

A REVIEW AND ANALYSIS OF TITLE IX OF THE EDUCATION AMENDMENTS  
OF 1972

by

STEVEN SETH RHINE

(Under the Direction of John Dayton)

ABSTRACT

Title IX of the Education Amendments of 1972 has become synonymous with expanding the athletic opportunities for females. Often misunderstood by educational administrators and the general public, this study attempts to review and analyze the historical development of Title IX with specific attention given to athletics at the collegiate and scholastic levels. Throughout this study, the historical and current status of the Title IX is evaluated as well as a thorough comparison between the law's current administration with the historical evidence of Title IX's legislative intent. With the most recent actions involving Title IX in March of 2005, the law's recent publicity demonstrates the ever increasing importance of understanding the legality of various actions by educational institutions as well as high school athletic associations.

INDEX WORDS: Title IX, gender equity, intercollegiate athletics, scholastic athletics, Cohen v. Brown University, Franklin v. Gwinnett, Jackson v. Birmingham, gender discrimination

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## Chapter 1

### Overview of the Study

During the second half of the 20<sup>th</sup> century, the United States continued to expand legal protections for civil rights. In 1954, the United States Supreme Court ruled in *Brown v. Board of Education* that racially separate but equal schools were unconstitutional. During the early 1960's, President John F. Kennedy worked to expand the opportunities for both blacks and women. In his 1963 Civil Rights speech, President Kennedy cited the difficulties facing minorities and women by stating, "The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated." After President Kennedy's assassination, President Lyndon Johnson continued attempts to improve America with his "Great Society" programs. These programs included the Elementary and Secondary Education Act as well as various other plans designed to improve the educational opportunities for disadvantaged citizens (Schugurensky, n.d.). In a speech made by President Johnson to the graduates of University of Michigan in 1964, President Johnson cited the importance of education within his legislative initiatives by stating, "A third place to build the Great Society is in the classrooms of America. There your children's lives will be shaped. Our society will not be great until every young mind is set free to scan the farthest reaches of thought and imagination."

Also during the 1960s, President Johnson's administration continued efforts to pass the Equal Rights Amendment (ERA). First introduced in 1923, the Equal Rights Amendment has been reintroduced in Congress each year since 1923. The proposed Amendment states, "Equality of Rights under the law shall not be denied or abridged by the United States or any state on account of sex." Although the necessary number of states never ratified the ERA, efforts to improve the quality of life for females were successful.

In 1972, President Richard Nixon signed Title IX of the Education Amendments into law. Primarily a law mandating equal opportunity in education (Hueben, 2003), Title IX states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" (Title IX, 1972, § 1681). More than 30 years after its passage, Title IX continues to generate significant debate. Although renamed in 2002 the Patsy T. Mink Equal Opportunity in Education Act, the law is still commonly referred to as Title IX. For those persons directly affected by Title IX, the law remains confusing and almost always controversial (Galemore, 2003). The difficulties in interpreting the original law and the subsequent enforcement of Title IX's regulations have created two vastly different arguments concerning Title IX. The future implementation of Title IX and the potential changes to the administration of the law carry far-reaching consequences for students and educational institutions.

The development of Title IX resulted from the failure of the Equal Rights Amendment's ratification as a constitutional amendment (Title IX Legal Manual, 2001). After the ERA's continued rejection, Title IX of the Education Amendments was

developed. The law was proposed by Senator Edith Green as an effort to increase the educational opportunities for females within schools receiving federal funding. Title IX has been used to challenge gender inequity in a variety of contexts: sexual harassment, pregnancy, admissions, testing, scholarships, and athletics (Grossman, 2002). Since Title IX's enactment, the number of girls playing high school sports has gone from 1 in 27 to 1 in 3. In colleges, women's participation in athletics has gone from fewer than 32,000 in 1981 to more than 150,000 in 2001 (Brake, 2001).

Title IX covers three main areas relating to gender discrimination in educational institutions. First, Title IX and its regulations apply to athletic opportunities. Second, with the Supreme Court's ruling in *North Haven Board of Education v. Bell* (1982), Title IX covers gender discrimination in employment practices within educational institutions. Third, recent Supreme Court cases in the late 1990's highlight an expansion of Title IX's coverage to include teacher-student and student-student sexual harassment (*Gebser v. Lago Vista Independent School District*, 1998, *Davis v. Monroe County Board of Education*, 1999).

Despite the continuing controversy, Title IX is arguably the most successful civil rights statute in history (Grossman, 2003). In addition, with President Bush's special commission formed in 2003 to potentially modify Title IX's enforcement, and with the U.S. Supreme Court's recent ruling in *Jackson v. Birmingham Public Schools* (2005), a Title IX case involving retaliation, Title IX retains a high public profile. Likewise, Title IX continues to have prominent supporters in the U.S. Congress. In 2003, a discussion within the House of Representatives highlighted the continued strong support of Title IX among members of Congress. Representative Lynn Woolsey from California and

Representative Louise Slaughter from New York argued for the continued enforcement of Title IX. Representative Slaughter argued that females were only 42% of college athletes although they made up 58% of undergraduate students. Furthermore, at the time, females received 1.1 million fewer athletic opportunities at the high school level, which were 41% fewer than males. At the collegiate level, females totaled 58,000 athletes, which were 38% fewer than males. Finally, Representative Woolsey argued that before the passage of Title IX, only 7% of females played interscholastic and collegiate sports. In 2003, over 40% of females participated in intercollegiate and high school athletic contests (Legislative Update, 2003). Future rulings and legislative actions impacting Title IX will continue to draw public attention.

Although Title IX has increased athletic participation for females, many argue that Title IX has gone too far. Critics of Title IX note that efforts by colleges to satisfy the law have led to the elimination of 400 men's collegiate wrestling teams (Will, 2002). Also, between 1992 and 1997, colleges cut 3.4 men's athletic positions for every female athletic spot created, a practice impacting wrestling, swimming, and gymnastics (Clark, 2001). Finally, critics of Title IX point out that much of the growth in female athletic participation occurred before Title IX's regulations and clarifications were incorporated in 1979. Aronberg's research found that "the proportion of female NCAA intercollegiate athletes skyrocketed from 7% to 33% between 1972 and 1978" (1995, p. 766). Before 1972, 1 in 27 high school females participated in athletics. By 1979, the number had increased to 1 in 4; by 2001, 1 in 3 (Will, 2002). Nonetheless, it is difficult to deny the significance of Title IX as a civil rights statute. Although the efficacy of Title IX continues to be debated, the impact of Title IX has been profound.

### Significance of the Study

This study will provide useful information for high school and collegiate athletic administrators responsible for their respective educational institution's Title IX compliance. Title IX's impact has been covered in numerous academic journals and law reviews, but this study is unique because of its thorough historical review and the inclusion of the most current developments involving Title IX. The study will cover the most current Title IX topics including a recently decided U.S. Supreme Court case in March of 2005, *Jackson v. Birmingham Public Schools* (2005). Also in March of 2005, the Office for Civil Rights, the governmental department responsible for enforcing Title IX, released further clarification of Title IX's regulations.

This study will give educators and other readers a useful overview of Title IX, its regulations, and case law governing its implementation. The study will allow readers an opportunity to review the applicable regulations and history of Title IX. Since the U.S. Supreme Court's ruling in *Franklin v. Gwinnett County Public Schools* (1992), the courts have allowed for monetary damages when Title IX has been knowingly violated. Since recent research suggests that an estimated 80% of high schools and colleges run athletic programs that do not comply with Title IX (Grossman, 2003, Anderson, et al., 2004) and because Title IX was written in broad language, the potential impact of Title IX requires all educators, and especially administrators, to be well versed on Title IX's relevant history and current status.

Finally, this study is intended to analyze whether the current administration and implementation of Title IX aligns with the original intentions of the members of Congress in 1972. According to Staton's research in the *Mississippi Law Journal* (1989),

Title IX's intention was to encourage equal treatment of both sexes in education. This study intends to examine whether Title IX's existing administration and implementation aligns with the promotion of equal treatment in education for both genders.

### Research Questions

This study investigated the following research questions:

- 1) What is the relevant legal history of Title IX of the Education Amendments of 1972?
- 2) What is the current legal status of Title IX of the Education Amendments of 1972?
- 3) Does Title IX's administration and implementation today align with Title IX's intentions when passed in 1972?

### Procedures

Research included an extensive search for relevant sources of law, including federal legislation, regulations, case law, scholarly commentary, and other relevant documents using the University of Georgia's library, *Ebscohost*, *Lexus-Nexus*, and *Findlaw*. The resulting documents were reviewed, analyzed, and synthesized to form an accurate historical review and a current composite perspective on the law concerning Title IX of the Education Amendments to the Civil Rights Act of 1964.

Arranged in chronological order, the literature review provides the reader with an accurate depiction of the historical development of the law. Chapter 2 includes relevant federal statutes, such as Title IX of the Education Amendments of 1972, the regulations published in 1975; and policy clarifications published in 1979, 2001, 2003, and 2005. Finally, Chapter 2 presents relevant Supreme Court and appellate court decisions.

Chapter 3 of the study analyzes the current law pertaining to Title IX as well as a comparison of Title IX's intentions with the current administration and implementation of the law. Chapter 4 provides a summary of findings and conclusions.

### Limitations of the Study

This dissertation is intended to study the relevant history and current laws relating to Title IX of the Education Amendments of 1972. This study will include a review of federal laws and federal court cases that have shaped Title IX and its implementation over the last three decades. No state-specific research is included.

This study is not intended to be a complete summary of the women's movement since the passage of Title IX in 1972. In addition, this dissertation focuses neither on a specific level or field of education. Finally, this study is not intended to make judgments or offer suggestions in regards to the rulings, enforcement, or interpretation of Title IX by the legislative, judicial, or executive branches of our government.

Although Title IX's coverage is not limited to athletics, much of this study focuses on Title IX's impact on collegiate and scholastic athletic programs. The intention of this study is not to ignore Title IX's impact on sexual harassment or sexual discrimination in educational institutions, but rather to focus more specifically on the impact of Title IX on collegiate and scholastic athletics.

## Chapter 2

### Review of the Literature

This chapter presents the chronological development of statutes, policies, regulations, and litigation shaping the expansion and implementation of Title IX of the Education Amendments of 1972. Part 1 of the chapter covers the formation of Title IX, starting with President John F. Kennedy's construction of the President's Commission on the Status of Women in the early 1960's and finishing with President Richard Nixon's signing of the Education Amendments of 1972. This section will cover the formation of Title IX including testimony in Congress about the intentions and wording of the Act.

Part 2 reviews the development of Title IX from its passage in 1972 until the Supreme Court's ruling in *Franklin v. Gwinnett County Public Schools* in 1992. The development of Title IX's regulations, as well as the legal precedents set by the Supreme Court and other federal courts will be discussed.

Part 3 reviews the growth of litigation and subsequent clarifications involving Title IX that arose after *Franklin*. In this part, the Office for Civil Rights, as well as the court system, continues to outline the boundaries of Title IX's administration and implementation.

### Development of Title IX of the Education Amendments of 1972

In the early 1960's, President John F. Kennedy established the President's Commission on the Status of Women (Perrin, 1982). The year-long commission established in 1961, made up of 13 women and 11 men and chaired by Eleanor Roosevelt, was designed to push for equal pay for women. The commission decided that the 14<sup>th</sup> and 15<sup>th</sup> amendments of the United States Constitution would provide females the protection the Equal Rights Amendment was trying to accomplish. Although the report issued by the commission attracted little public attention, it did lead to the Equal Pay Act (1963), which was an amendment to the Fair Labor Standards Act. The Equal Pay Act stated,

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill effort, and responsibility, and which are performed under similar working conditions. (Equal Pay Act, 1963, § 206, d1)

Ultimately, the Act was difficult to enforce because of the tremendous discretion used to gauge equal skill, responsibility, and effort. For example, Brake's research (2004) notes that the Equal Pay Act has no application to male coaches of women's teams at the collegiate level. Furthermore, the Equal Pay Act has failed to equalize the salaries of comparable male and female coaches throughout the collegiate ranks.

The same year the President's commission issued its report, Betty Friedan released her book, *The Feminine Mystique*. The book's significance in the women's movement was unexpected as sales for the book topped three million in hardback alone. The book's purpose was to bring to the forefront the societal roles of women and break

the silence about females working and producing in our society. Furthermore, the book inspired women to look for fulfillment beyond the role of homemaker (Eisenberg & Ruthsdotter, 1998).

As a major component of President Lyndon Johnson's "Great Society", the Civil Rights Act of 1964 attempted to end discrimination in public places, voting procedures, and employment practices. Title VI of the Act states, "No 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" (Civil Rights Act, 1964, § 2000d). Title VII of the Act was a controversial amendment designed to end discrimination based on sex, race, religion, and national origin in employment practices. Section 703 B of Title VII states,

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin. (Civil Rights Act, 1964)

White House leaders expected the addition of the word *sex* to the amendment to cause the overall Act to fail (Eisenberg & Ruthsdotter, 1998); however, the Act was signed on July 2, 1964 with both amendments. The Act created the Equal Employment Opportunity Commission (EEOC) to enforce provisions of Title VI and Title VII (Civil Rights Act, 1964). Title VI of the Civil Rights Act (1964) later became the template for Title IX of the Education Amendments (Title IX Legal Manual, 2001).

After the Civil Rights Act of 1964, females continued to face widespread discrimination from educational institutions. Galles (2004) noted that many schools completely barred women from stereotypical male programs such as medicine and law.

Furthermore, many educational institutions set quotas limiting the number of females admitted. Finally, Galles (2004) noted prestigious schools such as the University of Virginia remained male only prior to the passage of Title IX in 1972. The widespread discrimination of females by educational institutions forced members of Congress to address the problem through legislation.

In 1965, President Lyndon Johnson issued Executive Order 11246, which was a follow-up to the Civil Rights Act of 1964. Executive Order 11246 stated,

The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. (1965)

The Executive Order prohibited federal contractors from discriminating within employment on the basis of race, color, religion, or national origin by persons receiving federal contracts for \$10,000 or more. Executive Order 11246 was later amended in 1967 by Executive Order 11375, which added *sex* and was primarily concerned with discrimination in the workplace (Perrin, 1982). Both executive orders attempted to eliminate discrimination in the workplace, but their effectiveness was debatable because of the difficulty in enforcement.

In 1970, members of Congress began addressing female discrimination within educational settings. The formation of Title IX of the Education Amendments of 1972 grew out of the women's civil rights movement in the late 1960's and 1970's (Galemore, 2003). Discussions about ending gender discrimination in educational institutions started in the Special Subcommittee on Education's hearings on the discrimination of women (Hearings on Sex Discrimination, 1970). Representative Edith Green, the chair of the

subcommittee, was speaking to the inequities between males and females in education when she stated,

Far from the maddening [sic] crowd, where fair play is the rule of the game, and everyone, including women, gets a fair roll of the dice. Let us not fool ourselves, our educational institutions have proven to be no bastion of democracy. (Hearings on Sex Discrimination, 1970, p. 4)

During the hearings, the subcommittee found “massive, persistent patterns of discrimination against women in the academic world” (Hearings on Sex Discrimination, 1970, p. 5). During the hearings, it also became clear that educational institutions were the primary focus of complaints concerning sex discrimination. Both in the House and in the Senate, leaders formulated legislation attempting to end gender discrimination in educational institutions. Examples of discrimination included having higher standards for admission for women, not accepting married women into nursing schools, giving less scholarship money to females and excluding females from honor societies because of their gender (Galemore, 2003).

Although many proposed acts addressing gender discrimination were introduced in 1970, the Comprehensive Manpower Act (1971) was the only significant piece of legislation passed. The Manpower Act was the first law to outlaw sex discrimination against students (Imbornoni, 2003). Also in 1970, the Equal Rights Amendment passed through the House of Representatives by a vote of 350-15 (Timeline of legal history of women in the United States, 2002).

In 1971, the Supreme Court ruled on the constitutionality of a state statute that arbitrarily gave preferences to males. In *Reed v. Reed* (1971), the Court decided that

A mandatory provision of the Idaho probate code that gives preference to men over women when persons of the same entitlement class apply for appointment as administrator of a decedent's estate is based solely on a discrimination prohibited

by and therefore violative of the Equal Protection Clause of the Fourteenth Amendment. (Reed v. Reed, 1971, p. 71)

Chief Justice Berger, writing for a unanimous court, wrote

To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. . .[T]he choice in this context may not lawfully be mandated solely on the basis of sex. (Reed v. Reed, 1971, pp. 74-75)

The Court's ruling in *Reed* served as a precursor to Title IX. In its ruling, the Court warned about the potential dangers of mandating change solely based on sex.

Later in 1971, while discussing the Higher Education Bill, Representatives Edith Green and Patsy Mink proposed a bill to outlaw sexual discrimination in educational institutions. The bill (H.R. 7248) was modeled after Title VI of the Civil Rights Act of 1964 and replaced *race* with *sex*. The bill faced resistance from the educational establishment and organizations representing prestigious schools, athletic programs, and fraternities. These organizations argued the bill would require the integration of football teams, locker rooms, and eventually end fraternities (Mankiller, 1998). Although the bill did not pass in 1971, it foreshadowed Title IX's passage in 1972.

The legislative history of Title IX comes from Congressional testimony in committees and dialogue between members of Congress. Congress included no committee report with the final bill and there were only two references to intercollegiate athletics during the congressional debate. Because Title IX was first introduced as a floor amendment, its legislative history is unusually sparse (Lewis, 1983).

In the House of Representatives, Edith Green was the sponsoring Representative, while Birch Bayh was the sponsoring Senator. While introducing the legislation, Senator Bayh stated "a strong and comprehensive measure is needed to provide women with solid

legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship of women” (Congressional Record, 1972, p. 5808). Title VI of the Civil Rights Act (1964) quickly became the model for Title IX (Title IX Legal Manual, 2001). Senator Bayh was quoted as saying “This is identical language, specifically taken from Title VI of the 1964 Civil Rights Act” (Congressional Record, 1971, p. 30,407). Senator Bayh’s testimony during the passage of Title IX holds great weight in many of the earliest court cases involving Title IX. For example, In *North Haven Board of Education v. Bell* (1982), Justice Blackman wrote “Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction” (North Haven Board of Education v. Bell, 1982, p. 527).

According to Senator Bayh, the goal of Title IX was to “guarantee that women, too, will enjoy the educational opportunity every American deserves” (Congressional Record, 1972, p. 5803). During the debates and committee hearings, the discussions focused on educational opportunities for females not previously available. Senator Bayh’s stated intent of Title IX was to

Provide for the women of America something that is rightfully theirs – an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work. (Congressional Record, 1972, p. 5803)

Furthermore, Bayh recognized that

One of the great failings of the American education system is the continuation of corrosive and unjustified discrimination against women . . . . The only antidote is a comprehensive amendment such as the one now before the Senate. . . . The heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. (Congressional Record, 1972, p. 5807)

Supporting Bayh's efforts to end discrimination, Representative Mink said,

Any college or university that has a policy which discriminates against women applicants . . . is free to do so under Title IX, but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for this support of institutions to which we are denied equal access. (Congressional Record, 1972, p. 5808)

In 1972, Bayh pointed to the link between education and employment opportunities by stating,

The field of education is just one of many areas where differential treatment [between men and women] has been documented because education provides access to jobs and financial security; discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women. (Congressional Record, 1972, p. 5803)

Congressional records reveal some of the topics the members of Congress intended Title IX to cover and not cover. In 1971, one year prior to Title IX's passage, Senator Bayh pushed for an amendment to end gender discrimination in educational institutions receiving federal funds, but a vote was never held (Congressional Record, 1971). In 1972, Bayh asserted that, "this portion of the amendment covers discrimination in all areas where abuse has been mentioned – employment practices for faculty and administrators, scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth" (Congressional Record, 1972, p. 5807). As the amendment continued to be debated, limits on Title IX's coverage arose. Bayh responded to Senator Pell's concerns about the potential scope of Title IX with clarification:

As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution

once students are admitted, and discrimination in employment within an institution, as member of a faculty or whatever. In the area of employment, we permit no exceptions. (Congressional Record, 1972, p. 5812)

Debate surrounding Title IX demonstrated it was intended to cover a wide variety of topics, including admissions, employment, athletics, and educational opportunities for females.

Members of Congress also introduced arguments against Title IX. Members demonstrated concern about reverse discrimination against males in both 1971 and 1972. During Congressional debate in 1971, Senator Dominick questioned if Title IX would “try to keep a certain quota or a certain ratio as between male and female students” (Congressional Record, 1971, p. 30,403). Dominick’s concerns about quotas echoed throughout the debates, but Senator Bayh’s rebuttal stated quotas are “exactly what the amendment intends to prohibit . . . the amendment does not contain, nor does the Senator from Indiana feel it should contain, a quota which says there has to be a 50-50 ratio to meet the test” (Congressional Record, 1971, p. 30,406). In 1972, Bayh insisted that “the language of my amendment does not require reverse discrimination. It only requires that each individual be judged on merit, without regard to sex” (Congressional Record, 1972, p. 5808). Title IX of the Education Amendments of 1972 was eventually passed by Congress and signed by President Richard Nixon in June of 1972.

### Formation of Title IX Regulations and Relevant Judicial Interpretations to 1992

Title IX of the Education Amendments of 1972 addresses sexual discrimination within educational institutions receiving federal financial aid. Signed on June 23, 1972, Title IX has eight total sections.

