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# IMPROVING GENDER EQUITY THROUGH THE CONTROLLING AUTHORITY OF THE NCAA

LAUREN MCCOY COFFEY\*

The 2022 National Collegiate Athletic Association (NCAA) Convention began with a celebration for the fiftieth anniversary of Title IX of the Educational Amendments of 1972, legislation prohibiting gender discrimination in educational programs or activities that receive federal funding.<sup>1</sup> This celebration announced a year-long effort to “host programs, tributes, and other activities” continuing through spring 2023, along with a guide with suggestions for member schools on how to recognize the anniversary on their campus and within the community.<sup>2</sup> On the surface, this celebration appears to highlight the NCAA’s commitment to inclusion and gender equality in college athletics. However, their actions often do not align with their words.

In May 2022, the American Volleyball Coaches Association (AVCA) filed a request for relief from NCAA legislation due to concerns regarding the policy’s compliance with Title IX.<sup>3</sup> Their concern surrounds a new rule for Division I institutions allowing football teams thirty-one days of preseason practice while women’s volleyball programs are limited to seventeen days.<sup>4</sup> This request was denied.<sup>5</sup> Additionally, the Division I Council tabled legislation granting volleyball teams access to coaches and funding in the summer, a benefit currently available to football.<sup>6</sup> Giving football expanded access to team

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1. Gail Dent, *NCAA Kicks Off Title IX at 50 Celebration*, NCAA (Jan. 25, 2022, 2:19 PM), <https://www.ncaa.org/news/2022/1/25/media-center-ncaa-kicks-off-title-ix-at-50-celebration.aspx>.

2. *Id.*

3. *AVCA Filing Waiver Request With NCAA to Protect Schools From Title IX Violations*, AVCA (May 23, 2022), <https://www.avca.org/Blog/Article/372/AVCA-Filing-Waiver-Request-with-NCAA-to-Protect-Schools-from-Title-IX-Violations>.

4. *Id.*

5. *NCAA Refuses Women’s VB Requests For Equitable Preseason Training*, AVCA (June 24, 2022), <https://www.avca.org/Blog/Article/378/NCAA-Refuses-Women-s-VB-Requests-for-Equitable-Preseason-Training>.

6. *Id.*

services and practices in the summer creates gender equity issues because equitable access to benefits is a central tenet for Title IX compliance.<sup>7</sup> It is difficult to argue that a fourteen-day difference given to a men's fall sport versus a women's fall sport is equitable, especially when the men's sport also receives access to coaches and funding during the summer.

This is merely one example of how the NCAA's actions prioritized men's sports over women's sports over the years. An external gender equity review conducted by Kaplan Hecker & Fink LLP after this controversy posed that the primary reason for gender inequities at the NCAA "stem[s] from the structure and systems of the NCAA itself, which are designed to maximize the value of and support to the Division I Men's Basketball Championship as the primary source of funding for the NCAA and its membership."<sup>8</sup> While some may argue this prioritization stems from the men's tournament being more financially solvent, this report establishes how the NCAA devalued the broadcast rights for women's basketball.<sup>9</sup> Additionally, the NCAA is not currently subject to Title IX, which allows the organization to emphasize men's sports without consequence.<sup>10</sup>

How does the NCAA's lack of focus on gender equality in collegiate athletics affect the actions of its member institutions as it relates to compliance with Title IX? In June 2022, Roger Wicker, a U.S. Senator from Mississippi and "ranking member of the Senate Committee on Commerce, Science, and Transportation" sent a letter to NCAA President Mark Emmert seeking an update on how the NCAA is overseeing Title IX compliance.<sup>11</sup> At the time of this writing, the NCAA has not provided a response. However, these questions and previously introduced bills<sup>12</sup> allow for an implicit understanding that gender equity in college athletics is not fully possible without the NCAA's involvement. If the governing body does not make gender equity a priority in their own actions, the NCAA's actions make violations of Title IX by member institutions more likely.

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7. *Id.*

8. *NCAA External Gender Equity Review: Phase I: Basketball Championships*, KAPLAN HECKER & FINK LLP 1-2 (Aug. 2, 2021), <https://ncaagenderequityreview.com/> [hereinafter *NCAA External Gender Equity Review*].

9. *Id.* at 2-3.

10. *Id.* at 2; see *NCAA v. Smith*, 525 U.S. 459, 469-70 (1999).

11. *Wicker Writes to NCAA Ahead of Title IX 50th Anniversary*, U.S. SENATE COMM. COM, SCI., & TRANSP. (June 17, 2022), <https://www.commerce.senate.gov/2022/6/wicker-writes-to-ncaa-ahead-of-title-ix-50th-anniversary>.

