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### Title IX and It's Effect on Collegiate Athletics

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This starred paper submitted by Holly J. Schmidtbauer in partial fulfillment of the requirements for the Degree of Master of Science at St. Cloud State University is hereby approved by the final evaluation committee.

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ST. CLOUD STATE UNIVERSITY

TITLE IX AND ITS EFFECT ON COLLEGIATE ATHLETICS

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## INTRODUCTION

What is fair and what is not? Do societies today really discriminate based on gender? How do you prevent gender discrimination in athletics? These questions are coated in controversy and Title IX is at the heart of this debate. “Title IX” refers to Title IX of the Education Amendments of 1972, a Federal civil rights statute that prohibits sex discrimination in education programs, including athletics programs, that receive or benefit from federal funding (Bonnette, 2000). Title IX plays a key role in collegiate athletic programs; and therefore, it is very important to understand what implications Title IX has had in regards to collegiate institutions.

The primary goal of this starred paper was to address how Title IX has shaped the specific issues involving sex discrimination in intercollegiate athletics programs. This paper also took an in-depth look at the range of Title IX cases and how they influenced the way athletic departments operate today.

Title IX is a very broad topic that addresses a wide range of issues. Title IX, as it relates to intercollegiate athletics can be divided into three major categories. Those three categories are: Accommodation of Interests and Abilities, Athletic Financial Assistance and Other Program areas, which would include coaching, scheduling and equipment (Bonnette, 2000). These categories have been established to help intercollegiate athletic programs, and have provided a guideline for determining

compliance with Title IX. Athletic programs must monitor their compliance in all three of these areas. Being non-compliant in just one area could cause a Title IX violation.

When athletic departments do not meet the Title IX requirements and do not provide equal opportunities to those underrepresented, then they are in violation. A violation of Title IX is a denial of equal athletic opportunity to students of one sex at an institution (US Department of Education, 1996). Violations of Title IX are processed through the Office for Civil Rights (OCR). The OCR enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. The OCR is the governing body that determines whether institutions are in compliance; and if not, what ramifications there will be for noncompliant institutions. Individuals may also file lawsuits in federal court claiming discriminatory treatment under Title IX. A lawsuit is a distinctly different and separate procedure from filing a complaint with the OCR. An individual must be the alleged victim of discrimination to succeed when filing a lawsuit, while anyone may file a complaint with the OCR.

Understanding the large scope of Title IX and the effect that it has had on intercollegiate athletics is just the beginning. Schools must strive to continually stay in compliance with guidelines set forth by Title IX and the OCR. Today it is more important than ever that administrators make monitoring compliance of Title IX a priority in their programs. Not only are violations of Title IX detrimental to current student-athletes, but the financial penalties that are placed upon a university when they

lose a Title IX lawsuit are astronomical. Ultimately, these penalties affect the way an athletic department operates for years to come.

## REVIEW OF LITERATURE

### History of Title IX

Title IX of the Education Amendment of 1972 was signed into law by President Richard Nixon on June 23, 1972. Title IX in its most basic concept as defined by the Department of Education (as cited in Semo & Bartos, 2000, p. 1) provides that “no person shall be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.” The legislation provided a few exceptions to the prohibition against discrimination for specialized classes of institutions with a tradition and history of admitting students of one sex, such as religious institutions and the military services. This legislation was intended to mirror already existing federal prohibitions against racial discrimination (Festle, 1996). Since practically every educational institution receives some sort of federal assistance, Title IX affects most educational institutions making them responsible for complying with Title IX regulations.

Title IX covers all aspects of educational programs, including admissions, treatment of students, and employment, at all levels of education-graduate, undergraduate, secondary, and elementary programs (Bonnette, 2004). Title IX is enforced by the OCR of the US Department of Education. The OCR was charged

with developing the details in the form of regulations; and then enforcing those regulations.

When the original Title IX statute was enacted in June of 1972, only a small number of colleges and universities had varsity sports for women (Suggs, 2007). In fact, many people in physical education departments did not believe their students should be participating in competitive sports. That year, there were fewer than 30,000 women in college varsity and recreational programs, according to the National Collegiate Athletic Association, compared with 170,000 men.

Title IX; however, facilitated tremendous growth in women's athletics participation during the 1970s. Women's collegiate sports participation doubled from 32,000 participants in 1971 to more than 64,000 in 1977 (NCAA, 2004).

The positive effect that Title IX has had in reversing gender discrimination by providing women with more opportunities in sports is unquestionable. Much of the growth occurred in the 1980s and 1990s, according to the US Department of Education, "from 1981 to 1999, the total number of college women's teams increased by 66 percent" (2000, p. 6). The statistics provide proof that the passage and enforcement of Title IX has tremendously benefited women in athletics.

The idea of equity in sports was not considered by everyone to be an important topic in the early 1970s. In fact, Title IX itself was slipped into a civil-rights law because conservative Southerners thought the idea of granting equal opportunities for women would derail the bill (Suggs, 2007). To many people's surprise the bill received great support. Senator Birch Bayh of Indiana and Representative Edith



Green of Oregon, both Democrats made sure the bill was pushed through the Senate.

At that time, Senator Bayh said the Title IX was designed to “provided for women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want” (p. 2).

Title IX had little immediate legal impact on college sports because of the lack of enforceable means (Wushanley, 2004). When Title IX was first established, schools were given a 6-year grace period to meet the requirements; thus, the year, 1978, became the mandatory compliance date (Carpenter & Acosta, 2005). This specific statute did not make any reference to athletics or athletic programs. While the Title IX statute did not reference athletics, those issues were specifically addressed in a section of the Title IX regulations that took effect in July of 1975. This added regulation to Title IX set specific requirements for athletics and athletic scholarships.

