sports*, SPORTING NEWS, Dec. 30, 1996. See also *infra* notes 195–203 concerning the lack of progress for female employees in NCAA intercollegiate programs.

<sup>73</sup> See Martha Ackmann, *Years Later, Maker of a Landmark Film Still Stands Up for Title IX*, N.Y. TIMES, March 12, 2000, § 8, col. 1, at 11 (addressing the documentary, *A Hero for Daisy*, about the struggles of the women's crew team at Yale University); Heckman, *supra* note 25, at 420 n.142 (identifying applicable cases).

<sup>74</sup> 520 U.S. 1186 (1997), *denying cert. to* 101 F.3d 155 (1st Cir. 1996) (affirming the district court's granting of a permanent injunction in favor of the female student-athletes, but remanding on the lower court's compliance plan, so as to allow the University to posit a satisfactory one). See also *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (trial seeking reinstatement of two women's varsity teams that began on September 26, 1994; case partially settled on September 28, 1994); *Cohen v. Brown Univ.*, 879 F. Supp. 185 (D.R.I. 1995) (ruling that the university violated Title IX and ordering the defendant to submit a compliance plan within 120 days, but staying the directive pending an appeal), *aff'd in part and rev'd in part*, 101 F.3d 155 (1st Cir. 1996); Heckman, *supra* note 34, at 565 n.103 (explaining this ruling). The district court judge modified his March 29, 1995 judgment, *Cohen*, 879 F. Supp. at 185, in the following respects: reducing the time to submit a compliance plan from 120 to 60 days and eliminating the provision which allowed for a stay pending the appeal. The University appealed the modified order. The First Circuit affirmed in part and reversed in part. *Cohen*, 101 F.3d 155 (1st Cir. 1996). See also *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993) (affirming the district court's granting of the plaintiff's motion for a preliminary injunction retaining the two women's varsity teams).

<sup>75</sup> 525 U.S. 459 (1998).

gymnastics and volleyball teams seeking to forestall the elimination of their teams.<sup>76</sup> On June 23, 1998, the parties settled the *Cohen* case, subject to court approval,<sup>77</sup> which was granted. The settlement required Brown University to provide athletic opportunities for females in close proportion to the percentage of female students (within a 3.5% range).<sup>78</sup>

In *Smith v. National Collegiate Athletic Ass'n*,<sup>79</sup> Renee M. Smith, a female graduate student who still had NCAA eligibility, wanted to play on her graduate schools' volleyball teams. She had the two graduate schools (Hofstra University and University of Pittsburgh School of Law) seek waivers from the NCAA, which had a rule that the individual must play at the same institution as the student's undergraduate institution. The NCAA denied the waivers for her continued athletic eligibility. Smith contended that the rejected waiver requests resulted in sex discrimination by the NCAA pursuant to Title IX, as allegedly more male student-athletes were afforded waivers than female student-athletes; and secondly, that the NCAA violated the Sherman Act.<sup>80</sup>

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<sup>76</sup> *Cohen*, 809 F. Supp. at 978.

<sup>77</sup> See Joint Agreement, *Cohen v. Brown Univ.*, 879 F. Supp. 185 (D.R.I. 1995) (No. 92-CV-197), *aff'd*, 101 F.3d 155 (1st Cir. 1996), <http://www.tlpj.org/briefs/010-Cohen.pdf>. The agreement called for the retention of thirteen varsity women's teams as university-funded teams for the academic years 1998–99 through 2000–01. *See id.* § II.B, at 4–5. While volleyball was one of the included teams, gymnastics was relegated to a donor-funded team. *See id.* § II.B, D, at 4–5. Moreover, the percentage of female students to female student-athletes must be within 3.5% in each academic year from 1998–99 through 2000–01. *See id.* § III.A.1, at 6–7.

<sup>78</sup> *See id.* § III.A.1, at 6–7. To date, there is no court decision expounding on the minimum differential that the judiciary will accept to satisfy Title IX's substantial proportionality requirement.

<sup>79</sup> 139 F.3d 180 (3d Cir. 1998), *rev'd*, 525 U.S. 459 (1999).

<sup>80</sup> *Id.* at 182 (citing 15 U.S.C. § 1 (2000)). The Third Circuit held the NCAA's "[e]ligibility rules are not related to the NCAA's commercial or business activities . . . [thus] the Sherman Act does not apply to the NCAA's promulgation of eligibility requirements." *Id.* at 185. In 1991, the NCAA instituted a rule aimed at cost-cutting that restricted earnings for certain assistant coaches to \$12,000 during the school year and \$4,000 during the summer. A group of the affected coaches instituted a successful lawsuit against the NCAA based on violation of the Sherman Act. The parties settled the suit in March of 1999 for \$54.5 million. Associated Press, *NCAA Settles Suit for \$54.5 Million*, *NEWSDAY* (N.Y.), March 10, 1999, at A76. The Association of Intercollegiate Athletics for Women, the former governing body of women's collegiate athletics, brought a lawsuit against the NCAA unsuccessfully alleging violation of the Sherman Act. *Ass'n for Intercollegiate Athletics for Women v. Nat'l Collegiate Athletic Ass'n*,

Procedurally, the defendant-NCAA sought a motion to dismiss the original complaint brought by the pro se plaintiff, which the district court granted.<sup>81</sup> Smith (this time with counsel) sought appellate review. The Third Circuit held that the NCAA would be governed by Title IX because it collected dues from its member colleges and universities, which received federal funds.<sup>82</sup> Nonetheless, the court affirmed the lower court's holding that the NCAA rule was not in restraint of trade in violation of the antitrust statutes.<sup>83</sup> A month after oral argument, the Supreme Court quickly and unanimously disposed of the appeal, reversing the appellate court on the issue of whether the NCAA was a recipient of federal funds,<sup>84</sup> and remanded for further consideration.

In *Pederson v. Louisiana State University*,<sup>85</sup> the Louisiana district court had the opportunity to hear a case where the female plaintiffs sought elevation of two club teams, soccer and softball, to varsity status. The district court found the university had

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558 F. Supp. 487 (D.D.C. 1983), *aff'd*, 735 F.2d 557 (D.C. Cir. 1984). *See also* Bowers v. Nat'l Collegiate Athletic Ass'n, 9 F. Supp. 2d 460, 497-98 (D.N.J. 1998) (dismissing a female learning-disabled student's claim against the NCAA for violation of the Sherman Act).

<sup>81</sup> Smith v. Nat'l Collegiate Athletic Ass'n, 978 F. Supp. 213, 220 (W.D. Pa. 1997), *aff'd in part, rev'd in part, and vated in part* by 139 F. 3d 180 (3d Cir. 1998), *vacated by* 525 U.S. 459 (1999). The plaintiff also moved to amend her complaint, which the district court denied. *Id.* at 221.

<sup>82</sup> *Smith*, 139 F.3d at 187. Generally, athletic associations have been buffered from Title IX jurisdiction, as the associations did not directly receive federal funds. *See* Heckman, *supra* note 3, at 35 n.157. *But see* Horner v. Ky. High Sch. Athletic Ass'n, No. C-92-CV-295 (W.D. Ky. Jan. 11, 1993), *aff'd in part and rev'd in part*, 43 F.3d 265, 272 (6th Cir. 1994) (holding that the state interscholastic athletic association was subject to Title IX). *See also* Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 26 F. Supp. 2d 1001, 1008 (W.D. Mich. 1998) (concluding that whether this state high school athletic association was a recipient of federal funds was a question of fact).

<sup>83</sup> *Smith*, 139 F.3d at 187.

<sup>84</sup> Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999). The inquiry was whether funds the NCAA received for its National Youth Sports Program would be sufficient to trigger Title IX jurisdiction. *Id.* at 469-70. The Court noted, "[u]nlike the earmarked student aid in *Grove City*, there is no allegation that NCAA members paid their dues with federal funds earmarked for that purpose." *Id.* at 468. *See also* Cureton v. Nat'l Collegiate Athletic Ass'n, 198 F.3d 107 (3d Cir. 1999) (concerning whether the NCAA received federal funds to garner Title VI jurisdiction).

<sup>85</sup> 912 F. Supp. 892 (M.D. La. 1996) (finding that the University violated Title IX, and ordering submission of a compliance action plan), *aff'd in part, rev'd in part, and vacated in part by* 213 F.3d 858 (5th Cir. 2000).

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violated Title IX.<sup>86</sup> Subsequently, on March 4, 1997, the court denied the state university's motion to dismiss,<sup>87</sup> which it had raised based on the intervening Supreme Court decision in the *Seminole Tribe* case.<sup>88</sup> During May 1997, the district court finally accepted a university-proposed compliance plan.<sup>89</sup> On July 1, 1997, the court entered final judgment in this case.<sup>90</sup> In determining whether the selection of sports, identified in the first program area, was satisfied, the court referenced the three-part "effective accommodation test" found in the 1979 Policy Interpretation.<sup>91</sup> The educational institution that provides separate athletic programs for male and female student-athletes must meet one of the three prongs found in the test. The first prong requires

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<sup>86</sup> *Id.* at 917.

<sup>87</sup> *See Pederson v. La. State Univ.*, 213 F.3d 858, 865 (5th Cir. 2000).

<sup>88</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). *See also* Heckman, *supra* note 10, at 856–57.

<sup>89</sup> *See Pederson*, 213 F.3d at 865.

<sup>90</sup> *Id.*

<sup>91</sup> *See id.* at 879.

C. Effective Accommodation of Student Interests and Abilities.

...

5. Application of the Policy—Levels of Competition. In effectively accommodating the interests and abilities of male and female athletes, institutions must provide the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules, which equally reflect their abilities.
  - a. Compliance will be assessed in any one of the following ways:
    - (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
    - (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, 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 or 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.

Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

substantial proportionality between the percentage of students and the percentage of student-athletes of the same sex.<sup>92</sup> The second prong demands a history and continuing practice of program expansion, while the third prong directs that the current program fully and effectively accommodates the interests and abilities of the underrepresented gender.<sup>93</sup> The district court eschewed the application of the first prong of the three-prong effective accommodation test<sup>94</sup> that had been sanctioned by the First, Third, Sixth, Seventh, Ninth, and Tenth Circuit Courts of Appeals.<sup>95</sup> The Fifth Circuit decision ultimately upheld the use of the entire effective accommodation test.<sup>96</sup>

Significantly, another district court sided with the *Pederson* district court in rejecting use of the first prong. The California district court in *Neal v. Board of Trustees California State University*, enunciated, “[T]he *Pederson* court’s rejection of the safe harbor test, is sensible. This court essentially finds that the safe harbor rule is not dictated by the Policy Interpretation and is inconsistent with the text, structure and policy of Title IX itself.”<sup>97</sup>

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<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*; *Pederson v. La. State Univ.*, 912 F. Supp. 892 (M.D. La. 1996), *aff’d in part, rev’d in part, and vacated in part* by 213 F.3d 858 (5th Cir. 2000).

Under the Policy Interpretation, an educational institution which is proved not to be effectively accommodating the interests and abilities of the underrepresented sex but is able to demonstrate a history and continuing practice of program expansion demonstrably responsive to the developing interests and abilities of the underrepresented sex may still be found to be in compliance with Title IX.

*Id.* at 916.

<sup>95</sup> *See Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 2000) (“Today, we join our sister circuits in holding that Title IX does not bar universities from taking steps to ensure that women are approximately as well represented in sports programs as they are in student bodies.”); *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996); *Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Bd. of Trs.*, 35 F.3d 265 (7th Cir. 1994); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993); *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1992); Heckman, *supra* note 25, at 408 n.83.

<sup>96</sup> *Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000). The Ninth Circuit would also condone the effective accommodation test. *See Neal*, 198 F.3d at 763.

<sup>97</sup> *Neal v. Bd. of Trs. of Cal. State Univ.*, No. CV-F-97-5009, 1997 WL 1524813, at \*12 (E.D. Cal. Dec. 26, 1997), *rev’d*, 198 F.3d 763 (9th Cir. 1999). *See also* Heckman, *supra* note 67, at 993 (concerning the consent decree entered into by the California State Universities).

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However, on appeal, the Ninth Circuit emphatically rejected this position, noting that the *Pederson* district court's rejection of the first prong was found in the dicta. The appellate court stated:

As is explained above, those courts emphasized that women's interest in sports appeared to be lower than men's, but that the genders' interests were slowly but surely converging, which was precisely the reason why requiring only that each gender's expressed interest in participating be accommodated equally would freeze the inequality of the status quo.<sup>98</sup>

In *Boucher v. Syracuse University*,<sup>99</sup> the district court granted summary judgment to the defendant-university and dismissed the Title IX claims of female student-athletes. The court found that Syracuse University had satisfied the second prong of Title IX with a continuing history of program expansion as the university had current plans to add more intercollegiate athletic teams for female students.<sup>100</sup> This is the first court to make such an affirmative finding. The students appealed. The Second Circuit determined that the district court, in this class action, should have sanctioned classes representing the female lacrosse players and softball players.<sup>101</sup>

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<sup>98</sup> *Neal*, 198 F.3d at 768. Moreover, "Adopting [the university's] interest-based test for Title IX compliance would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment." *Id.* at 769. Thus, the Ninth Circuit concluded, "We adopt the reasoning of *Cohen I*, *Cohen II*, and *Kelley*, and hold that the constitutional analysis contained therein persuasively disposes of any serious constitutional concerns that might be raised in relation to the OCR Policy Interpretation." *Id.* at 772.

<sup>99</sup> No. 95-CV-620, 1998 WL 167296 (N.D.N.Y. Apr. 3, 1998) (mem.) (reviewing the entire history of the university's athletic programs and activities since the enactment of Title IX), *aff'd in part, dismissed as moot in part, and vacated in part* by 164 F.3d 113 (2d Cir. 1999).

<sup>100</sup> See Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (setting out the second prong of the effective accommodation test).

