

4-1-1994

Women & Athletics: A Twenty Year Retrospective on Title IX

Diane Heckman

Follow this and additional works at: <http://repository.law.miami.edu/umeslr>



Part of the [Entertainment and Sports Law Commons](#)

Recommended Citation

Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. Miami Ent. & Sports L. Rev. 1 (1992)
Available at: <http://repository.law.miami.edu/umeslr/vol9/iss1/2>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Entertainment & Sports Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

UNIVERSITY OF MIAMI ENTERTAINMENT & SPORTS LAW REVIEW

ARTICLES

WOMEN & ATHLETICS: A TWENTY YEAR RETROSPECTIVE ON TITLE IX

DIANE HECKMAN*

I. EQUAL JUSTICE UNDER LAW	2
A. <i>Introduction</i>	2
B. <i>Application of Other Legal Doctrines</i>	4
C. <i>Gender-Based Classifications</i>	7
II. HISTORY OF TITLE IX	9
A. <i>Overview</i>	9
B. <i>Avenues to Pursue a Title IX Violation</i>	14
III. TITLE IX	27
A. <i>Purpose</i>	27
B. <i>Constitutional Considerations</i>	27
C. <i>Programs Must be Federally Funded</i>	29
IV. ATHLETIC ASSOCIATIONS	34
V. TITLE IX REGULATIONS	36
A. <i>Significant Court Cases</i>	36
B. <i>Separate But Equal?</i>	39
C. <i>Allowing Women to Participate on Men's Sports Teams in Contact and Noncontact Sports</i>	45
D. <i>Contact Sports</i>	47

* B.A. 1977, St. John's University; J.D. 1980, St. John's University School of Law. Attorney practicing in New York. The author is on the Advisory Board of the Women's Sports Foundation.

1. Football	49
2. Basketball	51
3. Baseball	53
4. Soccer	54
5. Wrestling and Boxing	55
6. Hockey and Field Hockey	56
E. Noncontact Sports	57
1. Tennis, Track, Swimming, and Cross-Country Skiing	57
2. Golf	58
3. Volleyball	59
F. Who's On First?	59
VI. CONCLUSION	62

I. EQUAL JUSTICE UNDER LAW

A. Introduction

Sports is a significant business industry in this country.¹ The full assimilation of women in the sports industry has not been realized. The question arises what, if any, is the role of the federal government in the area of athletics.

Twenty years ago, Congress enacted Title IX of the Education Amendments of 1972.² Title IX prohibits discrimination on the basis of sex in educational programs and activities, including interscholastic³ and intercollegiate⁴ athletic programs. As a result, it is the cornerstone of federal statutory protection for female athletes and prospective female athletes in the United States.⁵

1. "Sports in the United States is a \$50 billion industry. According to *Sports Inc.*, by the year 2000, sports will be a \$121 billion industry." Anita L. DeFrantz, *The Sky is the Limit*, HEADWAY, Summer 1989, at 1.

2. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-09, 86 Stat. 235 (codified at 20 U.S.C. §§ 1681-1688 (1990)) [hereinafter Title IX].

3. Discrimination in high school interscholastic athletics constitutes discrimination in education within the purview of this section. See *Rice v. President & Fellows of Harvard College*, 663 F.2d 336, 338 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982); *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 660 (6th Cir. 1981); *Brenden v. Independent Sch. Dist.*, 477 F.2d 1292, 1298 (8th Cir. 1973).

4. *Haffer v. Temple Univ.*, 524 F. Supp. 531 (E.D. Pa. 1981), aff'd, 688 F.2d 14 (3d Cir. 1982), motion for reconsideration, 678 F. Supp. 517 (E.D. Pa. 1987).

5. Since the enactment of Title IX in 1972, the number of high schools in the country offering girls' basketball increased from 4000 to 17,000. Further, women's participation in college athletics grew from 66,000 to over 150,000. RICHARD E. LAPCHICK & ROBERT MALEKOFF, ON THE MARK: PUTTING THE STUDENT BACK IN STUDENT-ATHLETE 106 (1987). See also United States Commission on Civil Rights, *More Hurdles to Clear: Women and Girls in Competitive Athletics*, No. 63, July 1980. This report provides a history of women and girls in sports, dating from the Victorian era to contemporary times, id. at 1-6, which was incorporated in an appendix to *Yellow Springs Exempted Sch. Dist. Bd. of Educ. v. Ohio Sch. Athletic Ass'n*, 443 F. Supp. 753 (S.D. Ohio 1978), rev'd, 647 F.2d 651, 669-75 (6th Cir. 1981). It also provided a statistical accounting of the emerging interscholastic and intercollegiate programs and budgets for female athletes compared to the programs for male athletes, during the 1970's. Id. at 11-32 and 37-44. While Title IX has resulted in increased opportu-

Title IX provides in pertinent part:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance⁶

While the statutory language is unequivocal in stating there shall be no sex discrimination, this protection is limited to educational programs or activities. Therefore, community recreational leagues and programs, such as Little League, are not covered under the statute.⁷ The statutory language is further qualified by requiring that the program or activity receive federal financial assistance in order for Title IX to apply.

This second requirement raised questions as to what constitutes "receipt" under the statute. Resolution of this issue had great significance because few athletic departments and programs directly receive federal funds. Therefore, if the statute required the "specific" program to receive federal funding, referred to as the "program-specific" approach,⁸ Title IX would be foreclosed as a legal avenue upon which to assert a claim for redress when sex discrimination occurred in an athletic program or activity. However, if Title IX covered all of an institution's component programs and activities when any one program or activity or the university itself received federal funds, referred to as the "institution-wide" approach,⁹ Title IX could be utilized to pursue sex discrimination charges.

The gravamen issue would not be decided until 1984 when the United States Supreme Court issued the opinion in *Grove City College v. Bell*.¹⁰ Adopting the "program-specific" approach, the *Grove City* decision remained the prevailing standard until 1988, when Congress overturned the Supreme Court's decision through its enactment of the Civil Rights Restoration Act of 1987 (1988 Amendments).¹¹

This Article will trace the evolution of Title IX over the past two decades, focusing on the history of the federal statute and the

nities for female athletes, female coaches have not fared well. See *infra* note 187.

6. 20 U.S.C. § 1681(a) (1990).

7. See *infra* notes 244-45 and accompanying text.

8. For a judicial exposition of this bifurcated approach, see *Hillsdale College v. Department of Health, Education and Welfare*, 696 F.2d 418 (6th Cir. 1982).

9. *Id.*

10. 465 U.S. 555 (1984).

11. Pub. L. 100-259, 102 Stat. 28 (codified at 20 U.S.C. § 1687 (1990)). See also *infra* notes 144-53 and accompanying text.

implementing regulations. It will address the significant court decisions, as well as the salient actions of the executive branch responsible for enforcing Title IX. In addition, this Article will examine the athletic programs and activities that are foreclosed to women, based on whether the sport falls within the definition of a contact or noncontact sport. The actions of the ubiquitous athletic associations will also be reviewed. The next section highlights other legal doctrines utilized to redress sex discrimination claims in athletic programs and activities.

B. Application of Other Legal Doctrines

Given the restricted application of the statute in pursuing gender equity claims in athletics, it is incumbent to ascertain whether a claim of sex discrimination can be maintained under other legal theories, including: (1) the Fifth Amendment to the United States Constitution;¹² (2) the Due Process Clause,¹³ or, most notably, the Equal Protection Clause of the Fourteenth Amendment;¹⁴ or (3) the Civil Rights Act¹⁵ (alleging, for example, a denial of rights se-

12. The Fifth Amendment provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ." U.S. CONST. amend. V. See, e.g., *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 443 F. Supp. 753, 759 (S.D. Ohio 1978), *rev'd*, 647 F.2d 651 (6th Cir. 1981). *Yellow Springs* is the only Title IX case predicated on a violation of the Fifth Amendment.

13. U.S. CONST. amend. XIV, § 1. See also Mark A. Kadzielski, *Legal Approaches to Sex Discrimination in Amateur Athletics: The First Decade*, in *LAW & AMATEUR SPORTS* 95, 97 (Ronald J. Waicukauski ed. 1982) ("Although the predominant challenge to sex discrimination in athletics has been under the equal protection clause, it is worth noting that due process claims are not totally disregarded by courts."). See, e.g., *Petrie v. Illinois High Sch. Bd.*, 394 N.E.2d 855 (Ill. App. Ct. 1979). For a synopsis of procedural due process considerations, see *Hawkins v. NCAA*, 652 F. Supp. 602 (C.D. Ill. 1987).

14. Section 1 of the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State therein wherein they reside. 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.

U.S. CONST. amend. XIV, § 1. See, e.g., *Sullivan v. City of Cleveland Heights*, 869 F.2d 961 (6th Cir. 1989). See also *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985); *Haffer v. Temple Univ.*, 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982), *motion for reconsideration*, 678 F. Supp. 517 (E.D. Pa. 1988); *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977); *Cape v. Tennessee Secondary Sch. Athletic Ass'n*, 424 F. Supp. 732 (E.D. Tenn. 1976), *rev'd*, 563 F.2d 793 (6th Cir. 1977).

15. 42 U.S.C. § 1983 (1988). The Civil Action for Deprivation of Rights states as follows:

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 juris-

cured by the Fifth,¹⁶ or Fourteenth Amendments);¹⁷ or (4) the Amateur Sports Act of 1978;¹⁸ and (5) parallel state constitutional protections, including equal rights acts,¹⁹ or other state laws operating

diction 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 other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

See, e.g., *Gilpin v. Kansas State High Sch. Activities Ass'n*, 377 F. Supp. 1233 (D. Kan. 1973). Female coaches, athletic administrators, and support staff may also seek redress for sex discrimination in employment-related situations under other federal statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988), and the Equal Pay Act of 1963 (as amended 29 U.S.C. § 206(d) (1988) (Title IX amended the Equal Pay Act). See *infra* note 187.

16. See, e.g., *King v. Little League Baseball, Inc.*, 505 F.2d 264 (6th Cir. 1974).

17. See *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F. Supp. 1117 (E.D. Wis. 1978).

18. 36 U.S.C. § 371 (1988). The Amateur Sports Act established the United States Olympic Committee, a federally chartered corporation, to oversee amateur athletics competition in the Olympics, and to provide for eligibility of national governing bodies, and resolution of disputes involving national governing bodies. Equal opportunity is required "without discrimination on the basis of . . . sex," regarding athletes. *Id.* § 391(b)(6). Governing boards are to be selected "without regard to . . . sex, except that in sports where there are separate male and female programs, it provides for reasonable representation of both males and females on such governing board. *Id.* § 391(b)(7). Section 392 (a)(6) details the duties of the national governing bodies, including the obligation to "provide equitable support and encouragement for participation by women where separate programs for male and female athletes are conducted on a national basis." *Id.*

19. The following 19 states have equal rights amendments in their state constitutions: Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington, and Wyoming. 3 KAREN TOKARZ, *LEGAL RESEARCH GUIDES: WOMEN, SPORTS, AND THE LAW* 80-83 (1986). See also Doralice McEuen Graff et al., Comment, *Blair v. Washington State University: Making State ERA's A Potent Remedy for Sex Discrimination in Athletics*, 14 J.C. & U.L. 575, 583 n.39 (1988) (containing a table comparing 16 state ERA's); Christina A. Longo & Elizabeth F. Thomas, Comment, *Haffer v. Temple University: A Reawakening of Gender Discrimination in Intercollegiate Athletics*, 16 J.C. & U.L. 137, 142 n.35 (1989). See also Sherry Broder & Beverly Wee, *Hawaii's Equal Rights Amendment: Its Impact on Athletic Opportunities and Competition for Women*, 2 U. HAW. L. REV. 97 (1979); Graff et al., *supra*; Pamela L. Jacklin, *Sexual Equality in High School Athletics: The Approach of Darrin v. Gould*, 12 GONZ. L. REV. 691 (1977); Longo & Thomas, *supra*, at 144-45 (regarding the Pennsylvania Equal Rights Amendment, PA. CONST. art. 1, § 28); Jacqueline A. Mikula, *Pennsylvania Constitution—Equal Rights Amendment—Sex Discrimination—Interscholastic Sports*, 14 DUQ. L. REV. 101 (1975).

Some courts concluded that their states' equal rights acts extended equal protection to community or interscholastic athletics. See, e.g., *Michigan Dep't of Civil Rights v. Waterford Township Dep't of Parks and Recreation*, 387 N.W.2d 821 (Mich. 1986) (MICH. CONST. art. 1, § 2); *Attorney General v. Massachusetts Interscholastic Athletic Ass'n*, 393 N.E.2d 284 (Mass. 1979); *Packel v. Pennsylvania Interscholastic Athletic Ass'n*, 334 A.2d 839 (Pa. Commw. Ct. 1975) (PA. CONST. art. 1, § 28); *Darrin v. Gould*, 540 P.2d 882 (Wash. 1975) (WASH. CONST. art. 31, §1). See also *Lincoln v. Mid-Cities Pee Wee Football Ass'n*, 576 S.W.2d 922 (Tex. Civ. App. 1979) (TEX. CONST. art. III, § 3(a) (1972); *Junior Football Ass'n of Orange v. Gaudet*, 546 S.W.2d 70 (Tex. Civ. App. 1976) (same); *White v. Corpus Christi*

in the attendant jurisdiction that also prohibit sex discrimination in this area.²⁰ Minnesota²¹ and Washington,²² for example, have

Misses Kickball Ass'n, 526 S.W.2d 766 (Tex. Civ. App. 1975) (same).

20. Some states enacted legislation modeled on Title IX. See N.O.W. LEGAL DEFENSE AND EDUCATION FUND & DR. RENEE CHEROW-O'LEARY, *THE STATE-BY-STATE GUIDE TO WOMEN'S LEGAL RIGHTS* 48 (1987) ("Fourteen states have enacted laws modeled on the federal Title IX; Alaska, California, Florida, Hawaii, Iowa, Maine, Massachusetts, Minnesota, Nebraska, New Jersey, Oregon, Rhode Island, Washington, and Wisconsin."). Other states issued their own statutes prohibiting sex discrimination in educational programs and activities. See TOKARZ, *supra* note 19, at 83-89 (Colorado, Connecticut, District of Columbia, Idaho, Illinois, Louisiana, and North Carolina are jurisdictions or states which have statutes that prohibit sex discrimination in educational institutions). See also Longo & Thomas, *supra* note 19, at 147 nn.63-63. See, e.g., ALASKA STAT. § 14.18.010 to -110 (1987 & Supp. 1991) (prohibition against discrimination based on sex in public education); ALASKA STAT. § 14.18.040 (1987) (discrimination in recreational and athletic activities prohibited); CAL. EDUC. CODE §§ 40, 41 (West 1978 & Supp. 1991) (participation in a particular physical education activity or sport, if required of students of one sex, shall be available to students of each sex); CAL. EDUC. CODE §§ 200-260 (West Supp. 1991) (prohibition of discrimination on the basis of sex) (modeled after Title IX); COLO. REV. STAT. § 24-34-601 (West 1990 & Supp. 1991) (governing discrimination on the basis of sex in places of public accommodation, including "educational institution"); CONN. GEN. STAT. § 10-15c (West Supp. 1991) (discrimination in public schools prohibited; school attendance by five-year-olds); FLA. STAT. ANN. § 228.2001 (West 1989) (discrimination against students and employees in state system of public education; prohibitions; equality of access; strategies to overcome underrepresentation; remedies) (modeled after Title IX); FLA. STAT. ANN. § 240.533 (West 1989) (regarding the composition of a Council on Equity in Athletics); HAW. REV. STAT. § 296-61 (Supp. 1991) (student bias) (modeled after Title IX); ILL. REV. STAT. ch. 122, § 27-1 (West Supp. 1991) (areas of education taught—discrimination on account of sex); ILL. REV. STAT. ch. 122, § 34-18(1) (West Supp. 1991) (powers of the board); IOWA CODE ANN. § 601A.9 (West 1988 & Supp. 1991) (unfair or discriminatory practices-education) [Civil Rights Commission]; ME. REV. STAT. ANN. tit. 5, §§ 4601, 4602.1 (1989 & Supp. 1990) (right to freedom from discrimination in education, and unlawful educational discrimination on the basis of sex); MICH. COMP. LAWS ANN. § 380.1146 (West 1988) (school discrimination; race, color, sex, intellectual progress) ("A separate school or department shall not be kept for a person on account of race, color, or sex."); MICH. COMP. LAWS ANN. § 380.1521 (West 1988) (athletic association; promotion of sport, regulations, eligibility of athletes); MICH. COMP. LAWS ANN. § 363.03(5) (West 1991) (Educational Institution); MINN. STAT. ANN. § 126.21 (West Supp. 1992) (education-athletic programs; sex discrimination) (The Kahn Act is modeled after Title IX); MINN. STAT. ANN. § 363.01 to -15 [Human Rights] (West 1991) ("[I]t is not an unfair discriminatory practice for an educational institution or a public service to operate or sponsor separate athletic teams and activities for members of each sex or to restrict membership on an athletic team to participants of one sex, if this separation or restriction meets the requirements of section 126.21; (c) The department of human rights shall investigate all charges alleging sex discrimination on athletic programs in educational institutions and public services pursuant to the standards and requirements of section 126.21 and the procedures enumerated in this chapter); MONT. CODE ANN. § 49-2-307 (1991) (discrimination in education); N.J. STAT. ANN. § 18A:36-20 (West 1989) (discrimination; prohibition) ("No pupil in a public school in this state, shall be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of . . . sex . . ."); N.Y. CIV. RTS. LAW § 40, 40-c (McKinney 1976 & Supp. 1992) (equal rights in places of public accommodation, resort of amusement) (public accommodations includes schools); N.Y. EDUC. LAW § 3201-a (McKinney 1981) (discrimination on account of race, color, or national origin prohibited); N.Y. EXEC. LAW § 291(2) (McKinney 1982) (equality of

passed comprehensive legislation prohibiting sex discrimination in educational athletic departments.

C. Gender-Based Classifications

Equal protection considerations are inextricably intertwined in amateur athletics due to the history and scope of Title IX and the nature of some of the defendants. There are three standards of review applied to determine whether a classification comports with the guarantees afforded by the Equal Protection Clause of the Fourteenth Amendment. The strictest standard of review is imposed for fundamental rights and "suspect" classifications.²³ Un-

opportunity a civil right); ORS § 659.150 (1989) (discrimination in education); ORS § 659.175 (1989) (prohibition against discrimination for participation in sanctioned athletic event) (regarding participation in Olympic sports); PA. STAT. ANN. tit. 24, § 5-511 (Purdon 1962 & Supp. 1991) (rules and regulations governing athletics, publications, and organizations); PA. STAT. ANN. tit. 24, § 5004 (Purdon 1962 & Supp. 1991) (unfair educational practices); R.I. GEN. LAWS § 16-38-1.1 (1988) (discrimination because of sex in public elementary and secondary schools' extracurricular athletic activities) (females may be prohibited from participation in all contact sports provided that equal athletic opportunities which effectively accommodate the interests and abilities of both sexes are made available); R.I. GEN. LAWS §§ 16-38-1.1(a)(2), -1.1(b)(2) (1988) (on the collegiate level, schools may "provide separate teams for contact sports or for sports where selection for teams is based on competitive skills, provided that equal athletic opportunities which effectively accommodate the interests and abilities of both sexes are made available . . ."); S.D. CODIFIED LAWS ANN. § 20-13-22 (1987) ("Segregation by sex of athletic activities offered by an educational institution does not constitute discrimination on the basis of sex in violation of this chapter if the opportunity to participate in athletic activities offered by the educational institution is substantially equal for both sexes."); S.D. CODIFIED LAWS ANN. § 20-13-22.1 (Supp. 1991) (programs and activities exempt when conducted for educational, social, or recreational purposes); WASH. REV. CODE ANN. § 28A.640.010 (West Supp. 1991) (discrimination prohibited); WASH. REV. CODE ANN. § 28A.85.020 (West Supp. 1991) (regulations, guidelines to eliminate discrimination); WASH. REV. CODE ANN. § 28B.100 (West 1989 & Supp. 1991) (gender equity in higher education); WIS. STAT. ANN. § 118.13 (West 1991) (prohibits discrimination on the basis of sex in any extracurricular or recreational programs or activities); WYO. CONST. art. 7, 10 (1990) (no discrimination between pupils) ("In none of the public schools so established and maintained shall distinction or discrimination be made on account of sex, race or color"). See also *Israel v. Secondary Schs. Activities Comm'n*, 388 S.E.2d 480 (W. Va. 1989) (W. VA. CODE § 5-11-9 (f)(1) (1987); *Aiken v. Lieuallen*, 593 P.2d 1243, 1245 (Ct. App. Ore. 1979) (ORS § 659.150).

21. MINN. STAT. ANN. §§ 126.21, 363.01 (West Supp. 1991).

22. WASH. REV. CODE ANN. §§ 28A.85.010, 28B.100 (West 1989 & Supp. 1991) (Gender Equity in Higher Education).

23. "Suspect" classifications include race, alienage, and national origin. See, e.g., *Loving v. Richardson*, 388 U.S. 1 (1967) (race); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Korematsu v. United States*, 323 U.S. 214 (1944) (national origin). See Note, *Sex Discrimination in Intercollegiate Athletics*, 61 IOWA L. REV. 420, 442 n.125 (1975). In applying the strict scrutiny standard, the classification must "further a demonstrably compelling interest and limit their impact as narrowly as possible consistent with their legitimate purpose." *Attorney General v. Massachusetts Interscholastic Ass'n*, 393 N.E.2d 284, 291 (Mass. 1979). Colorado, Hawaii, Illinois, Maryland, Massachusetts, Pennsylvania, and Washington

like race, creed, or national origin, gender is not deemed a suspect class.²⁴ Therefore, gender-based discrimination is not held to a strict scrutiny standard for justification.²⁵ Rather, the second, or intermediate standard of review is applied to cases based on sex discrimination.²⁶ "To be constitutional, gender-based discrimination must serve important governmental objectives. The discriminatory means must be substantially related to the achievement of those objectives."²⁷ Third, the traditional standard of review requires the legislative classification to have a rational relationship to a legitimate government interest.²⁸

apply the strict scrutiny standard of review to their state equal rights amendments. Longo & Thoman, *supra* note 19, at 144 n.47.

24. The Equal Rights Amendment (ERA) would have resulted in sex being deemed a suspect class. The ERA "passed by Congress . . . and submitted to the legislatures of the States for ratification, declares that '[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.'" *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973). However, it was not ratified by the requisite number of states within the permitted time period. For cases predicated on a state's equal rights amendment, see *supra* note 19.

25. *Califano v. Webster*, 430 U.S. 313 (1977); *Craig v. Boren*, 429 U.S. 190 (1976). Sex was deemed a suspect class in *Frontiero v. Richardson*, 411 U.S. 677 (1973); however, it was not a majority decision as only eight Justices decided the case. Note, *supra* note 23, at 450 n.172. This commentary explained:

The plurality opinion written by Mr. Justice Brennan in *Frontiero v. Richardson*, . . . also declared sex to be inherently suspect; however, this view has yet to garner a majority by the Court. Indeed, given the current composition of the Court and the general attitude of reluctance to expand the field of suspect classifications, it seems improbable that the Court will declare sex as suspect at this time

Id. at 442 n.125. This statement appears just as relevant in 1992. "In analyzing gender-based discrimination, the United States Supreme Court has been willing to take into account actual differences between the sexes, including physical ones." *Israel v. West Va. Secondary Schs. Activities Comm'n*, 388 S.E.2d 480, 484 (W. Va. 1989). See also *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1129 (9th Cir. 1982).

