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Title IX: Sex Discrimination in Public Elementary and Secondary Schools

by Jean M. Cary

Title IX of the Education Amendments of 1972 grew out of two of the most profound movements for social change in this century—the civil rights movement and the women's movement. Encouraged by the legislative and judicial changes achieved during the civil rights movement, women began to focus their energies on the elimination of sex discrimination. Frustrated with limited job opportunities and discrepancies in salaries between men and women, one place women hoped for legislative change was in the educational arena.¹

Congress responded to this political pressure by enacting Title IX of the Education Amendments of 1972. Patterned after Title VI of the 1964 Civil Rights Act,² Title IX states, "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."³ Title VI of the Civil Rights Act is a more inclusive statute that prohibits discrimination on the basis of race, color, religion, or national origin in any program receiving federal financial assistance. Title IX prohibits only sex discrimination, and it applies only to educational institutions that receive federal financial assistance. This article examines some aspects of Title IX that are relevant to public elementary and secondary schools.

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1. Carolyn Ellis Staton, "Sex Discrimination in Public Education," *Mississippi Law Journal* 58 (Fall 1988): 323; and R. Salomone, *Equal Education under Law*, 113-14 (New York: St. Martin's Press, 1986).

2. 42 U.S.C. § 2000(d) (1982). Section 2000(d) prohibits discrimination on the basis of race in federally assisted programs.

3. 20 U.S.C. § 1681 (1976).

Who Is Covered by Title IX

When Title IX was first enacted, a major question was whether Title IX applied when an institution received only indirect federal assistance. In 1977 Grove City College, a private coeducational institution, refused to sign an assurance that it would comply with Title IX. Grove City claimed that as a private institution it did not receive direct federal assistance and therefore was not obligated to abide by Title IX. The United States Department of Education claimed that Grove City College received indirect federal assistance when it accepted Basic Educational Opportunity Grants (BEOGs) as tuition payments from needy students. The Department of Education initiated proceedings to declare the college and its students ineligible for BEOGs unless the college agreed to comply with Title IX. Grove City and four of its students then sued the Department of Education. In the 1984 case *Grove City College v. Bell*,⁴ the United States Supreme Court ruled that Title IX applied to all forms of federal aid to education, whether direct or indirect. Therefore Grove City had to agree to comply with Title IX or lose any students who wished to use BEOGs for tuition payments.

A second question that arose after the enactment of Title IX was whether it applied to only the department or part of the institution that received federal funds, or if one department's receipt of federal money obligated the entire institution to comply with Title IX. When this question arose in *Grove City*, the Supreme Court concluded that Title IX applied to only the part of the institution that received federal education funds and not to the institution as a whole. Grove City College had argued that if the

4. 465 U.S. 555 (1984).

Court found that the receipt of BEOGs did constitute federal assistance, only the financial aid office of the college should be obligated to comply with Title IX. The United States Supreme Court agreed.⁵

Grove City also had a major impact on three other civil rights statutes that were worded in the same manner as Title IX.⁶ Congress reacted to the Supreme Court's decision by amending the four statutes⁷ to make clear that if any part of a system receives federal financial assistance, then the entire system must abide by the statute:

[The Civil Rights Restoration Act of 1987] will restore the broad, institution-wide application which characterized coverage and enforcement from the time of initial passage until the *Grove City* decision. . . . The Civil Rights Restoration Act of 1987 amends each of the affected statutes by adding a section defining the phrase "program or activity" and "program" to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance. . . . For education institutions, the bill provides that where federal aid is extended anywhere within a college, university, or public system of higher education, the entire institution is covered. If federal aid is extended anywhere in an elementary or secondary school system, the entire system is covered.⁸

By amending the statute, Congress overruled the part of *Grove City* limiting the application of Title IX to the department receiving federal assistance. It is now clear that Title IX requires an entire institution or education system to prohibit sex discrimination if any part of the institution or system receives federal assistance.⁹ Because all school administrative units in North Carolina receive some form of federal assistance, Title IX applies to all North Carolina public elementary and secondary schools. In fact, it applies to every public school in the country.

5. *Id.*

6. The three other statutes were Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1982); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1990); and the Age Discrimination Act of 1975, 29 U.S.C. § 621 (1985).

7. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

8. 1988 U.S. CODE CONG. & ADMIN. NEWS, vol. 3, *Legislative History of the Civil Rights Restoration Act of 1987*, p. 6.

9. Title IX requires that every application for federal financial assistance for any education program or activity contain or be accompanied by an assurance from the applicant or recipient that each education program or activity operated by the applicant or recipient will be operated in compliance with Title IX. Each recipient, or local educational agency [LEA as defined by Section 801(f) of the Elementary and Secondary Education Act of 1965], is required to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX. 34 C.F.R. §§ 106.8, 106.2 (1989).

