

The Scope of Title IX Protection Gains Yardage As Courts Continue To Tackle the Contact Sports Exception

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I. INTRODUCTION

It is a typical Sunday morning. As a part of your weekend routine, you reach for the sports section of the newspaper. The headlines read: "Chris Pins All Wrestlers in Weight Class;" "Pat Scores Winning Touchdown at Football Homecoming;" and "Jamie's Last Second Jumper Secures Berth in Boy's County Basketball Tournament." Sound fairly ordinary? Perhaps, but would it surprise you to discover that Chris, Pat and Jamie are girls?

Stories such as these would have been considered ridiculous in the early 1970s. Before the advent of Title IX,¹ women could only dream of an opportunity to play football or wrestle with their male peers. Today, women are participating on men's contact sports teams in record numbers.

Gender based segregation in sports has long been an accepted societal norm.² Generally, men compete against men, and women compete against

1. 20 U.S.C. § 1681 (1999). Title IX was passed to end discrimination based on sex in federally funded educational and athletic programs. See Iram Valentin, *Title IX: A Brief History* (visited August 1997), <<http://www.edc.org/WomensEquity/pubs/digests/digest-title9.html>> (tracing the origin of Title IX legislation). In addition, the statute ensures protection against sexual harassment, discrimination in the workplace and discrimination based on parental and marital status. See *id.*

2. See generally Jessica Jay, *Women's Participation in Sports: Four Feminist Perspectives*, 7

women. In the case of the "in-your-face" rough and tumble sports, certain educational institutions and athletic associations have enacted rules to prevent females from playing on men's contact sports teams.³ In fact, Title IX, the law that has accomplished so much for women in terms of increasing their participation in athletics, exempts contact sports from its protection.⁴ Why is this so?

Proponents of single sex athletic teams have voiced several reasons for separating the genders in athletic competition. Some cite historical reasons, noting that sports were created for men and by men to showcase their talents and strengths.⁵ Others argue that because a physiological disparity exists between men and women, there is a need to separate the two genders.⁶ Still others believe that psychological⁷ and cultural factors warrant the separation.⁸

TEX. J. WOMEN & L. 1 (1997); Dana Robinson, Comment, *A League of Their Own: Do Women Want Sex-Segregated Sports?*, 9 J. CONTEMP. LEGAL ISSUES 321 (1998) (both articles discuss the existence of sexual classifications in athletics and assert the need for change in the current sex-segregated model of sports participation). See also Mark Kelman, *(Why) Does Gender Equity in College Athletics Entail Gender Equality?*, 7 S. CAL. REV. L. & WOMEN'S STUD. 63, 66 (1997) (arguing that gender segregation in sports is permitted because good, non-stigmatic reasons exist that favor girls to compete against each other rather than on the same teams with boys).

3. See, e.g., *Clinton v. Nagy*, 411 F. Supp. 1396 (N.D. Ohio 1974). The court held the constitution and rules of the Ohio High School Athletic Association mandated that male sports teams are to consist of only male athletes. See *id.* at 1397; see also *Brenden v. Independent School District 742*, 477 F.2d 1292 (8th Cir. 1973), where the Minnesota State High School League prohibits females from competing on or against male sports teams. See *id.* at 1294.

4. 34 C.F.R. § 106.41(b) states that if 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.

34 C.F.R. § 106.41(b) (West, WESTLAW through Dec. 7, 1999).

5. See Robinson, *supra* note 2, at 346 (citing Waldo Sweet, *SPORT AND RECREATION IN ANCIENT GREECE* 134-44 (1987)). "Thus, men are not more suited for sports, the contact sports are more suited for men." *Id.*

6. See, e.g., Karen Tokarz, *Separate But Unequal Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L. J. 201, 218 (1985). The author states that school officials reason that the separation of the genders is necessary to prevent boys from dominating mixed sex teams, because of their greater size and strength. See *id.* But see Jay, *supra* note 2, at 21. The differences in the "strength and muscular and cardiovascular endurance 'may be more an artifact of social and cultural restrictions' on females 'than a result of true biological differences in performance potential between genders.'" *Id.* (citing Jack Wilmore, *Exploding the Myth of Female Inferiority*, 2 THE PHYSICIAN AND SPORTS MEDICINE 54, 55 (1981)).

7. See, e.g., HANDBOOK FOR YOUTH SPORT COACHES 347 (Vern Seefeldt, ed. 1987). Due to an immutable genetic inheritance, males have a need to dominate females in athletics, especially between the ages of 12 and 22. See *id.* (citing JAMES MICHENER, *SPORT IN AMERICA* 130 (1976)). The author attributes this need to dominate as a way to "conform[] to some permanent psychological need of the human race." *Id.*

8. See, e.g., Jay, *supra* note 2, at 31. The author suggests that women are traditionally viewed

Though the opportunity for females to compete in sports has substantially increased, certain sports have been set aside strictly for males. Specifically, Title IX does not mandate equal opportunity in the area of contact sports.⁹ The sports that have become available to girls are either non-contact¹⁰ or watered down versions of contact sports.¹¹ These sports have modified rules and uniform restrictions designed to maintain the femininity of female athletes.¹²

Since the 1970s, however, women have begun to change the rules of the game. They are throwing out their saddle shoes and megaphones to don shoulder pads and cleats. They are vying for places on rosters of teams that are considered "traditionally" male.¹³ They are challenging the laws and regulations that prevent them from competing with their peers on male contact sports teams and coming away victorious.¹⁴

The purpose of this comment is to examine the different ways that the courts are circumventing the "contact sports" exception imposed by Title IX. Part II of this comment discusses Title IX, with a brief examination of its history, effect and provision regarding contact sports. Part III illustrates the different approaches that courts have taken when faced with the issue of women's involvement on men's contact sports teams. Part IV details several of the current female student-athletes around the country that are competing on men's athletic teams. Part V of the comment proposes that

by males as the spectator/supporter and not as the competitor in the sports arena. *See id.* The author points to cheerleading as the "perfect illustration of this form of subordination" because it revolves around supporting and encouraging males playing the real sports. *Id.* Several courts have found that using the power of the government to set masculine and feminine roles or limit cultural changes is not permitted by the Constitution. *See e.g., Hoover v. Meiklejohn*, 430 F. Supp. 164, 169 (D. Colo. 1977)(concluding that a high school athletic association that limits participation in soccer to males is a violation of the female athlete's equal protection rights).