In July of 1980 the OCR put out the Interim Title IX Intercollegiate Athletics Manual (Carpenter & Acosta, 2005). This manual gave more information to investigators on how to investigate Title IX compliance in intercollegiate athletics. This manual was the main reference for Title IX and intercollegiate athletics until 1990 when the Title IX Athletics Investigator’s manual replaced it. The Investigators Manual was drafted not to interpret the law and regulations but to give the OCR investigators a systematic guide to follow as they evaluated the degree of compliance on a particular campus or in a particular program.

There was a period of time from 1984 to 1988 when Title IX was not considered to apply to intercollegiate athletics, physical education, intramural

programs, or recreation programs (Carpenter & Acosta, 2005). Title IX did not apply to these programs during that time because of the 1984 Grove City case, which removed intercollegiate athletics from the jurisdiction of Title IX. In February of 1984, the US Supreme Court ruled that Title IX applied only to those education programs receiving direct federal funds (Bonnette, 2004). Since few athletics programs received federal aid directly, nearly all aspects of athletics programs were no longer subject to Title IX regulations. This interpretation was later overturned through the 1988 passage of the 1987 Civil Rights Restoration Act, which restored the jurisdiction of Title IX.

In January of 1996 the OCR issued "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" (NCAA, 2004). This clarification was used to analyze compliance in the accommodation of students' athletics interests and abilities, 1 of 13 program areas reviewed for compliance under Title IX.

Early in the process of trying to figure out the complexity of Title IX and its relation to athletics, civil-rights lawyers imported the concept of substantial desegregation cases (Suggs, 2005). In a given region, if a certain proportion of the population was black, then investigators would examine schools to see if the same proportion of their students were black. If that was not the case, they looked closer to see whether the school in question was discriminating against black students. They found that a similar approach applied in athletics. However, they concluded that the problem was finding a standard in a situation where simply letting boys and girls participate clearly would not provide opportunities for girls.

In the debate over how to regulate Title IX compliance, many different organizations have pointed out ideas on how to try and help solve the problem. One of those organizations was the National Collegiate Athletics Association (NCAA). In the beginning the NCAA believed that making colleges sponsor women's sports would force cutbacks in men's sports, especially football (Suggs, 2007). The association fought the law from the start. While time has definitely changed the standing of the NCAA on this topic, they now are a proponent of Title IX and emphasize compliance with member institutions. While the NCAA does not enforce compliance of Title IX on the campuses of certifying institutions, they do play a very strong role in helping to educate schools on the importance of Title IX.

The Title IX regulation stipulated that athletic association rules do not alleviate an institution's obligation to comply with Title IX (Bonnette, 2004). Complying with the rules of the National Collegiate Athletic Association (NCAA), the National Association of Intercollegiate Athletics (NAIA), the National Junior College Athletic Association (NJAA), or other national, regional, state, or local conferences is not an acceptable justification for violating Title IX.

### Title IX and Intercollegiate Athletics

When most people hear the phrase, Title IX, they instantly draw a connection to athletics. While Title IX refers to more than athletics, much of the interest surrounding Title IX has come from publicity of high profile cases involving athletics programs. It is important to remember that the broad scope of Title IX covers state and local agencies that receive federal education funds. These agencies include

approximately 16,000 local school districts, 3,200 colleges and universities, and 5,000 for-profit schools as well as libraries and museums (US Department of Education, 1998).

While there are so many different areas to be addressed by Title IX, there is a strong focus on the connection between this regulation and intercollegiate athletics. Athletics has found itself at the center of the debate over Title IX for many different reasons. One reason behind athletics' leading role with Title IX is that historically athletics has centered on male athletes and their dominance in sports. Athletics and sports also have predominantly been divided into teams and competitions based on gender. This intentional division between men and women has also led to a very strong starting point for having discrimination issues (Carpenter & Acosta, 2005). Combining the intentional gender separation of teams along with the historically male dominated past of athletics shows the underlying reasons why athletics is at the forefront of Title IX compliance issues.

While the original Title IX act was not written to address intercollegiate athletics, there has been reference material established to better assist collegiate institutions both to understand and stay current on Title IX issues. The Title IX Regulation and the Policy Interpretations are two major sources of specific information for athletics programs (US Department of Education, 1998). The OCR has also issued significant athletics policy documents such as: The Title IX Athletics Investigators Manual; the "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test; and Guidance Regarding the Award of Athletics Scholarships.

The Title IX regulation and policy interpretation require that “athletically related financial assistance be allocated in proportion to the numbers of male and female students participation in intercollegiate athletics; are other benefits, opportunities and treatment afforded participants of each sex be equivalent; and the interests and abilities of students be effectively accommodated to the extent necessary to provide equal athletics opportunity for members of both sexes” (Semo & Bartos, 2000, p. 1). This policy interpretation divided athletic issues into three major categories to be analyzed for compliance: sports offerings; scholarships; and everything else which included 11 program areas (Bonnette, 2000). These 11 program areas were equipment and supplies, scheduling of games and practice time, travel and per diem allowances, tutoring, coaching, locker rooms, practice and game facilities, medical and training facilities, housing and dining facilities, publicity, support services, and recruitment of student athletes.

Civil rights laws have two basic provisions, equal access to the program, and equal treatment once in the program (Bonnette, 2000). For Title IX and athletics, equal access was addressed by the program component of the “accommodation of interests and ability,” which included the much debated and litigated three-part test. Equal treatment of those who were already participants was addressed by 12 other program components. Within those program components, compliance is analyzed by weighing several factors, which were listed in the 1979 policy interpretation. A thorough Title IX review required analyses of the benefits for each intercollegiate team under each factor within each program component. Under OCR’s 1979 policy

clarifying the accommodation of interests and abilities, an institution may choose which one test of a three-part test for compliance it will meet.

