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TITLE IX AT FORTY: AN INTRODUCTION AND HISTORICAL REVIEW OF
FORTY LEGAL DEVELOPMENTS THAT SHAPED GENDER EQUITY LAW

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Perhaps no law has received more attention in the sports industry, specifically within high school and collegiate sports, than Title IX. Forty years after its enactment, this educational statute has truly reshaped the landscape of American sport.

The purpose of this Article is to provide an introduction to forty important legal developments related to Title IX over the past forty years. All of the United States Supreme Court decisions reviewing Title IX, many other important federal and state cases, the regulations, and other important agency guidance, are included, as they must be understood together in order to truly understand the impact of Title IX. The Article follows a chronological progression through these developments to demonstrate how they have built upon each other over the past forty years.

Although many lawyers, law students, and sports personnel have a general idea of what Title IX is, most do not understand or attempt to understand the details. This Article focuses on those details. It often includes the exact language of the cases, law, regulations, and other documents--language that is often ignored by practitioners and scholars--as this language provides the best guidance on how the law really works. Of particular note, because Congress did not clarify Title IX's impact on an educational institution until the late 1980s, much of the focus (twenty-eight of the forty developments presented *326 below) is on cases and other guidance provided within the past twenty years.

1. The History of Title IX (1964-1972)

Although Title IX was enacted in 1972, it is important to look back before its enactment to truly understand its meaning and impact. In many ways, Title IX was patterned after the Civil Rights Act of 1964.¹ Title VI of the Civil Rights Act provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”² This language is virtually identical to that in Title IX except that the Civil Rights Act does not provide a prohibition in relation to the sex of the individual involved.

Title IX, itself, began to take shape in 1970 during hearings held by a special House Subcommittee on Education.³ The statute was first introduced as an amendment to the Education Amendments of 1971 and provided at that point that “[n]o person in the United States shall, on the ground of sex . . . be subject to discrimination . . . under any program or activity conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance.”⁴ Perhaps if this version of the law had gone into effect, the confusion over the types of entities that are subject to Title IX would not have lasted until 1987.

At this early stage, Senator Birch Bayh of Indiana made clear that Title IX was based on the Civil Rights Act and that it closed the gap by prohibiting discrimination based on sex as well, as he noted that the language of Title IX “is identical language,

specifically taken from [T]itle VI of the 1964 Civil Rights Act,” and that “educational opportunity should not be based on sex, just as we earlier said it should not be based on race, national origin, or some of the other discriminations.”⁵ This initial version of Title IX was rejected, but it was reintroduced in 1972 with the language found today.⁶ At this point, Senator Bayh again clarified that this law was a direct reaction to the Civil Rights Act, which “unfortunately . . . does not apply to discrimination on the *327 basis of sex.”⁷ These 1972 amendments were then an effort to “close this loophole” and prohibit sex discrimination as well because “our national policy should prohibit sex discrimination at all levels of education.”⁸

Although the focus on education, and the connection to the Civil Rights Act, is clear, little can be found within the legislative history of Title IX that refers specifically to athletic programs. The first mention of athletics is found in Senator Bayh's response to a question about the initial version of the Act. Some worried that the Act would mandate gender-mixed sports teams, and, in response, he noted that:

I do not read this as . . . mandat[ing] the desegregation of football fields. What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, nor that the men's locker room be desegregated.⁹

After Title IX was reintroduced, Senator Bayh also recognized that Title IX provides federal agencies with the rule-making authority necessary to effectuate the law.¹⁰ In relation to sports, then “[t]hese regulations would allow enforcing agencies to permit differential treatment by sex only, . . . such as . . . in sports facilities or other instances where personal privacy must be preserved.”¹¹

None of this language provides a direct connection to the application of Title IX to athletics. Instead, this legislative history demonstrates that Title IX was specifically enacted to prohibit discrimination within the educational setting. And as even the first case to refer to the law, *Brenden v. Independent School District*,¹² makes clear, courts have repeatedly found that athletics is a vital and important part of the educational experience for high school and college students.

2. The Law (1972)

As finally enacted into law, Title IX provides that:

*328 No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.¹³

As gender equity law and the application of Title IX have developed over the past four decades, there are several important initial concepts to note.

Title IX applies only to “programs or activities” that receive “[f]ederal financial assistance.” This language led to many controversial court decisions and the need for further amendment of the law in the 1980s because, as first enacted, the law did not clearly define what a covered “program or activity” is.

The law then prohibits discrimination on the basis of sex in three general areas. First, no one can “be excluded from participation in” any education program or activity. In general, the focus in this first provision is on issues of accommodation and what will eventually be identified in a policy interpretation (“the Policy Interpretation”) as the “three-part” test. This focus centers on making sure that actual participation opportunities are not provided in a discriminatory fashion.

Second, no one can “be denied the benefits of” any education program or activity. This focus typically centers on what is now known as the program analysis, looking at various aspects of an athletic program as listed in the regulations and specifically laid out in the Policy Interpretation.

Third, no one can be “subjected to discrimination under” any education program or activity. This area focuses specifically on sexual discrimination and harassment within athletic programs. Although the focus within Title IX scholarship is often on Title IX's accommodation provisions, sexual discrimination and harassment claims have received much more judicial review.¹⁴

It is always important to remember that Title IX is part of the Education Amendments of 1972. No part of the law includes the words “sports” or “athletics” or includes any specific reference to athletic programs in any way. As the legislative history discussed above demonstrates, Title IX was implemented to end sex discrimination in education. It was not until courts began to connect this to their recognition of the importance of athletic participation as part of the overall educational experience, and when the Office of Civil Rights (OCR) began to provide specific guidance related to Title IX's application to athletic programs, that Title IX's application to athletics began ***329** to become clear.

3. The First Case (1973)

The only form of recovery provided within Title IX is the discontinuation of federal funding provided to a covered program or activity that violates the law.¹⁵ Because of this limitation, during the 1970s, there was little litigation attempting to use the law to fight discrimination.¹⁶

Brenden, the first case to actually refer to the statute, was not decided until April 18, 1973, nine months after the law's enactment.¹⁷ The lawsuit focused on civil rights claims brought by female high school students in the Minnesota public schools.¹⁸ At the time, the Minnesota State High School League had a rule barring females from participating with males in high school sports.¹⁹ While the focus of the case was on the court's review of the rule under the Equal Protection Clause,²⁰ for the first time the United States Court of Appeals for the Eighth Circuit also mentioned Title IX. The court held that the rule violated the Equal Protection Clause because it banned female students from participating with men based on assumptions about their qualifications as women and not on their actual abilities to play the particular sport involved.²¹ Moreover, while discussing other landmark cases dealing with discrimination toward women in education, the court noted that in passing Title IX, “Congress has also recognized the importance of all aspects of education for women.”²² Perhaps setting the foundation for the review of sports programs by courts over the next forty years, the court recognized that high school sports are “an important and integral facet of the . . . education process,” and, therefore, “[d]iscrimination in high school interscholastic athletics constitutes discrimination in education.”²³

***330** 4. The Javits Amendment (1974)

During these initial years after the enactment of Title IX, a number of bills were introduced attempting to stop Title IX from what some believed was its potential negative impact on revenue-producing sports in collegiate athletics.²⁴ None of these amendments passed.

Instead, on August 21, 1974, Congress passed the Javits Amendment (also known as the Education Amendments of 1974), which required the Department of Health, Education, and Welfare²⁵ (the “Department”) to “prepare and publish . . . proposed regulations implementing the provisions of [T]itle IX of the Education Amendments of 1972 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 particular sports.”²⁶ Until this time, it was difficult to understand the specific

application of Title IX to athletics. This amendment led the Department to draft the regulations that would begin to provide specific details regarding what athletic departments must do in order to comply with the law.

5. The Regulations (1975)

The regulations (the “Regulations”) required by the Javits Amendment were published in 1975.²⁷ The first part of the Regulations covers athletics and begins with a prohibition against discrimination that is virtually identical *331 to the prohibition found in Title IX:

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.²⁸ After an initial provision dealing with separate teams for each sex, the Regulations then provide specific provisions focusing on “equal opportunity for members of both sexes” in any high school, college, or intramural sport.²⁹ In order to assess whether a recipient of federal funds (i.e., a school, university, or other program or activity) is providing “equal opportunity,” to provide some guidance for schools, and to provide some useful measures for those evaluating schools, the Regulations provide the following ten factors that may be considered:

- (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; and
- (10) Publicity.³⁰

Although the Regulations provide significant guidance on Title IX compliance, they would not be referred to in any reported judicial decision *332 until 1992.³¹ Perhaps a reason for this lag is because the Regulations provided an “adjustment period” that gave elementary schools a year to come into compliance, while giving three years for high schools, colleges, and universities.³² With a substantial time frame to comply, potential plaintiffs had little reason to challenge a school when they would have already lost their eligibility, thus leaving them with nothing to recover. Three years later, the Department was focused on the completion of what, in 1979, would become the Policy Interpretation.

The second part of the Regulations deals with financial assistance. This part provides that:

[I]n providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

. . . (3) Apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.³³

Specific to athletic scholarships, the Regulations provide that:

(c) Athletic scholarships.

(1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this *333 paragraph and § 106.41.³⁴

Although not the specific focus of much litigation³⁵ or scholarship surrounding Title IX, these Regulations clearly show that the law's prohibition against discrimination applies even to the awarding of scholarships. The Policy Interpretation would also pick up on these Regulations and provide more guidance related to financial assistance four years later.

6. OCR Guidance #1: The Memorandum (1975)

In addition to the actual agency regulations found in the Code of Federal Regulations, throughout the past forty years, OCR has provided additional information in the form of memorandums, "Dear Colleague Letters," clarifications, and guidance, presumably in an attempt to assist those administering sports to better understand the application of Title IX to their programs. In order to truly understand how the Department interprets and enforces the law, one must review these documents as well.

One of the first documents appeared after the Regulations became effective in a memorandum (the "Memorandum") to chief state school officers, superintendents of local educational agencies, and college and university presidents.³⁶ Although the Regulations became effective on July 21, 1975, this Memorandum was sent four months later due to concerns raised by educational institutions related to their athletic programs.³⁷

This Memorandum made clear that it is "the basic responsibility of educational institutions to provide equal opportunity to members of both sexes interested in participating in the athletics programs" that they offer.³⁸ However, this analysis of equal opportunity was "not to be so inflexible as to require identical treatment in each of the matters listed" in the Regulations.³⁹

Although for years there was significant debate about what parts of an educational program were subject to the Regulations and Title IX, this *334 Memorandum made clear that "[t]hese sections apply to each segment of the athletic program of a federally assisted educational institution whether or not that segment is the subject of direct financial support through the Department."⁴⁰ As a result, OCR recognized early on that separate funding for athletic programs "does not remove it from the reach of the statute and hence of the regulatory requirements."⁴¹ In addition, foregoing a sport-by-sport review of Title IX compliance, OCR made clear that the Regulations focus on "the totality of the athletic program of the institution rather than each sport offered."⁴²

Finally, of specific importance to an understanding of what activities constitute a sport that may be covered by Title IX and the Regulations, OCR also stated that “drill teams, cheerleaders and the like . . . are not a part of the institution's ‘athletic program’ within the meaning of the regulation.”⁴³ This statement would receive further analysis in litigation to come.

Although this Memorandum has not received the level of judicial deference seen by the Title IX clarifications or Policy Interpretation released in subsequent years,⁴⁴ it is important because it set the stage for the frequent information that OCR would provide over the next forty years in its attempts to continuously guide educational organizations as they grappled with Title IX compliance.

7. Validity of the Regulations: Part One (1978)

As has happened since the Regulations were created, claimants have consistently sued to try to invalidate them. One of the first parties to try was the National Collegiate Athletic Association (NCAA). In *NCAA v. Califano*, the NCAA sued the federal agency charged with enforcing Title IX, the Department, claiming that the Department exceeded its authority by promulgating the Regulations without finding that they were specifically consistent with the objectives of the statute.⁴⁵ Specifically disagreeing with the Memorandum, the NCAA also argued that the Regulations should not ***335** apply to intercollegiate athletic programs because they do not directly receive federal funding.⁴⁶

The district court dismissed the claims, finding that the NCAA does not receive federal funding; thus, it is not subject to Title IX.⁴⁷ As a result, although the NCAA was perhaps bringing the claim on behalf of member athletic departments across the country, the court found that there was no justiciable controversy between the Department and the NCAA.⁴⁸

8. The First Cause of Action Under Title IX (1979)

Although the law, Regulations, and Memorandum seemed to make clear that educational organizations could not discriminate based on sex, during the 1970s, courts would not allow claimants to bring claims under Title IX. As noted earlier, the only form of recovery provided for in the law is that if there is a finding of noncompliance, the offending program or activity may lose its federal financial assistance.⁴⁹ As a result, courts reviewing the first claims brought by female student-athletes found that the statute did not provide a private cause of action that could be brought in attempt to enforce the law.⁵⁰ This status quo remained unchanged until May 14, 1979, seven months before the publication of the Title IX Policy Interpretation.

Cannon v. University of Chicago, the case that led to the development of a private right of action under Title IX, did not involve athletics.⁵¹ Instead, a student sued the University of Chicago claiming that she was denied admission to medical school based on her sex in violation of Title IX.⁵² Following the early case interpretations of Title IX, the district court dismissed the claim because Title IX provided no private right of action to a plaintiff.⁵³ The United States Court of Appeals for the Seventh Circuit affirmed.⁵⁴ On appeal, the Supreme Court reversed. The Court noted that Title IX was based on Title VI of the Civil Rights Act of 1964 and that the legislative history of Title IX demonstrated that Congress expected that, similar to Title VI, Title IX ***336** would be enforced by private action.⁵⁵ Therefore, although the Court recognized that it would be better for Congress to have included some specific language within the statute providing for a private right of action, it found that “Title IX presents the atypical situation in which all of the circumstances that the Court has previously identified as supportive of an implied remedy are present.”⁵⁶

As a result, since 1979, private plaintiffs have been able to sue schools, alleging that the schools' programs or activities violate Title IX. Seven months later, guidance from the Department would further clarify how Title IX applies to athletic departments.

9. OCR Guidance #2: The Policy Interpretation (1979)

Four years after the Regulations were put in place, sports administrators were still confused about how the Regulations, and Title IX itself, applied to their athletic programs. At this point, OCR again attempted to provide further information to explain how the law impacted athletic programs.

Published in the Federal Register on December 11, 1979, the Policy Interpretation focuses on Title IX's application to collegiate athletics but also specifically how it applies to high school, club, and intramural sports.⁵⁷ The Policy Interpretation attempts to provide further guidance on how an educational organization can comply with Title IX. It also elaborates on the meaning of "equal opportunity" from the Regulations and provides several specific factors that can be used to evaluate each part of the Regulations.

The Policy Interpretation is separated into three distinct areas:

[1.] Compliance in Financial Assistance (Scholarships) Based on Athletic Ability: Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.

[2.] Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem, coaching and academic tutoring; assignment and *337 compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services): Pursuant to the [R]egulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.

[3.] Compliance in Meeting the Interests and Abilities of Male and Female Students: Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.⁵⁸

Part one, dealing with compliance in financial assistance based on athletic ability, takes its charge from the Regulation specific to financial assistance.⁵⁹ This part focuses on determining "whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs."⁶⁰ The Policy Interpretation does not demand identical assistance for both sexes. Instead, it calls for "substantially equal amounts" and notes that disparities may be allowed as a result of "legitimate, nondiscriminatory factors," such as higher out-of-state tuition costs at public schools or decisions by schools as to how to allocate assistance in order to drive program development.⁶¹ The focus of this part is on the total amount of scholarship funding rather than the specific amount of actual scholarships provided to each sex.⁶²

Part two, dealing with "Compliance in Other Program Areas," specifies factors to be used in assessing "equal opportunity" in the provision of the second through tenth factors provided in the Regulations.⁶³ In addition to these factors, the Policy Interpretation also focuses on recruitment and support services.⁶⁴ Known to many as the Title IX "laundry list," these overall factors include the following areas:

1. equipment and supplies,

*338 2. scheduling of games and practice times,

3. travel and daily per diem allowances,

4. access to tutoring,

5. coaching,
6. locker rooms,
7. practice and competitive facilities,
8. medical and training facilities and services,
9. publicity,
10. recruitment of student athletes, and
11. support services.⁶⁵

Monitoring these areas for both sexes is often the focus of Title IX compliance within an athletic department.