How Title IX Is Enforced

There are two methods of enforcing Title IX: termination of federal funding or an individual private right of action. The statute speaks only of the termination of federal funds.¹⁰ The United States Supreme Court created the second remedy when it allowed aggrieved individuals to file their own lawsuits against institutions that are allegedly violating Title IX.¹¹

Termination of Federal Funding

The Department of Education (and any other federal department or agency that is empowered to extend federal financial assistance to any education program or activity) issues regulations or orders defining compliance with Title IX. The department's Office of Civil Rights (OCR) investigates complaints of violations of Title IX. In addition OCR conducts compliance reviews to determine that recipients of federal education funds are complying with Title IX.¹² If Title IX or its regulations are violated, then the Department of Education must warn the institution of the violation and give it an opportunity to come into compliance. (Most cases are resolved through voluntary compliance.) If the institution refuses to comply, then the agency may terminate or refuse to grant federal financial assistance to the institution. The institution is entitled to a hearing on the matter. Before terminating federal funding, the head of the Department of Education (or other agency empowered to extend federal education funds) is required to file a report of the circumstances and grounds for the proposed termination with the United States House of Representatives and Senate committees having legislative jurisdiction over the program. The termination of funding cannot occur until thirty days after this report has been filed with the House and Senate committees.¹³

Federal regulations implementing Title IX provide that a person who believes that he or she has been subjected to discrimination prohibited by Title IX must file a

10. 20 U.S.C. § 1682 (1976), as amended by Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

11. *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

12. According to a press release from Michael Williams, assistant secretary of the Department of Education, entitled "National Enforcement Strategy, Office for Civil Rights" and issued in December, 1990, "The increased complaint workload in FY 1990 allowed OCR to devote only 3 percent of its total staff resources to compliance review investigations, compared to 75 percent of the total staff resources used for complaint investigations and related activities; e.g., monitoring, complainant appeals and quality review. We intend to devote the bulk of any new resources to the compliance review program. Reviews of larger institutions will be carried out by teams to expedite the gathering and analysis of data and the development of the letters of findings."

13. 20 U.S.C. § 1682.

written complaint with the Department of Education no later than 180 days from the date of the alleged discrimination. The Department of Education also has the authority to extend the time for filing the complaint.¹⁴ Once the administrative complaint is filed, OCR must then investigate the alleged discrimination.

Litigation

The other method of enforcement of Title IX is the private cause of action. Although the Title IX statute does not mention a private cause of action, the United States Supreme Court has found that private litigants who allege that their Title IX rights have been violated may seek redress through their own lawsuits.¹⁵ In approving enforcement through a private cause of action, the Court relied on the similarity between Title VI of the 1964 Civil Rights Act and Title IX. Courts had earlier approved a private cause of action under Title VI.¹⁶ The Supreme Court also heard testimony from the Department of Health, Education, and Welfare (the agency that was then in charge of the enforcement of Title IX) that it did not have the resources to enforce Title IX in a substantial number of circumstances and it therefore supported a private cause of action. The Court held, "We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination."¹⁷

Persons pursuing a private cause of action are not required to exhaust administrative remedies before filing a lawsuit. In other words, such persons are not required to ask the Department of Education or any other administrative body to intervene to protect their rights under Title IX before resorting to court action. They may go straight to court.¹⁸

If a student sues a state agency for a violation of Title IX, the state cannot defend the lawsuit by claiming that

as a governmental agency it is immune from liability. In 1986 Congress enacted the Civil Rights Remedies Equalization Amendment,¹⁹ which provides that a state shall not be immune under the Eleventh Amendment of the United States Constitution from suit in federal court for a violation of Title IX. Therefore if a state is sued for a violation of Title IX, it will be liable to the same extent as any other public or private entity.

Statute of limitations. As mentioned earlier, federal regulations implementing Title IX provide a 180-day time limit for filing administrative complaints. However, these regulations do not contain a statute of limitations for the filing of litigation.²⁰ Because litigants do not have to exhaust administrative remedies prior to going to court, they may miss the 180-day time limit for filing an administrative complaint and still pursue litigation under Title IX.

Because there is no statute of limitations provided in Title IX, and the United States Supreme Court has not defined the appropriate time limit in Title IX cases, courts are likely to analogize Title IX to civil rights actions and look to the recent United States Supreme Court decision of *Owens v. Okure*²¹ to determine the appropriate statute of limitations. In *Owens* the Court found that the appropriate statute of limitations in civil rights actions under Section 1983 of Title 42 of the United States Code is a state's residual or general personal injury statute of limitations. In *Owens* the plaintiff claimed that he had been beaten by police officers when he was arrested. Twenty-two months after the incident the plaintiff sued, claiming a violation of his civil rights. The defendants moved to dismiss the complaint claiming that the deadline for filing the action had passed. Defendants argued that the court should utilize the state's strict one-year statute of limitations for intentional torts instead of the broader three-year general statute of limitations. The Supreme Court ruled that when state law provides multiple statutes of limitations for personal injury actions, courts considering Section 1983 claims should use the general or residual statute for personal injury actions.²² Therefore the Court ruled that the case was timely filed under the state's three-year statute of limitations.

Although no courts have yet applied *Owens v. Okure* to Title IX, because Title IX violations are similar to civil

14. 34 C.F.R. § 100.7 (1989).

15. *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

16. *Id.* at 696 [citing *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967)].

17. *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979). In this case a woman who was denied admission to two medical schools brought a civil rights suit charging the two schools with sex discrimination under Title IX. The schools had denied her admission even though they had admitted applicants who were less qualified. The schools had a policy of excluding anyone over the age of thirty. The petitioner, who was thirty-nine years of age, claimed that the policy of excluding applicants over the age of thirty had a discriminatory impact on women because women were more likely to postpone their higher education in order to raise a family. The Court's decision permitted her to pursue her lawsuit against the two schools.

