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Gender Discrimination in Athletics

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GENDER DISCRIMINATION IN ATHLETICS

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I. INTRODUCTION

Historically, men and women have been separated in many activities based merely upon their gender differences. However, on December 14, 1961, Executive Order No. 10980 was issued by President John F. Kennedy, establishing the President's Commission on the Status of Women. Based upon that organization's findings, task force findings, and congressional hearings, it was evident that gender discrimination in the United States was rampant.[1] It became apparent to all three branches of government that no individual branch had the ability to solve the problem of gender discrimination without the cooperation of the other two.

While Congress has enacted numerous laws protecting individuals from gender discrimination,[2] and the executive branch has established the President's Commission on the Status of Women and the President's Task Force on Women's Rights and Responsibilities to fully investigate the matter, the judiciary has probably been the most active in defining the boundaries of gender discrimination. Gender discrimination cases have arisen under numerous statutes and the United States Constitution. In amateur athletics most cases interpreting gender discrimination legislation involve petitioners' arguments that base their claims on the fourteenth amendment of the United States Constitution and Title IX.[3]

This article will discuss the primary legal theories that are

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1. See *American Women*, Report of the President's Commission on the Status of Women (1963); *A Matter of Simple Justice*, The Report of the President's Task Force on Women's Rights and Responsibilities (Apr. 1970); *Discrimination Against Women: Hearings on § 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education & Labor*, 91st Cong., 2nd Sess. (1970); L. KANOWITZ, WOMEN AND THE LAW (1969); *1969 Handbook on Women Workers*, United States Department of Labor, Women's Bureau Bulletin 294.

2. *E.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1964), et. seq. (hereinafter referred to as Title VII); The Equal Pay Act, 29 U.S.C. § 206(d) (1963); and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1978) (hereinafter referred to as Title IX).

3. Title IX, *supra* note 2.

used by athletes who believe that they have been the victims of gender-based discrimination. The gender-based discrimination theories will be analyzed using the fourteenth amendment of the Constitution of the United States and Title IX of the Educational Amendments of 1972. This paper will also discuss the procedural issues involved in developing a gender-based discrimination action.

It is important that both the athlete and counsel understand the theories described in this article and employ the proper procedures in advancing the case initially. If the proper theories and procedures are not applied, then the case may be dismissed before final arguments.

II. FOURTEENTH AMENDMENT

The fourteenth amendment states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."[4] In order to successfully litigate gender discrimination under the fourteenth amendment, a petitioner must discuss and advocate four areas. First, the petitioner must show that state action exists.[5] Second, the petitioner must address the issue of competition on "mixed" teams, where physical contact within the athletic event may take place and the petitioner may have been denied the right to compete because of physical contact.[6] Third, the petitioner must address the issue of separate but equal opportunities to participate in the athletic activity.[7] Fourth, the petitioner must demonstrate that he or she had a valid property interest.[8]

A. STATE ACTION

In order for the fourteenth amendment protections to be afforded to an individual, the rights allegedly violated must have been violated by the state.[9] The claimant must show that differential treatment is involved. Once state action has been established, the claimant must then prove that the alleged discriminatory pol-

4. U.S. CONST. amend. XIV, § 1.

5. Craig v. Boren, 429 U.S. 190 (1976); Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), 688 F.2d 14 (3d Cir. 1982), 115 F.R.D. 506 (F.D. Pa. 1987), 678 F. Supp. 517 (E.D. Pa. 1987).

6. LaFler v. Athletic Bd. of Control, 536 F. Supp. 104, 106 (W.D. Mich. 1982).

7. Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1130 (9th Cir. 1982).

8. Fluitt v. University of Neb., 489 F. Supp. 1194, 1202 (D. Neb. 1980).

9. Shelley v. Kraemer, 334 U.S. 1, 14-16 (1948); Hawkins v. National Collegiate Athletic Ass'n, 652 F. Supp. 602, 612 (1987).

icy does not have a substantial relationship to the governmental objective to which it is directed. A substantial relationship cannot be presumed.[10]

However, the state itself need not be the actor.[11] If another party, organization, or institution has acted so that its actions are considered state actions, then fourteenth amendment protections will be invoked.[12] The fourteenth amendment seeks to protect against injustices and against unequal treatment of those individuals who should be treated equally. It is not an issue whether one has the right to participate; what is at issue is that no one is treated unfairly in an activity provided by the state. A participant can be treated differently only if there is a substantial basis for the disparate treatment.[13] There are numerous ways in which a private entity assumes the role of a state actor. These ways include com-

