

## CHAPTER 9

# GENDER EQUITY AND WOMEN IN SPORTS

### OVERVIEW

Historically, women have been discriminated against in sports and have not been provided with the same opportunities for participation as men. A vast disparity has existed between men's and women's sports in the provision of training facilities, adequate equipment, coaching staff, trainers, playing fields, recruitment for the sport, and adequate funding. Opportunities for girls at the interscholastic level had also been curtailed because of an overall attitude that girls could not play or had no desire to participate in sports at the same competitive level as boys. Many women around the world still do not have the equal opportunities for sports participation that U.S. women do.

Female amateur athletes have experienced much discrimination and harassment, which has limited their opportunities in athletics over a long period of time. Fortunately, this has begun to change. Girls and women are now participating in sports at the interscholastic and intercollegiate levels in record numbers, which are still increasing. More women are coaching at the collegiate level, and some strides are being made by women in athletic administration as well. Many of the archaic notions about women participating in sports have been discarded as women achieve greatness and notoriety in both amateur and professional sports.

Interest in women's sports has greatly increased as a result of the participation of girls in sports at an early age as well as the existence of laws that have given women the opportunity to participate fully. Parents of daughters have also taken an interest in involving girls in sports at a young age. More females are now participating in what were once all-male sports. Girls now participate on boys' high school football, baseball, and even wrestling teams.

The National Federation of State High School Associations (NFHS) is the body that oversees and governs the majority of high school athletics in the United States. More than 17,000 high schools are associated with the NFHS, which keeps statistics for participation in interscholastic sports. During the 1971–1972 school year, 294,015 girls participated in a variety of sports, with basketball the most popular sport. In comparison, 3,666,917 boys participated in all sports during the same time

period. In the 2008–2009 school year, there were 3,114,091 girls and 4,422,662 boys participating in a variety of sports at the interscholastic level.<sup>1</sup>

Participation for women has increased at the collegiate level as well, and many more women now receive athletic scholarships to colleges and universities. Table 9-1 shows the participation of women in all collegiate divisions from 1991 to 2006. In what sports has participation increased? Decreased? Why? What conclusions can you derive from this data? Does the popularity of a sport coincide with society's interest in that sport? Does participation increase for girls and women if there is a successful role model in the sport, such as Danica Patrick that they can emulate?

Professional sports have also seen an increase in opportunities for women. The Women's National Basketball Association (WNBA) was established in 1996 and has been very successful. It has given elite women college basketball players an opportunity to display their abilities on the professional level, an opportunity that did not exist previously.

Women athletes have made a substantial contribution to sports. Katherine Switzer was one of the pioneers in the realm of women's sports. She played field hockey at Lynchburg College in Virginia and was a dedicated long-distance runner. She was forced to enter the Boston Marathon in 1967 registered as K. V. Switzer instead of Katherine. Officials attempted to oust her out of the race after she had completed two miles.<sup>2</sup> She completed the marathon in 4:20:00. Because of her 1967 run, women were eventually allowed to openly enter and compete in the Boston Marathon.

Olympian Wilma Rudolph beat the odds by winning three Olympic gold medals. Rudolph wore a brace on her left leg because of bouts she had fought with scarlet fever and pneumonia as a young girl. At the age of 16, she won a bronze medal in the Olympics; she followed that by dominating the 1960 Olympic Games. Danica Patrick has been extremely successful in the racing world, notwithstanding comments like Richard Petty's, who said "I just don't think it's a sport for women. . . . And so far, it's proved out. It's really not. It's good for them to come in. It gives us a lot of publicity, it gives them publicity."<sup>3</sup>

Women's individual sports, such as golf, bowling, track and field, and skating, have a longer history than women's team sports. In 1950, the Ladies Professional Golf Association (LPGA) was established. The leading money winner on the LPGA Tour for 2008 was Lorena Ochoa, earning \$2,763,193. Annika Sörenstam was the tour's leading money winner from 2001–2005 and was also the leader in 1995, 1997, and 1998. The leading money winner in 1990, Beth Daniel, earned a paltry \$863,578.

U.S. women's teams made headlines in the 1996 Olympics, winning gold medals in several sports, including basketball, softball, synchronized swimming, and soccer. The U.S. women's Olympic ice hockey team debuted in 1998 and won the gold medal over the Canadians. In the 2000 Olympics held in Sydney, Australia, women competed in the same number of team sports as men.

Young girls are now being recognized publicly for their achievements in sports. The National Baseball Hall of Fame and Museum asked Katie Brownwell to donate her Little League jersey after she pitched a perfect game for her team, the Dodgers. By the way, she also struck out all 18 batters, never reaching a three-ball count for any batter. Maria Pepe, who opened the doors for girls to play in Little League via her Supreme Court case, was present at the ceremony.<sup>4</sup>

<sup>1</sup> National Federation of State High School Associations, <http://www.nfhs.org>.

<sup>2</sup> Katherine Switzer, *First Women's Strides in Boston Still Echoing*, *The New York Times*, April 15, 2007.

<sup>3</sup> *Petty hasn't Changed Views on Women Racers*, ESPN.com, June 1, 2006.

<sup>4</sup> Richard, Sandomir, *TV SPORTS; For Unsung Female Athletes, A Top-Notch, Revealing 'Passion to Play'*, *The New York Times*, October 7, 1994.

TABLE 9-1

**PARTICIPATION OPPORTUNITIES FOR FEMALE ATHLETES: ALL DIVISIONS (1991 TO 2006)**  
*Percentage Of Schools That Offer Each Sport*

|               | 2006 | 2004 | 03   | 02   | 01   | 00   | 99   | 98   | 97   | 96   | 95   | 94   | 93   | 92   | 91   |
|---------------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|
| Archery       | 0.2  | 0.2  | 0.2  | 0.5  | 0.5  | 0.3  | 0.2  | 0.2  | 0.2  | 0.5  | 0.6  | 0.5  | 0.5  | 0.5  | 0.3  |
| Badminton     | 0.4  | 0.3  | 0.3  | 0.1  | 0.1  | 0.5  | 0.5  | 0.2  | 0.2  | 0.3  | 0.3  | 0.7  | 0.5  | 0.9  | 0.9  |
| Basketball    | 98.4 | 98.3 | 97.9 | 98.8 | 98.6 | 99.6 | 98.0 | 98.2 | 98.3 | 98.3 | 97.5 | 97.8 | 97.8 | 97.2 | 97.1 |
| Bowling       | 3.2  | 3.3  | 3.2  | 2.6  | 2.2  | 1.4  | 1.2  | 0.9  | 0.8  | 0.5  | 0.3  | 0.3  | 0.8  | 0.5  | 0.3  |
| Crew/Rowing   | 15.2 | 14.0 | 13.9 | 16.2 | 15.7 | 15.6 | 14.6 | 12.4 | 11.2 | 11.7 | 10.4 | 10.4 | 10.4 | 5.6  | 8.6  |
| Cross Country | 89.2 | 88.8 | 87.9 | 86.5 | 85.0 | 87.8 | 86.2 | 86.0 | 83.1 | 85.2 | 83.0 | 82.6 | 79.9 | 80.1 | 69.0 |
| Fencing       | 5.9  | 4.6  | 4.6  | 5.8  | 5.8  | 5.1  | 5.1  | 5.5  | 5.2  | 4.6  | 4.3  | 4.6  | 4.8  | 7.0  | 7.2  |
| Field Hockey  | 28.0 | 28.2 | 27.8 | 27.0 | 26.7 | 27.4 | 26.7 | 26.6 | 26.0 | 27.1 | 26.9 | 28.2 | 28.0 | 28.1 | 28.9 |
| Golf          | 52.2 | 48.7 | 46.4 | 48.6 | 46.8 | 43.4 | 40.6 | 35.1 | 31.9 | 30.4 | 26.7 | 26.1 | 22.9 | 24.0 | 22.9 |
| Gymnastics    | 9.5  | 11.0 | 11.0 | 12.0 | 12.0 | 11.7 | 11.9 | 10.3 | 10.1 | 11.2 | 11.1 | 10.8 | 10.9 | 11.5 | 11.3 |
| Ice Hockey    | 9.7  | 8.8  | 8.7  | 8.5  | 7.9  | 6.8  | 5.8  | 4.6  | 3.6  | 2.8  | 2.6  | 2.4  | 2.2  | 2.4  | 2.7  |
| Lacrosse      | 30.6 | 28.5 | 27.6 | 26.7 | 26.2 | 26.0 | 24.1 | 21.7 | 20.5 | 20.9 | 18.7 | 17.1 | 16.6 | 16.0 | 16.1 |
| Riding/Equest | 3.6  | 3.6  | 3.3  | 3.6  | 3.6  | 3.9  | 3.7  | 3.2  | 3.0  | 2.8  | 2.6  | 3.4  | 3.2  | 2.4  | 2.2  |
| Riflery       | 3.4  | 2.8  | 3.0  | 3.8  | 3.9  | 3.6  | 3.6  | 3.2  | 3.2  | 4.2  | 4.0  | 2.6  | 2.2  | 2.2  | 2.4  |
| Sailing       | 3.8  | 3.2  | 3.3  | 3.1  | 2.7  | 2.9  | 2.9  | 2.4  | 2.6  | 3.5  | 3.5  | 3.9  | 3.9  | 3.8  | 3.6  |
| Skating       | 5.7  | 5.8  | 6.0  | 5.0  | 4.8  | 4.6  | 4.6  | 4.2  | 4.1  | 4.6  | 4.9  | 4.9  | 5.2  | 5.7  | 5.6  |
| Soccer        | 89.4 | 88.6 | 87.5 | 87.9 | 86.0 | 84.0 | 81.6 | 78.5 | 75.8 | 68.9 | 61.8 | 55.5 | 49.7 | 45.8 | 44.4 |
| Softball      | 87.1 | 86.4 | 85.5 | 86.2 | 85.0 | 82.5 | 79.8 | 81.2 | 79.0 | 77.0 | 74.5 | 75.9 | 74.2 | 72.4 | 70.6 |
| Squash        | 3.4  | 3.8  | 3.8  | 3.1  | 3.1  | 3.2  | 3.1  | 3.6  | 3.6  | 3.4  | 3.4  | 3.6  | 3.6  | 3.9  | 3.6  |
| Swim/Dive     | 50.9 | 48.7 | 47.9 | 52.0 | 51.5 | 52.9 | 51.2 | 45.7 | 44.7 | 48.1 | 47.4 | 48.6 | 47.8 | 51.1 | 51.1 |
| Synch Swim    | 1.3  | 0.5  | 0.5  | 1.0  | 1.2  | 1.4  | 1.4  | 0.9  | 0.9  | 0.8  | 0.8  | 0.7  | 0.5  | 1.2  | 1.4  |
| Tennis        | 85.1 | 85.2 | 84.2 | 87.7 | 86.7 | 87.8 | 84.7 | 88.0 | 86.6 | 87.8 | 86.4 | 85.3 | 82.9 | 85.8 | 85.0 |
| Track & Field | 67.4 | 67.4 | 67.2 | 67.5 | 67.7 | 68.1 | 67.2 | 64.9 | 64.0 | 65.8 | 63.7 | 65.0 | 63.3 | 66.4 | 64.3 |
| Volleyball    | 95.2 | 94.6 | 93.8 | 85.4 | 94.7 | 95.2 | 94.2 | 93.5 | 92.1 | 92.4 | 90.9 | 91.5 | 90.6 | 91.1 | 89.1 |
| Water Polo    | 5.9  | 6.5  | 6.0  | 6.0  | 5.3  | —    | —    | —    | —    | —    | —    | —    | —    | —    | —    |

Source: Courtesy of The Women's Sports Foundation.

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The gap in opportunities between boys and girls has begun to shrink because of laws such as Title IX as well as attitude changes in our society about the role of girls and women and their ability to participate and compete in the sports world. Case 9-1, *State v. Hunter*, 300 P.2d 455 (Or. 1956), illustrates the mind-set of that period when dealing with women's participation in sports. Consider the crime with which the defendant was charged. What reasons were given as to why women should be banned from wrestling?



### CASE 9-1 *State v. Hunter*

300 P.2d 455 (Or. 1956)

TOOZE, Justice.

Defendant Jerry Hunter, a person of the feminine sex, was charged . . . with the crime of 'participating in wrestling competition and exhibition,' in violation of the provisions of ORS 463.130.

The complaint, omitting formal parts, charged as follows:

'Jerry Hunter is accused by W. L. Bradshaw, District Attorney, by this Complaint of the Crime of Person of Female Sex Participating in Wrestling Competition and Exhibition committed as follows: The said Jerry Hunter on the 25th day of October, A.D., 1955, in the County of Clackamas and State of Oregon, then and there being a person not of the male sex, to-wit: of the female sex, did then and there unlawfully and willfully participate in a wrestling competition and wrestling exhibition, said act of defendant being contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Oregon.'

. . . [D]efendant asserts on this appeal that the statute involved in this prosecution is unconstitutional and void . . .

