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COMMENT

TITLE IX'S PROMISE OF EQUALITY OF OPPORTUNITY IN ATHLETICS: DOES IT COVER THE BASES?

*Equal education opportunity for women is the law of the land—and it will be enforced.*¹

*Equal Funding Said Not Necessary*²

INTRODUCTION

Widespread discrimination has been practiced against females in the United States since the founding of the nation.³ Societal stereotypes and the common law have combined to confine women to a different and generally inferior status.⁴ In

¹ Statement by Caspar W. Weinberger, Secretary of Health, Education and Welfare, in Washington, D. C., June 3, 1975.

² Lexington Herald, June 6, 1975, at 16, col. 1.

³ See generally Bayh, *The Equal Rights Amendment*, 6 IND. L. REV. 1 (1972); Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 NEB. L. REV. 131 (1968). For accounts of the legal status of women in English and American history, see E. FLEXNER, *CENTURY OF STRUGGLE* (1959); L. KANOWITZ, *WOMEN AND THE LAW* (1969); Crozier, *Constitutionality of Discrimination Based on Sex*, 15 BOSTON U. L. REV. 723 (1935); Note, *Sex Discrimination and the Constitution*, 2 STAN. L. REV. 691 (1950). On the prevalence of discrimination in the American legal system today see in addition to the above materials, PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, *AMERICAN WOMEN* (1963); THE PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, *REPORT: A MATTER OF SIMPLE JUSTICE* (1970) [hereinafter cited as *SIMPLE JUSTICE*]; Cavanagh, "A Little Dearer Than His Horse": *Legal Stereotypes and the Feminine Personality*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260 (1971); Seidenberg, *The Submissive Majority: Modern Trends in the Law Concerning Women's Rights*, 55 CORN. L. REV. 262 (1970); *Hearings, The Equal Rights Amendment*, S.J. Res. 61, 91st Cong., 2d Sess., Senate Subcommittee on Constitutional Amendments (May 1970); *Hearings on Section 805 of H.R. 16,098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *Discrimination Against Women*]; *Hearings on S.J. Res. 61 & S.J. Res. 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (Sept. 1970) [hereinafter cited as *Hearings*]; *Hearings on H.R. 208 Before the Subcomm. on Equal Opportunities of the Comm. on Education and Labor*, 93rd Cong., 1st Sess. (1973) [hereinafter cited as *Women's Educational Equity*].

⁴ Brief for National Federation of Business and Professional Women's Clubs, Inc. as Amicus Curiae at 8, *Reed v. Reed*, 404 U.S. 71 (1971);

The evidence is overwhelming that persistent patterns of sex discrimination permeate our social, cultural and economic life. Much of this discrimination is directly attributable to state action, both in maintaining archaic discrimi-

the past, the subordination of more than half the population has been widely accepted as natural or necessary or divinely ordained.⁵ Women crusaded in the late 19th and early 20th centuries to obtain the vote, but only recently has the women's liberation movement challenged the denial of other legal rights and opportunities as well as the retention of stereotyped roles for women and men.⁶ Despite the recent impetus for change, or perhaps because of it, "major remnants of the common law's discriminatory treatment of women persist in the laws and institutions of all states."⁷ Title IX of the Education Amendments of 1972⁸ (Title IX) and its implementing regulations⁹ purport to correct this imbalance in education.

Although equality of opportunity has been called the "most basic doctrine in our country's social policy,"¹⁰ there is no doubt that "present educational programs in the United States are inequitable as they relate to women and limit their full participation in American society."¹¹ "The early education and socialization of children play a large part in the develop-

natory laws and in tolerating and perpetrating discriminatory practices in employment, education and other areas That the majority of our population should be subjected to the indignities and limitations of second-class citizenship is a fundamental affront to personal human liberty.

⁵ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring): Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

The genesis of such thought is cited to such Biblical passages as:

And the Lord God caused a deep sleep to fall upon Adam, and he slept: and he took one of his ribs, and closed up the flesh instead thereof; And the rib, which the Lord God has taken from a man, made he a woman.

Genesis 2:21.

⁶ PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS (1963) [hereinafter cited as REPORT].

⁷ Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 872-73 (1971).

⁸ 20 U.S.C. § 1681 (Supp. 1973).

⁹ HEW Regs., 45 C.F.R. § 86 (1975).

¹⁰ GILES, *THE INTEGRATED CLASSROOM* 105 (1959).

¹¹ *Women's Educational Equity*, *supra* note 3, at 1. These hearings occurred after passage of Title IX but before regulations were created to enforce the legislation.

ment of attitudes and career motivation."¹² If schools are to provide for the needs of females in light of the realities of large numbers of working women, nondiscriminatory laws and the new recognition of women's rights, those schools must move beyond the educational opportunities that have traditionally existed. Title IX is a legislative attempt to provide educational opportunities for women by making all aspects of the educational process nondiscriminatory,¹³ a necessary commitment following earlier national policy entitling women to total equality in employment.¹⁴ Title IX was enacted by Congress on June 23, 1972.¹⁵ On June 20, 1974, the Department of Health, Education, and Welfare (HEW) published its proposed implementing regulations.¹⁶ On July 21, 1975, more than three years after enactment of the bill,¹⁷ the final HEW regulations¹⁸ went into effect to insure that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or

¹² 121 CONG. REC. S 13,528 (daily ed. July 24, 1975) (remarks of Senator Clark).

¹³ *Women's Educational Equity*, *supra* note 3, at 230: "Growing up equal is not growing up in the same ways but rather growing up with opportunities that permit each person to develop and grow in ways that are consistent with their values, culture and potential."

¹⁴ SIMPLE JUSTICE, *supra* note 3, *excerpted* in 117 CONG. REC. 30, 405-06 (1970):

What this Task Force recommends is a national commitment to basic changes that will bring women into the mainstream of American life. Such a commitment, we believe is necessary to healthy psychological, social and economic growth of our society Discrimination in education is one of the most damaging injustices women suffer. It denies them equal educational and equal employment opportunity, contributing to a second class self image.

See also *Women's Educational Equity*, *supra* note 3, at 165.

¹⁵ Pub. L. No. 92-318, Title IX, § 901, 86 Stat. 373 (June 23, 1972).

¹⁶ HEW Regs., 39 Fed. Reg. 22, 232 (1974).

¹⁷ The long delay between enactment of Title IX and publication of the final implementing regulations is evidence of the care with which HEW proceeded in attempting to formulate workable, reasonable standards. Telephone inquiry to Frank Kreuger, General Counsel, Office of Civil Rights, Department of Health, Education and Welfare, Washington, D.C., July 25, 1975 [hereinafter cited as Telephone inquiry]; H.E.W., Office of Civil Rights, Memorandum to Chief State School Officers, Superintendents of Local Educational Agencies and College and University presidents—Subject: Elimination of Sex Discrimination in Athletic Programs 3 (Sept. 1975) [hereinafter cited as HEW Memorandum].

¹⁸ HEW Regs., 45 C.F.R. § 86 (1975).

be subjected to discrimination under any education program or activity receiving Federal financial assistance¹⁹

HEW takes the position that physical education and athletics constitute an integral part of the educational processes of schools and colleges,²⁰ and that, as such, they are fully subject to the requirements of Title IX, even if federal funds are not directly allocated to the schools' athletic programs.²¹ However, the regulations attempt to balance the vested interests of educational institutions with the goal of equality of opportunity for women in this particular area. As Secretary Weinberger indicated when HEW's final regulations were presented:

We wanted to eliminate the very evident and obvious discrimination that has taken place against women in athletics and sports over the years, mostly unconsciously, I think, by the schools. At the same time, we did not want to disrupt the entire pattern of American college life, or indeed a large part of American life itself I think this regulation will . . . enhance markedly the opportunities for women in athletics. But, it will also allow schools certain flexibility.²²

The HEW regulations regarding physical education and athletics rely upon the reasoning and distinctions developed in the court cases which were decided in the interim between the enactment of Title IX and the promulgation of the regulations and which addressed the fourteenth amendment equal protection argument.²³ Reliance upon such cases is questionable, however, because the small number of fourteenth amendment cases deal chiefly with high school education whereas "[t]he biggest problem in this country . . . is with higher education

¹⁹ 20 U.S.C. § 1681 (Supp. 1973). For purposes of Title IX, educational institutions include any public or private preschool, elementary school, or secondary school or any institution of vocational, professional, or higher education.

²⁰ 40 Fed. Reg. 24,134 (1975).

²¹ For legislative history, see 117 CONG. REC. 39,256 (1970) (remarks of Representative Green). See also HEW Memorandum, *supra* note 17. The direct statement of HEW's interpretation appears at 40 Fed. Reg. 24,134 (1975).

²² Press Conference of Caspar W. Weinberger, Secretary of Health, Education and Welfare, in Washington, D.C., June 3, 1975 [hereinafter cited as Press Conference].

²³ 40 Fed. Reg. 24,134 (1975). See, e.g., *Brenden v. Independent School Dist.* 742, 477 F.2d 1292 (8th Cir. 1973); *Morris v. Michigan State Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973); *Bucha v. Illinois High School Ass'n.*, 351 F. Supp. 69 (N.D. Ill. 1972); *Haas v. South Bend Community School Corp.*, 289 N.E. 2d 495 (Ind. 1972).

and there is now not one institution of higher learning which is in compliance [with the final regulations] The discrepancy between the amount of money being spent on men and that on women is astronomical."²⁴ In addition, the fourteenth amendment equal protection analysis limits judicial inquiry to the scope delineated by Supreme Court cases rather than permitting an absolute determination of what constitutes equality of opportunity in athletics. Whether the enhanced opportunity envisioned by Secretary Weinberger and equal opportunity, as Title IX purports to provide, are the same is uncertain. The prerequisite to resolution of this question is a determination of the nature of equal opportunity for women in athletics.

