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# EQUALITY BEYOND THE THREE-PART TEST: EXPLORING AND EXPLAINING THE INVISIBILITY OF TITLE IX'S EQUAL TREATMENT REQUIREMENT

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## I. INTRODUCTION

In 2006, Adrian College in Adrian, Michigan, unveiled its brand new \$6.5 million Multi-sport Performance Stadium. The new stadium meant that the Adrian College Bulldogs football team, which competes in the National Collegiate Athletic Association's (NCAA) Division III, would no longer have to share the town high school's stadium, as it had been doing since the 1960s.<sup>1</sup> Though the college described it as a multi-sport facility, the current athletic department web page only speaks of its use as a football stadium, for football-related events like alumni gatherings on game days, and for its soccer and lacrosse teams.<sup>2</sup> What is clear, though, is that it was never intended for use by female student-athletes. The facility has no women's locker room.<sup>3</sup>

This was one of the issues brought to the attention of the administration via two separate complaints anonymously filed in 2007 with the Department of Education's Office of Civil Rights (OCR). The complaints detailed the unequal treatment between the men's and women's programs, which included access to and quality of facilities, publicity, quality of coaching, equipment, access to quality competition, scheduling, recruitment, and access to medical personnel, as well as disparities in the number of athletic opportunities provided to members of each sex. But the lack of a women's locker room in the new stadium attracted the most attention. When the complaint became

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1. *Multi-sport Performance Stadium*, ADRIANBULLDOGS.COM, <http://www.adrianbulldogs.com/facilities/performance> (last visited Feb. 24, 2012).

2. *Id.*

3. David Jesse, *Adrian College Must Improve Sports Facilities for Female Athletes*, DETROIT FREE PRESS, Sept. 17, 2011, <http://www.ongo.com/v/1864446/-1/EAF6984983D5B3D6/adrian-college-must-improve-sports-facilities-for-female-athletes>.

public, the college's executive vice president, Rick Creehan, said that the absence of a women's locker room in the complex was an "oversight."<sup>4</sup>

Title IX's implementing regulations clearly require equal treatment in a variety of program areas, including access to facilities, and OCR unsurprisingly determined that Adrian College's "oversight," as well as the other alleged inequities, violated the law.<sup>5</sup> To avoid losing its federal funding, as part of a resolution agreement, Adrian College had to add a locker room and provide women's teams with equal access to the facility, as well as remediate the other violations the agency had found.<sup>6</sup> The story of this egregious violation and its expensive remediation raises a compelling question: Why did this happen? Forty years after Congress passed Title IX, the law prohibiting sex discrimination in federally-funded educational institutions,<sup>7</sup> and in an era where Title IX's application to athletics is the subject of litigation, agency enforcement, and media attention on a daily basis, how did administrators at Adrian College not realize that they had a legal obligation to provide equal treatment to its student-athletes of both sexes? Title IX's implementing regulations clearly require athletic departments to not only provide a *quantity* of athletic opportunities that are equitable to both sexes (the "equal opportunity" requirement),<sup>8</sup> but it also requires those opportunities to be equal in *quality*, as measured by access to facilities, quality of coaching, uniforms, equipment, publicity, tutoring, medical trainers, and other amenities (called the "equal treatment" requirement).<sup>9</sup> One cannot imagine that Adrian College would construct a facility without ensuring it was compliant with the Americans with Disabilities Act, another statute that protects civil rights.<sup>10</sup> And yet, it clearly did not consider how to make its new athletic facility Title IX compliant.

Adrian College is one example of schools' lack of knowledge about Title IX's equal treatment mandate. This is despite the abundance of equal treatment violations that students, parents, administrators, coaches, and community members are reporting every week. The visibility of these complaints, though, remains low, especially in comparison to the publicity

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4. *Id.*

5. *Id.*

6. *Id.*

7. Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2011).

8. 34 C.F.R. § 106.41(c)(1) (2011) (requiring schools to offer a "selection of sports and levels of competition effectively accommodat[ing] the interests and abilities of members of both sexes").

9. *Id.* § 106.41(c)(2)–(10) (requiring equity in such qualitative factors as access to facilities and equipment, scheduling, coaching, publicity and promotion, and other aspects of athletic participation).

10. *See* 42 U.S.C. § 12101 (2011).

around Title IX's equal opportunity regulation,<sup>11</sup> which is measured by the controversial three-part test.<sup>12</sup> Early work on "Title IX literacy" within athletic departments provides tentative confirmation of this point; in a survey of nearly 1100 college coaches, a significantly higher percentage (70%) knew that Title IX required equal opportunity as measured by the three-part test than the percentage of respondents (38%) who knew that a school's use of private funds—such as those raised by booster clubs—is not a defense for unequal treatment (the only question asked to test literacy about equal treatment).<sup>13</sup>

Equal treatment is also under-examined in the academic literature, as scholars have focused significantly more research attention on Title IX's equal opportunity mandate and the three-part test.<sup>14</sup> This scholarship has

11. See 34 C.F.R. § 106.41(c)(1).

12. *A Policy Interpretation: Title IX and Intercollegiate Athletics*, OFFICE FOR CIV. RIGHTS, DEP'T OF EDUC. 44 Fed. Reg. 71,413 (Dec. 11, 1979), available at <http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html> [hereinafter 1979 Policy Interpretation]. According to the 1979 Policy Interpretation, compliance with equal opportunity can be measured in any one of three ways:

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

*Id.* at 71,418.

13. Ellen J. Staurowsky & Erianne A. Weight, *Title IX Literacy: What Coaches Don't Know and Need to Find Out*, 4 J. INTERCOLLEGIATE SPORT 190 (2011).

14. See, e.g., Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51 (1996); Erin E. Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821 (2006); Walter B. Connolly, Jr. & Jeffrey D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L. REV. 845 (1994); A. Jerome Dees, *Access or Interest: Why Brown Has Benefited African-American Women More Than Title IX*, 76 UMKC L. REV. 625 (2008); A. Jerome Dees, *Do the Right Thing: A Search for an Equitable Application of Title IX in Historically Black Colleges and University Athletics*, 33 CAP. U. L. REV. 219 (2004); Sara A. Elliott & Daniel S. Mason, *Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance*, 11 J. LEGAL ASPECTS SPORT 1 (2001); Thomas S. Evans, *Title IX and Intercollegiate Athletics: A Primer on Current Legal Issues*, 5 KAN. J.L. & PUB. POL'Y 55 (1996); B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 WIS. L. REV. 647 (1995); B. Glenn George, *Forfeit: Opportunity, Choice, and Discrimination Theory Under Title IX*, 22 YALE J.L. & FEMINISM 1 (2010); C. Peter Goplerud, III, *Title IX: Part Three Could Be the Key*, 14 MARQ. SPORTS L. REV. 123 (2003); Mary W. Gray, *The Concept of Substantial*

contributed to a greater understanding of the equal opportunity provision, including debunking myths around equal opportunity and analyzing the backlash against Title IX. In comparison, however, the scholarship addressing equal treatment in athletics has been minimal.<sup>15</sup> This Article is an effort to add to this scholarship in order to provide a greater understanding of equal treatment provisions.