26. The state court in *Israel*, 388 S.E.2d at 484, explained:

Under the United States Constitution, a gender-based discrimination is subject to a level of scrutiny somewhere between the traditional equal protection analysis and the highest level of scrutiny utilized for suspect classes. The intermediate level of scrutiny as applied to gender-based discrimination was stated in *Craig v. Boren*, 429 U.S. 190 (1976) Under the middle-tier analysis for gender-based discrimination claims, courts have recognized that it is constitutionally permissible under certain circumstances for public schools to maintain separate sports teams for males and females so long as they are substantially equivalent.

27. *O'Connor v. Board of Educ.*, 545 F. Supp. 376, 378 (N.D. Ill. 1982). See also *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Sullivan v. City of Cleveland Heights*, 869 F.2d 961, 963 (6th Cir. 1989). "Equal protection of the laws is implicated when a classification treats similarly situated persons in a disadvantageous manner. The alleged discrimination must be a product of state action as distinguished from a purely private activity." *Israel v. West Va. Secondary Schs. Activities Comm'n*, 388 S.E.2d 480, 484 (W. Va. 1989).

28. The legislative classification will not be overturned unless patently arbitrary. See Note, *supra* note 23, at 441 n.118. For a discussion of the three standards of review, see *id.*

II. HISTORY OF TITLE IX

A. Overview

The odyssey of Title IX and its application is one filled with controversy. It is unquestioned that Title IX provided the impetus for the unparalleled rapid growth of female athletes in this country.²⁹ Notwithstanding this relative advancement, however, Title IX was handicapped from its inception, primarily because little legislative history surrounding the enactment is available.³⁰

at 440-44; Glenn Wong & Richard Ensor, *Sex Discrimination in Athletics: A Review of Two Decades of Accomplishments and Defeats*, 21 GONZ. L. REV. 345, 354-58 (1985/86). See also KADZIELSKI, *supra* note 13, at 97-98. For a detailed analysis of the applicable legal doctrines to support a female athlete's position on an all-male team when a female team is provided, see Note, *Sex Discrimination in High School Athletics: An Examination of Applicable Legal Doctrines*, 66 MINN. L. REV. 1115 (1982).

29. "According to the National Federation of State High School [Athletic] Associations, 1.9 million girls participated in interscholastic sports in 1990-1991, a total virtually unchanged since the late 1970's." Jay P. Goldman, *Leveling the Playing Field for Female Athletes: Title IX Brings Equity to School Sports, But Leaves Many Still Fighting*, 48 SCHOOL ADMINISTRATOR 20 (Dec. 1991). Kathryn M. Reith, Communications Director of the Women's Sports Foundation, indicated that 89,212 women took part in NCAA intercollegiate athletic activities (all divisions), according to figures of the NCAA for the year 1989-1990. This figure does not take into account women participating in intercollegiate athletic activities governed by other athletic associations.

30. Title IX was adopted without formal hearings or a committee report. See S. Rep. No. 798, 92d Cong., 2d Sess. 221-22 (1972); 118 CONG. REC. 5802 (1972) (Sen. Bayh) (commenting that amendment would generally parallel the provisions of Title VI of the Civil Rights Act of 1964). The genesis for Title IX originated at hearings on gender discrimination in education, held in 1970 by a special House Subcommittee on Education chaired by Representative Edith Green. See *Discrimination against Women: Hearings Before the Special Committee on Education of the Committee on Education and Labor*, § 805 of H.R. 16098, 91st Cong., 2d Sess. (1970). See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523 n.13 (1982). See also Haffer v. Temple Univ., 524 F. Supp. 531, 534 (E.D. Pa. 1981) (tracing in detail the early congressional actions regarding Title IX). The statute was "first introduced as an amendment to the Education Amendments of 1971." 117 CONG. REC. 30,155 (1971). The Senate, however, rejected the amendment "as nongermane to the bill under consideration." *Id.* at 30,415. In 1972, Title IX in its current form was reintroduced by Senator Birch Bayh. Haffer, 524 F. Supp. at 534. See also Note, *supra* note 23, at 459 n.218. The original legislation which became Title IX was "introduced as Title IX of H.R. 7248, the Higher Education Act of 1971. The early version of this legislation proposed the addition of the word 'sex' to Title VI of the Civil Rights Act of 1964 [which prohibits racial discrimination in public facilities]." *Id.* (citing H.R. 16098, 91st Cong., 2d Sess. § 805 (1970); H.R. 916, 92d Cong., 1st Sess., (1971)). For comments regarding the proposed legislation, see 117 CONG. REC. 30412 (daily ed., Aug. 6, 1971) (statement of Sen. Bayh); 118 CONG. REC. 3935-40, 5802-09 (1972) (statement of Sen. Bayh); 118 CONG. REC. 5814-15 (1971) (Sen. Bentsen's amendment to exempt certain universities, such as Texas Women's University, *id.* at 5814, was supported by Sen. Tower).

The courts are in accord that the legislative history of Title IX is sparse. See, e.g., Grove City College v. Bell, 465 U.S. 555, 566 (1984); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 532-33 (1982); Iron Arrow Honor Society v. Heckler, 702 F.2d 549, 557 (5th Cir. 1983), *vacated as moot*, 464 U.S. 67 (1983); Hillsdale College v. Department of Health, Edu-

The statute, as amended, specifically provides for certain exemptions, the most notable being religious institutions with religious tenets that do not comport with coeducational programs where required,³¹ Boy Scout and Girl Scout programs,³² and not-for-profit sororities and fraternities.³³ The statute, as originally enacted, allows federal agencies awarding federal funding to promulgate regulations insuring the absence of sex discrimination in educational programs or activities which are recipients of federal funds.³⁴

cation and Welfare, 696 F.2d 418, 426 (6th Cir. 1982); *Yellow Springs Exempted Village Sch. Bd. of Educ. v. Ohio High Sch. Athletics Ass'n*, 647 F.2d 651, 660 (6th Cir. 1981).

31. 20 U.S.C. § 1681(3) (1990).

32. 20 U.S.C. § 1681(7) (1990).

33. Pub. L. 93-568, §3a, 88 Stat. 1862 (1974). Other exclusions under the statute include: educational institutions training individuals for military service or merchant marine, 20 U.S.C. § 1681(4) (1972); public educational institutions with traditional and continuing admissions policy, 20 U.S.C. § 1681(5) (1972); social fraternities and sororities which are exempt from taxation under section 501(a) of Title 26, 20 U.S.C. § 1681(6) (1974); voluntary youth organizations, 20 U.S.C. § 1681(7) (1976); father-son or mother-daughter activities of educational institutions, however, "opportunities for reasonably comparable activities shall be provided for students of the other sex," 20 U.S.C. § 1681(8) (1976); and institutions of higher educational scholarships awards in beauty pageants," 20 U.S.C. § 1681(9) (1976). Title IX defines an educational institution as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means such school, college, or department." *Id.* § 1681(c).

34. Section 902, 20 U.S.C. § 1682 (1990) provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the commit-

Sports were only mentioned briefly in the congressional debate.³⁵ However, when it became apparent that Title IX could require that there be no sex discrimination in educational athletic programs or activities, particularly men's revenue-producing collegiate athletic teams, members of Congress introduced a number of bills and amendments that would restrict or dilute Title IX.³⁶ Congress defeated these proposed legislation.³⁷ The first Tower Amendment, for example, proposed that revenue-producing sports be exempted,³⁸ which would have ostensibly excluded intercollegi-

tees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such report shall become effective until thirty days have elapsed after the filing of such report.

The statute reveals that "[s]evere controls were imposed on HEW's power to issue regulations. First, any regulations proposed by HEW must receive presidential approval. Second, the statute provides for congressional review and potential veto of all proposed regulations. Finally, Congress retains the right to disapprove any termination of funds ordered by HEW." Courtney W. Howland, Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1256 (1979).

35. See 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh) (commenting that his legislation would not mandate the desegregation of football fields or men's locker rooms); 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh) (differential treatment based on sex would not be allowed in "sports facilities or other instances where personal privacy must be preserved."). See Howland, *supra* note 34, at 1255 n.11. See also Thomas A. Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 36 (1977).

36. Initially, the prevailing attitude was that discrimination is education pertained to admissions. See, e.g., 120 CONG. REC. 15,322 (1974) (Amendment 1343 to S. 1539) (Tower Amendment modification); 121 CONG. REC. 17,300 (1975) (S. Con. Res. 46) (Helm's Concurrent Resolution) 121 CONG. REC. 19,209 (1975) (H.R. Con. Res. 311 (Martin Concurrent Resolution); 121 CONG. REC. 22,775 (1975) (S. 2106) (Tower Amendment reintroduced); 121 CONG. REC. 22,940 (S. Con. Res. 52 (Laxalt Concurrent Resolution); 121 CONG. REC. 23,845 (1975) (S. 2146) (Helm's Amendment); 122 CONG. REC. 28,136 (1976) (Amend. 389) (McClure Amendment). See also *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 532 n.22 & 533 n.24 (1982); *Haffer v. Temple Univ.*, 524 F. Supp. 531, 534-35 (E.D. Pa. 1981) (regarding the specific proposed legislation).

37. Although Congress did not exempt revenue-producing sports, universities continued to assert this argument in state courts in which the aegis of state constitutional rights or state statutes controlled. See, e.g., *Aiken v. Lieuellen*, 593 P.2d 1243 (Or. Ct. App. 1979). In *Aiken*, the court considered the revenue-generating ability of a sport to be a valid factor in determining whether the University of Oregon satisfied the state statute's "reasonableness" standard. The court enunciated a caveat, however, that the University must take into account "the possibility of increasing [the] revenue-generating capabilities [of the women's intercollegiate basketball program, where the men's program was revenue-producing] by the use of increased funding and support." *Id.* at 1249. See *Edward Baranchfield & Melinda Grier, Aiken v. Lieuellen and Peterson v. Oregon State University: Defining Equity in Athletics*, 8 J.C. & U.L. 369 (1981). This argument was advanced by the university in *Blair v. Washington State Univ.*, 740 P.2d 1379 (Wash. 1987), regarding the men's intercollegiate football team, but rejected by the Washington Supreme Court. See also Graff et al., *supra* note 19.

38. Texas has a number of men's collegiate football programs. See, e.g., DAVID WHITFORD, *A PAYROLL TO MEET: A STORY OF GREED, CORRUPTION & FOOTBALL AT SMU* (1989)

ate football and men's basketball. In lieu of the Tower Amendment, Congress passed the Javits Amendment.³⁹ Although this Amendment did not exempt revenue-producing sports from Title IX coverage, it required the Department of Health, Education, and Welfare (HEW) to issue proposed reasonable regulations for intercollegiate athletic activities considering the nature of the particular sports.⁴⁰ Proposed regulations were subsequently introduced by HEW in 1974.⁴¹ It was not until May 27, 1975, that President Ger-

(regarding problems at one Texas intercollegiate football program). The interest in high school football in Texas is legendary. *See, e.g.*, H.G. BISSINGER, *FRIDAY NIGHT LIGHTS: A TOWN, A TEAM, AND A DREAM* (1990) (detailing a season in the life of a high school football team in Odessa, Texas). Interestingly, a United States Senator from Texas, Senator John Tower, in 1974 introduced the Tower Amendment, which initially exempted all intercollegiate athletics programs. *See* 120 CONG. REC. 15,322 (1974). The Amendment was later modified and would have added the following language to Title IX: "This section shall not apply to an intercollegiate activity insofar as such activity provides to the institutions gross receipts or donations required by such institutions to support that activity." *Id.* For statements in opposition to this proposed amendment, which was reintroduced in 1975, *see* 121 CONG. REC. 29791-95 (1975).

According to the Tower Amendment, the intercollegiate sport need only provide gross receipts or donations; it is not required to maintain a balanced budget. *See* MURRAY SPERBER, *COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY* 1-148 (1990). Sperber sets forth the proposition that it is a myth that college sports are incredibly profitable, earning huge sums of money for American colleges and universities. *Id.* at 3-4. "[O]nly ten percent of the college athletic departments in the United States are able to finance their athletic budget with the income from revenue-producing sports. The other ninety percent must dip into public money." 121 CONG. REC. 29791, 29793 (1975). According to a recent article, "[t]he most recent NCAA survey shows that more than 75[%] of Division I universities are operating in the red." Doug Bedell, *No Sporting Chance: 19-Year Move Toward Gender Equality Has Run Aground*, *THE DALLAS MORNING NEWS*, Sept. 1, 1991, at 16B. *See, e.g.*, *Haffer v. Temple Univ.*, 678 F. Supp. 517, 529 (E.D. Pa. 1981) (putative revenue teams of football and basketball "produce no net revenue"). The National Collegiate Athletic Association (NCAA) was a major opponent of Title IX. *See Note, supra* note 23, at 473; *see also* SPERBER, *supra*, at 324-25; Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, 3 *YALE J.L. & FEMINISM* 105, 112 (1990).

39. Section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 612 (1984). *See Note, supra* note 23, at 473 ("[A]fter its passage by the Senate, the Tower Amendment was deleted by a joint Senate-House conference committee which substituted the so-called Javits Amendment").

40. *Id.* The Javits Amendment provided that "[t]he Secretary [of the Department of Health, Education, and Welfare] shall prepare and publish, not later than thirty days after the date of enactment of this Act [August 21, 1974], proposed regulations implementing provisions of [T]itle IX . . . relating to the prohibition of sex discrimination in federally assisted education programs, which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports." U.S. CODE CONG. & ADMIN. NEWS 695 (1974).

41. 39 Fed. Reg. 22,228 (1974). Pursuant to the proposed Title IX regulations, "[e]ach educational institution was also obliged to undertake a student survey, at least once a year, in order to gauge student interest in participating in athletic activities provided by the institutions." Proposed Reg. § 86.38 (b). *See Note, supra* note 23, at 472. The federal regulations were watered down, omitting specifically any annual student-athletic interest survey and

ald Ford authorized the final Title IX regulations.⁴² The regulations were then submitted to Congress for review.⁴³ On July 21, 1975, Title IX regulations became effective.⁴⁴ The principal regulation pertaining to athletics governs interscholastic and intercollegiate programs, and other club and intramural sports sponsored by the schools.⁴⁵ Title IX regulations concerning athletic programs provided educational institutions a transition period for compliance. Elementary schools were required to comply by July 21, 1976; whereas secondary and post-secondary schools had until July 21, 1978, to comply.⁴⁶

Under the statute, a violation of Title IX by a recipient of federal funds could result in the termination of all federal funds, until the recipient came into compliance.⁴⁷ Due to the all-or-nothing severity of this provision,⁴⁸ post-secondary schools (some of which received substantial amounts of federal aid either directly or indirectly through their students who received federal educational grants or loans) had a legitimate interest in ascertaining the requisite elements of "equal opportunity" to insure compliance.

This uncertainty by colleges and universities resulted in HEW's issuance of a policy interpretation on December 11, 1979.⁴⁹ Seven years after the enactment of Title IX, the action, in effect, provided at least colleges and universities with additional time to comply with Title IX standards. As Congress never reviewed the policy interpretation, it does not have the imprimatur of the Title

any affirmative efforts by the school. *Id.* at 472. HEW explained, "This provision was widely interpreted as requiring institutions to take an annual poll of the student body and to offer all sports in which a majority of the student body expressed interest and abolish those in which there is no interest." 40 Fed. Reg. 24,128, 24,134 (1975). *See also* Howland, *supra* note 34, at 1257; 39 Fed. Reg. 22,228, 22,236 (1974).

42. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 531-32 (1982) (describing the enactment of Title IX regulations in detail).

43. *Id.* *See* Section 431(d)(1) of the General Education Provisions Act, Pub. L. No. 93-380, 88 Stat. 567 (amended at 20 U.S.C. § 1232 (d)(1)) (1990)).

44. 45 C.F.R. Part 86 (1975) (codified at 34 C.F.R. Part 106 (1991)). The NCAA proposal to exempt revenue-producing intercollegiate sports from coverage was not sanctioned, 40 Fed. Reg. 24,128, 24,134 (1975), with HEW determining that "[t]here is no basis under the statute for exempting such sports or their revenue from coverage of Title IX." *Id.*

45. 34 C.F.R. § 106.41 (1991). This Section is divided into four subsections entitled: (a) Generally; (b) Separate teams; (c) Equal opportunity; and (d) Adjustment period. The second and third subsections have provoked the most attention. The issuance of athletic scholarships is examined at 34 C.F.R. § 106.37 (c) (1991). Other general Title IX regulations that impact the prohibition of sex discrimination in educational athletic programs and activities are highlighted within the Article.

46. 45 C.F.R. § 86.41(d) (codified at 34 C.F.R. § 106.41(d) (1991)).

47. Section 902, 20 U.S.C. § 1682 (1990).

48. *Id.*

49. 44 Fed. Reg. 57,450 (1979).

regulations.⁵⁰ With the establishment of the Department of Education, the regulations were recodified in 1980,⁵¹ as a procedural matter, in order to grant the necessary authority to this new federal agency to oversee enforcement of the Title IX regulations.⁵²

During the early 1980's, while the federal executive branch primarily addressed what constituted compliance with Title IX, federal courts focused on the threshold issue of whether the program or activity received the requisite federal funding for Title IX to apply.⁵³ The latter issue culminated in the Supreme Court's decision in *Grove City College v. Bell*.⁵⁴

B. Avenues to Pursue a Title IX Violation

An allegation of a violation of Title IX may be pursued through four avenues: (1) utilizing the educational institution's internal grievance process; (2) filing an administrative complaint; (3) initiating of a compliance review by the administrative agency; and (4) commencing a federal lawsuit.

Title IX regulations require each recipient of federal funds to appoint a Title IX coordinator⁵⁵ and disseminate a nondiscriminatory policy.⁵⁶ Furthermore, the educational institution is required to set up an internal grievance procedure.⁵⁷ The procedural elements of a Title IX claim must be satisfied, namely, the time period (statute of limitations) in which the complaint must be filed with the Department of Education or appropriate department, and/or when the action must be commenced in federal court.⁵⁸

50. One legal scholar questioned "the legitimacy and constitutionality of the policy interpretation." Howland, *supra* note 34, at 1260.

51. 34 C.F.R. Part 106 (1980).

52. 45 Fed. Reg. 30,802, 30,962-63 (1980).

53. See *infra* notes 127-41 and accompanying text.

54. 465 U.S. 555 (1984).

55. 34 C.F.R. § 106.8(a) (1991).

56. 34 C.F.R. § 106.9 (1991).

57. *Id.* § 106.8(b). See MARTHA MATTHEW & SHIRLEY McCUME, TITLE IX GRIEVANCE PROCEDURE: AN INTRODUCTORY MANUAL, U.S. DEP'T OF EDUCATION OFFICE FOR CIVIL RIGHTS (2d ed. 1987) (detailing the methods for conducting and analyzing the internal grievance process used by educational institutions). The complainant is not required to use the internal grievance procedure before filing an administrative complaint with OCR. In some instances, however, filing an administrative complaint with OCR precludes further action of the internal grievance procedure. See U.S. Dep't of Education Office for Civil Rights pamphlet, *Title IX and Sex Discrimination* 3 (Nov. 1987).

58. An administrative complaint must be filed with the Department of Education or appropriate federal executive department within 180 days from the time that the discriminatory act occurred, 34 C.F.R. § 100.7 (1991), or within 60 days from the completion of an educational institution's internal grievance procedure process. See 34 C.F.R. § 106.8 (1991). Apparently, this time period may be extended by the discretion of a regional director for

The Department of Education, through their Office for Civil Rights (OCR), is responsible for enforcing the provisions of Title IX.⁵⁹ In addition, other agencies that distribute federal funds in this area are provided supervisory powers.⁶⁰ An administrative complaint may be filed with the OCR against the recipient of federal funds.⁶¹ The complaint may be filed confidentially.⁶² There is

good cause shown. See U.S. Dep't of Education Office for Civil Rights pamphlet, *supra* note 57, at 3.

The time period within which the lawsuit must be commenced in federal court is governed by the relevant state statute of limitations, according to the courts. There is no express statute of limitations provision in the federal statute. This period will neither be extended nor tolled unless pursuant to a statutory section. See *Bougher v. University of Pittsburgh*, 882 F.2d 74, 77 (3d Cir. 1989), wherein the Third Circuit stated:

The statute of limitations for judicial proceedings are not bound by the 180 day limitations period required to initiate administrative proceedings The regulatory scheme for federal administrative review of an educational institution's compliance with Title IX is not the applicable period to determine whether a judicial proceeding to enforce rights under Title IX has been initiated in a timely manner We therefore must 'borrow' the state statute of limitations in the cause of action most similar to the plaintiff's Title IX claim.

See also *Minor v. Northville Public Schools*, 605 F. Supp. 1185, 1199-1200 (D. Mich. 1985) ("Title IX . . . does not contain a statute of limitations. To ascertain the proper statute of limitations, the Court must look to the most analogous state statute.").

59. 34 C.F.R. § 106.41 (1991), 44 Fed. Reg. 71,413 (1979).

60. Section 902, 20 U.S.C. § 1682 (1990).

61. For a presentation of Title IX administrative complaints which were successful for prospective female athletes on the elementary and secondary level, see Goldman, *supra* note 29, at 21-22. Seventeen administrative complaints were filed during the first nine months of 1991, alleging Title IX violations at elementary and secondary schools. *Id.* at 21.

Forty-five administrative complaints have been filed against colleges and universities alleging Title IX violations and the athletic departments since passage of the Civil Rights Restoration Act. See Robert McG., Thomas, Jr., *Major Step Against Sex Discrimination*, N.Y. TIMES, Feb. 27, 1992, at B12. Sixteen administrative complaints were received by the OCR between March 23, 1988 [post-Civil Rights Restoration Act of 1987] and November 2, 1988, alleging violations at the following post-secondary educational institutions: "Athens (Ala.) State College, Bossier (La.) Parish CC, California-Santa Barbara, Louisiana State, Loyola (Md.) College, University of Maryland-Baltimore County, Metropolitan (Colo.) State, Mendocino (Calif.) CC, University of Nebraska, Salem (W. Va.) College, Santa Clara University, Towson (Md.) State." Longo & Thomas, *supra* note 19, at 147 n.64 (citation omitted).

The Board of Trustees of the University of Toledo voted in April 1990 to drop the women's field hockey team. An administrative complaint alleging violation of Title IX was filed in May 1990. Erik Brady, *Title IX: Still Trying to Measure Up*, USA TODAY, June 18, 1990, at 1C-2C. No letter of finding has been issued by the OCR, as of February 27, 1992, according to Jean Ledwith King, counsel for the women's team. Ms. King, based in Ann Arbor, Michigan, is also representing another women's field hockey team, which filed an administrative complaint during the spring of 1991 against Eastern Kentucky University. No letter of finding has been issued in that case as of February 27, 1992. Telephone conversation with Jean Ledwith King (February 27, 1992).

During December 1990, professors Linda Jean Carpenter, Ph.D., J.D. and R. Vivian Acosta, Ph.D., at Brooklyn College, filed an administrative complaint with the OCR alleging sex discrimination in athletics at Brooklyn College in violation of Title IX. See Robert McG.

a nonretaliation provision applicable to this area.⁶³ Upon receipt of an administrative complaint, the OCR would be charged with its investigation. The OCR issued a new *Title IX Athletic Investigator's Manual (Manual)* on April 2, 1990.⁶⁴ According to the Assistant Secretary of the OCR, Michael L. Williams, "The Manual was issued with the expectation that it would be revised periodically."⁶⁵

In 1974, the Women's Equity Action League (WEAL) commenced the first lawsuit in the area of Title IX against the then Secretary of HEW, alleging noncompliance with Title IX in permitting schools that discriminate to continue to receive federal

Thomas, Jr., *Two Women at Brooklyn College File Rights Complaints*, N.Y. TIMES, Dec. 12, 1990, at D2; Bedell, *supra* note 38, at 1B, 16B; Doug Bedell, *Title IX Case Could Set Precedent: Women's Advocates See Brooklyn College Complaint As Critical Test*, THE DALLAS MORNING NEWS, Sept. 3, 1991, at 10B.