9. *See* 34 C.F.R. § 106.41(b).

10. Examples of traditionally male non-contact sports that women are participating in are soccer, tennis, golf and volleyball. *See, e.g., Equal Footing: Women's Field of Dreams Takes a Worldwide Stage* (last modified July 1, 1999) <http://cnnsi.com/womens/news/1999/07/01/field_of_dreams/> (discussing the various women's sports that are garnering media attention).

11. For example, in collegiate basketball, women's teams are required to play with a smaller basketball and decreased time on the shot clock. *See* 1999 NCAA MEN'S AND WOMEN'S BASKETBALL RULES AND INTERPRETATIONS, BR-29, Section 14(b); BR-37, Section 13 (Marty Benson, ed. 1998).

12. *See, e.g., Jay, supra* note 2, at 30-31. The author maintains that sports, such as tennis, lacrosse and field hockey, which require women to wear skirts, only serve the purpose of showing off the legs of the athletes. *See id.*

13. Sports that involve a great deal of bodily contact such as football, wrestling, hockey and rugby.

14. *See, e.g., Hoover v. Meiklejohn*, 430 F. Supp. 164, 172 (D. Colo. 1977) (holding that a high school athletic association rule limiting soccer to male students violates the equal protection rights of female students); *Lantz v. Ambach*, 620 F. Supp. 663, 666 (S.D.N.Y. 1985) (finding that a regulation prohibiting mixed sex competition in football infringes the equal protection rights of girls).

the judges and justices will permit Title IX to protect the female athletes who have tried-out or compete on men's contact sports teams because of the necessity to protect women from discrimination based on sex. To deny female athletes the protection of the law merely because the sport in which they participate involves bodily contact is without logic.

II. EXAMINATION OF TITLE IX

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance. . . ."¹⁵

On June 23, 1972, Title IX of the Educational Act Amendments was passed by Congress and later signed into law by President Richard M. Nixon to end sex discrimination in any federally funded educational and athletic program or activity.¹⁶ Consequently, opportunities have substantially increased for women in the past twenty-eight years, opening doors that were once closed to them.

A. Brief History of Title IX

Modeled after Title VII of the Civil Rights Act of 1964,¹⁷ Title IX protects students of all ages, from kindergarten through graduate-level studies. In addition to athletics, the law applies to educational admissions and recruiting procedures; programs and activities;¹⁸ class offerings and availability;¹⁹ student housing and campus facilities; scholarships and other forms of financial assistance; psychological counseling services; and

15. 20 U.S.C. § 1681(a) (1999), the heart of Title IX.

16. See Diane Heckman, Comment, *Scoreboard: A Concise Chronological Twenty-five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391 (1997) (providing a detailed history of the legislation). A program or activity is federally funded if it receives financial assistance by way of grants, loans or contracts with the federal government. See 42 U.S.C. § 2000(d)(1) (1998) for a comprehensive definition.

17. 42 U.S.C. § 2000(d)(i) prohibits racial discrimination in federally funded educational activities. See 42 U.S.C. § 2000(d)(i).

18. A program or activity of an educational institution includes any of the operations of a university, college, post-secondary institution, vocational school or other school system. See 20 U.S.C. § 1687(2) (1999).

19. Courses or programs in areas such as physical education, home economics, health, music and business cannot be administered to men and women on a separate basis, nor can the students be denied participation on the basis of sex. See 34 C.F.R. § 106.34 (West, WESTLAW through Dec. 7, 1999).

insurance.²⁰

In 1975, the U.S. Department of Health, Education and Welfare issued Title IX regulations to assist educational institutions in their quest for gender equity in athletics.²¹ Now under the auspices of the U.S. Department of Health and Human Services (HHS), the Title IX regulations have been found by the courts to deserve controlling weight.²²

In order to clarify any misconceptions, a school, athletic association or institution of higher education may, in its pursuit of compliance with Title IX, have the U.S. Department of Education Office for Civil Rights (OCR)²³ issue a policy interpretation to be utilized in conjunction with the Title IX regulations.²⁴ Divided into three sections, the policy interpretation focuses on compliance with athletic scholarships and financial assistance, athletic program benefits and meeting the abilities and interests of the students.²⁵ It is a “‘considered interpretation’ of the applicable regulations and is entitled to substantial deference by the courts.”²⁶

Athletic scholarships and financial assistance for male and female athletes are compared to determine if proportionally equal amounts are allocated to the men’s and women’s athletic programs.²⁷ The amount of aid available to each sex is divided by the number of male and female athletes in the sports program.²⁸ A disproportionate amount disbursed to

20. See Valentin *supra* note 1. The legislation governs both public and private schools. See *id.*

21. See Heckman, *supra* note 16, at 396-97. The regulations were signed by President Gerald Ford and became effective on July 21, 1975. See *id.* The Title IX regulations mirror the regulations of the U.S. Departments of Energy and Education. See 34 C.F.R. §§ 106.1 - .71 (West, WESTLAW through Aug. 19, 1999); 10 C.F.R. §§ 1040.1 - .131 (West, WESTLAW through Dec. 7, 1999).

22. See, e.g., Cohen v. Brown Univ., 879 F. Supp. 185, 199 (D.R.I. 1995) (holding that the university failed to treat female athletes equally after infringing Title IX regulations).

23. In addition to Title IX, the OCR is responsible for the enforcement of Title II of the Americans with Disabilities Act of 1990, Title VI of the Civil Rights Act of 1964, § 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. See OCR: About US (last modified Sept. 22, 1999) <<http://www.ed.gov/offices/OCR/aboutus.html>>, at 2.

24. See Title IX of the Education Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 1 (visited Feb. 3, 2000) <<http://www.ed.gov/offices/OCR/t9interp.html>> [hereinafter *Policy Interpretation*]. The Policy Interpretation was written primarily for intercollegiate athletic programs, but the principles also apply to interscholastic sports. See *id.* at 2.