The first and longest section states, “No person in the U.S. shall, on the basis of sex be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal assistance” (Title IX, 1972, § 1681, a). In Section 1681(a)(1), the law continues, “In regards to admissions to educational institutions, the first section only applies to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education” (Title IX, 1972). The law defines educational institutions as

Any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department. (Title IX, 1972, § 1681, c)

Title IX has exclusions. The law states, “This section shall not apply to any educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization” (Title IX, 1972, § 1681, a3). Section 1681 (a)(4) states, “this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine” (Title IX, 1972). In regards to admissions, Title IX states “this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and

continually from its establishment has had a policy of admitting only students of one sex” (1972, § 1681, a5). Title IX also excludes fraternities and sororities, boy and girl scouts, beauty pageants, and father-son or mother-daughter activities.

Section 1681(b) of Title IX addresses the disparate treatment of individuals because of the imbalance in participation or receipts of federal benefits. It reads,

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, state, section, or other area, *Provided*, that this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex. (Title IX, 1972, § 1681, b)

Section 1682 of Title IX empowers each federal department and agency that grants federal financial assistance the ability to regulate Section 1681 of Title IX.

Section 1682 of Title IX also states,

Compliance with any requirement adopted pursuant to this Section may be effected by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect by the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this Section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such

action shall become effective until thirty days have elapsed after the filing of such report. (Title IX, 1972, § 1682)

The Civil Rights Restoration Act (1987) later amended Section 1682 of Title IX by broadening the definition of program and activity under Title IX.

Section 1687 of Title IX further defines and explains programs and activities. Section 1687 defines programs as any department or agency at the state or local government level that is in charge of the distribution of federal funds or assistance, colleges and educational institutions as well as local education institutions, or corporations, partnerships, or private organizations whose principle purpose is the education, housing, social services, or park recreation (Title IX, 1972). For the sake of educational institutions, Title IX includes any “college, university, or other postsecondary institution, or a public system of higher education; or a local educational agency (as defined in Section 2854(a)(10) of this title), system of vocational education, or other school system” (1972, § 1687).

After the passage of Title IX, the Department of Health, Education, and Welfare (HEW) spent three years developing Title IX’s regulations. During the three year process, members of Congress proposed amendments to restrict the scope of Title IX. The Tower Amendment (1974), which was defeated, attempted to exclude revenue-producing sports from Title IX regulations. Specifically, the Tower Amendment would have removed football from any and all considerations concerning Title IX. Although the Tower Amendment failed, the arguments surrounding the exclusion of revenue sports from Title IX coverage have not ceased (Congressional Record, 1974).

Also in 1974, the Javits Amendment was introduced and passed. The Javits Amendment directed the governing body responsible for Title IX enforcement, which

was the Department of Health, Education, and Welfare (HEW), to implement regulations with “a provision stating that such regulations shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports” (Education Amendments, 1974, § 844). Examples of these situations include the size of event management staff needed at some events compared to others or the cost of equipment needed in football compared to the costs of equipment for volleyball. With the introduction and passage of the Javits Amendment to Title IX, athletics was included into the law (Starace, 2001).

In 1975, Representative O’Hara proposed a bill (H.R. 8394) using the revenues generated from a specific sport to first offset the cost of the specific sport and then be used to support other sports. Later in 1977, a second bill introduced in the Senate (S. 2106) by Senators Tower, Bartlett, and Hruska once again proposed excluding revenue producing sports from Title IX coverage and regulations. Both bills died in their respective committees and never reached the floors for debate (History of Title IX, 2001).

In 1975, the Department of Health, Education, and Welfare issued their final regulations (Title IX Regulations, 1975) to guide the enforcement of Title IX. Signed by President Gerald Ford, the regulations are divided into six parts, including an introduction and subsequent Sections on Title IX’s coverage, admissions policies, and procedures for remedies. According to the written purpose of the regulations, the regulations

Are designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. (Title IX Regulations, 1975, § 106)

Within the published regulations, the admission policies of colleges are addressed. The regulations read, “No person shall, on the basis of sex, be denied admission, or be

subjected to discrimination in admission, by a recipient to whom this subpart applies”

(Title IX Regulations, 1975, § 106.21). The regulations also outlaw giving preferential treatment in admissions by stating,

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart. (Title IX Regulations, 1975, § 106.22)

Subpart D of the guidelines contains information on educational activities, athletics, housing requirements, financial assistance, and other topics. It states,

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. (Title IX Regulations, 1975, § 106.31, d)

The guidelines allow for separate training and locker room facilities (if desired), but they must “be comparable to such facilities provided for students of the other sex” (Title IX Regulations, 1975 § 106.33).

In addition, scholarships and housing must be available to both sexes so that the opportunities afforded one sex is available to the other sex. On this topic, the regulations read,

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. (Title IX Regulations, 1975, § 106.37, c)

The athletics portion of the guidelines receives the most scrutiny, both at the collegiate and scholastic levels (Samuels & Galles, 2003). The general portion of the regulations stipulates that

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise 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. (Title IX Regulations, 1975, § 106.41)

About providing separate teams, the regulations state,

Notwithstanding the requirements of paragraph (a) of this Section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact. (Title IX Regulations, 1975, § 106.41, b)

The third part under the athletics subsection of the Title IX guidelines stipulates that both genders are provided equal athletic opportunity (Title IX Regulations, 1975).

Evaluating the equality of these opportunities requires consideration of ten factors.

Examples of these factors include whether the selection of sports and levels of competition effectively accommodate the interest and abilities of both sexes, the provision of equipment and supplies, scheduling of games and practice time, an opportunity to receive coaching and academic tutoring, assignment and compensation of coaches and tutors, the provision of locker rooms, practice and competitive facilities and appropriate publicity (Title IX Regulations, 1975).

Once the regulations were signed in 1975, elementary schools had one year to comply and high schools and colleges were granted three years to comply.

After the publishing of Title IX's regulations in 1975, the Department of Health, Education, and Welfare (HEW) received over 100 complaints of discrimination (Starace,

2001). Ganzi's (2004) research notes that Congress has never articulated whether it approved or disapproved of the regulations published by the HEW. In response to the numerous complaints, the HEW issued a policy clarification to guide institutions of higher education. According to the Department of Health, Education, and Welfare, the purpose of the clarification was to "explain the regulations so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs" (Title IX Policy Clarification, 1979, p. 2). Although the interpretation is specifically aimed at intercollegiate athletics, its general ideas apply to interscholastic and intramural athletics also.

The 1979 Title IX Policy Clarification is divided into two parts. Part one addresses equal opportunities for athletic participants. Part one of the clarification

Requires the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions can establish a presumption of compliance if they can demonstrate that: average per capita expenditures for male and female athletes are substantially equal in the area of 'readily financially measurable' benefits and opportunities or, if not, that any disparities are the result of nondiscriminatory factors, and benefits and opportunities for male and female athletes, in areas which are not financially measurable, 'are comparable'. (Title IX Policy Clarification, 1979, p. 3)

The first portion of Title IX's Policy Clarification also addresses financial assistance for intercollegiate athletes. Financial assistance, which is essentially scholarships, must be offered for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics (Title IX Regulations, 1975). For example, when 42% of a school's athletes are females, approximately 42% of the athletic assistance offered by the athletic department must go to females. When the percentages are different, the Office for Civil Rights can determine whether the difference is because of

non-discriminatory reasons. Examples of non-discriminatory factors include out-of-state tuition that will at times skew the balance. Also, the timing of the scholarships will be taken into consideration. If a high number of scholarships are offered one year in an attempt to build a program quickly or from scratch, the total percentage may not reflect discrimination, but rather temporary circumstances (Title IX Policy Clarification, 1979).

For the purpose of Title IX regulations, participants are defined as those who receive the normal institutional support affiliated with being a varsity level athlete such as training, tutors, coaching, and equipment. Participants are also students who participate in team practices and team meetings during a sport's season and off season or those listed on the eligibility or squad lists maintained for each sport. Finally, participants include those students who because of injury, cannot satisfy the above requirements but did receive financial aid because of their athletic abilities (Title IX Clarification, 1979).

Besides athletic scholarships, part one of the policy clarification outlines the gender equivalency standards in other areas. Title IX's regulations state recipients - educational institutions that receive federal aid and that operate or sponsor interscholastic, intercollegiate, club or intramural athletics - must "provide equal athletic opportunities for members of both sexes" (Title IX Regulations, 1975, § 106.41).

Evaluating factors include the provision and maintenance of supplies and equipment, scheduling of games and practice times, and other criterion mentioned in the regulations (Title IX Regulations, 1975). When assessing Title IX compliance, the investigators will take the unique aspects of the sports into account when evaluating Title IX compliance. The regulations state that schools are not in compliance if the policies of the institution

are discriminatory in language or effect. Furthermore, non-compliance with Title IX exists if disparities of unjustified nature subsist in the areas of game scheduling and other practices affiliated with athletics, and where the disparities are substantial enough in and of themselves to deny equality of athletic opportunity (Title IX Policy Clarification, 1979).

Part two of the 1979 Policy Clarification addresses how universities accommodate the growing interests in athletics among males and females. Part two

Addresses an institution's obligation to accommodate effectively the athletic interest and abilities of women as well as men on a continual basis. It requires an institution either to follow a policy of development of its women's athletic program to provide the participation and competition opportunities needed to accommodate the growing interests and abilities of women, or to demonstrate that it is effectively (and equally) accommodating the athletic interests and abilities of students, particularly as the interests and abilities of women students develop. (Title IX Policy Clarification, 1979, p. 4)

The HEW listed three reasons for the clarification of its approach. First, the HEW sought to provide "a need for more definitive guidance on what constituted compliance" and further explanation of "equal athletic opportunity" (Title IX Policy Clarification, 1979, p. 4). Second, the HEW attempted to provide concrete examples of compliance. Finally, the HEW recognized that purely financial measures did not accurately depict discrimination (Title IX Policy Clarification, 1979).

Within the Title IX Policy Clarification, the Department of Health, Education, and Welfare "requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes" (1979, p. 8). The HEW assesses Title IX compliance by looking at the following factors: determination of athletic interests and abilities of students, selection of sports offered, and levels of

competition available including the opportunity for team competition (Title IX Policy Clarification, 1979). The process for determining athletic interests and abilities takes into account the nationally increasing levels of interests among female athletes as well as whether the method of determining interest is discriminatory in nature, if the methods of determining ability take into account team performance records, and whether the methods are responsive to the underrepresented sex (Title IX Clarification, 1979).

In regards to the selection of sports to offer, the policy clarification grants educational institutions great latitude in its choices. The clarification does not require the integration of teams; “however, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex” (Title IX Clarification, 1979, p. 9). Some sports, such as contact sports, are excluded from this regulation. If a school provides a contact sport for one sex and not another, it must do so for members of the other sex under the following circumstances: the excluded sex has historically been limited in opportunities or if there is sufficient interest and ability of the excluded sex to sustain a viable team (and reasonable expectations of competition for that team) (Title IX Policy Clarification, 1979).

The Title IX Policy Clarification includes a three-part test to measure the effective accommodation of athletic interests among students within educational institutions. The clarification states,

In effectively accommodating the interest and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities. (Title IX Policy Clarification, 1979, p. 10)

In measuring whether “effective accommodation of interests and abilities” are being satisfied, the test

Measures whether intercollegiate level participation for male and female students are provided in numbers substantially proportionate to their respective enrollments; or 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 interests and abilities of the members of that sex; or 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. (Title IX Policy Clarification, 1979, pp. 10-11)

The three-part test looks at compliance on a program-wide basis. Furthermore, the test looks to see if the competitive sports afford proportionally similar numbers (number of spots on teams) and if the educational institution has a continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex (Title IX Policy Clarification, 1979). The three-part test has been the subject of various discussions among athletic directors, educational leaders, and members of Congress.

The last part of the clarification addresses the enforcement procedures of Title IX. The enforcement process is set forth by the Title IX regulations, which reference the enforcement procedures in Title VI of the Civil Rights Act of 1964. There are two ways in which enforcement is initiated. First, compliance reviews conducted by the Office for Civil Rights, which consist of randomly selecting institutions to check, can lead to changes. Second, the investigative arm of the HEW (now the Office for Civil Rights) must investigate all valid, written, and timely complaints alleging discrimination. The investigators then must inform the recipient and the complainant of the results of the investigation. If the school is in compliance, the case is closed. The Department has 90

days to investigate and an additional 90 days to resolve violations by obtaining a voluntary compliance agreement from the recipient. To be acceptable, a plan must describe the manner in which institution's resources will be used to correct the violation. The plan must also state appropriate timetables for reaching interim goals and full compliance. Finally, if voluntary compliance is unsuccessful, the removal of federal funds begins (Title IX Policy Clarification, 1979).

In 1979, Congress divided the Department of Health, Education, and Welfare into the Department of Health and Human Services and the Department of Education. The Department of Health and Human Services remained an enforcer of Title IX, but the Department of Education reissued the identical regulations for its own use. Over the last 25 years, the Department of Education and the Office for Civil Rights have been the primary enforcement agencies for Title IX (History of Title IX, 2001).

Also in 1979, the Supreme Court ruled that individuals may seek a private remedy under Title IX of the Education Amendments of 1972. In *Cannon v. University of Chicago* (1979), the Supreme Court drew upon the precedent set in *Cort v. Ash* (1975). Although *Cort v. Ash* (1975) did not specifically address a Title IX issue, the *Cort* case determined whether a remedy can be made available to a special class of litigants in light of the Civil Rights Act of 1964. The *Cort* Court established four criteria to measure whether certain litigants can exist. The Court's opinion read,

First, is the plaintiff one of the class for whose special benefit the statute was enacted? . . . Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . Finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law. (*Cort v. Ash*, 1975, p. 69)

The *Cort* test provided a legal framework and precedent for the Court to evaluate the appropriateness of lawsuits under Title IX.

Although *Cannon v. University of Chicago* (1979) did not specifically address athletics, the Court's ruling in *Cannon* allows for future lawsuits related to Title IX to occur. The background information in *Cannon* is basic. Geraldine Cannon was a potential medical school student that was denied admissions to the University of Chicago and Northwestern University because of her gender. Because the university received federal financial assistance, the university was obligated to comply with Title IX regulations (*Cannon v. University of Chicago*, 1979).

During the case, the Supreme Court addressed whether people who feel like they have been discriminated against under Title IX can seek a private right of action. The district court dismissed Cannon's case, claiming that since Title IX had not expressly provided for a private right of action, then the courts could not infer that a private right of action was allowed (*Cannon v. University of Chicago*, 1979). After the district court's ruling, Congress passed the Civil Rights Attorney's Fees Award Act (1976), which authorized an award of fees to prevailing private parties in actions to enforce Title IX. In light of Congress's actions, the district court granted a petition for rehearing the case, but once again ruled that a private right of action was not allowed under Title IX.

In the 7 to 2 decision, the Supreme Court overruled the 2<sup>nd</sup> Circuit Court of Appeals and allowed for Title IX to include a private right of action. Justice Stevens, writing for the majority, noted the similarities between Title IX and the models for Title IX, Title VI and Title VII of the Civil Rights Act of 1964. He wrote,

As to the second factor, the legislative history of Title IX rather plainly indicates that Congress intended to create a private cause of action. Title IX was patterned after Title VI of the Civil Rights Act of 1964, and the drafters of Title IX explicitly assumed that it would be interpreted and enforced in the same manner as Title VI, which had already been construed by lower federal courts as creating a private remedy when Title IX was enacted. (*Cannon v. University of Chicago*, 1979, p. 694)

The ruling in *Cannon* illustrated the Court's acknowledgment between the connection between Title IX and its model, Title VI of the Civil Rights Act of 1964.

Title IX sought to accomplish two related goals when compared to Title VI of the Civil Rights Act of 1964. First, Congress wanted to avoid federal resources being used by institutions that continue discrimination based on gender. Second, Title IX intended to provide citizens effective protection against those practices (Congressional Record, 1972). In Justice Stevens's opinion, he wrote

Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination. Neither statute expressly mentions a private remedy for the person excluded from participation in a federally funded program. The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years. In 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy. Most particularly, in 1967, a distinguished panel of the Court of Appeals for the Fifth Circuit squarely decided this issue in an opinion that was repeatedly cited with approval and never questioned during the ensuing five years. In addition, at least a dozen other federal courts reached similar conclusions in the same or related contexts during those years. It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX. (*Cannon v. University of Chicago*, 1979, pp. 695-698)

Stevens continued by stating the Court's ruling "is not inconsistent with an intent . . . to have such remedy available" (*Cannon v. University of Chicago*, 1979, p. 717). With the

Court's ruling in *Cannon*, individuals were granted a private right of action under Title IX. By the Court granting private parties the ability to sue educational institutions, the Office for Civil Rights was not exclusively responsible for enforcing Title IX and its regulations.

In 1980, the National Collegiate Athletic Association (NCAA) brought suit against the Department of Health, Education, and Welfare claiming the Department's Title IX regulations would cause its member institutions to suffer, therefore, harming the NCAA. In *National Collegiate Athletic Association v. Califano* (1980), the 10<sup>th</sup> Circuit Court of Appeals ruled the NCAA lacked the legal standing to challenge the Department of Health, Education, and Welfare's Title IX regulations. The NCAA sought "injunctive relief seeking to invalidate regulations promulgated by the Department of Health, Education, and Welfare with respect to sex discrimination in athletics" (*NCAA v. Califano*, 1980, p. 1382). In its ruling, the 10<sup>th</sup> Circuit did not feel the NCAA was injured by the 1975 Title IX Regulations and the plaintiff's claims of potential injury to its organization were speculative at best. The 10<sup>th</sup> Circuit ruled the NCAA did not have a claim against the Department of Health, Education, and Welfare and dismissed the lawsuit (*National Collegiate Athletic Association v. Califano*, 1980).

In 1981, *Newport v. Fact Concerts, Inc.* asked the U.S. Supreme Court to rule if municipalities were exempt from punitive damages under 42 U.S.C. 1983. Because school boards and local governments are often defendants in Title IX cases, *Newport's* ruling impacts Title IX's enforcement procedures. Section 1983 states,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. (42 U.S.C., 1871)

In a 6-3 vote, the Court held “municipalities are immune from punitive damages under 1983” (*Newport v. Fact Concerts Inc.*, 1981, p. 258). In *Schultzen v. Woodbury Central Community School District* (2002), the district court clarified the impact of *Newport* by writing,

In *Newport*, the Court set out a two part test to determine whether punitive damages were available against a municipality. First, the Court held that Congress must evince an intent to eviscerate the well-established immunity of a municipal corporation from punitive damages before courts are empowered to award punitive damages against a municipality. Relying on the common-law tradition of municipal immunity, which was well entrenched at the time Section 1983's predecessor was enacted in 1871, the Court reasoned that Congress must have been aware of this tradition; therefore, had it intended to abolish the doctrine, Congress would have so provided. (*Schultzen v. Woodbury Central Community School District*, 2002, pp. 263-265)

The immunity granted to municipalities is significant to Title IX because of the number of lawsuits against school districts during the 1990s and 2000s.

Ten years after Title IX's passage, the U.S. Supreme Court considered the question of whether Title IX covers employees of educational institutions from gender discrimination. Until 1982, Title IX's coverage was mainly focused on the students within educational institutions, not the employees. In *North Haven Board of Education v. Bell* (1982), the Supreme Court ruled in a 6-3 decision that Title IX did cover employees and protected them from sexual discrimination with respect to hiring and employment. Specifically, the Court looked at subpart E of the Title IX regulations, which read

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment,

consideration, or selection therefore, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance. (1975, § 106.51)

Within Justice Blackmun's majority opinion, the majority relied heavily on congressional records from the early 1970's to determine the legislative intent of Title IX.

According to the records of 1972, Senator Bayh noted that

Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs. . . The heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions. Enforcement powers include fund termination provisions – and appropriate safeguards – parallel to those found in Title VI of the 1964 Civil Rights Act. (Congressional Record, 1972, p. 5803)

Since Senator Bayh was the sponsoring senator of the amendment, much of his testimony is used as an authoritative guide to the statute's construction (*North Haven Board of Education v. Bell*, 1982). After considering the Congressional testimony of Bayh, the Supreme Court came to the conclusion "that employment discrimination comes within the prohibition of Title IX. There is no doubt that if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language" (*North Haven Board of Education v. Bell*, 1982, p. 520). With the Court's ruling in *North Haven*, students and employees within educational institutions were covered under Title IX.

Also in 1982, the U.S. Supreme Court ruled on whether a university's denial of admissions solely because of gender violated the Equal Protection Clause of the 14<sup>th</sup> Amendment. Joe Hogan applied for admissions into the Mississippi University for Women's School of Nursing but was denied specifically because of his gender. Hogan sued and claimed the university violated his Equal Protection rights under the 14<sup>th</sup> Amendment to the U.S. Constitution. The 14<sup>th</sup> amendment reads,

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Constitution, 1868)

In *Mississippi University for Women v. Hogan* (1982), Justice O'Connor writing for the narrow majority, wrote

That this statutory policy discriminates against males, rather than against females, does not exempt it from scrutiny or reduce the standard of review. Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. [citing *Kirchberg v. Feenstra*, 450 U.S. 455, 1981]. The burden is met only by showing at least that the classification serves "important governmental objectives, and that the discriminatory means employed" are "substantially related to the achievement of those objectives." [citing *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 1980] (*University for Women v. Hogan*, 1982, p. 719)

The 5-4 vote by the U.S. Supreme Court determined Mississippi University's female only admissions policy violated the 14<sup>th</sup> Amendment of the Constitution. The Court ruled that the university's policy of granting credit for only female students to compensate women for alleged discrimination did not meet the "exceedingly persuasive justification" desired by the Court (*Mississippi University for Women v. Hogan*, 1982, p. 719).