While there has been a lot of debate over the use of the three-part test, it has truly become the guideline that many institutions use to make sure they are staying compliant with the regulations set forth by Title IX (Office of Civil Rights, 2005).

This three-part test measures for compliance with the requirement to effectively accommodate the interests and abilities of the underrepresented sex. A school is required to meet only one of the three prongs in order to achieve compliance.

The first prong of the three-part test is called proportionality (Carpenter & Acosta, 2005). Proportionality is met when programs provide participation opportunities for women and men that are substantially proportionate to their respective rates of enrollment as full-time undergraduate students. The second prong is program expansion, where a school has to demonstrate a history and continuing practice of program expansion for the underrepresented sex. And finally, the third prong is full accommodation where the program has to fully and effectively accommodate the interests and abilities of the underrepresented sex.

The three-part test has definitely not gone unchallenged. While many institutions complied with the three-part test in the late 1970s and early 1980s, progress slowed during the mid 80s (NCAA, 2004). There were many assumptions as to why progress slowed. Some believed it was because of the federal government's limited enforcement authority or growing budget problems for the institutions. Others felt that many institutions had the mistaken belief that the addition of a few women's

teams was sufficient even if women remained significantly underrepresented in the program. Whether it was one of these factors or a combination of them is debatable.

This test also came under scrutiny from Congress during the 1990s. In May 1995, the House Subcommittee on Postsecondary Education held a hearing at which members of Congress expressed their concerns that institutions were being required to comply with the first part of the test known as proportionality, and that this was the focus of OCR's enforcement (Office for Civil Rights, 2005). As a result of Congressional interest, OCR issued its "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test," in January of 1996.

The OCR has developed a way of categorizing compliance problems so that all problems can fall within one of four categories (Suggs, 2005). The first category is Minor Disparity. This category refers to denying a minor benefit, such as practice shorts and t-shirts, to one or more teams that represent a small percentage, such as 20% or less, of the participants of one sex. The second category is Moderate Disparity, where it refers to limiting an important benefit, such as coaching, to one or two teams, or denying a minor benefit, such as practice shorts and t-shirts, to half the participants for one sex. The third category is Significant Disparity, which refers to limiting an important benefit, such as coaching, for several teams for one sex, or limiting a minor benefit, such as practice uniforms, to all teams for one sex. And the final category is a violation. This category refers to a major benefit, such as the opportunity to participate or scholarships, where the institution fails to comply with the three-part test or the Title IX standard for scholarships. A violation may also be a

series of disparities, all disadvantaging athletes of one sex, which creates a pattern and practice of discrimination that denies equal athletics opportunity program-wide.

### Title IX Major Court Cases

Since Title IX's inception there have been many cases that have paved the way for Title IX today. Carpenter and Acosta felt that,

Without such cases as Cannon v. University of Chicago (1979), we would not know that an individual has enforcement options beyond simply filing an in-house or OCR complaint. Without North Haven Board of Education v. Bell (1982), we would not know that the protections of Title IX include employees as well as students. Without Grove City College v. Bell (1984), we would not know that indirect federal funding triggers Title IX jurisdiction. (Carpenter & Acosta, 2005, p. 115)

In Cannon v. University of Chicago, the main question that was asked was may an individual sue an institution without first exhausting all administrative remedies, such as an in-house complaint or OCR complaint (Carpenter & Acosta, 2005).

Cannon believed that she had been denied admission to medical school based on her gender and the medical school was under the jurisdiction of Title IX. Could Cannon exercise her rights under Title IX only by filing a complaint with OCR, or did her options include a private right of action to file a lawsuit in court? The answer was not found within Title IX or its regulations so Cannon brought the matter up to the United States Supreme Court. In this case the United States Supreme Court decided that a private right of action was indeed available under Title IX when:

1. someone who is discriminated against on the basis of sex is a member of the class for whose special benefit Title IX was enacted,
2. the legislative history of Title IX indicates Congress' intent to create a private cause of action for a person excluded, on the basis of sex, from participation in a federally funded program,



3. implication of a private remedy under Title IX is fully consistent with the orderly enforcement of Title IX, and
4. the subject matter of a private action under Title IX does not involve an area basically of concern to the states. (p. 117)

In the case of *North Haven Board of Education v. Bell*, Elaine Dove was a tenured public school teacher that after taking a 1-year maternity leave tried to return to her job, but the school district barred her from doing so (Carpenter & Acosta, 2005).

Dove then filed a Title IX complaint. The school district did not cooperate with the investigation as they believed that Title IX had no power to regulate employment practices. The US Supreme Court determined that the reach of Title IX did in fact extend to employees and not just students, opening the door for employment cases today.

Finally, in the case of *Grove City College v. Bell*, there were two important questions that were answered.

1. Does the word "program," which is found in the one-sentence law called Title IX, refer to the entire institution or only the subunit or subunits that actually receive federal financial assistance?
2. Must the institution receive federal financial assistance directly from the federal government to trigger Title IX jurisdiction? (Carpenter & Acosta, 2005, p. 119)

At first, question one was answered that only subunits that actually received federal money were included in the term program. However, this decision was later overturned. The decision regarding the second question continues to stand; the court determined that institutions need not receive federal assistance directly from the federal government to trigger Title IX jurisdiction.