I. THE EQUAL PROTECTION STANDARDS: AN OVERVIEW

Most of the court cases brought by female athletes were decided within the three-year time period between congressional recognition of sexual discrimination in education²⁵ and the implementation of the Title IX regulations.²⁶ In the absence of notice to state and local school officials that Title IX had been passed and was applicable to them²⁷ and without working procedures under Title IX,²⁸ the plaintiffs challenged rules bar-

²⁴ Telephone inquiry, *supra* note 17.

²⁵ *Discrimination Against Women*, *supra* note 3. These hearings, chaired by Edith Green, were the first congressional recognition of sex discrimination in education. The topic of athletics was not raised.

²⁶ HEW Regs., 45 C.F.R. § 86 (1975). For thorough discussions of many of these cases see Fabri and Fox, *The Female High School Athlete and Interscholastic Sports*, 4 J. LAW & ED. 285 (1975) [hereinafter cited as Fabri and Fox]; Stroud, *Sex-Discrimination in High School Athletics*, 6 IND. L. REV. 66 (1973) [hereinafter cited as Stroud]; Note, *The Case for Equality in Athletics*, 22 CLEV. ST. L. REV. 370 (1973); Note, *Sex Discrimination in High School Athletics*, 57 MINN. L. REV. 339 (1972) [hereinafter cited as *Sex Discrimination*]; Note, *Sex Discrimination in High School Athletics Unreasonable*, 19 N.Y.L.F. 166 (1973); Comment, *Equality in Athletics: The Cheerleader v. The Athlete*, 19 S. DAK. L. REV. 428 (1974) [hereinafter cited as *Equality in Athletics*]; Comment, *Sex Discrimination in Interscholastic High School Athletics*, 25 SYRACUSE L. REV. 535 (1974) [hereinafter cited as *Female Athletics*].

²⁷ State and local school administrators and staff were not notified of Title IX legislation until February 1973, although the measure was passed in June 1972. See *Women's Educational Equity*, *supra* note 3, at 231.

²⁸ *Id.* at 275: "[T]he charges we have filed against schools that stand in violation of the law are yet to be investigated [due to the absence of regulatory guidelines]." Statement of Ellen Morgan, Coordinator, Task Force on University Compliance, Princeton, N.J.

ring girls from boys' athletic teams with the constitutional argument that such rules deny female athletes equal protection of the law under the fourteenth amendment.²⁹

The function of the equal protection clause is to insure that a state classifying statute treats alike all those and only those persons who are similarly situated with respect to the purpose of the statute.³⁰ It is recognized that in order to achieve a variety of legitimate ends, a government often must classify its citizens into various groups and, on the basis of the classification, treat one group differently than another.³¹ Two distinct standards of review have evolved to determine whether such unequal treatment is valid under the equal protection requirement. Permissive review, or the rational relationship test, is the traditional standard.³² Under this approach, a court will defer to the legislative judgment if there is a rational relationship between a legitimate governmental purpose and the classification.³³ A court will not "cross-examine either actually or argumentatively the mind of the . . . legislators nor question their motives."³⁴ Only if the classifying criteria are "wholly unrelated" to the governmental purpose will the statute be overturned.³⁵ The burden of showing the invalidity of the classification rests on the person challenging it.³⁶ "There is in effect a presumption that the rule or program does not violate the equal protection guarantee."³⁷ Active review, or "strict scrutiny," is

²⁹ U.S. CONST. amend. XIV, § 1 provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

³⁰ *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886). For a comprehensive treatment of equal protection, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments*].

³¹ *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954). See also *Sex Discrimination*, *supra* note 26, at 340.

³² *Developments*, *supra* note 30, at 1084-86.

³³ See, e.g., *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971); *McGowan v. Maryland*, 366 U.S. 420 (1961). The court does not look for the probable "real" purpose but for a purpose that is legitimate.

³⁴ *Goesaert v. Cleary*, 335 U.S. 464, 466-67 (1948).

³⁵ For cases in which this standard was applied, see *Schilb v. Kuebel*, 404 U.S. 357 (1971); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

³⁶ See, e.g., *Kotch v. Board of River Port Pilots Comm'rs*, 330 U.S. 552 (1947). See generally, *Developments*, *supra* note 30, at 1077-87.

³⁷ *Sex Discrimination*, *supra* note 26, at 342. This standard is commonly used in fiscal and regulatory affairs and has been applied to social welfare programs as well.

used when fundamental interests³⁸ or suspect classifications³⁹ are involved. In such cases, the state has the burden of proving that it had a "compelling interest" for creating the classification;⁴⁰ mere administrative convenience will not meet the burden.⁴¹

In general, judicial application of the equal protection clause to invalidate sex discrimination has developed slowly.⁴² As late as 1963, the Committee on Civil and Political Rights, President's Commission on the Status of Women, noted: "In no 14th amendment case alleging discrimination on account of sex has the United States Supreme Court held that a law classify-

³⁸ *Boddie v. Connecticut*, 401 U.S. 371 (1971) (divorce); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (interstate travel); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (marital privacy); *Reynolds v. Sims*, 377 U.S. 533 (1964) (voting); *Sherbert v. Verner*, 374 U.S. 398 (1963) (practice of religion); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (freedom of association); *Griffin v. Illinois*, 351 U.S. 12 (1956) (criminal appeals when granted as a matter of right); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (procreation); *Truax v. Raich*, 239 U.S. 33 (1915) (right to employment).

³⁹ *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimacy); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (wealth); *Oyama v. California*, 332 U.S. 663 (1948) (nationality); *Korematsu v. United States*, 323 U.S. 214 (1944) (race); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (alienage). *But see* *Labine v. Vincent*, 401 U.S. 532 (1971) (illegitimacy). Suspect classifications are those which historically have been used as a technique for depriving a certain class of people of opportunities available to others.

⁴⁰ *Loving v. Virginia*, 388 U.S. 1, 9 (1967). *See also* *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (purpose is subject to "the most rigid scrutiny").

⁴¹ *Reed v. Reed*, 404 U.S. 71, 76 (1971). *See* *Stanley v. Illinois*, 405 U.S. 645 (1972); *Carrington v. Rash*, 380 U.S. 89 (1965).

⁴² *See generally* Getman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 SUPREME COURT REV. 157; Gunther, *The Supreme Court 1971-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther]; Johnson & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675 (1971); Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965); Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971). Until recently, classifications based on sex were almost always upheld. In *Muller v. Oregon*, 208 U.S. 412 (1908), the Court upheld maximum working hours for women on the basis that women required special treatment which the legislature could properly provide. The Court based its holding partly on the physical capabilities of women. *Id.* at 421. In *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948), the Court upheld a statute that prohibited women from holding bartending licenses unless they were wives or daughters of male bar owners on the ground that there was a rational relationship between the statute and the legitimate governmental interest in avoiding "moral and social problems."

ing persons on the basis of sex is unreasonable and therefore, unconstitutional."⁴³ Although sex as a classification is currently subject to scrutiny by the courts under the equal protection doctrine,⁴⁴ the Supreme Court has refused to grant sex the strict scrutiny due a suspect status.⁴⁵ Since 1971, when the Supreme Court decided *Reed v. Reed*,⁴⁶ the Court's formula for the equal protection analysis of dissimilar treatment of males and females is that "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"⁴⁷ As a result of this hybrid basis for review,⁴⁸ a rule which treats males and females differently will be examined to determine if it is actually accomplishing the purpose used to justify its creation. However, the burden of proving that there is no fair and substantial relation between the classification and the object of the legislation remains with the plaintiff.⁴⁹

⁴³ Report, *supra* note 6, at 34.

⁴⁴ *Reed v. Reed*, 404 U.S. 71, 77 (1971); *Brenden v. Independent School Dist. 742*, 477 F.2d 1292, 1296 (8th Cir. 1973).

⁴⁵ *Frontiero v. Richardson*, 411 U.S. 677 (1973). In this opinion, Justices White, Marshall, Douglas, and Brennan found classifications based on sex to be inherently suspect as invidious discrimination: "[W]e can only conclude that classifications based on sex, like classifications based on race, alienage, or national origin are inherently suspect and must therefore be subjected to strict judicial scrutiny." *Id.* at 688. However, Chief Justice Burger and Justices Blackmun and Powell concurred only in holding the sex-based statutory scheme unconstitutional, finding authority for this conclusion in *Reed v. Reed*, 404 U.S. 71 (1971), which "did not add sex to the narrowly limited group of classifications which are inherently suspect." 411 U.S. at 692 (Powell, J., concurring). Rejection or ratification of the equal rights amendment was considered more appropriate for determining whether classification by sex should require strict scrutiny. *Id.* Justice Stewart agreed with Justices Burger, Blackmun, and Powell, but on the grounds of "invidious discrimination." Justice Rehnquist dissented. See generally *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 57, 116-25 (1973). Compare *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) in which the California Supreme Court designated sex a suspect classification: "Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by accident of birth"; as a basis for classification, it "frequently bears no relation to ability to perform . . ." *Id.* at 540, 95 Cal. Rptr. at 340. This decision was handed down six months before *Reed*.