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10. *See* Kirchberg v. Feenstra, 450 U.S. 455, 461 (1980) (party seeking to uphold a statute that classifies individuals on the basis of gender must show an exceedingly persuasive justification for the regulation); Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 273 (1978) (party seeking to uphold a statute that classifies individuals on the basis of gender must show an exceedingly persuasive justification of the regulation); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1979) (party seeking to uphold a statute that classifies individuals on the basis of gender must show an exceedingly persuasive justification of the regulation); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (university limited its enrollment to women, denying qualified men the right to enroll in the nursing program). *See also* Bednar v. Nebraska School Activities Ass'n, 531 F.2d 922 (8th Cir. 1976) (regulation prohibiting girls from participating on cross-country teams); Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (regulation against girls competing on the men's tennis team, cross-country skiing team, and the cross-country running team); Cape v. Tennessee Secondary School Athletic Ass'n, 563 F.2d 793 (6th Cir. 1977) (different rules required for girl's basketball); Haas v. South Bend Community School Corp., 289 N.E.2d 495 (Ind. 1972) (regulation denying females the right to participate on men's golf team); Fortin v. Darlington Little League, Inc., 514 F.2d 344 (1st Cir. 1975) (regulation prohibiting girls from playing on boys little league baseball team); Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973) (regulation prohibiting girls from competing on the men's tennis team); Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974) (regulation prohibiting girls from participating in football); Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976) (regulation prohibiting girls from playing on baseball teams); Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1973) (regulation prohibiting girls from participating on cross-country team); Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977) (regulation prohibiting girls from participating on high school soccer team); Kelly v. Wisconsin Interscholastic Athletic Ass'n, 367 F. Supp. 1388 (E.D. Wis. 1974) (state interscholastic athletic association policy limited opportunity for females); Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753 (S.D. Ohio 1978) (regulation preventing girls from participating in contact sports); Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 334 A.2d 839 (Pa. 1975) (state interscholastic athletic association prohibited girls from practicing or participating in any athletic contest with males); Darrin v. Gould, 540 P.2d 882 (Wa. 1975) (regulation prohibiting girls from football competition); and National Ass'n for Women, Essex County Chapter v. Little League Baseball, Inc., 318 A.2d 33 (N.J. 1974) (regulation prohibiting girls from participating in little league baseball).

11. Howard Univ. v. National Collegiate Athletic Ass'n, 510 F.2d 213, 217 (1975); Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028, 1031-32 (1975).

12. *Howard University*, 510 F.2d at 216-17; *Parish*, 506 F.2d at 1031.

13. Burton v. Wilmington Parking Authority, 365 U.S. 715, 721-22 (1961); Brenden v. Independent School Dist. 742, 477 F.2d 1292, 1297 (1973); Haffer v. Temple Univ., 678 F. Supp. 517, 524 (E.D. Pa. 1987).

mandment by the government,[14] encouragement by the government,[15] joint efforts in a symbiotic relationship with the government,[16] and assumption of public functions.[17]

It is possible for a gender-based discrimination petitioner to

14. Peterson v. City of Greenville, 373 U.S. 244, 248 (1963).

15. Robinson v. Florida, 378 U.S. 153, 155-56 (1964).

16. *Burton*, 365 U.S. at 724.

17. Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982). One example of the state requiring a private entity to act in violation of the fourteenth amendment protections occurred in 1963. Peterson v. City of Greenville, 373 U.S. 244 (1963). In *Peterson*, the state required restaurants to serve food in a racially segregated manner. *Id.* at 246. The owners of the restaurant attempted to comply with the state requirement but found it nearly impossible. Petitioners, the restaurant owners, filed an action under the fourteenth amendment. *Id.* at 247. The petitioners claimed that since the restaurant was merely acting in compliance with a state requirement, it was the state that was actually infringing upon the petitioners' rights. *Id.* at 249. The Court held that since the state was forcing the action, it fell under the ambit of the fourteenth amendment. *Id.* at 248.

In 1964, the Court determined that the state, through legislation or the actions of its officers, could encourage the activities of private organizations to such an extent that the private organizations were seen as state actors. Robinson v. Florida, 378 U.S. 153 (1964). In *Robinson*, a Florida statute required restaurants that served members of minority races to have separate toilet facilities for the minority patrons. *Id.* at 156. Due to these restrictions being placed upon restaurant owners, some restaurants limited their patrons to whites only. *Id.* Petitioners were members of the minority class who attempted to receive but were refused service at these restaurants. *Id.* The Court determined that the Florida statute was so restrictive that it was the cause of the discrimination. *Id.* Absent the statute, the discrimination would not have occurred. *Id.* Therefore, the petitioners were entitled to constitutional protection under the fourteenth amendment. *Id.* at 156-57.

Another method by which it has been determined that private actions constitute state action has been when the relationship between the two actors, the state and the individual, is so intertwined that a determination as to which actions are state and which are private, is impossible. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). In *Burton*, the Wilmington Parking Authority leased parking space from a government parking facility. *Id.* at 719. The parking facility was located near a government office, resulting in most of its patrons being government employees. *Id.* The restaurant was required to follow all of the limitations placed on government actors, because the location was near the government facility and the land was granted to the restaurant owners by the government. Therefore, the fourteenth amendment was applicable and equal protection should have been afforded to those who were the victims of gender discrimination. *Id.* at 724.