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*Proportionality in Title IX Athletics Cases*, 3 DUKE J. GENDER L. & POL'Y 165 (1996); Rich Haglund, *Staring Down the Elephant: College Football and Title IX Compliance*, 34 J.L. & EDUC. 439 (2005); Robert R. Hunt, *Implementation and Modification of Title IX Standards: The Evolution of Athletics Policy*, 1999 BYU EDUC. & L.J. 51 (1999); Julia Lamber, *Intercollegiate Athletics: The Program Expansion Standard Under Title IX's Policy Interpretation*, 12 S. CAL. REV. L. & WOMEN'S STUD. 31 (2002); Daniel R. Marburger & Nancy Hogshead-Makar, *Is Title IX Really to Blame for the Decline in Intercollegiate Men's Nonrevenue Sports?*, 14 MARQ. SPORTS L. REV. 65 (2003); Catherine Pieronek, *An Analysis of the New Clarification of Intercollegiate Athletics Policy Regarding Part Three of the Three-Part Test for Compliance with the Effective Accommodation Guidelines of Title IX*, 32 J.C. & U.L. 105 (2005); J. Brad Reich, *All the [Athletes] Are Equal, But Some Are More Equal than Others: An Objective Evaluation of Title IX's Past, Present, and Recommendations for Its Future*, 108 PENN ST. L. REV. 525 (2003); Gary R. Roberts, Essay, *Evaluating Gender Equity Within the Framework of Intercollegiate Athletics' Conflicting Value Systems*, 77 TUL. L. REV. 997 (2003); Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11 (2003); Suzanne Sangree, *The Secretary's Commission on Opportunity in Athletics Squandered Its Opportunity to Understand Commercial Collegiate Sports: Why They Eliminate Minor Men's Sports and Prevent Title IX from Achieving Full Gender Equality*, 3 MARGINS 257 (2003); Honorable Donald E. Shelton, *Equally Bad Is Not Good: Allowing Title IX "Compliance" by the Elimination of Men's Collegiate Sports*, 34 U. MICH. J.L. REFORM 253 (2001); Rodney K. Smith, *Solving the Title IX Conundrum with Women's Football*, 38 S. TEX. L. REV. 1057 (1997); Ellen J. Staurowsky, *Title IX and College Sport: The Long Painful Path to Compliance and Reform*, 14 MARQ. SPORTS L. REV. 95 (2003); Michael Straubel, *Gender Equity, College Sports, Title IX and Group Rights: A Coach's View*, 62 BROOK. L. REV. 1039 (1996); Ellen J. Vargyas, *Gender Equity and Athletics: Governing Legal Standards and Practical Applications*, 2 J. LEGAL ASPECTS SPORT 74 (1992); Roy Whitehead et al., *Gender Equity in Athletics: Should We Adopt a Non-Discriminatory Model?*, 30 U. TOL. L. REV. 223 (1999); John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL'Y 191 (1996); Darryl C. Wilson, *Parity Bowl IX: Barrier Breakers v. Common Sense Makers The Serpentine Struggle for Gender Diversity in Collegiate Athletics*, 27 CUMB. L. REV. 397 (1996-1997); Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731 (2003); Perry A. Zirkel, *Title IX and Intercollegiate Athletics: Wrestling with Elephants?*, 34 J.L. & EDUC. 437 (2005). Countless student notes, not included in this footnote, have also addressed some aspect of the three-part test.

15. See, e.g., Anne Bloom, *Financial Disparity as Evidence of Discrimination Under Title IX*, 2 VILL. SPORTS & ENT. L.J. 5 (1995); Patricia A. Cervenka, *Free Shoes for Primary and Secondary Schools: Playing by the Rules of Title IX*, 17 MARQ. SPORTS L. REV. 285 (2006); Neena K. Chaudhry & Marcia D. Greenberger, *Seasons of Change: Communities for Equity v. Michigan High School Athletic Association*, 13 UCLA WOMEN'S L.J. 1 (2003); Mark Kelman, *(Why) Does Gender Equity in College Athletics Entail Gender Equality?*, 7 S. CAL. REV. L. & WOMEN'S STUD. 63 (1997); Brian A. Snow & William E. Thro, *Still on the Sidelines: Developing the Non-Discrimination Paradigm Under Title IX*, 3 DUKE J. GENDER L. & POL'Y 1 (1996).

It is clear from the proliferation of cases and complaints challenging programmatic disparities in school and college athletic programs that Title IX's goal of equal treatment has not been fully realized. This Article examines why many school officials administer athletic departments in apparent oblivion to Title IX's equal treatment mandate. Section II provides the history of Title IX's equal treatment provisions and their enforcement at the high school and collegiate levels since the 1970s. The Section also discusses trends in the types of equal treatment violations and the success of both public and private enforcement. Section III analyzes why the equal treatment mandate remains largely absent from the public discourse about Title IX through a discussion of the political philosophy and climate in the United States, constructions of masculinity, and the role of amateurism in sport. Finally, Section IV offers recommendations to address the relative invisibility of Title IX's equal treatment mandate with the goal of facilitating greater enforcement of equal treatment provisions and improving the overall equality of athletics.

## II. TITLE IX'S EQUAL TREATMENT STANDARD: BACKGROUND AND ENFORCEMENT TRENDS

After first looking at the development of Title IX's equal treatment standard, this Section will examine current trends in its enforcement.

### *A. Early Development of Title IX's Equal Treatment Standard*

After Congress passed Title IX in 1972, women's sports advocates realized the law's potential to remedy the gross gender inequities in intercollegiate athletics and made a concerted and deliberate push to use the law to increase the number of opportunities for female student-athletes.<sup>16</sup> Their priority of growing women's athletics by leveraging the law as a mandate for equal opportunity has influenced both activism and the public discourse for decades. Equal opportunity cases have been organized, highly visible, and prevalent in the intercollegiate context, and Title IX's success and potential as an equal opportunity law is its most widely-touted attribute.<sup>17</sup>

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16. See DEBORAH L. BRAKE, *GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION* 144 (2010); see also *1979 Policy Interpretation*, *supra* note 12, at 71,413 (noting that it received nearly 100 complaints under the 1975 implementing regulations, raising the central question of whether a school was providing enough opportunities for female students, which suggested that equal opportunity was a major concern of women's sports advocates in the early years of Title IX).

