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Julie G. Yap

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# PAY OR PLAY?: WHY REQUIRING NOTICE AND AN OPPORTUNITY TO CURE IN CLAIMS FOR MONEY DAMAGES BEST SERVES THE COMPLIANCE GOALS OF TITLE IX

JULIE G. YAP\*

In 2011, the University of Delaware eliminated its varsity men's outdoor track and field team after 100 years of intercollegiate competition.<sup>1</sup> The university cited "exercising fiscal responsibility and remaining in compliance with Title IX" as the reasons for the cut.<sup>2</sup> However, the university did not argue that the elimination was essential to immediate compliance with the law.<sup>3</sup> Indeed, the university had been maintaining compliance through the periodic expansion of female athletic programs and planned to add a women's golf team in the fall of 2011.<sup>4</sup> Rather, the team was eliminated out of the university's concern that it could not remain compliant in the future given financial constraints.<sup>5</sup> In eliminating a more low-profile team, the university joined dozens of fellow institutions that have eliminated men's "minor" sports teams, such as wrestling,<sup>6</sup> tennis, and gymnastics, purportedly because of Title

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\* Julie Yap is a lawyer in Washington, D.C. She served as a career law clerk in the Eastern District of California and as an adjunct professor at University of the Pacific, McGeorge School of Law. Special thanks to Scott P. Mallery for his continual comments and insight and to the Honorable Frank C. Damrell, Jr. (ret.) for his thoughtful review and amazing mentorship.

1. Katie Thomas, *Cutting Men's Programs Now to Satisfy Title IX in Future*, N.Y. TIMES, May 2, 2011, at D1; Kevin Tresolini, *University of Delaware Drops Men's Track, Cross Country*, DELAWARE ONLINE (Jan. 19, 2011), <http://blogs.delawareonline.com/collegesports/2011/01/19/university-of-delaware-drops-mens-track-cross-country>.

2. Tresolini, *supra* note 1. The university also eliminated men's cross country. *Id.*

3. Thomas, *supra* note 1.

4. *Id.*; Tresolini, *supra* note 1. In 1991, the university had eliminated men's wrestling, and subsequently added women's soccer and women's rowing. Tresolini, *supra* note 1.

5. Thomas, *supra* note 1. The university's athletic director stated, "Continued expansion of our athletic program is not feasible in this financial climate, and given that reality, the university made the only decision it could." *Id.*; Laura Gottesdiener, *University of Delaware's Title IX Sports Cuts: Questions Still Linger*, HUFFINGTON POST (July 9, 2011), [http://www.huffingtonpost.com/2011/05/09/university-delaware-title-ix\\_n\\_859737.html](http://www.huffingtonpost.com/2011/05/09/university-delaware-title-ix_n_859737.html).

6. In January 2002, the National Wrestling Coaches Association and others brought suit against the Department of Education, claiming that Title IX results in discrimination against men because it forces schools to cut men's teams, such as wrestling. *See Nat'l Wrestling Coaches Ass'n v. U.S.*

IX.<sup>7</sup>

However, critics of the decision, including members of the former track and field team, question whether Title IX is unnecessarily taking the blame for the elimination of the programs.<sup>8</sup> Specifically, concerns have been raised that Title IX has become the scapegoat for funneling additional resources into the football budget.<sup>9</sup> In fact, similar cuts to lower profile varsity men's programs have been made at other schools in the Colonial Athletic Conference, in which the university competes; Towson University cut four men's teams in 2004, and James Madison University cut seven in 2006.<sup>10</sup> Further, advocates of Title IX assert that the law is often unfairly blamed for the misallocation of resources to "major" men's sports, such as football and basketball.<sup>11</sup>

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Dep't of Educ., 263 F. Supp. 2d 82 (D.D.C. 2003). However, in the four-year period when the three-part test was not enforced, 1984–1988, "colleges and universities cut wrestling teams at a rate almost three times as high as the rate of decline during the twelve years after Title IX's application to intercollegiate athletics was firmly reestablished." Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 32 (2003).

7. Chelsea A. Young, *Experts Reflect on Title IX's Successes, Challenges 35 Years After Law Enacted*, STANFORD REP. (May 2, 2007), <http://news.stanford.edu/news/2007/may2/title-050207.html>; Megan K. Starace, *Reverse Discrimination Under Title IX: Do Men Have a Sporting Chance?*, 8 VILL. SPORTS & ENT. L.J. 189, 190 (2001) (noting that the indirect result of Title IX is that "budget restrictions force universities to reduce the number of roster spots available on men's athletic teams or, in the alternative, eliminate these teams completely"); Susan M. Shook, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990's: Nonrevenue Men's Teams Join Women Athletes in the Scramble for Survival*, 71 IND. L. J. 773, 793–96 (1996) ("[I]nstitutions facing budget cuts realize that while downsizing their athletic programs is an economic must, they cannot respond by lowering the participation opportunities granted to female athletes. As a result, some schools have responded by retaining most, if not all, of their women's varsity sports slots while cutting back on their men's teams."); see Dennis Dodd, *Football Needs to Start Making Title IX Sacrifices*, CBSSPORTS.COM (June 12, 2002), <http://www.cbssports.com/b/page/pressbox/0,1328,5427007,00.html> (noting that hundreds of men's programs have been cut in order to free up scholarships for new women's programs).

8. Gottesdiener, *supra* note 5.

9. *Id.*

10. *Id.*

11. Numerous Title IX experts and commentators posit that the problem is not that Title IX takes resources away from men's sports, but that resources are misallocated among men's sports with the majority of resources distributed to men's football and basketball teams. *Title IX and Men's "Minor" Sports: A False Conflict*, NAT'L WOMEN'S L. CENTER (July 2008), at 1, available at <http://www.nwlc.org/sites/default/files/pdfs/Men's%20Minor%20Sports%20Final.pdf> [hereinafter *Title IX and Men's "Minor" Sports*]; see also Dodd, *supra* note 7 (noting that none of the 117 I-A programs have cut a single football scholarship in order to gain compliance with Title IX); Graham Watson, *Title IX Puts Schools in Conundrum*, ESPN (July 14, 2009), <http://sports.espn.go.com/ncaa/news/story?id=4326021> (noting that 75–78% of Division I men's athletic budget is spent on men's basketball and football). However, critics of Title IX point to the revenue generating disparity between men's and women's athletic programs. *Id.* In the 2007–2008 academic year, the median NCAA Division I men's program generated \$22.2 million in revenue, \$19.6 million of which was

At the core of this controversy is one thing. Money.

Title IX was landmark legislation that changed the educational and athletic opportunities available to women.<sup>12</sup> Its purposes were considered revolutionary at the time it was enacted and continue to serve a vital service in educational equality among men and women to this day.<sup>13</sup> In a world of limitless resources, no one would seriously debate the importance of providing gender equity to women in the provision of athletic opportunities.

However, this is not a world of limitless resources.

The debate over Title IX is driven by the allocation of finite athletic department budgets. It requires tough choices between men's programs that have been around for decades (or even a century),<sup>14</sup> programs that produce thousands (if not millions) in revenue,<sup>15</sup> and programs that give a class of historically underrepresented students an opportunity to compete. Critics of Title IX assert that the former should not necessarily be sacrificed by the latter.<sup>16</sup>

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attributable to men's football and basketball, while the median women's program generated \$865,000. *Id.*

12. In 1974, nationwide, 50,000 men attended college on athletic scholarships, compared to fewer than 50 women. Twenty-five years later, well over 100,000 women participated in varsity sports at member institutions of the National Collegiate Athletic Association (NCAA). Lee Sigelman & Paul J. Wahlbeck, *Gender Proportionality in Intercollegiate Athletics: The Mathematics of Title IX Compliance*, 80 SOC. SCI. Q. 518, 519 (1999) (citing *Hearing on Title IX of the Education Amendments of 1972 Before the H. Subcomm. on Postsecondary Educ., Training, and Life-Long Learning of the H. Comm. on Economic and Educ. Opportunities*, 104th Cong., 104–31, 138–77 (1995) (statement by Normal Cantu, Assistant Sec'y, Office for Civ. Rights, U.S. Dep't of Educ.)).

13. Moreover, the work of Title IX is far from over. At the thirty-year anniversary of the enactment of Title IX, women's athletic programs continued to lag behind men's athletic programs in participation opportunities, athletic scholarships, operating budgets, and recruiting expenditures. *Title IX and Men's "Minor" Sports: A False Conflict*, *supra* note 11, at 1. "For example, women in Division I colleges, while representing 53% of the student body, receive only 44% of the participation opportunities, 37% of the total money spent on athletics, 45% of the total athletic scholarship dollars, and 32% of recruiting dollars." *Id.* (citing NCAA, 2003–04 NCAA GENDER-EQUITY REPORT (September 2006), available at <http://www.ncaapublications.com/productdownloads/GERONLINE.pdf>).

14. See Thomas, *supra* note 1.

15. See Gottesdiener, *supra* note 5 (noting that, in 2010, the University of Delaware's football team netted just under one million dollars).

16. Some legal and policy scholars have called for the repeal or, at minimum, reworking of Title IX based on, *inter alia*, the law's failure to take into account the costs of providing particular athletic opportunities, the revenue generated by certain sports, and the inflexible proportionality requirement. Richard A. Epstein, *Repeal Title IX*, DEFINING IDEAS (May 4, 2011), <http://www.hoover.org/publications/defining-ideas/article/77231> ("Congress should junk Title IX in its entirety as a failed experiment in government intervention."); see also Allison Kasic, *Title IX and Athletics: A Case Study of Perverse Incentives and Unintended Consequences*, INDEP. WOMEN'S FORUM, June 2010, at 9, available at <http://www.iwf.org/files/8fc3dc20d277ff96968266aaab0add0a.pdf> ("[T]he development and current enforcement of Title IX policies have succeeded only in

But, what if these already limited budgets were further depleted in the name of Title IX? What if female students, some of whom may have the desire but not the ability to compete at a collegiate varsity level, were given a payout for a school's unanticipated or unintentional failure to comply with Title IX? What if those female students do not even attend the institution anymore? What if these female students bring suit in the form of a class action that eventually results in damages that exceed an entire athletic department's budget? How will advocates of Title IX defend such a result?