'1. It denies to defendant the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the U. S. Constitution, and it grants other citizens and classes of citizens privileges or immunities which upon the same terms do not equally belong to defendant and all other citizens, in violation of Section 20, Article 1 of the Constitution of the State of Oregon.' . . .

ORS 463.010 to 463.990, inclusive, provides for the creation of boxing and wrestling commissions, for registration of boxers and wrestlers, authorizes certain prize fights and wrestling exhibitions, with certain regulations pertaining to the same, invests the commissions created with certain powers, including the rule-making power, provides for licensing, for penalties, and, in general, assumes to cover the entire field involved in boxing and wrestling exhibitions. ORS 463.130 provides as follows:

'Wrestling competitions; females barred; licensing; fees. (1) . . . No person other than a person of the male sex shall participate in or be

*licensed to participate in any wrestling competition or wrestling exhibition.'* . . .

The principal question for decision is whether the foregoing ban against women wrestlers constitutes an unreasonable exercise of the police power of the state and violates Art. XIV, § 1, of the U.S. Constitution and Art. 1, § 20, of the Oregon Constitution. Is the classification contained in the statute arbitrary and unconstitutional, or is it based upon a reasonable distinction having a fair and substantial relation to the object of the legislation and, therefore, is constitutional?

Class legislation is permissible if it designates a class that is reasonable and natural and treats all within the class upon the basis of equality. We take judicial notice of the physical differences between men and women. These differences have been recognized in many legislative acts, particularly in the field of labor and industry, and most of such acts have been upheld as a proper exercise of the police power in the interests of the public health, safety, morals, and welfare. As we said in *State v. Baker*, 50 Or. 381, 385, 92 P. 1076, 1078, 13 L.R.A., N.S., 1040:

'By nature citizens are divided into the two great classes of men and women, and the recognition of this classification by laws having for their object the promoting of the general welfare and good morals does not constitute an unjust discrimination.'

The *Baker* case involved a statute which prohibited women from entering and remaining in a saloon. The statute was upheld.

Moreover, there is no inherent right to engage in public exhibitions of boxing and wrestling. Both sports have long been licensed and regulated by penal statute and, in some cases, absolutely prohibited. It is axiomatic that the Fourteenth Amendment to the U.S. Constitution does not protect those liberties which civilized states regard as properly subject to regulation by penal law. . . .

In addition to the protection of the public health, morals, safety, and welfare, what other considerations might have entered the legislative mind in enacting the statute in question? We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominately masculine. That fact is important in determining what the legislature might have had in mind with respect to this particular statute, in addition to its concern for the public weal. It seems to us that its purpose, although somewhat selfish in nature, stands out in the statute like a sore thumb. Obviously it intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman. It had watched her emerge from

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long tresses and demure ways to bobbed hair and almost complete sophistication; from a creature needing and depending upon the protection and chivalry of man to one asserting complete independence. She had already invaded practically every activity formerly considered suitable and appropriate for men only. In the field of sports she had taken up, among other games, baseball, basketball, golf, bowling, hockey, long distance swimming, and racing, in all of which she had become more or less proficient, and in some had excelled. In the business and industrial fields as an employee or as an executive, in the professions, in politics, as well as in almost every other line of human endeavor, she had matched her wits and prowess with those of mere man, and, we are frank to concede, in many instances had outdone him. In these circumstances, is it any wonder that the legislative assembly took advantage of the police power of the state in its decision to halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges? Was the Act an unjust and unconstitutional discrimination against woman? Have her civil or political rights been unconstitutionally denied her? Under the circumstances, we think not.

The judgment is affirmed.

Source: Courtesy of Westlaw; reprinted with permission.

Should girls be allowed to participate with boys in Little League baseball? That was the question presented in Case 9-2, *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344 (1st Cir. 1975). What reasons can you give for and against such participation?



### CASE 9-2 *Fortin v. Darlington Little League, Inc.*

514 F.2d 344 (1st Cir. 1975)

CAMPBELL, Circuit Judge.

This case concerns the right of a girl to play Little League baseball. In the spring of 1974, ten year old Allison "Pookie" Fortin and her father went to Slater Field, a City of Pawtucket park, where Pookie sought to participate in the baseball program of the Darlington Little League, Inc., American Division ("Darlington"). Pookie was a Pawtucket resident and otherwise eligible; she was turned down because of her sex. Defendant McCluskie, president of Darlington, told the Fortins that a boys-only policy was dictated by the national Little League organization. If Pookie were accepted, McCluskie feared that Darlington's Little League charter would be revoked, and the inexpensive insurance provided by the national organization lost.

After she was rejected, Pookie and her father brought suit under 42 U.S.C. § 1983 and related statutes against Darlington and McCluskie and also against Dragon, Pawtucket's Director of Parks and Recreation, who maintains Slater Field and controls permission to use its baseball diamonds. They asserted that denying Pookie the same places of public accommodation and recreational activities as the male children of Pawtucket taxpayers enjoy violated the equal protection clause of the fourteenth amendment. Plaintiffs requested a declaration and injunction allowing Pookie to play on the same terms as boys.

. . . .

. . . Reviewing the facts in this context, we are of the view that the court's conclusion is not supported, and for reasons hereafter stated we reverse. First, however, we briefly summarize the evidence presented at the trial:

1. Pookie's father, a physician, testified that she was "physically fit and able to play baseball."
2. The Little League program she would have entered, had Darlington accepted her, was shown to sponsor three tiers of teams, accommodating players of different levels of maturity and ability. Younger boys, 8-9, play on the so-called minor league teams, of which there are eight. There are also several instructional league teams for boys of lesser ability. Boys of 10-12 are "drafted" into the seven Little League teams, although some older boys may never reach that level if they lack the ability. Darlington has a policy of accepting physically handicapped boys, placing them in teams and positions suited to their skills.
3. Darlington presented the deposition of Dr. Crane, an orthopedist who treated Brown University teams and who also had coached Little League baseball. Ninety percent of his experience with athletes had been with males. Dr. Crane felt the average girl could not safely compete with boys, although there might be some exceptions. His opinion seems to have rested mostly on the observation that girls, being more sedentary, were likely to be in poorer condition than boys. However, he also felt that girls, by reason of the design of their pelvis, walked with more unstable gait; that girls lacked the capacity to throw overhand; and that girls might be more likely to sustain bone-end fractures since they would be growing faster than boys during the 8-12 period.
4. Plaintiffs' main expert, Dr. Mathieu, was a board certified pediatrician who was medical director of the City of Providence School Department. She felt girls of Little League age could safely play baseball with boys. She testified that girls 8-12 are generally larger and as strong or stronger than boys of a similar age. They are no more subject to fractures or other injuries, no more unstable on their feet, are neurologically similar, and have the same amount of fat. The only notable

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physical difference at these ages is that girls have a lesser respiratory capacity, although Dr. Mathieu did not believe the difference would affect their ability to play baseball.

5. A radiologist called by plaintiffs testified that girls' bones are no different from boys,' and that skeletally girls are no more subject to injury or unstable.
6. The president and coaches of Darlington testified to a belief that girls would detract from the game; might cause boys to play less aggressively and more protectively; had a lower "boiling point"; would be more prone to injury and, if in need of first aid, would embarrass the male coaches; and would prefer to play with other girls.
7. Darlington's only witness with experience with mixed teams said that boys on his teams had been encouraged to hold back because girls were less able to protect themselves. He thought that girls were injured more often than boys.

We find this evidence meager support for the court's finding of "material physical differences . . . regarding musculature, bone strength, strength of ligaments and tendons, pelvic structure, gait and reaction time . . . that . . . could undoubtedly result in serious injuries to girls. . . ." Dr. Crane, it is true, deposed that boys generally were stronger, being, he thought, more active. His basis for comparison, however, was entirely impressionistic. He admitted never having observed girls playing baseball and to a medical practice with emphasis upon male patients. He further agreed, with only a few qualifications, that the bones and bodies of girls were essentially as resistant to blows as those of boys, and that girls from 10-12 would experience a growth spurt ahead of boys. No statistical data whatever was presented tending to show greater female than male susceptibility to injury in the 8-12 group, and it is difficult to tell how much of Dr. Crane's deposition rested on personal views, to which he admitted, that it was the normal activity of a young lady to keep off baseball fields and play with dolls, and how much on science.

The court, moreover, gave no reason for totally rejecting the contrary testimony of Dr. Mathieu, a pediatrician with excellent credentials who would seem to have had more chance to examine children of both sexes in the relevant age groups than Dr. Crane. . . .

Darlington, moreover, accepts boys of all degrees of physical condition, including handicapped boys. Even Dr. Crane believed that a few girls could compete at the level of boys, and it is reasonable to suppose that handicapped and unathletic boys would be less proficient than many girls. Girls found to lack conditioning or ability to play safely could, like similarly situated boys, be retained on instructional or junior league teams rather than advanced to little league teams.



In addition, it seems most unlikely that a girl's parents would encourage or permit her to participate—or that the girl would wish to participate—in a program found to be too fast or rough for her. Should girls find Little League baseball too demanding, the problem would seem self-regulating in that the girls would withdraw.

Finally, we take notice not only that girls have for some time played Little League baseball in many communities but that Congress has amended the national Little League charter for the express purpose of encouraging and permitting girls to play on equal terms with boys. To uphold the district court would require us to accept the likelihood that both the policy in other communities and the judgment of Congress have resulted or will result in disproportionate physical injury to girls. We cannot conceive of Congress consciously adopting, and the Little League accepting, a policy likely to result in widespread injury; indeed Congress' action implies a finding by that body that girls are capable of playing Little League baseball without undue risk. The amendment of course removes Darlington's worry as to the availability of insurance for girl players.

We conclude that the court's stated reason for finding Darlington's exclusion of girls "rational"—namely, that injury will undoubtedly occur due to the physical differences between boys and girls—is unsupported. Our decision relates, of course, solely to the age group in question. It seems likely that as girls and boys mature, greater physical differences affecting athletic ability exist. But the evidence is essentially uncontroverted that the years 8-12 are those during which girls come close to matching boys in size and physical potential.

The other reasons cited by Darlington, the alleged preferences of coaches and players, the sense of what is or is not fit for girls to do, and the like, seem to us inadequate reasons to deny Pookie an opportunity to play on equal terms. These fall more under the heading of those "archaic and overbroad generalizations" rejected by the Supreme Court. Other arguments, such as that girls do not deserve an opportunity since later they will move in other athletic channels, do not impress us as justifying their exclusion during the years that they possess essentially equal capacity to enjoy this healthy and beneficial form of recreation. Darlington, we recognize, is staffed by volunteers who, it is asserted, do not wish to coach girls. But while Darlington could adopt any policy it wishes if it did not rely on the large-scale use of city facilities, the latter factor impresses it with the City's duty to deal equally.

Central to our decision, of course, are such factors as the ages of the children concerned, the uniqueness of the opportunity, and recent congressional assessment of the situation. Nothing we say is meant to

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preclude recognition of bona fide distinguishing factors between the sexes in some sports at some ages and in some circumstances.

The judgment of the district court is reversed and the case is remanded for entry of a suitable declaratory judgment and, if required, an injunction . . . to admit the female plaintiff to [Darlington's] programs upon the same terms and conditions available . . . to all others.

Source: Courtesy of Westlaw; reprinted with permission.

Do you agree with the court's finding in *Fortin* that between the ages of 8 and 12 girls closely match boys in size and physical potential? Should there be age limits for girls who want to play baseball in an all-boys league? For an opposite holding, see *Magill v. Avonworth Baseball Conference*, 364 F. Supp. 1212 (W.D. Pa. 1973). In that case the court found that a refusal to allow a ten-year-old girl to play Little League baseball was not discriminatory. The court stated:

The directors, male and female, were unanimous in their opinions that baseball is a contact sport at times and at times the contact is violent. We can take judicial notice of that fact and find that baseball is a contact sport. There is no question that a runner who tries to beat a throw to the plate is frequently blocked by a catcher. The contact is severe if not violent. The directors spoke of their concern with wild pitchers and, of course, we know the consequences of trying to steal second or third. The directors have had a great deal of experience with boys' baseball and have formed the opinion after mature consideration that girls would not fare well in physical contact with the boys. They admit that there are excellent girl athletes but contend that they should not be placed in physical contact with boys. This is a class action intended to force integration of the sexes generally in the baseball program and the directors believe this unwise.<sup>5</sup>

### Problem 9-1

You are the president of the local chapter of Pony League Baseball for boys aged 13 and 14. A 14-year-old girl has requested she be able to play in the boys' Pony League games. There is no current local policy relating to girls' participation in Pony League Baseball. Some of the parents of the boys have said they would withdraw their sons from the league if girls were allowed to play. How would you handle this situation? Draft a policy that will cover this scenario.