In *Grove City College v. Bell* (1984), Title IX's application to collegiate athletics was indirectly challenged. In this case, the Supreme Court was faced with two significant questions. First, can the Department of Health, Education, and Welfare begin the process of terminating federal funds if an institution refuses to execute an Assurance of Compliance with Title IX? Next, does an institution's willingness to accept federal funds

in one program or activity automatically mean all the institution's programs and activities must comply with Title IX (*Grove City College v. Bell*, 1984)?

Grove City College made the decision not to accept federal funds from the government; however, the college continued to enroll students who received federal grants to assist in paying tuition and fees. After a formal Title IX complaint, Grove City refused to grant an Assurance of Compliance to Title IX arguing that the federal grants did not trigger institution-wide coverage under Title IX (*Grove City College v. Bell*, 1984). At the same time, the Department of Health, Education, and Welfare (HEW) had begun the process of removing federal funding from the college. The 3<sup>rd</sup> Circuit Court of Appeals stated that the acceptance of students receiving federal grants did trigger compliance with Title IX in the admissions program, but not all of the college's programs and activities (*Grove City College v. Bell*, 1984).

With regards to the question about whether a university's denial to grant an Assurance of Compliance to Title IX, Justice White, writing for the majority, wrote "A refusal to execute a proper program-specific Assurance of Compliance warrants termination of federal assistance to the student financial aid program" (*Grove City College v. Bell*, 1984, p. 574). The Court's ruling defined the implementation and enforcement procedures of Title IX for the mid 1980s.

The Court ruled that Title IX did not apply to all areas of an educational institution. Since Title IX was modeled after Title VI of the Civil Rights Act of 1964, the Court, in a unanimous vote, concluded that an institution's receipt of federal funds did mandate compliance with Title IX in that program; however, it did not mandate compliance in all programs or activities. Justice White wrote,

We conclude that the receipt of BEOG's [Basic Educational Opportunity Grants, which are grants through the Department of Education] 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 to the College's own financial aid program, and it is that program that may properly be regulated under Title IX. (*Grove City College v. Bell*, 1984, p. 575)

With this ruling, the Supreme Court significantly limited the scope of Title IX's coverage. Because athletic departments rarely received federal funding directly, athletic departments were no longer obligated to comply with Title IX's regulations (*Grove City College v. Bell*, 1984). The ruling in *Grove City* essentially removed every university's athletic program from the scope of Title IX (Starace, 2001). The significance of the ruling in *Grove City College* was short-lived because of Congress's passage of the Civil Rights Restoration Act (1987), but the ruling greatly shaped Title IX's impact during the 1980's and stunted the expansion of athletic opportunities for females during the decade (Suggs, 2005).

Three years after the U.S. Supreme Court's ruling in *Grove City College v. Bell* (1984), members of Congress sought to redefine Title IX. Congress passed the Civil Rights Restoration Act in 1987, which expanded the definitions of "program" and "activity" under Title IX. Essentially, the Act overturned the Supreme Court's decision in *Grove* and reiterated Congress's intentions of Title IX. The Act read,

Congress finds that certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX of the Education Amendments of 1972 . . . ; and legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered. (Civil Rights Restoration Act, 1987, § 2)

The Civil Rights Restoration Act (1987) reiterated that if any activity or program at an educational institution receives federal funds, all of the institution's departments are

bound by Title IX's regulations. Congress clearly favored a broad interpretation of Title IX and passed the Act over President Reagan's veto, which brought athletics back under Title IX's guidelines.

Also in 1987, Title IX's governing regulations concerning athletics were first challenged in court. A group of female athletes at Temple University claimed they suffered discrimination because of poorer dining facilities, tutoring opportunities, and housing situations when compared to male athletes at the university. In *Haffer v. Temple University* (1987), the court noted, "This appears to be the first case to challenge the operation of an intercollegiate athletic program on federal equal protection grounds" (*Haffer v. Temple University*, 1987, p. 518). During its ruling, the district court recognized the overall goal of Title IX and its regulations. The court reiterated that Temple did not have to offer athletics at its university, but if it so chooses, it must "be made available to all on equal terms" (*Haffer v. Temple University*, 1987, p. 525). Essentially, the court's ruling noted colleges are not forced to offer athletic opportunities to anyone, but if they do, they must comply with Title IX and Title IX's regulations (*Haffer v. Temple University*, 1987).

In 1990, ten years after the first publication of Title IX's Legal Manual, the Office for Civil Rights reissued its athletics investigator's manual. The stated purpose of the new manual was "to assist investigators of the Office for Civil Rights (OCR) in the investigations of interscholastic and intercollegiate athletics programs offered by educational institutions required to comply with Title IX of the Education Amendments of 1972" (Bonnette & Daniel, 1990, p. 3). The investigators are provided hypothetical

models of compliance and non-compliance to compare to the possible real-life scenarios they may encounter.

When investigating specific Title IX complaints related to athletics, the OCR gives specific attention to the lengthy and difficult investigation process. About Title IX compliance, the manual reads,

The decision regarding compliance involves determining which benefits and services are provided to men and which are provided to women, whether there are any differences between benefits and services for men and women, and whether these differences have a negative impact on athletes of one sex, and thus, may result in noncompliance. (Bonnette & Daniel, 1990, p. 5)

The manual acknowledges the considerable variety in compliance problems the investigator may come across. Noting the difference between *disparity* and *difference*, the OCR defines *disparity* as “a difference, on the basis of sex, in benefits or services, that has a negative impact on athletes of one sex when compared with benefits or services available to athletes of the other sex” (Bonnette & Daniel, 1990, p. 9). Bonnette and Daniel acknowledge that a difference does not automatically imply discrimination. In addition, Title IX does not require institutions to offer competitive teams. Furthermore, the teams representing educational institutions are not obligated to be successful, only that the benefits to male and female athletes are equivalent and often equal.

Twenty years following the passage of Title IX, the Supreme Court decided a case that forever changed Title IX’s enforcement procedures. Prior to their ruling in *Franklin v. Gwinnett County Public Schools* (1992), the procedures for enforcement involved either a complaint with the Office for Civil Rights and the potential termination of federal funds or a temporary injunction granted by the courts. Although the removal of federal funds would be damaging to educational institutions, the OCR had never reached this

step of enforcement. Furthermore, when courts granted temporary injunctions in favor of the plaintiffs, the injunctions did not always provide immediate relief to the students.

The Court's ruling in *Franklin* added another possibility in the enforcement of Title IX.

*Franklin v. Gwinnett County Public Schools* (1992) asked the Court to decide a basic question regarding Title IX: are plaintiffs eligible for financial awards in Title IX lawsuits? Because Congress did not explicitly state whether financial awards were available or not available under Title IX, the Court was left to interpret the history of Title IX and decide for itself. The Supreme Court stated, "If a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief" (*Franklin v. Gwinnett County Public Schools*, 1992, p. 67). Furthermore, the Court looked at the circumstances in the *Franklin* case and found little doubt that Franklin was a victim of sexual discrimination because of the numerous sexual advances and constant sexual harassment by her teacher. Although the school and district were informed of similar allegations against the teacher, neither the school administration nor school district acted against the teacher.

The facts of the case combined with the school's attempt to handle the situation led to the unanimous decision against the school district. Writing for the majority, Justice White wrote, "Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe" (*Franklin v. Gwinnett County Public Schools*, 1992, p. 72). Finally, the Court looked at other possible remedies and decided that financial damages were the only reasonable type of damages. In Justice White's opinion, he addresses in adequacies of non-financial damages by writing,

Finally, the United States asserts that the remedies permissible under Title IX should nevertheless be limited to backpay and prospective relief. In addition to diverging from our traditional approach to deciding what remedies are available for violation of a federal right, this position conflicts with sound logic. First, both remedies are equitable in nature, and it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief. . . .

Moreover, in this case, the equitable remedies suggested by respondent and the Federal Government are clearly inadequate. Backpay does nothing for petitioner, because she was a student when the alleged discrimination occurred. Similarly, because Hill - the person she claims subjected her to sexual harassment - no longer teaches at the school and she herself no longer attends a school in the Gwinnett system, prospective relief accords her no remedy at all. The government's answer that administrative action helps other similarly-situated students in effect acknowledges that its approach would leave petitioner remediless. (*Franklin v. Gwinnett County Public Schools*, 1992, pp. 76-77)

Justice White concluded, “a damages remedy is available for an action brought to enforce Title IX” (*Franklin v. Gwinnett County Public Schools*, 1992, p. 77).

The impact of the *Franklin* decision was profound. The Court’s decision opened another option for victims of sex discrimination by educational institutions. Prior to the Court’s ruling in *Franklin*, people who felt their Title IX right’s had been violated were either forced to file a complaint with the Office for Civil Rights or attempt a lawsuit and fight for a temporary injunction against the educational institution. Furthermore, the willingness of the court system to grant financial awards to victims caused educational institutions throughout the country to reanalyze their Title IX situations. Although *Franklin* did not involve athletics, the enforcement procedures created by the U.S. Supreme Court influenced athletic departments across the country.

Soon after the *Franklin* decision in 1992, the NCAA completed and issued a gender-equity study of its member institutions. The study highlighted the significant levels of discrimination as judged by Title IX’s regulations and 1979 Policy Clarification.

After the *Franklin* decision in 1992, the levels of female athletic opportunities began to rise significantly (Starace, 2001).

#### Relevant Court Cases and Federal Statutes from 1992 to Current

After the Supreme Court's decision in *Franklin*, the enforcement procedures significantly changed. This ruling forced colleges and high schools to adapt to gender differences or face potential costly and public lawsuits. During the 1990's, court cases at various levels defined the parameters of Title IX. Also during the 1990's, budgetary constraints faced by higher education institutes across the country forced many colleges to eliminate sports teams (Stevens, 2004). Finally, the implementation of Title IX and specifically the three-part test found in the 1979 Title IX Policy Clarification by educational institutions broadened the law's impact.

In *Favia v. Indiana University of Pennsylvania* (1993), the courts looked at the manner in which colleges handle Title IX injunctions from courts. During the 1990-1991 school year, the Indiana University of Pennsylvania (IUP) supported 18 varsity teams with a total of 503 athletes. The university decided to cut women's gymnastics and field hockey as well as the men's soccer and table tennis teams in response to growing budgetary concerns. All four of the teams were varsity status.

In October of 1992, members of the female gymnastics and field hockey teams brought a class-action lawsuit against IUP seeking temporary injunctive relief and the reinstatement of the female teams. The district court applied the three-part test found in the Title IX Policy Clarification (1979), which requires either substantial proportionality, a history and continuing practice of program expansion, or evidence of the full and effective accommodation of students' interests and abilities. Before the cutbacks, IUP's

disparity between female enrollment and female athletics participation was 17%, but after the cutbacks, the disparity climbed to 21%. With the large gender disparity before the cuts, IUP failed the first part of the test, substantial proportionality, both before and after the cutbacks. IUP also failed the second part of the test. Although the district court noted a history of meeting athletic opportunities, IUP failed to demonstrate a continued practice of expanding opportunities (*Favia v. Indiana University of Pennsylvania*, 1993). By cutting teams already established, IUP failed the third part of the test by not fully and effectively accommodating the interests of the underrepresented sex. The district court granted a temporary injunction forcing IUP to comply. IUP's response and subsequent actions highlight the major legal question: in scenarios where teams must respond to court ordered injunctions, can universities modify the court order in an attempt to comply with Title IX?

In response to the court's temporary injunction, Indiana University of Pennsylvania wanted to add female soccer instead of reinstating the female gymnastics team. IUP argued that the overall number of female participation opportunities would increase if soccer were allowed instead of gymnastics. Although the third part of the test, full and effective accommodation would not occur for the female gymnasts, IUP argued that they would now be closer to substantial proportionately, which is part one of the test. The district court would not allow the substitution and stated if it did allow the substitution, it would make "the original plaintiffs in this case losers" (*Favia v. Indiana University of Pennsylvania*, 1993, p. 578). IUP appealed the district court's ruling, but the 3<sup>rd</sup> Circuit Court of Appeals upheld the lower court's ruling. The 3<sup>rd</sup> Circuit Court acknowledged that the participation rates would have increased for females, but the

aggregate financial expenditures for the female athletes would actually decrease as a total percentage of the athletic budget. This decrease would reflect a further disparity in athletic opportunities. The district court's ruling upheld by the 3<sup>rd</sup> Circuit demonstrates the difficulty of cutting female athletic teams in times of budgetary crunches.

In the early 1990's, *Cohen v. Brown University* (1993), and the resulting appeals deeply influenced Title IX's impact on schools and discrimination. Although the case never reached the Supreme Court, *Cohen* is cited in numerous cases because of the arguments used by Brown University during the case and the precedents set by the district court and the 1<sup>st</sup> Circuit Court of Appeals. Furthermore, the 1<sup>st</sup> Circuit Court of Appeals' ruling in *Cohen* has been echoed by every Circuit Court deciding similar Title IX cases (*Kelley v. Board of Trustees*, 1994, *Neal v. Board of Trustees of the California State Universities*, 1999, *Pederson v. Louisiana State University*, 2000).

In May of 1991, Brown University relegated two female and two male teams from varsity status to donor-funded varsity status. At the varsity level status, the school funded the sports, but when demoted to donor-funded varsity status, the sports had to become self-sufficient. Because of the demotion, all four sports struggled financially and lost varsity privileges because of the inability to become self-sufficient. The female athletes brought a class-action lawsuit for "all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown" (*Cohen v. Brown*, 1993, p. 892).

The district court granted Amy Cohen and the other female athletes' injunctive relief and would not allow Brown to demote the female athletic teams to donor-funded

status until the case could be decided on its merits. In its ruling, the district court noted “Brown is cutting off varsity opportunities where there is still great interest and talent, and where Brown still has an imbalance between men and women varsity athletes in relation to their undergraduate enrollments” (Cohen v. Brown University, 1993, p. 892). The plaintiffs argued the Title IX violation “was allegedly exacerbated by Brown's decision to devalue the two women's programs without first making sufficient reductions in men's activities or, in the alternative, adding other women's teams to compensate for the loss” (Cohen v. Brown University, 1993, pp. 892-893)

Brown University appealed to the 1<sup>st</sup> Circuit Court of Appeals seeking relief from the temporary injunction granted by the district court. The Circuit Court was to decide the pivotal issue: did Brown University effectively accommodate the interests and abilities of its student body? The 1<sup>st</sup> Circuit Court used the three-part test found in the 1979 Title IX Policy Clarification issued by the Department of Health, Education, and Welfare. The Circuit Court noted its reliance on the Clarification was because “the degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs” (Cohen v. Brown, 1993, p. 895)

The 1<sup>st</sup> Circuit stated that Brown’s inability to accommodate the interests and abilities of its students constituted a Title IX violation. The first part of the three-part test requires a university to achieve substantial proportionality, but Brown University failed this part because the university had a 13% disparity between the percentage of female undergraduate students and the percentage of female athletes within the athletic

department. Noting the importance of the first part of the test, the Circuit Court stated substantial proportionality provides

A safe harbor for those institutions that have provided athletic opportunities in numbers 'substantially proportionate' to the gender composition of their student bodies. A university which 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. (Cohen v. Brown University, 1993, pp. 897-898)

The second part of the three-part test requires universities to demonstrate a history and continuing practice of program expansion (Title IX Policy Clarification, 1979). Specifically, the Circuit Court wanted to see that “an ongoing effort is made to meet the needs of the under-represented [sic] gender” (Cohen v. Brown, 1993, p. 898). Although Brown had aggressively added female sports teams in the late 1970’s and early 1980s, Brown had not added a female team since 1982. The 1<sup>st</sup> Circuit was not convinced that Brown had demonstrated a history and continuing practice of program expansion. The Circuit Court noted, “a university deserves appreciable applause for supercharging a low-voltage athletic program in one burst rather than powering it up over a longer period, such energization, once undertaken, does not forever hold the institution harmless” (Cohen v. Brown University, 1993, p. 903). The Court continued by noting Brown’s inability to create a new female program in twelve years “suggest something far short of a continuing practice of program expansion” (Cohen v. Brown University, 1993, p. 903).

Having determined that Brown University did not meet the first two parts of the three-part test required in the policy clarification, the 1<sup>st</sup> Circuit Court looked to the third part, the full and effective accommodation test. This part of test is met by

Ensuring participatory opportunities at the intercollegiate level when, and to the extent that, there is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of

intercollegiate competition for that team. (Cohen v. Brown University, 1993, p. 898)

The 1<sup>st</sup> Circuit Court of Appeals upheld the temporary injunction and stated that an “institution violates Title IX if it ineffectively accommodates its students’ interests and abilities in athletics under 34 C.F.R. 106.41 c1, regardless of its performance with respect to other Title IX areas” (Cohen v. Brown University, 1993, p. 888). Because Brown University had demoted two female teams already participating at the varsity level status, the 1<sup>st</sup> Circuit Court found Brown University in violation of the third part of the test. Furthermore, the court found that because Brown had failed to satisfy any part of the three-part test, they affirmed the district court’s injunction and ordered Brown to reinstate the women’s volleyball and gymnastics teams.

In its ruling, the 1<sup>st</sup> Circuit Court’s wording proved specifically significant for in future court cases. The 1<sup>st</sup> Circuit Court stated,

Even when male athletic opportunities outnumber female athletic opportunities, and the university has not met the first benchmark (substantial statistical proportionality) or the second benchmark (continuing program expansion) of the accommodation test, the mere fact that there are some female students interested in a sport does not ipso facto require the school to automatically provide a varsity team in order to comply with the third benchmark. (Cohen v. Brown University, 1993, p. 898)

The Circuit Court also illustrated how universities can comply with Title IX by writing,

Title IX does not require that a school pour ever-increasing sums into athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender. (or reducing them to a much lesser extent). (Cohen v. Brown University, 1993, pp. 898-899)

The district court and the 1<sup>st</sup> Circuit Court established two key precedents in its rulings.

First, substantial proportionality provided schools seeking to compliance with Title IX a

“safe harbor”, meaning that once substantial proportionality was displayed, the school had demonstrated the full accommodation of athletic interests. Second, universities are free to reduce male athletic slots in attempts to achieve substantial proportionality and Title IX compliance.

The case of *Gonyo v. Drake University* (1993) in the early 1990’s highlighted a growing trend of male-initiated lawsuits involving Title IX. Due to financial concerns in the 1992-1993 academic year, Drake University announced its intention to discontinue the men’s wrestling team. The male wrestlers filed a class-action lawsuit claiming Drake University violated their Title IX rights as well as the Equal Protection Clause of the 14<sup>th</sup> Amendment. Also, the plaintiffs argued Title IX was unconstitutional as well as Drake University breached a legal contract with the scholarship wrestlers at the university.

During Drake’s defense, the university acknowledged that “Wrestling is not a revenue producing sport, such as football and basketball. In recent years, many other colleges and universities, due to budget constraints, have discontinued their wrestling programs at the Division I level” (*Gonyo v. Drake University*, 1993, p. 989). In its ruling, the district court looked at the impact that a temporary injunction and potential reinstatement of the wrestling team would create. First, the ruling would require Drake University to reinstate the team and suffer the financial difficulties it was trying to avoid. Second, the court acknowledged the power of higher education institutions in its allocation of funds. The court stated,

Academic freedom, of course, does not immunize defendants from civil liability, including injunctive relief, for any violations of the law, . . . but courts should be very cautious about overriding, even temporarily, a school’s decisions in these areas, especially absent a showing that plaintiffs are likely to ultimately prevail. (*Gonyo v. Drake University*, 1993, p. 989)

Within its ruling, the district court suggested that the plaintiffs would not face much success at the subsequent levels of the judicial branch. The district court concluded “that the harm to Drake in issuing a preliminary injunction is far greater than the harm to plaintiffs in not doing so” (*Gonyo v. Drake University*, 1993, p. 990).

The district court also ruled that the application of Title IX and its regulations were constitutional and did not violate the Equal Protection Clause of the 14<sup>th</sup> Amendment. In its ruling, the court stated that there was no constitutional right to participate in college athletics and dismissed the validity of the claim. The district court noted that “Drake is trying to remedy disparity in its athletic programs by encouraging greater athletic participation by women through scholarship offerings to them. It is women, not men, who have historically been and still are underrepresented in Drake’s athletic program” (*Gonyo v. Drake University*, 1993, p. 991). Finally, the district court concluded Drake University did not breach their contract with the male athletes because Drake University had offered to keep the athletes on scholarships. During the case, Drake acknowledged plans to dismiss the team had been discussed prior to 1992, but the program was allowed to move forward with the idea that they had the “full-support” of the university (*Gonyo v. Drake University*, 1993).