<sup>101</sup> *Boucher*, 164 F.3d 113, 119 (2d Cir. 1999). The Second Circuit also directed that since the University had agreed to sponsor a women's varsity softball team, the order as to forming a sub-class for the female softball players would be deemed in temporary abeyance, awaiting the actual implementation of this team. *Id.*



Both male and female student-athletes instituted the lawsuit in *Harper v. Board of Regents, Illinois State University*,<sup>102</sup> where two female students alleged sex discrimination based on the elimination of men's athletic teams to achieve Title IX proportionality rather than the addition of three more women's teams. The court held:

[The] two named [female] plaintiffs lacked standing to bring a claim for failing to add a women's Rugby team to the ISU athletic roster under Title IX. Title IX does not require ISU to add women's teams, in particular Rugby teams; it merely requires 'equal opportunity' for both male and female athletes who are students.<sup>103</sup>

Thus, the court dismissed this count with prejudice.<sup>104</sup> The Seventh Circuit affirmed the lower court's grant of the university's motion for summary judgment with respect to the men's Title IX claim.<sup>105</sup>

On March 16, 1998, the district court in *Grandson v. University of Minnesota*<sup>106</sup> denied the defendant-university's motion to dismiss the complaint in an action brought concerning allegations of discriminatory funding of the women's soccer team, including the lack of an athletic scholarship. There was also a companion action brought in *Thompson v. University of Minnesota at Duluth*,<sup>107</sup> in which a similar result was reached in denying the defendant-university's motion to dismiss in this action seeking a women's varsity ice hockey team. Subsequently, the trial court judge ruled that the plaintiffs in *Grandson* and *Thompson* did not

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<sup>102</sup> No. 95-CV-1371 (C.D. Ill. Oct. 6, 1997) (granting in part and denying in part the defendant's motion for summary judgment).

<sup>103</sup> *Id.*, slip op. at 33-34.

<sup>104</sup> *Id.* at 34.

<sup>105</sup> *Harper v. Bd. of Regents, Ill. State Univ.*, 35 F. Supp. 2d 1118, 1123 (C.D. Ill. 1999), *aff'd sub nom. Boulahanis v. Bd. of Regents of Ill. State Univ.*, 198 F.3d 633 (7th Cir. 1999). See also *infra* text accompanying notes 151-152.

<sup>106</sup> No. 97-CV-265 (D. Minn. March 16, 1998), *aff'd*, 272 F.3d 568 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 1910 (2002).

<sup>107</sup> No. 97-CV-1072 (D. Minn. March 16, 1998), *aff'd sub nom. Grandson v. Univ. of Minn.*, 272 F.3d 568 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 1910 (2002).

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have standing to sue.<sup>108</sup> The plaintiffs in both these cases filed appeals, which were consolidated.<sup>109</sup>

Finally, on November 20, 2001, the Eighth Circuit reviewed the three main issues advanced in the two cases. First, it ruled that the plaintiffs' request for the university to provide a women's varsity hockey team was properly deemed moot, since the university now offered the team.<sup>110</sup> Second, the plaintiffs sought to amend their Title IX lawsuit as a class action alleging unequal treatment of female student-athletes; the appellate court upheld as appropriate the district court's decision dismissing claims based on failure to timely serve requests for class certification.<sup>111</sup> Third, one plaintiff sought to amend the complaint to request damages for failure of the university to award her a soccer scholarship. The appellate court again affirmed the lower court's denial of a request to amend damages was proper where there "was no allegation of prior notice of their complaints to appropriate [University of Minnesota at Duluth (UMD)] officials, no allegation of deliberate indifference by such officials, and no allegation they had afforded UMD a reasonable opportunity to rectify the alleged violations."<sup>112</sup>

In 1998, in *Gebser v. Lago Vista Independent School District*, the Supreme Court issued its stern standard to be applied in Title IX cases involving sexual harassment claims made by a student against an educational institution for actions of a teacher: "[D]amages may not be recovered in those circumstances unless an

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<sup>108</sup> See *id.*; *Grandson*, No. 97-CV-265. The appellants' briefs indicated that the university announced the creation of a women's varsity hockey team and athletic scholarships for the women's soccer team only after the female students had filed their lawsuits. Appellants' Reply Brief & Supplemental Addendum, at 3-4, *Grandson*, 272 F.3d at 568 (No. 99-1817) [hereinafter Appellants' Brief]. The plaintiffs' motion to amend the complaint had been denied. In light of the *Gebser* requirements, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), the students argued that actual notice of the Title IX discrimination came from students, women's groups and the university's own employees. Appellants' Brief at 10. The students, who sought creation of a women's varsity ice hockey team, stated, "Failure to address complaints of gender discrimination under Title IX until after a lawsuit has been filed is the very epitome of deliberate indifference." *Id.* at 13.

<sup>109</sup> *Grandson*, 272 F.3d at 568.

<sup>110</sup> *Id.* at 574.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 575.

official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."<sup>113</sup> The Eighth Circuit applied the *Gebser* standard arising from a Title IX sexual harassment lawsuit to a Title IX athletics equal opportunity lawsuit: "When an individual plaintiff such as Grandson claims money damages from a specific Title IX violation, such as failing to award her a soccer scholarship, *Gebser* requires prior notice to a university official with authority to address the complaint and a response demonstrating indifference to the alleged violation."<sup>114</sup> This appellate court specifically rejected any of the following actions as satisfying the notice requirement: the prior filing of an administrative complaint with the OCR;<sup>115</sup> the student's complaint to the director of UMD's Office of Equal Opportunity,<sup>116</sup> as this was after she had quit the women's varsity soccer team; and UMD's allegedly "[c]onsistently unequal expenditures for its men's and women's athletic teams[, which was not] sufficient evidence of the deliberate indifference required by *Gebser*."<sup>117</sup> The plaintiffs in *Grandson* unsuccessfully sought final appellate review by the Supreme Court.<sup>118</sup>

Despite many cases seeking certiorari, the Supreme Court has never reviewed a Title IX lawsuit challenging a transgression of

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<sup>113</sup> *Gebser*, 524 U.S. at 277.

<sup>114</sup> *Grandson*, 272 F.3d at 576. See also *Mercer v. Duke Univ.*, 181 F. Supp. 2d 525, 539–40 (M.D.N.C. 2001) (finding that female student-athlete had properly placed the university on notice).

<sup>115</sup> *Id.* at 575.

<sup>116</sup> See *id.* at 576.

<sup>117</sup> *Id.* Remarkably, female college students had been successful in all Title IX lawsuits initiated within the past thirty years except for this recent Eighth Circuit decision. *Grandson* appears to be the first post-*Gebser* decision to apply the standard articulated by the Supreme Court in a Title IX sexual harassment case where neither the statute nor implementing regulations mentioned sexual harassment, as opposed to traditional sex discrimination, as it involves separate athletic programs voluntarily provided by educational institutions. It remains to be seen whether requiring female students in non-sexual harassment cases to meet a standard imposed in Title IX sexual harassment cases is the proper analysis. Imposing the strict *Gebser* standard to equal opportunity matters will certainly prove a barrier to students seeking gender equity in athletic programs some thirty years after the statute's passage and where many schools have yet to achieve true equity for their female students despite the lengthy passage of time.

<sup>118</sup> 122 S. Ct. 1910 (2002).

equal opportunity in separate athletic programs provided to male and female student-athletes.<sup>119</sup> During 1999, critics asserted that Title IX (and by implication the effective accommodation test) constituted a quota system, but the Honorable Norma Cantu, Assistant Secretary of the OCR, emphatically argued that Title IX was not a quota system.<sup>120</sup>

A number of cases were settled involving female collegiate students. During November 1998, female students in *Seigler v. Presbyterian College*,<sup>121</sup> alleged unequal athletic opportunities and unequal distribution of athletic scholarships at the South Carolina college, where female students comprised 50% of the undergraduate population, but reflected a mere 22% as student-athletes, and received only 18% of athletic scholarships. The parties settled the lawsuit during 1999. The settlement is notable because it required the college to hire a women's softball coach with a salary within \$3,500 of that paid to the men's baseball coach, and because it required that the college not cut funding or facilities for the baseball team in order to implement equity for the softball team.<sup>122</sup>

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<sup>119</sup> See, e.g., *Cohen v. Brown Univ.*, 101 F.2d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993); *Kelley v. Bd. of Trs. of Univ. of Ill.*, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995).

<sup>120</sup> Norman V. Cantu, Letter to the Sports Editor, *College Athletics' Title IX Law Is Not a Quota System*, USA TODAY, July 22, 1999, at 14A (“[Title IX] is not a quota system. . . . Nothing in Title IX requires the cutting of men’s sports, and schools have viable alternatives for providing equal opportunity in athletics.”). See also Andrew Zimbalist, *Backlash Against Title IX: An End Run Around Female Athletes*, CHRON. HIGHER EDUC., Mar. 3, 2000, at B9 (“It is duplicitous for colleges and universities to accept the fruits of amateurism for men’s sports and then invoke business principles when it comes to financing women’s sports.”).

<sup>121</sup> No. 98-CV-3475 (D.S.C. filed Nov. 27, 1998).

<sup>122</sup> Settlement and Release Agreement, paras. 1, 18, *Seigler v. Presbyterian Coll.*, No. 98-CV-3475 (D.S.C. Nov. 16, 1999). Moreover, the college must provide over a period of years, at least as many scholarships in aggregate as the baseball team offers. *Id.* para. 13. The settlement details a number of factors concerning the facilities provided to the softball team, including the construction of permanent, stationary dugouts to accommodate seating for the entire softball team to be in place by January 1, 2000 (an extremely brief time-frame). *Id.* para. 3. It also requires the college not discriminate in the scheduling of any summer softball camps provided on-campus. *Id.* para. 2.

During April 1997, the New York district court approved the settlement establishing a women's varsity ice hockey team in *Bryant v. Colgate University*.<sup>123</sup> During 1997, the parties settled the lawsuit in *Carver v. St. Leo's College*,<sup>124</sup> which was brought on behalf of individual female varsity softball players seeking retention of their sport.

b) Interscholastic Athletics

During Title IX's history, there has been little legal addressing "equal opportunity" involving interscholastic athletics.<sup>125</sup> In *Horner v. Kentucky High School Athletic Ass'n*, the Sixth Circuit found that there was no evidence of discriminatory animus to support a Title IX claim that the failure of the school districts to provide fast-pitch softball for female high school students was discriminatory based on gender.<sup>126</sup> The Sixth Circuit, in this 2-1 decision, stated that to establish intentional discrimination the proponents must demonstrate evidence of discriminatory animus versus notice or deliberate indifference, which was used in prior Supreme Court sexual harassment decisions. The Sixth Circuit concluded, "Because of Plaintiffs' fundamental failure to establish a violation of Title IX, let alone an intentional violation, we need not adopt any test at this time."<sup>127</sup> The dissent strongly opposed this position stating, "I believe that, short of a defendant actually

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<sup>123</sup> No. 93-CV-1029, 1997 U.S. Dist. LEXIS 21518 (N.D.N.Y. Apr. 14, 1997) (outlining the proposed settlement). The following year, the court grappled with the issue of attorneys' fees. *Bryant v. Colgate Univ.*, 996 F. Supp. 170 (N.D.N.Y. 1998). See also Heckman, *supra* note 10, at 869.

<sup>124</sup> No. 96-CV-383 (M.D. Fla. settled May 22, 1997).

<sup>125</sup> *But see* *Fritson v. Minden Pub. Sch.*, No. 95-CV-3129 (D. Neb. 1995); *Liberty v. Holdrege Pub. Sch. Dist. No. 44*, No. 95-CV-3127 (D. Neb. 1995); *Praster v. N. Platte Sch. Dist.*, No. 95-CV-3128 (D. Neb. 1995); *Thomsen v. Fremont Pub. Sch. Dist. No. 1*, No. 95-CV-3124 (D. Neb. 1995). These four lawsuits were simultaneously filed on April 5, 1995, alleging unequal opportunities and benefits for female student-athletes, including the non-offering of interscholastic softball teams for the females. During 1996, the four cases settled with the establishment of girls' softball teams at the respective school districts.

<sup>126</sup> 206 F.3d 685, 696 (6th Cir. 2000).

<sup>127</sup> *Id.* at 692.

defying a court injunction, the ‘animus’ standard will almost never be met in a Title IX athletic-equity case.”<sup>128</sup> The dissent found:

[P]urported “unintentional” violations of Title IX are pervasive in our educational institutions even a quarter-century after the statute’s enactment. While much has changed for female athletes since the passage of Title IX, much remains the same . . . Because the “animus” standard ensures that Title IX defendants will be virtually impervious to a money judgment, they have little incentive to rectify any inequities in their athletic programs until judicially directed.<sup>129</sup>

On October 2, 1996, less than eight months after the institution of a lawsuit, the parties in *Randolph v. Owasso Independent School District*<sup>130</sup> agreed to a consent decree addressing the interscholastic sports program. On March 8, 1996, female student-athletes filed a complaint in *Bull v. Tulsa Public Schools*<sup>131</sup> alleging inequitable conditions fostered on them. Female high school student-athletes, who alleged sex discrimination against the Michigan High School Athletic Association, were questioning whether the defendant-association was a recipient of federal funds in *Communities for Equity v. Michigan High School Athletic Ass’n*.<sup>132</sup> In *Alston v. Virginia High School League*,<sup>133</sup> female students prevailed in their

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<sup>128</sup> *Id.* at 701 (Jones, J., dissenting).

<sup>129</sup> *Id.* (Jones, J., dissenting).

<sup>130</sup> No. 96-CV-0105 (N.D. Okla. Feb. 15, 1996).

<sup>131</sup> No. 96-CV-0180 (N.D. Okla. Mar. 8, 1996).