Each of these factors is then analyzed using a four-step process. The first step calls for an assessment of each factor from the list “by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes.”⁶⁶ If this initial assessment finds a disparity, this disparity can then be justified in the second step by certain nondiscriminatory factors, including “unique aspects of particular sports or athletic activities,” and “legitimately sex-neutral factors related to special circumstances of a temporary nature.”⁶⁷

If a disparity cannot be justified by a nondiscriminatory factor, the third step provides individual criteria that can be used to assess each part of the laundry list. For example, when looking at locker rooms, practice facilities, and competitive facilities, OCR should examine:

[T]he equivalence for men and women of:

- (1) Quality and availability of the facilities provided for practice and competitive events;
- (2) Exclusivity of use of facilities provided for practice and competitive events;
- (3) Availability of locker rooms;
- (4) Quality of locker rooms;
- *339** (5) Maintenance of practice and competitive facilities; and
- (6) Preparation of facilities for practice and competitive events.⁶⁸

After analyzing these particular aspects of any part of the laundry list, the fourth step calls for an overall assessment that looks at:

- (a) Whether the policies of an institution are discriminatory in language or effect; or
- (b) Whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's program as a whole; or

(c) Whether disparities in benefits, treatment, services, or opportunities in individual segments of the program are substantial enough in and of themselves to deny equality of athletic opportunity.⁶⁹

This four-step process, used to assess “Compliance in Other Program Areas,” has become particularly important in the many cases dealing with scheduling and facility issues in high school athletics.

The final part of the Policy Interpretation, part three, focuses on “Compliance in Meeting the Interests and Abilities of Male and Female Students.” Although this part provides several tests and other criteria that may be used to assess Title IX compliance,⁷⁰ no test has received more publicity than the three-part effective accommodation test:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; ***340** or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.⁷¹

This test has become the focal point of much of the Title IX litigation and scholarship that has followed in the past three decades. Although it has been subject to much debate, what is important to remember is that OCR made clear in the Policy Interpretation that, regardless of the fact that this has come to be known as the “three-part” test, compliance is not based on an overall evaluation of each part. Instead, compliance is based on whether a program meets “any one” of the particular tests above.⁷²

10. Validity of the Regulations: Part Two (1982)

Three years after Cannon and the introduction of the Policy Interpretation, another Title IX case made its way to the Supreme Court, again in a case that did not specifically deal with sport.

In *North Haven Board of Education v. Bell*, a tenured teacher in the North Haven public school system filed a complaint with the Department, claiming that the school board had violated Title IX by refusing to rehire her after she returned from maternity leave.⁷³ In response, following its regulations related to employment, the Department asked the school board for its employment policies.⁷⁴ The board refused, claiming that the Department did not have the authority to regulate its employment practices.⁷⁵ As a result, the Department ***341** notified the board that it would consider administrative proceedings under Title IX in order to revoke its federal funding.⁷⁶ The board sued, asking the court to declare that the Department exceeded its authority and to prohibit the Department from trying to revoke its federal funding.⁷⁷

The district court sustained the board's complaint and found that Title IX was not intended to apply to employment practices.⁷⁸ On appeal, the United States Court of Appeals for the Second Circuit reversed, finding that Title IX did apply to employment, but it also declined to decide whether the Department could revoke federal funding in this case, as it had not yet attempted to do so.⁷⁹ Due to a conflict among the federal courts on this issue, the Supreme Court granted certiorari.⁸⁰

In its review, the Supreme Court found that both the statutory language and legislative history of the law supported the conclusion that employment discrimination is prohibited under Title IX.⁸¹ In addition, Congress had already reviewed the Department's Title IX Regulations and, to date, had not taken issue with the Regulations specific to employment.⁸² Therefore, the Supreme Court affirmed the decision of the Second Circuit and upheld the Department's authority under Title IX to implement employment regulations and to force the school board to comply with them.⁸³

Although this case does not discuss the sports context, employment discrimination is one of the leading issues in Title IX litigation.⁸⁴ North Haven also demonstrates that courts should defer to the rules and regulations put forth by the federal agency empowered to enforce the particular federal law. In the Title IX context, this has led to the general deference that courts typically give to the Title IX Regulations and Policy Interpretation, as well as to later clarifications and even Dear Colleague Letters, all interpreting Title IX's prohibitions against sex discrimination.

*342 11. The Supreme Court Limits the Application of Title IX (1984)

Two years after the North Haven decision, the Supreme Court would again review a Title IX challenge. After Cannon and North Haven, it was clear that individuals could use Title IX to bring discrimination claims against educational programs. However, whether they could also bring claims against a program's athletic department was unclear. At this point in the history of Title IX, the actual definition of a "program or activity" receiving "federal financial assistance" was unclear. In North Haven, without defining what a covered "program" might be, the Supreme Court supported a program-specific reading of the statute,⁸⁵ noting that "Congress failed to adopt proposals that would have prohibited all discriminatory practices of an institution that receives federal funds."⁸⁶ The Court would confirm this view of Title IX's application in 1984 in *Grove City College v. Bell*.⁸⁷

In *Grove City*, students at a private, liberal arts college received aid from Basic Educational Opportunity Grants (BEOGs) provided by the school.⁸⁸ The college followed the Alternative Disbursement System (ADS) for disbursing these BEOGs, wherein the students received their aid directly from the Department.⁸⁹ As a result of these disbursements, the Department found that the college was a recipient of federal funds covered by Title IX and required it to complete the "Assurance of Compliance" form.⁹⁰ Once the college refused to complete the form, the Department initiated administrative proceedings to declare the college and its students ineligible to receive federal funding due to the school's failure to comply with Title IX.⁹¹ The college then sued the Department, arguing that Title IX did not apply to the BEOGs for its students.⁹²

The Supreme Court initially found that receipt of federal funding by the students was enough to subject the college to Title IX.⁹³ However, the Court limited this application specifically to the school's financial aid program and not to the entire school itself, as it concluded that "the receipt of BEOG's by some of Grove City's students does not trigger institutionwide coverage under Title IX. In purpose and effect, BEOG's represent federal financial assistance *343 to the College's own financial aid program, and it is that program that may properly be regulated under Title IX" ⁹⁴ In essence then, the Court read the "program and activity" language within the statute to limit the application of Title IX to only the specific program or activity that receives federal financial aid.

After the *Grove City* decision, unless an athletic department itself received some form of direct federal funding, it did not need to worry about compliance with Title IX, the Regulations, or even the Policy Interpretation. For the next three years, courts followed this decision, dismissing Title IX claims against athletic and other university departments where there was no specific finding that these departments received federal funding.⁹⁵

12. Congress Reestablishes the Reach of Title IX (1988)

By Title IX's fifteenth anniversary in 1987, the law's impact on athletics had been insignificant at best, as courts continued to dismiss claims against athletic departments. Congress soon took the initiative and proposed the Civil Rights Restoration Act in specific response to the Grove City decision because the decision “significantly narrowed the scope of four civil rights statutes, and . . . the basic civil rights of women, minorities, the elderly[,] and the disabled, have been threatened, denied, and ignored with no redress.”⁹⁶

Seeking to “restore the broad scope of coverage and to clarify the application of title IX . . .,”⁹⁷ Congress passed the Civil Rights Restoration Act (the “Act”) on March 22, 1988.⁹⁸ The Act defines the term “program or activity” for purposes of Title IX as follows:

[T]he term “program or activity” and “program” mean all of the operations of --

...

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

***344** (B) a local educational agency . . . , system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

...

any part of which is extended Federal financial assistance, . . .⁹⁹

The Act makes clear that Title IX compliance is institution-wide; it is not focused on only a specific program or activity that receives federal financial assistance. Coupled with Title IX's definition of an “educational institution” as “any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education,”¹⁰⁰ the Act makes clear that if any part of a school or university receives federal financial assistance, then Title IX compliance should reach the athletic department as well.

13. OCR Guidance #3: Investigator's Manual (1990)

Throughout its first two decades, the Department provided significant guidance on the application of Title IX and its prohibition of sex discrimination in athletics. However, until the clarification provided by the Act in 1988, the specific application of Title IX to athletic departments was still not clear. Regardless of this lack of clarity, OCR continued to provide guidance to schools about the application of Title IX to athletics.

In 1980, OCR developed an “Interim Title IX Intercollegiate Athletics Manual” (the “Interim Manual”), providing some guidance to government investigators as they reviewed athletic department compliance with Title IX and its regulations.¹⁰¹

In 1982, OCR issued “Guidance on Writing Intercollegiate Athletic Letters of Findings.”¹⁰² Although both of these ***345** documents were available, due to the limitations imposed by the Grove City decision, it was not until the passage of the Civil Rights Act in 1988 that OCR considered replacing the Interim Manual, and, in 1990, OCR issued the “Title IX Investigator's Manual” (the “Investigator's Manual”).¹⁰³ The Investigator's Manual was created to “assist investigators of the Office for

Civil Rights . . . in the investigations of interscholastic and intercollegiate athletics programs offered by educational institutions required to comply with Title IX.”¹⁰⁴ Although the Investigator's Manual is not considered to be specific guidance for schools or other educational institutions on how they must comply with Title IX, courts have referred to it in their analysis of Title IX.¹⁰⁵ The Investigator's Manual includes thirteen sections providing methods that can be used to investigate each of the program elements provided in the Regulations and Policy Interpretation. It also contains appendices with model letters of findings, investigative plans, and other information.¹⁰⁶

The Investigator's Manual is not an official interpretation of Title IX or its Regulations and Policy Interpretation. However, as the agency's specific guidance that it provided to its own investigators charged with reviewing Title IX compliance, it is an important document that many look to in order to understand how to comply with Title IX.¹⁰⁷

14. The Second Cause of Action Under Title IX (1992)

After the enactment of the Act, it was clear that athletic departments needed to specifically comply with Title IX, and litigation in this area increased; however, the actual form of recovery was still unclear. The Supreme Court began to clarify this confusion in 1992.

***346** In *Franklin v. Gwinnett County Public Schools*, Christine Franklin was a student at North Gwinnett High School.¹⁰⁸ A teacher and coach, Andrew Hill, subjected her to repeated sexual harassment over a two-year span, asking her about sexual experiences and whether she would consider having sex with an older man.¹⁰⁹ The school was notified about his behavior but took no action to stop it.¹¹⁰ In fact, teachers and school administrators discouraged Franklin from pressing charges.¹¹¹ Hill resigned on the condition that all matters pending against him be dropped, and the school subsequently closed its investigation into the matter.¹¹²

Franklin sued, seeking damages from the school for allowing the harassment to continue. The district court dismissed her complaint, finding that Title IX does not allow for an award of damages.¹¹³ The specific issue for the Supreme Court on appeal was whether monetary damages should be available to a plaintiff alleging discrimination under Title IX.¹¹⁴ The Supreme Court made clear that, although in *Cannon* it had to examine “the text and history” of Title IX in order to determine whether Congress intended to create a private right of action under the statute, it would “presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise.”¹¹⁵ Finding that Congress had not limited the remedies available under Title IX, the court found that “a damages remedy is available for an action brought to enforce Title IX.”¹¹⁶

The Franklin decision not only provided relief for Title IX claimants, but it also provided an incentive for those student-athletes or others suffering sexual harassment, who, for the first two decades after the enactment of the law, could not be guaranteed that their complaints would receive any relief. Although these individuals possessed a right of action after 1979, it was not until 1992 that they were assured that they also might be able to receive some sort of monetary award as a result of a finding of sexual discrimination. Perhaps it is not surprising then, that after this decision, “Title IX litigation saw its first large spike in litigation with 24 decisions from the end of 1992 ***347** until 1995.”¹¹⁷

15. Elimination of Opportunities: Part One (1993)

As schools were forced to continue to come into compliance with the parameters of Title IX in the early 1990s, the focus was typically on opportunities to participate and the Policy Interpretation's three-part test. As schools faced difficult budgetary decisions, they often decided to cut athletic programs and opportunities for students within those programs, in order to cut costs. Many schools decided to simultaneously cut opportunities for men and women. When athletic opportunities are cut, student

athletes who can no longer participate in athletics often challenge these decisions in court. The first important cases in this area focused on female student athletes' claims that cutting their participation opportunities violated Title IX.

In *Favia v. Indiana University of Pennsylvania*, as a result of budgetary concerns, Indiana University of Pennsylvania decided to cut four varsity athletic programs, including men's tennis and soccer and women's gymnastics and field hockey.¹¹⁸ At the time, enrollment at the university was 55.6% female and 44.4% male, while participation in athletics was 62% male and 38% female; participation numbers that would not meet the proportionality part of the three-part test.¹¹⁹ Several gymnasts and field hockey players sued, claiming that the university was currently violating Title IX and that the cut teams should be restored.¹²⁰ The district court held that the university violated Title IX because it could not meet any part of the three-part test, and it also ordered the university to reinstate the gymnastics and field hockey teams.¹²¹ The university asked the court to allow it to add a new women's soccer team instead of the gymnastics team, but the court denied its request.¹²² The university then appealed.

The United States Court of Appeals for the Third Circuit affirmed, noting that "it is not clear that the University's proposed substitution of soccer for gymnastics will substantially ameliorate what the district court decided was likely to be a violation of Title IX."¹²³

Although limited to the specific situation involved, the *Favia* case was *348 important in showing that if a university was not in compliance with Title IX, it could not cut opportunities to women, the already underrepresented sex. Budgetary considerations such as those cited by the university were not an excuse for it to violate federal law. In situations where a school cannot show that it provides more than proportionate opportunities for women (i.e., the percentage of women participating in sports is higher than the percentage of overall enrollment), cannot show a continuing practice of expanding opportunities for women, and has no evidence of attempting to meet the interests and abilities of its female students, it will not be able to cut opportunities for women in athletics. Even in this case where, after cutting both men's and women's teams, the school could increase its overall percentage of opportunities for women,¹²⁴ it still violated Title IX because its overall participation percentages were not proportionate.

In times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletics programs. Nonetheless, the ordinary meaning of the word "expansion" may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs.¹²⁵

16. Elimination of Opportunities: Part Two (1994)

When schools are faced with difficult budgetary considerations they often cut male sports. Several cases have addressed whether the elimination of male sports opportunities violates Title IX. In the initial cases in this area, members of eliminated male teams sued universities, alleging violations of Title IX. One of the earliest cases, *Kelley v. Board of Trustees*, dealt with a claim by members of a men's swimming team cut at the University of Illinois in 1993.¹²⁶

In 1982, OCR determined that the university was not providing equal athletic opportunities to its female students, but because the university promised to take care of the problem in a reasonable time, OCR did not find that it was in violation of Title IX.¹²⁷ However, by 1993, the university still failed part one of the three-part test because, while 44% of its students were female, only 23.4% participated in athletics.¹²⁸ At the same time, faced with a *349 budget deficit in the athletic department, the university decided to eliminate four teams, including men's swimming.¹²⁹ The men sued, claiming that the university violated Title IX when it cut the swimming team.¹³⁰

The plaintiffs argued that the Title IX Regulations and Policy Interpretation, specifically the substantial proportionality test, had turned Title IX into "a statute that mandates discrimination against males."¹³¹ This type of argument would be

repeated in litigation by male advocates in subsequent years. In *Kelley*, the court disagreed, noting that “where Congress has specifically delegated to an agency the responsibility to articulate standards governing a particular area, we must accord the ensuing regulation considerable deference,” and that “[t]his Court must defer to an agency’s interpretation of its regulations if the interpretation is reasonable . . . a standard the policy interpretation at issue here meets.”¹³² Moreover, when the university cut the men’s swimming team, its “actions were consistent with the statute and the applicable regulation and policy interpretation.”¹³³ Therefore, affirming the decision of the district court, the United States Court of Appeals for the Seventh Circuit found that the school could “eliminate the men’s swimming program without violating Title IX since even after eliminating the program, men’s participation in athletics would continue to be more than substantially proportionate to their presence in the University’s student body.”¹³⁴

Another interesting part of this case relates to the argument that many advocates for Title IX and female sports put forth. They often argue that the purpose of Title IX is to create interest and participation opportunities for women. While addressing the plaintiff’s attempt to argue that Title IX violated the U.S. Constitution, the Seventh Circuit noted that:

Title IX need not require--as plaintiffs would have us believe--that the opportunities for the underrepresented group be continually expanded. Title IX’s stated objective is not to ensure that the athletic opportunities available to women increase. Rather its avowed purpose is to prohibit educational *350 institutions from discriminating on the basis of sex.¹³⁵

The court noted this as it recognized that at times schools must be allowed to eliminate opportunities for the overrepresented sex (males) because, “in instances where overall athletic opportunities decrease, the actual opportunities available to the underrepresented gender do not.”¹³⁶ Although not specifically answering the arguments about the true purpose of Title IX, the court made it clear that the elimination of male opportunities can be a viable tool used by schools in their attempts to comply with Title IX. This analysis would be repeated in the 1996 and 2003 clarifications and in similar litigation in the future.¹³⁷

17. Reporting on Title IX (1994)

As many schools attempted to comply with Title IX, it was difficult for student-athletes to readily find information about the benefits and opportunities schools were providing to their students athletes. Congress passed the Equity in Athletics Disclosure Act (EADA) in 1994,¹³⁸ in response to the “increasing concern among citizens, educators, and public officials regarding the athletic opportunities for young men and women at institutions of higher education.”¹³⁹ The EADA focuses on prospective students and student-athletes who “should be aware of the commitments of an institution to providing equitable athletic opportunities for its men and women students,” because such knowledge would help them “make informed judgments about the commitments of a given institution of higher education to providing equitable athletic benefits to its men and women students.”¹⁴⁰

Under the EADA, institutions are required to prepare annual reports including undergraduate attendance, information on varsity sports teams, money spent on athletically related student aid, recruiting expenses, revenues, salaries, and overall expenses.¹⁴¹ This information can then be accessed online on the U.S. Department of Education’s Equity in Athletics Analysis Cutting Tool.¹⁴²

*351 Although focused on providing information for prospective students, the information reported under the EADA is frequently used in cases alleging violations of Title IX, specifically in regard to part one of the three-part test,¹⁴³ and allegations of program inequalities.¹⁴⁴

18. OCR Guidance #4: The Clarification (1996)

As schools continued to grapple with Title IX compliance, and specifically with how to meet the requirements of the three-part test, OCR stepped in to provide more guidance in the form of a policy clarification (the “1996 Clarification”).¹⁴⁵ In the letter accompanying the 1996 Clarification, OCR made clear that the 1996 Clarification simply provides an updated explanation of the Policy Interpretation, which “has also enjoyed the support of every court that has addressed issues of Title IX athletics.”¹⁴⁶ OCR also reasserted that “institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes.”¹⁴⁷

As to the first part of the three-part test, when assessing whether a school provides athletic opportunities to members of each sex proportional to its enrollment, OCR looks to the number of actual participation opportunities provided to male and female athletes. Overall, these participation opportunities “must be real, not illusory,” and such participants will only be athletes:

- a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training *352 room services, on a regular basis during a sport's season; and
- b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
- c. Who are listed on the eligibility or squad lists maintained for each sport, or
- d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.¹⁴⁸ Within this determination of participants, OCR will include “among others, those athletes who do not receive scholarships (e.g., walk-ons), those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds, and those athletes who practice but may not compete.”¹⁴⁹

Although many schools feared that OCR would force them to provide equal opportunities to men and women, or at least opportunities that exactly match enrollment, the 1996 Clarification made clear that after determining who should count as an athletic participant, OCR will then determine whether such opportunities are substantially proportionate, analyzing an “institution's specific circumstances and the size of its athletic program . . . on a case-by-case basis, rather than through use of a statistical test.”¹⁵⁰ Thus, the first part does not require exact proportionality in all cases.