The last method by which a private entity's actions will be held to the stricter state action requirements is when the entity is engaged in the exercise of a public function. The purpose of this last requirement is to restrict the state from freeing itself from the constitutional limitations simply by delegating its duties to private entities. Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). The challenged actions cannot be those which a state merely "can" perform, but must be actions which the state has traditionally performed and which the state has a duty to perform. Some of these functions include protection of the citizenry, taxation, maintenance of roadways, and public education.

In 1981, the Supreme Court indicated its intention to examine more closely the assertions of government involvement in a challenged activity. Blum v. Yaretsky, 457 U.S. 991 (1982); *Lugar* , 457 U.S. 922 (1982); *Rendell-Baker* , 457 U.S. 830 (1982). In *Blum*, *Lugar*, and *Rendell-Baker*, the conduct of a private party or organization was examined. The Court has described a private party or organization that received government support in the form of revenue as private contractors. These private contractors perform the government contracts as individuals and the acts of these individuals cannot be attributed to the government. Thus, in these cases, even though the revenue funding came from the state government, the Court found no governmental involvement. In other words, while the government is the "employer," the institution is "private," and its intentional acts cannot be attributed to the government. *Blum*, 457 U.S. at 1011-12; *Lugar*, 457 U.S. at 943; *Rendell-Baker*, 457 U.S. at 843.

claim that an institution, whether it be a state school or a private school, whether it receive governmental financial assistance or not, to have acted in violation of the fourteenth amendment of the Constitution.

B. PHYSICAL CONTACT

Historically, the states have separated males and females in athletics due to the physical differences between the sexes.[18] This has been done for two reasons. First, it was, and to some extent still is, believed that there may be more physical danger to a female who is competing in a contact sport that includes males than to a female competing solely against other females.[19] Second, there is a belief that males would dominate the female programs and deny the females the opportunity to participate in the activities if the males and females were allowed to compete against each other.[20]

Since 1970, numerous petitioners have challenged the regulations established by state schools and athletic associations that have regulations prohibiting females from participating in certain sports. Most of the challenges have been brought by concerned females who were denied the right to participate on mixed teams.[21] Courts have concluded that regulations prohibiting female student-athletes from participating on male teams such as soccer,[22] tennis,[23] cross-country skiing,[24] cross-country running,[25] football,[26] and baseball are discriminatory.[27]

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18. O'Connor v. Board of Educ., 449 U.S. 1301 (1980).
19. *Id.* at 1305.
20. *Id.* at 1307.
21. *See infra* notes 22-27 and accompanying text.
22. Hoover v. Meiklejohn, 430 F. Supp. 164, 165 (D. Colo. 1977) (petitioner was a female student who was prohibited from playing soccer on high school team).
23. *See* Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (petitioner was a female student who was prohibited from competing in tennis, cross-country, skiing, and running); Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973) (prohibiting two high school girls from participating in interscholastic tennis matches); Leffel v. Wisconsin Interscholastic Athletic Ass'n., 444 F. Supp. 1117 (E.D. Wis. 1978) (The petitioner was a female student-athlete who wanted to try out for the boy's tennis team, but state regulation prohibited girls from trying out for boys' teams. The court found the regulations discriminatory.).
24. Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973).
25. *Id.*
26. Force v. Pierce City R-VI School Dist., 570 F. Supp. 1020 (W.D. Mo. 1983); Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974).
27. Carnes v. Tennessee Secondary School Athletics Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976); National Organization for Women v. Little League Baseball, Inc., 127 N.J. Super 522, 318 A.2d 33, *aff'd* 67 N.J. 320, 338 A.2d 198 (1974); Israel v. West Virginia, 388 S.E.2d 480 (W. Va. 1989). In *Israel*, a suit was filed by Erin Israel, a female high school student, against the Secondary Schools Activities Commission (SSAC) for refusing to allow her to play on the boy's baseball team. *Id.* at 482. The SSAC rules allowed her to

Courts quickly point out that there is no constitutional right to participate in interscholastic athletics.[28] The only issue the courts want to examine is whether a program of interscholastic athletics provided by the school has been administered so that the program denies equal rights to female students to participate.[29]

States have promulgated rules prohibiting males from participating on female teams as well, and actions have been brought by males who wanted to participate on those teams.[30] Such a classification is subject to scrutiny under the equal protection clause of the fourteenth amendment to ascertain whether there is a rational relationship to a valid state purpose.[31]

In *B.C. v. Cumberland Regular School District*,[32] the court ruled that a male student had not been discriminated against, even though the rules promulgated by the State Interscholastic Athletic Association prevented him from playing on the girls' field hockey team.[33] The court was convinced that the rules preventing the boy from playing were promulgated in order to achieve equality of athletic opportunity for both sexes and to rectify the historical denial of athletic opportunities for women.[34] The court believed equalization of athletic opportunities was an important governmental objective, and the Association's rules provided an appropriate and proper means of protecting the athletic opportunities of

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participate in softball on the girl's softball team. *Id.* at 482-83. The court determined that for constitutional purposes, softball and baseball are not substantially equivalent, due to differences in equipment, size of the playing field, number of players on a team, and the difference in the skills required to play the two games. *Id.* at 485. Therefore, the court stated that since the two games are not substantially equivalent, the SSAC rule violated petitioner's equal protection rights. *Id.* The court also rejected the argument that Israel's claims for relief were moot since she had already graduated from high school. The court concluded that the SSAC rule would have collateral consequence sufficient to justify the effort, and that the issue presented a matter of public concern since it involved public education; also, the court stated that cases like this would never reach the court of appeals, and should, therefore, be heard. *Id.* at 483.

