Athletics & Title IX of the 1972 Education Amendments

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I. INTRODUCTION

Congress passed Title IX of the 1972 Education Amendments ("Title IX" or "the Act") to end sex-based discrimination in education.[1] Title IX states "[no] person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." [2]

The Act is most widely known for its application to sports, specifically in expanding opportunities for female athletes. While the Act never explicitly addresses athletics, prior to the passage of the Act, athletics were recognized as a part of the educational process and subject to the Equal Protection Clause of the Fourteenth Amendment.[3] Not only does Title IX apply to athletics issues, but it also applies in situations involving sexual harassment and employment discrimination.

Title IX has greatly impacted female participation in athletics. The number of female high school athletes has increased from less than 300,000 in 1972 to nearly 3.5 million in the 2018–2019 school year.[4] At the collegiate level, six times more women compete in athletics now than before the Act was passed.[5] While progress has been made in the world of female athletics, the playing field is still not entirely level, and Title IX continues to play an important role in guarding against discrimination.

Title IX's protections have grown beyond discrimination against women. No transgender student athlete has brought a case thus far, and whether they may have a successful claim is speculative. However, scholars have articulated a legal theory under which a transgender student athlete could validly sue the NCAA under a theory of sex-discrimination.[6] The Biden administration has largely withdrawn federal guidelines deeming transgender athletes' participation a Title IX violation. Nevertheless, such lawsuits may be imminent in the aftermath of the *Bostock* decision and discriminatory laws being passed across the country on the state level.

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1. *See* 20 U.S.C. § 1681.
2. 20 U.S.C. § 1681(a).
3. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971).
4. Maya Riser-Kositsky & Holly Peele, *Statistics on School Sports: How Many Students Play Sports? Which Sports Do They Play?*, EDUCATIONWEEK (July 30, 2021), https://www.edweek.org/leadership/statistics-on-school-sports-how-many-students-play-sports-which-sports-do-they-play/2021/07.
5. Sarah Pruitt, *How Title IX Transformed Women's Sports*, HISTORY (June 11, 2021), https://www.history.com/news/title-nine-womens-sports.
6. *See infra* Section III.C.

This article describes the history and framework of Title IX legislation in the context of high school and intercollegiate athletics. First, this article explores common issues in athletics litigation, including claims regarding increased participation opportunities, competition on teams of the opposite sex, sexual harassment, discrimination against athletics coaches, and private sponsorship and funding of school athletic teams. Next, the article discusses *Jackson v. Birmingham Board of Education*,[7] the most recent Supreme Court case concerning Title IX in athletics, as well as the implications of the Court's decision in *Bostock v. Clayton County* on how courts will interpret the definition of "sex" in Title IX moving forward.[8] A discussion on the administration and enforcement of Title IX, including the available remedies and alternatives to litigation, follows. Finally, this article covers how state laws have moved to ban transgender athletes from competing.

II. DEVELOPMENT OF TITLE IX

A. HISTORY OF TITLE IX

Title IX of the Education Amendments of 1972 prohibits the use of federal funds to support sexually discriminatory practices in educational programs and provides citizens with administrative and judicial relief from such discriminatory practices.[9] Congress enacted Title IX in response to evidence of discrimination against women within the realm of educational opportunities.[10]

Policy, legislation, and judicial interpretation shaped the development of Title IX. The Office of Civil Rights ("OCR") in the U.S. Department of Education is primarily responsible for administering Title IX. OCR regulations concerning athletics opportunities are codified in the Code of Federal Regulations and preclude sex-based discrimination in athletics.[11] Beyond these regulations, OCR issues additional policy interpretations to more precisely define schools' accountability under Title IX.[12] These regulations and policy interpretations also provide

7. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).

8. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

9. 20 U.S.C. §§ 1682–83.

10. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523 n.13 (1982) (citing 118 Cong. Rec. 5804 (statement of Sen. Evan Bayh)); Cohen v. Brown Univ. (*Cohen IV*), 101 F.3d 155, 165 (1st Cir. 1996) (referring to "extensive hearings held in 1970 by the House Special Subcommittee on Education").

11. *See, e.g.*, 34 C.F.R. § 106.41(a) (2018) ("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, and no recipient shall provide any such athletics separately on such basis.").

12. *See generally A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71413, 71414 (Dec. 11, 1979), https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html [hereinafter *Policy Interpretation*]; *Clarification Of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEP'T OF EDUC. (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two [hereinafter *Three-Part Test*]; Valerie M. Bonnette & Lamar Daniel, *Title IX Athletics Investigator's Manual*, OFF. FOR C.R., U.S. DEP'T OF EDUC. (1990), https://files.eric.ed.gov/fulltext/ED400763.pdf [hereinafter *Investigator's Manual*].

guidance to courts adjudicating claims under Title IX.[13] Thus, courts generally give deference to OCR's regulations and policy interpretations.[14]

Recent history illustrates the importance of OCR's policy statements. In 2002, the Department of Education convened a commission of athletes, athletic directors, university administrators, and practitioners who championed female sports interests; the commission analyzed public sentiment regarding the effectiveness of Title IX and recommended legislative changes or promulgated additional guidance on Title IX's requirements.[15] After the commission released its recommendations in February 2003, OCR issued a policy clarification, noting "broad support throughout the country for the goals and spirit of Title IX,"[16] which stated that cutting men's teams is a "disfavored" method of compliance.[17] OCR also touted Title IX's three-pronged enforcement scheme, encouraging schools to take advantage of its flexibility, and noted that the scheme has "worked well" in bringing "true equality of opportunity to male and female student-athletes in America."[18]

In 2005, OCR issued another policy clarification, which provided that institutions may use internet surveys to measure the interest of the underrepresented sex for purposes of establishing compliance with Title IX.[19] However, OCR issued another policy clarification in a 2010 Dear Colleague Letter, which withdrew the

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13. *See Policy Interpretation, supra* note 12.

14. *See, e.g.*, *N. Haven Bd. of Educ.*, 456 U.S. at 538–40 (giving deference to section E of *Policy Interpretation* when dealing with employment); Chalenor v. Univ. of N.D., 291 F.3d 1042, 1047 (8th Cir. 2002) (giving controlling deference to *Policy Interpretation* as a reasonable interpretation of the regulation); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615 (6th Cir. 2002) (holding that *Policy Interpretation* is entitled to deference by the courts); Cohen v. Brown Univ. (*Cohen II*), 991 F.2d 888, 895 (1st Cir. 1993) (finding that OCR's Policy Interpretation should be afforded "appreciable deference"); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council Inc., 467 U.S. 837, 844 (1984) (holding that regulations promulgated by agency pursuant to explicit delegation by Congress should be given "controlling weight"); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 828 (10th Cir. 1993) (holding that OCR's Policy Interpretation should be afforded substantial deference because it is an agency's interpretation of its own regulations).

15. *See The Secretary of Education's Commission on Opportunity in Athletics*, 67 Fed. Reg. 45961 (July 11, 2002), https://www.gpo.gov/fdsys/pkg/FR-2002-07-11/pdf/02-17467.pdf (stating that the purpose of the Commission is "collecting information, analyzing issues, and obtaining broad public input directed at improving the application of current Federal standards for measuring equal opportunity for men and women and boys and girls to participate in athletics under Title IX").

16. OFF. FOR C.R., U.S. DEP'T OF EDUC., *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (2003), http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html [hereinafter *Title IX Compliance*] ("After eight months of discussion and an extensive and inclusive fact-finding process, the commission found very broad support throughout the country for the goals and spirit of Title IX.").

17. *Id.* (noting that the elimination of teams is "contrary to the spirit of Title IX" and that OCR will seek remedies not involving elimination of teams).

18. *Id.* (stating that OCR encourages schools to take advantage of the flexibility of the three-prong test and to consider which of the three prongs best suits their individual situations).

19. OFF. FOR C.R., U.S. DEP'T OF EDUC., *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three* (2005), http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html.

2005 Additional Clarification and User's Guide, including the model survey.[20] OCR's 2010 clarification found that the 2005 Additional Clarification and User's Guide "changed OCR's approach from an analysis of multiple indicators to a reliance on a single [internet] survey instrument to demonstrate that an institution is accommodating student interests and abilities in compliance with Part Three."[21] Given the problems with a unitary mechanism by which institutions would demonstrate compliance, OCR determined that the 2005 Additional Clarification and the User's Guide were "inconsistent with the nondiscriminatory methods of assessment set forth in the 1979 Policy Interpretation and the 1996 Clarification and do not provide the appropriate and necessary clarity regarding nondiscriminatory assessment methods, including surveys, under Part Three."[22]

In May 2020, OCR issued a letter effectively barring transgender athletes[23] from competing in school sports. The guidance stated that despite the Court's decision in *Bostock v. Clayton County*, the agency continues to consider the term "sex," as used in Title IX, to mean biological sex, not gender identity.[24] OCR then deemed that allowing transgender girl athletes to participate in interscholastic girls' sports discriminated against biologically female student athletes.[25] The agency reasoned that, due to transgender girls' biological physical advantages over cisgender girls, transgender participation policies denied cisgender girls opportunities to compete and receive public recognition critical to college recruiting.[26] As a result, under this interpretation, policies that allow transgender girls to compete with cisgender girls violate Title IX.[27] As of 2021, the Biden administration has reversed this guidance.[28]

In addition to the OCR's interpretive guidance, courts play a significant role in defining the effective application of Title IX, as Congress left little in the way of legislative history identifying or defining how the statute should be used.[29]

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20. OFF. FOR C.R., U.S. DEP'T OF EDUC., *Title IX Dear Colleague Letter* (2010), https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-20100420.html [hereinafter 2010 DCL].

21. *Id.* at 2.

22. *Id.*

23. Transgender refers to people whose gender identity differs from the sex they were assigned at birth. Cisgender refers to those who identify as their sex assigned at birth. *Queer and Trans Spectrum Definitions*, UNIV. OF NEB. OMAHA, https://www.unomaha.edu/student-life/inclusion/gender-and-sexuality-resource-center/lgbtqia-resources/queer-trans-spectrum-definitions.php.

24. Lee Green, *Legal Rulings on Sports Participation Rights of Transgender Athletes*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS (Sept. 29, 2020), https://www.nfhs.org/articles/legal-rulings-on-sports-participation-rights-of-transgender-athletes/.

25. OFF. FOR C.R., U.S. DEP'T OF EDUC., *Revised Letter of Impending Enforcement Action* (Aug. 31, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf.

26. *Id.*

27. *Id.*

28. OFF. FOR C.R., U.S. DEP'T OF EDUC., *Withdrawal of Revised Letter of Impending Enforcement Action* (Feb. 23, 2021), https://www.aclu.org/sites/default/files/field_document/soule_et_al_v._ct_association_of_schools_et_al_-_doj_withdrawl_letter.pdf.

29. *See Cohen II*, 991 F.2d at 893 ("Part of the confusion about the scope of Title IX's coverage and the acceptable avenues of compliance arose from the absence of secondary legislative materials. Congress included no committee report with the final bill . . . .").

Initially, Title IX was generally perceived to apply only to educational programs that directly received federal funding on the basis of the Supreme Court's decision in *Grove City v. Bell*.[30] However, both Congress and the Court took action to expand the effective scope of Title IX. Following *Grove City*, Congress passed the Civil Rights Restoration Act of 1987 ("CRRA").[31] The CRRA amended Title IX to encompass all of the programs or activities of educational institutions that received any federal financial assistance.[32] This legislation clarified that Title IX applies directly to school athletic programs so long as any part of the school receives federal funding.[33] Through the CRRA amendment of Title IX, Congress attempted to further secure the right of women to be free from sex-based discrimination in schools receiving federal funds.[34] Hence, the Court expanded the scope of Title IX in *Franklin v. Gwinnett County Public Schools* by holding that Title IX prohibits sexual harassment and permits individuals to collect compensatory damages based on such discrimination.[35]

In the past two years, federal legislators have proposed several bills involving Title IX. Republican legislators have repeatedly attempted to pass legislation codifying "that sex shall be recognized based solely on a person's reproductive biology and genetics at birth."[36] These bills aim to maintain sex-segregated spaces and athletic programs in schools and to prevent transgender students from participating in activities designated for cisgender women or girls.[37] Conversely, Democratic

30. 465 U.S. 555, 573 (1984) (construing Title IX narrowly to apply only to programs that receive direct federal financial assistance).

31. *See* 20 U.S.C. § 1687 ("For the purposes of this chapter, the terms 'program or activity' and 'program' mean all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . .").

32. *Id.*

33. *Id.*

34. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 70–71 (1992) (awarding compensatory damages to a female student under Title IX for sexual harassment and abuse when equitable remedies were insufficient).

35. *Id.*

36. Protection of Women and Girls in Sports Act, S. 251, 117th Congress (2021); H.R. 426, 117th Congress (2021); S. 4649, 116th Congress (2020); H.R.5702, 116th Congress (2020); Protect Women's Sports Act, H.R. 8932, 116th Congress (2020) (These bills would make it a violation of federal law for a recipient of federal funds who operates, sponsors, or facilitates athletic programs or activities to permit a person whose sex is male to participate in an athletic program or activity that is designated for women or girls. The bills specify that sex shall be recognized based solely on a person's reproductive biology and genetics at birth.); Safety and Opportunity for Girls Act, H.R. 1417, 117th Congress (2021) (This bill addresses protections related to sex and sex-segregated spaces. Sex is defined as sex determined solely by a person's reproductive biology and genetics at birth. The bill would prohibit construing the provisions of Title IX of the Education Amendments of 1972 in a manner that would require forgoing the maintenance of sex-segregated spaces (such as bathrooms) and of sex-segregated athletic or academic programs by educational institutions.).

37. *Id.*

legislators have tried to pass laws expanding transgender rights under Title IX.[38] However, neither party has been successful in their respective legislative efforts.

In 2005, the Supreme Court's interpretation in *Jackson v. Birmingham Board of Education* marked a significant development in the interpretation of Title IX.[39] In *Jackson*, an Alabama public school teacher sued the Birmingham Board of Education, alleging they fired him for complaining that the girls' basketball team he coached was denied equal treatment by the school.[40] The Court ruled in favor of the coach, holding that "[r]etaliation 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."[41]

Courts have, however, also enumerated underlying motivational factors necessitating the intervention of Title IX to promote gender equality in education, specifically in athletics.[42] Athletic activity may lead to sexual harassment claims under Title IX when the offending action occurs in an athletic setting, such as on campus, in a locker room, or during travel to an off-campus game.[43] In fact, some argue that the increase in number of female athletes correlates with an increase in sexual harassment incidents reflecting attempts to discourage women from participating in athletics.[44]

Additionally, there is some indication that harassment based on actual or perceived sexual orientation may be prohibited by Title IX. In 2006, a federal district court in Connecticut held that "language, with sexual orientation overtones, amounts to gender discrimination."[45] The foremost of these factors is providing women with an equal opportunity to attend their desired schools and develop their chosen skills, so that they have a fair chance for success in future employment.[46] Schools must also provide equal opportunities for men and women to

38. Justice for All Act, H.R. 8698, 116th Congress (2020) (To amend the Civil Rights Act of 1964 to clarify that disparate impacts on certain populations constitute a sufficient basis for rights of action under such Act, and for other purposes).