17. In 1971, the year before Congress passed Title IX, 294,015 girls played high school sports compared to over 3 million today. At the college level, participation rates have increased as well.

Yet, perhaps less well-known is the vital role that Title IX has played in ensuring equal treatment for girls and women's sports, even from the earliest days of the law.

Indeed, one of the most iconic images associated with Title IX's history conveys that equal treatment was on the minds—and in this case, the bodies—of female athletes, administrators, and their advocates from the beginning of the Title IX era. In 1976, nineteen members of the Yale women's crew team took off their shirts, painted "Title IX" across their bodies, and marched into the associate athletic director's office to demand equal treatment.<sup>18</sup> Their activism was born of frustration with their own experience with unequal treatment; the team had spent many cold mornings sitting on a bus after morning workouts wet from the water and their own sweat.<sup>19</sup> They were waiting for the men's team to shower and change in their own dedicated facilities.<sup>20</sup> The women had no such facilities and, so, were, at best, freezing and inconvenienced in ways the men were not and, at worst, catching colds, pneumonia, and other illnesses. They knew about Title IX. They knew the law required equal treatment, and they demanded and received it. Their story is famous because the Yale rowers drew attention to their plight through the use of media.<sup>21</sup> Unfortunately, there is no way to determine how many similar incidents took place in athletic departments all over the country during the 1970s. How many less dramatic and less public complaints were offered by student-athletes, coaches, and athletic administrators to their athletic directors or university administrators? There were complaints filed with the Department of Health, Education, and Welfare (HEW) (then responsible for the implementation and oversight of Title IX), though how many were devoted to or included equal treatment claims is unknown.<sup>22</sup>

Despite these empirical gaps, it is known that within athletic departments, women were requesting better treatment for their teams, including requests for

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*See* PLAY FAIR: A TITLE IX PLAYBOOK FOR VICTORY 4 (Women's Sports Found. ed., 2009). In 1971, there were just under 30,000 female athletes participating at the college level. *Id.* Today, in the NCAA alone (i.e., not accounting for female athletes associated with other athletic conferences like the NAIA), that number is over 182,000. NCAA, 1981–82 – 2008–09 NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 65 (2010).

18. A HERO FOR DAISY (50 Eggs Productions 1999).

19. *See id.*

20. *See id.*

21. *Yale Women Strip to Protest a Lack of Crew's Showers*, N.Y. TIMES, Mar. 4, 1976, at 33; *Yale Women Crew to Get Locker Rooms*, N.Y. TIMES, Mar. 11, 1976, at 41.

22. Also, in 1975, HEW said that it would not investigate individual complaints, but that it would wait until there was a "pattern of complaints" at a given institution. MARY JO FESTLE, PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN'S SPORTS 172 (1996).

facilities improvements, while younger students—with the help of their parents—leveraged the law to improve the conditions for girls high school sports, as well. Moreover, evidence of activists’ early commitment to, and concern for, equal treatment is reflected in the many versions of regulations and guidelines that HEW devised and revised during the 1970s, particularly the 1975 implementing regulations and the 1979 Policy Interpretation. Though the three-prong test, which has caused so much controversy, emerged from the 1979 Policy Interpretation, most of HEW’s efforts to implement Title IX in athletics focused on equal treatment.<sup>23</sup> For instance, after a vociferous public comment period,<sup>24</sup> HEW revised its draft regulations<sup>25</sup> to ensure that the final regulations included more specific language requiring equal treatment for women’s sports—a so-called “laundry list”<sup>26</sup> of factors, consisting of equipment, playing facilities, locker rooms, training and dining facilities, coaching, tutoring, medical care, publicity, scheduling of games and practices, and other factors that HEW later interpreted to include recruiting and support services.<sup>27</sup> The fact that the regulations listed these program areas under the

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23. Recognition of and advocacy for equal treatment also came from within Congress. Senator Birch Bayh, one of the initial sponsors of Title IX, defended the regulations, noting that they did not require equal scholarship dollars, provision of specific sports for women, or equal expenditures, only that when offering separate teams, “the institution is prohibited from discriminating on the basis of sex in providing the necessary supplies or equipment.” He offered as an example of unfair treatment under the regulations a school that pays for the uniforms of its basketball team but requires the women to buy their own. *Prohibition of Sex Discrimination, 1975: Hearings Before the Subcomm. on Educ. of the S. Comm. on Labor and Pub. Welfare*, 94th Cong. 1 (1975) (statement of Sen. Birch Bayh) [hereinafter *Subcommittee Hearings*].

24. HEW received more than 10,000 comments on the draft regulations, prompting then-Secretary Casper Weinberger to quip that college sports must be “the most important issue in the United States today.” Nancy Hogshead & Andrew Zimbalist, *Introduction to EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 51–52* (Nancy Hogshead-Makar & Andrew Zimbalist, eds. 2007) [hereinafter *EQUAL PLAY*].

25. The draft regulations, released in 1974, said that institutions should make affirmative efforts to “[p]rovide support and training activities for members of [the underrepresented] sex designed to improve and expand their capabilities and interests to participate in such opportunities.” Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance, 39 Fed. Reg. 22,228, 22,236 (June 20, 1974) (to be codified at 45 C.F.R. pt. 86).

26. See, e.g., SUSAN WARE, *TITLE IX: A BRIEF HISTORY WITH DOCUMENTS 50* (2007) (using the term “laundry list”).

27. FESTLE, *supra* note 22, at 171. The implementing regulations provide that:

In determining whether equal opportunities are available the Director will consider, among other 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



subheading “equal opportunity” suggests that HEW viewed schools’ obligation to equalize the number of participation opportunities as inclusive of, and in tandem with, their obligation to ensure equal treatment.<sup>28</sup>

HEW’s 1979 Policy Interpretation, meant to clarify the agency’s expectations for compliance, is best known for including the controversial three-part test, which offered schools three ways to measure compliance with the regulations’ requirement to offer a “selection of sports and levels of competition [to] effectively accommodate the interests and abilities of members of both sexes.”<sup>29</sup> But the agency also responded to comments it had received on the policy’s draft, which included letters outlining the inequitable treatment female student-athletes received (even when they played for nationally-ranked teams), as well as testimony about dangerous conditions in women’s facilities, the lack of women’s practice times and funding for travel, and the practice of requiring female college athletes to purchase their own equipment.<sup>30</sup> Addressing these concerns, the Policy Interpretation also reinforced the mandate that schools must provide equal or equivalent treatment to members of both sexes in the quality of those athletic opportunities, in the program areas mentioned above, and in everything from “provision of equipment and supplies”<sup>31</sup> to “[p]ublicity.”<sup>32</sup> By separating out these program-area requirements under a separate heading, “B. Equivalence in Other Athletic Benefits and Opportunities,” the 1979 Policy Interpretation is the first to signal equal treatment and equal opportunity as separate components of Title IX.<sup>33</sup> The Policy Interpretation clarifies that HEW will

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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.