Fourteen months later, the OCR found violations in ten out of twelve program areas charged, with Brooklyn College agreeing to implement reforms and come into full compliance by September 8, 1992. Thomas, *supra*, at B12. On February 13, 1991, the Committee on Women, chaired by former Council Member Miriam Friedlander of the City of New York, held a public hearing examining whether gender discrimination exists in athletic departments at CUNY (City University of New York) colleges. Brooklyn College is a member of the CUNY system.

62. 34 C.F.R. § 100.7(e) (1991).

63. *Id.*

64. The *Manual* was prepared without any input from interested groups. A briefing was held by the OCR during May 1990 at the United States Department of Education, in Washington, D.C. The new *Manual* contains a number of distressing components. First, regional offices may now use their own discretion in several areas, *id.* at 4, and in making many decisions, the offices are required to obtain only "information relevant to plans or commitments for the current year." *Id.* at 5. Further, the *Manual* contains no policy concerning the interviewing of nonathletes. *Id.* at 6. The *Manual* provides for a "second-class status" as being the yardstick to determine whether a violation has occurred, which is not the standard contained in the policy interpretation. 44 Fed. Reg. 71,413, 71,415 (1979) (setting forth an "equivalent standard"). Women's groups have raised the concern as to whether the statistical tests used to analyze the distribution of athletic scholarships between the sexes, found in the *Manual* are proper. See, e.g., Kathryn Reith, *Title IX Investigator's Manual: Under Review*, HEADWAY, Summer 1991, at 1, 6 (quarterly newsletter of the Women's Sports Foundation). Finally, the *Manual* provides few concrete examples in many cases where they would be helpful in ascertaining rather vague standards. It introduces an "offsetting factor" approach which is neither mentioned in the Title IX statute nor the Title IX regulation subsection mandating "Equal Opportunity." 34 C.F.R. § 106.41(c) (1991).

On January 4, 1991, women's education and sports advocates, led by Ellen J. Varygas, an attorney at the National Women's Law Center and chair of the National Coalition for Women and Girls in Education, met with Assistant Secretary of the OCR, Michael L. Williams, regarding certain sections of the new *Manual*. See Reith, *supra*, at 1, 6. Assistant Secretary Williams during May 1991 agreed to make certain revisions in the *Manual*. *Oversight Hearing: Office for Civil Rights, Department of Education, Hearing Before the Committee on Labor & Human Resources*, 102d Cong., 1st Sess., on *Reviewing the Activities of the Office of [sic] Civil Rights* 105-06 (1991) [hereinafter *Oversight Hearing*]. As of January 8, 1992, copies of the exact revisions have not been received by the Women's Sports Foundation, one of the groups participating in the January 1991 meeting.

65. *Oversight Hearing*, *supra* note 64, at 105-06.

funds.⁶⁶ WEAL was permitted to intervene in a pending lawsuit, *Adams v. Mathews*,⁶⁷ in 1976. The litigation in the *WEAL* lawsuit lasted sixteen years. In 1990, the District of Columbia Circuit Court dismissed the case, concluding that there was no jurisdiction, pursuant to intervening court decisions.⁶⁸ However, in 1977, during the pendency of the case, the parties entered into a consent decree, requiring the OCR to conduct a reasonable number of compliance reviews and to abide by certain time frames in their investigations.⁶⁹

The OCR was required to conduct an investigation, for instance, and determine whether a violation occurred within ninety days.⁷⁰ If a violation did occur, the OCR had an additional ninety days to obtain a remedy with the offending recipient.⁷¹ These provisions were incorporated into the 1979 HEW policy interpretation.⁷² The timeliness of investigations done by OCR, in the past, has been criticized.⁷³ In addition to this judicial oversight, as delin-

66. *Women's Equity Action League v. Mathews*, C.A. No.74-1720.

67. 536 F.2d 417 (D.C. Cir. 1976). The original case was brought in 1973, *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *aff'd and modified*, 480 F.2d 1159 (D.D.Cir. 1973) (en banc), *sub nom.* *Adams v. Mathews*, 536 F.2d 417 (D.C. Cir. 1976) (granting motion by WEAL to intervene in Adams case), *sub nom.* *Adams v. Bell*, 711 F.2d 161 (D.C. Cir. 1983) (affirming district court's refusal to enjoin the Department of Education from settling its Title VI enforcement proceeding against the North Carolina higher education system), *cert. denied*, 465 U.S. 1021 (1984), *sub nom.* *Adams v. Bennett*, 675 F. Supp. 668 (D.D.C. 1987) (granting defendant's motion to dismiss the action).

68. *See Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Council of and for the Blind v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983) (en banc). In 1984, the court of appeals in *WEAL v. Bell*, 743 F.2d 42 (D.C. Cir. 1984), vacated the injunction and consent order and remanded the case on the issue of whether plaintiffs had standing. On remand, the district court granted defendants' motion to dismiss the case. 675 F. Supp. 668 (D.D.C. 1987). On appeal, the circuit court reversed the decision, concluding that plaintiffs had standing and satisfied the "case or controversy" jurisdictional requirement. *WEAL v. Cavazos*, 879 F.2d 800 (D.C. Cir. 1989). In June 1990, upon further argument, the circuit court dismissed the case. *WEAL v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990).

69. *Cavazos*, 879 F.2d at 883 (detailing consent decree provisions). *See Caulfield v. Board of Educ. of City of New York*, 632 F.2d 999, 1002 (2d Cir. 1980) ("OCR has the responsibility of ensuring compliance through reviews, investigations and complaint resolution."), *cert. denied*, 450 U.S. 1030 (1981).

70. 44 Fed. Reg. 71,413, 71,418 (1979).

71. *Id.* at 71,418.

72. *Id.*

73. "OCR's primary activity is, and always has been, the investigation of complaints of discrimination in a timely manner." *Written statement of Assistant Secretary of OCR Michael Williams, Oversight Hearing, supra* note 64, at 10. *Contra* the plaintiffs' allegations in the *WEAL/Adams* litigation, *supra* notes 66-69 and accompanying text. *See, e.g., WEAL v. Cavazos*, 879 F.2d 880, 884 (D.C. Cir. 1989) ("In 1981, however, plaintiffs again complained of defaults and undue protraction in administrative superintendence of the statutory antidiscrimination prescriptions; for the delay and inaction, plaintiffs sought contempt sanctions."). "Clarence Thomas defended his record as head of OCR from July 1981 to May

eated, Congress has addressed a number of distressing elements regarding OCR's enforcement of Title IX, as well as other civil rights laws it is empowered to oversee.⁷⁴

In addition to filing administrative complaints, the OCR may initiate their own investigations, termed "compliance reviews."⁷⁵ It

1982. During his tenure Thomas admitted to a federal judge that the agency was violating court-ordered [WEAL] time frames for processing discriminatory complaints." *Thomas Values Affirmative Action, First Amendment*, 19 SCHOOL LAW NEWS, Sept. 26, 1991, at 5. See also *Thomas's OCR Stint Scrutinized as Confirmation Hearing Nears*, 19 SCHOOL LAW NEWS, Aug. 15, 1991, at 5.

74. See TWENTY-FOURTH REPORT BY THE HOUSE COMM. ON GOVERNMENT OPERATIONS TOGETHER WITH SEPARATE VIEWS, INVESTIGATION OF CIVIL RIGHTS ENFORCEMENT BY THE OFFICE FOR CIVIL RIGHTS AT THE DEP'T OF EDUCATION, H.R. No. 458, 99th Cong., 1st Sess. 6-33 (1985), wherein the findings of the subcommittee, chaired by Rep. Ted Weiss, included:

A. OCR and DOJ [Department of Justice] have failed to obtain complete enforcement remedies in cases where serious violations of law were found.

B. OCR ignored the internal findings of its quality assurance staff, and instead of acting on the services recommendations, disbanded it . . .

D. OCR cannot ensure that more than 300 cases settled by early complaint resolution were resolved according to Federal law and DOE'D regulations, and will not jeopardize future litigation involving violations of civil rights laws enacted by Congress.

E. OCR is studying methods to substitute technical assistance for compliance reviews, a switch that OCR's own policy and enforcement service considers illegal.

F. Despite insufficient resources, OCR has not used all funds appropriated by Congress for the enforcement of federal civil rights laws.

The recommendations included:

A. OCR should develop guidelines for the use of its two methods of enforcement . . .

C. OCR should develop guidelines for the resolution of discrimination complaints by early complaint resolution and pre-letter of finding negotiations.

D. OCR should develop guidelines ensuring that all settlements of cases where violations of law are found actually correct the violations.

Id. at v. See also MAJORITY STAFF OF THE COMM. ON EDUC. & LABOR, A REPORT ON THE INVESTIGATION OF THE CIVIL RIGHTS ENFORCEMENT ACTIVITIES OF THE OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUCATION, H.R. No. 100-FF, 100th Cong., 2d Sess. 63 (1988) with a scathing "Conclusions" section, which stated:

The oath of office, taken by various Secretaries of Education since 1981, has been an 'oath betrayed,' however. In its failure to enforce the civil rights law entrusted to it, the Office for Civil Rights of the Department of Education has caused harm to those whom it was established to protect, has shown contempt for the Federal courts, and has defied the Congress which enacted the statutes that this agency was empowered to execute.

See also *Failure & Fraud in Civil Rights Enforcement by the Department of Education*, Comm. on Government Operations (1987), and *Civil Rights Enforcement in the Department of Education: Hearings Before the Subcomm. on Civil and Constitutional Rights, Comm. on the Judiciary*, 97th Cong. 2d Sess. (1982). Congressional oversight hearings examining the Office for Civil Rights were held on May 17, 1991, by the Senate Subcommittee on Employment and Productivity, chaired by Sen. Paul Simon. See *supra* note 64.

75. The number of compliance reviews conducted by the OCR is insignificant. As indicated, at one period the OCR was bound by a consent decree requiring the OCR to conduct

may follow any of four options at the completion of an investigation. First, the OCR may determine that an actionable basis exists, and try to amicably resolve the alleged sex discrimination.⁷⁶ The typical scenario has been that when a school or school district is found in violation of Title IX, it enters into a "compliance action plan"—a voluntary agreement between the OCR and the educational institution initiating or discontinuing certain actions within specified time frames, thereby curtailing the withdrawal of federal funds.⁷⁷ The OCR would then be further obligated to monitor that the conditions set forth in the compliance action plan were implemented and completed. Second, administrative hearings may be

a reasonable number of compliance reviews. See *WEAL v. Cavazos*, 906 F.2d 742, 746 (D.C. Cir. 1990). Schools chosen for compliance reviews are generally randomly selected.

During December 1990, Assistant Secretary of OCR, Michael L. Williams, announced that Title IX would be among the top priorities for his office during 1991. During May, 1991, the Senate subcommittee hearings were held before the Subcommittee on Employment & Productivity of the U.S. Senate Committee on Labor & Human Resources. Although the main focus of the oversight hearings was tracking and ability grouping within school systems, the prepared written statement of Assistant Secretary Michael L. Williams, submitted to the subcommittee, covered a myriad of topics, including Title IX. According to the written statement, Assistant Secretary Williams indicated, "I have changed the focus of OCR's compliance review program from an emphasis on overall numbers to an emphasis on impact." *Oversight Hearing*, *supra* note 64, at 15.

The statement's appendix indicated that as of May 15, 1991, the OCR scheduled four Title IX compliance reviews to be conducted at the following public universities: West Carolina University, Iowa State University, University of Wyoming, and Oregon State University. *Id.* at 26. It is unclear what "impact" was intended. Mendocino College and the University of California, Santa Barbara were also selected for compliance reviews. However, the review of three of the institutions did not commence until September 1991. See Squire, Sanders & Dempsey, *Governmental Affairs Report*, THE NCAA NEWS, Oct. 21, 1991, at 5 (Western Carolina University, University of Wyoming, and Mendocino College). In a December 1991 article, Jean Peelen, Director of Policy and Enforcement Services for the OCR indicated "[T]itle IX athletic compliance reviews [are] now underway at six universities and one school district, the San Mateo, California Union High School District . . ." Goldman, *supra* note 29, at 24. It should be noted that there are ten regional offices of the OCR nationwide. Therefore, the compliance reviews planned would not even account for each regional office conducting a single compliance review. This lackluster figure should be compared to the OCR's budget request of \$56,000,000 for the contemporaneous fiscal year. *Oversight Hearing*, *supra* note 64, at 13.

76. 34 C.F.R. § 106.8(a) (1991). "[S]ecretary Terrel H. Bell of the Department of Education adopted a nonconfrontation approach in 1981. Under this policy, the OCR may find schools in compliance with Title IX if the schools agree to rectify any violations of Title IX found through the OCR's investigation." Wong & Ensor, *supra* note 28, at 372. But see OCR Policy Interpretation, 44 Fed. Reg. 71,413, 71,419 (1979) (nonconfrontational approach already set forth); 34 C.F.R. § 106.3(a) (1991) (regarding "remedial action" which required that "such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.").

77. See, e.g., *Alexander v. Yale University*, 631 F.2d 178 (2d Cir. 1980). See also Barry Temkin, *Public League Agrees to Upgrade Girls Athletics*, CHICAGO TRIBUNE, July 13, 1987, § 4, at 5 (Chicago Board of Education entered into a compliance action plan with the OCR).

conducted, generally a rare occurrence under Title IX.⁷⁸ Third, the OCR may forward the complaint to the Justice Department for prosecution, also done infrequently.⁷⁹ Finally, if the OCR finds no violation at the end of its investigation, it may dismiss or close the case.

Since the enactment of Title IX nearly twenty years ago, there have been only four Supreme Court decisions.⁸⁰ In *Cannon v. University of Chicago*,⁸¹ the Court held that although Title IX does not expressly provide for an aggrieved individual's right to commence a federal lawsuit, there is an implied right by a citizen to commence a Title IX action.⁸² Individual plaintiffs alleging sex dis-

78. See *In the Matter of Birmingham City Sch. Dist. and Alabama Dept of Educ.*, 53 EDUC. L. REP. 1470 (West 1989). This is one of the rare cases wherein an administrative panel ordered that federal funds could be curtailed in a Title IX case. Section 903 of Title IX provides for judicial review of any agency determination. See 20 U.S.C. § 1683 (1990). *Accord Doe v. Attorney General of United States*, 941 F.2d 780, 787 (9th Cir. 1991).

79. See, e.g., *Pavey v. University of Alaska*, 490 F. Supp. 1011 (D. Alaska 1980). In 1979, the Justice Department's motion to intervene in the pending lawsuit was granted. *United States Commission on Civil Rights*, *supra* note 5, at 36. But see *Bush Administration Lax On Civil Rights Lawyers Say*, 19 SCHOOL LAW NEWS, April 25, 1991, at 5 ("The Education Department has not asked the Justice Department to prosecute a single case of sex- or disability-based discrimination since President Bush took office in January 1989.").

80. See *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (implied private right of action to commence a Title IX lawsuit); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) (regulations covering employees of educational institutions receiving federal funds were constitutional); *Grove City College v. Bell*, 465 U.S. 555 (1984) (specific program must receive federal funds for Title IX to apply); *Franklin v. Gwinnett County Public Schs.*, No. 90-918, 1992 U.S. LEXIS 1375 (Feb. 26, 1992) (compensatory damages may be awarded in a Title IX action when intentional discrimination exists) (opinion on file with the U. MIAMI ENT. & SPORTS L. REV.). See *infra* text accompanying note 102, for a discussion of the *Franklin* opinion.

81. 441 U.S. 677 (1979).

82. See *Cannon v. University of Chicago*, 441 U.S. 677 (1979), *on remand*, 605 F.2d 560 (7th Cir. 1979). See also *Haffer v. Temple Univ.*, 524 F. Supp. 531, 535 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982), *motion for reconsideration*, 678 F. Supp. 517 (E.D. Pa. 1986); *O'Connor v. Board of Educ.*, 645 F.2d 578 (7th Cir.), *cert. denied*, 454 U.S. 1084 (1981), *on remand*, 545 F. Supp. 376, 382 (N.D. Ill. 1982).

It appears that a prospective plaintiff need not first pursue the administrative route before commencing an action in a federal district court, as a prospective plaintiff must do before commencing an action alleging age discrimination. See *Age Discrimination in Employment Act*, 29 U.S.C. §§ 621-634 (1990). The federal district courts have granted preliminary injunctions without the plaintiff first filing with the OCR or any other appropriate federal department.

The possibility of a federal lawsuit brought on behalf of the women's intercollegiate basketball team at the University of Oklahoma resulted in the university's decision to reverse their decision to discontinue the team. See *OU Coach Quits*, NEWSDAY, April 7, 1990, at 23; Donna A. Lopiano, *Fair Play for All (Even Women)*, N.Y. TIMES, April 15, 1990, § 8, at 10; Paul English, *OU Told Suit Looms Over Women's Team*, THE DAILY OKLAHOMAN, April 5, 1990, at 1, 2. The situation was replicated at William and Mary College during February 1991. See *Lyn St. James, President's Corner*, HEADWAY, Spring 1991, at 3; *Now*

crimination are accorded injunctive⁸³ and declaratory relief,⁸⁴ and attorneys fees may be awarded.⁸⁵ However, the question whether compensatory damages may be awarded to a plaintiff was controverted by the courts.⁸⁶

One theory in support of allowing compensatory damages in a Title IX action is that Title IX was modeled after Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and national origin in public facilities.⁸⁷ As Title VI allows for compensatory damages,⁸⁸ and both statutes remedy

William and Mary Both Get to Play, WOMEN'S SPORTS PAGES, March 1991, at 9.

83. See, e.g., *Rowley v. Members of the Bd. of Educ. of the St. Vrain Valley Sch. Dist.*, 863 F.2d 39 (10th Cir. 1989); *Saint v. Nebraska Sch. Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988). See also *Dahlem v. Board of Educ. of Denver Public Schs.*, 901 F.2d 1508 (10th Cir. 1990); *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982). For an examination of injunctive relief, see Cheryl L. Schubert-Madsen, et al., *Gender Discrimination in Athletics*, 67 N.D.L. Rev. 227, 237-38 (1991).

84. See, e.g., *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletics Ass'n*, 443 F. Supp. 753 (S.D. Ohio 1978), *rev'd*, 647 F.2d 651 (6th Cir. 1981).

85. See Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988). According to the Supreme Court in *Cannon*, 441 U.S. at 685, this Act "authorizes an award of fees to prevailing private parties in actions to enforce Title IX." *Accord* *North Carolina Dep't of Transp. v. Crest St. Council*, 479 U.S. 6, 12 (1986). See also *Othen v. Ann Arbor Sch. Bd.*, 699 F.2d 309 (6th Cir. 1983). For cases involving allegations of sex discrimination in high school athletic programs and whether attorney's fees should be awarded in actions under 42 U.S.C. § 1983 (pursuant to 42 U.S.C. § 1988), see *Habetz v. Louisiana High Sch. Athletic Ass'n*, 915 F.2d 164 (5th Cir. 1990); *Dahlem v. Board of Educ. of the Denver Public Schs.*, 901 F.2d 1508 (10th Cir. 1990); *Libby v. South Inter-Conference Ass'n*, 728 F. Supp. 504 (N.D. Ill. 1990).

In *Haffer v. Temple Univ.*, 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982), apparently "the university wound up spending more than \$1 million in defense. It also had to pay plaintiffs' legal fees of about \$700,000." Doug Bedell, *Title IX Fighter: Attorney Ellen Varygas Battles Inequality in Sports Wherever She Finds It*, THE DALLAS MORNING NEWS, Sept. 4, 1991, at 10B. See *infra* notes 127-30 and accompanying text.

86. Both the Title IX statute, Pub. L. 92-318, 86 Stat. 373 (codified primarily at 20 U.S.C. § 1681 (1991)), and Title IX regulations, 34 C.F.R. Part 106, are silent on the issue of compensatory damages. See, e.g., *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 885 n.6 (1st Cir. 1988), *on remand*, 759 F. Supp. 40 (D. Puerto Rico 1991). Title IX specifically provides for the withholding of federal funds to the recipient which discriminates in its educational programs or activities on the basis of sex, § 902, 20 U.S.C. § 1682, "or (2) by any means authorized by law." *Id.* As pertains to administrative complaints, Title IX regulations provide that "the procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated by reference . . ." 34 C.F.R. § 106.71 (1991).

87. See *supra* note 30. See, e.g., *Lieberman v. University of Chicago*, 660 F.2d 1185, 1189 (7th Cir. 1981) (citing *Cannon v. University of Chicago*, 441 U.S. 677 (1979), *cert. denied*, 456 U.S. 937 (1982)); *Beehler v. Jeffes*, 664 F. Supp. 931, 940 (M.D. Pa. 1986) (citing *Cannon*, 441 U.S. 677 (1979) and *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979)); *Haffer v. Temple Univ.*, 524 F. Supp. 531, 533 (E.D. Pa. 1981).

88. See *Beehler*, 664 F. Supp. 931 (M.D. Pa. 1986) (citing *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984) (Section 504 of the Rehabilitation Act of 1973) and *Guardians Ass'n of New York City v. Civil Service Comm'n*, 663 F.2d 232 (2d Cir. 1980), *cert. granted*, 463 U.S. 582 (1983)). But see *infra* note 98.

discriminatory conduct, this theory advances that Title IX should, *a fortiori*, also provide compensatory damages where warranted.⁸⁹

There is no uniformity on the question whether a violation of Title IX requires a claimant to prove an intentional discriminatory act. The United States Court of Appeals for the Third Circuit in *Pfeiffer v. School Board for Marion Center Area*,⁹⁰ explicitly stated, "Neither the Supreme Court nor this court has decided specifically whether intent is a necessary element of a Title IX claim."⁹¹ According to the Seventh Circuit, disparate impact is not sufficient to establish a violation; intentional discrimination must be proven.⁹² In *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Ass'n*,⁹³ however, the Sixth Circuit remanded the case to permit the plaintiffs to show there was intentional support of a local board of education in pursuing discriminatory practices and that the plaintiffs sought relief the state could provide.

Some courts sanctioned compensatory damages in a Title IX action when the plaintiffs established intentional discrimination.⁹⁴ The Supreme Court granted a petition for writ of certiorari to hear the case of *Franklin v. Gwinnett County Public Schools*.⁹⁵ In *Franklin*, a female high school student, who has since graduated, alleged sexual harassment under Title IX at an educational institution by a male high school teacher.⁹⁶ The issue was whether com-

89. *Beehler*, 664 F. Supp. at 940 (citing *Cannon*, 441 U.S. 677 (1979), and *Lieberman*, 660 F.2d at 1189 (Swygert, C.J. dissenting)).

90. 917 F.2d 779 (3d Cir. 1990).

91. *Id.* at 788. See also *Haffer v. Temple Univ.*, 678 F. Supp. 517, 539 (E.D. Pa. 1987) (holding "Title IX regulations, like the Title VI regulations at issue in *Guardians*, do not explicitly impose an intent requirement").

92. *Cannon v. University of Chicago*, 648 F.2d 1104, 1109 (7th Cir. 1981). However, in sex discrimination cases brought under the Fourteenth Amendment the plaintiffs must demonstrate intentional discrimination. *Croteau v. Fair*, 686 F. Supp. 552, 553 (E.D. Va. 1988). But see *Pfeiffer v. School Bd. for Marion Center Area*, 917 F.2d 779, 788 (3d Cir. 1990); *Haffer*, 678 F. Supp. at 539 (determining the plaintiffs were not required to prove discriminatory intent to succeed on their claims where the complaint explicitly alleged violations of both Title IX and the implementing regulations). See also *supra* notes 90-91 and accompanying text. Some courts concluded that compensatory damages may be awarded when plaintiffs establish intentional discrimination, but may not be awarded if this element is missing.

93. 647 F.2d 651 (6th Cir. 1981).

