SCOREBOARD: A CONCISE CHRONOLOGICAL TWENTY-FIVE YEAR HISTORY OF TITLE IX INVOLVING INTERSCHOLASTIC AND INTERCOLLEGIATE ATHLETICS

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I. INTRODUCTION

The 1972 enactment of the federal statute, Title IX of the Education Amendments of 1972,[1] which prohibits discrimination on the basis of sex, has been the starting line for the development and recognition of interscholastic and intercollegiate athletic opportunities for the females of this country. The course over the ensuing 25 year history has featured a rugged terrain, but the benefits have proved enormous. The Title IX paradigm is not perfect, and obstacles continue to exist.

On the facade of the United States Supreme Court is inscribed "Equal Justice Under Law." Equality is one of the underpinnings of American jurisprudence. The two overriding questions affecting student-athletes and prospective student-athletes are: (1) may separate athletic programs be offered for men and women, based on their sex; and (2) if so, must "equal" programs be provided. On the athletic employment front, the overriding issues are: (1) is there a Title IX cause of action, or is the educational employee restricted to other federal statutes; (2) what impact do the Title IX regulations on employment have; and (3) may a school compensate a coach of one team better than the coach of another team, based on the sex of the athletes coached.

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1. *See* §§ 901-9, 20 U.S.C. §§ 1681-8 (1994), for a codification of the Title IX statute.

An array of jurisdictional, threshold and procedural issues have arisen during the past 25 years, including: (1) what constitutes "receipt" of federal funds for operation of the statute; (2) what statute of limitations should be applied; (3) what standard should be applied to evaluate the "equality" of the programs; and (4) what remedies may be awarded to an aggrieved individual. Rounding out the Title IX paradigm, is the new issue of whether an educational institution can be found liable for the sexual harassment of a student-athlete by a coach.

This chronology provides a blueprint of the notable highlights and landmarks along the way to Title IX's silver anniversary.

A. Equal Justice Under Law

The Supreme Court summarized the state of affairs of gender equity in our country in the decision rendered in *Frontiero v. Richardson*,[2] where Justice Brennan stated:

> There can be no doubt that our nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage. . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the Nineteenth Century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right . . . until adoption of the Nineteenth Amendment half a century later [in 1920]. . . . because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our *educational institutions*, in the job market and, perhaps most conspicuously, in the political arena. . . . the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating without regard to the actual capabilities of its individual members.[3]

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2. 411 U.S. 677 (1973).

3. *Id.* at 684-5 (emphasis added) (citations omitted).

II. Title IX Milieu

May 17, 1954

The Supreme Court decides *Brown v. Board of Education of Topeka Kansas*,[4] stating, "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[5]

March 22, 1972

The Equal Rights Amendment ("ERA") was "passed by Congress . . . and submitted to the legislatures of the states for ratification, [it] declares that '[e]quality of rights under the law shall not be denied or abridged by any State on account of sex.'"[6] The ERA was never ratified.

May 14, 1973

In *Frontiero v. Richardson*,[7] the Supreme Court held that discrimination based on sex in violation of the Fourteenth Amendment's Equal Protection Clause, would be subject to the highest scrutiny, reserved for "suspect" classes and fundamental rights.[8] However, this was a plurality decision, and was never ratified by a majority of the Court.[9]

December 20, 1976

Instead, in *Craig v. Boren*,[10] the Supreme Court articulated the intermediate scrutiny test for sex-based distinctions, whereby, "To withstand constitutional challenge . . . classification by gender must serve important governmental objectives,

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4. 347 U.S. 483 (1954).
5. *Id.* at 493.
6. *See* Frontiero v. Richardson, 411 U.S. at 689 (1973).
7. 411 U.S. 677 (1973).
8. *Id.* at 688. The Fourteenth Amendment, adopted in 1868, provides, "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 person shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV § 1. The Fourteenth Amendment Equal Protection Clause was first applied to gender discrimination in Reed v. Reed, 404 U.S. 71 (1971).
9. Justice Brennan authored the opinion, joined by Justices Douglas, White and Marshall.
10. 429 U.S. 190 (1976).

and must be substantially related to the achievement of those objectives."[11]

June 26, 1996

In *United States v. Virginia*,[12] the Supreme Court determined that the single-sex military college at Virginia Military Institute was unconstitutional in violation of the Fourteenth Amendment Equal Protection Clause. The Court reasoned:

> Parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action. . . . Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden is demanding and it rests entirely on the State. . . . The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[13]

III. TITLE IX

June 23, 1972

Title IX of the Education Amendments of 1972 ("Title IX")[14] was enacted during the Nixon administration. The essential language of the statute mandates that:

> No person in the United States shall, on the basis of sex, be ex-

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11. *Id.* at 197. *See also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982), demanding an "exceedingly persuasive justification" for gender-based classifications.

12. 116 S. Ct. 2264 (1996).

13. *Id.* at 2274-5.

14. *See* Sections 901-9, 20 U.S.C. §§ 1681-8 (1994), for a codification of the Title IX statute. This legislation came about as a result of findings of the House Subcommittee hearings orchestrated by Representative Edith Green in 1970. *See* DISCRIMINATION AGAINST WOMEN: HEARINGS ON EDUCATION & LABOR, 91st Cong., 2d Sess. (1970). Senator Birch Bayh (D-Ind.) was the sponsor of Title IX. Title IX was modeled upon Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000(a) (1994), which prohibits discrimination on the basis of race, creed, or national origin in public facilities. The statute "was adopted in conference without formal hearings or a committee report, sports were only mentioned twice in the congressional debate, 118 CONG. REC. 5807 (1972) (Sen. Bayh) (personal privacy to be respected in sports facilities) . . . 117 CONG. REC. 30,407 (1971) (Sen. Bayh) (intercollegiate football and men's locker rooms)." Courtney W. Howland, Note, *Sex Discrimination & Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L. J. 1254, 1255 n.11 (1979). *See also* Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 9 n.30 and accompanying text, 11 n.35 and accompanying text (1992).

> cluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .[15]

1973

The first female to receive an athletic scholarship was Terry Williams, a golfer, who attended the University of Miami in Coral Gables, Florida.[16]

May 20, 1974

Tower Amendment introduced, which would add the following language: "This section shall not apply to an intercollegiate athletic activity insofar as such activity provides to the institution gross receipts or donations required by such institutions to support that activity."[17] This proposal however, was never adopted, and neither were other bills and legislation, which would have usurped or dramatically altered Title IX.[18]

1974

Instead, the Javits Amendment was adopted,[19] which directed that the Secretary of the Department of Health, Education and Welfare ("HEW") prepare and publish proposed implementing 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."[20]

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15. Section 901(a), 20 U.S.C. § 1681(a) (1994).

16. *See* Heckman, *supra* note 14, at 44-5 n.198.

17. *See* 120 CONG. REC. 15,322 (1974).

18. *See* Haffer v. Temple Univ., 524 F. Supp. 531, 534-5 (E.D. Pa. 1987), detailing specific bills and amendments which would have eviscerated Title IX's application in whole or part. *See also* Heckman, *supra* note 14, at 11 n.36.

19. Section 844 of the Education Amendments of 1974, 88 Stat. 612, Pub. L. 93-380 (1974).

20. 20 U.S. CODE CONG. & ADMIN NEWS 695 (1974). "However, severe controls were imposed on HEW's power to issue regulations." Howland, *supra* note 14, at 1256. *See* 39 Fed. Reg. 22,228, 22,236. The Title IX regulations enacted by HEW made "no provisions for 'affirmative efforts' or an annual student-interest survey." Howland, *supra* note 14, at 1259. However, one regulation does provide that "a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex." 34 C.F.R. § 106.3 (1997).

1974

The Women's Equity Action League instituted the first Title IX lawsuit[21] "against the then Secretary of HEW alleging noncompliance with Title IX in permitting schools which discriminate to continue to receive federal funds."[22] Remarkably, the lawsuit lasted 16 years, until 1990, when the District of Columbia Circuit Court of Appeals in *Women's Equity Action League v. Cavazos*[23] affirmed the district court's dismissal of the lawsuit, finding "none of [the] asserted sources authorizes the continuing, across-the-board federal court superintendence of [the] executive enforcement plaintiffs seek."[24]

The case is noteworthy, for the consent decree entered into by the parties in 1977, which required:

> [F]ederal officials to investigate non-frivolous complaints alleging discrimination in educational institutions receiving federal funds, and to conduct a reasonable number of compliance reviews; it set timeframes for individual complaint processing and agency-sparked compliance reviews, with leeway for situations in which witnesses were unavailable, or resources 'inadequate,' or circumstances 'unusual.'. . . It applied to the . . . enforcement obligations nationwide.[25]

June 1974

HEW published proposed Title IX regulations.[26]

May 27, 1975

President Gerald Ford executed the authorization for the

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21. *See* Women's Equity Action League v. Harris, No. 74-1720, *sub nom.*, Women's Equity Action League v. Bell, 743 F.2d 42 (D.C. Cir. 1984), *on remand, sub nom.*, Adams v. Bennett/Women's Equity Action League v. Bennett, 675 F. Supp. 668 (D.D.C. 1987), *rev'd on the issue of standing, sub nom.*, Women's Equity Action League v. Cavazos, 879 F.2d 880 (D.C. Cir. 1989), *aff'd district court's dismissal of case*, 906 F.2d 742 (D.C. Cir. 1990). The lawsuit sought injunctive relief barring HEW's deferral of review of Title IX complaints pending completion of all complaints regarding Title VI, 42 U.S.C. § 2000(a) (1994). The names of the defendants changed herein to reflect the then Secretary of HEW, or after the formation of the Department of Education, the Secretary of Education.