39. 544 U.S. 167 (2005).

40. *Id.* at 171.

41. *Id.* at 173.

42. *See, e.g.*, Cohen v. Brown Univ. (*Cohen IV*), 101 F.3d 155, 165 (1st Cir. 1996) (citing Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)) ("Title IX was passed with two objectives in mind: 'to avoid the use of federal resources to support discriminatory practices,' and 'to provide individual citizens effective protection against those practices.'").

43. *See, e.g.*, Jennings v. Univ. of N.C., 482 F.3d 686 (4th Cir. 2007), *cert. denied*, 552 U.S. 887 (2007) (vacating summary judgment on a Title IX claim against UNC women's soccer coach where the coach's "persistent, sex-oriented discussions, both in team settings and in private, were degrading and humiliating to his players because they were women").

44. *See, e.g.*, WOMEN'S SPORTS FOUND., SEXUAL HARASSMENT AND SEXUAL RELATIONSHIPS BETWEEN COACHES, OTHER ATHLETIC PERSONNEL AND ATHLETES 1, https://www.womenssportsfoundation.org/wp-content/uploads/2016/08/sexual-harassment-sexual-harassment-and-sexual-relationships-between-coaches-other-athletic-personnel-and-athletes-the-foundation-position.pdf

45. Riccio v. New Haven Bd. of Educ, 467 F. Supp. 2d 219, 226 (D. Conn. 2006).

46. *See Cohen IV*, 101 F.3d at 167 (citing 118 Cong. Rec. 5808 (1972) (statement of Sen. Evan Bayh)).

participate in sports where historically women have faced limited opportunities.[47] The mandates allow women to participate equally in skill-development training, leading to improved physical fitness, teamwork skills, interpersonal skills, and self-esteem, lower rates of drug use and smoking, and achievement of higher levels of education.[48]

Despite these benefits, some criticize Title IX for its effects on male athletic programs. Criticism on this front comes from representatives of men's "minor sports"—such as swimming, wrestling, and volleyball—who bring reverse-discrimination suits in an effort to challenge the allegedly negative effects of Title IX on their sports.[49] These representatives claim that schools' attempts to comply with Title IX result in budget cutbacks to men's athletic programs, which typically end with the termination of minor teams to equalize athletic spending between genders.[50] Some argue that women are not as interested in sports as men, therefore requiring equal opportunities between the genders imposes an artificial standard of "equality."[51]

Women's rights groups refute the basis of these claims, emphasizing the importance of Title IX in affirming the worth of gender balance in the athletic arena.[52] They argue that past discrimination is the reason for the gender

47. *Id.* at 170 ("Like other anti-discrimination statutory schemes, the Title IX regime *permits* affirmative action.").

48. *See* WOMEN'S SPORTS FOUND., *Women's Sports & Physical Activity Facts & Statistics*, 2–6 (Mar. 26, 2009), https://www.womenssportsfoundation.org/wp-content/uploads/2016/08/wsf-facts-march-2009.pdf (compiling studies describing positive body, mind, and confidence benefits of sports); *see also* Betsey Stevenson, *Title IX and the Evolution of High School Sports*, 25 CONTEMP. ECON. POL'Y 483, 486 (2007).

49. *See* Chalenor v. Univ. of N.D., 291 F.3d 1042, 1043 (8th Cir. 2002) (addressing the argument that elimination of men's wrestling program, even after team secured a private donor, was sex discrimination forbidden by Title IX); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 610 (6th Cir. 2002) (examining plaintiff's argument that eliminating men's wrestling, tennis, and soccer programs discriminated against men on the basis of sex); Boulahanis v. Bd. of Regents, 198 F.3d 633, 637 (7th Cir. 1999) (addressing argument that elimination of school soccer and wrestling teams by the university to cut its athletic budget as part of Title IX compliance plan was a decision based on sex); Neal v. Bd. of Trs. of Cal. State Univs., 198 F.3d 763, 766 (9th Cir. 1999) (discussing argument that capping the size of school wrestling team violated Title IX and the Equal Protection Clause); Kelley v. Bd. of Trs., 35 F.3d 265, 267 (7th Cir. 1994) (examining claim under Title IX and Equal Protection Clause when university terminated men's swimming program); Gonyo v. Drake Univ., 837 F. Supp. 989, 990 (S.D. Iowa 1993) (discussing a gender discrimination claim in violation of Title IX and Equal Protection Clause when the university discontinued its men's wrestling program).

50. *See, e.g.*, Eric Pearson, *After 40 years, Title IX is Getting Old for Boys*, WASH. TIMES (June 22, 2012), http://www.washingtontimes.com/news/2012/jun/22/after-40-years-title-ix-is-getting-old-for-boys/ (Chairman of the American Sports Council argues that Title IX's proportionality scheme has led to the loss of male athletic opportunities).

51. *See* Jessica Gavora, *Time's Up for Title IX Sports*, AM. SPECTATOR (May/June 2002) (arguing that biological differences in men and women account for their varying levels of interest in sports participation, and therefore laws should not seek to enforce 50/50 sharing of athletic resources between the sexes).

52. *See Title IX at 40: Proven Benefits, Unfounded Objections*, NAT'L COAL. FOR WOMEN & GIRLS EDUC. 7, 11 (2012), http://www.ncwge.org/TitleIX40/Athletics.pdf.

imbalance, and they are optimistic about the promise of increased future participation due to Title IX's encouragement of equal opportunities for female athletes.[53]

These groups also stress the numerous benefits women derive from participation in sports.[54] Abundant empirical evidence documents the advantages to physical health, mental acumen, and general well-being promoted by athletic participation.[55] Women's groups argue that continuing the opportunities Title IX brings to women through their enhanced participation in sports will offer women greater achievement and enjoyment.[56]

As new judicial decisions are made and political administrations cycle through, Title IX continues to be a controversial piece of legislation with ever-changing interpretations. Nevertheless, it has proved to be a crucial protection for combatting discrimination against women within educational environments.

B. NON-ATHLETIC APPLICATIONS OF TITLE IX

Besides its application to expanding opportunities for female athletes, Title IX has been effectively applied to non-athletic areas, including combating sexual harassment and reducing discrimination in employment practices. The Supreme Court held that Title IX, along with other mechanisms, can be used to address sexual harassment and gender discrimination. The Biden administration is actively working on proposing new Title IX interpretations to reverse the highly restricted rules from the prior administration. In addition, employment discrimination claims can also be brought under Title IX if they take place in an educational institution receiving federal funds.

1. Sexual Harassment

While Title IX can be a "shield" to ensure equal participation in athletics, Title IX also has the equally effective power of the "sword" in combating sexual harassment. Courts divide sexual harassment into three categories: hostile environment, quid pro quo, and peer-to-peer.[57] A hostile environment is one in which "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct have the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile, and an offensive environment."[58] Quid pro quo harassment is "the receipt of benefits or the

53. *Id.*

54. *See* WOMEN'S SPORTS FOUND., *supra* note 48, at 2–6.

55. *Id.*; *see also* Stevenson, *supra* note 48, at 486.

56. *See* WOMEN'S SPORTS FOUND., *supra* note 48, at 2–6; *see also* Stevenson, *supra* note 48, at 486.

57. *See generally* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (holding that sex discrimination includes sexual harassment); Mary M. v. N. Lawrence Cmty. Sch. Corp., 131 F.3d 1220, 1226 n.7 (7th Cir. 1997).

58. *See Mary M.*, 131 F.3d at 1228 (establishing that a hostile environment claim under Title IX requires a plaintiff to prove: (1) plaintiff belongs to a protected group, (2) plaintiff was subjected to harassment, (3) the harassment was based on sex, (4) the harassment affected the plaintiff's pursuit of education, and (5) school officials were indifferent to the harassment); *see also* P.H. v. Sch. Dist. of

maintenance of the status quo . . . conditioned on acquiescence to sexual advances."[59] For a claim of peer-to-peer sexual harassment to succeed, a person of authority must have actual notice of the harassment and must have responded with "deliberate indifference" to it.[60] In determining whether a person of authority acted with deliberate indifference to known acts of harassment in its programs or activities, courts analyze the conduct of the funding recipient, not the alleged harasser, to ensure that the court holds the recipient liable only if its deliberate indifference "subjected" the plaintiff to discrimination.[61] The Supreme Court described the deliberate indifference standard as "an official decision by the [funding] recipient not to remedy the violation."[62] Schools are not liable for student-on-student or teacher-on-student harassment unless the school had actual knowledge of the harassment and failed to respond adequately.[63]

In 2009, the Supreme Court decided *Fitzgerald v. Barnstable School Committee*, a case addressing peer-to-peer sexual harassment which involved the alleged harassment of a kindergarten girl by an older student.[64] In *Fitzgerald*, the plaintiffs alleged that the school system's response to their allegations of sexual harassment had been inadequate, resulting in further harassment to their daughter.[65] Their complaint included a claim for a violation of Title IX, claims under 42 U.S.C. § 1983 for violations of Title IX and the Equal Protection Clause of the Fourteenth Amendment, and some state-law claims against the school

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Kan., 265 F.3d 653, 662 (8th Cir. 2001) (holding that a school district is not liable under Title IX for teacher's sexual harassment of student because the school district did not have knowledge of the harassment and thereby could not have intentionally ignored harassment); Doe *ex rel*. Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380, 387–88 (5th Cir. 2000) (finding that school principal did not show indifference to sexual harassment accusation because principal warned accused teacher about alleged conduct and spoke with student's parents).

59. *Mary M*. at 1226 n.7; *see also* Cram v. Lamson & Sessions Co., 49 F.3d 466, 473 (8th Cir. 1995).

60. *See Mary M*., 131 F.3d at 1226 n.7; *see also* Simpson v. Univ. of Colo. Boulder, 500 F. 3d 1170, 1177 (10th Cir. 2007); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1292–93 (11th Cir. 2007). *But see* Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 276 (1998) (stating that school's alleged failure to comply with regulations requiring the promulgation of policy and grievance procedure for sexual harassment claims did not establish the requisite actual notice and deliberate indifference required for claims).

61. *See Williams*, 477 F.3d at 1293; Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640–41 (1999).

62. *Gebser*, 524 U.S. at 290.

63. *See Davis*, 526 U.S. at 645–47; *see also Simpson*, 500 F.3d at 1184–85 (reversing dismissal of Title IX claim against the University of Colorado where plaintiffs who were sexually assaulted by football recruits provided enough evidence to support a finding that a risk of sexual assault was obvious to school officials); *Williams*, 477 F.3d at 1299 (reversing dismissal of Title IX claim against the University of Georgia where the school failed to adequately respond to the sexual assault and rape of a student by three student athletes, "including one whose past sexual misconduct was known" to school officials); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000) (holding that school district was not liable for student-on-student alleged sexual harassment because it was unreported to officials until the school year had terminated and, once reported, the harassment ceased). *But see Gebser* 524 U.S. at 276. (1998).

64. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 246 (2009).

65. *Id*. at 250.

committee.[66] The Court of Appeals found that the school's prompt and thorough investigations, after learning of the allegations of abuse, could not be considered unreasonable. Therefore, the school did not act with the "deliberate indifference" required for liability for peer-to-peer sexual harassment. Additionally, the Court of Appeals held that Title IX's implied private remedy was comprehensive enough to preclude the use of § 1983 in the advancement of constitutional claims.[67] Addressing the issue of whether a Title IX claim should be comprehensive enough to preclude other claims in gender discrimination cases, the Supreme Court reversed the Court of Appeals' decision, holding that Title IX does not in fact preclude a § 1983 action and that Title IX is not an exclusive mechanism for addressing gender discrimination.[68]

From 2009 to 2017, the Obama administration utilized Title IX as a tool for addressing campus sexual harassment, including assault.[69] The administration enacted the Dear Colleague initiative to advance and reinforce the understanding that a victim will not be denied an equal education.[70] The Dear Colleague Letter expanded the goals of Title IX by encouraging federally-funded universities to crack down on campus sexual assault by facilitating a procedure by which victims can safely report incidents of sexual assault.[71]

Though the Trump administration introduced restrictive interpretations of Title IX, the Biden administration has taken initiatives to reverse the previous administration's policies. In September 2017, the Trump administration rescinded the Dear Colleague Letter to reduce false claims made by students under the initiative.[72] Additionally, in May 2020, the Trump administration released a new set of interpretations for Title IX that drastically limited the types of sexual misconduct universities are required to investigate.[73] In March 2021, President Biden signed an executive order to suspend, revise or rescind the Trump administration's rule governing Title IX interpretations.[74] In April 2021, the Department of Education

66. *Id*.

67. *See id*. at 251.

68. *See id*. at 258.

69. Max Larkin, *The Obama Administration Remade Sexual Assault Enforcement on Campus. Could Trump Unmake It?*, WBUR NEWS (Nov. 25, 2016), https://www.wbur.org/news/2016/11/25/title-ix-obama-trump.

70. Russlynn Ali, *Dear Colleague Letter*, OFF. FOR C.R., U.S. DEP'T EDUC. & U.S. DEP'T JUSTICE 2 (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

71. *Id*.

72. Alexa Lardieri, *Betsy DeVos Announces the Trump Administration Plans to Revamp Title IX*, U.S. NEWS (Oct. 12, 2017), https://www.usnews.com/news/politics/articles/2017-09-07/betsy-devos-annouces-the-trump-administration-plans-to-revamp-title-ix (Betsy DeVos claims the Obama initiative was ineffective and unfair, especially to those falsely accused of assault).

73. *Id*.