25. See *id.* at 3.

26. Horner v. Kentucky High Sch. Athletic Ass’n, 43 F.3d 265, 273 (6th Cir. 1994).

27. See *Policy Interpretation*, *supra* note 24, at 5. Though the statute does not mandate a proportionate amount of athletic scholarships for both sexes or equal dollar amounts, it does require that the aggregate amount of available scholarship money is substantially proportionate to the participation rates. See *id.* The financial assistance can be in the form of loans or work-related aid. See *id.*

28. See *Policy Interpretation*, *supra* note 24, at 5.

one sex could result in a Title IX violation by the university or college.²⁹

The assessment of gender equity by the OCR includes a comparison of the benefits and opportunities that are available through the athletic program to the male and female athletes.³⁰ The benefits and opportunities that are considered include: scheduling of practices and game times;³¹ the quantity and quality of the athletic equipment;³² transportation and lodging for away contests;³³ the amount and quality of media attention and publicity;³⁴ athletic training and health services;³⁵ and locker rooms and athletic facilities.³⁶ If the benefits and opportunities in these areas are equivalent or equivalent in effect, then the educational institution is in compliance with Title IX.³⁷

In addition, the personnel of the men's and women's sports programs are examined during the overall comparison of the athletic programs. The coaches and academic tutors for the men's and women's teams are studied by the OCR or the courts, with a focus on each individual's professional experience, duties and salary.³⁸ Accessibility to the men's and women's athletic teams of the sports information staff, athletic trainers and team physicians are compared as well as the amount of administrative support each program employs.³⁹

To determine whether an educational institution has met the interests and abilities of its students, the policy interpretation outlines a three prong test that could be applied to determine compliance with the statute.⁴⁰ Employed by the OCR, the three prong test focuses on the

29. See *Policy Interpretation*, *supra* note 24, at 5.

30. See *Policy Interpretation*, *supra* note 24, at 5.

31. For example, the time of day, amount and duration of practices are compared. See *Policy Interpretation*, *supra* note 24, at 7.

32. See *Policy Interpretation*, *supra* note 24, at 7. Equipment includes uniforms, instructional devices and weights. See *id.*

33. See *Policy Interpretation*, *supra* note 24, at 8. The OCR will assess the modes of transportation, daily allowances for the athletes, the length of stay and the dining arrangements. See *id.*

34. See *Policy Interpretation*, *supra* note 24, at 10. A comparison of publications and other items that promote the men's and women's sports teams will be made. See *id.*

35. For example, the OCR will compare the accident insurance coverage for both the men's and women's athletic programs, the availability and quality of the weight training facilities and the qualifications of the trainers. See *Policy Interpretation*, *supra* note 24, at 9.

36. See *Policy Interpretation*, *supra* note 24, at 9. Factors include the quality and availability of locker rooms to both male and female athletes and maintenance of the facilities. See *id.*

37. See *Policy Interpretation*, *supra* note 24, at 6. These components do not have to be identical as long as the effects of the differences are negligible. See *id.*

38. See *Policy Interpretation*, *supra* note 24, at 8.

39. See *Policy Interpretation*, *supra* note 24, at 9-10. Administrative support includes secretarial, clerical and administrative assistance. See *id.* at 10.

40. See *Policy Interpretation*, *supra* note 24, at 11.

underrepresented sex in an athletic program and evaluates the school's or athletic association's commitment to equal opportunity for both sexes.⁴¹ Known as the "substantial proportionality" test, the first prong specifically examines whether athletic participation for men and women is proportionate to their respective enrollments.⁴² Experts believe that an institution will satisfy this portion of the test if the difference in percentage points is five or less.⁴³

The second prong assesses whether an athletic program demonstrates a history and continuing effort to expand its athletic opportunities to meet the interests and abilities⁴⁴ of an underrepresented sex.⁴⁵ The final prong of the OCR test, which is regarded as the "most highly litigated"⁴⁶ of the three prongs, determines if the interests and abilities of the members of the underrepresented sex have been effectively accommodated by the institution.⁴⁷ In order to be found in compliance with Title IX, an educational institution need only satisfy one of the three prongs.⁴⁸

In 1984, the Supreme Court attempted to limit the broad coverage of Title IX.⁴⁹ The decision in *Grove City College v. Bell*⁵⁰ held that Title IX was program specific and could only be applied to programs and activities directly receiving financial assistance.⁵¹ Congress legislatively overturned the Court's ruling with the passage of the Civil Rights Restoration Act of 1987.⁵² The Act provides that Title IX is enforceable against all of the

41. See Welch Suggs, *More Women Participate in Intercollegiate Athletics*, THE CHRONICLE OF HIGHER EDUCATION (May 21, 1999) <<http://chronicle.com/free/v45/i37/37a00101.htm>>, for a detailed discussion on assessing Title IX compliance. The author maintains that universities that sponsor football teams are those that give women athletes fewer opportunities than men. See *id.*

42. See *Policy Interpretation*, *supra* note 24, at 12.

43. See Suggs, *supra* note 41, at 4.

44. Educational institutions are free to determine the interests and abilities of their students provided they incorporate the national trends of women's athletic interests and their team's performance records in the particular sport into their methodology. See *Policy Interpretation*, *supra* note 24, at 11. The methodology must be responsive to the athletic interests of the underrepresented sex who are capable of competing on the intercollegiate level. See *id.*

45. See *id.* at 12.

46. *Beasley v. Alabama State Univ.*, 966 F. Supp. 1117, 1124 (M.D. Ala. 1997).

47. See *Policy Interpretation*, *supra* note 24, at 12. Compliance may be determined by comparing the schedules of both the men's and women's sports teams on a program-wide basis to assess whether proportionally similar numbers of men and women receive equally competitive opportunities. See *id.* An institution can also comply with this prong by demonstrating the upgrade of competitive opportunities to a historically disadvantaged sex. See *id.*

48. See *Policy Interpretation*, *supra* note 24, at 12.

49. See *Grove City College v. Bell*, 465 U.S. 555, 573-74 (1984) (holding that a small number of college students receiving federal grants did not render Title IX applicable to the entire institution, only to the financial aid program).

50. 465 U.S. 555 (1984).