<sup>132</sup> 26 F. Supp. 2d 1001 (W.D. Mich. 1998). The defendant, MHSAA moved for summary judgment, arguing it is not subject to Title IX or a state actor for Constitutional purposes. The Clinton Administration’s Department of Justice filed an amicus brief against these positions. *See also* Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n, 80 F. Supp. 2d 729 (W.D. Mich. 2000) (addressing a number of motions by the parties, including whether a civil rights organization had standing to bring a Title IX lawsuit; whether the MHSAA, a state athletic association, was a proper party defendant; and whether certain named defendants, who were officials of the MHSAA could be sued in their individual capacity).

<sup>133</sup> 176 F.R.D. 220 (W.D. Va. 1997). The boys’ divisions (A, AA, and AAA) all played in the same season, but not so for all the girls’ divisions. The girls’ volleyball, basketball, and tennis teams played different seasons based on the school enrollment, while all boys’ teams were aligned regardless of the school size. *Alston v. Va. High Sch. League*, 184 F.R.D. 574, 576 (W.D. Va. 1997) (ruling a conflict of interest prevented the female student-athletes from being certified as a class). Ultimately, on July 20, 2000, each of the

lawsuit alleging that the state high school league violated Title IX with the seasonal placement scheduling of certain interscholastic sports for females, which differed from the boys' teams.

The next series of cases involving high schools in Brevard County, Florida, showcase the first Title IX decisions to examine in detail other benefits and opportunities provided to male student-athletes, but not female student-athletes as directed by the equal opportunity subsection.<sup>134</sup> Three decisions were rendered in *Daniels v. School Board of Brevard County*,<sup>135</sup> where female student-athletes contended discrimination due to alleged inequitable benefits and conditions provided to the girls' high school softball team as compared to the boys' baseball team including: inequities concerning the electronic scoreboards, batting cages, bleachers, signs, concession stand, press box, bathroom facilities and field lighting. In the November 25, 1997, decision, a Florida district court granted the female students a preliminary injunction and ordered the school board to propose a plan to rectify the alleged discrimination.<sup>136</sup> The preliminary injunction did not

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named female student-plaintiff were awarded \$17,000 by a Virginia jury. Vicari, *supra* note 18, at 15.

<sup>134</sup> See 34 C.F.R. § 106.41(c)(2)–(10) (2002). For an account of an interscholastic coach who filed a Title IX administrative complaint seeking equitable benefits for female student-athletes, see Johnette Howard, *Contested Terrain*, NEWSDAY (N.Y.), June 17, 2001 at C12–16. The girls' field hockey coach for over thirty-one years—and only female physical education teacher at the Centereach High School on Long Island, New York, for eighteen years—sought a team room for all female athletes similar to the 2,929-square-foot-facility provided to the boys; the girls' room measured 1,040 square feet. See *id.*

<sup>135</sup> 985 F. Supp. 1458 (M.D. Fla. 1997) (granting athletes' preliminary injunction and ordering the school board to propose a remedial plan) [hereinafter *Daniels I*]. See also *Daniels v. School Bd. of Brevard County, Fla.*, 995 F. Supp. 1394 (M.D. Fla. 1997) (rejecting the board's plan and granting a permanent injunction against the school board) [hereinafter *Daniels II*]; *Landow v. Sch. Bd. of Brevard County*, 132 F. Supp. 2d 958 (M.D. Fla. 2000) (noting that Landow became the new named plaintiff in the same class action).

<sup>136</sup> *Daniels I*, 985 F. Supp. at 1462. The School Board's plan centered predominantly on withholding or eliminating items from the boys' baseball team, rather than affording the girls' softball team certain items. See *Daniels II*, 995 F. Supp. at 1396. The court noted that the "School Board proposes not to spend any funds to remedy the inequities identified in the prior Order," other than the installation of lights for the girls' fields, which had previously been approved. *Id.* at 1395. However, if the lights were not installed, then the board proposed disallowing the lights for the boys' field. *Id.*

mandate the expenditure of an explicit amount of funds to rectify the inequities in the provision of the girls' softball team. In the December 23, 1997 decision, the court found that the terms of the preliminary injunction were proper.<sup>137</sup>

In *Landow v. School Board of Brevard County*,<sup>138</sup> once again the district court held that disparities between Brevard County's girls' softball program and the boys' baseball program violated Title IX. The girls did not have an available scoreboard, lighted field, a concession stand, or press box. The court noted that the "softball teams are forced to 'make do' by playing on fields that are built to the dimensions of a different sport: men's slow-pitch softball. This signals to the girls that they are not as important as the boys."<sup>139</sup> An interesting aspect of the decision was the pronouncement that "evidence concerning whether the girls' softball teams have the same ability as the boys' baseball teams to raise funds through gate admission fees, concession stand revenues, and sales of advertising signs, is immaterial."<sup>140</sup> The court found that the absence of batting cages and a lighted field for females violated the provisions of Title IX regarding equipment and supplies and the scheduling of games and practice times.<sup>141</sup> The court nevertheless found the "School Board is not obligated to ensure absolute parity in coaching ability."<sup>142</sup>

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<sup>137</sup> See *id.* at 1394 (M.D. Fla. 1997). The court identified that two class actions have been commenced concerning the lack of softball fields by other schools. See *id.* at 1397.

<sup>138</sup> 132 F. Supp. 2d 958 (M.D. Fla. 2001). In this class action lawsuit, the court analyzed Title IX on a county-wide basis versus a school-by-school basis. *Id.* at 962. The decision also mentioned a Florida statute governing gender equity, FLA. STAT. ch. 228.2001(2)(a) (2002) (tracking the Title IX regulation governing "equal opportunity" in athletics, 34 C.F.R. § 106.41(c)(1)–(10) (2002)).

<sup>139</sup> *Landow*, 132 F. Supp. 2d at 964. Thus, "the girls do not actually practice and play on true fast-pitch softball fields." *Id.* at 960.

<sup>140</sup> *Id.* at 962.

<sup>141</sup> See *id.* at 964.

<sup>142</sup> *Id.* See also *Landow v. Sch. Bd. of Brevard County*, No. 97-CV-1463, 2001 U.S. Dist. LEXIS 7155, at \*2 (M.D. Fla. Mar. 7, 2002) (approving the joint plan the parties submitted dated March 5, 2001, with new softball fields to be constructed at the two high schools).



### 3. Male Student-Athletes

During the 1990s, Title IX was decried across the country for being an anathema to retention of certain men's collegiate teams. Even Representative J. Dennis Hastert, the Speaker of the House of Representatives and a former wrestler, testified during Congressional hearings on the matter.<sup>143</sup> Nonetheless, antagonism with Title IX is not a new phenomenon. Since the Tower Amendment in 1974,<sup>144</sup> individuals have sought to pierce Title IX overall, or at least fillet the law when it comes to interfering with men's sports.<sup>145</sup> This issue of Title IX's applicability to men's sports, but especially men's intercollegiate athletics, has raised the most passion (and probably the most misinformation about what Title IX entails). There has been minimal recent legal action involving male student-athletes, who uniformly have sought to forestall their teams from elimination.<sup>146</sup> While certain men's non-revenue teams are sometimes slated for termination under the guise of achieving Title IX compliance, as previously indicated, it would be illuminative to ascertain the monies expended on the entire men's athletic department.<sup>147</sup> Universities continue to base elimination of men's intercollegiate teams on Title IX.<sup>148</sup>

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<sup>143</sup> See *Title IX of the Education Amendments of 1972: Hearing Before the Subcomm. on Postsecondary Educ., Training & Life-Long Learning, House Comm. on Econ. & Educ. Opportunities*, 104th Cong. 9–17 (1995) (testimony and prepared statement of Hon. J. Dennis Hastert).

<sup>144</sup> See Amend. 1343 to S. 1539, 93d Cong., 120 CONG. REC. 15322 (1974) (proposing to eliminate revenue-generating sports from Title IX calculation).

<sup>145</sup> See Heckman, *supra* note 3, at 11–12.

<sup>146</sup> See, e.g., *Gonyo v. Drake Univ.*, 837 F. Supp. 989 (S.D. Iowa 1994) (denying plaintiffs' motion for a preliminary injunction preventing the elimination of the men's wrestling team); *Kelley v. Bd. of Trs. of Univ. of Ill.*, 832 F. Supp. 237 (C.D. Ill. 1993) (finding no Title IX violation where members of the men's swimming team sought relief from having their team eliminated), *aff'd*, 35 F.3d 265 (7th Cir. 1994); *Cooper v. Peterson*, 626 N.Y.S.2d 432 (N.Y. Sup. Ct. 1995) (granting St. Lawrence University's motion to dismiss the action brought by members of the men's wrestling team, which was slated for elimination); Heckman, *supra* note 25, at 421 n.142.

<sup>147</sup> See Heckman, *supra* note 67, at 997. The increasing escalation of costs spent on men's athletic programs continues to raise ire. *The New York Times* reported the University of Oregon purportedly spent \$250,000 on a "seven-story-high billboard near Madison Square Garden to promote its quarterback for the Heisman Trophy." Jodi Wilgoren, *Spiraling Sports Budgets Draw Fire from Faculties*, N.Y. TIMES, July 29, 2001, at 12. Recently, CBS signed a \$6.2 billion, eleven-year television contract to telecast the NCAA men's basketball tournament. See Janis Carr, *Are You Ready for*

Men's intercollegiate wrestling teams have been particularly battered. Nonetheless, the Sixth, Seventh, Eighth, and Ninth Circuits found no Title IX violation in cases commenced by male intercollegiate student-athletes. In *Harper v. Board of Regents of Illinois State University*,<sup>149</sup> members of the men's soccer and wrestling teams commenced a lawsuit in 1995 seeking retention of their teams. The district court granted in part and denied in part the defendant's motion to dismiss the second amended complaint, including the sustaining of the Title IX cause of action, but only against the university and the Board of Regents.<sup>150</sup> On appeal, the Seventh Circuit rejected the male athletes' stance that Title IX was violated, incorporating the prior Seventh Circuit decision in *Kelley v. Board of Regents of the University of Illinois*,<sup>151</sup> which dealt with the elimination of the men's swimming team, stating:

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*Some . . . Lacrosse?: Colleges—The National Collegiate Sports Network Plans to Spotlight Non-Major Sports*, ORANGE COUNTY REG., Oct. 31, 2002, at A1. The deal does not call for CBS to televise any of the women's tournament games, not even the final championship game. The latest installment of the Knight Foundation's Commission on Intercollegiate Athletics decried the escalation of costs and advised that colleges should put a stop to the increasing commercialization of intercollegiate athletics. The commission's report also commented on Title IX, recommending that universities ensure compliance, stating, the "legitimate and long-overdue need to support women's athletic programs and comply with Title IX is not used as an excuse for soaring costs while expenses in big time sports are unchecked." Knight Commission on Intercollegiate Athletics, *A Call to Action: Reconnecting College Sports and Higher Education*, 2001 REP. KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS 27, [http://www.knightfdn.org/downloads/pdf/KCfinal\\_06-2001.pdf](http://www.knightfdn.org/downloads/pdf/KCfinal_06-2001.pdf). See also Donna Lopiano, *The Real Culprit in the Cutting of Men's Olympic Sports*, Women's Sports Foundation, at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/opin/article.html?record=776> (May 10, 2001) (Lopiano, former women's athletic director at University of Texas, and Executive Director of the Women's Sports Foundation, enumerated specific instances of spending of men's teams. For example, "Following a football season in which a football team won seven games, the head coach treated his entire staff and their wives to a trip to the Bahamas.").

<sup>148</sup> See, e.g., Joe Schad, *Providence 9 Tells Schools: Take That!*, NEWSDAY (N.Y.), May 24, 1999, at A38 (Providence College, a member of the Big East Conference, apparently decided to drop the men's baseball team due to Title IX. "Providence administrators . . . said they had no choice but to drop the three men's programs because the university's enrollment is 58 percent female but females make up only 48 percent of the school's athletes.").

<sup>149</sup> 35 F. Supp. 2d 1118 (C.D. Ill. 1999), *aff'd sub nom.* Boulahanis v. Bd. of Regents of Ill. State Univ., 198 F.3d 633 (7th Cir. 1999).

<sup>150</sup> *Id.*

<sup>151</sup> 35 F.3d 265 (7th Cir. 1994).

In short, the plaintiffs-appellants attempt to draw a distinction between decisions in which sex is a consideration (as in *Kelley*) and decisions in which sex serves as the motivating factor (as in the present case).

We are not persuaded by the plaintiffs-appellants' attempt to distinguish decisions to eliminate athletic programs motivated by financial concerns from those based on considerations of sex. That distinction ignores the fact that a university's decision as to which athletic programs to offer necessarily entails budgetary considerations. For universities, decisions about cutting or adding athletic programs are based on a consideration of many factors including: the total size of the athletic department, which is governed by budgetary considerations, and the distribution of programs among men and women, which is governed by Title IX concerns. To say that one decision is financial, while another is sex-based, assumes that these two aspects can be neatly separated. They cannot. Absent financial concerns, Illinois State University presumably would rather have added women's programs while keeping its men's programs intact. Similarly, in the absence of Title IX concerns, the University of Illinois in *Kelley* would have cut both its men's and women's swimming programs in order to save money. Ultimately, both the decision of the University in this case and the decision of the University of Illinois at issue in *Kelley* were based on a combination of financial and sex-based concerns that are not easily distinguished.<sup>152</sup>

Application of the first prong of the three-part effective accommodation test was at issue in the next case, also brought by male wrestlers, where the district court had eschewed application of the substantial proportionality comparison found in the first prong. On December 15, 1999, the Ninth Circuit in *Neal v. Board of Trustees of the California State Universities*,<sup>153</sup> reversed the

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<sup>152</sup> *Boulahanis*, 198 F.3d at 637.

<sup>153</sup> 198 F.3d 763 (9th Cir. 2000).