Litigation surrounding the effective accommodation of athletic opportunities for women has been sparse, and most has involved claims for injunctive relief, seeking the actual addition of more athletic opportunities for women at the collegiate level. Recently, though, a split among circuits has emerged with respect to claims for money damages arising out of the alleged ineffective accommodation of female student-athletes. While one circuit has concluded that an institution must be given notice and an opportunity to cure this type of alleged violation,<sup>17</sup> two circuits have concluded that because institutional decisions regarding athletic programs are always intentional, notice and an opportunity to cure are not required.<sup>18</sup>

This article asserts that, where money damages are sought: (1) notice and an opportunity to cure alleged claims of ineffective accommodation is consistent with the statutory scheme enacted by Congress; and (2) failure to require such notice ignores precedent relating to the appropriate interpretation of legislation enacted pursuant to Congress' authority under the Spending Clause. Moreover, failure to require notice and an opportunity to cure in claims for money damages undermines the flexible application and even-handed enforcement mechanisms of the statute. Finally, allowing individuals to sue for money damages without notice and an opportunity to cure may likely lead to further criticism of the statute, particularly in times of fiscal distress for many educational institutions.<sup>19</sup>

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replacing one form of discrimination with another.”); Neal McCluskey, *UConn's Streak and Title IX*, CATO INST. (Dec. 21, 2010), <http://www.cato-at-liberty.org/uconn-streak-and-title-ix/> (arguing that Title IX does not reflect “the reality . . . that women might just not want to play sports as fervently as men”). Moreover, the American Sports Council, previously the College Sports Council, recently filed suit against the Department of Education, alleging that the use of gender quotas to enforce Title IX in high school athletic programs violates the Equal Protection Clause. Complaint, *Am. Sports Council v. U.S. Dep't of Educ.*, No. 11-1347, 2012 U.S. Dist. LEXIS 41233 (D.D.C. Mar. 27, 2012).

17. *Grandson v. Univ. of Minn.*, 272 F.3d 568, 569 (8th Cir. 2001).

18. *Pederson v. La. St. Univ.*, 213 F.3d 858 (5th Cir. 2000); *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957 (9th Cir. 2010).

19. *Watson*, *supra* note 11 (noting that maintaining gender equity and Title IX compliance in both athletic opportunities and scholarships has become even more difficult during the economic downturn).

Conversely, such notice is not needed when a party brings suit to actually end or prevent a discriminatory practice or policy, because a suit purely for injunctive and declaratory relief does not implicate the countervailing policy concern of ensuring that funds are optimally devoted to the provision of equal educational and athletic opportunities. Indeed, unlike suits for money damages, suits for equitable relief further the primary focus of Title IX—protecting individuals from discriminatory practices.<sup>20</sup>

Part I describes the evolution of the private right of action under Title IX, including the Spending Clause principles that influence its statutory interpretation and the scope of the rights and remedies available. Part II examines the current split among the circuits regarding whether notice and an opportunity to cure is required in suits for money damages arising out of challenges to an institution’s athletic program. Part III proposes that notice and an opportunity to cure is required in such cases in order to comply with both statutory interpretation and sound policy.

#### I. THE EVOLUTION OF PRIVATE RIGHTS OF ACTION UNDER TITLE IX FOR MONEY DAMAGES

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .<sup>21</sup>

“Congress enacted Title IX in response to its finding—after extensive hearings held in 1970 by the House Special Subcommittee on Education—of pervasive discrimination against women with respect to educational opportunities.”<sup>22</sup> In enacting Title IX, Congress “sought to accomplish two

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20. This Article does not advocate for the imposition of a notice and opportunity to cure requirement when a party brings suit to actually end or prevent a discriminatory practice or policy. Furthermore, this Article does not advocate for restrictions on whom is an appropriate person to give notice or what type of notice is required. The Article simply asserts that some actual notice and opportunity to cure should be required before allowing a plaintiff to sue for money damages under Title IX.

21. Title IX, Education Amendments of 1972, 20 U.S.C. § 1681 (2011).

22. *Cohen v. Brown Univ.*, 101 F.3d 155, 165 (1st Cir.1996) [hereinafter *Cohen II*]. Title IX addressed a perceived gap created by Title VI, which prohibits race discrimination by institutions that receive federal funding, and Title VII, which prohibits discrimination in employment on a variety of bases, including sex. David S. Cohen, *Limiting Gebser: Institutional Liability for Non-Harassment Sex Discrimination Under Title IX*, 39 WAKE FOREST L. REV. 311, 317–18 (2004). Neither Title VI

related, but nevertheless somewhat different, objectives.”<sup>23</sup> Specifically, Congress sought “to avoid the use of federal resources to support discriminatory practices” and “to provide individual citizens effective protection against those practices.”<sup>24</sup> Title IX anticipated institutional compliance by 1978.<sup>25</sup>

Title IX’s coverage extends, with few exceptions, to educational institutions—including colleges, universities, elementary and secondary institutions, and training programs—that receive federal funding.<sup>26</sup> Because federal financial assistance takes many forms, both direct and indirect,<sup>27</sup> “in practice, [Title IX reaches] the vast majority of accredited colleges and universities.”<sup>28</sup> Where Title IX applies, it guarantees equal opportunity in all aspects of the education program, including admissions, treatment of participants, and employment.<sup>29</sup>

### A. Evolution of Title IX and Implementing Regulations

After Title IX was first enacted in 1972, the breadth of Title IX’s application was unclear, particularly with regard to whether the statute’s requirements applied to athletic programs.<sup>30</sup> Indeed, the inclusion of athletic programs generally, and football specifically, was debated prior to enactment. Attempts by Congress to exclude “revenue producing” sports, such as football, were defeated or otherwise died in committee.<sup>31</sup>

In 1974, Congress sought to resolve the lack of clarity by directing the Department of Health, Education, and Welfare (HEW) to draft implementing

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nor Title VII, however, prohibits sex discrimination in education. *Id.* at 318.

23. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

24. *Id.*

25. 20 U.S.C. § 1681(a)(2).

26. U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL (2001), available at <http://www.justice.gov/crt/about/cor/coord/ixlegal.php>.

27. The Supreme Court has expressly held that “[t]here is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the federal government are subject to regulation.” *Grove City Coll. v. Bell*, 465 U.S. 555, 564 (1984). “The economic effect of direct and indirect assistance is often indistinguishable.” *Id.* at 565.

28. *Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993) [hereinafter *Cohen I*]. The most common funding sources for colleges and universities are federal student loans, federal work-study dollars, and federal research grants. Janet P. Judge, *Title IX and Its Application to Intercollegiate Athletics*, in PRACTICAL INSIGHT ON NATIONAL ISSUES IMPACTING HIGHER EDUCATION § 11.2 (Robert W. Iuliano ed., 2009); see generally *Grove City Coll.*, 465 U.S. at 563–69.

29. U.S. DEP’T OF JUSTICE, *supra* note 26.

30. Judge, *supra* note 28, § 11.1.

31. *Id.*

regulations that included direction to intercollegiate athletic programs.<sup>32</sup> In 1975, the HEW<sup>33</sup> issued its first set of implementing regulations to Title IX.<sup>34</sup> The regulations generally provide:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.<sup>35</sup>

With respect to intercollegiate athletics, the regulations more specifically provide that “[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”<sup>36</sup> This provision guarantees equality in both the provision of athletic opportunities—“effective accommodation”—and the treatment as student-athletes<sup>37</sup>—“equal treatment.”<sup>38</sup> The effective accommodation component is set forth in 34 C.F.R. section 106.41(c); it requires consideration of “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of

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32. *Id.*

33. In 1979, the HEW was divided into the Department of Health and Human Services (HHS) and the Department of Education (DOE). Dep’t of Educ. Org. Act, Pub. L. No 96-88 (1979). The DOE, acting through the Office for Civil Rights (OCR) is the current agency responsible for administering and ensuring compliance with Title IX. When the HEW was divided into the HHS and the DOE, “the existing regulations were left within HHS’s arsenal while, at the same time, [DOE] replicated them as part of its own regulatory armamentarium.” *Cohen I*, 99 F.2d at 895. For purposes of clarity, the article cites only to the DOE regulations, found at 34 C.F.R. § 106.

34. *Cohen I*, 99 F.2d at 895.

35. Athletics, 34 C.F.R. § 106.41(a) (2011).

36. 34 C.F.R. § 106.41(c).

37. Equal treatment of student-athletes requires that educational institutions (1) “allocate athletic scholarship dollars equitably;” and (2) “treat male and female students equitably in all respects of athletics, including with regard to equipment and supplies; locker rooms, facilities, and practice areas; scheduling of games and practices; medical and training services; publicity; and assignment and compensation of coaches.” Samuels & Galle, *supra* note 6, at 13. While this Article discusses only the first component—equal athletic participation opportunities—the same principles apply with almost equal force to claims brought for a violation of the equal treatment components of Title IX. Accordingly, while this Article does not expressly address such claims, as set forth, *infra*, notice and an opportunity to cure should similarly be a prerequisite to suits for money damages brought under an equal treatment theory.

38. *Id.* While these prohibitions bear equal weight in determining whether an institution is Title IX compliant, “in practice, participation opportunities are *primus inter pares* in deciding whether a school is compliant with Title IX.” Sigelman & Wahlbeck, *supra* note 12, at 520.



both sexes.”<sup>39</sup> At its core, the effective accommodation component is concerned with the availability of equal opportunities for female student-athletes to participate in athletics.

With respect to measuring effective accommodation, Title IX expressly provides that statistical evidence of an imbalance between the percentage of persons of a certain sex at an institution receiving federal funds and the percentage of persons of that sex in any community by itself is insufficient “to require any educational institution to grant preferential or disparate treatment to the members of one sex.”<sup>40</sup> However, such an imbalance can be considered in evaluating whether equal accommodation has been provided.<sup>41</sup>

As a result of the ambiguity in how to consider proportional imbalances and “in response to numerous complaints alleging Title IX violations with regard to discrimination in athletics,” in 1979 “the HEW issued a policy interpretation explaining the ways in which institutions may effectively accommodate the interests and abilities of their student-athletes.”<sup>42</sup> The policy interpretation (1979 Interpretation) sets forth the “three-part test” for measuring compliance with Title IX.<sup>43</sup> Under this test, a university may demonstrate compliance in one of three ways: by showing that (1) “intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments”;<sup>44</sup> or (2) the institution has “a history and continuing practice of

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39. 34 C.F.R. § 106.41(c)(1). The equal treatment component derives from 34 C.F.R. § 106.41(c)(2)–(10), which requires equality in (1) provision of equipment and supplies, (2) scheduling of games and practice time, (3) travel and per diem allowance, (4) opportunities to receive coaching and academic tutoring, (5) assignment and compensation of coaches and tutors, (6) provision of locker rooms, practice, and competitive facilities, (7) provision of medical and training facilities and services, (8) provision of housing and dining facilities and services, and (8) publicity.

40. 20 U.S.C. § 1681(b).

41. *Id.*

42. *Mansourian v. Regents of the Univ. of Cal.*, No. 2:03-cv-2591, 2011 WL 3364887, at \*45 (E.D. Cal., Aug. 3, 2011); *A Policy Interpretation, Title IX and Intercollegiate Athletics*, OFFICE FOR CIV. RIGHTS, DEP’T OF EDUC., 44 Fed. Reg. 71,413 (Dec. 11, 1979), available at <http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html> (hereinafter *1979 Policy Interpretation*). The 1979 Interpretation delineates three general areas in which institutional compliance with the effective accommodation section of the regulation is assessed” – (1) the determination of athletic interests and abilities of students; (2) the selection of sports offered; and (3) the levels of competition available including the opportunity for team competition. *Id.*; *Roberts v. Colo. St. Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993).