18. *See Cannon v. University of Chicago*, 441 U.S. 677, 708 (1979), n.41: "For these reasons, we are not persuaded that individual suits are inappropriate in advance of exhaustion of administrative remedies. Because the individual complainants cannot assure themselves that the administrative

process will reach a decision on their complaints within a reasonable time, it makes little sense to require exhaustion." *See also Simpson v. Reynolds Metal Co., Inc.*, 629 F.2d 1226 (7th Cir. 1980); and *Rothschild v. Grottenthaler*, 716 F. Supp. 797 (S.D.N.Y. 1989).

19. Civil Rights Remedies Equalization Amendment [codified at 42 U.S.C. § 2000d-7 (1988)].

20. *Minor v. Northville Pub. Schools*, 605 F. Supp. 1185, 1199-200 (E.D. Mich. 1985).

21. 488 U.S. 235 (1989).

22. *Id.* at 249-50.

rights injuries, courts may use the reasoning of that case to find that a state's general or residual statute of limitations is appropriate.²³ The residual statute in North Carolina is three years.²⁴

Compensatory damages. When the Supreme Court decided that litigants have the right to pursue a private cause of action against an institution for alleged gender-based discrimination, the Court did not decide if a person may be compensated monetarily when she or he is successful in such a lawsuit.²⁵ Because the issue of compensation did not arise in the case, the Court authorized only declarative and injunctive relief. In other words, a litigant could seek a court order requiring an educational institution to comply with Title IX. A litigant also could seek an order declaring or defining an institution's action as a violation of Title IX. More recently litigants have sought monetary compensation as well as declarative and injunctive relief.

Currently there is a conflict in the circuit courts on the availability of monetary awards in Title IX cases. When the monetary compensation issue arose in the Seventh Circuit Court of Appeals, the court found that both Title IX and its legislative history were silent as to the existence of a financial award for sexual discrimination. Because the court found that by accepting federal money, an institution could potentially be exposing itself to huge financial liability—possibly greater than the federal funds received—the court concluded that institutions should not be forced to pay damages unless the statute clearly informs them of their potential liability. Because Congress did not create an explicit monetary compensation remedy, the court found that the plaintiff was not entitled to damages.²⁶

In a more recent case, *Franklin v. Gwinnett County Public Schools*, the Eleventh Circuit Court of Appeals concluded that because the Supreme Court has not decided whether a litigant can recover compensatory damages for intentional discrimination under Title IX, each circuit court of appeals can decide the issue for itself.²⁷ In the eleventh circuit case, a female student sued seeking damages for alleged intentional gender-based discrimination against her. She alleged that she and her economics teacher had engaged in two or three episodes of sexual intercourse on school property. She stated that

the teacher had also authorized her late admittance to other classes on several occasions. The student presented extensive evidence in court showing that other school officials knew of the relationship and did not take appropriate action to protect the girl. The eleventh circuit decided that the Supreme Court decision in *Guardians Association v. Civil Service Commission of New York*²⁸ precluded a cause of action for damages for unintentional discrimination but left open the question of damages for intentional discrimination under Title IX. Basing its decision on earlier precedent in the circuit, the eleventh circuit ruled that a student could not recover compensatory damages under Title IX even if the student proved intentional discrimination.²⁹

In another recent case the Third Circuit Court of Appeals ruled that if the litigant proved discriminatory intent she could recover compensatory damages under Title IX.³⁰ The plaintiff was a member of her high school chapter of the National Honor Society (NHS). She was dismissed from the NHS when she became pregnant out of wedlock. She alleged that the principal and the teachers who composed the faculty council governing the NHS chapter had discriminated against her on the basis of sex. The third circuit remanded the case to the district court with instructions that the court hear the plaintiff's evidence that two years after her dismissal a male member of the NHS had not been dismissed after he impregnated his girlfriend. He later married his girlfriend just prior to the birth of their child. The faculty council did not take any action against him. The third circuit instructed the district court to hear the male student's testimony and then determine if the plaintiff had been discriminated against intentionally on the basis of her sex. The third circuit found that compensatory damages could be awarded under Title IX if the plaintiff proved discriminatory intent.

The question of whether a litigant can receive compensatory damages under Title IX if she or he proves that the educational institution intentionally discriminated against the litigant has not been decided by the Fourth Circuit Court of Appeals, which includes North Carolina,

23. See *Minor v. Northville Pub. Schools*, 605 F. Supp. 1185 (E.D. Mich. 1985), for a decision applying this concept to Title IX before *Owens v. Okure*.

24. N.C. GEN. STAT. § 1-52(5) (1983).

25. *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

26. *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981).

27. 911 F.2d 617 (11th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3441 (U.S. Dec. 10, 1990) (No. 90-918).

28. 463 U.S. 584 (1983). In that opinion the United States Supreme Court agreed that discriminatory intent was not a prerequisite to *relief* under Title VI, but "at least five justices would not allow *compensatory* relief to a private plaintiff under Title VI absent proof of discriminatory intent." *Franklin v. Gwinnett County Public Schools*, 911 F.2d 617, 620 (11th Cir. 1990), [citing *Manecke v. School Bd. of Pinellas County, Fla.*, 762 F.2d 912, 922 n.8 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)]. The eleventh circuit looked to the Supreme Court decision in *Guardians* because Title IX was modeled after Title VI.

29. *Franklin v. Gwinnett County Pub. Schools*, 911 F.2d 617, 622 (11th Cir. 1990) [citing *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir. Unit A, 1981)].

