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THE CIVIL RIGHTS RESTORATION ACT OF 1987: REVITALIZATION OF TITLE IX

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Title IX¹ gave dramatic impetus to the growth of women's sports on both the high school and collegiate levels in the 1970s. However, the United States Supreme Court's decision in *Grove City College v. Bell*² led to a loss of women's programs and scholarships in some instances.³ With the passage of the Civil Rights Restoration Act of 1987,⁴ Title IX's regulations undoubtedly will be revived and be used to offer guidelines to sports administrators. It appears that women's sports once again will be given added impetus.

This article will outline the obstacles women have encountered in their attempts to gain equal treatment in intercollegiate athletics. Additionally, it will provide an overview of Title IX and its regulation requirements. Finally, this article will examine the effects of the *Grove City* decision on Title

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1. Education Amendments of 1972, Pub. L. No. 92-318, Title IX, 86 Stat. 373-75 (1972) (codified as amended at 20 U.S.C. §§ 1681-88 (1982)).

2. 465 U.S. 555 (1984).

3. Wong & Ensor, *Sex Discrimination in Athletics: A Review of Two Decades of Accomplishments and Defeats*, 21 GONZ. L. REV. 345 (1986).

4. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). Since the 1984 Supreme Court ruling in *Grove City*, numerous attempts have been made to bypass the decision. In 1984, the House passed a *Grove City* bill by a 375-32 vote, but a barrage of amendments from opponents on the Senate floor ended any chance of the bill's success. Molotsky, *House Passes Bill to Upset A Limit On U.S. Rights Law*, N.Y. Times, March 3, 1988, § A, at 1, col. 6. In 1985, the bill was bottled up in a controversy over its language on abortion. *Id.* Specifically, "whether the bill would effect the provision of abortion services in student and employee health insurance plans." *Id.* In 1988, the abortion debate terminated with an addition of an "abortion neutral" amendment in the Senate, sponsored by Senator John Danforth (R-MO), stating that the Restoration Act would neither prohibit nor forbid institutions receiving federal funds from providing abortion services in insurance plans. *Id.* In January 1988, the Senate voted 75 to 14 in favor of the bill (S-557). Molotsky, *House and Senate Vote to Override Reagan On Rights*, N.Y. Times, March 23, 1988, § A, at 1, col. 6. A month later, the House overwhelmingly approved the act over the strong threat of a presidential veto, 315 to 98. *Id.* Upon Senate and House approval of the Restoration Act, President Reagan vetoed the bill, asserting that he did not oppose the concepts embodied in the *Grove City* legislation, rather he felt that its application was overbroad. *Id.* Nonetheless, on March 22, 1988, Congress overrode President Reagan's veto of the proposed Civil Rights Restoration Act (S-557) by decisive margins in both houses. *Id.* The Senate voted 73 to 24, and the House followed with a vote of 292 to 133 to override the President's veto. *Id.*

IX and how the Civil Rights Restoration Act will strengthen Title IX's regulatory powers.

I. BACKGROUND

A number of related events of the early 1970s, including the passage of Title IX, the founding of the Association for Intercollegiate Athletics for Women (AIAW),⁵ and the rise of expectations for women's rights, spurred the greatest growth in women's athletics in the history of this country. The 1980s, however, were not as fruitful for women in sports. The failure of the attempted ratification of the Equal Rights Amendment (ERA), the end of the AIAW in 1982, and the negative impact of the *Grove City* decision on Title IX combined to impede the movement.⁶

The proposed Equal Rights Amendment, which would have barred all states and the federal government from denying "equality of rights under the law . . . on account of sex,"⁷ was defeated in 1982, when the extended period for its ratification expired. The Amendment would have raised the examination of gender discrimination to a stricter standard of judicial scrutiny in equal protection cases.⁸ The passage of the Amendment could have supplemented and served to enhance the strength of Title IX.

One of the goals of the AIAW was to bring about a more intense and higher level of competition in women's sports. Differing somewhat from the NCAA in founding principles and policies, the AIAW promoted less

5. The original legislative purpose of the 1972 Title IX Education Amendments was not to implement prohibitions on athletic programs of educational institutions. The legislative history of Title IX indicates that the Act had limited scope, covering only those educational programs receiving federal financial assistance such as vocational, bilingual, and compensatory education programs. See Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 56-63 (1976). However, the Department of Health, Education and Welfare (HEW) broadly construed Title IX as applying to educational institutions or agencies discriminating in athletic or physical education programs. *Id.* HEW interpreted the words "education program or activity receiving federal financial assistance" as encompassing every program or activity conducted by an educational agency. *Id.* "In HEW's view, the only test of coverage is whether the agency or institution is a recipient of any federal assistance; if so, all activities (including athletic programs) of the agency come within the provisions of the Act." *Id.*

6. From the multitude of organizations overseeing college women's athletics, came the National Commission on Intercollegiate Sports. This commission established national intercollegiate championships in the late 1960s in seven sports events. This growth of championships demanded a strong, unified body to give direction and governance to women's athletic programs. In 1971, the AIAW was founded for this purpose. The AIAW eventually sponsored thirty-nine national championships for women before disbanding in 1982. See *AIAW v. NCAA*, 558 F. Supp. 487 (D.D.C. 1983), *aff'd*, 735 F.2d 577 (D.C. Cir. 1984).