The second part of the three-part test focuses on a demonstration of a history and continuing practice of program expansion for the underrepresented sex. In order to assess compliance with this test, OCR will focus on two areas. With regard to finding evidence that an institution has a history of program expansion, it will look to:

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- *353 • an institution's affirmative responses to requests by students or others for addition or elevation of sports.¹⁵¹

In assessing whether there is evidence of a continuing practice of program expansion, OCR will look to:

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and

- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.¹⁵²

A school cannot show a history or continuing practice of program expansion for women by merely cutting opportunities for men in order to increase the percentage of participation for women, as OCR made clear that if “an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone” it will not comply with part two of the three-part test.¹⁵³ Overall, schools must be able to show that they have responded to the projected interests of their female students by elevating or adding sports over time.

Finally, specific to the third part of the test focusing on accommodation of the interests and abilities of the underrepresented sex, OCR initially made clear that schools must accommodate the interests of all admitted and enrolled students.¹⁵⁴ The 1996 Clarification also notes that it is possible for a school to meet this part, even if there is a low rate of participation by female students, as long as the school can still show that it is meeting the interests and abilities of its student population.¹⁵⁵

When assessing whether a school complies with this part, OCR will analyze “whether there is (a) unmet interest in a particular sport; (b) sufficient *354 ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team.”¹⁵⁶ Of particular importance to institutions that face budgetary constraints and see no alternative but to cut teams, the 1996 Clarification makes clear that “[i]f an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.”¹⁵⁷

Overall, for those schools seeking to cut opportunities for student-athletes, the 1996 Clarification made clear that they could choose to cap or eliminate opportunities for the overrepresented sex (men) in order to comply with the first part of the three-part test.¹⁵⁸ However, although cutting men's opportunities is allowed under part one as a way to come in to proportionality, “nothing in the three-part test requires an institution to eliminate participation opportunities for men,” as such cuts would not help an institution meet the requirements of parts two or three because both “measure an institution's positive, ongoing response to the interests and abilities of the underrepresented sex.”¹⁵⁹

19. Application of the Three-part Test and a Safe Harbor (1996)

Ten months after the publication of the 1996 Clarification, the First Circuit referred to it, along with the Regulations, Policy Interpretation, and the statutory framework of Title IX, as it decided an important case involving Brown University.

In *Cohen v. Brown University*, realizing the same budgetary concerns faced by Indiana University of Pennsylvania, Brown University dropped women's volleyball and gymnastics and men's golf and water polo.¹⁶⁰ As in *Favia*, the female student-athletes from the eliminated sports sued, asking the court to reinstate their teams.¹⁶¹ Brown University argued that the court should not follow the Regulations or the Policy Interpretation, thereby forcing it to comply with the three-part test because the Policy Interpretation, in particular, conflicts “with the Constitution, the Statute, the Regulation, other Agency materials and practices, existing analogous caselaw, and in addition, is *355 bad policy.”¹⁶²

In response, the court made it clear that the Regulations “deserve controlling weight” and “that the Policy Interpretation warrants substantial deference . . . ‘because the agency's rendition stands upon a plausible, if not inevitable, reading of Title IX.’”¹⁶³ The court also relied on the 1996 Clarification because, while it did “not change the existing standards for compliance,” it “does provide further information and guidelines for assessing compliance under the three-part test.”¹⁶⁴ The court then affirmed the district court's holding that Brown University did not meet any part of the three-part test. Therefore, its athletic program was in violation of Title IX, and it was required to reinstate the women's volleyball and gymnastic teams.¹⁶⁵

The Cohen case is also important because it followed the 1996 Clarification, which also identified the first part of the three-part test as a “safe harbor.”¹⁶⁶ The court explained that “a university [that] does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup.”¹⁶⁷ What the court did not specify was how to exactly determine whether a school could be in the “safe harbor” zone.

The Cohen court also followed the 1996 Clarification and recognized that cutting male opportunities is a “permissible” way to meet the proportionality requirement.¹⁶⁸ After this case, many schools thought that the only part of Title IX compliance was meeting part one, providing proportionate opportunities for both sexes, often by cutting male opportunities. Perhaps as a result, the amount of litigation again spiked for the rest of the 1990s as thirty-seven cases were decided from 1997 to 1999,¹⁶⁹ and men continued to sue when their sports were eliminated.¹⁷⁰

*356 20. OCR Guidance #5: Sexual Harassment (1997)

By the mid-1990s, much of the litigation surrounding Title IX in athletics had focused on the elimination of teams and the three-part test. However, by the end of the 1990s, people began to realize that sexual harassment within educational programs was also a serious problem. The Franklin case established that a plaintiff could receive monetary damages for claims of sexual harassment in violation of Title IX, and courts frequently reviewed sexual harassment claims related to harassment by coaches,¹⁷¹ teachers,¹⁷² and fellow students.¹⁷³

In order to help clarify the application of Title IX to instances of sexual harassment, OCR published its first guide, “Sexual Harassment Guidance” (the “Guidance”) in 1997.¹⁷⁴ This Guidance explains that “[s]exual harassment of students can be a form of discrimination prohibited by Title IX” and that schools must have policies and procedures in place that provide for “a prompt and equitable procedure for resolving sex discrimination complaints.”¹⁷⁵ Schools are liable for instances of quid pro quo sexual harassment¹⁷⁶ and may also be liable for hostile environment sexual harassment¹⁷⁷ if the coach or other employee uses their apparent authority when they engage in harassing conduct.

Schools may also be liable for student-on-student sexual harassment (i.e. peer-to-peer) if the school allowed a hostile environment to persist, knew or should have known about the harassment, and failed to take immediate and appropriate actions to correct the situation.¹⁷⁸ Overall, in order to properly deal with instances of sexual harassment, the Guidance provides that schools must “establish grievance procedures, provide for prompt and equitable resolution of sex discrimination complaints, publicize the procedures and full sexual harassment policy, monitor employees to avoid vicarious liability, and, after notice of possible harassing conduct, a school must take immediate and *357 appropriate steps.”¹⁷⁹

21. The Third Cause of Action Under Title IX (1998)

By 1998, although OCR's Guidance set a framework for a school's responsibilities to protect students from sexual harassment, courts had not yet clarified what relief a plaintiff could receive in a sexual harassment case. The Supreme Court would begin to set out the available relief in sexual harassment cases in 1998.

Gebser v. Lago Vista Independent School District was the first case to deal with a sexual harassment claim brought by a high school student.¹⁸⁰ In Gebser, the student participated in a sexual relationship with one of her teachers.¹⁸¹ Although the relationship was hidden, eventually a police officer found the student and teacher having sex.¹⁸² The teacher was subsequently arrested and eventually fired.¹⁸³ The school district had failed to implement a proper grievance procedure, as provided in the Guidance, but the court still would not support an award of damages for the plaintiff “unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately

indifferent to, the teacher's misconduct.”¹⁸⁴ Finding that the school district did not have this actual notice or act deliberately indifferent, the court affirmed the appellate court's decision that the student could not recover damages for the teacher's sexual harassment.¹⁸⁵

Although the student was unable to recover in this case, the Gebser decision confirmed that victims of sexual harassment could recover under Title IX if they could show that the school (or other educational institution involved) had actual notice of the harassment and was deliberately indifferent to the harassment. The specific parameters of a school's notice and indifference have been debated over the past thirteen years and continue to be clarified by the judiciary.

22. OCR Guidance #6: Financial Aid (1998)

One month after the Gebser decision, OCR provided further guidance for ***358** schools related to athletic scholarships. The Regulations provide that educational programs must provide athletic scholarships “in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.”¹⁸⁶ The Policy Interpretation then provides that athletic scholarships provided must be “substantially proportionate” to the participation rates for men and women, although disparities may be allowed as a result of “legitimate, nondiscriminatory factors,” such as higher out-of-state tuition costs at public schools.¹⁸⁷ In 1998, while in the process of investigating twenty-five complaints related to the provision of athletic scholarships, OCR provided a Dear Colleague Letter (the “July 1998 Letter”) expanding upon these requirements.¹⁸⁸

The July 1998 Letter noted that a “disparity” in the awarding of athletic scholarships “refers to the difference between the aggregate amount of money athletes of one sex received in one year, and the amount they would have received if their share of the entire annual budget for athletic scholarships had been awarded in proportion to their participation rates.”¹⁸⁹ When OCR analyzes a school's provision of scholarships, it will first adjust this disparity to account for any “legitimate nondiscriminatory reasons provided by the college.”¹⁹⁰ The July 1998 Letter provides several examples of legitimate reasons for disparities in these numbers, including efforts by schools to increase participation opportunities in order to comply with part one of the three-part test.¹⁹¹ If a disparity is 1% or less for the entire athletic scholarship budget, “there will be a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors.”¹⁹² However, if there is an unexplained disparity of more than 1%, “there will be a strong presumption” that the school “is in violation of the ‘substantially ***359** proportionate’ requirement.”¹⁹³ In the end, if a college does not meet this 1% threshold, the “burden should be on the college to provide legitimate, nondiscriminatory reasons for the disproportionate allocation.”¹⁹⁴

Overall, although OCR will again conduct a case-by-case analysis “with due regard for the unique factual situation presented by each case” when reviewing an athletic program, this 1% threshold does not leave much room for flexibility. This is clearly intentional, as “a college has direct control over its allocation of financial aid to men's and women's teams,” and so a lack of “substantial proportionality” could be clear evidence of a conscious decision by the school to provide an inequitable amount of scholarships to male and female student-athletes.¹⁹⁵

23. The NCAA Is Not Subject to Title IX (1999)

The next year, the Supreme Court would review Title IX for the fourth time, in *NCAA v. Smith*.¹⁹⁶ Renee Smith was an undergraduate at St. Bonaventure where she participated on the volleyball team in the 1991-1992 and 1992-1993 seasons.¹⁹⁷ She decided not to play in the 1993-1994 season and graduated from St. Bonaventure in two and a half years.¹⁹⁸ She then decided to go to law school and enrolled at Hofstra University in 1994-1995 and the University of Pittsburgh in 1995-1996 because St. Bonaventure did not have a law school.¹⁹⁹ While in law school, she attempted to play volleyball, but was barred by the NCAA's postbaccalaureate rule that does not allow student-athletes to participate in athletics after undergraduate graduation

unless they participate at the school where they earned their undergraduate degree.²⁰⁰ Smith sued, arguing that the rule violated Title IX because the NCAA granted more waivers under the rule to men than to women.²⁰¹ The district court found that Smith's argument that the NCAA was subject to Title IX based on financial assistance received by member schools was "too far attenuated" to sustain a claim.²⁰² On appeal, the United States Court of Appeals for the Third Circuit reversed, finding that the NCAA's receipt of *360 dues from member schools made the NCAA a beneficiary of federal financial assistance and was enough to make it a recipient of federal funds subject to Title IX.²⁰³ The NCAA then appealed to the Supreme Court.

The Supreme Court found that only those entities that directly or indirectly receive federal financial assistance are subject to Title IX.²⁰⁴ As there was no allegation that the NCAA member schools paid dues with the federal funds that they received, "[a]t most, the Association's receipt of dues demonstrate[d] that it indirectly benefits from the federal assistance afforded its members."²⁰⁵ As a result, the NCAA was immune from suit under Title IX.

It is important to note that although the NCAA is not amenable to lawsuits under Title IX, as an organization, it does a lot to promote and achieve gender equity. Its "Principle of Gender Equity" actually promotes member school compliance with Title IX:

2.3 THE PRINCIPLE OF GENDER EQUITY

2.3.1 Compliance With Federal and State Legislation. It is the responsibility of each member institution to comply with federal and state laws regarding gender equity

2.3.2 NCAA Legislation. The Association should not adopt legislation that would prevent member institutions from complying with applicable gender-equity laws, and should adopt legislation to enhance member institutions' compliance with applicable gender-equity laws

2.3.3 Gender Bias. The activities of the Association should be conducted in a manner free of gender bias.²⁰⁶ The NCAA also maintains many resources on recent developments related to Title IX and gender equity law, and consistently promotes compliance throughout its membership.²⁰⁷

24. The Fourth Cause of Action Under Title IX (1999)

Three months after the Smith case, the Supreme Court again analyzed a *361 claim under Title IX in a case mirroring Gebser's analysis of a Title IX sexual harassment claim, though this time applying that analysis to peer-to-peer sexual harassment. In *Davis v. Monroe County Board of Education*, a fifth-grade student was subject to prolonged sexual harassment by a classmate.²⁰⁸ The student complained to several teachers, but they did nothing to stop the harassment even though the plaintiff's grades suffered and she contemplated suicide.²⁰⁹ The classmate's behavior stopped only when he was arrested and pled guilty to sexual battery charges.²¹⁰ Mirroring its decision in *Gebser*, and noting OCR's Guidance, the Supreme Court held that the school could be liable "for [its] deliberate indifference to known acts of peer sexual harassment"²¹¹ when the harassment "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."²¹² Therefore, the Court found that the school could be liable for damages because the plaintiff's allegations demonstrated that school officials acted with deliberate indifference to harassment that was "severe, pervasive, and objectively offensive," and "had a concrete, negative effect on her . . . ability to receive an education."²¹³

As a result of Gebser, Davis, and the Guidance, schools are now on notice that they can be liable for harassing conduct by their employees and students, and the schools must have proper procedures in place to deal with these situations when they become aware of them.