74. Lauren Camera, *Education Department Begins Sweeping Rewrite of Title IX Sexual Misconduct Rules*, U.S. NEWS (June 7, 2021), https://www.usnews.com/news/education-news/articles/2021-06-07/education-department-begins-sweeping-rewrite-of-title-ix-sexual-misconduct-rules.

announced the beginning of the formal rulemaking process that will culminate in May 2022 to rewrite the Trump administration's Title IX rules.[75]

2. Employment Practices

Title VII of the Civil Rights Act of 1964 covers most instances of discrimination in employment practices.[76] Title VII prohibits discrimination in the workplace based on race, color, religion, sex, or national origin.[77] Although a majority of employment discrimination claims were typically brought under Title VII, many of those claims can also be brought under Title IX if they take place in an educational institution receiving federal funds. The Supreme Court validated this practice in *North Haven Board of Education v. Bell*, which expanded Title IX's scope to include the prohibition of sex discrimination in employment practices of federally financed educational institutions.[78]

Title IX additionally prevents federal funding of discriminatory actions pursuant to Congress's spending power.[79] Procedurally, while Title VII's aim is retrospective in seeking to compensate victims of discrimination,[80] Title IX's purpose is more preemptive and seeks to protect against future discrimination.[81] In instances in which both a Title IX and a Title VII claim are available, the plaintiff may not always bring both claims. Some courts have ruled that a plaintiff who has a Title VII claim may not also bring a private discrimination claim for money damages under Title IX.[82]

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75. Brooke LePage, *What's Next for Title IX?*, FUTUREED (Sept. 26, 2021), https://www.future-ed.org/whats-next-for-title-ix/.

76. *See* 42 U.S.C. § 2000e.

77. *Id.*

78. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530 (1982) (holding that Title IX covers employment since it is not listed as an exception in the statute).

79. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640 (1999) ("[W]e have repeatedly treated Title IX as legislation enacted pursuant to Congress's authority under the Spending Clause . . . ."); *see also* Gebser v. Largo Vista Ind. Sch. Dist., 524 U.S. 274, 286 (1998) (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)) (stating that Title IX was enacted "with two principal objectives in mind: 'to avoid the use of federal resources to support discriminatory practices' and 'to provide individual citizens effective protection against those practices'").

80. *See* Landsgraf v. USI Film Prods., 511 U.S. 244, 254 (1994) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975)) (finding that the purposes of Title VII include "making persons whole for injuries suffered through past discrimination").

81. *See Cannon*, 441 U.S. at 677, 704 (stating that the principal purposes of Title IX are to "avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices").

82. *See* Lakoski v. James, 66 F.3d 751, 754 (5th Cir. 1995) (finding that an implied private right of action for damages under Title IX for employment discrimination "would disrupt a carefully balanced remedial scheme for redressing employment discrimination by employers such as the University of Texas Medical Branch." The court concluded that it was "unwilling to do such violence to the congressionally mandated procedures of Title VII," holding that the district court erred in submitting a Title IX claim for damages to the jury); *see also* Howard v. Bd. of Educ. of Sycamore Cmty. Unit Sch. Dist. No. 427, 893 F. Supp. 808, 815 (N.D. Ill. 1995) (holding that Title VII preempts Title IX employment discrimination action).

III. SUITS UNDER TITLE IX

Even though Title IX strives for equality between the sexes, there is no affirmative duty upon schools to create and sustain athletic opportunities for all students.[83] In some instances, schools have reduced, rather than expanded, athletic opportunities to comply with Title IX.[84]

However, merely cutting women's and men's existing athletic programs generally does not bring a school into compliance with Title IX, so long as student interest and ability could support a team in which there is a reasonable expectation of competition. As the OCR's 2010 Dear Colleague Letter clarifies,

> If the information or documentation compiled by the institution during the assessment process shows that there is sufficient interest and ability to support a new intercollegiate team and a reasonable expectation of intercollegiate competition in the institution's normal competitive region for the team, the institution is under an obligation to create an intercollegiate team within a reasonable period of time in order to comply with Part Three.[85]

The 1996 Additional Clarification had previously explained that:

> [c]uts in the program for the underrepresented sex, even when coupled with cuts in the program for the overrepresented sex, cannot be considered remedial because they burden members of the sex already disadvantaged by the present program. However, an institution that has eliminated some participation opportunities for the underrepresented sex can still meet part two if, overall, it can show a history and continuing practice of program expansion for that sex.[86]

Thus, OCR reiterates that educational institutions do not ensure Title IX compliance by eliminating an athletic program for which there is a reasonable expectation of intercollegiate competition.

A court assessing an educational institution's Title IX compliance should not conclude that a violation exists solely because of a disparity between the gender composition of the educational institution's student constituency and its athletic

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83. *See Policy Interpretation*, *supra* note 12 (providing a three-part test concerning opportunities for participation in athletics).

84. *See, e.g.*, Neal v. Bd. of Trs. of Cal. State Univs., 198 F.3d 763, 771–72 (9th Cir. 1999) (finding no violation of Title IX when the university implemented a gender-conscious decision to reduce male participation in varsity athletics to remedy imbalance in female participation relative to female student enrollment); Kelley v. Bd. of Trs. of Univ. of Ill., 35 F.3d 265, 270, 272 (7th Cir. 1994) (finding no Title IX violation when university terminated men's swimming program).

85. *See* 2010 DCL, *supra* note 20, at 19.

86. *See Three-Part Test*, *supra* note 12.

programs.[87] On a policy level, the institution must be in direct opposition to the guidelines of Title IX. Common litigation claims include unequal allocation of resources and opportunities,[88] unequal treatment by the school of administrators of women's teams,[89] and barring of female (and sometimes male) athletes' access to sports offered to only one sex.[90]

Part A of this section examines OCR's basic framework for Title IX compliance, including participation opportunities, athletic scholarships, and other treatment and benefits. Part B addresses increased opportunities for participants in team sports, while Part C provides an overview of discrimination against transgender student-athletes, including how the 2020 *Bostock v. Clayton County* decision may impact Title IX claims. Part D covers discrimination against coaches and other athletic officials. Part E looks at issues related to funding. Part F covers retaliation against whistleblowers, with a particular focus on *Jackson v. Birmingham*. Lastly, Part G discusses alternative constitutional claims.

A. BASIC FRAMEWORK

With regard to athletics, OCR's policies mandate compliance with Title IX through the provision of equal opportunities in three areas:[91] participation opportunities,[92] athletics scholarships,[93] and other treatment and benefits.[94] Generally,

87. *See* 2010 DCL, *supra* note 20, at 3–4 ("As the 1996 Clarification indicates, while disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy Part Three if it can show that the underrepresented sex is not being denied opportunities, i.e., that the interests and abilities of the underrepresented sex are fully and effectively accommodated."); *see also* 20 U.S.C. § 1681(b).

88. *See, e.g.*, Cohen v. Brown Univ. (*Cohen II*), 991 F.2d 888, at 892 (1st Cir. 1993) (examining Title IX claims by members of women's athletic teams because significantly more money was cut from the women's teams, and the cutting of the programs left only 37% of relative team positions open for women, who comprised 48% of the student body); *see also* Favia v. Ind. Univ. of Pa., 7 F.3d 332, 335–36 (3d Cir. 1993) (discussing how female athletes successfully challenged university's decision to cut women's teams).

89. *See, e.g.*, Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1322–23 (9th Cir. 1994) (holding that coaching positions were not substantially equal in suit where women's varsity basketball coach was paid significantly less than the coach of the school's men's team).

90. *See, e.g.*, Hoover v. Meiklejohn, 430 F. Supp. 164, 172 (D. Colo. 1977) (holding that a female student had the right to compete for a position on the male team if high school chose to offer male soccer only).

91. *See Policy Interpretation*, *supra* note 12 (describing compliance evaluation method); *see also Investigator's Manual*, *supra* note 12, at 1.

92. *See* 34 C.F.R. § 106.41(c) (2018) (equal opportunity analyzed by effective accommodation, expenditures, and opportunity for participation).

93. *See* 34 C.F.R. § 106.37(c) (2018); *see also Three-Part Test*, *supra* note 12.

94. *See* 34 C.F.R. §§ 106.41(c)(1)–(10) (2008). Other treatment and benefits include "(a) equipment and supplies; (b) scheduling of games and practice times; (c) travel and daily allowance/per diem; (d) access to tutoring; (e) coaching, (f) locker rooms, practice and competitive facilities; (g) medical and training facilities and services; (h) housing and dining facilities and services; (i) publicity and promotions; (j) support services and (k) recruitment of student-athletes." National Collegiate Athletic Association, *Title IX Frequently Asked Questions*, http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions (last visited Apr. 14, 2022).

the governing principle for financial assistance for sports is that all such assistance "should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program."[95] The standards apply to schools from the primary to intercollegiate level.

1. Participation Opportunities

Most of the litigation related to Title IX concerns opportunities for participation in athletics when female students seek relief for gender-based unequal treatment.[96] To defend a Title IX claim, a school must show that its athletic program conforms with at least one element of the following three-part test promulgated by the Department of Education: (1) athletic participation opportunities provided for male and female students are "substantially proportionate" to their respective enrollment, (2) a history and continuing practice of expanding athletic opportunities for the underrepresented sex, or (3) "full and effective" accommodation of the interests and abilities of the underrepresented sex.[97] In its April 2010 policy clarification, OCR stressed that no one part of this test is "favored": if an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.[98]

The first part of the test ("substantially proportionate") requires the plaintiff to show that the ratio of athletic opportunities available for males and females does not match the school's gender ratio with respect to overall enrollment.[99] OCR

95. *See* 34 C.F.R. § 106.37(c) (2018); *see also Policy Interpretation*, *supra* note 12.

96. *See, e.g.*, Pederson v. La. State Univ., 213 F.3d 858, 880 (5th Cir. 2000) (finding violation of Title IX when LSU refused to create women's fast pitch softball and soccer teams); Horner *ex rel.* Horner v. Ky. High Sch. Athletic Ass'n, 206 F.3d 685, 697 (6th Cir. 2000) (holding that plaintiffs failed to prove intentional discrimination under Title IX); Boucher v. Syracuse Univ., 164 F.3d 113, 119 (2d Cir. 1999) (remanding injunctive claims regarding promotion of club women's softball team to varsity status after determining which female students should be certified for purposes of class action); Mercer v. Duke Univ., 190 F.3d 643, 648 (4th Cir. 1999) (holding that a female student, who had previously been allowed to try out and participate on football team as kicker, could not be denied equal opportunity to participate because of her sex); Cook v. Colgate Univ., 992 F.2d 17, 18–19 (2d Cir. 1993) (dismissing claim to reinstate varsity status for women's club hockey team as moot because plaintiffs were graduating); Favia v. Ind. Univ. of Pa., 7 F.3d 332, 343–44 (3d Cir. 1993) (affirming a preliminary injunction reinstating women's varsity gymnastics and field hockey teams as a result of a Title IX violation); Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 178 F. Supp. 2d 805, 855 (W.D. Mich. 2001) (holding that state association exercised sufficient control over federally funded programs such that it was subject to Title IX and association's scheduling of athletic seasons was in violation of Title IX), *aff'd*, 377 F.3d 504 (6th Cir. 2004), *vacated*, 544 U.S. 1012 (2005), *aff'd on remand*, 459 F.3d 676 (6th Cir. 2006); Daniels v. Sch. Bd. of Brevard Cnty., 995 F. Supp. 1394, 1398 (M.D. Fla. 1997) (ordering a school district to eliminate disparities between girls' softball and boys' baseball programs); Cohen v. Brown Univ. (*Cohen I*), 809 F. Supp. 978, 1001 (D.R.I. 1992) (granting preliminary injunction for reinstatement of women's varsity gymnastics and volleyball teams), *aff'd*, 991 F.2d 888, 907 (1st Cir. 1993).

97. *See Policy Interpretation*, *supra* note 12 (providing a series of examples of how the three-prong test works).

98. 2010 DCL, *supra* note 20, at 3.

99. *See Policy Interpretation*, *supra* note 12 (disparity measured by subtracting percentage of female athletes from the percentage enrollment of females).

defines substantial proportionality as exact proportionality unless there is a non-discriminatory reason for the disparity, such as an unprecedented jump in female enrollment.[100] Defendants have attempted to invoke a lack of female interest in participation as an explanation for disproportionate distribution of athletic opportunities.[101] Courts decry this argument as a "stereotyped notion" of women's interest and abilities that is precisely what Title IX is meant to combat.[102] Historically, courts allowed the elimination of men's programs as a means for satisfying this test. OCR's recent policy statements declared this practice contrary to Title IX's intent but did not forbid team elimination as one available remedy.[103]

Because OCR has not forbidden team elimination as an available remedy, male athletes sometimes challenge schools' implementation of Title IX. Under a reverse-discrimination hypothesis, male plaintiffs generally argue that compliance with Title IX violates their rights because men's programs are sometimes eliminated to fulfill the "substantial proportionality" test. Thus far, suits by male athletes are consistently rejected because the protection of a traditionally underrepresented group (female athletes) is deemed a more important government interest than rebalancing the needs of a traditionally overrepresented group (male athletes).[104] In rejecting these claims, courts note that, overall, men continue to

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100. In the 1996 Clarification, the Department explained that enrollment and athletic participation rates should be about equal to meet the "substantial proportionality" prong unless there is a reason for the disparity. *See Three-Part Test*, *supra* note 12. The Clarification offered an example of a college that normally has fifty percent female enrollment and has achieved a fifty percent female athletic participation rate. If the female enrollment jumps to fifty-two percent one year, while the female athletic participation rate stays at fifty percent, the disparity will likely be excused, and the college will not fail the "substantial disparity" prong. However, a higher disparity of ten percent would likely be impermissible. *Id*.

101. *See, e.g.*, Cohen v. Brown Univ. (*Cohen IV*), 101 F.3d 155, 178–79 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) ("We view Brown's argument that women are less interested than men in participating in intercollegiate athletics . . . with great suspicion . . . . [This] ignore[s] the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities."); *see also* Neal v. Bd. of Trs. of Cal. State Univs., 198 F.3d 763, at 767 (9th Cir. 1999) (finding unpersuasive the Board of Trustees' claim that "men's expressed interest in participating in varsity sports is apparently higher than women's at the present time").

102. *See Cohen IV*, 101 F.3d at 179.

103. *See* 2010 DCL, *supra* note 20, at 3–4 ("As the 1996 Clarification indicates, while disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy Part Three if it can show that the underrepresented sex is not being denied opportunities, i.e., that the interests and abilities of the underrepresented sex are fully and effectively accommodated."); *see also Title IX Compliance*, *supra* note 16 ("Because the elimination of teams diminishes opportunities for students who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from discrimination, it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams. Therefore . . . OCR's policy will be to seek remedies that do not involve the elimination of teams.").