12. See *Gender Equity in College Sports Commission Act*, H.R. 7336, 117th Cong. § 3 (2022); *College Athletes Bill of Rights*, S. 4724, 117th Cong. § 4 (2022); Lindsay Schnell, *As US Celebrates 50 Years of Title IX, A New Bill Aims to Improve Gender Equity in Sports*, USA TODAY (June 23, 2022, 11:24 AM), <https://www.usatoday.com/story/sports/2022/06/23/new-bill-gender-equity-sports-title-ix-50/7703186001/>.

This article addresses the impact of NCAA governance on Title IX compliance for member institutions and why the association should be subject to Title IX. Much of the promise of Title IX comes from schools and universities willingly complying with the law and its intended purpose. A governing body with similar responsibilities can better prioritize compliance than the Department of Education, who is more likely to get involved only after a severe breach has occurred.<sup>13</sup> Part one considers the history of the NCAA's relationship with Title IX. Part two will highlight areas where the NCAA's influence and a lack of governing legislation related to gender equity makes member institutions vulnerable to Title IX violations. Finally, part three will address why making the NCAA comply with Title IX is needed and how that will reform gender equality in college athletics.

### I. TITLE IX AND THE NCAA

Addressing gender equity in intercollegiate athletics was not an initial aim under Title IX. The intended goal was to provide equal opportunity and access to education for women.<sup>14</sup> However, as Richard Bell notes, a critical error with the passing of Title IX was a lack of clarity as to how the law would be applied and to whom.<sup>15</sup> After Title IX was signed into law, Congress gave secondary and post-secondary schools six years to achieve compliance with the law.<sup>16</sup> The accompanying regulations developed by the Department of Health, Education and Welfare (HEW) proved contentious as scholastic athletic programs sought to limit the interpretation of Title IX.<sup>17</sup> This regulation, signed into law by President Ford on May 27, 1975, stated the following:

[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors: [ ]Whether the selection of sports

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13. Catherine Lhamon, Assistant Secretary for Civil Rights for the U.S. Department of Education, noted that most of the Office of Civil Rights work in Title IX enforcement is driven by complaints and that Title IX is enforced by students and parents. See Henry Bushnell, *After 50 Years, Title IX Compliance in College Sports Still Lags. The Reason? 'It Has No Teeth'*, YAHOO! SPORTS (June 23, 2022), [https://sports.yahoo.com/title-ix-compliance-college-sports-enforcement-department-of-education-office-for-civil-rights-161545634.html?soc\\_src=social-sh&soc\\_trk=ma](https://sports.yahoo.com/title-ix-compliance-college-sports-enforcement-department-of-education-office-for-civil-rights-161545634.html?soc_src=social-sh&soc_trk=ma).

14. Richard C. Bell, *A History of Women in Sport Prior to Title IX*, SPORT J. (Mar. 14, 2008), <https://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/>.

15. *Id.*

16. *Id.*

17. *Id.*

and levels of competition effectively accommodate the interests  
and abilities of members of both sexes . . . .<sup>18</sup>

Notably, the regulations do not consider equal spending between men's and women's programs as an example of non-compliant behavior, but instead could be used as evidence along with other concerns that a school or university is not providing equal opportunity.<sup>19</sup> Clarification provided in 1979 further defined how schools can achieve equal opportunity using a "Three-Part" Test which creates three valid avenues for compliance: substantial proportionality, history and continuing practice, and effective accommodation of interests and abilities.<sup>20</sup>

Although the regulations state that equal funding was not a requirement, many saw application of Title IX as a direct threat to college athletics.<sup>21</sup> For example, the NCAA sued the HEW in 1976 arguing that no athletic department is a direct recipient of federal funding. This suit was later dismissed.<sup>22</sup> Women's sports at the time were governed by the Association for Intercollegiate Athletics for Women (AIAW).<sup>23</sup> The NCAA did not introduce women's sport championships until the 1981-82 school year when it became clear that Title IX would apply to athletics programs.<sup>24</sup> A lawsuit filed by the AIAW in 1981 alleged the NCAA used monopolistic practices like predatory pricing to establish their governance of women's sports in violation of the Sherman Antitrust Act.<sup>25</sup> No additional fees were added to the flat rate paid to the NCAA by its member institutions after women's championship events were introduced in 1981, leading a large percentage of schools to leave the AIAW and govern their women's sports programs through the NCAA.<sup>26</sup> The U.S. Court of Appeals for the District of Columbia ruled against the AIAW because the organization failed to prove economic injury from the NCAA's practices.<sup>27</sup>

After attempts to minimize the applicability of Title IX in the regulations failed, schools challenged the application in the courts. Grove City College, a

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18. 34 C.F.R. § 106.41(c)(1) (1975).

19. *Id.*

20. *A Policy Interpretation: Title IX and Intercollegiate Athletics*, U.S. DEPT. OF EDUC., OFF. FOR CIV. RTS., 44 Fed. Reg. 71,413 (Dec. 11, 1979), <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>.

21. *See, e.g., History of Title IX*, WOMEN'S SPORTS FOUND. (Aug. 13, 2019), <https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/>.