28. Brenden v. Independent School Dist. 742, 477 F.2d 1292, 1297 (8th Cir. 1973); Morris v. Michigan State Bd. of Educ.,472 F.2d 1207, 1209 (6th Cir. 1973); Bucha v. Illinois High School Ass'n, 351 F. Supp. 69, 73 (N.D. Ill. 1972).

29. *Bucha* , 351 F. Supp. at 72.

30. 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); Mularadelis v. Haldane Central School Bd., 74 A.D.2d 248, 427 N.Y.S.2d 458 (1980) (promulgated rules were upheld). The courts, in the above cited cases, relied upon the arguments that regulations denying or prohibiting boys from participating on girl's teams were substantially related to the important governmental interests in promoting overall equality of athletic opportunity and in redressing past discrimination against women in athletics.

31. *Morris*, 472 F.2d at 1209.

32. 220 N.J. Super. 214, 531 A.2d 1059 (1987).

33. B.C. v. Cumberland Reg. School Dist., 220 N.J. Super. 214, __, 531 A.2d 1059, 1063-64 (1987).

34. *Id.* at __, 531 A.2d at 1065.

female students in the educational system.[35]

The courts have had more difficulty in ruling on actions where the male student-athlete alleges discrimination.[36] In this area, the Supreme Court has held that gender-based classifications can withstand a constitutional challenge under the fourteenth amendment where the actual purpose of the gender-based regulation or rule was to compensate for past discrimination.[37]

If an institution demonstrates that there is potential harm to the female student-athletes, or, arguably, to the male student-athletes, due to the nature of the contact sport in question, it will be held constitutional to limit participation in that sport.[38] The state must show the primary concern is for the average differences between the sexes, and that the state is concerned for the health and safety of the participants.[39] The factors used to justify the harm, which the state must allege and prove, are safety, intimidation and displacement.[40] In order to prevail on a constitutional claim of gender discrimination, the plaintiff must prove that the state action is involved in the denial of an application to compete.[41]

C. SEPARATE BUT EQUAL

In 1979, the parents of two collegiate female basketball players brought suit against Oregon State University for failure to provide equality between the men's and women's athletic programs.[42] The petitioners contended that there were verifiable instances of inequality in the two sports programs.[43]

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35. *Id.* The courts have had more difficulty in ruling on these actions. In this area, the Supreme Court has held that sex-based classification can withstand a constitutional challenge under the fourteenth amendment where the actual purpose of the gender-based rule is to compensate for past discrimination. Califano v. Webster, 430 U.S. 313, 318 (1977).

36. *B.C.*, 220 N.J. Super. at __, 531 A.2d at 1066; *Califano*, 430 U.S. at 318.

37. *Id.*

38. LaFler v. Athletic Bd. of Control, 536 F. Supp. 104, 106 (W.D. Mich. 1982).

39. *B.C.*, 220 N.J. Super. at __, 531 A.2d at 1067.

40. *Id.*

41. *Id.*

42. Aiken v. Lieuallen, 39 Or. App. 779, __, 593 P.2d 1243, 1244 (1979). Oregon State University provided both a men's athletic program and a women's program. *Id.* at 1246. Each program had its own staff and its own budget. *Id.* The programs did not offer identical sports activities. *Id.*

43. *Id.* at 1251. The court found disparity between the men's and the women's programs based upon evidence indicating that the men's program had a budget nearly 200 percent larger than the women's program. The court stated that in making a determination as to whether the athletic programs for men and women were disparate in their treatments of athletes, the factfinder could consider the revenue-generating ability of a sport, the level of interest and ability of the participants, the nature of transportation provided, the amounts paid to those individuals officiating the contest, the level of coaching provided, and the university's commitment to competitive athletic programs. *Id.* at 1248-51. The court emphasized that athletic expenditures need not be equal, but the pattern of

Prior to addressing the specific issues, the court emphasized that an institution can provide separate programs for men and women.[44] The court stated that programs must exist for both sexes, and there must be an opportunity for both genders to participate in intercollegiate athletics.[45] The issue of separateness was not the question; the issue of equality was.[46]