7. Uhler, *Athletics and the University: The Post-Women's Era*, 73 ACADEME 25, 25-29 (July-August 1987).

8. Equal Rights Amendment, H.J. Res. 208, 92d Cong., 2d Sess. (1972).

expensive recruiting policies and placed strong restrictions on the exploitation of students.⁹ The NCAA fought both the growth of women's programs and the AIAW, yet the number of women participating in collegiate competition continued to grow. This pressure, intensified by the introduction of Title IX legislation, resulted in the NCAA embracing a more aggressive position. In 1980, the NCAA began holding women's championships in Divisions II and III schools, and in 1981 it added Division I women's championships. During the same year, the AIAW suffered a significant drop in membership and in participation in its events.¹⁰ The practical effect of this action was to eliminate the AIAW's control over women's athletics. On June 30, 1982, the AIAW ceased operations.¹¹

The Supreme Court's *Grove City College v. Bell*¹² decision left women's athletic programs with no substantive protection under Title IX since most school sports programs receive no direct federal funding.¹³ Without the threat of Title IX, several schools responded to financial pressures by cutting women's sports teams and reducing their budgets for women's athletic programs.¹⁴

Despite the *Grove City* decision, the women's sports movement has shown unexpected resilience.¹⁵ Between 1985 and 1988, approximately 450 new NCAA women's teams were created, reflecting a willingness among college administrators to voluntarily fund women's sports.¹⁶ Other indicators pointing to growth in women's athletics included increases in participation, spectators, and local and national media coverage.¹⁷ Before Title IX, only fifteen percent of the total number of athletic participants in college were women.¹⁸ By 1984, that percentage increased to 30.8%.¹⁹

As compiled by the NCAA, the average number of women's varsity sports operated in a member institution's athletic program rose from 5.61 in

9. Wong & Ensor, *supra* note 3, at 392.

10. Beezley & Hobbs, *Nice Girls Don't Sweat: Women in American Sport*, 16 J. POPULAR CULTURE 42, 42-53 (1983).

11. AIAW v. NCAA, 735 F.2d 577, 580 (1984).

12. 465 U.S. 555 (1984).

13. Wong & Ensor, *supra* note 3, at 348.

14. "Pressures exacerbated by the Supreme Court's deregulation of the college football television package in 1984 added to many school's adopting policies of dropping non-revenue making intercollegiate sports events." Tokarz, *Sex Discrimination in Amateur and Professional Sports*, in LAW OF PROFESSIONAL AMATEUR SPORTS § 13.04 (G. Uberstine ed. 1988).

15. Neff, *Equality at Last: Part II*, SPORTS ILLUSTRATED, March 21, 1988, at 70-71.

16. *Id.*

17. Wong & Ensor, *supra* note 3, at 346-47.

18. *Id.* at 347.

19. *Id.*

1977 to 5.9 in 1984, while aggregate expenditures for women's intercollegiate athletics increased from \$24.7 million in 1977 to \$116 million in 1981.²⁰

Funding in women's programs has increased for many reasons. First, society's attitudes towards women have changed dramatically.²¹ This change includes women's own perception about their athletic capabilities and participation.²² Second, the NCAA has repeatedly indicated its commitment to equal athletic opportunity without regard to gender.²³ In 1982-83, its sponsorship of thirty women's championships totaled \$2.2 million and exceeded its support of twenty-eight men's championships by 8.4%.²⁴

Still, inequities continue as some women's sports programs have suffered budget reductions that were not imposed upon men's teams and that might not have been allowed had Title IX been in force.²⁵ Moreover, the growth of women's programs has not resulted in a proportional increase of decision making positions for females.²⁶ In no area of higher education are women so noticeably absent from the most prestigious positions of decision making. Opportunities for elite women athletes have improved, but total participation slots available to women have declined.²⁷ Women have never achieved anything close to parity.²⁸

Part of the inequity results from the fact that there are more championships offered for men than for women. In 1987-88, the NCAA sponsored seventy-six national championships, forty-two for men, thirty-four for women.²⁹ In 1980-81, the AIAW sponsored thirty-nine national championships for women in seventeen different sports, five more national championships than offered by the NCAA today.³⁰ Moreover, sports in which women have shown strong interest in the past, such as gymnastics, are declining at such a rate that the NCAA Division II championships have already been eliminated.³¹

20. *Id.*

21. *Id.* at 346-47.

22. Beezley & Hobbs, *supra* note 10, at 43.

23. Wong & Ensor, *supra* note 3, at 348.

24. *Id.* (citing Fields, Title IX, at IX, *Chronicle of Higher Educ.*, June 23, 1982, at 1, col. 2). These were nonrevenue producing championships. *Id.*

25. *Id.* Women's sports groups point to Southwest Texas State University as a typical example of inequity. "In 1986 the school disbanded a consistently successful women's gymnastics program two years after the football team embarked on a costly move up to Division I-AA, where the Bobcats have had a mediocre four-year record of 18-26."

26. Uhlir, *supra* note 7, at 2.

27. *Id.* at 25.

28. *Id.*

29. *Id.*

30. *Id.*

31. L.A. Times, April 9, 1987, at 16, col. 2.

The demise of the AIAW in 1982 has affected the opportunities for women leaders to assist in the governance of college athletics. While interest in women's intercollegiate athletics continues to grow in the 1980s, there is a steady erosion in the number of women holding positions as administrators.³² In 1972, virtually all women athletic programs were directed by women and only six percent of the Division I programs merged into single athletic departments.³³ By 1979-80, over 80 percent of all collegiate athletic administrations were merged, and 90 percent of the merged administrations were led by men.³⁴ Between 1975 and 1985, over 300 women have disappeared from athletic decision-making positions.³⁵ The female directors who survived the merger found that they were powerless. Their previous sources of power, Title IX before the *Grove City* decision, the AIAW, gender solidarity afforded by the networks, and meetings associated with women's governance, were either weakened or destroyed.³⁶

The absence of women in administrative roles is only one reason for the stagnation in women's intercollegiate sports. Throughout college sports, there is a declining number of women in leadership positions.³⁷ Currently, women only hold 50 percent of the head coaching position of women's sports. In 1972, 90 percent of women's teams were coached by women.³⁸

Another factor affecting women's intercollegiate athletic programs is the inability of women's athletic events to produce revenue.³⁹ At the May 1984 meeting of the NCAA's women athletic program administrators, John Toner, who was then president of the NCAA, stated that "it is time for women leaders to concentrate on how they can stimulate and enlarge the income from women's programs."⁴⁰ Television coverage for collegiate women's sports continues to be scarce on network stations. Only those events with similar appeal to men's televised events are offered.⁴¹ In 1986-87, the networks only covered the semifinal and final games of the NCAA Division I women's basketball championship.⁴² Unfortunately, the success of athletic programs is measured by the amount of money raised and not by the