43. *1979 Policy Interpretation*, *supra* note 42. The 1979 Interpretation was effective on its face December 11, 1979. However, it was never submitted to the President for approval, and thus, does not have the binding effect of rule, regulations, or orders authorized by 20 U.S.C. § 1682. See *Pederson v. La. St. Univ.*, 912 F. Supp. 892 (M.D. La. 1996) *rev’d on other grounds*, 213 F.3d 858 (5th Cir. 2000).

44. *1979 Policy Interpretation*, *supra* note 42. The first prong of the three-part test “effectively

program expansion which is demonstrably responsive to the developing interest and abilities of the members” of the historically underrepresented sex;<sup>45</sup> or (3) “the interests and abilities of the members of [the historically underrepresented sex]<sup>46</sup> have been fully and effectively accommodated<sup>47</sup> by the present program.”<sup>48</sup>

However, between 1984 and 1988, institutions once again faced uncertainty regarding whether Title IX required equal opportunities in athletic programs. In 1984, in *Grove City College v. Bell*, the Supreme Court held that Title IX’s compliance requirements were program specific.<sup>49</sup> The fact that federal funds might eventually reach an institution’s general operating budget could not subject the entire institution to Title IX’s requirement; rather the “program or activity” that received federal assistance is the only “program or activity” regulated under Title IX.<sup>50</sup>

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provides that if every female student has the same chances of participating in athletics as every male student, then the school will be found to be providing equal athletic participation opportunities.” Samuels & Galles, *supra* note 6, at 15.

45. *1979 Policy Interpretation*, *supra* note 42. The second prong of the three-part test focuses on incremental progress toward equality, “an exceptionally and atypically generous standard for measuring civil rights compliance.” *Id.*

46. While the regulations refer generally to the “historically underrepresented sex,” this Article refers specifically to women and female student-athletes as the intended beneficiaries of Title IX’s protections. The author is aware of no cases challenging an educational institution’s athletic program under Title IX on the basis that male students are not offered substantially proportionate athletic opportunities relative to their enrollment.

47. The third prong of the three-part test is satisfied if female students are not interested in additional opportunities to participate in athletics. “In practice, the third prong often constitutes a significant ‘chicken and egg’ barrier for female athletes” due to a history of barriers, social and institutional, that impeded female interest, ability, and participation. Samuel & Galles, *supra* note 6, at 15–16. “Fundamentally, the problem with an interest-based test for allocation of participation opportunities lies in the fact that women’s lower rate of participation in athletics reflects women’s historical lack of opportunities to participate in sports—not lack of interest, which evolves as a function of opportunity and experience.” *Id.* at 29 (internal quotations and citations omitted).

48. *1979 Policy Interpretation*, *supra* note 42. “Critics insist, and many defenders concede, that the real issue is proportionality, not program expansion or full accommodation.” Sigelman & Wahlbeck, *supra* note 12, at 521. While proportionality is only one means of demonstrating compliance with Title IX, “compliance in the foreseeable future with either the second or third prong of the participation requirement is widely dismissed as a pipe dream” because cost cutting, as opposed to program expansion, has been the trend. *Id.* Many critics assert that proportionality is not a fair or accurate measurement for gender equality in intercollegiate activity. *Id.*

49. *Grove City Coll.*, 465 U.S. at 571–74.

50. *Id.* In *Grove City College*, the petitioner was a private, coeducational, liberal arts college that consistently refused both state and federal financial assistance in order to preserve its institutional autonomy. *Id.* at 559. However, the institution enrolled a large number of students who received Basic Educational Opportunity Grants (BEOGs) pursuant to the DOE’s Alternate Disbursement System. *Id.* As a result, the DOE concluded that the college was a “recipient” of “Federal financial assistance” under Title IX and requested that the college execute an “Assurance of Compliance” required under the applicable regulations. *Id.* at 560. Despite rejecting the petitioner’s argument that

In response, in 1988, Congress reinstated an institution-wide application of Title IX by passing the Civil Rights Restoration Act of 1987.<sup>51</sup> Under the Civil Rights Restoration Act, if any facet of an educational institution receives federal funds, the entire institution must comply with Title IX's requirements.<sup>52</sup> In an attempt to better monitor, and thus, ensure such compliance,<sup>53</sup> in 1994, Congress passed the Equity in Athletics Disclosure Act (EADA), which imposes an annual reporting requirement for colleges and universities that have separate athletic programs for men and women.<sup>54</sup> The statute requires federally funded higher education institutions to disclose (1) the number of undergraduates and athletes, divided by gender; (2) certain financial information regarding athletic departments, including the money spent on athletic scholarships; (3) graduation rate of student-athletes broken down by race and gender; and (4) the gender of coaches.<sup>55</sup>

Subsequently, in 1996, the Office of Civil Rights (OCR) published a clarification (the "1996 Clarification") of the three-part test for effective accommodation. The 1996 Clarification was preceded by a letter from Norma V. Cantu, the Assistant Secretary for Civil Rights, which emphasized the case specific nature of the Title IX analysis for effective accommodation claims.<sup>56</sup> Specifically, Cantu noted, "the Clarification does not provide strict numerical formulas or 'cookie cutter' answers to the issues that are inherently case- and fact-specific."<sup>57</sup> Cantu further explained that "Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory

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it was not required to comply with Title IX because it did not directly receive financial assistance, the Court held that the college was only required to comply with Title IX in the administration of its student financial aid program because that was the program receiving indirect federal financial assistance through the BEOGs. *Id.* at 574–75. In so holding, the Court rejected arguments that the entire institution could be subject to Title IX requirements simply because (1) federal assistance in one area may allow diversion of funds to other areas, or (2) federal assistance could potentially be used to provide a variety of services to the students through whom the funds pass. *Id.* at 573.

51. See 20 U.S.C. § 1687; Civ. Rights Restoration Act, Pub. L. 100-259 § 2 (1988).

52. 20 U.S.C. § 1687. The Act provides, in relevant part, "For purposes of this chapter, the term 'program or activity' and 'program' mean all the operation of . . . a college, university, or other postsecondary institution, or a public system of higher education, . . . any part of which is extended Heckman Federal financial assistance." *Id.*

53. See Rodney K. Smith, *When Ignorance is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics*, 61 MO. L. REV. 329, 371–72 (1996).

54. Cleary Act, 20 U.S.C. § 1092 (2011).

55. *Id.*; *Mansourian*, 602 F.3d at 968; Diane Heckman, *Is Notice Required in a Title IX Athletics Action Not Involving Sexual Harassment?*, 14 MARQ. SPORTS L. REV. 175, 214–15 (2003).

56. Norma Cantu, Assistant Secretary for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, OFFICE FOR CIV. RIGHTS, U.S. DEP'T OF EDUC. (Jan. 16, 1996), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter *1996 Clarification*].

57. *Id.*

participation opportunities” and that an attempt to set forth strict numerical formulas or rigid answers would “deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.”<sup>58</sup> However, the 1996 Clarification “provides specific factors that guide an analysis of each part of the three-part test” and includes examples “to demonstrate, in concrete terms, how these factors will be considered.”<sup>59</sup>

In 2003, OCR issued a “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (2003 Clarification).”<sup>60</sup> The 2003 Clarification noted that Title IX does not require cutting or reduction of teams; indeed such a practice is disfavored.<sup>61</sup> It also noted that OCR will “aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply,”<sup>62</sup> but that it will also work with schools to achieve compliance and avoid such sanctions.<sup>63</sup>

### B. Administrative Remedial Scheme

The express statutory means of enforcement of Title IX are purely administrative.<sup>64</sup> Title IX directs each federal department and agency empowered to extend federal financial assistance to any education program or activity to establish requirements to effectuate the nondiscriminatory mandate of the statute.<sup>65</sup> In 1980, the DOE added a compliance requirement to Title IX’s implementing regulations.<sup>66</sup> Under this requirement, each recipient of federal funds must execute a compliance agreement with the federal

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58. *Id.*

59. *Id.*; see also *Mansourian*, 2011 WL 3364887, at \*46. The 1996 Clarification also expressly noted that schools are permitted, though not encouraged, to meet proportionality standards by reducing athletic opportunities for men. *1996 Clarification*, *supra* note 56; *Samuels & Galles*, *supra* note 6, at 17.

60. Gerald Reynolds, Assistant Secretary for Civil Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*, OFFICE FOR CIV. RIGHTS, U.S. DEP’T OF EDUC. (July 11, 2003), available at <http://www.ed.gov/about/offices/list/ocr/title9/guidanceFinal.html>. [hereinafter *2003 Clarification*].

61. Judge, *supra* note 28, § 11.1.

62. *2003 Clarification*, *supra* note 60.

63. Judge, *supra* note 28, § 11.1. In 2010, the OCR issued another clarification letter, discussing compliance under prong three of the three-part test. The letter also withdrew the clarification letter relating to this prong that was issued in 2005. Russlynn Ali, Assistant Secretary for Civil Rights, *Dear Colleague Letter: Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three*, OFFICE FOR CIV. RIGHTS, U.S. DEP’T OF EDUC. (Apr. 20, 2010), at 1 available at <http://ed.gov/about/offices/list/ocr/letters/colleague-20100420.html>.

64. 20 U.S.C. § 1682.

65. 20 U.S.C. § 1682; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280–81 (1998).

66. Assurance Required, 34 C.F.R. 106.4 (1980).

government, indicating that the educational institution is not discriminating on the basis of sex in its programs and activities.<sup>67</sup> Title IX further provides that compliance may be enforced by any means authorized by law, including the “termination of or refusal to grant or continue assistance” after the opportunity for a hearing and an express finding of noncompliance.<sup>68</sup>

An individual seeking redress for a Title IX violation can utilize the internal grievance process that every educational institution receiving federal funds is required to have.<sup>69</sup> She may also file an administrative complaint with the OCR within the DOE, which would trigger an investigation into the allegations.<sup>70</sup> Such an investigation is not necessarily limited to the specific program area raised in the complaint.<sup>71</sup> Rather, “if during the investigation there is evidence to suggest that a disparity in a program component being investigated is the result of an apparent disparity in another program component that is not being investigated, then that program [area] should be investigated.”<sup>72</sup> Moreover, the OCR may unilaterally choose to investigate whether an institution is in compliance.<sup>73</sup> If after investigation the OCR concludes that an institution has violated Title IX, it may terminate federal funding to the institution or institute other lawful proceedings.<sup>74</sup>

Significantly, however, the DOE may not initiate any enforcement proceedings, including the termination of funding, until it “has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.”<sup>75</sup>

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67. *Id.* (“Every application for Federal financial assistance shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that the education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.”); Heckman, *supra* note 55, at 210–11.

68. 20 U.S.C. § 1682.

69. Designation of Responsible Employee and Adoption of Grievance Procedures, 34 C.F.R. 106.8(b) (“A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.”); Heckman, *supra* note 55, at 216.