Another case that has shaped the history of Title IX is Franklin v. Gwinnett County Public Schools. In this case the U.S. Supreme Court ruled that private individuals who are victims of sex discrimination under Title IX may receive monetary damages for intentional discrimination (Bonnette, 2004). In this case a student at North Gwinnett High School alleged that Title IX was violated when a coach and teacher sexually harassed her on a continuous basis. She alleged that teachers and administrators took no action to stop the harassment and discouraged her from filing charges. The school closed its investigation when the coach/teacher resigned on the condition that charges against him would be dropped.

The district court dismissed the complaint on the grounds that Title IX does not authorize an award of damages, and the circuit court agreed (Bonnette, 2004). The US Supreme Court, however, reversed this decision. The US Supreme Court differentiated between intentional and unintentional violations, stating that,

the point of not permitting monetary damages for an unintentional violation is that the receiving entity of Federal funds lacks notice that it will be liable for a monetary award. This notice problem does not arise when intentional discrimination is alleged. (p. 523)

Because of this case, monetary damages became an available remedy for intentional discrimination.

#### Roster Management Violations of Title IX

While many institutions have successfully been able to balance gender equity, the fact remains that not all schools have been able to. One of the most recent cases has been Choke v. Slippery Rock University (Women's Law Project, 2007). In 2006

Slippery Rock University cut three women's varsity sports; swimming, water polo, and field hockey. These sports were to be cut at the end of the 2005-2006 season. After school officials were notified by lawyers for students of their intent to challenge the cuts under Title IX, the school decided to reinstate field hockey. With field hockey reinstated, the school still planned on cutting the other two sports. Because of their intentions to cut those two sports, a lawsuit was filed claiming that "Slippery Rock provides neither equitable athletic opportunities for its female students nor equitable treatment of female student athletes" (p. 5). During the proceedings of this case, the judge found that the student-athletes had demonstrated a substantial ongoing disparity between the gender composition of the student body and available athletic opportunities. The judge also found that "Slippery Rock had not added a women's varsity team since 1993, and the fact that it had cut viable, competitive women's teams showed that it was failing to accommodate the interests of its female students in athletics competition" (p. 4).

As a result of this case, there was a settlement that was separated into two different stages (Women's Law Project, 2007). These two stages required that Slippery Rock University complied with both Title IX's equal participation and equal treatment requirements. This settlement "aimed at achieving equity through major investments in the women's programs, establishment of gender-equity policies, and institution of prospective budgeting of all athletic expenditures" (p. 2). The major terms of the settlement included:

1. Substantial improvements to the softball field to bring it closer in quality to the baseball team's field,



2. New and improved women's locker rooms,
3. Equitable availability of medical and training personnel and facilities for women athletes;
4. Equitable provision of and compensation to coaches of women's teams;
5. Adoption of policies setting forth gender-equitable treatment regarding uniforms, travel, equipment, publicity, trainers, and access to automobiles for recruitment by coaches. (p. 2)

The second stage of the settlement was central to the achievement of equity in treatment in Slippery Rock University's agreement to adopt a comprehensive prospective athletic budget and the creation of a \$300,000 fund to be spent over 3 years on women's athletics to overcome the effects of historical conditions that have limited women's participation in athletics. The two major achievements in this stage were:

1. Retain women's swimming and water polo as varsity teams for one full academic year after Slippery Rock University has achieved compliance with the proportionality requirement of Title IX within two percentage points and;
2. Allocate an additional amount of money to women's varsity athletics for the academic year following any year during which the participation of Slippery Rock University female varsity athletics was not within two percentage points of the proportion of full-time female undergraduates. (p. 3)

Slippery Rock University also agreed to provide documentation to plaintiff's counsel on an annual basis for 3 years to allow monitoring of compliance with the terms of the agreement and progress in achieving equity in both participation and treatment.

Another Title IX case that dealt with roster management was *Neal v. Board of Trustees of California State University, Bakersfield* (Martel, 2003). This Title IX case dealt with the appropriateness of the use of team membership limits or "capping" as a type of roster management. In this case, members of the wrestling team initiated a

lawsuit when the university decided to reduce the wrestling team from 34 to 25 male members. The wrestlers wanted to stop the university from eliminating male athletes solely to create gender proportionality. Their argument was that the decision was gender based; and therefore, violated Title IX.

In this case the district court accepted the plaintiff's argument and issued a preliminary injunction barring the university from capping the wrestling team (Martel, 2003). The district court concluded that relying on proportionality to cap the men's teams constituted implementation of a quota based on gender in violation of Title IX. Not surprisingly; however, the Court of Appeals took an entirely different view of the matter. The appeals court observed that several courts had expressly ruled that Title IX permitted a university to decrease athletics opportunities for the over-represented sex in order to bring the university into compliance with the requirements of Title IX. The court also noted that the district court had failed to give deference to the policy interpretation put forth by the OCR and stated that the plain meaning of Title IX does not prohibit remedial actions that are designed to achieve substantial proportionality.

#### Effective Accommodation Cases of Title IX

While most institutions try very hard to prevent Title IX issues, it is unfortunately too common for institutions to have minor compliance issues with Title IX. Institutions find themselves in violation of Title IX when they allow these minor compliance issues to repeatedly occur in numerous programs. For example, in the case of Sanders v. University of Texas at Austin, female students at Texas filed a Title IX class action suit alleging that the university had failed to accommodate fully and

effectively the interests and abilities of female students and sought the addition of four women's varsity sports (Semo & Bartos, 2000). When the women's suit was filed, females were 47% of the undergraduate enrollment but had access to only 23% of the school's intercollegiate athletic opportunities. In settling the lawsuit, the university agreed to raise women's participation in varsity athletics from 23% to 44%.