34 C.F.R. § 106.41(c) (2011). The implementing regulations also contain a separate provision addressing athletic scholarships, which requires institutes that award athletic scholarships to “provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.” *Id.* § 106.37 (c)(1).

28. 34 C.F.R. § 106.41(c). HEW’s concern about equal treatment is also evidenced by the agency’s solicitation of Margaret Dunkle at the Resource Center on Sex Roles in Education to write a manual for schools, that, at that point, had received a three-year grace period for compliance, detailing how equal opportunity through the provision of equal treatment measures has been denied and offering specific strategies for remedying the discrepancies. Margaret Dunkle, *Competitive Athletics: In Search of Equal Opportunity* (1976), in WARE, *supra* note 26, at 64–68.

29. 34 C.F.R. § 106.41(c)(1).

30. *Subcommittee Hearings*, *supra* note 23.

31. 34 C.F.R. § 106.41(c)(2).

32. *Id.* § 106.41(c)(10).

33. *1979 Policy Interpretation*, *supra* note 12, at 71,417.

find institutions in compliance “if the compared program components are equivalent, that is, equal or equal in effect.”<sup>34</sup> If program components are not equal, a disparity must be due to a nondiscriminatory factor, such as the “unique aspects of particular sports” or fluctuations in the needs of various teams.<sup>35</sup> The Policy Interpretation also provides three alternative grounds on which the agency could render a finding of noncompliance, including: (a) institutional policies that are discriminatory in language or effect; (b) substantial and unjustified disparities in treatment to male and female athletes “in the institution’s program as a whole”; or (c) disparities in treatment in individual segments of the program that “are substantial enough in and of themselves to deny equality of athletic opportunity.”<sup>36</sup>

### *B. Contemporary Enforcement of Title IX’s Equal Treatment Mandate*

Because HEW spent the majority of the 1970s drafting, revising, and clarifying regulations and offering grace periods for compliance,<sup>37</sup> schools were under little pressure to comply during that decade. Instead, educational institutions and other stakeholders in athletics responded to Title IX by mounting legislative and judicial challenges to the law’s scope. These challenges began to pay off in the early 1980s, when lower courts began ruling that Title IX did not apply to athletic departments on the grounds that they do not directly receive federal funds<sup>38</sup>—a position the Supreme Court endorsed in 1984.<sup>39</sup> Although Congress eventually clarified the statute’s application to athletic departments within educational institutions receiving federal funds, for much of the 1980s, Title IX was off the table as a remedy for sex discrimination in college and high school athletics.<sup>40</sup>

Yet even during this time, plaintiffs found ways to raise such claims. For

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34. *Id.*

35. *Id.*

36. *Id.* at 71,418. Courts have interpreted this provision to mean that “a disparity in one program component (i.e., scheduling of games and practice time) can alone constitute a Title IX violation if it is substantial enough in and of itself to deny equality of athletic opportunity to students of one sex at a school.” *McCormick ex rel. Geldwert v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 293 (2d Cir. 2004).

37. 34 C.F.R. § 106.41(d) (“A recipient . . . shall comply fully with this section as expeditiously as possible but in no event later than [July 21, 1978,] three years from the effective date of this regulation.”).

38. *See generally* *Univ. of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982); *Othen v. Ann Arbor Sch. Bd.*, 507 F. Supp. 1376 (E.D. Mich. 1981); *Grove City Coll. v. Harris*, 500 F. Supp. 253 (W.D. Pa. 1980).

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

40. Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (2011).

example, lawsuits against Washington State University and Temple University utilized a state constitution's Equal Rights Amendment and the U.S. Constitution's Equal Protection Clause, respectively, to successfully challenge inferior funding, publicity, scholarships, facilities, equipment, coaching, uniforms, and other support provided by those universities to their women's athletics program.<sup>41</sup> Judicial enforcement of Title IX in college athletics accelerated in the 1990s, owing to Congress's restoration of Title IX's application to athletics in 1988 and a Supreme Court decision in 1992 that recognized a plaintiff's right to pursue money damages for violations of Title IX.<sup>42</sup> Thereafter, courts fielded complaints challenging unequal treatment at the college and high school level. For instance, in one case from the 1990s, plaintiffs won a court order against the school board in Brevard County, Florida, to remediate the inequitable treatment of the girls softball team at Merritt Island High School in contrast to the boys baseball team, which had a lighted playing field, scoreboard, batting cage, superior bleachers, signs publicizing the team, bathroom facilities, and a concession stand, press box,

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41. See generally *Blair v. Wash. State Univ.*, 740 P.2d 1379 (Wash. 1987) (en banc); *Haffer v. Temple Univ.*, 678 F. Supp. 517 (E.D. Pa. 1988), *plaintiff's motion for reconsideration granted*, Civ. A. No. 80-1362, 1988 WL 3845 (E.D. Pa. Jan. 19, 1988).

In *Blair*, the trial court agreed and ordered WSU to allocate a specific and incrementally increasing percentage of overall athletic expenditures to the womens program, though it allowed the university to exclude expenditures for football from this calculation. *Blair*, 740 P.2d at 1382. On appeal, the Washington Supreme Court reversed the exclusion for football expenditures—"[T]he Equal Rights Amendment contains no exception for football"—though it allowed the university to incorporate football's revenue and calculate the percentage target based on net expenditures. *Id.* at 1383–85.

In *Haffer*, public university Temple was obligated under the Equal Protection Clause to provide comparable treatment for mens and womens athletics, including equal access to practices and competitions, medical training, uniforms and equipment, travel accommodations and per diem coaching, tutoring, publicity, and recruiting. After a federal district court denied Temple's motion for summary judgment on these claims, the case settled with Temple agreeing to remedy the inequities cited in its case, including such things as awarding athletic scholarships to women in proportion to the womens participation in Temple's athletic program, increasing the overall budget for womens sports, adding participation opportunities, and providing additional resources and staff to womens athletics. Christina A. Longo & Elizabeth F. Thoman, *Haffer v. Temple University: A Reawakening of Gender Discrimination in Intercollegiate Athletics*, 16 J.C. & U.L. 137, 148 (1989). In addition to upholding the plaintiffs' claims under the Equal Protection clause, the court also held that *Grove City* did not bar their claim that inequitable athletic scholarships violated Title IX because athletic scholarships were administered as part of the university's financial aid program, which did receive federal funds. *Haffer*, 678 F. Supp. at 537–38.