⁴⁶ 404 U.S. 71 (1971).

⁴⁷ *Id.* at 76, citing *Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920).

⁴⁸ For an excellent discussion of the hybrid model, see Gunther, *supra* note 42. He sees an evolution of rationality scrutiny, as opposed to the strict scrutiny or rational relationship tests.

⁴⁹ *Id. Contra*, *Brenden v. Independent School Dist. 742*, 477 F.2d 1292, 1300 (8th

The Supreme Court has also refused to declare education a fundamental interest.⁵⁰ Therefore, while there has been a consensus since 1954 as to the importance of education in American life,⁵¹ plaintiffs cannot demand application of the strict scrutiny test on this ground either. Because the primary right to education is not recognized, the subsidiary rights to physical education in the curriculum and to interscholastic sports programs within that physical education curriculum are not enforceable as fundamental interests worthy of strict judicial scrutiny.⁵² Given the difficulty of applying the ambiguous equal protection standard used in sex discrimination cases and the inability to assert the fundamental right to education, it is not surprising that the cases involving women in athletics do not articulate a clear standard as a basis for the decisions.⁵³

Cir. 1973). This case shifted the burden of proof to the defendant: "We believe that in view of the nature of the classification and the important interests of the plaintiffs involved, the High School League has failed to demonstrate that the sex-based classification fairly and substantially promotes the purposes of the League's rule."

⁵⁰ *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973): "Education, of course, is not among the rights afforded explicit protection under the Federal Constitution." *Id.* at 35.

⁵¹ *Brown v. Board of Education*, 347 U.S. 483, 493 (1954): "Today, education is perhaps the most important function of state and local governments . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education." *See also* SIMPLE JUSTICE, *supra* note 3, at 7: "Discrimination in education is one of the most damaging injustices women suffer. It denies them equal education and equal employment opportunity, contributing to a second class self image."

⁵² However, discrimination in high school interscholastic athletics has been recognized as constituting discrimination in education. *See* *Bunger v. Iowa High School Athletic Ass'n*, 197 N.W.2d 555 (Iowa 1972); *Thompson v. Barnes*, 200 N.W.2d 921 (Minn. 1972). *See also* *Female Athletes*, *supra* note 26, at 535, citing SPORTS ILLUSTRATED, May 28, 1973 at 88: "There may be worse (more socially serious) forms of prejudice in the United States, but there is no sharper example of discrimination today than that which operates against girls and women who take part in competitive sports . . ."

⁵³ Plaintiff-athletes have won the following cases: *Brenden v. Independent School Dist.* 742, 477 F.2d 1292 (8th Cir. 1973) (tennis, cross-country running and skiing); *Morris v. Michigan State Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973) (tennis); *Reed v. Nebraska School Activities Ass'n*, 341 F. Supp. 258 (D. Neb. 1972) (golf); *Haas v. South Bend Community School Corp.*, 289 N.E.2d 495 (Ind. 1972) (golf). Suits decided for the defendant are *Bucha v. Illinois High School Ass'n*, 351 F. Supp. 69 (N.D. Ill. 1972) (swimming); *Harris v. Illinois High School Ass'n*, No. 72-25 (S.D. Ill., April 17, 1972) (tennis); *Hollander v. Connecticut Interscholastic Athletic Ass'n*, No. 12-49-27 (Super Ct. of New Haven Co., Conn., March 19, 1971) (track); *Gregorio v. Board of Educ. of Asbury Park*, No. A-1277-70 (Super Ct. of N.J., App. Div., April 5, 1971) (tennis).

II. DEVELOPMENT OF EQUAL PROTECTION STANDARDS FOR ATHLETIC DISCRIMINATION SUITS

The challenges to segregated athletic programs have arisen in two situations: (1) Girls have wanted to participate on boys' teams when no girls' teams had been provided, and (2) girls have sought to participate on boys' teams even when a girls' team was offered. The plaintiffs' equal protection argument is not that they have an absolute constitutional right to participate in interscholastic athletics, but that they have a right to play if they qualify under the neutral criteria normally used to select a team and that they can not be precluded from playing solely because they are female.⁵⁴ Initially, the courts reacted protectively, in keeping with the attitudes of the time. They had difficulty accepting the fact that women were interested in participating in sports at all. No precedent existed for application of the equal protection clause to women's participation in athletics, and as a result, the courts vacillated in their attempts to determine what interests deserved equal protection.

A. Cases in Which Teams Are Not Provided for Women

*Hollander v. Connecticut Interscholastic Athletic Conference*⁵⁵ was one of the earliest cases to deal with the issue of male and female athletic segregation. The court refused to enjoin the enforcement of a rule forbidding the plaintiff's participation on the track team. Because it applied the rational relationship test, which is satisfied by finding *any* legitimate state purpose related to the classification, the court made no attempt to determine whether the classification bore a substantial relation to any legitimate objective of the rule. Instead, the court found partial justification for the rule in the fact that it reflected the customs and traditions of sports.⁵⁶ Another ra-

⁵⁴ Brief for Appellant at 71-75, *Haas v. South Bend Community School Corp.*, 289 N.E.2d 495 (Ind. 1972).

⁵⁵ No. 12-49-27 (Super Ct. of New Haven Co., Conn., March 29, 1971), *appeal dismissed*, 295 A.2d 671 (Conn. 1972) (mem.); *See Equality in Athletics*, *supra* note 26, at 433 n. 32: "This dispute was settled by agreement. The Association agreed to amend its regulations to permit girls to compete in noncontact sports where no team existed for girls. ACLU Women's Rights Project, Legal Docket, docket number WR 1001 (Aug. 1973)."

⁵⁶ The court took judicial notice that important athletic events always involve

tionale for upholding the rule was the court's belief that competition between males and females would probably produce psychological damage to members of both groups.⁵⁷ Essentially, the court based this theory on stereotyped images of men and women:

[T]he present generation of our male population has not become so decadent that boys will experience a thrill in defeating girls in running contests With boys vying with girls in cross-country running and indoor track, the challenge to win, and the glory of achievement, at least for many boys, would lose incentive and become nullified. Athletic competition builds character in our boys. We do not need that kind of character in our girls, the women of tomorrow.⁵⁸

The approach of the *Hollander* court was supplanted by the standard enunciated by the Supreme Court in *Reed v. Reed*,⁵⁹ but *Reed* left gaps in the reasoning necessary to reach the female athlete's legally protectable interest where no team had been provided for her. Nevertheless, the implications favorable to women in *Reed* caused courts to examine more closely the rules excluding women from athletic participation.

In *Haas v. South Bend Community School Corp.*,⁶⁰ a proven female athlete challenged a rule of the Indiana High School Athletic Association which stated: "Boys and girls shall not be permitted to participate in interschool athletic games as mixed teams, nor shall boys' teams and girls' teams participate

segregated competition and observed: "Does this not signify that in the athletic world, by tradition and custom, it was never contemplated as a matter of policy that males and females be joined together on a team and compete with other teams or similar groups so composed?" *Hollander v. Connecticut Interscholastic Athletic Conference*, No. 12-49-27, at 19-20 (Super. Ct. of New Haven Co., Conn., March 29, 1971).

⁵⁷ The theory is that in direct competition the girl would not be able to win and therefore might be psychologically damaged; boys would lose incentive to win and might be denied the opportunity for character building. See, e.g., *Gregorio v. Board of Educ. of Asbury Park*, No. C-1988-69 (Super. Ct. of N.J., Ch. Div., Monmouth City, April 13, 1970). Arguments concerning potential psychological damage have been confusing and the testimony has been inconclusive. Even expert witnesses have not been able to concur on who might be damaged. See generally *Sex Discrimination*, *supra* note 26 at 352; *Female Athletes*, *supra* note 26, at 551.

⁵⁸ *Hollander v. Connecticut Interscholastic Athletic Conference*, No. 12-49-27, at 12 Super. Ct. of New Haven Co., Conn., (March 29, 1971).

⁵⁹ 404 U.S. 71 (1971).

⁶⁰ 289 N.E.2d 495 (Ind. 1972).

against each other in interschool athletic contests."⁶¹ No golf team for females was provided at the plaintiff's school. Although she shot a qualifying score, the plaintiff was not permitted to join the male team because of the Association rule. She charged that the rule discriminated against her on the basis of sex in violation of the equal protection clause.⁶² The trial court held that the rule was constitutionally valid. On appeal, the Supreme Court of Indiana reversed the decision by a three to two vote, an indication of judicial indecision on this issue.⁶³

The court, emphasizing that the problem of contact sports was not at issue in this case,⁶⁴ employed a reasonableness standard of review.⁶⁵ It considered two governmental interests which could arguably be served by the rule: prevention of an increase in the cost of administering interscholastic athletics,⁶⁶ and protection of girls' athletic programs.⁶⁷ To support the contention that allowing girls to play on boys' teams would have an adverse effect on the development of girls' athletic programs, the court reasoned that if girls were permitted to try out for boys' teams, it would necessarily follow that boys would have to be allowed to try out for girls' teams. Because, as a

⁶¹ Indiana High School Athletic Association By-Laws, Rule 9, § 7.

⁶² 289 N.E.2d at 496.

⁶³ *Id.* at 501.