To achieve this goal, the institution planned to add a women's varsity soccer team and a women's varsity softball team (Semo & Bartos, 2000). It also agreed that after a phase-in period of 5 years, scholarships to women would increase from 32% to 42%. This case is an example of a lawsuit that was filed because of an institution being non-compliant with Title IX.

Another Title IX case that caught the public's attention is *Pederson v. Louisiana State University* in 2000 (Sports Law, 2005). This case was filed after Louisiana State University declined a request to add varsity soccer and fast pitch softball as women's sports. Originally, there were two lawsuits filed by the athletes. Ultimately, the cases were combined into one case. This case charged the school with intentional discrimination. The court ruled that Louisiana State University violated Title IX by failing to accommodate effectively the interests and abilities of certain female students. In addition, it concluded that the discrimination was intentional.

The court based the findings for this case of intentional discrimination on numerous factors including "outdated, "archaic," and "outmoded" treatment and attitudes by Louisiana State University toward women (Sports Law, 2005, p. 2). It was noted that on numerous occasions the athletics director and others referred to female



athletes using discriminatory language. The athletics director said he would not voluntarily add more women's sports at Louisiana State University, but would if he was forced to. The athletics director was noted as having referred to one of the plaintiffs as "honey," "sweetie," and "cutie," and stated that female soccer players "would look cute running around in their soccer shorts" (p. 2). The court also credited evidence showing that the athletics director appointed a low-level male athletics department staff member to the position of senior woman administrator. It was also noted that Louisiana State University consistently approved larger budgets for travel, personnel and training facilities for men's teams, and they continually compensated coaches of women's teams at lower rates.

Another Effective Accommodation case was *Roberts v. Colorado State University* (NCAA, 2004). This case started when members of Colorado State's women's softball team sued after it was announced that due to budgetary cuts, the women's softball and men's baseball programs were going to be eliminated. Colorado State argued that the department's percentage of intercollegiate athletics opportunities available to women (37.7%) was substantially proportionate to the percentage of matriculating women (48.2%). The court rejected the contention that a 10.5% disparity constituted substantial proportionality.

Colorado State's efforts at arguing compliance under part two of the three-part test were also rejected because although it had created a women's program out of nothing in the 1970s by adding 11 teams, the percentage of women's participation opportunities declined steadily in the 1980s (NCAA, 2004). Although the court

recognized that it was difficult to expand women's programs in times of economic hardship, a school could not satisfy part two if it increased percentages while eliminating men's and women's programs. The court also made clear that the burden of proof in Title IX cases rests with the plaintiffs. In particular, under part three of the three-part test, the plaintiffs were required to show that the university was not fully and effectively accommodating the interests and abilities of female athletes. With respect to demonstrating compliance, the court observed that if there was interest and ability among the under-represented sex, and the institution failed to satisfy it, the university would fail this part of the three-part test.

#### Program Elimination Title IX Cases

While the majority of Title IX cases address the lack of adequate opportunities for females, some of the cases also address the effects Title IX had when men's sports were dropped in order to become compliant with Title IX. For example, the debate has recently started at James Madison University where they eliminated 10 teams (Brady, 2007). Of these 10 teams that were eliminated, seven were men's sports and three were women's sports. The school stated the move would bring the university into compliance with Title IX. University staff indicated that by eliminating these teams they would meet the Title IX requirements in part one of the three-part test, otherwise known as proportionality.

In 2007, James Madison University had an undergraduate enrollment of 15,800; 61% women and 39% men (Brady, 2007). After the cuts, 61% of its athletes would be women, 39% of its athletes would be men. With these percentages of male



to female students equaling the same percentages of male to female athletes, James Madison University was compliant with part one of the three-part test. The debate for student-athletes at James Madison was is this process fair? Could institutions truly begin eliminating opportunities for men so that they have equal opportunities for women? Equity in Athletics (EIA), a new advocacy group for male athletes based in Roanoke, VA, asked for an injunction reinstating the men's and women's teams. EIA is a nonprofit coalition of athletes, coaches, parents, alumni, and fans who want to ensure broad-based and equitable athletic opportunities for all athletes, at all levels of competition (Equity in Athletics, 2008). EIA has added James Marshall University to the suit it filed against the US Department of Education. The suit sought to invalidate the three-part test, long at the heart of Title IX's underlying regulations.

Officials at James Madison felt they really had no other option (Brady, 2007). When reviewing their current situation with the Title IX guidelines, they realized they were not in compliance and knew that something had to be done. Officials knew that in order to meet one of the three parts of the test, they would have to add more sports for women but they agreed that they were in no position to be adding sports. Therefore, it would not be possible for them to meet prong two of the three part test. Therefore, they felt it was still in their best interest to cut sports in order to meet prong-one, proportionality.

A second program elimination case that was filed was Gonyo v. Drake University (NCAA, 2004). In this case, a decision to eliminate the wrestling program triggered a lawsuit by four members of the men's wrestling team, they claimed that the

action violated Title IX and the Equal Protection Clause of the United States Constitution. The court disagreed and held that because Drake fell within the safe harbor provision (part one of the three-part test) for males, the university was compliant under Title IX. The court noted that the men's athletics participation ratio actually was disproportionately high. The court also rejected the plaintiffs' constitutional challenge and concluded that while consideration of gender in the application of Title IX may work to the immediate disadvantage of males under the facts of this case, that fact alone did not support a challenge under the Equal Protection Clause.