51. See *id.* at 573-74.

52. See 20 U.S.C.A. § 1681. The act became law on March 22, 1988 after Congress overrode a

programs and activities of an educational institution, so long as any part of that institution receives direct or indirect financial assistance from the federal government.⁵³

Finally, in the landmark case of *Franklin v. Gwinnett County Public Schools*,⁵⁴ the Supreme Court reiterated the right of individuals to bring private Title IX actions against an educational institution, but added that monetary damages can be sought as well, thus paving the way for athletes to bring suits on their own behalf.⁵⁵ *Franklin* also expanded the potential defendants for Title IX violations by allowing schools and athletic associations to be held responsible for discriminatory actions by individuals within those institutions.⁵⁶ The result is that an infringement of Title IX, even if perpetrated by an employee, not only subjects the educational institution to an OCR investigation, but also to court battles, high litigation costs and possible monetary damages.⁵⁷

B. Effects of the Law

With the help of Title IX, the role of women in education and athletics has undergone a metamorphosis. Traditionally, men went to college and to work while the women's role was to stay at home and care for the children. Shedding the restraints of tradition and seeking freedom of self-expression, women now comprise more than half of the enrolled student body at institutions of higher learning.⁵⁸ They train to fight for our country on the front lines and are no longer just nurses and secretaries back at the base. They are serving on our nation's highest Court,⁵⁹ in Congress⁶⁰ and

veto by President Ronald Reagan. See *History of Title IX Legislation, Regulation and Policy Interpretation* (visited Sept. 28, 1999) <<http://bailiwick.lib.uiowa.edu/ge/history.html>>.

53. See 20 U.S.C.A. § 1681(a). See also *History of Title IX Legislation, Regulation and Policy Interpretation*, *supra* note 52.

54. 503 U.S. 60 (1992).

55. See *id.* at 76. The Supreme Court first recognized a private cause of action for individuals bringing Title IX claims in *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

56. See *Valentin*, *supra* note 1, at 4.

57. See Trudy Saunders Bredthauer, *Twenty-Five Years Under Title IX: Have We Made Progress?*, 31 Creighton L. Rev. 1107, 1109 (1998). The author points out that although no individual liability exists under Title IX, educational administrators could be subject to personal liability if the Title IX suit is combined with a Section 1983 action. See *id.* at 1110.

58. See *id.* at 1107.

59. Justices Sandra Day O'Connor and Ruth Bader Ginsburg are presently serving on the United States Supreme Court.

60. Nine women presently serve in the United States Senate and fifty-eight in the House of Representatives including Senators Barbara Boxer (CA), Dianne Feinstein (CA), Kay Bailey Hutchison (TX) and Patty Murray (WA) and Representatives Carolyn McCarthy (NY), Tammy Baldwin (WI) and Julia Carson (IN). See *Current Congressional Profile* (visited Feb. 3, 2000) <<http://clerkweb.house.gov/mbrcmtee/statsanswers.htm>>.

in the President's cabinet.⁶¹ Women are now the athletes at center court and no longer just the cheerleaders on the sidelines.

Title IX is renowned for its great impact on women's interscholastic and intercollegiate sports.⁶² Before the law was enacted, only one female out of twenty-seven was participating in sports.⁶³ Today, that figure is nearly one in two.⁶⁴ In 1992, 37% of high school athletes were female, contrasting the mere 7% in 1972 when Title IX was enacted.⁶⁵ Athletic scholarship money for women at colleges and universities has grown from \$100,000 per year since the passage of Title IX to \$180 million in 1997.⁶⁶ Women's participation on sports teams is at a record high, increasing at a rate faster than that of men.⁶⁷ Title IX has done much to pave the way for women in athletics but has overlooked one area – contact sports.⁶⁸

C. Treatment of Contact Sports

Although Title IX bars discrimination based on sex in any varsity, intramural or club sport, this protection does not extend to all sports.⁶⁹ A federally funded educational program or activity that offers a sport for members of one sex must permit the excluded sex to try-out for that team,

61. Currently, Attorney General Janet Reno, Secretary of State Madeleine Albright, Secretary of Labor Alexis Herman and Secretary of Health and Human Services Donna Shalala are members of the President's Cabinet.

62. See, e.g., *Equal Footing: Women's Field of Dreams Takes a Worldwide Stage*, *supra* note 10; Mark Stringham, *More Women in Sports* (last modified Feb. 27, 1997) <<http://newslines.byu.edu/newslines/Archives/news/19702/970227NINE.Htm>>; *Title IX: A Brave New World for Women in Sports* (last modified June 17, 1997) <<http://europe.cnn.com/US/9706/17/title.nine>> (all articles attributing the increase in women's athletic participation to Title IX).

63. See Randolph T. Holhut, *Title IX: Leveling the Playing Field for Women* (visited Sept. 20, 1999) <<http://www.mdle.com/WrittenWord/rholhut/holhut43.htm>> (stating that Title IX caused a revolution in women's sports, but many schools are still discriminating against female athletes).

64. See *id.*

65. See Feminist Majority Foundation's Task Force on Women and Girls in Sports, *Empowering Women in Sports: Women Still on the Sidelines* (visited Sept. 28, 1999) <<http://www.feminist.org/research/sports3.html>> (arguing that female participation in interscholastic sports has been increasing at such a slow rate that equality for male and female athletes will not be reached until the year 2033).

66. See *Senators, Athletes Celebrate 25th Anniversary of Title IX, Call for Fair Play* (visited Mar. 18, 2000) <<http://www.senate.gov/~dpc/events/970618/970618.html>>. As a result of Title IX, colleges and universities increased their annual operating expenses from less than one dollar per female athlete to \$4100 in 1997. See *id.*

67. See *Growing Pains: As Female Participation Grows, So Do Problems* (visited Mar. 18, 2000) <http://cnnsi.com/womens/news/1999/07/26/girls_sports/index.html> (stating that the bad attitudes associated with male sports are carrying over into women's sports).

68. See 34 C.F.R. § 106.41(b).

69. See *id.*

provided that the sport offered is not a contact sport.⁷⁰ The law defines a "contact sport" as one in which the "purpose or major activity . . . involves bodily contact," such as football, wrestling, boxing, basketball, rugby and ice hockey.⁷¹

According to the OCR Policy Interpretation, certain circumstances can apply in which an educational institution that sponsors a contact sport team for one sex is required to sponsor that particular contact sport for the other sex in order to satisfy the effective accommodation prong.⁷² For instance, athletic opportunities for the excluded sex must have been historically limited for Title IX to mandate the establishment of the contact sports team.⁷³ In addition, members of the excluded sex must possess enough interest in the contact sport to sustain a team, have the athletic ability and a reasonable expectation to compete on the intercollegiate level.⁷⁴ If these conditions are satisfied, it follows that a female athlete may look to the courts to provide relief from an athletic program that refuses to sponsor a particular female contact sport team.

III. JUDICIAL TREATMENT OF THE CONTACT SPORT EXCEPTION

"It's time to treat our daughters as well as our sons."