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expenditures must not result in a disparate effect on opportunity. *Id.* at 1245. The Oregon regulations were fashioned after the federal regulations implementing Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681. *Id.* One of the key definitions is that which defines discrimination as "any act that *unreasonably* differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on age, handicap, national origin, race, marital status, religion, or sex." OR. REV. STAT. 659.150(1) (1975) (emphasis added). In *Aiken*, the court determined that there was no gender discrimination, due to the fact that the disparities between the two programs were reasonable. *Id.* at 1251. For similar discussions, see Haffer v. Temple Univ., 688 F.2d 14 (3rd Cir. 1982) (a landmark case in that the U.S. Supreme Court had heard it before); Grove City College v. Bell, 687 F.2d 684 (3rd Cir. 1982), *aff'd* 465 U.S. 555 (1984) and again after the decision in *Grove City*, allowing the petitioners in *Haffer* to amend their complaint to raise the federal and state issues. In *Haffer*'s original complaint, the petitioners based their claim upon Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 (1978). *Grove City* held that the institution itself must be the program receiving assistance, and that grants by some of the college students did not trigger institution-wide coverage. *Grove City*, 687 F.2d at 691. Therefore, if the program did not receive federal money, the regulations of Title IX did not apply to that program. *Id.* at 692.

Since the *Grove City* decision, the federal government enacted the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). In this Act, Congress explicitly intended "to reaffirm pre-*Grove City*" by applying federal antidiscrimination laws and overturn the decision by the Supreme Court in *Grove City*. The Civil Rights Restoration Act of 1987 states that all programs and activities of an institution are now subject to federal antidiscrimination laws if any federal aid is received by the institution in any one of its programs or activities. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, Legislative History at 4 (1988).

See also Blair v. Washington State Univ., 108 Wash. 2d 558, 740 P.2d 1379 (1987). In *Blair*, evidence showed that in the 1980-81 school year, the total funding available to the men's athletic programs was $3,017,692, whereas the women's athletic program in that year received only $689,757. *Id.* at 561, 740 P.2d at 1381. This equaled 23% of the men's funding. When the factors were evaluated, the defendants argued that football should be excluded from the factoring, since it was the primary revenue-generating sport. *Id.* at 564, 740 P.2d at 1382. The court denied this argument. *Id.* at 569, 740 P.2d at 1385. The court observed the evidence presented and concluded that the defendants "had 'acted, or failed to act, in the operation of the University's intercollegiate athletic programs in a manner that resulted in discriminatory treatment of females. . . .'" *Id.* at 561, 740 P.2d at 1381. The court, quoting the trial court memorandum stated, after examining the evidence that "'[t]he message came through loud and clear, women's teams [at Washington State] were low priority.'" *Id.* The court found other specific areas of inequality and discrepancies including tutoring, training table privileges, transportation, and officiating. *Id.*

44. Aiken v. Lieuallen, 39 Or. App. 779, __, 593 P.2d 1243, 1245 (1979) (the court cited Oregon statutes stating that only "unreasonabl[e] differentiat[ion]" in treatment is discrimination).

45. *Id.*

46. *Id.* at __, 593 P.2d at 1249-51. The specific issues which were addressed by the court in this case were:

1. Alleged unreasonable inequality of transportation;
2. Alleged unreasonable inequality and inferior officiating;
3. Alleged unreasonable disparity in coaching staffs;
4. Alleged inequality of the entire competitive athletic program for men and women.

Id. The court examined the following areas:

1. Appropriateness of equipment and supplies;

The court stated that the revenue-producing capability of the two sports programs was a "valid criterion" to be considered in examining the distinctions between the programs.[47] The court recognized that athletic programs are revenue-producing endeavors, and that the income generated from each individual sport affects the financial expenditures upon that program.[48] Therefore, a sport that provides a larger income to the institution may have a larger budget and more "extras."[49] However, the court emphasized that the discrepancies must have some actual basis in fact.[50] For example, if the men's basketball program is actually being funded at an amount ten times greater than the women's basketball program, the income from the men's basketball program should be approximately ten times larger than the income from the women's program. While the numbers do not have to match exactly, any disparity must be reasonable.[51] The petitioner should allege that the revenue-generating ability of a sport is not static.[52] As the sport emerges from the institution, if the university is to be reasonable in its funding, the university must take into account not only the present revenue-generating capabilities, but they must also consider the future revenue-generating capabilities.[53] The petitioners should argue that increased funding to a program would increase the revenue-generating capabilities.[54] The petitioner should prepare for the court an economic analysis of the existing factors, showing that it takes money to make money.[55]

In determining whether the university or institution's action results in a disparate effect upon one sex over the other and is, therefore, unreasonable, one must examine the amount of money that is budgeted for various women's sports as compared to the

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2. Games and practice schedules;
3. Travel and per diem allowances;
4. Opportunity for coaching and academic tutoring;
5. Coaches and tutors;
6. Locker rooms, practice and competitive facilities;
7. Medical and training services;
8. Housing and dining facilities and services; and
9. Publicity.

Id.