30. *Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779 (3d Cir. 1990).

or the United States Supreme Court. Plaintiffs in *Franklin v. Gwinnett County Public Schools*, the eleventh circuit case described above, have filed a petition for *certiorari*, asking the United States Supreme Court to hear the case. The Court has asked the solicitor general to file a brief in the case expressing the views of the United States.³¹ Because of the conflict in the circuits, the Supreme Court may agree to hear the case. Unless there is a decision by either the Fourth Circuit Court of Appeals or the United States Supreme Court finding that damages are unavailable, North Carolina school authorities should be aware that litigants might be able to obtain compensatory damages as well as injunctive and declaratory relief under Title IX, if they prove that school officials have discriminated intentionally against them.

Attorney's fees. In a significant amendment to Section 1988 of Title 42 of the United States Code, Congress clarified that federal courts have the discretion to award attorney's fees to successful litigants under Title IX. The Civil Rights Attorney's Fees Awards Act of 1976 authorizes federal courts to award attorney's fees to the prevailing party in a Title IX case. The amount of attorney's fees can be a substantial cost to an unsuccessful litigant.³²

When Title IX Applies

Admission and Scholarship Policies

Title IX prohibits educational institutions that receive federal funding from discriminating on the basis of sex in the admission of candidates to their programs. This prohibition applies to admission policies in institutions of vocational education, professional education, graduate higher education, and undergraduate higher education.³³

Admission issues rarely arise in public elementary and secondary schools. Occasionally vocational education programs involve admission decisions. Under Title IX, if an institution receives any federal financial assistance, its vocational education programs cannot treat applicants for admission differently on the basis of actual or potential parental, family, or marital status, or pregnancy, childbirth, termination of pregnancy, or recovery therefrom.³⁴ For example, if a pregnant student applies for admission

to a vocational course in welding, school officials cannot prevent her entry in the program because of her sex or her pregnancy. They can require her to obtain a medical certification that she is physically able to participate in the course, so long as such a certification is required of all students who have other physical conditions requiring the attention of a physician.³⁵

In a similar area in the public schools, a New York court intervened in the use of test scores to award scholarships when high school students alleged sex discrimination in the decision-making process. In 1989 applicants for the New York State Regents and Empire scholarships successfully sued the New York Education Department concerning the method of determining the winners of these scholarships.³⁶ The female students claimed that the department discriminated against them under Title IX when it allowed the SAT score to be used as the sole determination of qualification for the scholarships. It was undisputed that the female high school seniors scored an average of sixty points lower on the SAT tests than their male counterparts, even though they performed as well or better in high school courses. Defendants' reliance on the SAT as the sole criterion resulted in a consistent pattern: females received only 43 percent and 28 percent of the Regents and Empire State scholarships, respectively, although they represented 53 percent of the applicant pool.

In the year before the lawsuit, the New York legislature had ordered the department to find a better indication of high school achievement than the SAT scores. In response the department had weighted the SAT scores and the grade point averages of the students equally. This formula had improved the balance of females in relation to males: females who had comprised 53.3 percent of the applicant pool had received 49.3 percent and 37.4 percent of the Regents and Empire State scholarships, respectively, that year. At the time of the lawsuit, the department had decided to revert to its earlier method of exclusive reliance on the SAT scores.³⁷

The federal court granted a preliminary injunction after it concluded that the department's sole reliance on SAT scores denied the plaintiffs equal protection under the Fourteenth Amendment and violated Title IX. The court prohibited the department from relying exclusively on the SAT scores in the award of Regents and Empire State scholarships.

31. *Franklin v. Gwinnett County Pub. Schools*, ___ U.S. ___, 111 S. Ct. 949 (1990).

32. Attorney's fees awards have reached six figures in some cases. Ellen J. Vargyas, attorney, National Women's Law Center, conversation with author, 26 February 1991.

33. 20 U.S.C. § 1681(a)(1).

34. 34 C.F.R. § 106.21(c)(1) and (2) (1989).

35. 34 C.F.R. § 106.40(b) (1989).

36. *Sharif by Salahuddin v. New York State Educ. Dept.*, 709 F. Supp. 345 (S.D.N.Y. 1989).

37. *Sharif by Salahuddin v. New York State Educ. Dept.*, 127 F.R.D. 84, 86-87 (S.D.N.Y. July 19, 1989).

Participation in Education Programs Including Physical Education and Human Sexuality Classes

Schools covered by Title IX cannot exclude any student from any academic, extracurricular, research, occupational training, or other education program or activity on the basis of sex.³⁸ For example, schools cannot offer separate classes for boys and girls in health, physical education, business, industrial arts, home economics, or music.³⁹

Title IX regulations provide for two exceptions to the rule prohibiting separate classes. Schools may separate students in elementary and secondary schools by sex when the class deals exclusively with human sexuality. Music teachers may also make requirements based on vocal range or quality that may result in a chorus of one or predominantly one sex.