—Billie Jean King⁷⁵

Labeled "the broadest exception recognized to the overarching goal of equal athletic opportunity,"⁷⁶ courts have taken different approaches when confronted with the "contact sports exception."

A. *Prior Case Law*

1. Strict Reading of Title IX

Though courts have struck down rules barring mixed competition in non-contact sports, typically a different result is reached when an educational institution denied women a chance to compete on a men's

70. *See id.*

71. *Id.*

72. *See Policy Interpretation, supra* note 24, at 11.

73. *See Policy Interpretation, supra* note 24, at 11.

74. *See Policy Interpretation, supra* note 24, at 12.

75. Billy Jean King, *Gender Equity Report Card 1997* (visited Sept. 28, 1999) <<http://www.lifetimetv.com/WoSport/stage/GENEQ97>>.

76. *Williams v. School Dist. of Bethlehem*, 998 F.2d 168, 172 (3d. Cir. 1993).

sport" exception, many courts have found that educational institutions or athletic associations violated the female athlete's Fourteenth Amendment rights.⁸⁷ Such a claim is distinct from a Title IX claim and essentially requires the athlete to assert that she did not have opportunities afforded to her on account of her gender.

However, the Equal Protection Clause of the Fourteenth Amendment bars only intentional discrimination.⁸⁸ Therefore, challenging a rule or law on equal protection grounds requires the plaintiff to establish that the rule or law was promulgated or reaffirmed with the intention of having an adverse impact on others in the same class as the plaintiff.⁸⁹ In addition, the Supreme Court has detailed that the discrimination suffered must be significant and unexplainable on grounds other than discrimination.⁹⁰ The female athlete alleging Title IX violations maintains that, because of her classification as a woman, the rules of the educational institutions or athletic associations infringed upon her Fourteenth Amendment rights and thereby treated males and females dissimilarly.⁹¹

When confronted with equal protection claims, an analysis is applied to determine whether persons are discriminated against because of the class in which they are situated. Specifically, a law that classifies on the basis of gender carries the burden of showing an exceedingly persuasive justification for the classification.⁹² The classification must serve important governmental objectives, and the discriminatory means employed must be substantially related to the achievement of those objectives.⁹³ In *Frontiero v. Richardson*,⁹⁴ the Supreme Court compared a

87. See U.S. CONST. amend. XIV. The Fourteenth Amendment states that: no state shall make or enforce any law which shall abridge the privileges or immunities of the 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 law. . . .

Id. The Amendment, which was adopted in 1868, "potentially limited the discretion that the states had possessed to determine the civil liberties and rights of citizens within their sphere of authority." PETER WOLL, *AMERICAN GOVERNMENT: READINGS AND CASES* 104 (1996). Examples of cases include *Lantz v. Ambach*, 620 F. Supp. 633 (S.D.N.Y. 1985) (holding that a public high school regulation prohibiting mixed gender competition in all sports is a violation of the Equal Protection Clause) and *Clinton v. Nagy*, 411 F. Supp. 1396 (N.D. Ohio 1974) (barring a football league from denying females the opportunity to play based on sex).

88. See *Washington v. Davis*, 426 U.S. 229, 238-39 (1976).

89. See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

90. See *Horner*, 43 F.3d at 276.

91. See, e.g., *Brenden*, 477 F.2d at 1299-1300.

92. See *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) (finding unconstitutional on equal protection grounds a state law that gave a husband the right to dispose of a jointly owned property without the consent of his wife).

93. See *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980) (holding that a state law that mandates proof of certain conditions for a widower to claim workers' compensation benefits

contact sports team.⁷⁷ The reasoning relied upon is the wording of Title IX itself, which exempts contact sports from its protection. In fact, the statutory language is quite clear. An educational institution or athletic association is not required to sponsor contact sports teams for both sexes.⁷⁸

For example, the federal district court in *Barnett v. Texas Wrestling Ass'n*⁷⁹ held that the defendants did not infringe Title IX by prohibiting females from participating in wrestling matches against males.⁸⁰ Wrestling by its very nature, Judge Fish opined, is the "quintessential contact sport," which, according to statute, is exempted from the protection of Title IX.⁸¹ Therefore, the athletic association was permitted to escape Title IX liability.⁸²

In *Adams v. Baker*,⁸³ a female freshman filed suit against her high school for excluding female athletes from wrestling try-outs.⁸⁴ The federal district court, again relying on the contact sports exception, found that the plaintiff's Title IX claim could not succeed on the merits due to the nature of the sport.⁸⁵

These cases indicated that female athletes who desired to play sports like football and hockey would have to bring an action on other grounds for an opportunity to participate with their male peers. Title IX does not provide a remedy.⁸⁶

2. Equal Protection of the Law

In an attempt to circumvent the statutory language of the "contact

77. See, e.g., *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994) (finding that females cannot be prevented from competing with males on non-contact sports teams like track, gymnastics, swimming and golf); *Bednar v. Nebraska Sch. Activities Ass'n*, 531 F.2d 922 (8th Cir. 1976) (stating that girls should be permitted to compete on the cross country team); *Brenden v. Independent Sch. Dist. 742*, 477 F.2d 1292 (8th Cir. 1973) (striking down rule excluding female participation on the men's golf, track and cross country teams).

78. 34 C.F.R. § 106.41(b) states that if 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 been previously limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.

79. 16 F. Supp. 2d 690 (N.D. Tex. 1998).

80. See *id.* at 694.

81. *Id.*

82. See *id.* at 695.

83. 919 F. Supp. 1496 (D. Kan. 1996).

84. See *id.* at 1499-1500.

85. See *id.* at 1503.

86. See *id.* But see Part II.C., *supra*, for regulation that may require a school to sponsor an entire women's contact sport team, as opposed to being required to allow a female athlete to try-out for a men's team.

sex classification to a race classification, stating the two are similar because both are immutable characteristics determined by the accident of birth.⁹⁵ The plaintiffs' threshold showing is a relatively simple one; that their classification as women, according to the rules in question, causes them to receive unequal treatment or benefits in comparison with the male athletes.