32. *Id.*

33. Uhlir, *supra* note 7, at 25.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 26.

39. Oberholtzer, *What Are the Girls Playing in College These Days?*, 11 WOMEN'S SPORTS & FITNESS 49 (1989).

40. Wong & Ensor, *supra* note 3, at 350.

41. *Id.*

42. Uhlir, *supra* note 7, at 26.

educational benefits of all participating athletes.⁴³ Hence, popular collegiate sports such as men's football and basketball continue to receive priority over non-revenue producing sport programs.⁴⁴

In the latter part of the 1970s and early 1980s, leadership opportunities for women had diminished and women's participation in intercollegiate athletics had come to a standstill.⁴⁵ The 1970s and 1980s left an uphill struggle for women in the future and may be characterized by the following:⁴⁶

1. For financial aid based on athletic ability approximately one dollar in five is awarded to women.⁴⁷

2. Men coach fifty percent of the women's teams.⁴⁸

3. Only fifteen percent of women's intercollegiate programs are under the supervision of female athletic directors.⁴⁹

4. Only one of the NCAA Division I merged athletic programs in the United States has a woman as the athletic director.⁵⁰

5. The highest paid college women's basketball coach in 1986-87 earned sixty-one percent less than the highest paid men's basketball coach.⁵¹

6. In 1986-87, the four highest paid coaches in women's basketball were men.⁵²

7. Only thirty-one percent of the 1985-86 NCAA participants were female.⁵³

8. Currently, there are fewer women's national championships, in fewer sports and in fewer divisions, than there were in 1981-82, the last year of the AIAW.⁵⁴

For the above mentioned reasons, women leaders are depending on Title IX and the Restoration Act for a more reassuring future.

II. TITLE IX

The intercollegiate athletics requirements of Title IX are found in the rules and interpretations of the agencies responsible for implementing the

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Uhlir, *supra* note 7, at 26.

52. *Id.*

53. *Id.*

54. *Id.*

statute. The principal sources of these rules and interpretations are the athletics provisions of the Title IX Regulation (Regulation),⁵⁵ the Intercollegiate Athletics Policy Interpretation (Policy Interpretation),⁵⁶ the Intercollegiate Athletics Investigator's Manual (Manual),⁵⁷ and the Guide for Writing Intercollegiate Athletics Letters of Findings (LOF Guide).⁵⁸

In December 1979, seven years after the original passage of Title IX, the Department of Health, Education, and Welfare (HEW) released the Policy Interpretation of the Athletics Regulations of Title IX.⁵⁹ The Policy Interpretation contained strict guidelines for the Office of Civil Rights (OCR) to apply in assessing Title IX compliance.⁶⁰ The Policy Interpretation also outlined "nondiscriminatory factors" to be considered when assessing Title IX compliance. These factors include differences that may result from the unique nature of particular sports, special circumstances of a temporary nature, the need for greater funding for crowd control at more popular athletic events, and differences that have not been remedied but which an institution is voluntarily working to correct.⁶¹ The Policy Interpretation does not have the force and effect of law. It does, however, have considerable practical significance because it sets forth the standards by which the Department of Education measures compliance with the Regulation.

55. W. KRAMER, GUIDE TO TITLE IX AND INTERCOLLEGIATE ATHLETICS 1-56, 2-3 (1988); 34 C.F.R. § 106.41 (1988); 45 C.F.R. § 86.41 (1988); 7 C.F.R. § 41 (1988); 10 C.F.R. § 1040.44 (1988); 44 Fed. Reg. 71, 413 (1988); Department of Education, Office of Civil Rights, Title IX Intercollegiate Athletics Investigator's Manual (Interim) (July 1980); Memorandum to Regional Civil Rights Directors from Antonio J. Califa, Guidandance for Writing Title IX Intercollegiate Athletics Letters of Findings. (A guide prepared to assist college and university officials in understanding the intercollegiate athletics requirements of Title IX.)

The Regulation originally was issued by the Department of Health, Education and Welfare (HEW) in June 1975, and was adopted by the Department of Education in May 1980. The athletic provisions are contained in two sections: 34 C.F.R. section 106.37(c) (Athletic Scholarships) and 34 C.F.R. section 106.41 (Athletics). These provisions became fully effective in July 1978 after a three-year adjustment period. The Regulation has the force and effect of law and has *not* been revised since its issuance. *Id.* The LOF guide, issued in March 1982, provides detailed guidance to investigators regarding how to provide intercollegiate letters of findings. *Id.* It supplements, and in certain respects supersedes, the Manual. OCR intends to revise the Manual, combine it with the LOF Guide, and incorporate the changes made since the new legislation. *Id.*

56. W. KRAMER, *supra* note 55.

57. *Id.*

58. *Id.*

59. *Id.*

60. Seha, *The Administrative Enforcement of Title IX in Intercollegiate Athletics*, 2 LAW & INEQUALITY 121, 138 (1984).

61. 34 C.F.R. Part 106 (1988); 44 FED. REG. 71,413 (1979).

III. REQUIREMENTS OF TITLE IX

Section 901(a) of Title IX of the Education Amendments of 1972 provides that "[n]o 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"⁶² Title IX requires equality of opportunity in accommodation of interests and abilities, in athletic scholarships, and in other benefits and opportunities.⁶³

The OCR determines that an institution is "equally and effectively" accommodating the athletic interest and abilities of its female and male students if it can satisfy any one of the following three tests.⁶⁴ First, an institution complies with Title IX if it offers both male and female students opportunities to participate in athletics that are proportional to that gender's enrollment at the institution.⁶⁵ Second, an institution complies with Title IX if it can demonstrate a history and continuing practice of expanding its athletic program which is responsible to the athletic interests of the underrepresented sex.⁶⁶ If an institution fails to comply with Title IX under the first two tests, the OCR will find the institution in compliance if the institution can demonstrate that it is currently accommodating the interests and abilities of the underrepresented sex in its athletic program.⁶⁷

When an institution awards athletic scholarships, Title IX requires the institution to provide aid "substantially proportional" to the number of female and male participants in its athletic program.⁶⁸ The objective of the Title IX requirement was to ensure that all institutions receiving federal aid provide "reasonable opportunities" for both women and men to receive scholarship aid.⁶⁹ The existence of reasonable opportunities was determined by examining the ratio of male to female participants.⁷⁰ Scholarship aid would then be distributed according to this participation ratio.⁷¹

In addition, institutions must give female and male athletes equivalent treatment, benefits, and opportunities in eleven enumerated program ar-

62. *Id.*

63. 20 U.S.C. § 1681(a) (1982).