104. *See, e.g.*, Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 939–40 (D.C. Cir. 2004) (holding that plaintiffs lacked standing because they failed to show that their injuries would be redressed if challenged Title IX enforcement policies were invalidated); Boulahanis v. Bd. of Regents,

enjoy more athletic opportunities than women.[105]

To meet the second part of the participation test, an institution must demonstrate an ongoing commitment to increasing athletic opportunities for the underrepresented sex.[106] OCR judges continuing expansion of athletic opportunities by educational institutions on the following criteria: (1) a record of adding or upgrading teams for the underrepresented sex, (2) increasing participation of the underrepresented sex, and (3) affirmative responses to requests by students for the addition or elevation of sports.[107] Eliminating opportunities for the overrepresented sex will not satisfy the "continuing expansion" inquiry.[108]

Regarding the third part of the test, an institution must show full and effective accommodation of the underrepresented sex's interests and abilities.[109] To

198 F.3d 633, 639 (7th Cir. 1999) ("The elimination of sex-based discrimination in federally-funded educational institutions is an important government objective, and the actions of the Illinois State University in eliminating the men's soccer and men's wrestling programs were substantially related to that objective."); *Neal*, 198 F.3d at 771–72 (finding no violation of either Title IX or equal protection when university's gender-conscious decision to reduce male participation in varsity athletics was implemented to remedy imbalance in female participation relative to female student enrollment); Kelley v. Bd. of Trs. of Univ. of Ill., 35 F.3d 265, 270, 272 (7th Cir. 1994) (finding no Title IX violation when university terminated men's swimming program because, even after termination, men's athletic participation would continue to be more than substantially proportionate to their population in the student body and additionally finding no equal protection violation because, "removing the legacy of sexual discrimination . . . from our nation's educational institutions is an important governmental objective"); *see also* Equity in Athletics, Inc. v. Dep't of Educ., 504 F. Supp. 2d 88, 112 (W.D. Va. 2007) (denying a preliminary injunction to an association of sports participants, coaches, and fans challenging the Department of Education's Title IX regulations); Gonyo v. Drake Univ., 837 F. Supp. 989, 996 (S.D. Iowa 1993) (finding no Title IX violation when university terminated men's wrestling program because males were effectively accommodated by the athletic program overall).

105. *See, e.g.*, *Cohen IV*, 101 F.3d at 163 (finding Title IX violation when university reduced spending for both women's and men's sports); Favia v. Ind. Univ. of Pa., 7 F.3d 332, 335–36 (3d Cir. 1993) (holding that elimination of two men's teams and two women's teams was discriminatory to women because of greater financial impact and greater loss of athletic opportunity for women).

106. *See Cohen IV*, 101 F.3d at 187 (stating that the history of program expansion was not adequately demonstrated by mere demotion or elimination of several men's teams when only one new women's team had been added to university's athletic program since the 1970s); Pederson v. La. State Univ., 912 F. Supp. 892, 916 (M.D. La. 1996) (finding that the history of program expansion was not adequately demonstrated when no new women's teams had been added for 14 years), *aff'd*, 213 F.3d 858 (5th Cir. 2000); Roberts v. Colo. State Univ., 814 F. Supp. 1507, 1514 (D. Colo. 1993) (holding that the mere fact that university now offers women's teams is not evidence of program expansion for women), *aff'd*, 998 F.2d 824 (10th Cir. 1993).

107. *See* 2010 DCL, *supra* note 20; *see also Three-Part Test*, *supra* note 12 (listing factors to be considered, among others, in OCR's determination of "history and continuing practice of program expansion" for the underrepresented sex).

108. *See Three-Part Test*, *supra* note 12 (noting permissibility for institution to eliminate teams as means of complying with part one of test, but not as means of complying with parts two or three); *see also Cohen IV*, 101 F.3d at 166 (holding that elimination of men's teams did not constitute expansion of women's opportunities); *Roberts*, 814 F. Supp. at 1514–15 (holding that increased proportion of women athletes, accomplished by cutting men's athletic opportunities, did not constitute program expansion).

109. *See* 2010 DCL, *supra* note 20; *see also Three-Part Test*, *supra* note 12 (An institution must "fully and effectively" accommodate the "interests and abilities of its students who are members of the underrepresented sex," but is not required to "accommodate the interests and abilities of potential students."); Horner *ex rel.* Horner v. Ky. High Sch. Athletic Ass'n, 206 F.3d 685, 696; (6th Cir. 2000); *Boulahanis*, 198 F.3d at 635 (stating that under Title IX, an institution is "required to 'provide equal

determine that this standard is met, OCR takes into account: (1) unmet interest in a sport, (2) an institution's ability to effectively sustain a team in a particular sport, and (3) a reasonable expectation of available competition for the team.[110] Either OCR, in the case of an investigation or review, or the plaintiff in a private suit bears the burden of proof of showing that the institution is not in compliance with part three of the test.[111] Even if these considerations are met, an institution may still be required to remedy historic discrimination by fostering new opportunities for the underrepresented sex.[112]

2. Qualification as a Sport

While the Department of Education provides schools with the three-prong test to determine whether there are equal athletic opportunities available for both sexes, it does not provide schools with a specific definition of a "sport."[113] In 2008, OCR issued guidance that helps schools "determine which intercollegiate or interscholastic athletic activities can be counted for the purpose of Title IX compliance."[114] OCR considers several factors related to an "activity's structure, administration, team preparation and competition" when determining whether an activity counts as a sport under Title IX.[115]

Because many schools are members of intercollegiate athletic organizations, like the National Collegiate Athletic Association ("NCAA"), the athletic organizations impose requirements that address the factors identified by OCR.[116] Thus, if the organizational requirements satisfy these factors, OCR will presume the sport can be counted under Title IX.[117] However, if the presumption does not exist or has been rebutted, OCR will then consider the factors above.[118]

Biediger v. Quinnipiac University illustrates how the Second Circuit applied OCR's factors in deciding whether competitive cheerleading could be counted as

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athletic opportunity' for men and women" and that "[e]qual opportunities are to be evaluated according to the following ten factors: (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; and (10) Publicity." In addition to these factors, an "institution may violate Title IX solely by failing to accommodate the interest and abilities of student athletes of both sexes."); Cohen v. Brown Univ. (*Cohen II*), 991 F.2d 888, 897–98 (1st Cir. 1993); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 828 (10th Cir. 1993).

110. *See* 2010 DCL, *supra* note 20, at 3; *see also Three-Part Test, supra* note 12.

111. *See Three-Part Test, supra* note 12.

112. *See* 2010 DCL, *supra* note 20, at 13.

113. Stephanie Monroe, *Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance*, OFF. FOR C.R., U.S. DEP'T EDUC. (Sept. 17, 2008), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html.

114. *Id.*

115. *Id.; see* 34 C.F.R. § 106.41(c).

116. Biediger v. Quinnipiac Univ., 691 F.3d 85, 94 (2d Cir. 2012).

117. *Id.*

118. *Id.*

a sport under Title IX. In *Biediger*, the Second Circuit concluded that competitive cheerleading does not qualify as a sport.[119] The court determined competitive cheerleading did not qualify as a sport based on an evaluation of the totality of the circumstances.[120] Noting that neither the NCAA nor the Department of Education recognizes competitive cheerleading as a sport, the district court "review[ed] the *structure, administration, team preparation, and competition* of Quinnipiac's competitive cheerleading program to determine whether it nevertheless qualified as a sport whose athletic participation opportunities should be counted for purposes of Title IX."[121] The court found that with the exception of two "minor" inconsistencies—namely, lack of locker space and lack of NCAA catastrophic injury insurance—the team was organized, structured, and administered equivalently to other varsity sports.[122]

However, the district court noted, and was ultimately persuaded by, a number of irregularities between the competitive cheerleading program and other varsity sports.[123] In particular, no uniform rules applied to competitive cheerleading competitions throughout the 2009–2010 season.[124] That is, five different scoring systems were used throughout the season, and competitions were not limited to intercollegiate teams.[125] Further, while most varsity sports would have used some sort of system to rank teams for post-season competition, there was no such system for the competitive cheerleading program.[126] Finally, Quinnipiac's competitive cheerleading team could not conduct any off-campus recruitment during the 2009–2010 season.[127]

The Second Circuit affirmed the district court's decision using an abuse of discretion standard.[128] However, the court went further and stated in dicta that even under a *de novo* standard, it would not have found Quinnipiac's competitive cheerleading program to be a varsity sport.[129] The Second Circuit's decision does not, however, sound the death knell for competitive cheerleading as a varsity sport. The court stated, "we do not foreclose the possibility that [competitive cheerleading], with better organization and defined rules, might someday warrant recognition as a varsity sport."[130]

The *Biediger* decision sheds light on how courts have decided which types of athletic activities are considered "sports" under Title IX. There is no bright-line

119. *Id.* at 105 (affirming the decision of the District Court for the District of Connecticut).
120. *Id.*
121. *Id.* at 103 (emphasis added).
122. *Id.* at 103–04.
123. *Id.* at 104.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 105.
129. *Id.*
130. *Id.*

rule by which the court will evaluate a team.[131] Rather, the assessment requires the examination and weighing of the many facets of a program.[132] Courts will determine whether a particular "activity qualifies as a sport by reference to several factors relating to 'program structure and administration' and 'team preparation and competition.'"[133] To dismiss a Title IX claim, the mere fact that a sport is not recognized by a particular organization, club, athletic or other league, or association is insufficient.[134]

3. Scholarships, Treatment, and Benefits

Beyond equalizing opportunities for participation in athletics, Title IX also requires that athletic scholarships, treatment, and benefits be equivalent amongst genders.[135] OCR evaluated whether males and females receive equal treatment and benefits by: (1) analyzing the availability of resources necessary to ensure equal opportunities for males and females, and (2) comparing the advantages provided to females and males program-wide.[136] Benefits include, but are not limited to, the following: equipment and supplies, scheduling of games and practice times, travel and per diems, opportunity to receive coaching and tutoring, assignment and subsidization of coaching and tutors, locker rooms, practice and competitive facilities, medical and training facilities and services, housing and dining facilities and services, and publicity.[137]

The receipt of outside sponsorship or funding for an athlete, team, or program does not relieve a school from the responsibility of ensuring equal treatment between females and males.[138] Furthermore, if a school enters into a partnership

131. *Id.*

132. *Id.*

133. Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 858 (9th Cir. 2014) (quoting Biediger v. Quinnipiac Univ., 691 F.3d 85, 105 (2d Cir. 2012)).

134. *Id.* (stating in dicta that, even if field hockey were not recognized by the California Interscholastic Federation, it could still be considered a sport).

135. *See* 34 C.F.R. §§ 106.41(c)(1)–(10) (2018).

136. *See Three-Part Test*, *supra* note 12 ("OCR examines the institution's program as a whole. Thus OCR considers the effective accommodation of interests and abilities in conjunction with equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes to determine whether an institution provides equal athletic opportunity as required by Title IX . . . . An institution's failure to provide nondiscriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.").

137. 34 C.F.R. §§ 106.41(c)(1)–(10) (2018); *see* McCormick v. Mamaroneck, 370 F.3d 275, 279 (2d Cir. 2004) (fathers sued school district on behalf of daughters, alleging that scheduling girls' soccer in the spring violated Title IX); Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 178 F. Supp. 2d 805, 855 (W.D. Mich. 2001) (holding state association's scheduling of athletic seasons in violation of Title IX), *aff'd*, 377 F.3d 504 (6th Cir. 2004), *vacated*, 544 U.S. 1012 (2005), *aff'd on remand*, 459 F.3d 676 (6th Cir. 2006), *cert. denied*, 549 U.S. 1322 (2007); *see also* Bill Pennington, *High School Sports: Title IX Trickles Down to Girls of Generation Z*, N.Y. TIMES (June 29, 2004), https://www.nytimes.com/2004/06/29/sports/high-school-sports-title-ix-trickles-down-to-girls-of-generation-z.html.

138. Chalenor v. Univ. of N.D., 291 F.3d 1042, 1048 (8th Cir. 2002); *see* Daniels v. Sch. Bd. of Brevard Cnty., 995 F. Supp. 1394, 1397 (M.D. Fla. 1997) (addressing disparity due to presence of booster club funds for boys' teams but not for girls).

with a funding group that either creates or exacerbates inequalities between female and male athletes, it can violate Title IX.[139]

B. INCREASED OPPORTUNITIES FOR PARTICIPATION IN TEAM SPORTS

Litigation is the primary means for establishing a Title IX cause of action. Claims brought under Title IX and the Equal Protection Clause are generally based on the argument that institutions have not accommodated the interests of female athletes under four different scenarios: (1) the institution has failed to create teams for women; (2) the institution has cut existing teams; (3) the institution has demoted the competitive level of an existing team; or (4) the institution has failed to provide sufficient scholarship money for female athletes.[140] These claims have largely been successful, especially when there is a proportional disparity between a school's female enrollment and the number of females who participate in sports teams.

Educational institutions may operate single-sex teams and possess flexibility in which sports they decide to offer for each sex.[141] When a school fields a team for a non-contact sport and only offers that sport to one sex, the school must allow members of the opposite sex to try out for the team.[142] In such cases, athletic opportunities for the excluded sex must have been historically limited, and the student must be sufficiently able to compete on the team.[143] By contrast, when fielding a team for a contact sport, the institution may allow or prohibit members

139. *Chalenor*, 291 F.3d at 1048; *Daniels*, 995 F. Supp. at 1396.

140. *See, e.g.*, Pederson v. La. State. Univ., 213 F.3d 858, 864 (5th Cir. 2000) (discussing claims of female students who sued to force university to create women's fast pitch softball and soccer teams); Boucher v. Syracuse Univ., 164 F.3d 113, 115 (2d Cir. 1999) (concerning suit brought by female students against university alleging discrimination against female athletes in allocation of participation opportunities and benefits, including scholarships, to athletes); Cohen v. Brown Univ. (*Cohen IV*), 101 F.3d 155, 161 (1st Cir. 1996) (examining arguments of students on women's gymnastics and volleyball teams against private university alleging Title IX violations for demotion from university-funded status to donor-funded varsity status); Roberts v. Colo. State Univ., 814 F. Supp. 1507, 1519 (D. Colo. 1993) (finding a Title IX violation when university terminated women's varsity softball team), *aff'd* in part, *rev'd* in part on other grounds, 998 F.2d 824 (10th Cir. 1993); Cook v. Colgate Univ., 992 F.2d 17, 18 (2d Cir. 1993) (dismissing suit to attain varsity status for women's club hockey team as moot because plaintiffs were graduating); Favia v. Ind. Univ. of Pa., 7 F.3d 332, 344 (3d Cir. 1993) (upholding preliminary injunction ordering reinstatement of women's varsity field hockey and gymnastics programs).

141. *See* 34 C.F.R. § 106.41(b) (2018) ("[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."); *see also Policy Interpretation*, *supra* note 12.

142. *See* 34 C.F.R. § 106.41(b) (2018) ("[W]here a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.").