70. Conduct of Investigations, 34 C.F.R. § 100.7(b); Heckman, *supra* note 55 at 216.

71. Heckman, *supra* note 55, at 216.

72. *Id.* at 217 (citing DIANE HECKMAN, 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 ON THE POST-RESTORATION ACT ERA 206 n.99 (1997)).

73. 34 C.F.R. § 100.7; Heckman, *supra* note 55, at 216. Historically, the OCR has chosen not to conduct a significant number of these periodic compliance reviews. Heckman, *supra* note 55, at 216–17.

74. 20 U.S.C. § 1682. The complainant would not be able to obtain money damages for any violations. Heckman, *supra* note 55, at 217.

75. 34 C.F.R. § 100.7(d)(1). A settlement, called a compliance plan, between the institution and

Similarly, the administrative regulations require resolution of compliance issues “by informal means whenever possible,”<sup>76</sup> and prohibit enforcement proceedings absent a showing the aid recipient “has been notified of its failure to comply and of the action to be taken to effect compliance.”<sup>77</sup> Thus, both the statute and its implementing regulations condition enforcement proceedings on notice and an opportunity to cure noncompliance.

### *C. Private Right of Action*

Title IX does not include an express private right of action in the language of the statute. Furthermore, the statute was enacted pursuant to Congress’ authority under the Spending Clause.<sup>78</sup> Accordingly, in determining whether a private right of action exists and interpreting the scope of such a right, courts must look to both the congressional intent underlying the statute as well as the scope of Congress’ power in enacting the statute.

#### 1. Implied Private Rights of Action and the Spending Clause

In determining whether a private right of action can be inferred from a federal statute, the Court looks to statutory construction,<sup>79</sup> the focal point of which is Congress’ intent in interpreting the statute.<sup>80</sup> In *Cort v. Ash*, the Court enumerated four factors relevant to determining whether a private remedy is implicit in a statute not expressly providing one:<sup>81</sup> (1) “whether the statute was enacted for the benefit of a special class of which the plaintiff is a member;”<sup>82</sup> (2) whether the legislative history indicates congressional intent to provide such a remedy;<sup>83</sup> (3) whether a private remedy would frustrate the underlying purpose of the legislative scheme;<sup>84</sup> and (4) “whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States.”<sup>85</sup> This more restrictive analysis was a departure from the Court’s previous emphasis on the desirability of implying private rights of action in order to provide remedies that might better

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the OCR may be reached without the complainant’s acquiescence. Heckman, *supra* note 55, at 217.

76. 34 C.F.R. § 100.7(d)(1).

77. Procedure for Effecting Compliance, 34 C.F.R. § 100.8(d)(2).

78. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992).

79. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

80. *Thompson v. Thompson*, 484 U.S. 174, 179 (1988).

81. *Cort v. Ash*, 422 U.S. 66, 79 (1975).

82. *Cannon*, 441 U.S. at 689.

83. *Id.* at 694.

84. *Id.* at 703.

85. *Id.* at 708.

effectuate the purposes of a given statute.<sup>86</sup>

The Court subsequently clarified that despite the relevance of the four *Cort* factors, the dispositive question is whether Congress intended to create a private remedy;<sup>87</sup> indeed, the first three *Cort* factors are those traditionally relied upon by the Court in determining legislative intent.<sup>88</sup> As such, the touchstone for determining whether an implied right of action can be inferred from a federal statute is Congressional intent to create one based upon the statute, beginning with the language itself.<sup>89</sup> The other factors may serve to further support a conclusion that Congress intended such a remedy, especially where the language itself is ambiguous.<sup>90</sup>

When interpreting rights and available remedies in legislation enacted pursuant to Congress' power under the Spending Clause,<sup>91</sup> the Court has been particularly cautious in finding implied rights and remedies.<sup>92</sup> Typically, the remedy for state noncompliance with conditions imposed by federal Spending Clause legislation is action by the federal government to withdraw or terminate federal funding.<sup>93</sup> However, to the extent that an implied right of action is available, the Court has analogized the benefits and obligations to those in the nature of a contract: "in return for federal funds, the recipients agree to comply with federally imposed conditions."<sup>94</sup> As such, akin to basic contract law principles that require offer and acceptance, "the legitimacy of Congress' power to legislate under the spending power rests on whether the [recipient] voluntarily and knowingly accepts the terms of the contract."<sup>95</sup> The Court has applied this contract law analogy in determining the scope of

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86. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 432–33 (1964) ("[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.").

87. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

88. *Redington*, 442 U.S. at 575–76.

89. *Id.* at 568. The Court has also noted that "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Thompson*, 484 U.S. at 179 (quoting *Lewis*, 444 U.S. at 18).

90. See *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) ("We have never accorded dispositive weight to context shorn of text. In determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent it clarifies text. We therefore begin (and find that we can end) our search for Congress' intent with the text and structure of Title VI.") (internal citations omitted).

91. U.S. CONST., art. I, § 8, cl. 1.

92. See *Barnes v. Gorman*, 536 U.S. 181, 185–86 (2002).

93. *Pennhurst St. Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981). In the twenty years following its decision in *Pennhurst*, the Court has only twice found that Spending Clause legislation gave rise to enforceable rights. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002).

94. *Barnes*, 536 U.S. at 186.

95. *Id.* (internal quotations and citation omitted).

conduct for which a funding recipient may be liable,<sup>96</sup> the remedies available,<sup>97</sup> and the scope of such remedies.<sup>98</sup> Accordingly, a recipient of federal funds may be liable only for conduct that violated the clear terms of the statute and may be subjected only to remedies that it had notice of.<sup>99</sup> With respect to available remedies, “[a] funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract,” such as compensatory damages and injunctive relief.<sup>100</sup>

## 2. Private Right of Action under Title IX

The plain text of Title IX does not provide for a private enforcement scheme. However, in 1972, the Court held in *Cannon v. University of Chicago* that Congress intended to create a cause of action in favor of private victims of discrimination. In *Cannon*, the plaintiff alleged that her applications for admission to medical school were denied by the defendants, whose education programs were receiving federal financial assistance, because she was a woman.<sup>101</sup> The Court analyzed the four factors set forth in *Cort* to determine whether Congress intended to provide a remedy to a special class of litigants.<sup>102</sup>

With respect to the first *Cort* factor, the Court held that it weighed in favor of inferring a private remedy because the plain language of the statute expressly identified a distinct class to be benefitted by the legislation.<sup>103</sup> The Court reasoned that

[t]here would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions

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96. *Id.*; see also *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999).

97. *Barnes*, 536 U.S. at 187; *Franklin*, 503 U.S. at 74–75.

98. *Barnes*, 536 U.S. at 187.

99. *Id.*; see also *Davis*, 526 U.S. at 640; *Franklin*, 503 U.S. 60, 74–75.

100. *Barnes*, 536 U.S. at 187 (holding that punitive damages were not available because such damages are generally not available for breach of contract).

101. *Cannon*, 441 U.S. at 680.

102. *Cort*, 422 U.S. 66.

103. *Cannon*, 441 U.S. at 693–94.



engaged in discriminatory practices.<sup>104</sup>

With respect to the second *Cort* factor, the Court held that it had “no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.”<sup>105</sup> The Court noted that Title VI and Title IX use nearly identical language to describe the benefitted class and that both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination.<sup>106</sup> Further, the Court reasoned that representatives must have been aware that at least one federal court of appeals and a dozen federal district courts had concluded that Title VI created a private remedy and that the parallel constructions reflected an intent to create a similar private remedy with respect to Title IX.<sup>107</sup>

With respect to the third *Cort* factor, the Court held that a private remedy would further, not hinder, the dual purposes of Title IX, namely to avoid the use of federal funds at institutions that support sex discrimination and to provide individual citizens effective relief against such practices. Specifically, the Court reasoned that while the first purpose is served by the statutory procedure for terminating federal funding, such a remedy is “severe and often may not provide an appropriate means of accomplishing the second purpose if merely an isolated violation has occurred.”<sup>108</sup> The Court also noted that it would make little sense to require that an individual prove that an institution’s discriminatory practices are so pervasive to warrant the complete termination

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104. *Id.* at 690–93. The Court observed that “a statute declarative of a civil right will almost have to be stated in terms of the benefitted class . . . because the right to be free of discrimination is a ‘personal’ one . . . .” *Id.* at 690 n.13. As such, and unlike statutes benefitting the public at large, “a statute conferring such a right will almost have to be phrased in terms of the persons benefitted.” *Id.* Indeed, the Court also noted that Congress passed over an alternative proposal that was phrased as a directive to the Secretary of HEW not to make any disbursement of federal funds to an institution that discriminates on the basis of sex. *Id.* at 693 n.14.

105. *Id.* at 703.

106. *Id.* at 695–96.

107. *Id.* at 696–98.

108. *Id.* at 705. Indeed, Congress noted the severity of the termination of federal funding, describing it as a last resort, “all else—including ‘lawsuits’—failing.” *Id.* at 705 n.38 (citing 110 Cong. Rec. 7067 (1964) (statement of Sen. Ribicoff)). One of the dissents, however, notes that the drastic nature of this ultimate remedy does not evidence congressional intent to allow a private remedy. “Rather, Congress considered termination of financial assistance to be a remedy of last resort, and expressly obligated federal agencies to take measures to terminate discrimination without resorting to termination of funding.” *Cannon*, 441 U.S. at 719–20 (White, J., dissenting). The dissent also notes that the reference to litigation in the legislative history referred to suits against public institutions, not an expanded private remedy. *Id.* at 727 (White, J., dissenting).

of federal funds when such a plaintiff seeks only enforcement of a statute in a particular case.<sup>109</sup> Rather, “In that situation, the violation might be remedied more efficiently by an order requiring an institution to accept an applicant who had been improperly excluded.”<sup>110</sup> Moreover, the Court observed that while excerpts of the legislative history expressed concern with the procedure for terminating federal funding, none of the excerpts evidenced “any hostility toward an implied private remedy to terminate the offending discrimination.”<sup>111</sup>

Finally, the Court concluded that the fourth *Cort* factor also weighed in favor of a private right of action because the expenditure of federal funds justified the particular statutory prohibition. As such, a federal private right of action did not intrude upon an area principally of state concern.

Accordingly, the Court held that all four *Cort* factors supported the inference that Congress intended to provide a private right of action in Title IX. The Court rejected the argument that the risk of litigation would inhibit university administrators’ ability to independently and professionally discharge important responsibilities, noting that “[w]hatever disruption of the academic community may accompany an occasional individual suit seeking admission is dwarfed by the relief expressly contemplated by the statute.”<sup>112</sup> As such, the Court concluded that “[n]ot only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination.”<sup>113</sup>

In 1986, Congress validated the Court’s holding in *Cannon* with the enactment of the Rehabilitation Act Amendments of 1986.<sup>114</sup> The statute abrogated the states’ Eleventh Amendment immunity under various civil rights legislation, including Title IX, expressly noting that “remedies (including remedies both at law and in equity) are available for such a violation to the

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109. *Id.* at 705–06.