64. 34 C.F.R. § 106.37(c)(1) (1988).

65. *Id.*

66. 44 FED. REG. 71,415 (1979).

67. 34 C.F.R. § 106.37(c)(1) (1988); 44 FED. REG. 71,415 (1979).

68. *Id.*

69. 44 FED. REG. 71,415 (1979); 45 C.F.R. § 86.37(c) (1988).

70. *Id.*

71. 44 FED. REG. 71,415, 71,417 (1979).

eas.⁷² The Policy Interpretation defines "equivalency" as "equal or equal in effect."⁷³ The OCR, which monitors compliance of Title IX, has considered many factors in determining the equality of opportunity.⁷⁴ The Regulations point out that equal athletic expenditures are not required, but comparative budgets could be considered in relation to the appropriateness of equipment and supplies, games and practice schedules, travel and per diem allowances, coaches and tutors, medical and training services, housing and dining facilities and services, locker rooms, practice and competitive facilities, and publicity.⁷⁵

Another section of the Regulations specifies the requirements for athletic programs.⁷⁶ Title IX Regulations permit separate but equal physical education classes and teams when segregation is based upon ability or competitive skills or where the activity involves bodily contact.⁷⁷ Under Title IX, a school must permit members of the excluded gender to compete for positions on noncontact sports teams determined by skill if the school previously limited athletic opportunities for the excluded gender.⁷⁸ Contact sports are subject to regulations distinct from those governing noncontact sports. Title IX regulations broadly define contact sports as including basketball, football, ice hockey, rugby, wrestling, boxing, and "other sports the purpose or major activity of which involves bodily contact."⁷⁹ If only one noncontact team exists, both women and men must be allowed to compete for positions on the team.⁸⁰

Finally, the Regulations cover the method by which Title IX is enforced. OCR reviews schools based on complaints brought by individuals and they also select schools at random. Based on the data collected,⁸¹ the OCR determines whether the equivalent treatment, benefits, and opportunities mandated by Title IX have been afforded to both women and men.

A finding of inequality in a single component of the program is not enough for the OCR to find a school in noncompliance with Title IX.⁸²

72. 45 C.F.R. § 86.31(c) (1988).

73. 34 C.F.R. § 106.41(c) (1988).

74. 44 FED. REG. at 71,415.

75. *Id.* at 71,415.

76. 34 C.F.R. § 106.41 (1988).

77. 34 C.F.R. § 106.34(a)-(c), 106.41(b) (1988).

78. 34 C.F.R. §§ 106.34(a)-(c), 106.41(b) (1988) 44 FED. REG. 71,417-18 (1979).

79. 45 C.F.R. 86.41(b); *see generally* O'Connor v. Board of Educ. of School Dist. No. 23, 645 F.2d 578 (7th Cir. 1981); *Gomes v. Rhode Island Interscholastic League*, 604 F.2d 733 (1st Cir. 1979).

80. 34 C.F.R. § 106.41(b) (1988).

81. 45 C.F.R. § 86 (1988).

82. 34 C.F.R. § 106.41(c) (1988).

The OCR's approach to investigating and determining compliance with Title IX has been to focus on the *overall* provision of equivalent opportunities in the athletic program before it finds the school to be in noncompliance.⁸³ Also, under this policy, the OCR may find schools that do not actually comply with Title IX in compliance if the schools agree to rectify any Title IX violations found through the OCR's investigation.⁸⁴

IV. THE EFFECTS OF *GROVE CITY*

A. *Scope and Applicability of Title IX*

The major concern with Title IX is whether it applies only to the specific departments receiving direct funding or whether it extends to any department within an institution that benefits from federal assistance.⁸⁵ The Supreme Court answered this troublesome question in *Grove City College v. Bell*.⁸⁶ In *Grove City*, the Court ruled that only those programs within an institution that receive direct financial assistance from the federal government are subject to the rules of Title IX.⁸⁷ This interpretation is often re-

83. 34 C.F.R. § 106.41(b) (1988).

84. See W. KRAMER, *supra* note 55, at 4.

85. *Id.*

86. 465 U.S. 555 (1984). Title IX was originally introduced to increase public awareness of the barriers prohibiting millions of Americans from receiving full opportunity. S. Rep. No. 64., 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 13. Title IX helped break down several of the sex barriers in education, including participation in athletics and graduate degree programs. *Id.* However, the *Grove City* decision affected the scope of the statutes' protection. The Court in *Grove City* unanimously held that the student aid dollars reaching the college through its students constituted federal financial assistance to the school. *Grove City College v. Bell*, 465 U.S. 555 (1984). However, in determining the scope of the duty not to discriminate, a divided court narrowly interpreted the law's "program or activity" phrase. The Court concluded that only the program or activity which directly received federal aid is covered under Title IX. *Id.* The ruling reversed years of administrative interpretation and enforcement practiced by Republican and Democratic administrations and was in conflict with many court interpretations of the laws. S. Rep. No. 64., 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 13. In response to the *Grove City* decision, Senators Kennedy and Packwood introduced S. Bill No. 557, the "Civil Rights Restoration Act of 1985" with the intent of restoring Title IX and the Institution-wide application which characterized coverage and enforcement from the time of initial passage until the *Grove City* decision. *Id.*

87. Petitioner Grove City College is a private, coeducational, liberal arts college. Grove City College did not direct federal assistance, nor did it participate in the Regular Disbursement System (RDS) of the Department of Education (Department), whereby amounts for federal grants to students were advanced to the institution. 465 U.S. at 559. The institution following RDS would then select eligible students and calculate and distribute the grants as required. *Id.* However, Grove City College enrolled students who did receive direct federal Basic Opportunity Grants (BEOG's) under the Department of Education's Alternative Disbursement System (ADS). *Id.* The Department concluded that, under applicable regulations, Grove City College was a "recipient" of "federal financial assistance." *Id.* Therefore, the Department initiated administrative proceedings when the College refused to execute an Assurance of Compliance with Title IX's

ferred to as the "programmatic approach" to the Title IX statute. A direct result of the *Grove City* decision was the immediate termination of twenty-three Title IX investigations.⁸⁸

