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TITLE IX AND EMPLOYMENT DISCRIMINATION IN COACHING INTERCOLLEGIATE ATHLETICS

CATHRYN L. CLAUSSEN, J.D.*

I. INTRODUCTION

Title IX litigation concerning intercollegiate athletics has focused primarily on participation opportunities for female athletes.¹ Four such cases have been decided at the appellate level.² Recently, however, Title IX litigation has begun to probe other issues, such as reverse discrimination, retaliatory firings of coaches, and salary disparities between male and female coaches. The focus of this article is the issue of employment discrimination.

*Tyler v. Howard University*³ and *Pitts v. Oklahoma*⁴ are the only decided cases that examine employment discrimination in the area of intercollegiate athletics. In *Tyler*, the women's basketball coach sued Howard University for, among other things, sex discrimination for paying her a salary lower than that of the men's basketball coach. The court awarded the coach damages for lost wages under both Title IX and the Equal Pay Act.⁵ In *Pitts*, the women's golf coach at Oklahoma State University also sued for sex discrimination because she earned \$35,712, while the men's golf coach earned \$63,000.⁶ The court found that the university had vi-

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1. 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 . . ." 20 U.S.C. § 1681 *et seq.*

2. *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993); *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993); *Cook v. Colgate Univ.*, 992 F.2d 17 (2d Cir. 1993); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824 (10th Cir. 1993).

3. No. 91-CA11239 (D.C. Super. Ct. 1993).

4. No. CIV-93-1341-A (W.D. Okla. 1994).

5. *Tyler v. Howard Univ.*, No. 91-CA11239 (D.C. Super. Ct. 1993). The Equal Pay Act of 1963 prohibits discrimination between employees on the basis of sex by paying different wages for work that is substantially similar in skill, effort, responsibility, and is performed under similar working conditions. 29 U.S.C.

§ 206(d)(1). Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, sex, religion, or national origin. 42 U.S.C. § 2000(e) *et seq.*

6. *Debra E. Blum, 2 More Coaches of Women's Teams Go to Court to Press Claims of*

olated both Title IX and Title VII, but found no Equal Pay Act violation.⁷

Because these were jury trials, there are no formal opinions, and therefore little guidance as to how Title IX was applied to the facts in each case. Recognizing the paucity of judicial guidance on this issue, this article analyzes the potential applicability of Title IX to employment discrimination in intercollegiate athletics. Specifically, it will address two types of employment discrimination: (1) the severely diminished percentage of coaches who are female, and (2) the inferior salaries received by female coaches and/or coaches of female teams. Donna Lopiano, executive director of the Women's Sports Foundation, highlighted the importance of these two issues by addressing them in her testimony before Representative Cardiss Collins' Congressional committee in February 1993.⁸ The question is whether Title IX can be used to remedy these problems.

A preliminary question is, why use Title IX, rather than Title VII or the Equal Pay Act, to reach employment discrimination in intercollegiate athletics? The answer is that both Title VII and the Equal Pay Act probably have limited applicability in the context of intercollegiate athletics. First, regarding the diminished percentage of female coaches in women's athletics, Title VII would not help because it provides only individual redress for victims of discrimination. Title IX, however, takes a program-wide look at availability of coaches, and assumes a significant disparity in number of coaches to be a factor in whether male and female athletes are being coached equally. Therefore, if part of a program's non-compliance is having too few coaches of women's teams, then the university might be required to hire several coaches at once. Of course, the added coaches will not necessarily be women. Thus, this article will discuss research which suggests that female coaches are as qualified as male coaches, and will examine arguments supporting why Universities should hire female coaches. Second, regarding the salary disparity issue, courts generally hold that Title VII and the Equal Pay Act apply to discrimination based on the sex of the employee, not the team. Yet, the reality of intercollegiate coaching

Sex Discrimination, CHRON. HIGHER EDUC., Sept. 1, 1993, at A47, A48.

7. *Pitts. v. Oklahoma*, No. CIV-93-1341-A (W.D. Okla. 1994).

8. *Intercollegiate Sports, 1993: Hearings on Title IX Impact on Women's Participation in Gender Equity Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 17 (1993) (Statement of Donna A. Lopiano, Ph.D., Executive Director, Women's Sports Foundation).

salaries is that not only do women typically earn less than men, but salaries are lower for coaches of women's teams regardless of the coach's sex. Because many males coach women's teams, it would be difficult under both laws to prove that a women's coach was discriminated against simply on the basis of being female, rather than because the team she coached was female.

In two similar cases, a Pennsylvania court held that Title VII did not apply to discrimination based on the team's sex.⁹ In these cases, female coaches of female teams sued for sex discrimination based on salary. At each institution, male coaches of female teams also received less pay than coaches of men's teams. In both cases the court held that the plaintiffs were not being discriminated against because of their sex, but because of the sex of the team, and therefore Title VII was not violated. According to the court in *Kenneweg*:

It is clear from the statute that the sex of the plaintiffs must be the basis of the discriminatory conduct. . . . If plaintiffs coaching female sports are being paid less than individuals coaching male sports, there is no valid claim of gender based discrimination as to these plaintiffs. Here plaintiffs are not being discriminated against because of *their* sex.¹⁰

The same argument could be made against the applicability of the Equal Pay Act: If both men and women are performing the same job (coaching women's sports) for the same low pay, it is difficult to argue that women are being discriminated against simply because of their sex.¹¹ Currently, the team's sex is more relevant to determining coaching salaries than the coach's sex. The Title IX athletics provisions, which focus on the sex of the team as the relevant concern, may be more useful.