⁶⁴ *Id.* at 498. Justice Hunter, speaking for the court: "Appellant concedes that a male-female classification is reasonable insofar as it applies to sports necessarily involving direct physical contact between the contestants. Appellant's challenge is directed only to the validity of the rule's application to non-contact sports." However, this is questionable in light of appellant's reply brief in which she stated: "The plaintiff does not concede that there should be a dividing line or classification based on sex for any type of athletic activity. It is true that the plaintiff seeks to enjoin the defendant from denying the high school girls the right to participate in interschool noncontact sports, and it might be assumed . . . that she recognized the reasonable basis for sexual classification in contact sports. But she does not. The idea of a girl participating in a contact sport with boys is not yet acceptable." Appellant's Reply Brief at 11.

⁶⁵ 289 N.E.2d at 498.

⁶⁶ Stroud, *supra* note 26, at 667; *Sex Discrimination*, *supra* note 26, at 353. This argument was advanced in *Reed v. Nebraska School Activities Ass'n*, 341 F. Supp. 258 (D. Neb. 1972); *Hollander v. Connecticut Interscholastic Athletic Ass'n*, No. 12-49-27 (Super. Ct. of New Haven Co., Conn., March 19, 1971); *Gregorio v. Board of Educ. of Asbury Park*, No. A-1277-70 (Super Ct. of N.J., App. Div., April 5, 1971).

⁶⁷ Stroud, *supra* note 26, at 668-69; *Sex Discrimination*, *supra* note 26, at 354. This argument was also used in *Gregorio v. Board of Educ. of Asbury Park*, No. A-1277-70 (Super. Ct. of N.J., App. Div., April 5, 1971) and *Brenden v. Independent School Dist.* 742, 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973).

general rule, "males tend to possess a higher degree of athletic ability in traditional sports offered by most schools,"⁶⁸ they would soon dominate both girls' and boys' teams. Therefore, the court concluded that the rule appeared reasonable on its face. The majority opinion went on, however, to note that: "[A] rule or law which appears to be nondiscriminatory on its face may nevertheless be struck down as a denial of equal protection if it is unreasonably discriminatory in its operation."⁶⁹ In a case where only one program—for males—was provided, difference in athletic ability was not a justifiable reason to deny girls access to the boys' team. Four of the five Indiana justices stated their belief that the existence of a "comparable" girls' athletic program would make the rule valid under the equal protection clause.⁷⁰

The *Reed* "fair and substantial relationship" standard of review was fully applied in *Brenden v. Independent School District 742*.⁷¹ Two exceptional female students whose schools did not provide girls' teams in the noncontact sports of tennis, cross-country running or cross-country skiing brought suit challenging a Minnesota State High School League rule prohibiting interscholastic competition between women and men.⁷² The Eighth Circuit emphatically pointed out at the beginning of its opinion that it would *not* decide whether separate but equal teams for males and females would fulfill the responsibilities of the schools⁷³ or whether the League was justified in prohibiting females from competing with males in contact sports.⁷⁴ The court limited its decision to whether the equal protection clause permits the exclusion of qualified female athletes from participation on the boys' team in the absence of any program for girls.

The trial court had specifically found that the plaintiffs

⁶⁸ 289 N.E.2d at 499.

⁶⁹ *Id.* at 500. See *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁷⁰ 289 N.E. 2d at 500.

⁷¹ 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973).

⁷² The rule in issue provided: "Girls shall be prohibited from participation in the boys' interscholastic program either as a member of the boys' team or a member of the girls' team playing the boys' team." 342 F. Supp. at 1227.

⁷³ 477 F.2d at 1295.

⁷⁴ *Id.*

were capable of competing with men in noncontact sports, that the class of women, like the class of men, contains individuals of widely different athletic abilities, and that in noncontact sports, factors such as coordination, concentration, agility, and timing are crucial to achieve success.⁷⁵ Unpersuaded by the argument that physical differences exist between the sexes which preclude females from competing successfully with males, the court held that the sex-based classification had no fair and substantial relationship to the objective of the League rule, which was "to insure that persons with similar qualifications [would] compete with each other."⁷⁶ Given the plaintiffs' proven athletic ability and the absence of an athletic program equal to that provided for males, the females were entitled to an "individualized determination" of their ability to compete before being denied interscholastic competition.⁷⁷

B. *A Case In Which Teams Are Provided for Women*

*Bucha v. Illinois High School Association*⁷⁸ is one of a small number of athletic discrimination cases in which teams were provided for both sexes.⁷⁹ Despite this important factual difference, the court was faced with the same type of evidence and many of the same arguments as had been presented in the single team cases. *Bucha* was a class action challenging the Association's rules setting limitations on women's, but not men's, athletic contests⁸⁰ and forbidding mixed interscholastic competition.⁸¹ The plaintiffs, both outstanding athletes, asserted the right to equal educational opportunity⁸² and the

⁷⁵ 342 F. Supp. at 1233. No objective evidence was introduced as to this claim. *Accord*, *Weeks v. Southern Bell Tel. & Tel. Co.* 408 F.2d 228, 236 (5th Cir. 1969): "Technique is hardly a function of sex." See *Sex Discrimination*, *supra*, note 26, at 363.

⁷⁶ *Brenden v. Independent School Dist. 742*, 477 F.2d 1292, 1302 (8th Cir. 1973).

⁷⁷ *Id.* If the purpose of the rule was to insure that persons having the same qualifications compete with each other, women cannot be barred from competition with males on the basis of an assumption about the qualifications of women as a class. The court cited *Sex Discrimination*, *supra* note 26.

⁷⁸ 351 F. Supp. 69 (N.D. Ill. 1972).

⁷⁹ See *Equality in Athletics*, *supra* note 26, at 434-35.

⁸⁰ 351 F. Supp. at 71, nn. 1 & 2.

⁸¹ *Id.* at 71.

⁸² The plaintiffs cited *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

right to equal treatment regardless of sex, unless the Association could demonstrate a compelling state interest.⁸³ The court rejected the compelling interest test, interpreting *Reed* as a rejection of sex as a suspect classification and an endorsement of the traditional rational relationship test.⁸⁴ In view of the "fair and substantial relationship" language in *Reed*, it appears that the *Bucha* court misinterpreted the Supreme Court's intent to establish an intermediate standard of review for sex classifications. Despite this possible misinterpretation, the case indicates the approach that courts are likely to follow in a situation where teams are provided for both males and females. This court resolved the issue in favor of the Association, finding a rational basis for sexual segregation in physiological differences and probable male domination of both sports programs. These same rationales were articulated in *Brenden* and *Haas*, but were not decisive in those cases due to the complete absence of female sports programs.

A potential argument based on Title IX was overlooked by both the plaintiffs and the court. The plaintiffs did cite sex discrimination decisions dealing with equal employment opportunity⁸⁵ under Title VII of the 1964 Civil Rights Act⁸⁶ as analogous to the case at hand. However, the court rejected them as "inapposite" because it viewed Title VII as a legislative exception to application of the rational relationship test in sex discrimination cases.

In enacting Title VII Congress has made the legislative judgment that employment is too important an interest to be protected solely by the equal protection clause of the Constitution But . . . [n]either the State of Illinois nor the federal Congress has enacted a statute applicable to high school sports that conceivably resembles Title VII's concern with equal employment opportunity.⁸⁷

Bucha was decided November 15, 1972; Title IX, which

⁸³ The plaintiffs cited *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

⁸⁴ 351 F. Supp. at 74.

⁸⁵ *Id.* at 75.

⁸⁶ 42 U.S.C. § 2000-e (1970).

⁸⁷ 351 F. Supp. at 75.

had been enacted in June of that year, could have supported the plaintiffs' analogy.⁸⁸

C. *Summary of Athletic Sex Discrimination in the Courts*

An examination of these representative cases indicates a noticeable trend toward recognition that "[t]he female high school athlete has a legally protectable interest in the benefits of an interscholastic sports program where one is provided for the male athletes by the school system."⁸⁹ However, such an interest is less certain where programs have been provided for both sexes.

The usual inequity between the programs is irrelevant.⁹⁰ The courts look to a hierarchy of concerns in their determination of whether a female has been denied equal protection by a rule or policy which denies her the opportunity to compete against males. A plaintiff bringing such a suit has the greatest likelihood of success if there is no women's program at her school for the sport in which she wishes to participate, especially if that sport does not involve contact. Although courts express concern that the physical and psychological differences between the sexes will create an inequality in their competition, the same courts will not bar females from the desired athletic activity altogether.⁹¹ However, when a female program in the challenged sport is provided or when the sport is one which involves contact, or even when the suit is a class action

⁸⁸ Lack of notice to state school officials that Title IX had been passed by Congress and was applicable to their programs, *see* note 27, *supra*, probably extended to the judiciary as well. In addition, Congress' failure to specify whether athletics were to be included in the educational activities to be regulated might have been partly to blame. A law journal article published in April, 1975, Fabri and Fox, *supra* note 26, indicated that there were no reported decisions basing the complaint on a violation of Title IX as of that time. A note to that article did mention a suit filed in Kalamazoo, Michigan, based on Title IX. "[T]he Education Amendments envision an administrative remedy rather than a judicial one," the authors hypothesize as an explanation for the virtual nonexistence of suits brought under Title IX. *Id.* at 298.

⁸⁹ *Id.* at 286.

⁹⁰ *See* *Morris v. Michigan State Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973); *Brenden v. Independent School Dist.* 742, 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973); *Reed v. Nebraska School Activities Ass'n*, 341 F. Supp. 258 (D. Neb. 1972). *Contra*, *Harris v. Illinois High School Ass'n*, Civil No. 72-75 (S.D. Ill., April 17, 1972).