47. *Id.* at __, 593 P.2d at 1248-49.
48. *Id.*
49. *Id.* at __, 593 P.2d at 1251.
50. *Id.* at __, 593 P.2d at 1248-49.
51. *Id.* at __, 593 P.2d at 1251.
52. *Id.* at __, 593 P.2d at 1249.
53. *Id.*
54. *Id.*
55. *See Aiken*, 39 Or. App. at __, 593 P.2d at 1251.

money that is budgeted for men's sports.[56] Also, the petitioner should compare the money spent on equipment, facilities, officiating and uniforms for both programs.[57] In some instances, these differences may be so glaring that no other evidence is necessary to show that disparate treatment exists between programs.[58]

D. PROPERTY INTEREST

At the inception of a collegiate athletic career, the student-athlete has no constitutional right to participate in or receive grant-in-aid funding for collegiate athletics.[59] However, as factors are introduced into the student-athlete's career, the property right to participate may be granted.[60] Property interests are created by existing rules or understandings stemming from an independent source, such as state law, and the dimensions of the interests are defined similarly.[61] Property rights can be created by contract.[62] Until such property interest is specifically granted, it does not exist, and due process protections are not invoked.[63] However, once such property interest is granted, recipients may not be deprived of it without due process.[64]

Courts have noted that regulations and documentation regarding student athletic scholarships can give rise to a property interest on the part of the student-athlete.[65] Courts have held that the right to be eligible to participate in college athletics is a property right of present economic value.[66] Because some college athletes receive scholarships of value to engage in collegiate athletics, there is a property right of present economic value.[67] In high school athletics there are no scholarships, and at some colleges (especially NCAA Division III) there are no scholarships, and thus,

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56. *Id.* at __, 593 P.2d at 1251.
57. *Id.*
58. *Id.* at __, 593 P.2d at 1251 n. 10.
59. Fluitt v. the University of Neb., 489 F. Supp. 1194, 1202-03 (D. Neb. 1980); *But cf.* Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 604 (D. Minn. 1972) (*Behagen* stated that an education is of such "substantial importance" that it requires some constitutional protection.). *See also* Regents of the Univ. of Minn. v. N.C.A.A., 560 F.2d 352 (8th Cir. 1977) (court specifically declined to find a property interest in intercollegiate basketball participation despite the fact that the lower court had found such a property interest).
60. Parish v. N.C.A.A., 506 F.2d 1028, 1034 (5th Cir. 1975); Colorado Seminary v. N.C.A.A., 417 F. Supp. 885, 895 (D. Colo. 1976).
61. *Fluitt*, 489 F. Supp. at 1202.
62. *See Fluitt*, 489 F. Supp. at 1202-03 n. 4.
63. *Id.* at 1203.
64. J. NOWARK, B. ROTUNDA AND J. YOUNG, CONSTITUTIONAL LAW, chap. 15 at 530 (2d. ed. 1983).
65. Boyd v. Board of Directors of McGehee School Dist., 612 F. Supp. 86, 93 (1985).
66. Gulf South Conference v. Boyd, 369 So. 2d 553 (1979).
67. *Id.* at 556.

no right to participate.[68] However, if a student-athlete can show a direct link between participation and a tangible property interest, it is conceivable that a court would find that a property interest is present in the mere participation in collegiate athletics.

D. FOURTEENTH AMENDMENT CONCLUSION

The injunction is a remedy commonly used by petitioners when alleging a constitutional violation of their fourteenth amendment rights.[69] The petitioner may seek either an ex parte temporary restraining order (TRO) or a preliminary injuntion.[70]

The preliminary injunction is granted prior to a determination on the merits of the actual action.[71] Therefore, the petitioner must show that none of the less drastic provisional remedies provide an acceptable alternative, and that irreparable injury will occur if the temporary restraining order or temporary injuncton is not granted.[72]

The courts will then balance the relative harm to each party before granting the injunction.[73] When the petitioner believes that immediate relief is essential, a court will more often grant a temporary restraining order.[74] In order to obtain this ex parte order, the petitioner must meet a number of special conditions.[75] The temporary restraining order generally is in effect for a relatively short time or until a hearing is held on plaintiff's request for a preliminary injunction.[76] The factors a court considers before granting a temporary restraining order or a preliminary injunction are: 1) Is there an adequate legal remedy available which is less drastic? 2) Are there difficulties of enforcement and administration of the order? 3) Will the injunction be effective? 4) Is there irreparable harm? 5) Does the applicant have "clean hands," or is the applicant guilty of laches? and 6) Will the applicant prevail at the formal hearing?[77]

If it is determined that an institution is in violation of a stu-

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68. *See id.*

69. Saint v. Nebraska School Activities Ass'n, 684 F. Supp. 626 (D. Neb. 1988); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972); FED. R. CIV. P. 65(b).

70. *Saint*, 684 F. Supp. at 628; *Reed*, 341 F. Supp. at 261.

71. COUND, FRIEDENTHAL, AND MILLER, CIVIL PROCEDURES CASES AND MATERIALS 975 (1980).

72. *Id.*

73. *Id.*

74. *Saint*, 684 F. Supp. at 629.