California district court's refusal to provide the first prong with "safe harbor" status.<sup>154</sup>

Male wrestlers were not successful in maintaining their team in *Chalenor v. University of North Dakota*,<sup>155</sup> despite the fact that there were sufficient funds. Male students were overwhelmingly represented as student-athletes at this state university, and thus met the first prong of the effective accommodation test.

In *Miami University Wrestling Club v. Miami University*,<sup>156</sup> male wrestlers at this university located in Ohio were unsuccessful in pursuing a complaint alleging violation of the Fourteenth Amendment Equal Protection Clause and Title IX to retain their team. On March 24, 2000, the Ohio district court dismissed the Title IX action against both the university and individually-named defendants and also dismissed the equal protection claim against the university. On January 24, 2001, the court dismissed the equal protection claims asserted against the individually-named defendants and denied the wrestlers' motion for reconsideration of the court's rejection of their Title IX claim against the university.

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<sup>154</sup> *Id.* at 768.

<sup>155</sup> 142 F. Supp. 2d 1154 (D.N.D. 2000), *aff'd*, 291 F.3d 1042 (8th Cir. 2002). The Eighth Circuit was the first circuit court to address the January 16, 1996 letter of Assistant Secretary Cantu indicating that "an institution can choose which part of the test it plans to meet." *Chalenor*, 291 F.3d at 1045. The court further stated that "a public university cannot avoid its legal obligations by substituting funds from private sources for funds from tax revenues. Once a university receives a monetary donation the fund becomes public money, subject to Title IX's legal obligations in their disbursement." *Id.* at 1048. The Eighth Circuit has yet to rule on application of the three-prong effective accommodation test. In this decision, while the appellate court indicated that the 1979 policy interpretation should be accorded a "controlling deference," *id.* at 1047, it nonetheless withheld its judicial imprimatur stating, "The validity of the interpretation was not put in question before the District Court, so the Court relied, as it was supposed to, on that interpretation. As we are not presented with that issue here, consideration of it will have to await another day." *Id.* The Eighth Circuit also did not reach application of the policy interpretation in *Grandson v. University of Minnesota*, 272 F.3d 568 (8th Cir. 2001), due to the court's determination that the plaintiff failed to satisfy a notice requirement.

<sup>156</sup> 195 F. Supp. 2d 1010 (S.D. Ohio 2001), *aff'd*, 802 F.3d 608 (6th Cir. 2002). The men's wrestling, tennis, and soccer teams were slated for elimination. The university indicated that elimination of the three men's teams was being done to comply with Title IX. During 1999, the school agreed to provide the male wrestlers with athletic scholarships during the tenure. The Center for Individual Rights represented the plaintiffs. *Id.*

In addressing classifications based on gender pursuant to the Fourteenth Amendment, the court noted:

The objective explicitly underlying both Title IX and the challenged actions of the individual Defendants herein is the elimination of the effects of past discrimination against women in publicly funded athletic programs, particularly those administered by public educational institutions. That objective is borne out in the legislative history of Title IX and in the unequivocal evidence of record in this matter.<sup>157</sup>

On the motion for reconsideration as to the Title IX claim, the court stated:

The [Sixth Circuit] Court of Appeals noted in its *Horner II* decision that Title IX does not require strict gender parity but rather the equal accommodation of interest by male and female students in athletic participation and opportunities . . . [T]o state a claim under Title IX, . . . a plaintiff must allege that an institution receiving public funding has failed to provide equal athletic opportunities by gender . . . Plaintiffs make no such allegation.<sup>158</sup>

Thus, the court found that even if it had relied to some extent on the policy interpretation to support its earlier determination, the failure by the plaintiffs to properly advance a prima facie Title IX claim rendered the claim ultimately defective.<sup>159</sup> The court emphasized, “Equal accommodation of the athletic abilities and interests of the sexes ought to be the ultimate objective of any program or policy related to athletic opportunities at publicly funded institutions.”<sup>160</sup> The court also found that, “Calculations of relative interest in athletic participation will often be skewed by imbalances in the number of students recruited to the institution specifically for their athletic ability and interest.”<sup>161</sup>

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<sup>157</sup> *Id.* at 1016.

<sup>158</sup> *Id.* at 1018.

<sup>159</sup> *See id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 1019. The court continued, the “most obvious method of accounting for the skewing effect of an imbalance caused by disparities in opportunities currently available is to provide equal opportunities on the basis of numerical proportionality and then to

During January of 2002, in *National Wrestling Coaches Ass'n v. Department of Education*,<sup>162</sup> members of various collegiate wrestling associations commenced a lawsuit against the Department of Education challenging that the Title IX regulations, specifically the two governing athletics, and the 1979 Policy Interpretation, which yields the “effective accommodation test” were not properly approved by the President in violation of section 902 of the statute.<sup>163</sup>

### C. Athletic Scholarships

Another section of the Title IX Regulations instructs on the provision of athletic scholarships. 34 C.F.R. § 106.37(c), states:

- (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.
- (2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.<sup>164</sup>

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consider lingering interest among non-participating students when making future decisions regarding the provision of athletic opportunities.” *Id.*

<sup>162</sup> No. 02-CV-00072 (D.D.C. filed Jan. 16, 2002). The Department of Education subsequently filed a motion to dismiss, which was scheduled for submission during June 2002.

<sup>163</sup> See 20 U.S.C. § 1682 (2000):

Each Federal department and agency which is empowered to extend Federal financial assistance to any educational program or activity . . . is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general application which shall be consistent with achievement of the objectives of the statute . . . . No such rule, regulation, or order shall become effective unless and until approved by the President.

*Id.*

<sup>164</sup> 34 C.F.R. § 106.37(c) (2002).

During Title IX's first twenty-five years, there has been only one judicial decision concerning the application of this regulation with the distribution of athletic scholarships by educational institutions.<sup>165</sup> Male wrestlers unsuccessfully sought judicial intervention to prohibit the reduction of certain scholarships for their sport in *Neal v. Board of Trustees of the California State Universities*.<sup>166</sup> While not dealing with the required distribution of athletic scholarships, in *Beasley v. Alabama State University*,<sup>167</sup> a female volleyball player alleged Title IX discrimination for being mistreated for an injury which resulted in the revocation of her athletic scholarship. Significantly, during 1998, the OCR informed its constituency that a one percent differential between the percentage of athletes of one sex and the percentage of athletic scholarships—or one scholarship differential—will be tolerated.<sup>168</sup> One counsel commented, “The failure of the NCAA and OCR to cooperate in developing a realistic mechanism for accommodating institutional efforts in achieving gender-equity in scholarships is puzzling and disturbing.”<sup>169</sup>

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<sup>165</sup> See *Gonyo v. Drake Univ.*, 879 F. Supp. 1000 (S.D. Iowa 1995) (granting the university's motion for summary judgment); *Gonyo v. Drake Univ.*, 837 F. Supp. 989 (S.D. Iowa 1994) (denying plaintiffs' motion for a preliminary injunction which sought the prevention of the university's intention to eliminate the men's wrestling team).

<sup>166</sup> 198 F.3d 763 (9th Cir. 1999). See also Brian A. Snow, *Broadening the Demand for Gender-Equity in Athletics: Financial Aid and Coaches' Compensation*, 130 EDUC. L. REP. 965, 967 n.9 (1999) (The court issued a temporary restraining order—which was vacated on appeal—on the wrestlers' behalf that would prevent the university from trimming the number of athletic scholarships for this male team. Mr. Snow was counsel to Colorado State University in *Roberts v. Colorado State University*, 998 F.2d 824 (10th Cir. 1993).).

<sup>167</sup> 966 F. Supp. 1117 (M.D. Ala. 1997) (concerning application of the statute of limitations). The court reported Beasley's claims that she was recruited to play volleyball at the state university with a promise of an athletic scholarship, which did not materialize during her freshman year due to a lack of allocated funds for this team, and, secondarily, while playing volleyball she suffered a foot injury, which she alleged that the school declined to provide financial coverage for until a few years later. See *id.* at 1121; *Beasley v. Ala. State Univ.*, 3 F. Supp. 2d 1304 (M.D. Ala. 1998) (providing an additional exposition on the issue of application of the statute of limitations).

<sup>168</sup> The 1999–00 NCAA GENDER-EQUITY REPORT, *supra* note 49, tbl. 7, at 20, found male student-athletes received 57% (\$1,411,400) of athletic scholarships, compared to 43% (\$1,055,500) awarded to female student-athletes, at Division I programs overall.

<sup>169</sup> See Snow, *supra* note 166, at 977.

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## III. EQUAL OPPORTUNITY IN ATHLETIC EMPLOYMENT

When sex discrimination occurs in the employment context, the question arises: Under what federal statutes can the relief be sought? Title VII of the Civil Rights Act of 1964 (hereinafter “Title VII”)<sup>170</sup> prohibits sex discrimination in the terms and conditions of employment, and is applicable to most public and private employers, including educational employers. The critical language of Title VII directs:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . .<sup>171</sup>

The Equal Pay Act of 1963 (hereinafter “Equal Pay Act”),<sup>172</sup> which also covers educational employees, governs the issue of compensation. The statute imposes equal pay “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .”<sup>173</sup> Whether educational employees may also pursue a claim of sex discrimination via Title IX is an issue which came to the forefront in the 1990s, and presently remains unresolved.

*A. Educational Employment Generally*

The pivotal question is whether any educational employee may assert a Title IX cause of action or whether they must pursue an

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<sup>170</sup> 42 U.S.C. § 2000e-2(a)(1) (2000). *See also* Diane Heckman, *Lowrey v. Texas A&M University System: Title IX Vis-à-Vis Title VII Sex Discrimination in Educational Institutions*, 124 EDUC. L. REP. 753 (1998); Heckman, *supra* note 34, at 592–614.

<sup>171</sup> 42 U.S.C. § 2000e-2(a)(1). *See also, e.g.*, *Fuhr v. Sch. Dist. of the City of Hazel Park*, 131 F. Supp. 2d 947 (E.D. Mich. 2001) (concluding an issue of fact existed in this Title VII action as to whether the failure to promote the current girls’ basketball coach, a female, as the boys’ basketball coach was based on sex discrimination). *See generally* *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999) (deciding when punitive damages may be awarded in a Title VII action as a result of the Civil Rights Act of 1991).

<sup>172</sup> 29 U.S.C. § 206(d), (d)(1) (2000).

<sup>173</sup> *Id.*



action under either the Equal Pay Act or Title VII. When allegations of sex discrimination by educational employees are raised, conflicting judicial decisions have yielded the following array of options: (a) there is no Title IX cause of action for sex discrimination; (b) there is a Title IX cause of action; (c) there is only a Title IX cause of action for employment claims of retaliation; (d) there is no Title IX cause of action for employment claims of retaliation; (e) Title VII standards will be applied when a Title IX cause of action is alleged; (f) Title VI of the Civil Rights Act of 1964 (hereinafter "Title VI")<sup>174</sup> standards will be applied; or (g) Title IX standards will be applied. An anomalous situation has arisen where educational employees assert Title IX sex discrimination, depending on whether the individual is a regular employee or an athletic employee. Courts have been more willing to find a Title IX cause of action brought by athletic department employees than in cases brought by non-athletic employees. Between 1995 and 1996, the Fifth, Sixth, Seventh, and Eighth Circuits all ruled on this issue involving non-athletic department employees, in, respectively: *Lakoski v. James*,<sup>175</sup> *Ivan v. Kent State*

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<sup>174</sup> 42 U.S.C. § 2000d-6(a) (prohibiting discrimination on the basis of race in certain public places, such as educational institutions).

<sup>175</sup> 66 F.3d 751 (5th Cir. 1995). The Fifth Circuit rejected claim by the female medical professor, who was denied tenure, that Title IX provided a private cause of action for sex discrimination. The Fifth Circuit stated:

We are not persuaded that Congress intended that Title IX offer a bypass of the remedial process of Title VII. We hold that Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions. We limit our holding to individuals seeking money damages under Title IX directly or derivatively through Section 1983 for employment practices for which Title VII provides a remedy, expressing no opinion whether Title VII excludes suits seeking only declaratory or injunctive relief.

*Id.* at 753. It amplified that:

Given the availability of a private remedy under Title VII for aggrieved employees, we are unwilling to follow Dr. Lakoski's beguilingly simple syllogism that *Cannon*, *Bell*, and *Franklin* all add up to an implied private right of action for damages under employment discrimination. Doing so would disrupt a carefully balanced remedial scheme for redressing employment discrimination by employers such as the University of Texas Medical Branch.

*Id.* at 754. The appellate court cited the Department of Justice regulations for investigation of Title IX employment discrimination, 28 C.F.R. § 42.604 (1994), and the Equal Employment Opportunity Commission [EEOC] regulations, which adopt an

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*University*,<sup>176</sup> *Waid v. Merrill Area Public Schools*,<sup>177</sup> and *Brine v. University of Iowa*.<sup>178</sup> Recent decisions have yielded mixed results. In 1997, the Supreme Court denied certiorari in *Holt v. Lewis*<sup>179</sup> and *Brine v. University of Iowa*.<sup>180</sup>

Sandra Musso alleged that the defendant-university demoted her and then refused to renew her contract as Director of Sports Facilities because of her sex in *Musso v. University of Minnesota*.<sup>181</sup> In 1980, the university entered into a consent decree that governed sex discrimination claims brought by female academic employees.<sup>182</sup> The district court found the university's actions were not the result of sex-based discrimination.<sup>183</sup> The Eighth Circuit affirmed that result, but reversed the district court's determination as to a retaliation claim, remanding this issue back to the district court with instructions to dismiss that claim.<sup>184</sup>

The Sixth Circuit relied on Title VII to determine the unequal pay claim advanced via Title IX in *Buntin v. Breathitt County Board of Education*.<sup>185</sup> In this case, the female former Director of Pupil Personnel alleged she was paid less than her male predecessor in violation of Title IX. The court reversed a previous grant of judgment as a matter of law in favor of the employer since

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identical view of Title IX's scope, 29 C.F.R. § 1691.4 (1994). *Id.* at 757. See also Heckman, *supra* note 170, at 755–58.