⁹¹ *Haas v. South Bend Community School Corp.*, 289 N.E.2d 495, 499 (Ind. 1972).

rather than a suit by an exceptional female athlete, courts often find enough reason behind the rule barring mixed competition to deny the relief sought. Usually in cases which involve one or more of these factors, the justification of physical differences carries more weight.⁹² Although conflicting testimony as to the existence and importance of physical differences appears in the cases, the issue remains unresolved, especially in regard to the contact versus noncontact sport distinction.⁹³

The courts' adherence to the equal protection analysis established by the Supreme Court for cases involving alleged sex discrimination does not resolve the critical question: What is the most equitable athletic program? Whether "separate but equal" athletic programs are adequate under the equal protection doctrine has never been directly addressed.⁹⁴ Segregation

⁹² "Most female athletes do not possess the same athletic ability as men, and the rule [segregating male competitors from female competitors] accordingly groups athletes by ability to avoid the problems caused by competition among mismatched opponents." *Sex Discrimination*, *supra* note 26, at 356.

⁹³ Plaintiffs bringing suit to challenge Little League rules have provided courts the only direct confrontation with a contact sport. In *Magill v. Avonworth Baseball Conference*, 364 F. Supp. 1212 (W.D. Pa. 1973), the court dismissed the complaint, even though no comparable program existed for girls, on the ground that baseball's contact sport status provided a rational basis for the discriminatory classification. The court took judicial notice that baseball is a contact sport due to game situations like the stolen base, wild pitch, and play-at-the-plate. *Id.* at 1216. Three months later, New Jersey's Division on Civil Rights decided to permit girls to play Little League baseball. *National Organization for Women v. Little League Baseball, Inc.*, Docket No. DJO 55B-0493 (Dep't. of Laws & Pub. Safety Div. on Civil Rights of N.J., Nov. 7, 1973). Thus, stereotyped ideas about ubiquitous physical differences are beginning to break down.

"Though the majority of women have yet to overcome the physical differences that preclude effective participation with men, there can be no doubt that there are interested women who are as qualified to compete in contact as well as noncontact sports as most men." *Female Athletics*, *supra* note 26, at 550. Evidence of the female's interest in contact sports is the existence of organized programs in baseball, basketball, boxing, ice hockey, lacrosse, professional football, roller derby, and soccer. *SPORTS ILLUSTRATED*, June 4, 1973, at 46. The Army is currently compiling statistics, on the basis of more women undergoing basic training, which should provide helpful information in this area of physical differences. Interview with Nancy Ray, Affirmative Action Officer, University of Kentucky, Lexington, Kentucky [hereinafter cited as Interview].

⁹⁴ In analyzing whether "separate but equal" athletic programs are adequate, attention must be given to the different ways in which male and female sports are conducted. Usually the women's distances in swimming and track are shorter than the men's; women frequently experience greater restriction on the number of events in which they may participate; women are often discouraged from playing before crowds. Although the "separate but equal" doctrine was struck down in *Brown v. Board of*

of activity has the virtue of preserving opportunities for the majority of women, but it fails to accommodate the exceptional female athlete who would rather compete against men. If relegated to a sex-separated team, it is arguable that she will encounter less competition and receive less training than her ability deserves.⁹⁵ Separate but equal has generally been proven to be separate and unequal in athletics.⁹⁶ At present, equal protection of the law is a more limited concept than equal opportunity in the area of athletics.

III. DEVELOPMENT OF EQUALITY OF OPPORTUNITY IN EDUCATION: TITLE IX

Before 1970, there were no laws forbidding sex discrimination against women in education.⁹⁷ Beginning in 1971, however, a massive effort was initiated to statutorily eliminate sex discrimination. Congress first addressed the problem of sex discrimination in education in the 1970 hearings before the Special Subcommittee on Education chaired by Representative

Educ., 347 U.S. 483 (1954), that case dealt with race, a suspect classification. "Separate but equal" is not necessarily invalid with regard to athletics, which is not afforded the suspect or fundamental interest status.

⁹⁵ *Sex Discrimination*, *supra* note 26, at 369. See also *Kirstein v. Rectors and Visitors of the Univ. of Va.*, 309 F. Supp. 184 (E.D. Va. 1970), in which the prestige factor attached to an all-male school caused the facility to be considered unequalled by any other school in the system. The system was declared unequal in fact and the school was compelled to admit women. In the area of athletics, there is much prestige in being a male athlete but the amount of prestige attached to a female athlete is questionable. Fewer opportunities for training and competition are part of the basis for the arguably lesser prestige afforded female athletes.

⁹⁶ *Female Athletics*, *supra* note 26, at 553: "For example, sex separated programs may result in the loss of educational and economic benefits. Athletic ability has proven to be an enormous vehicle for obtaining a college education, but the ratio between male and female athletic scholarships is almost 1000 to one." SPORTS ILLUSTRATED, May 28, 1973, at 91-92. Until women have access to the same facilities, coaching and competition, they will continue to be disadvantaged in this respect.

⁹⁷ At that time, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, which forbids discrimination in employment, exempted educational institutions. Title VI of the same Act, 42 U.S.C. § 2000d, prohibited discrimination by race, color and national origin against beneficiaries (i.e., students) in federally assisted programs. The Equal Pay Act did not cover executive, administrative and professional employees until July, 1972. In addition, there had been no Congressional hearings on the Equal Rights Amendment. See also *Dunkle, Women Students: The End of Second Class Citizenship, Women's Educational Equity*, *supra* note 3, at 41-48.

Edith Green.⁹⁸ These hearings, roughly coinciding with the beginning of the courts' struggle to apply equal protection standards to sex discrimination, marked the initiation of a congressional effort to shape a national policy to end sex discrimination in all educational institutions at all levels. Congress extended Title VII of the Civil Rights Act of 1964,⁹⁹ which had proved to be an effective weapon against sex discrimination in employment, to include all educational institutions. Congress amended the Equal Pay Act of 1963¹⁰⁰ to cover executive, administrative, and professional employees, including all faculty members. The Public Health Service Act¹⁰¹ was amended to equalize admission standards between the sexes in all health profession training programs, thereby increasing the opportunity for women to become doctors. Congress also attacked the problem directly by enacting Title IX of the Education Amendments Act of 1972¹⁰² to cover all aspects of student and employee treatment in educational institutions.

A. *Legislative History of Title IX*

The legislation that became Title IX was first introduced on April 6, 1971, in the House of Representatives by Representative Edith Green.¹⁰³ Comparable legislation was introduced in

⁹⁸ *Hearings on Section 805 of H.R. 16,098 Before The Special Subcomm. on Education of the House Comm. on Education and Labor, 91st Cong., 2d Sess. (1970)*. Over 1,200 pages of testimony on the subject of sex discrimination were gathered at the hearing.

⁹⁹ Pub. L. No. 92-261, § 2, 86 Stat. 103 (1971), *amending* 42 U.S.C. § 2000e-1 (1964).

¹⁰⁰ Pub. L. No. 92-318, Title IX, § 906(b)(1), 86 Stat. 373 (June 23, 1972).

¹⁰¹ Pub. L. No. 92-157, § 110, 85 Stat. 431 (1971), *amending* 42 U.S.C. § 295h-9 (1963).

¹⁰² Pub. L. No. 92-318, Title IX, §901, 86 Stat. 373 (June 23, 1972).

¹⁰³ 111 CONG. REC. 9822 (1971) (remarks of Representative Green). There was no mention of athletics at this time, but recommended provisions as to single-sex and religious institutions were contained in the final draft. The bill was introduced as Title X of H.R. 7248, the Higher Education Act of 1971, to amend Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* [hereinafter Title VI]. Title VI essentially prohibited federal agencies from granting federal financial assistance to those who discriminate on the basis of race, color, or national origin. Title IX is similar to Title VI in language, but differs in that Title IX applies to discrimination based on sex, is limited to education programs and activities and includes employment in educational institutions. Since the language of Title IX so closely parallels that of Title VI, in the absence of specific Congressional indications to the contrary, HEW has interpreted

the Senate by Senator Birch Bayh.¹⁰⁴ Senator Bayh's amendment came as an afterthought to other considerations and concerned itself with three major provisions: (1) Nondiscrimination by recipient institutions in the areas of admissions and benefits, (2) implementation measures, and (3) the necessity of a nationwide survey of both public and private higher educational institutions to determine the extent to which equality of educational opportunity was being denied to citizens of the United States on the basis of sex.¹⁰⁵ The only mention of athlet-

Title IX consistently with interpretations of Title VI in similar areas. Under Title VI, the courts have consistently considered athletics sponsored by educational institutions to be an integral part of the institution's education program. See 40 Fed. Reg. 24, 134 (1975), citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971). Due to current distress among some members of Congress concerning the athletic provisions of Title IX, the bonds between Title IX and Title VI are being repudiated. See 121 CONG. REC. S 9713 (daily ed. June 5, 1975) (remarks of Senator Helms).

¹⁰⁴ Senator Bayh introduced S. 659, Calendar No. 342, a bill to amend the Higher Education Act of 1965, the Vocational Education Act of 1963, and related acts, to guarantee educational opportunity to women.