However, the Title IX regulations also contain general employment provisions (not specific to athletics) which may apply to athletics employment. These employment regulations appear to incorporate Title VII disparate impact and Equal Pay Act types of analyses. Although such analyses may be more difficult to argue, they could be used if the sex of the team is disregarded. If, for example, one defines coaching basketball as the same job regard-

9. *Kenneweg v. Hampton Township School Dist.*, 438 F. Supp. 575 (W.D. Pa. 1977); *Jackson v. Armstrong School Dist.*, 430 F. Supp. 1050 (W.D. Pa. 1977).

10. *Kenneweg*, 438 F. Supp. at 577 (emphasis in original).

11. The Equal Pay Act provides for equal pay for work that is substantially similar in skill, effort, responsibility, and is performed under similar working conditions. 29 U.S.C. § 206(d)(1).

less of the sex of the team, then one can argue that women are excluded from higher paying jobs because they are generally not allowed to coach men's teams. Thus, with regard to the Equal Pay Act, coaches of both men's and women's teams should earn similar salaries. These types of analyses are plausible, but because they depend on a sex-neutral definition of coaching which is not generally accepted, they are more difficult to use successfully than a typical Title IX athletics analysis.¹²

In contrast to Title VII and the Equal Pay Act, Title IX appears to provide the best approach to the problem of employment discrimination in coaching intercollegiate athletics. To determine whether this is true, this article examines the regulations that implement Title IX to assess how the courts might apply them to the discrimination problem. As part of the analysis, the Investigator's Manual published by the Department of Education's Office of Civil Rights (OCR) is used to determine OCR's interpretation of the potentially applicable regulations.¹³ While not having the authority of law, OCR's interpretation may be persuasive to the courts because the Department of Education is the agency authorized to implement and enforce Title IX.¹⁴

In analyzing the applicability of Title IX to employment discrimination in intercollegiate athletics, this article will first discuss the regulatory framework of Title IX in order to differentiate between the athletics provisions and the employment provisions. This is followed by a discussion of the issue of decreased numbers of female coaches, in which application of the regulations is considered under the rubric of *Cohen v. Brown University*.¹⁵ Next is an analysis of the applicability of the regulations to the salary disparity issue, along with discussions of both *Tyler v. Howard University* and the Ninth Circuit's decision on the appeal of a denial of a preliminary injunction in *Stanley v. University of Southern Cali-*

12. For an examination of the arguments under a Title VII analysis, see text accompanying notes 70-72. For the arguments supporting an Equal Pay Act Analysis, see text accompanying notes 73-82.

13. V. Bonnette & L. Daniel, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL, Office for Civil Rights, Department of Education (1990) [hereinafter INVESTIGATOR'S MANUAL].

14. The courts typically defer to agency interpretations of the law since it is presumed that Congress intended to delegate regulatory authority to those agencies designated to implement federal statutes. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "The degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX." *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993).

15. *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993).

fornia.¹⁶ Finally, the article concludes that Title IX may indeed provide a remedy for employment discrimination in intercollegiate athletics.

II. RELEVANT TITLE IX REGULATIONS

Two major parts of the Title IX regulations bear on the issue of employment discrimination in coaching intercollegiate athletics. The first, Subpart D - Discrimination on the Basis of Sex in Education Programs and Activities Prohibited, includes athletics regulations under section 106.41. Section 106.41(c) requires that athletes of both sexes receive equal opportunities and lists ten factors to be considered in determining whether equal opportunity exists.¹⁷ These factors include the opportunity to receive coaching, section 106.41(c)(5), and the assignment and compensation of coaches, section 106.41(c)(6). It is important to note that (c)(5) and (c)(6) are only "factors" to be considered in assessing program-wide compliance, and thus are not necessarily sufficient in and of themselves to support a lawsuit.¹⁸ Equally important, (c)(5) and (c)(6) are found in the section mandating equal opportunities for athletes of an underrepresented sex.¹⁹ That is, section 106.41(c) addresses the sex of the athletes, not the sex of the coach.

16. *Tyler v. Howard Univ.*, No. 91-CA11239 (D.C. Super. Ct. 1993); *Stanley v. Univ. of Southern Cal.*, 13 F.3d 1313 (9th Cir. 1994).

17. The regulation provides:

(c) *Equal Opportunity*. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

34 C.F.R. § 106.41(c)(1993).

18. See INVESTIGATOR'S MANUAL, *supra* note 13, at 7-8.

19. 34 C.F.R. § 106.41 (c) (1993).

According to the Investigator's Manual, this may mean that any plaintiff alleging a violation of (c)(5) or (c)(6) may need to prove that a lack of coaches or lower compensation of coaches (whichever the specific case may be) has had a negative effect on the athletes.²⁰ To date, though, the courts have not required evidence that any factor listed in section 106.41(c) has resulted in inequitable opportunities for female athletes. More likely, the courts will construe a violation of these factors as *prima facie* evidence of inequitable treatment of athletes.

The second major part of the Title IX regulations that may bear on employment discrimination in intercollegiate athletics is Subpart E - Discrimination on the Basis of Sex in Employment in Education programs and Activities Prohibited, which contains the general education employment discrimination regulations.²¹ Section 106.51(a)(1) states that there shall be no sex discrimination in employment in educational institutions receiving federal funds.²² Section 106.51(a)(2) states that all employment decisions shall be made "in a nondiscriminatory manner and shall not limit, segregate, or classify . . . employees in any way which could adversely affect . . . employment opportunities or status because of sex." According to section 106.51(b), the Subpart E provisions apply to rates of pay²³ and job assignments.²⁴ Section 106.53 is the recruitment provision, which establishes that an institution shall affirmatively recruit members of the underrepresented sex to remedy past or present discrimination in hiring or recruitment.²⁵ Section 106.54

20. See INVESTIGATOR'S MANUAL, *supra* note 13, at 58.

21. The Supreme Court upheld the validity of the Title IX employment regulations in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), although it did so under the assumption that Title IX would be interpreted as program-specific—the interpretation rendered by the Court in *Grove City College v. Bell*, 465 U.S. 555 (1984), and later overturned by Congress in the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1988).

22. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance. 34 C.F.R. § 106.51(a)(1) (1994).

23. 34 C.F.R. § 106.51 (1994):

(b) The provisions of this subpart apply to:

.....

(3) Rates of pay or any other form of compensation, and changes in compensation.

24. *Id.* at § 106.51:

(b) The provisions of this subpart shall apply to:

.....

(4) Job assignments, classifications and structure, (including position descriptions, lines of progression, and seniority lists.

25. A recipient shall not recruit primarily or exclusively at entities which furnish as

is the compensation provision. Section 106.54(a) prohibits sex-based distinctions in pay, and section 106.54(b) utilizes language similar to the Equal Pay Act to prohibit unequal pay for equal work.²⁶

The employment regulations found in subpart E are not specific to athletic employment, nor are they directed at providing equal opportunities to athletes. Rather, they are intended to provide equity for employees at educational institutions receiving federal funds. As such, these regulations may provide a basis on which coaches might sue for sex-based employment discrimination without regard to the effect discrimination has on their athletes, and without having to prove program non-compliance with Title IX.

III. DIMINISHED NUMBER OF FEMALE COACHES

There has been a significant decrease in the percentage of female coaches over the past twenty years. According to a study performed by Acosta & Carpenter, in 1972 90% of coaches of women's sports were female, but in 1992 that figure dropped to 48%.²⁷ Furthermore, the study found that from 1982-1992, the number of head coaching jobs for women's teams increased by 812, but of those 812 only 181 went to women. Contrast this with the fact that 98% of the coaches of men's teams are male.²⁸ These statistics suggest that collegiate coaching jobs are sex-segregated: women have virtually no access to positions coaching men's sports, and it is no longer true that women hold a similar monopoly on coaching positions in women's sports. Can Title IX be used to address this drastic decline in the percentage of coaches who are female? The regulations with potential applicability are section 106.41(c)(5)—opportunity to receive coaching, section 106.41(c)(6)—assignment of coaches, and section 106.53—recruitment.

applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart. *Id.* at § 106.53 (b).

26. *Id.* at § 106.54:

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinction in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. *Compare to* Equal Pay Act, 29 U.S.C. § 206(d)(1).

27. R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, *Women in Intercollegiate Sport, A Longitudinal Study - Fifteen Year Update, 1977-1992*, at 5 (1992), available in Educational Resources Information Center (ERIC) database, ED 352 337, SP 034 188 (1992) [hereinafter ACOSTA & CARPENTER].

28. *Id.*

A. Opportunity to Receive Coaching—Section 106.41(c)(5)

According to the 1990 Title IX Investigator's Manual, section 106.41(c)(5) aims at equalizing the relative number of full-time and assistant coaches of women's sports compared to men's sports.²⁹ The Manual asserts that this aspect of coaching employment is OCR's primary focus.³⁰ The Manual emphasizes that although men's and women's programs might look equal when comparing fulltime equivalency ratios (FTE) of coaches to athletes, they may not in fact be equitable.³¹ Large numbers of football players may cause the FTEs to be equal, but women may in fact have fewer coaches per team, the result being less coaching time available to spend with the athletes (because of administrative duties, recruiting activities, fundraising demands, etc.).³² Enforcement of section 106.41(c)(5) will address this problem and should result in more coaches for women's teams. This conclusion is supported by the court's opinion in *Cohen v. Brown University*.

In *Cohen*, the district court granted a preliminary injunction to female athletes whose teams had been demoted to intercollegiate club status, restoring the teams to their former varsity status. Although the court granted the preliminary injunction solely upon a finding that the plaintiffs were substantially likely to prevail on their Title IX claim under section 106.41(c)(1), the court considered the potential violation of the other factors listed in section 106.41(c) in its dictum. In this portion, the court listed what it considered the most significant evidence plaintiffs presented to prove violation of these additional factors. In its discussion of section 106.41(c)(5), the court listed disparities in the numbers of full and part-time assistant coaches between men's and women's basketball, and similar disparities between coaches of men's and women's lacrosse, ice hockey, and crew teams.³³

The primary effect of enforcement of section 106.41(c)(5) will likely be to increase the number of assistant coaches for women's programs because most programs already have a full complement of head coaches in place. However, enforcement will not necessarily result in more *women* coaches being hired for these positions.

29. INVESTIGATOR'S MANUAL, *supra* note 13, at 55 (incorporating the OCR Intercollegiate Athletics Policy Interpretation, December 11, 1979, 44 Fed. Reg. 71413 *et seq.* (1979)).

30. *Id.* at 58.

31. *Id.* at 59.

32. *Id.* Football is justifiably expected to have a high number of assistant coaches due to the number of players and the injury rate.

33. *Cohen*, 809 F. Supp. 978, 997 (D.R.I 1992)(preliminary injunction granted), 991 F.2d 888 (1st Cir. 1993)(preliminary injunction affirmed).

It merely mandates equity in numbers of coaches—gender unspecified—between the men’s and the women’s programs.