In *Gonyo v. Drake University* (1993) and many other cases, the elimination of male teams in order to satisfy substantial proportionality has been an accepted method of achieving Title IX compliance. In Brake’s research (2004), she criticized this method as being an impeding obstacle to further progress for female athletes. Arguing that the purpose of Title IX was to expand athletic and educational opportunities, the practice of limiting male athletic slots does not align with the intention of Title IX (Brake, 2001,

Brake, 2004). Noted by the 1<sup>st</sup> Circuit Court in *Cohen*, universities can decrease the athletic opportunities of male athletes to achieve Title IX compliance.

In *Roberts v. Colorado State Board of Agriculture* (1993), Colorado State University attempted to remove both the baseball and softball teams because of budgetary constraints. The members of the softball team sued in district court claiming the Colorado State Board of Agriculture (the governing body of Colorado State University) violated their Title IX rights. The district court agreed with the softball players and granted a permanent injunction reinstating the softball program. Approximately three weeks later, the district court held a status conference and ordered Colorado State to move faster in its reestablishment of the team. The Colorado State Board of Agriculture then appealed claiming there was no Title IX violation, and if there had been one, the district court did not have the authority to order the softball program reinstated (*Roberts v. Colorado State Board of Agriculture*, 1993).

*Roberts* presented the district court and the 10<sup>th</sup> Circuit Court the following question: when faced with financial constraints, can universities cut both male and female sports if they are equivalent (i.e. baseball and softball)? The 10<sup>th</sup> Circuit Court of Appeals analyzed Colorado State University's Title IX compliance using the three-part test found in the 1979 Title IX Policy Clarification. With a 10.5% disparity between female undergraduate enrollment and athletic participation numbers, CSU failed the substantial proportionality part of the test. Since athletic opportunities for females declined steadily in the 1980's, the college could not demonstrate a continuing practice of program expansion; therefore CSU failed the second part of the test. Finally, because the

softball team had previously played a competitive schedule at the varsity level, the 10<sup>th</sup> Circuit Court ruled that CSU had failed the third part of the test.

In *Roberts*, the 10<sup>th</sup> Circuit Court of Appeals used the precedents established in *Cohen v. Brown* (1993). In *Cohen*, the 1<sup>st</sup> Circuit Court of Appeals established that “an institution may violate Title IX simply by failing to accommodate effectively the interests and abilities of student athletes of both sexes” (Cohen v. Brown University, 1993, p. 888). Also in *Cohen*, the 1<sup>st</sup> Circuit Court of Appeals stated, “If there is sufficient interest and ability among members of the statistically underrepresented gender, not satisfied by existing programs, an institution necessarily fails this part of the test” (Cohen v. Brown University, 1993, p. 889). Because of its inability to show compliance with the three-part test, CSU was found in violation of Title IX.

In its opinion, it is clear that the 10<sup>th</sup> Circuit Court of Appeals recognized the difficulty in funding athletic programs. CSU argued its decision to cut both the men’s baseball team and the women’s softball team was not discriminatory in nature. In its ruling, the Circuit Court stated,

We recognize that in times of economic hardship, few schools will be able to satisfy Title IX’s effective accommodation requirement by continuing to expand their women’s athletics programs. Nonetheless, the ordinary meaning of the word ‘expansion’ may not be twisted to find compliance under this part when schools have increased the relative percentages of women participating in athletics by making cuts in both men’s and women’s sports programs. Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men’s and women’s athletic participation rates become substantially proportionate to their representation in the undergraduate population. (*Roberts v. Colorado State Board of Agriculture*, 1993, p. 824)

Colleges and universities that have previously established female athletic teams will have difficulties cutting them if they are not in compliance with the proportionality test (Brake, 2001).

By 1993, universities and colleges were aware of the potential damages Title IX lawsuits could cause. During this time, many colleges settled lawsuits in efforts to end public discrimination battles. In Title IX cases, settlements reached between plaintiffs and educational institutions provide further guidance on the Title IX issues facing colleges today (Semo & Bartos Jr., n.d.).

In July of 1993, the female soccer players at Auburn University brought a class-action lawsuit arguing that Auburn's refusal to elevate the club team to varsity status violated the athletes' Title IX rights. In the settlement, Auburn agreed to elevate the soccer team to varsity status, commit \$400,000 to the operating expenses of the soccer team over two years, construct permanent practice and game facilities for the team, phase in full scholarship amounts for the program, and pay the attorneys fees and expenses (Auburn University Settlement, 1993).

Following the Auburn settlement in 1993, the University of Texas settled a lawsuit with the female athletes arguing the University of Texas violated their Title IX rights by "failing to effectively accommodate the interests" of the female athletes (University of Texas at Austin Settlement, 1993, p. 2). Within the settlement, Texas agreed to increase their percentage of female athletes from 23 to 44, which was within 3 percentage points of the female undergraduate enrollment rate, within three years. Next, the university agreed to add women's varsity soccer and softball with permanent practice and game facilities. Texas also agreed to increase the female scholarships by 10%, from 32% to 42%. Finally, Texas agreed to form a Title IX Compliance Committee and evaluate the university's standing on a yearly basis (University of Texas at Austin

Settlement, 1993). The settlement by both Auburn University and the University of Texas demonstrate the proactive behavior needed to avoid lengthy lawsuits in the future.

In 1994, the 7<sup>th</sup> Circuit Court of Appeals heard a complaint from the male swimmers at the University of Illinois claiming that when the university cut the men's swimming team, the university violated the male swimmers' Title IX rights. Similar to the circumstances surrounding the male wrestlers in *Gonyo v. Drake University* (1993), the University of Illinois's decision to cut the men's swimming team was in response to efforts to reduce budgetary concerns and also to comply with Title IX (Kelley v. Board of Trustees, 1994). The university did not terminate the female swimming team because

If the university had terminated the women's swimming program it would have been vulnerable to a finding that it was in violation of Title IX. Female participation would have continued to be substantially disproportionate to female enrollment, and women with a demonstrated interest in intercollegiate athletic activity and demonstrated ability to compete would be left without an opportunity to participate in their sport. (Kelley v. Board of Trustees, 1994, pp. 269-270)

In its ruling, the 7<sup>th</sup> Circuit Court cited *Cohen's* ruling stating, "that if the percentage of student-athletes of a particular sex is substantially proportionate to the percentage of students of that sex in the general student population, the athletic interests of that sex are presumed to have been accommodated" (Cohen v. Brown University, 1993, p. 898). The plaintiffs argued that the three-part test found in the 1979 Title IX Policy Clarification distorted the intention of Title IX. About Title IX, the plaintiffs argued "[Title IX] has through some alchemy of bureaucratic regulation been transformed from a statute which prohibits discrimination on the basis of sex into a statute that mandates discrimination against males" (Kelley v. Board of Trustees, 1994, p. 270). The court disagreed and ruled that the policy clarification "merely creates a presumption that a school is in compliance with Title IX and the applicable regulations

when it achieves such statistical balance” (Kelley v. Board of Trustees, 1994, p. 271).

Finally, the court added,

Even if the three-part test favored women, it is appropriate to consider gender in establishing a remedy for a Title IX violation as it serves the important objective of ensuring that in instances where overall athletic opportunities decrease, the actual opportunities available to the underrepresented gender do not. (Kelley v. Board of Trustees, 1994, p. 272)

The 7<sup>th</sup> Circuit Court dismissed both the plaintiffs Title IX claim and their claim that the actions of the university violated the 14<sup>th</sup> Amendment.

In research published within various law journals, part one of the three-part test is recognized as the dominant tool in measuring whether colleges and universities are effectively accommodating the interests of the underrepresented sex. Noting that most colleges would prefer to satisfy part one of the test, substantial proportionality, Ganzi (2004) reiterated that colleges and universities are choosing the path of least resistance. Ganzi also notes that the path selected by the universities and colleges to decrease male opportunities contradicts the original intent of Title IX. Supporting Ganzi’s research, Lamber (2001) notes that the second and third options of the “effective accommodation” test has been applied in limited circumstances by the courts, therefore, most courts have required schools to meet the first prong of the proportionality test. Finally, Yuracko (2003) writes that “Title IX has been interpreted by the OCR and by the courts as requiring schools provide their female and male students with exact proportionality between participation numbers and enrollment figures” (p. 13). Proportionality has become the most scrutinized test for whether colleges are in compliance with Title IX.

In 1994, Congress passed the Equity in Athletics Disclosure Act (EADA). Although much of the Act is not related to Title IX, some provisions make collegiate

expenditure reporting relevant. The Equity in Athletics Disclosures Act states, “Any coeducational institution of higher education that participates in any Federal student financial aid program and has an intercollegiate athletics program must disclose certain information concerning that intercollegiate athletics program” (1994, § 382). With the EADA’s passage, universities were required to make public statistical information regarding the gender of athletes and gender enrollment at the university. In addition, the Act required the university to report its athletic spending in annual reports submitted to the NCAA. Prior to the Act’s passage, the statistical data was only available if a formal complaint to the OCR and a subsequent investigation followed. Because of the ease in comparing the percentages of female undergraduates with the percentage of varsity female athletes, the new public reporting requirement continued to put pressure on schools to satisfy one part of the three-part test found in the 1979 Title IX Policy Clarification (Ganzi, 2004).

In the mid 1990’s, Norma Cantu, the Assistant Secretary of the Department of Education continued to clarify Title IX for educational institutions as well as members of Congress. In 1995, Ms. Cantu testified before the Subcommittee on Postsecondary Education and the Committee on Economic and Education Opportunities in the United States House of Representatives. Also in 1995, she authored a cover letter accompanying the 1996 Title IX Policy Clarification. Both the testimony and letter highlighted the intentions of Title IX according to the Office for Civil Rights and Ms. Cantu.

In Ms. Cantu’s testimony, she testified about the applicability and enforcement of Title IX, a law “enacted by the Congress to eliminate sex discrimination in all aspects of American education in the classroom, in course offerings, in the school workplace, and

on the athletic fields” (Cantu, 1995, p. 2). Speaking to OCR’s role in the enforcement procedures of Title IX, Cantu stated that, “The OCR’s primary responsibility is to ensure that recipients of federal financial assistance do not discriminate against students, faculty, or other individuals on the basis of race, color, national origin, sex, disability or age” (Cantu, 1995, p. 2).

Within the letter, Cantu elaborated on the three-part test used to measure students’ opportunities to participate in intercollegiate athletics. Ms. Cantu wrote that the first test, substantial proportionality, “affords institutions a ‘safe harbor’ for compliance with Title IX” (Title IX Policy Clarification, 1996, p. 4). Cantu further explained the other two parts of the test: demonstrating a history and continuing practice of increasing opportunities and fully accommodating the interests of the underrepresented sex. Cantu called the second part of the test, “an examination of an institution’s good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex at that institution” (Title IX Clarification, 1996, p. 3). Cantu noted the third part of the test focuses on the method of evaluating whether there is concrete and viable interest among the underrepresented sex that should be accommodated by an institution (Title IX Policy Clarification, 1996).

Cantu’s third objective of the letter was to stress that the policy clarification is “consistent with OCR and federal court decisions: it confirms that institutions need to comply only with any part of the three-part test to provide nondiscriminatory participation opportunities for individuals of both sexes” (Title IX Policy Clarification, 1996, p. 3). While addressing the criticisms of OCR’s administration of the three-part test, Ms. Cantu writes, “We have not provided strict numerical formulas or ‘cookie

cutter' answers to the issues that are inherently case and fact-specific" (Title IX Policy Clarification, 1996, p. 3). Cantu emphasized that the clarification does not require an institution cap or eliminate participation opportunities for men. Finally, Cantu wrote that Title IX and the 1979 Policy Clarification do not amount to an inflexible quota (Title IX Policy Clarification, 1996).

About the same time the policy clarification was issued, the 1<sup>st</sup> Circuit Court of Appeal again heard a second appeal from Brown University. In 1993, the 1<sup>st</sup> Circuit Court of Appeals ruled that Brown University had failed to comply with Title IX and remanded the case back to the district court. The district court then ordered Brown to submit a plan of compliance with Title IX. After submitting its plan to the court, the district court rejected Brown's proposed plan and ordered specific relief. Brown appealed arguing that "an athletics program equally accommodates both genders and complies with Title IX if it accommodates the relative interests and abilities of its male and female students" (Cohen v. Brown University, 1996, p. 155). Brown's argument was labeled the "relative interest approach" (Cohen v. Brown, 1996, p. 157).

Brown University argued that relatively speaking, males were more interested in sports than females. Therefore, if Brown University was able to demonstrate that the relative interests of the student body were being satisfied, Brown was effectively accommodating the interests and abilities of its student population. The 1<sup>st</sup> Circuit Court rejected the "relative interest approach" argument because, in essence, Brown was stating that more males are interested in athletics than females (Cohen v. Brown University, 1996). The court noted that Brown's "relative interest approach reads the 'full' out of the duty to accommodate 'fully and effectively.' Prong three requires 'not merely some

accommodation, but full and effective accommodation''' (Cohen v. Brown University, 1996, p. 174).

The 1<sup>st</sup> Circuit Court also found that Brown's reasoning was based on stereotypes, which "disadvantaged women and undermined the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interests" (Cohen v. Brown University, 1996, p. 174). Brown argued that through appropriate surveys of the student enrollment and incoming student body, the university could evaluate the interests of the population. The court disagreed with the prospective method, stating that the evidence collected by Brown is "only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports" (Cohen v. Brown University, 1996, pp. 179-180). Finally, the court concluded that the evidence was irrelevant because the demotion of two established varsity teams demonstrated the inability to meet the interests and abilities of the student body (Cohen v. Brown, 1996).

Ultimately, Brown University and the plaintiffs settled on the terms of compliance with Title IX. In the settlement, Brown agreed to elevate the status of the two female teams demoted and keep the participation levels between female athletes and male athletes within 3.5 percentage points of one another (Brake, 2001). The Supreme Court's denial to grant a *writ of certiorari* signaled to Brown and other universities the Circuit Court's rulings would stand.

During *Cohen v. Brown University* in 1996, the OCR issued the 1996 Title IX Policy Clarification, which expanded on the 1979 Title IX Policy Clarification (Title IX Clarification, 1996). According to Norma Cantu, the purpose of the clarification was "to

respond to requests for specific guidance about existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics” (Title IX Clarification, 1996, p. 1). The clarification reads, "if there are substantially proportionate numbers in their athletic participation in respect to the enrollment numbers, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes" (Title IX Policy Clarification, 1996, p. 8). Furthermore, in determining athletic opportunities, the OCR counts the number of athletes participating. The clarification continues by defining participants as those individuals receiving the institutionally sponsored support normally provided to athletes competing at the institution involved; and who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport’s season; and who are listed on the eligibility or squad lists maintained for each sport, or who because of injury, cannot meet the above but continue to receive financial aid on the basis of athletic ability (Title IX Policy Clarification, 1996). The OCR defines a sport’s season as the first day of an intercollegiate competitive event to the last date of an intercollegiate competitive event. Finally, any athlete that receives financial aid is considered a participant. If an athlete participates in two sports, they will also be counted as a participant for both teams.

The policy clarification reads “there should be no difference between the participation rate in an institution’s intercollegiate athletic program and its full-time undergraduate student enrollment” (Title IX Policy Clarification, 1996, p. 6): however, the clarification acknowledges that the difference between enrollment and participation rates will occur occasionally because of unforeseen circumstances. For example, during

some years the enrollment or athletic participation rates could fluctuate, causing the ratio to appear beyond the boundaries of Title IX compliance. The OCR determines whether education institutions are substantially proportionate on a case-by-case basis and has yet to define substantial proportionality for educational institutions and the court system (Suggs, 2005).

With regards to part two of the test, the Office for Civil Rights is looking at “an institution’s past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion” (Title IX Policy Clarification, 1996, p. 8). Within the process of evaluating the continued history of program expansion, there are no fixed intervals of time that will be used to determine compliance (Title IX Policy Clarification, 1996). The OCR considers some of the following factors to determine whether a school has a history of program expansion: whether an institution has a record of adding intercollegiate teams or upgrading teams to intercollegiate status for the underrepresented sex; whether an institution has a record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and whether an institution has demonstrated affirmative responses and requests to elevate or add sports to varsity status (Title IX Policy Clarification, 1996).

In addition to the factors considered for demonstrating a continuing practice of program expansion, the OCR will consider other factors as evidence. First, does the institution have a current implementation and nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams). Second, is the school’s policy effectively communicated to students? Third, is the institution’s current implementation of a plan of program expansion responsive to the

developing interests and abilities of the underrepresented sex? Finally, the OCR will evaluate the institution's "efforts to monitor the developing interests and abilities of the underrepresented sex" (Title IX Policy Clarification, 1996, p. 9).

After stating the qualifications for meeting the second part of the test, the clarification details what things will not satisfy the second part of the test. It reads,

The OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the over represented sex alone or by reducing participation opportunities for the over represented sex to a proportionately greater degree than for the underrepresented sex. (Title IX Policy Clarification, 1996, p. 10)

Furthermore, expanding programs must be more than a promise to do so in the future.

The clarification states, "OCR will not find that an institution satisfies part two . . . by merely promising to expand its program for the underrepresented sex at some time in the future" (Title IX Policy Clarification, 1996, p. 10).

The third part of the test centers upon meeting the interests and desires for participation by the underrepresented sex. The clarification states,

An institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these students are, in fact being fully and effectively accommodated. (Title IX Policy Clarification, 1996, p. 11)

When measuring if the interests of the underrepresented sex have been satisfied, the OCR determines whether there is "unmet interest in a particular sport . . . sufficient ability to sustain a team in the sport . . . a reasonable expectation of competition for the team" (Title IX Policy Clarification, 1979, p. 8). If all three conditions are present, the institution has not satisfied the interests and abilities of the underrepresented sex. The

1996 Title IX Policy Clarification continued to offer guidance to colleges and universities trying to comply with Title IX's regulations.

During the mid 1990's, the Supreme Court considered whether gender only decisions made by educational institutions could exist in other capacities. In *United States v. Virginia* (1996), the Court ruled that Virginia Military Institute (VMI) could no longer exclude females from admission if they wished to continue accepting federal aid. In a 7-1 decision, the Supreme Court found that VMI was in direct violation of the Equal Protection Clause of the 14<sup>th</sup> Amendment with their male only admissions policy. In the majority opinion written by Justice Ginsburg, the Court wrote,

To summarize the Court's current directions for cases of official classification based on gender: focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.' The burden of justification is demanding and it rests entirely on the State. The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. (*United States v. Virginia*, 1996, pp. 532-533)

The higher standard set forth by the Court, requires State's justification be "exceedingly persuasive" and the discriminatory means are substantially related to the goal of those objectives (*United States v. Virginia*, 1996).

In 1997, Brevard County School District in Florida became the first school district to be challenged for violating Title IX's equal opportunity subsection of the Title IX regulations (Heckman, 2003). Over the course of four years, three class-action lawsuits and resulting court decisions rectified inequalities in such things as playing surfaces, scoreboards, bathroom facilities, and field lighting (*Daniels v. School Board of Brevard*

County, 1997, *Daniels v. School Board of Brevard County*, 1999, *Landow v School Board of Brevard County*, 2001). In the first case, *Daniels v. School Board of Brevard County* (1997), the district court found the school district in violation of Title IX because of inferior scoreboards, a lack of bleachers and no restrooms. The district court ordered a preliminary injunction and forced the school board to rectify the situation. The school board decided to eliminate the advantages held by the male athletes, including removing bathroom facilities and lighting for the male athletes. The choice by the school board to eliminate opportunities for males, rather than advance the opportunities for females, was not accepted by the district court and the court ordered the school district to address the situation in another manner. Before the case reached the next step, Brevard School District financed the needed adjustments, but the ruling by the district court to not allow the school district to eliminate advantages for male athletes to comply with the injunction proved significant. Although district courts have limited jurisdiction, the ruling demonstrated that eliminating benefits for some athletes does not equate into equal treatment of athletes.

During the late 1990's, the Supreme Court again decided two landmark cases defining Title IX's boundaries. When passed, Title IX had three main areas of coverage: admissions, employment, and sexual harassment (Congressional Record, 1972). In the late 1990's, the U.S. Supreme Court decided two specific cases dealing with sexual harassment in educational institutions. Although neither case specifically addressed athletics under Title IX, a complete study of Title IX would be incomplete without covering the impact of *Gebser v. Lago Vista Independent School District* (1998) and *Davis v. Monroe Board of Education* (1999) on educational institutions.

In *Gebser* (1998), the Supreme Court established the precedent of the liability of educational institutions in cases of sexual discrimination. The significant question in *Gebser* was what standard will schools and school districts be responsible for following in cases of teacher-student sexual harassment?

In a 5-4 ruling, the Supreme Court's narrow majority wrote "that the recipient of federal funds could not be held responsible unless an official who at the minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails to adequately respond" (*Gebser v. Lago Vista Independent School District*, 1998, p. 274). Writing for the majority, Justice O'Connor continued by noting, "We think, moreover, that the response must amount to deliberate indifference to discrimination" (*Gebser v. Lago Vista Independent School District*, 1998, p. 276).