143. *See id.*

of the opposite sex to participate.[144] However, once a school allows a member of the opposite sex to try out for a contact sport, the school becomes subsequently liable to that individual for any future denial of equal treatment.[145]

C. DISCRIMINATION AGAINST TRANSGENDER STUDENT-ATHLETES

To establish a prima facie case of discrimination in violation of Title IX, a plaintiff must allege that the discrimination was on the basis of sex.[146] In *Bostock v. Clayton County*, the Supreme Court found that the termination of a homosexual or transgender employee violates Title VII's prohibition on discrimination on the basis of sex. Relying on *Bostock*, in June 2021, the Department of Education released a Notice of Interpretation clarifying that Title IX's prohibition on discrimination on the basis of sex includes: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity.[147] Since *Bostock* and the Interpretation, some federal courts have found that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity, and the NCAA has issued new guidance relating to transgender student-athletes.

In *Bostock v. Clayton County*, the Supreme Court, with the majority opinion written by Justice Gorsuch, found that an employer violated Title VII "because of" the individual's sex by firing an individual for being homosexual or transgender.[148] While the majority opinion provides an expansion of workplace and hiring protections for the LGBTQ community, Justice Alito's dissent highlighted how the decision would impact Title IX.

Title VII is limited to employment discrimination while Title IX is limited to educational discrimination, and both prohibit discrimination on the basis of sex.[149] Moreover, both Title VII and Title VII are part of the same federal statute and apply the same wording concerning gender discrimination to educational and athletic programs receiving federal aid as Title VII does to employment.[150] In light of the textual similarities between the Title VII and Title IX, Justice Alito's dissent questioned the extent to which *Bostock* applies to Title IX if the definition of "on the basis of sex" is meant to be the same under Title VII and Title IX.

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144. *See id.* ("[C]ontact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact."); *see also Policy Interpretation*, *supra* note 12.

145. *See* Mercer v. Duke Univ., 401 F.3d 199, 201–02 (4th Cir. 2005).

146. Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015).

147. Enforcement of Title IX in Light of Bostock v. Clayton County, 86 Fed. Reg. 32637-01 (effective June 22, 2021) (to be codified in 34 C.F.R Chapter I).

148. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1742 (2020).

149. *Id.*

150. Gregory Marino & Andrew Lee, *Bostock: How Will the Supreme Court's Landmark Civil Rights Decision Play Out In Sports?*, FOLEY & LARDNER LLP INSIGHTS (Aug. 10, 2020), https://www.foley.com/en/insights/publications/2020/08/bostock-supreme-courts-civil-rights-sports.

If *Bostock*'s Title VII definition of "on the basis of sex" is imported into Title IX's definition, then laws that bar transgender athletes from participating in female competitions would likely violate Title IX.[151] Similarly, cases where cisgender female athletes have challenged school policies that allow for transgender athletes to compete are likely at odds with the definition of "on the basis of sex" in *Bostock*.[152]

In January 2021, the Biden administration issued Executive Order 13988, which explains that *Bostock's* reasoning applies with equal force to other laws prohibiting sex discrimination.[153] The Civil Rights Division of the Department of Justice, which is responsible for the coordination of the implementation and enforcement of Title IX, concluded in March 2021 that Title IX prohibits discrimination on the basis of gender identity and sexual orientation.[154]

In June 2021, DOE issued a Notice of Interpretation ("Interpretation") clarifying its previously inconsistent position on whether Title IX's prohibition on sex discrimination encompass discrimination based on sexual orientation and gender identity.[155] The Department's interpretation primarily relies on *Bostock v. Clayton County*. However, the Interpretation also cites three reasons as to how the Department concluded that Title IX, like Title VII, prohibits discrimination based on gender identity and sexual orientation: (1) the textual similarities between Title IX and Title VII; (2) other federal case law analyzing Title IX claims under *Bostock*; and (3) the conclusion from the Civil Rights Division of the Department of Justice that *Bostock* applies to Title IX.[156]

The Interpretation confirms that OCR will "fully enforce" these prohibitions under Title IX provided that any complaints of potential violations meet certain

151. Hecox v. Little, 479 F. Supp. 3d 946, 943–44 (D. Idaho 2020) (where two transgender women sued Idaho over its Fairness in Women's Sports Act which prohibits transgender women from competing on women's sports teams at public schools).

152. Soule by Stanescu v. Conn. Ass'n of Sch.s, Inc., No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021) (involving a challenge to the transgender policy of a state athletic conference which permitted transgender students to participate in sex-segregated sports consistent with the gender identification of the student in school records and daily life activities in school).

153. *See* Enforcement of Title IX in Light of Bostock v. Clayton County, 86 Fed. Reg. 32637-01 (effective June 22, 2021) (to be codified in 34 C.F.R Chapter I).

154. Pamela S. Karlan, *Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972*, U.S. DEP'T OF JUST. C.R. DIV. (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/download.

155. *See* Enforcement of Title IX in Light of Bostock v. Clayton County, 86 Fed. Reg. 32637-01; *see also* Sandra Battle & T.E. Wheeler II, *Dear Colleague Letter*, OFF. FOR C.R., U.S. DEP'T EDUC. & U.S. DEP'T JUST. 2 (Feb. 22, 2017) (previous guidance removing certain protections for transgender students), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

156. *See* Susan Keating Anderson & Ahmer Sheriff, *U.S. Department of Education Issues New Interpretation Providing Protection Against Discrimination Based on Sexual Orientation and/or Gender Identity Under Title IX*, ROETZEL EDUC. LAW ALERT (June 17, 2021) https://www.ralaw.com/media/insights/Education%20Law%20Alert/u_s_department_of_education_issues_new_interpretation_providing_protection_against_discrimination_based_on_sexual_orientation_and_or_gender_identity_under_title_ix.

standards.[157] It further describes potential violations to include "allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity."[158] Notably, the Interpretation does not contain any discussion of what is now required of school districts in terms of Title IX policies and/or the employee training requirement contained in the 2020 Amendments to Title IX.[159]

Prior to *Bostock*, some courts have prohibited discrimination against transgender students on the basis of gender identity.[160] Since *Bostock*, numerous federal courts have relied on *Bostock* in finding that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity.[161]

Hecox v. Little and *Soule v. Connecticut* are both pending cases that both directly address the inclusion of transgender athletes at the college and high school level, respectively.[162] In *Hecox v. Little*, two transgender women sued Idaho over its Fairness in Women's Sports Act, which bans transgender women from competing on women's sports teams at public schools. The plaintiff relies on Title IX's protections in attempting to strike down the law.[163] While the court issued a preliminary injunction against the Act in August of 2020, as of January 2022, the case is still pending in the Ninth Circuit.[164]

In *Soule v. Connecticut*, female cisgender athletes in Connecticut are suing a local interschool athletic conference for its inclusive gender policy, claiming it unfairly allowed transgender athletes to dominate track and field events intended

157. *Id.* (stating that complaints must "meet[] the jurisdictional requirements in Title IX and its regulations, 'other applicable legal requirements,' and the standards contained in OCR's Case Processing Manual.") (quoting the Interpretation).

158. *See* Enforcement of Title IX in Light of Bostock v. Clayton County, 86 Fed. Reg. 32637-01.

159. *See* Pamela S. Karlan, *supra* note 154.

160. *See* Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049–50 (7th Cir. 2017) (finding that the school district likely violated Title IX by excluding a transgender boy from the boys' restroom); Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221–22 (6th Cir. 2016) (per curiam) (holding that a school district who sought to exclude a transgender girl from the girls' restroom would likely not succeed on its claim because Title IX prohibits discrimination based on sex stereotyping and gender nonconformity).

161. *See*, e.g., Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *petition for cert filed*, No. 20-1163 (Feb. 24, 2021); Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1305 (11th Cir. 2020) (ruling for student plaintiff on Title IX question) *vacated and superseded by* 3 F.4th 1299 (July 14, 2021) (declining to reach the Title IX question); Koenke v. Saint Joseph's Univ., No. CV 19-4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); Doe v. Univ. of Scranton, No. 3:19-CV-01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020).

162. *See* Gregory Marino & Andrew Lee, *supra* note 150.

163. *Id.*

164. *Hecox v. Little*, AM. C.L. UNION (Apr. 11, 2022), https://www.aclu.org/cases/hecox-v-little.

for cisgender competitors.[165] In March 2021, a Connecticut District Court dismissed the suit, and as of January 2022, the Second Circuit has yet to rule on the plaintiff's appeal of the dismissal.[166]

In January 2022, the NCAA released new guidance regarding athletic participation of transgender athletes. The guidance states that eligibility requirements will be determined by each sport's national governing body as opposed to the 2010 uniform policy based on hormone requirements. Additionally, beginning with the 2022 winter championships, transgender athletes must document their testosterone levels, which must comply with their specific sport, four weeks before the sport selects of championship participants. If a sport's national governing body does not have a policy, then the international federation's policy will be used. If the international federation does not have a policy, then International Olympic Committee policy will be used.[167] The policy likely cannot be challenged by student-athletes under Title IX because the Supreme Court has held that the NCAA is not subject to the requirements of Title IX despite receiving dues payments from recipients of federal funds.[168]

D. Discrimination Against Coaches and Other Athletic Officials

The scope of Title IX provisions is not limited to athletes themselves; coaches and other athletics officials are also protected from sex-based discrimination when the discrimination is based on the employee's gender. To outline the scope of Title IX in the context of athletics, the Office of Civil Rights (OCR) has promulgated 45 C.F.R. § 86.41, which specifically states that one's sex shall not cause a person to be treated differently in athletics, nor excluded from, or denied the benefits of athletics.[169] Further clarifying this regulation, the OCR published a policy interpretation stating that there is a violation of section 86.41 "where compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability."[170] This provision creates tension because coaches and officials associated with women's athletic teams and programs are generally paid less than they would be if they were associated with men's athletics teams and programs.[171] Given this disparity, officials and coaches

165. Gregory Marino & Andrew Lee, *supra* note 150.

166. Soule v. CT Conn. Ass'n of Sch.s, Am. C.L. Union (Apr. 11, 2022), https://www.aclu.org/cases/soule-et-al-v-ct-association-schools-et-al.

167. *Board of Governors Update Transgender Participation Policy*, Nat'l Coll. Athletic Ass'n (Jan. 19, 2022), https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx.

168. Nat'l Coll. Athletic Ass'n v. Smith, 525 U.S. 459 (1999).

169. Discrimination on the Basis of Sex in Education Programs or Activities Prohibited, 45 C.F.R. § 86.41 (1975).

170. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 239 (Dec. 11, 1979) (codified 45 CFR § 26).

171. *See generally Pay Inequity in Athletics*, Women's Sports Found. (July 20, 2015), https://www.womenssportsfoundation.org/articles_and_report/pay-inequity/; Tom Hopkins, *Unequal Pay Between Basketball Coaches Highlights Gender Income Inequality*, Recorder (Apr. 3, 2019), https://

have sued for equal pay under Title IX, Title VII, and the Equal Pay Act of 1963.[172]

E. BOOSTER CLUBS, PRIVATE SPONSORSHIP, AND REVENUE-PRODUCING SPORTS

Given that much of the tension surrounding Title IX compliance concerns a finite pool of available funding that a school must distribute among many athletic teams, schools often look to outside sources as a means of supplementing their own financial resources; the use of such outside funding must also be in compliance with Title IX's requirements.[173] Neither Title IX nor OCR's policy directives disallow private sponsorship; OCR simply warns that Title IX's equality directive necessarily implies that any supplemental funding be evenly allocated between the sexes.[174] In fact, at least one court has explicitly stated that outside funding for athletics programs, whether through booster clubs or outside donors, becomes transformed into public funds upon receipt by a school and thus must be disbursed impartially between male and female student athletes.[175]

In *Chalenor*, male student wrestlers sued a public university, alleging that its elimination of the men's wrestling team violated Title IX.[176] The male wrestlers argued that the team was eliminated due to a discriminatory motive: to attain proportionality between the gender composition of athletic teams and the gender composition of the student body.[177] However, the university argued that it eliminated the team due to a permissible, non-discriminatory motive: to improve gender balance in the context of budget cuts.[178] The wrestlers denied that budget cuts were the true motive for eliminating the team, because a private donor offered to fund the program, and thus, the university could have eliminated the team's funding without canceling the entire program.[179] The Eighth Circuit rejected the

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centralrecorder.org/64139/news/unequal-pay-between-basketball-coaches-highlights-gender-income-inequality/.

172. *See* 29 U.S.C. § 206(d)(1) ("[N]o employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .").

173. *See Paying for the Playing Field: Booster Clubs, Funding, School Sports and Title IX*, NAT'L WOMEN'S L. CTR. (May 16, 2011), https://nwlc.org/wp-content/uploads/2015/08/booster_myths_final_5.26.11.pdf.

174. *See Title IX Compliance*, *supra* note 16.

175. *See* Chalenor v. Univ. of N.D., 291 F.3d 1042, 1048 (8th Cir. 2002) ("Once a university receives a monetary donation, the funds become public money, subject to Title IX's legal obligations in their disbursement."); *see also* Daniels v. Sch. Bd. of Brevard Cnty., 995 F. Supp. 1394, 1396–97 (M.D. Fla. 1997) (requiring the high school to alter certain aspects of its athletics program where boys' teams enjoyed numerous benefits beyond what girls' teams were offered, even though the disparity was based solely on contributions of booster club).

176. *Chalenor*, 291 F.3d at 1048.

177. *Id.*

178. *Id.*

179. *Id.*

team's argument, stating that "once a university receives a monetary donation, the funds become public money, subject to Title IX's legal obligations in their disbursement."[180] Therefore, outside funding is not a defense for a university that provides more than substantially proportionate athletic opportunity to one gender in violation of Title IX.[181]

The Eighth Circuit's determination in *Chalenor* that outside funding is not a defense for disproportionate athletic opportunity for one gender is further supported by previous communications from OCR. A 1995 OCR letter states that outside funding is permissible and need not be shared amongst teams, but there is still a responsibility "to insure that benefits, services, treatment and opportunities overall, regardless of funding source, are equivalent for male and female athletes."[182] The implication of *Chalenor* and the OCR letter is that although outside funding is permissible for specific teams, it does not suddenly permit disproportionate athletic opportunity for one gender in violation of Title IX.