22. *Id.*

23. Bell, *supra* note 14.

24. *Ass'n for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 579-80 (D.C. Cir. 1984).

25. *Id.* at 580.

26. *Id.*

27. *Id.* at 582.

private liberal arts college in Pennsylvania, challenged the application of Title IX based on their refusal to accept state or federal financial assistance.<sup>28</sup> While the college did not receive state or federal money directly, it did accept students with federal grants to be used for educational purposes only.<sup>29</sup>

U.S. Supreme Court Justice White writing for the majority concluded that there is no basis for a narrow application of the statute that only institutions directly applying for aid are subject to Title IX.<sup>30</sup> Compliance with Title IX, however, was limited to the area receiving the federal funding and was not considered applicable to the school or university as a whole.<sup>31</sup> At issue in the majority and the dissent, was an interpretation of congressional intent related to the regulation of Title IX. Justice Brennan agreed that congressional intent did not intend to limit Title IX's directive for recipients of federal funding to be limited to directly applying for those funds. However, the Court limited that intent without implementing a standard of broad application for Title IX compliance.<sup>32</sup> Under this interpretation, athletic programs would not have to address gender equity because they are not direct recipients of federal funding.

Justice Brennan's concerns related to congressional intent were confirmed when Congress overturned the precedent set by *Grove City College v. Bell* with the Civil Rights Restoration Act of 1987.<sup>33</sup> This law established that entities receiving federal funding must comply with civil rights legislation for all operations associated with that entity, making Title IX compliance an overarching concern for schools and universities instead of a program-by-program concern.<sup>34</sup> Additionally, it became clear that Title IX compliance would include athletics.<sup>35</sup>

What remained uncertain at this time was the applicability of Title IX to the NCAA. This organization does not receive federal funding directly, unlike its member institutions.<sup>36</sup> Renee Smith sued the NCAA alleging a Title IX violation after she was denied permission to play intercollegiate volleyball.<sup>37</sup> Smith argued that the NCAA's receipt of dues from federally funded institutions and

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28. *Grove City Coll. v. Bell*, 465 U.S. 555, 559 (1984).

29. *Id.*

30. *Id.* at 557, 564.

31. *Id.* at 571-74.

32. *Id.* at 592-99 (1984) (Brennan, J., dissenting).

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

34. *Id.*

35. See, e.g., P. Michael Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 MARQ. SPORTS L.J. 149, 163 (1990).

36. *NCAA v. Smith*, 525 U.S. 459, 459 (1999).

37. *Id.* at 463-64.

governance over those same institutions provided that the organization should abide by Title IX because the NCAA received an economic benefit provided by its member institutions.<sup>38</sup> In dismissing Smith's primary argument, the Supreme Court highlighted precedent defining who qualifies as a recipient of federal funds. While *Grove City College v. Bell* supports Smith's argument that Title IX encompasses all forms of aid, this requirement is limited to the receipt of federal funding either directly or through an intermediary.<sup>39</sup> Merely receiving an economic benefit from an institution that received federal funding is not enough to trigger Title IX compliance.

The Court in *NCAA v. Smith* remanded the case back to the Third Circuit to address the remaining arguments related to the application of Title IX to the NCAA.<sup>40</sup> The first argument considered on remand was whether the NCAA had controlling authority over its member institutions and thus over federally funded programs.<sup>41</sup> Using the Supreme Court's analysis in *NCAA v. Tarkanian* as a guide, the Third Circuit dismissed the controlling authority argument because member institutions retain the ability to ignore directives from the NCAA. "The fact that the institutions make these decisions cognizant of NCAA sanctions does not mean the NCAA controls them, because they have the option, albeit unpalatable, of risking sanctions or voluntarily withdrawing from the NCAA."<sup>42</sup> Next, Smith's second argument considered whether the NCAA's administration of the National Youth Sports Program (NYSP) creates the receipt of direct and indirect federal financial funding. The court remanded this argument to the district court for reconsideration because Smith's allegations, if true, established direct control of the NYSP in a manner providing more than an indirect receipt of federal funding that merely contains an economic benefit.<sup>43</sup>

Although the controlling authority argument has been repeatedly dismissed by courts, this argument provides an interesting angle for determining NCAA compliance with Title IX fifty years after the law was enacted. Each member institution maintains their own autonomy in determining whether they will follow NCAA rules, but do those rules create Title IX violations or allow schools to avoid meeting Title IX requirements? NCAA governance, at present, does not have to consider Title IX compliance even though it impacts all of their member institutions. Their actions can be solely motivated by the commercialization of intercollegiate sports and how to grow economically even

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38. *Id.* at 464.

39. *Id.* at 468.

40. *Id.* at 470.

41. *Smith v. NCAA*, 266 F.3d 152, 155-56 (3d Cir. 2001).