42. See generally *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60 (1992); see also Paul Anderson & Barbara Osborne, *A Historical Review of Title IX Litigation*, 18 J. LEGAL ASPECTS OF SPORT 127, 131 (2008) (pointing out results of an empirical study that 83% of the 190 cases involving Title IX's application to athletics between 1972 and 2008 have been decided since 1990).

and announcer's booth.<sup>43</sup> In New York, a federal district court recognized that inferior treatment of the women's hockey team at Colgate University, which resulted in part from the university's refusal to elevate the women's team to varsity status, violated the equal treatment mandate of Title IX.<sup>44</sup> In addition to the courts, OCR, which received enforcement authority over Title IX when HEW was reorganized in 1979, also enforced Title IX's equal treatment provisions during this time. Though public enforcement of civil rights laws was generally lax in the 1980s,<sup>45</sup> there is evidence that OCR resolved equal treatment cases in the 1990s.<sup>46</sup>

Since the 1990s, litigation and administrative complaints challenging equal treatment in athletics have been amenable to several observations, which the rest of this Section will address in detail. First, contemporary complainants and litigants are availing themselves of both public and private enforcement by seeking remedies through both the courts and OCR. Second, their efforts predominantly target just a few program areas. Third, in contrast to challenges of the equal opportunity variety, which have been directed towards inequities at the college level, equal treatment cases and complaints are targeting both high school and college athletics.

### 1. Public and Private Enforcement

Those seeking remedies for unequal treatment utilize both public and

43. *Daniels v. Sch. Bd. of Brevard Cnty.*, Fla. 985 F. Supp. 1458 (M.D. Fla. 1997). The court rejected the school district's defense that the inequities were the result of stronger booster-club support for boys baseball, explaining that by acquiescing to a system that relies on booster-club funding, the school district "is responsible for the consequences of that approach." *Id.* at 1462. In response to the ruling, the school district submitted a compliance plan that did not seek to improve the girls facility, but to achieve equality by prohibiting the boys team from using its amenities. Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L. 75, 83-84 (2003). Sensing its retaliatory nature, and recognizing the "symbolic" discrimination that the noticeably unused amenities would invoke against the girls, the court rejected this plan in large part, refusing to let the board impose a "separate disadvantage" by punishing both girls and boys. *Id.* at 84; see also R. Craig Wood & Luke M. Cornelius, *Leveling the Playing Field: Title IX & Daniels v. School Board of Brevard County, Florida*, 129 W. EDUC. L. REP. 19, 22-23 (1998).

44. See generally *Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D.N.Y. 1992). On appeal, however, the decision was vacated as moot since the players had graduated. *Cook v. Colgate Univ.*, 992 F.2d 17, 18 (2d Cir.1993).

45. EQUAL PLAY, *supra* note 24, at 99-100.

46. For instance, it was reported in a judicial decision on another claim that the plaintiff, a college volleyball player, dropped her equal treatment claim against Alabama State University because it was successfully resolved by OCR. See *Beasley v. Ala. State Univ.*, 3 F. Supp. 2d 1325, 1332 (M.D. Ala. 1998); *Beasley v. Ala. State Univ.*, 966 F. Supp. 1117 (M.D. Ala. 1997) (challenge to institution's compliance with Title IX in the area of scholarships was dismissed as time-barred).

private enforcement measures. Because Title IX does not require litigants to exhaust administrative remedies before going to court, many Title IX plaintiffs bypass OCR and seek judicial relief instead. Others start with an administrative complaint and seek judicial remedies only if the administrative process fails to produce a satisfactory and enforceable remedy. There are benefits and drawbacks to each method of enforcement. To successfully maintain a lawsuit, the plaintiff must have standing—that is, he or she must actually experience the injury that he or she is seeking to remedy. This limits the scope of equal treatment litigants to student-athletes and their parents filing on their behalf.<sup>47</sup> In contrast, anyone can file an OCR complaint. For example, in 2010 in Amherst, Massachusetts, a resident whose daughters were former students at Amherst Regional High School filed a complaint with OCR based on inequities he observed and he tried to remedy while his children were student-athletes there.<sup>48</sup> Though his daughters had graduated, he was still able to file the complaint and successfully remedy the disparities.<sup>49</sup> Additionally, OCR complaints can be filed anonymously, thus offering protection from retaliation. Often the complainant is never publically known.

Potential complainants, though, may not view public enforcement as equally effective or strong in comparison to a lawsuit for several reasons. First, OCR sometimes forgoes a site visit in exchange for the school's promise to conduct its own investigation and report the results.<sup>50</sup> Many believe that these internal investigations are not as effective at recognizing unequal treatment as an outside investigation from the OCR would have been. OCR

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47. For example, in both *Boucher v. Syracuse Univ.*, 164 F.3d 113 (2d Cir. 1999) and *Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000), courts dismissed equal treatment claims because the plaintiffs who filed them were not varsity athletes and, therefore, were not directly injured by the discriminatory treatment that they had alleged.

48. Mike Wilkinson, *Amherst Regional Corrects Gender Imbalance in Sports Scheduling*, DAILY HAMPSHIRE GAZETTE, Aug. 24, 2011.

49. *Id.*

50. See, e.g., Katie Thomas, *Long Fights for Sports Equity, Even with a Law*, N.Y. TIMES, July 28, 2011, available at [http://www.nytimes.com/2011/07/29/sports/review-shows-title-ix-is-not-significantly-enforced.html?\\_r=2&pagewanted=all](http://www.nytimes.com/2011/07/29/sports/review-shows-title-ix-is-not-significantly-enforced.html?_r=2&pagewanted=all).

For a specific example, in the winter of 2009, OCR allowed the University of Alaska, Anchorage to conduct an internal investigation in response to a 2008 complaint filed with the agency that cited inequitable facilities, primarily locker rooms, access to quality coaching, and access to medical personnel. Additionally, the university had to develop and submit a plan for remedying inequities. See Beth Bragg, *UAA Group to Assess Title IX Complaint*, ANCHORAGE DAILY NEWS, Jan. 31, 2009, available at <http://www.adn.com/2009/01/30/v-printer/674140/uaa-group-to-assess-title-ix-complaint.html>. In the summer of 2009, the university announced that it was building additional locker rooms for their womens teams. Josh Edge, *Title IX Self Assessment Requires Locker Room Renovations*, THE N. LIGHT, June 30, 2009, available at <http://www.thenorthernlight.org/2009/06/30/titleixselfassessmentrequireslockerroomrenovations/>

investigations can be quite thorough. For example, after the above-mentioned three-year investigation into inequities at Adrian College, OCR found violations in every program area.<sup>51</sup>