22. *See* Heckman, *supra* note 14, at 16-7.

23. 906 F.2d 742 (D.C. Cir. 1990).

24. *Id.* at 747. Ruth Bader Ginsburg, now a Justice of the Supreme Court, wrote the opinion for the majority, while a Judge on the District of Columbia Court of Appeals.

25. 879 F.2d 880, 883 (D.C. Cir. 1989). Part of the consent decree was incorporated by reference into the Policy Interpretation. 44 Fed. Reg. 71,413, 71,418 n.9 and accompanying text (1979).

26. *See* 39 Fed. Reg. 22,228 (1974).

final Title IX regulations, which HEW published on June 4, 1975.[27] The Title IX regulations were then:

> [s]ubmitted . . . to Congress for review. This 'laying before' provision was designed to afford Congress an opportunity to examine a regulation and, if it found the regulation 'inconsistent with the Act from which it derives its authority . . .,' to disapprove it in a concurrent resolution. If no such disapproval resolution was adopted within 45 days, the regulation would become effective."[28]

Different resolutions were introduced, but none adopted within the requisite time frame.[29]

July 21, 1975

Federal regulations were enacted, some of which covered athletics.[30] There are two main provisions governing athletic programs. The first concerns the issuance of athletic scholarships and states:

> (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.
> (2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.[31]

The second provision is entitled "Athletics" and is divided into four subsections. The first subsection tracks the language of the Title IX statute and states:

> *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics

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27. 40 Fed. Reg. 24,128 (1975).

28. *Id.*

29. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 531-2 (1982). For example, "Senator Laxalt introduced a resolution disapproving the regulations governing athletic programs." *Id.* at 532 n.22. "Representative Martin introduced two resolutions in the House - one broad resolution disapproving all the Title IX regulations . . . and one focusing on the sections governing athletic programs, . . . No action was taken on the Martin resolutions." *Id.* at 533 n.24.

30. 34 C.F.R. Part 106 (1997).

31. 34 C.F.R. § 106.37(c) (1997). The only court decision explicitly addressing the distribution of athletic scholarships during this time period is Gonyo v. Drake Univ., 879 F. Supp. 1000 (S.D. Iowa 1995).

> offered by a recipient, and no recipient shall provide any such athletics separately on such basis.[32]

The second subsection is entitled "Separate teams" and governs when athletic programs may be separate or must be coed. It states:

> *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.[33]

Thus, the provision of athletic programs is one of the few educational activities that can be separate based on the sex of the students. The condoning of separate teams in certain circumstances pursuant to Title IX, resulted in numerous lawsuits during Title IX's history.[34]

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32. 34 C.F.R. § 106.41(a) (1997).

33. 34 C.F.R. § 106.41(b) (1997).

34. *See* Heckman, *supra* note 14, at 47-59. The cases where athletes of one sex seek to participate on a team composed of members of the opposite sex are routinely referred to as "cross-over" cases. *Id.* Typically, the case law focuses on individual female students who wanted to be on the males' team. *See, e.g.,* decisions examining female students who wanted to participate on all-male teams, all on the interscholastic level: Adams v. Baker, 919 F. Supp. 1496 (D. Kan. 1996) (case settled 1996) (interscholastic wrestling); Croteau v. Fair, 686 F. Supp. 552 (E.D. Va. 1988) (interscholastic baseball); Lantz v. Ambach, 620 F. Supp. 663 (S.D.N.Y. 1985) (interscholastic football); Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020 (W.D. Mo. 1983) (interscholastic football); O'Connor v. Board of Educ., 545 F. Supp. 376 (N.D. Ill. 1982), *rev'd and remanded*, 645 F.2d 576 (7th Cir.), *cert. denied*, 454 U.S. 1984 (1981) (interscholastic basketball); Leffel v. Wisconsin Interscholastic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978) (interscholastic contact sports); Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 443 F. Supp. 753 (S.D. Ohio 1978), *rev'd*, 647 F.2d 651 (6th Cir. 1981) (interscholastic basketball). "In light of the Supreme Court decision in *United States v. Virginia*, a real concern emerges as to whether the ostensible demarcation of certain sports for men only, under the 'contact sport' classification, would withstand [Fourteenth Amendment] equal protection scrutiny." Diane Heckman, *On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545, 565 (1997). *See, e.g.,* decisions examining male students who wanted to participate on all-female teams, all on the interscholastic level: Williams v. School Dist. of Bethlehem, 998 F.2d 168 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 689 (1994) (interscholastic field hockey); Dahlem v. Board of Educ. of Denver Public Schs., 901 F.2d 1508 (10th Cir. 1990) (interscholastic gymnastics);

The third subsection is entitled "Equal Opportunity" and states:

> *Equal Opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors: (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity. Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.[35]

The review of the "equal opportunity" provision would catapult onto the judicial landscape in the 1990's.[36]

The fourth subsection is entitled "Adjustment period" and states:

> *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from

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Rowley v. Board of Educ. of St. Vrain Valley Sch. Dist., 863 F.2d 39 (10th Cir. 1989) (interscholastic volleyball); Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) (interscholastic volleyball); Kleczak v. Rhode Island Interscholastic League, 768 F. Supp. 951 (D.R.I. 1991) (interscholastic field hockey); Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D.R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979) (interscholastic volleyball). Remarkably, there has been no reported case law exploring cross-over participation involving intercollegiate athletes during the first 25 years of Title IX's existence.

35. 34 C.F.R. § 106.41(c) (1997).

36. *See* Diane Heckman, *The Explosion of Title IX Litigation During 1992-93: Defining the "Equal Opportunity" Standard*, 1994 DET. C. L. REV. 953 (1994) (interestingly, all of the "equal opportunity" decisions, to date, involve intercollegiate athletic programs. However, letters of findings issued by the OCR after investigating administrative complaints and agency-initiated compliance reviews examined the equal opportunity element on both the interscholastic and intercollegiate level). *See e.g.*, Diane Heckman, *The Women's Sports Foundation Report on Title IX, Athletics and the Office for Civil Rights: An Examination of Letters of Findings Issued by the Office for Civil Rights in the Post-Civil Rights Restoration Act Era* (Sept. 1997).

> the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.[37]

February 17, 1976

On behalf of its member colleges and universities, the National Collegiate Athletic Association ("NCAA") leveled the first constitutional attack on the Title IX regulations in *National Collegiate Athletic Association v. Califano*.[38] The district court dismissed the action based on the standing requirement, without reaching the merits of the constitutional challenge.

July 21, 1976

The regulations mandated that elementary schools comply with Title IX by this date.[39]

January 9, 1978

The district court in *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association*,[40] held the Title IX regulation,[41] which denied physically qualified individual girls the right to compete with boys in interscholastic contact sports violated the Fifth Amendment Due Process Clause and was therefore unconstitutional. The court stated, "Separate teams [for boys and girls] may, in fact, be satisfactory if they insure due process. However, their existence can not serve as an excuse to deprive qualified girls positions on formerly all boys' teams, regardless of the sport."[42] However, the Sixth Circuit Court of Appeals reversed the decision.[43]

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37. 34 C.F.R. § 106.41(d) (1997).

38. 444 F. Supp. 425 (D. Kan. 1978), *rev'd and remanded*, 622 F.2d 1362 (10th Cir. 1980) (on the standing issue). The matter was not pursued. Originally, the NCAA oversaw only male athletes, while female athletes abided by the rules and regulations of the Association of Intercollegiate Athletics for Women, which ceased operation in 1982. *See* Heckman, *supra* note 14, at 35-6. *See infra* notes 73-5 and accompanying text.

39. 45 C.F.R. § 86.41(d) (1997).

40. 443 F. Supp. 753 (S.D. Ohio 1978), *rev'd*, 647 F.2d 651 (6th Cir. 1981).

41. 45 C.F.R. § 86.41(b), now 34 C.F.R. § 106.41(b) (1997).

42. *Yellow Springs*, 443 F. Supp. at 758-9.

43. 647 F.2d 651 (6th Cir. 1981).

July 21, 1978

The regulations directed Title IX compliance by this date by secondary and post-secondary schools.[44]

January 19, 1979

The anomalous decision of the district court in *Leffel v. Wisconsin Interscholastic Athletic Association*,[45] remains noteworthy, as it is the only reported decision to find any of the Title IX regulations unconstitutional, which was not reversed on appeal.[46] Therein, the court concluded that the Title IX regulation,[47] which permits educational institutions to operate all-male teams in contact sports to the exclusion of individual qualified female students violated the Fourteenth Amendment Equal Protection Clause, and thus granted summary judgment on behalf of the female student-athletes.[48]

May 14, 1979

The Supreme Court rendered its first decision addressing Title IX in *Cannon v. University of Chicago*.[49] The Court held that although the Title IX statute is silent on whether there is a private right of action, nevertheless there is an implied pri-

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44. 45 C.F.R. § 86.41(d) (1997).