Unlike Title IX claims, equal protection claims have proven successful. The analyses of several courts have concluded that regulations preventing females from participating in contact sports infringe on the athlete's right to equal protection.⁹⁶ For instance, in *Clinton v. Nagy*,⁹⁷ Judge Lambros noted that contact sports provide males with an opportunity to develop leadership qualities and strength of character.⁹⁸ Though these are qualities that are desirable in all youngsters, only males have been afforded the opportunity to participate in such sports through which these qualities have the potential to develop.⁹⁹

Another example can be found in *Leffel v. Wisconsin Interscholastic Athletic Ass'n*.¹⁰⁰ In *Leffel*, the federal district court held that there was no legitimate government objective that would permit the exclusion of female high school athletes from competing on men's contact sports teams.¹⁰¹ Though the defendant athletic association argued that biological differences in the sexes exist that leave girls open to an unreasonable risk of harm to their person if they participate in mixed competition, Judge Gordon stated that such a risk of injury did not suffice as a justifiable objective.¹⁰² The defendant athletic association was given three options:

and not a widow violated equal protection).

94. 411 U.S. 677 (1973) (maintaining that statutes treating the dependents of servicewomen differently than servicemen for administrative convenience infringe the Due Process Clause of the Fifth Amendment).

95. *See id.* at 686.

96. *See e.g., Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n*, 334 A.2d 839 (Pa. 1975) (applying the state's equal rights amendment to conclude that a regulation stating that men and women cannot compete together is unconstitutional); *Darrin v. Gould*, 540 P.2d 882 (Mass. 1975) (maintaining that the Massachusetts Equal Rights Amendment prevented females from being barred from playing football based on their sex).

97. 411 F. Supp. 1396 (N.D. Ohio 1974). The plaintiff, a pre-teen girl, was denied the opportunity to compete with the 97th Street Bulldogs football team on the basis of her sex. *See id.* at 1397. After a finding that the plaintiff did not lack any physical qualifications that her male teammates possessed nor was she more prone to serious injury, the court issued a temporary restraining order. *See id.* at 1398-99.

98. *See Clinton*, 411 F. Supp. at 1399-1400.

99. *See id.* at 1400.

100. 444 F. Supp. 1117 (E.D. Wis. 1978).

101. *See id.* 1122.

102. *See id.* The court opined that the athletic association had not advanced a governmental objective to justify giving males an opportunity to compete in contact sports on the interscholastic

sanction coeducational teams; form separate contact sports teams for girls; or discontinue varsity interscholastic competition all together.¹⁰³

By filing claims on equal protection grounds, female athletes have been able to overturn the rules of the federally funded educational institutions and athletic associations that discriminated against them on the basis of their classification as women. In this manner, the "contact sport" exception in Title IX was properly circumvented to give women an opportunity to compete in contact sports, an area where Title IX's protection falls short.

B. *Mercer v. Duke University*

Despite the contact sport exception, one court recently has held that Title IX can provide protection to female athletes that participate in contact sports, thus affording a means in addition to equal protection by which women can gain access to traditional male sports.¹⁰⁴ The landmark case of *Mercer v. Duke University*¹⁰⁵ broadened the scope of Title IX protection afforded to female athletes, making it possible to bring a successful Title IX action against a federally funded program or activity, even if the sport at issue is a contact sport.¹⁰⁶

In *Mercer*, the plaintiff, Heather Sue Mercer, wanted to play football at the collegiate level.¹⁰⁷ An All-State placekicker in high school, she was determined to secure a spot on the Duke University football team.¹⁰⁸ After she enrolled in 1994, Mercer tried-out for a walk-on¹⁰⁹ position on the roster, something that no other women had attempted in the history of the Blue Devils football program.¹¹⁰ Though Mercer initially did not make the team, she served as the team manager and was given the opportunity to participate in the conditioning drills.¹¹¹

In the spring of 1995, Mercer was again given a chance to display her

level while barring the same opportunity to females. *See id.* "It is doubtful that any such legitimate governmental objective exists." *Id.*

103. *See id.*

104. *See Mercer v. Duke Univ.*, 190 F.3d 643, 648 (4th Cir. 1999)[hereinafter *Mercer II*].

105. *See id.*

106. *See id.*

107. *See id.* 644. Mercer regularly attended the football team's practices and conditioning sessions. *See id.*

108. *See Mercer II*, 190 F.3d at 644. Mercer attended Yorktown Heights High School in Yorktown, New York. *See id.*

109. A walk-on is a non-scholarship, collegiate athlete that earns a position on a team without having been recruited. *See Webster Dictionary* (visited Feb. 14, 2000) <<http://www.m-w.com/cgi-bin/dictionary>>.

110. *See Mercer II*, 190 F.3d at 644.

111. *See id.*

ability.¹¹² The senior members of the football team had chosen their female teammate to take part in the annual intersquad scrimmage known as the Blue-White Game.¹¹³ Mercer did not disappoint. She garnered a 24-22 victory for her Blue team by kicking the winning 28-yard field goal.¹¹⁴

The Duke head football coach, Fred Goldsmith, informed the sports reporters covering the Blue Devils that Heather was a member of the team.¹¹⁵ Her name was placed on the team roster and she was featured in the Duke football yearbook.¹¹⁶ Soon thereafter, the sports information director contacted Mercer about sitting for interviews with members of the print and broadcast media.¹¹⁷

Throughout the 1995 season, Mercer regularly attended the practices, but was never given the chance to compete in any of the games.¹¹⁸ According to Mercer, Coach Goldsmith gave the other walk-on kickers more opportunities to participate in team practices.¹¹⁹ He did not allow her to attend the summer camp with the rest of her teammates, nor would he permit her to dress for games or sit on the sidelines.¹²⁰

However, the discrimination did not end there. Mercer contended that Coach Goldsmith had directed several offensive comments towards her.¹²¹ Examples included questioning her interest in football and querying why she would rather play football than compete in a beauty pageant.¹²² The coach also suggested that Mercer sit with her boyfriend

112. *See id.*

113. *See id.*

114. *See Mercer II*, 190 F.3d at 644-45. Replays of the kick were even televised on the cable sports network, ESPN. *See id.*

115. *See id.* Goldsmith later apologized for leading Mercer to believe that he had reserved a spot for her on the roster, stating that he let his emotions overcome him after the scrimmage. *See* Dave Berger, *Mercer Booted Off Football But Keeps Swinging at Coach* (last modified Aug. 29, 1995) <<http://www.chronicle.duke.edu/chronicle/95/08/29/hm Mercer.html>>. The coach said that he "was carried away at the time." *Id.* "I was speaking more as the father of two daughters than I was as a football coach." *Id.* Goldsmith admitted that he should have realized that other walk-ons might overtake Mercer in the pre-season practices. *See id.*

116. *See Mercer II*, 190 F.3d at 645.