B. Assignment and compensation of coaches—section 106.41(c)(6)

According to the Investigator’s Manual, section 106.41(c)(6) refers to coaching qualifications, specifically “training, experience, and other professional qualifications.”³⁴ The Manual warns that relatively new coaches with less experience than others may in fact be good coaches, and concludes that instead of comparing individual coaches, enforcement of this regulation requires proof of a pattern of assigning less qualified coaches to the women’s program.³⁵ In her testimony before Congress, Dr. Donna Lopiano asserted that athletic directors often will hire entry level coaches for women’s sports, but will solicit top-notch coaches from other jobs for men’s sports.³⁶ Establishing the existence of this kind of hiring pattern might prove inequity in assignment of coaches.

Thus, sections 106.41(c)(5) and (c)(6) might result in more and better coaches for women’s teams. Neither provision, however, requires female coaches to be hired to coach women’s teams, nor do they require half the coaches of men’s sports to be females. Therefore, these regulations don’t directly reach the problem of diminished numbers of female coaches. Rather, they focus on comparing numbers and quality of coaches regardless of the sex of those coaches. The Investigator’s Manual instructs investigators to seek information regarding coaching, teaching, and playing experience at all levels of sport, as well as information about an individual’s highest academic degree attained, without regard to the coach’s sex.

Two arguments could be made that hiring more females to coach women’s teams would enrich the quality of the coaching provided to the athletes: (1) female athletes need female role models; and (2) some research suggests that female coaches tend to be more qualified in terms of educational preparation and playing experience than their male counterparts.³⁷ With regard to the need

34. INVESTIGATOR’S MANUAL, *supra* note 13, at 58 (again following OCR Intercollegiate Athletics Policy Interpretation).

35. INVESTIGATOR’S MANUAL, *supra* note 13, at 60.

36. *Hearings*, *supra* note 8, at 12.

37. Male coaches do tend to have more years of experience—one study found male coaches averaged seventeen years of coaching experience versus ten years for women coaches. Annelies Knoppers, Barbara Bedker Meyer, Martha Ewing, & Linda Forrest, *Gender and the Salaries of Coaches*, 6 SOCIOLOGY OF SPORT J. 348, 353 (1989) [hereinafter

for female role models for female athletes, the argument is that having female role models enhances the quality of the sport experience for female athletes, enabling them to learn from and emulate women in leadership roles in sport, as well as receive mentoring toward a future coaching career. The lack of such role models may impede womens' ability to become coaches after their playing days are done. In support of this argument, Margaret Dunkle, director of the Equality Center in Washington, D.C., states that "[f]rom the student's perspective, it's a very subtle form of discrimination, like having a school with black students and white teachers. But if you also don't have black teachers in that school, you're sending a very specific message to those students."³⁸ The message is that female athletes can play, but cannot coach players, and cannot assume leadership positions in sport. In the analogous situation mentioned by Dunkle, courts have acknowledged that racial discrimination against teachers also discriminates against students.³⁹ Hiring practices that tend to exclude females from coaching positions should be viewed in the same manner.

Regarding the comparative quality of male versus female coaches, a 1993 study by the National Association of Athletics Compliance Coordinators found that 49% of men's basketball coaches have an advanced degree, compared to 46% of women's basketball coaches, 46% of Division I-A football coaches, 49% of Division I-AA football coaches, and 48% of coaches of all other sports. 63% of men's basketball coaches had physical education or education degrees, compared to 58% of women's basketball coaches, 67% of both Division I-A and I-AA football coaches, and 57% of coaches of all other sports.⁴⁰ The study, however, failed to specify male versus female coaches of women's basketball teams. Additionally, it grouped all sports besides football and basketball together regardless of gender.

This approach obscures information brought to light in other studies indicating that female coaches may be better prepared for the job. For example, in one study, Cynthia Hasbrook found that

Knoppers, et al.]. This is perhaps a result of the hiring pattern mentioned by Lopiano, the high turnover in low-paying women's coaching jobs, or a combination of these.

38. Wendy Olson, *A Title IX Paradox: More Female Athletes but Fewer Coaches*, L.A. TIMES, July 8, 1987, Sports section, at 3.

39. *United States v. Jefferson County Board of Education*, 372 F.2d 836, 883-86, (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967).

40. J. Gerdy, *Coaches Education Survey Results: Less Than Half Possess Master's Degree*, 4 OFFICIAL NEWSLETTER OF THE NATIONAL ASSOCIATION OF ATHLETICS COMPLIANCE COORDINATORS 1 (Summer 1993).

while 74% of the women who coach women's teams and 72% of the men who coach women's teams have intercollegiate playing experience, 75% of these women were physical education majors compared to only 46% of the men.⁴¹ Bischoff, in a 1988 study of Division I coaches of women's basketball, found that of the head coaches, 92% of the females had intercollegiate playing experience compared to 65% of the males; of the assistant head coaches, 96% of the females had intercollegiate playing experience versus 44% of the males; and of the assistant coaches, 95% of the females had intercollegiate playing experience compared to 42% of the males.⁴² Finally, Knoppers et al, in their 1989 study of gender and coaching salaries (analyzing Division I coaches of men's and women's sports, not including football), found that 93% of the female coaches had majored in physical education compared to 80% of the males. They also found that 92% of the female coaches had been varsity athletes, compared with 86% of the male coaches, a statistically significant difference. Finally, they found no significant difference in win/loss records between the sexes.⁴³

Based on these studies, one might conclude that men are hired for their years of work experience, without regard to the fact that women are more likely to have significant playing experience, more relevant educational preparation, and nearly identical coaching proficiency as measured by win/loss records. Hiring greater numbers of female coaches might result in better quality coaching being provided to female athletes, thus better fulfilling the intent of section 106.41(c)(6).