#### Title IX Employment Cases

Another category of Title IX cases are Employment cases. One of those cases was Weaver v. Ohio State (NCAA, 2007). This case was brought forward when team members complained about the field hockey coach's competence, effectiveness, and coaching ability. After an investigation, the university terminated her. The coach subsequently filed suit and claimed that the termination was the result of sex discrimination in violation of Title IX and Title VII, that she had been subjected to retaliation for having complained about the condition of their practice field, and that the university had violated the Equal Pay Act by not paying her as much as the men's ice hockey coach.

The court concluded that the retaliation claim failed because there was no connection between her complaints about the field conditions and her termination (NCAA, 2007). In addition, the court observed that the men's lacrosse team used the

same field as her team and it responded to her complaint by having the field evaluation. Although the university agreed that the replacement of the field was important, it did not want to undertake the project until it found a donor. In the end, the legitimate and nondiscriminatory reasons for the university's termination decision in conjunction with the absence of any causal connection between complaint and the termination ultimately led to the rejection of the claim (NCAA, 2004).

The coach also alleged that she was terminated because she had complained to an NCAA committee about the university's level of Title IX compliance (NCAA, 2007). However, this claim also was rejected because this information was never shared with the university; and therefore, could not have been the basis for any type of retaliation.

In analyzing the coach's claim of sex discrimination, the court concluded that the university's reason for firing her was both legitimate and nondiscriminatory (NCAA, 2007). Like many courts, this court observed that the reason for a termination does not have to be good or fair as long as it is not discriminatory. Weaver claimed that she was treated differently from two men's coaches who had disciplinary problems with his team or performance issues. However, the court found those other instances sufficiently separate and distinct from Weaver's case because they did not involve the ongoing student-athlete complaints that were the justification for her termination.

Another Title IX case dealing with employment issues was *Stanley v. University of Southern California* (Sports Law, 2005). In this case, the coach of the

women's basketball team filed suit alleging violations of the Equal Pay Act and Title IX. The main standing by the plaintiff was that she claimed she performed equal work as the men's coach; and therefore, deserved equal pay.

In this case the district court granted summary judgment to the University of Southern California (Strick, 2001). The focus of the case was the Equal Pay Act claim. The court analyzed the relative experience of Stanley (as the coach of the women's basketball team) and Raveling (as the coach of the men's basketball team) was sufficiently different to justify a disparity in compensation. The court focused in on the fact that Raveling had 31 years of coaching experience, was a two-time national coach-of-the-year recipient, a two-time Pacific 10 Conference coach of-the-year recipient, was regarded as one of the best recruiters in the nation, was an Olympic coach, had 9 years of marketing experience, and was the author of books on basketball. In contrast, Coach Stanley had only 17 years of experience, had never coached an Olympic team and was not an author. The court concluded that these differences were a legitimate basis upon which to differentiate their respective salaries. As a result, Stanley's claims failed.

One of the most recent Title IX cases that have been brought up in the courts is *Vivas v. Fresno State University*, in which Lindy Vivas, a former volleyball coach said the university had discriminated against her on the basis of sex (Lipka, 2007). Vivas had sued Fresno State for \$4.1 million, alleging the school did not renew her contract in 2004 because of her perceived sexual orientation and her speaking up on behalf of female athletes. On July 9, 2007 a state jury in California ruled in favor of



Vivas and awarded her \$5.85 million in damages. The award, which took into account Vivas' back wages, future lost pay and emotional distress, is to date the largest sum to be given to a coach who sued for retaliation under Title IX. Fresno State Officials said they would appeal this decision. University officials stated that, "they were extremely disappointed that the jury did not see that the university's actions in this matter were based solely on Ms. Vivas' job performance and her unwillingness to improve the volleyball program" (The Associated Press, 2007, p. 1).

#### Sexual Harassment Cases of Title IX

Title IX cases are also filed under the presumption of sexual harassment. In the case of Simpson v. University of Colorado, two female students alleged that they were sexually harassed/assaulted in violation of Title IX by football players and recruits while at a party (Campus Legal Council, 2001). After the federal case law precedent in this area, the federal district court specified that the plaintiffs were required to prove the following:

1. That the university had actual knowledge of sexual harassment of female Colorado students by football players and recruits as part of the football recruiting program;
2. That the university was deliberately indifferent to this known sexual harassment of female Colorado students by football players and recruits as part of the football recruiting program;
3. That the plaintiffs were subjected to severe, pervasion and objectively offensive sexual harassment caused by the university's deliberate indifference to known sexual harassment;
4. That the harassment occurred in the context of an education activity; and
5. That the harassment had the systemic effect of depriving the plaintiffs of access to educational benefits or opportunities. (p. 4)

In analyzing these requirements, the court found that the alleged sexual assaults constituted severe and objectively offensive sexual harassment. However, after viewing the facts in the light most favorable to the plaintiffs, the court stated that no rational person could have concluded that the plaintiffs established the first and second elements; that the university had knowledge of the assaults or the risk of the assaults or acted with deliberate indifference. In the absence of such evidence, the court concluded that the plaintiffs could not establish the casual connection required under the third element. As a result, the university was entitled to judgment in its favor.

A second Title IX sexual harassment case was *Zimmer v. Ashland University* (Sports Law, 2005). This case involved a swimmer who alleged that her coach touched her in an inappropriate manner and made inappropriate comments. She alleged that the coach felt her back and legs when she had an outbreak of hives, unnecessarily phoned her dorm room, posted an e-mail on the bulletin board that referred to pigs having orgasms, told her she had nice legs and looked good in a blue bathing suit, stared at her chest several times, massaged her shoulder instead of letting the trainer do it, kept her after practice so he could be alone with her and referred to her as "honey, sweetheart, sunshine, and dear" (p. 7). He also allegedly engaged in similar treatment with other swimmers.