<sup>176</sup> No. 94-4090, 1996 U.S. App. LEXIS 22269 (6th Cir. filed July 26, 1996) (affirming a grant of summary judgment for a university advisor and supervisor against a student's gender discrimination claim of Title VII and Title IX violations based on her pregnancy and later childbirth).

<sup>177</sup> 91 F.3d 857 (7th Cir. 1996) (holding that a teacher who previously prevailed on a state employment discrimination claim was not precluded from seeking additional remedies against appellee school system under Title IX).

<sup>178</sup> 90 F.3d 271 (8th Cir. 1996) (reversing the lower court's judgment for plaintiff faculty members based on a failure to prove a causal connection between their allegations of sex discrimination and defendant university's closing of its dental hygiene program).

<sup>179</sup> 522 U.S. 817 (1997).

<sup>180</sup> 519 U.S. 1149 (1997).

<sup>181</sup> 105 F.3d 409 (8th Cir. 1997).

<sup>182</sup> *Id.* at 440.

<sup>183</sup> *Id.* at 441.

<sup>184</sup> *Id.*

<sup>185</sup> 134 F.3d 796 (6th Cir. 1998).

the plaintiff employee had met her prima facie burden of demonstrating employment discrimination.<sup>186</sup>

In *Carter v. Cornell University*,<sup>187</sup> a black female employed as a senior administrative secretary at Cornell University Medical Center alleged sex discrimination and racial discrimination due to poor evaluations she received. On September 4, 1997, the New York district court ruled that it would apply Title VII standards to her Title IX claim. “However, because plaintiff has raised Title IX claims dealing with sex discrimination and because Title IX adopts Title VII substantive standards . . . the court deals with both gender and race discrimination under Title VII.”<sup>188</sup> The court also noted that “the Second Circuit has held that Title VII standards are to be applied in interpreting Title IX . . . .”<sup>189</sup> Thus, the district court did “[n]ot reach the question of whether Title IX extends to employees involved in federally funded educational programs.”<sup>190</sup> The following year, the same New York district court ruled, in *Burrell v. City University of New York*,<sup>191</sup> that Title IX did not provide a university employee with a private right of action for sex

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<sup>186</sup> *Id.* at 799.

<sup>187</sup> 976 F. Supp. 224 (S.D.N.Y. 1997), *aff'd*, No. 97-CV-9180, 1998 U.S. App. LEXIS 18807 (2d Cir. July 9, 1998).

<sup>188</sup> *Id.* at 229 n.2.

<sup>189</sup> *Id.* at 232, *citing* *Torres v. Pisano*, 116 F.3d 625, 630 n.3 (2d Cir. 1997), *and* *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 248 (2d Cir. 1995). *See also* *Weinstock v. Columbia Univ.*, No. 95-CV-569, 1999 WL 549006 (S.D.N.Y. July 28, 1999), *aff'd*, 224 F.3d 33 (2d Cir. 2000).

<sup>190</sup> *Id.* at 232. *Compare* *Lakoski v. James*, 66 F.3d 751, 754 (5th Cir. 1995) (refusing to find a Title IX cause of action given the availability of Title VII for aggrieved employees), *with* *Henschke v. New York Hospital-Cornell Medical Center*, 821 F. Supp. 166, 171–73 (S.D.N.Y. 1993) (holding that a private right of action exists under Title IX for employees of federally funded educational programs).

<sup>191</sup> 995 F. Supp. 398 (S.D.N.Y. 1998). *See also* *Weinstock*, 1999 WL 549006, at \*1. The district court granted the university’s motion for summary judgment as to Title VII and Title IX causes of action by a female Ph.D. assistant professor in the chemistry department at Barnard College, a part of Columbia University. She had alleged that she was denied tenure due to sex discrimination. As to the Title IX claim, herein the court would apply the same standards as with the three-prong burden-shifting analysis used with Title VII cases. *Id.* at \*7. *See* *Gillen v. Borough of Manhattan Cmty. Coll.*, 1999 WL 221105 (S.D.N.Y. Apr. 14, 1999), in a case brought by a female adjunct lecturer, who alleged Title IX sexual harassment, the same district court in this earlier opinion, stated, “[t]he provisions of Title IX have been construed to prohibit gender discrimination against students and employees in educational institutions that receive federal funding.” *Id.* at \*2.

discrimination. The *Burrell* court held that “the remedies of Title IX are limited to student plaintiffs, and Title VII is meant to offer the exclusive remedy for employment discrimination based on sex.”<sup>192</sup>

In *Cooper v. Gustavus Adolphus College*,<sup>193</sup> a Minnesota district court found, “There is no private cause of action for damages available to a college employee under Title IX for sex discrimination.”<sup>194</sup>

### B. Hiring

There continues to be a scarcity of cases contesting hiring opportunities for female coaches or athletic positions in education, despite the paucity of women coaching men’s teams or being hired as athletic directors. During Spring 2002, former professors R. Vivian Acosta and Linda Jean Carpenter issued an installment of their comprehensive study of women in intercollegiate sport involved with the NCAA.<sup>195</sup> The study illustrated an overall downward trend for women in athletic employment positions. It found the following: first, it showed that overall only 17.9% of head athletic directors of women’s programs are women.<sup>196</sup> Women hold the top athletic director positions of women’s programs at 8.4% of Division I, 16.1% of Division II, and 27.6%

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<sup>192</sup> *Burrell*, 995 F. Supp. at 408.

<sup>193</sup> 957 F. Supp. 191 (D. Minn. 1997).

<sup>194</sup> *Id.* at 193. See also Heckman, *supra* note 170, at 760 n.48.

<sup>195</sup> See R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT: LONGITUDINAL STUDY—TWENTY-FIVE YEAR UPDATE: 1977–2002, at 2 (2002), available at [http://www.womenssportsfoundation.org/binary-data/WSF\\_ARTICLE/pdf\\_file/906.pdf](http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/906.pdf). The actual number of women being head coaches of men’s teams at Division I schools is abominable some thirty years after Title IX’s passage. The few women indicated as head coaches were in the sports of golf (one full-time) and track and field/cross country (five full-time). See 1999–00 NCAA GENDER-EQUITY REPORT, *supra* note 49, tbl. 2A, at 13. The few women indicated as assistant coaches were in the sports of soccer (one full-time), swimming/diving (one full-time), track and field/cross country (six full-time) and other sports (one full-time). See *id.*, tbl. 2B, at 14. This study does not provide the percentage statistics for the NCAA overall or a breakdown of the percentages for the respective divisions. See *id.*; *infra* note 204 (concerning the salaries accorded the coaches of the men’s versus women’s teams).

<sup>196</sup> ACOSTA & CARPENTER, *supra* note 195, at 16. This represents a decrease from 17.8% in 2000. *Id.* In 1998, 19.4% of women’s programs were directed by females, an increase from 18.5% in 1996. *Id.*

of Division III schools.<sup>197</sup> In 1998, only thirty women were the head athletic directors of Division I women's athletic programs.<sup>198</sup>

The study also found that only 44% of coaches of women's teams of NCAA programs overall are females, down from 47.7% in 1996.<sup>199</sup> This represents the lowest percentage compiled for that statistic. The 2002 figures disclosed that women comprise head coaches as follows: 45.1% at the Division I level, 38.9% at Division II, and 45.6% at Division III.<sup>200</sup> Conversely, the "percentage of females among the coaching ranks of men's athletics remains under 2% as it has been for at least the last three decades,"<sup>201</sup> while 55.5% of all assistant coaching positions of women's teams are female.<sup>202</sup> Further, only 12.3% have women serving as the full-time sports information directors and 27.8% of head athletic trainers are women.<sup>203</sup>

### C. Equal Pay

During 1998, a *Chronicle of Higher Education* survey found, "At the median institution for men's [NCAA intercollegiate] head coaches, their average salary was \$54,800. At the median institution for women's head coaches, their average salary was \$39,400. However, men's coaches made 43% more than women's coaches at the median institution."<sup>204</sup> The 2001 Knight

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 17.

<sup>199</sup> *Id.* at 10.

<sup>200</sup> *Id.* at 9. The overall figure shows a decline from women comprising 48.3% in 1992, 52.4% in 1982 and more than 90% in 1972 (when it was customary to have the same-sex coach for the sports teams). *Id.* at 10.

<sup>201</sup> *Id.* at 2.

<sup>202</sup> *Id.* at 14. This demonstrates another decrease from 2000 figures: 59.8% of all assistant coaching positions of women's teams are female; with 62% at Division I, 54.5% at Division II, and 59.3% at Division III. *Id.*

<sup>203</sup> *Id.* at 18.

<sup>204</sup> Jim Naughton, *Salaries of Head Coaches Are Rising, Survey Shows: Men and Women are Both Gaining, but a Gender Gap Persists*, CHRON. HIGHER EDUC., May 1, 1998, at A55. Coaches of women's teams are still lagging behind in salaries. At Division I, the average institutional expense for salaries for coaches of men's teams was \$484,900 (59%), while the average institutional expense for salaries for coaches of women's teams was \$330,500 (41%). 1999-00 NCAA GENDER-EQUITY REPORT, *supra* note 49, tbl. 7, at 20. For assistant coaches, the average institutional expense for salaries

Commission Report cautioned against the escalation in athletics costs and stated, "A glaring symptom of the arms race run amok is the salaries of the so-called 'star' coaches. At last count, some 30 [men's] college football and men's basketball coaches are paid a million dollars or more a year. A few are nearing twice that, or are already there."<sup>205</sup> Coaches of female teams are uniformly absent from that extremely well-paid pantheon. The issue of equal pay will be more roundly discussed in the cases involving termination of athletic positions. There was no case law during this period involving female athletic employees who, while employed, alleged Title IX violations on the issue of unequal pay compared to male athletic employees.

#### *D. Termination*

One of the most contested issues in Title IX jurisprudence today is whether female coaches, female athletic employees or coaches of female teams have been discriminated against when they are terminated or not promoted.<sup>206</sup> These cases routinely include allegations of retaliation.<sup>207</sup>

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for coaches of men's teams was \$580,100 (72%), while the average institutional expense for salaries for assistant coaches of women's teams was \$231,000 (28%). *Id.* tbl. 7, at 20.

At Division I overall, the highest paid head coaches are the football coaches with an average salary of \$177,200. The average salary for coaches of men's basketball teams compared to coaches of women's basketball teams is \$149,700 to \$91,300. Coaches of men's baseball teams receive an average salary of \$55,400 compared to coaches of women's softball teams with an average salary of \$38,900. There is a startling discrepancy in salary for the sport of ice hockey, where coaches of the men's teams average \$94,000 compared to only \$43,600 for coaches of women's teams. There is almost parity in soccer, where the coaches of the men's team average \$42,500 compared to \$40,300 for the coaches of the women's teams. *Id.* tbl. 5A, at 17.

The figures become more glaring when examining the high-profile Division I-A universities and colleges, where the average compensation for football coaches is \$267,000. The next highest-paid coaches are the coaches of the men's basketball teams with average salaries of \$216,400, compared to only \$130,600 for coaches of women's teams. The average institutional salary for coaches of the baseball teams is \$77,500 compared to \$53,500 for softball teams. Parity is represented in soccer with \$49,200 for the men's teams compared to \$49,900 for the women's teams. *Id.* tbl. 5A, at 29.

<sup>205</sup> Knight Commission on Intercollegiate Athletics, *supra* note 147, at 18.

<sup>206</sup> See Heckman, *supra* note 25, at 421-22 n.143 (listing the numerous lawsuits commenced).

<sup>207</sup> See *infra* Part III.E.

1. *Lowrey v. Texas A&M University System*

In *Lowrey v. Texas A&M University System*,<sup>208</sup> a female athletic employee alleged retaliation and sex discrimination under Title IX and state laws because she was not named athletic director and was demoted from the women's athletic coordinator position at Tarleton University, which is part of the Texas A&M University System.<sup>209</sup> The district court dismissed the complaint in its entirety.<sup>210</sup> On appeal, the Fifth Circuit Court found that there was no Title IX private discrimination cause of action for a female coach at a post-secondary institution<sup>211</sup> but allowed the claim for retaliation.<sup>212</sup>

On remand, the district court denied in part and granted in part defendants' amended motion for summary judgment.<sup>213</sup> First, the court denied the defendants' motion as to the Equal Pay Act and Title VII claims of discrimination in pay.<sup>214</sup> The court stressed that discriminatory intent is not required for a prima facie case under the Equal Pay Act, unlike for Title VII.<sup>215</sup> Secondly, the court held that although Lowrey could compare her salary to that of the male men's athletics coordinator she could not compare her pay to the female women's athletic coordinator. "The Equal Pay Act only prohibits pay differences between members of the opposite sex,"<sup>216</sup> the court instructed. However, the court denied summary judgment since an issue of fact existed as to whether the plaintiff received adequate, equal pay for her work as the Athletics Coordinator.<sup>217</sup> The court found:

The evidence . . . shows that Johnson [(the men's athletics coordinator)], who held a quasi-administrative position, received \$9,062 from the Athletics Administration Budget,

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<sup>208</sup> 117 F.3d 242 (5th Cir. 1997).

<sup>209</sup> *Id.* at 244.

<sup>210</sup> *Id.* at 245.

<sup>211</sup> *Id.* at 251.

<sup>212</sup> *Id.* at 252. *See also* Heckman, *supra* note 170, at 760–62 (analyzing the Fifth Circuit's ruling).

<sup>213</sup> *Lowrey v. Tex. A&M Univ. Sys.*, 11 F. Supp. 2d 895 (S.D. Tex. 1998).