The Court held that Grove City College, a private college, was a recipient of federal assistance for Title IX purposes, despite the advance of any direct federal assistance, because it enrolled students who received federal loans from which they paid their tuition.⁸⁹ The Court cited *Bob Jones University v. Johnson*.⁹⁰ In *Johnson*, the court held that the university was subject to the race discrimination ban of Title VI, even though it did not receive any direct federal funding, because several of its students received Veterans Administration benefits that were applied to pay tuition at the school.⁹¹

The Court also held that only specific programs receiving such federal funds were subject to Title IX coverage and sanctions.⁹² The Court specifically rejected the "free-up" analysis which is an institution-wide perspective that the entire institution benefited even though funds were earmarked for a particular program because earmarked money frees up other money for general usage (also referred to as the "institutional approach").⁹³ Because of the rejection of the "free-up," a party cannot argue that discrimination was prohibited in Program A because federal funds for Program B freed general university funds to be shifted to Program A. The Court also rejected the "infection theory," that funding follows the student throughout the institution.⁹⁴

The impact of *Grove City* precipitated the Department of Education to narrow or suspend approximately forty pending Title IX investigations and twenty other Title VI and Section 504 cases.⁹⁵ The OCR refrained from

nondiscrimination provisions, as required by the regulations. *Id.* at 560. The administrative proceedings resulted in an order terminating assistance until the Grove City College executed an Assurance of Compliance and demonstrated to the Department that it was in compliance with the regulations. *Id.* at 561. The College and four of its students then filed suit in federal district court. *Id.* The district court held that the students' BEOG's constituted "[f]ederal financial assistance" to the College. *Id.* However, it also determined that the Department could not terminate the students' aid because of the College's refusal to execute an Assurance of Compliance. *Id.* On certiorari, the United States Supreme Court affirmed the court of appeals decision. *Id.* at 563.

88. Wong & Ensor, *supra* note 3, at 351-52.

89. *Grove City*, 465 U.S. at 574.

90. *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 601-04 (D. S.C. 1974), *aff'd*, 529 F.2d 524 (4th Cir. 1975).

91. *Id.*

92. *Grove City*, 465 U.S. at 564-77.

93. *Id.* at 572.

94. *Id.*

95. Sullivan, *The Law That Needs New Muscle*, SPORTS ILLUSTRATED, March 4, 1985, at 9.

investigating and pursuing complaints against athletic departments unless the complaints involved departments receiving direct federal funding.⁹⁶ The most critical concern about the *Grove City* decision was that since a majority of the athletic programs in colleges and universities do not receive direct federal funding, women's athletic programs would have neither Title IX protection nor a shield to fall back on in case of discrimination or unequal opportunities. Hence, for a Title IX claim against an institution, the claimant would have to show that the specific athletic program in question received direct federal funding.⁹⁷

One week after the *Grove City* decision, the Department of Education dropped gender discrimination charges against the University of Maryland's intercollegiate athletics program because the athletics program did not receive direct federal funding.⁹⁸ Prior to this decision, the OCR had uncovered discrimination at the University in several areas, including travel and per diem allowances, the provision of support services, and the accommodation of student interests and abilities.⁹⁹ Yet, *Grove City* left female athletes and coaches at the University of Maryland and other universities without any federal protection against this discrimination.¹⁰⁰

In *O'Connor v. Peru State College*,¹⁰¹ a state college physical education teacher and women's basketball coach who was not rehired brought a gender discrimination action against the college under Title VII of the Civil Rights Act of 1964¹⁰² and Title IX of the Education Amendments of 1972.¹⁰³ The federal funds in question dealt with a Title III¹⁰⁴ grant awarded to Peru State College for student and faculty research. A central research facility was to be established and the college was to select the projects and departments that were to have access to the facility and funds.¹⁰⁵ The district court held that the Title III grant did not constitute federal financial assistance under Title IX because the funds did not go *directly* to the physical education department and because other departments

96. Wong & Ensor, *supra* note 3, at 361.

97. *Grove City*, 465 U.S. at 571.

98. S. REP. NO. 64, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 13.

99. *Id.*

100. *Id.*

101. 605 F. Supp. 753 (D. Neb.), *aff'd* 781 F.2d 632 (8th Cir. 1986).

102. 42 U.S.C. §§ 1000e-2 (1982).

103. 20 U.S.C. § 1681 (1982).

104. 20 U.S.C. § 1057 (1982). Title III federal financial assistance grants are awarded to qualifying state colleges in part for student and faculty research and other *academic* programs. *Id.* The statute lists as special concerns the development of faculty and academic programs, utilization of libraries, and acquisition of equipment for academic programs. *Id.*

105. *O'Connor*, 605 F.Supp. at 761, 781 F.2d at 639.

of the college also benefited.¹⁰⁶ The program funded, the court concluded, only the research facility.¹⁰⁷

The Eighth Circuit Court of Appeals pointed out that the direct/indirect distinction approach used by the district court was expressly rejected by the Supreme Court.¹⁰⁸ Moreover, the appellate court found that this approach seemed to conflict with *Grove City*:

Just as the student financial aid in *Grove City* was no less federal funding received by the college's financial aid program for being channeled through students rather than being given directly to the college, the use of research funds for a physical education research project was no less federal financial assistance to the physical education department for being channeled first through an administrative structure overseeing the research program and facility for the entire college.¹⁰⁹

The appellate court decided that the economic effect of the Title III funding was the same as if a portion of it had been granted directly to the physical education department.¹¹⁰

The appellate court used a different approach in concluding that Title IX coverage did not extend to Peru State's athletic programs. The court's approach was twofold. It examined Congress' purpose in making the particular funds available under Title III and then it examined whether the relevant Title IX program or activity fell within the scope of Congress' intent for such funds.¹¹¹ The court held that the purpose of Title III was to improve academic quality and that academics was the focus of the Peru State funding.¹¹² Furthermore, the Court determined that even though intercollegiate sports is important to the higher education experience, it does not constitute "academics" within the contemplation of Title III.¹¹³ The program that benefitted, therefore, could only have been the academic program.