45. 444 F. Supp. 1117 (E.D. Wis. 1978).

46. The district court stated, "It is declared that the defendants' exclusion of the [female] plaintiffs and the class they represent from participation in a varsity interscholastic athletic program in a particular program where such a program is provided for male students violates the equal protection clause of the fourteenth amendment." *Id.* at 1123. Two decades later, the Seventh Circuit Court of Appeals, which covers this jurisdiction, upheld the athletic regulation in Kelley v. Board of Trustees of Univ. of Illinois, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995), and held "Such a provision [34 C.F.R. § 106.41(b) (1997)] is not at odds with the purpose of Title IX and we do not understand plaintiffs to argue that it is. And since 34 C.F.R. § 106.41 [(1997)] is not manifestly contrary to the objectives of Title IX, this Court must accord it deference." *Id.* at 270-1.

47. 45 C.F.R. § 86.41(b), now 34 C.F.R. §106.41(b) (1997).

48. *Leffel*, 444 F. Supp. at 1123. *See also* Adams v. Baker, 919 F. Supp. 1496 (D. Kan. 1996) (female high school student was prevented from participating on the boy's varsity wrestling team sought injunctive relief. The district court stated, "Plaintiff has established a substantial likelihood of success on the merits by showing that prohibiting her from participating in wrestling on the basis of gender does not significantly advance a substantial government interest. To deny a preliminary injunction would cause plaintiff irreparable injury in lost practice time and competitive opportunities, as well as the injury inherent in a denial of constitutional rights." *Id.* at 1505.)

49. 441 U.S. 677 (1979).

vate right of action to seek redress for a violation of Title IX.[50]

December 11, 1979

The Office for Civil Rights ("OCR") of the Department of HEW issued its official policy interpretation for Title IX compliance in the area of intercollegiate athletics. The practical effect was to give post-secondary educational institutions a further reprieve to comply with Title IX until the issuance of the policy interpretation.[51] Parenthetically, HEW had published a proposed policy interpretation for public comment on December 11, 1978. Changes were made to the original policy interpretation proposed.

1980

The Title IX regulations were recodified, without any substantive change, in connection with the creation of the Department of Education.[52]

1980

Mary Alice Hill became the first female athletic director at an NCAA member-institution, San Diego State University.[53]

September 22, 1981

Sandra Day O'Connor, nominated by President Ronald Reagan, became the first female Justice of the United States

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50. The Supreme Court stated, "Title IX, like its model Title VI [of the Civil Rights Act of 1964], sought to accomplish two related, but nevertheless somewhat different objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Id.* at 704. It should be noted that this case concerned the right of a medical student to bring a Title IX cause of action. The Fifth Circuit Court of Appeals in Lowrey v. Texas A&M Univ. System, 117 F.3d 242, 254 (5th Cir. 1997) stated, "Here we decide only that the employees of federally funded educational institutions who raise complaints, or participate in investigations, concerning compliance with the substantive provisions of Title IX are protected from retaliation by 34 C.F.R. § 100.7(e) (1997) and enjoy an implied private right of action for money damages to vindicate their rights." *Id.* at 254.

51. 44 Fed. Reg. 71,413 (1979). The policy interpretation may also be applied to interscholastic, intramural and club athletic programs. *Id.*

52. *See* 34 C.F.R. Part 106 (1997).

53. E-mail from Jennifer Garrett, NCAA Education Services to author, dated March 21, 1997 (on file with SETON HALL JOURNAL OF SPORT LAW).

Supreme Court.[54]

May 17, 1982

The Supreme Court upheld Subpart E of the Title IX regulations (which did not concern the area of athletics) in *North Haven Board of Education v. Bell*.[55] The Court stated, "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."[56]

1984

Trisha Zorn was the first female disabled athlete to receive a full athletic scholarship. Zorn, a blind swimmer, attended the University of Nebraska at Lincoln.[57]

February 28, 1984

The Supreme Court issued the opinion in *Grove City College v. Bell*,[58] and concluded the specific program or activity in question must receive federal funds to qualify as a Title IX action, adopting the "program-specific" approach, and not the institution as a whole, or "institution-wide" approach, whereby if any part of the institution received federal funds, this would inure to all the institution's programs and activities.[59] This narrow interpretation effectively nullified Title IX in the area of athletics, because although many college and university students received federal financial assistance (in the form of grants or loans); however, this did not indicate that the college

54. Linda Greenhouse, *Senate Confirms Judge O'Connor; She Will Join High Court Friday*, N.Y. TIMES, Sept. 22, 1981, at A1.

55. 456 U.S. 512 (1982).

56. *Id.* at 521 (brackets in original).

57. Deb Hauser, *Athletes First, Disabled Second*, WOMEN'S SPORTS EXPERIENCE, Winter 1992, at 9-10. For federal statutes that may apply to disabled athletes, *see e.g.*, the Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1994); Individuals with Disabilities Act, 20 U.S.C. § 1400 (1994); American with Disabilities Act, 42 U.S.C. § 12101 (1994). *See e.g.*, State ex rel. Lambert v. West Virginia State Bd. of Educ., 447 S.E.2d 901 (W. Va. Sup. Ct. 1994) (hearing-impaired female basketball player). For other cases brought by disabled female students seeking athletic participation, *see* Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) (Rehabilitation Act); Kampmeier v. Harris, 411 N.Y.S.2d 744 (N.Y. App. Div. 1978) (McKinney's Educ. Law § 4409); Swiderski v. Board of Educ. City Sch. Dist. of Albany, 95 Misc. 2d 931, 408 N.Y.S.2d 744 (Albany Co. 1978) (McKinney's Educ. Law § 4409).

58. 465 U.S. 555 (1984).

59. *Id.* at 571.

or university as a whole received assistance, only that the school's financial aid department did. Thus all athletic program would be eliminated from the analysis, except possibly a review of the issuance of athletic scholarships offered within the financial aid office.[60]

July and September 1985

The House Subcommittee on Human Resources and Intergovernmental Relations conducted the first congressional hearings examining the Department of Education and the OCR, with Representative Ted Weiss (D-NY) as chairman.[61]

October 30, 1987

The district court in *Haffer v. Temple University*[62] noted, "This appears to be the first case to challenge the operation of an intercollegiate athletic program on federal equal protection grounds."[63] A Title IX claim was also alleged. The court stated, "However, since Temple has decided to sponsor intercollegiate athletics as part of its educational offerings, this pro-

60. Justice Brennan dissented, stating: "The absurdity of the Court's decision is further demonstrated by examining its practical effect. According to the Court, the financial aid program at Grove City College may not discriminate on the basis of sex because it is covered by Title IX, but the college is not prohibited from discriminating in its admissions, its athletic programs, or even its various academic departments." *Id.* at 601 (Brennan, J. dissenting).

61. The findings of the Subcommittee were critical of the OCR. *See* 24TH REPORT OF THE COMMITTEE ON GOVERNMENTAL OPERATIONS TOGETHER WITH SEPARATE VIEWS: INVESTIGATION OF CIVIL RIGHTS ENFORCEMENT BY THE OFFICE FOR CIVIL RIGHTS AT THE DEPARTMENT OF EDUCATION, 99th Cong., 1st Sess., House Report 99-458 (Dec. 30, 1985). During December 1988, the majority staff of the U.S. House of Representatives Committee on Education & Labor (Rep. Augustus F. Hawkins (D-CA), Chairman) issued A REPORT OF THE INVESTIGATION OF THE CIVIL RIGHTS ENFORCEMENT ACTIVITIES OF THE OFFICE FOR CIVIL RIGHTS U.S. DEPARTMENT OF EDUCATION. *See also* FAILURE & FRAUD IN THE CIVIL RIGHTS ENFORCEMENT BY THE DEPARTMENT OF EDUCATION, Comm. on Gov't Operations, U.S. House of Representatives, 100th Cong., 1st Sess. (1987) and CIVIL RIGHTS ENFORCEMENT IN THE DEPARTMENT OF EDUCATION, HEARINGS BEFORE THE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS, Comm. on the Judiciary, 97th Cong., 2d Sess. (1982). *See* Heckman, *supra* note 14, at 18 n.74. *See also* REPORT, HEARING ON TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 BEFORE THE SUBCOM. ON POSTSECONDARY EDUC., TRAINING AND LIFE-LONG LEARNING, 104th Cong., 1st Sess. (1995).

62. 678 F. Supp. 517 (E.D. Pa. 1987).

63. *Id.* at 522. The court recognized the "[j]udicial endorsement of the policy of maximizing athletic opportunities for females." *Id.* at 524. The first lawsuit alleging a violation of Title IX by an employee of an athletic department appears to be Minor v. Northville Public Schools, 605 F. Supp. 1185 (E.D. Mich. 1985).

gram 'must be made available to all on equal terms.'"[64]

March 22, 1988

Congress passed the Civil Rights Restoration Act of 1987 (1988 Amendments) ("Restoration Act"), surmounting President Ronald Reagan's veto, which reaffirmed the legislative intent to protect against sex discrimination by institutions that receive any federal funds; thus it applied to all of the school's programs and activities.[65]

February 23, 1989

The Second Circuit Court of Appeals upheld the constitutionality of the Restoration Act and its retroactive effect in *Leake v. Long Island Jewish Medical Center*.[66] However, over a year later, the Tenth Circuit Court of Appeals disagreed with *Leake* and concluded in *De Vargas v. Mason & Hanger-Silas Mason Co., Inc.*[67] that the Restoration Act should not be retroactively applied.