<sup>214</sup> *Id.* at 909.

<sup>215</sup> *Id.* at 906.

<sup>216</sup> *Id.* at 907.

<sup>217</sup> *See id.* at 908.

while Lowrey, who held a similar quasi-administrative position, received nothing from the Athletics Administration Budget. Moreover, Johnson's overall salary increased by \$5,430 after he assumed the positions of Men's Athletics Coordinator and NCAA Compliance Coordinator while Lowrey's salary did not rise at all when she assumed the official position of Women's Athletics Coordinator.<sup>218</sup>

The court added, "None of Lowrey's salary came out of the Athletics Administration Budget; it all came out of the women's basketball and physical education budgets."<sup>219</sup>

Next, the court analyzed the plaintiff's Title VII and Title IX claims separately. Under Title VII, the retaliatory action must affect the ultimate employment decision concerning five actions: hiring, granting leave, discharge, promotion, or compensation.<sup>220</sup> "Demotion is the opposite of promotion [thus] . . . Lowrey's removal from the position [as Women's Athletics Coordinator] was an adverse employment action."<sup>221</sup> The court, therefore, denied defendants' motion to dismiss the Title VII claim. Concerning Title IX, the court stated, "While the *Lowrey I* court held that Title IX implies a retaliation claim, the court did not address what substantive legal standards apply to such a claim."<sup>222</sup> The court found that the Title IX retaliation claim "is best analyzed under the standard *Burdine-McDonnell Douglas* burden-shifting scheme for employment discrimination claims."<sup>223</sup> Thus, the court would apply a modified Title VII approach to the Title IX retaliation claim.<sup>224</sup> In critical language, the court stated, "Because a Title IX retaliation claim only covers conduct protected by Title IX, a plaintiff may only recover under Title IX when the defendant retaliated against her 'solely as a consequence of complaints

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 909.

<sup>220</sup> *See id.* at 910.

<sup>221</sup> *Id.* at 907.

<sup>222</sup> *Id.* at 911.

<sup>223</sup> *Id.* *But see* 34 C.F.R. § 106.71 (2002) ("[T]itle VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference.").

<sup>224</sup> *See Lowrey*, 11 F. Supp. 2d at 911; Naughton, *supra* note 204.



alleging noncompliance with the substantive provisions of Title IX.”<sup>225</sup> Moreover, “[r]etaliatio[n] claims brought under Title IX protect against a broad array of retaliatory conduct *unrelated to employment*.”<sup>226</sup> Thus, the court set out the elements for establishing such a prima facie claim of retaliation under Title IX: (1) the plaintiff engaged in activities protected by Title IX; (2) the university-employer took adverse action against the plaintiff; and (3) a causal connection exists between the plaintiff’s protected activities and the university-employer’s adverse action.<sup>227</sup>

Addressing the second element of its test, the district court ruled that such adverse actions are not limited to “ultimate employment decisions,”<sup>228</sup> (referenced with Title VII claims) rather the law “protects against a broader range of retaliatory conduct.”<sup>229</sup> Addressing the third element, the court found that the plaintiff failed to establish a “causal connection between her protected Title IX conduct and Tarleton’s failure to promote her to Athletics Director.”<sup>230</sup> However, the plaintiff did establish a prima facie case as to her demotion.<sup>231</sup> Thus, the court granted the defendant summary judgment as to the Title IX retaliation claim which dealt with the lack of a promotion, but denied summary judgment on the Title IX retaliation claim which dealt with her demotion.<sup>232</sup>

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<sup>225</sup> *Lowrey*, 11 F. Supp. 2d at 911. *Contra* *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002). There was no private cause of action for Title IX retaliation for a terminated male former girls’ basketball coach, who allegedly complained of gender inequities concerning his athletes. The Eleventh Circuit stated, “But the Court has not overturned the specific holding of *Cannon*, and so a direct victim of gender discrimination still may pursue a private right of action under Title IX to remedy the discrimination she has suffered.” *Id.* at 1343.

<sup>226</sup> *Lowrey*, 11 F. Supp. 2d at 912 (emphasis added).

<sup>227</sup> *See id.*

<sup>228</sup> *Id.* at 910.

<sup>229</sup> *Id.* at 912.

<sup>230</sup> *Id.* at 914.

<sup>231</sup> *Id.*

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

## 2. *Stanley v. University of Southern California*

In 1994, the Ninth Circuit, in *Stanley v. University of Southern California*,<sup>233</sup> affirmed the district court's denial of Marianne Stanley's motion for a preliminary injunction seeking reinstatement to her position as the women's basketball coach. Thereafter, the district court granted summary judgment to the university on all causes of action.<sup>234</sup> Stanley again appealed to the Ninth Circuit. Some additional pleadings were filed due to the implementation of new Equal Employment Opportunity Commission (EEOC) guidelines.<sup>235</sup> On June 2, 1999, the Ninth Circuit finally rendered its 2-1 decision.<sup>236</sup>

First, as to the Equal Pay Act, the Ninth Circuit stated that the plaintiff bears the burden of establishing that the jobs being compared are "substantially equal."<sup>237</sup> Despite the parties' differing opinions as to whether the job as head basketball coach for the men's and women's teams were substantially equal, the appellate court found that the university could pay a different salary to the men's head basketball coach due the "markedly disparate levels of experience and qualifications" between the two individuals.<sup>238</sup> The court took explicit notice that the women's basketball coach had fourteen years less coaching experience, had never coached an Olympic team or authored a book on basketball, and had no marketing or promotional experience other than that gained as a coach.<sup>239</sup> Thus, the court determined that the university satisfied one of the affirmative defenses attributable to an Equal Pay claim, basing the salary on factors other than sex:

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<sup>233</sup> 13 F.3d 1313 (9th Cir. 1994).

<sup>234</sup> *Stanley v. Univ. S. Cal.*, No. 93-CV-4708, 1995 U.S. Dist. LEXIS 5026 (C.D. Cal. Mar. 8, 1995), *aff'd*, 178 F.3d 1069 (9th Cir. 1999).

<sup>235</sup> EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604-1607. *See also* *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995) (discussing the EEOC guidelines for the first time in a Title IX case).

<sup>236</sup> 178 F.3d 1069.

<sup>237</sup> *Id.* at 1074.

<sup>238</sup> *Id.* at 1075.

<sup>239</sup> *Id.* at 1075-76 (citing *Harker v. Utica Coll. of Syracuse Univ.*, 85 F. Supp. 378 (N.D.N.Y. 1995) ("[N]ine year experience differential between women's and men's basketball coaches justifies pay differential . . ."), but failing to recognize that Stanley had led her former team to three championships, while the men's basketball coach had not).

“Stanley has conspicuously failed, moreover, to present any meaningful evidence in support of her claim that she and [the men’s basketball coach] had comparable levels of experience.”<sup>240</sup>

Dismissing the Title IX cause of action, the court rule that because “Stanley fails to show any discriminatory conduct on the part of the defendants, all of these claims fail as well.”<sup>241</sup> Interestingly, the Ninth Circuit made no mention of the Fifth Circuit decision in *Lowrey*, and did not, on its own volition, find that there is no cause of action for employees asserting Title IX violations against educational employers. The court also found no claim of retaliation, although that assertion was not brought pursuant to Title IX.<sup>242</sup> The Ninth Circuit reversed and remanded only as to whether the district court had abused its discretion in awarding costs to the university in the amount of approximately \$47,000.<sup>243</sup>

Judge Pregerson’s dissent noted:

By focusing on the differences between Stanley’s and Raveling’s qualifications, the majority skips over the many ways in which gender discrimination insidiously affected the University’s treatment of the women’s basketball program and Stanley as its Head Coach. The University’s half-hearted promotion of the women’s basketball program, its intensive marketing of the men’s basketball program, and the formidable obstacles Stanley faced as a woman athlete in a male-dominated profession contributed to this disparate treatment.<sup>244</sup>

The Supreme Court ultimately denied certiorari in this case.<sup>245</sup>

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<sup>240</sup> *Id.* at 1076.

<sup>241</sup> *Id.* at 1077.

<sup>242</sup> *See id.*

<sup>243</sup> *See id.* at 1079–80.

<sup>244</sup> *Id.* at 1080 (Pregerson, J., dissenting).

<sup>245</sup> *Stanley v. Univ. of S. Cal.*, 528 U.S. 1022 (1999). Stanley went on to coach in the Women’s National Basketball Association, where she was named head coach of the Washington Mystics. *See Mystics Name Coach (No, Not Him)*, *NEWSDAY* (N.Y.), Apr. 5, 2002, at A74.

### 3. *Perdue v. City University of New York*

During August 1997, the district court judge in *Perdue v. City University of New York*,<sup>246</sup> following the Fifth Circuit decision in *Lowrey*, rejected the Title IX employment cause of action brought by Molly Perdue,<sup>247</sup> the former women's basketball coach and women's sports administrator at Brooklyn College (a part of the City University of New York (CUNY)), but allowed her claim for Title IX retaliation to go to the jury.<sup>248</sup> The jury found none in the multi-based cause of action lawsuit.

The following year, the same New York district court ruled on the Equal Pay Act and Title VII claims, as well as Eleventh Amendment immunity.<sup>249</sup> First, in addressing the Equal Pay Act, the district court ruled that:

To show a violation of the EPA, a plaintiff need not prove that an intention to discriminate on the basis of gender motivated the pay disparity.

Where there is a willful violation of the EPA, the resulting compensatory award should be doubled as liquidated damages. A violation of the EPA is willful if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."<sup>250</sup>

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<sup>246</sup> No. 93-CV-5939 (E.D.N.Y. Aug. 28, 1997).

<sup>247</sup> Transcript of Trial Before the Honorable Frederic Block, United States District Judge, and a Jury, *Perdue v. City of New York* (E.D.N.Y. Aug. 28, 1997) (No. 93-CV-5939). Judge Block opined:

I agree with *Lakoski* [*v. James*, 66 F.3d 751 (5th Cir. 1995),] completely insofar as these basic intentional discrimination and hostile work environment cases are brought forth, that they are really Title VII claims, and that Title IX should not give plaintiffs a way of obviating the total remedy and the totality of what Congress has divined in Title VII by characterizing the same claims, substantively, as Title IX claims.

*Id.* at 6, ll. 2–9.

<sup>248</sup> *Id.*

<sup>249</sup> *Perdue v. City Univ. of N.Y.*, 13 F. Supp. 2d 326 (E.D.N.Y. 1998).

<sup>250</sup> *Id.* at 332–33 (citations omitted) (quoting *Reich v. Waldbaum*, 52 F.3d 35, 39 (2d Cir. 1995)).

According to the job descriptions, both the men's and women's sports administrators had the same eleven duties, but Perdue had an extra duty of being available for guidance of all female student-athletes.<sup>251</sup> Perdue reported her inferior working conditions to her superiors, including that she was doing laundry for the women's basketball team, and the conflicting practice times for the men's and women's teams.<sup>252</sup> In an interesting aside, the district court noted that "despite the fact that the Office [for] Civil Rights found that CUNY [at Brooklyn College] had committed multiple Title IX violations, there was testimony that CUNY did not implement the modifications promised in its detailed assurances."<sup>253</sup> The court therefore concluded that the College's actions were willful.<sup>254</sup>

On June 19, 1998, the trial court judge issued judgment for \$799,566.73 in favor of the plaintiff.<sup>255</sup> The court found damages of \$134,829 in back wages, \$85,000 in compensatory damages, \$5,262 in unpaid retirement benefits, and \$134,829 in liquidated damages.<sup>256</sup> An appeal and a cross-appeal were filed for determination by the Second Circuit.<sup>257</sup> The parties reached a confidential settlement in April 1999, that the court approved.<sup>258</sup>

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<sup>251</sup> See *id.* at 334.

<sup>252</sup> *Id.* at 335.

<sup>253</sup> *Id.*

<sup>254</sup> See *id.*

<sup>255</sup> *Perdue v. City Univ. of N.Y.*, No. 93-CV-5939 (E.D.N.Y. judgment entered June 19, 1998).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* The parties had been awaiting resolution by the Second Circuit of the appeal in *Anderson v. State University of New York, College at New Paltz*, 169 F.3d 117 (2d Cir. 1999), vacated by 528 U.S. 1111 (2000). On remand from the Supreme Court, the Northern District Court of New York ruled that the Eleventh Amendment did not prohibit use of the Equal Pay Act, 29 U.S.C. § 206(d) (1994), in a case brought by a tenured female professor. *Anderson v. State Univ. of N.Y.*, 107 F. Supp. 2d 158 (N.D.N.Y. 2000). The professor alleged violation of the Equal Pay Act due to a branch of the New York State University not paying her equally to her male counterparts. The court held that the Equal Pay Act was enacted pursuant to the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 162-63. The parties in the *Perdue* case had been contemplating whether they would stay pursuit of their Second Circuit appeal pending the Supreme Court's certiorari decision in the *Anderson* case.

<sup>258</sup> *Perdue*, No. 93-CV-5939 (E.D.N.Y. settlement entered June 22, 1999).

#### 4. *Weaver v. Ohio State University*

In *Weaver v. Ohio State University*,<sup>259</sup> Karen Weaver, a former women's field hockey coach, commenced a lawsuit on November 21, 1996, alleging that her termination was predicated on sex discrimination and retaliation in violation of Title IX, Title VII, the Equal Pay Act, and state law. On June 4, 1997, the Ohio district court partially granted and partially denied the defendant-university's motion to dismiss. Weaver complained to the university about the poor condition of the artificial grass practice field used for field hockey and talked with the NCAA Peer Review Committee representatives, who visited the campus, in conjunction with the NCAA program requiring certification about this same issue. Weaver compared her treatment to the men's ice hockey coach's (as there was no men's field hockey team offered at OSU), who received a higher salary than she did. The plaintiff asserted she was treated

[D]ifferently than male coaches, specifically Randy Ayers, then coach of the OSU men's basketball team, who was allegedly afforded greater tolerance for his team members' disciplinary problems. Plaintiff also contends that she was not offered another position within the OSU Athletic Department upon her termination, unlike Jerry Welsh, the men's hockey coach.<sup>260</sup>

The district court, in a 29-page decision, granted the defendant-university motion for summary judgment on all counts.<sup>261</sup> The court initially went over the grounds for the granting of summary judgment before addressing the substantive claims.