After the *Grove City* decision, at least 674 complaints filed under the four civil rights statutes were disregarded.¹¹⁴ In addition, other cases that were in the formal enforcement stage (cases where discrimination was found) were put on hold. For example, at West Texas State College, a com-

106. *Id.*

107. *Id.*

108. *O'Connor v. Peru State College*, 781 F.2d 632, 640-41 (8th Cir. 1986).

109. *Id.* at 640.

110. *Id.* at 641.

111. *Id.* at 642.

112. *Id.*

113. *Id.*

114. *Sullivan*, *supra* note 95, at 9.

plaint was filed charging gender discrimination in the entire intercollegiate athletic program. The Fifth Circuit Court of Appeals decided that neither the program nor the scholarships were covered by Title IX.¹¹⁵ Furthermore, Western Michigan, Ohio, and Ball State Universities were in the process of implementing Title IX compliance programs. After *Grove City*, OCR declined to monitor their efforts.¹¹⁶

V. CIVIL RIGHTS RESTORATION ACT OF 1987

Recent legislation has rendered *Grove City College v. Bell*¹¹⁷ and *O'Connor v. Peru State College*¹¹⁸ moot in regards to whether the programmatic approach and purpose distinction approach are viable. On March 22, 1988, Congress enacted the Civil Rights Restoration Act of 1987.¹¹⁹ This new legislation changed the wording of Title IX to state that discrimination was prohibited in the programs and activities of any recipient of federal funds.¹²⁰ The Act redefined the term "program or activity" to mean in the case of higher education institutions, "a college, university, or postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance."¹²¹ The Act further defined "recipient" as "any state or political subdivision thereof, . . . or any public or private agency, institution or organization, or other entity . . . to which federal financial assistance is extended (directly or through another entity or a person)."¹²² The new Act clarifies that entire institutions and agencies are covered by Title IX and other federal anti-discrimination laws if *any* program or activity within the institution receives federal aid.¹²³ Accordingly, Title IX now applies to all institutions whose students receive federal student aid. This measure is designed to reverse the impact of *Grove City*.

Proponents of the new legislation hoped that it would restore the strength that Title IX had prior to the *Grove City* decision.¹²⁴ Under Title

115. *Grove City Decision Spurs OCR Actions*, NCAA News, March 21, 1984, at 1, col. 1.

116. McGrath, *Let's Put Some Muscle Where It Really Counts*, 12 WOMEN'S SPORTS & FITNESS 78 (1986).

117. 465 U.S. 555.

118. O'Connor, 605 F. Supp. 753 (D. Neb.), *aff'd* 781 F.2d 632 (8th Cir. 1986).

119. Pub. L. No. 100-2259, 102 Stat. 28 (1988).

120. *Id.* The new legislation also changed the wording of Title IV, the Rehabilitation Act, and the Age Discrimination Act.

121. Pub. L. No. 100-259, § 3(a), 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687(2)(A) (1989)).

122. *Id.*

123. *Id.*

124. *Id.*

IX, women's sports made great progress between 1972 and 1984.¹²⁵ More than 10,000 college scholarships were offered for qualified female athletes in 1985, compared with virtually none in 1971. However, women's programs never actually achieved equality. In 1985 when women accounted for thirty percent of all intercollegiate athletes, colleges and universities spent sixteen percent of their athletic budgets on women.¹²⁶

The Restoration Act may not make an immediate impact, but it will add considerable muscle in the women's fight for equality in a traditionally male dominated arena. In the first six months after its passage, sixteen complaints of gender discrimination were filed against the athletics departments of twelve colleges and universities.¹²⁷ Alternatively, in an effort to comply with the law, many universities may make changes on their own.¹²⁸ Athletic directors and experts in sports law expect an increase in gender discrimination complaints to be filed.¹²⁹ A recent example that the Restoration Act may put pressure on college athletics departments to make changes is the Temple University's settlement reached in June 1988. The settlement involved a gender discrimination lawsuit filed by several female athletes.¹³⁰ Settlement of the eight year-old case resulted in boosting women's sports aid at Temple University.

The plaintiffs asked the court to order the university to give female athletes a proportionate share of athletic scholarships and to increase opportunities in sports.¹³¹ The University's Faculty Senate report indicated that although the ratio of males to females participating in intercollegiate athlet-

125. *Id.*

126. Frederick, *Title IX's Legacy in Bloom*, *The Christian Science Monitor*, June 28, 1985, at 23-24 (compared with two percent in 1972).

127. Oberlander, *16 Bias Complaints Against 12 Athletics Departments Filed in Wake of Civil-Rights Restoration Act*, *Chron. Higher Educ.*, November 2, 1988, at A33-34. (Title IX complaints have been filed against the following Universities: Santa Clara, Louisiana State, Towson State, California at Santa Barbara, Maryland at College Park, and Nebraska. The following colleges also have complaints filed against them: Athens State, Bossier Parish Community, Loyola, Mendocino, Metropolitan State, and Salem (West Virginia)).

128. *Id.*

129. *Id.* at A33-34.

130. *Id.* at A34; *Haffer v. Temple University*, 688 F.2d 14 (3d Cir. 1982). This lawsuit was amended in April of 1988 in the United States District Court to include a charge that Temple was violating the new Civil Rights Restoration Act. The suit originally charged that Temple University's Athletic Department was violating Title IX by failing to provide equal funds and an equal number of scholarships for women. But the *Grove City* decision in 1984 caused the athletes to alter their complaint. The Court ruled that Title IX prohibited gender discrimination only in specific programs that directly received federal money, thus excluding most college athletic departments.