42. *Id.* at 156 (quoting *Cureton v. NCAA*, 198 F.3d 107, 117 (3d Cir. 1999)).

43. *Id.* at 163.

if that growth is to the detriment of gender equality. If the NCAA through their influence, and protection from Title IX compliance, allows for inequitable treatment and benefits, then is the purpose of Title IX subverted? What motivation is provided to member institutions to comply with the law if NCAA guidelines allow schools to manipulate their actions to appear compliant or simply ignore gender equity?

## II. HOW THIS CREATES TITLE IX ISSUES

Title IX compliance under the regulations provided by the Department of Education requires equal athletic opportunities for members of both sexes in three areas: financial assistance based on athletic ability, treatment and benefits, and the interests and abilities of male and female students.<sup>44</sup> Financial assistance should be required in substantially equal amounts whereas determining equal treatment and benefits is determined on a case-by-case basis where the Department of Education will consider multiple factors including the scheduling of games and practice times, along with coaching salaries and recruiting budgets.<sup>45</sup> Finally, the interests and abilities of male and female students are evaluated using a three-part test for compliance that ensures equal opportunity and similar levels of competition for both male and female students.

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.<sup>46</sup>

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44. *A Policy Interpretation: Title IX and Intercollegiate Athletics*, *supra* note 20.

45. *Id.*

46. *Id.*



Much of the legal action surrounding Title IX compliance addresses the ability to meet one of the three prongs provided in the three-part test, but violations can occur in any of the three main areas. For example, the concerns of the AVCA were based on equal treatment and benefits.<sup>47</sup> Since volleyball was not granted relief from the new NCAA legislation, there is now a strong argument that Division I volleyball schools are no longer in compliance with Title IX due to the disparity in practice days made available to football versus volleyball.<sup>48</sup> A fourteen-day difference in available practice time could demonstrate that a university following this NCAA rule is not providing equal athletic opportunities for both sexes.

The COVID-19 pandemic exposed other areas where NCAA intervention could impact Title IX compliance.<sup>49</sup> In the wake of financial challenges related to the cancellation of games during the pandemic, college sport commissioners associated with the Group of Five<sup>50</sup> schools sent a letter to the NCAA formally requesting a waiver of several bylaws for a four-year period in April 2020.<sup>51</sup> These requests included relief from financial aid, participation, and scheduling requirements, among others.<sup>52</sup> Financial aid, participation, and scheduling requirements all have the ability to impact Title IX compliance. A blanket waiver available to all Division I institutions for one year allowed schools to “provide less than the currently legislated minimum financial aid requirements to maintain membership”<sup>53</sup> was granted, but did not dismiss other financial aid rules. Bylaw 20.9.9.4 requires Football Bowl Subdivision (FBS) schools to “provide an average of at least 90 percent of the permissible football grants-in-aid per year during a rolling two-year period” and “annually offer . . . 200

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47. *AVCA Filing Waiver Request with NCAA to Protect Schools From Title IX Violations*, *supra* note 3.

48. *Id.*

49. See Karen L. Hartman, *The Elephant in the Room: How COVID-19's Financial Impact Further Threatens Title IX Compliance*, 13 INT'L J. SPORT COMM'N 399, 401 (2020).

50. Group of Five refers to Division I Football Bowl Subdivision conferences that are not members of the Power Five (Atlantic Coast Conference, Big Ten, Big 12, PAC-12, and the Southeastern Conference). Group of Five conferences includes Conference USA, Mid-American Conference, Mountain West Conference, Sun Belt Conference, and the American Athletic Conference. See Dennis Dodd, *With NCAA Constitution Changing, Will Powerful College Football Teams Effort to Formally Divide FBS?*, CBS SPORTS (Nov. 18, 2021, 11:49 AM), <https://www.cbssports.com/college-football/news/with-ncaa-constitution-changing-will-powerful-college-football-teams-effort-to-formally-divide-fbs/>.

51. Pete Thamel, *With Budgets Tightening Due to Coronavirus Fallout, Will More College Sports Be Cut?*, YAHOO! SPORTS (Apr. 14, 2020), [https://sports.yahoo.com/with-budgets-tightening-will-more-college-sports-be-cut-204423901.html?soc\\_src=social-sh&soc\\_trk=ma](https://sports.yahoo.com/with-budgets-tightening-will-more-college-sports-be-cut-204423901.html?soc_src=social-sh&soc_trk=ma).

52. *Id.*

53. Michelle Brutlag Hosick, *DI Council Coordination Committee Approves Blanket Waiver Requests*, NCAA (May 6, 2020, 4:45 PM), <https://www.ncaa.org/news/2020/5/6/di-council-coordination-committee-approves-blanket-waiver-requests.aspx>.

athletics grants-in-aid or expend at least \$4 million . . . .”<sup>54</sup> Waiving this requirement for even a year allows for the possibility of continued gender inequities. There is no language within this bylaw that addresses that this aid must be awarded at a gender proportional rate.<sup>55</sup> Further, assessment is determined through headcount or equivalency, giving schools the ability to manipulate funding in a manner that may not address Title IX compliance.<sup>56</sup> There are more opportunities for headcount scholarships for male athletes.<sup>57</sup> These concerns exist even when the bylaw is followed.