C. Recruitment—section 106.53

It must be kept in mind that section 106.41(c)(5) and (c)(6) are "factors" in assessing program compliance with Title IX, and might not stand alone as grounds for a Title IX suit. The Investigator's Manual makes clear that the intent of Subpart D is to create better women's programs, and that the relevant focus is discrimination against the athletes, not the coaches. Because most schools are currently in compliance with Title IX, these regulations may be a good way to get several higher quality coaches of either

41. W. Olson, *A Title IX Paradox: More Female Athletes but Fewer Coaches*, L.A. TIMES, July 8, 1987, Sports section, at 3.

42. J. Bischoff, *The Coaches of Division I Women's Basketball: Who Are They?*, at 4 (Nov. 9, 1988) (unpublished manuscript, presented at the North American Society for the Sociology of Sport Conference, Cincinnati, OH).

43. Knoppers, et al., *supra* note 37, at 352-53.

sex for women's teams. Perhaps the best approach to assuring that some of these coaches are female would be to use the recruitment regulation, section 106.53, in subpart E in conjunction with sections 106.41(c)(5) and (c)(6). Section 106.53 directly targets past discrimination in hiring and recruitment, and would require recruitment of female coaches, thus boosting the numbers of female candidates for coaching jobs.

IV. DISPARATE SALARIES

The 1992 National Collegiate Athletics Association (NCAA) gender equity study reported that for Division I-A, head coaches of men's sports (19 sports) received an average total of \$396,791 per year, whereas head coaches of women's sports (16 sports) earned an average total of \$206,106 — about half the total expenditure for the men. With regard to assistant coaches, the amounts were \$624,312 for men's sports, and \$118,897 for women's sports.⁴⁴ A 1994 Women's Basketball Coaches Association survey found that the average base salary for Division I women's basketball coaches is \$44,961 while men's basketball coaches average \$76,566.⁴⁵ This means that the women's base salary is 59% of the base for men's coaches.

The first decided case to focus on the salary issue was *Tyler v. Howard University*.⁴⁶ Since the plaintiff prevailed in *Tyler*, several universities have acted to avoid similar legal action, giving their women's basketball coaches raises to bring them to parity with the men's.⁴⁷ However, legal action has been initiated in several other

44. National Collegiate Athletics Association, NCAA Gender-Equity Study: Summary of Results, March 1992, p. 11. The higher figure for assistant coaches of men's teams is only partially explained by the fact that men's sports typically get more assistant coaches than women's sports.

45. Debbie Becker, *Coaches' Pay Sees Gender Gap*, USA TODAY, Jan. 25, 1994, at 1C; *Sidelines*, CHRON. HIGHER EDUC., Feb. 2, 1994, at A29.

46. *Tyler v. Howard Univ.*, No. 91-CA11239 (D.C. Super Ct. 1993).

47. The first of these was Virginia, which awarded Debbie Ryan \$106,000 for the 1992-93 season—the same as their men's basketball coach. The University of Iowa soon awarded Vivian Stringer a five-year contract at \$117,860, the same base salary as men's coach Tom Davis. Scott M. Reid, *Matching salaries for Men, Women a College Fad*, THE ATLANTA JOURNAL/THE ATLANTA CONSTITUTION, Mar. 13, 1994, at E6. Virginia Tech has granted Carol Alfano a four-year contract for the 1993-94 season at \$55,000 with five percent raises each year. Tennessee has awarded Pat Summitt a salary of \$110,000, whereas the men's basketball coach receives \$100,000. Texas Tech will pay Marsha Sharp \$100,000, whereas their men's coach is paid \$108,000. Ceal Barry at Colorado will receive a twenty percent raise to \$78,000, with a promise of \$95,000 for 1994-95, whereas the men's coach is receiving \$93,000. Finally, the University of Washington has awarded Chris Gobrecht a twenty percent raise to \$94,260, with a promise that she will receive the same salary as the men's coach (\$110,000)

cases. Complaints have been filed on hiring and compensation issues against Bowdoin College, the University of North Carolina at Charlotte, and Eastern Kentucky University.⁴⁸ Jolyn Montgomery, women's volleyball coach at North Dakota State University, filed a complaint with OCR in November 1992 claiming salary and other spending inequities and a disparity in the number of full-time coaches. Her complaint was still pending as of mid-April 1993.⁴⁹ Pam Bowers, former women's basketball coach at Baylor University, is suing under Title IX, claiming, among other things, that she has been compensated with an inequitable salary compared to the men's basketball coach.⁵⁰

Marianne Stanley, former women's basketball coach at the University of Southern California, is suing her university for \$8 million. She sought a three-year contract that would have brought her to parity by the third year with men's coach George Raveling. After she repeatedly refused offers for a lesser amount, she was terminated. Stanley is suing under both Title IX and the Equal Pay Act.⁵¹ USC is arguing that there is no Equal Pay Act violation

by July 1, 1995. Carol Herwig, *Equality of Salary Exception, Not Rule*, USA TODAY, Jan. 25, 1994, at 8C. There remain some glaring inequities, however, at universities with major women's basketball programs. At number seven-ranked Kansas, Marian Washington receives \$55,000 while the men's coach gets \$98,000. Also, at number sixteen-ranked Florida International, Cindy Russo earns \$45,000, whereas the men's coach receives \$115,000. *Id.*

Andy Landers, women's basketball coach at Georgia, one of the winningest women's basketball coaches of all time, came close to suing his university because he was being paid \$58,160, whereas the Georgia's men's basketball coach was earning \$99,080. If this lawsuit had been filed, it would have been an interesting test of the ability of Title IX to reach the salary disparity issue. Despite Women's Basketball Coaches Association counsel Tim Stoner's claims that Landers' case was a clear violation of both Title IX and the Equal Pay Act, a court might have found the Equal Pay Act inapplicable because Landers is male, rendering it impossible for him to claim sex discrimination in pay based on *his* sex. Title IX, however, might have helped in his case because it does establish compensation of coaches as a factor in gender equity. Scott M. Reid, *Landers' Pay: The Next Kemp Case?* THE ATLANTA JOURNAL/THE ATLANTA CONSTITUTION, Mar. 13, 1994, at E1. Resolution of this issue will have to wait, though, because the University of Georgia, under pressure, did award Andy Landers a significant raise. Debra E. Blum, *Pay Equity for Coaches*, CHRON. OF HIGHER EDUC., Apr. 6, 1994, at A53.