94. See, e.g., *Pfeiffer*, 917 F.2d 779, 788 (3d Cir. 1990) (on remand to the district court, the case was dismissed, without compensatory damages being awarded); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 884 n.3 (1st Cir. 1988); *Beehler v. Jeffes*, 664 F. Supp. 931 (M.D. Pa. 1986) (citing *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981)).

95. 911 F.2d 617 (11th Cir. 1990), *cert. granted*, 501 U.S. —, 111 S. Ct. 2795 (1991), *rev'd*, No. 90-918, 1992 U.S. LEXIS 1375 (Feb. 26, 1992).

96. *Franklin*, No. 90-918, 1992 LEXIS 1375, at *1 (Feb. 26, 1992). Allegedly, the

pensatory damages may be awarded when intentional discrimination is alleged.⁹⁷ The United States Court of Appeals for the Eleventh Circuit concluded that Title IX does not allow compensatory damages.⁹⁸

This decision directly contradicts the Third Circuit's 1990 decision in *Pfeiffer*.⁹⁹ During February 1991 the Supreme Court invited the United States Solicitor General to file a brief as to whether the plaintiff's petition for a writ of certiorari should be granted in the *Franklin* Case, including the position of the federal government. The brief filed on behalf of the Solicitor General concurred that the petition should be granted, and approved the determination of the Eleventh Circuit.¹⁰⁰

The Supreme Court granted the petition for a writ of certiorari to hear the *Franklin* case during the October 1991 term.¹⁰¹

school administration was informed of the situation and a band director tried to dissuade the petitioner from pursuing the matter. The school began an investigation. However, at the end of that academic year, the teacher resigned and the band director retired. Therefore, the school closed its investigation. *Id.* at *8.

97. *Id.*

98. The Eleventh Circuit relied on *Guardians*, 463 U.S. 582, 620 (1983) ("[a]t least five justices would not allow compensatory relief to a private plaintiff under Title VI absent proof of discriminatory intent."). *Guardians* was a 5-4 decision with Justices Blackmun, Brennan, Marshall, and Stevens dissenting. *Accord* *Cone Corp. v. Florida Dep't of Transp.*, 921 F.2d 1190, 1202 (11th Cir. 1991).

99. 917 F.2d 779 (3d Cir. 1990).

100. — U.S. —, 111 S. Ct. 949 (1991). The brief of the U.S. Solicitor General, filed with the Office of the Clerk on May 20, 1991, concluded that "[t]he petition for a writ of certiorari should be granted." Brief at 20. It stated, "in our view, the court of appeals was correct in its conclusion that Title IX does not impliedly authorize a private plaintiff to recover compensatory legal damages, even if the plaintiff alleges an intentional violation of the statute." Brief at 6.

The five points raised in the amicus curiae brief dated August 14, 1991, filed with the Supreme Court by the National Women's Law Center and a number of women's legal, educational, and sport groups, were the following:

- (1) *Cannon's* holding that a private right of action exists under Title IX forms the basis of a Title IX compensatory damages remedy;
- (2) Compensatory damages, the normal remedy for a violation of statutory rights, are permissible under Title IX;
- (3) *Pennhurst* [State School and Hospital v. Halderman, 451 U.S. 1 (1981)] does not apply to the determination of the available remedies here;
- (4) In enacting the Civil Rights Remedies Equalization Amendment of 1986, [42 U.S.C. § 2000d-7] Congress ratified the availability of compensatory damages; and
- (5) Contrary to the contention of the United States, the availability of compensatory damages under Title IX would not lead to frivolous or excessive awards.

Brief at i, ii (on file with the U. MIAMI ENT. & SPORTS L. REV.). See also *infra* note 125.

101. See *supra* note 95. The United States Solicitor General was permitted to participate in oral argument, — U.S. —, 112 S. Ct. 43 (1991). Oral argument occurred on December 11, 1991. See *Thomas Hearings May Throw Spotlight on School Sex Bias Case*, 19 SCHOOL LAW NEWS, Oct. 24, 1991, at 6.

Only ten weeks after oral argument, a decidedly conservative Court, by unanimous decision, reversed the Eleventh Circuit and held that compensatory damages may be awarded in a Title IX action in which intentional discrimination is established. There is no provision in the federal statute on the issue of compensatory damages as a remedy. Justice White, writing for the majority, advanced "[t]hat if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief."¹⁰²

102. No. 90-918, 1992 U.S. LEXIS 1375, at *18 (Feb. 26, 1992). The opinion was joined by Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter. A concurring opinion was written by Justice Scalia, and joined by Chief Justice Rehnquist and Justice Thomas. (The author extends her gratitude to the National Women's Law Center for supplying a copy of the opinion on an expedited basis, for inclusion within this Article).

An analytical framework of Court's analysis follows:

- 1) Does the federal statute provide for a private cause of action to enforce it;
- 2) Does the statute provide for compensatory damages;
- 3) If not, did Congress intend compensatory damages as a remedy when the statute was enacted;
- 4) If so, did any subsequent actions of Congress contradict this position;
- 5) If not, do the federal courts have the authority to award compensatory damages.

First, the Court in *Canon v. University of Chicago*, 441 U.S. 677 (1979), determined that an implied private right of action existed to enforce Title IX. *Franklin*, 1992 U.S. LEXIS 1375, at *11-12. See also *supra* notes 80-82 and accompanying text. Second, because there was no express language conferring a private cause of action, the Court found it was understandably not surprising that there was no statutory language pertaining to remedies. *Id.* at *21. The Court affirmed the traditional presumption: "[W]e presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* at *12 (quoting *Davis v. Passman*, 442 U.S. 228, 246-47 (1979)). Third, the Court examined the state of law at the time Title IX was enacted, in 1972. *Id.* at *21. The Court determined that Supreme Court decisions had been rendered finding implied rights of action and approving of damage remedies. *Id.* at *22 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 207 (1967); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969)). Therefore, it could be inferred that Congress likewise intended a full spectrum of remedies. Fourth, the post-Title IX actions by Congress included the passage of the Civil Rights Remedies Equalization Amendment of 1986, see *infra* note 125 and accompanying text, and the Civil Rights Restoration Act of 1987, see *infra* notes 144-53 and accompanying text. *Id.* at *24. The *Franklin* Court noted that Congress in enacting the later statute sought "to correct what it considered to be an unacceptable decision on our part in *Grove City College v. Bell*, 465 U.S. 555 (1984)." *Id.* The Court concluded that these statutes established that Congress validated *Canon's* holding and "made no effort to . . . alter the traditional presumption . . ." *Id.*

Furthermore, the Court rebuked the notion that the recipients of federal funds were not on notice that the potential for compensatory damages existed. The Court stated: "This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. . . . Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe." *Id.* at *27.

Also rejected was the argument that permitting compensatory damages would infringe on the separation of powers of the executive and legislative branch. The Court found instead that the power to issue compensatory damages by the judicial branch would serve "an

While the possibility of having all federal funds terminated to the educational institutions was the safeguard for complying with Title IX, it has historically been more of a threat than actuality. The potential for monetary damages should have a considerable impact for Title IX.

The case law in the area of Title IX focuses on the jurisdictional issue of whether Title IX applies in the particular context, and explores the three remedies available to academic institutions when sex discrimination occurs.¹⁰³ The paradigmatic situation in this context arises when an educational institution has a men's sports team but not a women's team and a female athlete brings proceedings under Title IX alleging sex discrimination.¹⁰⁴ The institution may respond to a finding of sex discrimination in several ways. First, it may discontinue the men's team. This approach,

important safeguard against abuses of legislative and executive power." *Id.* at *25-26. Back pay or prospective relief would be of no avail as the petitioner has since graduated from high school, and regardless was not an employee of the school, and the teacher allegedly involved in the sexual harassment had resigned.

Respondents and the federal government argued that Title IX was enacted pursuant to the Spending Clause of the Constitution and, as such, could be limited to equitable relief. In dicta, the Court stated that because compensatory damages were permitted, there was no need to determine under which power of the Constitution Title IX derived its authority from Congress. *Id.* at *28 n.8.

Fifth, the Court, in an abbreviated lecture on American jurisprudence, going back to *Marbury v. Madison*, 1 Cranch 137, 163 (1803), recognized that the courts have been authorized to issue appropriate remedies. *Id.* at *13. The Court relied on the traditional presumption set forth in *Bell v. Hood*, 327 U.S. 678 (1946). *Id.* at *12 (quoting *Bell*, 327 U.S. at 684) ("[W]here legal rights have been invoked, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.").

Additionally, legal damages are favored as the first resort, before imposition of equitable damages. *Id.* at *29. Moreover, there was nothing in the opinions of *Consolidated Corp. v. Darrone*, 465 U.S. 624 (1984), or *Guardians Ass'n v. Civil Service Comm'n of New York City*, 463 U.S. 582 (1983), which eroded the traditional presumption. *Id.* at *19.

Justice Scalia, concurring, stated that "when rights of action are judicially 'implied,' categorical limitations upon their remedial scope may be judicially implied as well." *Id.* at *31 (Scalia, J., concurring). However, "[b]ecause of legislation enacted subsequent to *Canon*, it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate. *Id.* at *33 (Scalia, J., concurring).

103. See *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977). *Hoover* is cited with regularity in the area of gender discrimination in athletic programs, probably in part due to the well-reasoned decision of the court.

104. The atypical case scenario arises as to whether the men may participate on the women's team in a particular sport. See, e.g., *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), cert. denied, 464 U.S. 818 (1983) (denying a high school male the opportunity to play on the women's volleyball team where no men's volleyball team existed). See *infra* note 284. The plight of the talented female athlete who wants to play on the men's team in a contact sport, when a female team has been provided by the educational institution, is another fact pattern that has been examined by the courts.

however, is somewhat draconian: Although it renders the opportunity equal for both sexes, the underlying goal of Title IX is to foster female participation, not to deny athletic opportunity altogether.

Second, the educational institution may allow the female to try out for the men's team, thereby permitting both sexes to compete on the same team. Lastly, a separate team may be established for the women, provided it is equivalent to the men's team. An equivalent program includes comparable facilities, equipment, supplies, uniforms, coaches, tutors, playing time, practice time, medical care, and publicity.¹⁰⁵

Title IX regulations do not require, and case law interpreting these regulations has not held, that women be provided with a replication of the men's program, or that educational institutions allocate equal expenditures to each program.¹⁰⁶ Many colleges and school districts face economic problems and therefore are attempting to reduce their expenditures.¹⁰⁷ As institutions look to athletic departments to reduce costs incurred by their departments, the decision of which programs and activities are eliminated will be scrutinized to ensure that schools comply with Title IX.¹⁰⁸

105. 34 C.F.R. § 106.41(c) (1991). See *infra* notes 183-84.

106. *Id.* But see *Blair v. Washington State Univ.*, 740 P.2d 1379 (Wash. 1987) (discussing formulas to determine comparable programs between the sexes in a case brought under the state's constitutional and civil rights laws); WASH. REV. CODE ANN. § 28B.100 (West 1989 & Supp. 1991). "Washington State's spending on scholarships is now within one-half of one percent of the 53-47[%] male-to-female gender mix of the student body. In terms of participation numbers, Livengood [Washington State's Athletic Director] says the participation figures are even closer." Bedell, *supra* note 38, at 16B. See *infra* note 178.

107. See, e.g., Robert Suro, *Courts Ordering Financing Changes in Public Schools*, N.Y. TIMES, March 11, 1990, at A1 ("In the last 14 months the Supreme Courts of Montana, Kentucky, Texas have struck down their states' school financing systems. The courts, ruling under their state constitutions, have found unconstitutional disabilities in what is spent in rich and poor districts, primarily because of the difference in the value of taxable property."). See also Michael Marriott, *School Sports' Last Rah Rah? Budget Cuts Force Administrators to Choose Between Physical Education and Physics*, N.Y. TIMES, Nov. 3, 1991, at 4A, 24A-25A. Cornell University plans to drop four sports by the beginning of the 1992-93 academic year, including men's and women's gymnastics and fencing teams; and to stop funding this summer the following sports: men's and women's equestrian polo, men's lightweight football, and men's squash. The action was precipitated by a \$600,000 reduction in budget. Cornell: *Athletes Opposing Decision to Cancel at Least 4 Sports*, N.Y. TIMES, Feb. 9, 1992, at 52. In addition, baseball, men's and women's gymnastics, and men's and women's fencing were selected to be dropped at Wisconsin University to bring into line a \$1.95 million deficit in the athletic budget. Wisconsin Athletics Board Votes to Drop Varsity Sports, THE NCAA NEWS, April 3, 1991, at 20.

108. See *Dropping the Ball*, TIME, May 6, 1991, at 27; Lyn St. James, *President's Corner*, HEADWAY, Spring 1991, at 3. See also Emily Walzer, *Trimming the Field: Field Hockey Gets Mowed from College Budgets*, WOMEN'S SPORTS & FITNESS, Sept. 1991, at 78; *Title IX, Two Decades Later*, VOGUE, Sept. 1991, at 406 (regarding *inter alia* Yale Univer-

III. TITLE IX

A. Purpose

The *sine qua non* of Title IX is that it expresses the governmental interest in redressing past discrimination in athletics and in promoting equality of athletic opportunity.¹⁰⁹ In *Yellow Springs*,¹¹⁰ the Sixth Circuit noted: "Congress struck a balance between the needs of the individual athlete versus the group, [through Title IX], and determined that for purposes of the statute, equality is to be measured by the opportunities offered to the group, not by the makeup of any individual team."¹¹¹ One judge who concurred in part and dissented in part, stated:

[A] stigma may attach when qualified female athletes are not allowed to compete on teams with male athletes solely because they are females. Consequently, an equal opportunity is not offered if one team is organized in each sport and the female players are not capable of making the team.¹¹²

B. Constitutional Considerations

The Supreme Court has determined that Title IX does not violate the First Amendment to the United States Constitution.¹¹³ Furthermore, the Court expressly rejected the notion that education is a fundamental right, protected by the Fourteenth Amend-

sity women's ice hockey and gymnastics teams which were not cut); Debbie Becker, *Making the Cut, Women's Athletic Directors See Red After NCAA Budget Cutting*, WOMEN'S SPORTS & FITNESS, May/June 1991, at 70. In the Southwest Conference, "the Arkansas women's athletics staff toyed with filing [a Title IX complaint] prompting the university to add \$350,000 to its women's budget, hire a women's athletic director, boost salaries, and expand scholarships and support systems." Bedell, *supra* note 38, at 16B.

109. *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). "Civil rights statutes as this [Title IX] are entitled to broad interpretation to facilitate their remedial purposes." *Haffer v. Temple Univ.*, 525 F. Supp. 531, 537 (E.D. Pa. 1981). For a comprehensive listing of law journal articles examining Title IX and athletics, see F.G. Houdek, *Researching the Law of Sports: A Revised and Comprehensive Bibliography of Law Related Materials*, 13 HASTINGS COMM. & ENT. L.J., 589, 665-69 (1991). Other recent law journal articles not found therein include: Cynthia J. Harris, Comment, *The Reform of Women's Intercollegiate Athletics: Title IX, Equal Protection, and Supplemental Method*, 20 CAP. U.L. REV. 691 (1991); Olson, *supra* note 38; Schubert-Madsen et al., *supra* note 83.

110. 647 F.2d 651 (6th Cir. 1981).

111. *Id.* at 657. "[T]hrust of the legislation under [T]itle IX and the regulations promulgated thereunder are [sic] directed to an overall program rather than to each individual sport offered at an affected institution of learning," *Mularadelis v. Haldane Cent. Sch. Bd.*, 74 A.D.2d 248, 255 (2d Dept. 1980), *appeal dismissed*, 54 N.Y.2d 760 (1982).

112. *Yellow Springs*, 647 F.2d at 667.

113. *Grove City College v. Bell*, 465 U.S. 555 (1984) (associational right).

ment.¹¹⁴ In the area of education, participation in interscholastic and intercollegiate activities is not a constitutionally protected civil right.¹¹⁵ While extracurricular activities are not considered a fundamental constitutional right,¹¹⁶ when a school provides extracurricular activities, it must do so on an equal, though not necessarily identical, basis.¹¹⁷ Absolute equality of opportunity in every sport is not the mandate.¹¹⁸ A reduced opportunity to compete in amateur, professional, and Olympic basketball, for instance, and a diminished opportunity for a college athletic scholarship did not rise to the level of a constitutional violation.¹¹⁹ Moreover, the right to participate in post-season collegiate athletic competitions to secure future basketball careers did not constitute a fundamental right for the purpose of equal protection.¹²⁰ The court further concluded that "interscholastic athletics [is not] a property right."¹²¹

114. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-39 (1972).

115. See *Ridgeway v. Montana High Sch. Ass'n*, 633 F. Supp. 1564 (D. Mont. 1986), *aff'd*, 858 F.2d 579 (9th Cir. 1988). In *Croteau v. Fair*, 686 F. Supp. 552, 554 (E.D. Va. 1988), the court stated: "[T]here is no constitutional or statutory right to play any position on any athletic team. Instead, there is only the right to compete for such a position on equal terms and to be free from sex discrimination in state action." See also *Regents of the Univ. of Minnesota v. NCAA*, 560 F.2d 352 (8th Cir. 1977) (court specifically declined to find a property interest in intercollegiate basketball participation despite the fact that the lower court had found such a property interest); *Albach v. Odle*, 531 F.2d 983 (10th Cir. 1976); *Lesser v. Neosho Community College*, 741 F. Supp. 854 (D. Kan. 1990) (male student had no Fourteenth Amendment due process right to participate in a baseball program); *Burrows v. Ohio High Sch. Athletics Ass'n*, 712 F. Supp. 620, 627 (S.D. Ohio 1988), *aff'd*, 891 F.2d 122 (6th Cir. 1989); *Hawkins v. National Collegiate Athletic Ass'n*, 652 F. Supp. 602 (C.D. Ill. 1987); *Haverkamp v. Unified Sch. Dist. No. 380*, 689 F. Supp. 1055 (D. Kan. 1986) (there is no Fourteenth Amendment property interest right in cheerleading); *Blue v. University Interscholastic League*, 503 F. Supp. 1030, 1034-36 (N.D. Tex. 1980) (the right to play high school football or participate in post-season tournaments is not a fundamental right protected by the equal protection clause of the Fourteenth Amendment, and the denial thereof, does not constitute a denial of due process afforded under this amendment); *Bucha v. Illinois High Sch. Ass'n*, 351 F. Supp. 69 (N.D. Ill. 1972); *Haas v. South Bend Community Sch. Corp.*, 289 N.E.2d 495 (Ind. 1972); *Caso v. New York State High Sch. Athletic Ass'n*, 78 A.D.2d 41, 434 N.Y.S.2d 60 (4th Dept. 1980).

116. See *Stone v. Kansas State High Sch. Activities Ass'n*, 761 P.2d 1255 (Kan. Ct. App. 1988).

117. *Ridgeway*, 633 F. Supp. at 1564. See also *Haffer v. Temple Univ.*, 678 F. Supp. 517, 525 (E.D. Pa. 1987); *Leffel v. Wisconsin Interscholastic Ass'n*, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978); *Hoover v. Meiklejohn*, 430 F. Supp. 164, 171 (D. Colo. 1977).

118. *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1132 (9th Cir. 1982).

119. *Ridgeway*, 633 F. Supp. at 1580 (citing *Jones v. Oklahoma Secondary Sch. Activities Ass'n*, 453 F. Supp. 150 (W.D. Okla. 1977)).

120. *Hawkins v. National Collegiate Athletic Ass'n*, 652 F. Supp. 602, 611 (C.D. Ill. 1987).

121. *Id.* at 613. See also *Simkins v. South Dakota High Sch. Activities Ass'n*, 434 N.W.2d 367 (S.D. 1989).

In *Hoover v. Meiklejohn*,¹²² the district court stated, "Egalitarianism is the philosophical foundation of our political process and the principle which energizes the equal protection clause of the Fourteenth Amendment."¹²³ The court held that the complete denial to a female public high school student of any opportunity to play interscholastic soccer (deemed a contact sport), was a violation of the plaintiff's right to equal protection of the law under the Fourteenth Amendment. However, the court noted that "there is no right to a position on the athletic team, but only a right to compete for it on equal terms."¹²⁴

As of October 21, 1986, the Civil Rights Remedies Equalization Act provided that, "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in federal court for a violation of . . . [T]itle IX of the Education Amendments of 1972."¹²⁵

C. Programs Must be Federally Funded

Through its enactment of Title IX, Congress sought to avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against these practices.¹²⁶ The jurisdictional requirement in a Title IX action is the receipt of federal funds by the entity involved in the alleged sex discrimination. Prior to the passage of the Civil Rights Restoration Act, the threshold issue was whether the actual athletic program received federal funds necessary for Title IX to apply, or whether receipt by an educational institution or its students rendered the school as a whole, and all of its programs, subject to Title IX scrutiny.

122. 430 F. Supp. 164 (D. Colo. 1977).

123. *Id.* at 169.

124. *Id.* at 171. See *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985) (holding that there was no basis for a Title IX claim but granted the female-plaintiff's right to a preliminary injunction based on the Equal Protection Clause). See *infra* text accompanying notes 219-21.

125. 42 U.S.C. § 1000d-7(a)(1) (1986). It also provided that "[r]emedies (including both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a state." 42 U.S.C. § 2000d-7(a)(2). See *supra* notes 86-102 and accompanying text on the issue whether compensatory damages should be awarded, as inclusive as a remedy at law. The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State." See *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), *on remand*, 759 F. Supp. 40 (D. Puerto Rico 1991).

126. *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).

In *Haffer v. Temple University*,¹²⁷ the district court held that Title IX applied to an intercollegiate athletic program even if the program received no direct financial assistance.¹²⁸ On appeal, the United States Court of Appeals for the Third Circuit upheld the lower court's decision.¹²⁹ The parties subsequently entered into a consent decree settlement.¹³⁰

Most courts utilized the narrow "program-specific" interpretation to determine whether Title IX applied.¹³¹ In *O'Connor v. Board of Education*,¹³² the court stated:

The Supreme Court has recently upheld the [Title IX] regulations, although it construed them to be program specific, meaning that the particular program or activity accused of sex discrimination must receive or benefit from federal financial assistance.¹³³

The federal assistance many college students received, generally in the form of grants, was not considered to be a contribution to the entire institution. Rather, the federal assistance was considered federal funding only to the school's financial aid department. The entire institution, and thus all its departments, programs, and activities were not bound by Title IX.¹³⁴

The Supreme Court in *Grove City College v. Bell*¹³⁵ addressed

127. 524 F. Supp. 531 (E.D. Pa. 1981).

128. *Id.* at 532. The university as a whole received approximately nineteen million dollars from federal sources, constituting more than ten percent of the university's budget.

129. 688 F.2d 14 (3d Cir. 1982), *motion for reconsideration*, 678 F. Supp. 517 (E.D. Pa. 1987).

130. "Temple University will be bound to an extra year of successful class action settlement combatting discrimination against female athletes. The U.S. District Court has tentatively approved modifications to the 1988 consent decree, negotiated between counsel for Temple University and for the plaintiffs." *Temple University Update*, HEADWAY, Winter 1991, at 9. See also Longo & Thomas, *supra* note 19.

131. See, e.g., *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982); *Othen v. Ann Arbor Sch. Bd.*, 507 F. Supp. 1376 (D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983) (federal impact aid did not subjugate the school district's athletic department to Title IX jurisdiction). See also Note, *Title IX: Women's Collegiate Athletics in Limbo*, 40 WASH. & LEE L. REV. 297 (1983) (examining the jurisdictional aspect pre-*Grove City College*).

132. 645 F.2d 578 (7th Cir.), *cert. denied*, 454 U.S. 1084 (1981). See also 545 F. Supp. 376 (N.D. Ill. 1982) (granting defendant's motion for summary judgment).