While we have always looked to education as the ultimate answer to our national problems of poverty, discrimination, and development, never before have we sought to embody this belief in substantive public policy. Now we are trying to establish access to higher education as a basic Federal right But as we seek to help those who have been the victims of economic discrimination, let us not forget those Americans who have been subject to other, more subtle but still pernicious forms of discrimination Today I am submitting an amendment which will guarantee that women, too, enjoy the educational opportunity every American deserves.

117 CONG. REC. 30,155 (1971) (remarks of Senator Bayh). In support of Senator Bayh's amendment, Senator McGovern urged his colleagues "to prohibit Federal funding of sex discrimination." 117 CONG. REC. 30,158 (1971) (remarks of Senator McGovern). He continued: "While amending individual bills in no way reduces the need for the constitutional (Equal Rights) amendment, it does provide at least a step-by-step attack giving women equality in at least those areas covered by the specific bills." He also noted the conclusion drawn from Mrs. Green's hearings, *Discrimination Against Women*, *supra* note 3, that the Office of Education, *i.e.*, the Government, by its policies, its programs and its guidelines, fails to condemn measures arbitrarily restricting potential women students.

¹⁰⁵ 117 CONG. REC. 30,404 (1971). Since Senator Bayh introduced S.659 at the close of the day, discussion of the amendment was postponed until the following day. On August 6, 1971, several Senators expressed their concerns as to what the amendment would require. There was talk of quotas, agreedly discriminatory in regard to admissions to medical schools, but less consensus about admission to religious institutions. Senator Bayh explained: "I do not think it is wise for the Congress of the United States to determine whether or not men or women should be priests, preachers, or religious figures in any church. That is for the church itself to decide." 117 CONG. REC. 30,407 (1971) (remarks of Senator Bayh).

ics at that time arose from Senator Dominick's concern regarding the scope of the amendment.¹⁰⁶ Senator Bayh explained:

I [do not] feel it mandates the desegregation of the football fields. What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved.¹⁰⁷

After limited debate, the amendment was rejected as nongermane.¹⁰⁸

Undaunted, Senator Bayh reintroduced the same amendment at the beginning of the 92d Congress as the Women's Educational Equality Act.¹⁰⁹ Two months later, before action on this bill, the Higher Education Act of 1971 was referred to the Committee on Labor and Public Welfare.¹¹⁰ Senator Bayh reintroduced his amendment¹¹¹ but specifically excepted the controversial topic of admission to military and religious institutions.¹¹² In the meantime, the House bill was undergoing sim-

There was also discussion of how compliance would be assured. The notion at that time was that hearings, notice and normal administrative procedures would be available to complainants, but the end result would be to cut off all aid that comes through HEW. When questioned closely on this topic, Senator Bayh indicated that he imagined that the Secretary of HEW would use only reasonable leverage against the institution necessary under the circumstances and that assistance to individual students would not be cut off. 117 CONG. REC. 30,408 (1971).

¹⁰⁶ 117 CONG. REC. 30,407 (1971).

¹⁰⁷ *Id.* Mr. Dominick's response: "If I may say so, I would have had much more fun playing college football if it had been integrated."

¹⁰⁸ Shortly after this exchange, Senator Thurmond noted that he was one of the authors of the equal rights amendment and then made a point of order that the amendment was not germane. The Senator was concerned that the amendment had not been examined in any committee. 117 CONG. REC. 30,412 (1971) (remarks of Senator Thurmond). The Chair agreed and, after some further discussion, ruled that Senator Bayh's amendment was not germane to the bill. 117 CONG. REC. 30,415 (1971).

¹⁰⁹ *Id.* at 32,476: A bill to prohibit discrimination on the grounds of sex by institutions of higher education.

¹¹⁰ *Id.* at 43,080.

¹¹¹ *Id.* at 43,081.

¹¹² Senator Bayh described his amendment as dealing with three basically different types of discrimination: Discrimination in admissions, discrimination of available services or studies once students are admitted, and discrimination in employment within an institution, as a faculty member or otherwise. "In the area of employment, we permit no exceptions. In the area of services, once a student is accepted within an institution, we permit no exceptions. [As to] admissions policies of private secondary and primary schools, [t]hey would be excepted." 118 CONG. REC. 5,812 (1972).

ilar debate.¹¹³ Here, too, equality of opportunity for employment in educational institutions presented no problems, but in the area of admissions there was much debate.¹¹⁴ The topic of athletics was never raised in the discussion of the legislation.

The legislation finally became law on June 23, 1972, as Title IX to the Education Amendments of 1972.¹¹⁵ The statute 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"¹¹⁶ The Department of Health, Education and Welfare (HEW) was directed to fashion implementing regulations for the enforcement of Title IX.

B. *Development of Regulations for Title IX*

The express purpose of Title IX was to close the gap in the laws protecting women from biased educational policies.¹¹⁷ It was unclear, however, whether Congress intended the Act to reach the subject of athletics. HEW made the controversial decision to include athletics within the scope of the regulations for several reasons. First, the language of Title IX parallels that of Title VI of the Civil Rights Act of 1964,¹¹⁸ and since there were no specific indications to the contrary, HEW tried to interpret Title IX consistently with Title VI.¹¹⁹ Second, the courts have consistently considered athletics sponsored by educational institutions to be an integral part of the educational program and, consequently, covered by Title VI.¹²⁰ HEW also

¹¹³ See 117 CONG. REC. 37,784 (1971) (remarks of Senator Quie).

¹¹⁴ *Id.* at 39,248 (remarks of Representative Erlenborn). Mr. Erlenborn offered an amendment to exclude undergraduate admissions, ". . . so that there would be no question of quota or governmental determination of any degree as to undergraduate admissions but we would still require equal and complete access to the graduate school, the entry to the professions." That amendment was passed in the House. *Id.* at 39,261.

¹¹⁵ 20 U.S.C. § 1681 (Supp. 1973).

¹¹⁶ *Id.*

¹¹⁷ 117 CONG. REC. 30,400 (1971) (remarks of Senator Bayh).

¹¹⁸ 42 U.S.C. § 2000d *et seq.*

¹¹⁹ Press Conference, *supra* note 22. See also 40 Fed. Reg. 24,134 (1975).

¹²⁰ See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 891 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied sub. nom. United States v. Caddo Parrish Bd. of Educ.*, 389 U.S. 840 (1967).

considered the cases which challenged rules prohibiting competition between men and women in high school athletics as a violation of the equal protection clause. Those cases explicitly recognized interscholastic sports as an integral part of the education process.¹²¹ Finally, indications of congressional intent to have athletics included in the implementing provisions of Title IX¹²² strengthened HEW's resolve to provide regulations for equal opportunity in athletics for women.

On June 20, 1974 the Office for Civil Rights of HEW (OCR) gave notice that it intended to add Part 86 to the departmental regulation in order to effectuate Title IX.¹²³ Interested persons were given until October 15, 1974 to submit written comments, suggestions, or objections regarding the proposed regulation. OCR received almost 10,000 such comments.¹²⁴ The process of sifting through the opinions and suggestions took over six months. Although the athletics and physical education sections of the regulations comprise only a small part of the document, the emphasis on these areas of education assumed large proportions for those writing the regulations,¹²⁵ in part because many of the comments expressed concern that HEW was going beyond its authority in its regulation of this field of activity.¹²⁶ The final regulations reflect significant changes incorporated due to the public response.¹²⁷

¹²¹ *Brenden v. Independent School Dist.* 742, 477 F.2d 1292, 1297-99 (8th Cir. 1973); *Bucha v. Illinois High School Ass'n*, 351 F. Supp. 69, 74 (N.D. Ill. 1972); cf. *Reed v. Nebraska School Activities Ass'n*, 341 F. Supp. 258, 262 (D. Neb. 1972) and *Haas v. South Bend Community Corp.*, 289 N.E.2d 495, 499 (Ind. 1972).

¹²² 20 U.S.C.A. § 1681 note (Supp. 1975).

¹²³ 45 C.F.R. § 86 (1974).

¹²⁴ Press Conference, *supra* note 22.

¹²⁵ Press Conference, *supra* note 22, at 7: "With athletics, which is without question the most important issue before the American people today, based on the comments we received . . ."

¹²⁶ See 121 CONG. REC. 13,175 (daily ed. July 21, 1975). Senator Jesse Helms (R. N.C.) introduced S. 2146, the Equal Educational Opportunity Amendments of 1975: The bill provides that Title IX shall apply only to education programs and activities which directly receive federal financial assistance and that such "education programs and activities" shall mean only those programs and activities which are an integral part of the required curriculum of an educational institution. Thus intercollegiate athletics and the like would be excluded from coverage of Title IX. 121 CONG. REC. S 13,176 (1975).