Although physical education classes cannot be separated by sex, students may be divided into different classes or grouped into separate groups within a class if they are assessed by objective standards of individual ability and performance developed and applied without regard to sex. However, physical education teachers cannot use a single standard of measuring skill or progress that has an adverse effect on members of one sex. Instead, they must use appropriate standards that do not have such an effect. Finally, Title IX permits the division of physical education classes by sex when the activity involves bodily contact, such as wrestling, boxing, rugby, ice hockey, football, and basketball.⁴⁰

Counseling

Under Title IX school officials cannot discriminate against any person on the basis of sex in the provision of counseling or guidance services. Guidance counselors may not use different materials for male and female students unless the materials cover the same occupations and the use of the different materials is shown to be essential to limit sex bias. School officials should be alert to ways in which counselors may unintentionally encourage a student to pursue a sex-stereotyped career or course plan, when other choices would be more appropriate for the student. For example, male students should not be the only ones who receive information on military careers while only females receive information on careers in nursing.

In addition school officials should be on the lookout for courses in which there is a disproportionate enrollment

of students of one sex. If they find such a situation, they are required under Title IX to determine if the predominance of one sex in the course is the result of discrimination on the basis of sex in the counseling of students or the career interest materials used by counselors, and if so, to take corrective action.⁴¹ For instance, if a school official discovers that only males are taking shop, while only females are taking home economics, the official should talk with the school counselors and teachers to see if they are encouraging students of one sex to pursue a particular course plan, while discouraging students of the other sex in a similar pursuit. If the official finds that the counselors or teachers are in fact responsible for the disproportionate balance in the sexual enrollment in these courses, he or she is required to take corrective action.

Competitive Athletics

Title IX has had a dramatic impact on the participation of girls in high school athletics. In 1971 only 7.4 percent of high school interscholastic athletes were girls. Title IX went into effect in 1972, and the following year the participation rate of female athletes rose by more than half a million nationwide. By the 1989–90 school year, the participation rate of girls in high school athletics had risen to 35 percent.⁴² In 1971 North Carolina offered high school state championships to girls in only two sports, golf and tennis, while today girls compete for state honors in ten sports.⁴³ Despite this marked improvement, many girls still do not have the athletic opportunities that boys have. Some girls have pursued litigation to remedy the situation.

Three different strains of litigation have developed as courts have attempted to resolve issues of sex discrimination in athletics. Some litigants have sought relief under Title IX.⁴⁴ Other litigants have focused on state equal rights statutes or constitutional amendments as the basis of their causes of action.⁴⁵ A third group of litigants has claimed that educational institutions have denied them

38. 34 C.F.R. § 106.31 (1989).

39. 34 C.F.R. § 106.34 (1989).

40. 34 C.F.R. § 106.34(b) through (f) (1989).

41. 34 C.F.R. § 106.36(a) through (c) (1989).

42. Statistics compiled by the National Federation of State High School Associations, *1990 Handbook* (Kansas City, Mo.: NFSHSA, 1990), 73.

43. Thomas H. Thornburg, "The Validity of Single Sex and Coed, Interscholastic Sports Teams," *School Law Bulletin* 21 (Spring 1990): 11, hereinafter cited as Thornburg, "Sports Teams"; N.C. High School Athletic Association, *1988–89 Handbook* (Chapel Hill, N.C.: NCHSAA, 1988), 12.

44. *Croteau v. Fair*, 686 F. Supp. 552 (E.D. Va. 1988); *Rowley v. Board of Educ. of St. Vrain Valley School Dist.* RE-1J, 863 F.2d 39 (10th Cir. 1988).

45. *B.C. v. Board of Educ.*, 220 N.J. Super. 214, 531 A.2d 1059 (1987); *Commonwealth ex rel. Packer v. Pennsylvania Interscholastic Ass'n*, 18 Pa. Commw. 45, 334 A.2d 839 (1975).

their state or federal constitutional rights to equal protection of the laws in the administration of athletic programs.⁴⁶ Because some litigants have sought relief under more than one cause of action, the following discussion is divided into topics according to the description of the litigant and not the cause of action used by the litigant.

The Title IX litigation relies on Title IX's prohibition on recipients of federal assistance from discriminating on the basis of sex in any interscholastic, intercollegiate, club, or intramural athletics offered by an educational institution. According to the Title IX regulations, no recipient of federal assistance may provide athletics separately according to the sex of the participants, or exclude members of one sex from participating in athletics.⁴⁷ There are two huge exceptions to Title IX's prohibition on separate teams for males and females: if the selection for the separate teams is based upon competitive skill or if the activity is a contact sport.

Selection based on competitive skill. Title IX provides that an educational institution may operate or sponsor a team in a particular sport for members of one sex if the selection is based on competitive skill. Because almost all athletic teams are chosen based on competitive skill, this exception to the rule prohibiting separation of teams by sex covers a large portion of athletics. However, the regulations provide that if there is not a team available for members of the opposite sex, and athletic opportunities for members of that sex have been limited previously, then members of the excluded sex must be allowed to try out for the team unless the sport involved is a contact sport.⁴⁸ For instance, if the school has a golf team for men but no golf team for women, then women must be permitted the opportunity to try out for the men's golf team.

Comparable team for female athletes does not exist. Since the enactment of Title IX, federal and state courts have been virtually unanimous in upholding the regulation allowing women to try out for men's noncontact sports teams when there are no comparable teams for women.⁴⁹ Neither Title IX nor the courts that have

considered the issue have mandated that women be permitted to play on these teams. Instead, their right is limited to the opportunity to try out. If they make the team, of course, they then have the right to be on the team.