110. *Id.* at 705. The Court also cited to legislative history of Title VI that acknowledged the existence of and need for less drastic remedies than full termination of federal funds. *Id.* at 705 n.38.

Personally, I think it would be a rare case when funds would actually be cut off. In most cases, alternative remedies, principally lawsuits to end discrimination, would be the preferable and more effective remedy. If a Negro child were kept out of a school receiving Federal funds, I think it would be better to get the Negro child into school than to cut off funds and impair the education of the white children.

*Id.* (quoting 110 Cong. Rec. 7067 (1964) (statement of Sen. Ribicoff)).

111. *Id.* at 711.

112. *Id.* at 710 n.44.

113. *Id.* at 709.

114. Rehabilitation Act Amendments of 1986, 100 Stat. 1845 (1986) (codified as 42 U.S.C. § 2000d-7 (2011)); see *Franklin*, 503 U.S. at 72.

same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.”<sup>115</sup>

Subsequently, in 1992, the Court expressly held that money damages were an available remedy for intentional violations of Title IX.<sup>116</sup> In *Franklin v. Gwinnett County Public Schools*, the plaintiff brought a Title IX suit arising out of allegations that a teacher subjected the plaintiff to continual sexual harassment while a student, and that despite awareness and an investigation of the situation, teachers and administrators took no action and indeed discouraged the plaintiff from pressing charges.<sup>117</sup> The Court noted the general presumption that all appropriate remedies are available unless Congress expressly indicates to the contrary and that “[s]ince the Court in *Cannon* concluded that this statute supported no express right of action, it is hardly surprising that Congress also said nothing about the applicable remedies for an implied right of action.”<sup>118</sup> Moreover, the Court rejected the argument that remedies were limited for both intentional and unintentional violations to the extent Title IX was enacted pursuant to Congress’ Spending Clause power; rather, the Court noted that the presumption against money damages applied only to unintentional violations because “the receiving entity of federal funds lacks notice that it will be liable for a monetary award.”<sup>119</sup> Accordingly, because the case presented claims for only intentional discrimination, the Court concluded that petitioner could sue under Title IX for monetary damages.<sup>120</sup>

#### *D. Notice and Opportunity to Cure*

Despite the widespread connotation of Title IX with gender equality in athletic opportunities, there are only a handful of lawsuits that interpret the provisions relating to effective accommodation or equal treatment of women in athletics under Title IX.<sup>121</sup> Rather, the majority of substantive Title IX litigation before the lower courts, and the only ones to make it before the Supreme Court arise from allegations of sexual discrimination, sexual

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115. 42 U.S.C. § 2000d-7(a)(2).

116. *Franklin*, 503 U.S. at 76.

117. *Id.* at 63–64

118. *Id.* at 66, 71. The concurrence noted its view that “when rights of action are judicially ‘implied,’ categorical limitations upon their remedial scope may be judicially implied as well.” *Id.* at 77 (Scalia, J., concurring). However, the concurrence concluded that a judicially implied exclusion of damages under Title IX would be inappropriate in light of the Rehabilitation Act Amendments of 1986. *Id.* at 78 (Scalia, J., concurring).

119. *Id.* at 74.

120. *Id.* at 76.

121. Cohen, *supra* note 22, at 312–13.

harassment, or related retaliation.<sup>122</sup> Indeed, it was within the context of a sexual harassment case that the Supreme Court introduced a notice requirement into the Title IX liability analysis.

In *Gebser v. Lago Vista Independent School District*, the Court first addressed the contours and limits of a private right of action for monetary damages under Title IX.<sup>123</sup> In *Gebser*, a high school student brought suit against her teacher and the school district as a result of the teacher's initiation of a sexual relationship.<sup>124</sup> The student did not report the relationship to school officials, and there was no evidence that the school district had actual or constructive notice that the teacher was involved in a sexual relationship with a student.<sup>125</sup> The Court affirmed the dismissal of the student's Title IX claim against the school district, holding that damages may not be recovered "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."<sup>126</sup>

In reaching this holding, the Court emphasized that "[b]ecause the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute."<sup>127</sup> In determining the scope of the available remedies, the Court examined Title IX to ensure that it fashioned the scope of the implied right "in a manner [not] at odds with the statutory structure and purpose."<sup>128</sup> Specifically, the Court noted that, unlike other civil rights statutes that focus on compensating victims of discrimination, "Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds."<sup>129</sup> Furthermore, the structure of Title IX, which is essentially a contract between the government and the recipients of federal funds,<sup>130</sup> prompted the Court to closely examine "the propriety of private actions holding the recipient liable in monetary damages for noncompliance

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122. *Id.* at 313; *see Gebser*, 524 U.S. 274; *Davis*, 526 U.S. 629; *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

123. *Gebser*, 524 U.S. at 284.

124. *Id.* at 277–78.

125. *Id.* at 278–79.

126. *Id.* at 277.

127. *Id.* at 284.

128. *Id.* at 284.

129. *Id.* at 287 (noting that the Court first recognized an implied right of action under Title IX in a claim for injunctive or equitable relief).

130. *Id.* at 286 (explaining that, like Title VII, Title IX conditions "an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.").

with the condition”<sup>131</sup> in order to ensure ““that the receiving entity of federal funds [has] notice that it will be liable for a monetary award.””<sup>132</sup>

Finally, and “[m]ost significantly,” the Court placed weight on the express notice requirement and remedial scheme set forth in the statute and implementing regulations.<sup>133</sup> Under the statute, an agency may not initiate enforcement proceedings until it “has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.”<sup>134</sup> Similarly, the implementing regulations require resolution of compliance issues “by informal means whenever possible”<sup>135</sup> and prohibit the termination of or refusal to grant or continue federal financial assistance until the recipient has been advised of the failure to comply, the agency has determined that voluntary compliance is unobtainable, and an express finding of noncompliance is made after an opportunity for hearing.<sup>136</sup> Further, no other lawfully authorized action to effect compliance can be taken until the agency has determined that voluntary compliance is unobtainable and the recipient “has been notified of its failure to comply and of the action to be taken to effect compliance.”<sup>137</sup> Where a violation is found, the regulations provide that a funding recipient may be required to take the remedial action deemed “necessary to overcome the effects of such discrimination.”<sup>138</sup> However, while such remedial action may provide equitable relief to a specific victim,<sup>139</sup> “the regulations do not appear to contemplate a condition ordering payment of monetary damages, and there is no indication that payment of damages has been demanded as a condition of finding a recipient to be in compliance with the statute.”<sup>140</sup>

The Court presumed that a central purpose of the administrative notice and opportunity to cure mechanisms was “to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its

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131. *Id.* at 287.

132. *Id.* (quoting *Franklin*, 503 U.S. at 74).

133. *Id.* at 288–89.

134. 20 U.S.C. § 1682(2).

135. 34 C.F.R. 100.7(d) (“If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible.”).

136. Procedure for Effective Compliance, 34 C.F.R. § 100.8(c).

137. 34 C.F.R. § 100.8(d).

138. Remedial and Affirmative Action and Self-Evaluation, 34 C.F.R. § 106.3(a); *Gebser*, 524 U.S. at 288.

139. *Gebser*, 524 U.S. at 288 (citing *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 518 (1982)).

140. *Gebser*, 524 U.S. at 288–89.

programs and is willing to institute prompt corrective measures.”<sup>141</sup> As such, the Court concluded that “[w]here a statute’s express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions.”<sup>142</sup> Accordingly, the Court held that “a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s programs and fails to adequately respond” by making an official decision not to remedy the known violation.<sup>143</sup>

Subsequently, in *Davis v. Monroe County Board of Education*, the Supreme Court reaffirmed these principles by holding that a suit for private damages may lie against a school in cases of student-on-student sexual harassment only where the funding recipient acts with deliberate indifference to known acts of harassment that are so severe, pervasive, and objectively offensive as to effectively bar a victim’s access to an educational opportunity or benefit.<sup>144</sup> The Court again noted that Title IX was enacted by Congress pursuant to its power under the Spending Clause and that “there can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions imposed by the legislation or is unable to ascertain what is expected of it.”<sup>145</sup> In concluding that a funding recipient can be liable for an official decision not to remedy a known violation where it “exercises substantial control over both the harasser and the context in which the known harassment occurs,”<sup>146</sup> the Court reaffirmed the prerequisites of actual knowledge and conduct amounting to deliberate indifference in stating a claim for money damages under Title IX.<sup>147</sup>

Indeed, the Supreme Court underscored the importance of actual knowledge of Title IX violations in holding that a funding recipient could be liable for intentional discrimination on the basis of sex in violation of Title IX for retaliating against a person that complains of sex discrimination.<sup>148</sup> Specifically, the Court stressed that Title IX’s enforcement scheme “depends

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141. *Id.* at 289.

142. *Id.* at 290.

143. *Id.* at 290.

144. *Davis*, 526 U.S. at 633.

145. *Id.* at 640.

146. *Id.* at 645.

147. *Id.* at 650.

148. *Jackson*, 544 U.S. at 174, 181.

on individual reporting because individuals and agencies may not bring suit under the statute unless the recipient has received ‘actual notice’ of the discrimination.”<sup>149</sup> Accordingly, protection from retaliation for such individual reporting is necessary to ensure that unlawful discrimination does not go unremedied.<sup>150</sup> Further, the Court noted that, unlike other forms of individual sexual discrimination or harassment, retaliatory conduct is easily attributable to the funding recipient and is, by definition, intentional.<sup>151</sup>

## II. IS NOTICE AND AN OPPORTUNITY TO CURE REQUIRED?

While it is clearly established that there is a private right of action under Title IX, that compensatory damages and injunctive relief are available remedies to such a right, and that an appropriate official must have knowledge of the alleged violation in claims of sexual harassment, the scope of the private right of action and available remedies for claims arising out of systemic ineffective accommodation has not been conclusively addressed.

Because the Supreme Court has held only that actual notice by appropriate officials is required in sexual harassment cases, it is unclear whether and how this standard should be applied in other types of cases brought under Title IX.<sup>152</sup> Specifically, it is unclear whether notice and opportunity to cure is a prerequisite to Title IX suits challenging an institution’s equal provision of athletic opportunities. The three circuits to address this issue have reached inconsistent conclusions.

### A. *Pederson v. Louisiana State University*

As the first federal appellate court to address the issue, the Fifth Circuit concluded that the Supreme Court’s holding in *Gebser* and *Davis* had “little relevance” in determining whether the funding recipient in the case before it had engaged in unlawful intentional discrimination.<sup>153</sup> In *Pederson*, female students attending Louisiana State University (LSU) challenged the university’s provision of facilities and teams for intercollegiate athletic competition.<sup>154</sup> The trial court concluded that LSU was in violation of Title IX. Specifically, the court found that during the relevant time period, LSU’s

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149. *Id.* at 181.

150. *Id.* at 180.

151. *Id.* at 183.

152. Cohen, *supra* note 22 (arguing that *Gebser*’s notice requirement should not apply to non-sexual harassment discrimination cases brought under Title IX).