## CONSTITUTIONAL ISSUES IN GENDER EQUITY

Women have sued under multiple legal theories when asserting claims of sex discrimination in sports, including the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. State action must be present to prevail under this theory. Women have also pursued discrimination

<sup>5</sup> *Magill*, 364 F. Supp. at 1216.

claims under the Equal Rights Amendment (ERA) of some states' constitutions. State ERAs have been extremely helpful in assisting women who have been denied the opportunity to participate in sports.<sup>6</sup>

There have been many cases dealing with the issue of whether girls can play on boys' teams. Courts have recognized that separate teams are justified if the sport is a contact sport. The general rule states that when only one team is available and the sport is deemed a non-contact sport, both sexes must be allowed to try out for the team. If women are given the opportunity to compete on their own, then it is less likely they will be allowed to compete with men. Title IX regulations (discussed later in this chapter) allow an athletic department to field separate teams for each sex if team selection is based on a competitive skill or the sport is deemed a contact sport. If a particular sport is not sponsored for one sex and the sex that has been excluded has a history of limited opportunity in the sport, then the sex being excluded must be allowed to try out for the team.<sup>7</sup> Under Title IX such sports as boxing, wrestling, rugby, ice hockey, basketball, and football have been deemed contact sports.

What happens if a girl wants to try out for the boys' high school football team? Should she be allowed to try out? Should she be allowed to play? That was the issue in Case 9-3, *Lantz by Lantz v. Ambach*, 620 F. Supp. 663 (D.C. N.Y.1985), involving a 16-year-old girl who wanted to try out for her high school football team.



### CASE 9-3 *Lantz by Lantz v. Ambach*

620 F. Supp. 663 (D.C. N.Y.1985)

STANTON, District Judge.

Plaintiff Jacqueline Lantz, a 16-year-old healthy female student in her junior year at Lincoln High School, Yonkers, New York wants to play football. Lincoln High School has no girls' football team, so she attempted to try out for the junior varsity football squad. Her attempts were blocked by a regulation. . . . The regulation, 8 N.Y.C.R.R. § 135.4(c)(7)(ii)(c)(2) states:

"There shall be no mixed competition in the following sports: basketball, boxing, football, ice hockey, rugby and wrestling."

Suing under the Civil Rights Act, 42 U.S.C. § 1983, plaintiff claims the regulation violates . . . her right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. She seeks a declaratory judgment that the regulation as written violates that statute and that clause of the Fourteenth Amendment, and an injunction requiring the defendants to delete the regulation and permit her to try out for the junior varsity squad. . . .

<sup>6</sup> See A. Faraone, *The Florida Equal Rights Amendment: Raising the Standard Applied to Gender Under the Equal Protection Clause of the Florida Constitution*, 1 FLA. COASTAL L.J. 421 (2000).

<sup>7</sup> 45 C.F.R. § 86.41.

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The Supreme Court has stated that discrimination among applicants on the basis of their gender is subject to scrutiny under the Equal Protection clause of the Fourteenth Amendment, and will be upheld only where there is "exceedingly persuasive justification" showing at least that the classification serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." Here the governmental objective is to protect the health and safety of female students, and there is no quarrel with the importance of that objective. To demonstrate that the regulation is substantially related to that objective, the Commissioner and the Board of Regents have offered data establishing that "as a general rule, senior high school students (age 15 through 18) are more physically developed, stronger, more agile, faster and have greater muscular endurance than their female counterparts," medical opposition to girls' participation on boys' teams in such contact sports as football (which Dr. Falls described as a "collision" sport) because of the risk of injury in such participation, and the testimony of Dr. Willie to the effect, among other points, that the present regulation enhances safety by permitting simple and uniform administration across the state.

But these data, however refined, inevitably reflect averages and generalities. The Commissioner and the Regents say, "It makes no difference that there might be a few girls who wish to play football who are more physically fit than some of the boys on the team." Yet it does make a difference, because the regulation excludes all girls. No girl—and simply because she is a girl—has the chance to show that she is as fit, or more, to be on the squad as the weakest of its male members. Where such cases exist, the regulation has no reasonable relation to the achievement of the governmental objective. In such a case, the effect of the regulation is to exclude qualified members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior. Thus the regulation's operation is too broad, and must give way to the facts in particular cases.

. . . Jacqueline Lantz obviously has no legal entitlement to a starting position on the Lincoln High School Junior Varsity football squad, since the extent to which she plays must be governed solely by her abilities, as judged by those who coach her. But she seeks no such entitlement here.

Instead she seeks simply a chance, like her counterparts, to display those abilities. She asks, in short, only the right to try.

To the extent that the challenged regulation deprives her of the opportunity to try out for the junior varsity football squad, it operates to abridge her right under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the defendants will be enjoined from complying with it or enforcing it.

. . . ORDERED that the defendant Board of Education, its agents and employees arrange for a prompt determination whether plaintiff Jacqueline Lantz is eligible for junior varsity football pursuant to the same standards that are applied to male candidates and, if she is found eligible, direct that she be permitted to try out for the squad. . . .

Source: Courtesy of Westlaw; reprinted with permission.

Is girls' half-court basketball equivalent to boys' full-court basketball? In Case 9-4, *Dodson v. Arkansas Activities Ass'n et al.*, 468 F. Supp. 394 (E.D. Ark. 1979), a federal court in Arkansas was faced with that issue in 1979.



### CASE 9-4 *Dodson v. Arkansas Activities Ass'n et al.*

468 F. Supp. 394 (E.D. Ark. 1979)

OPINION

ARNOLD, District Judge.

Diana Lee Dodson brought this suit on January 25, 1977. At the time she was 14 years old and in the ninth grade in the public schools of Arkadelphia, Arkansas. She was a good basketball player and had played on her junior high girls' team in the eighth grade. There are three defendants: the school district in which Diana Lee's school is located, the superintendent of schools of that district, and the Arkansas Activities Association. The Association is a voluntary group of schools, mostly public, to which the Arkadelphia schools belong, together with most, if not all, other public junior and senior high schools in Arkansas.

This suit challenges the constitutionality of the rules for girls' junior and senior high basketball laid down by the defendant Association. There is no question of state action. . . . It is, at least for present purposes, subject to the Equal Protection Clause of the Fourteenth Amendment.

The question presented is whether the differences in girls' and boys' junior and senior high basketball rules, as laid down by the Association for play in Arkansas, are so lacking in justification, and so injurious to the girls, as to deprive them of the equal protection of the laws. This Court holds that the rules place girl athletes in Arkansas at a substantial disadvantage as compared to boy athletes, that no sufficient justification is offered to justify this disparity, and that the resulting discrimination is unconstitutional. A decree will be entered requiring defendants to erase the differences between the two sets of rules.

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Girls' basketball, as played in Arkansas, is markedly different from boys.' It is variously referred to as "half-court," "six on six," or "three on three," while the boys' game is known as "full-court" or "five on five." Girls' teams have six players, while boys' have five. Three girls are forwards, almost always on offense, and three are guards, almost always on defense. No players may cross the center line in the middle of the court. The three guards must always stay in the half of the court where the other team scores. The forwards must stay in the half of the court where their own team scores. Only a forward can shoot or score points. If a guard is fouled, she does not get a free throw. The ball goes to the other end of the court, and one of the forwards does the shooting. In "full court" or "boys' rules," by contrast, all five players may range the full length of the court. They all play defense when the other team has the ball, and they all play offense when their own team has the ball. Any player may shoot and score points, both field goals and free throws.

There are some other differences between the two games, but the difference just described is a major one. Arkansas girls simply do not get the full benefit and experience of the game of basketball available to Arkansas boys. Although substitution is possible, and a girl may play both guard and forward at various times, such changes appear to be the exception rather than the rule. Most girls are typed as either a guard or a forward and remain so. A five-person, full-court game requires a more comprehensive and more complex strategy. It also provides more intensive physical training and conditioning, because, if for no other reason, players on a five-person team have to run up and down the full length of the court, not just half of it. Players of the full-court game also learn to shoot from farther out, because there are five opponents, not just three, trying to keep them away from the basket. Various expert witnesses at the trial summarized the effect of these rules on girls in Arkansas. They are a disservice to the youngsters coming up. Girls are learning half of the game.

All this might not matter so much were it not for the effects on the girls after graduation. Those whose ambition it is to play basketball in college, perhaps even on scholarship, are at a marked disadvantage. College basketball is full-court, for women as well as men. For that matter, almost no one plays half-court any more. Most Arkansas private schools play full-court for boys and girls. International competition is full-court. Every state except Arkansas, Iowa, Oklahoma, and Tennessee is full-court in secondary school. (Texas was apparently in the process of changing when this case was tried. It seems now to play full-court.) If an Arkansas girl wishes to compete for a position on a college team, she must overcome substantial

obstacles. Most of her opposition will have played full-court in high school. The lack of training and conditioning, the psychological barrier of the center line, which she has been schooled not to cross, and, in the case of guards, the lack of shooting experience all . . . make the Arkansas girl less able to compete. The disadvantage is tremendous. It takes about a year for a half-court girl with talent to adjust to the difference in games. Even the University of Arkansas does most of its recruiting out of state, for just this reason. The primary basketball player will be from outside of the state of Arkansas, which will be a disadvantage to those young girls who are in this state going to high school.

In view of these disparities a movement understandably arose among some schools to change the rules to permit girls to play full-court. This kind of decision is made by vote of the membership of the Arkansas Activities Association. The vote is by mail ballot. . . . The Association had about 508 memberships at the time this case was tried, but only those with girls' basketball teams were entitled to vote on this issue. The record does not disclose how many eligible votes there were on the question. A vote taken in August 1976 was 117 to 114 to change to full-court. This decision was reversed, however, in January 1977 by a vote of 147 to 116. . . .

The fact that girls in Arkansas secondary schools are treated differently, or less advantageously, than boys, of course, is not at all conclusive of the claim asserted. The Equal Protection Clause does not forbid differences as such. It remains to ask, what justification is offered for the difference? We lay at once to one side any suggestion that girls are not strong enough, or large enough, to play the orthodox full-court game. No such suggestion is made by any party, and in any event the record is overwhelmingly to the contrary. Both the experience in most other states, and the testimony at the trial of this cause, show beyond doubt that no physiological or anatomical reason makes girls unable, or any less able, to play five on five. Indeed, defendants' counsel expressly stated on the record that no physiological differences between males and females . . . prohibit females from playing five on five basketball. Some defense witnesses offered various reasons for preferring half-court: more girls can play, games tend to be higher-scoring (or at any rate more shots are attempted), the center-line barrier requires more agility and skill of movement, and the like. These considerations may have merit in their own way. Half-court may in fact be a better game. But if it's better for the girls, it's better for the boys as well. None of the reasons proffered is at all relevant to a gender-based classification. And significantly, no official of the Association relied at trial on any of these reasons.

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The real reason for the difference, and in fact the only operative reason, is simply that girls' rules have always been this way in Arkansas. Lee Cassady, director of the Association, candidly testified as follows:

Q. Do you know why the girls have been classified to play under these certain rules (rules which are different from boys' rules)?

A. In our state it has been kind of a traditional development. It was not done originally for any particular reason, other than that these were the girls' rules that were being played by girls' teams and sponsored by women for girls.

Other evidence supports Mr. Cassady's conclusion. According to Dr. Downing, when basketball was invented by one Naismith in 1892, girls and women at once became interested in the game, but they played on a court divided into Three (not just two) equal parts. There were nine players on a team, three in each of the three divisions. Why? Because girls and women wore bustles, long trains, and high starched collars. They just couldn't get up and down the court fast enough. Over the years, the game evolved. Girls and women changed first to half-court, and then, in most states, to full-court.

What constitutional standard is to be applied? The Supreme Court has recently reaffirmed the standard. In *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979), the Court said: "To withstand scrutiny under the equal protection clause, 'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.'"

It is at once apparent that the justification offered here does not even come close to meeting that test. Simply doing things the way they've always been done is not an "important government objective," if indeed it is a legitimate objective at all. Change for its own sake is no doubt to be avoided, and tradition is a healthy thing. But tradition alone, without supporting gender-related substantive reasons, cannot justify placing girls at a disadvantage for no reason other than their being girls. The Association's decision to go back to half-court may have been reached by a democratic process, at least among school administrators. That circumstance cannot save it from constitutional condemnation. The Equal Protection Clause is a limitation on governmental action, no matter how fair the process that led to it.

It is proper to add a word about what this case is not about. It is not about whether girls could or should play against boys. The question is whether girls are entitled to play full-court against each



other. Nor is the case concerned with discrimination between Arkansas girls and, say, Mississippi girls. (Mississippi plays full-court.) That kind of discrimination is not cognizable under the Equal Protection Clause, because it results from the action of two separate sovereigns. The point here is that Arkansas boys are in a position to compete on an equal footing with boys elsewhere, while Arkansas girls, merely because they are girls, are not. Nor does this Court hold that there is a constitutional right to play basketball, or to score points. Arkansas schools have chosen to offer basketball. Having taken that step, they may not limit the game's full benefits to one sex without substantial justification.