48. C. Grant & M. Curtis, *Judicial Action Regarding Gender Equity*, Unpublished compilation, drafted Apr. 19, 1993. OCR issued a letter of finding for the University of Maryland, Baltimore County, which found the university in violation with regard to participation opportunities, but not in opportunity to receive coaching or in compensation of coaches. *Id.*

49. *Id.*

50. Bowers Complaint, CA 94-CA239, filed April 6, 1994 (W.D. Texas); *Governmental Affairs Report*, THE NCAA NEWS, Apr. 27, 1994, at 13.

51. Debra E. Blum, *2 More Coaches of Women's Teams Go to Court to Press Claims of Sex Discrimination*, CHRON. OF HIGHER EDUC., Sept. 1, 1993, at A47, A48; Glenn M. Wong & Carol A. Barr, *Catching Up: An Update on Gender Equity and Butch Reynolds' Battle*

because the jobs are different. The university claims that the men's basketball coach must handle more pressure and responsibility because men's basketball brings in more revenue.⁵² In affirming the district court's denial of a preliminary injunction that would restore Stanley as head coach, the 9th Circuit agreed with USC. The court found that the men's basketball coach had more public relations and promotional duties than the women's basketball coach, and concluded that Stanley had failed to show that she should be paid the same as the men's coach.⁵³

A. Subpart D—Athletics Provisions

The Investigator's Manual asserts that if the opportunity to receive coaching and assignment of coaches are equivalent, sex-based differences in compensation of coaches probably will not establish that female athletes receive poorer coaching.⁵⁴ It is worth reiterating here that section 106.41(c)(6) on compensation of coaches is within Subpart D, with its focus on opportunities for women athletes, and not on equity for employees/coaches. The Manual admits, however, that because increasing emphasis is being placed on certain women's sports, differential compensation for coaches of those sports might result in lesser quality coaching compared to men's sports at those institutions.⁵⁵ This is because a university would have to pay more to attract a high quality coach away from a successful program.

The Manual and Policy Interpretation both recommend evaluating coaching compensation for women's sports versus men's sports using the following factors: rate of compensation; duration of the contract; conditions relating to contract renewal; experience; nature of coaching duties performed; working conditions; and other terms and conditions of employment.⁵⁶ According to the Manual, salary differences based on nondiscriminatory reasons are justifiable. Such reasons, according to the Policy Interpretation, include: range and nature of duties; experience of individual coaches; number of participants in particular sports; number of assistant coaches supervised; level of competition; and, individual outstand-

With the IAAF, *ATHLETIC BUSINESS*, Nov. 1993, at 10, 14; M. Ahmann, *The Story of Mari-
anne Stanley*, *COACHING WOMEN'S BASKETBALL*, Nov. 1993, at 34.

52. Wong & Barr, *supra* note 51, at 14.

53. *Athletics Notes*, *CHRON. OF HIGHER EDUC.*, Jan. 19, 1994, at A36.

54. *INVESTIGATOR'S MANUAL*, *supra* note 13, at 58.

55. *Id.* at 60.

56. *Id.* at 58.

ing record of achievement that justifies an abnormally high salary.⁵⁷ The Manual concedes that in light of the recent expansion of women's programs, these types of nondiscriminatory reasons for significant disparities in coaching compensation will be increasingly harder to establish.⁵⁸

Finally, the Manual suggests that the proportion of funds allocated to coaching should be approximately equivalent to the proportion of male to female participants in athletics. This Manual, published in 1990, pre-dates the federal appellate court decisions which utilize the Policy Interpretation's test comparing the proportion of participation opportunities to the proportion of males to females in the overall undergraduate student body.⁵⁹ In light of these decisions, OCR policy regarding allocation of coaching funds may need to be altered. The Manual concludes its discussion of the coaching compensation section by once again insisting that the focus of Subpart D is the sex of the athletes, and that for differential compensation to contribute to a finding of noncompliance, a plaintiff would have to provide evidence that it negatively affected the athletes.⁶⁰

Courts have mentioned compensation in three cases. In *Cohen v. Brown University*, the district court found that 72% of salary expenditures went to fifteen men's sports, and 28% to fourteen women's sports.⁶¹ The court determined that this could ultimately be a factor in finding Brown University in violation of Title IX, as would the disparity in opportunity to receive coaching that was also evident.⁶² In *Pitts v. Oklahoma*, Ann Pitts, head women's golf coach at Oklahoma State University, was awarded damages under Title VII and Title IX because her salary was approximately \$30,000 less than the men's golf coach.⁶³ In *Tyler v. Howard University*, Sanya Tyler, head women's basketball coach at Howard University since 1980, who had led her team to six conference ti-

57. *Id.* at 60.

58. *Id.*

59. See *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824 (10th Cir. 1993); *Favia v. Indiana Univ. of Pennsylvania*, 7 F.3d 332 (3d Cir. 1993).

60. The courts may disagree with the Manual here, and not require proof of a negative effect on athletes. That is, a court might assume that OCR listed those factors in § 106.41(c) as factors which may *presumptively* constitute unequal treatment of athletes. See *supra* text accompanying note 20.