153. *Pederson*, 213 F.3d at 882.

154. *Id.* at 864.

student population was approximately 51% male and 49% female and its athletic participation for the same period was approximately 71% male and 29% female, despite demonstrated interest by female student-athletes for more athletic opportunities.<sup>155</sup> Moreover, prior to verbally committing to add two women's intercollegiate varsity teams in 1993, LSU had added no new women's teams in fourteen years; rather, it had eliminated a successful women's intercollegiate varsity team in 1983 with no credible reason given.<sup>156</sup> The court also found that LSU had not honored its commitment regarding the addition of two new women's teams. Furthermore, the court found that LSU led a minority movement in the National Collegiate Athletic Association (NCAA) to resist changes toward gender equity in athletics within the NCAA. Accordingly, the trial court concluded that LSU had not effectively accommodated female student-athletes and was therefore in violation of Title IX.<sup>157</sup>

However, the trial court also ruled that LSU was not liable for monetary damages because it did not *intentionally* violate the statute.<sup>158</sup> The court noted that, although the question was a close one, the violations were not the result of intentional discrimination, but rather of "arrogant ignorance, confusion regarding the practical requirements of the law, and a remarkably outdated view of women and athletics which created the byproduct of resistance to change."<sup>159</sup> The court found that LSU's athletic director credibly believed that the women's athletic program was "wonderful" and that LSU's disparate treatment of women in athletics was based upon outdated assumptions of women's abilities.<sup>160</sup> The trial court also noted the confusion relating to Title IX, both with respect to application and interpretation, since its enactment.<sup>161</sup> As such, the trial court held that LSU, through the actions of its athletic director, was "negligent in not adapting to the changing social and athletic landscape," but did not have the requisite intent to impose monetary damages on the university.<sup>162</sup>

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155. The *Pederson* court found that there was ample evidence of interest in women's fast-pitch softball and soccer. *Id.* at 878. At trial, the plaintiffs established that (1) a number of current LSU female students wanted to try out for fast-pitch softball or soccer; (2) well over 5,000 female high school students were playing fast-pitch softball or soccer; and (3) many former members of a local soccer club had received scholarships to play intercollegiate soccer. *Id.* at 868.

156. *Pederson*, 912 F. Supp. at 915–16.

157. *Id.* at 916–17.

158. *Id.* at 918–21.

159. *Id.* at 918.

160. *Id.* at 919–20.

161. *Id.* at 919.

162. *Id.* at 921.



In reversing the trial court's ruling regarding liability for money damages, the Fifth Circuit held that "the requirement in the sexual harassment cases—that the academic institution have actual knowledge of the sexual harassment—is not applicable for purposes of determining whether an academic institution intentionally discriminated on the basis of sex by denying females equal athletic opportunity" because in the latter circumstance "it is the institution itself that is discriminating."<sup>163</sup> Because the Fifth Circuit found that the record evidenced LSU's intention to treat women differently on the basis of their sex by offering them unequal athletic opportunity, it held that LSU had intentionally discriminated on the basis of sex and was therefore liable for money damages.<sup>164</sup>

*B. Grandson v. University of Minnesota*

Conversely, the Eighth Circuit concluded that failure to provide an education institution notice and a reasonable opportunity to rectify alleged violations serves as a bar to private actions for monetary damages under Title IX.<sup>165</sup> In *Grandson*, female students filed claims for injunctive relief against the University of Minnesota following an investigation by OCR. OCR had notified the university that a Title IX complaint, alleging ineffective accommodation, unequal financial assistance, and unequal opportunities in athletics, had been filed. Within the year, the university and OCR entered into an agreement to resolve the complaint, which included increasing women's athletic opportunities, financial assistance, and support, as well as status reports and administrative monitoring by OCR.<sup>166</sup> Two months prior to the university's entry into the agreement, individual plaintiffs brought suit for injunctive relief on behalf of themselves and similarly situated female students.<sup>167</sup> Subsequently—almost three months after the university had entered into the agreement—the plaintiffs sought leave to amend their complaint to assert claims for money damages.<sup>168</sup>

In affirming the trial court's denial of leave to amend, the Eighth Circuit emphasized that the express remedy in Title IX "operates on an assumption of prior notice of alleged discrimination to the funding recipient and an opportunity to rectify any violation voluntarily."<sup>169</sup> The court also noted that

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163. *Pederson*, 213 F.3d at 882.

164. *Id.*

165. *Grandson*, 272 F.3d at 575.

166. *Id.* at 572.

167. *Id.*

168. *Id.*

169. *Id.* at 575.

OCR's three-part test provides flexible standards for compliance, and given *Gebser's* emphasis that money damages should not be awarded except for knowing violations, claims from a specific Title IX violation require "prior notice to a university official with authority to address the complaint and a response demonstrating deliberate indifference to the alleged violation."<sup>170</sup>

C. *Mansourian v. Regents of the University of California*

Finally, in the most recent case to address the issue, the Ninth Circuit agreed with the approach of the Fifth Circuit in concluding that *Gebser's* notice requirement is not applicable to university decisions with respect to athletics.<sup>171</sup> In *Mansourian*, female student-athletes at the University of California, Davis (UCD) who had participated on the men's varsity wrestling team brought suit after they were eliminated from the team when UCD imposed roster caps on all the men's teams to help aid in Title IX compliance.<sup>172</sup> Prior to bringing suit, the women had filed a complaint with OCR regarding their removal from the wrestling team; however, plaintiffs did not file a claim with OCR or otherwise give UCD officials notice of a claim arising from the alleged ineffective accommodation of women in the athletic program at UCD.<sup>173</sup> During the course of the litigation, all of the plaintiffs graduated from UCD; as such, there were no viable claims for injunctive relief, only for money damages.<sup>174</sup> Rather, current female students filed a separate class action suit for injunctive relief, and a settlement for broad-ranging injunctive relief was reached between the class and UCD.<sup>175</sup> The trial court held that all plaintiffs' claims arising from specific conduct relating to the removal from and tryout policies for the men's varsity wrestling team were time-barred.<sup>176</sup> The trial court also concluded that the plaintiffs' ineffective accommodation claim must be dismissed because the plaintiffs failed to give UCD notice and an opportunity to cure the alleged violation of a university-wide failure to provide sufficient athletic opportunities for female student-athletes.

In reversing the trial court's decision with respect to the notice

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170. *Id.* at 576.

171. *Mansourian*, 602 F.3d at 968.

172. *Mansourian*, 2011 WL 3364887.

173. *Mansourian*, 602 F.3d at 962.

174. *Id.* at 962–63.

175. Stipulated Judgment and Order, *Brust v. Regents of the Univ. of Cal.*, No. 07-1488 (E.D. Cal. Oct. 19, 2009).

176. *Mansourian v. Bd. of Regents of Univ. of Cal.*, No. 2:03-cv-2591, 2007 WL 3046034, at \*5–\*6 (E.D. Cal. Oct. 18, 2007).

requirement, the Ninth Circuit noted that, unlike sexual harassment cases, “[i]nstitutions, not individual actors, decide how to allocate resources between male and female athletic teams” and that “[a]thletic programs that fail effectively to accommodate students of both sexes thus represent ‘official policy of the recipient entity’ and so are not covered by *Gebser*’s notice requirement.”<sup>177</sup> Further, the court reasoned that “a judicially imposed notice requirement would be superfluous in light of universities’ ongoing obligations to certify compliance with Title IX’s athletics requirements and to track athletics gender equity data.”<sup>178</sup> Rather, if in compliance with its statutory and regulatory duties, a university should be aware of whether it is providing equal athletic opportunities to women. As such, the Ninth Circuit “[joined] the Fifth Circuit in holding that *Gebser*’s notice requirement is inapplicable to cases alleging that a funding recipient has failed effectively to accommodate women’s interest in athletics.”<sup>179</sup>

### III. NOTICE AND AN OPPORTUNITY TO CURE SHOULD BE REQUIRED IN SUITS FOR MONEY DAMAGES BASED ON INEFFECTIVE ACCOMMODATION UNDER TITLE IX

With respect to claims for money damages arising out the alleged systemic ineffective accommodation of opportunities for female student-athletes, notice to the educational institution of the alleged claim as well as an opportunity to cure should be a prerequisite to suit. Notice and an opportunity to cure is most consistent with statutory construction principles applied to implied private rights of action in Spending Clause legislation. Moreover, such a requirement is sound policy, both in promoting the equal treatment of female students in athletics and limiting educational institutions’ exposure to monetary liability if they voluntarily correct violations brought to their attention.

#### *A. Notice and an Opportunity to Cure is Supported by Statutory Construction*

Because the legitimacy of Congress’ Spending Clause authority is based upon the knowing and voluntary agreement to the terms of the funding by the recipient, an educational institution should be entitled to notice and an opportunity to cure alleged violations of systemic ineffective accommodation before being subjected to a suit for money damages. As discussed, *supra*, both the private right of action and the availability of money damages under Title

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177. *Mansourian*, 602 F.3d at 968 (quoting *Gebser*, 524 U.S. at 290).

178. *Id.*

179. *Id.* at 969.

IX have been judicially implied; the statute is silent with respect to the manner and means that an educational institution should be held liable for private suits. Indeed, the *Gebser* Court expressly noted the latitude it had to shape a sensible remedial scheme that best comports with the statute.<sup>180</sup> Accordingly, in determining the manner and means that an institution may be exposed to broad monetary liability to approximately half of its student population and recent graduates, the guiding principle should be the statute itself and its supporting regulatory scheme.<sup>181</sup>

As an initial matter, one of the dual purposes of Title IX is to provide individual citizens effective protection against discriminatory practices in education on the basis of gender.<sup>182</sup> This purpose is most clearly served by remedies that actually end the discrimination, which come in the form of injunctive and other equitable relief.<sup>183</sup> Because the focus of Title IX is the *protection* of individuals from discriminatory practices, not the compensation of victims of discrimination, courts should be wary of interpreting the statute in a way that unnecessarily exposes educational institutions to excessive monetary liability.<sup>184</sup>

The express regulatory means of enforcement and its focus on voluntary compliance militates in favor of a notice requirement in suits for money damages.<sup>185</sup> Notice and an attempt to secure voluntary compliance is a prerequisite to agency enforcement proceedings.<sup>186</sup> The statutory and regulatory language repeatedly emphasizes the primary goal of achieving voluntary compliance by the recipient entity.<sup>187</sup> These provisions are expressly aimed at ensuring compliance in a recipient's programs,<sup>188</sup>

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180. *Gebser*, 524 U.S. at 284.

181. *See id.*

182. *Cannon*, 441 U.S. at 704–05.

183. The *Cannon* Court expressly contemplated relief aimed at remedying the alleged discriminatory situation. *Id.* at 705 (“In that situation, the violation might be remedied more efficiently by an order requiring an institution to accept an applicant who had been improperly excluded.”). In examining the legislative history, the Court specifically noted that none of the comments evidenced “any hostility toward *an implied private remedy to terminate the offending discrimination.*” *Id.* at 711 (emphasis added).