Schools sponsoring intercollegiate athletic programs and participating in federal student aid programs are required to provide data regarding funding under the Equity in Athletics Disclosure Act (EADA).<sup>58</sup> Included in the data provided each year as mandated by the EADA is scholarship funding. Title IX athletics regulations do not mandate equal athletically-related aid for men and women.<sup>59</sup> Instead, schools must “provide reasonable opportunities . . . in proportion to the number of students of each sex . . . .”<sup>60</sup> The Office of Civil Rights defined this proportionality rate of athletic scholarship dollars to the number of male or female participants to be within one percent.<sup>61</sup> Proportionality is defined on a case-by-case basis, upon certain statistical tests, giving schools an opportunity for compliance despite a disparity of three to five percent.<sup>62</sup> The EADA data does not support overall compliance with Title IX.<sup>63</sup> There were thirty-seven Division I FBS schools with more women’s team sport

54. 2020-21 NCAA Division I Manual, NCAA, at art. 20.9.9.4, 413 (Aug. 1, 2020), <http://www.ncaa.com/publications/productdownloads/D121.pdf>.

55. *See id.*

56. In headcount sports, each athlete counts as one full scholarship as long as the athlete receives some kind of aid. Whereas equivalency sports are allowed to divide a limited number of scholarships between each team’s athletes. Ice Hockey, as an example, has a maximum of eighteen scholarships but that could be divided between thirty-six athletes receiving a half scholarship each. Hartman, *supra* note 49, at 402-03.

57. *Id.*

58. *Equity in Athletics Data Analysis*, U.S. DEP’T OF EDUC., <https://ope.ed.gov/athletics/#/> (last visited Dec. 30, 2022).

59. *See* Barbara J. Osborne, *Failing to Fund Fairly: Title IX Athletics Scholarships Compliance*, 6 TENN. J. RACE, GENDER, & SOC. JUST. 83, 102 (2017).

60. 34 C.F.R. § 106.37(c)(1) (2022).

61. *See* Mary Frances O’Shea, Nat’l Coordinator for Title IX Athletics, *Dear Colleague Letter: Bowling Green State University*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (July 23, 1998), <https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrm.html>; Osborne, *supra* note 59, at 90.

62. O’Shea, *supra* note 61.

63. *Equity in Athletics Data Analysis*, *supra* note 58. (Follow hyperlink; click “Download Custom Data”; then click “Sanctioning Body”; then click NCAA Division I-FBS; then click “Continue”; then click “Continue With All Found”; then click “2020”; then click “Athletics Participation – All Sports and Men’s, Women’s and Coed Teams”; then click “Download”).

participants in 2020.<sup>64</sup> This number dwindled to nineteen when counting only unduplicated women's participants.<sup>65</sup> Therefore, there should be at least nineteen schools that provide more athletically related aid to women if all institutions were compliant with Title IX. In examining EADA data provided in 2020, just seven of those schools provided more athletically related aid to women's teams or were within one percent.<sup>66</sup>

Participation numbers provide an additional area of concern for institutional Title IX compliance due to confusion surrounding the addition of male practice players in women's sports. Bylaw 12.7.5 allows male students verified as eligible to serve as practice players for women's teams.<sup>67</sup> Gender equity issues related to this bylaw arise when counting participation numbers; should male practice players count as women's sports participants? The Office of Civil Rights, the governing agency for Title IX compliance for the U.S. Department of Education, says that male players should not count but the Office of Postsecondary Education, which administers the EADA report, believes they should count for female participation opportunities.<sup>68</sup> The lack of clarity makes it easier for schools to circumvent the purpose of Title IX and appear compliant with the law. USA Today, in a 2022 report, found twenty-nine athletes of the forty-three participants on the University of Michigan women's basketball team were male practice players.<sup>69</sup> The report also found that at least one in four of those reported as women's basketball players for the EADA were male practice participants.<sup>70</sup> The NCAA's Committee on Women's Athletics unsuccessfully proposed banning the use of male practice players in 2007, arguing that the rule violates the spirit of Title IX while removing opportunities for women and perpetuating notions about the athletic superiority of men.<sup>71</sup> Continued use of

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64. *Id.*

65. *Id.*

66. *Id.* (Follow hyperlink; click "Download Custom Data"; then click "Sanctioning Body"; then click NCAA Division I-FBS; then click "Continue"; then click "Continue With All Found"; then click "2020"; then click "Athletically Related Student Aid – Men's, Women's and Coed Teams"; then click "Download").