133. 545 F. Supp. 376, 382 n.9 (N.D. Ill. 1982) (citing *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982)).

134. *Hillsdale College v. Department of Health, Education and Welfare*, 696 F.2d 418 (6th Cir. 1982), *rev'd*, 466 U.S. 901 (1984), *vacated and remanded*, 737 F.2d 520 (6th Cir. 1984). Examples of federal student aid include the following: Basic Educational Opportunity Grants (BEOGS); Pell Grants; Supplemental Educational Opportunity Grants (SEOGS); and Stafford Loans (formerly Guaranteed Student Loans (GSL)).

135. 465 U.S. 555 (1984). For a case that had such an immediate and substantial im-

the same issue in which students of the college received federal aid, while the private college itself did not receive federal financial assistance. The Supreme Court held the financial assistance received by the students did not inure to the college as a whole, but only to the college's financial aid department. Therefore, Title IX only operated to determine if any sexual discrimination occurred in this department and not in the school as a whole or in other programs within the college. The Court stated, "The fact that federal funds eventually reach the college's general operating budget cannot subject Grove City (College) to institution-wide coverage."¹³⁶ Justice Brennan, in his dissent, illustrated the inconsistency of the Court's decision:

The absurdity of the Court's decision is further demonstrated by examining its practical effect. According to the Court, the financial aid program at Grove City College may not discriminate on the basis of sex because it is covered by Title IX, but the college is not prohibited from discriminating in its admissions, its athletic programs, or even its various academic department.¹³⁷

The plaintiffs in *Bennett v. West Texas State University*,¹³⁸ unsuccessfully attempted to extend the Court's rationale. *Bennett*, a class action, was commenced in 1980 (pre-Grove City College) and alleged sex discrimination in the university's intercollegiate athletic program. The university received no direct federal aid; rather, the federal student aid to the university students was issued in the form of grants amounting to nearly one million dollars.¹³⁹ Some of this grant money was applied toward athletic scholarships. While the Supreme Court had rejected what could be

part on Title IX, it is ironic that in *Grove City* there was no finding of sex discrimination. A condition precedent to a recipient receiving federal funds was the requirement that the recipient execute an "Assurance of Compliance" with the Department of Education, in effect stating that the recipient will operate its programs and departments that receive funds in a compliance with Title IX, and therefore be entitled to the quid pro quo of federal funds. The college refused to sign the assurance, based on the college's position that it did not directly receive federal funds, and therefore, signing the certificate of assurance was unnecessary, which the federal agency had originally asserted was a violation of 34 C.F.R. § 106.4 (1991).

136. 465 U.S. at 572. "[One hundred and forty] of [Grove City College] students received federal grants and [three hundred and forty-two] obtained guaranteed student loans." *DKT Memorial Fund v. Agency for Int'l Dev.*, 887 F.2d 275, 295-96 (D.C. Cir. 1989).

137. *Id.* at 601.

138. 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd*, 698 F.2d 1215 (5th Cir. 1983) (without opinion), *cert. denied*, 466 U.S. 903 (1984), *appeal after remand*, 799 F.2d 155 (5th Cir. 1986) (affirming district court's granting of summary judgment in favor of defendant).

139. 799 F.2d at 157.

described as a trickle down theory, did the receipt of federal funds arguably directed to the financial aid office, but used, in part, for athletic scholarships thereby render the athletic program subject to Title IX strictures.

Six years later, the Fifth Circuit rejected the plaintiffs' "infection" theory and affirmed the lower court's granting of the summary judgment in favor of the university. Plaintiffs' theory advanced the proposition that even using a programmatic approach, a program should not be considered in isolation as it may be so affected by discriminatory practices elsewhere in the institution that it thereby extends to a discriminatory program.¹⁴⁰ While agreeing that such federal aid would trigger Title IX coverage in the university's financial aid office, pursuant to the intervening *Grove City College* decision, the *Bennett* court held that Title IX did not cover the athletic department which awarded athletic scholarships. The court concluded that any relationship between the financial aid office and the athletic department regarding athletic scholarships was merely ministerial.¹⁴¹

Consequently, because there was little direct federal funding of athletic programs and departments,¹⁴² most athletic programs were eliminated from Title IX coverage under the *Grove City College* decision.¹⁴³ Four years later, Congress, by legislation, over-

140. *Id.* at 158 (citing Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068 (5th Cir. 1969) (regarding Title VI)).

141. *Id.* at 159.

142. "Few, if any, intercollegiate athletic departments receive direct federal financial assistance or directly benefit when such assistance is received by an individual college or university." Note, *supra* note 23, at 469. One author summarized that:

Aside from a few possible grants to athletic programs for the purpose of upgrading women's athletics under the Women's Educational Equity Act of 1974 (20 U.S.C. § 1806), few federal grants have gone to finance intercollegiate athletics. The more common experience has been funding of athletic departments by some combination of student fees, state appropriations, gate-receipts, and donations.

Id. at 469 n.273.

143. However, when college students received federal grants that inured to the school's financial aid office, the Office for Civil Rights (OCR) of the Department of Education could continue to ascertain whether the distribution of scholarships by the financial aid departments of the colleges or universities were equitable, based on the percentage of athletes of each sex. See 34 C.F.R. § 106.37(c) (1991), and the 1979 HEW policy interpretation. See also 44 Fed. Reg. 71,413, 71,415 (1979) (OCR declared that the amounts of the scholarships did not have to be equal for each sex).

For example, assume a university has an even ratio (50% - 50%) of male and female students, but the percentage of male athletes is 75% and the percentage of female athletes is 25%. The percentage of scholarship aid, according to the regulation, should substantially reflect the 75%-25% distribution, or there must be a nondiscriminatory reason to account for a substantial violation. Otherwise, there would be a violation. This analysis, in effect, sanctions the existing unequal representation of the sexes in collegiate athletics. However,

turned the narrow interpretation of the Supreme Court.¹⁴⁴ On March 22, 1988, after overriding a veto by President Ronald Reagan, Congress passed the Civil Rights Restoration Act of 1987.¹⁴⁵ The Restoration Act reaffirmed the legislative intent to protect against sex discrimination by institutions that receive federal funds.¹⁴⁶ The Restoration Act remedied the inconsistency by expressly adopting a broad base for application of Title IX. It discounted the "program-specific" approach and adopted the "institution-wide" approach. Thus, Congress re-established that if any part of a school or institution or a program thereof, receives federal financial assistance, the entire school and all of its programs become subject to Title IX.

Although no federal court addressed the issue whether retroactivity of the Restoration Act applies to Title IX,¹⁴⁷ a number of

under the *Grove City College* decision, when there is no specific funding of the athletic department, the court or the OCR would not have jurisdiction to examine the question whether equal athletic opportunity was satisfied as mandated by 34 C.F.R. § 106.41(c) (1991). Specifically, the court could not address the question whether the existing program satisfied the accommodation of interests and abilities of the females, due to the significant underrepresentation of female athletes (25%), for example, as compared to the percentage of female students (50%). See 34 C.F.R. § 106.41(c)(1) (1991).

Currently, the breakdown of athletes active in intercollegiate sports is 33% women and 66% men. *Women's Sports & the Media*, 1 GANNETT CENTER JOURNAL 59 (1987) (Anita De Frantz commenting in a round table discussion). "In 1984, of the 685 medals awarded [in the Olympics], 195 went to women." *Id.* at 71. According to one newspaper article, "Most college student bodies are split about 50-50 male and female. Yet the latest NCAA figures show women's sports on campus receive only 18[%] of the overall athletic department budgets. Even at Division I schools where men's football is not offered, spending on women is only about 30[%]." Bedell, *supra* note 38, at 16B. "In the Southwest Conference . . . men take 70[%] of athletic scholarships while they take up only 53[%] of the student bodies." *Id.*

144. Section 2 of Pub. L. 100-259 specifically provided that: "The Congress finds that (1) certain aspects of recent decisions and opinions of the Supreme Court cast doubt upon the broad application of Title IX of the Education Amendments of 1972; and (2) legislative action is necessary to restore the prior consistent and long standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." See *West Virginia Hospitals, Inc. v. Casey*, — U.S. —, 111 S. Ct. 1138, 1154-55 (1991) (Court took cognizance of Congress' repudiation of the *Grove City College* decision).

145. Pub. L. 100-259, 102 Stat. 28 (codified at § 908, 20 U.S.C. § 1687 (1990)) [hereinafter Restoration Act]. See generally 9 JON S. SCHULTZ HISTORY & ANALYSIS OF THE CIVIL RIGHTS RESTORATION ACT (1989), a multi-volume set which contains a chronological digest of the congressional documents involved with this legislation.

146. See *supra* note 144.

147. See *Croteau v. Fair*, 686 F. Supp. 553, 553 n.1 (E.D. Va. 1988). In this case, the district court's opinion rendered on March 28, 1988, six days after the Restoration Act was enacted, found the issue of retroactivity not relevant, in denying the plaintiff relief. See *infra* notes 246-49 and accompanying text. See also *In the Matter of Birmingham City School District and Alabama Department of Education*, 53 EDUC. LAW REP. 1470, 1472 (West 1989) (administrative review panel elected not to decide whether the Civil Rights Restoration Act was retroactive "since the Board [of Education] was currently in noncom-

courts ruled on the issue as it pertains to other federal civil rights statutes affected by the Restoration Act.¹⁴⁸ The district court in *Leake v. Long Island Jewish Medical Center*,¹⁴⁹ for instance, held that the Restoration Act had a retroactive effect, "[g]iven [the] remedial intent of Congress in enacting [the] Act to correct what it believed was an incorrect judicial interpretation."¹⁵⁰ On appeal, the Second Circuit affirmed the district court's holding.¹⁵¹ Conversely, the Tenth Circuit in *De Vargas v. Mason & Hanger-Silas Mason Co.*,¹⁵² specifically disagreed with *Leake* and determined the Restoration Act should not be applied retroactively. The Supreme Court denied the petition for a writ of certiorari to decide this issue in January 1991.¹⁵³

IV. ATHLETIC ASSOCIATIONS

"To deny females equal access to athletics supported by public

pliance [with Title IX regulations] by refusing OCR access to investigate"). There was a lack of acknowledgment that the Restoration Act was enacted in a 1991 case involving Title IX, *Kleczek v. Rhode Island Interscholastic League*, 768 F. Supp. 951 (D.R.I. 1991), wherein the district court followed the "programmatic" approach. See *infra* note 262.

148. The Restoration Act applies to four major civil rights acts, which include the following: (1) 20 U.S.C. § 1687 (Title IX); (2) 29 U.S.C. § 794 (amending section 504) (the Rehabilitation Act of 1973) (prohibiting discrimination on the basis of physical or mental handicap in programs receiving federal funds); (3) 42 U.S.C. § 2000(d) (1982) (Title VI of the Civil Rights Act of 1964) (prohibiting discrimination on the basis of race, color, or national origin in federally funded programs); and (4) 42 U.S.C. § 6107 (1988) (Age Discrimination Act of 1975).

149. 695 F. Supp. 1414 (E.D.N.Y. 1988), *aff'd*, 869 F.2d 130 (2d Cir. 1989) (Rehabilitation Act of 1973, § 504).

150. *Id.* at 1417.

151. 869 F.2d at 131. The Second Circuit stated: "[C]ongress did intend the 1988 Amendments [of the Civil Rights Restoration Act] to apply to suits pending at the time of their enactment. . . ." *Accord Lussier v. Dugger*, 904 F.2d 661 (11th Cir. 1990) (Rehabilitation Act of 1973, § 504); *Bonner v. Arizona Dep't of Corrections*, 714 F. Supp. 420 (D. Ariz. 1989) (Rehabilitation Act of 1973); *United States v. Berg*, 710 F. Supp. 438, 442 (E.D.N.Y. 1989), *aff'd in part, rev'd and remanded in part, sub nom. United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991); *Ayers v. Allain*, 893 F.2d 732 (5th Cir.) (Title VI of the Civil Rights Act of 1964), *reh'g granted en banc*, 898 F.2d 1014 (5th Cir.), *aff'd*, 914 F.2d 676 (5th Cir. 1990), *sub nom. Ayers v. Mabius, cert. granted*, ___ U.S. ___, 111 S. Ct. 1579 (1991). See *Radcliff v. Landau*, 883 F.2d 1481, 1483 (9th Cir. 1989) (Title VI of the Civil Rights Act of 1964).

152. 911 F.2d 1377 (10th Cir. 1990) (Rehabilitation Act of 1973, § 504), *cert. denied*, ___ U.S. ___, 111 S. Ct. 799 (1991) ("The standard of 'clear congressional intent' for the retroactive application of statutes requires articulated and clear statements on retroactivity, not inferences drawn from the general purpose of the legislation.").

153. *Id.* (Justices White and Marshall would have granted the petition for a writ of certiorari). "A lawyer for the Mason & Hanger Co. said a computer search found only a handful of cases that would be affected if the [statute was] made retroactive." *High Court Refuses to Make Grove City Reversal Retroactive*, SCHOOL LAW NEWS, Jan. 31, 1991, at 9.

funds is to permit manipulation of governmental power for a masculine advantage."¹⁵⁴ To assert a claim that a violation of the Equal Protection Clause of the Fourteenth Amendment occurred, or to bring an action alleging a civil rights violation on the basis of sex under 42 U.S.C. § 1983, the individual must prove the offending entity acted under color of state law.¹⁵⁵ "[U]nder color of law has consistently been treated as the same thing as the 'state action' requirement under the Fourteenth Amendment."¹⁵⁶

Public high school sports teams are uniformly members of voluntary state athletic associations. The associations set forth the governing rules and regulations for high school sports programs. Courts that considered the question of whether there was state action when these athletic associations were involved, uniformly answered in the affirmative.¹⁵⁷

On the collegiate level, previously women's intercollegiate programs were governed by the Association of Intercollegiate Athletics for Women (AIAW) while the men's intercollegiate athletic programs were primarily governed by the National Collegiate Athletic Association (NCAA). The AIAW's focus was not on female athletes receiving athletic scholarships; however, it conducted championships for the women's sports teams that were members of the association. Then, "[i]n the 1981-1982 sports season, [the] NCAA in-

154. *Hoover v. Meiklejohn*, 430 F. Supp. 164, 169 (D. Colo. 1977).

155. See *Lyon v. Temple Univ.*, 543 F. Supp. 1372, 1376 (E.D. Pa. 1982). See also *Smith v. Duquesne Univ.*, 612 F. Supp. 72 (W.D. Pa. 1985), *aff'd*, 787 F.2d 583 (1986) (without opinion); *Fischer v. Driscoll*, 546 F. Supp. 861 (E.D. Pa. 1982) (involving due process cases in which private institutions were not state actors for purposes of 42 U.S.C. § 1983). The Third Circuit Court indicated in *Pfeiffer v. School Board for Marion Center Area*, 917 F.2d 779 (3d Cir. 1990), that Title IX's enforcement scheme is sufficiently comprehensive to preclude section 1983 claims. *Id.* at 789 (citing *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 597 F. Supp. 1235, 1239 (D. Colo. 1984), *aff'd on other grounds*, 813 F.2d 311 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987)).

156. *Hawkins v. NCAA*, 652 F. Supp. 602, 606 (C.D. Ill. 1987).

157. *Libby v. South Inter-Conference Ass'n*, 728 F. Supp. 504 (N.D. Ill.), *aff'd*, 921 F.2d 96 (7th Cir. 1990); *Griffin v. Illinois High Sch. Ass'n*, 822 F.2d 671 (7th Cir. 1987); *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982); *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651 (6th Cir. 1981); *Brenden v. Indep. Sch. Dist.*, 477 F.2d 1292 (8th Cir. 1973); *Mitchell v. Louisiana High Sch. Athletic Ass'n*, 430 F.2d 1155 (5th Cir. 1970); *Blue v. University Interscholastic League*, 503 F. Supp. 1030 (N.D. Tex. 1980); *B.C. v. Board of Educ.*, 531 A.2d 1059 (N.J. Super. Ct. Ct. App. Div. 1987); *Haas v. South Bend Community Sch. Corp.*, 289 N.E.2d 495 (Ind. 1972). But see *Burrows v. Ohio High School Athletic Ass'n*, 891 F.2d 122, 125 (6th Cir. 1989) (finding that the high school athletic association was an organization analogous to the NCAA, and the Sixth Circuit in *Graham v. NCAA*, 804 F.2d 953, 957 (6th Cir. 1986), had concluded the NCAA was not acting under color of state law). For a discussion on whether the courts will continue to find "state action" by interscholastic athletic associations, based on analogies to the NCAA, see *infra* note 160.

roduced 29 women's championships in 12 sports."¹⁵⁸ The AIAW subsequently stopped doing business on June 30, 1982, after unsuccessfully bringing a lawsuit against the NCAA alleging violation of the Sherman Act, which prohibits antitrust violations.¹⁵⁹ In contrast to the high school athletic associations, in 1988 the Supreme Court held that the NCAA, the principal association governing intercollegiate sports programs, was a private entity¹⁶⁰ and, therefore, was not required to extend constitutional due process to its members. Additionally, as athletic associations are generally not recipients of federal funds, the athletic associations would not be under Title IX jurisprudence.¹⁶¹

V. TITLE IX REGULATIONS

A. Significant Court Cases

Few court decisions have addressed the constitutionality of Title IX regulations regarding athletes. To date, the NCAA has been a defendant in a number of cases; however, since it was founded in 1906, it has only commenced a lawsuit in three cases.¹⁶² The first

158. AIAW v. NCAA, 735 F.2d 577, 580 (D.C. Cir. 1984).

159. AIAW v. NCAA, 558 F. Supp. 487 (D.D.C. 1983), *aff'd*, 735 F.2d 577 (D.C. Cir. 1984). See SPERBER, *supra* note 38, at 325-27. See Olson, *supra* note 38, at 110-13 (detailing the relationship between the AIAW and the NCAA); Victoria Thomas & Jan Sheldon-Wildgen, *Women in Athletics: Winning the Game but Losing the Support*, 8 J.C. & U.L. 295, 316-26 (1981) (discussing in detail the differences between the AIAW and the NCAA). See also Pavey v. University of Alaska, 490 F. Supp. 1011 (D. Alaska 1980) (third-party complaint brought against both the AIAW and the NCAA).

160. NCAA v. Tarkanian, 488 U.S. 179 (1988). See also McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986); Rhonda Montoya, Note, *The Battle in Both Courts: NCAA v. Tarkanian*, 7 U. MIAMI ENT. & SPORTS L. REV. 151, 152 n.7 (1989). As a result of the *Tarkanian* case, state legislatures have been introducing and enacting legislation to require that athletic associations including the NCAA, abide by due process in determining whether infractions of the athletic associations' rules were committed by their member institutions. Nevada passed such legislation following the Supreme Court's decision. NEV. REV. STAT. ANN. §§ 398.005-.255 (1991). During November 1991, the NCAA commenced a lawsuit challenging the Nevada statute. *Arena: NCAA Files Lawsuit to Test Legality of Nevada Statute*, NEWSDAY, Nov. 13, 1991, at 136. Florida, Illinois, and Nebraska have also passed due process legislation to oversee athletic associations. See Squire, Sanders & Dempsey, *supra* note 75, at 5.

However, for purposes of drug testing, the theory advanced is that the NCAA is engaging in "state action." See Note, *The National Collegiate Athletic Association, Random Drug-Testing, and the Applicability of the Administrative Search Exception*, 17 HOFSTRA L. REV. 641, 647-48, 651 (1989). In *Clay v. Arizona Interscholastic Ass'n*, 779 P.2d 349 (Ariz. 1989), the court determined that for purposes of judicial review, a state intercollegiate association, which deals with athletic eligibility, is an administrative agency.

161. *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 656 (6th Cir. 1981).

162. See *NCAA Files Lawsuit to Test Legality of Nevada Statute*, *supra* note 160, at

legal challenge to the regulations in the area of athletics was brought by the NCAA in 1975, less than seven months after the Title IX regulations were enacted.¹⁶³ In *NCAA v. Califano*,¹⁶⁴ the district court granted defendant's motion to dismiss the complaint on the ground that the NCAA did not have standing to bring the claim. On appeal, the Tenth Circuit reversed and remanded the case on the issue whether the NCAA was a proper party plaintiff.¹⁶⁵ The court did not reach the merits on the legality of the regulations.

The next review of the legality of any of the Title IX regulations involving athletics was by the United States District Court for the Southern District of Ohio in *Yellow Springs*.¹⁶⁶ In this case, the plaintiff, a school district, brought suit against the athletic association which had a rule that only males could compete on high school teams involving contact sports. Two females made the school's boys' basketball team, a contact sport. The school district commenced a declaratory action because it did not want to be found in violation of Title IX, with the possibility of having its federal funds terminated.

The district court in *Yellow Springs* held that a regulation that denied talented female athletes the opportunity to compete on contact sports—all-male teams—violated the Fifth Amendment to the Constitution, and was therefore unconstitutional. This amendment governs the actions of the federal government. Herein, HEW was never made a party to the action. On appeal, however, the Sixth Circuit reversed, upholding the prohibition of females on the males' basketball teams. The court rationalized its position by stating, "[W]omen's athletics may be significantly harmed if the best female competition is lost to the boys' program."¹⁶⁷ The case was not appealed to the Supreme Court.¹⁶⁸

In 1982, the Supreme Court in *North Haven Board of Educa-*

136.

163. 45 C.F.R. § 86.41 (1975) (codified at 34 C.F.R. § 106.41 (1991)).

164. 444 F. Supp. 425 (D. Kan. 1978).

165. 622 F.2d 1382 (10th Cir. 1980).

166. 443 F. Supp. 753 (S.D. Ohio 1978), *rev'd*, 647 F.2d 651 (6th Cir. 1981) (discerning the Title IX regulation, 45 C.F.R. § 86.41(b) (codified at 34 C.F.R. § 106.41(b) (1991)). See also *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F. Supp. 1117, 1123 (E.D. Wis. 1978) (concluding that "in a particular sport where such a program is provided for male students but not female students violates the equal protection clause of the [F]ourteenth [A]mendment" irrespective of the Title IX regulation, 45 C.F.R. § 86.41(b)).

167. 647 F.2d 651, 658 (6th Cir. 1981). *Contra* Note, *supra* note 28, at 1122-26.

168. See Elizabeth J. Henley, Note, *Irrebuttable Presumption Doctrine*, 4 U. DAYTON L. REV. 197 (1979) (examining the *Yellow Springs* case).

tion v. Bell,¹⁶⁹ upheld Subpart E of the Title IX regulations. This subsection did not involve athletics; rather, it concerned employees working for educational institutions. The Supreme Court held that Title IX prohibited sex discrimination of employees working for educational institutions that received federal funds and deemed these regulations constitutional.¹⁷⁰

According to *O'Connor*,¹⁷¹ HEW, in its review of the Title IX regulations, did not intend to require boys' teams to be open to girls. To the contrary, HEW envisioned that institutions would comply by providing separate but equal teams for both sexes.¹⁷² In *O'Connor*,¹⁷³ the plaintiff, a talented eleven-year-old girl, wanted to try out for the boys' basketball team. The school also sponsored a girls' basketball team. An athletic association rule prohibited the plaintiff to try out for the boy's team. The school district argued that separate teams maximize the participation of both sexes in interscholastic sports, and that the separate team policy is substantially related to this goal. "By maintaining separate programs, defendants enable girls to participate in interscholastic sports."¹⁷⁴ The court cautioned:

Here, because gender discrimination is involved, intermediate scrutiny, requiring a substantial relation to an important governmental interest, is required, and the generalization at issue may be sufficiently treacherous, in light of the questionable significance of the physical differences between boys and girls [the plaintiff's] age.¹⁷⁵

It was argued by the plaintiff that the allowance of separate teams in contact sports did not effectively accommodate the interests and abilities of both sexes. This is the first factor listed in the equal opportunity subsection of the regulations in the area of athletics.¹⁷⁶ The court determined: "[N]othing in (c) [Equal opportunity subsection] can be construed to require that talented women be permitted to try out for men's teams."¹⁷⁷

169. 456 U.S. 512 (1982).