61. *Cohen v. Brown Univ.*, 809 F. Supp. 978, 995 (D.R.I. 1992), *aff'd* 991 F.2d 888 (1st Cir. 1993).

62. *Id.* at 997.

63. *Pitts v. Oklahoma*, No. Civ-93-1341-A (W.D. Okla. 1994).

ties, was receiving a combined salary of \$62,000 for her duties as coach and associate athletics director, while the men's basketball coach, hired in 1990, was earning a base salary of \$78,000 and use of a car, for serving exclusively as coach.⁶⁴ Tyler sued for, among other things, sex discrimination based on salary under Title IX and the Equal Pay Act, seeking both damages and back pay. Following a jury award of \$2.39 million, the judge reduced the award to \$1.11 million because damages for lost wages had been awarded for each claim and were thus overlapping and excessive assessments.⁶⁵

B. Subpart E—General Employment Provisions

The complaint filed by Tyler's attorney made no attempt to connect coaching compensation with a negative effect on opportunities for women athletes.⁶⁶ It is possible, although unlikely, that the courts may agree with the Investigator's Manual that such proof should be required. In that case, instead of using the athletics provisions in Subpart D, the compensation section of the generic employment provisions (section 106.54 of Subpart E of Title IX) could be used as grounds for a claim such as Tyler's.

According to the Investigator's Manual, section 106.54 differs from the athletics provisions in Subpart D in that Subpart E focuses on the sex of the employee/coach, and not the sex of the athlete.⁶⁷ According to the Policy Clarification, section 106.54(a) is a Title VII analog, while section 106.54(b) is an Equal Pay Act analog, both of which focus on discrimination based on the sex of the employee.⁶⁸ The Policy Clarification draws the conclusion that lower salaries based on the sex of the athletes will not constitute a violation of section 106.54, especially because both males and females coach women's teams.⁶⁹ If, however, coaching a sport is defined in a sex-neutral manner, section 106.54 could apply.

The Policy Clarification does leave room for a Title VII type of disparate impact analysis. It states that where evidence exists

64. Wong & Barr, *supra* note 51, at 10; Carol Herwig, *Equality of Salary Exception, Not Rule*, USA TODAY, Jan. 25, 1994 at 8C.

65. Carol Herwig, *Coach Had to 'Make a Stand'*, USA TODAY, June 28, 1993, at 3C; Tyler v. Howard Univ., CA 91-CA11239, 2 (D.C. Super. Ct. 1993).

66. See generally Tyler Complaint, CA 91-CA11239, filed August 30, 1991 (D.C. Super. Ct.).

67. Policy Clarification—Title IX Coaching Compensation, issued June 27, 1983, included in Appendix E in the INVESTIGATOR'S MANUAL, *supra* note 13, app. E at 1.

68. *Id.* at 1-2.

69. *Id.* at 2.

that female coaches are excluded from jobs with higher compensation (e.g., coaching men's teams) without regard for their qualifications, a Subpart E violation may exist.⁷⁰ Since 99% of coaches of men's teams are male, lower pay for coaches of women's sports would probably constitute a violation under section 106.51 and section 106.54(a). It is true, as previously discussed, that two federal district court decisions in 1977 ruled that Title VII (section 106.54(a) analog) was inapplicable to alleged sex discrimination based on the sex of the athletes,⁷¹ but neither of these cases included evidence of the sex-segregated nature of coaching positions in athletics, which depresses salaries for coaches of women's sports. Both cases also failed to disregard sex of team in their definitions of the job of coaching. With a sex neutral definition of the job, this type of disparate impact argument might have allowed the plaintiffs to prevail.⁷²

The Title IX regulations may also make possible an Equal Pay Act type of argument. Under the Equal Pay Act, if the job is equal, involving similar skill, effort, and responsibility, and is performed under similar working conditions, then the pay must also be equal.⁷³ As an Equal Pay Act analog, section 106.54(b) can be interpreted with the aid of Equal Pay Act case law that addresses the problem of lower paid sex-segregated jobs. In *Hodgson v. Miller Brewing Company*,⁷⁴ the Seventh Circuit stated:

It is irrelevant that the male technicians in the Analytical Lab are now also receiving the lower wage or that the jobs in the MQC Lab are now open to women at the higher rate, since we have found those circumstances to be part of a plan to circumvent the Act's requirement that the wages of the women in the Analytical Lab be raised.⁷⁵

Thus, it could be argued that the mere fact that some low-paid women's basketball coaches are male should not damage an Equal Pay Act type of analysis under section 106.54(b).

Under this type of analysis, after the plaintiff has proved that the job is equal but the salary is not, the burden shifts to the de-

70. *Id.*

71. See *Kenneweg v. Hampton Township School Dist.*, 438 F. Supp. 575 (W.D. Pa. 1977); *Jackson v. Armstrong School Dist.*, 430 F. Supp. 1050 (W.D. Pa. 1977).

72. See R. Dessem, *Sex Discrimination in Coaching*, Appendix B of National Education Association, *NEA Research Memo: Title IX: Parity of Coaches' Salaries for Male and Female Athletic Teams*, 1979, at 38-39 [hereinafter Dessem].

73. Equal Pay Act, 29 U.S.C. §206(d)(1).

74. 457 F.2d 221 (1972).