131. *Id.*; Oberlander, *Trial Begins in Sex-Bias Lawsuit Against Temple U.; Charge is Added Under New U.S. Civil-Rights Act*, *Chron. Higher Educ.*, April 13, 1988, at A43-44.

ics at Temple University was close, the budget for men's sports, excluding money allocated to the school's football team, exceeded the women's intercollegiate athletic budget by 3.6 to 1.¹³² Under the strength of the new legislation, with respect to athletic financial assistance, the basic test of compliance is *financial proportionality*.¹³³ About one-half of Temple's undergraduate students are men while only thirty-five percent of its intercollegiate athletes are women. The women's program, however, receives only about twenty percent of Temple's operating expenditures for sports and about thirty percent of its sports scholarships.¹³⁴ Additionally, from 1977 to 1987, Temple spent twelve million dollars on scholarships for male athletes and three million dollars on scholarships for female athletes. Such disparities were maintained even during the years that women's athletics were growing in popularity. But, according to Temple University representatives, such popularity in women's sports had not reached Pennsylvania.¹³⁵ During the trial process, lawyers and administrators for the University admitted that Temple's policy on sports expenditures was based on a response to a societal demand for strong men's football and basketball teams, thus promoting those sports more heavily than women's sports.¹³⁶ Temple representatives also stipulated that if society demanded to see more women's sports, Temple would spend more time on them.¹³⁷ However, this rationale epitomizes the problem regarding the lack of public awareness in women's sports programs. If more money were spent promoting women's sports, attendance may increase at their games and perhaps create a market for women's sports.

An illustration of the positive effects of promoting women's sports is the growth in popularity of women's intercollegiate basketball. In 1988, the NCAA paid out approximately \$31,600 dollars to each of the four women's finalists in the NCAA Division I Women's Basketball tournament.¹³⁸ The effects of the NCAA's efforts were twofold. The total attendance for the forty-eight team women's tournament was 132,960, about an eight percent

132. *Id.*

133. 34 C.F.R. § 106.37(c)(1) (1987). To meet this test, an institution's aggregate allocations of athletic financial assistance to male and female students must be substantially proportionate to the numbers of male and female students participating in the institution's intercollegiate athletics.

134. Oberlander, *After Eight Years, Female Athletes' Suit Against Temple U. Goes to Trial in U.S. District Court This Week*, Chron. Higher Educ., March 30, 1988, at A37-38.

135. *Id.*

136. *Id.*

137. *Id.*

138. Lederman & Monaghan, *Duke Tops Money Sweepstakes; Women's Tourney Advances*, Chron. Higher Educ., April 13, 1988, at A43-44.

increase over 1987's total of 122,674.¹³⁹ In its first two years, the women's Final Four tournament ran deficits. Since 1984, however, "it has moved into the black and not looked back."¹⁴⁰ Another measure of growth was the "all-important" press coverage. The 1988 nationally televised women's championship game scored better ratings than it had in the past.¹⁴¹ Hence, monetary incentive coupled with an opportunity for national exposure, may induce colleges to increase support of their women's athletic programs.

However, women leaders are not fully satisfied with the current progress. Title IX's revitalization by the Restoration Act does not answer all the questions and problems involving gender discrimination in our educational system. For example, enforcement of the Regulations is practically determined by active participation from those discriminated against and not the government. In addition, departures from Title IX requirements are permitted if justified by factors determined by OCR to be nondiscriminatory.¹⁴²

Women's groups, including the American Association of University Women, the National Women's Law Center, the Women's Sports Foundation, and the Women's Equality Action League are concerned with the enforcement of Title IX. This coalition of women's groups have begun a campaign urging female athletes to file complaints with the OCR if their schools are not providing adequate funding and proper facilities.¹⁴³

The OCR's enforcement policy will be critical in the Post-Act years. A major concern is the strength of Title IX since it remains dependent of federal funding.¹⁴⁴ The availability of funds needed to enforce Title IX depends on what priority the current administration will place on the enforcement of civil rights in general. Leaders of the women's sports movement feel optimistic that the Bush Administration will be more receptive than the Reagan Administration. At a recent meeting with President Bush on National Girls and Women in Sports Day, Deborah Anderson, Executive Director of the Women's Sports Foundation, noted that "the whole atmosphere in the White House was more engaging and encouraging than with the previous Administration."¹⁴⁵

139. *Id.*

140. *Id.*

141. *Id.*

142. 44 FED. REG. at 71,415 (1979).

143. Blow, *Don't Look Now*, NEW REPUBLIC, April 11, 1988, at 11; Neff, *Equality and Horseshoes*, SPORTS ILLUSTRATED, Feb. 20, 1989, at 11.

144. Wong & Ensor, *supra* note 3, at 366.

145. Neff, *supra* note 143.

However, in a Regulatory Impact Statement by the Labor and Human Resources Committee (required by the Senate during hearings concerning the Civil Rights Restoration Act), the Committee found that the new Act spends no new money, and that the inflationary impact will be zero.¹⁴⁶ Furthermore, the new Act eliminated the requirement that federal agencies trace federal funds within the entity which is extended federal financial assistance prior to investigation of a discrimination complaint.¹⁴⁷ The Act does not alter the already existing Title IX regulations and requires no new investigatory procedures or affirmative efforts by colleges and universities.¹⁴⁸ The OCR is limited in its attempts to initiate its own investigations because no new funds are created by the Act. Instead, enforcement will depend upon the following: success of current Title IX complaints, lawsuits such as the students at Temple University, and campaigns urging those athletes who are discriminated against to file complaints with OCR.¹⁴⁹ These procedures, in combination with the lack of affirmative effort requirements by OCR, allow a university to comply with the regulations while only minimally encouraging participation by female athletes.

Nondiscriminatory justifications allow institutions to allocate athletic financial assistance disproportionately if the disparity is attributable to legitimate, nondiscriminatory factors.¹⁵⁰ These factors include the following: athletic association rules;¹⁵¹ differences in the revenue producing capabilities of particular sports;¹⁵² the sources and methods of generating the funds awarded;¹⁵³ differences in interest or athletic proficiency between male and female students;¹⁵⁴ differences in the competitive level of divisional classification of sports programs for female and male student athletes;¹⁵⁵ and dif-

146. S. REP. NO. 64, 100th Cong., 2d Sess., reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 32.

147. *Id.*

148. *Id.*; see also C. Johnson, *The Evolution of Title IX: Prospects for Equality in Intercollegiate Athletics*, 11 GOLDEN GATE U.L. REV. 759, 782 (1981). Affirmative efforts would require a recipient institution to demonstrate that it included procedures designed to encourage women to participate in intercollegiate athletics by increasing the number of women sports, publicizing the athletic opportunities available for women, and elevating the scope of women's intercollegiate competition. *Id.*

149. Ordinarily, an intercollegiate athletics investigation is initiated as a result of the OCR receiving a complaint. An institution may also be selected for Title IX compliance review on its own initiative. 34 C.F.R. § 106.71 (1988).