170. *Id.* See also *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982) (questioning the validity and scope of several regulations promulgated under Title IX, and adopting the narrow "program-specific" approach articulated in *Bell*, 456 U.S. 512 (1982)).

171. 545 F. Supp. 376 (N.D. Ill. 1982).

172. *Id.* at 383.

173. 545 F. Supp. 376 (N.D. Ill. 1982).

174. *Id.* at 379.

175. *Id.* at 380.

176. 34 C.F.R. § 106.41(c)(1) (1991).

177. 545 F. Supp. at 383.

The decision by the Washington Supreme Court in *Blair v. Washington State University*¹⁷⁸ is noteworthy, as it required the imposition of certain formulas and calculations that must be adhered to in the comparison of the athletic programs for the males and females. *Blair* provided the impetus for the May 1989 passage of the Washington legislation codifying certain requirements for athletes' programs offered by four-year public universities and colleges.¹⁷⁹

B. Separate But Equal?

In *Brown v. Board of Education*,¹⁸⁰ the landmark Supreme Court decision that impacted the area of education and racial desegregation, the Court concluded "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."¹⁸¹

First, in addition to the regulations not mandating female participation on all sports, thus allowing for separate educational athletic programs based on gender,¹⁸² the regulations also set forth ten

178. 740 P.2d 1379 (Wash. 1987). See Graff et al., *supra* note 19. See also *Advocacy Update*, HEADWAY, Fall 1991, at 6. "The percentage of athletes at WSU who are female has risen [to] [forty-four] percent . . . [which] is only one percent below the general student body rate of [forty-five] percent female." Women's soccer and crew have been added as teams at Washington State University, with women's softball to be added in the spring of 1993. See also Bedell, *supra* note 38, at 16B.

179. WASH. REV. CODE ANN. § 28B.100 (West Supp. 1991).

180. 347 U.S. 483 (1954).

181. "'Separate but equal' fails to accommodate the exceptional female athlete, and a single coeducational team works to the detriment of the majority of women." Richard Alan Rubin, Comment, *Sex Discrimination in Interscholastic High School Athletics*, 25 SYRACUSE L. REV. 535, 568 (1975). See also Olson, *supra* note 38, at 105.

"The fundamental tenet of these critics is that separate can never be equal in result and will be but a self-serving mechanism by which the dominant class (men) can perpetuate its control over athletic competition." Note, *supra* note 23, at 449.

182. 34 C.F.R. § 106.41(b) (1991). For an excellent analysis of this topic, see Note, *supra* note 28, at 1115, in which the commentator strongly stated:

The exception in section 86.41(b) [now 34 C.F.R. § 106.41(b) (1991)] of the Department's regulations permitting a Title IX recipient to deny a female athlete the opportunity to compete for a position on a male contact sports team is irrational and inconsistent with the social policies underlying the enactment of Title IX . . . [A] rule which bars female athletes from competing against males in contact sports while providing no similar bar for the demonstrably weak male athlete is clearly arbitrary. In addition to its irrational character, the exception for contact sports is inconsistent with the purposes of Title IX because it perpetuates the stereotypical view of the female as weak, fragile, and unable to compete with males in sports requiring physical contact. Congress intended to reduce this type of sex-stereotyping with the enactment of Title IX.

Id. at 1134 (citations omitted). See *Lantz v. Ambach*, 620 F. Supp. 663, 665 (S.D.N.Y. 1985). Cyclist Inga Thompson is receiving criticism because she wants to join a men's team for

factors to be considered in determining whether "equal opportunity" was provided.¹⁸³ The OCR, in its application of this subsection, investigating administrative complaints filed or conducting compliance reviews, examines these ten factors and others, as permitted by the regulation.¹⁸⁴

The critical question in the application of the "equal opportunity" subsection is what constitutes a violation? If a men's program contains all ten factors enumerated and the women's program does not, then the women's program would not be equal to the men's program. The enumerated program areas include the following: accommodation of interests and abilities of members of both sexes;¹⁸⁵ provision of equipment and supplies;¹⁸⁶ scheduling of

more competitive tests, as opposed to competing against only women's cyclist teams. Clare Hertel, *Inga Thompson: Breaking Away*, WOMEN'S SPORTS & FITNESS, May/June 1991, at 16. *Contra* Virginia P. Croudace & Steven A. Desmarais, Note, *Where the Boys Are: Can Separate Be Equal in School Sports?*, 58 S. CAL. L. REV. 1425 (1985) (supporting separate athletic teams for males and females as satisfying the equal protection clause).

Addressing the competitive skill exemption, one author noted, "Axiomatically, intercollegiate athletic teams are selected on the basis of competitive skill, and the regulation thus permits an institution to operate no teams open to members of both sexes, provided the other requirements of the regulations are met." Cox, *supra* note 35, at 43.

183. 34 C.F.R. § 106.41(c) (1991). This subsection provides:

(c) *Equal opportunity.* A recipient which 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.

184. *Id.* The two additional factors generally examined by the OCR in intercollegiate programs are the support services offered and the recruitment of athletes. 44 Fed. Reg. 71,413, 71,415 (1979). The OCR also routinely examines the issuance of athletic scholarships in intercollegiate programs. See 34 C.F.R. § 106.37(c) (1991).

185. "[E]xpanding the number and quality of athletic opportunities available to women is an important governmental interest." *Haffer v. Temple Univ.*, 678 F. Supp. 517, 525 (E.D. Pa. 1987). "The average number of sports offered for women is 7.24 per school."

games and practice times; travel and per diem allowances; opportunity to receive coaching and tutors;¹⁸⁷ assignment and compensa-

R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, *WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL STUDY—THIRTEEN YEAR UPDATE 1977-1990* 1 (1990) (unpublished paper) (summary on file with the U. MIAMI ENT. & SPORTS L. REV.).

186. See, e.g., Aiken v. Lieualten, 593 P.2d 1243 (Or. Ct. App. 1979). That season, the record for the University of Oregon's men's intercollegiate basketball team was 12 wins and 15 losses, while the women's team had an undefeated season of 20 wins and no losses. However, the women's team did not fair well when it came to the money allocated for equipment. The 1977-78 budget for this men's team was \$7,600; a meager \$100 was budgeted for the women's basketball team. *Id.* at 1251 nn.9 & 10.

187. The decline of women coaches continues. "Only 47.3% of the coaches of women's teams are females. Over 99% of the coaches of men's teams are males. In 1972 more than 90% of women's teams were coached by females." ACOSTA & CARPENTER, *supra* note 185, at 1. See also Goldman, *supra* note 29, at 24 (A Bowling Green State University Study reported, "[T]he number of women coaching high school sports had dropped two-thirds over the last 15 years, so that only one of every three girls' team is now coached by a woman."). Eighteen of the twenty-one girls' basketball teams in New York City's Public Schools Athletic League are coached by men. *Id.* See also Robertha Abney & Dorothy Richey, *Barriers Encountered by Black Female Athletic Administrators and Coaches*, JOPERD, Aug. 1991, at 19-21. The increase in compensation to the coaches of the women's teams as a result of the Title IX legislation made the positions more attractive to male coaches. Bedell, *supra* note 38, at 1B, 16B. See Tom Hanlon, *Strategies for Returning Women to Coaching*, COACHING WOMEN'S BASKETBALL, March/April 1990, at 12-15. "Before Title IX, most colleges and universities had two athletic departments, one headed by a woman, one headed by a man. After Title IX, male administrators were appointed to head the new combined departments that most colleges established." MARIAH BURTON NELSON, ARE WE WINNING YET?: HOW WOMEN ARE CHANGING SPORTS AND SPORTS ARE CHANGING WOMEN 159 (1991).

Female coaches were not successful in pursuing claims of gender discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988), which prohibits unlawful employment practices, when coaches of female athletic teams received less compensation than coaches of male athletic teams. See, e.g., Jackson v. Armstrong Sch. Dist., 430 F. Supp. 1050 (W.D. Pa. 1977). *Accord* Kenneweg v. Hampton Township Sch. Dist., 438 F. Supp. 575 (W.D. Pa. 1977). See Sennewald v. University of Minnesota, 847 F.2d 472 (8th Cir. 1988) (denying a female part-time assistant coach of the women's softball a promotion); O'Connor v. Peru State College, 781 F.2d 632 (8th Cir. 1980) (denying a women's basketball coach who was not rehired relief for her claim of sex discrimination under Title IX). *But see* Burkey v. Marshall County Bd. of Educ., 513 F. Supp. 1084 (N.D. W. Va. 1981); Coble v. Hot Springs Sch. Dist. No. 6, 682 F.2d 721, 729 (8th Cir. 1982). See also Hill v. Nettleton, 455 F. Supp. 514 (D. Colo. 1978) (awarding an advocate for the expansion of intercollegiate athletics for women at Colorado State University compensatory and punitive damages when her contract for employment on the faculty of the Physical Education Department was not renewed for failure to obtain a doctorate within a certain time frame, when such requirement was not imposed on the male coaches). For a scholarly discussion of this topic, see R. Lawrence Dessem, *Sex Discrimination in Coaching*, 3 HARV. WOMEN'S L.J. 97 (1980), and Barbara A. McDonald, Note, *Equal Pay for Coaches of Female Teams: Finding a Cause of Action Under Federal Law*, 55 NOTRE DAME LAW. 751 (1980), wherein the commentator advances the proposition that in "paying the coach of a female team less than a coach of the corresponding male team, despite the fact that their duties are equivalent, a school board is declaring essentially that the athletic development of their female students is a less valuable objective than the athletic development of their male students." *Id.* at 751. For a discussion of women coaches and their influence as role models, see NELSON, *supra*, at 155-74.

The situation of women being athletic directors is equally dismal. See, e.g., Wynn v.

tion of coaches and tutors; provision of locker rooms and practice and competitive facilities; provision of medical and training facilities and services; provision of housing and dining facilities and services; and publicity.¹⁸⁸ This issue is especially significant because if the legislature, the courts,¹⁸⁹ and the executive branch allow "separate but equal" athletic programs for each sex, then equality in all areas must be provided.¹⁹⁰

There is little case law in this area, other than the courts proferring that they will examine the programs as a whole, and not the individual sports.¹⁹¹ In *Mularadelis v. Haldane Central School*

Columbus Mun. Separate Sch. Dist., 692 F. Supp. 672 (N.D. Miss. 1988) (high school had routinely combined the positions of athletic director and the head football coach). Barbara Hedges, the athletic director at the University of Washington, is only the second woman to run an NCAA Division 1-A program. However, in 1989 the State of Washington passed legislation allowing for role models in athletics. WASH. REV. CODE ANN. § 28B.110.030(7)(c) (West Supp. 1991). See also Joni Sensel, *Athletic Director: Leader of the Pack*, WOMEN'S SPORTS & FITNESS, Sept. 1991, at 17 (regarding Hedges).

188. Television coverage of women's athletic events is quantitatively and qualitatively inferior to coverage for men's athletic events according to a 1990 report. See AMATEUR ATHLETIC FOUNDATION OF LOS ANGELES, GENDER STEREOTYPING IN TELEVIEWED SPORTS 8-9 (1990). See also Toni Bruce, *Newspapers Still Ignore Women's Sports*, HEADWAY, Spring 1991, at 5; *Best Newspapers in U.S. Don't Cover Enough Women's Sports*, WOMEN'S SPORTS PAGES, March 1991, at 3. A review of magazine covers of the weekly sports periodical *Sports Illustrated* for 1991, indicated that only three issues featured any females. However, only one full cover went to a female athlete, professional tennis player Steffi Graf, on the July 15, 1991 edition. There was a small picture of Olympian heptathlete Jackie Joyner-Kersey on the August 5, 1991 edition, which focused on the "Black Athlete." One full cover went to a female nonathlete modeling a bathing suit for the annual "swimsuit issue."

189. The district court in *Haffer v. Temple Univ.*, 678 F. Supp. 517 (E.D. Pa. 1987), examined each of the program areas individually. Nonetheless, the district court found that "allegations of discrimination in the tutoring program, dining facilities and the scheduling and number of competitions do not constitute separate claims for purposes of entering final judgment." *Id.* at 542.

190. The august body represented in the Knight Commission issued a report in March 1991, identifying certain problems in intercollegiate athletics. In the area of gender equality the Commission advocated the following:

Presidents should commit their institutions to equity in all aspects of intercollegiate athletics. The Commission emphasizes that continued inattention to the requirements of Title IX (mandating equitable treatment of women in educational programs) represents a major stain on institutional integrity. It is essential that presidents take the lead in this area. We recommend that presidents:

- Annually review participation opportunities in intercollegiate programs by gender.

- Develop procedures to insure more opportunities for women's participation and promote equity for women's teams in terms of schedules, facilities, travel arrangements and coaching.

KNIGHT FOUNDATION COMMISSION ON INTERCOLLEGIATE ATHLETICS, KEEPING THE FAITH WITH THE STUDENT-ATHLETE: A NEW MODEL FOR INTERCOLLEGIATE ATHLETICS 14 (1991).

191. See *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651 (6th Cir. 1981); *Mularadelis v. Haldane Central Sch. Bd.*, 427 N.Y.S.2d 458 (App. Div. 1980), *appeal dismissed*, 54 N.Y.2d 760 (1982); *Forte v. Board of*

Board,¹⁹² a New York state court determined that boys could be excluded from girls' high school tennis teams. Affirming the court's ruling, the appellate court referred to a question and answer contained in a 1975 HEW memorandum:

QUESTION: If there are insufficient women interested in participating on a women's track team, must the institution allow an interested woman to compete for a slot on the men's team?

ANSWER: If athletic opportunities have previously been limited for women at that school, it must allow women to compete for the men's team if the sport is a noncontact sport such as track. The school may preclude women from participating on a men's team in a contact sport. A school may preclude men or women from participating on teams for the other sex if athletic opportunities have not been limited in the past for them, regardless of whether the sport is contact or noncontact.¹⁹³

The adopted standard was an examination of the "over-all" athletic opportunity provided to the students, whereby

institutions should examine all of the athletic opportunities for men and women and make a determination as to whether each has an equal opportunity to compete in athletics in a meaningful way. The equal opportunity emphasis in the regulation addresses the totality of the athletic program of the institution rather than each sport offered.¹⁹⁴

This analysis permits schools to preclude males from participating in a particular sport, as in *Forte v. Board of Education*,¹⁹⁵ where the overall athletic opportunity for members of the male sex had not been limited in the past. Subsection 106.41(c) of the Title IX regulations governing athletics also states:

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.¹⁹⁶

Educ., 431 N.Y.S.2d 321 (Sup. Ct. 1980). In *Haffer v. Temple Univ.*, 678 F. Supp. 517 (E.D. Pa. 1987), the court stated the issue as follows: "This court's task is to define the 'equality' that is required, and then to determine whether defendants offer equivalent athletic programs to men and women student athletes." *Id.* at 525.

192. 427 N.Y.S.2d 458 (App. Div. 1980), *appeal dismissed*, 54 N.Y.2d 760 (1981).

193. *Id.* at 463.

194. *Id.*

195. 431 N.Y.S.2d 321 (Sup. Ct. 1980).

196. 34 C.F.R. § 106.41(c) (1991). One legal commentator summarized the problems

The regulation provides a convenient loophole because it does not require equal expenditures for the men's and women's programs.¹⁹⁷ Additionally, the distribution of athletic scholarship money between the sexes does not have to be equal.¹⁹⁸

inherent in this subsection, stating:

The laundry list of the equal-opportunity section is an incomplete and inadequate basis for assessing equal treatment in collegiate athletics, since its application is limited. More importantly, although institutions must achieve overall equal opportunity, equality is not required in each area on the list; the regulations only require HEW to "consider" each area. Such consideration may involve a balancing process that permits equality or even mere improvement in one area to compensate for inequality in another. Although the flexibility of the regulations has been praised, this much flexibility may lead not only to unequal enforcement, but also to no enforcement at all. Without equality in each area, elimination of sex stereotypes is impossible.

The most serious defect of the laundry list is its funding provision. The disparity between men's and women's sports is most noticeable in their respective budgets. Yet the regulations not only do not provide for, but do not even differentiate between, equal aggregate expenditures, per capita expenditures, or per-participant expenditures.

Howland, *supra* note 34, at 1270.

197. The district court in *Haffer v. Temple Univ.*, 678 F. Supp. 517, 530 (E.D. Pa. 1987) concluded "that financial concerns alone cannot justify gender discrimination." With regard to the financial aspect of the regulation, an author described the post-*Grove City College* implications, stating:

In 1984, the Supreme Court narrowed the Title IX interpretation with its *Grove City* decision and gave ADs [athletic directors] an excuse to cap funding on women's programs . . . In 1987, at the main campus of the University of Arkansas, the athletic department spent one dollar in ten on women's sports, and AD Frank Broyles, very knowledgeable about college sports' financing, explained that this ratio "is similar to differences at most major colleges.

SPERBER, *supra* note 38, at 327. *But see* Bedell, *supra* note 108, at 16B (regarding the University of Arkansas' recent infusion of a substantial amount of money into the women's intercollegiate athletics program).

Certain sports writers have detailed the large amount of money men's collegiate football programs receive when engaging in bowl games: "Bowls [football] are usually considered an important source of revenue for winning teams, but SMU [Southern Methodist University in Texas] chose to have fun at the Aloha Bowl instead. The team's share amounted to \$400,000, of which only \$16,699 remained by the time they returned to Dallas." WHITFORD, *supra* note 38, at 135 (1989). *See, e.g.,* Kneeland v. NCAA, 806 F.2d 1285 (5th Cir. 1987) (litigation which tangentially concerned SMU).

Postseason bowl games have become monstrous moneymakers. Schools participating in the Gator Bowl take home \$1 million; those in the Cotton Bowl \$2.5 million; those in the Sugar or Orange Bowl \$2.75 million; and the Big Ten and Pac Ten representatives in the Rose Bowl get \$6 million each. . . . True, members of conferences must split their booty with the other members, but independents such as Notre Dame, Miami, West Virginia, Florida State, and Syracuse get to keep it all. . . . The sponsors for the Texas-Oklahoma game are soon to guarantee each school \$1 million, and that's for a regular-season bout.

RICK TELANDER, THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT 44-45 (1989).

198. 34 C.F.R. § 106.37(c) (1991). In 1973, Terry Williams, a golfer, was "the first woman to receive a full-tuition athletic scholarship" and attended the University of Miami in

The most significant factor of the ten listed in the "Equal Opportunity" subsection is the first: "Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes."¹⁹⁹ Satisfaction of this factor is the only means by which greater athletic opportunities for women and girls may be established. If women are afforded greater athletic opportunities, by necessity more equipment, supplies, facilities, scheduling, coaches, and scholarships will be required to insure equal athletic opportunity.

C. Allowing Women to Participate on Men's Sports Teams in Contact and Noncontact Sports

Many courts have addressed the second alternative available to educational institutions facing Title IX sexual discrimination charges, namely, allowing co-educational teams. Title IX regulations prohibit educational institutions from excluding participation in athletic programs on the basis of sex.²⁰⁰ The regulations create an exception to this rule where selection is based upon competitive skill and for contact sports. Contact sports²⁰¹ include "boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact."²⁰² The institution may prohibit a coed team in these sports, therefore, and legally field a separate same-sex team.

The distinction between contact and noncontact sports is sig-

Coral Gables, Florida. Jeannie Roberts, *Twenty Years of Victories*, WOMEN'S SPORTS & FITNESS, Feb. 1992, at 26.

199. 34 C.F.R. § 106.41(c)(1) (1991).

200. 34 C.F.R. § 106.41(a) (1991). This subsection states in pertinent part:

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.

201. 34 C.F.R. § 106.41(b) (1991). This subsection states:

(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 of major activity of which involves bodily contact.

202. *Id.*

nificant for several reasons. While some courts allow females to play on men's teams (even in contact sports), absent a female team, the regulations do not expressly require the inclusion of females on all teams, regardless of the sport. Nor do the regulations require the sponsoring of a female team in a contact sport, unless a significant number of females are interested.²⁰³ The issue is whether the Title IX neutrality in the area of contact sports reinforces outdated stereotypes. Hence, access to the traditionally American men's sports of football, baseball,²⁰⁴ and basketball may continue to foreclose women's participation with impunity.

A substantial distinction is made in the "noncontact" sports:

[W]here 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 offered²⁰⁵

According to the language of the regulation, a female who is discriminated against is not guaranteed a position on the team, she is merely given the opportunity to try out. The regulation's allowance of separate sex sports teams in contact sports is inapposite to certain court decisions.²⁰⁶ These cases imply that some play is better than no play at all, by permitting individual women to become members of the all-male teams, even in contact sports. Cases that have addressed this issue are, for the most part, predicated on constitutional theories, however, not on Title IX.

The dialogue in the area of sports in which both genders may participate together incorporates discussions of the participant's age and physical differences between male and female athletes, thus resulting in different judges taking judicial notice of varying physical differences, and their significance. Overall, the courts have taken a constrictive approach to promoting the full panapoly of women's interest in the area of athletics.²⁰⁷ It is the female who

203. *Id.* The 1979 policy interpretation, which the OCR abides by, also requires that for contact sports there be "a reasonable expectation of intercollegiate competition for that team." 44 Fed. Reg. 71,413, 71,418 (1979).

204. For cases declaring baseball a contact sport, see *Croteau v. Fair*, 686 F. Supp. 552 (E.D. Va. 1988); *Carnes v. Tennessee Secondary Sch. Athletic Ass'n*, 415 F. Supp. 569 (E.D. Tenn. 1976); *Magill v. Avonworth Baseball Conference*, 364 F. Supp. 1212 (W.D. Pa.), *vacated on other grounds and remanded*, 497 F.2d 921 (3d Cir. 1974) (Little League).

205. 34 C.F.R. § 106.41(b) (1991).

206. See *infra* note 282.

207. *Contra Haffer v. Temple Univ.*, 678 F. Supp. 517, 524 (E.D. Pa. 1987) (comment-

bears the disadvantage when her sports schedules are not in accordance with the national norm, while the men's teams are engaged in athletic competition during the traditional seasons;²⁰⁸ and when different rules apply to women and men playing the same sport.²⁰⁹

In *Bucha v. Illinois High School Ass'n*,²¹⁰ the court upheld an association's regulation that prohibited female athletes from staying overnight for any athletic competitions and that limited to one dollar awards recognizing performance for female athletes. While these rules did not apply to the male students, they were nevertheless allowed. Assuming *arguendo* that these matters are of de minimis importance when compared to more severe instances of discrimination in athletic programs, there appears to be no rational legitimate state purpose advanced through such *prima facie* inequality.

The concern as the twentieth anniversary of Title IX passes is whether the present model is affecting the principles of equal opportunity. Commentators continue to question the direction of women's athletic programs. The dilemma advanced is that "Equality in the Title IX context means equality with men's athletics."²¹¹ Another author repudiates the men's model as militaristic and advocates a "partnership model."²¹²

D. Contact Sports

Pursuant to Title IX regulations, the general rule is that recipients of federal funds may exclude the opposite sex in a contact

ing on the "judicial endorsement of the policy of maximizing athletic opportunity for females").

208. *Ridgeway v. Montana High Sch. Ass'n*, 633 F. Supp. 1564 (D. Mont. 1986), *aff'd*, 858 F.2d 579 (9th Cir. 1988).

209. *Cape v. Tennessee Secondary Sch. Athletic Ass'n*, 424 F. Supp. 732 (E.D. Tenn. 1976), *rev'd*, 563 F.2d 793 (6th Cir. 1977).

210. 351 F. Supp. 69 (N.D. Ill. 1972).