. . . It is by the Court this 4th day of April, 1979, CONSIDERED, ORDERED, ADJUDGED, and DECREED,

That the defendants, and each of them, their agents, servants, and employees, and all persons acting in concert with them, be, and they are hereby, permanently enjoined and restrained from enforcing as to girls playing junior and senior high school basketball in Arkansas, any rules different from those enforced as to boys.

Source: Courtesy of Westlaw; reprinted with permission.

In Case 9-5, *Israel v. West Virginia Secondary Schools Activities Comm'n*, 388 S.E.2d 480 (W. Va. 1989), a high school girl who was an outstanding baseball player wanted to play on the boys' baseball team.



### **CASE 9-5 *Israel v. West Virginia Secondary Schools Activities Comm'n***

388 S.E.2d 480 (W. Va. 1989)

MILLER, Justice:

Erin Israel, by her next friend, Patricia Israel, appeals from a final order of the Circuit Court of Pleasants County, entered February 11, 1988, denying her request for a declaratory judgment, injunctive relief, and damages on the basis of alleged gender discrimination. On appeal, Ms. Israel asserts that she was discriminated against in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and its state counterpart, Article III, Section 17 of the West Virginia Constitution, as well as the Human Rights Act, W.Va. Code, 5-11-1, *et seq.* (1987).

Ms. Israel has a great deal of experience playing baseball. She began playing baseball at the age of six in the local park and recreation league where she learned the basic fundamentals of the game. At the age of nine, Ms. Israel progressed into the Little League system.

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Her Little League coach testified that Ms. Israel's skills were always above average. He stated that "[s]he was very aggressive, understood the game, its concepts, and its technique." While playing Little League, Ms. Israel was nominated for every all-star team. At the age of thirteen, she became the first female to ever play on a Pony League team in Pleasants County. When Ms. Israel was a freshman at St. Mary's High School, and expressed a desire to play on the all-male baseball team, the high school baseball coach told her he had no objections to her playing for him and promised to give her a fair tryout. In February, 1984, Ms. Israel tried out for the all-male high school baseball team. She was prohibited from playing on the team because of a regulation promulgated by the Secondary Schools Activities Commission (SSAC).

The Board of Education of the County of Pleasants (Board) is a member of the SSAC. The SSAC is a nonprofit organization created by W.Va. Code, 18-2-25 (1967), which authorizes county boards of education to delegate their supervisory authority over interscholastic athletic events and band activities to the SSAC. . . . In the exercise of its delegated authority, the SSAC adopted Rule No. 3.9, which provides:

"If a school maintains separate teams in the same or related sports (example: baseball or softball) for girls and boys during the school year, regardless of the sports season, girls may not participate on boys' teams and boys may not participate on girls' teams. However, should a school not maintain separate teams in the same or related sports for boys and girls, then boys and girls may participate on the same team except in contact sports such as football and wrestling."

Shortly after Ms. Israel tried out to play on the baseball team, she was informed by St. Mary's' assistant principal that she was ineligible to play on the baseball team because St. Mary's had a girls' softball team. The assistant principal explained that if the school allowed Ms. Israel to play baseball, it would be in violation of Rule 3.9 and would be barred from playing in state tournaments. After numerous futile efforts to have the rule changed through the internal mechanisms provided by the SSAC, Ms. Israel filed a complaint with the Human Rights Commission. . . .

The Commission issued Ms. Israel a right-to-sue letter, and she filed this action against the SSAC and the Board on April 18, 1986, in the Circuit Court of Pleasants County. The circuit court exonerated the Board, finding that it had made a good-faith effort to have the SSAC change the rule and that if the Board had ignored Rule 3.9, it would

have been subject to severe sanctions by the SSAC. Ms. Israel does not appeal this ruling. She does appeal the circuit court's decision that the SSAC rule was valid.

. . . .

## II. Equal Protection

Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner. The claimed discrimination must be a product of state action as distinguished from a purely private activity.

### A. Fourteenth Amendment Equal Protection

In analyzing gender-based discrimination, the United States Supreme Court has been willing to take into account actual differences between the sexes, including physical ones.

Under the United States Constitution, a gender-based discrimination is subject to a level of scrutiny somewhere between the traditional equal protection analysis and the highest level of scrutiny utilized for suspect classes. The intermediate level of scrutiny as applied to gender-based discrimination was stated in *Craig v. Boren*, 429 U.S. 190, 197, . . . (1976): "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand an equal protection challenge.

Under the middle-tier analysis for gender-based discrimination claims, courts have recognized that it is constitutionally permissible under certain circumstances for public schools to maintain separate sports teams for males and females so long as they are substantially equivalent. This result has been justified by one or more of the following reasons: (1) there are physical and psychological differences between males and females; (2) the maintenance of separate teams promotes athletic opportunities for women; and, as a corollary to (2), (3) if there were not separate teams, men might dominate in certain sports. . . .

While courts have recognized the concept of substantial equivalency in the area of interscholastic sports, this does not mean that mere superficial equivalency will be found constitutional under equal protection principles. We are not cited nor have we found a case precisely on point. Several courts have held that Little League baseball teams must, under equal protection principles, permit female players to try out. . . .

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From the record in this case, we find that the games of baseball and softball are not substantially equivalent. There is, of course, a superficial similarity between the games because both utilize a similar format. However, when the rules are analyzed, there is a substantial disparity in the equipment used and in the skill level required. The difference begins with the size of the ball and its delivery, and differences continue throughout. The softball is larger and must be thrown underhand, which forecloses the different types of pitching that can be accomplished in the overhand throw of a baseball.

There are ten players on the softball team and nine on a baseball team. The distance between the bases in softball is sixty feet, while in baseball it is ninety feet. The pitcher's mound is elevated in baseball and is not in softball. The distance from the pitcher's mound to home plate is sixty feet in baseball and only forty feet in softball. In baseball, a bat of forty-two inches is permitted, while in softball the maximum length is thirty-four inches.

Moreover, the skill level is much more demanding in baseball because the game is played at a more vigorous pace. There are more intangible rewards available if one can make the baseball team. For a skilled player, such as the record demonstrates Ms. Israel to be, it would be deeply frustrating to be told she could not try out for the baseball team, not because she did not possess the necessary skills, but only because she was female. The entire thrust of the equal protection doctrine is to avoid this type of artificial distinction based solely on gender.

We agree with the SSAC that by providing a softball team for females, it was promoting more athletic opportunities for females. However, this purpose does not satisfy the equal protection mandate requiring substantial equivalency. We do not believe that by permitting females to try out for the boys' baseball team, a mass exodus from the girls' softball team will result. There are obvious practical considerations that will forestall such a result. Gender does not provide an automatic admission to play on a boys' baseball team. The team is selected from those who apply and possess the requisite skill to make the team. What we deal with in this case is an opportunity to have a chance to try out for the team. Aside from the baseball-softball dichotomy, other athletic events ordinarily operate on the same rules such that the substantial equivalency issue would be unlikely to arise. . . .

Reversed and remanded.

Source: Courtesy of Westlaw; reprinted with permission.

**Problem 9-2**

You have just secured a new job as athletic director of the Johnson County Independent School District. One of the first issues you must face is whether girls should be able to try out for and play boys' football for grades 9 to 12. There is a girls' flag football sport at several high schools in the district. However, two girls have requested they be allowed to try out for and play junior varsity and varsity football, respectively. You must draft a policy for such activities that will be approved by the school district. You must consider whether you will have a different policy for junior varsity and varsity participants. Furthermore, your proposed policy must withstand any constitutional challenges. What legal considerations are present?

**TITLE IX****History and Overview**

Prior to 1970 there had been very few legal challenges addressing sex discrimination in athletics. In the early 1970s, women began using the Fourteenth Amendment for sex discrimination claims. Title IX, federal legislation that was passed in 1972, gave women the statutory remedy needed to address problems dealing with sex discrimination; its purpose is to eliminate discrimination in federally funded activities. The passage and implementation of Title IX has done more to advance women's rights in sports than any other piece of legislation. The statute states in part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>8</sup> Title IX has been hugely successful in opening doors for female athletes. Participation in women's sports has increased greatly since the passage of Title IX at both interscholastic and collegiate levels.

The Department of Health, Education, and Welfare (HEW) was given the task of implementing Title IX. Approximately three years after Title IX was passed, regulations were passed and became effective.<sup>9</sup> The Office of Civil Rights (OCR) under the Department of Education is responsible for enforcing Title IX. The OCR's job is to ensure that universities that receive federal funds are in compliance with the requirements of Title IX. The OCR also has a compliance review program for selected recipients. During the review process the OCR is able to identify and resolve sex discrimination issues that may not have been addressed through the compliance process. Many universities and colleges have established guidelines for the development of a Title IX action plan, and many will provide their gender equity plan if requested. Universities and colleges have committees that work directly with athletes in addressing issues of gender equity. Some even will invite OCR representatives or Title IX consultants to visit the campus and assist them in the evaluation and development of policies intended to ensure gender equity.

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<sup>8</sup> 20 U.S.C. § 1681(a).

<sup>9</sup> 45 C.F.R. Part 86.

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In 1979 the Department of Civil Rights established a three-prong test for compliance with Title IX. The test was later clarified in 1996 and again in 2005. It states:

- (1) whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollment (the “substantial proportionality prong”);
- (2) where the members of one sex have been and are underrepresented among intercollegiate athletics, where 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 (the “history of continuing expansion prong”); 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 cited above, where it can be demonstrated that the interests and abilities of the members of the sex have been fully and effectively accommodated by the present program.

A school can comply with Title IX by meeting the requirements of one of the tests.<sup>10</sup>

Title IX has had a major effect on colleges and universities since its inception. Many have made substantial changes within their athletic programs to ensure compliance with Title IX. In 2006, for example, James Madison University (JMU) voted to dismantle ten athletic teams to comply with federal law.<sup>11</sup> Seven men’s varsity teams (outdoor and indoor track, cross country, archery, gymnastics, swimming, and wrestling) and three women’s varsity teams (archery, fencing, and gymnastics) were discontinued to comply with Title IX. JMU had been out of compliance with federal law because women made up 61% of enrolled students, whereas female athletic participation was only 50%. With the new plan in place, female athletic participation is predicted to increase to 61%.<sup>12</sup>

In *Kelly v. Board of Trustees of the University of Illinois*, 35 F.3d 265 (7th Cir. 1994), the court ruled that the university did not violate Title IX when it eliminated the men’s swimming team and not the women’s. The university cited budget constraints along with the need for compliance with Title IX and the gender equity policy of the Big Ten Conference. The court found that Illinois could do away with men’s programs without violating Title IX because men’s interests are permanently met when

<sup>10</sup> See *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993); *Choike v. Slippery Rock Univ. of Pa. of the State Sys. of Higher Educ.*, 2006 WL 2060576 (W.D. Pa. July 21, 2006); *Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265 (6th Cir. 1994).

<sup>11</sup> Associated Press, *James Madison to Drop Teams for Title IX Compliance*, ESPN.com, September 29, 2006.

<sup>12</sup> James Madison University, *JMU Enacts Proportionality Plan to Comply with Title IX*, Sept. 29, 2006, <http://www.jmu.edu/jmuweb/general/news/general7490.shtml>.

<sup>13</sup> See *Miami University Wrestling Club v. Miami University*, 302 F.3d 608 (6th Cir. 2002) (granting summary judgment for the university on the plaintiff’s claims under Title IX and Equal Protection arguments after the university eliminated the men’s soccer, tennis, and wrestling teams); *Chalenor v. University of North Dakota*, 291 F.3d 1042 (8th Cir. 2002) (granting summary judgment for the university on the plaintiff’s claims for violation of Title IX after men’s wrestling was canceled).

<sup>14</sup> D. Klinker, *Why Conforming with Title IX Hurts Men’s Collegiate Sports*, 13 SETON HALL J. SPORT L. 73 (2003).

substantial proportionalities exist. Men's participation in athletics at the University of Illinois was at 76.6%, which was more than substantially proportional to their enrollment (56%).

Some athletic programs have been cut in an attempt to comply with Title IX requirements.<sup>13</sup> The fairness of having to cut certain sports programs to comply with Title IX has been subject to debate.<sup>14</sup> In a memo of July 11, 2003, Assistant Secretary of Civil Rights Gerald Reynolds wrote regarding the compliance of intercollegiate athletics with Title IX, "OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice."

*Grove City College v. Bell*, 46 U.S. 555 (1984), was a landmark case in the history of Title IX. In that case, the court ruled that only programs that received direct financial assistance were subject to Title IX. The holding of *Grove City* was not the intent of Congress when it passed Title IX, so the Civil Rights Restoration Act of 1987 was eventually passed, which further clarified the applicability of Title IX to athletes. Almost all colleges, universities, elementary, and secondary school districts are covered under Title IX. The Civil Rights Restoration Act further supported congressional intent to protect against sex discrimination in institutions receiving federal funds by indicating that a "program" or "activity" includes the entire range of programs in a federally funded institution, not just specifically funded programs as set forth in *Grove City College*.