April 2, 1990

The OCR premiered a new TITLE IX ATHLETICS INVESTIGATOR'S MANUAL.[68]

1991

Judith Sweet, of the University of California at San Diego,

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64. *Id.* at 525. "This court's task is to define the 'equality' that is required, and then to determine whether defendants offer equivalent athletic programs to men and women student athletes." *Id.*

65. 20 U.S.C. § 1687, 102 Stat. 28, Pub. L. 100-259 (1988). It states: "For the purposes of this chapter, the term 'program or activity' and 'program' mean all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education; or . . . a local educational agency . . . system of vocational education, or other school system . . . except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization." *Id.*

66. 869 F.2d 130 (2d Cir. 1989).

67. 911 F.2d 1377 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 799 (1991).

68. While Michael L. Williams, Assistant Secretary of OCR, agreed to make certain revisions to the OCR MANUAL, none were implemented during his tenure with the Bush Administration.

became the first female president of the NCAA.[69]

July 1991

President George Bush nominated the Honorable Clarence Thomas, a former Assistant Secretary of the OCR under the Reagan Administration, to fill the vacancy of Justice Thurgood Marshall, who resigned for health reasons. On October 18, 1991, Thomas became an Associate Justice of the Supreme Court.[70]

February 26, 1992

The Supreme Court rendered a unanimous opinion in *Franklin v. Gwinnett County Public Schools*[71] holding that damages may be awarded in a Title IX action when intentional discrimination exists. This case concerned a female high school student's allegations of sexual harassment against her school district arising out of actions by one of her male teachers, who was incidentally a coach of one of the boys' teams.[72]

March 11, 1992

The NCAA unveiled the first national comprehensive gender-equity study in intercollegiate athletics.[73] Disparities be-

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69. *See* Ronald D. Mott, *Sweet: Focus Shall Be on All Parts of Title IX*, NCAA NEWS, April 22, 1996, at 1.

70. Maureen Dowd, *The Thomas Swearing In*, N.Y. TIMES, October 19, 1991, at A8.

71. 503 U.S. 60 (1992).

72. *See* Heckman, *supra* note 36, at 1018-21 (discussing sexual harassment in education). *See also* Heckman, *supra* note 34 at 618-50 (discussing recent Title IX decisions dealing with sexual harassment in education between: coaches and student-athletes; teachers and students; supervisors and students; other individuals and students; peer sexual harassment between students; employment sexual harassment, and claims brought by individuals charged with sexual harassment at academic institutions). *See also* Kracunas v. Iona College, 119 F.3d 80 (2d Cir. 1997) (allegations regarding professor-student sexual harassment); Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir. 1997) (allegations regarding teacher-student sexual harassment); Canutillo Indep. Sch. Dist. v. Leija, 101 F. 3d 393 (5th Cir. 1996) (allegations regarding teacher-student sexual harassment); Stilley v. University of Pittsburgh of Com. Systems of Higher Educ., 968 F. Supp. 252 (W.D. Pa. 1996) (allegations regarding professor-student sexual harassment); Bruneau v. South Kortright Central Sch. Dist., 962 F. Supp. 301 (N.D.N.Y. 1997) (allegations of peer sexual harassment); Collier ex rel Collier v. William Penn Sch. Dist., 956 F. Supp. 1209 (E.D. Pa. 1997) (allegations of peer sexual harassment).

73. NCAA Gender Equity Study (1992). *See* Heckman, *supra* note 36, at 956-7, 1004 n.283. During May 1997, the NCAA released updated figures showing that overall male student-athletes decreased from 71% in 1992 to 66% in 1997; with an increase in female athletes from 29% to 34%. Operating expenses remained rather static decreasing by only

tween the men's and women's programs were identified, based on usable questionnaires supplied by 646 of its then 847 member colleges and universities.[74] Concurrently, a number of the NCAA conferences reviewed the issue of gender equity in athletics and crafted plans toward achieving better gender equity. Subsequently, the NCAA certification process would require that the Division I member-schools provide a plan for working toward gender equity as one of the components for obtaining certification.[75]

August 6, 1992

In *Cohen v. Brown University*,[76] the federal district court denied the defendant-university's motion to dismiss the case, but set forth the elements that must be alleged in a Title IX complaint.

September 28, 1992

A federal district court judge rendered the first decision to specifically address the issue of the elevation of a women's club

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one percent for men during the five year period, from 80% to 79%, and conversely increasing for women from 20% to 21%. Dempsey, *Women's Gains Coming Too Slowly*, NCAA NEWS, May 5, 1997, at 1.

74. NCAA Gender Equity Study (1992), at 1.

75. Telephone interview with David Knopp, NCAA Director of Compliance Services, (February 11, 1997). *See* NCAA *1996-97 Division I Athletics Certification Handbook* (Revised June 1996). For example, the institutional plans for athletics requires, *inter alia*, "In particular, institutional plans for addressing in the intercollegiate athletics program gender equity and minority opportunities (in the commitment to equity section of the self-study instrument) should reflect where the institution is currently, where the institution wants to be and how the institution intends to move from one status to the other. Institutions can address these elements by clearly specifying - The issues confronting the institution that were identified during the self study; - The goals the institution hopes to achieve; and - The steps involved in reaching those goals." *Id.* at 16. The overriding four elements covered are: governance and commitment to rules compliance, academic integrity, fiscal integrity, and commitment to equity. *Id.* at 5-35. For example, the operating principle applicable to gender equity states, "An institution shall demonstrate that in the area of intercollegiate athletics, it is committed to fair and equitable treatment of both men and women. It shall have available adequate information for assessing its current progress in this area and an institutional plan for addressing it in the future. The plan shall provide for accommodating the evolving standards of the Association in the area of gender equity." *Id.* at 22.

76. No. 92-197-P (D.R.I. Aug. 6, 1992) (Pettine, J.), Memorandum op. at 3. *See also Cohen*, 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 992 F.2d 17 (1st Cir. 1993), and *infra* note 119.

team to varsity status. In *Cook v. Colgate University*,[77] the court ordered that the women's club ice hockey team be elevated to varsity status by the 1993-94 academic year. In addressing the Title IX regulation "equal opportunity" subsection, the court analyzed the benefits and opportunities provided to the men's varsity ice hockey team compared to the women's club ice hockey team, rather than comparing the total athletic programs offered men and women.[78]

November 4, 1992

The district court in *Favia v. Indiana University at Pennsylvania*,[79] granted plaintiff's request for a preliminary injunction restoring the women's gymnastics and field hockey teams at the university. This was the first district court to address the cutback defense of established teams based on financial considerations, which the court categorically rejected.[80]

April 6, 1993

The First Circuit Court of Appeals became the first federal appellate court to address the "equal opportunity" requirement and issued a detailed opinion in *Cohen v. Brown University*,[81] analyzing the history of Title IX and the "equal opportunity" subsection of the Title IX regulations. The First Circuit Court of Appeals sanctioned the tripartite analysis found in the 1979 Policy Interpretation to ascertain whether the recipient of federal funds is satisfying the requirement of the "selection of sports and levels of competition effectively accommodate the interest and abilities of members of both sexes."[82] The three-prong test became known as the "effective accommodation" test.[83]

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77. 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993). *See infra* notes 84-5.

78. *Id.* 802 F. Supp. at 742.

79. 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993). The parties agreed to place the case on an inactive docket, in lieu of seeking a trial date, and abide by the preliminary injunction in place.

80. 812 F. Supp. at 583, wherein the district court emphatically stated, "[T]itle IX does not provide for any exception to its requirements simply because of a school's financial difficulties. In other words, a cash crunch is no excuse." *Id.*

81. 991 F.2d 888 (1st Cir. 1993).

82. *Id.* at 896.

83. The 1979 Policy Interpretation, 44 Fed. Reg. 71,414, 71418 (1979), provides that the effective accommodation of student interests and abilities will be assessed in any one

April 27, 1993

Due to the graduation or exhaustion of NCAA eligibility of the named plaintiffs in *Cook v. Colgate University*,[84] by the end of the 1992-93 academic year, the Second Circuit Court of Appeals determined that the trial court's order requiring the elevation of the women's club ice hockey team to varsity status by the 1993-94 academic year was rendered moot, and thus vacated the decision. The case was not brought as a class action lawsuit. Ultimately, the female club ice hockey players proved successful in negotiating the establishment of a varsity team.[85]

June 28, 1993

The case of *Tyler v. Howard University*,[86] is noteworthy, as it represents the first time a jury awarded monetary damages in a Title IX case involving athletics. The female basketball coach who alleged sex discrimination was awarded a multi-million dollar verdict ($2.39 million) by the jury in the District of Columbia Superior Court, based on allegations of violation of *inter alia*, Title IX and a District of Columbia Human Rights Act. The judge reduced the amount to $1.06 million, based on his determination that the jury had awarded duplicate relief

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of the following ways: (1) Whether intercollegiate level participation for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice or program expansion such 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 their present program. *Accord*, Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994), *reh'g en banc denied*, No. 93-5191 (6th Cir. March 10, 1995); Favia v. Indiana Univ. at Pennsylvania, 7 F.3d 332 (3d Cir. 1993); Roberts v. Colorado State Univ., 998 F.2d 824 (10th Cir. 1993), *cert. denied, sub nom.* Colorado State Bd. of Agriculture v. Roberts 510 U.S. 1004 (1993); Kelley v. Board of Trustees of Univ. of Illinois, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1994). *But see* Pederson v. Louisiana State Univ., 912 F. Supp. 892 (M.D. La. 1996), *infra* notes 109-12 and accompanying text.