184. *See Gebser*, 524 U.S. at 285–86. In *Gebser*, the Court rejected the possibility of unlimited recovery of damages under Title IX. The Court noted that when Congress made damages available under Title VII in 1991, it carefully limited the amount of damages in each individual case. The Court concluded that it would be incongruous to allow greater recovery under Title IX, where Congress had not spoken at all on the issue of damages and where, unlike Title VII, the focus of the statute was on protection of individuals, not compensation. *Id.*

185. *See* 34 C.F.R. §§ 100.7, 100.8; *see also Gebser*, 524 U.S. at 288.

186. 34 C.F.R. §§ 100.7, 100.8; *Gebser*, 524 U.S. at 288.

187. 34 C.F.R. §§ 100.7, 100.8; *Gebser*, 524 U.S. at 288.

188. 20 U.S.C. § 1682.

practices, and policies.<sup>189</sup> Under Spending Clause principles, the terms of the “contract” put a funding recipient on notice only that it is subject to potential financial consequences after the institution was made aware of the complaints against it and given a reasonable opportunity to respond.<sup>190</sup> Therefore, it is not only “unsound” but also contrary to principles of statutory interpretation, “for a statute’s *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient’s knowledge or its corrective actions upon receiving notice.”<sup>191</sup>

Importing the safeguards set forth in the express enforcement system into the judicially implied enforcement scheme is particularly important in claims for money damages where recovery could exceed the level of federal funding.<sup>192</sup> In a claim for ineffective accommodation, any female student-athlete currently attending the institution, as well as those who graduated within the relevant statute of limitations, would have standing to bring suit for money damages if their sport of choice was not offered at the varsity level, regardless of their skill level.<sup>193</sup> To establish the requisite standing, a plaintiff need only demonstrate that she is or was “able and ready to compete for a position on the unfielded team.”<sup>194</sup> Further, because these damages claims, by definition, do not seek the actual fielding of the athletic team, plaintiffs who are no longer students and who are ineligible to compete may be compensated for past violations, thus increasing the number of potential plaintiffs. Potential damages may include the value of lost scholarship opportunities, educational services provided to varsity athletes, and other benefits received by varsity athletes, as well as any actual injury suffered as a result of the failure to provide opportunities. Moreover, it is possible that recovery could be attempted as a class.<sup>195</sup> Accordingly, it is probable that the amount of

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189. 34 CFR § 100.7.

190. *See Gebser*, 524 U.S. at 290 (“The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance.”).

191. *Id.* at 289 (emphasis in original).

192. *See id.* at 289–90.

193. *See Pederson*, 213 F.3d at 871. In order to have standing, the potential plaintiffs would also likely need to demonstrate eligibility. *See id.*

194. *Id.* at 871.

195. Where the injury alleged is the systemic deprivation of athletic opportunities due to unequal and illegal funding decisions, the questions of programmatic liability would likely be common across a class of current and former female students; it would be only the measurement of damages that might differ among the members of the class. However, individualized damage calculations, alone, may not defeat class treatment. *See Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010).

damages arising out of an ineffective accommodation claim could exceed a recipient's level of federal funding.<sup>196</sup> The Court has noted that “[w]here a statute’s express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions.”<sup>197</sup> As such, requiring notice and an opportunity to cure prior to filing a lawsuit for money damages is both consistent with and supported by the express enforcement mechanism.<sup>198</sup>

The flexible nature of the regulatory compliance framework further supports the need for notice in claims arising out of alleged ineffective accommodation. While Title IX’s mandate against discrimination on the basis of gender is clear, the application of that mandate to athletic programs is far from it. Courts have routinely relied on the three-part test set forth in the 1979 Interpretation in determining programmatic compliance with Title IX. However, OCR has emphasized that compliance with the three-part test is itself “case- and fact- specific.”<sup>199</sup> And, there is sparse statutory, regulatory, or judicial guidance with respect to these factors.<sup>200</sup>

For example, under the first prong of the three-part test, a university may demonstrate compliance by showing that “intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.”<sup>201</sup> However, there is no authoritative guidance regarding what percentage disparity constitutes “substantial proportionality.” A number of nonauthoritative sources refer to narrowing proportionality to a 5% disparity as sufficient to satisfy prong one.<sup>202</sup> This calculation ignores the actual number of students enrolled as well

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196. See *Gebser*, 524 U.S. at 290.

197. *Id.* at 290.

198. See *Alexander*, 532 U.S. at 289–90 (analyzing the method of agency enforcement in determining whether Congress intended to create privately enforceable rights).

199. *1996 Clarification*, *supra* note 56.

200. See generally Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 61 (2001) (“[T]he courts have not yet explicitly articulated the theory of equality that does underlie the three-part test, nor have they fully explored its implications. Court decisions adopting the three-part test have not looked beyond the disparities in participation opportunities to more fully understand the relationship between how sport programs are structured and the shaping of men’s and women’s interest in sport.”); See Jerry R. Parkinson, *Grappling with Gender Equity*, 5 WM. & MARY BILL RTS. J. 75 (1996) (noting that despite a handful of cases and OCR guidance, the law surrounding compliance with the three-part test is still unclear).

201. *1979 Policy Interpretation*, *supra* note 42.

202. In 1993, the California State University System entered into a settlement by which it agreed that each campus with an NCAA athletic program would raise the level of female athletic

as the number of athletic opportunities. On the opposite end of the spectrum, other nonauthoritative sources assert that an institution cannot achieve substantial proportionality unless the number of underrepresented athletes is insufficient to field a varsity athletic team.<sup>203</sup> This formulation would seem to be highly problematic if one undertakes to include sports that focus on the individual, such as swimming, track and field, and gymnastics, where a “team” can theoretically be fielded with a small number of athletes.<sup>204</sup>

Similarly, under the second prong of the three-part test, a university may demonstrate compliance by showing “a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members” of the underrepresented class.<sup>205</sup> As with prong one, there is little to no authoritative guidance as to what constitutes a sufficient history and continuing practice of program expansion under prong two. While the 1996 Clarification provides a number of illustrative examples, it does not provide any hard and fast rules for determining compliance.<sup>206</sup> Indeed, the 1996 Clarification allows for the possibility of satisfying prong two even if an institution eliminates a team for the underrepresented sex.<sup>207</sup> Further, it is unclear how many opportunities must be added within what period of time in order to demonstrate a history and continuing practice of program expansion.<sup>208</sup>

Under this less than lucid compliance regime, it is not outside the realm of reasonableness for an institution to not be fully aware of its compliance status regarding effective accommodation. As such, the imposition of a notice

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participation to within 5% of female undergraduate enrollment within five years. See Robert C. Farrell, *Title IX or College Football?*, 32 HOUS. L. REV. 993, 1041–42 (1995).

203. Both Dr. Donna Lopiano and Dr. Christine Grants, nationally and internationally recognized experts in Title IX, have testified that “substantial proportionality” is reached if the gap between the percentage of female enrollment and the percentage of female participation opportunities is less than the size of a female sports team that could be added. *Mansourian*, 2011 WL 3364887, at \*13.

204. *Id.* at \*13 n.17 (“However, the court has some misgivings about the practical application of such a test, particularly in combination with plaintiffs’ concurrent advancement of the ‘team of one’ theory. Under plaintiff’s combined theories, to the extent an institution has not added a team where individual competition is possible, such as swimming, indoor track & field, outdoor track & field, cross-country, fencing, or wrestling, that institution would not be ‘substantially’ proportionate if the participation gap was equal to one student who was interested in participating in such a sport.”).

205. *1979 Policy Interpretation*, *supra* note 42.

206. *1996 Clarification*, *supra* note 56 (setting forth four examples intended to illustrate the principles underlying Prong Two).

207. *Id.*

208. *Id.* (“There are no fixed intervals of time within which an institution must have added participation opportunities.”); *Mansourian*, 2011 WL 3364887, at \*14–15 (recounting the testimony of Dr. Grant, the defendants’ expert, that an institution must expand every two to three years to rely on prong two and that an institution should be given a “credit” for adding a number of teams at once).

requirement for an alleged ineffective accommodation violation would encourage institutions to undertake a robust inquiry into their compliance plan in order to avoid potentially expansive monetary liability.

The Fifth and Ninth Circuit's focus on intent is misplaced under the statutory and regulatory framework applicable to ineffective accommodation claims. Intentional conduct in this context is different from intentional conduct in sexual harassment or retaliation claims. In those cases, the focus is on an individual actor who makes a knowing and voluntary decision to engage in discriminatory conduct that violates Title IX.<sup>209</sup> In effective accommodation, the decision at issue is one made by an educational institution, and in most circumstances, a decision not made by one individual unilaterally.<sup>210</sup> Further, given that these are challenges to an institution's athletic program, in most cases, the violation likely does not arise from one decision, but rather a series of decisions that impact numerous institutional policies, interests, and goals.<sup>211</sup> Therefore, what the offending conduct is, who engaged in the offending conduct, and whether that person intended to engage in such conduct is a much more amorphous inquiry in a programmatic challenge than it is in a challenge arising out of a clearly identifiable actor's discrete acts.<sup>212</sup>

Moreover, the expansive conclusion reached by the Ninth Circuit runs directly counter to the Supreme Court's reasoning in *Gebser*. Under the reasoning of the Ninth Circuit, notice and an opportunity to cure would never

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209. See generally *Gebser*, 524 U.S. at 277 (whether a school district can be held liable for the independent misconduct of a teacher); *Davis*, 526 U.S. at 639 (whether a school district can be held liable for the misconduct of other students); *Jackson*, 544 U.S. at 171 (whether a school district can be held liable for its retaliatory conduct against a person who complains of sex discrimination).

210. *Mansourian*, 602 F.3d at 968 ("Institutions, not individual actors, decide how to allocate resources between male and female athletic teams.").

211. *Id.* ("Decisions to create or eliminate teams or to add or decrease roster slots for male or female athletes are official decisions, not practices by individual students or staff.").

212. Critics of the imposition of notice argue that "[b]ecause schools create sex-segregated teams at the outset, they make a gender-conscious allocation of opportunities in the first instance." Samuels & Galles, *supra* note 6, at 26. Theoretically, a school's yearly funding decisions could constitute affirmative discriminatory conduct by the institution. However, this characterization ignores the practical difficulties identifying and correcting gender inequities. For example, the number of available athletes may fluctuate based upon incoming or graduating talent; the need for more female athletic opportunities may significantly increase due to a significant increase in the female undergraduate population; or the addition of a new varsity sport for women may take time to implement. See Epstein, *supra* note 16 (noting the impediments to Title IX compliance "now that women constitute over 57 percent of all college students" because the number of spots on women's teams does not increase with enrollment just as the number of spots on men's teams does not decrease with diminishing enrollment). Accordingly, while such circumstances would not excuse a Title IX violation, they do render problematic a clear identification of official intent for purposes of claims for money damages.



be required in ineffective accommodation cases because “[a]thletic programs that fail effectively to accommodate students of both sexes thus represent ‘official policy of the recipient entity’ and so are not covered by *Gebser*’s notice requirement.”<sup>213</sup> However, the *Gebser* Court expressly recognized that the administrative enforcement mechanism was designed for a recipient that “was unaware of discrimination *in its program*[].”<sup>214</sup> Because the express enforcement scheme, which includes notice and an opportunity to cure, was purposefully aimed at remedying *programmatic* challenges, it is inconsistent with the statutory and regulatory scheme to wholly exclude private challenges to an institution’s program from a notice requirement. Further, the *Gebser* Court also noted that imposing a notice requirement in private suits served the central purpose of the notice requirement in the agency enforcement scheme, namely, “to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures.”<sup>215</sup> The Ninth Circuit’s conclusion wholly ignores this aim.