The team eventually met with the coach to protest his actions, and for a time, he modified his behavior (Sports Law, 2005). When the conduct returned, they complained to the athletics director, who in turn met with the coach and warned him in a letter about the inappropriate nature of that type of conduct. The coach was

undeterred and continued to make inappropriate comments. At the end of the school year, Zimmer ultimately decided to transfer at which time the coach gave her a hard time about making this decision. In response to this move, Ashland University administrators promised that if Zimmer stayed it would be harassment-free environment. Zimmer ultimately decided that she had to transfer in order to get away from the situation. At the new school, however, her grades and swimming performance were not as good as they had been in the past and she blamed the prior coach's harassment for it.

Zimmer's sexual harassment claim was analyzed under Title IX (Sports Law, 2005). She had to prove that the university had actual knowledge of the problematic conduct. Although no formal harassment complaint had actually been filed, the court easily concluded that the university had been put on notice of the problem and that a jury should decide the matter.

Second, Zimmer was required to show that the university acted with deliberate indifference to the complaint (Sports Law, 2005). The university's position was that it had acted appropriately because it had previously issued a warning letter to the coach. However, the letter did not specifically reference that the alleged harassment and only contained veiled references to inappropriate conduct. Because of the absence of a concrete response, the court concluded that the issue of "deliberate indifference" should be decided by a jury. In addition, even though Zimmer did not report her concerns to the person identified in the university's sexual harassment policy, she had reported them to the athletics director. As a result and because the athletic director

failed to follow the policy once the report was made, the court concluded that this evidence could be considered in determining whether there was deliberate indifference to the complaint.

The court also concluded that these facts, if established at trial, would constitute a sexually hostile environment, particularly given the specific nature of the allegations, the fact that a coach was the alleged harasser, and that the alleged harassment occurred so frequently (Griffin, 2005). The court held that the defendants were entitled to summary judgment, as to the negligent hiring claim, because there was no evidence that the university or its athletics director should have known of the coach's intentions and that the hiring process used to hire the coach was sound.

However, the court denied the motion for summary judgment with regard to the plaintiff's negligent retention claim (Griffin, 2005). The court found that Ashland University and the athletics director were aware of the coach's harassing behavior prior to the plaintiff's decision to leave Ashland University. More specifically, the court found that the athletics director failed to follow university policy and neglected to report the complaints or the findings of his own investigation to the proper university officials. Under these facts, the motion for summary judgment was properly denied because a jury could find that Ashland University was negligent in retaining the swimming coach.

Given the access that coaches, faculty, and staff have to students, it is apparent that failing to promptly respond to threatening conduct can easily expose colleges and universities to negligent retention claims (Griffin, 2005). In this case the university



had sufficient reason to know that the swim coach was likely to harm students on the women's swim team. In cases where the university has no actual or constructive knowledge of alleged wrongdoing, a negligent hiring and retention claim may not prevail.

### Regional Title IX Cases

Title IX cases have appeared all over the country and that includes schools in the Midwest (United States Court of Appeals, 2001). One very notable case was *Grandson v. University of Minnesota Duluth*. In September 1996, the Office for Civil Rights of the United States Department of Education notified the University of Minnesota Duluth that a Title IX complaint had been filed, alleging that the University of Minnesota Duluth and its athletic department were violating Title IX by:

1. Not effectively accommodating the athletic interests and abilities of females;
2. Failing to provide female athletes with proportional athletic financial assistance; and
3. Failing to provide female athletes with equal opportunities for travel allowances, coaching, practice facilities, medical and training services, housing and dining, publicity services, and recruiting resources. (p. 4)

On April 2, 1997, the University of Minnesota and the Office for Civil Rights entered into an agreement to resolve the complaint (NCAA, 2007). The agreement required the University of Minnesota Duluth to increase the squad size of its varsity teams for women, to provide women "equal opportunities to receive athletic financial assistance," and to provide women equivalent access to the other services and facilities enumerated in the complaint (p. 4). The agreement further required the University of Minnesota Duluth to submit status reports to the Office for Civil Rights for 4

consecutive years following the agreement. In November 2000, after the University of Minnesota Duluth submitted those reports, the Office for Civil Rights determined that the University of Minnesota Duluth had fully implemented all provisions of the agreement. The Office for Civil Rights then terminated its administrative monitoring.

Another case at a regional school that dealt with program elimination was *Chalenor et al. v. University of North Dakota* (Bonnette, 2004). The debate behind this case was one that put into question if it was reasonable to cut men's teams in order to meet the requirements of Title IX. While the Office for Civil Rights has indicated that this method could be used to meet the proportionality prong of the three-part test, many male athletes felt they suffered from these regulations.

Budget constraints as well as concerns over finding a way to meet the proportionality prong of the accommodations test were the justifications the University of North Dakota used for cutting the men's wrestling team (Carpenter & Acosta, 2005). Members of North Dakota wrestling team then sued the University for violating their rights under Title IX. However, the court found that terminating a men's team did not violate Title IX when males were not the protected class.

In the mid 1990s Minnesota State University, Moorhead (then called Moorhead State University) found themselves deep in the battle of Title IX compliance (Tornell, 1996). The move toward Title IX compliance began in 1993 when former Moorhead State President Dille appointed a Gender Equity Task Force, which submitted recommendations in the spring of 1994. They were dealing with a problem that so many institutions were facing at that time. Their populations at the

university level indicated that women represented almost half of their institution's population but were heavily underrepresented in intercollegiate athletics. Moorhead State University found that men outnumbered women three-to-one on their campus varsity athletic teams. These discoveries were what led to many changes at Moorhead State University.