84. 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993) (case settled).

85. The class action lawsuit, Bryant v. Colgate Univ., No. 93-CV-1029FJS (N.D.N.Y. 1993), was instituted during 1993. On April 14, 1997, the federal district court judge approved the January 16, 1997 settlement.

86. No. 91-CA11239 (D.C. Super. Ct. June 28, 1993) (memorandum and order for entry for judgment).

on some of the causes of action.[87] Ultimately, the trial judge further truncated the amount of compensatory damages.[88] The case was thereafter settled.

July 7, 1993

The Tenth Circuit Court of Appeals in *Roberts v. Colorado State Board of Aggriculture*,[89] affirmed the issuance of a permanent injunction requiring the reinstatement of the women's softball team at the University. It sanctioned the three-part test used in determining whether there was effective accommodation of interests and abilities of the members of each sex, as set forth in the first program area of the "equal opportunity" section of the Title IX regulation.[90] The appellate court found that the burden of proof on the first prong (substantial proportionality) and third prong (current accommodation) are on the plaintiffs (the district court had differed as to the third prong); and the burden of proof as to the second prong (history and continuing practice of expansion of athletic program for underrepresented sex) was on the defendant.[91] The court upheld the relief issued herein — a permanent injunction— but questioned whether such would be proper in a class action.[92]

August 3, 1993

Ruth Bader Ginsberg became the second female Justice of the Supreme Court.[93]

August 31, 1993

The decision in *R.L.R. v. Prague School District I-103*[94] is notable as it represents the first substantive federal decision examining a Title IX claim on behalf of a female minor and her parents against her school district based on allegations of sexual harassment involving her (male basketball) coach.[95]

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87. *Id.*
88. No. 91-CA11239 (D.C. Super. Ct. Sept. 15, 1995) (Burnett, Sr., J.).
89. 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 580 (1993).
90. *Id.* at 828-9.
91. *Id.* at 831.
92. *Id.* at 834.
93. Linda Greenhouse, *Senate, 96-3, Easily Affirms Judge Ginsburg as a Justice*, N.Y. TIMES, Aug. 4, 1993, at B8.
94. 838 F. Supp. 1526 (W.D. Okla. 1993) (case settled).
95. *See also* Franklin v. Gwinnett County Public Schs., 112 S. Ct. 1028 (1992); Lil-

September 1, 1993

The decision in *Kelley v. Board of Trustees of the University of Illinois*,[96] is significant as it represents the first judicial determination examining a claim by male collegiate athletes seeking redress pursuant to Title IX. The men's swimming and fencing teams and the men's and women's diving teams were slated to be discontinued.[97] The women's swimming team was retained. Members of the men's swimming team commenced suit seeking restoration of their team.[98] The court granted the defendant-University's motion for summary judgment as to the Title IX and Fourteenth Amendment Equal Protection Clause predicates.[99]

January 1994

The Ninth Circuit Court of Appeals affirmed the denial of a preliminary injunction restoring Marianne Stanley to the position of women's basketball coach at the University of Southern California in *Stanley v. University of Southern California*,[100] pursuant to the Equal Pay Act of 1963[101] ("Equal Pay Act"). Stanley's complaint seeks $8 million in damages and injunctive relief for alleged sexual discrimination and retaliation pursuant to Title IX,[102] Title VII of the Civil Rights Act of

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lard v. Shelby County Bd. of Educ., 76 F.3d 716 (6th Cir. 1996); Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988), *on remand*, 759 F. Supp. 40 (D.P.R. 1991); Moire v. Temple Univ. Sch. of Medicine, 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986); Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980). *See also* Heckman, *supra* note 36, at 1019-20 and Heckman, *supra* note 34, at 618-50. The OCR issued proposed material for review and comments entitled, "Sexual Harassment Guidance: Harassment of Students by School Employees," 61 Fed. Reg. 52,172 (Oct. 4, 1996) (utilizing the Title VII standards for sexual harassment). *See also* OCR Policy Guidance "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" issued on March 13, 1997.

96. 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1994).

97. *Id.* at 239-40.

98. *Id.*

99. *Id.* at 244. *See also* Gonyo v. Drake University, 879 F. Supp. 1000 (S.D. Iowa 1995) (court granted the defendant-university's motion for summary judgment. No appeal was taken).

100. 13 F.3d 1313 (9th Cir. 1994). Thereafter, the district court granted the defendants' motion for summary judgment in its entirety, and plaintiff filed an appeal with the Ninth Circuit Court of Appeals.

101. 29 U.S.C. § 206(d) (1994).

102. *Id.* at 1318. While the Ninth Circuit Court of Appeals ostensibly ignored Title IX

1964[103] ("Title VII"), and the Equal Pay Act.

September 1, 1994

The Seventh Circuit Court of Appeals affirmed the district court's granting of the defendant's motion for summary judgment in *Kelley v. Board of Trustees of University of Illinois*.[104] Essentially, the appellate court stated:

> The University could, however, eliminate the men's swimming program without violating Title IX since even after eliminating the program, men's participation in athletics would continue to be more than substantially proportionate to their presence in the University's student body. And as the case law makes clear, 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.[105]

Fall 1994

Equity in Athletics Disclosure Act of 1994 passed, as part of the Improving America's Schools Act of 1994.[106] It requires the

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in its discussion, nonetheless there are a handful of Title IX regulations that deal explicitly with employment at educational institutions. *See e.g.*, 34 C.F.R. § 106.6(a) (1997) (Effect of other Federal regulations); 34 C.F.R. § 106.7 (1997) (Effect of employment opportunities); 34 C.F.R. § 106.51 (1997) (Employment); 34 C.F.R. § 106.52 (1997) (Employment criteria); 34 C.F.R. §106.54 (1997) (Compensation); and 34 C.F.R. §106.55 (1997) (Job classification and structure). For example, the regulation on compensation states: A recipient shall not make or enforce any policy or practice which, on the basis of sex: (a) Makes distinctions in rates of pay or other compensation; (b) Results in the payment of wages to employees of one at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. However, to date, the federal judiciary has provided no substantive amplification of the aforementioned employment regulations in the Title IX context. *See generally North Haven, supra* notes 55-6. *See also* Brine v. University of Iowa, 90 F.3d 271, 276 (8th Cir. 1996) (regarding 34 C.F.R. § 106.51(b)); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 315 (10th Cir.), *cert. denied* 484 U.S. 849 (1987) (regarding 34 C.F.R. § 106.57(a) (1986)); Gabor Deli v. Univ. of Minnesota, No. 3-93-501 (D. Minn. Aug. 18, 1994) (Magnuson, J.) (discussing 34 C.F.R. § 106.34(5-6)) (equal opportunity - opportunity to receive coaching and the assignment and compensation of coaches. Slip op. at 14-5). For other decisions dealing with Title IX employment sex discrimination in athletics, *see infra* note 143.

103. 42 U.S.C. §§ 2000e-2000e-17 (1994). *See also* Civil Rights Act of 1991, 42 U.S.C. § 1981(a) (1994).

104. 35 F.3d 265 (7th Cir. 1994), *reh'g en banc denied*, (Oct. 5, 1994), *cert. denied*, 115 S. Ct. 938 (1995).

105. 35 F.3d at 270.

106. Pub.L. 103-382. *See infra* note 118.

preparation and dissemination to students, potential students and the public of the following information: a report on participation rates, financial support, and other information on men's and women's intercollegiate athletic programs.

October 3, 1995

The Fifth Circuit Court of Appeals, in *Lakoski v. James*[107] determined that there is no separate Title IX cause of action for employees of educational institutions who allege sex discrimination. They must utilize Title VII. The Supreme Court subsequently rejected an appeal.

December 15, 1995

The Eighth Circuit Court of Appeals in *Egerdahl v. Hibbing Community College*[108] affirmed the application of the state's personal injury statute of limitations to a Title IX action, rather than the state's comparable civil rights statute.