After the *Gebser* decision in 1998, *Davis v. Monroe Board of Education* (1999) addressed school's responsibilities in cases of student-on-student sexual harassment. In another 5-4 ruling, the Supreme Court reversed the ruling of the circuit court and extended *Gebser's* standard to student-on-student harassment. Writing for the slim majority, Justice O'Connor wrote,

We conclude that it may, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, we conclude that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit. (*Davis v. Monroe Board of Education*, 1999, p. 639)

The initial enforcement procedures of Title IX influenced the Supreme Court's ruling in both *Gebser* and *Davis*. Originally, schools receiving federal aid could lose its funding only if the schools failed to correct the discrimination through a voluntary

compliance plan. In *Gebser*, the Court's ruling stated that federal funding recipients were only responsible if the recipients knew about the discrimination or harassment and then failed to remedy the situation. The dissenting opinion of the Court, written by Justice Stevens, openly challenged the high standard set forth by the court and warned that "few Title IX plaintiffs who have been victims of intentional discrimination will be able to recover damages" (*Gebser v. Lago Vista Independent School District*, 1998, p. 282). In the end, the majority of the Court could not validate a scenario when a lawsuit results in an award higher than the federal funds the institution receives, given the inability of the institution to voluntarily remedy the discrimination (*Gebser v. Lago Vista Independent School District*, 1998). Justice O'Connor expressed the need that someone "with authority to take corrective action to end the discrimination" knows of the situation and takes the appropriate corrective measures (*Gebser v. Lago Vista Independent School District*, 1998, p. 276).

In 1999, the 4<sup>th</sup> Circuit Court of Appeals in *Mercer v. Duke University* (1999) addressed whether contact sports were exempt from Title IX's regulations. The Title IX regulations state,

Notwithstanding the requirements of paragraph (a) of this Section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. (1975, § 106.41)

Heather Sue Mercer, an aspiring football player, participated in the Duke intrasquad scrimmage in 1995, subsequently kicking the winning field goal. After the game, the head football coach, Fred Goldsmith, proceeded to tell the news media that

Mercer was on the team. Furthermore, the position coach, Fred Chatham, told Mercer she had made the team. After the spring season, Mercer continued to practice and attend regular workouts with the football program. Although Mercer did not play in any games in 1995, she was listed in the Duke Football yearbook and football roster filed with the National Collegiate Athletic Association (NCAA).

During the 1995 football year, Mercer claimed she was the subject of numerous discriminatory actions and remarks. After not being placed on the 1996 Duke Football team, Mercer brought suit against head coach Fred Goldsmith and the Duke Football program claiming her dismissal from the team was based solely on her gender. Mercer claimed kickers with lesser abilities were selected for the team.

After losing at the district court level, Mercer appealed to the 4<sup>th</sup> Circuit Court of Appeals. The 4<sup>th</sup> Circuit Court ruled “where a university has allowed a member of the opposite sex to try out for a single-sex team in a contact sport, the university is subject to Title IX and therefore prohibited from discriminating against the individual on the basis of his or her sex” (Mercer v. Duke University, 1999, p. 1016). Citing the Title IX Regulations (1975), Fred Goldsmith and Duke University argued that the football program was exempt from Title IX coverage because football is a contact sport. The 4<sup>th</sup> Circuit Court disagreed and found that the actions against Mercer isolated and targeted her because of her gender. The 4<sup>th</sup> Circuit Court ruled that universities can exclude females from contact sports, but only if the decision is made prior to a female participating in the sport at the educational institution (Mercer v. Duke University, 1999).

Also in 1999, the National Collegiate Athletic Association was once again in the Title IX spotlight. In *National Collegiate Athletic Association v. Smith*, the U.S. Supreme

Court unanimously ruled that “dues payments from recipients of federal funds do not suffice to subject the NCAA to suit under Title IX” (1999, p. 6). In the case, Renee Smith played intercollegiate volleyball for two seasons at St. Bonaventure University before enrolling in postgraduate programs at Hofstra University and the University of Pittsburgh. Smith sought to play intercollegiate volleyball at Hofstra and Pittsburgh, but the NCAA denied her eligibility on the basis of its postbaccalaureate restrictions (National Collegiate Athletic Association v. Smith, 1999). Smith claimed the NCAA’s denial of eligibility was discriminatory in nature, but the unanimous Court disagreed. Justice Ginsburg wrote,

Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not. The Third Circuit’s decision is inconsistent with this precedent. Unlike the earmarked student aid in *Grove City*, there is no allegation that NCAA members paid their dues with federal funds earmarked for that purpose. While the Third Circuit dispositively and, this Court holds, erroneously relied on the NCAA’s receipt of dues from its members, the Third Circuit also noted that the relationship between the NCAA and its members is qualitatively different from that between the airlines and airport operators at issue in *Paralyzed Veterans*—the NCAA is created by, and composed of, schools that receive federal funds, and the NCAA governs its members with respect to athletic rules. These distinctions do not bear on the narrow question here decided: an entity that receives dues from recipients of federal funds does not thereby become a recipient itself. (National Collegiate Athletic Association v. Smith, 1999, pp. 5-8)

In regards to the NCAA’s rules and regulations, the Court’s ruling in *NCAA v. Smith* (1999) cleared the NCAA from Title IX coverage.

During the late 1990’s, males continued to argue colleges and universities seeking to achieve substantial proportionality through the elimination of male teams were violating the rights of male athletes. In 1999, the men’s wrestling team at California State University at Bakersfield claimed that they were victims of Title IX and the Equal

Protection Clause of the 14th. *Neal v. Board of Trustees* (1999) originated after the university cut men's athletic slots in all sports. Before the roster cuts, men at the university made up 61% of the athletic participants and received 68% of the athletic funding, even though females outnumbered males in the undergraduate enrollment count. The males argued that eliminating male teams to satisfy substantial proportionality was a violation of the male athlete's Title IX rights. In the 9<sup>th</sup> Circuit Court's ruling, the court disagreed and wrote, "If a university wishes to comply with Title IX by leveling down programs instead of ratcheting them up, Title IX is not offended" (*Neal v. Board of Trustees*, 1999, p. 765). Although the males argued that schools were consistently trying to satisfy the substantial proportionality part of the Title IX compliance test, the court cited a recent 5 year survey that more than two-thirds of the schools involved in Title IX cases before the Department of Education chose to comply with one of these alternative parts (Grossman, 2002).

In *Boulahanis v. Illinois State University* (1999), the 7<sup>th</sup> Circuit Court of Appeals supported the 9<sup>th</sup> Circuit Court's ruling that eliminating male teams in efforts to satisfy Title IX was allowable. Because Illinois State University had a 21% disparity between the enrollment percentages of females and the percentage of female athletes and feared a Title IX complaint, the university eliminated the men's soccer and wrestling programs. The university also added women's soccer along with increasing the school's athletic aid to female athletes. In response to the cuts, the male athletes on the men's soccer and wrestling programs filed a class-action lawsuit against the university.

In the 7<sup>th</sup> Circuit Court's ruling, the court acknowledged the differences between other Title IX cases by stating, "In short, the plaintiffs appellants attempt to draw a

distinction between decisions in which sex is a consideration (as in *Kelley*) and decisions in which sex serves as the motivating factor (as in the present case)” (*Boulahanis v.*

*Illinois State University*, 1999, p. 5). The court also stated,

Unless we are willing to mandate such spending, the agency's substantial proportionality rule must be read to allow the elimination of men's athletic programs to achieve compliance with Title IX. . . . Because the University has achieved substantial proportionality between men's enrollment and men's participation in athletics, it is presumed to have accommodated the athletic interests of that sex. . . . Under such circumstances, Illinois State University's actions in eliminating the programs at issue do not constitute a violation of Title IX. (*Boulahanis v. Illinois State University*, 1999, pp. 6-7)

The ruling in *Boulahanis* and other Circuit Court decisions continued to permit universities to eliminate male athletic slots in efforts to become substantially proportionate with undergraduate enrollment percentages.

In a case dealing with athletic funding in 2000, *Chalenor v. North Dakota* (2000) established that outside funding did not excuse athletic programs from Title IX compliance. Due to budgetary constraints combined with the increasing pressure of compliance with Title IX, the University of North Dakota decided to end its varsity wrestling program. The University of North Dakota claimed that it was cutting the men's wrestling program because of financial constraints, not because of efforts to comply with Title IX, although the university admitted Title IX was a consideration. In an effort to alleviate some of the university's budget concerns, the wrestling athletes offered to raise the monies necessary to sustain the program. The federal district court ruled that “outside funding” could not be a defense used to circumvent the intentions of Title IX.

Furthermore, the court noted that

A school may not skirt the requirement of providing both sexes equal opportunity in athletic programs by providing one sex more than substantially proportionate opportunity through the guides of ‘outside funding’. Simply put, money is not a

justification for discrimination. Once a school receives a monetary donation, the funds become public money, subject to Title IX's legal obligation in their disbursement. (*Chalenor v. North Dakota*, 2000, p. 1157)

The ruling by the district court restricted male athletes' efforts to become self sufficient in efforts to sustain male athletic programs and was later echoed by the 2003 Policy Clarification.

Also in 2000, the 5<sup>th</sup> Circuit Court of Appeals continued the pattern of Circuit Courts reaffirming the 1<sup>st</sup> Circuit Court's ruling in *Cohen v. Brown University* (1993, 1996). In *Pederson v. Louisiana State University* (2000), LSU tried to argue that women were less interested in sports than their male counterparts. LSU's argument paralleled the "relative interest approach" first introduced by Brown University. Both the district court and the 5th Circuit rejected the argument used by LSU. The district court noted that,

LSU's hubris in advancing this argument is remarkable, since of course fewer women participate in sports, given the voluminous evidence that LSU has discriminated against women in refusing to offer them comparable athletic opportunities to those it offers its male students. (*Pederson v. Louisiana State University*, 2000, p. 858)

After the ruling in *Cohen v. Brown*, other courts have applied the same rationale displayed by the 1<sup>st</sup> Circuit Court of Appeals. Furthermore, no circuit court of appeals has ruled in favor of male participants.

In January 2001, the Department of Education issued another Title IX Policy Clarification. Specific to sexual harassment, the clarification was in response to the U.S. Supreme Court's ruling in *Gebser* and *Davis* in the late 1990's. The purpose of the 2001 clarification was "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" (Title IX Policy Clarification, 2001, p. 3). The

clarification stressed the importance of good judgment by teachers and school administrators in the handling of potential sexual harassment situations. The clarification reiterated to educational institutions that the OCR continues to review sexual discrimination cases and the educational institutions' responses to these cases (Title IX Policy Clarification, 2001).

In *Brentwood Academy v. Tennessee Secondary School Athletic Association* (2001), the Supreme Court broadened Title IX's scope to include associations that high schools join. Because public schools in Tennessee constituted 84% of the members of the Tennessee Second School Athletic Association, the TSSAA was considered a "state actor" and held responsible for following Title IX's regulations. In its ruling, the Court stated that TSSAA "engaged in state action when it enforced one of its rules against a member school, because of the pervasive entwinement of state school officials in the structure of the association" (*Brentwood Academy v. Tennessee Secondary School Athletic Association*, 2001, p. 288). Writing for the slight 5-4 majority, Justice Souter wrote,

To the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms. (*Brentwood Academy v. Tennessee Secondary School Athletic Association*, 2001, p. 290)

With the ruling, the Supreme Court required that educational institutions receiving federal funds and the membership organizations dependent on these public schools follow the regulations and policy clarifications issued by the government.

In 2001, Brevard County in Florida was once again being challenged for violating the equal opportunities subsection of the Title IX regulations. In *Landow v. School Board of Brevard County* (2001), the softball players within the county attempted to improve their practice situations and facilities through a class-action lawsuit. In the case, the district court elected to analyze the Title IX situation of the school district by looking at its overall county-wide situation, rather than by a school-by-school analysis. Within its ruling, the district court noted, “softball teams are forced to ‘make do’ by playing on fields that are built to the dimensions of a different sport: men's slow-pitch softball. This signals to the girls that they are not as important as the boys” (Landow v. School Board of Brevard County, 2001, p. 964). Within the case, the school district raised the question of financing and the issues with softball’s ability to raise revenues. In its ruling, the district court responded by writing, “evidence concerning whether the girls' softball teams have the same ability as the boys' baseball teams to raise funds through gate admission fees, concession stand revenues, and sales of advertising signs, is immaterial” (Landow v. School Board of Brevard County, 2001, p. 962).

In the early 2000’s, Title IX lawsuits began to focus on the benefits of athletic competition. In *Communities for Equity v. Michigan High School Athletic Association* (2001), Communities for Equity brought a class-action lawsuit against the Michigan High School Athletic Association charging that its scheduling of female athletic contests was unfair. The Michigan High School Athletic Association (MHSAA) is the governing body for all scholastic athletic activities within the state and is responsible for the overall athletic season scheduling for male and female athletics. The Communities for Equity represented a group of female athletes claiming the scheduling of the respective female

sports limited their athletic opportunities (*Communities for Equity v. Michigan High School Athletic Association*, 2001). Basketball, tennis, softball, soccer, golf, swimming and diving and were all scheduled in non-traditional seasons, which are categorized as seasons not normally used for the specific sport.

During the district court hearing in Western Michigan, the head of the MSHAA was quoted as saying about the scheduling of seasons, “boys’ sports were in MHSAA member schools first and girls’ sports, which came later, were fitted around the pre-existing boys program” (*Communities for Equity v. Michigan High School Athletic Association*, 2001, p. 805). The plaintiff’s complaints focused on publicity differences and the lack of recruiting opportunities afforded females because of the non-traditional playing season by arguing “Michigan girls have decreased ability to be nationally ranked or obtain All-American honors because they play basketball during the non-traditional fall season” (*Communities for Equity v. Michigan High School Athletic Association*, 2001, p. 807). Additional complaints from the female athletes included playing on inferior fields and having an increased exposure to injury because of the various circumstances.

In the district court’s ruling, the court recognized that the overall treatment of females relayed a message that females were “second-class” and that “their athletic role is of less value” (*Communities for Equity v. Michigan High School Athletic Association*, 2001, p. 808). Using the standard set in the *Brentwood* case, the 6<sup>th</sup> Circuit determined the MHSAA was indeed a state actor. The Michigan High School Athletic Association argued that by having the female athletic seasons in non-traditional seasons, females were allowed more overall opportunities to compete. The MHSAA argued Michigan

possessed a higher overall number of female athletes and the negative aspects argued by plaintiffs were “unavoidable consequences of separate teams” (*Communities for Equity v. Michigan High School Athletic Association*, 2001, p. 808). The MHSAA continued by stating the association has to accommodate twice the number of teams and athletes as most states. Furthermore, MHSAA argued the scheduling was not of discriminatory intent. The 6<sup>th</sup> Circuit Court countered by relying on the standard established by the Supreme Court in *United States v. Virginia* (1996). In this case, the Court ruled that the discrimination or separation must “serve important governmental objectives” (*United States v. Virginia*, 1996, p. 532). The 6<sup>th</sup> Circuit Court ruled that the scheduling of the female athletic seasons did not meet the heightened standard and ruled for the *Communities for Equality*.

In 2002, the Northern District court of Iowa addressed a case dealing with the limitations of financial damages available in Title IX cases. In *Schultzen v. Woodbury Central Community School District* (2002), the district court summarized the case by noting

This case presents a fundamental question under Title IX: whether punitive damages are available against a school district for alleged violations of Title IX. No court of appeals has addressed this issue; and, while a handful of district courts have undertaken the task of resolving this question, a consensus has not been reached. (*Schultzen v. Woodbury Central Community School District*, 2002, p. 3)

In the case, April Marie Schultzen was a high school female athlete suspended for violating the athletic department’s “Good Conduct Code.” After finding out the suspension was increased because Schultzen was a repeat offender, Schultzen’s mother sued claiming differential treatment because the violator was a female athlete. Schultzen and her mother claimed similar situations involving male athletes did not result in the

same level of punishment (*Schultzen v. Woodbury Central Community School District*, 2002).

About the importance of punitive damages, the district court wrote,

However, neither the Supreme Court nor the Eighth Circuit, nor any other circuit court for that matter, has determined whether punitive damages are recoverable in a Title IX action against municipal entities. In addition, this court was unable to locate any Northern District of Iowa decisions regarding the issue of municipal exposure to punitive damages under Title IX. (*Schultzen v. Woodbury Central Community School District*, 2002, p. 8)

In *Schultzen*, the district court used the standard established in *Newport* (1981). The district court wrote,

In light of the well-settled presumption of municipal immunity from punitive damages and the absence of any indicia of congressional intent to the contrary, the court finds that punitive damages are unavailable against local governmental entities under Title IX. While there are bona fide reasons to deviate from this traditional presumption, these reasons are not strong enough to disturb municipalities' common-law immunity. Accordingly, the court will grant the School District's motion to dismiss *Schultzen*'s claim for punitive damages under Count I of her complaint. (*Schultzen v. Woodbury Central Community School District*, 2002, p. 47)

With its ruling in *Schultzen*, the district court has established a pattern limiting the ability of courts to grant punitive damages under Title IX.

Also in 2002, the 4<sup>th</sup> Circuit Court addressed the intentional discrimination of Heather Mercer by Duke University again. In 1999, the 4<sup>th</sup> Circuit ruled that Duke University and the football program's choice not to allow Heather Mercer to participate in football was discriminatory in nature because of her previous inclusion on the football team (*Mercer v. Duke University*, 1999). The 4<sup>th</sup> Circuit remanded the case back to the district court to be reheard. Upon the rehearing, the district court ruled in favor of Heather Mercer and granted her \$1 in compensatory damages but \$2 million in punitive damages because of Duke's intentional discrimination and violation of Title IX. Duke

University appealed arguing that that Title IX does not allow for punitive damages (Mercer v. Duke University, 2002).

In its consideration, the 4<sup>th</sup> Circuit Court used the precedent established by the Supreme Court in *Barnes v. Gorman* earlier in 2002. In *Mercer v. Duke University* (2002), the court wrote,

In *Barnes*, the Supreme Court held that punitive damages may not be awarded in private actions brought to enforce Section 202 of the ADA [Americans with Disability Act] or Section 504 of the Rehabilitation Act. The Court reached this decision by first determining that punitive damages are not available for private actions brought under Title VI of the Civil Rights Act of 1964. (*Barnes v. Gorman*, 2002, pp. 2102-03).

The 4<sup>th</sup> Circuit Court continued by stating,

It is well established that Title IX, upon which Mercer's claim is based, is also modeled after Title VI and is interpreted and applied in the same manner as Title VI. Thus, the Supreme Court's conclusion in *Barnes* that punitive damages are not available under Title VI compels the conclusion that punitive damages are not available for private actions brought to enforce Title IX. We therefore vacate the award of punitive damages. (*Mercer v. Duke*, 2002, p. 643)

The decision by the 4<sup>th</sup> Circuit Court to not permit punitive damages under Title IX limits the monetary damages available in cases of intentional discrimination by school districts and colleges (Heckman, 2003).

In late 2002, President George W. Bush organized a committee to analyze the enforcement of Title IX. Rod Paige, the Secretary of Education, selected Ted Leland, the athletic director at Stanford University, as the co-chair of the commission. Cynthia Cooper, a prominent female basketball player and professional coach was selected as the other co-chair of the committee. The stated 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,

women, boys and girls to participate in athletics under Title IX” (Open to all, Title IX at thirty, 2003). According to Brake’s research (2004), the purpose of the commission was to focus on the unintended consequences Title IX had on male sports. During the data gathering stage, the commission toured the country conducting town-hall meetings to gauge public opinion about Title IX and its future. The Commission issued its findings on February 28<sup>th</sup>, 2003, titled “Open to All: Title IX at Thirty” despite contentious moments between committee members (Schemo, 2003).

During the commission’s hearings, the topics focused on four major themes. First, if there are differences between the levels of interests between genders, should it be the goal of the public policy to eliminate these differences or to accommodate and even celebrate them (Leland, 2003)? Second, should Title IX’s goal be to eliminate gender discrimination? Third, how does the Office for Civil Rights balance the public’s disapproval of quotas with a need for clarity in compliance requirements (Leland, 2003)? Finally, how do colleges balance the need for the revenue generated from football with the rising costs affiliated with football? Furthermore, the fact that the most successful female teams come from colleges with high football revenue, do female athletes potentially stand to be harmed if changes are made to this system? The Commission issued 27 recommendations for consideration to Rod Paige and the Department of Education.

Of the 27 recommendations, many of the suggested recommendations called for vastly different ways of enforcing Title IX’s regulations. For example, one suggestion was to assume female enrollment was 50% at undergraduate educational institutions, vastly different than the actual percentages of females in most colleges, which is

generally 55% or higher. Next, the commission suggested counting available athletic slots towards the participation instead of the actual number of females participating. These “ghost slots” would potentially inflate the actual participation by females. Finally, the commission suggesting authorizing the Department of Education and Secretary Rod Paige the ability to identify “additional ways of demonstrating compliance with Title IX” (Open to all, Title IX at thirty, 2003, p. 4). Ultimately, the commission’s suggestions were ignored with Rod Paige reiterating that the three-part test used to evaluate Title IX compliance was sufficient. Furthermore, the Secretary of Education restated that any part of the three-part test would be sufficient in meeting the goals of Title IX compliance (Open to all, Title IX at thirty 2003).