75. *Id.*

76. COUND *supra* note 71, at 975; FED. R. CIV. P. 65(b).

77. COUND *supra* note 71, at 976; *Saint*, 684 F. Supp. at 629; *Reed*, 341 F. Supp. at 263-64.

dent-athlete's fourteenth amendment rights, that student may seek an injunction to restrain the discriminatory action from continuing.[78] An injunction may be brought to stay any harmful action while the primary action is pending.[79] The court then reviews the entire case and determines if discriminatory action exists. Often, the court requires the institution to provide separate but equal sports programs.[80] Courts have also awarded damages to the female student-athletes who have been injured by the discrimination.[81]

III. TITLE IX

Title IX, which has been the basis of many gender discrimination suits against collegiate institutions by female student-athletes, 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 . . . ."[82] The purpose of Title IX was to eliminate gender discrimination in numerous settings, one of which was coeducational programs.[83]

Title IX was more specifically tied to high school athletic programs in 1973, when the United States Court of Appeals for the Eighth Circuit ruled on *Brenden v. Independent School Districts*,[84] a case involving two female high school student-athletes.[85] In *Brenden*, the plaintiffs sought an injunction barring their high schools from refusing to permit them to participate on the tennis, cross-country skiing, and running teams and to further bar the Minnesota State High School League from imposing any sanctions

78. *Fluitt*, 489 F. Supp. at 1201; *Saint*, 684 F. Supp. at 628-29; *Reed*, 341 F. Supp. at 262-63;

79. *See Saint*, 684 F. Supp at 630.

80. *Id.*

81. *See generally* Haffer v. Temple Univ., 678 F. Supp. 517 (E.D. Pa. 1987); Fluitt, 489 F. Supp. 1194 (D. Neb. 1980). In order to prevail on a constitutional claim of discrimination based on the fourteenth amendment, a claimant must allege and prove that state action is involved. *Haffer*, 678 F. Supp. at 524; *Bennet*, 525 F. Supp. at 79. The party seeking to uphold a statute that classifies individuals on the basis of their gender " 'must carry the burden of showing an "exceedingly persuasive justification" for the classification.' " *Haffer*, 678 F. Supp. at 524. This " 'burden is met . . . by showing . . . that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives . . . ." ' " *Id.* In addition, in order to prevail in a gender-based law suit the injured party must allege and prove a property interest. *Fluitt*, 489 F. Supp. at 1202.

82. 20 U.S.C. § 1681(a) (1978).

83. Plascik v. Cleveland Museum of Art, 426 F. Supp. 779, 781 n. 1 (D.C. Ohio 1977).

84. 477 F.2d 1292 (8th Cir. 1973).

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

upon their high schools due to their participation.[86]

In *Brenden*, the high schools that the plaintiffs attended had accepted and followed a rule prohibiting the plaintiffs from participating on their respective teams.[87] The rule specifically barred females from participating against males in any high school interscholastic athletic activity.[88] The court granted the plaintiffs' request for an injunction, but specified that numerous questions remained unanswered at the time.[89]

The *Brenden* court did not address the issue of whether the schools could fulfill their responsibilities under Title IX by providing separate but equal facilities for females in interscholastic athletics, due to the fact that no teams for females existed in the sports involved. Also, the court did not address the issue of whether the institution would be justified in precluding females from competing with males in contact sports, because both sports involved were intrinsically noncontact sports. In later cases, courts would address these questions and other questions similar to these in order to analyze the Title IX issues.[90]

Title IX was applied to intercollegiate athletic programs in 1981.[91] In *Haffer v. Temple University*, numerous female student-athletes brought an action on behalf of all of the female student-athletes at Temple University.[92] They claimed that the institution offered disparate opportunities to compete in intercollegiate athletics, disparate financing of the men's and women's athletic programs, and disparate allocation of financial aid to male and female student-athletes.[93]

In addition to the fourteenth amendment argument, the petitioners claimed that the distribution of financial aid violated Title IX.[94] The court explained that, although an institution of higher education is not as inherently tied to the state as a secondary school, a college that receives financial aid from the state or federal government is acting in concert with the government in its actions, and therefore, Title IX applies to the actions of the

86. *Id.* at 1294. The challenged rule was promulgated by the Minnesota State High School League. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *See* cases cited *supra* note 10.
91. Haffer v. Temple Univ., 524 F. Supp. 531, 537 (E.D. Pa. 1981).
92. *Id.*
93. *Id.*
94. Haffer v. Temple Univ., 688 F.2d 14, 15 (3rd Cir. 1982).

institution.[95]

In 1984, the Supreme Court heard *Grove City v. Bell*,[96] a landmark case which added conditions to a 1982 decision in a Texas case.[97] In *Grove City*, the Court limited the bond between the government and the institution.[98] The Court found that since the financial aid itself had no discriminatory impact, and the financial aid could not be logically and naturally tied to the athletic program, the institution was not in violation of Title IX.[99] Once *Grove City v. Bell* was decided, the appeals of *Haffer* and *Bennett v. West Texas State University*[100] became significant. Courts now had a Supreme Court action upon which to base decisions regarding Title IX claims of student athletes.