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107. 66 F.3d 751 (5th Cir. 1995), *cert. denied, sub nom.*, Lakoski v. University of Texas, Medical Branch at Galveston, 116 S. Ct. 357 (1996). *Accord*, Lowrey v. Texas A&M Univ. System, 117 F.3d 242 (5th Cir. 1997) (Fifth Circuit Court of Appeals declining to revisit the issue of the *Lakoski, supra* determination, stated "Title IX does not afford a private right of action for employment discrimination on the basis of sex in federally funded educational institutions." *Id.* at 247. However, the Fifth Circuit Court of Appeals recognized a Title IX cause of action for personal retaliation related to the plaintiff's participation in complaints and investigations challenging alleged violations of Title IX. "On appeal, Lowrey argues that this cause of action for retaliation arises exclusively under the provisions of Title IX, not Title VII, and thus is not preempted by Title VII under the specific holding of *Lakoski*. We agree." *Id.*); Cooper v. Gustavus Adolphus College, 957 F. Supp. 191 (D. Minn. 1997); Howard v. Board of Educ. Sycamore Community Unit Sch. Dist. No. 427, 893 F. Supp. 808 (N.D. Ill. 1995); Wedding v. University of Toledo, 862 F. Supp. 201 (N.D. Ohio 1994). *See* Heckman, *supra* note 34 at 614-7, and specifically n.399 (indicating that there have been no decisions in cases brought by coaches of women's teams or female athletic directors of educational institutions that were dismissed for finding there existed no Title IX cause of action for these aggrieved individuals, even though they may or may not been ultimately successful in establishing a Title IX grievance). *See also* Minor v. Northville Public Schs., 605 F. Supp. 1185, 1197 (E.D. Mich. 1985). *But see Lowrey, supra.*

108. 72 F.3d 615 (8th Cir. 1995). *See also* Lillard v. Shelby County Bd. of Educ., 76 F.3d 716 (6th Cir. 1996); Bougher v. University of Pittsburgh, 713 F. Supp. 139 (W.D. Pa. 1989), *aff'd on other grounds*, 882 F.2d 74 (3d Cir. 1989); Nelson v. University of Maine System, 914 F. Supp. 643 (D. Me. 1996). *Contra* Deli v. University of Minnesota, 863 F. Supp. 958 (D. Minn. 1994). In Beasley v. Alabama State Univ., 966 F. Supp. 1117 (D. Ala. 1997) (district court found since the female athlete's claim was based on a continuing violation; it would not be barred by a two-year Alabama statute of limitations, where the case was not commenced until four years later).

January 12, 1996

A district court in Louisiana issued its decision in *Pederson v. Louisiana State University*,[109] becoming the first district court to reject reliance of the first prong of the three-prong effective accommodation test, and yet regardless of whether the proportionality element should be afforded "safe harbor" protection, still concluded that the university violated Title IX.[110] It is also the first decision to speak on the "ability" aspect, incorporated in the first program area of effective accommodation,[111] albeit in a perfunctory conclusory way. "For this Court to order LSU to treat its intercollegiate varsity female athletes differently would not impact plaintiffs, as they are not varsity athletes nor have plaintiffs convinced this Court plaintiffs will, in fact, be intercollegiate varsity athletes at LSU."[112]

January 16, 1996

The OCR released the "Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test."[113]

June 26, 1996

The Supreme Court ruled in *United States v. Virginia*[114] that the public all-male military college at the Virginia Mili-

109. 912 F. Supp. 892 (M.D. La. 1996) (final judgment was entered on July 1, 1997; multiple appeals to the Fifth Circuit Court of Appeals are pending; a motion to consolidate the appeals is being made).

110. *Id.* at 913-7.

111. The first program area states, "Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41 (c)(1) (1997). Instead, the courts have overwhelmingly focused on the "interest" aspect.

112. *Pederson*, 912 F. Supp. at 905. The court articulated, "LSU provided no organized athletic participation opportunity for those with the interest and skill of the Pinedas at any level, at a time when LSU provided greater athletic opportunity to its male than female students and at a time when male students with similar interest and skill were provided the opportunity to participate in baseball at the intercollegiate varsity Division I level." *Id.* As to the soccer component, where separate club soccer teams were provided for men and women, the court stated, "Further, this Court finds the Pederson plaintiffs did not establish the existence of the requisite ability to play soccer above the club level. Consequently, the Pederson plaintiffs did not establish they had been excluded from athletic participation at LSU because of their sex; rather the evidence proved they were *included* in the soccer participation offered at LSU in the same manner as male students." *Id.*

113. The case of Cohen v. Brown Univ., 101 F.3d 155, 167 (1st Cir. 1996), contained the first judicial reference to this document.

114. 116 S. Ct. 2264 (1996).

tary Institute was unconstitutional.[115]

August 4, 1996

Title IX entered the marketplace when Nike Inc. runs a commercial addressing Title IX during the prime time 1996 Summer Olympics national television coverage.[116] The commercial identified the federal statute and recites subsection (a) of the regulation, 34 C.F.R. § 106.41(a) (1997).[117]

October 1, 1996

All of the nation's universities and colleges, that are recipients of federal funds, were required to gather information and statistics concerning gender equity elements involving their intercollegiate athletic programs, where separate programs were provided for men and women.[118]

November 21, 1996

The First Circuit Court of Appeals upheld the Title IX liability in a 2-1 decision in *Cohen v. Brown University*.[119] It reversed and remanded solely on the relief the district court had

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115. The Title IX statute exempted by definition the country's same-sex public military colleges, including Virginia Military Institute and The Citadel, in South Carolina. 20 U.S.C. § 1681 (a)(5) (1994). *See supra* note 12 and accompanying text. *See also* Michael Janofsky, *Military College Awaits Its First Female Cadets*, N.Y. TIMES, July 20, 1997, §1, at 12; Faulkner v. James, 66 F.3d 661, *cert. granted,* 116 S. Ct. 331 (1995) (concerning The Citadel).

116. Nike Inc. (Thirty second "Equality" commercial, produced by Tylie Jones and Associates, Inc.). For the impact of Title IX on female American participation in the Olympics, *see infra* text accompanying note 122.

117. *Id.* NBC announcer Bob Costas would also discuss the positive impact of Title IX for females during the closing ceremonies of the Atlanta Games, on August 4, 1996. *See also Breaking Through: Our Turn to Play*, a LIFETIME special documentary on Title IX, first aired on June 18, 1997.

118. *See* Student Assistance General Provisions, 60 Fed. Reg. 61,424 (1996), amplifying enforcement with the Equity in Athletics Disclosure Act, enacted in 1994. *See also* 34 C.F.R. §§ 668.81-89 (1997) (Interscholastic athletic programs are not presently covered by the Disclosure Act). According to the Department of Education, the university-generated report "should be made within a few days after a request is made. [And the post-secondary institution] may send the report via regular U.S. mail." *Governmental Affairs Report*, NCAA REGISTER, May 5, 1997, at 3. New legislation, entitled the Fair Play Act, introduced in Congress, on June 18, 1997, by Sen. Carol Mosely-Braun (D-Ill.) and Rep. Nita M. Lowey (D-N.Y.), would provide for greater public access to the material required to be reported through the Equity in Athletics Disclosure Act. *Id.*

119. 101 F.3d 155 (1st Cir. 1996), *petition for cert. filed, sub nom.*, Brown Univ. v. Cohen, No. 96-1321, *cert. denied*, 117 S. Ct. 1469 (1997).

fashioned, after rejecting the University's plan to achieve Title IX compliance.[120]

In repudiating Brown University's argument that Title IX was an affirmative action or quota statute, the First Circuit Court of Appeals stated:

> Title IX is not an affirmative action statute; it is an anti-discrimination statute, modeled explicitly after another anti-discrimination statute, Title VI. No aspect of the Title IX regime at issue in this case — inclusive of the statute, the relevant regulation, and the pertinent agency documents — mandated gender-based preferences or quotas, or specific timetables for implementing numerical goals. Like other anti-discrimination statutory schemes, the Title IX regime permits affirmative action. In addition, Title IX, like other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination.[121]

In examining the dramatic effect of Title IX on the nation, the First Circuit Court of Appeals identified:

> One need look no further than the impressive performances of our country's women athletes in the 1996 Olympic Summer Games to see that Title IX has had a dramatic and positive impact on the capabilities of our women athletes, particularly in team sports. These Olympians represent the first full generation of women to grow up under the aegis of Title IX. The unprecedented success of these athletes is due, in small measure, to Title IX's beneficent effects on women's sports, as the athletes themselves have acknowledged time and again. What stimulated this remarkable change in the quality of women's athletic competition was not a sudden, anomalous upsurge in women' s interest in sports, but the enforcement of Title IX's mandate of gender equity in sports.[122]

April 21, 1997

The Supreme Court denied certiorari in the *Brown University v. Cohen* case.[123]

May 1997

NCAA released its sequel report to the "Gender Equity

120. *Id.* at 197.

121. *Id.* 101 F.3d at 170-1.

122. *Id.* at 188.

123. 117 S. Ct. 1469 (1997). *See* Steve Wulf, *A Level Playing Field for Women*, TIME, May 5, 1997 at 79.

Study" of 1992.[124] The study compared 47% male undergraduates, with 53% female undergraduates at Division I schools.[125] Male student-athletes at Division I schools averaged 63%, compared to 37% for female student-athletes.[126] The imbalance in operating expenses continues in a dramatic fashion at Division I institutions with men's teams commanding an average $1,165,100 (77%), compared to women's teams with $388,600 (23%).[127] Recruiting expenses at Division I schools also favored male athletes with an average of $133,303 (73%), compared to $49,176 (27%) for female teams.[128] Male athletes received an average of $1,052,540 (62%) in athletic financial aid, compared to $634,689 (38%) for female student-athletes at Division I schools.[129]

Coaches of men's teams averaged $330,456 (60%) in compensation, compared to $216,419 (40%) for coaches of women's teams at Division I schools.[130] The average salaries at Division

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124. *See supra* note 73 and accompanying text.