The Equity Athletics Disclosure Act (EADA) was passed in 1994 and requires public disclosure of financial records relating to athletic expenditures by universities and colleges. The Department of Education is required to report to Congress on gender equity in college athletics; it relies on information received through the EADA in making that report. The university or college must list all participants in athletics, the operating expenses for both men's and women's programs, the number of scholarships awarded, the revenue received, coaches' salaries, and recruiting expenses. This statute allows the NCAA and the public to closely monitor gender equity issues and graduation rates for student-athletes. Many universities and school districts now have a specific job position that has the responsibility of ensuring Title IX compliance. What qualifications are necessary for a Title IX compliance officer? What should be the main responsibility of such officers? To whom should they report? What would their daily duties be?

Case 9-6, *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996), may be the most significant case ever decided under Title IX. After the Ivy League university announced that it was going to eliminate four women's sports but stated that the teams could still qualify as unfunded club sports, the university was sued. The Brown student body was 52% male and 47% female, with 63% of its student-athletes male. The Court of Appeals for the First Circuit ruled against Brown, stating that the university was not in compliance with Title IX and that a university must fully and effectively accommodate the interests of women students to ensure Title IX compliance.



## CASE 9-6 *Cohen v. Brown University*

101 F.3d 155 (1st Cir. 1996)

BOWNES, Senior Circuit Judge.

This is a class action lawsuit charging Brown University, its president, and its athletics director (collectively "Brown") with discrimination against women in the operation of its intercollegiate athletics program,

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in violation of Title IX of the Education Amendments of 1972. The plaintiff class comprises all present, future, and potential Brown University women students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown.

This suit was initiated in response to the demotion in May 1991 of Brown's women's gymnastics and volleyball teams from university-funded varsity status to donor-funded varsity status. Contemporaneously, Brown demoted two men's teams, water polo and golf, from university-funded to donor-funded varsity status. As a consequence of these demotions, all four teams lost, not only their university funding, but most of the support and privileges that accompany university-funded varsity status at Brown.

Subsequently, after hearing fourteen days of testimony, the district court granted plaintiffs' motion for a preliminary injunction, ordering, *inter alia*, that the women's gymnastics and volleyball teams be reinstated to university-funded varsity status, and prohibiting Brown from eliminating or reducing the status or funding of any existing women's intercollegiate varsity team until the case was resolved on the merits. A panel of this court affirmed the district court's decision granting a preliminary injunction to the plaintiffs. In so doing, we upheld the district court's analysis and ruled that an institution violates Title IX if it ineffectively accommodates its students' interests and abilities in athletics . . . regardless of its performance with respect to other Title IX areas.

On remand, the district court determined after a lengthy bench trial that Brown's intercollegiate athletics program violates Title IX and its supporting regulations. The district court ordered Brown to submit within 120 days a comprehensive plan for complying with Title IX, but stayed that portion of the order pending appeal. The district court subsequently issued a modified order, requiring Brown to submit a compliance plan within 60 days. This action was taken to ensure that the Order was "final" for purposes of this court's jurisdiction, and to expedite the appeal process. Finding that Brown's proposed compliance plan was not comprehensive and that it failed to comply with the . . . order, the district court rejected the plan and ordered in its place specific relief consistent with Brown's stated objectives in formulating the plan. The court's remedial order required Brown to elevate and maintain at university-funded varsity status the women's gymnastics, fencing, skiing, and water polo teams. The district court's decision to fashion specific relief was made, in part, to avoid protracted litigation over the compliance plan and to expedite the appeal on the issue of liability. The district court entered final judgment. . . . This appeal followed. . . .



We find no error in the district court's factual findings or in its interpretation and application of the law in determining that Brown violated Title IX in the operation of its intercollegiate athletics program. We therefore affirm in all respects the district court's analysis and rulings on the issue of liability. We do, however, find error in the district court's award of specific relief and therefore remand the case to the district court for reconsideration of the remedy in light of this opinion.

. . . Brown therefore should be afforded the opportunity to submit another plan for compliance with Title IX. The context of the case has changed in two significant respects since Brown presented its original plan. First, the substantive issues have been decided adversely to Brown. Brown is no longer an appellant seeking a favorable result in the Court of Appeals. Second, the district court is not under time constraints to consider a new plan and fashion a remedy so as to expedite appeal. Accordingly, we remand the case to the district court so that Brown can submit a further plan for its consideration.

## VIII.

There can be no doubt that Title IX has changed the face of women's sports as well as our society's interest in and attitude toward women athletes and women's sports. In addition, there is ample evidence that increased athletics participation opportunities for women and young girls, available as a result of Title IX enforcement, have had salutary effects in other areas of societal concern.

One need look no further than the impressive performances of our country's women athletes in the 1996 Olympic Summer Games to see that Title IX has had a dramatic and positive impact on the capabilities of our women athletes, particularly in team sports. These Olympians represent the first full generation of women to grow up under the aegis of Title IX. The unprecedented success of these athletes is due, in no small measure, to Title IX's beneficent effects on women's sports, as the athletes themselves have acknowledged time and again. What stimulated this remarkable change in the quality of women's athletic competition was not a sudden, anomalous upsurge in women's interest in sports, but the enforcement of Title IX's mandate of gender equity in sports.

Affirmed in part, reversed in part, and remanded for further proceedings. . . .

Source: Courtesy of Westlaw; reprinted with permission.

## Equality of Facilities

To what extent do the facilities for men's and women's sports have to be "equal" under Title IX? In Case 9-7, *Mason v. Minnesota State High School League*, 2004 WL 1630968 (D. Minn. 2004), the dispute was whether the venue for the girls' hockey team was equal to that of the boys' team.



### CASE 9-7 *Mason v. Minnesota State High School League*

2004 WL 1630968 (D. Minn. 2004)

TUNHEIM, J.

Plaintiffs, high school students who participate in girls' hockey, brought this lawsuit against the Minnesota State High School League ("the League") alleging that its administration of the girls' state hockey tournament is not substantially equal to its administration of the boys' state hockey tournament, and that such inequity violates Title IX, 20 U.S.C. § 1681(a) . . .

Plaintiffs request an injunction requiring the League to move the girls' tournament to the Xcel Energy Center ("Xcel"), where the boys' tournament is held. Defendant moves for summary judgment, arguing that there is no legally sufficient basis for granting plaintiffs' requested injunction. For the reasons discussed below, the Court denies defendant's motion for summary judgment.

### Factual Background

The League began sponsoring girls' hockey in 1994 and held its first state tournament in February of 1995 at Aldrich Arena in Maplewood, Minnesota. Aldrich is used for high school hockey league and play-off games and is also open to the public for recreational skating. Because attendance at that tournament exceeded Aldrich's capacity of 3,400, the League sought a new venue for the 1996 tournament. From 1996 to 2002, the State Fair Coliseum hosted the girls' tournament. The Coliseum, which offered a 5,200 seating capacity, was built in 1951 to host horse shows and livestock judging. Because it was not originally designed as a hockey arena, the spectator seating is approximately 10 feet from the ice. Conversely, in a standard hockey arena fans sit quite close to the ice, where they are able to generate excitement by pounding on the boards and cheering.

In 2000, the Office for Civil Rights ("OCR") received a discrimination complaint regarding the location of the girls' tournament and opened an investigation. In response to the investigation, the League explored alternative sites, including Mariucci Arena at the University

of Minnesota. At this time, the University was building Ridder Arena specifically for its women's hockey team. The League requested permission from OCR to continue holding the girls' tournament at the Coliseum until construction was completed on Ridder. Both the 2001 and 2002 tournaments were held at the Coliseum, after the State Fair made some improvements to the facility. In 2002, twelve teams participated and a total of 15,551 people attended the tournament.

During these same years, the boys' hockey tournament, which drew between 106,307 and 120,133 total fans, was held in the St. Paul Civic Center (1995-98), Target Center (1999-2000), and Xcel (2001-present). Xcel is home to Minnesota's National Hockey League team, the Minnesota Wild, and has been called one of the nation's finest hockey arenas.

In 2001, the League sent a request for proposal ("RFP") to potential hosts of several high school tournaments, including girls' hockey. Bids were solicited for eight different tournaments to be held between Fall 2003 and Winter 2008. The RFP sought a venue with a seating capacity of 4,000 for the girls' tournament. The University of Minnesota submitted a bid for the girls' tournament to use Ridder Arena. Xcel did not submit a bid for girls' hockey, but did bid for the girls' dance team tournament, which Xcel had hosted in the past. The League scheduled the dance team competition for the same dates as the girls' hockey tournament.

The League ultimately accepted the bid for Ridder Arena despite its 2,700-3,200 seating capacity, which is below both the requested 4,000 and below Aldrich's capacity of 3,400. The League argues that Ridder's proposal is consistent with the RFP, which actually specified 4,000 per session. The League reasons that since there are two games per session, Ridder's capacity is actually in the requested range. In contrast to Ridder's relatively small capacity, Xcel has a seating capacity of 17,759, which may be reduced to 9,295 by closing off the upper level. Some of the League's tournaments use the lower bowl option, including Class A boys' hockey.

Plaintiffs point to several additional differences between the facilities. Xcel is home to Minnesota's professional hockey team, has padded stadium seating, and employs advanced technologies such as a large, full-color scoreboard and closed-circuit televisions in concession areas and suites. Ridder is home to the University of Minnesota's women's hockey team, has unpadded stadium seating and bench seating, and does not have a scoreboard capable of video-replay. The locker rooms are also distinguishable. Xcel's locker rooms average nearly double the size of Ridder's, are carpeted, and include full shower/restroom facilities. At Ridder, some locker rooms are shared, restrooms are shared, and some teams must use locker rooms at nearby

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Mariucci Arena. There are also differences in publicity, parking availability, and proximity to local attractions, hotels, and restaurants.

In December 2002, OCR notified the League that it had closed its monitoring of the case. OCR had toured both Ridder and Xcel and summarized its findings, concluding that Ridder was an adequate venue for the girls' hockey tournament and satisfied the League's commitment to resolve the discrimination complaint. Plaintiffs contend that those findings are based on errors of fact and an incomplete investigation. For example, OCR's comparison was based on availability of 12,000 parking spaces near Ridder, but fewer than 5,000 spaces are actually available within five blocks of that arena. Plaintiffs also allege that OCR misapplied its Title IX policy interpretation. . . .

### Analysis

. . . .

### *II. Legal Standard*

#### *A. Title IX, 20 U.S.C. § 1681(a)*

Title IX of the Education Act prohibits sex discrimination in any educational program or activity receiving federal funds. The regulations implementing Title IX provide:

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

34 C.F.R. § 106.41(a)

The regulations specify certain areas for consideration when determining whether athletics programs meet Title IX's requirements. Responsibility for interpretation and implementation of the Education Act is delegated to the Department of Education's Office for Civil Rights ("OCR"). . . .

The policy interpretation does not require identical treatment or opportunities if the overall effect of any differences is negligible. The program components must be equal or equal in effect. . . .

### *III. Application*

Plaintiffs have satisfied their burden to survive summary judgment. The facts, as alleged by plaintiffs, raise questions as to whether

the League treats the girls' ice hockey team in a manner "substantially equal" to that of the boys' team. Construing the facts in a light most favorable to plaintiffs, which the Court must do for purposes of this motion, defendant has not shown that the gender classification is "exceedingly persuasive," that the arenas are "equal or equal in effect," and that the "overall effect" of this difference is negligible.

The Court agrees with plaintiffs' contention that factual questions exist over whether the League is providing equal competitive facilities to the girls and boys hockey players. Differences in treatment, according to OCR's policy interpretation, are permissible under Title IX only if the differences [do] not limit the potential for women's athletics events to rise in spectator appeal . . .

. . . Here, there is no dispute that the seating capacity of Ridder is less than that of Aldrich Arena, which was abandoned as a site for the girls' tournament in part because of insufficient seating capacity. Plaintiffs suggest that Xcel's lower bowl option may provide sufficient capacity for current attendance and room for growth while simultaneously addressing the League's concern of maintaining an exciting, loud state tournament atmosphere. Notwithstanding this concern, the League holds other events at Xcel—such as girls' volleyball and dance team—that draw smaller or comparable crowds. Additionally, the League accommodates the smaller Class A boys' hockey tournament at Xcel by using the lower bowl option.

Although the OCR policy interpretation recognizes that crowd size may influence the allocation of resources to a particular team or event, it permits such differences only when it does not limit the potential for women's athletic events to rise in spectator appeal. The evidence presented on this record could lead a fact-finder to conclude that the capacity of Ridder impermissibly restricts the growth of girls' ice hockey. There is also a question whether the League's decision to hold the girls' tournament at Ridder is "substantially related" to its goal of maintaining a "state tournament atmosphere."

Plaintiffs have established a material fact dispute as to whether differences in seating, locker rooms, scoreboards, and variety of available concessions make Ridder impermissibly inferior to Xcel as a state hockey tournament venue. The parties do not dispute that Xcel, with its full-color scoreboard, private locker room facilities, and closed-circuit televisions, is more lavish than Ridder. Defendant, however, points out that Ridder offers benefits to the girls' team that are not available to the boys at Xcel, such as use of weight room and training room facilities and equipment. Ultimately, the question whether these differences constitute illegal gender discrimination is one for a factfinder.