67. 2022-23 *NCAA Division I Manual*, NCAA, at art. 12.7.5 p. 60 (Aug. 1, 2022), <http://www.ncaa.com/publications/productdownloads/D123.pdf>.

68. Libby Sander, *Education Dept. Offers Conflicting Instructions About Counting Male Practice Players on Women's Athletic Teams*, CHRON. HIGHER EDUC. (Apr. 28, 2011), <https://www.chronicle.com/article/education-dept-offers-conflicting-instructions-about-counting-male-practice-players-on-womens-athletic-teams>.

69. Kenny Jacoby et al., *Title IX Was Intended to Close the Gender Gap in College Athletics. But Schools Are Rigging the Numbers.*, USA TODAY (Dec. 15, 2022, 5:05 AM), <https://www.usatoday.com/in-depth/news/investigations/2022/05/26/college-sports-title-ix-and-dark-illusion-gender-equity/7438716001/>.

70. *Id.*

71. Sander, *supra* note 68; Bill Finley, *A Man's Place at a Woman's Practice Faces Limits*, N.Y. TIMES (Jan. 2, 2007), <https://www.nytimes.com/2007/01/02/sports/ncaabasketball/02women.html>.

male practice players undermines the purpose of Title IX and could lead to trouble for schools should female students later complain about the true number of opportunities made available to them.

Regardless of the intent, these examples highlight the influence of NCAA legislation on a member institution's ability to comply with Title IX. These schools appear to rely heavily on the NCAA for guidance and to address gender equity. This dependence could lead to further complications without intervention from the NCAA or the federal government.

### III. THE NCAA AS A CONTROLLING AUTHORITY

While the NCAA highlights gender equity in its efforts to celebrate Title IX, their actions do not illustrate the same level of importance. Compliance with gender equity laws is passed off on the member institutions and is barely considered when developing new NCAA regulations. Recent changes to the *NCAA Division I Manual* also present a contradictory message. Article 2.3, adopted in January 1994, previously addressed NCAA rules on gender equity.<sup>72</sup> Specifically, Article 2.3.2 states that “[t]he Association should not adopt legislation that would prevent member institutions from complying with applicable gender-equity laws, and should adopt legislation to enhance member institutions’ compliance with applicable gender-equity laws.”<sup>73</sup> The 2022-2023 manual, approved in January 2022 and adopted on August 1, 2022, adapts the language to instead refer to a general principle of gender equity and a commitment to “preventing gender bias in athletics activities and events, hiring practices, professional and coaching relationships, leadership and advancement opportunities” only.<sup>74</sup> Notably, this commitment towards the prevention of gender bias no longer includes any direct language that will not allow the association to adopt legislation that creates Title IX violations for member institutions. This change establishes that the Division I Council’s decision to deny the preseason practice waiver submitted by the AVCA<sup>75</sup> no longer violates the Association’s own legislation while sidestepping a commitment to gender equity.

Article 2.3.2, as previously written, functions as an appropriate basis for the NCAA to expand their focus on Title IX compliance because it confirms that NCAA legislation should not be inconsistent with gender equity. Phase one of the Kaplan Hecker & Fink LLC external gender equity review recommended

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72. 2021-22 *NCAA Division I Manual*, *supra* note 54, at art. 2.3 p. 2.

73. *Id.* at art. 2.3 p 2.

74. 2022-23 *NCAA Division I Manual*, *supra* note 67, at 2.

75. *AVCA Filing Waiver Request with NCAA to Protect Schools From Title IX Violations*, *supra* note 3.

that the NCAA should provide structural support for gender equity along with improving transparency and accountability.<sup>76</sup> The review suggested increasing the number of NCAA staff members with expertise in Title IX and gender equity.<sup>77</sup> Progress towards this recommendation is continuing as the NCAA noted they are committed to hiring a full time employee to focus on women and gender equity issues.<sup>78</sup> However, changing the language regarding gender equity at this point arguably looks like a concerted effort to minimize responsibility under Title IX because the NCAA recognizes the authority it holds over member institutions. Relying on recommendations from an external gender equity review and annual progress reports will not prevent the inconsistencies addressed in part two. Increasing legal responsibility will necessitate making Title IX a priority.

The NCAA has controlling authority over intercollegiate athletics. Schools heavily rely on the association for guidance as it relates to gender equity. In *NCAA v. Tarkanian*, the Court asserted state action for a private organization occurs when a state actor delegates its authority to the private actor or if the state knowingly accepts the benefits from unlawful behavior.<sup>79</sup> Under this definition, the NCAA should be considered a private organization with authority over Title IX compliance in intercollegiate athletics. Previous research shows that a majority of coaches and administrators at member institutions do not have a basic knowledge of Title IX and how it applies to their athletic programs.<sup>80</sup> Though not subject to Title IX, the coaches and administrators surveyed for Weight and Staurowsky's research identified that they used the NCAA as a primary source for Title IX education.<sup>81</sup> Compliance issues will certainly arise if those in charge at member institutions get their knowledge from a governing body that passes the responsibility off to those same member institutions when it comes to regulating gender equity. As the NCAA takes more action that may impact compliance for member institutions, the application of Title IX to the

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76. Phase one of the external gender equity review addressed the Division I Men's and Women's Basketball Championships only. Phase two concerns the championship events for every other sport handled by the NCAA. *NCAA External Gender Equity Review*, *supra* note 8, at 4, 11.