This theory of no discriminatory impact was repeated in *Bennett*, in 1986.[101] Six female student-athletes contended that West Texas State University denied them equal opportunity to participate in intercollegiate athletics.[102] The female athletes contended that the discrimination was due to a disproportionate amount of spending between the men's athletic programs and the women's athletic programs.[103] The court stated that the athletic program of the institution did not fall under Title IX scrutiny, because the athletic program itself was not a direct recipient of federal funding.[104] Based upon *Grove City*, the court found that indirect aid which was awarded to the institution but not to the specific program was not enough contact to bring the athletic program within the scope of Title IX.[105]

However, in 1988, the United States Congress passed the Civil Rights Restoration Act.[106] Using this Act, Congress broadened the use of Title IX in gender discrimination claims against institutions based upon the intercollegiate athletic program.[107]

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95. *Id.* at 16.
96. 465 U.S. 555 (1984), *aff'g*, 687 F.2d 684 (3d Cir. 1982).
97. Grove City College v. Bell, 465 U.S. 555 (1984), *aff'g*, 687 F.2d 684 (3d Cir. 1982).
98. *Id.* at 573.
99. *Haffer*, 678 F. Supp. at 522.
100. 799 F.2d 155 (5th Cir. 1986).
101. Bennett v. West Tex. State Univ., 799 F.2d 155 (5th Cir. 1986).
102. *Id.* at 156.
103. *Id.* at 156-57.
104. *Id.* at 157-58.
105. *Id.* at 159.
106. Pub. L. No. 100-259, 102 Stat. 28 (1988).
107. *Id.* When the federal legislators enacted Public Law Number 100-259, they intended to reaffirm "pre-*Grove City*" by applying federal antidiscriminatory laws. Congress intended to overturn the *Grove City* decision. The Civil Rights Restoration Act of 1987 states that all programs and activities of an institution are subject to federal antidiscrimination laws if any federal aid is received by the institution in any of its programs or activities.

Following passage of the Civil Rights Restoration Act, the petitioner in *Haffer* was granted a motion for reconsideration.[108] The court determined that the relationship between the financial aid office, which does receive federal funds, and the athletic scholarships, which are administered through the financial aid office, was a sufficient interconnection, thus placing an institution within the protections of Title IX.[109] The athletic scholarships allow the institution to administer the federal funds in a way that the institution had previously been unable to do.[110] The athletic scholarships had direct impact upon the financial aid office, and the financial aid office had direct control over the federal funds.[111] The athletic scholarships, specifically the administration of them, had a direct impact on the use of the federal funds.[112] Therefore, petitioners could sue based upon a Title IX claim.[113]

If a petitioner successfully challenges an institution based upon a Title IX claim, the same recourse exists as under a successful fourteenth amendment claim. However, under a Title IX claim, the petitioner has one additional claim for relief—the successful petitioner may petition the court for the withholding of federal funds from the institution.[114] The minor impact upon the petitioner's life is the withholding of the funds.

The ability to petition for withholding of federal funds can be an important tool in the negotiating process in the early stages of a Title IX case. A petitioner may seek an injunction preventing the appropriation of federal funds to an institution.[115] The petitioner needs to demonstrate that there is a significant likelihood of winning the case, and that the petitioner, or others similarly situated, will be injured if the federal funds are distributed.[116] An institution faced with the lack of federal funds is more likely to negotiate with the petitioner than an institution that is merely required to allow the student-athlete to participate.

CONCLUSION

Prior to the passage of the Civil Rights Restoration Act in 1988, victims of gender-based discrimination relied primarily

108. Haffer v. Temple Univ., 678 F. Supp. 517 (E.D. Pa. 1987).
109. *Id.* at 537-38.
110. *Id.* at 538.
111. *Id.*
112. *Id.*
113. *Haffer*, 678 F. Supp. at 539-40.
114. *Id.* at 533.
115. *Id.*
116. *Id.*

upon a constitutional challenge or violation of the fourteenth amendment. Title IX challenges were not too successful, and basically the results were the same in either challenge. However, when the Title IX challenge was successful, the petitioner could pray for federal financial aid to be withheld as one form of relief. This was not a relief granted in the constitutional challenge.

To be successful, a petitioner has to include all of the remedies available in order to avoid a summary judgment decision by a judge who is reluctant to interfere in the educational process. Also, judges view intercollegiate or athletic programs as an integral part of a student-athlete education.

It is impossible to predict what the next decade may hold for those individuals who choose to participate in athletic endeavors that have traditionally been for the "other" gender. Some male student-athletes are choosing to compete in traditionally female-dominated sports, whereas female student-athletes are choosing the male-dominated sports. One cannot predict, but it is a fact that athletic programs will be closely monitored in the future.