Second, complaints offer relatively little control over the process of remediation. Once someone files a complaint, OCR takes over the investigation, negotiation, and enforcement of the terms of the resolution agreement. The complainant has little to no opportunity for further input. Finally, while OCR is authorized to penalize violations of Title IX with withdrawal of the institution's federal funding, this penalty is a sort of "nuclear option" that OCR has never exercised. Instead, it typically resolves complaints through resolution agreements that bind the offending institution to implement remedies by agreed-upon deadlines and to submit to monitoring by OCR until the violation is resolved. A complainant seeking compensatory damages, therefore, would likely prefer private enforcement instead. Even in equal treatment cases, where compensatory damages are likely to be small, judicial relief may include punitive damages where the equal treatment offense violates the U.S. Constitution's Equal Protection Clause as well as Title IX. Constitutional violations can be simultaneously pursued under 42 U.S.C. § 1983,<sup>52</sup> a statute that provides access to punitive damages in egregious cases, in contrast to Title IX, which some jurisdictions have interpreted to disallow punitive damages.<sup>53</sup>

Additionally, the remedy of attorneys' fees and costs also makes litigation an effective choice, particularly when it is used against schools or associations that have been resistant to making changes and have already been put on notice for sometimes longstanding inequities. For example, softball players sued the Alhambra Unified School District in California after failing in their internal efforts to challenge inequitable playing facilities, which included the construction of a multi-use athletic field that was not accessible to softball.<sup>54</sup> The case ultimately settled on the plaintiffs' terms, including the district's obligation to provide two new softball fields, new locker room facilities for female students, equal access to weight rooms and other facilities, more desirable practice and game times, equitable funding and fundraising

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51. Jesse, *supra* note 3.

52. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 248–49 (2009).

53. Mercer v. Duke Univ., 401 F.3d 199, 202 (4th Cir. 2005); *see also* Katrina A. Pohlman, Note, *Have We Forgotten K-12? The Need for Punitive Damages to Improve Title IX Enforcement*, 71 U. PITT. L. REV. 167, 168 (2009).

54. Cruz *ex rel.* Cruz v. Alhambra Sch. Dist., 601 F. Supp. 2d 1183 (C.D. Cal. 2009).

opportunities, equitable publicity, enhanced coaching,<sup>55</sup> and attorneys' fees and costs.<sup>56</sup> Similarly, in a case at the intercollegiate level, Slippery Rock University has had to answer for its treatment of female student-athletes in court multiple times.<sup>57</sup> The case, which began in 2006, addressed both equal treatment and equal opportunities.<sup>58</sup> The case settled in 2007, but the plaintiffs took the university back to court for potential violations of the settlement and for alleged retaliation against those involved in the lawsuit.<sup>59</sup> In 2010, the district court granted (at least in part) the students' motion for attorneys' fees and costs.<sup>60</sup>

In yet one more example, litigation was effective at remedying unequal treatment inherent in the Michigan High School Athletic Association's (MHSAA) nontraditional scheduling of six girls sports: volleyball in the winter (instead of the fall), basketball in the fall (instead of the winter), soccer in the spring (instead of the fall), golf in the spring (instead of the fall), swimming and diving in the fall (instead of the winter), and tennis in the fall (instead of the spring).<sup>61</sup> A federal district court found that this practice violated Title IX, the Equal Protection Clause of the Fourteenth Amendment, and Michigan's antidiscrimination law, and required MSHAA to devise a compliance plan that would equitably distribute the advantageous playing seasons.<sup>62</sup> MHSAA appealed the district court's ruling,<sup>63</sup> but eventually, in

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55. *Id.* at 1187–88.

56. *Id.* at 1201.

57. *See* Choike v. Slippery Rock Univ., No. 2:06-cv-00622, 2006 WL 2060576 (W.D. Pa. July 21, 2006) (order granting preliminary injunction).

58. *Id.* at \*6.

59. Choike v. Slippery Rock Univ., No. 2:06-cv-00622, 2007 WL 2317323 (W.D. Pa. Aug. 8, 2007) (order affirming settlement); Rich Lord, 2 *Women Cry 'Foul' in Lawsuit Against Slippery Rock University*, POST-GAZETTE.COM (June 18, 2011), <http://www.post-gazette.com/pg/11169/1154609-54.stm#ixzz1amsJhiHV>.

60. Choike v. Slippery Rock Univ., No. 2:06-cv-00622, 2007 WL 3120097 (W.D. Pa. Oct. 22, 2007); Choike v. Slippery Rock Univ., No. 2:06-cv-00622, 2010 WL 4614610 (W.D. Pa. Nov. 5, 2010).

61. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 807 (W.D. Mich. 2001); *see also, generally*, Chaudhry & Greenberger, *supra* note 15.

62. *Cmtys. for Equity*, 178 F. Supp. 2d at 862.

63. On the case's first trip to the Sixth Circuit Court of Appeals, the appellate panel affirmed the district court's determination of MSHAA's liability only under the Equal Protection Clause. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 377 F.3d 504, 515 (6th Cir. 2004). MSHAA's appeal from that decision raised the question—since resolved in another case *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009)—of whether the Equal Protection Clause can provide an independent remedy to violations of Title IX. *See Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 1012 (2005). This required the Sixth Circuit to produce a second opinion on the matter, this time affirming the district court's determination that MHSAA violated Title IX. *Cmtys. for Equity v.*

2006, after nearly a decade of litigation, the Sixth Circuit Court of Appeals affirmed the district court's decision on Title IX, Equal Protection, and state law grounds.<sup>64</sup> The court also required that MHSAA pay the multi-million dollar legal fees incurred by the plaintiffs.<sup>65</sup>

## 2. Program Areas of Particular Focus in Equal Treatment Cases

Both complaints and lawsuits over unequal treatment have resulted in significant improvements in conditions for female student-athletes. But the resolution agreement involving Adrian College, referenced above, which required the college to implement remedies in nearly all of Title IX's program areas, is rare in its breadth of scope. Instead, it seems more typical of contemporary equal treatment cases to focus primarily on inequitable facilities and inequitable scheduling. Complaints that address multiple violations across several program areas, however, could be an emerging trend. For example, in 2011, a parent filed a complaint against Boiling Springs High School, alleging disparate treatment in terms of facilities, access to strength training, and uniform replacement rates.<sup>66</sup> And in 2012, a federal judge in California concluded after trial that the class action plaintiffs had successfully proven that the Sweetwater Union School District violated Title IX's requirement for equal access to facilities, equipment, scheduled games and practices, medical and training services, coaching, publicity, and promotional support.<sup>67</sup> For reasons explored in the following Section, complaints and lawsuits regarding inequitable facilities have dominated the equal treatment cases. Most of these cases have involved softball facilities, whose conditions and amenities are often compared to those of a school's baseball team.<sup>68</sup> When reporting on a

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Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 698–99 (6th Cir. 2006), *cert. denied*, 549 U.S. 1322 (2007).