Beyond booster clubs and private sponsorship, some athletic programs attempt to escape Title IX's mandates by claiming a self-sufficiency argument. Such an argument posits that certain teams such as football or basketball generate enough revenue through ticket and merchandise sales to sustain their own program and in some cases are even profitable enough to warrant sharing their income with teams that are not self-sustaining.[183] However, self-sufficient, revenue-producing teams are not exempt from Title IX.[184] Such an exemption would require congressional action, because Congress has explicitly placed the issue within its purview by previously rejecting or failing to act on proposals to exempt certain revenue-producing teams from Title IX.[185]

F. RETALIATION AGAINST WHISTLEBLOWERS

Title IX standing not only applies to direct victims of discrimination, but has also come to apply to whistleblowers who bring claims on behalf of others who experience sex-based discrimination. In March 2005, the U.S. Supreme Court decided *Jackson v. Birmingham Board of Education*.[186] In *Jackson*, the Court unprecedentedly expanded the scope of standing for Title IX plaintiffs. The Supreme Court held that Title IX's protections encompassed the claim of a plaintiff basketball coach who, though not a direct victim of sex discrimination, was fired in retaliation for complaining of sex-based discrimination against his players. The impact of this decision extends beyond the realm of Title IX, as *Jackson*

180. *Id.*
181. *Id.*
182. U.S. Dep't of Educ., Off. of C.R., *Opinion Letter* (Feb. 7, 1995), https://www2.ed.gov/about/offices/list/ocr/letters/jurupa.html.
183. *See* SEC. EDUC. COMM'N ON OPPORTUNITY ATHLETICS, U.S. DEP'T OF EDUC., OPEN TO ALL: TITLE IX 31, 36 (2003), http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf.
184. *Id.*
185. *Id.*
186. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 170 (2005).

is also cited to protect the rights of whistleblowers in civil rights cases that are not directly linked to gender discrimination.

1. *Jackson v. Birmingham* in the Lower Courts

In 2001, Roderick Jackson filed suit against the Birmingham Board of Education alleging that the Board retaliated against him in violation of Title IX.[187] Jackson, a women's basketball coach, claimed the Board terminated him from his coaching position after he raised concerns about unlawful sex discrimination against his athletes.[188] The District Court of the Northern District of Alabama dismissed the claim on the grounds that Jackson lacked standing to assert a Title IX sex discrimination claim.[189] Specifically, the court declined to sustain Jackson's claim because, as the coach of the team and not one of the female players, he was not the target of the discrimination.[190] Additionally, the court rejected the notion that Title IX created a private cause of action for retaliation.[191]

The Eleventh Circuit Court of Appeals affirmed the lower court's dismissal of Jackson's suit.[192] The court based its holding on *Alexander v. Sandoval,* in which the Supreme Court held that no private right of action exists to enforce the prohibition on disparate impact discrimination created by regulations under Title IX because Title VI itself prohibits only intentional discrimination.[193] Mirroring the logic in *Alexander v Sandoval*, the court found no "private right of action in favor of individuals who, although not themselves the victims of gender discrimination, suffer retaliation because they have complained about gender discrimination suffered by others."[194]

2. *Jackson* in the Supreme Court

The Eleventh Circuit's decision in *Jackson* created a split among the circuit courts.[195] After granting certiorari in 2004, the Supreme Court reversed the Eleventh Circuit and held, five to four, that "retaliation against a person because

187. Jackson v. Birmingham Bd. of Educ., No. CV-01-TMP-1866-S, 2002 WL 32668124, at *1 (N. D. Ala. Feb. 25, 2002).

188. *Id.* ("[Jackson] discovered that the girls' team was denied equal access to sports facilities and equipment, even being denied a key to the gymnasium.").

189. *Id.* at *2 (finding Jackson had no standing to assert a Title IX discrimination claim for the girls' basketball team because Jackson did not personally suffer loss or injury).

190. *Id.*

191. *Id.* at *2 (noting that retaliation claims may be made for discrimination in employment).

192. Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333, 1347 (11th Cir. 2002).

193. Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (finding no private right of action exists to enforce the prohibition on disparate impact discrimination created by regulations under Title IX because Title VI itself prohibits only intentional discrimination).

194. *Jackson*, 309 F.3d at 1347.

195. Peters v. Jenny, 327 F.3d 307, 317 (4th Cir. 2003) (holding that private right of action to enforce Title VI includes retaliation claims); Preston v. Virginia *ex rel.* New River Cmty. Coll., 31 F.3d 203, 206 (4th Cir. 1994) (identifying private right of action to enforce retaliation claims); *See* Litman v. George Mason Univ., 92 Fed. App'x 41, 42 (4th Cir. 2004) (identifying implied private right of action to enforce

that person has complained of sex discrimination is a form of intentional sex discrimination encompassed by Title IX's private cause of action."[196]

Justice O'Connor, writing for the majority, framed the question as "whether the private right of action implied by Title IX encompasses claims of retaliation."[197] The Court held that it did "where the funding recipient retaliates against an individual because he has complained about sex discrimination."[198] Although Jackson was not a female high school basketball player who was directly discriminated against, he was found to have standing.[199]

As coach, Jackson felt it was his duty to complain about the sexual discrimination facing his team. The Supreme Court declared that teachers and coaches, like Jackson, are 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."[200] The Court also looked to the practical effects of the ruling and recognized that if retaliation were permitted, individuals who witnessed discrimination "would be loathe to report it, and all manner of Title IX violations might go unremedied."[201] The Court held that retaliation claims must be permitted if Title IX's enforcement scheme is to have any real meaning.[202]

3. The Impact of *Jackson*

Jackson expanded the scope of standing to bring suit under Title IX.[203] Prior to *Jackson*, the only recognized plaintiffs were athletes who were directly discriminated against because of their sex.[204] After *Jackson*, the courts must not only allow claims based directly on sex discrimination, but also those based on the consequences of speaking out about sex discrimination.[205] Coaches are often better suited than student-athletes to bring Title IX claims because their position provides them with longevity and experience helpful in identifying Title IX grievances.[206] A student's tenure as an athlete is often too brief to allow her to

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Title IX extends to retaliation claims), *cert. denied*, 544 U.S. 960 (2005); *see also* Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242, 247 (5th Cir. 1997).

196. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005).

197. *Id.* at 171.

198. *Id.*

199. *Id.* at 178.

200. *Id.* at 181.

201. *Id.* at 180.

202. *Id.* ("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.").

203. *Id.*

204. *See* Atkinson v. LaFayette Coll., 460 F.3d 447, 455 (3d Cir. 2006) (vacating lower court's dismissal for lack of standing of Title IX retaliation claim and remanding for further proceedings consistent with Jackson).

205. *See id.*

206. *See* Dahlia Lithwick, *Man, I Throw Like a Woman: The Supreme Court Explores the Subtleties of Sex and Basketball*, SLATE (Nov. 30, 2004), http://www.slate.com/id/2110257/.

gain a sophisticated understanding of Title IX claims and remedies.[207] Coaches thus have the ability to act as whistleblowers for students who might otherwise be unable to recognize the discrimination or act effectively as self-advocates.[208]

Jackson's practical application is not limited to the realm of Title IX, however, as plaintiffs across the country already rely on it to bolster their own civil rights cases. Many of these cases mainly concern civil rights issues other than Title IX. For example, in *Gutierrez v. State of Washington, Department of Social and Health Services*, the plaintiff alleged discriminatory conduct in three adverse employment actions because of his national origin and in retaliation for his reporting of improper governmental conduct to the Office of Civil Rights of the Department of Health and Human Services.[209] The district court, citing *Jackson*, concluded that retaliation claims could be recognized under Title IX and Title VII and that the Supreme Court has applied the two statutes similarly.[210] Therefore, because *Jackson* held that standing exists in a claim for retaliation under Title IX, the court stated it must find standing for a retaliation claim under Title VII.[211]

But not every plaintiff has been successful under *Jackson*. Courts are wary of expanding the private right of remedy under section 503 of the Rehabilitation Act.[212] A federal district court in Kansas rejected the argument, holding that "[t]he Court will not infer a private right of action from regulations if the Tenth Circuit has held that the statute itself does not imply a private right of action. Regulations may not exceed the scope of the statute."[213] The court in *Jones* was wary of overstepping the bounds of the law drafted by Congress, regardless of the public policy implications.[214]

G. ALTERNATIVE CONSTITUTIONAL CLAIMS

Sex discrimination claims based on Title IX often implicate the Equal Protection Clause of the Fourteenth Amendment.[215] The Equal Protection Clause prohibits the government and other state actors from discriminating on the basis of sex.[216] For purposes of Title IX litigation, third-party athletic associations, in addition to traditional educational institutions, may be considered state actors

207. *Id.*
208. *Id.*
209. Gutierrez v. State of Wash., Dep't of Social & Health Servs., No. CV-04-3004-RHW, 2005 WL 2346956, at *1.
210. *Id.* (citing Cannon v. Univ. of Chi., 441 U.S. 677, 694–99 (1979)).
211. *Id.*
212. *See, e.g.*, Jones v. United Parcel Serv., Inc., 378 F. Supp. 2d 1312, 1314 (D. Kan. 2005).
213. *Id.*
214. *See id.*
215. *See* U.S. CONST. amend. XIV, § 1.
216. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (holding that University violated Equal Protection Clause when it refused a man admission to an all-female nursing school on basis of sex where there was no showing or an "exceedingly persuasive justification" for maintaining a single-sex school).

when their behavior exhibits a "close nexus" with the state itself.[217] To merit a showing of an "exceedingly persuasive" justification for a distinction based on sex, a state must show that this distinction serves an important governmental objective and that "the discriminatory means employed are substantially related to the achievement of [that] objective."[218]

Claims may also involve substantive equal protection violations brought under the Civil Rights Act of 1964, as promulgated by Title 42, Section 1983 of the United States Code.[219] Section 1983 claims may be brought against public educational institutions, some athletic associations, and school administrators.[220]

IV. TITLE IX ADMINISTRATION AND ENFORCEMENT

The government's role in administering and enforcing Title IX has historically been dependent upon the current administration's agenda. With each administration has come new interpretations, guidelines, and executive orders that have changed the landscape of what constitutes a Title IX violation and who is protected. The mission of the U.S. Department of Education's Office for Civil Rights (OCR) is to ensure equal access to education and to promote educational excellence through robust enforcement of civil rights in the nation's schools.[221] While OCR has always enforced civil rights laws to protect students from unlawful discrimination and harassment based on sex, the shifting interpretations of sexual discrimination has created varying degrees of Title IX administration and enforcement.

A. THE GOVERNMENT'S ROLE IN ADMINISTERING TITLE IX

OCR is the primary enforcer of Title IX of the Education Amendments of 1972. The government's role in administering Title IX comes through the vigorous enforcement of the Title IX statute by OCR to ensure that institutions receiving federal financial assistance from the Department comply with the law. With changing administrations there have been changes in the guidelines of what will be enforced under Title IX. From 2021, this shift has been illustrated by President Biden's actions and executive orders combating the Trump administration's rollbacks of Title IX policy guidelines relating to the enforcement of transgender student protections.

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217. *See* Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 692 (6th Cir. 2006) (quoting Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 291, 298 (2001)) ("so entwined with the public schools and the state of Michigan, and because there is 'such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself'").

218. *See* United States v. Virginia, 518 U.S. 515, 571–72 (1996); *see also Cmtys. for Equity*, 459 F.3d at 694 (finding that a high rate of female participation does not alone justify discriminatory scheduling of athletic seasons).

219. 42 U.S.C. § 1983.

220. *Id.*

221. *Resources for LGBTQI+ Students*, OFF. FOR C.R., U.S. DEP'T EDUC. (Oct. 26, 2021), https://www2.ed.gov/about/offices/list/ocr/lgbt.html.

1. Remedies Available

OCR aims to render private litigation unnecessary by working with schools to establish Title IX compliance plans. An individual may file a complaint with OCR, which may result in an administrative investigation of an educational institution.[222] Although OCR as an organization is not required to seek individual relief, the goal is that administrative action will yield quicker and cheaper relief to those seeking to enjoin discriminatory practices. After a sex discrimination complaint is filed with OCR against an institution receiving federal funding, OCR investigates the complaint and enforces compliance when it is found to be necessary.[223] In responding to a complaint, OCR first attempts to resolve the alleged sex discrimination through informal means.[224]

Once a determination is made that voluntary compliance is unobtainable, OCR may pursue enforcement proceedings in federal court with the assistance of the Department of Justice.[225] The final and most drastic measure at OCR's disposal is revocation of an educational institution's federal funding,[226] although the legislative history of Title IX describes withholding funds as a last resort.[227] OCR possesses the authority to enforce Title IX's affirmative remedy of withholding federal funding to schools that fail to comply with Title IX; it did so notably in 2018 by withholding millions of dollars in federal grant money from Chicago Public Schools District ("District") for Title IX violations.[228] OCR and the District reached a resolution agreement in September of 2019, creating actionable obligations and reporting requirements through 2023 for the District, of which failure to comply will lead to judicial proceedings or administrative enforcement.[229]

2. Recent Administrative Developments

Title IX jurisprudence has faced a shifting landscape based on different administration's respective ideologies. Enforcement guidelines issued by the Obama administration in the 2016 Dear Colleague Letter clarified that OCR and the DOJ "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations," and "that a school must not treat a transgender student differently from the way it treats other students of the same gender

222. 20 U.S.C. § 1682.

223. *Id.*

224. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 288 (1998) (stating that enforcement proceedings can only be commenced after the agency fails to achieve voluntary compliance and the alleged violator receives notice of its failure to comply and notice of the impending action to effect compliance).

225. 34 C.F.R. § 100.8 (2017).

226. *See* 20 U.S.C. § 1682.

227. Cannon v. Univ. of Chi., 441 U.S. 667, 705 n.38 (1979).

228. 34 C.F.R. § 106 (2020).

229. *See* U.S. DEP'T OF EDUC., *Resolution Agreement* (Sept. 12, 2019), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05151178-b.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

identity."[230] Along with the Obama administration's 2016 guidelines, the Department of Education issued a supplemental document containing examples of policy recommendations for supporting transgender students, specifically when it comes to allowing transgender students and student athletes to use restrooms and locker rooms consistent with their gender identity.[231]

In February 2017, the Trump administration withdrew Title IX enforcement guidelines issued by the Obama administration. Though the Trump administration withdrew the 2016 guidelines because they did not "contain extensive legal analysis or explain how the positions [are] consistent with the express language of Title IX,"[232] the administration notably did not withdraw the supplemental document of policy recommendations, which expressly supports allowing transgender students to use locker room facilities associated with their gender identity.[233] This implied that, regardless of the withdrawal of the 2016 Obama administration guidelines, transgender student athletes could possibly still establish a claim for relief under Title IX when denied access to locker rooms that correspond with their gender identity.[234] That hope for relief was dimmed by legal decisions early in the Trump administration, suggesting courts were deferential to the guideline rollback, thereby limiting the enforcement of Title IX protections for transgender students.[235]

The Trump administration and the Department of Education amended regulations implementing Title IX in a long-anticipated final rule that went into effect on August 14, 2020.[236] These regulations altered how universities manage sexual misconduct, and faced harsh criticism by advocacy groups who believed that the new interpretation placed new barriers in the way of survivors coming forward.[237] Announced by then-Secretary of Education Betsy DeVos, OCR's explanation for the rule is over 2,000 pages long and specifies fair grievance processes that provide due process protections to alleged perpetrators of sexual harassment or

230. Catherine E. Lhamon & Vanita Gupta, *Dear Colleague Letter*, OFF. FOR C.R., U.S. DEP'T EDUC. & U.S. DEP'T JUSTICE 2 (May 13, 2016), https://www.justice.gov/opa/file/850986/download.