117. *See id.* Mercer received several interview requests from newspaper, radio and television reporters, including one from representatives of *The Tonight Show*. *See id.*

118. *See id.* Goldsmith contends that Mercer's abilities fell well short of the other kickers on the team. *See* Berger, *supra* note 114. The coach stated that Mercer "can't kick the ball half as far as six other kickers." *Id.* He claimed that Mercer possessed far less leg strength than the other walk-ons and was unable to contribute in practice as a scout squad player. *See id.*

119. *See Mercer II*, 190 F.3d at 645.

120. *See id.*

121. *See id.*

122. *See id.*

during the football games, and not with the team.¹²³

Mercer was dropped from the Blue Devils' active roster at the beginning of the 1996 football season.¹²⁴ Her attempts to participate in the team endurance training sessions were futile because the coach only opened the sessions to team members.¹²⁵ Goldsmith told Mercer that she could try-out for the team the following season.¹²⁶

In the fall of 1997, Mercer chose not to pursue her dream of being the first woman to play Division I college football. Instead, she filed a suit in federal court against Duke University and Coach Goldsmith, alleging sexual discrimination in violation of Title IX.¹²⁷ Mercer contended that she was not afforded the same opportunity to participate as a member of the team because of her sex.¹²⁸

The federal district court dismissed the case, holding that Duke University was not obligated to permit Mercer, or any female, to partake in its football program.¹²⁹ Title IX, the court reasoned, did not apply to contact sports.¹³⁰ Therefore, Duke was permitted to exclude Mercer from its football team.¹³¹

On appeal, the Fourth Circuit reversed.¹³² Judge Luttig held that a university, which has permitted a member of the opposite sex to try-out for a position on a single-sex contact sports team, is subject to the provisions of Title IX and barred from discriminating against the athlete on the basis

123. See *Mercer II*, 190 F.3d at 645. Male kickers on the team that possessed less talent than Mercer were permitted to attend the Duke football camps in the summers of 1995 and 1996. See *Mercer v. Duke Univ.*, 32 F. Supp. 2d 836, 838 (M.D.N.C., 1998) [hereinafter *Mercer I*]. In addition, Mercer was never given a team uniform. See *id.*

124. See *Mercer I*, 32 F. Supp. at 838. Goldsmith told Mercer that there was "no place for her on the team." *Id.* Mercer believes that she was cut from the Duke football program on the basis of her sex because the coach let other, less qualified, male walk-on kickers remain on the roster. See *Mercer II*, 190 F.3d at 645. Mercer stated, "I believe that if I were a man and had the same kicking skills that I have now, I would be a member of the Duke football team." Berger, *supra* note 114.

125. See *Mercer II*, 190 F.3d at 645. Goldsmith insisted that Mercer had "no right" to be at the endurance training sessions and asked her to leave. See *Mercer I*, 32 F. Supp. at 838.

126. See *Mercer II*, 190 F.3d at 645.

127. See *id.* Mercer's complaint also alleged negligent misrepresentation and breach of contract in violation of North Carolina law.

128. See *Mercer I*, 32 F. Supp. at 837.

129. See *id.* at 839. The court held that because football is clearly a contact sport, a straightforward reading of 34 C.F.R. § 106.41(b) demands dismissal of the case as a matter of law. See *id.* at 839-40. Mercer specifically charged that Duke denied her the opportunity to "develop her fullest potential as a student athlete." Emery Dalesio, *Woman Sues After Losing Bid to Become Duke Kicker* (visited Aug. 31, 1999) <<http://www.athensnewspapers.com/1997/091897/0918.s4womankicker.html>>.

130. See *Mercer I*, 32 F. Supp. at 839.

131. See *id.*

132. See *Mercer II*, 190 F.3d at 648.

of his or her gender.¹³³ The judge stated that this was the only permissible reading of Title IX because Duke invited females to participate in the “traditionally all-male bastion of college football.”¹³⁴

The *Mercer* court found that this interpretation of Title IX was consistent with the congressional intent of providing equal access without mandating the integration of the sexes in intercollegiate contact sports.¹³⁵ According to the opinion, the intent of Congress was to prevent discrimination in all instances where it is unreasonable, such as when the educational institution itself voluntarily opened the athletic team to members of both sexes.¹³⁶

As a result of *Mercer*, schools and athletic associations appear to be facing a choice. They can either legally prohibit women from participating on men’s contact sports teams based on the contact sport exception, or they can afford women the opportunity to compete and become subject to Title IX. From a legal standpoint, educational institutions and athletic associations would be foolish to risk future Title IX litigation by permitting females to try-out and compete on men’s contact sports teams. The unfortunate effect of this ruling may be the total exclusion of female participation on men’s contact sports teams.

IV. BREAKING FROM TRADITION

“We grew up thinking - as many girls still do - that the most important thing about a female body is not what it does, but how it looks”

—Gloria Steinem¹³⁷

The opinions of the judges and justices, regarding the involvement of women in sports, have changed over time. The rulings have come a long way since the decision in *State v. Hunter*¹³⁸ that validated the use of the state’s police power by the legislature to stop the rise of the “feminine

133. See *id.* The court acknowledged the fact that it was the first to recognize such a cause of action. See *id.*

134. *Id.* The interpreted meaning of 34 C.F.R. § 106.41(a)-(b) was that federally funded educational institutions and athletic associations must permit the excluded sex to try out for the single-sex athletic team if the sport is non-contact. See *Mercer II*, 190 F.3d at 647. Thus, contact sports are only exempted from the non-contact sports try-out requirement. See *id.* When the institution opens up its team try-outs to the excluded sex, Title IX becomes applicable even if the sport is contact in nature. See *id.* at 647-48.

135. See *Mercer II*, 190 F.3d at 647.

136. See *id.*

137. Gloria Steinem, *Gender Equity Report Card 1997* (visited Sept. 28, 1999), <<http://www.lifetimetv.com/WoSport/stage/GENEQ97>>.

138. 300 P.2d 455 (Or. 1956) (finding a state law barring female wrestling to be constitutional).

encroachment upon what for ages has been considered strictly as manly arts and privileges."¹³⁹ As a result of Title IX and equal protection claims, women have become active participants in most sports.¹⁴⁰ The increased presence of women on men's contact sports teams, in particular, is a testament to this fact.