64. *Cmtys. for Equity*, 459 F.3d at 676.

65. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, No. 1:98-CV-479, 2008 WL 906031, at \*2 (W.D. Mich. Mar. 31, 2008); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, No. 1:98-CV-479, 2008 WL 3834024 (W.D. Mich. Aug. 14, 2008).

66. Robert W. Dalton, *Boiling Springs High at Center of Probe on Discrimination Against Female Athletes*, GOUPSTATE.COM (May 25, 2011) <http://www.goupstate.com/article/20110525/ARTICLES/105251015/1083/ARTICLES?p=1&tc=pg>.

67. *Ollier v. Sweetwater Union High Sch. Dist.*, No. 07cv714-L (WMC), 2012 WL 424413 (S.D. Cal., Feb. 9, 2012) (findings of fact & conclusions of law).

68. Because Title IX requires equity in the aggregate, inequities revealed in a two-sport comparison, even between sports that are often paired as “equivalent” sports, does not provide conclusive evidence of a violation. But rarely does a school that provides favorable treatment to its boys baseball team make up for it by providing equal treatment to any other girls sport. Baseball and softball comparisons, therefore, provide vivid and concrete examples of unequal treatment.



complaint about inferior softball fields at a high school in Virginia in 2009, the Washington Post reported that the case was one of forty-seven cases under OCR investigation for similar problems at that time.<sup>69</sup> Since its inception in Fall 2006, the Title IX Blog has posted about dozens of high schools and colleges whose softball fields have been challenged under Title IX.<sup>70</sup> Across America, it seems that softball fields are inferior to their counterpart boys' facilities when it comes to such attributes as lighting, dugouts, soil and grass quality, foul poles, backstops, fences, regulation dimensions, restroom facilities for fans, locker rooms for players, concession stands, and distance from the school. At one school, the softball outfield was used as an overflow parking lot for football games, a condition from which the baseball field was exempt due to its expensive irrigation system.<sup>71</sup>

In many cases, particularly at the high school level, inequalities arise due to unmatched efforts of boys teams' booster clubs, which often raise funds to pay for improvements to facilities, as well as providing other perks and amenities, such as equipment, supplies, travel, and awards. For example, in 2009, OCR received a complaint about the Lebanon School District in Oregon, where the booster club paid for a batting cage for the baseball team and raised funds for a team spring break trip to Arizona, amenities that were not provided in their equivalent to any girls teams.<sup>72</sup> Woodbridge, Virginia,<sup>73</sup> and Pitt County, North Carolina,<sup>74</sup> are among additional communities where booster club spending has created unequal treatment for which school districts have had to answer.

The courts and OCR have held the long-standing and consistent position that booster club funding for one sport does not absolve schools of their obligation to provide equal treatment. For example, in a 1995 opinion letter, OCR expressed its concern that "private funds . . . , although neutral in principle, are likely to be subject to the same historical patterns that Title IX

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69. Michael Birnbaum, *Woodbridge, Va., High School Ballfields Scrutinized for Sex Discrimination*, WASH. POST, (July 20, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/19/AR2009071901429.html?nav=emailpage>.

70. See generally Erin Buzuvis & Kristine Newhall, TITLE IX BLOG, <http://www.title-ix.blogspot.com> (last visited Feb. 24, 2012).

71. Ellen Williams, *Inequities in Girls' Softball Brings Title IX Complaint*, S. ALABAMIAN, Aug. 23, 2007, at 2B.

72. Jennifer Moody, *Title IX Complaint Filed in Lebanon*, DEMOCRATHERALD.COM (Nov. 27, 2009), [http://democratherald.com/sports/high-school/article\\_1680f6d2-db89-11de-ba46-001c4c002e0.html](http://democratherald.com/sports/high-school/article_1680f6d2-db89-11de-ba46-001c4c002e0.html).

73. Birnbaum, *supra* note 69.

74. Josh Humphries, *Title IX Complaint Is Being Reviewed*, DAILY REFLECTOR, Nov. 18, 2007.

was enacted to address.”<sup>75</sup> Boys’ sports generally occupy a favored position in society that results in stronger public and parental support. If a school could simply channel support for boys’ teams through private funds, Title IX’s equal treatment mandate “could be routinely undermined.”<sup>76</sup> In the same vein, the federal district court that decided the Brevard County softball case, mentioned above, rejected the school district’s defense that the inequities were the result of stronger booster club support for boys baseball, explaining that by acquiescing to a system that relies on booster club funding, the school district “is responsible for the consequences of that approach.”<sup>77</sup> Thus, OCR has made it clear that booster club fundraising on behalf of a particular team does not itself violate Title IX. But a school that chooses to accept booster-raised funds as a donation toward the team maintains the obligation to provide equal treatment in the aggregate. This may mean spending other money to provide commensurate treatment to a comparable number of girls. In other districts, however, it has resulted in an overhaul to the way booster clubs are organized and overseen—as some have adopted “unified” booster clubs to ensure that private funds are not earmarked for any specific team.<sup>78</sup> Yet judging by the frequency with which booster clubs are at the center of equal treatment complaints, it does not seem that this message has gotten through.

Another precipitating factor for softball field inequities is a holdover from historic discrimination that excluded girls and women from sport until relatively recently. By the time many schools added softball, perhaps in response to Title IX’s equal opportunity mandate, they had already dedicated all of the outdoor playing facilities on campus to sports like baseball, football, and soccer. Lacking room for such facilities, schools have made arrangements to use off-campus locations, such as city parks, which may lack the amenities schools provide to their on-campus facilities, thus constituting unequal treatment.<sup>79</sup> Sometimes, however, this explanation is too generous. The

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75. Letter from John E. Palomino, Regional Civil Rights Director, to Karen Gilyard, Esq., Atkinson, Andelson, Loya, Ruud and Romo (Feb. 7, 1995), available at <http://www2.ed.gov/about/offices/list/ocr/letters/jurupa.html>.

76. *Id.*

77. *Daniels*, 985 F. Supp. at 1462.

78. See, e.g., Elizabeth Celms, *Title IX: Mercer Island School District Proposes Unified Booster Club*, MERCER ISLAND REP., Nov. 19, 2008 (reporting on a school’s effort to create a unified booster club in order to resolve Title IX inequities revealed in a compliance review).

79. For examples of Title IX complaints involving off-campus softball fields, see *Complaint: Schools Unfair to Girls*, SPRINGFIELD NEWS-LEADER (Mo.), Nov. 9, 2007, at A1; Rhiannon Meyers, *GISD Settles Title IX Lawsuit*, GALVESTON CNTY. DAILY NEWS, Apr. 16, 2007, available at <http://galvestondailynews.com/story.lasso?ewcd=bf97a25cfb3551be&-session=TheDailyNews:42F942220a223397EDoho30EAC42>.