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ORDER

. . . IT IS HEREBY ORDERED that defendant's motion for summary judgment is DENIED.

Source: Courtesy of Westlaw; reprinted with permission.

**Problem 9-3**

You have recently been named Title IX coordinator for a Division I athletic program. The athletic director has asked you to draft a two-page summary outlining a Title IX compliance plan. Draft a short memorandum highlighting the significant portions of a Title IX plan that will withstand scrutiny. What information do you need to draft such a plan? What will be your major concerns and the focus and goals of the plan?

In Case 9-8, *Daniels v. School Bd. of Brevard County, Fla.*, 995 F. Supp. 1394 (M.D. Fla. 1997), disparity existed between the high school programs for girls' softball and boys' baseball. The school board submitted a plan addressing those disparities. The following court decision addressed whether the plan was compliant with Title IX, along with some other matters as well.

**CASE 9-8 *Daniels v. School Bd. of Brevard County, Fla.***

995 F. Supp. 1394 (M.D. Fla. 1997)

**I. Introduction**

On November 25, 1997, the Court entered an Order determining that the Defendant, School Board of Brevard County, was violating Title IX . . . based on disparities between the girls' softball and boys' baseball programs at Merritt Island High School ("MIHS"). In the Order, the Court identified specific inequalities with respect to the following matters: electronic scoreboard, batting cage, bleachers, signs, bathroom facilities, concession stand/press box/announcer's booth, and field lighting . . . [T]he Court directed the School Board to submit a plan concerning how it proposed to remedy the deficiencies identified in the Order. The School Board has filed its plan. . . .

**II. The School Board's Plan**

Preliminarily, the School Board notes that it has sent a directive to all secondary school principals, advising them that effective

immediately all principals, athletic directors, coaches and booster clubs are to be advised that district policy henceforth requires that each principal shall be responsible for insuring that regardless of the source of funding, whether it be school district, school, or booster club, the expenditures that support male and female athletic teams shall be on an equitable basis. Henceforth a principal may not accept or approve, either directly or indirectly, funding which fosters a disparate, inequitable status between male and female athletic teams.

. . . However, the School Board proposes not to spend any funds to remedy the inequities identified in the prior Order. In that regard, the School Board states:

[T]he plan here being submitted by the School Board does not involve the expenditure of funds by the School Board of Brevard County or Merritt Island High School. The Defendant assumes that the Court understands and can fully appreciate the financial limitations and tight budgetary constraints under which the School Board is forced to operate. Any monies spent on athletics must obviously be taken from another area of operations which is already lacking in funds.

The School Board believes that the immediate expenditure of funds to eliminate the inequities the Court has determined exist between the boys' baseball program and the girls' softball program at Merritt Island High School would create more problems than it would solve. In reaching the decision not to expend funds to eliminate the inequities the Defendant is not unmindful of the fact that before the Court has even issued an injunction in this case the Daniels family has already filed a separate class action asking that the School Board be required to install new softball fields at three other Brevard County high schools which presently use off-campus fields for practice and games. That new suit also suggests that there are inequalities between the boys' facilities and girls' facilities used by students from Brevard County high schools other than Merritt Island High School and that they need to be remedied.

The School Board proposes the following remedial measures regarding the specific inequities identified in the prior Order:

### ***Electronic Scoreboard***

The School Board says it is not feasible to move the electronic scoreboard on the boys' baseball field back and forth between the baseball field and the girls' softball field. Accordingly, the Board proposes

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to disallow use of the scoreboard on the boys' field until such time as the girls' field has a comparable scoreboard.

***Batting Cage***

The School Board contends that the design and structure of the batting cage on the boys' field precludes moving it back and forth between the two fields. The Board proposes to co-locate the girls' and boys' separate pitching machines so that both teams can use the batting cage on alternate weeks.

***Bleachers***

The School Board maintains it is not feasible to relocate bleachers from the boys' field to the girls' field. Accordingly, "[u]ntil such time as funds may be raised for the purchase of additional bleachers or bleachers are donated so that the girls' field has bleachers essentially equal in number and quality to the boys' bleachers," the School Board proposes to rope off the boys' bleachers so that the only area used during games shall be equivalent in size and seating number to those bleachers which presently exist on the girls' softball field.

***Signs***

The School Board proposes altering the "Merritt Island Baseball" sign facing the student parking lot, to read "Merritt Island Baseball and Softball." Alternatively, the Board proposes to either eliminate all lettering or change the sign to "Merritt Island Athletics." The School Board also proposes to remove the donated "Home of the Mustangs" sign which faces the boys' baseball diamond, and to leave in place a second, gender neutral sign located outside the boys' field.

***Bathroom Facilities***

The School Board proposes to remove a portion of the fence separating the boys' and girls' fields, so as to permit equal access to the restrooms.

***Concession Stand/Press Box/Announcer's Booth***

The Board proposes to close down this building until such time as a comparable facility is constructed on the girls' field.

***Lighting***

The School Board has already approved the installation of lights on the MIHS girls' softball field. The Board anticipates the installation



process will be complete by the beginning of the girls' season. If it is not, the Board proposes to disallow use of the lights on the boys' field until the lights on the girls' field are in place.

### III. Plaintiffs' Response to the Plan

Plaintiffs' basic position is that the School Board should be required to remedy the inequities by spending the funds necessary to improve the MIHS girls' softball program, rather than denying the boys' baseball team facilities it already enjoys. Plaintiffs commend the Board's new policy regarding booster club funding; however, they maintain that this policy will essentially freeze present inequities. Plaintiffs also assert that the School Board's "take it away from the boys" approach is actually designed to generate "backlash" against the girls' softball team. Further, Plaintiffs contend that the Board's plan is inadequate to remedy the perception of inequality because even if the boys are not allowed to use certain facilities—such as the electronic scoreboard, bleachers, lighting and concession stand/press box/announcer's booth—those facilities will remain in place as symbols of inequality. Accordingly, Plaintiffs urge the Court to require the School Board to either completely remove those facilities from the boys' field or provide the girls with equal facilities on their field. Finally, Plaintiffs decry the School Board's claim of "tight budgetary constraints;" they maintain that the Board is slated to receive at least \$43 million from the Florida Department of Education for capital improvements.

### IV. Analysis

In giving the School Board the opportunity to submit a plan, the Court had hoped for constructive input, such as a long-range fiscal plan to remedy the inequities identified in the Court's prior Order. Unfortunately, the Board's plan leaves much to be desired; it creates the impression that the Board is not as sensitive as it should be regarding the necessity of compliance with Title IX. The Court is inclined to agree with Plaintiffs that many of the Board's proposals seem more retaliatory than constructive. The Board's approach essentially imposes "separate disadvantage," punishing both the girls and the boys, rather than improving the girls' team to the level the boys' team has enjoyed for years. The Court is sensitive to the financial constraints imposed upon public educational institutions in this day and age; that is yet another reason the Court gave the Board an opportunity to submit a remedial plan, rather than simply entering an

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injunction decreeing the expenditure of funds by a date certain. However, the fact remains that Plaintiffs have presented substantial evidence that the School Board has violated, and continues to violate, Act of Congress mandating gender equality in public education.

However, the inquiry does not end here. Before the School Board's response to the Court's November 25 Order was due, Plaintiffs altered the playing field dramatically by filing a separate suit seeking class action status and challenging the Board's treatment of girls' softball on a county-wide basis. In this second suit, Plaintiffs complain, *inter alia*, of the fact that three of the ten high schools in Brevard County have boys' baseball fields, but no girls' softball fields. On the heels of this filing, a different group of parents and children commenced yet another action claiming gender equity violations with respect to girls' softball programs throughout the county.

As a result of these latest two cases, the Title IX focus has expanded from the softball facilities at one high school to girls' softball programs throughout Brevard County. In the instant suit, two high school girls and a parent sought to force expenditures to improve one softball field. The two subsequent cases presumably seek to force, *inter alia*, the construction of softball fields at three other high schools. These developments dramatically alter the potential financial impact on the School Board.

At this juncture, the Court cannot make a reasoned determination concerning the amount of additional funds the School Board should be required to expend to remedy the inequities present at Plaintiffs' particular high school. The extent to which the Board must further appropriate funds to correct the situation at MIHS must be considered in the context of the two related cases which seek class action treatment and the expenditure of funds on a county-wide basis. Accordingly, with the exception of lighting on the MIHS girls' softball field, which the School Board has already committed to install, for the moment, the Court will impose injunctive measures which do not require additional funding.

**V. Preliminary Injunction**

Based on the foregoing, it is ORDERED as follows:

1. Before January 26, 1998, the School Board shall make the following changes at Merritt Island High School:
  - a. Remove a portion of the fence separating the boys' baseball field and girls' softball field, so that the restroom facilities are readily accessible to players and spectators at both fields.

- b. Co-locate the girls' and boys' pitching machines so that both teams can use the batting cage, and establish a schedule allowing both teams equal use of the cage.
  - c. Change the "Merritt Island Baseball" sign facing the student parking lot, so that it reads "Merritt Island Baseball and Softball," and remove the donated "Home of the Mustangs" sign which faces the boys' baseball diamond.
  - d. Install lighting on the girls' softball field.
2. During the pendency of this action and the two related cases, the School Board is not required to deny the boys' baseball team and its spectators use of the electronic scoreboard, existing bleachers and the concession stand/press box/announcer's booth. FN 1.

FN 1. Of course, this ruling assumes that the players and spectators of the girls' team are free to patronize the concession stand.

The Board is also not required to deny the boys' baseball team use of the lights on the baseball field, since the Board is required to install lighting on the girls' softball field by January 26, 1998. Finally, the Board is not required to remove the gender-neutral sign located outside the boys' baseball field.

Source: Courtesy of Westlaw; reprinted with permission.

## Contact Versus Non-contact Sports

Courts have usually made a distinction between contact and non-contact sports when considering the participation of women in sports. Women will usually be allowed to participate on men's teams if the sport is deemed a non-contact sport and no women's team is available. If there is no team for one sex in a particular sport, and the excluded sex has had a history of limited opportunity, then the excluded sex must be allowed to try out for the existing team. If women have the opportunity to compete, then courts are usually less willing to allow them to participate on men's teams. The HEW regulations under Title IX allow athletic departments that receive federal funding to establish separate teams if the sport is deemed a contact sport or is based on competitive skill.<sup>15</sup>

In Case 9-9, *Mercer v. Duke University*, 190 F.3d 643 (4th Cir. 1999), the university argued that because football is a contact sport, the school need not allow the plaintiff to try out for the team. However, the court found that once the plaintiff was allowed to try out, she should have been given an equal opportunity to make the squad. The trial court awarded her \$1 in compensatory damages and \$2 million in punitive damages, finding that Duke had engaged in intentional discrimination. The punitive damages award was vacated by the Fourth Circuit Court of Appeals. Mercer was awarded \$1 in compensatory damages.<sup>16</sup> In July 2004, the plaintiff was awarded \$349,243 in attorneys' fees.<sup>17</sup>

<sup>15</sup> 45 C.F.R. § 86.41(b).

<sup>16</sup> See, Nicole Mitchell, *Encyclopedia of the Title IX and Sports*, Greenwood Publishing, 2007, pp.76–78.

<sup>17</sup> *Mercer v. Duke University*, 301 F. Supp. 2d 454 (M.D. N.C. 2004).

**CASE 9-9 Mercer v. Duke University**

190 F.3d 643 (4th Cir. 1999)

LUTTIG, Circuit Judge:

Appellant Heather Sue Mercer challenges the federal district court's holding that Title IX provides a blanket exemption for contact sports and the court's consequent dismissal of her claim that Duke University discriminated against her during her participation in Duke's intercollegiate football program. For the reasons that follow, we hold that where a university has allowed a member of the opposite sex to try out for a single-sex team in a contact sport, the university is, contrary to the holding of the district court, subject to Title IX and therefore prohibited from discriminating against that individual on the basis of his or her sex.

**I.**

Appellee Duke University operates a Division I college football team. During the period relevant to this appeal (1994-98), appellee Fred Goldsmith was head coach of the Duke football team and appellant Heather Sue Mercer was a student at the school.

Before attending Duke, Mercer was an all-state kicker at Yorktown Heights High School in Yorktown Heights, New York. Upon enrolling at Duke in the fall of 1994, Mercer tried out for the Duke football team as a walk-on kicker. Mercer was the first—and to date, only—woman to try out for the team. Mercer did not initially make the team, and instead served as a manager during the 1994 season; however, she regularly attended practices in the fall of 1994 and participated in conditioning drills the following spring.