25. Girls Can Play Football Too (1999)

The next interesting development in 1999 involved a collegiate female student-athlete who wanted to play football at Duke University. In *Mercer v. Duke University*,²¹⁴ Heather Sue Mercer was a star football player who won all-state honors as a kicker at Yorktown Heights High School in New York. She went to Duke University and tried out for the team, but she did not make it.²¹⁵ Instead, she became a team manager and participated in conditioning drills and practice in 1994.²¹⁶ In 1995, she participated in a scrimmage and ***362** kicked the game-winning field goal, a moment that was aired on ESPN.²¹⁷ The head coach then told the media that she had made the team, although she subsequently did not participate in any games in 1995.²¹⁸

During this time, she alleged that she was subjected to various types of discrimination, such as not being allowed to attend summer football camp or to dress or sit on the sidelines for games and hearing numerous offensive comments from the head coach.²¹⁹ Before the 1996 season, the coach removed her from the team.²²⁰ As a result, in September of 1997, she sued, claiming that the decision to exclude her was discriminatory because it was based on her gender.²²¹ The trial court dismissed her claim, and she subsequently appealed to the United States Court of Appeals for the Fourth Circuit.²²²

The Fourth Circuit began its review, noting that the Title IX Regulations provide for separate teams based on sex.²²³ However, the court found that “[o]nce an institution has allowed a member of one sex to try out for a team operated by the institution for the other sex in a contact sport . . . the institution is subject to the general anti-discrimination provision of” the Regulations and cannot discriminate against that individual.²²⁴ On remand, a jury found that Duke had violated Title IX and “discriminated against Mercer on the basis of her gender” and awarded her “\$1 in compensatory damages and \$2 million in punitive damages.”²²⁵

The university appealed, arguing that punitive damages should not be an available remedy for a claim of discrimination under Title IX.²²⁶ As noted earlier in this Article, Title IX is modeled after Title VI, and the Fourth Circuit found that because the Supreme Court has held such damages are not available under Title VI, it was compelled to conclude that “punitive damages are not available for private actions brought to enforce Title IX.”²²⁷ As a result, the court vacated the punitive damages award, and Mercer's sole award was one ***363** dollar in compensatory damages.²²⁸

As some scholars have noted, “[t]his decision may significantly weaken the benefit of litigating a Title IX claim” because, although a claimant like Mercer can win, the actual benefit of the litigation is minimal.²²⁹ Fighting a school in order to prove discrimination is costly and time consuming, especially if winning can result in such an insignificant damage award.

26. What Is a Sport Under Title IX: Part One (2000)

The 1996 Clarification provided that athletic opportunities “must be real, not illusory,” and such participants will only be athletes who are “receiving . . . institutionally-sponsored support,” “participating in organized practice sessions,” and “are listed on the eligibility or squad lists,” or are injured and “continue to receive financial aid on the basis of athletic ability.”²³⁰ Many schools still did not understand what particular activities could be classified as a sport for these athletes to participate in. In the spring of 2000, in two letters to the Executive Director of the Minnesota State High School League, OCR attempted to provide some details to answer this question.

The first, sent on April 11, 2000 (the “April 2000 Letter”), began by noting that “OCR does not rely on a specific definition of sport. Nor does OCR rely solely on a claim by an institution that the activity in question is a sport.”²³¹ Instead, similar to the approach noted in the Policy Interpretation, when analyzing whether an activity qualifies as a sport for Title IX purposes, OCR will “assess each activity on a case-by-case basis.”²³² The April 2000 Letter then provides different types of inquiries that OCR will undertake in determining whether something is a sport, including, but not limited to, “whether the primary purpose of the activity is athletic competition and not the support or promotion of other athletes,” and “whether organizations knowledgeable about the activity agree that it should be recognized as an athletic sport.”²³³

The Regulations specifically apply Title IX's prohibition against sex discrimination to “interscholastic, intercollegiate, club or intramural *364 athletics,”²³⁴ as does the Policy Interpretation.²³⁵ However, perhaps following up on the 1996 Clarification's criteria used to determine who is an athletic participant, the April 2000 Letter noted that:

[I]n order for the athletes who engage in the activity to be considered participants for purposes of Title IX analysis of intercollegiate or interscholastic benefits and opportunities, they must be engaging in sports at the intercollegiate or interscholastic level of competition. Thus, club and intramural participants would be excluded from such a Title IX analysis.²³⁶

This exclusion might explain why most cases do not discuss intramural or club sports when analyzing whether a school complies with Title IX.

In addition, this letter reiterates the Memorandum²³⁷ and makes clear that “there is a presumption by OCR that drill teams, cheerleading, and other like activities are extracurricular activities not considered sports or part of an institution's athletic program within the meaning of the Title IX regulations.”²³⁸

A little more than a month later, on May 24, 2000, OCR sent another letter (the “May 2000 Letter”) to the Minnesota State High School League.²³⁹ This May 2000 Letter responded to a request for a further clarification of the activities presumed not to be sports in the April 2000 Letter. Although the May 2000 Letter makes clear that OCR does not have definitions of these activities, it then provides some clarification in that “the term cheerleading in this context includes both competitive and sideline cheer” and “other like activities would include all extracurricular activities similar to drill teams and cheerleading, such as danceline, skateline, and pep squads.”²⁴⁰ OCR also recognized that, in any past situation where it has been asked to evaluate these types of activities, it “did not recognize as a sport any of the identified activities.”²⁴¹ Eight years later, OCR would provide further criteria for *365 assessing whether an activity is a sport.

27. OCR Guidance #7: Revised Guidance (2001)

In response to the Supreme Court's Gebser and Davis decisions, in January of 2001, OCR issued revised guidance (the “Revised Guidance”).²⁴² In many ways, simply reiterating what was already contained in the Guidance, the Revised Guidance was intended to continue to “provide the principles that a school should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving Federal financial assistance.”²⁴³ In addition, while the Supreme Court established that claimants can have claims under Title IX for teacher-to-student or peer-to-peer sexual harassment, the Revised Guidance made clear that in order to comply with Title IX, “[s]trong policies and effective grievance procedures are essential to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it.”²⁴⁴

Although courts have found that the 1997 and 2001 sexual harassment guidance documents are important because they were published “to guide funding recipients in fulfilling their Title IX obligations,”²⁴⁵ to date, they have not given them the same

deference that has been provided to the various Title IX clarifications. As one court noted, “[t]he DOE’s Sexual Harassment Guidance provides just that: guidance. It is not binding on this Court, but rather a resource on the DOE’s position. It sets out the ‘compliance standards that [the DOE] applies in investigations and administrative enforcement of Title IX.’”²⁴⁶

28. The Federal Government Reports on Title IX’s Impact (2001)

In 1994, the EADA was passed, requiring schools to report information to the Department of Education, information that would then be available to the public.²⁴⁷ The 1998 Amendments to the Higher Education Act of 1965 required additional reporting.²⁴⁸ Under these amendments, the Government *366 Accountability Office was required to “conduct a study of the opportunities for participation in intercollegiate athletics,”²⁴⁹ focusing on many items, including:

[T]he extent to which the number of . . . (A) secondary school athletic teams has increased or decreased in the 20 years preceding 1998 (in aggregate terms); and (B) intercollegiate athletic teams has increased or decreased in the 20 years preceding 1998 (in aggregate terms) at 2-year and 4-year institutions of higher education.²⁵⁰

The first report analyzing these criteria was released in March of 2001. This report, “Intercollegiate Athletes: Four-Year Colleges’ Experiences Adding and Discontinuing Teams,” was based on questionnaires sent to NCAA and National Association of Intercollegiate Athletics (NAIA) schools.²⁵¹ The findings that have proven to be most controversial relate to the report’s analysis of schools that had cut teams. It found that from 1992-1993 until 1999-2000, 386 teams had been cut for men, while 150 had been cut for women.²⁵² In direct opposition to those arguing that Title IX has forced schools to cut men’s opportunities, the report found that 72% of the schools added women’s teams without simultaneously cutting men’s teams.²⁵³ These schools “used a variety of strategies to do so, including obtaining funding from nonschool sources and finding ways to contain costs.”²⁵⁴ This report, and in particular this finding, has been contested repeatedly by Title IX detractors in litigation over the elimination of male sports opportunities.²⁵⁵

*367 29. OCR Guidance #8: Further Clarification (2003)

On the thirtieth anniversary of Title IX’s enactment, the Secretary of Education created a Commission on Opportunity in Athletics (the “Commission”) to study Title IX. The purpose of the Commission was to “collect information, analyze issues, and obtain broad public input directed at improving the application of current federal standards for measuring equal opportunity for men and women and boys and girls to participate in athletics under Title IX.”²⁵⁶ The Commission was asked to study several questions, including:

- Are Title IX standards for assessing equal opportunity in athletics working to promote opportunities for male and female athletes?
 - Is there adequate Title IX guidance that enables colleges and school districts to know what is expected of them and to plan for an athletic program that effectively meets the needs and interests of their students?
 - Is further guidance or other steps needed at the junior and senior high school levels, where the availability or absence of opportunities will critically affect the prospective interests and abilities of student-athletes when they reach college age?²⁵⁷
- The Commission issued a final report on February 28, 2003, including twenty-three recommendations, of which fifteen were unanimously approved (the “Commission Report”).²⁵⁸ Given the history of Title IX and the many different forms of guidance provided by OCR, one of the more interesting recommendations was Recommendation #3: “[t]he Department of Education’s Office for Civil Rights should provide clear, consistent and understandable written guidelines for implementation of Title IX

and make every effort to ensure that the guidelines are understood, through a national education effort.”²⁵⁹ With all of the guidance that OCR had already put forth during the first thirty years after the enactment of Title IX, it was perhaps surprising that the Commission would call for even more. Regardless, in a few months, this *368 call would be answered.

Another interesting recommendation was Recommendation #5: “[t]he Office for Civil Rights should make clear that cutting teams in order to demonstrate compliance with Title IX is a disfavored practice.”²⁶⁰ The Commission noted that “educational institutions should pursue all other alternatives before cutting or capping any team when Title IX compliance is a factor in that decision.”²⁶¹ It is interesting that the Commission felt the need to make this recommendation. The 2001 Government Accountability Office (GAO) report found that the majority of schools were able to add teams without cutting opportunities.²⁶² The 1996 Clarification had also already stated that “nothing . . . requires that an institution cap or eliminate participation opportunities,” instead “Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities.”²⁶³

Perhaps most controversially, Recommendation #18 provided that:

The Office for Civil Rights should allow institutions to conduct interest surveys on a regular basis as a way of (1) demonstrating compliance with the three-part test, (2) allowing schools to accurately predict and reflect men's and women's interest in athletics over time, and (3) stimulating student interest in varsity sports. The Office should specify the criteria necessary for conducting such a survey in a way that is clear and understandable.²⁶⁴

Although OCR would directly respond to this recommendation in 2005, by 2010, it would disavow that response altogether.

Virtually every aspect of the Commission process, from its membership, how it gathered information, the makeup of the town meetings it called, and even its charge, was widely criticized.²⁶⁵ In addition, a minority report was simultaneously issued by two Commission members out of their concern that minority views were not adequately expressed in the final report.²⁶⁶

*369 Soon after the Commission Report was issued, OCR issued further clarification (the “Further Clarification”) “in order to strengthen Title IX's promise of non-discrimination in the athletic programs of our nation's schools.”²⁶⁷ The Further Clarification notes that because the 1996 Clarification referred to the first part (proportionality) as a “safe harbor,” institutions came “to believe, erroneously, that they must take measures to ensure strict proportionality between the sexes.”²⁶⁸ However, the Further Clarification made clear that “each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored.”²⁶⁹ Following the recommendation of the Commission, the Further Clarification also stated that “nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and . . . the elimination of teams is a disfavored practice” because “it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams.”²⁷⁰ Finally, OCR promised to conduct an educational campaign to provide further specific guidance to schools as to how they can best comply with Title IX.²⁷¹

30. Elimination of Opportunities: Part Three (2004)

The Kelley decision in 1995 demonstrated that when universities cut male opportunities in order to come into compliance with Title IX, they do not violate Title IX. The 1996 and 2003 clarifications, while not encouraging cutting male opportunities, made clear that under part one of the three-part test, such cuts were a legal method for schools to achieve Title IX compliance. Still, members of eliminated male sports did not give up, and, in the 2000s, they stopped suing schools over this practice (perhaps because they did not win those lawsuits) and started to sue the federal government itself.

One group to bring this type of claim against the federal government was the National Wrestling Coaches Association, a membership organization that represents collegiate male wrestlers, coaches, athletes, and alumni.²⁷² In *370 National Wrestling Coaches Association v. Department of Education, the Association sued the Department, claiming that the enforcement policy embodied in the 1979 Policy Interpretation and the 1996 Clarification--i.e., the Three-Part Test--violates the equal protection component of the Due Process Clause of the Fifth Amendment and exceeds the Department's statutory authority by requiring the very same intentional discrimination that Title IX prohibits.²⁷³ The district court quickly found that:

[I]t is clear that appellants have no standing to pursue this challenge, because they have not demonstrated that their alleged injuries will be redressed by the requested relief. The direct causes of appellants' asserted injuries -- loss of collegiate-level wrestling opportunities for male student-athletes -- are the independent decisions of educational institutions that choose to eliminate or reduce the size of men's wrestling teams. Appellants offer nothing but speculation to substantiate their claim that a favorable decision from this court will redress their injuries by altering these schools' independent decisions. Absent a showing of redressability, appellants have no standing to challenge the Department's enforcement policies, and we have no jurisdiction to consider their claims.²⁷⁴

The plaintiffs also relied on the 2001 GAO report discussed above, and specifically its finding that 519 men's teams were eliminated from 1981-1982 to 1998-1999.²⁷⁵ Noting that the report found that schools actually added more teams (555) than they eliminated and that the report was "utterly inconclusive as to whether the Three-Part Test caused the elimination of any men's athletic teams," the court found that the report also did not support the plaintiff's claims.²⁷⁶

Finally, referring to the Cannon case, the court also found that "the *371 availability of a private cause of action directly against universities that discriminate in violation of Title IX constitutes an adequate remedy that bars [the] appellants' case."²⁷⁷ Therefore, the plaintiffs should have sued the schools making the decisions to cut the teams. Although, of course, the Kelley decision demonstrates that there is not much likelihood that they would have won those lawsuits either.²⁷⁸

Despite the fact that members of eliminated male teams have repeatedly lost lawsuits against schools and the federal government, these lawsuits have continued.²⁷⁹ In addition, advocacy groups have petitioned the Department to rescind the three-part test itself. In 2003, the College Sports Council²⁸⁰ petitioned the Department, asking it to do just that.²⁸¹ Following its Further Clarification, and referring to the district court in the National Wrestling Coaches Association litigation, OCR denied the request noting that "[t]he Three-Part Test has consistently been found to be worthy of . . . deference, as well as enforcement, based on findings that it does not violate the statute or regulations, exceed the agency's statutory authority, or offend constitutional principles"²⁸²

The second request on behalf of the College Sports Council came from the Pacific Legal Foundation (the "Foundation") in 2007, asking the Department again to repeal the three-part test, specifically as it applies to high school athletics.²⁸³ The Department denied the request, asserting that "[n]umerous federal courts have held that the 1979 Policy Interpretation and the Three-Part Test are entitled to substantial deference," and that "every federal court that *372 has considered an equal protection challenge to the Three-Part Test has upheld its constitutionality."²⁸⁴

The Foundation again petitioned the Department on February 8, 2011.²⁸⁵ In response to several administrative complaints filed by the National Women's Law Center, claiming that twelve school districts around the country were not providing equal

athletic opportunities to girls,²⁸⁶ the Foundation asked the Department again to find that the three-part test does not apply to high school athletics.²⁸⁷

In July of 2011, the Foundation, as part of the American Sports Council, followed its February letter with a complaint against the Department.²⁸⁸ The complaint focused on judicial review of the Department's 2008 letter denying the Foundation's request to revisit the three-part test's application to high school athletics and asked the court to enjoin the Department from applying the three-part test to high school athletics in the future.²⁸⁹

Although both the government agency responsible for enforcing Title IX and the courts have been consistent and clear in allowing cuts to male opportunities in order to comply with part one of the three-part test, it remains to be seen whether this type of litigation will stop. Given that many of these courts have also recognized the value of athletic participation and its value as a part of the educational process, it is not surprising that these athletes who are being denied an opportunity to participate would seek some way to get their opportunity back. In addition, if courts ever pick up the Minnesota District Court's reasoning in *Cobb v. U.S. Department of Education*,²⁹⁰ it is possible that these types of claims will be revisited.

*373 31. Violations of Title IX: Scheduling Athletic Contests (2004)

Although compliance with the three-part test has often been the focus of Title IX litigation, other areas started to see increased litigation in the past decade. Apart from financial assistance and accommodation of interests and abilities, these areas focus on the analysis of the second through tenth factors from the Regulations.²⁹¹ One area that has been particularly scrutinized at the high school level is “[s]cheduling of games and practice time.”²⁹²

One of the most interesting cases dealing with scheduling focused on the scheduling practices of the New York State Public High School Athletic Association.²⁹³ In *McCormick v. School District of Mamaroneck*, 741 member schools offered girls soccer in the fall, and the regional and state championships were at the end of the fall season.²⁹⁴ Boys soccer was scheduled in the fall at every school.²⁹⁵ The plaintiffs were outstanding female soccer players whose schools chose to play soccer in the spring.²⁹⁶ They alleged two reasons for why they should be allowed to play soccer in the fall season: (1) so they could play in the championships and (2) because colleges typically recruit athletes for college scholarships in the fall.²⁹⁷ They sued, alleging that the scheduling violated Title IX. The district court agreed and ordered the school districts involved to create a plan to offer soccer to both genders in the same season.²⁹⁸ The school districts then appealed to the United States Court of Appeals for the Second Circuit.