Furthermore, the Ninth Circuit’s assertion that an institution could not be legitimately unaware of the unequal provision of athletic opportunities in its athletic program is belied by the flexible nature of Title IX compliance.<sup>216</sup> Indeed, *Mansourian* demonstrates that the question of compliance is not so easily answered. In *Mansourian*, two Title IX experts, both of whom were involved in the evolution of Title IX and its regulations and both of whom had previously testified only on behalf of the underrepresented sex in Title IX cases, disagreed about whether the university had sufficiently complied with prong two of the three-part test.<sup>217</sup> Based upon the same history and the same official reports, the experts reached two different conclusions regarding whether the university had a history and continuing practice of program expansion.<sup>218</sup> Accordingly, because of the flexible standards relating to Title IX compliance, as well as the ambiguity surrounding those already flexible standards, it is even more important that a university official with authority to address the complaint has notice of the specific basis for the claim and an

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213. *Mansourian*, 602 F.3d at 968; *see also* Heckman, *supra* note 55, at 232 (“With traditional Title IX athletics claims of sex discrimination, it is submitted that any prerequisite notice provision should, if required, be deemed satisfied as therein the actions of the athletic department—as carried out by the athletic directors or coaches—represent the official policy of that educational institution.”).

214. *Gebser*, 524 U.S. at 289 (emphasis added).

215. *Id.* at 289.

216. Moreover, the *Gebser* Court expressly held that “failure to comply with the regulations does not establish the requisite actual notice and deliberate indifference.” *Id.* at 291–92.

217. *Mansourian*, 2011 WL 3364887, at \*12–15.

218. *Id.*

opportunity to respond.<sup>219</sup>

*B. Notice and an Opportunity to Cure is Sound Policy*

Beyond being supported by cannons of statutory interpretation and by judicial precedent, notice and an opportunity to cure in claims for money damages based on ineffective accommodation claims is sound policy that furthers the goals and considerations underlying Title IX.

Notice and an opportunity to cure in claims for money damages furthers the antidiscrimination goals of Title IX while also avoiding the diversion of educational funds away from beneficial uses. The threat of potentially expansive financial hardship as a result of failure to respond to a complaint of ineffective accommodation is likely a sufficient incentive for a funding recipient to take a close look at its athletic program and take voluntary action to bring itself into compliance. If an institution voluntarily complies, it ensures that educational funds are actually being used to provide athletic opportunities for the underrepresented gender, not to fund damages claims by students or former students who may not have the skill to compete at a varsity level or who may have already graduated from the institution. This also serves Title IX's focus on protection as opposed to compensation.

Further, given the expansive nature of potential Title IX liability, it is important that an educational institution has notice of the specific violation at the base of the complaint. As noted *supra*, the question of what constitutes ineffective accommodation itself is not a clear-cut inquiry. Moreover, while ineffective accommodation claims constitute one category of Title IX violations, there are a number of different potential types of programmatic challenges arising out of alleged unequal treatment. In order for an institution to have a reasonable opportunity to voluntarily remediate an actual violation, it needs to be on notice of the specific violation at issue. For example, in *Mansourian*, the plaintiffs had never advised the university that they were claiming violations based upon alleged ineffective accommodation violations prior to bringing suit.<sup>220</sup> Rather, they had filed complaints about the

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219. See *Grandson*, 272 F.3d at 576.

These are flexible standards, and *Gebser* emphasized that money damages should not be awarded except for knowing violations. When an individual plaintiff such as *Grandson* claims money damages from a specific Title IX violation . . . *Gebser* requires prior notice to a university official with authority to address the complaint and a response demonstrating deliberate indifference to the alleged violation.”

*Id.*

220. Indeed, the district court noted that it was not clear until oral argument on the defendants' motion for judgment on the pleadings, almost four years after the case was filed, that the plaintiffs

elimination of wrestling opportunities for women on the men's varsity wrestling team.<sup>221</sup> It was not until four years into the litigation that it became clear that the plaintiffs were launching a challenge against the number of female opportunities in the entire athletic program, not just alleged inequities in the wrestling program.<sup>222</sup> However, despite this belated clarification to both the university and the court,<sup>223</sup> under the Ninth Circuit's ruling, the plaintiffs were entitled to press their broad, systemic claims for money damages without any opportunity for the university to enter into a voluntary compliance plan.<sup>224</sup> Given that the university subsequently entered into a class settlement for expansive injunctive relief that would eventually bring the university into compliance under prong one,<sup>225</sup> the litigation is an example of the unnecessary expenditure of sparse funds both with respect to the cost of litigation itself as well as any potential money damages.

Conversely, the facts of *Grandson* exemplify how the system is supposed to work, honoring the importance of ensuring equal opportunities in athletics in addition to the fiscal constraints of most universities. In *Grandson*, after a complaint was filed with OCR, the university entered into a voluntary agreement to increase athletic opportunities for women. In approximately three years, the university had fully implemented all provisions of the agreement. Accordingly, the goals of Title IX were served without imposing additional monetary obligations on the university in the form of money damages. As such, from both a legal and policy perspective, the Eighth Circuit appropriately upheld the dismissal of the plaintiffs' claims for money damages based upon the failure to give the university notice and an opportunity to cure.

Moreover, notice and an opportunity to cure as a prerequisite to suits for money damages would increase public confidence in the implementation of Title IX. In times of tight budget conditions, where athletic programs are already strained to continue providing existing athletic opportunities as well as

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were filing an ineffective accommodation claim under Title IX. *Mansourian v. Bd. of Regents*, 617 F. Supp. 2d 1011, 1019 n.8 (E.D. Cal. 2008).

221. *Id.* at 1019 n.7 (noting that the plaintiffs' complaints to the defendants and OCR did not set forth an ineffective accommodation claim with respect to either the university's wrestling program specifically or its athletic program generally, but rather alleged unequal treatment of female wrestlers).

222. *Id.*

223. *Id.*

224. *Mansourian*, 602 F.3d at 966–68.

225. *Brust v. Regents of the Univ. of Cal.*, No. 07-1488 (E.D. Cal. Oct. 19, 2009); *Title IX Settlement Leads to Stricter 1.5 % Compliance Standard*, UNIV. OF HA., MANOA, OFFICE OF THE C.-INSTITUTIONAL RES. (June 22, 2009), available at [http://ovcaa-iro.org/support\\_bulletin/2009/2009-1.pdf](http://ovcaa-iro.org/support_bulletin/2009/2009-1.pdf).

to add more opportunities for female students,<sup>226</sup> it is not hard to assume that a monetary windfall to female students, including those who have already graduated from the offending institution, would not be favorably received by the general public. While everyone would prefer that educational institutions achieve the equality mandated by Title IX by increasing opportunities for female student-athletes to match those long-enjoyed by male student-athletes, schools with financial constraints cannot always do this.<sup>227</sup> Even when the athletic budget pie gets smaller, both male and female athletes still deserve and are legally entitled to an equal slice.<sup>228</sup> However, it serves neither Title IX's policies nor the interests of any student-athlete when that pie is further diminished by money damages for a violation that an institution is willing to correct.

#### IV. CONCLUSION

It is beyond dispute that the opportunity to participate in collegiate athletics brings with it unparalleled experiences that educate and serve a student-athlete long after graduation. Title IX legislatively mandates the sound policy that men and women should be given equal opportunities to participate in such experiences. Litigation brought under Title IX can help ensure that educational institutions are honoring their agreements to provide such equal opportunities, particularly where the remedy sought is declaratory or injunctive in nature.<sup>229</sup>

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226. When the original implementing regulations were before Congress, Representative Patsy Mink acknowledged the tension between men's major and minor sports and women's sports, particularly during times of tight institutional and athletic budgets. However, she concluded that such tension did not justify the continued denial of equal opportunities and benefits to female student-athletes. Samuels & Galles, *supra* note 6, at 22 (citing *Sex Discrimination Regulations: Hearings Before the H. Subcomm. on Post-Secondary Educ. of the Comm. on Educ. & Labor*, 94th Cong. 166 (1975) (statement of Rep. Mink)). However, there was no mention of the balance between resources devoted to implementing programmatic change and those diverted to money damages at these congressional hearings.

227. See Epstein, *supra* note 16 ("In hard times, budget dollars are still scarcer, so the pressure to cut men's teams becomes even greater. That pressure hits minor sports harder because of the large number of spots that colleges have to reserve for football."); Starace, *supra* note 7; Susan M. Shook, Note, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990's: Nonrevenue Men's Teams Join Women Athletes in the Scramble for Survival*, 71 IND. L. J. 773, 793-96 (1996); see also Samuels & Galles, *supra* note 6, at 31 (noting that Title IX does not dictate an institution's funding choices and "is not the cause of these schools' decision-making").

228. See *Title IX and Men's "Minor" Sports: A False Conflict*, *supra* note 11, at 5 ("Title IX simply ensures that it can no longer be the women who suffer cuts, second-class treatment, and the brunt of limited resources."); Samuels & Galles, *supra* note 6, at 31 ("[Title IX] merely requires that [institutions] equitably allocate the opportunities and resources that they have.").

229. The author again notes that requiring notice and an opportunity to cure in suits for injunctive relief are not supported by the same arguments that apply to imposing such a requirement

However, requiring notice and an opportunity to cure in claims for money damages is neither a barrier nor an impediment<sup>230</sup> to implementation of the policies advanced by Title IX. It is a means of ensuring that valuable resources are directed at remedying inequities in the provision of athletic opportunities. Where an institution knowingly fails to correct violations after being alerted of them, a plaintiff may pursue any and all remedies, including money damages. But, to the extent that an institution is willing to voluntarily cure its own violations, it should be given the opportunity to do so, and thus provide as many opportunities as possible. In a choice between institutional compliance and post-harm compensation, compliance should be the paramount interest.

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in suits for money damages.

230. Heckman, *supra* note 55, at 232 (“The thirty-year history of individuals seeking redress for claims of Title IX sex discrimination within athletic departments is one replete with legal minefields placed along the way . . . . [W]hether the judiciary will require a condition precedent notice requirement in order to pursue a regular Title IX athletics case just represents another uphill climb in the long race to achieve gender equity in the nation’s schools.”).