In April 1995, the seniors on the team selected Mercer to participate in the Blue-White Game, an intrasquad scrimmage played each spring. In that game, Mercer kicked the winning 28-yard field goal, giving the Blue team a 24-22 victory. The kick was subsequently shown on ESPN, the cable television sports network. Soon after the game, Goldsmith told the news media that Mercer was on the Duke football team, and Fred Chatham, the Duke kicking coach, told Mercer herself that she had made the team. Also, Mike Cragg, the Duke sports information director, asked Mercer to participate in a number of interviews with newspaper, radio, and television reporters, including one with representatives from "The Tonight Show."

Although Mercer did not play in any games during the 1995 season, she again regularly attended practices in the fall and participated in

conditioning drills the following spring. Mercer was also officially listed by Duke as a member of the Duke football team on the team roster filed with the NCAA and was pictured in the Duke football yearbook.

During this latter period, Mercer alleges that she was the subject of discriminatory treatment by Duke. Specifically, she claims that Goldsmith did not permit her to attend summer camp, refused to allow her to dress for games or sit on the sidelines during games, and gave her fewer opportunities to participate in practices than other walk-on kickers. In addition, Mercer claims that Goldsmith made a number of offensive comments to her, including asking her why she was interested in football, wondering why she did not prefer to participate in beauty pageants rather than football, and suggesting that she sit in the stands with her boyfriend rather than on the sidelines.

At the beginning of the 1996 season, Goldsmith informed Mercer that he was dropping her from the team. Mercer alleges that Goldsmith's decision to exclude her from the team was on the basis of her sex because Goldsmith allowed other, less qualified walk-on kickers to remain on the team. Mercer attempted to participate in conditioning drills the following spring, but Goldsmith asked her to leave because the drills were only for members of the team. Goldsmith told Mercer, however, that she could try out for the team again in the fall.

On September 16, 1997, rather than try out for the team again, Mercer filed suit against Duke and Goldsmith, alleging sex discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, and negligent misrepresentation and breach of contract in violation of North Carolina law. . . .

From the district court's order dismissing her Title IX claim for failure to state a claim upon which relief can be granted and its order denying the motion to alter judgment, Mercer appeals.

## II.

Title IX prohibits discrimination on the basis of sex by educational institutions receiving federal funding. . . .

The district court held, and appellees contend on appeal, that, under this regulation, "contact sports, such as football, are specifically excluded from Title IX coverage." We disagree. . . .

We therefore construe the second sentence of subsection (b) as providing that in non-contact sports, but not in contact sports, covered

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institutions must allow members of an excluded sex to try out for single-sex teams. Once an institution has allowed a member of one sex to try out for a team operated by the institution for the other sex in a contact sport, subsection (b) is simply no longer applicable, and the institution is subject to the general anti-discrimination provision of subsection (a). . . .

Accordingly, because appellant has alleged that Duke allowed her to try out for its football team (and actually made her a member of the team), then discriminated against her and ultimately excluded her from participation in the sport on the basis of her sex, we conclude that she has stated a claim under the applicable regulation, and therefore under Title IX. We take to heart appellees' cautionary observation that, in so holding, we thereby become "the first Court in United States history to recognize such a cause of action." Where, as here, however, the university invites women into what appellees characterize as the "traditionally all-male bastion of collegiate football," we are convinced that this reading of the regulation is the only one permissible under law.

The district court's order granting appellees' motion to dismiss for failure to state a claim is hereby reversed, and the case remanded for further proceedings.

REVERSED AND REMANDED

Source: Courtesy of Westlaw; reprinted with permission.

### Problem 9-4

Mary Williams was an outstanding placekicker for her high school football team. She wants to try out for her college football team but is not allowed to do so. The university cites federal law that states that educational institutions are allowed to maintain separate teams in contact sports. Mary argues that because she is a placekicker only, a non-contact position, she should therefore be allowed to try out. Is she correct? Does the school have to let her try out for the team? Should rules be different for placekickers as opposed to other players?

### Retaliation Under Title IX

The Supreme Court case in Case 9-10, *Jackson v. Birmingham Bd. Of Educ.*, 125 S.Ct. 1497 (2005), dealt with the issue of whether an individual who was not the direct victim of sex discrimination under Title IX could sustain a cause of action for retaliatory conduct.

**CASE 9-10 *Jackson v. Birmingham Bd. of Educ.***

125 S.Ct. 1497 (2005)

O'CONNOR, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG and BREYER JJ., joined. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C.J., and SCALIA and KENNEDY, JJ., joined.

Roderick Jackson, a teacher in the Birmingham, Alabama, public schools, brought suit against the Birmingham Board of Education (Board) alleging that the Board retaliated against him because he had complained about sex discrimination in the high school's athletic program. Jackson claimed that the Board's retaliation violated Title IX of the Education Amendments of 1972. . . . We consider here whether the private right of action implied by Title IX encompasses claims of retaliation. We hold that it does where the funding recipient retaliates against an individual because he has complained about sex discrimination.

**I.**

. . . .

According to the complaint, Jackson has been an employee of the Birmingham school district for over 10 years. In 1993, the Board hired Jackson to serve as a physical education teacher and girls' basketball coach. Jackson was transferred to Ensley High School in August 1999. At Ensley, he discovered that the girls' team was not receiving equal funding and equal access to athletic equipment and facilities. The lack of adequate funding, equipment, and facilities made it difficult for Jackson to do his job as the team's coach.

In December 2000, Jackson began complaining to his supervisors about the unequal treatment of the girls' basketball team, but to no avail. Jackson's complaints went unanswered, and the school failed to remedy the situation. Instead, Jackson began to receive negative work evaluations and ultimately was removed as the girls' coach in May 2001. Jackson is still employed by the Board as a teacher, but he no longer receives supplemental pay for coaching.

After the Board terminated Jackson's coaching duties, he filed suit in the United States District Court for the Northern District of Alabama. He alleged, among other things, that the Board violated Title IX by retaliating against him for protesting the discrimination against the girls' basketball team. The Board moved to dismiss on the ground that

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Title IX's private cause of action does not include claims of retaliation. The District Court granted the motion to dismiss.

The Court of Appeals for the Eleventh Circuit affirmed.

. . . .

## II.

### A.

Title IX prohibits sex discrimination by recipients of federal education funding. The statute provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). More than 25 years ago, in *Cannon v. University of Chicago*, 441 U.S. 677, 690-693, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), we held that Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination. In subsequent cases, we have defined the contours of that right of action. We have also held that the private right of action encompasses intentional sex discrimination in the form of a recipient's deliberate indifference to a teacher's sexual harassment of a student. . . .

In all of these cases, we relied on the text of Title IX, which, subject to a list of narrow exceptions not at issue here, broadly prohibits a funding recipient from subjecting any person to "discrimination" "on the basis of sex." 20 U.S.C. § 1681. Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.

The Court of Appeals' conclusion that Title IX does not prohibit retaliation because the "statute makes no mention of retaliation," 309 F.3d, at 1344, ignores the import of our repeated holdings construing "discrimination" under Title IX broadly. Though the statute does not mention sexual harassment, we have held that sexual harassment is



intentional discrimination encompassed by Title IX's private right of action. . . .

Congress certainly could have mentioned retaliation in Title IX expressly, as it did in § 704 of Title VII of the Civil Rights Act of 1964. . . . Title VII, however, is a vastly different statute from Title IX . . . and the comparison the Board urges us to draw is therefore of limited use. Title IX's cause of action is implied, while Title VII's is express. Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition. See 20 U.S.C. § 1681. By contrast, Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute. Because Congress did not list any specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.

. . . .

The Board cites a Department of Education regulation prohibiting retaliation "against any individual for the purpose of interfering with any right or privilege secured by [Title IX]," 34 CFR § 100.7(e) (2004) . . . and contends that Jackson . . . seeks an "impermissible extension of the statute" when he argues that Title IX's private right of action encompasses retaliation. This argument, however, entirely misses the point. We do not rely on regulations extending Title IX's protection beyond its statutory limits; indeed, we do not rely on the Department of Education's regulation at all, because the statute *itself* contains the necessary prohibition. . . . [T]he text of Title IX prohibits a funding recipient from retaliating against a person who speaks out against sex discrimination, because such retaliation is intentional "discrimination" "on the basis of sex." We reach this result based on the statute's text. . . . [W]e hold that Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex.

### C.

Nor are we convinced by the Board's argument that, even if Title IX's private right of action encompasses discrimination, Jackson is not entitled to invoke it because he is an "indirect victi[m]" of sex discrimination. The statute is broadly worded; it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint. If the statute provided instead that "no person shall be subjected to discrimination

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on the basis of *such individual's sex*," then we would agree with the Board. However, Title IX contains no such limitation. Where the retaliation occurs because the complainant speaks out about sex discrimination, the "on the basis of sex" requirement is satisfied. The complainant is himself a victim of discriminatory retaliation, regardless of whether he was the subject of the original complaint. . . .

Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also to provide individual citizens effective protection against those practices. We agree with the United States that this objective "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation." If recipients were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result.

Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel. Recall that Congress intended Title IX's private right of action to encompass claims of a recipient's deliberate indifference to sexual harassment. Accordingly, if a principal sexually harasses a student, and a teacher complains to the school board but the school board is indifferent, the board would likely be liable for a Title IX violation. But if Title IX's private right of action does not encompass retaliation claims, the teacher would have no recourse if he were subsequently fired for speaking out. Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied.

Title IX's enforcement scheme also depends on individual reporting because individuals and agencies may not bring suit under the statute unless the recipient has received "actual notice" of the discrimination. If recipients were able to avoid such notice by retaliating against all those who dare complain, the statute's enforcement scheme would be subverted. We should not assume that Congress left such a gap in its scheme.

Moreover, teachers and coaches such as Jackson are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are "the only effective adversar[ies]" of discrimination in schools.

**D.**

The Board is correct in pointing out that, because Title IX was enacted as an exercise of Congress' powers under the Spending Clause, "private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue." When Congress enacts legislation under its spending power, that legislation is "in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." As we have recognized, "[t]here can . . . be no knowing acceptance [of the terms of the contract] if a State is unaware of the conditions [imposed by the legislation on its receipt of funds]."

The Board insists that we should not interpret Title IX to prohibit retaliation because it was not on notice that it could be held liable for retaliating against those who complain of Title IX violations. We disagree. Funding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979. . . .

. . . .

Thus, the Board should have been put on notice by the fact that our cases . . . have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination. Indeed, retaliation presents an even easier case than deliberate indifference. It is easily attributable to the funding recipient, and it is always—by definition—intentional. We therefore conclude that retaliation against individuals because they complain of sex discrimination is intentional conduct that violates the clear terms of the statute . . . and that Title IX itself therefore supplied sufficient notice to the Board that it could not retaliate against Jackson after he complained of discrimination against the girls' basketball team.

The regulations implementing Title IX clearly prohibit retaliation and have been on the books for nearly 30 years. A reasonable school board would realize that institutions covered by Title IX cannot cover up violations of that law by means of discriminatory retaliation. . . .

To prevail on the merits, Jackson will have to prove that the Board retaliated against him *because* he complained of sex discrimination. The amended complaint alleges that the Board retaliated against Jackson for complaining to his supervisor, Ms. Evelyn Baugh, about sex discrimination at Ensley High School. At this stage of the proceedings, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Accordingly, the judgment of the Court of Appeals for the

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Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Source: Courtesy of Westlaw; reprinted with permission.

### Problem 9-5

You are the general counsel for Academics University, an NCAA Division I football powerhouse. You have been asked to perform some research and prepare a subsequent memorandum of law concerning the liability of the university and its board of regents. The university wants to know under what circumstances the board of regents, the university, and its coaches could be held liable for the criminal acts of student-athletes. You are to specifically examine Title IX and cases relating to its interpretation. What steps should be taken to limit liability?

## NOTES AND DISCUSSION QUESTIONS

### Overview

1. ESPN has ranked the top ten greatest moments in women's sports as follows:
  - (i) President Nixon signs Title IX into law (July 23, 1972).
  - (ii) Billie Jean King wins the Battle of the Sexes (Sept. 20, 1973).
  - (iii) The United States defeats China to win the 1999 World Cup.
  - (iv) Wilma Rudolph blazes to three golds in the 1960 Olympics.
  - (iv) Maria Pepe plays Little League baseball (1972).
  - (vi) Shirley Muldowney, Janet Guthrie, and Julie Krone ride into history (1976–93).
  - (vii) Amelia Earhart flies solo nonstop across the Atlantic (May 20–21, 1932).
  - (viii) Katherine Switzer runs in disguise in the Boston Marathon (April 19, 1967).
  - (ix) Babe Didrikson sets four world records at AAU championships (July 16, 1932).
  - (x) Huskies hoopsters go undefeated, capture 2002 NCAA title (March 31, 2002).

### Constitutional Issues in Gender Equity

2. Under what circumstances should women be allowed to participate in a sport dominated by men? Should there be restrictions? Historically, how have women been discriminated against? When are separate sports teams required or allowed? What are the advantages and disadvantages of having same-sex teams?
3. What could Formula One boss Bernie Ecclestone have meant when he said the following in an interview: “You know, I’ve got one of the wonderful ideas that women should be dressed in white like all the other domestic appliances”?<sup>18</sup> Is there actually a debate about Danica Patrick’s ability to drive a race car? Why are remarks such as Richard Petty’s and Ecclestone’s made? How does it harm the progress of women in sports?