After the Commission’s report, Gerald Reynolds, the Assistant Secretary for Civil Rights, authored the 2003 Title IX Policy Clarification. The clarification highlighted five main objectives. First, with respect to the three-part test, Reynolds wrote, “The OCR encourages schools to take advantage of its flexibility, and to consider which of the three parts best suits their individual situations” (2003, p. 1). Reynolds reinforced that all three parts of the test have been used successfully by colleges to demonstrate compliance with Title IX. She noted that “each of the three parts is thus a valid, alternative way for schools to comply with Title IX” (Reynolds, 2003, p. 2).

With the clarification’s second objective, Reynolds wrote,

[The] OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice. Because the elimination of teams diminishes opportunities for students who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from discrimination, it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams. Therefore, in negotiating

compliance agreements OCR's policy will be to seek remedies that do not involve the elimination of teams. (Reynolds, 2003, p. 2)

The clarification's wording stressed a desire to expand athletic opportunities for all participants, not only females. It was the first clarification the Office for Civil Rights issued targeting intercollegiate athletics since 1996.

The clarification's third objective reads, "[The] OCR hereby advises schools that it will aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply" (Reynolds, 2003, p. 3). The fourth objective was that private sponsorship of athletic teams will continue to be allowed, but does not diminish a school's obligations under Title IX. Finally, OCR will ensure that its enforcement practices do not vary from region to region (Reynolds, 2003).

Late in 2003, a group of male athletes attempted to target the Department of Education rather than the athlete's respective universities. The National Wrestling Coaches Association (NWCA), a non-profit organization representing wrestling participants, coaches, and alumni throughout the United States, brought suit against the Department of Education claiming Title IX's administration and implementation "results in discrimination against male athletes" (National Wrestling Coaches Association et al. v. United States Department of Education, 2004). The NWCA also claimed that the three-part test the Office for Civil Rights and courts use violates the Equal Protection clause of the 14<sup>th</sup> Amendment (Suggs, 2004). At the collegiate level, wrestling programs have been eliminated more than any other males' sport since the enactment of Title IX. The wrestling group decided to sue the Department of Education because they are the organization in charge of implementing and enforcing the regulations guiding Title IX.

Along with the NWCA, support groups from Bucknell, Marquette, and Yale joined the NWCA. Lastly, the College Sports Council, an umbrella organization representing many non-revenue sports, filed a brief in support of the NWCA. Although the Department of Education was the defendant in the case, the department received widespread support from many organizations satisfied with Title IX's implementation. Submitting *amicus curiae* briefs in support of the DOE included the National Women's Law Center, Women's Sports Foundation, and many of the sports played by females at the collegiate level (volleyball, fastpitch softball, lacrosse, basketball). Eventually, the courts decided the NWCA did not have the legal standing to sue the Department of Education (National Wrestling Coaches Association et al. v. United States Department of Education, 2004).

In 2004, the D.C. Circuit of Appeals decided not to rehear the lower courts ruling that the Department of Education was not liable for the cuts made by colleges. In the 2 to 1 ruling, the D.C. Circuit judges issued a rare written opinion that read,

We affirm the decision of the District Court in all respects. Appellants' alleged injury results from the independent decisions of federally funded educational institutions that choose to eliminate or reduce the size of men's wrestling teams in order to comply with Title IX. Assuming that this allegation satisfies Article III's injury-in-fact requirement, we hold that appellants nevertheless lack standing because they have failed to demonstrate how a favorable judicial decision on the merits of their claims will redress this injury. The Supreme Court has made it clear that when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish. (National Wrestling Coaches Association et al. v. United States Department of Education, 2004, p. 3)

The denial by the United States Supreme Court to grant a *writ of certiorari* means the case has completed its course.

Also in 2004, the 2<sup>nd</sup> Circuit Court of Appeals ruled on a lawsuit against the school districts of Pelham and Mamaroneck in New York alleging the school districts violated Title IX and the Equal Protection Clause of the 14<sup>th</sup> Amendment because of the school districts scheduling of the high school female soccer season. Citing the disadvantage of playing out of season, the female athletes were quoted as saying,

It is important for us to be able to try to compete for the Regional and State championships. The boys get to compete for those titles, and the girls also should be able to do that. We are entitled to compete in the same post season competition as the boys do. (McCormick v. School District of Mamaroneck and the School District of Pelham, 2004, p. 277)

Similar to the *Communities for Equity* case, the 2<sup>nd</sup> Circuit Court addressed whether in specific situations when gender disparity is proven can the school or school district still be in compliance with Title IX by overcompensating the disparity in other areas for the discriminated gender?

In the case, the 2<sup>nd</sup> Circuit Court recognized that female soccer players were at a disadvantage by playing in the fall and not having the opportunity to participate for a state championship; however, the 2<sup>nd</sup> Circuit Court admitted that if the school district would have granted other female athletes in the school district an equivalent advantage over males, the entire school district would be in compliance with Title IX. In effect, the court ruled that the scheduling of the games did not immediately put the school districts in violation of Title IX, but rather required that compensation for females be made in other areas (McCormick v. School District of Mamaroneck and the School District of Pelham, 2004). By not allowing the female soccer players the opportunity to compete for a State and Regional title, the school districts limited their athletic opportunities. In its ruling, the circuit court did not rule that playing in non-traditional seasons is an automatic

violation of Title IX. The court wrote, “We do not intend to foreclose the possibility that scheduling a sport outside the season of championship game play, may, under certain circumstances, be permissible under Title IX” (McCormick v. School District of Mamaroneck and the School District of Pelham, 2004, p. 278). The court did acknowledge that “the disadvantage that girls face in the scheduling of soccer has not been offset by any advantages given to girls as compared to boys in the Mamaroneck and Pelham athletics programs” (McCormick v. School District of Mamaroneck and the School District of Pelham, 2004, p. 278). The wording used by the 2<sup>nd</sup> Circuit Court of Appeals suggest an ability to schedule seasons out of the traditional season if comparable advantages or benefits are granted to the female athletes.

In December of 2004, the Supreme Court heard arguments concerning third party complaints and their potential protection under Title IX regulations. The case, *Jackson v. Birmingham Board of Education* (2005), involved a male basketball coach of a female high school basketball team in Birmingham, Alabama. In 2001, Roderick Jackson claimed the female basketball players were discriminated against because of having to always practice in the non-air conditioned gym with bent rims and wooden backboards. Furthermore, the female athletes traveled with parents to away games while the male basketball players were provided busses for transportation. After complaining and threatening to sue the school board, Jackson was fired from his basketball position, although he continued to teach at the school (Jackson v. Birmingham Board of Education, 2004).

At the district court level and the 11<sup>th</sup> Circuit court level, Roderick Jackson’s claim of Title IX discrimination was denied. The district court and the circuit court of

appeals found nothing mentioned by Congress restricting retaliation under Title IX. Jackson and his lawyers claimed that protection against whistleblowers in similar situations is implicit in the law (Brady, 2004). In Brake's research, she noted the 11<sup>th</sup> Circuit's ruling is "remarkable for its blindness to the equality implication for female athletes" (2004, p. 1). Because of the variance of rulings involving similar complaints and Title IX, the Supreme Court decided to accept the case and set a clear and standard precedent for all lower courts to follow.

The arguments for and against the protection of third parties reached the highest levels. The Bush Administration, represented by the U.S. Solicitor General Theodore Olson, publicly supported Jackson and his argument. In the legal briefing submitted by Olson, he stated, "Teachers and coaches are often in a much better position to identify sex discrimination and express opposition to it than are the students who are denied equal educational opportunities" (Brady, 2004, p. 1). Supporting the Birmingham School District, nine states and the National School Boards Association filed briefs backing the actions of the school board. Kenneth Thomas, the lawyer representing the Birmingham School Board, stated, "If Congress had intended to ban retaliation, it would have done so. It did not. That's the debate" (Brady, 2004, p.1).

The 5-4 ruling released by the Supreme Court in March of 2005 ruled in favor of Roderick Jackson (*Jackson v. Birmingham Board of Education*, 2005). The majority opinion, written by Justice O'Connor, highlighted the willingness of the Court to include third party members under the Title IX protection against gender discrimination. Within the majority ruling, Justice O'Connor noted the importance of having Title IX violations reported. O'Connor wrote,

Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel. Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied. Moreover, teachers and coaches such as Jackson are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. (*Jackson v. Birmingham Board of Education*, 2005, pp. 11-12)

The Supreme Court's decision to provide Title IX protection to third party individuals received widespread support from the National Women's Law Center and similar organizations. Jocelyn Samuels, the attorney representing Roderick Jackson, called the opinion "a huge win for women and girls and all of those who care about civil-rights protections across the country" (Suggs, 2005). Supporting the Court's ruling, Senator Birch Bayh was quoted as saying, "the Roderick Jacksons all over the country, men and women, can do a better job of enforcement at the local level" (Suggs, 2005).

The 5-4 vote in favor of Roderick Jackson was sternly opposed by Justices Rehnquist, Scalia, Thomas, and Kennedy. Justice Thomas, authoring the dissenting opinion, strongly criticized the majority for expanding the class of people Title IX protects beyond the legislation's original wording. In the dissenting opinion, Justice Thomas argued the majority side was guilty of "crafting its own additional enforcement mechanism" (*Jackson v. Birmingham Board of Education*, 2005, p. 23). Thomas continued by writing "The majority substitutes its policy judgments for the bargains struck by Congress. The question before us is only whether Title IX prohibits retaliation, not whether prohibiting it is good policy" (*Jackson v. Birmingham Board of Education*, 2005, p. 24). The close vote by the Supreme Court illustrates the bitter battle over Title

IX's legislative intent in 1972 and what the courts believe are the intentions of the law today.

Also in March of 2005, the Office for Civil Rights issued a clarification specifically addressing the third part of the three-part test originally found in the 1979 Policy Clarification. Accompanying the policy clarification letter written by James Manning is the "User's Guide to Student Interest Surveys under Title IX". According to the cover letter, the purpose of survey guide is to "reinforce the flexibility of the three-part test and facilitate application of part three for those schools that choose to use it to ensure Title IX compliance" (Manning, 2005, p. 3). The third part of the three-part test requires schools to "fully and effectively accommodate the interest and ability of the underrepresented sex" (Title IX Policy Clarification, 1979). Although two-thirds of the 132 schools investigated from 1992 to 2002 complied with part three of the test, the OCR "believes some of the institutions may be uncertain about the factors OCR considers under part three, and they may mistakenly believe that part three offers less than a completely safe harbor" (Manning, 2005, p. 3).

Within the cover letter, Mr. Manning noted the OCR's continued efforts to provide technical assistance to the educational institutions attempting to comply with Title IX. Seeking to explain how educational institutions can violate part three of the three-part test found in the 1979 Title IX Policy Clarification, Manning writes,

An institution will be found in compliance with part three unless there exists a sport (s) for the underrepresented sex for which all three of the following conditions are met: (1) unmet interest sufficient to sustain a varsity team in the sport(s); (2) sufficient ability to sustain an intercollegiate team in the sport(s); and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region. (2005, p. 2)

According to the recent policy clarification, colleges are not forced to meet every desire by the underrepresented sex, but only when all three of the above criteria are met.

The bulk of the clarification provides a model survey to evaluate whether the interests and abilities of the underrepresented sex are being met. The user's guide was prepared by the National Center for Education Statistics (NCES) and was based on 10 years of analysis from the OCR and 132 specific cases involving 130 colleges. If used and administered properly to all full-time undergraduate students or to all members of the underrepresented sex, the survey will satisfy the Office for Civil Rights' desire to measure the interests among the student population. According to Manning's cover letter, the OCR's

Presumption of compliance can only be overcome if OCR finds direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team, such as the recent elimination of a viable team for the underrepresented sex or a recent, broad-based petition from an existing club team for elevation to varsity status. (Manning, 2005, p. 2)

The clarification of the three-part test echoes the findings of the Presidential Commission formed in 2002. Both the commission and this clarification continue to stress to educational institutions that all three parts of the Title IX compliance test are viable options for schools.

## **Chapter 3**

### Overview of Chapter 3

A better understanding of the current legal status of Title IX may be derived from analyzing court cases, federal regulations, and policy clarifications issued since the law's passage in 1972. Chapter three of this study is divided into two parts. First, the current legal status of the law is analyzed with specific attention focused on: a) defining "educational institutions" and other organizations under Title IX, b) Administering Title IX at the scholastic and intercollegiate levels, and c) current enforcement procedures of Title IX. Second, this study reviews Title IX's legislative intent when passed in 1972 and contrasts the original purpose of the law with evidence of its administration and implementation since its passage.

### Current Legal Status of Title IX

#### **Defining "educational institutions" and other organizations under Title IX**

Title IX specifically defines education institutions by stating, "For the purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education" (Title IX, 1972, § 1681, c). Later in the law, Section 1687 of Title IX addresses what programs or activities are required to follow the law and its regulations. Public education institutions, school districts, universities, and other public postsecondary education

institutions that receive federal financial assistance are obligated to follow Title IX and its regulations. According to the last part of Section 1687, Title IX also applies to

An entire corporation, partnership, or other private organization, or an entire sole proprietorship -- if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship. (Title IX, § 1687, 3a)

Title IX's regulations published in 1975 clearly targeted high schools, elementary schools, and higher education institutions that receive federal financial assistance.

Clarification as to the extent of Title IX's influence on organizations affiliated with educational institutions required appropriate jurisprudence. In 1999, the Supreme Court ruled that the National Collegiate Athletic Association (NCAA) did not fall under Title IX's definition of "program" or "activity." In *National Collegiate Athletic Association v. Smith*, the Court ruled, "dues payments from recipients of federal funds do not suffice to subject the NCAA to suit under Title IX" (1999, p. 6). Two years following the Court's ruling in *Smith*, the Court included state high school athletic associations within Title IX's scope. In *Brentwood v. Tennessee Secondary School Athletic Association*, the Supreme Court's slight majority wrote that the "Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling" (2001, p. 290). The Court concluded that the dependence of the member organization on dues from educational institutions obligates the organization to comply with Title IX, its regulations and subsequent policy clarifications issued by the federal government (*Brentwood v. Tennessee Secondary School Athletic Association*, 1999).

To date, universities and school districts receiving direct or indirect federal financial assistance must follow Title IX and its regulations. Indirect federal assistance can include but is not limited to government assisted scholarships to students of universities to defray the tuition costs of the school. Furthermore, high school athletic associations created for the sole purpose of governing high school athletics and activities and who receive its member dues from institutions that receive federal funding are obligated to follow Title IX and its regulations. Finally, the National Collegiate Athletic Association (NCAA) is excluded from following Title IX's regulations, although according to the NCAA, the organization is committed to advancing athletic opportunities for females (NCAA leadership groups urge Department of Education to rescind additional clarification for Title IX and maintain 1996 clarification, 2005).

### **Administering Title IX at the scholastic and collegiate levels**

Title IX essentially requires all educational institutions receiving federal funding to provide athletic opportunities on a sex-neutral basis (Anderson, et al., 2004). Since Title IX's passage, the law has become synonymous with expanding participation for female athletes, although during its formation and passage, few comments from members of Congress about athletics were made (Heckman, 2003).

When passed in 1972, Title IX included no mention of intercollegiate or scholastic athletics. Furthermore, Congressional testimony provides little indication if Congress intended Title IX to apply to athletics (Cox, 1977). Since 1972, Congress's actions have clarified that Title IX does indeed apply to athletics. In 1974, Congress passed the Javits Amendment to Title IX, which specifically included specific provisions

addressing athletics. Furthermore, following the Supreme Court's ruling in *Grove City College v. Bell* in 1984, which effectively removed collegiate athletics from Title IX coverage, Congress passed the Civil Rights Restoration Act of 1987. Eventually becoming only one of eight laws passed over a President Reagan veto (Suggs, 2005), the Civil Rights Restoration Act of 1987 redefined the "programs" and "activities" to be covered under Title IX. The Civil Rights Restoration Act brought intercollegiate athletics back under Title IX. In Section 2 of the Act, Congress clearly disagreed with the Court's ruling in *Grove* and wrote,

Congress finds that certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX of the Education Amendments of 1972 . . . ; and legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered. (Civil Rights Restoration Act, 1987)

Congressional action since Title IX's passage illustrate Congress's acceptance of athletics under Title IX regulations and policy clarifications.

Through appropriate policy clarifications, regulations, and jurisprudence, the current legal status of Title IX as it pertains to athletics has become increasingly clear. In *Haffer v. Temple University* in 1987, the district court reiterated that Temple did not have to offer athletics at its university, but if it so chooses, it must "be made available to all on equal terms" (*Haffer v. Temple University*, 1987, p. 525). Colleges and school districts are not required to offer athletics, but the decision to offer athletics obligates the educational institution receiving federal assistance to comply with Title IX and its regulations.

The purpose of Title IX and the regulations was to eliminate discrimination on the basis of sex within educational institutions (Title IX Regulations, 1975). In Title IX's regulations, it reads

No person shall, on the basis of sex, be excluded from participation in, be denied or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. (Title IX Regulations, 1975, § 106.31, d)

As it relates to intercollegiate and scholastic athletics, Title IX covers three broad areas within intercollegiate and scholastic athletics: financial assistance, treatment and benefits, and equal opportunities for athletes (Anderson et al., 2004). First, Title IX mandates the proportional distribution of athletic financial aid, also known as scholarships. Under normal circumstances, scholarships and financial aid are specific to intercollegiate athletic programs. Second, Title IX ensures equity in athletic program areas. Such areas covered under Title IX include the treatment of athletes, athletic facilities, and benefits afforded to the student-athletes. Finally, Title IX attempts to ensure for the underrepresented sex that the “interests and abilities of the members of that sex have been fully and effectively accommodated” (Title IX Policy Clarification, 1979, p. 11). Through appropriate jurisprudence, the courts have determined that a university's inability to fully and effectively accommodate the interests and abilities of the underrepresented sex will cause the school to be found in violation of Title IX regardless of the school's standing regarding Title IX's regulations (Cohen v. Brown University, 1993, Kelley v. Board of Trustees, 1994, Boulahanis v. Illinois State University, 1999). Since the ruling in *Cohen* subsequent reinforcement by the courts, much of Title IX's

focus at the intercollegiate level has been on the meeting of female's interests and abilities in athletics.

Financial aid and scholarships to athletes are covered within the Title IX regulations published in 1975. The regulations state that universities "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" (Title IX Regulations, 1975, § 106.37, c). After the regulations were published in 1975, the Department of Health, Education, and Welfare (HEW) received over 100 complaints of discrimination and requests by numerous institutions seeking further clarification of the regulations (Starace, 2001). The response by educational institutions to the regulations prompted the HEW and the Office for Civil Rights to release its 1979 Title IX Policy Clarification.

The 1979 Title IX Policy Clarification was designed specifically to address confusion regarding intercollegiate athletics. Within the clarification, the OCR explained how institutions could comply with Title IX's regulations regarding scholarships. The clarification reads, "Institutions may be found in compliance if this comparison results in substantially equal amounts or if a disparity can be explained by adjustments to take into account legitimate nondiscriminatory factors" (Title IX Policy Clarification, p. 6). For example, when 42% of a college's athletes are females, approximately 42% of the athletic assistance offered by the athletic department must go to females.

In 1998, Dr. Mary Frances O'Shea, the National Coordinator for Title IX Athletics with the Office for Civil Rights at the time, issued a letter addressing scholarship allocation in response to requests by educational institutions for further

clarification of the athletic scholarship standard. In the letter, Dr. O'Shea explained that the OCR analyzes disparities in the awarding of scholarships on a case-by-case basis.

She continued by writing,

If any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the 'substantially proportionate' requirement. (O'Shea, 1998, p. 4)

The regulations, policy clarification issued in 1979, and the letter by Dr. O'Shea point to universities needing to maintain less than a 1% difference between the athletic scholarship money awarded to female athletes as a percentage of total athletic scholarship money and the percentage of female athletes within the athletic department (Suggs, 2005). For example, an institution with 50% of the varsity athletes being female, but only 35% of the athletic scholarship money going to females would be in violation of Title IX unless the school could demonstrate that the reason for the disparity was nondiscriminatory. Furthermore, the wording used in Dr. Shea's letter implies that universities that possess more than a 1% disparity are presumed guilty unless they can provide evidence justifying the financial disparity.

The second part of the regulations addresses the overall treatment of the underrepresented sex, which has been recognized as females by the courts (Kelley v. Board of Trustees, 1994). The athletics subsection of the Title IX regulations stipulates that both genders are provided equal athletic opportunity (Title IX Regulations, 1975). Evaluating the equality of these opportunities requires the consideration of ten factors. Examples of these factors include whether the selection of sports and levels of competition effectively accommodate the interest and abilities of both sexes, the

provision of equipment and supplies, the scheduling of games and practice time, an opportunity to receive coaching and academic tutoring, the assignment and compensation of coaches and tutors, the provision of locker rooms, the practice and competitive facilities and appropriate publicity (Title IX Regulations, 1975). The Office for Civil Rights and the courts analyze the treatment and benefits of the underrepresented sex on a program wide basis, rather than by analyzing specific sports. For example, if volleyball players are not receiving the exact benefits afforded other sports, if the overall treatment of females within the educational institution is found comparable to males; the school is found in compliance with Title IX.