In 1988 a Virginia federal district court ruled that Julie Croteau, a seventeen-year-old high school senior, had not been discriminated against when she was "cut" after the second tryout for the men's baseball team. The court concluded that she had failed to prove that the decision to cut her from the varsity baseball team was motivated by gender bias. Rather, the court concluded that she had received a fair tryout and the coach's decision to cut her was made in good faith. The court explained its decision:

[T]he law's mandate of equality does not dictate a disregard of the differences in talents and abilities among individuals. As the Court noted from the bench, there is no constitutional or statutory right to play any position on any athletic team. Instead, there is only the right to compete for such a position on equal terms and to be free from sex discrimination in state action.⁵⁰

Sometimes OCR has gone further than requiring an educational institution to permit a female student to try out for the male team. The HEW Intercollegiate Athletics Policy Interpretation issued in 1979 further requires that in certain situations involving noncontact sports an educational institution must sponsor a team for members of the excluded sex. For instance, if the school has a golf team for males but no golf team for females, a school will be required to sponsor a golf team for females if the following circumstances exist:

1. The opportunities for members of the excluded sex have historically been limited;
2. There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and
3. Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.⁵¹

Although this Policy Interpretation was designed specifically for intercollegiate athletics, "its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation."⁵²

Comparable team for male athletes does not exist. When male students have sued seeking the right to try out and play for a women's team, most courts have ruled that male students do not have a right to participate on the

46. *Croteau v. Fair*, 686 F. Supp. 552 (E.D. Va. 1988); *Rowley v. Board of Educ. of St. Vrain Valley School Dist.* RE-1J, 863 F.2d 39 (10th Cir. 1988); *B.C. v. Board of Educ.*, 220 N.J. Super. 214, 531 A.2d 1059 (1987); *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982); *Ritacco v. Norwin School Dist.*, 361 F. Supp. 930 (W.D. Pa. 1973).

47. 34 C.F.R. § 106.41(a) (1989).

48. 34 C.F.R. § 106.41(b) (1989). See the section in this article on contact sports.

49. Thornburg, "Sports Teams." See also *Bednar v. Nebraska School Activities Ass'n*, 531 F.2d 922 (8th Cir. 1976) (cross-country running); *Brenden v. Independent School Dist.*, 477 F.2d 1292 (8th Cir. 1973) (cross-country running and skiing); *Morris v. Michigan State Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973) (tennis); *Haas v. South Bend Community School Corp.*, 259 Ind. 515, 289 N.E.2d 494 (1972) (golf); *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D.Colo. 1977) (soccer).

50. *Croteau v. Fair*, 686 F. Supp. 552, 554 (E.D. Va. 1988).

51. Intercollegiate Athletics Policy Interpretation, issued December 11, 1979, 44 Fed. Reg. 71413, 71418.

52. *Id.* at 71413.

women's team.⁵³ Although this result appears contradictory to that achieved by women when they have sued, courts have justified excluding men from women's teams for two major reasons: First, courts have ruled that historically women have been excluded from participation in sports, while men have had and continue to have ample opportunity to participate in athletic activities. Courts have reasoned that if men are permitted to join women's teams, they will be taking the positions from women, thereby further reducing the opportunity of women to participate in sports. Second, men are often taller and stronger and therefore, if allowed to participate, may soon dominate the women's teams.

Courts that have applied Title IX to situations in which a male wishes to play on a female athletic team have arrived at differing interpretations of the Department of Education's regulation requiring a school to determine if the "athletic opportunities for members of that sex have previously been limited."⁵⁴ Most courts have looked to the overall athletic opportunities for members of the excluded sex at that particular school.⁵⁵ For instance, a New York court determined that if the overall athletic opportunities for males were equal to or better than those of females at the school in question, then males could be excluded from a particular team without violating Title IX.⁵⁶

Comparable team for female athletes does exist. Occasionally outstanding female athletes have sued to join male teams so that they can have a higher level of competition. Courts have generally rejected these claims when there is already a female team in existence.⁵⁷

Under Title IX regulations schools must permit females to try out for male teams only when there are no female teams, and then only when it is a noncontact sport and there has been a past history of discrimination in athletic opportunities for women.⁵⁸ Even though they do not have a claim under Title IX, students may still sue under other legal theories. For instance, they may allege

violations of equal protection or a violation of a state's equal rights act.

Contact sports. The Department of Education regulations issued under Title IX exempt schools from providing coeducational teams for contact sports. The regulations define contact sports as including "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact."⁵⁹ The HEW Intercollegiate Athletics Policy Interpretation provides that if a higher educational institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex under the following circumstances:

1. The opportunities for members of the excluded sex have historically been limited.
2. There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.⁶⁰

Comparable team for female athletes does not exist. Despite these regulations and policies, since the mid-1970s women have consistently won the right to compete on men's teams in contact sports when there are no women's teams available to them. Instead of limiting their legal theories to Title IX, they have alleged a violation of a state equal rights act or a violation of the constitutional guarantee of equal protection under the law. Women have succeeded in winning the right to compete on men's contact sports teams when there were no women's teams in wrestling, football, and soccer and in Massachusetts, in all contact sports.⁶¹

For example, a federal district court in Nebraska invalidated a rule that prohibited females from joining a male wrestling team when there were no female teams.⁶² The court condemned a rule that permitted males regardless of body size, strength level, speed capability, or muscle power output to try out for the team, but prohibited all females. The court rejected "[s]uch a paternalistic gender-based classification" that results from ascribing a particular trait or quality to one sex, when not all share

53. Thornburg, "Sports Teams." See also *Rowley v. Board of Educ. of St. Vrain Valley*, 863 F.2d 39 (10th Cir. 1989); *B.C. v. Board of Educ.*, 220 N.J. Super. 214, 531 A.2d 1059 (1987); *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), cert. denied, 464 U.S. 818 (1983); *Petrie v. Illinois High School Athletic Ass'n*, 75 Ill. App. 3d 980, 394 N.E.2d 855 (1979); and *Muladaradelis v. Haldane Central School Bd.*, 74 A.D.2d 248, 427 N.Y.S.2d 458 (1980).