150. W. KRAMER, *supra* note 55, at 12.

151. 34 C.F.R. § 106.6(c) (1987).

152. Guide to Title IX, at 14-15.

153. *Id.*

154. *Id.*

155. *Id.*

fering levels of spectator interest and student or community support.¹⁵⁶ Problems exist when the OCR determines that institutions are in compliance while the difference in proportionality between participation and aid has been as great as seven percentage points.¹⁵⁷

Similarly, the Regulation permits OCR to consider other factors in determining whether an institution is providing equality of opportunity. Identical treatment is not required, provided the overall effect of any differences is nondiscriminatory.¹⁵⁸ The Policy Interpretation identifies certain nondiscriminatory factors that may justify departures from equivalence such as: "unique aspects of particular sports or athletic activities (i.e., football is unique for its high per capital cost); special circumstances of a temporary nature; differences in event management needs; and voluntary affirmative action."¹⁵⁹ For example, teams competing at different levels of competition may require coaches with differing qualifications. In addition, teams competing on a national level may require greater publicity resources than teams with more limited competitive schedules.¹⁶⁰

Furthermore, OCR usually will render an institution in noncompliance if there exists disparity in one program component or in one part of a program. The test is whether lack of equivalence in a component is "likely by itself to deny equality of athletic opportunity."¹⁶¹ Basically, the disparities are balanced against one another. For example, "if one program receives lower quality equipment, but this disadvantage is counterbalanced by better access to support services, neither disparity would result in a finding of non-compliance."¹⁶² "When investigators find disparities in the overall athletic program or in individual program components that could support a finding of noncompliance, a finding of compliance may still be made if the institution already is implementing such a plan in pre-LOF (Letters of Findings)

156. *Id.*

157. "To determine whether or not substantial proportionality has been achieved, investigators make two types of comparisons. First, they compare the percentage of all participants who are female with the percentage of all athletic financial assistance awarded to women (and do the same for men). If the two percentages (participation and financial aid) are the same, the comparison indicates compliance. If not, the determination whether they are substantially equal is made *on a case-by-case* basis. The second comparison made by investigators is between the average award given to female athletes and the average award given to male athletes."

W. KRAMER, *supra* note 55, at 12-13.

158. 44 FED. REG. at 71,417-18 (1979).

159. *Id.* at 71,416.

160. *Id.* at 71,417.

161. *Id.* at 71,418.

162. *Id.*

negotiations with OCR.”¹⁶³ This permits institutions, taking part in the expansion of participation and competitive opportunities for women, to move at an undefined pace. Theoretically, “an institution can perpetually continue to plan to increase opportunities for women, and accomplish this at a slow rate, and still be in compliance.”¹⁶⁴

Subsequently, the Policy Interpretation and the Manual standards set out by OCR allow for disparities in both financial assistance and equality of opportunity for female athletes. The purpose of Title IX, to “provide *equal* access for women and men students to the educational process and the extracurricular activities in a school” is circumvented by three remaining loopholes: 1) lack of funding for OCR to effectively enforce Title IX; 2) lack of regulatory provisions mandating affirmative efforts by recipient institutions; and 3) allowing nondiscriminatory exceptions through which institutions avoid compliance.¹⁶⁵

CONCLUSION

In the early 1970s and 1980s, the women’s sports movement flourished with the help of Title IX legislation. In recent years, however, the movement has been at a standstill. Even with the rejuvenation of Title IX by the passage of the Civil Rights Restoration Act, proponents of the women’s sports movement are uncertain of its future. The major concern is enforcement of Title IX.

Without a strong Title IX to force universities to make a commitment to women’s athletics, athletic directors may be tempted to deal with future budget crunches by cutting back on women’s programs.¹⁶⁶ The needed enforceability of Title IX hinges on several factors, including political and societal attitudes.¹⁶⁷

During the Nixon, Ford and Carter Administrations, Title IX was applied broadly, but the Reagan Administration, while claiming to be a proponent of women’s sports, backed the *Grove City* decision and its narrowing

163. W. KRAMER, *supra* note 55, at 56.

164. Johnson, *supra* note 148, at 799.

165. S. REP. NO. 64, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 8.

166. Universities may strategically avoid compliance with Title IX requirements by cutting back on low priority women’s athletic programs. This will enable the university to comply with athletic financial assistance requirements (i.e., if there exists ten men’s programs with an average financial expenditure of one thousand dollars and ten women’s programs at an average financial expenditure of eight hundred dollars, the university may choose to comply with Title IX by cutting two women’s programs resulting in a higher proportion of financial assistance to the number of female athletes). W. KRAMER, *supra* note 55, at 11-12.

167. Wong & Ensor, *supra* note 3, at 392.

effect.¹⁶⁸ However, the Bush Administration, along with the Democratic Senate, has indicated that the women's sports movement, and women's rights in general, will have a higher priority than during the Reagan era.¹⁶⁹ The passing of the Restoration Act demonstrates that current legislators are supporting a broad application of Title IX.

A political change in the executive branch's priorities may spark a greater interest by OCR to make a more aggressive attempt to investigate inequities involving women's athletic programs. Similarly, it may encourage OCR to alter its current policies and regulations by requiring stricter compliance with Title IX requirements. Strict compliance may include scrutinizing nondiscriminatory justifications allowed by universities, requiring a time limit for conforming with the regulations, and establishing affirmative effort procedures, such as requiring all federally assisted universities to register a Title IX compliance report annually. Hopefully, the change in political attitude will be supported with financial as well as diplomatic backing.

Finally, societal attitudes may be altered through the development of a power base within the intercollegiate governance associations by women athletic administrators. "It may be then that through the slow process of gaining positions on governing bodies, women athletic administrators may be able to improve [the] stalled progress in advancing women's athletic programs and eliminating sex discrimination in sports."¹⁷⁰

168. Sullivan, *supra* note 95, at 9.

169. *Id.*

170. Wong & Ensor, *supra* note 3, at 393.