In their attempts to become compliant with the Title IX regulations, Moorhead State University added women's soccer and swimming at the varsity level and also boosted its recruiting efforts for women athletes (Tornell, 1996). They also added junior varsity volleyball and basketball to their list of programs. They were also forced with having to make the tough decision to cut men's golf and tennis, to downsize the football team and cap other men's sports. By the end of the 1990s, the gap between the number of women and men competing on athletic teams was beginning to close. "By the fall of 1997, the number of women and men varsity athletes here should reflect an approximate proportionality ratio of full-time women and men undergraduate students," said Moorhead State University athletic director Katy Wilson (p. 1).

Moorhead State University also completely remodeled its women's locker facilities and added a smaller locker room for visiting women's teams (Tornell, 1996). A former campus softball complex was converted into a soccer field and the baseball field was retrofitted for the women's softball team. A new state-of-the-art electronic scoreboard was also installed. The Office of Civil Rights, Wilson says, immediately accepted the 5-year plan of the Moorhead State task force.

## TITLE IX REPORTING SYSTEMS

Compliance of Title IX regulations are monitored in two separate reporting mechanisms for higher education institutions. The Equity in Athletics Disclosure Act (EADA) requires educational institutions participating in federal student financial assistance programs that have an intercollegiate athletic program, to prepare an annual report to the Department of Education (US Department of Education, 2006). This report provides information on athletic participation, staffing, and revenues and expenses for men's sports programs and for women's sport programs. The Department of Education compiles this information for its required annual report to Congress on gender equity in intercollegiate athletics.

The EADA is designed to make prospective students aware of a school's commitment to providing equitable athletic opportunities for its male and female students (US Department of Education, 2006). Results of this report are available to the general public through the US Department of Education website. This website provides students the opportunity to review data from one institution, get aggregated data for a group of institutions, compare data of one institution with the average of a group of institutions or compare the averages of two groups of institution.

NCAA Division I and Division II schools are also required to complete a gender-equity report annually for the NCAA. This report provides summary information concerning personnel, revenues, expenses and other comparative variables of men's and women's intercollegiate athletics programs (NCAA, 2003). The overall objective of this report is to provide data relevant to gender issues in intercollegiate

athletics. Each year the report is used to update the information from previous reports concerning financial and various other aspects related to intercollegiate athletics. The data that is presented concerns athletics participation, number of head and assistant coaches, salaries of head and assistant coaches, total expenses, recruiting expenses, athletically related student aid, and overall revenues and expenses of intercollegiate athletic programs. Another objective of this report is to provide a comparison of the revenues and expenses attributed to men's programs and women's programs, and trends of athletics programs within each of the respective NCAA divisions. Each of these divisions has its own self-contained section in which data relevant to that division are included.

Although a gender-equity plan is not required by any federal rule or regulation, its creation and implementation at an institution can be immensely helpful. Similarly, NCAA Divisions II and III self study guidelines expect gender-equity planning and evaluation (NCAA, 2007). Although adherence to the plan's requirements is not an outright excuse for noncompliance with Title IX, both the existence and good-faith progress with a plan could help derail an OCR complaint or a lawsuit. Given such a positive advantage, and because they are helpful in guiding an institution toward compliance, they are highly recommended by the NCAA.

Plans can be tailored to fit the needs and requirements of the individual institution. They can run from a comprehensive plan that addresses each area within Title IX to being very specific and focused on a particular area or areas of concern (NCAA, 2007). Plans have a variety of different structures and formats. The time

frame for a plan also is flexible. Although the NCAA suggests a 5-year plan, each institution is encouraged to structure the duration of the plan so that it is responsive to the particular issues and compliance status at the institution. The concept behind a durational time period for a plan is that short term, mid-range and long-term goals be established, pursued and achieved.

Initially, the plan's content can be compiled and drafted by one or more sources: the athletics department; a campus gender-equity committee; a subcommittee of the campus gender-equity committee that oversees athletics; a committee appointed by the president, the general counsel's office or legal affairs office, the campus equal opportunity office, or an outside consultant, among others (NCAA, 2007). The process of evaluating where an athletics department stands with respect to gender equity may be a complex and time-consuming undertaking. As a result, it is often useful to have the institution's legal counsel or an outside consultant play a significant role in evaluating the institution's current level of compliance through the performance of an audit and the preparation of a report. The audit may focus on specific areas or address each of the areas under Title IX.

Once the plan is in place, periodic audits of the institution's compliance level would be necessary because these audits enable an institution to validate its progress, refocus its efforts on problem areas that may have arisen; and to otherwise, adapt to changing conditions. Whether conducted internally or externally, the audits would keep the focus on achieving and/or maintaining gender equity.

## SUMMARY

There are no easy answers to solving the problems of Title IX. What institutions have to remember is the Department of Education's intention behind Title IX, and that is that "no person shall be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance" (Semo & Bartos, 2000, p. 1). The issues at the heart of Title IX will continue to evolve as additional cases are decided by the courts. Meanwhile members of the intercollegiate athletics community should consider the lessons that are drawn from the cases decided and settled to date, and evaluate whether they are in compliance with the requirements of Title IX. If an institution is not in compliance, then the institution's administration needs to evaluate what it must do to bring itself into compliance with Title IX.

Achieving compliance with Title IX does not need to be difficult, even for programs that currently have serious compliance problems. The flexibility allowed under the Policy Interpretation manual permits a range of options for resolving any compliance concerns. Those options often include inexpensive resolutions that do not involve eliminating benefits for some students to improve those benefits for other students.

Compliance does require effort, planning; and occasionally, imagination. Athletics administrators may need to develop specific guidelines to ensure that their students do not experience discrimination. It is a matter of determining what those guidelines are and how they will administer them.

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