As to the claim of discriminatory discharge pursuant to Title VII and Title IX, the court found:

[The plaintiff] had produced no direct evidence of discriminatory motive on the part of the defendants, nor has

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<sup>259</sup> 71 F. Supp. 2d 789 (S.D. Ohio 1998), *aff'd*, 194 F.3d 1315 (6th Cir. 1999). This appears to be the first Title IX lawsuit commenced by a women's field hockey coach. *See also* Rallins v. Ohio State Univ., 191 F. Supp. 2d 920 (S.D. Ohio 2002) (dismissing a female women's head track and field coach's Title VII, Equal Pay Act, and Title IX causes of action predicated on sex discrimination).

<sup>260</sup> *Weaver*, 71 F. Supp. 2d at 791.

<sup>261</sup> *Id.* at 789.

she met her burden of producing evidence sufficient to satisfy all of the elements of a prima facie case of discriminatory discharge in light of the fact that the person who was hired to replace her is also a woman.<sup>262</sup>

Regarding Title IX, the court noted, “The Title VII standards for proving discriminatory treatment also apply to claims of employment discrimination brought under Title IX.”<sup>263</sup> In addition, this court would apply the Title VII standards for retaliation in the Title IX action.<sup>264</sup> The court stated:

To prove a prima facie case of retaliation the plaintiff must show: 1) that she engaged in protected opposition to Title VII or Title IX discrimination or participated in a Title VII or Title IX proceeding; 2) that plaintiff’s exercise of her protected rights was known to the defendants; 3) that she was subjected to an adverse employment action subsequent to or contemporaneous with the protected activity; and 4) that there was a causal connection between the protected activity and the adverse employment action.<sup>265</sup>

In examining the Title IX retaliation claim, the court ruled that the complaints about the condition of the hockey practice field were not couched in terms of Title IX sex discrimination. “Complaints concerning unfair treatment in general which do not specifically address discrimination are insufficient to constitute protected activity.”<sup>266</sup> Moreover, “[d]efendants also note that the Title IX complaint would have been unfounded in light of the fact that the men’s lacrosse team also used the same practice field.”<sup>267</sup> The university also presented evidence that they never had

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<sup>262</sup> *Id.* at 793.

<sup>263</sup> *Id.* (citing *Doe v. Claiborne County, Tennessee*, 103 F.3d 496 (6th Cir. 1996); *Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070 (8th Cir. 1996); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243 (2d Cir. 1995)).

<sup>264</sup> *Weaver*, 71 F. Supp. 2d at 793. *See also* *Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997).

<sup>265</sup> *Weaver*, 71 F. Supp. 2d at 793 (citing *Cantia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990)).

<sup>266</sup> *Id.* at 793–94.

<sup>267</sup> *Id.* at 794 (“The turf was replaced in the summer of 1996 when funds became available.”).

knowledge of the plaintiff's comments to the NCAA Peer Review Committee, which were confidential. Based on all of these factors, there were no grounds for the retaliation claim.<sup>268</sup> Weaver was dismissed a short time after her interview with the NCAA members. Nonetheless, the court stated, "[T]emporal proximity between the complaints and the employment action alone is usually not sufficient to support an inference of retaliatory discrimination in the absence of other evidence."<sup>269</sup> The male athletic director testified that he had made his decision to terminate the field hockey coach prior to her meeting with the NCAA representatives.<sup>270</sup> The court also accepted the defendants' reason for terminating the coach, which was based on concerns players voiced about her style of coaching.<sup>271</sup> This provided a legitimate non-discriminatory reason for plaintiff's termination.<sup>272</sup> The judge elaborated, "The defendants' reason for terminating plaintiff's employment need not be a good reason, but rather only a non-discriminatory reason."<sup>273</sup> Although the plaintiff contended that her strong stance on the university anti-drug and alcohol policy was a factor in the discharge,<sup>274</sup> the court ruled that she lacked standing.<sup>275</sup>

As to the Equal Pay Act, the court emphasized, "A plaintiff's comparison to a specifically chosen employee should be scrutinized closely to determine its usefulness. Courts which have addressed the merits of Equal Pay Act claims advanced by coaches of athletic teams have been reluctant to find an equality of work between coaches of different sports."<sup>276</sup> The decision went on to

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<sup>268</sup> *Id.* at 793.

<sup>269</sup> *Id.* at 794.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 795-96.

<sup>272</sup> *Id.* at 796.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 796-97.

<sup>275</sup> See Heckman, *supra* note 10, at 865 n.129.

<sup>276</sup> *Weaver*, 71 F. Supp. 2d at 799-800 (citations omitted) (citing *EEOC v. Madison Comm. Unit Sch. Dist. No. 12*, 818 F.2d 577, 584 (7th Cir. 1987) (rejecting findings of equality between boy's soccer and girls' volleyball and basketball teams and between boy's track and girl's basketball teams); *Deli v. Univ. of Minn.*, 863 F. Supp. 958, 961 (D. Minn. 1994) (finding women's gymnastic coach not substantially equal to men's football, hockey, and basketball coaches)).



summarize the relevant elements for an Equal Pay Act claim, pronouncing:

In determining whether men's and women's coaching positions are equal, courts have looked to such factors as team size, the number of assistant coaches, recruiting responsibilities, the amount of spectator attendance and community interest in the sport, the amount of revenue generated by the sport, the degree of responsibility in the area of public and media relations and promotional activities, and the relative importance of the sport in the athletic program as a whole.<sup>277</sup>

The court found that the field hockey season spanned only about two months, featuring nineteen to twenty-one games, whereas ice hockey extended over five months, with larger squads playing thirty-five to thirty-eight games.<sup>278</sup> Once again, as in *Stanley*,<sup>279</sup> the men's ice hockey coach had "a greater burden in the public relations area."<sup>280</sup> Also, the men's team produced substantially more revenue than the field hockey team.<sup>281</sup> The university also articulated a market condition defense for paying the men's ice hockey coach more: since there was professional ice hockey and there was no equivalent for field hockey, the best ice hockey college coaches would be more actively recruited by other schools.<sup>282</sup> No statistics were provided for this statement. Furthermore, the plaintiff's salary was above the salary for the average field hockey coach in the Big Ten Conference, of which OSU was a member, as well as the NCAA average.<sup>283</sup>

In a first judicial reference to the new 1997 EEOC Guidelines in the area of educational athletics programs and Title VII and the

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<sup>277</sup> *Weaver*, 71 F. Supp. 2d at 800 (citing *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1321–23 (9th Cir. 1994); *Bartges v. Univ. of N.C.*, 908 F. Supp. 1312, 1323–26 (W.D.N.C. 1995), *aff'd*, 94 F.3d 641 (4th Cir. 1996); *Deli*, 863 F. Supp. at 961; *Jacobs v. Coll. of William & Mary*, 517 F. Supp. 791, 797 (E.D. Va. 1980), *aff'd*, 661 F.2d 922 (4th Cir. 1981)).

<sup>278</sup> *Id.*

<sup>279</sup> 13 F.3d 1313 (9th Cir. 1994).

<sup>280</sup> *Weaver*, 71 F. Supp. 2d at 801.

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

<sup>282</sup> *Id.*

<sup>283</sup> *See id.* at 802.

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Equal Pay Act, the court dismissed them out-of-hand stating, “While plaintiff cites non-binding Equal Employment Opportunity Commission guidelines published in October of 1997 which call for a comparable worth analysis, such guidelines do not have the effect of agency regulations and are not entitled to deference.”<sup>284</sup>

The court concluded:

Only the men’s football coach and the men’s and women’s basketball coaches are given multi-year contracts. There is no evidence that the job of women’s field hockey is substantially identical to any of these multi-year positions, and a substantial number of male coaches of comparable minor sports teams are impacted equally with female coaches by this policy.<sup>285</sup>

The Sixth Circuit summarily affirmed the decision.<sup>286</sup>

#### 5. Other Pending Cases

In *Bedard v. Roger Williams University*,<sup>287</sup> the former female associate athletic director unsuccessfully brought suit against a Division III university for failing to be promoted to the position of athletic director. The court found that the university’s actions did not constitute sex discrimination in violation of Title IX where the university hired a male applicant to fill the position.

In October, 1998, the Illinois district court, in *Harper v. Illinois State University*,<sup>288</sup> granted in part and denied in part the defendant’s motion for summary judgment concerning the coach of a women’s basketball team, who alleged sex discrimination. In *Legoff v. Trustees of Boston University*,<sup>289</sup> the district court

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<sup>284</sup> *Id.* See also EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (2002).

<sup>285</sup> *Weaver*, 71 F. Supp. 2d at 802. See also Heckman, *supra* note 170, at 764–66 (discussing the EEOC Guidelines).

<sup>286</sup> *Weaver v. Ohio State Univ.*, 194 F.3d 1315 (6th Cir. 1999).

<sup>287</sup> 989 F. Supp. 94 (D.R.I. 1997). See also generally *McKenzie v. Wright State Univ.*, 683 N.E.2d 381 (Ohio Ct. App. 1997) (ruling that a former assistant women’s basketball coach did not establish her claim of sex discrimination and noting that the coach advanced no Title IX claim).

<sup>288</sup> 35 F. Supp. 2d 1118 (C.D. Ill. 1999).

<sup>289</sup> 23 F. Supp. 2d 120 (D. Mass. 1998).

examined whether a former women's basketball coach at Boston University had satisfied the statute of limitations for commencing her lawsuit. In *Deli v. University of Minnesota*,<sup>290</sup> a former women's gymnastics coach, who had previously sought damages pursuant to Title IX,<sup>291</sup> could not recover for emotional distress damages.<sup>292</sup> In this state court action, the plaintiff asserted violation of promissory estoppel based on the athletic director's alleged breach of an oral promise not to view a videotape that contained both the gymnastics team's performance and the coach's sexual encounter with her husband, an assistant coach of the team, who was also terminated. The Minnesota Court of Appeals overturned the state judge's award of \$675,000 in damages.<sup>293</sup>

The first Title IX decision concerning a referee was rendered in *Kemether v. Pennsylvania Interscholastic Athletic Ass'n*,<sup>294</sup> where Noreen Kemether, a female basketball referee, alleged sex discrimination against the Pennsylvania Interscholastic High School Athletic Association (PIAA) for assigning her a work schedule which excluded boys' high school basketball games.<sup>295</sup> The Pennsylvania district court, in addressing motions for summary judgment submitted by both sides, initially found that the athletic association was not the referee's employer for purposes of Title VII employment discrimination;<sup>296</sup> however, an issue of fact remained as to whether the athletic association was an employment agency so as to trigger Title VII.<sup>297</sup> As to the Title IX claim, the

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<sup>290</sup> No. C9-97-1530 (Minn. Ct. App. May 19, 1998).

<sup>291</sup> *Deli v. Univ. of Minn.*, 863 F. Supp. 958 (D. Minn. 1994) (granting defendant-university's motion for summary judgment). *See also* Gabor *Deli v. Univ. of Minn.*, No. 93-CV-0501 (D. Minn. Aug. 18, 1994) (granting defendant-university's motion for summary judgment concerning the lawsuit alleging violation of a number of grounds, including Title IX, based on the university's termination of the male former assistant women's gymnastics coach).

<sup>292</sup> *Deli v. Univ. of Minn.*, 578 N.W.2d 779 (Minn. Ct. App. 1998). *See also* *Deli v. Univ. of Minn.*, 511 N.W.2d 46 (Minn. Ct. App. 1994) (affirming termination of the coaches despite lack of strict adherence to procedural due process set forth in the university manual).

<sup>293</sup> *Deli*, 578 N.W.2d at 784.

<sup>294</sup> 15 F. Supp. 2d 740 (E.D. Pa. 1998).

<sup>295</sup> *Id.* at 743-44.

<sup>296</sup> *Id.* at 758 (concerning the regular season). *See also id.* at 761 (addressing the post-season arrangement).

<sup>297</sup> *Id.* at 764.

court ruled that an issue of fact remained,<sup>298</sup> secondarily, Title IX subsumed the section 1983 cause of action alleged because of the Equal Protection Clause.<sup>299</sup> After the trial, the jury awarded Kemether \$314,000 in compensatory damages against the state athletic association.<sup>300</sup> The jury found that the PIAA's refusal to evaluate women was "a necessary step toward being assigned to [referee] regular season boys' junior and varsity high school games."<sup>301</sup> The association sought to have the award thrown out. On further review, the Pennsylvania district court denied the association's request for a new trial and for a judgment in its favor as a matter of law.<sup>302</sup>

#### 6. Cases settled

A number of cases, all involving intercollegiate coaches who were terminated, were settled from 1997 to 2000,<sup>303</sup> including *Carver v. St. Leo's College*,<sup>304</sup> where the head coach and assistant coach—both males—of the successful women's softball intercollegiate team at the college brought a lawsuit regarding their suspension. On March 27, 1997, the district court held one need not be a student to advance a Title IX claim for retaliation.<sup>305</sup>

In 1997, the parties in *Hawkins v. Loyola University*<sup>306</sup> settled the case brought by a male women's basketball coach who was terminated, alleging sexual discrimination. That summer, the parties in *Gobrecht v. Reed*<sup>307</sup> settled a case brought by a former women's basketball coach at Florida State University. Later that

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<sup>298</sup> *Id.* at 766 (finding that the athletic association would be within Title IX's scope).