In analyzing the scheduling claim, the court initially made it clear that it had to defer to the Regulations.²⁹⁹ The court then pointed to the language in the Regulations specifically dealing with “[s]cheduling of games and practice time.”³⁰⁰ The court then moved to the Policy Interpretation's factors for assessing scheduling, focusing on “[t]he opportunities to engage in available pre-season and post-season competition.”³⁰¹ Analyzing this factor, the court noted that a “disparity in one program component (i.e., scheduling of games and practice time) can alone constitute a Title IX violation if it is substantial *374 enough in and of itself to deny equality of athletic opportunity to students of one sex at a school.”³⁰² The court then held “that the fact that boys have a chance to compete at the Regional and State Championships for soccer, and girls are denied this opportunity, constitutes a disparity that is substantial enough to deny equality of athletic opportunity to girls.”³⁰³

32. OCR Guidance #9: Additional Clarification (2005)

Although subsequently withdrawn by the “Intercollegiate Clarification,”³⁰⁴ the 2005 additional clarification (the “Additional Clarification”) still must be mentioned, as it was a direct response to the Commission Report, and it was another attempt by

OCR to provide further guidance for schools as they attempted to comply with the three-part test. It also is one of the only documents that attempted to provide specific guidance relative to part three of the test, effective accommodation of the interests and abilities of the underrepresented sex.

Released in March 2005, the Additional Clarification pointed out that, although the focus of the Commission and often the focus of critics of Title IX is on part one and the elimination of opportunities, of 130 institutions that OCR investigated from 1992 to 2002, two-thirds complied with part three of the test.³⁰⁵ Controversial to some, the Additional Clarification also specified that under part three of the three-part test, an institution may provide proportionally fewer athletic participation opportunities to one sex as compared to its enrollment rate, if the interests and abilities of the enrolled and admitted students of the underrepresented sex are being fully and effectively accommodated by the institution's current varsity athletics.³⁰⁶

In addition, it noted that if a school complies with part one by providing proportionate opportunities for each sex, "it is not required to accommodate the specific interests of all of its students of the underrepresented sex."³⁰⁷ The Additional Clarification also provided a sample survey and a "User's Guide" *375 to assist schools in complying with the third part of the three-part test.³⁰⁸

One of the most controversial parts of the Additional Clarification is that it provided that:

[T]he burden of proof is on OCR (in the case of an OCR investigation or compliance review), or on students (in the case of a complaint filed with the institution under its Title IX grievance procedures), to show by a preponderance of the evidence that the institution is not in compliance with part three.³⁰⁹

In other words, as opposed to monitoring schools' compliance with Title IX, "OCR investigates complaints of discrimination and may, at its discretion, conduct compliance reviews," it does not "preapprove or review compliance with these standards by every institution."³¹⁰

In addition, it allowed schools that used the survey to count nonresponses as lack of interest.³¹¹ Although controversial, the Additional Clarification also provided that schools may only count nonresponses as lack of interest "if all students have been given an easy opportunity to respond to the census, the purpose of the census has been made clear, and students have been informed that the school will take nonresponse as an indication of lack of interest."³¹² Moreover, "schools must administer the census in a manner that is designed to generate high response rates, . . . students must have an easy opportunity to respond to it"³¹³ and "schools cannot use the failure to express interest during a census or survey to eliminate a current and viable intercollegiate team for the underrepresented sex."³¹⁴

Regardless of these clarifications, many groups immediately criticized the Additional Clarification. The NCAA's Executive Committee even passed a resolution calling for OCR to rescind it because it was "inconsistent with the *376 1996 Clarification and with basic principles of equity under Title IX," and it "provide[d] the opportunity to evade the legal obligation to provide equal opportunity in sports and violate[d] the Department's 2003 commitment to strongly enforce long-standing Title IX standards."³¹⁵ Five years later, the controversy would end when OCR withdrew the Additional Clarification. Regardless, as part of the historical record of the federal agency's interpretation of Title IX and its requirements, the Additional Clarification provides an interesting perspective on the three-part test.

33. The Fifth Cause of Action Under Title IX (2005)

By 2005, the Supreme Court had reviewed Title IX seven times³¹⁶ and held that it provided four different causes of action for potential plaintiffs.³¹⁷ However, violations of Title IX are not often reported by the student-athletes who are victims of

discrimination. This makes sense because these athletes fear that their participation in sport, even if they are not receiving the appropriate comparable benefits as their male counterparts, will be harmed if they complain. They may also be perfectly satisfied with what they are receiving and not realize that the school's athletic department is not in compliance with Title IX. As a result, other individuals, such as coaches, often report Title IX violations to OCR, putting their own livelihoods at stake due to threats of retaliation or termination by their employers.

In *Jackson v. Birmingham Board of Education*, Roderick Jackson was a high school teacher and girls basketball coach.³¹⁸ He claimed that his team was not given equal funding or access to athletic equipment or facilities.³¹⁹ The school administration and school board ignored his complaints, and Jackson began to receive negative performance evaluations and was removed from his coaching position.³²⁰ Jackson sued, claiming that the Birmingham *377 Board of Education (“Board”) and school violated Title IX by retaliating against him for complaining about the unequal treatment that the members of his girls basketball team were receiving.³²¹ Finding that Title IX does not provide a cause of action related to retaliation, the district court dismissed his claim.³²² The United States Court of Appeals for the Eleventh Circuit then affirmed, and Jackson appealed to the Supreme Court.³²³

The Supreme Court granted certiorari because it recognized the conflict among the circuits as to whether there is a private cause of action for retaliation under Title IX.³²⁴ On March 29, 2005, the Supreme Court held retaliation against someone like Jackson, who complained about violations of Title IX, is another form of intentional discrimination in violation of Title IX.³²⁵ The Court explained that:

[R]etaliation is, by definition, an intentional act. It is a form of “discrimination” because the complainant is being subjected to differential treatment Moreover, retaliation is discrimination “on the basis of sex” because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional “discrimination” “on the basis of sex,” in violation of Title IX.³²⁶

The case was then remanded to the Eighth Circuit, which proceeded to remand back to the district court.³²⁷ Before the district court could rule on whether the school board did discriminate against Jackson, the parties entered into a settlement agreement.³²⁸ Under this agreement, the Board refused to admit any liability for its actions toward Jackson.³²⁹ However, Jackson received \$10,825 in back pay, \$2,750 in out-of-pocket expenses, and \$36,425 for *378 mental anguish and emotional distress.³³⁰ Additionally, the Board agreed to remove any documentation from Jackson's personal file that commented negatively on his job performance.³³¹ The Board also confirmed Jackson's recent hire as a coach at a new school.³³²

On November 30, 2006, the parties entered into a “Consent Decree” under which the Board agreed “to take all steps necessary to ensure that the Birmingham school system is free from discrimination on the basis of sex in all of its schools and programs.”³³³ The Board also agreed to hire a Title IX coordinator and to institute new antidiscrimination policies and grievance procedures to handle complaints of sex discrimination.³³⁴

Although those who report violations of Title IX now have a cause of action if the school or other educational institution retaliates against them, there is more to a retaliation claim than merely alleging negative treatment by the school. As coaches have found, the standard for demonstrating retaliation in violation of Title IX is a difficult one to meet.³³⁵

34. Violations of Title IX: Athletic Facilities (2007)

Another factor from the Regulations that has been the subject of increasing litigation at the high school level is number seven, “[p]rovision of locker rooms, practice and competitive facilities.”³³⁶ Under the Policy Interpretation, in order to assess compliance with this part of the Regulations, OCR and courts must look to the equivalence for men and women of:

- (1) Quality and availability of the facilities provided for practice and competitive events;
- (2) Exclusivity of use of facilities provided for practice and competitive events;
- (3) Availability of locker rooms;
- *379 (4) Quality of locker rooms;
- (5) Maintenance of practice and competitive facilities; and

(6) Preparation of facilities for practice and competitive events.³³⁷

Several cases in Florida have focused on comparable high school sports, i.e., baseball and softball, and found that it was a violation of Title IX for schools to provide better facilities to the boys baseball team than the girls softball team.³³⁸

Other litigation in Minnesota has focused on claims by high school girls hockey players who alleged that the state high school athletic association's administration of the girls hockey championships were not substantially equal to its administration of the boys hockey championships. In *Mason v. Minnesota State High School League*, the girls championships were held in an arena and then a coliseum with seating for up to approximately 5000 fans.³³⁹ The boys championships were held at an NHL hockey arena with seating for 17,000 fans.³⁴⁰ In 2000, the girls initiated a complaint with OCR regarding the differences in size and quality of the locations.³⁴¹ The 2002 girls tournament drew 15,551 fans, while the boys tournament drew close to 120,000 fans.³⁴² Due to these attendance differences, and the fact that the girls were now playing at a new college hockey arena (even though its capacity was only 2700- 3200), OCR approved the high school association's administration of the championships.³⁴³ The girls sued, claiming that this setup violated Title IX, specifically the Regulations dealing with facilities.³⁴⁴

The Minnesota district court focused on the Policy Interpretation and, specifically, the factors related to facilities. It noted that “[a]lthough the OCR policy interpretation recognizes that crowd size may influence the allocation of resources to a particular team or event, it permits such differences only when it ‘does not limit the potential for women's athletic events to rise in spectator appeal.’”³⁴⁵ In this case, the court found that “[t]he evidence *380 presented on this record could lead a fact-finder to conclude that the capacity of Ridder impermissibly restricts the growth of girls' ice hockey.”³⁴⁶ Dismissing the state association's motion for summary judgment, the court then found that the locations selected for the championships might violate Title IX because there were genuine “questions as to whether the [I]eague treats the girls' ice hockey team in a manner ‘substantially equal’ to that of the boys' team.”³⁴⁷

Although the initial litigation ended, in *Cobb v. U.S. Department of Education for Civil Rights*, the focus shifted to a lawsuit by fathers of the girls hockey players who sued the Department, claiming that OCR's process in allowing the hockey championships to continue in the same locations was flawed and that OCR should have found that the setup violated Title IX.³⁴⁸ The fathers' claims were dismissed for lack of standing;³⁴⁹ however, the girls then intervened and continued the litigation.³⁵⁰ In reviewing the amended complaint, the court ignored the litigation by men from discontinued sports and advocacy groups³⁵¹ and found for the first time that there should be a “private right of action against federal funding agencies . . . when the funding agency

itself is accused of acting to violate Title IX and foster discrimination.”³⁵² Therefore, the government's motion to dismiss the girls' Title IX claim was denied.³⁵³

At this point it seemed that the Minnesota district court had developed a potential sixth cause of action under Title IX, a private cause of action to sue OCR claiming that its own actions violated Title IX. In this case, the plaintiffs alleged the OCR did just that by approving the different locations for the girls and boys, locations that the court in Mason found were potentially inequitable in violation of Title IX.³⁵⁴ In 2007, the district court granted OCR's motion to vacate the opinion³⁵⁵ without any discussion. As a result, the Supreme Court has had no chance to review this issue. Thus, the court's reasoning has not yet been followed.

*381 35. What Is a Sport Under Title IX: Part Two (2008)

As courts have struggled with analyzing schools' attempts to comply with Title IX, they often must determine what types of sports actually can be counted for Title IX purposes. In its letters to the Minnesota State High School League in 2000, OCR made clear that it “does not rely on a specific definition of a sport.”³⁵⁶ However, a 2008 Dear Colleague Letter (“September 2008 Letter”) would provide further information “to help institutions determine which intercollegiate or interscholastic athletic activities can be counted for the purpose of Title IX compliance,” and, therefore, which activities qualify as sports under Title IX.³⁵⁷

In this September 2008 Letter, OCR reiterated that it has no specific definition of sport, instead it will consider factors related to “an activity's structure, administration, team preparation and competition . . . when determining whether an activity is a sport that can be counted as part of an institution's intercollegiate or interscholastic athletics program for the purpose of determining compliance.”³⁵⁸ OCR also introduced another presumption that it will follow. If a school is part of an athletic association or organization, such as the NCAA, and that organization has its own requirements that define its sanctioned sports that must be followed by members, “OCR will presume that such an institution's established sports can be counted under Title IX.”³⁵⁹ This presumption could then be rebutted with evidence that the particular member institution is not offering the activity in accordance with the other factors listed in this letter.

The September 2008 Letter separates the factors used in its “case-by-case” assessment of whether an activity should be counted as a sport into factors related to program structure and administration and those related to team preparation and competition. In general, an analysis of program structure and administration focuses on “whether the activity is structured and administered in a manner consistent with established intercollegiate or interscholastic varsity sports in the institution's athletics program.”³⁶⁰ OCR's analysis of team preparation and competition focuses on “whether the team prepares for and engages in competition in a manner consistent with established varsity *382 sports in the institution's intercollegiate or interscholastic athletics program.”³⁶¹ Each area includes specific factors that assist OCR in analyzing whether an activity should be counted as a sport for Title IX purposes.

Although the September 2008 Letter provides detailed information that may be used to assess whether an activity is a sport, OCR also made clear that this letter is not the law and does not “confer any rights for or on any person.”³⁶² In addition, a school cannot simply look to what other schools are doing or rely on past OCR reviews of schools or activities, as the September 2008 Letter makes clear that “determinations based on these factors are fact-specific,” and they “may vary depending on a school district or postsecondary institution's athletics program, the nature of the particular activity, and the circumstances under which it is conducted.”³⁶³ Regardless of these qualifications, this September 2008 Letter, coupled with the April 2000 and May 2000 Letters,³⁶⁴ clarifications,³⁶⁵ Memorandum,³⁶⁶ and the Policy Interpretation,³⁶⁷ provides detailed information for athletic administrators attempting to evaluate what types of activities they must provide in order to achieve Title IX compliance.

36. Title IX and the Constitution (2009)

The Supreme Court's most recent review of Title IX focused on the continuing issue of whether a Title IX claim precludes a plaintiff from simultaneously bringing a constitutional claim as well. *Fitzgerald v. Barnstable School Committee* brought the issue of peer-to-peer sexual harassment of a grade school student on a school bus to the Supreme Court.³⁶⁸ The student's parents complained to the school, which offered several alternatives to deal with the harassment, none of which satisfied the parents, who then sued, claiming that the school violated their daughter's rights under Title IX and the Equal Protection Clause.³⁶⁹ The United States Court of Appeals for the First Circuit initially focused on the Title IX claim and found that the school district was not liable for the sexual harassment because:

***383** Title IX does not make an educational institution the insurer either of a student's safety or of a parent's peace of mind. Understandably, then, "deliberate indifference" requires more than a showing that the institution's response to harassment was less than ideal. In this context, the term requires a showing that the institution's response was "clearly unreasonable in light of the known circumstances."³⁷⁰

In this case, although the parents did not agree with the school district's plan to deal with the harassment, "no rational factfinder could supportably conclude that the [Barnstable] School Committee acted with deliberate indifference in this case."³⁷¹

Turning to the plaintiffs' equal protection claim, the court found quickly that "the remedial scheme of Title IX is sufficiently comprehensive to demonstrate Congress's intention to preclude the prosecution of counterpart actions against state actors . . . under section 1983."³⁷² The plaintiffs appealed this part of the decision to the Supreme Court.³⁷³

The Supreme Court focused its initial analysis on prior decisions where claimants attempted to assert claims under the Constitution and separate federal statutes and noted that, "[i]n determining whether a subsequent statute precludes the enforcement of a federal right under § 1983, we have placed primary emphasis on the nature and extent of that statute's remedial scheme."³⁷⁴ In cases where the Court held that the statute precluded constitutional claims, the federal statutes themselves required "plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit."³⁷⁵ Looking to Title IX, the Court noted that the only enforcement mechanism provided in the statute is the potential withdrawal of federal funding from schools that do not comply with the law.³⁷⁶ Added to the implied right of action found in *Cannon*, this enforcement is far less than the elaborate enforcement schemes provided in other federal statutes.³⁷⁷ Moreover, the Court noted that it had never held that an implied right, like that provided in *Cannon* to enforce Title IX, "had the ***384** effect of precluding suit under § 1983."³⁷⁸

The Court also found that the actual rights provided under Title IX and the Equal Protection Clause are very different. Title IX reaches institutions and programs that receive federal funds, but it does not authorize claims "against school officials, teachers, and other individuals."³⁷⁹ On the other hand, equal protection claims can be brought against "individuals as well as municipalities and certain other state entities."³⁸⁰

Overall, because it found that Title IX and the Equal Protection Clause provide "divergent coverage," and that Title IX contains no "comprehensive remedial scheme," the Supreme Court concluded that "Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights,"³⁸¹ and "suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools."³⁸²

37. OCR Guidance #10: Intercollegiate Clarification (2010)

On April 20, 2010, after determining that “the 2005 policy documents are inconsistent with the Department's long-standing Title IX athletics policy and nondiscrimination requirements and do not provide appropriate clarity regarding nondiscriminatory assessment methods, including surveys,” and in order to provide educational institutions “with additional clarification on compliance with part three of the three-part test,”³⁸³ OCR withdrew its Additional Clarification and published its “Intercollegiate Athletics Policy Clarification” (the “Intercollegiate Clarification”).³⁸⁴