211. See Olson, *supra* note 38, at 118. This article addresses the shortcomings of the present model for women engaged in athletics. See also Harris, *supra* note 109, at 713-21. See also Jody Conradt, *Why Must Women Pay for the Men's Mistakes?*, N.Y. TIMES, Nov. 12, 1989, § 8, at 10.

212. See NELSON, *supra* note 187, at 9-10, 210-13. The partnership model is defined as "a compassionate, egalitarian approach to sports in which athletes are motivated by themselves, of sports, and of each other. Power is understood not as power-over (power as dominance) but as power-to (power as competence). Like early physical educators, partnership athletes maintain that sports should be inclusive; in balance with other aspects of life, cooperative and social in spirit; and safe. This view is not anti-competition. *Id.* at 9-10. The author provides the following challenge: "Can both women and men search for saner, safer, more ethical methods of playing sports, beyond the ritualistic violence of the military model?" *Id.* at 211.

sports unless there are sufficient numbers of that sex to field their own team.²¹³ Some courts, however, allowed individual female athletes to participate on men's sports teams, even in contact sports. To prohibit participation by women athletes on male sports teams would result in a complete denial of a woman's right to equal protection,²¹⁴ regardless of whether there was a women's team in a contact sport,²¹⁵ or because the action could not be upheld as providing a reasonable relationship to any legitimate state purpose.²¹⁶ Rationale for the rules and regulations prohibiting same sex teams have included the following: the physical, biological and psychological differences between males and females, promotion of the safety of the players; promote athletic opportunities for women and/or preserve emergent female sports programs from domination by male athletes, or to maintain the competitiveness within the women's programs.²¹⁷ Moreover, the classification of a contact sport must be reasonable.²¹⁸

213. 34 C.F.R. § 106.41(b) (1991). One commentator stated, "The contact sports exception is difficult to justify, either on the basis of physical differences between the sexes or as a matter of statutory interpretation." Cox, *supra* note 35, at 44. Furthermore, the author noted: "The contact sports exception was not included in the proposed regulation, and HEW's explanatory notes to the final regulation fail to explain why this provision was added." *Id.* at 44 n.66 (citing 40 Fed. Reg. 24,128-45 (1975)).

214. See Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977) (high school soccer); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978); Lantz v. Ambach, 620 F. Supp. 663 (S.D.N.Y. 1985) (high school football); Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020 (W.D. Mo. 1983) (high school football); Gilpin v. Kansas State High Sch. Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1974) (high school cross country).

215. Petrie v. Illinois High School Ass'n, 394 N.E.2d 855, 858 (Ill. App. Ct. 1979).

216. See Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973); Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974).

217. See, e.g., Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F. 2d 651 (6th Cir. 1981); B.C. v. Board of Educ., Cumberland Regional Sch. Dist., 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987); O'Connor v. Board of Educ., 645 F.2d 578 (7th Cir.), *cert. denied*, 454 U.S. 1084 (1981), *on remand*, 545 F. Supp. 376 (N.D. Ill. 1982). "Courts have increasingly found little merit in the defendant's asserting that separate sex team system is necessary to prevent physical harm to female athletes." Note, *supra* note 28, at 1120.

218. Carnes v. Tennessee Secondary Sch. Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976). In Rubin, *supra* note 181, at 535 n.3, the author explained:

While the distinction is always made, what constitutes a contact or noncontact sports has never been articulated by the courts. They have taken a case by case approach, relying on common sense. Contact sports include those activities which actually encourage physical pushing and shoving of opponents, as in football, hockey, and rugby. Where physical interaction is less emphasized but nevertheless foreseeable, sports such as baseball, basketball and soccer have been lumped in the contact category. The rationale for including baseball and soccer may also stem from the involvement of moving objects often traveling at high speeds capable of inflicting serious injury. Noncontact sports consist of swim-

1. Football

Jacqueline Lantz, a healthy sixteen-year-old female commenced a declaratory judgment action in *Lantz v. Ambach*,²¹⁹ pursuant to 42 U.S.C. § 1983. Ms. Lantz alleged that a New York State regulation, which prevented her from trying out for the high school junior varsity football team violated Title IX and the Equal Protection Clause of the Fourteenth Amendment. The state regulation prohibited all female participation on men's teams in the basketball, boxing, football, ice hockey, rugby, and wrestling.

The district court indicated that it was not clear whether Title IX applied to this case (as it was post-*Grove City College*, but pre-Restoration Act). However, assuming *arguendo* that Title IX did apply, the court found that Title IX was neutral as to requiring a coed team in football,²²⁰ which had been expressly designated in the Title IX regulations as a contact sport.²²¹ However, because this state regulation did not distinguish or prevent "weak" males from playing football, the court in applying the middle tier analysis used in examining constitutional equal protection claims based on gender discrimination concluded the regulation was overbroad, and therefore, the plaintiff would be permitted to try out for the team.

As a result, the New York State regulations were amended.²²² Six years after the *Lantz* case, Jacqueline Gainer entered the history books when she became the first female in New York State to score a point during a varsity high school football game.²²³ In a parallel situation to the *Lantz* case, Nichole Force, a thirteen-year-old female successfully sought an injunction in 1983 to compete on the eighth grade football team in *Force v. Pierce City R-VI School District*,²²⁴ where all females were again prohibited from being on the football team, and no team was provided for the girls. Force alleged a violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. The district court, in

ming, golf, tennis, track and similar activities where contact tends to occur sporadically and usually by accident.

Id.

219. 620 F. Supp. 663 (S.D.N.Y. 1985).

220. *Id.* at 665.

221. 34 C.F.R. § 106.41(b) (1991).

222. N.Y. COMP. CODES R. & REGS. tit. 8, § 135.4(7) (1991) (basic code for extraclass athletic activities).

223. Gainer, a placekicker, scored the extra point for the Valley Stream Central team on Sept. 28, 1991. Mike Candel, *And It's Good! Girl's Kick Helps VSC Ice Opener*, *Newsday*, Sept. 29, 1991, Sports Section, at 17.

224. 570 F. Supp. 1020 (W.D. Mo. 1983).

addressing the school's Title IX concerns, also pointed out Title IX's neutrality and stated, "Title IX's regulations leave each school free to choose whether co-educational participation in a contact sport will be permitted."²²⁵ Defendants asserted that allowing separate sex teams would maximize participation in athletics, even though there was not a football team for the girls. However, the court stated that "it makes no sense, absent some substantial reason, to deny all persons of one sex the opportunity to test their skills at a particular sport."²²⁶

The court also found defendants exclusion of all females premised on promoting safety was suspect, as it was not applied to males as well.²²⁷ "All this tends to suggest the very sort of well-meaning but overly 'paternalistic' attitude about females which the Supreme Court has viewed with such concerns."²²⁸

These two cases illustrate that although the Title IX regulations were neutral, the schools originally prohibited coed football. The schools' or the athletic associations' restrictive stance was prevalent in many contact sports, so that although the intent of the regulations may not have been to deny all females the right to compete on contact sports, the practical effect was that it could be used to do just that.

Several courts allowed females to tryout for men's football teams,²²⁹ but none of the cases involved intercollegiate football

225. *Id.* at 1025.

226. *Id.* at 1028. The court elaborated that there may be certain exceptional instances in which there is a "substantial reason" for such an exclusion, as for example where peculiar safety and equipment requirements demand it, . . . or perhaps where excluding males is necessary to redress past inequality and to foster female participation." *Id.* (citations omitted).

227. *Id.* at 1029.

228. *Id.*

229. See, e.g., *Clinton v. Nagy*, 411 F. Supp. 1396 (N.D. Ohio 1974) (district court granted the female plaintiff's motion for a temporary restraining order against a recreational league that refused to allow the plaintiff the opportunity to play football); *Balsley v. North Hunterdon Regional High School Bd. of Educ.*, 225 N.J. Super. 221, 542 A.2d 29 (App. Div. 1988), *rev'd and remanded*, 117 N.J. 434, 568 A.2d 895 (Sup. Ct. 1990) (female allowed on male high school football team); *Darrin v. Gould*, 540 P.2d 882 (Wash. 1975) (en banc) (Court found unconstitutional a high school athletics association regulation which prohibited all high school girls from playing on boys' football teams in interscholastic games, where the females' ability to play was not taken into account on an individual basis, and where the school did not provide a girls' football team). See also *Jacklin*, *supra* note 19; *Packel v. Pennsylvania Interscholastic Athletics Ass'n*, 334 A.2d 839 (Pa. Commw. 1975) (striking down as unconstitutional an athletics association by-law which prohibited all high school girls from competing or practicing against boys in any athletic contests as violating the Pennsylvania Constitution's Equal Rights Amendment, art. I, § 28, refusing to exempt the sports of football or wrestling). See also *Mikula*, *supra* note 19. But see *Lincoln v. Mid-Cities Pee Wee Football Ass'n*, 576 S.W.2d 922 (Tex. Civ. App. 1979) (recreational football

programs, which offer a significant number of athletic scholarships.

2. Basketball

Courts have strictly examined women's rights in basketball.²³⁰ In *Ward v. Robinson*,²³¹ a female was dismissed from the men's basketball team without any violation of her constitutional rights.²³² In *O'Connor v. Board of Education*,²³³ Karen O'Connor, a gifted middle school basketball player was denied the right to play on the boys' team. A girls' team existed, but it was argued that it did not provide the same caliber of competition as the boys' team.

In *Ridgeway v. Montana High School Ass'n*,²³⁴ the district court held the females' high school basketball and volleyball seasons need not be aligned with the national norm. The court found that this factor was not relevant to the issue of inequality overall. On appeal, the Ninth Circuit determined that "the District Court should not have decided [sic] that seasons placement did not violate equal protection."²³⁵ The court concluded the issue was not properly before the district court. Therefore, the circuit court "express[ed] no opinion on its appropriate resolution in this or any other context in which seasonal placement of girls' sports may be an issue."²³⁶ However, the lower court's opinion was affirmed.²³⁷

league that disallowed females from playing with boys did not violate state constitution's equal rights amendment). *Accord Junior Football Ass'n of Orange v. Gaudet*, 546 S.W.2d 70 (Tex. Civ. App. 1976).

230. "Basketball was first played by women in the United States in 1892, the year after it was invented . . ." 3 TOKARZ, *supra* note 19, at 1. It was not until 1976, however, that "women's basketball was finally added to the Olympics." *Id.* at 11.

231. 496 F. Supp. 1 (E.D. Tenn. 1987), *aff'd*, 624 F.2d 1101 (6th Cir. 1980).

232. *Contra Lavin v. Illinois High Sch. Ass'n*, 527 F.2d 58 (7th Cir. 1975) (female prohibited from playing on men's high school varsity team).

233. 545 F. Supp. 376 (N.D. Ill. 1982), *rev'd and remanded*, 645 F.2d 576 (7th Cir.), *cert. denied*, 454 U.S. 1984 (1981).

234. 858 F.2d 579 (9th Cir. 1988).

235. *Id.* at 589. "A federal district court closed the case only last fall [1990], satisfied that all sides were making progress in implementing a 41-page settlement. The comprehensive agreement required every Montana high school to offer an equal number of sports for girls and boys and calls for comparability in length of seasons, coaching salaries, publicity, facility use, equipment, and booster club support." Goldman, *supra* note 29, at 25.

236. *Id.*

237. *See also Michigan Dep't of Civil Rights v. Waterford Township Dep't of Parks and Recreation*, 355 N.W.2d 204 (Mich. Ct. App. 1983), *rev'd*, 387 N.W.2d 821 (Mich. 1986). In *Michigan*, the court held that the scheduling of girls' high school basketball league during the fall, instead of the customary time during the winter, did infringe on the females' rights. The court stated:

Although it appeared that facilities, funding, and coaching were [the] same for girls and boys basketball leagues, where girls' basketball league played during fall while boys played in winter, with result that girl who played on [the] foot-

Presently, college basketball is played on the full basketball court for both men and women. This is referred to as "full-court." Traditionally, high school girls had played a "half-court" game with six players, none of the whom could cross the center line on the court, while the boys played a "full-court" game with five players. As the half-court game differed from the full-court game, it impacted on the females' opportunity to successfully be recruited for women's collegiate teams.²³⁸ In *Cape v. Tennessee Secondary School Athletic Ass'n*,²³⁹ the Sixth Circuit held that the Equal Protection Clause did not prohibit different basketball rules for females and males.²⁴⁰

In *Yellow Springs v. Ohio High School Athletic Ass'n*,²⁴¹ the Sixth Circuit remanded the case to determine whether there was intentional support of the local board in pursuing discriminatory practices when two girls made the boys' middle school basketball team. The court determined that girls and boys of this level have essentially the same skills.

Recently, women's collegiate basketball programs were saved from being discontinued when the possibility of litigation was raised as at William and Mary College and the University of Oklahoma, which had decided to discontinue their women's programs during the NCAA women's post-season basketball tournament.²⁴²

ball team in fall was required to make choice between playing football or basketball, which was [a] choice that boys were not required to make, separate leagues were not equal and could not withstand equal protection analysis; thus separate league policy did not comply with requirements of Civil Rights Act.

335 N.W.2d at 208.

On appeal, the case was reversed on procedural grounds. See *Striebel v. Minnesota High Sch. League*, 321 N.W.2d 400 (Minn. 1982). In *Striebel*, limited athletic facilities made it necessary to schedule high school boys' and girls' athletic teams in the same sport in two separate seasons. The court stated that neither season was substantially better than the other, thus the scheduling decision was not a denial of equal protection of the law. *Id.* at 402.

238. See *Dodson v. Arkansas Activities Ass'n*, 468 F. Supp. 394 (E.D. Ark. 1979).

239. 424 F. Supp. 732 (E.D. Tenn. 1976), *rev'd*, 563 F.2d 793 (6th Cir. 1977).

240. *Accord Jones v. Oklahoma Secondary Sch. Activities Ass'n*, 453 F. Supp. 150 (W.D. Okla. 1977). But see *Dodson*, 468 F. Supp. at 394 (enjoining continuation of the female "half-court" rules, which differed from the "full-court" rules applied to men). This court specifically disagreed with the determinations in *Cape* and *Jones*. See also Janet Johnson, Comment, *Half-Court Girls' Basketball Rules: An Application of the Equal Protection Clause and Title IX*, 65 IOWA L. REV. 766 (1980).

241. 647 F.2d 651 (6th Cir. 1981).

242. See *supra* note 82.

3. Baseball

Although some jurisdictions categorize baseball as a contact sport, courts have permitted females to participate in the great American pastime sport with males.²⁴³ In *Fortin v. Darlington Little League, Inc.*,²⁴⁴ the court held eight-to-twelve year-old girls must be allowed to play Little League baseball, which is not governed by Title IX. The evidence did not support a finding of material physical differences between boys and girls between those ages.²⁴⁵

In *Croteau v. Fair*,²⁴⁶ the plaintiff, Julie Croteau, alleged sex discrimination when she did not make the high school varsity baseball team. The court found no discrimination in violation of 42 U.S.C. § 1983. The district court held that Title IX was not at issue because the coach made his determination on the merits,²⁴⁷ not because Croteau would be the only female playing on this team.²⁴⁸ Croteau would enter the record books as she went on to become the first female to play baseball (for more than a few innings) on the collegiate level.²⁴⁹

In *Israel v. Secondary Schools Activities Comm'n*,²⁵⁰ a high

243. *Carnes v. Tennessee Secondary Athletic Ass'n*, 415 F. Supp. 569 (E.D. Tenn. 1976).

244. 514 F.2d 344 (1st Cir. 1975).

245. *Accord National Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33 (N.J. Ct. App. Div. 1974), *aff'd*, 338 A.2d 198 (1974) (regarding the desire of Maria Pepe from Hoboken, New Jersey to play Little League baseball); *Rappaport v. Little League Baseball, Inc.*, 65 F.R.D. 545 (1975). *But see* *Magill v. Avonworth Baseball Conference*, 364 F. Supp. 1212 (W.D. Pa.), *vacated on other grounds and remanded*, 497 F.2d 921 (3d Cir. 1974) (Little League). *See also* *King v. Little League Baseball, Inc.*, 505 F.2d 264 (6th Cir. 1974) (finding insufficient state involvement in the Little League's enforcement of its "no girls" rule to bring it under color of state law). In *King*, the plaintiff sought injunctive relief under the Civil Rights Act to protect rights allegedly secured by the Fifth and Fourteenth Amendments to the United States Constitution.

246. 686 F. Supp. 552 (E.D. Va. 1988).

247. *Id.* at 554.

248. Croteau reported that during her sophomore year when she played for the school team another coach "wouldn't call ahead to tell other teams to open a girls' locker room, so Julie would have to track down a janitor and change in a bathroom." NELSON, *supra* note 187, at 16.

249. "In the spring of 1989, Julie Croteau became the first women to play on a men's college baseball team when she played for St. Mary's College in Maryland. . . ." Olson, *supra* note 38, at 151 n.196 (1991). Ms. Croteau who completed her junior year, "left her team, citing sexism among her teammates." *Arena*, *NEWSDAY*, June 7, 1991. Apparently, "Julie has her sights set on becoming a civil rights attorney. 'It's the only thing I've really cared about—people getting a fair shot. I want to change the world.'" NELSON, *supra* note 187, at 22.

250. 388 S.E.2d 480, 485 (W. Va. 1989). In 1991, the Virginia High School League changed a rule allowing females to play on the high school junior varsity baseball team,

school female was prohibited from playing on the boys' high school baseball team where softball was provided for females. A state court determined that the games of baseball and softball were not substantially equivalent for purposes of determining if equal athletic opportunities were provided to boys and girls.²⁵¹ The court determined there was a violation.²⁵²

4. Soccer

The first women's world cup soccer tournament was won by the United States on November 30, 1991.²⁵³ In *Hoover v. Meiklejohn*,²⁵⁴ the district court struck down a Colorado High School Athletic Association rule which prohibited high school females from participating in soccer, deemed a contact sport. The

recognizing the difference between the sports of baseball and softball. See *Double Play in Virginia: High School Legislation*, WOMEN SPORTS PAGES, March 1991, at 3; *On the Ball*, HEADWAY, Fall 1991, at 2.

251. The great increase in female athletes has also included disabled female athletes. See Joe Krupinski, *Lynbrook's Truly Special Athlete: Chaplick Overcomes Hearing Impairment to Excel On and Off the Field*, NEWSDAY, March 17, 1991, at 19 (regarding Melanie Chaplick, a hearing impaired high school female who played interscholastic softball). During March 1991 Olympic gold medal winner, physically-challenged skier, Diana Golden, received the WSF Flo Hyman Award presented by President George Bush. Since 1987, Congress has recognized the National Girls and Women in Sports Day. *President Bush Presents WSF Flo Hyman Award to Diana Golden*, HEADWAY, Summer 1991, at 2. See also NELSON, *supra* note 187, at 77-96. But see *Colombo v. Sewanhaka Central High School Dist.*, 87 Misc.2d 48, 383 N.Y.S.2d 518 (1976) (upholding the Board of Education's prohibition of a high school male who was deaf in one ear and had a 50% hearing loss in the other ear, from playing contact sports, such as football, lacrosse, and soccer).

252. See *Thorn v. Johnson* (Civ. A. 89-0092) (class action filed in the United States District Court for the Western District of Louisiana). The complaint alleged gender discrimination at the West Monroe High School in Monroe, Louisiana, regarding the sports playing fields (facilities) provided to the male and female athletes, and the alleged lack of accommodation of interests and abilities of the female students. The complaint alleged that the high school spent approximately \$100,000 on a new baseball field and facilities for the men's baseball team. Subsequent to the commencement of the lawsuit, the high school built a new softball field for the women's softball team. Pursuant to the consent decree, filed during March 1991, the school agreed to provide a new batting cage for the softball team, and conduct a survey in good faith to determine whether there was interest in forming a female volleyball team. Jack Wright, Jr., Louisiana, was co-counsel for the plaintiffs. A copy of the complaint and the consent decree is on file with the U. MIAMI ENT & SPORTS L. REV. See *On the Ball*, HEADWAY, Spring 1991, at 2. See also *Habetz v. Louisiana High School Athletic Ass'n*, 915 F.2d 164 (5th Cir. 1990) (The athletic association action changed a rule, subsequent to the commencement of the action, whereby if softball was not provided to the girls, they would be eligible to play on the boys' baseball team. The issue was whether the plaintiff was a prevailing party so as to be awarded attorney's fees.).

253. See Barbara Basler, *U.S. Women Beat Norway to Capture World Cup*, N.Y. TIMES, Dec. 1, 1991, 58, at 8; Filip Bondy, *U.S. Women's Team May Be World's Best*, N.Y. TIMES, June 9, 1991, § 8, at 11.

254. 430 F. Supp. 164 (D. Colo. 1977).

court noted that the range of physical ability among individuals of both sexes was greater than the average differences between the sexes.²⁵⁵

The Seventh Circuit in *Libby v. South Inter-Conference Ass'n*,²⁵⁶ addressed the issue whether attorney's fees should be awarded. A temporary restraining order was issued on the eve before a tournament game allowing a high school female, Tanya Libby, to play on the boy's interscholastic soccer team in that game. Further legal action, such as request for a preliminary injunction or final injunction, became moot when the school lost the game. The court held that the plaintiff was not a prevailing party so as to be awarded attorney's fees.

5. Wrestling and Boxing

In *Saint v. Nebraska School Activities Ass'n*,²⁵⁷ the court granted a female high school student's request for a temporary restraining order to participate on the boys' wrestling team. The court concluded the association's rule excluding females from the men's wrestling team did not satisfy the asserted goal of protection of the health and safety of female students.²⁵⁸

The court in *Lafler v. Athletic Board of Control*,²⁵⁹ denied a female plaintiff's request for a preliminary injunction against an organization sponsoring a Golden Glove boxing competition for men, even though no female program existed.²⁶⁰ The court empha-

255. See *Burrows v. Ohio High Sch. Athletic Ass'n*, 712 F. Supp. 620 (S.D. Ohio 1988), *aff'd*, 891 F.2d 122 (6th Cir. 1989) (upholding athletic association rule prohibiting high school soccer players from participating in spring competition).

256. 728 F. Supp. 504 (N.D. Ill.), *aff'd*, 921 F.2d 96 (7th Cir. 1990). The school did determine that there was sufficient interest to field a girls' soccer team, so during the following year the plaintiff played on the girls' team.

257. 684 F. Supp. 626 (D. Neb. 1988).

258. See *Packel v. Pennsylvania Interscholastic Athletic Ass'n*, 334 A.2d 839 (Pa. Commw. Ct. 1975). During November 1991, Barbara Toms, a fifteen-year old, received approval to participate on the boys' wrestling team at Bethlehem High School in upstate New York. *Arena: High School Girl Admitted to Boys' Wrestling Program*, *NEWSDAY*, Nov. 27, 1991, at 180. *But see* MINN. STAT. ANN. § 126.21(3)(5) (West Supp. 1992) ("[A]ny wrestling team may be restricted to members of one sex whether or not the overall athletic opportunities of that sex have previously been limited, provided that programs of that sex are provided for each sex to the extent the educational institutions or public service determines that these programs or events are necessary to accommodate the demonstrated interest of each sex to participate in wrestling.").

259. 536 F. Supp. 104 (W.D. Mich. 1982).

260. The judge in his opinion also addressed the issue of male violence toward women. Social philosopher Myrian Miedzian's position is that the emphasis on competition and winning at any cost instilled in boys and male athletes leads to denigrating and even violent actions towards females. "If you combine the emphasis on winning at any cost with the

sized the physical differences between the sexes and the possibility of great physical harm when women boxed with men. The court suggested the problem be remedied by creating a female program and advised the plaintiff, a novice, to wait another year. There was no guarantee of a female program the following year, however.²⁶¹

6. Hockey and Field Hockey

A New Jersey appellate court upheld the interscholastic athletic association's regulation prohibiting a high school male from playing on the high school girls' field hockey team in *B.C. v. Board of Education Cumberland Regional School District*,²⁶² where there was no all-male team. In *Sullivan v. City of Cleveland Heights*,²⁶³

negative attitude toward women, it is not at all surprising that approximately one-third of the sexual assaults on college campuses are by [male] athletes." Daniel S. Levy, *Why Johnny Might Grow Up Violent & Sexist*, TIME, Sept. 6, 1991, at 14 (interviewing Myrian Miedzian).