<sup>299</sup> *Id.* at 767 (restricting this ruling only to the Fourteenth Amendment claim and not the First Amendment claim advanced by the plaintiff).

<sup>300</sup> *Kemether v. Pa. Interscholastic Athletic Ass'n*, No. 96-CV-6986, 1999 WL 1012957, at \*1 (E.D. Pa. Nov. 8, 1999).

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

<sup>302</sup> *Id.*

<sup>303</sup> *See, e.g., Plotzke v. Boston Coll.*, No. 94-CV-12329 (D. Mass. Mar. 27, 1995) (involving the termination of a female women's basketball coach at the university). *See also* Heckman, *supra* note 25, at 421 n.142.

<sup>304</sup> No. 96-383-CIV-T-25C (M.D. Fla. 1996). *See also* Heckman, *supra* note 170, at 764 (discussing *Carver*).

<sup>305</sup> *Carver*, No. 96-383-CIV-T-25C.

<sup>306</sup> No. 94-L03300 (Cir. Ct. Cook County, Ill. 1997).

<sup>307</sup> No. 497-CV-237 (N.D. Fla. 1997).

year, in *Dugan v. State of Oregon*,<sup>308</sup> the parties settled the case, reportedly for \$1.09 million, after the jury issued a million-dollar plus verdict in favor of the former female women's softball coach at Oregon State University.<sup>309</sup> In November, 1998, the parties settled in *Masten v. Truman State University*,<sup>310</sup> involving a female former women's volleyball coach. This settlement is noteworthy as the university, in addition to reaching a monetary settlement with the coach, agreed to ensure equitable conditions for its female student-athletes. In another instance, Perdue University and Lin Dunn, a female former women's basketball coach, reached an agreement prior to any lawsuit.<sup>311</sup>

### E. Retaliation

Title IX prohibits retaliation<sup>312</sup> by educational institutions against individuals who claim a violation of statutorily prescribed gender equity. Claims predicated on the retaliation portion of Title IX were neglected until recently.<sup>313</sup> In a number of recent cases, coaches who were terminated also raised claims of unlawful retaliation.<sup>314</sup>

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<sup>308</sup> No. 95-CV-6250 (D. Or. 1997).

<sup>309</sup> *Id.* See also Heckman, *supra* note 170, at 762–63 (“However, the Court granted the institution’s motion for a remittitur, in part, reducing the [total] jury award of \$1.28 million to approximately \$724,000, including \$285,000 against the individual defendant, plus post-judgment interest.”); Sarah Nathanson, *Title IX Report Card*, WOMEN’S SPORTS EXPERIENCE, May/June 1999, at 13; Brian A. Snow, *Broadening the Demand for Gender-Equity in Athletics: Financial Aid & Coaches’ Compensation*, 130 EDUC. L. REP. 965, 985 (1997).

<sup>310</sup> 1998 WL 2570894 (D. Mo. 1998). Truman State University (Missouri) agreed to pay former women’s volleyball coach, Deborah Masten, \$175,000 and to provide equal treatment for women athletes. *Id.* See also Karen Dillon, *Truman to Provide Gender Equity, Give Ex-Coach \$175,000*, KANSAS CITY STAR, Nov. 6, 1998, at D1.

<sup>311</sup> See Barbara Baker, *It’s A Dunn Deal*, NEWSDAY (N.Y.), Mar. 28, 1999, at C7.

<sup>312</sup> 34 C.F.R. § 106.51 (2002).

<sup>313</sup> See, e.g., *Minnesota v. Regents*, No. 94-CV-0289 (4th Dist. Ct. Minn. Jan. 30, 1995) (regarding sex discrimination claim brought by Stephanie Schleuder, the women’s volleyball coach of the University of Minnesota at Twin Cities, who had been an ardent supporter of pay equity). The case was settled during April 1995. Schleuder had previously voluntarily dismissed her federal lawsuit after her request for a temporary restraining order was denied. See *Governmental Affairs Report*, NCAA REG., Apr. 26, 1995, at 1, available at <http://www.ncaa.org/news/1995/19950426.pdf>.

<sup>314</sup> See, e.g., *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002); *Gobrecht v. Reed*, No. 497-CV-0237 (N.D. Fla. 1997); *Lowrey v. Tex. A&M Univ. Sys.*,

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*F. Reverse Discrimination*

In a move toward gender parity between men's and women's coaches, one university reduced the salary of the men's basketball coach to that received by the women's basketball coach, rather than raising the salary of the women's coach to match the salary of the men's team. The male coach in *Reinhart v. Georgia State University*,<sup>315</sup> brought suit alleging reverse sex discrimination. The complaint raised no Title IX claim. On July 1, 1997, the Eleventh Circuit affirmed the district court's granting of the university's motion for summary judgment.<sup>316</sup>

## CONCLUSION

Remarkable progress has been made by women in the twentieth century due to increased educational opportunities. As the nation celebrates Title IX's thirtieth anniversary, however, continued progress needs to be made in this area to ensure the promise of equal opportunity for the students and employees of educational institutions.

The courts and litigants continue to explore the parameters of Title IX, while Congress, for the most part, has exhibited a hands-off policy. On the legislative front, Congress should clarify whether Title IX was meant to preempt section 1983 actions.<sup>317</sup> Congress should impose a national statute of limitations to govern private lawsuits. Congress should consider eliminating the contact sports element found in the Title IX regulations, which continues to insulate men's teams to the detriment of capable and interested female student-athletes (recognizing that the reverse could seriously erode "female" or "coed" teams). One solution is to adopt a standard such as the state of New York allows for its

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No. 95-CV-4334 (S.D. Tex. Dec. 4, 1995), *aff'd*, 117 F.3d 242 (5th Cir. 1997); Clay v. Bd. of Trs. of Neosho Cmty. Coll., 905 F. Supp. 1488 (D. Kan. 1995); Perdue v. City Univ. of N.Y., 13 F. Supp. 2d 326 (E.D.N.Y. 1998); Carter v. Cornell Univ., 976 F. Supp. 224 (S.D.N.Y. 1997).

<sup>315</sup> No. 95-CV-0204 (N.D. Ga. 1996), *aff'd without op.*, 119 F.3d 11 (11th Cir. 1997).

<sup>316</sup> *Reinhart*, 119 F.3d at 11.

<sup>317</sup> 42 U.S.C. § 1983 (2000).

interscholastic athletes in grades seven through twelve, identified herein.

The Department of Education's formation of a Title IX commission to investigate the application of the law to intercollegiate athletic departments could have profound effects in seriously eroding the precarious advancements that have been achieved in the last thirty years, including possibly eviscerating the effective accommodation test and effectively negating the strong consensus exhibited by the circuit courts.

The Supreme Court dove into the Title IX waters by agreeing to hear three appeals in recent years. In *Smith*, the Court ruled on whether the NCAA, the pre-eminent collegiate athletic association, was a recipient of federal funds due to its receipt of funds from member post-secondary institutions that had received federal funds, to engender jurisdiction. The Court concluded the NCAA was not bound by Title IX based on the facts presented. The Supreme Court in *Gebser* imposed a tough standard for establishing liability by students against educational institutions for teacher-student sexual harassment. The Court followed this in *Davis*, imposing a strict standard for those claiming peer sexual harassment against educational institutions.

An unanswered question that has emerged is whether the *Gebser* decision requires all individuals to place the offending educational institutions on notice in Title IX cases, even when not pursuing a sexual harassment claim. Queries also arise as to specifically who would be required to be informed and what serves as sufficient notice. This uncertainty could significantly foreclose student-athletes from seeking redress in cross-over or equal opportunity cases. An educational institution may be unaware of the intentional harassing actions by an employee, as was at issue in *Gebser*. However, the issue becomes troublesome with claims involving lack of gender equity in athletics departments, where elementary, secondary, and post-secondary schools are clearly aware of how many students are participating in athletic departments, the history of their athletic departments as well as the allocation of scholarships, supplies, equipment, the number of coaches and tutors, and other provisions offered when separate athletic departments are provided. Will educational institutions be

shielded from possible Title IX liability because the student or prospective student-athlete did not inform the proper authority of the failure to provide equal opportunity in the selection of sports or benefits accorded or athletic scholarship money provided?

**Physical education classes:** Despite the passage of thirty years, there has been no case law involving the conduct of physical education classes.

**Cross-over cases:** In the area of athletics, cross-over litigation has slowed down involving interscholastic athletics. Remarkably, the *Mercer* case is the only decision involving an individual of one sex seeking to participate on the team composed of members of the other sex on the intercollegiate level. While this NCAA Division I team at Duke University was deemed a coed team no females had ever been a formal part of the team, and Mercer would complete her undergraduate degree without being included on the official roster. While the Fourth Circuit recently rejected allowing punitive damages against the private university, the jury verdict awarding \$2 million in punitive damages nevertheless sent a strong message.

**Female athletes and the selection of sports:** The last decade has been engulfed with the issue of whether the first program area involving the selection of sports when separate athletic programs are provided for males and females, as required by the equal opportunity subsection, has been met, played out exclusively on the intercollegiate level. Seven Circuit Courts (First, Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits) have all approved use of the effective accommodation test to ascertain whether the first program area has been satisfied. Until 2001, female collegiate students were successful on the federal circuit court level in every Title IX lawsuit commenced alleging the lack of equal opportunity in the provision of athletic opportunities. The Eighth Circuit decision in *Grandson* broke that record, and should be monitored to determine whether the strict *Gebser* notice standard will be imposed on non-sexual harassment Title IX matters in other jurisdictions. A *Newsday* editorial summarized the resultant benefits of the Title IX statute, stating:

It was a proud day for soccer moms—and their daughters too. But the U.S. women's soccer team's recent World



Cup win over China was one more victory, too, for Title IX, which bought equal access to sports for girls. The women's soccer team, the Olympic gold medal-winning U.S. women's hockey team and the ongoing, televised and popular Women's National Basketball Association teams would not have been possible without the still-controversial 1972 change in federal law. Title IX has paved the way for girls to go into good sports programs by barring sex discrimination in federally funded education programs. As a result, more and more female athletes are finding themselves on winning teams. If the trend continues, as it should, don't be surprised to see the creation of women's professional teams in other sports as well.<sup>318</sup>

**Male athletes and the selection of sports:** Male athletes continue to be foreclosed from Title IX relief when seeking to maintain their varsity teams, overwhelmingly for meeting the first prong of the "effective accommodation" test. Despite the passage of thirty years, no court has ever pronounced an acceptable percentage differential to meet the first prong, which requires substantial proportionality between the percentage of students and the percentage of student-athletes of that same sex. Despite the lack of success in the judicial arena, men may have achieved an end-run by commencing a 2002 class action lawsuit, which purportedly led to the formation of the Department of Education's Title IX Commission, which may be the catalyst to destroy the underpinnings of the statutory gender equity.

**Provision of benefits:** The emerging inquiry will be how strictly the courts will enforce the equal opportunity requirements for the component benefits and treatments afforded athletic programs that have separate teams for males and females. Despite the passage of thirty years, it is only recently that this matter is being judicially reviewed. As was previously highlighted, one district court perceptively noted, "[u]nfortunately, the Board's plan leaves much to be desired; it creates the impression that the Board

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<sup>318</sup> Editorial, *Thank Title IX*, NEWSDAY (N.Y.), July 24, 1999, at A18.

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is not as sensitive as it should be regarding the necessity of compliance with Title IX.”<sup>319</sup>

**Athletic scholarships:** Moreover, no court has ever pronounced an acceptable percentage differential to satisfy the allocation of athletic scholarships when separate programs are provided for male and female student-athletes. However, the OCR indicated that it would accept a one percent differential (or one scholarship) between the percentage of athletes of one sex and the percentage of athletic scholarships for the student-athletes.

**Funding of athletic departments:** The funding loophole continues to allow inequitable funding, as the regulations only require “necessary funding.”

**Athletic department employees:** The initiation of Title IX lawsuits by educational employees, including female athletic employees or coaches of women’s teams, has increased dramatically. The issue of whether a litigant may raise a Title IX cause of action for sex discrimination, aside from asserting Title IX-based retaliation, remains unresolved. Recent developments—including settlements in the *Lowrey v. Texas A&M University System* lawsuit (after the issuance of the Fifth Circuit decision rejecting Title IX as a basis to assert sex discrimination as opposed to retaliation) and the *Perdue v. City University of New York* case, as well as decisions not to appeal after the long-awaited decision by the Ninth Circuit in *Stanley v. University of Southern California* and the Sixth Circuit decision in *Weaver v. Ohio State University*—do not help to resolve the issue. Ultimately, it will probably require a Supreme Court resolution unless Congress chooses to act. The dramatic lack of females coaching males continues to be ignored, and is ripe for a major lawsuit. This coincides with the low numbers of women employed as head athletic administrators, or sports information directors nationally.

The “glass sneaker” continues to exist for females in athletics and its continued vulnerability has become glaringly evident since entering the new millennium. Aside from the failure to ensure gender equity in athletics thirty years later, there is another

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<sup>319</sup> Daniels v. Sch. Bd. of Brevard County, Fla., 995 F. Supp. 1394, 1397 (M.D. Fla. 1997).

potentially devastating issue percolating on the horizon as to whether the Eleventh Amendment will eviscerate Title IX's application to state educational institutions. Moreover, the case commenced by the National Wrestling Coaches Association must be watched as it attempts to eviscerate the Title IX regulations and Policy Interpretation. Additionally, the Secretary of Education's action, in response to the issuance of the February 2003 report by the Department of Education's Title IX commission, should be monitored to determine any restrictions in the statute's application to extracurricular athletics. The Title IX history has not been a smooth one. The good news is that the spirit of Title IX continues to persevere despite significant obstacles.

The twenty-first century provides an uncharted landscape to truly implement the law and spirit of Title IX eliminating discrimination on the basis of sex in educational programs and activities by providing not some opportunity for females, but equal opportunity for all.