Focusing on part three, this Intercollegiate Clarification makes clear that “an institution can satisfy Part Three if it can show that the underrepresented sex is not being denied opportunities, i.e., that the interests and abilities of the underrepresented sex are fully and effectively accommodated.”³⁸⁵ Reiterating the 1996 Clarification, to determine whether an institution complies with part three, OCR considers three questions: (1) “Is there unmet interest in a ***385** particular sport?”; (2) “Is there sufficient ability to sustain a team in the sport?”; and (3) “Is there a reasonable expectation of competition for the team?”³⁸⁶ If a review of an institution provides that the answer to all three of these questions is ‘yes’, then OCR will find that the institution does not meet part three and is violating Title IX.³⁸⁷

Although not specifically telling institutions that they cannot survey their student body to assess interest, OCR makes clear that a student's failure to respond to a survey cannot be used “as evidence sufficient to justify the elimination of a current and viable intercollegiate team for the underrepresented sex” because if a school has recently eliminated a team, “OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport” and the elimination of the team creates a presumption that the school is not complying with part three.³⁸⁸

Beyond mentioning that an institution must “periodically” assess student interest, it gives no further specific guidance as to how often a survey must be conducted aside from recommending that institutions have “effective ongoing procedures for collecting, maintaining, and analyzing information on the interests and abilities of students of the underrepresented sex.”³⁸⁹ Instead, an institution must periodically assess interest and abilities “so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex.”³⁹⁰ Additionally, regardless of the method used, OCR will “not accept an institution's reliance on a survey alone, regardless of the response rate, to determine whether it is fully and effectively accommodating the interests and abilities of its underrepresented students.”³⁹¹

Still, the Intercollegiate Clarification does provide some guidance as to how an institution might survey its student body to assess interests and abilities under part three. OCR reiterates that schools must survey full-time undergraduates and admitted students who are part of the underrepresented sex.³⁹² Unlike the Additional Clarification, in the Intercollegiate Clarification, OCR makes clear that it “does not consider nonresponses to surveys as evidence of lack of interest or ability in athletics.”³⁹³ In addition, the ***386** Intercollegiate Clarification provides significant guidance relative to the content of a survey, response rates, confidentiality, frequency, the indicators it will use to assess whether there is a sufficient number of interested and able students to sustain a team, and whether there is a reasonable expectation of competition for that team.³⁹⁴ Overall, [i]f the information or documentation compiled by the institution during the assessment process shows that there is sufficient interest and ability to support a new intercollegiate team and a reasonable expectation of intercollegiate competition in the institution's normal competitive region for the team, the institution is under an obligation to create an intercollegiate team within a reasonable period of time in order to comply with Part Three.³⁹⁵

38. What Is a Sport Under Title IX: Part Three (2010)

The April 2000, May 2000, and September 2008 Letters provided some guidance on what is considered to be a sport in order to be counted as part of a school's athletic department for Title IX purposes. A recent case dealing with cheerleading analyzed this issue in further detail. Although dealing with a university's failed attempt to use roster management to manipulate its numbers

of athletic participants and to meet the requirements of the three-part test, in order to add to an understanding of what is a sport under Title IX, this case is most interesting for its analysis of competitive cheer.

In *Biediger v. Quinnipiac University*, the university attempted to justify eliminating the women's volleyball team by elevating its competitive cheer team to varsity status and counting those participants in its overall athletic participation numbers.³⁹⁶ Members of the women's volleyball team sued, claiming that this plan would not put the university into compliance with Title IX and that it should not be able to eliminate their team.³⁹⁷ The district court's initial decision granted the plaintiff's motion for a preliminary injunction, stopping the school from eliminating the volleyball team.³⁹⁸

The court then analyzed whether competitive cheer should even be considered a sport for Title IX purposes. It initially recognized the *387 presumptions provided in OCR's April 2000 Letter and May 2000 Letter, a "presumption against treating competitive cheerleading as a sport," and OCR's 2008 Letter, a presumption "in favor of treating NCAA-governed activities . . . as sports."³⁹⁹ Both presumptions would not favor the university, as it could not count competitive cheer as a sport, and the NCAA does not recognize competitive cheer as a sport.

The court then turned to the analysis provided in the September 2008 Letter in order to determine whether competitive cheer at this university was structured in such a way as to override these presumptions. The court first looked at the program's structure and administration, finding that the "team's operating budget, benefits and services, and coaching staff are administered by the athletics department in a manner consistent with the administration of Quinnipiac's other varsity teams."⁴⁰⁰ However, the team received no locker room space, did not take part in the NCAA's catastrophic insurance program, and was not allowed to conduct any off-campus recruiting, "a significant difference in program structure and administration, as compared to other varsity teams."⁴⁰¹

The court then moved to an analysis of the team's preparation and competition. It found that the team's practice schedule seemed to be similar to that of other varsity teams, but that "there are major and, ultimately, dispositive distinctions between the competitive cheer regular and post-season schedules and the schedules for other varsity squads."⁴⁰² The national cheer association did not set a maximum number of competitions, rules for what kinds of teams its members could play against, or create a set scoring system for competitions.⁴⁰³ In addition, the postseason was unorganized and being "a competitive cheerleading team was not" even "a prerequisite" in order to compete.⁴⁰⁴

The court did note that the team met OCR's criteria under this factor that its "primary purpose be to compete athletically at the intercollegiate varsity level" because "[t]here is no doubt that the purpose of the competitive cheer team is to compete, and not to cheer others."⁴⁰⁵ Regardless, after reviewing these factors, the court found that "at this point in time, the University's *388 competitive cheer team cannot count as a sport under Title IX."⁴⁰⁶

This decision provides one of the most thorough judicial analyses of whether an activity should be considered a sport under Title IX. Using the letters and other guidance provided by OCR, the court painstakingly reviewed the competitive cheer team before concluding that it should not be considered a sport. And it left the door open for universities and athletic membership organizations to change the landscape in the future, as the court said:

I have little doubt that at some point in the near future--once competitive cheer is better organized and defined, and surely in the event that the NCAA recognizes the activity as an emerging sport--competitive cheer will be acknowledged as a bona fide sporting activity by academic institutions, the public, and the law.⁴⁰⁷

Although most Title IX cases analyzing equal opportunity in athletic programs deal with part one of the test, a recent case involving the University of California-Davis focused on the second part, showing a continuing history and practice of program expansion.

In *Mansourian v. Regents of the University of California*, several female wrestlers chose to attend the university so that they could participate in its acclaimed wrestling program, which provided opportunities for women to wrestle with the men.⁴⁰⁸ In 2000-2001, the university eliminated all women from the team.⁴⁰⁹ The students protested and filed a complaint with OCR, and the university subsequently agreed to permit them to wrestle.⁴¹⁰ However, in order to do so, they had to beat male wrestlers in their weight class under the men's rules. The women were unable to meet this requirement and, thus, did not make the team, subsequently losing their scholarships.⁴¹¹ They sued the school, claiming violations of Title IX and constitutional claims under 42 U.S.C. § 1983.⁴¹²

The district court dismissed their constitutional claim because it was ***389** subsumed under the Title IX claim.⁴¹³ It then granted the university's motion to dismiss because the students had not given it advance notice of filing their suit claiming violations of Title IX.⁴¹⁴

On appeal, the United States Court of Appeals for the Ninth Circuit first analyzed whether notice is required before bringing a claim that a school did not provide equal opportunities to women. Looking to *Franklin and Gebser*, the court concluded that “[p]roof of actual notice is required only when the alleged Title IX violation consists of an institution's deliberate indifference to acts that ‘do not involve official policy of the recipient entity.’”⁴¹⁵ Therefore, “no notice requirement is applicable to Title IX claims that rest on an affirmative institutional decision.”⁴¹⁶ Here, the university made the decision to cut the women from the team and to create a system where they could not meet the participation criteria. When a university makes this type of “official decision,” a plaintiff need not provide it with actual notice before bringing a Title IX claim.⁴¹⁷

The court also pointed to a part of the Regulations rarely mentioned in prior litigation. In addition to specifying that universities must provide equal opportunity in athletics, the Regulations also mandate that any entity receiving federal financial assistance must “certify, as a condition for receiving funds, that they are ‘tak[ing] whatever remedial action is necessary . . . to eliminate . . . discrimination.’”⁴¹⁸ This requirement makes clear that schools “have an affirmative obligation to ensure compliance with at least one prong of the three-part effective accommodation test.”⁴¹⁹

The court then analyzed whether the university could show that it was in compliance with the second part of the three-part test and, in so doing, provided guidance on how this part of the test should be analyzed. The second part requires institutions to show that they have a history and continuing practice of expanding programs for members of the underrepresented sex.⁴²⁰ The Ninth Circuit determined that this called for separate inquiries into the institution's “history” and “continuing practice” of providing opportunities for its female students.⁴²¹

***390** Looking at the evidence presented, the court found that the university did not expand opportunities from 1974 until 1996, only expanding opportunities from 1996 until 2000, when it then eliminated the women's opportunities to wrestle.⁴²² This evidence showed that the university did not have a “history of program expansion for women and so did not satisfy Option Two through such a history.”⁴²³

Examining the program expansion factor, the court determined that while the university added a women's golf team, it did not add teams in several other sports, including rugby and field hockey, which would have provided more opportunities for women and where women had shown definite interest in participating in the particular sports.⁴²⁴ Therefore, although the university had

added new opportunities for women, part two “requires evidence of continuous progress toward the mandate of gender equality,” and no evidence showed that the university made any continuous progress toward expanding opportunities for women.⁴²⁵

Therefore, the court held that “[t]he record before us does not contain undisputed facts showing a history and continuing practice of program expansion that is responsive to women's interests,” and the university could not assert compliance with Title IX under part two.⁴²⁶

Finally, the plaintiffs also brought a § 1983 claim, asserting that the university's conduct violated their rights under the Equal Protection Clause. Following the Supreme Court's decision in *Fitzgerald*, the Ninth Circuit reversed the district court, finding that Title IX “does not bar § 1983 suits to enforce rights under the Equal Protection Clause.”⁴²⁷

Although not a Supreme Court decision, the *Mansourian* case is important in providing some analysis of how a university might comply with part two of the three-part test and making clear that universities that receive federal funding are actually required to meet some part of the three-part test as a condition for receiving these funds. The court also made clear that Title IX plaintiffs do not need to provide specific pre-litigation notice to a university when they claim that the university's own policies and procedures violated Title IX.

***391** 40. OCR Guidance #11: Sexual Harassment Letter (2011)

The most recent OCR guidance adding to the development of gender equity law over the first four decades after the enactment of Title IX is OCR's third document, providing guidance related to an institution's responsibilities related to the sexual harassment of students, released on April 4, 2011 (“Sexual Harassment Letter”).⁴²⁸ Building off of the Revised Guidance, this Sexual Harassment Letter provides “additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence.”⁴²⁹ According to this Sexual Harassment Letter, sexual violence “refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol.”⁴³⁰

The Sexual Harassment Letter reiterates that if a school “knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”⁴³¹ The Sexual Harassment Letter then addresses three procedural requirements that schools must meet in order to comply with Title IX.

The first is that a school must “[d]isseminate a notice of nondiscrimination.”⁴³² This notice must be widely distributed to students, parents, employees, and even applicants.⁴³³ The second requirement is that a school must “[d]esignate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX.”⁴³⁴ The coordinator is responsible for “overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints.”⁴³⁵ The final requirement is that a school must “[a]dopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.”⁴³⁶

Although several courts have found that schools must address harassment ***392** only when they learn about it, this letter provides that “schools should take proactive measures to prevent sexual harassment and violence.”⁴³⁷ In addition, “if a school determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects.”⁴³⁸

Overall, although in many ways reiterating the requirements of the Revised Guidance and reinforcing what many courts have said in regard to a school's responsibility for sexual harassment, this Sexual Harassment Letter makes clear that schools cannot merely react to situations that are brought to the attention of school administrators. Instead, a school must have policies and

procedures in place that assist in preventing harassment in the first instance. Moreover, the Sexual Harassment Letter makes clear that sexual harassment can be unlawful under Title IX, even if criminal authorities do not have enough evidence to charge the individual involved with a crime.⁴³⁹ Clearly, OCR has renewed its focus on eliminating sexual harassment from schools, and it will not allow schools to hide behind criminal authorities who cannot find evidence of a crime.

CONCLUSION

Title IX, and the many judicial opinions and different forms of agency guidance that are its progeny, have shaped and continually redefined gender equity law over the past four decades. While some may debate the forty developments selected for inclusion in this Article, no one can debate Title IX's impact on gender equity in athletics.

Although this Article presents these forty items in chronological order tracking the development of the law, hopefully it is apparent to a reader that many of these developments merely reiterate (or clarify) requirements that have been around for a long time. For example, while many continue to fight the use of the three-part test, it has existed since 1979, every court that has reviewed it has deferred to it, and the federal agency in charge of its application has repeatedly clarified its meaning while reinforcing its impact.

The problem is that advocates for and against Title IX and its application to athletics often demonstrate no knowledge of the cases, regulations, and agency documents that are referenced in this Article. As a result, they are uninformed about the law's true impact and continue to litigate over matters that courts have decided over and over again. Perhaps a thorough *393 understanding of the full application of the law will allow the focus of gender equity law to move from the courtroom to efforts to truly provide comparable sports programs for student-athletes from both genders.

Footnotes

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¹ [Cannon v. Univ. of Chi.](#), 441 U.S. 677, 684-685 (1979).

² 42 U.S.C. § 2000d (2011).

³ See *Discrimination Against Women: Hearing Before the Spec. Subcomm. on Educ. on § 805 of H.R. 16098 of the Comm. on Educ. and Labor*, 91st Cong., 2d Sess. (1970).

⁴ Amend. 398, 117 Cong. Rec. 30,156 (1971).

⁵ 117 Cong. Rec. 30,406-07 (1971) (statement of Sen. Birch Bayh).

⁶ Summary: Amendment No. 874 to the Higher Education Bill, S.659, 118 Cong. Rec. 5808 (1972); Education Amendments of 1972, S. Rep. No. 92-798, 92nd Cong., 2d Sess. (1972).

⁷ 118 Cong. Rec. 5807 (1972) (statement of Sen. Birch Bayh).

⁸ *Id.*

⁹ 117 Cong. Rec. 30,407.

¹⁰ 118 Cong. Rec. 5807.

- 11 Id.
- 12 See generally [Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292, 1298 \(8th Cir. 1973\)](#).
- 13 [20 U.S.C. § 1681\(a\) \(2011\)](#).
- 14 Paul Anderson & Barbara Osborne, Report: A Historical Review of Title IX Litigation, 18 J. Legal Aspects of Sport 127, 161 (2008).
- 15 [20 U.S.C. § 1682 \(2011\)](#).
- 16 According to one report, during the 1970s, there were only seven cases dealing with Title IX within the athletic context. Anderson & Osborne, *supra* note 14, at 137.
- 17 [Brenden, 477 F.2d 1292](#). Title IX was enacted on June 23, 1972. [20 U.S.C. § 1681](#).
- 18 See generally [Brenden, 477 F.2d 1292](#).
- 19 See *id.*
- 20 See *id.* at 1295-98.
- 21 *Id.* at 1302.
- 22 *Id.* at 1298.
- 23 *Id.* at 1298 (internal citations omitted). Although this first case referring to Title IX came down within the first year after its enactment, it was another two years before a court would address a plaintiff's claim under the Act. In [Cape v. Tennessee Secondary School Athletic Association, 424 F. Supp. 732 \(E.D. Tenn. 1976\)](#), several female high school students sued the Tennessee Secondary School Athletic Association, claiming that the rules for girls basketball were different from those applied to boys. At the time, the rules required girls to play split-court, six-person basketball where three players played offense on one side, and three played defense on the other side of the court. *Id.* at 735. The court denied the students' Title IX claim, initially finding that Title IX did not provide for a private right of action. *Id.* at 738. This issue would remain unresolved until 1979. In addition, the court found that the plaintiffs had not exhausted their administrative remedies by first seeking redress from the Department of Health, Education, and Welfare. *Id.* However, the court did find that these rules violated the U.S. Constitution, particularly the Equal Protection Clause, because they denied the plaintiffs a significant educational experience based on nothing more than their sex. *Id.* at 744. On appeal, the United States Court of Appeals for the Sixth Circuit reversed, finding that the rules served "important governmental objectives" and were "substantially related to the achievement of them." [Cape v. Tenn. Secondary Sch. Athletic Ass'n., 563 F.2d 793, 795 \(6th Cir. 1977\)](#). Therefore, due to the "distinct differences in physical characteristics and capabilities between the sexes and that the differences are reflected in the sport of basketball by how the game itself is played," the court found that the rules did not violate the Equal Protection Clause. *Id.* The appellate court did not discuss Title IX.
- 24 See Diane Heckman, [Women & Athletics: A Twenty Year Retrospective on Title IX, 9 U. Miami Ent. & Sports L. Rev. 1, 11-12 \(1992\)](#).
- 25 Known as the Department of Education since 1979.
- 26 [Pub. L. No. 93-380, Title VII, Part D, § 844, 88 Stat. 612 \(1974\)](#).
- 27 Athletics, [34 C.F.R. § 106.41 \(2011\)](#); Financial Assistance, [34 C.F.R. § 106.37 \(2011\)](#).
- 28 [34 C.F.R. § 106.41\(a\)](#).
- 29 [34 C.F.R. § 106.41\(c\)](#).
- 30 *Id.*
- 31 Some of the earliest cases that refer to these regulations include [Williams v. School District of Bethlehem, 799 F. Supp. 513 \(E.D. Penn. 1992\)](#) and [Cook v. Colgate University, 802 F. Supp. 737 \(N.D.N.Y. 1992\)](#).