261. The court denied defendant's motion to dismiss a complaint in *Garrett v. New York State Athletic Commission*, 82 Misc.2d 524, 370 N.Y.S.2d 795 (Sup. Ct. 1975) (finding that the denial of a boxing license by the state athletic commission to a female boxer, Jacqueline Garrett, also known as Jackie Tonawanda, who wanted to fight against other female boxers, did state of cause of action). See Anthony Carter Paige, *Jackie Tonawanda Returns to the Ring*, CITY SUN, April 10-16, 1991, at 38-39. There are no women umpires in Major League Baseball, or women referees in the National Football League. However, Carol Castellano and Barbara Perez are professional boxing judges in New York State. In addition, while there are no women referees for boxing in New York, Gwen Adair is a boxing referee in California. Bill Gallo, *Ring Fits Women Well*, DAILY NEWS, Jan. 20, 1992, at 45. See also Emily Walzer, *Blowing the Whistle: Retirees Cry Foul When it Comes to Play*, WOMEN'S SPORTS & FITNESS, Nov./Dec. 1991, at 66.

262. 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987). In 1991, a federal district court judge determined that field hockey was a contact sport due to "incidental contact" inherent in competition, explaining that "such contact is inevitable in a sport that combines running, sticks, a hardball, and wide-open playing field." *Kleczek v. Rhode Island Interscholastic League*, 768 F. Supp. 951, 955-56 (D.R.I. 1991). In *Kleczek*, the league had a rule or regulation that prohibited males from playing on the girls' field hockey teams. The plaintiff, a high school male, who made the girls' junior varsity field hockey team, filed a motion for preliminary injunction to permit him to play on the team. The court denied the motion, concluding that the plaintiff had failed to establish the likelihood of success on the merits.

263. 869 F.2d 961 (6th Cir. 1989). Members of the women's club hockey team commenced suit against Colgate University alleging a violation of Title IX in not upgrading the team to a varsity sport. The trial in *Cook v. Colgate University* (N.D.N.Y.) is scheduled to take place in March 1992, according to Faith Seidenberg, of Syracuse, New York, counsel for the team. Telephone conversation with Faith Seidenberg (February 14, 1992). See Lindsay Kramer, *Colgate Women's Hockey Team Sues for Varsity Status*, THE POST-STANDARD, Feb. 8, 1990, at C1-C7.

In 1991, the Grand Rapids League in Michigan after "many meeting, letters, and threats of legal action," permitted Kitty Pipers, a fifteen-year old sophomore goalie, to play in league games for the boys' ice hockey team at her school, West Catholic High School. The high school had allowed her to play in nonleague games the previous year, but Pipers was not permitted to play in league games. John Beckett, *Grand Rapids Goalie Breaks Gender Barriers*, ANN ARBOR NEWS, Dec. 10, 1991, at D1, D7. A 1992 article indicated that there are

the Sixth Circuit determined that the equal protection rights of a ten-year-old girl were not violated when she was not permitted to change in the locker room used by the boys playing on a recreational hockey team. The lower court determined "there is no evidence that the [boys'] locker room area contains any shower facilities, or if the area is equipped with shower facilities, that any of the team members use them."²⁶⁴ The women's bathroom available to the plaintiff lacked shower facilities. Query, whether the "locker rooms" were equivalent if in fact the boys' locker room area did contain shower facilities; however, the boys on their own volition decided not to use them.²⁶⁵

E. Noncontact Sports

In noncontact sports, females have the option of playing on all-female teams where available, according to the "separate but equal" doctrine,²⁶⁶ or participating on the men's teams. Courts have held separate and exclusive female teams to be constitutionally permissible, giving women the choice of competing in an "open team" or a single-sex female team.²⁶⁷

1. Tennis, Track, Swimming, and Cross-Country Skiing

In *Brenden v. Independent School District*,²⁶⁸ the Eighth Circuit held that high school could not prohibit girls from playing on

two females—Liz Hill, a senior goaltender at Lawrence high School, and Claudine Pietrucha at Verona High School—competing on boys' high school ice hockey teams in New Jersey. *Goalie Overcomes an Icy Reception*, N.Y. TIMES, Feb. 9, 1992, § 8, at 7.

264. *Id.* at 964.

265. Although this was not a case governed by Title IX, the Title IX regulations provide that "a recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33 (1991).

266. "[T]he separate teams must be as nearly equal as possible, and separation allowed only to the extent absolutely necessary to provide equal athletic opportunity for all participants." *Striebel v. Minnesota State High Sch. League*, 321 N.W.2d 400, 402 (Minn. 1982).

267. According to a state court decision, *Attorney General v. Massachusetts Interscholastic Athletic Ass'n*, 393 N.E.2d 284 (Mass. 1979), an official from Massachusetts reported that the boys' participation on the girls' intramural sports team had been detrimental. *Cf. B.C. v. Board of Educ., Cumberland Regional Sch. Dist.*, 531 A.2d 1059, 1061-62 (N.J. Super. Ct. App. Div. 1987). See *Brenden v. Independent Sch. Dist.*, 477 F.2d 1292 (8th Cir. 1973) (holding the school could not prohibit girls from participating in interscholastic activities).

268. 477 F.2d 1292 (8th Cir. 1973). On January 4, 1992, the first United States women's Olympic biathlon team, which combines cross-country skiing and rifle marksmanship, was chosen. Gerald Eskenazi, *At Last, Women in the Biathlon*, N.Y. TIMES, Jan. 5, 1992, § 8, at 2.

boys' teams, at least in noncontact sports. The court struck down a state high school league rule precluding female students from participating on the men's tennis, cross-country skiing, and cross-country running teams. In *Gilpin v. Kansas State High School Activities Association*,²⁶⁹ the court allowed a female high school student to participate on the all-male cross-country track team, based on a civil rights action alleging violation of the Equal Protection Clause of the Fourteenth Amendment.²⁷⁰

In *Ruman v. Eskew*,²⁷¹ the state court denied the grant of an injunction to a high school female who wanted to try out for the boys' tennis team: A girls' tennis team existed and there was a high school athletic association rule prohibiting girls' participation on a boys' team if the school had a girls' program.²⁷²

2. Golf

In *Othen v. Ann Arbor School Board*,²⁷³ the plaintiffs alleged that their daughters were cut from a high school golf team because of their sex.²⁷⁴ Title IX was not applied because the court deter-

269. 377 F. Supp. 1233 (D. Kan. 1974).

270. In *Martin v. International Olympic Committee*, 740 F.2d 670 (9th Cir. 1984), the addition of a 5000 meter event and a 10,000 meter track event for women was not required in the 1984 Olympic events held in Los Angeles, California. See Martin P. Berman, Note, *Sex Discrimination: Another Hurdle on the Road to Equality*, 7 LOY. ENT. L.J. 167 (1987) (discussing the *Martin* case in-depth). The 1984 Summer Olympics featured for the first time a women's marathon, which Joan Benoit Samuelson of the United States won. Her time of 2:24.52 "would have won 13 of the previous 20 men's Olympic marathons." Roberts, *supra* note 198, at 27.

271. 333 N.E.2d 138 (Ind. Ct. App. 1975).

272. See *Morris v. Michigan State Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973) (concluding that girls can participate on the boys' tennis team). See also *Striebel v. Minnesota State High School League*, 321 N.W.2d 400 (Minn. 1982) (scheduling seasons based on the lack of tennis and swimming facilities); *Bucha v. Illinois High School Ass'n*, 351 F. Supp. 69 (N.D. Ill. 1972) (high school swimming); *Kelly v. Wisconsin Interscholastic Athletics Ass'n*, 367 F. Supp. 1388 (E.D. Wis. 1974).

273. 509 F. Supp. 1376 (D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983).

274. Women have been contemplating or commencing lawsuits against country clubs alleging discriminatory practices in memberships for the sexes and the tee-off times. See, e.g., *Bradshaw v. Yorba Linda Country Club and American Golf Corp.*, WEC 133760 (Los Angeles Super. Ct 1989), cited in Amy Engeler, *For Women Golfers, Life in the Rough*, N.Y. TIMES, October 1, 1989, § 6, at 42, 46, 52, 54 & 55. The case was commenced by a California attorney, Gloria Allred, on behalf of her client during February 1989, alleging violation of a California statute which prohibits businesses from discriminating against women. The case was subsequently settled on April 6, 1990, with the parties agreeing to allow women members to have more equitable playing hours and to vote and run for the governing body, which had been all-male, according to a statement provided by Ms. Allred, on file with the U. Miami Ent. & Sports L. Rev. The plaintiffs were not successful in challenging certain practices of a private men's golf club, where the all-male club received tax benefits in maintaining an open space for a certain period of time. Burning Tree Club, Inc.

mined there was no federal funding of the athletic program of the school in question, even though the school had received federal impact aid.²⁷⁵

3. Volleyball

In volleyball, sometimes referred to as the "female" football, courts have been protectionary toward females when no male team exists and men want to play on the women's team. The courts have upheld the prohibition of men playing on females' volleyball teams based on the past inequitable conditions involving females.²⁷⁶ In *Rowley v. Board of Education of St. Vrain Valley School District*,²⁷⁷ the district court granted a high school male's motion for a preliminary injunction to play on an all-girl volleyball team. However, this opinion was set aside on appeal to the Tenth Circuit, and subsequently withdrawn for mootness, as this was not a class action lawsuit, and the plaintiff was a high school senior when the lawsuit was commenced²⁷⁸ and had since graduated.

F. Who's On First?

The courts are split on the question whether the physical differences between the sexes justify denying females the opportunity to play sports on all-male teams. Some jurists conclude that there are no major physical differences between the sexes at the grade school level, and therefore, there is no reason to prohibit both

v. Bainum, 501 A.2d 817 (Md. 1985). See also Matt Lait, *Va. Golf Club to Vote on Men-Only Tee Times*, WASH. POST, August 16, 1989, at B1, B4; J. Peder Zane, *In Some Cities Women Still Battle Barriers to Membership in All-Male Clubs*, N.Y. TIMES, Dec. 8, 1991, at 38.

275. But see *Haas v. South Bend Community Sch. Corp.*, 289 N.E.2d 495 (Ind. 1972). In *Haas*, the supreme court reversed and remanded the denial of a permanent injunction that prevented a high school female from participating on a golf team due to a high school athletic association rule which prohibited males and females from competing on the same team. *Id.* at 501.

276. *Clark v. Arizona Interscholastic Ass'n.*, 695 F.2d 1126 (9th Cir. 1982). See *Forte v. Board of Educ.*, 431 N.Y.S.2d 321 (Suffolk C. 1980); *Petrie v. Illinois High Sch. Bd.*, 394 N.E.2d 855 (Ill. App. Ct. 1979) (public schools' sponsoring of a volleyball team exclusively for girls did not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution). *Contra Gomes v. Rhode Island Interscholastic League*, 469 F. Supp. 659 (D.R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979).

277. 863 F.2d 39 (10th Cir. 1989).

278. See the companion case, *Dahlem v. Board of Educ. of Denver Public Schs.*, 901 F.2d 1508 (10th Cir. 1990) (denying a male high school senior, who was originally granted a preliminary injunction to participate on an all-female gymnastics team, attorney's fees pursuant to 42 U.S.C. § 1988). As previously noted, the non-alignment of a female volleyball season from the national norm was upheld by the district court. However, the circuit court held this issue was not properly before the court. *Ridgeway*, 858 F.2d at 589.

sexes from being on the same team.²⁷⁹ Other judges determined that there are physical differences after grade school but both sexes should still be permitted to play on the same team.

The court in *Hoover* detailed certain differences between males and females which occurred after puberty, but also stressed:

It is also true that while males as a class tend to have an advantage in strength and speed over females as a class, the range of differences among individuals in both sexes is greater than the average differences between the sexes.²⁸⁰

Conversely, other courts concluded that there are physical differences and males and females should not be permitted to play on the same team, even if this would preclude participation by females because no female team exists.²⁸¹

In summary, when a male team in the sport is offered, but no female team, the courts generally conclude that a female should be permitted to play on the male team in noncontact sports and sometimes in contact sports.²⁸² Cases that have decided this issue

279. *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651 (6th Cir. 1981); *Fortin v. Darlington Little League*, 514 F.2d 344 (1st Cir. 1975). See also MINN. STAT. ANN. § 126.21 (West Supp. 1992).

280. *Hoover*, 430 F. Supp. at 166.

281. *Lafler v. Athletic Bd. of Control*, 536 F. Supp. 104 (W.D. Mich. 1982). See *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1127 (9th Cir. 1982) (stipulating that high school males are generally taller, can jump higher and are stronger than high school females). See also *Attorney General v. Massachusetts Interscholastic Athletic Ass'n, Inc.*, 393 N.E.2d 284 (Mass. 1979). In *Massachusetts Interscholastic*, the court stated:

The general male athletic superiority based on physical features [such as larger muscle mass, higher proportion of lean body tissue, greater cardiovascular capacity, and greater height Women may, however, have an edge in sports that test balance, since their average lower center of gravity augments stability. They retain heat longer and enjoy greater buoyancy than men—both advantages in swimming] is challenged by the development in increasing numbers of female athletes whose abilities exceed those of most men, and in some cases approach those of most talented men. Coordination, concentration, strategic acumen, and technique or form (capabilities of both sexes) intermix with strength and speed where males have some biologic advantages) to produce athletic results.

Id. at 293 n.34.

282. For cases permitting females to participate on male sports teams, see generally *Fortin v. Darlington Little League*, 514 F.2d 344 (1st Cir. 1975) (Little League baseball); *Brenden v. Independent Sch. Dist.*, 477 F.2d 1292 (8th Cir. 1973) (high school tennis, cross-country skiing, and cross-country track); *Morris v. Michigan St. Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973) (high school tennis); *Saint v. Nebraska Sch. Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988) (high school wrestling); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985) (high school football); *Force v. Pierce City*, 570 F. Supp. 1020 (W.D. Mo. 1983) (eighth grade football); *Leffel v. Wisconsin Interscholastic Ass'n*, 444 F. Supp. 1117 (D. Wis. 1978) (high school baseball); *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977) (high school soccer); *Carnes v. Tennessee Secondary Sch. Athletic Ass'n*, 415 F. Supp. 732 (D. Tenn. 1976) (high school baseball); *Clinton v. Nagy*, 411 F. Supp. 1396 (N.D. Ohio 1974) (recrea-

were primarily predicated on constitutional grounds and not through Title IX entitlement. None of the cases involved female participation on a collegiate men's sports team.

Otherwise, the educational institution or recipient of federal funds could provide a separate female team, provided it was equivalent to the existing male team.²⁸³ Where no male team exists and a male wants to become a member of an all-female team, the courts are reluctant to allow the male to participate, generally based on the absence of athletic activities for males.²⁸⁴ In *Hoover v. Meiklejohn*,²⁸⁵ the district court stated that the encouragement of female involvement in sports is a legitimate objective—and separation of teams may promote that purpose. Furthermore, “[i]t may also justify the sanction of some sports only for females.”²⁸⁶ Under Title IX regulations, the schools and recipients are permitted to preclude males from participating in a particular sport in a given situation.²⁸⁷

In general, the high school cases analyzed the issue of who plays with whom, while, overwhelmingly, the college cases were stymied by the Title IX threshold jurisdictional issue of whether the athletic department is a “program or activity” that receives federal funds. It is also interesting that, overall, women did better pursuing their claims under the Civil Rights Act and the constitutional grounds asserted.

tional football); *Gilpin v. Kansas St. High Sch. Activities Ass'n*, 377 F. Supp. 1233 (D. Kan. 1974) (high school cross-country track); *Balsley v. North Hunterdon High Sch. Bd. of Educ.*, 542 A.2d 29 (N.J. Super. Ct. App. Div. 1988), *rev'd*, 568 A.2d 895 (N.J. 1990) (attorney's fees) (high school football); *Packel v. Pennsylvania Interscholastic Athletic Ass'n*, 334 A.2d 839 (Pa. Commw. Ct. 1975) (high school football); *Darrin v. Gould*, 540 P.2d 882 (Wash. 1975) (all high school sports, including football and wrestling); *National Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33 (N.J. Ct. App. Div. 1974), *aff'd*, 338 A.2d 198 (1974) (Little League baseball).

283. For cases espousing the separate but equal doctrine in this area, see *O'Connor v. Board of Educ.*, 545 F. Supp. 376 (N.D. Ill. 1982); *Gomes v. Rhode Island Interscholastic League*, 469 F. Supp. 659 (D.R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979); *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977) (high school soccer); *Bucha v. Illinois High Sch. Ass'n*, 351 F. Supp. 69 (N.D. Ill. 1972); *Ritacco v. Norwin Sch. Dist.*, 361 F. Supp. 930 (Pa. 1973).

284. *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) (volleyball); *Kleczeck v. Rhode Island Interscholastic League*, 768 F. Supp. 951 (D.R.I. 1991) (high school field hockey); *B.C. v. Board of Educ., Cumberland Regional Sch. Dist.*, 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987) (field hockey); *Mularadelis v. Haldane Cent. Sch. Bd.*, 74 A.D.2d 248 (N.Y. App. Div. 1980) (high school tennis); *Forte v. Board of Educ.*, 431 N.Y.S.2d 321 (Suffolk C. 1980) (high school volleyball); *Petrie v. Illinois High Sch. Bd.*, 394 N.E.2d 855 (Ill. App. Ct. 1979) (high school volleyball).

285. 430 F. Supp. 164 (D. Colo. 1977).

286. *Id.* at 170.

287. 34 C.F.R. § 106.41 (1991).

An important issue remains unsettled, namely, on what type of team may a male or female participate. Presently, the first inquiry to be made is whether the team involves a contact or non-contact sport. The second inquiry to be made is whether there exists only a men's team, or only a women's team, or both. The result is eight generalizations:

(1) If there is a men's team in a contact sport, but no women's team, generally women may play on the men's team on constitutional grounds, but not Title IX grounds, unless the school voluntarily provides for co-educational participation on the designated contact sport;

(2) If there is a men's team in a contact sport and a women's team, generally women may not play on the men's team, on both Title IX and constitutional grounds;

(3) If there is no men's team in a contact sport, but a women's team, men could be prohibited from participating pursuant to Title IX; however there is little case law addressing this unusual situation;²⁸⁸

(4) If there is a men's team in a contact sport, and a women's team, men could be prohibited from participating under Title IX. There appears to be an absence of case law pertaining to this scenario;

(5) If there is a men's team in a noncontact sport, but no women's team, generally women may play on the men's team, pursuant to Title IX and constitutional theories;

(6) If there is a men's team in a non-contact sport and a women's team, women would probably not be allowed to participate on the men's team pursuant to Title IX;

(7) If there is no men's team in a non-contact sport, but a women's team, generally men may not play on the women's team pursuant to Title IX as the men have not been historically disadvantaged against; and

(8) If there is a men's team in a non-contact sport, and a women's team, generally men may not play on the women's team, pursuant to Title IX. There is no case law regarding this unusual fact pattern.

VI. CONCLUSION

Title IX has been the springboard for providing amateur athletic programs for females in this country. It has also resulted in a

288. *White v. Corpus Christi Misses Kickball Ass'n*, 526 S.W.2d 766 (Tex. Civ. App. 1975) (community kickball); *B.C. v. Board of Educ., Cumberland Regional Sch. Dist.*, 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987) (high school field hockey).

number of states guaranteeing equal athletic opportunities. From nonexistent or low-level programs for women and girls in the early 1970's, there has been progression. However, it appears that the status quo of sixty-six percent male athletic participation compared with only thirty-three percent female athletic participation, has become the acceptable norm, despite generally a fifty-fifty percent ratio of genders enrolled in schools. Instead of the glass ceiling women face in the business world, they have a glass sneaker in the sports world.

The issue today is not whether a sports program is provided to women, but whether the women's program is equivalent to the men's program. The inquiry has evolved from whether the women's team has uniforms to whether the women's team is provided with the new uniforms or the men's old uniforms. The scrutiny must be whether there are unfettered budgetary allowances, more coaches and sports, better per capita scholarships, better facilities and equipment for men while not recognizing the legal and egalitarian principles in providing women with the same quality of program.²⁸⁹

The 1992 Supreme Court decision sanctioning the provision of compensatory damages when intentional discrimination exists in a Title IX action expands the avenues toward redressing inequities in athletic programs for females. Nonetheless, a fresh look at the Title IX regulations and actions of the OCR are needed. The contact sport versus noncontact sport distinction, found in the Title IX regulations, should be reevaluated as to its propriety as the country heads into the twenty-first century. Should the nondistribution of scholarships based on the percentage of students of each sex, rather than student-athletes, and the unequal provision of these scholarships for each sex at colleges and universities continue to be condoned? The nebulous standard of what constitutes a violation of the "equal opportunity" requirement found in the regulations needs to be reviewed.

The court in *Othen v. Ann Arbor School Board* made the following cogent observation:

During the past 20 years, this country has finally begun to understand and has attempted to alleviate not only blatant and overt discrimination on the basis of sex, but also the subtle ways in which women are treated as less than equal. The struggle by women for equality continues to be one of the most important

289. "Discrimination in education is one of the most damaging injustices women suffer." *Brenden v. Independent Sch. Dist.* 477 F.2d 1292, 1298 (8th Cir. 1973).

unfinished problems facing our society in the 1980's.²⁹⁰

There can be no difference in the classroom between teaching males and females. The same teacher, equipment, books, and supplies must be supplied to all students, regardless of their sex.²⁹¹ Similarly, there should be no difference on the sports fields for men and women.

Twenty years after the passage of Title IX of the Education Amendments of 1972, the issue should not be whether opportunities are being provided; rather, the focus should be on the quality of the programs provided and on achievement and accomplishment,²⁹² and a renewed examination as to whether the present paradigm is satisfactory or requires changes.²⁹³

290. 507 F. Supp. 1376, 1379 (E.D. Mich. 1981).

291. The Detroit Board of Education originally had plans to have an all-boy high school. In *Garrett v. Board of Educ. of Sch. Dist. of City of Detroit* (91-CV-73821DT) (E.D. Mich.), the plaintiff alleged violations of Title IX. *Lawsuit Challenges Detroit Over All-Male Schools*, 19 SCHOOL LAW NEWS, Aug. 15, 1991, at 4. The case was shortly thereafter resolved when the school board agreed to let females attend the three academies. *Detroit Board Agrees to Let Girls Attend Male-Only Academies*, 19 SCHOOL LAW NEWS, Aug. 29, 1991, at 5. See also *Detroit Board Won't Fight Ban on All-Male Academics*, 19 SCHOOL LAW NEWS, Nov. 21, 1991, at 6. See also *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Pa. 1991), wherein a federal judge "upheld the Virginia Military Institute's (VMI) policy of excluding women, rejecting the Justice Department's argument that the school's admission practice is unconstitutional. [V]MI and the Citadel in Charleston, South Carolina, also a military school, are the only all-male public colleges in the United States . . ." *Virginia Military Institute May Stay All-Male, Judge Rules*, 19 SCHOOL LAW NEWS, June 20, 1991, at 6.

292. Nine out of the eleven medals, including all five gold medals, awarded to the United States at the 1992 Winter Olympics were won by women.

293. Congressional hearings on gender equity in intercollegiate athletics are scheduled to commence on April 9, 1992, before the House Subcommittee on Commerce, Consumer Protection, and Competitiveness, chaired by Rep. Cardiss Collins (D-Ill.).