The National Federation of State High School Associations (NFSHSA) reported that 779 girls played football at the high school level in the 1997-98 season.¹⁴¹ In fact, women's football clinics and flag football leagues are increasing in popularity.¹⁴² The NFSHSA also noted that in 1996 nearly 1,200 girls wrestled and 1,340 played baseball on boys' sports teams.¹⁴³

Since Heather Mercer's attempt to participate on the Duke football team, collegiate women athletes have been making strides as football placekickers. For example, the University of Colorado Buffaloes football team welcomed their first female teammate, Katie Hnida, who secured a reserve placekicker position.¹⁴⁴ Tonya Butler, a member of the Middle Georgia Junior College squad, was recruited after a stellar high school career as a placekicker, for which she garnered All-State honors.¹⁴⁵ Williamette University's Liz Heaston, an All-American selection for women's soccer, filled in for the football team's injured kicker and scored two points on kicks at the homecoming game.¹⁴⁶

Women are also enjoying much success in the sport of wrestling.¹⁴⁷ In

139. *Id.* at 458. Judge Tooze opined that the recognition of gender classifications "by laws having for their object the promoting of the general welfare and good morals does not constitute an unjust discrimination." *Id.* at 457.

140. See *supra* Parts II.B., III.A.2. and III.B.

141. See *More Common: Female Football Players No Longer Unique* (visited Sept. 2, 1999) <<http://cnnsi.com/football/news/1999/09/02/girlsfootball/index.html>>. In most instances, the girls are placekickers and not positioned in the interior line. See *id.*

142. See Rodney K. Smith, *Solving the Title IX Conundrum With Women's Football*, 38 S. TEX. L. REV. 1057, 1069-70 (1997) (noting women's increased interest in the sport of football).

143. See Teri Bostian, *Making the Cut* (visited Oct. 1999) <<http://sportsjones.com/mercer.htm>> (discussing the ramifications of the *Mercer v. Duke University* ruling).

144. See *id.* Hnida became the second known woman to ever suit up for a Division I game in the contest against Kansas on September 18, 1999. See *id.*

145. See Nick Charles, *A Real Kick: Georgia Woman Living Her Dream as College Placekicker* (visited Sept. 8, 1999) <http://cnnsi.com/thenetwork/news/1999/09/08/pageone_femalekicker/index.html>. Butler explains how she turned down offers from other schools that were hoping to add a female to their rosters to generate ticket sales and to satisfy Title IX requirements. See *id.*

146. See Bostian, *supra* note 142. Heaston resumed her position on the women's soccer team when the injured kicker returned. See *id.*

147. For example, Melina Hutchinson (the first female to win a high school state wrestling meet in Alaska), Melissa Minjarez (the first woman in California to reach the junior college state wrestling finals), Toccara Montgomery (earned a second-place finish in the 1999 High School Nationals), Andi Jones (first woman that qualified for the high school state championships in Tennessee), Cheryl New

1985, America Morris became the first woman to pin an opponent at the high school varsity level.¹⁴⁸ Casey Baranoski of Comstock Park High School in Michigan was the first female to record wins in 100 high school matches.¹⁴⁹ Minnesota high school student, Megan McHattie, garnered a first-place finish at the 1999 Girls' High School Wrestling National Championship.¹⁵⁰

In addition, women have the opportunity to take their high school and college sports careers to the professional level. Goalie Manon Rheaume became the first woman to play in a National Hockey League game when she defended the Tampa Bay Lightning in a pre-season contest against the St. Louis Blues.¹⁵¹ On July 24, 1998, Ila Borders, the first woman to pitch in a men's professional baseball game, threw six shutout innings in her first minor league win for the Duluth-Superior Dukes.¹⁵²

It is fortunate that the judiciary has taken more of a contemporary view regarding women's involvement on male contact sports teams.¹⁵³ The result is that female athletes are getting the opportunities they deserve to play on teams that once prohibited their participation.

V. CONCLUSION

"The pedestal upon which women have been placed has all to often, upon closer inspection, been revealed as a cage"

—Judge Heaney¹⁵⁴

Title IX, the law that has increased opportunities for women to participate in athletics, does, however, serve to exempt them from contact sports. Favorite American past times, such as football, were effectively set aside solely for males, and qualified female athletes were legally denied

(first female competitor in an Oregon state tournament), Mary Kelly (junior high school wrestler who placed third in Illinois state tournament) and Arielle Bradbury (first woman in Washington history to compete in a state wrestling tournament) are being heralded in the media around the country. *See Articles* (visited Sept. 23, 1999) <<http://www.fhsw.com/articles.htm>>. (detailing the accomplishments of female high school wrestlers across the country).

148. *See History* (visited Sept. 23, 1999) <<http://www.fhsw.com/history.htm>>. Morris, a sophomore at Clairemont High School in San Diego, pinned Madison High School wrestler, Russell Cain, in the 107 lb. weight class. *See id.*

149. *See Articles*, *supra* note 144. Baranoski was conference champ in the 103lb. weight class. *See id.*

150. *See Articles*, *supra* note 144.

151. *See Official Manon Rheaume Web Site* (last modified Dec. 27, 1999) <<http://www.manonrheaume.com/bio.htm>>.

152. *See Ila Borders* (visited Jan. 9, 2000) <<http://dsdukes.com/ila.html>>.

153. *See, e.g., Lantz v. Ambach*, 620 F. Supp 663, 665-66.

154. *Brenden*, 477 F.2d at 1297.

the chance to try-out and compete for any such team.

The decision in *Mercer* has filled this void in Title IX, albeit on narrow grounds. Women have finally achieved some protection in the context of contact sports. When an educational institution or athletic association affords a female the opportunity to compete with her male peers in a contact sport, she is now protected from discrimination by Title IX. The *Mercer* holding, together with equal protection claims, provide an avenue by which women can participate in contact sports and contemporaneously be protected from discrimination on the basis of sex.

No one should be exposed to sexual discrimination and denied the protection of the law simply because he or she is competing on a sports team that traditionally has excluded that gender. Female athletes who have secured positions on male contact sports teams should not have to be the targets of discrimination or harassment. They have earned their right to participate, and Title IX can now be used to assure that right.

Kimberly Capadona