32 34 C.F.R. § 106.41(d).

33 34 C.F.R. § 106.37(a).

34 34 C.F.R. § 106.37(c).

35 Interestingly, although not dealing specifically with athletics, the first litigation to refer to these regulations appeared ten years earlier than litigation involving the regulations specific to athletics. See *Univ. of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982); see also *Hillsdale Coll. v. Dep't of Health, Educ. & Welfare*, 696 F.2d 418 (6th Cir. 1982).

36 Memorandum from Peter Holmes, Dir., Office for Civ. Rights, U.S. Dep't of Health, Educ., and Welfare, to Chief State School Officers, Superintendents of Local Educ. Agencies, and Coll. and Univ. Presidents, Elimination of Sex Discrimination in Athletic Programs (Sept., 1975) [hereinafter Memorandum].

37 *Id.* at 2.

38 *Id.* at 3.

39 *Id.* at 8.

40 *Id.* at 3.

41 *Id.*

42 *Id.* at 8.

43 *Id.* at 3.

44 Few courts have even mentioned this Memorandum. However, in litigation over what a school district or other educational entity can legitimately define as a sport, it has become important. See e.g., *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 283 n.8 (2nd Cir. 2004) (The school district listed cheerleading as a sport. Although the court did not reach the issue of whether cheerleading was a sport, it noted that the Memorandum stated that cheerleading should not count as a sport).

45 *NCAA v. Califano*, 444 F. Supp. 425, 429 (D. Kan. 1978).

46 *Id.*

47 *Id.* at 430-31.

48 *Id.* at 437.

49 20 U.S.C. § 1682.

50 See *Cape*, 424 F. Supp. at 738; *Jones v. Okla. Secondary Sch. Activities Ass'n*, 453 F. Supp. 150, 153-54 (W.D. Okla. 1977).

51 *Cannon*, 441 U.S. 677.

52 *Id.*

53 *Cannon v. Univ. of Chi.*, 406 F. Supp. 1257 (N.D. Ill. 1976).

54 *Cannon v. Univ. of Chi.*, 559 F.2d 1063 (7th Cir. 1977).

55 *Cannon*, 441 U.S. at 710.

56 *Id.* at 717 (emphasis in original).

57 A Policy Interpretation: Title IX and Intercollegiate Athletics, Office For Civ. Rights, Dep't of Educ. (Dec. 11, 1979), available at <http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html> [hereinafter Policy Interpretation].

- 58 Id. § IV.
- 59 Id. § VII(A), P 1 (citing [34 C.F.R. § 106.37](#)).
- 60 Id. P 2.
- 61 Id. P 2(a)-(b).
- 62 Id. P 3.
- 63 See [34 C.F.R. § 106.41\(c\)\(2\)\(10\)](#).
- 64 Policy Interpretation, *supra* note 57, § VII(B)(1).
- 65 See e.g., A Title IX Primer, Women's Sports Found., [http:// 66.40.5.5/Content/Articles/Issues/Title-IX/A/A-Title-IX-Primer.aspx](http://66.40.5.5/Content/Articles/Issues/Title-IX/A/A-Title-IX-Primer.aspx) (last visited Aug. 14, 2011).
- 66 Policy Interpretation, *supra* note 57, § VII(B)(2).
- 67 Id. § VII(B)(2)(a), (b).
- 68 Id. § VII(B)(3)(f).
- 69 Id. § VII(B)(5).
- 70 For example, the “levels of competition” test evaluates:
(1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or (2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.
Id. § VII(B)(5)(b); see also [Pederson v. La. State Univ.](#), 912 F. Supp. 892, 913 (M.D. La. 1994).
- 71 Policy Interpretation, *supra* note 57, §VII(B)(5)(a).
- 72 Id.
- 73 [456 U.S. 512 \(1982\)](#).
- 74 Id. at 517.
- 75 Id.
- 76 Id. at 518.
- 77 Id.
- 78 Id.
- 79 Id. at 519.
- 80 Id. at 520.
- 81 Id. at 530.
- 82 Id. at 533-34 (citing [Part 86- Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance](#), 40 Fed. Reg. 24,128 (1975)).
- 83 Id. at 540.

- 84 Anderson & Osborne, *supra* note 14, at 136 (In a study of Title IX litigation from 1972 until 2007, 19% of the cases studied, or 37 cases, focused on claims of employment discrimination.).
- 85 *N. Haven Bd. of Educ.*, 456 U.S. at 536-40.
- 86 *Id.* at 537 (emphasis in original).
- 87 465 U.S. 555 (1984).
- 88 *Id.* at 558.
- 89 *Id.* at 559.
- 90 *Id.* at 560.
- 91 *Id.*
- 92 *Id.* at 561.
- 93 *Id.* at 568-69.
- 94 *Id.* at 573-74.
- 95 See e.g., *O'Connor v. Peru State Coll.*, 605 F. Supp. 753 (D. Neb. 1985); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985); *O'Connor v. Peru State Coll.*, 781 F.2d 632 (8th Cir. 1986); *Bennett v. W. Tex. State Univ.*, 799 F.2d 155 (5th Cir. 1986); *EEOC v. Madison Cmty. Unit Sch. Dist.*, 43 Fair Emp't. Prac. Cas. (BNA) 1410 (1986).
- 96 134 Cong. Rec. H1038 (daily ed. Mar. 22, 1988) (statement of Rep. Oakar).
- 97 Civil Rights Restoration Act of 1987, *Pub. L. No. 100-259*, 102 Stat. 28 (1987).
- 98 Civil Rights Restoration Act, 20 U.S.C. § 1687 (2011).
- 99 *Id.*
- 100 20 U.S.C. § 1681(c).
- 101 Linda Jean Carpenter & R. Vivian Acosta, *Title IX 15* (2005).
- 102 *Id.*
- 103 Valerie Bonnette & Lamar Daniel, Office for Civ. Rights, Dep't of Educ., *Title IX Athletics Investigator's Manual* (1990).
- 104 *Id.* at Introduction.
- 105 See, e.g., *McCormick*, 370 F.3d at 293 n.14.
- 106 Bonnette & Daniel, *supra* note 103, at 105-52. The Investigator's Manual also includes a "Title IX Coaching Compensation Policy Clarification" produced by OCR in 1983. *Id.* at 166. The Title IX Coaching Compensation Policy Clarification related to a question as to whether Title IX prohibits disparate coaching salaries based on the sex of the students receiving coaching services, rather than on the sex of the coaches providing coaching services. *Id.* With this Clarification, OCR made clear that the focus of the Title IX Regulations is on the sex of the employee and not the sex of the students involved. *Id.* at 167.
- 107 The United States Department of Justice has also produced a similar manual. Its "Title IX Legal Manual" is "intended to be an abstract of general principles and issues for use by various federal agencies charged with enforcing Title IX"; however, similar to OCR's manual, it "is not intended to provide a complete, comprehensive directory of all cases or issues related to Title IX." U.S. Dep't of Justice, *Title IX Legal Manual* (2001), available at <http://www.justice.gov/crt/about/cor/coord/ixlegal.php>.
- 108 503 U.S. 60 (1992).

- 109 [Id. at 63](#). Although not discussed in depth in this case, sexual harassment has been an actionable form of prohibited sexual discrimination under Title IX since 1977. See [Alexander v. Yale Univ.](#), 459 F. Supp. 1 (D. Conn. 1977).
- 110 [Franklin](#), 503 U.S., at 63.
- 111 [Id.](#)
- 112 [Id. at 64](#).
- 113 [Franklin v. Gwinnett Cnty. Pub. Sch.](#), 911 F.2d 617 (11th Cir. 1990).
- 114 [Franklin](#), 503 U.S. at 62-63.
- 115 [Id. at 66](#).
- 116 [Id. at 76](#).
- 117 [Anderson & Osborne](#), *supra* note 14, at 150.
- 118 [7 F.3d 332](#) (3rd Cir. 1993).
- 119 [Id. at 335](#).
- 120 [Id.](#)
- 121 [Id. at 335-36](#).
- 122 [Id. at 336-37](#).
- 123 [Id. at 343](#).
- 124 [Id. at 336](#).
- 125 [Roberts v. Colo. State Bd. of Agric.](#), 998 F.2d 824, 830 (10th Cir. 1993).
- 126 [Kelley v. Bd. of Trs.](#), 35 F.3d 265 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995).
- 127 [Id. at 269](#).
- 128 [Id.](#)
- 129 [Id.](#)
- 130 [Id.](#)
- 131 [Id.](#)
- 132 [Id. at 270-71](#).
- 133 [Id. at 272](#).
- 134 [Id. at 270](#).
- 135 [Id. at 272](#).
- 136 [Id.](#)
- 137 See, e.g., [Miami Univ. Wrestling Club v. Miami Univ.](#), 302 F.3d 608 (6th Cir. 2002).
- 138 Disclosure of Athletic Program Participation Rates and Financial Support Data, [Pub. L. No. 103-382](#), § 360B (1994).

- 139 Id.; 20 U.S.C. § 1092 n.(b)(3).
- 140 § 1092 n.(b)(7)-(8).
- 141 Id. § 1092(g).
- 142 The Equity in Athletics Data Analysis Cutting Tool, Office of Postsecondary Educ., <http://ope.ed.gov/athletics/> (last visited Aug. 12, 2011). The Department also has a website containing similar information for interscholastic institutions and school districts. See Civil Rights Data Collection, Office for Civ. Rights, <http://ocrdata.ed.gov/Default.aspx> (last visited Aug. 12, 2011).
- 143 See, e.g., [Brust v. Regents of Univ. of Cal.](#), 2007 WL 4365521, *4 (E.D. Cal. 2007).
- 144 See, e.g., [Barrett v. W. Chester Univ. of Penn. of State Sys. of Higher Educ.](#), 2003 WL 22803477, *6 (E.D. Pa. 2003).
- 145 Norma Cantu, Assistant Secretary for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, Office for Civ. Rights, U.S. Dep't of Educ. (Jan. 16, 1996), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter Clarification].
- 146 Norma Cantu, Assistant Secretary for Civil Rights, Dear Colleague Letter: Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, Office for Civ. Rights, U.S. Dep't of Educ. (Jan. 16, 1996), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter January 1996 Letter].
- 147 Id.
- 148 Clarification, *supra* note 145.
- 149 Id.
- 150 Id.
- 151 Id.
- 152 Id.
- 153 Id.
- 154 Id.
- 155 Id. This is a controversial point. It seems clear that OCR was permitting a situation where, if a school found little interest in athletic participation among its female student body, it did not have to provide athletic opportunities for these students. Many Title IX advocates argue instead that it is a school's responsibility to foster and create interest among female students. These arguments came together in the backlash faced by the recently rescinded Additional Clarification. See *infra* note 305.
- 156 Id.
- 157 Id.
- 158 Id.
- 159 January 1996 Letter, *supra* note 146.
- 160 [Cohen v. Brown Univ.](#), 809 F. Supp. 978 (D. R.I. 1992).
- 161 Id.
- 162 [Cohen v. Brown Univ.](#), 101 F.3d 155, 172 (1st Cir. 1996), cert. denied, [Brown Univ. v. Cohen](#), 520 U.S. 1186 (1997).
- 163 Id. at 173.
- 164 Id. at 167.

- 165 Cohen, 809 F. Supp. at 1001.
- 166 Clarification, supra note 145. The Clarification provided that “[t]he first part of the test--substantial proportionality--focuses on the participation rates of men and women at an institution and affords an institution a ‘safe harbor’ for establishing that it provides nondiscriminatory participation opportunities.” Id.
- 167 Cohen v. Brown Univ., 991 F.2d 888, 897-98 (1st Cir. 1993).
- 168 Cohen, 101 F.3d at 188.
- 169 Anderson & Osborne, supra note 14, at 150.
- 170 See, e.g., Neal v. Bd. of Trs., 198 F.3d 763 (9th Cir. 1999).
- 171 See, e.g., Ericson v. Syracuse Univ., 35 F. Supp. 2d 326 (S.D.N.Y. 1999).
- 172 See, e.g., Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223(5th Cir. 1997).
- 173 See, e.g., R.L.R. v. Prague Pub. Sch. Dist. I-103, 838 F. Supp. 1526 (W.D. Okla. 1993).
- 174 Norma Cantu, Assistant Secretary for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 4000-01-P, Office for Civ. Rights,U.S. Dep't of Educ. (Mar. 13, 1997), available at <http://www.ed.gov/about/offices/list/ocr/docs/sexhar00.html> [hereinafter Guidance].
- 175 Id.
- 176 Where a coach grants or withholds benefits as a result of the athlete's willingness or refusal to submit to the coach's sexual demands. Anderson & Osborne, supra note 14, at 148 n.179.
- 177 Where the conduct is so severe that it creates an intimidating, hostile, or offensive environment that interferes with the athlete's ability to perform. Id.
- 178 Guidance, supra note 174.
- 179 Anderson & Osborne, supra note 14, at 149.
- 180 Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).
- 181 Id. at 278.
- 182 Id.
- 183 Id.
- 184 Id. at 284.
- 185 Id. at 292-93.
- 186 34 C.F.R. § 106.37(c)(1).
- 187 Policy Interpretation, supra note 57, P 2.
- 188 Dr. Mary Frances O'Shea, National Coordinator for Title IX Athletics, Dear Colleague Letter: Bowling Green State University, Office for Civ. Rights,U.S. Dep't of Educ. (July 23, 1998), available at <http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html> [hereinafter July 1998 Letter].
- 189 Id.
- 190 Id.

- 191 Id. See, e.g., [Gonyo v. Drake Univ.](#), 879 F. Supp. 1000 (S.D. Iowa 1995). Members of eliminated men's wrestling team argued that the school violated the financial assistance regulations because the cuts magnified the disparity in scholarship funding as female athletes were already receiving significantly more scholarship funds than male athletes. Finding that the "safe harbor" in part one of the three part test "more comprehensively serves the remedial purposes of Title IX than does the scholarship test and therefore must prevail." Id. at 1006.
- 192 July 1998 Letter, supra note 188.
- 193 Id.
- 194 Id.
- 195 Id.
- 196 [525 U.S. 459 \(1999\)](#).
- 197 Id. at 463.
- 198 Id.
- 199 Id.
- 200 Id.
- 201 Id. at 464.
- 202 [Smith v. NCAA](#), 978 F. Supp. 213, 219 (W.D. Pa. 1997).
- 203 [Smith v. NCAA](#), 139 F.3d 180, 189 (3d Cir. 1998).
- 204 [Smith](#), 525 U.S. at 468.
- 205 Id.
- 206 2010-11 NCAA Division 1 Manual 4 (2010).
- 207 See NCAA Gender Equity, NCAA.org, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About+The+NCAA/Diversity+and+Inclusion/Gender+Equity+and+Title+IX/homepage.html (last visited Feb. 9, 2011).
- 208 [Davis v. Monroe Cnty. Bd. of Educ.](#), 526 U.S. 629 (1999).
- 209 Id. at 633-34.
- 210 Id. at 634.
- 211 Id. at 648.
- 212 Id. at 633.
- 213 Id. at 653-54.
- 214 [190 F.3d 643 \(4th Cir. 1999\)](#).
- 215 Id. at 644.
- 216 Id.
- 217 Id. at 645.
- 218 Id.