As Title IX pertains to facilities, the regulations state facilities for the underrepresented sex must “be comparable to such facilities provided for students of the other sex” (Title IX Regulations, 1975, § 106.33). Furthermore, Title IX requires colleges and school districts to continue to be responsive to growing interests among the underrepresented sex through the appropriate formation of teams and construction of team facilities (Title IX Policy Clarification, 1979). In the early 1990s, the settlements at Auburn University and the University of Texas demonstrated the standard needed to avoid legal consequences. Both universities agreed to provide new facilities for female teams being formed to meet the developing interest in women’s collegiate soccer and softball (University of Texas at Austin Settlement, 1993, Auburn University Settlement, 1993). According to recent Title IX clarifications and rulings by courts, educational institutions that are proactive are more likely to avoid complaints and negative lawsuits (Suggs, 2005). The clear indication is that educational institutions at both the scholastic and collegiate levels should seek to evaluate potential interests among female athletes and

continue to ensure that these interests and abilities are being fulfilled. Because Title IX's enforcement and administration does not excuse educational institution's ignorance of the law, colleges cannot neglect the growing desire of young females to participate in athletics.

At the scholastic level, facility construction continues to be at the forefront of Title IX compliance. Since the mid 1990s, school districts throughout the country have been the subject of numerous lawsuits because of the inequities in facilities. The first part of the three-part test, substantial proportionality, cannot be easily applied to high schools because of the inability of the school district to control the ratio of male and female students; therefore, inequities in facilities are often targeted by Title IX advocates. The explosion of knowledgeable parents pertaining to Title IX regulations has forced school districts to respond quickly to growing interests among female athletes (Brady, 2004). Finally, female sports such as softball have a male equivalent sport to target and easily draw comparisons between regarding facilities, scheduling, and other benefits to male and female athletes (Suggs, 2005).

In 1997, *Daniels v. Brevard County* was the first Title IX court case to address K-12 facilities and athletic opportunity issues (Heckman, 2003). Within the case, Brevard County was ordered to construct numerous new fields and facilities for fastpitch softball programs throughout the county. The financing of new facility construction created another issue addressed by the court system. *Chanelor v. North Dakota* (2000) addressed the question of funding through support groups or "booster clubs." In *Chanelor*, a wrestling team attempted to become self-sufficient to avoid the cancellation of the season and team's elimination. During the case, the district court disallowed the argument,

stating, “Simply put, money is not a justification for discrimination. Once a school receives a monetary donation, the funds become public money, subject to Title IX’s legal obligation in their disbursement” (Chalenor v. North Dakota, 2000, p. 1157). The inclusion of monetary donations into school district and colleges’ financial coffers eliminates the ability of many teams to become and remain self-sufficient. In 2003, the Office for Civil Rights reiterated the *Chanelor* ruling within its policy clarification by writing, “private sponsorship of athletic teams will continue to be allowed. Of course, private sponsorship does not in any way change or diminish a school's obligations under Title IX” (Reynolds, 2003, p. 3). Title IX does not permit “booster clubs” and private sponsorship to circumvent regulations for facility construction and other facets of Title IX (Brady, 2004).

In the early 2000s, school districts in New York and Michigan were both challenged regarding the competitive seasons for specific female sports (Communities for Equity v. Michigan High School Athletic Association, 2001, McCormick v. School District of Mamaroneck and the School District of Pelham, 2004). In both cases, the school districts were found to be in violation of Title IX and pertinent regulations regarding the equality of athletic benefits afforded female athletes. In *McCormick v. School District of Mamaroneck and the School District of Pelham* (2004) and *Communities for Equity v. Michigan High School Athletic Association* (2001), the 2<sup>nd</sup> and the 6<sup>th</sup> Circuit Courts ruled that scheduling female athletic seasons out of the traditional season could be a violation of Title IX. In both cases, the circuit courts cited a general lack of opportunities for female athletes to receive scholarship offers, publicity and

national awards. In *Communities*, the court noted the overall message being sent to female athletes was one of second class and of lesser importance.

In 1979, the Department of Education, through the Office for Civil Rights, issued a policy clarification aimed at further explaining how educational institutions can measure the full and effective accommodation of student interests in athletics (Title IX Policy Clarification). Within the clarification, the OCR requires “institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes” (Title IX Clarification, 1979, p. 8). The OCR issued its three-part test to allow educational institutions to measure their respective compliance with Title IX. Most recently in *National Wrestling Coaches Association v. Department of Education* (2004), the Circuit Court of the District of Columbia upheld the legality of the three-part test and dismissed the claim from the plaintiffs that the three-part test was discriminatory.

The Office for Civil Rights requires educational institutions comply with only one part of the test to demonstrate Title IX compliance (Title IX Policy Clarification, 1979, Cantu, 1995, Reynolds, 2003). The first part of the test, substantial proportionality, requires the percentage of female athletes participating at the varsity level at the school be substantially proportionate to the percentage of females within the undergraduate student enrollment. The second part of the test permits Title IX compliance if the university can demonstrate a history and continuing expansion of athletic opportunities for the underrepresented sex. Finally, if the university can demonstrate that it is fully and effectively accommodating the interests of the underrepresented sex, the educational

institution is in compliance with the three-part test (Title IX Policy Clarification, 1979).

Compliance with the three-part test does not excuse educational institutions at the collegiate or scholastic level to have inequities in treatment, benefits, or scholarships between male and female athletes. The three-part test is simply designed to measure Title IX compliance as it relates to accommodating the athletic interests and abilities of the sexes.

The first part of the test, substantial proportionality, has received the most scrutiny (Brake, 2004). In *Cohen v. Brown University*, the 1<sup>st</sup> Circuit Court ruled that the first part of the test provided universities a “safe harbor” when demonstrating Title IX compliance (1993, p. 897). The 1<sup>st</sup> Circuit Court continued by writing, “A university which 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” (Cohen v. Brown University, 1993, pp. 897-898). At the time of the ruling, Brown University offered the second most female athletic teams in the nation. The inability of Brown University to demonstrate compliance with Title IX made institutions less confident in their ability to defend themselves against similar Title IX lawsuits (Shulman & Brown, 2001). The precedent that reducing male athletic opportunities would permit Title IX compliance established by the 1<sup>st</sup> Circuit Court was echoed by eight other circuit courts and the 1996 Policy Clarification written by Norma Cantu, the Assistant Secretary of the Office for Civil Rights. In the 1996 Policy Clarification, Cantu reinforced the 1<sup>st</sup> Circuit Court’s ruling by including the phrase “safe harbor” and substantial proportionality within the clarification provided to educational institutions.

The circuit courts have been unanimous in ruling that university's efforts to reach substantial proportionality through the reduction of male athletic slots are protected under Title IX. In *Roberts v. Colorado State Board of Agriculture*, the 10<sup>th</sup> Circuit Court ruled "financially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population" (1993, p. 824). The court's ruling stated that cutting male and female slots at the same time would not be permitted unless substantial proportionality already existed because the varsity softball team had previously demonstrated the ability and interest to sustain a viable team (*Roberts v. Colorado State Board of Agriculture*, 1993).

In *Kelley v. Board of Trustees* (1994), the 7<sup>th</sup> Circuit Court ruled that the elimination of male teams because of budgetary concerns did not violate Title IX. In *Boulahanis v. Illinois State University* (1999), the 7<sup>th</sup> Circuit Court extended the ruling in *Kelley* by finding that if substantial proportionality is achieved; all the athletic interests of both sexes are assumed satisfied. In *Boulahanis*, the court noted, "Because the University has achieved substantial proportionality between men's enrollment and men's participation in athletics, it is presumed to have accommodated the athletic interests of that sex" (*Boulahanis v. Illinois State University*, 1999, pp. 6-7). If universities are able to achieve substantial proportionality between its undergraduate enrollment percentages and the percentage of athletes of the respective gender, the athletic interests and abilities among both sexes are presumed satisfied.

## **Current enforcement procedures of Title IX**

The Department of Education and the Office for Civil Rights have the responsibility of enforcing Title IX for the federal government. Section 1682 of Title IX reads,

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of Section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. (Title IX, § 1682)

The enforcement procedures are stated in the law published in 1972 and the regulations published in 1975. According to Title IX, if universities and school districts do not comply with Title IX through a voluntary plan of compliance, the educational institutions face the potential removal of federal funds after 30 days.

The original enforcement procedures of Title IX included formal complaints, investigations, subsequent voluntary compliance plans, and the potential removal of federal funding (Title IX Regulations, 1975). Currently, the Office for Civil Rights under the Department of Education is the primary executive agency responsible for enforcing Title IX. Norma Cantu, the Assistant Secretary of the OCR in the mid 1990's, stated the primary responsibility of the OCR "is to ensure that recipients of federal financial assistance do not discriminate against students, faculty, or other individuals on the basis of race, color, national origin, sex, disability or age" (Cantu, 1995, p. 2).

The Office for Civil Rights possesses two ways of investigating educational institution's compliance with Title IX. First, the OCR is responsible for investigating all written complaints filed with the agency. Second, the OCR randomly checks universities

and school districts for its respective Title IX situation. Both the formal complaint and the random check can ultimately lead to the removal of federal funding, but more often a voluntary plan of compliance is formulated to move the educational institution towards compliance. If the respective institution does not voluntarily comply with the plan in a timely manner, the OCR has the ability to begin the process of removing federal funding (Bonnette & Daniel, 1990). To date, no education institution has lost its federal funding for not complying with Title IX (Suggs, 2005).

In addition to investigations by the Office for Civil Rights, Title IX's enforcement options include a lawsuit targeted towards the specific educational institution or school district. After the Supreme Court's ruling in *Cannon v. University of Chicago* in 1979, individuals were able to pursue a private right of action, or lawsuit, claiming specific violations of Title IX. The Court's ruling opened a second avenue of enforcement, litigation, which has drastically altered the formation and enforcement of Title IX both in athletic and non-athletic areas. For example, the Supreme Court's ruling in *North Haven Board of Education v. Bell* (1982) provided employees within educational institutions protection from sexual discrimination under Title IX. Also, in *Franklin v. Gwinnett County Public Schools* in 1992, the Court ruled the intentional discriminatory actions of the school district warranted financial awards. Both in *North Haven* and *Franklin*, Supreme Court rulings were possible because of *Cannon* and the private right of action granted in 1979.

In 2004, the District of Columbia Circuit Court ruled the Department of Education could not be held liable for the manner in which educational institutions wish to comply with Title IX, its regulations, or Title IX's policy clarifications (National

Wrestling Coaches Association v. Department of Education, 2004). With the Supreme Court's rejection of *certiorari*, the circuit court established a precedent that lawsuits need to be aimed at specific educational institutions rather than at a governmental entity (Stevens, 2004). Previous to the circuit court's ruling, organizations were seeking to challenge the legality of the three-part test rather than the universities implementing the test.

Prior to 1992, courts predominately issued temporary injunctions limiting the actions of educational institutions (Stevens, 2004). The temporary injunctions restricted the discriminatory behavior of the school, but did not cause direct monetary damages. But in 1992, the Supreme Court unanimously ruled in *Franklin v. Gwinnett County Public Schools* that "a damages remedy is available for an action brought to enforce Title IX" (1992, p. 77). Since the Supreme Court's ruling in *Franklin*, monetary damages have been allowed, but with specific circumstances and restrictions (Franklin v. Gwinnett County Public Schools, 1992). The circumstances surrounding the *Franklin* ruling included intentional discriminatory actions by the teacher at the school along with inappropriate procedures by the school district in handling the discrimination complaint. When gauging whether financial awards are available in all Title IX cases, the case's circumstances establish the possibility of financial awards being granted by the court.

In *Gebser v. Lago Vista Independent School District* in 1998, the Supreme Court addressed the difficulties faced by courts in granting financial awards in Title IX cases. Within the case, it was revealed that the school district was not knowledgeable of the harassment faced by one of its students by an employee of the school. The Court wrote, that without direct knowledge of the Title IX violation by an official with the ability to

take corrective action, the school district could not be held liable under Title IX (*Gebser v. Lago Vista Independent School District*, 1998). Within its ruling, the Court cited the original enforcement procedures, which includes the ability of the school district to voluntarily correct its actions before the removal of federal funding. Finally, the Court noted that the actions of the school must amount to “deliberate indifference” towards the situation (*Gebser v. Lago Vista Independent School District*, 1998, p. 276). One year after *Gebser*, the Supreme Court extended the “deliberate indifference” standard to student-student harassment within education institutions (*Davis v. Monroe Board of Education*, 1999). In *Franklin*, *Gebser*, and *Davis*, the Supreme Court established a clear precedent to follow. The education institution must either intentionally discriminate or must be aware of the Title IX violation and subsequently act with “deliberate indifference” towards the situation before monetary damages can be awarded.

Following the Court’s ruling in *Franklin*, the question arose of which types of damages, compensatory or punitive, could be awarded (Heckman, 2003). With regards to punitive damages and Title IX lawsuits, no circuit court has granted punitive damages in Title IX cases. In *Mercer v. Duke University* (2002), the North Carolina district court jury granted Sue Mercer a punitive damage award of \$2 million, but the 4<sup>th</sup> Circuit remanded the ruling. In its ruling, the 4<sup>th</sup> Circuit Court wrote,

Concluding that punitive damages were not available in private causes of action seeking redress based on two federal civil rights laws prohibiting disability discrimination which relied on Title VI of the Civil Rights Act of 1964. The Fourth Circuit noted that Title IX was predicated upon Title VI; thus, the court reached the same conclusion for a Title IX action. (*Mercer v. Duke University*, 2002, p. 643)

In addition to *Mercer*, the district court in *Schultzen v. Woodbury Central Community School District* (2002) concluded that punitive damages were not permissible under Title

IX. Citing *Newport v. Fact Concerts, Inc* in 1981, the district court granted government municipalities immunity from punitive awards under Section 1983 of United States code. To date, courts have only granted compensatory damages affiliated with direct and flagrant violations of Title IX.

In March of 2005, the Supreme Court ruled that “whistleblowers” are protected from retaliation under Title IX. The 5-4 vote in *Jackson v. Birmingham Board of Education* protected “teachers and coaches such as Jackson” who “are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators” (2005, p. 12). Within its ruling, the slight majority recognized the enforcement potential of coaches who witness violations of Title IX. The majority’s ruling noted, “Indeed, if retaliation were not prohibited, Title IX’s enforcement scheme would unravel. Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied” (*Jackson v. Birmingham Board of Education*, 2005, pp. 11-12).

In conclusion, the enforcement procedures affiliated with Title IX have progressed greatly since the law’s passage in 1972. The Office for Civil Rights is still the main enforcement mechanism related to Title IX, but the potential financial damages from a lawsuit granted in *Franklin* forced universities and school districts to comply quickly. With the recent Supreme Court’s ruling allowing teachers and coaches to recognize and report alleged Title IX violations without the threat of retaliation, future enforcement and administration of Title IX by school districts and universities will continue to support the law’s anti-discriminatory language. Finally, temporary

injunctions and voluntary compliance plans remain the primary enforcement avenues of Title IX.

Title IX's Legislative Intent Compared with the Current Administration and  
Implementation of the Law

The Congressional testimony surrounding the formation and passage of Title IX is unusually sparse (Lewis, 1983). Although limited, the evidence from Congress demonstrates members' intentions to cover various aspects of gender discrimination by educational institutions. During the lawmaking process, Senator Birch Bayh, Representative Edith Green, and Representative Patsy Mink became the dominant voices of support for a statute attempting to eliminate gender discrimination in educational settings. In *North Haven Board of Education v. Bell*, the Supreme Court through Justice Blackmun's majority opinion recognized the importance of Senator Bayh by writing, "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction" (1982, p. 527). To determine the original legislative intent of Title IX and compare the intention to the current administration and implementation of Title IX, special attention must be granted to the evidence surrounding the law's passage.

Congressional records provide the only insight into the legislative intent of Title IX. In the early 1970's, Senator Birch Bayh became the sponsoring Senator of Title IX and his proposal attempted to "guarantee that women, too, will enjoy the educational opportunity every American deserves" (Congressional Record, 1972, p. 30,403). The

evidence pointed to the need to end gender discrimination by education institutions that plagued females for years in such areas as admissions and financial aid .

According to Bayh's testimony, at the heart of Title IX is a "provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions" (Congressional Record, 1971, p. 5803). In the House of Representatives, Representative Mink summed up Title IX's intentions of eliminating sex discrimination by stating, "Any college or university that has a policy which discriminates against women applicants . . . is free to do so under Title IX, but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination" (Congressional Record, 1971, p. 5808).

Title IX passed in 1972 with little mention of athletics, but the administration and implementation of Title IX and educational institution's efforts to comply with its appropriate regulations have led to athletics being the most scrutinized aspect of Title IX (Samuels & Galles, 2003). In Bayh's testimony in 1971 and 1972, he alluded to athletics twice. First, Bayh alluded to athletics by stating, "this portion of the amendment covers discrimination in all areas where abuse has been mentioned – employment practices for faculty and administrators, scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth" (Congressional Record, 1971, p. 5807). Second, in the events preceding Title IX's passage, Senator Bayh spoke to the overall purpose for Title IX by stating,

Title IX's purpose is to provide equal access for men and women 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. (Bayh, 1972, p. 18,435)

The lack of clear evidence or testimony supporting athletics' inclusion under Title IX has led to great debate about the incorporation of athletics under the law.

As written, Title IX provides little indication whether Congress intended the statute to apply to athletic programs (Cox, 1977), but both the Supreme Court and the Congress has recognized Title IX as a far-reaching law. In *North Haven Board of Education v. Bell* (1982), the Supreme Court interpreted Title IX as to include employees within educational institutions. In the majority's opinion, Justice Blackmun wrote "There is no doubt that if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language" (*North Haven Board of Education v. Bell*, 1982, p. 520). In addition, Congress reiterated Title IX as a broad law when it passed the Civil Rights Restoration Act in 1987. The Act reads, ". . . legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered" (Civil Rights Restoration Act, 1987, § 2). Finally, in a controversial decision in *Jackson v. Birmingham Board of Education* (2005), third party members or "whistleblowers" were protected from retaliation under Title IX although the act neglects retaliation in both the law's wording and published regulations. The actions by both the judicial and legislative branch of the United States government support Title IX being interpreted beyond its language. In both court rulings and legislative testimony, the interpretation of Title IX displayed similar characteristics with other anti-discriminatory laws such as Title VI of the Civil Rights Act of 1964 (Mahoney, 1995, Suggs, 2005).

After the law's passage in 1972, Congress spent three years formulating Title IX's regulations. In 1975, the Department of Health, Education, and Welfare (HEW) issued the regulations governing Title IX's implementation, although Congress never articulated its approval or disapproval (Ganzi, 2004). With regards to athletics, Title IX compliance centers upon two specific sections of the regulations. First, Section 106.31 reads

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. (Title IX Regulations, 1975, § 106.31, d)

Second, Section 106.41 reads,

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. (Title IX Regulations, 1975, § 106.41)

Although many institutions found the regulations were “vague and inadequate” (Johnson, 1994), the regulations have not been altered since passage.

Title IX covers three broad areas within intercollegiate and scholastic athletics: financial assistance, treatment and benefits, and equal opportunities for athletes (Anderson et al., 2004). After Title IX's regulations were published in 1975, the Department of Health, Education, and Welfare (HEW) received over 100 complaints of discrimination involving over 50 colleges and universities (Starace, 2001). Because of this, HEW issued Title IX's Policy Clarification to “explain the regulations so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs” (Title IX Policy

Clarification, 1979, p. 2). Also found in the clarification, the HEW requires “institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes” (Title IX Clarification, 1979, p. 8). In order to evaluate whether the accommodation of athletic interests and abilities of the underrepresented sex exist, the HEW included the three-part test including the controversial “substantial proportionality” part.

Since the 1979 Title IX Policy Clarification, athletics has been at the forefront of Title IX compliance. In *Cohen v. Brown University*, the 1<sup>st</sup> Circuit Court noted that an “institution violates Title IX if it ineffectively accommodates its students’ interests and abilities in athletics under 34 C.F.R. 106.41 c1, regardless of its performance with respect to other Title IX areas” (1993, p. 888). The district court in *Kelley v. Board of Trustees* (1994) admitted that the Policy Clarification and court decisions such as those in *Cohen* and *Roberts v. Colorado State Board of Agriculture* (1993) had “converted Title IX from a statute which prohibits discrimination on the basis of sex . . . into a statute which provides ‘equal opportunity for members of both sexes’” (Kelley v. Board of Trustees, 1993, p. 9). Since the issuance of the three-part test in 1979, many of the complaints about Title IX have focused on substantial proportionality and the perception of mandating quotas (Brake, 2004). Finally, universities complying with Title IX by achieving the substantial proportionality part of the test have led to the elimination of many male teams in efforts to reduce the number of male athletes, rather than increasing the number of opportunities for female athletes.

The Office for Civil Rights has continued to provide guidance to universities seeking to comply with Title IX including expounding on the meaning of substantial proportionality. The 1996 Title IX Policy Clarification reads, “if there are substantially proportionate numbers in their athletic participation in respect to the enrollment numbers, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes” (Title IX Policy Clarification, 1996, p. 8). However, after the President’s Commission in 2003, the OCR reemphasized the flexibility of the three-part test. The 2003 Title IX Policy Clarification reiterated that all three parts of the test can be used to demonstrate the full and effective accommodation of athletic interests and noted the elimination of male teams in attempts to gain substantial proportionality is a “disfavored practice” (Reynolds, 2003, p. 2). Finally, the 2003 Clarification and the OCR “encourages schools to take advantage of its [the three-part test] flexibility, and to consider which of the three prongs best suits their individual situations” (Reynolds, 2003, p. 2). Recent trends in measuring compliance with the three-part test have focused on the three-part test’s flexibility and the continued expansion of athletic opportunities for both sexes.