231. *See Examples of Policies and Emerging Practices For Supporting Transgendered Students*, U.S. DEP'T OF EDUC. 7 (May 2016), https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf [hereinafter *Examples of Policies and Emerging Practices*].

232. *See* Battle & Wheeler, *supra* note 155.

233. *Examples of Policies and Emerging Practices*, *supra* note 231, at 7.

234. Meghan M. Pirics, *Undressing the Locker Room Issue: Applying Title IX to the Legal Battle Over Locker Room Equality for Transgender Student Athletes*, 27 MARQ. SPORTS L. REV. 449, 461 (Spring 2017).

235. *See, e.g.*, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016), *cert. granted in part*, 137 S.Ct. 369 (2016), *and vacated*, 2017 WL 855755 (Mar. 6, 2017) (remanding for Fourth Circuit to further consider the case in light of the Trump administration's February 2017 guidance document); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 297–301 (W.D. Pa. 2017) (discussing how the interpretation and application of Title IX claims to transgender students is "so clouded with uncertainty" in light of the Trump administration's rollback).

236. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020).

237. Meghan Downey, *The Trump Administration's New Title IX Rule*, REGUL. REV. (May 20, 2020), https://www.theregreview.org/2020/05/20/downey-trump-administration-title-ix-rule/.

assault, including the right to cross-examination and the reduction of the scope of sexual harassment that schools are required to adjudicate pursuant to their Title IX policies.[238]

The Biden administration was quick to begin the process of reversing Trump-era guidance to schools on how to investigate sexual harassment and assault under Title IX, reviving Obama administration guidance and policy.[239] In January 2021, Executive Order 13988, "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation," expanded forms of sex discrimination under Title IX to include discrimination on the basis of gender identity and sexual orientation.[240] The Executive Order cites the Supreme Court's decision in *Bostock v. Clayton County* that discrimination based on sexual orientation and gender identity involves treating individuals differently because of their sex.[241] The Court reached its conclusion in the context of Title VII, which is used to inform interpretations of Title IX, making clear that Title IX's prohibition on sex discrimination includes discrimination based on sexual orientation and gender identity.[242] In February 2021, the Biden administration and OCR withdrew the legal views authored by the Trump administration regarding a Connecticut lawsuit that sought to ban transgender athletes from participating in girls' high school sports.[243]

B. PRIVATE CAUSES OF ACTION

This section will discuss the proper parties for a private cause of action under Title IX as well as the available remedies, including injunctive and declaratory relief, compensatory and punitive damages, equitable relief, and attorneys' fees. It will also address the possible pre-emption of other civil rights claims by a Title IX claim.

1. Parties

a. Proper Plaintiffs. In a Title IX claim, an individual must assert that he or she was excluded from participating in, denied the educational benefits of, or discriminated against under "any educational program or activity receiving Federal financial assistance."[244] Before *Bostock,* only some courts recognized sexual

238. *Id.*

239. Exec. Order No. 13988 (2021).

240. *Id.*

241. *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1737 (2020). *See supra* Section III.C for a more in-depth discussion of *Bostock*.

242. *See Bostock*, 140 S. Ct. at 1737.

243. OFF. FOR C.R., U.S. DEP'T OF EDUC., *Withdrawal of Revised Letter of Impending Enforcement Action* (Feb. 23, 2021), https://www.aclu.org/sites/default/files/field_document/soule_et_al_v._ct_association_of_schools_et_al_-_doj_withdrawl_letter.pdf.

244. 20 U.S.C. § 1681(a).

orientation discrimination as violating Title IX.[245] Lower courts were split on whether Title IX provides transgender individuals with a cause of action, primarily due to ambiguity on whether Title IX includes "transgender" as a protected category.[246] A student's parent only has standing to bring a personal Title IX claim as the student's next friend.[247] Post-*Jackson*, proper plaintiffs also include those who speak out about gender discrimination and face retaliation by an educational institution.[248] In June 2021, the Department of Education issued an interpretation to clarify that, in light of *Bostock* v. *Clayton County*, Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity, further broadening the scope of proper plaintiffs.[249] Additionally, the Department of Education's Office of Civil Rights has created equal access for students who are lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, and individuals who identify their sexual orientation or gender identity in other ways (LGBTQ) be proper plaintiffs in the face of unlawful discrimination and harassment on the basis of sex.[250]

b. Proper Defendants. All federally-funded education activities and programs may be liable for sex discrimination under Title IX.[251] Although officials cannot be held personally liable for violating Title IX,[252] they may be named as

245. *See, e.g.*, Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (holding that claims of discrimination based on sexual orientation are covered by Title VII and Title IX as gender stereotype or sex discrimination).

246. *See, e.g.*, Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1047–48 (7th Cir. 2017) (holding that transgender students may bring sex-discrimination claims under Title IX based on sex-stereotyping); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 299 (W.D. Pa. 2017) (denying a transgender student's request for preliminary injunctive relief on Title IX grounds because the interpretation and application of Title IX claims to transgender students is "so clouded with uncertainty" that the court could not reasonably conclude the likelihood of success on the merits); Johnston v. Univ. of Pittsburgh of Commonwealth Sys. of Higher Educ., 87 F. Supp. 3d 657, 674 (W.D. Pa. 2015) (holding that transgender is not a protected characteristic under Title IX).

247. *See, e.g.*, Haines v. Metro. Gov't of Davidson Cnty., 32 F. Supp. 2d 991, 1000 (M.D. Tenn. 1998) (holding that father of student alleging peer sexual harassment possessed standing as student's next friend).

248. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005).

249. Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed. Reg. 32637 (June 22, 2021).

250. *Resources for LGBTQI+ Students*, OFF. FOR C.R., U.S. DEP'T EDUC. (Oct. 26, 2021), https://www2.ed.gov/about/offices/list/ocr/lgbt.html.

251. 20 U.S.C. § 1687 (defining a "program or activity" as: state or municipal department, agency, special purpose district, or other instrumentality; college, university, or other postsecondary institution, or public system of higher education, or local educational agency, system of vocational education, or other school system; or private corporations and organizations in receipt of federal finding as a whole or is principally engaged in business or providing education, health care, housing, social services, or parks and recreation).

252. *See, e.g.*, Floyd v. Waiters, 133 F.3d 786, 789 (11th Cir. 1998) (quoting Smith v. Metro. Sch. Dist. Perry Township, 128 F.3d 1014, 1019 (7th Cir. 1997)) ("[B]ecause the contracting party is the grant-receiving local school district, a 'Title IX claim can only be brought against a grant recipient [-that

defendants in their official capacities.[253] Certain tax-exempt organizations are exempt from Title IX,[254] as are private educational organizations that do not receive direct federal funding.[255] However, the Civil Rights Restoration Act mandates that every educational institution must comply with Title IX if any part of it receives federal funds.[256] As a result, the most common defendants are educational institutions and school boards.[257]

2. Remedies in a Private Cause of Action

Title IX provides for the cessation of federal funds to institutions in violation of the law.[258] While the text of Title IX does not expressly allow private parties to bring suit, the Supreme Court recognizes an implied private right of action.[259] A plaintiff may bring his or her claim directly before the court without exhausting

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is, a local school district-] and not an individual.'"), *vacated*, 525 U.S. 802 (1998), *reinstated and remanded*, 171 F.3d 1264 (11th Cir. 1998); Doe v. Hillsboro Indep. Sch. Dist., 81 F.3d 1395, 1400 n.9 (5th Cir. 1996) (finding that individuals may not be liable for Title IX violations), *rev'd on other grounds en banc*, 113 F.3d 1412 (5th Cir. 1997); Lipsett v. Univ. of P.R., 864 F.2d 881, 901 (1st Cir. 1998) (holding chancellor of medical school not individually liable for Title IX violation because "separate liability of the supervisory officials at the University must be established, if at all, under section 1983, rather than under Title IX."), *superseded by statute on other grounds*, 42 U.S.C. §§ 1981, 1988, 2000; Nelson v. Temple Univ., 920 F. Supp. 633, 638 (E.D. Pa. 1996) (holding that individuals acting in their personal capacities cannot be held personally liable because they are not recipients of federal financial assistance).

253. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) ("An 'appropriate person' . . . is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination.").

254. 20 U.S.C. §1681(a) (explaining that Title IX's exemption applies to some religious schools, military schools, undergraduate admissions policies of public higher education institutions that traditionally and continuously admit students of only one gender, social fraternities and sororities, Boy and Girl Scout activities, father-son and mother-daughter activities at educational institutions, and scholarships awarded in beauty pageants).

255. Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 470 (1999) (finding that receipt of dues from institutions who receive federal funds did not suffice to characterize NCAA as a recipient of federal financial assistance for the purposes of Title IX).

256. 20 U.S.C. § 1687(3)(A)(ii).

257. *See, e.g.*, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 632–33 (1999) (examining a private action for damages against the school board and school officials for failing to remedy a student-on-student sexual harassment); Cannon v. Univ. of Chi., 441 U.S. 677, 680 (1979) (dealing with Title IX sex discrimination suit against two private universities who denied admission to a female student).

258. *See* 20 U.S.C. § 1682; *Cannon*, 441 U.S. at 695–96 (likening Title IX to Title VI, the Court held that "both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination. Neither statute expressly mentions a private remedy."); Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333, 1337 (11th Cir. 2002) ("The primary enforcement mechanism . . . is cessation of federal funding."), *rev'd on other grounds*, 544 U.S. 167, 173 (2005); Lakoski v. James, 66 F.3d 751, 754 (5th Cir. 1995) (finding the sole remedy expressly provided for violations of Title IX is termination of federal funding).

259. *Cannon*, 441 U.S. at 703 (finding a private right of action for a woman denied admission to two medical schools, stating, "we have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of prohibited discrimination."); *see also* Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380, 383 (5th Cir. 2000).

administrative remedies first.[260] In deciding the merits of the claim, courts can award any appropriate relief, including injunctive and declaratory relief, equitable relief, and in specific cases, compensatory and punitive damages.[261] When arriving at its decision, the court must account for the limitation that Title IX is designed to hold the institution liable for its own official decisions, not the independent actions of its employees.[262]

a. Injunctive and Declaratory Relief. Due to the concern that the passage of time could render many claims moot, injunctive and declaratory relief are available in almost every Title IX claim.[263] Student athletes are more likely to seek injunctive relief under Title IX where the individual plaintiff is likely to graduate before the claim is adjudicated, thereby rendering their claim moot.[264]

In these cases, preliminary injunctions serve as the first step toward legal relief for the original plaintiffs.[265] Pursuit of injunctive relief, however, does not always avoid problems of mootness, as plaintiffs may still graduate from the institution they are suing before the court decides the case.[266] In light of this predicament, claimants utilize class certification, with varying degrees of success, to file a Title IX claim on behalf of those "similarly situated."[267]

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260. *See Cannon*, 441 U.S. at 687 n.8.

261. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 73 (1992) (finding full range of remedies available due to lack of contrary indication in either Title IX's text or legislative history); *see also* Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 756 (2d Cir. 1998) (identifying several remedies available including equitable and compensatory relief), *abrogated on other grounds by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

262. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290–91 (1998); *see also* Shrum v. Kluck, 249 F.3d 773, 782–83 (8th Cir. 2001) (holding that Title IX limits school district's damages to prevent risk that it will be liable for actions of independent employees rather than merely for its own misconduct).

263. *See, e.g., Franklin*, 503 U.S. at 60 (holding that successful Title IX claimant entitled to at least injunctive relief); Beasley v. Ala. State Univ., 966 F. Supp. 1117, 1127 (M.D. Ala. 1997). *But see* Grandson v. Univ. of Minn., 272 F.3d 568, 574 (8th Cir. 2001) ("That a plaintiff lacks eligibility or is no longer a student is an adequate basis to dismiss an individual Title IX claim for injunctive relief.").

264. *See* Pederson v. La. State Univ., 213 F.3d 858 (5th Cir. 2000) (granting injunctive relief under Title IX to force LSU to create a women's soccer team); Favia v. Ind. Univ. of Pa., 7 F.3d 332, 339 (3d Cir. 1993) (finding injunction valid even though several named representatives of certified class had graduated since its issuance).

265. *See, e.g.*, Cohen v. Brown Univ. (*Cohen I*), 809 F. Supp. 978, 1001 (D.R.I. 1992) (granting preliminary injunction imposing reinstatement of women's volleyball and gymnastics teams to varsity status).

266. *See, e.g.*, Soule v. Conn. Ass'n of Sch.s, Case No. 3:20-cv-00201 (RNC), 12–14 (D. Conn. Apr. 25, 2021) (finding a request to enjoin a sport participation policy moot because the affected students had graduated); Cook v. Colgate Univ., 992 F.2d 17, 18 (2d Cir. 1993) (dismissing claim to reinstate varsity status for women's club hockey team as moot because plaintiffs were graduating).

267. *See, e.g.*, *Pederson*, 213 F.3d at 873–74 (finding injunctive relief not moot for the putative class of women interested in soccer, but not available for named plaintiffs who were no longer available to play); Boucher v. Syracuse Univ., 164 F.3d 113, 115 (2d Cir. 1999) (finding injunctive relief moot if named plaintiffs graduate, unless class is certified). *But see Favia*, 7 F.3d at 342 (holding injunction valid, despite the fact that several named representatives of certified class had graduated since its issuance).

Preliminary injunctive relief is appropriate if the plaintiff's and public's relative interest outweighs the defendant's interest in continuing its conduct.[268] In cases where injunctive relief is appropriate, courts often order the defendant institution to propose its own compliance plan.[269] The defendant institution's plan must conform to both Title IX and the Equal Protection Clause. Decisions regarding Title IX compliance plans must take into account many institution-specific factors. In addition, although schools may eliminate opportunities and resources for men as a part of Title IX compliance plan, courts generally take a negative view of such actions if they are likely to provoke a backlash against female student athletes.[270]

b. Compensatory Damages. Monetary damages may be available in private actions[271] where injunctive or equitable relief is deemed an inadequate remedy.[272] Courts maintain a strict standard to determine whether damages are recoverable.[273] The Supreme Court has limited the availability of monetary damages to cases in which there is intentional discrimination.[274] An educational institution may be liable for damages resulting from the misconduct of its employees[275] or its students[276] only when the school district has actual notice of and is deliberately indifferent to the harassing situation.