77. *Id.* at 11.

78. *2022 NCAA Championships Gender Equity Assessment*, NCAA 11 (July 12, 2022), [https://ncaaorg.s3.amazonaws.com/inclusion/titleix/July2022NCAA\\_GenderEquityAssessmentReport.pdf](https://ncaaorg.s3.amazonaws.com/inclusion/titleix/July2022NCAA_GenderEquityAssessmentReport.pdf).

79. *NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988).

80. See Erienne A. Weight & Ellen J. Staurowsky, *Title IX Literacy Among NCAA Administrators and Coaches: A Critical Communications Approach*, 15 INT'L J. SPORT MGMT. 257, 257-85 (2014); Ellen J. Staurowsky & Erienne A. Weight, *Title IX Literacy: What Coaches Don't Know and Need to Find Out*, 4 J. INTERCOLLEGIATE SPORT 190, 190-209 (2011); Ellen Staurowsky & Erienne A. Weight, *Discovering Dysfunction in Title IX Implementation: NCAA Administrator Literacy, Responsibility, & Fear*, 5 J. APPLIED SPORT MGMT. 1, 1-30 (2013).

81. Weight & Staurowsky, *supra* note 80, at 275.

NCAA needs to be reevaluated. Reliance on the NCAA as a Title IX resource along with the current legislation that creates gender equity issues; establishes the association's controlling authority over its member institutions' compliance with Title IX.

The parameters used to determine the NCAA's lack of controlling authority over member institutions in *Smith v. NCAA* should no longer apply. The Third Circuit in *Smith* relied on the notion that the NCAA rules and recommendations provide influence, but ultimately the school made the disciplinary decision in *NCAA v. Tarkanian*.<sup>82</sup> That *Tarkanian* logic should not apply to the NCAA and its current relationship with Title IX because the governance structure as it currently exists diminishes gender equity.<sup>83</sup> Further, there are few indications that NCAA regulations will be adjusted to make gender equity a priority beyond the resources available for championship events. Removing language directly stating that legislation cannot violate gender equity laws does not follow a commitment to preventing gender inequity. Instead, it removes a barrier allowing inequity to persist if necessary to achieve a goal. These decisions make gender inequity no longer a mere consequence, but a likely occurrence directly associated with membership in the NCAA. Conversely, researchers theorize that violating NCAA rules come with few downsides, even when punishments are issued, giving support to the position that the NCAA is not a controlling authority.<sup>84</sup> This logic may work for other areas of NCAA legislation but does not address the idea that the administrators trust the NCAA to educate them on Title IX and establish gender equity rules accordingly. If athletic administrators are receiving the bulk of their knowledge of Title IX from the NCAA, it shows that the NCAA is being treated as a controlling authority for gender equity regardless of the association's intent. That reliance, inconsistent messaging, and legislation failing to address gender equity shows that Title IX compliance will continue to be an issue in intercollegiate athletics and that the NCAA is uniquely qualified to remedy the problem.

Beyond the controlling authority theory, recent developments in potential federal legislation could require NCAA compliance with Title IX without judicial intervention. Two bills recently announced to the public, set to be introduced to Congress in 2022, would increase the NCAA's involvement with

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82. *Smith v. NCAA*, 266 F.3d 152, 156 (3d Cir. 2001); *Tarkanian*, 488 U.S. at 180-81.

83. *NCAA External Gender Equity Review*, *supra* note 8 at 7.

84. Daniel A. Rascher et al., *Because It's Worth It: Why Schools Violate NCAA Rules and the Impact of Getting Caught in Division I Basketball*, 12 J. ISSUES INTERCOLLEGIATE ATHLETICS 226, 229 (2019).

Title IX and require the association to address compliance with their legislation for member institutions.<sup>85</sup>

The first bill, titled the Fair Play for Women Act, was announced on the fiftieth anniversary of the signing of Title IX.<sup>86</sup> Under this bill, Title IX would be extended to the NCAA and conferences governing college sports.<sup>87</sup> This addition provides more monitoring to ensure compliance with Title IX because the primary enforcement methods (lawsuits and formal complaints to the Department of Education) available require students to recognize violations and take action against their school for a remedy. An announcement for a second bill addressing Title IX equity for intercollegiate governing bodies was announced on August 3, 2022.<sup>88</sup> The College Athlete Bill of Rights, first introduced in 2020, mainly addresses name, image, and likeness (NIL) and compensation for college athletes.<sup>89</sup> However, a new section of the bill focuses on Title IX equity in intercollegiate athletics.<sup>90</sup> As part of this section, a yearly evaluation of Title IX compliance published on the school's website is required.<sup>91</sup> Additionally, the bill extends Title IX compliance in some areas to athletic associations and conferences along with requiring the NCAA to permanently ban any institution providing misleading information or omissions for the purpose of appearing compliant with Title IX.<sup>92</sup>