125. NCAA Gender Equity Study (Summary of Results), ("1997 Study"), April 1997, at 4 (based on information relative to the 1995-96 academic year). The NCAA is composed of three divisions: Division I, Division II, and Division III. Division I is further broken down into three sub-categories: Division I-A, Division I-AA, and Division I-AAA. Overall, 742 of the 902 member-institutions responded to the survey (82.3%). *Id.* at 3. On June 18, 1997, the Women's Sports Foundation ("WSF") released its "Gender Equity Report Card," ("Report") drawing on information supplied by 767 of 902 NCAA Schools.

126. 1997 Study, Table 9, at 14. This represented a 6% increase in female student-athletics since the 1992 Study. *Id.* The WSF Report found overall the same percentage of female students (53%) and female student-athletes (37%). Report at 8-9.

127. 1997 Study, Table 3, at 8. 193 reporting Division I schools with football programs reported an average expense of $830,000. *Id.* The WSF Report also found overall that women received 27% of operating expenses. Report at 4.

128. 1997 Study, Table 4, at 9. In basketball, the men's recruiting expenses averaged $42,613, compared to $21,911 for the women. *Id.* Baseball averaged $7,269; while softball averaged $5,487. *Id.* Women's recruiting expenses surpassed men's expenses in the following sports: fencing, field hockey (men had no such teams), golf, gymnastics, rowing, skiing, soccer, synchronized swimming (men has no such teams), track field/cross country, and volleyball. *Id.* The WSF Report overall reached a comparable finding of 26.6% allocation of recruiting resources for women athletes. Report at 10-11.

129. 1997 Study, Table 5, at 10. Again, football commanded the highest scholarship numbers with an average of $768,919. In basketball, the numbers for athletic scholarships were close: $156,241 for men and $158,475 for women. *Id.* The WSF Report found overall women received athletic scholarships proportionate to their student-athlete percentage of 37%, which translated into women receiving $142 million less than male athletes. Report at 9-10.

130. 1997 Study, Table 6, at 11. Again, not surprisingly, football coaches commanded the highest salaries of any sport with an average of $103,382. *Id.* Pay equity is being achieved in the following sports: fencing, golf, gymnastics, rifle, swimming/diving, track field/cross country, tennis and volleyball. *Id.* There still remains significant disparities in the following sports for coaches of men's teams compared to coaches of women's teams:

I schools for assistant coaches clearly favored the men's teams with an $424,160 (76%), compared to $137,050 (24%) for women's teams.[131] This study did not include the percentages of men and women coaching men's and women's teams, however, for the reporting Division I schools, there were no females coaching the following major men's teams: football, basketball, and baseball.[132]

The myth that revenue from men's programs supports female programs appears questionable. While men's Division I teams averaged $3,857,000 (60%) in revenues, conversely, $3,398,000 (54%) was expended in sponsoring those teams.[133] On the other side, while women's teams only averaged $300,000 (75%) in revenues, their expenses came in at a staggering $1,525,000 (29%).[134] Thus, while athletic departments need to support and expand ways to make women's athletic teams more profitable, the men's programs with their exorbitant expenditures also are out of control, with the bottom line

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basketball ($99,283 to $60,603), ice hockey ($64,214 to $25,478), lacrosse ($35,745 to $26,871), rowing ($30,838 to $22,623), soccer ($32,275 to $27,791), and squash ($45,547 to $22,200). *Id.* The 1992 figures averaged $71,511 (men) to $39,177 (women) for basketball coaches. *See* Heckman *supra* note 36, at 1004 n.283. At Division I-A schools, the figures were more pronounced with the highest salaries going to football coaches, with an average of $141,624. Men's basketball coaches earned $128,836 compared to the highest paid women's coaches, which were women's basketball coaches at $78,340. 1997 Study, Table 6, at 28. There was greater salary parity at Division II and Division III institutions. 1997 Study, Table 6, at 79, and Table 6, at 96. The WSF Report found only 1.9% of head coaches of men's teams were women for all Divisions, whereas, 45% of head coaches of women's teams were men. Report at 12-13. This shows a slight increase from the 1992 NCAA Gender Equity Study, which found 1% of head coaches of men's teams were women, and 55% of head coaches of women's teams were men. *See* Heckman *supra* note 36, at 1002.

131. 1997 Study, Table 2A, at 6.

132. 1997 Study, Table 2A, at 6. The situation of an absence of females was replicated for assistant coaches of Division I schools coaching the aforementioned men's teams. *Id.* Table 2B, at 7. Likewise, there was an absence of female head coaches at Division II schools, concerning the three sports of football, basketball and baseball. *Id.* Table 2A, at 7. There were two female part-time assistant coaches of men's basketball at Division II schools, and one female part-time assistant baseball coach, and no female assistant football coaches. *Id.* Table 2B, at 75. In Division III, there were no female head coaches of the three indicated men's teams. *Id.* Table 2A, at 91. There were two female assistant part-time basketball coaches, one female part-time football coach, and no female part-time baseball coaches. *Id.* Table 2B, at 92. These figures are hardly encouraging. Overall, the statistic for women assistant coaches of men's teams was even more abysmal at 1.7%. WSF Report at 12-13.

133. However, Division I-A schools were overall profitable, with men's revenue averaging $9,561,000, while the expenses averaged $6,388,000. 1997 Study, Table 8, at 30.

134. *Id.* Table 8, at 13.

being that colleges and universities need to take a sharp look at the economics involved.

June 2, 1997

National Women's Law Center filed Title IX administrative complaints against 25 colleges and universities with the OCR.[135] The OCR provides technical assistance and investigates administrative complaints filed, as well as randomly designating educational institutions, which are recipients of federal funds, for compliance reviews. In the largest mass filing of its kind, Marcia Greenberger, co-president of the Center remarked, "Female students have waited 25 years for equity at our nation's colleges and universities. They have waited long enough."[136]

June 17, 1997

In federal government activities commemorating the 25th anniversary of Title IX, President Clinton underscored, "Every school and every educational program that receives federal assistance in the entire country must understand that complying with Title IX is not optional. It is the law and must be enforced."[137] The President stated, "[W]e're here to celebrate the God-given talent of every woman and girl who has been benefited by it."[138] He also stressed, "[T]itle IX has had a beneficial impact on every American citizen. If we've learned anything in the last 25 years since Title IX, it is that expanding benefits and opportunities for any American helps the rest of us."[139]

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135. Data from the National Women's Law Center, "25 Colleges and Universities Being Challenged by Center for Intercollegiate Scholarship Violations Under Title IX of the Education Amendments of 1972 (June 2, 1997)." The administrative complaints contain allegations of unequitable distribution of athletic scholarships, purportedly based on statistics yielded from 1995-96. *See also* 34 C.F.R. § 106.37(c) (1997), which requires the substantial proportionality between the distribution of athletic scholarships and the percentage of students of that sex. To date, the Department of Justice has instituted no Title IX lawsuits involving athletics during the Reagan, Bush or Clinton administrations; although amici briefs supporting the Title IX statute were filed in a number of cases, such as Kelley v. Board of Trustees of Univ. of Illinois, *supra*, and *Gonyo*, *supra*, during the latter presidency.

136. Tanyanika Samuels, *Title IX Complaints Filed on 25 Schools*, NEWSDAY, June 3, 1997, at A55.

137. William J. Clinton, White House Press Release, June 17, 1997.

138. *Id.*

139. *Id.* President Clinton also indicated his intent to close the exemption for educa-

June 23, 1997

25th anniversary of the passage of Title IX. This period has witnessed the evolution of five main areas involving athletics programs and activities: "first, the threshold issue of whether Title IX applies;[140] second, cross-over cases, whereby athletes of one sex seek to participate on the team composed of members of the opposite sex;[141] third, equal opportunity cases on behalf of student-athletes;[142] fourth, equal opportunity cases

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tional programs provided by the Department of Defense and other government education programs, including those run by the Bureau of Indian Affairs, pursuant to Title IX requirements. Joe Arace, *Clinton, Athletes Salute Title IX*, USA TODAY, June 18, 1997, at 1C. However, all the federal military academies have voluntarily complied with Title IX for the past two decades. *See* Heckman, *supra* note 34, at 555 n.46. It is not known if this was intended to include educational programs provided by federal prisons. *Id.* at 558-62, 658.

140. *See, e.g.*, Grove City College v. Bell, 465 U.S. 555 (1984); Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990); O'Connor v. Peru State Univ., 781 F.2d 632 (8th Cir. 1986); Hillsdale College v. Department of Health, Educ. and Welfare, 696 F.2d 418 (6th Cir. 1982), *rev'd*, 466 U.S. 901 (1984), *vacated and remanded*, 737 F.2d 520 (6th Cir. 1984); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (The district court granted the motion of the plaintiff-university to challenge the investigation by the OCR of its athletic department. The district court stated, "at issue is whether the Education Department is authorized to investigate and regulate the athletic program of a private university where the athletic program itself receives no direct federal financial assistance." *Id.* at 321); Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982). For cases analyzing the constitutionality of the Title IX regulations, see, e.g., North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); National Collegiate Athletic Ass'n v. Califano, 444 F. Supp. 425 F. Supp. 425 (D. Kan. 1978), *rev'd & remanded*, 622 F.2d 1362 (10th Cir. 1980).