Before March of 2005, the lack of guidance provided to institutions concerning the second and third parts of the test caused substantial proportionality to become the primary test to measure colleges’ compliance with Title IX (Suggs, 2005). In *Cohen v. Brown University* in the 1990’s, the 1<sup>st</sup> Circuit “required [Brown] university to adhere to strict criteria for demonstrating gender equity in intercollegiate athletics” (Thelin, 2000, p. 391). In addition, all the circuit courts that have addressed similar situations have followed the 1<sup>st</sup> Circuit’s precedent (Ganzi, 2004). For example, the 7<sup>th</sup> Circuit Court in

*Boulahanis v. Illinois State University* agreed with *Cohen* in its ruling which read, “Because the University has achieved substantial proportionality between men's enrollment and men's participation in athletics, it is presumed to have accommodated the athletic interests of that sex” (1999, pp. 6-7). Finally, the 9<sup>th</sup> Circuit in *Neal v. Board of Trustees* clarified how educational institutions can comply with Title IX without expanding opportunities when it wrote, “If a university wishes to comply with Title IX by leveling down programs instead of ratcheting them up, Title IX is not offended” (1999, p. 765). The attempts of universities to achieve substantial proportionality through the elimination of male athletic slots impede the further progress for female athletes (Ganzi, 2004, Brake, 2001 & 2004). Although numerous circuit courts have recognized universities’ efforts to achieve substantial proportionality as legitimate, the practice of eliminating male athletic slots to achieve substantial proportionality does not align with Title IX’s original intent (Ganzi, 2004).

Although the Office for Civil Rights has not issued a specific clarification addressing the second part of the three-part test, various circuit and district courts and the OCR have provided limited direction to educational institutions. The second part of the test requires universities demonstrate a “history and continuing practice” of program expansion (Title IX Policy Clarification, 1979, p. 11). In *Cohen*, the 1<sup>st</sup> Circuit noted that courts are looking to ensure “an ongoing effort is made to meet the needs of the under-represented [sic] gender” (Cohen v. Brown, 1993, p. 898). In 1996, the OCR called the second part of the test “an examination of an institution’s good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex at that institution” (Title IX Clarification, 1996, p. 3). In its

consideration and evaluation of a university's compliance with the second part of the test, the OCR looks at the universities record of adding team, the universities' responsiveness to requests to elevate club teams, and efforts to monitor interests among its students when applying the second part of the test (Title IX Policy Clarification, 1996).

The second part of the test requires the expansion of athletic opportunities for the underrepresented gender. The 1996 Title IX Policy Clarification reads,

The OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the over represented sex alone or by reducing participation opportunities for the over represented sex to a proportionately greater degree than for the underrepresented sex. (Title IX Clarification, 1996, p. 10)

Furthermore, the 1996 clarification noted compliance with the second part of the test requires more than a promise to expand athletic opportunities in the future by stating "OCR will not find that an institution satisfies part two . . . by merely promising to expand its program for the underrepresented sex at some time in the future" (Title IX Clarification, 1996, p. 10). Finally, the OCR has not attached a fixed interval of time to the second part of the test (Title IX Policy Clarification, 1996).

In March of 2005, the Office for Civil Rights issued a specific clarification of the third part of the test. Prior to the 2005 Title IX Policy Clarification, the OCR and the courts provided little guidance to educational institutions attempting to use the third part to demonstrate full and effective accommodation. In *Cohen*, the 1<sup>st</sup> Circuit Court would not permit the elimination of two female varsity teams and noted "Brown is cutting off varsity opportunities where there is still great interest and talent, and where Brown still has an imbalance between men and women varsity athletes in relation to their undergraduate enrollments" (Cohen v. Brown University, 1993, p. 892). The circuit

court continued by writing, “Brown is cutting off varsity opportunities where there is still great interest and talent, and where Brown still has an imbalance between men and women varsity athletes in relation to their undergraduate enrollments” (Cohen v. Brown University, 1993, p. 892). In *Roberts*, the 10<sup>th</sup> Circuit Court found that Colorado State’s elimination of an established fastpitch softball varsity program without possessing substantial proportionality violated Title IX. In its ruling, the circuit court wrote, “Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men’s and women’s athletic participation rates become substantially proportionate to their representation in the undergraduate population” (Roberts v. Colorado State Board of Agriculture, 1993, p. 824). The third part of the test will not allow colleges and universities to cut female teams and remain in compliance with Title IX unless the universities have established substantial proportionality (Brake, 2001)

The 2005 Title IX Policy Clarification provided a detailed methodology and survey on how to assess the interests and abilities on the student body. The clarification reads, “OCR issues this Additional Clarification to explain some of the factors OCR will consider when investigating a recipient's program in order to make a Title IX compliance determination under the third compliance option of the three-part test” (Manning, 2005, p. 1). The clarification continues,

An institution will be found in compliance with part three unless there exists a sport (s) for the underrepresented sex for which all three of the following conditions are met: (1) unmet interest sufficient to sustain a varsity team in the sport(s); (2) sufficient ability to sustain an intercollegiate team in the sport(s); and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region. Thus, schools are not required to accommodate the interests and abilities of all their students or fulfill every request for the addition or elevation of particular sports, unless all three conditions are present. (Manning, 2003, p. 2)

The clarification stressed the importance of all three conditions be met before a school must create a varsity team. The 2005 clarification echoes previous Title IX documents that stressed that universities and school districts are not forced to satisfy every athletic interest found on campus (Title IX Policy Clarification, 1979, Bonnette & Daniel, 1990). Because of the date of the clarification, the implementation and impact of the clarification cannot be assessed fully.

The recent policy clarification has drawn widespread criticism from Title IX supporters and the National Collegiate Athletic Association (Suggs, 2005). After the clarification's issuance, the NCAA immediately issued a resolution calling for its member institutions to ignore the clarification because

Whereas the Additional Clarification is inconsistent with the 1996 Clarification and with basic principles of equity under Title IX because it, among other problems (a) permits schools to use surveys alone, rather than the factors set forth in the 1996 Clarification, as a means to assess female students' interest in sports; (b) conflicts with a key purpose of Title IX – to encourage women's interest in sports and eliminate stereotypes that discourage them from participating; (c) allows schools to restrict surveys to enrolled and admitted students, thereby permitting them to evade their legal obligation to measure interest broadly; (d) authorizes a flawed survey methodology; (e) shifts the burden to female students to show that they are entitled to equal opportunity; and (f) makes no provision for the Department of Education to monitor schools' implementation of the survey or its results. (NCAA leadership groups urge Department of Education to rescind additional clarification for Title IX and maintain 1996 clarification, 2005)

The controversy over the recent clarification included a letter to President Bush from 140 members of the House of Representatives asking the President to rescind the clarification. Furthermore, members of Congress in the Senate Appropriations Committee asked the Department of Education to withdraw the clarification. The committee also called upon universities schools to make “reasonable, good faith efforts” to assess students' abilities and interests (Schuman, 2005). The tone of the recent actions by the Office for Civil

Rights in 2003 and 2005 suggest attempts to make the three-part test more flexible for educational institutions; moving away from a perceived inflexible quota driven test to a test that allows various ways to demonstrate the equity of athletic opportunities between sexes.

The alignment of the administration and implementation of Title IX with the law's intentions is difficult to evaluate because of the lack of clarity in both the law's intentions and incomplete data surrounding the law's implementation. A recent study found that a vast majority of NCAA member institutions did not satisfy the substantial proportionality part of the compliance test (Anderson, et al., 2004). Although the study noted slight gains when compared to similar data from 1995, the study found an average proportionality gap over 10%, which is beyond what the courts have granted as substantial proportionality (Anderson, et al., 2004). Although substantial proportionality is not the only way to comply with Title IX, the other aspects of Title IX do not provide the same level of data to make evaluations about the implementation of Title IX. In addition, facility construction and publicity for female athletes have reached an all-time high (Suggs, 2005).

## **Chapter 4**

### **Findings**

Title IX's jurisprudence and other governmental action concerning athletics has a complicated and controversial history. The tension between advocates of the law and opponents of the gender equalizing statute has centered on athletics at both the scholastic and collegiate levels. Deciphering the original intent of Title IX from Congressional records during the formation of the law has fallen on courts as well as the Office for Civil Rights. The review of relevant legal history in Chapter 2, as well as a current analysis of the law including a comparison between the present administration of the law with the intention of the law in Chapter 3, yielded several findings regarding Title IX and its application in athletic programs. These findings are as follows:

- 1) Title IX was modeled after Title VI of the Civil Rights Act of 1964 with the primary purpose of ending discrimination against females within educational institutions.
- 2) During the drafting and enactment of Title IX, several members of Congress voiced their displeasure concerning federal funds going to universities and public education institutions that engaged in sex discrimination.
- 3) Title IX was written as an anti-discrimination statute.
- 4) As written, there is no mention of athletics or interscholastic athletes within Title IX.
- 5) Athletics programs were first expressly included under Title IX in 1974 in the Javits Amendment.
- 6) Since its passage, Title IX's administration and implementation has been broadened to include sexual harassment of students by teachers and peers,

discrimination in employment practices, and retaliation by educational institutions to third party members after complaints of Title IX violations.

- 7) The Office for Civil Rights issued the 1979 Title IX Policy Clarification including the controversial “substantial proportionality” part to provide specific guidance to educational institutions for measuring the effective accommodation of athletic interests and abilities among universities’ student populations.
- 8) The three-part test found in the 1979 Title IX Policy Clarification requires universities to illustrate the full and effective accommodation of the interests and abilities among student athletes by either demonstrating: 1) substantial proportionality between the percentage of females in the athletic program and the percentage of females in the undergraduate enrollment, 2) a history and continuing practice of meeting the interests and abilities of the underrepresented sex, 3) the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated by the present program.
- 9) The Office for Civil Rights has continued to modify the requirements for satisfying the three-part test published in the 1979 Title IX Policy Clarification to determine if educational institutions are sufficiently meeting the athletic opportunities of its student population.
- 10) The legality of this three-part test has been upheld by all courts hearing relevant Title IX cases, a total of nine circuit courts.
- 11) At the scholastic level, the administration of the substantial proportionality part of the three-part test has been largely ignored due to the inability of the educational institution to control the gender percentages of students enrolled.
- 12) Unless universities can demonstrate substantial proportionality, which has yet to be exactly defined; eliminating established varsity female teams is a violation of Title IX, specifically resulting in an inability of the educational institution to meet the interests and abilities of the underrepresented sex.
- 13) Although the Supreme Court has not ruled on the applicability of punitive damages under Title IX, various district and circuit courts have ruled Title IX does not permit punitive damages.
- 14) High school athletic associations that collect dues from public educational institutions are required to follow Title IX and its regulations regarding such things as scheduling of seasons and appropriate publicity to male and female athletes.

- 15) Donations to educational institutions from outside sources cannot be used to circumvent Title IX's regulations concerning the equitable treatment and benefits afforded the underrepresented sex.
- 16) At the scholastic level, the treatment and benefits afforded athletes by the educational institution cannot be consistent with inferiority or discrimination and remain in compliance with Title IX.
- 17) Under the current administration, the Office of Civil Rights has deemed the elimination of male teams to satisfy substantial proportionality a "disfavored practice" and encouraged educational institutions to find other means to satisfy Title IX's regulations.
- 18) Since the passage of Title IX in 1972, athletic opportunities for females in scholastic and intercollegiate athletics have drastically improved.
- 19) On average, NCAA member institutions possess female enrollment percentages above 55%, while females constitute slightly more than 40% of athletes within respective athletic departments.
- 20) In the area of athletics, some specific men's teams and opportunities for male athletes have declined as a result of policy decisions made by specific educational institutions regarding the implementation of Title IX.
- 21) Justice O'Connor was the only Supreme Court Justice on the majority side of every case involving Title IX.

### Conclusions

Based on this study's findings, it may be reasonably concluded that during the formation of Title IX, members of Congress intentionally modeled Title IX after Title VI of the Civil Rights Act of 1964. Furthermore, the Supreme Court and other lower courts have recognized the similarities between Title VI and Title IX; drawing comparisons between the enforcement and legislative intent of both statutes. It can be concluded that the modeling of Title IX after Title VI of the Civil Rights Act was purposefully done by

members of Congress to extend the same anti-discrimination language found in the Civil Rights Act of 1964 to include gender discrimination within educational institutions.

Because of the lack of extensive direct evidence surrounding the passage of Title IX, the Court has largely relied on Senator Birch Bayh's recorded testimony to provide the legislative intent of Title IX. According to this testimony, the stated goal of Title IX was to end gender discrimination in all educational institutions receiving federal funding and to prohibit the use of federal monies to support educational organizations practicing discrimination. Further, Congressional records illustrate that members of Congress wanted additional educational opportunities opened to females. The initial lack of clear evidence regarding the legislative intent of Title IX may have contributed to further action by Congress, the Department of Education, and the court system resulting in Title IX's scope broadening to include employment, retaliation, athletics, and sexual harassment within educational institutions.

Since Title IX's passage, additional action by Congress has reinforced athletics' inclusion within Title IX. In 1974, the Javits Amendment to Title IX first incorporated athletics under Title IX, but the Supreme Court's ruling in *Grove City College v. Bell* (1984) effectively removed athletics from Title IX's regulations. The passage of the Civil Rights Restoration Act of 1987 and the resulting reinstatement of athletics under Title IX demonstrated Congress's intent to expanding athletic opportunities for females. From 1972 to today, athletic opportunities for females have exploded both at the collegiate and scholastic level. Female athletic participation at the collegiate level has improved over 400% while female participation at the high school level continues to grow at record rates.

Title IX's compliance from scholastic and intercollegiate athletics is measured by analyzing three areas: scholarships, treatment and benefits, and athletic opportunities. The regulations issued by the Department of Health, Education, and Welfare and signed by President Gerald Ford in 1975; provide the necessary guidance on scholarships and equitable treatment. With regards to athletic treatment and benefits, Title IX's goal is to prohibit gender discrimination afforded to athletes by the educational institution. Lastly, the issuance of the 1979 Title IX Policy Clarification provided the controversial three-part test to assist educational institutions in measuring the equitability of athletic opportunities between sexes. The three-part test requires universities to demonstrate the full and effective accommodation of the athletic interests and abilities among students by either demonstrating substantial proportionality between the percentage of females in the athletic program and the percentage of females in the undergraduate enrollment, a history and continuing practice of meeting the interests and abilities of the underrepresented sex, or that the athletic interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated by the present program. The legality of the three-part test as well as the legality of the manner in which educational institutions wish to comply with the test has consistently been upheld by every circuit court returning an appropriate verdict.

The first part of the three-part test found in the 1979 Title IX Policy Clarification, substantial proportionality, provides universities a "safe harbor" in its goal to comply with Title IX. Although educational institutions must demonstrate compliance with only one part of the three-part test, universities' reliance on achieving substantial proportionality has been the subject of numerous Title IX court cases. If universities

attain substantial proportionality, the courts have stated that all athletic interests for both sexes have been effectively accommodated. Although the substantial proportionality part of the test receives the most scrutiny, over two-thirds of the universities investigated by the Office for Civil Rights since 1992 have used the second and third parts of the test to demonstrate compliance with Title IX. Furthermore, the Office for Civil Rights called the reduction of male teams in order to attain substantial proportionality a “disfavored practice” in its 2003 Policy Clarification (Reynolds, 2003, p. 2). With the recent issuance of the 2005 Policy Clarification outlining how colleges can further use the third part of the test to satisfy Title IX, the Office for Civil Rights continues to encourage colleges to take full advantage of the flexibility found within the three-part test.

To date, there is on average a 10% discrepancy between female athletic participation and enrollment in undergraduate schools. This evidence illustrates that in order for colleges to remain in compliance with Title IX, many will be forced to demonstrate compliance with Title IX through parts two and three of the three-part test. Furthermore, because of the lack of guidance surrounding the second part, a history and continuing practice of program expansion, much of the future focus of Title IX compliance will surround surveys and the measurement of athletic interests among students. The Office for Civil Rights recently issued a clarification designed to offer guidance to educational institutions attempting to use the third part of the three-part test to demonstrate compliance with Title IX. With the clarification, the OCR issued a detailed survey complete with appropriate methodology, but the recent backlash surrounding the clarification calls into question the future availability and enforcement potential of the clarification.

With respect to athletics at the high school level, Title IX investigations focus upon the overall treatment of the high school female athletes. Many of the recent investigations and recent publicity has focused on the scheduling of female athletics' seasons and the facilities in which females participate. The overall goal of Title IX is to ensure that the treatment of the underrepresented sex by educational institutions is non-discriminatory, whether intentionally or resulting from choices made by educational institutions. The courts have consistently relayed the message that females are not to be treated in a manner that gives the perception that females are "second-class" or "inferior" to males. This standard has required the construction of numerous new fields and locker rooms to accommodate increasing interests among females in such sports as softball, soccer, and volleyball. Finally, unlike the ability of colleges to attain Title IX compliance with the three-part test by reducing male opportunities and achieving substantial proportionality, high schools are obligated to respond to the growing interests in athletic teams to comply with Title IX.

#### Future Recommendations

The future enforcement and administration of Title IX will continually be influenced by the Office for Civil Rights, members of Congress, and the Supreme Court. Because the government is politically driven, the future actions relating to Title IX by the OCR, Congress, and the Supreme Court could possibly contradict past court cases and statutes. The Supreme Court's role in Title IX enforcement was recently complicated with the resignation of Supreme Court Justice O'Connor. Because Justice O'Connor was the only Justice to side on the majority of every Title IX case reaching the Supreme

Court, her influence on shaping Title IX cannot be ignored. Since 1995, Justice O’Conner served as the deciding vote such significant Title IX cases as *Gebser v. Lago Vista Independent School District* (1998), *Davis v. Monroe County Board of Education* (1999), *Brentwood Academy v. Tennessee Secondary School Athletic Association* (2001), and most recently in March of 2005, *Jackson v. Birmingham Board of Education*. With the recent appointment of Chief Justice Roberts and a new Justice yet to be finalized, any Title IX case that reaches the Supreme Court will be decided by a decidedly different Court than the one Justice O’Conner served upon.

The future enforcement of Title IX will be greatly shaped by the decisions of various courts regarding the types of damages allowed by Title IX. The enforcement mechanism of the Office for Civil Rights, which is the potential removal of federal funding, has never completely been employed. Since the Court’s ruling in *Franklin v. Gwinnett County Public Schools* (1992), a “damages remedy” has been permitted. In the unanimous ruling, the Court did not clarify “damages remedy” to mean compensatory or punitive damages, but a few lower courts have ruled that punitive damages are not permissible under Title IX. If the Supreme Court eventually rules that punitive damages are not permissible under Title IX, the enforcement of Title IX could potentially face problems in the future. For example, educational institutions could conceivably deem a lawsuit resulting in compensatory damages cheaper than providing a new athletic team with new facilities. The Court’s eventual action regarding punitive damages and Title IX is one specific Title IX topic the Supreme Court might need to address.

The release of the 2005 Title IX Policy Clarification in March of 2005 highlights the political side of Title IX administration and enforcement. During the 1990s and the

Clinton Administration, the Office for Civil Rights was extremely aggressive in the implementation of Title IX (Suggs, 2005). Norma Cantu, the Assistant Secretary in the Office for Civil Rights, consistently allowed male athletic teams to be eliminated by colleges in efforts to achieve “substantial proportionality.” Specifically, the 1996 Title IX Policy Clarification echoed the words used in *Cohen v. Brown University* (1993) that stated the first part of the three-part test provided educational institutions a “safe harbor” when trying to comply with Title IX. However, the recent release of the 2005 Clarification seemingly contradicts the efforts made the OCR during the Clinton Administration. The 2005 Title IX Policy Clarification built upon the 2003 Title IX Policy Clarification that called the elimination of male teams a “disfavored practice.” The 2005 Clarification provided a detailed survey that would allow colleges to measure the athletic interests among the student body. If the survey conducted by the educational institution demonstrates the full and effective accommodation of athletic interests and abilities among its student enrollment, the educational institution complied with the third part of the 1979 Title IX Policy Clarification’s three-part test. The OCR’s allowance of surveys combined with its “disfavored practice” remark illustrates a potential shift away from using substantial proportionality to demonstrate Title IX compliance.

Finally, the inability of the courts and the Office for Civil Rights to apply the three-part test to high school athletics continues to pose difficulties in the administration and implementation of Title IX. Because school districts and individual schools cannot control the gender percentages of its enrollment, substantial proportionality is not used to demonstrate Title IX compliance. Without the ability to use substantial proportionality, Title IX advocates have struggled to continually advance the athletic opportunities for

females. Although battles over the equality of facilities continue to garner national attention, eventually many school districts will be forced to accommodate growing interests in female sports such as fastpitch softball, soccer, lacrosse, and volleyball. This accommodation of growing athletic interests and the costs associated with the accommodation are eventually going to conflict with shrinking budgets and other financial concerns.

The future of Title IX will continue to change and be modified by forces far removed from the law's passage in 1972. It will continue to be very interesting to read, study, and live the changes that Title IX will make in the world of athletics both at the scholastic and collegiate levels.

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