Should either of these bills be successful, the authority imposed on the NCAA would necessitate thorough gender equity inquiries by the association, providing another reason for the NCAA to reevaluate their current legislation on gender equity. A consistent theme related to these bills and recognition of the anniversary of Title IX highlight multiple failures by schools to reach gender equity, even with the expansive opportunities available today. Substantial change of the current structure will be necessary to achieve our gender equity goals because the system is not set up to prioritize these concerns or adequately address failures beyond intervention by the judiciary or the federal government.

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85. See Gender Equity in College Sports Commission Act, H.R. 7336, 117th Cong. § 4 (2022); Schnell, *supra* note 12.

86. *Id.*

87. *Id.*

88. Ross Dellenger, *Five Senators to Reintroduce Sweeping College Athlete Bill of Rights in Congress*, SPORTS ILLUSTRATED (Aug. 3, 2022), <https://www.si.com/college/2022/08/03/college-athlete-bill-of-rights-congress-transfers-nil>.

89. H.R. 7336, § 3; Dellenger, *supra* note 88.

90. H.R. 7336, § 4.

91. *Id.*

92. *Id.*

## CONCLUSION - THE PROMISE OF TITLE IX

A governing body, like the NCAA, is in a unique position to set rules and also educate member institutions to ensure compliance. They are also better situated to address violations and create consistent reporting requirements than the Department of Education or the judicial system. These options to address complaints typically exist only after the situation is so untenable that outside forces are necessary to address the issue.<sup>93</sup> Should Title IX compliance become part of NCAA legislation, students would have their needs better met, violations could be caught before a problem grows, and more emphasis on gender equity could be used in the decision-making process for athletic administrators.

As the business of intercollegiate athletics grows, there will be new hurdles and advancements that must consider gender equity. The impact of Title IX was an important component in the discussion about the impact of sponsorship deals allowing college athletes to profit from their NIL.<sup>94</sup> There was more concern related to equitable treatment in relation to payments for athletes than there is for the issues with participation and benefits present today. These concerns were largely unfounded and illustrate the promise of women's sports when properly marketed. Some of the more notable deals made during the first year of NIL involved female athletes who have strong social media presences and public personas that appeal to sponsoring organizations.<sup>95</sup>

These NIL deals present both a solution and an additional challenge for Title IX compliance. Many schools are establishing collectives to provide opportunities for sponsorship to their students and developing education for athletes to know their responsibilities under these agreements.<sup>96</sup> These collectives could establish gender equity issues because the direct involvement of the university in NIL deals would make those deals part of an educational program or activity triggering Title IX compliance. Even without this direct involvement in NIL, how schools market their athletic programs can manipulate potential deals as marketers seek well-known names for endorsement.<sup>97</sup> The

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93. Bushnell, *supra* note 13.

94. See Claudine McCarthy, *Legal Experts Discuss Potential Impact of NIL Changes*, 18 COLL. ATHLETICS & L. 6, 6-7 (2021); Alicia Jessop & Joe Sabin, *The Sky is Not Falling: Why Name, Image, and Likeness Legislation Does Not Violate Title IX and Could Narrow the Publicity Gap Between Men's Sport and Women's Sport Athletes*, 31 J. LEGAL ASPECTS SPORT 253, 254 (2021).

95. Thuc Nhi Nguyen, *Once Empowered by Title IX, Female Athletes Are Now Among Big Winners in New NIL Era*, L.A. TIMES (June 21, 2022, 5:00 AM), <https://www.latimes.com/sports/story/2022-06-21/once-empowered-by-title-ix-female-athletes-are-now-among-big-winners-in-new-nil-era>.

96. *NIL and Collectives: The Title IX Question*, LEAD1 ASS'N (May 3, 2022), <https://lead1association.com/nil-and-collectives-the-title-ix-question/>.

97. See Thilo Kunkel et al., *There is No Nil in NIL: Examining the Social Media Value of Student-Athletes' Names, Images, and Likeness*, 24 SPORT MGMT. REV. 5 839, 855 (2021).



lack of equal opportunity or benefits provided to women's sports through marketing and television rights can have a lasting impact beyond the teams themselves but the marketability of its athletes. Women's sports cannot continue to be undervalued based on the premise that men's sports are better drivers of revenue. The promise of Title IX is to ensure equitable opportunity in educational programs and activities. To continue on our current path would be to the detriment of Title IX and the advancement of intercollegiate sport as a whole.