<sup>18</sup> Associated Press, *F1's Ecclestone 'Trying to Make Amends' to Patrick*, USA Today, June 25, 2005.

4. Did you agree with the decision in the *Israel* case, Case 9-5? Are softball and baseball different enough to allow the plaintiff to play on the boys' baseball team?
5. Do you agree with the court's rationale in *Dodson v. Arkansas Activities Ass'n*? Is flag football the "equivalent" of padded football?
6. In *National Organization for Women v. Little League Baseball*, 318 A.2d. 33 (N.J. Super. Ct. App. Div. 1975), the question of whether girls should play Little League baseball was at issue. Little League attempted to defend the position that girls should not be allowed to play because of the physical difference between girls and boys.<sup>19</sup> The court, in allowing girls to play, stated:

We conclude there was substantial credible evidence in the record to permit the Division to find as a fact that girls of ages 8–12 are not as a class subject to a materially greater hazard of injury while playing baseball than boys of that age group. We will therefore not disturb that finding of the administrative agency. Thus the factor of safety does not militate for a determination that the nature of Little League baseball reasonably restricts participation in it at the 8–12 age level to boys. We regard the psychological testimony on both sides as too speculative to rest any fact-finding on it. In any case, we are clear that there is no substantial psychological basis in the record to warrant a conclusion that the game is reasonably restricted to boys in this age bracket, as against the evident statutory policy against sex discrimination in places of public accommodation.<sup>20</sup>

Based on this reasoning, should girls be allowed to participate on boys' high school and college baseball teams as well if they possess the requisite skill?

On December 26, 1974, the Federal Little League Baseball Charter was amended by Public Law No. 93-551 (December 26, 1974, 88 Stat. 1744, 93 Congress). The amended charter deleted the word "boys" from each place it appeared in the original charter and replaced it with "young people." The phrase "citizenship, sportsmanship and manhood" was replaced with "citizenship and sportsmanship." The stated purpose of the amendment indicated that Little League "shall be open to girls as well as boys." Approximately five million girls have participated in Little League baseball and softball since 1970.<sup>21</sup>

7. Women in coaching have historically been subject to discrimination. They have not been given the same opportunities to coach as men and have received less pay and benefits, and even less acknowledgment, than men for performing the same job. Title IX and Title XII have both been instrumental in allowing women coaches to achieve equality with their male counterparts. Pat Summitt, coach of the University of Tennessee women's basketball team, obtained a contract in excess of \$1.4 million per year in salary.<sup>22</sup> Because of the rise in the

<sup>19</sup> *National Organization for Women v. Little League Baseball*, 318 A.2d. at 35.

<sup>20</sup> *Id.* at 36–37.

<sup>21</sup> Little League Online, *Little League to Mark 30th Anniversary of Decision Allowing Girls to Play*, Nov. 4, 2003, [http://www.littleleague.org/media/newsarchive/06\\_2003/03\\_30thgirls.htm](http://www.littleleague.org/media/newsarchive/06_2003/03_30thgirls.htm). Also see, Mark Hyman, *Challenges for Girls Playing High School Baseball*, *The New York Times*, March 1, 2009.

<sup>22</sup> Bryan Mullen, *Pat Summitt's Road to 1,000 Wins*, *The Tennessean*, February 2, 2009.

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popularity of women's sports, girls and women have slowly been given opportunities to coach at the high school and college levels.<sup>23</sup>

8. In *Buick v. Illinois High School Ass'n*, 351 F. Supp. 69 (D.C. Ill. 1972), two female students were denied an opportunity to try out for the boys' swim team. The court held that the rule did not violate the Equal Protection Clause of the Fourteenth Amendment, citing physical differences between boys and girls as the basis of its opinion. In *Clinton v. Nagy*, 411 F. Supp. 1396 (D.C. Ohio 1974), the court granted the plaintiffs' motion for a temporary restraining order when a 12-year-old girl wanted to play football on a team licensed by the city.
9. Much has been written about discrimination against women in golf. See, Nancy Kamp, *Gender Discrimination at Private Golf Clubs*, 5 SPORTS LAWYERS JOURNAL 89 (1998); Charles Charpentier, *An Unimproved Lie: Gender Discrimination Continues at Augusta National Golf Club*, 11 VILLANOVA SPORTS AND ENTERTAINMENT LAW JOURNAL 111 (2004); and Barbara Osborne, *Gender, Employment, and Sexual Harassment Issues in the Golf Industry*, 16 JOURNAL OF LEGAL ASPECTS OF SPORT 25 (2006).

## Title IX

10. In *Pederson v. Louisiana State Univ.*, 201 F.3d 388 (5th Cir. 2000), the Court of Appeals found that LSU officials engaged in intentional discrimination against female athletes under Title IX. The court stated:

In addition to the district court's evaluation of LSU's attitudes as "archaic," our independent evaluation of the record and the evidence adduced at trial supports the conclusion that Appellees persisted in a systematic, intentional, differential treatment of women. For instance, in meetings to discuss the possibility of a varsity women's soccer team, Dean referred to Lisa Ollar repeatedly as "honey," "sweetie," and "cutie" and negotiated with her by stating that "I'd love to help a cute little girl like you." Dean also opined that soccer, a "more feminine sport," deserved consideration for varsity status because female soccer players "would look cute running around in their soccer shorts." Dean, charismatically defending LSU's chivalry, later told the coach of the women's club soccer team that he would not voluntarily add more women's sports at LSU but would "if forced to." Among many other examples, Karla Pineda testified that, when she met with representatives of the Sports and Leisure Department to request the implementation of an intramural fast-pitch softball team, she was told that LSU would not sponsor fast-pitch softball because "the women might get hurt."

LSU perpetuated antiquated stereotypes and fashioned a grossly discriminatory athletics system in many other ways. For example, LSU appointed a low-level male athletics department staff member to the position of "Senior Women's Athletic Administrator,"

<sup>23</sup> See *Fuhr v. School Dist. of City of Hazel Park*, 131 F. Supp. 2d 947 (E.D. Mich. 2001) (the court denied defendant's motion for summary judgment on plaintiff's claims of sexual discrimination after she was passed over for the position of boys' varsity basketball coach in favor of a male teacher). Also see *Wynn v. Columbus Municipal Separate School District*, 692 F. Supp. 672 (N.D. Miss. 1998) (plaintiff who alleged Title VII violation was awarded back pay and was placed into the athletic director's position); also see *Lowrey v. Texas A&M University System*, 11 F. Supp. 2d 895 (S.D. Tex. 1998) (A coach sued for retaliation in violation of Title IX).

which the NCAA defines as the most senior woman in an athletic department. LSU consistently approved larger budgets for travel, personnel, and training facilities for men's teams versus women's teams. The university consistently compensated coaches of women's teams at a rate far below that of its male team coaches.<sup>24</sup>

What must a plaintiff show to prove intentional discrimination in accordance with Title IX? How can attitudes about women in sports be changed?

11. For further discussion of the *Mercer* case see A. Crouse, *Equal Athletic Opportunity: An Analysis of Mercer v. Duke University and a Proposal to Amend the Contact Sport Exception to Title IX*, 84 MINNESOTA LAW REVIEW 1655 (2000).
12. Is it ethical that a women's basketball coach at a major university is paid less than the men's basketball coach? Consider noted women's basketball programs such as those of the University of Tennessee, Baylor University, or Old Dominion. Should the women's coach in such places make more than the men's coach because the women's program is more popular on campus?
13. In *Harper v. Board of Regents, Illinois State University*, 35 F. Supp. 2d 1118 (C. D. Ill. 1999), Illinois State University (ISU) eliminated the men's wrestling and soccer teams after an NCAA peer review committee determined that the university had failed to achieve gender equity in its athletic programs. The plaintiffs sued ISU, alleging that the reduction of men's programs was a Title IX violation. The court was "not unsympathetic to the hardship incurred by the members of the wrestling and soccer teams or their disappointment in not being able to pursue their sport of their choice at their chosen institution"; however, it still granted summary judgment for ISU on the plaintiffs' Title IX claims.
14. What do you think about the proposal submitted by the school board in Case 9-8, *Daniels v. School Bd. of Brevard County, Fla.*? Was the remedy ordered by the court fair to all parties? What steps would you have taken to ensure compliance with Title IX? The plaintiffs argued that the school board's plan was a "take it away from the boys" plan that was actually designed to create a backlash against the girls' softball team. Do you agree with that statement? All things being equal, how would you decide whether the words "baseball" or "softball" should appear first on the "Meritt Island Baseball" sign facing the student parking lot? Should there be two signs, one for boys' games and one for girls' games? Was the court order consistent with the application of Title IX? If the boys and girls should have "equal" scoreboards, why shouldn't the boys be denied use of the electronic scoreboard until the girls' team can get one as well?
15. What factors are considered in determining whether a university is in compliance with Title IX regulations?
16. In Case 9-10, *Jackson v. Birmingham Bd. of Educ.*, the court expanded the scope of Title IX to include protection to whistle blowers in addition to direct victims of discrimination under the act. Do you believe this was part of the intent of the act when it was passed? Are there any drawbacks to extending protection to those who were not directly discriminated against? What damages would such plaintiffs be entitled to if they could prove their case?
17. In *NCAA v. Smith*, 525 U.S. 459 (1999), the court was faced with the issue of whether the NCAA as an organization is subject to Title IX. A student-athlete sued the NCAA, stating

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<sup>24</sup> *Pederson*, 201 F.3d at 412.

that the NCAA was in violation of Title IX by refusing to allow her to enroll in a graduate program at a university where she did not receive her undergraduate degree. The Supreme Court held that the NCAA is not subject to Title IX on the basis that it receives dues from its members, which in turn receive federal financial assistance.

18. Shana Eriksson was a member of the equestrian team at California State University. She died in 2004 after she was thrown from a horse. At the time of her death she was riding unsupervised because her coach had resigned six weeks earlier and no new coach had yet been named. Her parents sued on her behalf, claiming that the university was liable for her death under Title IX. They alleged that the university failed to provide adequate facilities, funding, and coaching staff for the team, saying that the university was attempting to comply with Title IX and was not doing very well.<sup>25</sup> Summary judgment was granted for the defendant, and the plaintiff appealed. Can a university be held liable in tort under Title IX?
19. In *Miller v. University of Cincinnati*, 2006 WL 3591958 (S.D. Ohio 2006), the court granted plaintiffs' motion to certify as a class action. The plaintiffs requested that the court certify a class consisting of "[a]ll present, prospective and future participants in the women's athletics program at the University of Cincinnati."<sup>26</sup> The plaintiffs alleged they were denied the equal opportunity to compete for and receive athletic scholarships and were denied equal access to athletic benefits in training equipment, supplies, coaching, locker rooms, and recruitment of athletes, along with other benefits, in violation of Title IX. The court, in partially granting plaintiffs' motion, stated:

Limiting the class under consideration to current and future members of the University of Cincinnati women's rowing team provides a specific group that was allegedly harmed during a particular ongoing time frame in a particular location in a particular way, facilitating the Court's ability to ascertain its membership in an objective manner. . . .<sup>27</sup>

. . . .

The Court will thus certify a class of "all current and future members of the University of Cincinnati women's rowing team" conditioned upon the filing and granting of this motion.<sup>28</sup>

Who are the appropriate parties in a lawsuit alleging Title IX violations?

20. In *Butler v. National Collegiate Athletic Association*, 2006 WL 2398683 (D. Kan. 2006), the plaintiff alleged a Title IX violation when he missed an opportunity to participate in football at Northwestern Missouri State University (NMSU). His girlfriend had become pregnant and he decided to work and take care of his daughter instead of attending NMSU and playing football there. NCAA rules limit a student-athlete to four seasons of intercollegiate competition within five consecutive years. The plaintiff eventually transferred to the University of Kansas and played football there in the fall of 2005. NCAA rules do

<sup>25</sup> IBL CLASS ACTION REPORTER, March 18, 2004, Vol. 6, No. 55; *Eriksson v. CSU*, Super. Ct. No. 04CECG02226 MBS.

<sup>26</sup> *Miller*, 2006 WL 3591958 at 1.

<sup>27</sup> *Id.* at 6

<sup>28</sup> *Id.* at 7.



provide for a one-year extension in the eligibility rules for female students who are pregnant. Butler argued that if he had been female, he could have taken advantage of the extra year. The court disagreed, stating:

As defendants point out, the pregnancy exception allows a waiver “for reasons of pregnancy,” which appear to be different from reasons of maternity or paternity. . . . The Court finds no substantial likelihood of success on the merits of plaintiff’s Title IX claim.<sup>29</sup>

Does the plaintiff have an Equal Protection argument under the Constitution? Should male student-athletes be given an extension of their eligibility for caring for a child?

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<sup>29</sup> 2006 WL 2398683, p. 3

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