¹²⁷ One change beyond the scope of this paper mandates that each recipient set up a self evaluation procedure which will examine the institution's policies and modify

Provisions concerning physical education and athletics are included in the final regulations,¹²⁸ but indecision on how to im-

them to comply with the regulations. However, elementary schools have been given one year and secondary schools and universities three years to effect changes in their physical education and athletics departments. There is some question concerning the enforcement procedures to be directed against the institutions by HEW during that time. In addition, on June 4, 1975, HEW published a proposed new procedural regulation, 45 C.F.R. § 81 (1975), which will change their reactive, complaint-oriented enforcement to an approach which will attempt to identify and eliminate systematic discrimination. HEW claimed this change in procedure is necessary because "we just can't set ourselves up to handle" the large number of complaints already being received as the regulatory agency for several other laws on discrimination. If people want to continue to submit complaints, HEW will be glad to receive them as an indication of the types of discrimination being continued, but the person submitting the complaint will no longer be entitled to a hearing and review. HEW will advise the individual of the prospect of HEW scheduling a review of the complained-of institution within the next 12 months; if no such review is scheduled during that time, HEW will advise the individual as to other sources of relief, such as the courts, the Equal Employment Opportunity Commission, state Human Rights Commissions, and the Human Relations Agencies that have enforcement powers. HEW will also inform complainants of the grievance procedures which are required by the regulations to be established at the recipient institutions themselves. Press Conference, *supra* note 22. How these changes will affect individual recipient compliance is difficult to predict at this time. In addition, HEW will encourage individuals to bring suit in federal district courts for a violation of Title IX rather than relying on HEW enforcement procedures. Formerly, a plaintiff had to show that she had exhausted her administrative remedies before she could bring suit; under the proposed procedural regulation, there are no administrative remedies to pursue. Telephone inquiry, *supra* note 24. However individuals might be less likely to bring suit to demand equality of athletic opportunity due to the financial burden.

On August 1, 1975, Senators Bayh, Case, Brooke and 50 of their colleagues submitted Senate Resolution 235 which would require HEW to withdraw its proposed procedural regulations and instead augment its Office of Civil Rights. *See* 121 CONG. REC. S 14,947 (daily ed. August 1, 1975) (scathing remarks of Senator Bayh). The resolution was referred to the Committee on Labor and Public Welfare.

¹²⁸ Final Title IX Regulation Implementing Education Amendments of 1972 Prohibiting Sex Discrimination in Education, 40 Fed. Reg. 24,137 (1975) [hereinafter cited as HEW Regs.].

§ 86.34 *Access to course offerings*

.....

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports, the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the

plement equality of opportunity in these areas is evidenced by the many changes made after the tentative guidelines were issued October 9, 1973¹²⁹ and by the uncertainty as to what

recipient shall use appropriate standards which do not have such effect.

§ 86.41 *Athletics.*

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

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex, . . . and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purpose of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports, the purpose or major activity of which involves bodily contact.

(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:

- (i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (ii) The provision of equipment and supplies;
- (iii) Scheduling of games and practice time;
- (iv) Travel and per diem allowance;
- (v) Opportunity to receive coaching and academic tutoring;
- (vi) Assignment and compensation of coaches and tutors;
- (vii) Provision of locker rooms, practice and competitive facilities;
- (viii) Provision of medical and training facilities and services;
- (ix) Provision of housing and dining facilities and services;
- (x) Publicity.

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

¹²⁹ Proposed Dep't of Health, Education and Welfare Regulations to effectuate Title IX of the Education Amendments of 1972, 39 Fed. Reg. 22,232 (1974) [hereinafter cited as HEW Proposed Regs.].

§ 86.34 *Access to education program or activity.*

(a) *Course Offerings.* A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education

. . . .

constitutes compliance under these regulations.¹³⁰

IV. THE REGULATIONS

The final Title IX regulations regarding athletics posited that interscholastic, intercollegiate, club or intramural athlet-

§ 86.38 *Athletics.*

(a) *General.* Except as provided in this section, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any athletic program or activity operated by a recipient, and no recipient shall provide any such program or activity separately on such basis. In complying with this paragraph, a recipient shall not discriminate on the basis of sex in selection of sports in which it offers instruction or other activities.

(b) *Determination of student interest.* A recipient which operates or sponsors athletics shall determine at least annually, using a method to be selected by the recipient which is acceptable to the Director, in what sports members of each sex would desire to compete.

(c) *Affirmative efforts.* A recipient which operates or sponsors athletic activities shall, with regard to members of a sex for which athletic opportunities previously have been limited, make affirmative efforts to:

(1) Inform members of such sex of the availability for them of athletic opportunities equal to those available for members of the other sex and of the nature of those opportunities and

(2) Provide support and training activities for members of such sex designed to improve and expand their capabilities and interests to participate in such opportunities.

(d) A recipient which operates or sponsors athletics shall make affirmative efforts to provide athletic opportunities in such sports and through such teams as will most effectively equalize such opportunities for members of both sexes, taking into consideration the determination made pursuant to paragraph (b) of this section.

(e) *Separate teams.* A recipient which operates or sponsors separate teams for members of each sex shall not discriminate on the basis of sex therein in the provision of necessary equipment or supplies for each team, or in any other manner.

(f) *Expenditures.* Nothing in this section shall be interpreted to require equal aggregate expenditures for athletics for members of each sex.

For a discussion of Title IX in its entirety based on the proposed regulations see Buck and Orleans, *Sex Discrimination—A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1 (1973).

¹³⁰ Uncertainty is evidenced by the fact that the following questions are not directly answered in the regulations:

What is the remedy?

Is it a cut-off of all federal funds?

Are athletic scholarships to be determined by need? Or by athletic ability?

(For men to receive athletic scholarships, need is not a factor).

What is "comparable"?

ics, defined only as athletic programs and activities in the 1973 proposed version, be operated without discrimination on the basis of sex.¹³¹ Except for the more specific definition, this requirement is unchanged from the proposed 1973 regulations.¹³² However, the remainder of the athletics section has been significantly modified. The proposed regulations required that no recipient of federal funds could provide physical education classes or any athletic activity separately on the basis of sex.¹³³ Due in part to the public reaction to this proposal, the final regulations treat contact sports as a separate classification and allow each school to exercise its own discretion with regard to such sports.¹³⁴ Consequently, the interpretive problems posed by the final regulations involve only noncontact sports in physical education activities and competitive athletics.

The final regulations do not *require* coeducational physical education classes. An institution may conduct segregated physical instruction if the separation is justified by "objective standards of individual performance developed and applied without regard to sex."¹³⁵ The objective standard required by the regulations can be illustrated by an example involving running. A school might devise a program whereby all those who could run a mile in six minutes or less would be grouped in one physical education class. All those who run a mile in 6 to 12 minutes would be in another class, and those who take longer than 12 minutes would be in a third group. The grouping would be made totally on the basis of ability without regard to sex. Given current differences in interest and ability, this might mean that the first group would be all male, the third group all female, and the middle group coeducational. Since the clas-

What is the standard of reasonableness?

How is HEW going to deal with all this?

Interview, *supra* note 93.

¹³¹ HEW Regs. § 86.41(a), *supra* note 128.

¹³² HEW Proposed Regs. § 86.38(a), *supra* note 129.

¹³³ HEW Proposed Regs. §§ 86.34(a), 86.38(a), *supra* note 129.

¹³⁴ HEW Regs. §§ 86.34(c), 86.41(b), *supra* note 128.

¹³⁵ HEW Regs. § 86.34(b), *supra* note 128. However HEW's analysis of the objective standard requirement may raise more questions than it solves, for it posits classifications based upon expectations of achievement each athlete can reasonably meet, based on individual abilities. See 40 Fed. Reg. 24,134 (1975). The analysis seems to present a subjective standard rather than the objective one required by the regulations.

sifications would be totally ability oriented, an institution would be justified in providing activities segregated in this manner. However, the exceptional female athlete would not be precluded from an appropriate level of competition. This result satisfies a concern expressed in many of the comments to the proposed regulations that individuals of both sexes would not be able to learn and practice skills with others on the same level of ability.

The final regulations, like the proposed regulations, state the general proposition that there can be no sexually segregated teams in competitive athletics. If only one team is maintained, individuals of the sex usually excluded from the team must be given an opportunity to compete for a position on that team.¹³⁶ However, the final regulations provide a method by which institutions can evade the mandate of this general rule by allowing segregated teams when selection is based on competitive skill. This exception implies that a school can avoid allowing a female on the male team, regardless of the female's ability, simply by providing sex-segregated teams in that particular sport and utilizing the usual criterion, skill, to select the best athletes for such teams.

The proposed regulations required all educational institutions sponsoring athletic programs to make an annual determination of the activities desired by each sex and whether such activities should be provided by separate or integrated teams.¹³⁷ Because the comments to this provision indicated the belief that institutions would be required to take an annual poll of student interest,¹³⁸ the final regulations demand only that institutions select "sports and levels of competition which effectively accommodate the interests and abilities of both sexes."¹³⁹ The silence of the regulation enables an institution to establish its own reasonable method for ascertaining "the interests and abilities of both sexes."

A burden of affirmative action, requiring all educational institutions to inform individuals of the available competitive

¹³⁶ HEW Regs. § 86.34(b), *supra* note 128.

¹³⁷ 40 Fed. Reg. 24,134 (1975).

¹³⁸ Press Conference, *supra* note 22.

¹³⁹ HEW Regs. § 86.41(c)(i), *supra* note 129.

athletic opportunities, was imposed by the proposed regulations.¹⁴⁰ This provision was deleted in the final regulations as being inconsistent with § 86.3, which requires only that an institution, upon a finding of past discrimination, remedy the effects of that discrimination. If no past discrimination is found, affirmative efforts may be undertaken to correct the conditions which resulted in limited participation by one sex.¹⁴¹

Much controversy has surrounded the issue of funding, which was not addressed in the proposed regulations. The final regulations do not consider unequal funding for the members of each sex to be a failure *per se* to provide equal opportunity.¹⁴² "Clearly, it is possible for equality of opportunity to be provided without exact equality of expenditure. However, necessary funds for women's teams will be considered."¹⁴³ This raises the question of the sufficiency of expenditures for female teams. "Traditionally young women . . . have not been interested in sports activity."¹⁴⁴ At present there is a gross disparity in the expenditures for male and female athletic programs.¹⁴⁵ Equalization of those expenditures will depend upon the interest in participating in sports which is generated among females.¹⁴⁶ While the number of female athletes remains small, the

¹⁴⁰ 40 Fed. Reg. 24,134 (1975).