54. 34 C.F.R. § 106.41(b) (1989).

55. Thornburg, "Sports Teams." See also *Forte v. North Babylon Union Free School Dist.*, 105 Misc. 2d 36, 431 N.Y.S.2d 321 (N.Y. Sup. Ct., Special Term, 1980); and *Muladaradelis v. Haldane Central School Bd.*, 74 A.D.2d 248, 427 N.Y.S.2d 458 (1980).

56. *Muladaradelis v. Haldane Central School Bd.*, 74 A.D.2d 248, 427 N.Y.S.2d 458 (1980).

57. Thornburg, "Sports Teams."

58. 34 C.F.R. § 106.41(b) (1989).

59. *Id.*

60. Intercollegiate Athletics Policy Interpretation, issued December 11, 1979, 44 Fed. Reg. 71418.

61. Thornburg, "Sports Teams," at 13; *Saint v. Nebraska School Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988) (wrestling); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985) (football); *Force v. Pierce City R-VI School Dist.*, 570 F. Supp. 1020 (W.D.Mo. 1983) (football); *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977) (soccer); *Balsley v. North Hunterdon Regional High School Bd. of Educ.*, 225 N.J. 221, 542 A.2d 29 (1988) (football); *Opinion of the Justices to the House of Representatives*, 347 Mass. 836, 371 N.E.2d 426 (1977) (all sports).

62. *Saint v. Nebraska School Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988).

that trait or quality. The court concluded that such a result is not only inherently unfair, but generally tends only to perpetuate stereotypical notions regarding the proper roles of men and women and results in a denial of equal protection of the laws for all women to whom the rule applies.⁶³

Comparable team for female athletes does exist. A federal circuit court of appeals and one Justice of the United States Supreme Court reached a different result when the female requesting the right to play on a male contact sport team already had the opportunity to play on a female team.⁶⁴ In 1981 the Seventh Circuit Court of Appeals rejected an Illinois girl's petition to overturn a rule that prevented her from playing on her junior-high boys' basketball team. When Karen O'Connor enrolled in the sixth grade, she was told that she could only play on the girls' basketball team. When the district court first heard the case, it concluded that the boys' and girls' teams were not equal, because the girls' team did not give her the opportunity to compete with those who were equal or superior to her in skill.⁶⁵ The school officials appealed.

The school officials won before the Seventh Circuit Court of Appeals. Karen O'Connor then sought a temporary delay of the tryouts until her case could be argued before the United States Supreme Court. Justice Stevens, sitting as a single judge, ruled against Karen on her motion for a delay of the tryouts. He found the rule prohibiting girls from competing against boys in contact sports to be rational.

Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events. The defendants' program appears to have been adopted in full compliance with the regulations promulgated by the Department of Health, Education, and Welfare. Although such compliance certainly does not confer immunity on the defendants, it does indicate a strong probability that the gender-based classification can be adequately justified.⁶⁶

Because the case was never argued before the full United States Supreme Court, it is unclear how the Court would rule when confronted with a case in which a female sought to play a contact sport on a male team when a female team already existed.

63. *Id.* at 629.

64. *O'Connor v. Board of Educ. of School Dist. 23*, 645 F.2d 578 (7th Cir. 1981), *on application to vacate stay*, 449 U.S. 1301 (Stevens, Circuit Justice, 1980), *cert. denied*, 454 U.S. 1084 (1982), *on remand*, 545 F. Supp. 376 (N.D. Ill. 1982).

65. *O'Connor v. Board of Educ. of School Dist. 23*, 545 F. Supp. 376 (N.D. Ill. 1982).

66. *O'Connor v. Board of Educ. of School Dist. 23*, *on application to vacate stay*, 449 U.S. 1301, 1307 (Stevens, Circuit Justice, 1980).

Equal athletic opportunity. When it published regulations to govern the administration of Title IX, the Department of Education mandated that all recipients of federal education assistance provide "equal athletic opportunity" for members of both sexes if the recipient operates or sponsors interscholastic, intercollegiate, club, or intramural athletics. Although the regulations do not define "equal athletic opportunity," they do provide a list of factors the director of the Office of Civil Rights may consider when determining if an institution is complying with the equal opportunity mandate:

1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes
2. The provision of equipment and supplies
3. Scheduling of games and practice time
4. Travel and per diem allowance
5. Opportunity to receive coaching and academic tutoring
6. Assignment and compensation of coaches and tutors
7. Provision of locker rooms and practice and competitive facilities
8. Provision of medical and training facilities and services
9. Provision of housing and dining facilities and services
10. Publicity⁶⁷

According to the regulations, the above list is not exhaustive. In addition the regulations provide that unequal aggregate expenditures for members of each sex or for male and female teams do not constitute a violation of the regulations automatically, but the director of the Office of Civil Rights may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex. Under the 1979 HEW Intercollegiate Athletics Policy Guidelines, the Department of Education will assess compliance with both the recruitment and the general athletic program requirements of the regulation by comparing the availability, quality, and kinds of benefits, opportunities, and treatment afforded members of both sexes. "Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible."⁶⁸

In a lengthy opinion a federal district court in Pennsylvania analyzed the athletic program at Temple University

67. 34 C.F.R. § 106.41(c) (1989).