- 219 Id.
- 220 Id.
- 221 Id.
- 222 Id.
- 223 Id. at 645-56.
- 224 Id. at 648.
- 225 *Mercer v. Duke Univ.*, 181 F. Supp. 2d 525, 535 (M.D.N.C. 2001).
- 226 *Mercer v. Duke Univ.*, 50 Fed. Appx. 643 (4th Cir. 2002).
- 227 Id. at 644.
- 228 Id.
- 229 Anderson & Osborne, *supra* note 14, at 159.
- 230 Clarification, *supra* note 145.
- 231 Letter from Dr. Mary Frances O'Shea, Nat'l Coordinator for Title IX Athletics, Office for Civ. Rights, U.S. Dep't of Educ., to David V. Stead, Exec. Dir., Minn. State High Sch. League (Apr. 11, 2000) [hereinafter April 2000 Letter].
- 232 Id.
- 233 Id. at 2.
- 234 34 C.F.R. § 106.41.
- 235 Policy Interpretation, *supra* note 57.
- 236 April 2000 Letter, *supra* note 231 at 2 n. 2.
- 237 Memorandum, *supra* note 36, at 3.
- 238 April 2000 Letter, *supra* note 231, at 3.
- 239 Letter from Dr. Mary Frances O'Shea, Nat'l Coordinator for Title IX Athletics, Office for Civ. Rights, U.S. Dep't of Educ., to David V. Stead, Exec. Dir., Minn. State High Sch. League (May 24, 2000) [hereinafter May 2000 Letter].
- 240 Id.
- 241 Id.
- 242 Office for Civ. Rights, U.S. Dep't of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.
- 243 Id. at ii.
- 244 Id. at iii.
- 245 *Herndon v. Coll. of Mainland*, 2009 WL 367500, *19 n.12 (S.D. Tex. 2009).
- 246 *A.J. v. Victor Elementary Sch. Dist.*, 2011 WL 1005009, *6 (Cal. App. 4 Dist. 2011).
- 247 20 U.S.C. § 1092.

- 248 1998 Amendments to the Higher Education Act of 1965, [Pub. L. No. 105-244](#), § 805 (“Study Of Opportunities For Participation In Athletics Programs”). The Amendment was repealed in 2008 by [Pub. L. No. 110-315](#), Title IX, Part C, § 931(1), 122 Stat. 3456, (Aug. 14, 2008) (effective on enactment). Regardless, the several reports were published during the ten years that the Act was in place.
- 249 § 805 (a)(1).
- 250 *Id.*
- 251 This report was produced by the U.S. General Accounting Office, which has since been renamed the U.S. Government Accountability office; either may be referred to as the GAO. U.S. General Accounting Office, No. 01-297, *Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams* (Mar. 2001), available at [http:// www.gao.gov/new.items/d01297.pdf](http://www.gao.gov/new.items/d01297.pdf).
- 252 *Id.* at 14.
- 253 *Id.*
- 254 *Id.* at 25.
- 255 See, e.g., [Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.](#), 366 F.3d 930, 942 (D.D.C. 2003).
- 256 The Secretary of Education's Commission on Opportunity in Athletics, “Open to All” Title IX at Thirty 2 (Feb. 28, 2003), available at <http://www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf> [hereinafter Commission Report].
- 257 *Id.* at 3.
- 258 *Id.* at 4.
- 259 *Id.* at 33.
- 260 *Id.* at 34.
- 261 *Id.*
- 262 U.S. General Accounting Office, *supra* note 251, at 14.
- 263 Clarification, *supra* note 145.
- 264 Commission Report, *supra* note 256, at 38 (emphasis omitted).
- 265 Barbara Osborne, [Title IX in the 21st Century](#), 14 Marq. Sports L. Rev. 141, 153-56 (2003).
- 266 Donna de Varona & Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics* 19 (Feb. 2003), available at [http:// 66.40.5.5/Content/ Articles/Issues/Title-IX/M/Minority-Views-on-the-Report-of-the-Commission-on-Opportunity-in-Athletics.aspx](http://66.40.5.5/Content/Articles/Issues/Title-IX/M/Minority-Views-on-the-Report-of-the-Commission-on-Opportunity-in-Athletics.aspx).
- 267 Gerald Reynolds, Assistant Secretary for Civil Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*, Office for Civ. Rights, U.S. Dep't of Educ. (July 11, 2003), available at [http:// www.ed.gov/about/offices/list/ocr /title9guidanceFinal.html](http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html).
- 268 *Id.*
- 269 *Id.*
- 270 *Id.*
- 271 *Id.*
- 272 [Nat'l Wrestling Coaches Ass'n](#), 366 F.3d 930 (D.C. Cir. 2004), cert. denied, 545 U.S. 1104 (2005).
- 273 *Id.* at 936.

- 274 *Id.* at 936-37.
- 275 *Id.* at 942.
- 276 *Id.* at 943.
- 277 *Id.* at 945.
- 278 *Kelley*, 35 F.3d at 270.
- 279 See e.g., *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88 (D.C. Va. 2007), *aff'd*, 639 F.3d 91 (4th Cir. 2011).
- 280 According to its website, the Council is a “national coalition of coaches, athletes, parents, and fans who are devoted to preserving and promoting the student athlete experience.” About Us, Coll. Sports Council, <http://www.savingsports.org/about/> (last visited Aug. 12, 2011). The National Wrestling Coaches Association is part of this group, and the Council was also part of parallel litigation that was also dismissed. See *Coll. Sports Council v. Dep't of Educ.*, 357 F. Supp. 2d 311 (D.D.C. 2005).
- 281 Letter from Rod Paige, Sec'y of Educ., to Eric Pearson, Chairman, College Sports Council (July 28, 2003).
- 282 *Id.* at 2 (citing *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 263 F. Supp. 2d 82, 96 (D.D.C. 2003)).
- 283 Steven Geoffrey Gieseler, Pac. Legal Found., Petition to Repeal, Amend, and Clarify Rules Applying Title IX to High School Athletics (June 19, 2007), available at www.pacificlegal.org/document.doc?id=559. The Pacific Legal Foundation is a public interest legal organization that fights for limited government, property rights, individual rights, and a balanced approach to environmental protection. About PLF, Pac. Legal Found., <http://www.pacificlegal.org/page.aspx?pid=262> (last visited Aug. 12, 2011).
- 284 Letter from Margaret Spellings, Sec'y of Educ. to Steven Geoffrey Gieseler, Pac. Legal Found. (Mar. 27, 2008), available at <http://www2.ed.gov/about/offices/list/ocr/letters/title-ix-2008-0327.pdf>.
- 285 Letter from Joshua Thompson, Pac. Legal Found., to Office for Civ. Rights, U.S. Dep't of Educ. (Feb. 1, 2011), available at <http://www.pacificlegal.org/page.aspx?pid=1477>.
- 286 Center Files Title IX Complaints Against 12 School Districts, Nat'l Women's L. Ctr. (Nov. 10, 2010), <http://www.nwlc.org/press-release/center-files-title-ix-complaints-against-12-school-districts>.
- 287 Thompson, *supra* note 285. This position is especially interesting, as the Policy Interpretation, although focused on intercollegiate athletics, specifically states that “its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.” Policy Interpretation, *supra* note 57, § III. To date, the Department has not responded to this letter.
- 288 Complaint for Declaratory and Injunctive Relief, *Am. Sports Council v. Dep't of Educ.*, No. 2011cv01347, available at <http://www.pacificlegal.org/page.aspx?pid=1628>.
- 289 *Id.* at *5, *12.
- 290 *Cobb v. U.S. Dep't of Educ. for Civil Rights*, 487 F. Supp. 2d 1049 (D. Minn. 2007). See *infra* part 34.
- 291 34 C.F.R. § 106.41(c).
- 292 § 106.41(c)(3).
- 293 *McCormick*, 370 F.3d 275.
- 294 *Id.* at 279-80.
- 295 *Id.*
- 296 *Id.* at 280-81.

- 297 Id. at 280-82.
- 298 Id. at 283.
- 299 Id. at 288.
- 300 Id. at 289 (citing 34 C.F.R. § 106.41(c)(3)).
- 301 Id. (citing Policy Interpretation, *supra* note 57, § VII(B)(3)(b)(5)).
- 302 Id. at 293.
- 303 Id. at 296.
- 304 Russlynn Ali, Assistant Secretary for Civil Rights, Dear Colleague Letter: Intercollegiate Athletics Policy Clarification: The Three-Part Test - Part Three, Office for Civ. Rights, U.S. Dep't of Educ. (Apr. 20, 2010), at 1 available at <http://ed.gov/about/offices/list/ocr/letters/colleague-20100420.html> [hereinafter Intercollegiate Clarification].
- 305 Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test--Part Three, Office for Civ. Rights, U.S. Dep't of Educ., at 2 (Mar. 17, 2005), available at <http://www.nacua.org/documents/AddnClarificationInterCollegiateAthletic> [hereinafter Additional Clarification].
- 306 Id. at 3.
- 307 Id. at 4 n.7.
- 308 National Center for Education Statistics, U.S. Department of Education, User's Guide to Developing Student Interest Surveys Under Title IX (Mar. 2005) (appendix to Additional Clarification), available at <http://www.nacua.org/documents/AddnClarificationInterCollegiateAthleticsPol>.
- 309 James F. Manning, Delegated the Authority of the Assistant Secretary for Civil Rights, Dear Colleague Letter, Office for Civ. Rights, U.S. Dep't of Educ., at iv (Mar. 17, 2005), available at <http://www.nacua.org/documents/AddnClarificationInterCollegiateAthletic>.
- 310 Id. at 1.
- 311 Id. at 6.
- 312 Id.
- 313 Id.
- 314 Id. at 7.
- 315 NCAA News Release, In Honor Of Title IX Anniversary NCAA Urges Department Of Education To Rescind Additional Clarification Of Federal Law, NCAA Press Release Archive (June 22, 2005), available at [http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/In%20Honor%20of%20Title%20IX%20Anniversary%20NCAA%20Urges%20Department%20of%20Education%20to%20Rescind%20Additional%20Clarification%20of%20Federal%](http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/In%20Honor%20of%20Title%20IX%20Anniversary%20NCAA%20Urges%20Department%20of%20Education%20to%20Rescind%20Additional%20Clarification%20of%20Federal%20)
- 316 Cannon, 441 U.S. 677; N. Haven Bd. of Educ., 456 U.S. 512; Grove City Coll., 465 U.S. 555; Franklin, 503 U.S. 60; Gebser, 524 U.S. 274; Smith, 525 U.S. 459; Davis, 526 U.S. 629.
- 317 Cannon, 441 U.S. 677 (an implied private cause of action for violations of Title IX); Franklin, 503 U.S. 60 (a private cause of action for money damages for intentional violations of Title IX); Gebser, 524 U.S. 274 (a private cause of action for a teacher's sexual harassment of a student); Davis, 526 U.S. 629 (a private cause of action for student-on-student (peer-to-peer) sexual harassment).
- 318 544 U.S. 167 (2005).
- 319 Id. at 171.

- 320 *Id.* at 171-72.
- 321 *Id.* at 172.
- 322 *Id.*
- 323 *Id.*
- 324 *Id.*
- 325 *Id.* at 174.
- 326 *Id.* at 173-74 (emphasis in original).
- 327 *Jackson v. Birmingham Bd. of Educ.*, 416 F.3d 1280 (11th Cir. 2005).
- 328 Settlement Agreement and Mutual General Release, by and between Roderick Jackson and the Birmingham Board of Education (Nov. 28, 2006), available at <http://www.nwlc.org/sites/default/files/pdfs/13%20AU4901-Final%20Settlement%20Agreement.pdf>.
- 329 *Id.* First: Non-Admission of Liability, at 1.
- 330 *Id.* Third: Consideration, (1), at 2. Interestingly, under the Agreement, Jackson's legal counsel received \$340,000.00. *Id.* at (2).
- 331 *Id.* (4)(d), at 3.
- 332 *Id.* (4), at 2.
- 333 Consent Decree, *Jackson v. Birmingham Bd. of Educ.*, CV-01-BE-1866-S, 3 (D. Ala. 2006), available at <http://www.nwlc.org/sites/default/files/pdfs/14%20Jackson%20Consent%20Decree.pdf>.
- 334 Settlement Agreement and Mutual General Release, *supra* note 328, at 2-4.
- 335 See, e.g., *Cummings v. Tex. S. Univ.*, 2011 WL 1750697 (S.D. Tex. 2011); *McNally v. Univ. of Haw.*, 2011 WL 322533 (D. Haw. 2011).
- 336 34 C.F.R. § 106.41(c)(7).
- 337 Policy Interpretation, *supra* note 57, § VII(B)(3)(f).
- 338 See e.g., *Landow v. Sch. Bd. of Brevard Cnty.*, 132 F. Supp. 2d 958 (M. D. Fla. 2000); *Daniels v. Sch. Bd. of Brevard Cnty.*, 995 F. Supp. 1394 (M. D. Fla. 1997).
- 339 *Mason v. Minn. State High Sch. League*, 2004 U.S. Dist. LEXIS 13865 (D. Minn. 2004).
- 340 *Id.* at *5.
- 341 *Id.* at *2-*3.
- 342 *Id.* at *3.
- 343 *Id.* at *4.
- 344 *Id.* at *6-*7.
- 345 *Id.* at *14.
- 346 *Id.* at *15.
- 347 *Id.* at *12.
- 348 *Cobb v. U.S. Dep't of Educ. for Civ. Rights*, 2006 U.S. Dist. LEXIS 39985 (D. Minn. 2006).

- 349 Id. at *24.
- 350 Cobb, 487 F. Supp. 2d at 1051.
- 351 See, e.g., Kelley, 35 F.3d 265 & Nat'l Wrestling Coaches Ass'n, 366 F.3d 930.
- 352 Cobb, 487 F. Supp. 2d at 1054.
- 353 Id. at 1055.
- 354 Mason, 2004 U.S. Dist. LEXIS 13865, at *12.
- 355 Cobb v. U.S. Dep't of Educ., 2007 U.S. Dist. LEXIS 97578 (D. Minn. 2007).
- 356 April 2000 Letter, supra note 231, at 1.
- 357 Stephanie Monroe, Assistant Secretary for Civil Rights, Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance, Office for Civ. Rights, U.S. Dep't of Educ. (Sept. 17, 2008), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html> (emphasis in original).
- 358 Id.
- 359 Id. (emphasis in original).
- 360 Id.
- 361 Id.
- 362 Id.
- 363 Id.
- 364 April 2000 Letter, supra note 231; May 2000 Letter, supra note 239.
- 365 Clarification, supra note 145.
- 366 Memorandum, supra note 36.
- 367 Policy Interpretation, supra note 57.
- 368 555 U.S. 246 (2009).
- 369 Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 170 (1st Cir. 2007).
- 370 Id. at 171.
- 371 Id. at 175.
- 372 Id. at 179.
- 373 Fitzgerald, 555 U.S. 246.
- 374 Id. at 253.
- 375 Id. at 254.
- 376 Id. at 255.
- 377 Id.
- 378 Id. at 256.

- 379 Id. at 257.
- 380 Id.
- 381 Id. at 258.
- 382 Id.
- 383 Intercollegiate Athletics Policy: Three-Part Test -- Part Three, Question 1, Office for Civ. Rights, U.S. Dep't of Educ. (Apr. 16, 2010), <http://www2.ed.gov/about/offices/list/ocr/docs/title9-qa-20100420.html>.
- 384 Intercollegiate Clarification, *supra* note 304.
- 385 Id. at 3-4.
- 386 Id. at 4.
- 387 Id.
- 388 Id. at 5.
- 389 Id. at 7-8.
- 390 Id. at 7.
- 391 Id. at 8.
- 392 Id. at 10-11.
- 393 Id. at 12.
- 394 Id. at 9-12.
- 395 Id. at 13.
- 396 616 F. Supp. 2d 277 (D. Conn. 2009).
- 397 Id. at 278-79.
- 398 Id. at 298.
- 399 *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 93 (D. Conn. 2010).
- 400 Id. at 95.
- 401 Id. at 96.
- 402 Id. at 96-97.
- 403 Id. at 97.
- 404 Id. at 98.
- 405 Id. at 99.
- 406 Id.
- 407 Id. at 101.
- 408 *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 961 (9th Cir. 2010).

- 409 [Id. at 962.](#)
- 410 [Id.](#)
- 411 [Id.](#)
- 412 [Id.](#)
- 413 [Id.](#)
- 414 [Id. at 963.](#)
- 415 [Id. at 967.](#)
- 416 [Id.](#)
- 417 [Id. at 968.](#)
- 418 [Id. \(citing 34 C.F.R. § 106.4 \(2010\)\).](#)
- 419 [Id.](#)
- 420 [Policy Interpretation, supra note 57, § VII\(C\)\(5\)\(a\)\(2\).](#)
- 421 [Mansourian, 602 F.3d at 969.](#)
- 422 [Id. at 970.](#)
- 423 [Id. at 971.](#)
- 424 [Id. at 971-72.](#)
- 425 [Id. at 973.](#)
- 426 [Id.](#)
- 427 [Id.](#)
- 428 [Russlynn Ali, Assistant Secretary for Civil Rights, Dear Colleague Letter, Office for Civ. Rights, U.S. Dep't of Educ. \(April 4, 2011\), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.](#)
- 429 [Id. at 2.](#)
- 430 [Id. at 1.](#)
- 431 [Id. at 4.](#)
- 432 [Id. at 6.](#)
- 433 [Id.](#)
- 434 [Id.](#)
- 435 [Id. at 7.](#)
- 436 [Id. at 6.](#)
- 437 [Id. at 14.](#)
- 438 [Id. at 15.](#)

439 Id. at 10.

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