¹⁴¹ *Id.*

¹⁴² HEW Regs. § 86.41(c), *supra* note 128.

¹⁴³ Press Conference, *supra* note 22.

¹⁴⁴ Fabri and Fox, *supra* note 26, at 296.

¹⁴⁵ K. DeCROW, *SEXIST JUSTICE* 294 (1974):

In school systems throughout the country, supported by taxes from parents of both daughters and sons, there are huge amounts spent on boys' athletics, teams, equipment, and practically nothing spent on the girls. Not only does this deprive young women of the opportunity to develop their bodies, it has enormous image consequences.

The cheerleader cheers, while the players play. Girls learn, at a very early age, that their role is to sit on the sidelines or, at best, to cheer for the boys. This pattern is continued into adult life. Women in professional athletics receive unequal pay, unequal prize money, unequal status, unequal promotional opportunities and . . . the most biased media coverage

¹⁴⁶ Press Conference, *supra* note 22, at 18:

[Y]ou may have a lot fewer people participating in one sport. If there is some institution where there is sufficient interest in having a separate girls' football team, the institution would provide it. But it would be perfectly silly to say that they had to provide precisely the same total amount of money for 25 or 50 girls who want to try out for football, as opposed to a full scale operation

disparity between the funding of male and female sports activities is allowed under the regulations.

The same reasoning holds for athletic scholarships.¹⁴⁷ The HEW regulations require that schools provide reasonable opportunities for athletic scholarships for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate teams.¹⁴⁸ Nonetheless, it is in the area of financial equity that HEW received most complaints¹⁴⁹ and, on the basis of newspaper quotations, it appears many people do not understand what is mandated.¹⁵⁰ While the

[E]quality of opportunity does not necessarily require equal expenditures. It might require more for a women's team. It might require much more, because there would be more participants and a heavier schedule, and they might not have any facilities and they might have to build some

This is not to say that it can always be less or anything of the kind. It is to try to get a realistic look at what is desired. And, the result desired is to try to eliminate what is obviously at present some discrimination against women in athletics. It is not to require a ridiculous result that just breeds a lot of public opposition, and does not achieve that result.

¹⁴⁷ HEW Regs. § 86.37(c).

(c) *Athletic scholarships.*

(1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 86.41 of this part.

¹⁴⁸ *Id.*

¹⁴⁹ Press Conference, *supra* note 22. The National Collegiate Athletic Association proposed that the money earned by revenue producing intercollegiate sports be exempted from coverage under the regulations. However, this point had been taken up earlier, and rejected. Senator John Tower introduced an amendment on the floor of the Senate to this end. 120 CONG. REC. 58,488 (daily ed. May 20, 1974). The "Tower Amendment" was deleted in the conference committee and replaced by the "Javits Amendment", which became § 844 of Pub. L. No. 93-380, mandating that Title IX regulations include "reasonable provisions" covering intercollegiate athletics. The issue is unsettled, however, for two resolutions have been offered in Congress to amend the Regulations with respect to intercollegiate sports. Telephone inquiry, *supra* note 24.

¹⁵⁰ Louisville Courier-Journal, July 24, 1975, §C (Sports), at 5:

Penn State Coach Joe Paterno and five of the nation's top college players spoke out in Atlanta yesterday against strict enforcement of a new U.S. Department of Health, Education and Welfare rule regarding female athletics. They claim if women receive equal financial aid in their athletic programs that most male athletes will be forced to pay their own way.

"Women are going to get scholarships and the sport that makes money

possibility exists that equal funding may be required in the future, equivalence of expenditures for athletic scholarships is far from a threat at present.¹⁵¹

CONCLUSION

“[I]n a knowledge-based society, equal opportunity in education is fundamental to equality in all other forms of

is going to get scholarships.” Paterno said, “Everyone else is going to be hurt.” [Other] comments included:

“I believe in girls having their own programs, but I don’t think girls are quite ready.”

“If they want to have their own program, fine. But they can’t compete with men.”

“If the politicians don’t start using some judgment instead of just going after the female vote”

¹⁵¹ See *Hearings on S. 2518 Before the Senate Committee on Labor and Public Welfare*, 92nd Cong., 1st Sess. (Nov. 9, 1973) (Testimony of Billie Jean King); Gilbert and Williamson, *Sport is Unfair to Women*, Part I, *SPORTS ILLUSTRATED*, May 25, 1973, at 92. *But see* Louisville Courier-Journal, July 22, 1975, at B6, Col. 1: “Ky. State’s Russell takes increase in girls’ athletic budget in stride,” indicating that priority for the increase in the women’s athletic budget at Kentucky State University will go to recruit outstanding female high school athletes. “We’ve always had a quality program at Kentucky State, . . . but we were only able to work with interested students on campus. Now we know what to expect before the season starts.”

At present, women receive no athletic scholarships at the University of Kentucky. This is the only school in Kentucky which is not offering athletic scholarships to women. U.K. has a better program than other schools and is losing athletes to other Kentucky schools which do offer athletic scholarships to women. Telephone interview with Betty Gordon, Sports Information Director for Women’s Athletics and women’s golf coach at University of Kentucky, Oct. 20, 1975. *See also* 121 Cong. Rec. S 13,529 (daily ed. July 24, 1975) (remarks of Senator Clark):

No one wants to see [big time college athletics] destroyed, nor can we reasonably expect that this will happen where Title IX is enforced. What will happen is that women, as well as men, will now be able to participate fully in athletics. No longer can women be relegated to inferior facilities, equipment or scheduling options. Title IX will not require equal spending, but it does require equal opportunities for men and women in athletics. A look at present spending figures reveals an unbelievable inequality—of the \$300 million spent annually on collegiate athletic programs, only 2 percent is spent on women’s athletics. It cannot be argued that there is no interest in women’s athletics. The Association for Intercollegiate Athletics for Women . . . was formed in 1971 with 280 member schools; today the group’s membership totals more than 650. Spectator interest is not lacking either It is obvious that enthusiasm for women’s activities is growing and that these programs will continue to involve more and more people. With that, the entire field of athletic endeavor—men’s and women’s, professional and amateur—will be strengthened.

Id. at S 13,529.

human endeavor."¹⁵² The courts, using the equal protection doctrine, have not developed any positive test to determine when equal opportunity in educational athletics has been provided.

The barriers "constructed against women over the years desperately needed to be torn down, and Congress helped to do that through the 1972 Education Amendments."¹⁵³ Although HEW indicates that the effects of the athletics sections of the regulations are "not the most important thing[s] that [are] going to come out of Title IX,"¹⁵⁴ it is still HEW's hope that the regulations will help change attitudes about women in athletics.¹⁵⁵ "Implementation of the Title IX regulations certainly is not going to bring about an instant end to discrimination,"¹⁵⁶ largely because so many questions remain as to what equality of opportunity for women in athletics requires. Each educational institution receiving federal funds will have to evaluate the athletic program to determine whether it provides both men and women with an equal opportunity to participate in a meaningful way.¹⁵⁷

Basic questions remain unanswered: What is meaningful participation for women? What best serves the interests of women in the area of educational athletics? Is it promoting to the fullest the exceptional female athlete, or providing resources for segregated teams so that all women will have a chance to play? It would seem that in order to provide the greatest opportunity for all women, facilities for both separate and coeducational activities should be provided. HEW's regulations make this ideal possible, but at the same time allow educational institutions flexibility to create their own reasonable methods for compliance. It is very likely that budgetary limitations will prompt most institutions to choose a reasona-

¹⁵² Press Conference, *supra* note 22, at 3.

¹⁵³ 121 CONG. REC. S 13,529 (daily ed. July 24, 1975) (remarks of Senator Clark).

¹⁵⁴ Telephone inquiry, *supra* note 24.

¹⁵⁵ *Id.* "The athletics section is only one section in education, and achieving equality in athletics isn't going to solve all [women's] problems. . . . It's going to have to come up with the children. . . ."

¹⁵⁶ 121 CONG. REC. S 13,529 (daily ed. July 24, 1975) (remarks of Senator Clark).

¹⁵⁷ Memorandum, *supra* note 21, at 8: "The equal opportunity emphasis in the regulation addresses the totality of the athletic program of the institution rather than each sport offered."

ble "either-or" approach rather than an attempt to provide the maximum program possible. As long as the focus rests on the equal protection analysis of whether women should be allowed to participate with men in various sports, the question of what constitutes equality of opportunity in athletics will remain unanswered.

While it is unlikely that the regulations themselves will affect attitudes toward women in athletics in the immediate future, they do mandate changed behavior on the part of educational institutions receiving federal funds. In the long run, the required changes concerning financial support and better training, facilities, equipment, and publicity should, at a minimum, produce more women athletes and more careers for women in sports. Thus far the effect of the regulations has been to generate a great deal of interest, concern, and debate as to what is required from various interested parties. HEW believes its regulations will enforce equality of opportunity for women in athletics; it is now up to the schools to effectuate their conception of equal opportunity and up to women to demand what the regulations make possible. Title IX's regulations for athletics have the potential to cover the bases, but they can succeed only if the rules of the game of equal opportunity for women are ascertained and the funds necessary to implement the game are made available.

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