141. *See supra* note 34.

142. *See, e.g.*, on behalf of female students: Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996), *cert. denied, sub nom.*, Brown Univ. v. Cohen, 117 S. Ct. 1469 (1997) (retention of women's varsity gymnastics and varsity volleyball); Carver v. St. Leo's College, No. 96-383-CIV-T-25C (M.D. Fla. 1996) (case settled 1997) (women's varsity softball); Pederson v. Louisiana State Univ., 912 F. Supp. 892 (M.D. La. 1996) (multiple appeals are pending in this case) (elevation of women's club softball and club soccer); Boucher v. Syracuse Univ., No. 95-CV-620 (N.D.N.Y. May 8, 1995) (defendant has filed a motion to dismiss, which is pending as of Sept. 16, 1997) (elevation of women's club lacrosse and softball); Ulett v. Univ. of Bridgeport, No. 3:94CV01460 (PCD) (D. Conn. July 7, 1995) (case settled) (retention of women's varsity gymnastics); Harper v. Board of Regents, a body politic and corporate, Illinois State Univ., No. 95-1371 (C.D. Ill. 1995) (case brought on behalf of men's soccer and wrestling teams, as well as female student athletes) (defendant's motion to dismiss is pending as of Sept. 23, 1997); James v. Virginia Polytechnic Institute & State Univ., No. 94-0031-R (W.D. Va. 1994) (case settled 1995) (elevation of women's club field hockey, softball, lacrosse and crew); Roberts v. Colorado State Univ., 814 F. Supp. 1507 (D. Colo. 1993), *aff'd in principal part, rev'd in part*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 580 (1993) (retention of women's softball); Favia v. Indiana Univ. at Pennsylvania, 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993) (retention of women's varsity gymnastics and varsity field hockey);

on behalf of [athletic employees, including] coaches and athletic directors;[143] and fifth, sexual harassment allegations in-

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Bryant v. Colgate Univ., No. 93-CV-1029FJS (N.D.N.Y. 1993) (settlement approved April 14, 1997) (elevation of women's club ice hockey); Schuck v. Cornell Univ., No. 93-CV-756FJS (N.D.N.Y.) (case settled Dec. 8, 1993) (retention of women's varsity gymnastics and varsity fencing); Sanders v. University of Texas at Austin, No. A-92-CA-405 (W.D. Tex. Oct. 24, 1993) (order approving settlement agreement) (elevation of three women's club teams and one intramural team); Kiechel v. Auburn Univ., No. CV-93-V-474-E (M.D. Ala. 1993) (case settled 1993) (elevation of women's club soccer); Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 992 F.2d 17 (1st Cir. 1993) (retention of women's varsity gymnastics and varsity volleyball); Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993) (elevation of women's club ice hockey); Arnot v. Ramo, No. 92-2152 (10th Cir. 1992) (appeal voluntarily dismissed), *action dismissed* (D.N.M. March 9, 1993) (retention of women's gymnastics at University of New Mexico). *See, e.g.*, on behalf of male students: Kelley v. Board of Trustees of the Univ. of Illinois, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1994) (retention of men's varsity swimming); Gonyo v. Drake Univ., 837 F. Supp. 989 (S.D. Iowa 1995) (court denied the plaintiff's motion for a preliminary injunction retaining the men's varsity wrestling team); *Gonyo*, 879 F. Supp. 1000 (S.D. Iowa 1995) (court granted the defendant-university's motion for summary judgment); Harper v. Board of Regents, a body politic and corporate, Illinois State Univ., No. 95-1371 (C.D. Ill. 1995) (retention of men's varsity soccer and varsity wrestling).

143. *See, e.g.*, Lowrey v. Texas A&M Univ. System, 117 F.3d 242 (5th Cir. 1997) (former women's athletic coordinator at Tarleton State University alleged Title IX employment discrimination and retaliation in being removed from her position, and denial of being hired as the Athletic Director); Stanley v. University of Southern California, 13 F.3d 1313 (9th Cir. 1994); *Stanley*, No. CV93-4708 (C.D. Cal. Mar. 10, 1995) (district court granted the defendants' motion for summary judgment in its entirety) (women's basketball coach) (appeal filed to Ninth Circuit Court of Appeals which is pending); O'Connor v. Peru State College, 781 F.2d 632 (8th Cir. 1986); Perdue v. City of New York, No. CV93-4939 (E.D.N.Y. Aug. 1997) (trial occurred, awaiting judgment) (former women's basketball coach and primary women's athletic administrator at C.U.N.Y. at Brooklyn); Carver v. St. Leo's College, No. 96-383-CIV-T-25C (M.D. Fla. 1996) (case settled 1997) (women's softball coaches); Weaver v. Ohio State Univ., No. C2-96-1199 (S.D. Ohio Nov. 21, 1996) (discovery pending) (women's field hockey coach); Clay v. Board of Trustees of Neosho Community College, 905 F. Supp. 1488 (D. Kan. 1995) (determining that a retaliation claim could be brought pursuant to Title IX) (women's basketball coach); Harker v. Utica College of Syracuse Univ., 885 F. Supp. 378 (N.D.N.Y. 1995) (women's basketball and softball coach); Dugan v. State of Oregon, No. 95-6250-HO (D. Or. 1995) (trial scheduled October 1997) (women's softball coach at Oregon State University); Plotzke v. Boston College, No. 94-12329-EH (D. Mass. Mar. 27, 1995) (case settled) (women's basketball coach); State v. Regents, No. EM94-289 (4th Dist. Ct. Minn. January 30, 1995) (originally a federal lawsuit alleging Title IX had been filed and later voluntarily dismissed) (women's volleyball coach at University of Minnesota); Bartges v. University of North Carolina at Charlotte, 908 F. Supp. 1312 (W.D.N.C. 1994), *aff'd*, 94 F.3d 641 (4th Cir. 1996) (women's softball coach and assistant women's basketball coach); Deli v. University of Minnesota, 863 F. Supp. 958 (D. Minn. 1994) (granting defendant-university's motion for summary judgment) (women's gymnastics coach); Bowers v. Univ. of Baylor, 862 F. Supp. 142 (W.D. Tex. 1994) (case settled) (women's basketball coach); Gabor Deli v. University of Minnesota, No. 3-93-501 (D. Minn. Aug. 18, 1994) (Magnuson, J.) (granting defendant-university's motion for summary judgment) (women's assistant gymnastics coach); Hawkins v. Loyola Univ. of Chicago, No. 94

volving student-athletes against the educational institution for actions of coaches."[144]

Moreover, this period has witnessed the tremendous growth of female student-athletes. On the interscholastic level, the number of female athletes has increased from 817,073 during 1972-73 to 2,365,053 during 1995-96.[145] On the intercollegiate level, the numbers of females participating in athletics at NCAA member-institutions has grown from 80,040 in 1982-83 to 110,524 in 1994-95.[146] However, according to a USA TODAY report, female collegiate athletes at NCAA institutions only received "38 percent in scholarship money, 27 percent of recruiting money and 25 percent of operating budgets."[147]

CV-00245 (N.D. Ill. Jan. 1994) (case voluntarily dismissed but reconfigured in Illinois state court, No. 94L03300 Cook County, Ill. March 18, 1994) (case settled 1997) (women's basketball coach); Paddio v. Bd. of Trustees for State Colleges & Univs., 61 Fair Empl. Prac. Cas. (BNA) 86 (E.D. La. 1993) (women's volleyball and softball coach); Dowell v. College of Mount St. Joseph, No. C-1-93-0826 (S.D. Ohio Nov. 23, 1993) (case settled) (athletic director and women's basketball coach); Meadows v. State Univ. of New York at Oswego, No 92-CV-1492FJS (N.D.N.Y. Oct. 4, 1993) (case settled) (women's basketball and assistant basketball coaches); Pitts v. State of Oklahoma, No. 93-1941-A (W.D. Okla. 1993) (jury award in favor of plaintiff rendered in 1994) (women's golf coach at University of Oklahoma); Tyler v. Howard Univ., No. 91-CA11239 (D.C. Super. Ct. Sept. 15, 1995) (Burnett, Sr., J.) (case settled) (women's basketball coach). On the interscholastic level, see Minor v. Northville Public Schs., 605 F. Supp. 1185 (E. D. Mich. 1985) (resolved on procedural grounds). *See* Heckman, *supra* note 36, at 998-1018; Heckman, *supra* note 34, at 592-614.

144. *See, e.g.*, R.L.R. v. Prague Sch. Dist. I-103, 838 F. Supp. 1526 (W.D. Okla. 1993), *supra* notes 91-2 and accompanying text. See remarks of Heckman at a panel discussion on *Title IX, Gender Equity and the NCAA*, February 6, 1997, at the Fordham University School of Law inaugural Sports Law Symposium, 1 FORDHAM SPORTS LAW SYMPOSIUM (forthcoming 1998).

145. "This figure does not include a portion total of 17,901 participants in coeducational sports." National Federation of State High School Associations Summary: 1995-96 Athletics Participation Survey.

146. NCAA Participation Statistics Report 1982-95, at 4. Women's athletics came under NCAA jurisdiction during 1981-82.

147. *Governmental Affairs Report*, NCAA REGISTER, May 5, 1997, at 3.