75. *Id.* at 227; Dessem, *supra* note 72, at 42.

fendant to prove that the difference is justified by one of the Act's exceptions. The exception relevant to coaching is the catch-all exception in section (iv): "a differential based on any other factor other than sex."⁷⁶ As the Title IX Investigator's Manual states, non-discriminatory justifications for salary discrepancies in certain programs may be becoming increasingly hard to establish.⁷⁷ In the *Stanley* case, however, the Ninth Circuit found two such reasons to be legitimate: the difference in pressure and the difference in responsibility associated with coaching a "revenue-producing" men's sport.⁷⁸ A National Education Association staff attorney who prepared a memorandum on the issue of coaching compensation in athletics drew an analogy equating pressure in the medical profession with pressure in the coaching profession, and came up with the following response to the pressure argument:

To counter such an argument coaches may be obtained to testify that, to paraphrase the Fourth Circuit Court of Appeals, coaching "pressure" "is as much a function of attitude and experience" as it is of external factors; if such "pressure" does actually stem in part from external sources, it should be found to constitute merely "a peripheral part of [a coach's] employment."⁷⁹

Since the Equal Pay Act requires substantial similarity of jobs, and not absolute identity, peripheral pressure should not be a valid reason for large salary differences.

According to Dessem, a further response to the revenue-producing argument would be to determine whether the men's sport in question is indeed profitable.⁸⁰ In 1989, 34% of Division I-A men's basketball programs were operating at an annual average deficit of \$238,000; 74% of those at Division I-AA size schools at a deficit of \$199,000; 75% of those at Division I-AAA size schools at a deficit of \$223,000; 89-90% of those in Division II at a deficit of approximately \$100,000; and approximately 97% of those in Division III at a deficit of approximately \$28,000.⁸¹ One might conclude that most men's basketball programs produce large deficits rather than revenue. Furthermore, intercollegiate athletics are supposed

76. Equal Pay Act, 29 U.S.C. § 206(d)(1)(iv).

77. INVESTIGATOR'S MANUAL, *supra* note 13, at 60.

78. *Stanley v. Univ. of Southern Cal.*, 13 F.3d 1313, 1322-23 (9th Cir. 1994).

79. *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 290 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975), *quoted in* Dessem, *supra* note 72, at 46 n.9.

80. Dessem, *supra* note 72, at 46 n.9.

81. Mitchell H. Raiborn, *Revenues and Expenses of Intercollegiate Athletics Programs: Analysis of Financial Trends and Relationships, 1985-1989*, NCAA PUBLICATION, 1990, at 60.

to be an educational activity. As such, whether or not they produce revenue should be as irrelevant to coaching compensation as it is to the inclusion of football and men's basketball in the overall equity equation.

A final objection to the revenue-producing/pressure argument is the following:

Pressure and spectators [and the income brought in by a sport] are often determined by other factors which may be discriminatory. As long as male sports are enhanced by the attendance of cheerleaders, bands, pep squads, the press, the school principal and the superintendent, as long as they are seen as the school's representatives in traditional rivalries and are the recipients of the major school awards, and as long as they are scheduled in prime time at the most convenient locations, girls' sports will not be their equal. Thus pressure and the number of spectators may be directly related to the unequal treatment of the two programs [or to the fact that girls' teams have only been recently added to a school athletic program].⁸²

In other words, the reason that women's sports often have fewer spectators and a lower expected revenue generation is precisely because they have been treated unequally throughout the history of American sport. The logical conclusion is that a university should not be allowed to use the results of past discrimination to justify current discriminatory practices. Such a justification would be plainly contrary to the remedial intent of Title IX.

V. CONCLUSION

It is possible that Title IX can be used to remedy coaching salary inequities, disparities in numbers of coaches and coaching quality, and perhaps even the diminished numbers of female coaches in intercollegiate athletics. Using the athletics provisions in section 106.41 of the federal regulations implementing Title IX should result in more coaches of higher quality for women's teams, but not necessarily more female coaches. If used in conjunction with the recruitment regulation (section 106.53) and supporting data that indicate that qualified female coaches do exist, these regulations may stimulate hiring of more female coaches for women's teams.

The athletics provisions in section 106.41 can be used to reach

82. *Women's Equity Action League (WEAL) Fund, Some Thoughts on the Equal Pay Act and Coaching Salaries 6-7 (1977)*, quoted in Dessen, *supra* note 72, at 46 n.9.

inadequate compensation for women's teams coaches if this inequity is established as a factor in program noncompliance (with the possible further requirement of proving that the lower salaries have a negative effect on the quality of coaching received by the athletes). If coaching is defined without regard to sex of team, the employment provisions in section 106.51 and section 106.54 can reach the salary disparity problem. Under section 106.54(a), the plaintiff would need to prove that the sex-segregated nature of collegiate coaching has had a disparate impact on women's salaries that is not vitiated by the existence of low-paid male coaches of women's teams. Alternatively, section 106.54(b) of the employment provisions could be used to support an Equal Pay Act type of analysis in which the plaintiff would need to establish performance of the same job as a men's team coach but at an inferior salary if, once again, this argument is not vitiated by the existence of low-paid male coaches of women's teams. To use the Equal Pay Act type of analysis, a plaintiff will most likely have to overcome the argument that coaching a men's team is different because of the pressure and responsibilities associated with revenue-producing sports.⁸³

Little judicial opinion exists with respect to these issues, making it unclear which, if any, of these approaches will be persuasive. The *Cohen* case has provided us with the first indication that the courts will take seriously the opportunity to receive coaching, but no court has yet faced the issue as to whether additional coaches should be female. The *Stanley* case, to be tried on the merits in the summer of 1996, might eventually provide the first full judicial opinion on the issue of salary disparity between men's and women's coaches in intercollegiate athletics.

83. In non-revenue-producing sports, such as golf and tennis, this type of argument should, of course, present no obstacle to the Equal Pay Act type of analysis.