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268. Cohen v. Brown Univ. (*Cohen II*), 991 F.2d 888, 902 (1st Cir. 1993).

269. *See* Cohen v. Brown Univ. (*Cohen IV*), 101 F.3d 155, 185–88 (1st Cir. 1996) (finding district court in error for fashioning specific relief instead of ordering Brown to develop compliance plan); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993) (holding that the district court exceeded its authority in requiring university to permit softball team to play fall exhibition season once it was reinstated).

270. *See, e.g.*, Daniels v. Sch. Bd. of Brevard Cnty., 995 F. Supp. 1394, 1397 (M.D. Fla. 1997) (rejecting a school plan because it was retaliatory and "essentially impose[d] 'separate disadvantage,' punishing both the girl and the boys, rather than improving the girls' team to the level the boys' team has enjoyed for years").

271. *See* Davis, v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 642 (1999) (finding that Title IX claims for monetary damages governed by the "deliberate indifference" standard); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

272. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992).

273. *See Gebser*, 524 U.S. at 292–93 (holding monetary damages available for teacher-on-student sexual harassment when an official has notice of harassment yet fails to respond); *Davis*, 526 U.S. at 651–56 (holding monetary damages available for peer sexual harassment when: (1) student was harassed due to sex, (2) harassment was "so severe, pervasive, and objectively offensive," (3) that it deprived student of "equal access to an institution's resources and opportunities," (4) that school officials had both actual notice of harassment and was deliberately indifferent to it, and (5) the school district exercised "substantial control" over harasser and context in which harassment occurred).

274. *Franklin*, 503 U.S. at 74–75.

275. *See Gebser*, 524 U.S at 292–93 (holding monetary damages available for teacher-on-student sexual harassment only when official, who has authority to make corrective action on behalf of district, has actual notice of, yet responds with deliberate indifference to, teacher's discrimination); *see also* P.H. v. Sch. Dist. of Kan. City, 265 F.3d 653, 663 (8th Cir. 2001) (dismissing Title IX claim for lack of evidence that defendant's policymakers had actual knowledge of employee's sexual misconduct).

276. *See Davis*, 526 U.S. at 629–33.

c. Punitive Damages. Courts reserve punitive damages for extreme violations of Title IX.[277] The Supreme Court interprets Title VI and Title IX similarly and has all but ruled out the possibility of punitive damages for Title VI.[278] The only appellate court that has addressed this issue in the context of college sports was the Fourth Circuit in *Mercer v. Duke University*. In *Mercer*, the court vacated a plaintiff's two-million-dollar award in punitive damages.[279] District courts continue to follow the precedent set in *Mercer*, indicating an unlikeliness that punitive damages would ever be awarded in the Title IX context.[280]

d. Equitable Relief. Title IX claimants may have access to equitable relief beyond injunctive relief alone.[281] Equitable relief will take different forms depending on the status of the plaintiff. One available form of equitable relief is that employees may receive front or back pay.[282] Students may also receive relief in the form of tuition payments.[283]

e. Attorneys' Fees. At its discretion, a court may award attorneys' fees to any prevailing party other than the United States government in a Title IX claim.[284]

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277. *See, e.g.*, Canty v. Old Rochester Reg'l Sch. Dist., 54 F. Supp. 2d 66, 69–70 (D. Mass. 1999) (holding school district was not immune from punitive damages due to an extreme violation of Title IX when evidence demonstrated that school officials knew about improper sexual conduct of athletic coach dating back to 1970s, but did not fire the coach until he was convicted of rape in 1997); *see also* Doe v. Oyster River Coop. Sch. Dist., 992 F. Supp 467, 487 n.17 (D.N.H. 1997) (finding that punitive damages available only in extreme cases).

278. *See* Barnes v. Gorman, 536 U.S. 181, 187 (2002) (stating that punitive damages are not available in Title VI or, by extension, Title IX cases because, "punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract.").

279. *See* Mercer v. Duke Univ., 190 F.3d 643 (4th Cir. 1999) (vacating award for punitive damages).

280. Jaeckle v. Flagler Coll., Inc., No. 3:19-CV-1323-J-32MCR, 2020 WL 5016901, at *3 (M.D. Fla. Aug. 25, 2020), *order clarified*, No. 3:19-CV-1323-J-32MCR, 2020 WL 5096587 (M.D. Fla. Aug. 28, 2020) ("[f]ollowing *Barnes*, *Mercer*, and *Liese*, and in the absence of authority allowing punitive damages in a private action under Title IX, the Court strikes Jaeckle's punitive damages claim from Count II of the Second Amended Complaint."); *see also* Doe v. Sch. Bd. of Miami-Dade Cnty., 403 F. Supp. 3d 1241, 1268–69 (S.D. Fla. 2019) ("In the absence of binding precedent to the contrary, the Court adopts Mercer's reasoning as the Court's own."); Ayala v. Omogbehin, No. CV-H-16-2503, 2016 WL 7374224, at *4 (S.D. Tex. Dec. 20, 2016) ("Although it is correct that damages are recoverable, it is clear that punitive damages are not recoverable under Title IX."); Minnis v. Bd. of Sup'rs of La. State Univ. & Agric. & Mech. Coll., 972 F. Supp. 2d 878, 889 (M.D. La. 2013) (granting motion to dismiss insofar as complaint sought punitive damages under Title IX.).

281. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 73 (1992) (stating that Title IX claimants may be awarded all appropriate remedies); *see also* Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 756 (2d Cir. 1998) (stating that Title IX claimants have access to full panoply of remedies, including equitable and compensatory relief), *overruled on other grounds by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

282. *See, e.g.*, Nelson v. Univ. of Me. Sys., 944 F. Supp. 44, 50 (D. Me. 1996) ("One of the remedies available is an award of back pay to Plaintiff.").

283. *See generally* Gadsby v. Grasmick, 109 F.3d 940, 955 (4th Cir. 1997) (remanding for consideration of school tuition as equitable relief).

284. *See* Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1079–80 (9th Cir. 1999) (finding that trial court should consider plaintiff's indigence and chilling effect that imposing high cost may have on future civil rights litigants when deciding whether to award attorneys' fees to prevailing defendant institution).

Under 42 U.S.C. § 1988(b), "prevailing parties in certain civil rights cases, including Title IX cases, are eligible, but not entitled, to receive attorney's fees."[285] Courts determine the amount of the award, if any, after considering (1) the relief sought compared to the relief obtained; (2) the significance of the legal issue on which the plaintiff prevailed; and (3) whether the litigation served a public purpose.[286]

f. Preemption. A plaintiff's constitutional claims are not preempted by a Title IX claim.[287]

V. STATE LAW

States may provide further protection from discrimination by state actors for non-cisgender-male individuals. For example, in *Darrin v. Gould*, the Washington Supreme Court determined that the state constitution's Equal Protection Clause and Equal Rights Amendment would not allow a school district to prevent qualified women from participating on a football team.[288] Many states have anti-discrimination statutes that prohibit sex discrimination at places of public accommodation, which would include public schools.[289] Because "public accommodation" is an expansive term, state statutes may be used to challenge discrimination in athletics occurring in contexts beyond the school setting. In *National Organization for Women v. Little League Baseball, Inc.*, a New Jersey appellate court held that the league's baseball fields were places of public accommodation under a state anti-discrimination law and that women could not be excluded from playing on the league's baseball teams.[290]

States may also affirmatively protect transgender athletes through statutes. One such state is California, which passed the School Success and Opportunity Act (Assembly Bill 1266).[291] The Act states, "This bill would require that a pupil be permitted to participate in sex-segregated school programs and activities, including

285. 42 U.S.C. § 1988(b).

286. *See* Mercer v. Duke Univ., 401 F.3d 199, 203–04 (4th Cir. 2005) (awarding attorneys' fees because the prevailing legal issue, a first-of-its-kind liability determination, was significant and the litigation served a public purpose).

287. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 259 (2009).

288. Darren v. Gould, 540 P.2d 882, 889 (Wash. 1975).

289. *See, e.g.*, CAL. EDUC. CODE § 221.5(f) (West, Westlaw through Ch. 2 of 2018 Reg. Sess.) ("A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."); WASH. REV. CODE ANN. § 28A.600.200 (2) (West, Westlaw through 2017 3d Spec. Sess.) (prohibiting athletic associations from discriminating on the basis of sex); Kemether v. Pa. Interscholastic Athletic Ass'n, 15 F. Supp. 2d 740, 755, 767 (E.D. Pa. 1998) (holding that PIAA was a state actor, subject to state law and Title IX); Aiken v. Lieuallen, 593 P.2d 1243, 1245 (Or. Ct. App. 1979) (finding regulations implementing Oregon civil rights statute to be modeled closely after Title IX).

290. Nat'l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33, 39 (N.J. Super. Ct. App. Div. 1974).

291. Assemb. B. 1266 Reg. Sess. (Cal. 2013); *Frequently Asked Questions*, CAL. DEP'T OF EDUC. (Sept. 16, 2021) https://www.cde.ca.gov/re/di/eo/faqs.asp.

athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."[292]

In addition, it appears that advocates for gender equality in athletics may be developing new ways of working with state educational institutions to achieve the objectives of Title IX. In September 2006, the school board of Prince George's County Public Schools in Maryland approved an agreement with the National Women's Law Center to make improvements to the administration of its athletic programs so that all county schools are in compliance with Title IX.[293] Whether such agreements will be used more frequently is yet to be determined, but the agreement represents a promising development in the ongoing quest to end sex-based discrimination and to achieve equality of opportunity in athletics.

While state law can provide further protections, it may also provide additional limitations. In 2021, for example, there has been push by anti-LGBTQ groups to pass laws that ban transgender youth from participating in school sports.[294] The focus has particularly been on K-12 youths, although some of the bans seek to reach the collegiate level.[295] One such law was passed in April 2021 when Alabama Govenor Kay Ivey signed into law HB 391, which establishes different sports categories fixed by biological sex in K-12 public schools and bars athletes assigned male at birth from participating in the girls' category under any circumstances.[296] It also bars athletes assigned female at birth from participating in the boys' category unless there is no comparable girls' opportunity.[297] In October 2021, Texas Governor Greg Abbott signed House Bill 25 into law, which requires that public school students compete in interscholastic athlete competitions based solely on their assigned sex at birth, and it took effect on January 18, 2022.[298] Other states with similar legislation passed include Arkansas, Florida, Mississippi, Montana, South Dakota, and Tennessee.[299] Idaho tried to issue similar legislation, but on August 17, 2020, in *Hecox et al v. Little,* a U.S. District

292. Assemb. B. 1266 Reg. Sess. (Cal. 2013)

293. *Commitment to Resolve* (Sept. 2006), https://nwlc.org/wp-content/uploads/2015/08/12%20PGCPSAgreement.pdf; *Two Title IX Sex Discrimination Cases Finally Settled*, FEMINIST MAJORITY FOUND. (Dec. 15, 2006), https://feminist.org/news/two-title-ix-sex-discrimination-cases-finally-settled/.

294. *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/sports_participation_bans (last visited Oct. 30, 2021).

295. *Id.*

296. Katie Barnes, *Alabama to Wyoming: State policies on transgender athlete participation*, ESPN, https://www.espn.com/espn/story/_/id/32117426/state-policies-transgender-athlete-participation (last updated Mar. 30, 2022).

297. *Id.*

298. Rachel Treisman, *Texas' New Law Restricts Transgender Athletes' Participation on School Sports Teams*, NPR (Oct. 27, 2021), https://www.npr.org/2021/10/27/1049634164/texas-new-law-restricts-transgender-athletes-participation-on-school-sports-team.

299. *Bans on Transgender Youth Participation in Sports*, *supra* note 294.

Court in Idaho issued an injunction blocking the implementation of the statute.[300] The court concluded that the law violated the Equal Protection guarantees set forth in the Fourteenth Amendment to the U.S. Constitution.[301] Similarly, in *Soule v. Connecticut Association of Schools, Inc.*, a policy issued by the Connecticut Interscholastic Athletic Conference ("CIAC"), which permitted high school students to participate in sex-segregated sports consistent with their gender identity, was challenged for putting "non-transgender girls at a competitive disadvantage in girls' track and, as a result, denies them rights guaranteed by Title IX."[302] Although the court did not rule on the ultimate issue of whether the policy violated Title IX before dismissing the case on procedural grounds in April 2021, the backlash the policy caused reflects the reluctance of many to allow transgender athletes to compete in girls' and women's sports.[303]

VI. CONCLUSION

Title IX changed the face of modern athletics by increasing the opportunities for women to participate in all levels of competition.[304] The statute breaks down paternalism, challenges the stereotype that females are not interested in sports, and provides females the chance to compete and enjoy the benefits of athletic participation.[305] As recent judicial and administrative developments show, the law continues to evolve in terms of the understanding of the protections afforded by and the methods of compliance with Title IX.[306]

Title IX is also increasingly utilized to hold educational institutions accountable for sexual harassment and assault against female students and has led to increasing challenges about colleges' handling of sexual assault cases.[307] The guidelines influencing the standards and policies that shape Title IX litigation are often reflective of changes in administration. For example, during the Biden administration, the category of proper plaintiffs was broadened based on the Department of Education's interpretation that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity.[308] The relief that can be awarded to these plaintiffs can include any appropriate relief, including injunctive and declaratory relief, equitable relief, and in certain cases, compensatory and punitive damages.

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300. Lee Green, *Legal Rulings on Sports Participation Rights of Transgender Athletes*, NFHS (Sept. 29, 2020), https://www.nfhs.org/articles/legal-rulings-on-sports-participation-rights-of-transgender-athletes/.

301. *Id.*

302. Soule v. Conn. Ass'n of Sch., Case No. 3:20-cv-00201 (RNC), 2 (D. Conn. Apr. 25, 2021).

303. *Id.* at 13.

304. *See supra* Section I.

305. *See supra* Section I.

306. *See supra* Section II.

307. *See, e.g.*, Jennings v. Univ. of N.C., 482 F.3d 686 (4th Cir. 2007); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1292 (11th Cir. 2007).

308. *See supra* Section III.

Finally, in light of *Bostock*, transgender athletes have started to receive Title IX protections. Additionally, scholars have articulated a legal theory under which a transgender student athlete could validly sue the NCAA under a theory of sex-discrimination.[309] President Biden's executive order on January 21, 2021 stating, "Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports," could also signal toward Title IX protections extending to transgender athletes. It still remains to be seen whether state legislation will provide additional protections to transgender athletes, or, instead, present obstacles for transgender athletes' protections, but there is evidence that, overall, Title IX's protections continue to expand as time goes on.

309. *See supra* Section III.C.