68. Intercollegiate Athletics Policy Interpretation, issued December 11, 1979, 44 Fed. Reg. 71413, 71415.

in light of the opportunities available to men and women students.⁶⁹ Women students had sued claiming that although the school offered both male and female teams, the women were discriminated against because the programs and the money expended on the women's athletic teams were not equal to that expended for the male teams. The students alleged that the separate programs were unequal in almost every conceivable area including opportunities to compete, expenditures, recruiting, coaching, travel and per diem allowances, uniforms, equipment, supplies, training facilities, academic tutoring, and publicity. The students claimed that they were being discriminated against under Title IX in the unequal financial aid provided to male and female athletes, and that they were discriminated against under the equal protection clause of the United States Constitution because of the unequal expenditures for the male and female teams.

After a hearing on motions for summary judgment (asking the court to issue a ruling without a trial), the court concluded that although Temple University was not obligated to sponsor an intercollegiate athletic program, if it chose to do so, then the program "must be made available to all on equal terms."⁷⁰ The court found that the women had raised legitimate claims that they could present at trial concerning the number of teams available for men versus the number of teams available for women, and the expenditure of approximately \$2,100 more per male student athlete than per female student athlete.

The North Carolina appellate courts have not decided any cases that interpret these regulations. In addition the Fourth Circuit Court of Appeals and the United States Supreme Court have not decided any cases defining the meaning of "equal athletic opportunity" in the Department of Education's regulations concerning Title IX.

Sexual Harassment and Title IX

Public elementary and secondary school officials should be aware that in recent years courts have begun to recognize sexual harassment as a valid legal claim. As early as 1977 a federal district court found that sexual harassment was a valid legal claim under Title IX.⁷¹ In 1986 The United States Supreme Court first addressed sexual harassment in the workplace in *Meritor Savings Bank v. Vinson*.⁷² In that case a bank teller sued her employer charging that she had been subjected to a sexually hostile

work environment because of the unwelcome advances of a vice-president and bank manager. She testified that she had been fondled in front of other employees and that she had been forcibly raped. Because of her fear of losing her job, she said she had succumbed to her boss's unwelcome advances. The United States Supreme Court upheld the Health and Human Services regulation that "[u]nwelcome sexual advances . . . and other verbal or physical conduct of a sexual nature . . . [constitute] sexual harassment . . . [when] such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."⁷³

Although the United States Supreme Court has not yet decided a case of sexual harassment under Title IX, lower courts have found that sexual harassment is a violation of Title IX. In *Alexander v. Yale*⁷⁴ a lower court first recognized sexual harassment as a valid claim under Title IX. In that case women students joined former students and faculty members in seeking a court order requiring Yale University to implement a mechanism for processing sexual harassment complaints.

In a more recent case the First Circuit Court of Appeals followed the Supreme Court's reasoning in *Meritor* and concluded, "in a Title IX case, an educational institution is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees if an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it."⁷⁵

According to the National Coalition for Women and Girls in Education, there are two basic types of sexual harassment. Both types violate Title IX.

The first type is characterized by the imposition of unwelcome sexual activity in a relationship of unequal power. Examples of this type of harassment include unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of instruction, employment, or participation in an educational activity or (2) submission to or rejection of such conduct by an individual is used as a basis for evaluation in making academic or personnel decisions affecting an individual. The second type of harassment occurs where harassment creates a hostile, intimidating, or offensive

69. *Hafer v. Temple University*, 678 F. Supp. 517 (E.D.Pa. 1987).

70. *Id.* at 525.

71. *Alexander v. Yale*, 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

72. 477 U.S. 57 (1986).

73. *Id.* at 65 [citing 29 C.F.R. § 1604.11(a)(3) (1988)].

74. 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980). See also Elaine D. Ingulli, "Sexual Harassment in Education," *Rutgers Law Journal* 18 (1987): 281; and Carolyn Ellis Staton, "Sex Discrimination in Public Education," *Mississippi Law Journal* 58 (1988): 323.

75. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988).

academic or work environment and those in a position of authority do not redress the problem.⁷⁶

The Office of Civil Rights found a violation of Title IX when a high school coach and economics teacher became involved in a sexual relationship with one of his female students. The school's principal was informed of the relationship and discouraged the student from pursuing the matter. At the end of the school year the principal retired and the coach resigned. The Office of Civil Rights investigated the case and found a Title IX violation. It closed its investigation after it received assurances that

76. National Coalition for Women and Girls in Education, *Title IX: A Practical Guide to Achieving Sex Equity in Education* (Washington, D.C.: NCWGE, 1988), 11.

actions had been taken to prevent any future violations of Title IX.⁷⁷

Conclusion

It is clear that Title IX can affect many areas of public elementary and secondary schools: athletics, physical education and other special classes, counseling, admissions, and others. Because Title IX applies to all North Carolina public schools, officials must be careful to avoid sex discrimination in any school programs or policies. ■

77. *Franklin v. Gwinnett County Pub. Schools*, 911 F.2d 617 (11th Cir. 1990).