University of Charleston had a softball field, but converted it into a football field and moved the softball team to a city park.<sup>80</sup> In addition, the school district in Chillicothe, Ohio, was threatened with enforcement by the American Civil Liberties Union before it decided to construct a permanent softball facility, siting it, however, at an elementary school two miles away from the high school campus.<sup>81</sup> It is hard for schools to remedy inequalities in facilities that they do not own or control; but OCR and courts have consistently held that limitations of space and other resources do not absolve schools from their obligation to provide equal treatment. To hold otherwise would be to allow the historic discriminatory exclusion of girls from sports to continue to disadvantage them today. Schools have had to find creative solutions, including relocating their softball team to other fields, negotiating permission to set up portable locker rooms at city fields, contributing to improvements, or finding ways to share the burden of having to play off campus.

Another equal treatment issue that traces back to the historic discriminatory exclusion of girls from sport is the inequitable scheduling of high school sports for girls and boys teams—both in terms of the season of the year and the night of the week on which games are held. Title IX’s regulatory provision requires equal treatment in the “[s]cheduling of games and practice time[s].”<sup>82</sup> The watershed case in this area<sup>83</sup> was the lawsuit filed in 1997 by

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80. Veronica Nett, *Ex-UC Student Files Title IX Complaint*, CHARLESTON GAZETTE, Mar. 15, 2008, at 8A.

81. Erin Buzuvis, *Ohio School District Decides Location for Softball Field*, TITLE IX BLOG (Mar. 11, 2010, 4:15 PM), <http://title-ix.blogspot.com/2010/03/ohio-school-district-decides-location.html>.

82. 34 C.F.R. § 106.41(c)(3).

83. *Communities for Equity* was not the first or only lawsuit to address scheduling of seasons. One of the first scheduling cases was brought against the interscholastic athletic association in the State of Virginia (the Virginia High School League, or VHSL), which had consistent seasons for boys’ sports across the three divisions in which schools competed but varied the seasons for girls sports by division. *See generally* Alston v. Va. High Sch. League, Inc., 144 F. Supp. 2d 526 (W.D. Va. 1999). In 1997, parents alleged that this constituted unequal treatment in violation of Title IX because a school’s reclassification to another division would often create conflicts for multi-sport female athletes but never for male athletes who played multiple sports. *Id.* at 528–29. The VHSL moved for summary judgment, challenging the application of Title IX on the grounds that it does not directly receive federal funds. *Id.* at 529. A federal district court denied this motion, ruling that the VHSL could be subject to Title IX if the plaintiffs established that in fact the member school districts, who are themselves subject to Title IX, have ceded their controlling authority of interscholastic athletics to VSHL. *Id.* at 532. The court also determined that a reasonable jury could find the alleged discrimination to be sufficiently “substantial” to constitute a violation of Title IX. *Id.* at 536. An earlier case from the 1980s included a challenge to the Montana High School Association’s scheduling of girls volleyball and girls basketball in their nontraditional season. However, due to the

a parents' group, Communities for Equity, against MHSAA.<sup>84</sup> Like the schools that argued that they had no room to add softball facilities, MHSAA argued that there was no room in the existing schedule of seasons for girls sports when it started to sanction the sports in the 1970s.<sup>85</sup> By MHSAA's own admission, girls sports were "fitted around" the existing boys' program in order to ensure that boys teams would not have to share facilities, officials, and coaches.<sup>86</sup> In support of its conclusion that this practice violated Title IX (as well as the Equal Protection Clause and state law), the district court found that the nontraditional seasons disadvantaged girls in a variety of ways, including limiting their exposure to college recruiters, limiting their opportunities to participate in off-season development programs, precluding them from playing opponents or in tournaments in neighboring states, forcing them to choose between sports that they used to play in different seasons before they entered high school, and having to endure less-optimal weather conditions for spring sports.<sup>87</sup>

In addition to these concrete harms, the court also accepted as harmful "the psychological message" sent to female athletes in Michigan that it is acceptable for the scheduling of sport seasons to inconvenience them but never their male peers.<sup>88</sup> This "second-class" status can cause girls to internalize and accept an inferior status, can lower self-worth, and stigmatizes girls in the eyes of boys.<sup>89</sup> This decision is not the only one in a scheduling context to recognize the stigmatizing potential of inferior treatment. In a case challenging the decision of two school districts in New York to schedule their seasons for girls soccer in the spring, out of sync with most of the other schools in their division, the Second Circuit Court of Appeals recognized that "[s]cheduling the girls' soccer season out of the championship game season sends a message to the girls on the teams that they are not expected to succeed and that the school does not value their athletic abilities as much as it values the abilities of the boys."<sup>90</sup>

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parties' agreement to a settlement, the question of the schedule's compliance with Title IX or the Equal Protection Clause was not directly before the court. *See* *Ridgeway v. Mont. High Sch. Ass'n*, 858 F.2d 579 (9th Cir. 1988); *see also* Suzanne E. Eckes, *Title IX and High School Opportunities: Issues of Equity on and in the Court*, 21 WIS. WOMEN'S L.J. 175, 184–86 (2006).

84. *See Cmtys. for Equity*, 178 F. Supp. 2d at 805.

85. *Id.* at 815.

86. *Id.*

87. *Id.* at 817–20.

88. *Id.* at 837.

89. *Id.*

90. *McCormick*, 370 F.3d at 295.

In both the Michigan and New York cases, courts rejected the respective defendants' similar attempt to justify their schedules with concerns about the availability of facilities, coaches, and officials. Both courts insisted that if facilities for a given sport are truly so limited that only boys or girls can use them in a given season, the fair thing to do is to share the burden equally between them.<sup>91</sup> MHSAA ultimately devised a burden-sharing plan in which some girls sports—volleyball, basketball, tennis, and golf—are now offered in their traditional seasons, girls swimming and diving remains in its nontraditional seasons, and some boys' sports—golf and tennis—have also been moved to the nontraditional season.<sup>92</sup> In contrast, the two New York school districts decided to comply by moving their girls soccer season permanently to the fall.<sup>93</sup>

There has also been litigation and public enforcement in another variety of scheduling cases: those challenging the day or evening of the week in which competition is scheduled. In 2012, the Seventh Circuit Court of Appeals held that several Indiana high schools violated Title IX by choosing to almost always schedule boys' basketball games on "prime time" Friday nights, while relegating girls games to weeknights.<sup>94</sup> The court recognized this as a substantial disparity because it imposed a greater obstacle on girls than boys to balance schoolwork and games, it limited the availability of fans to attend

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91. *Cmtys. for Equity*, 178 F. Supp. 2d at 839 (noting that MHSAA's concern about facilities "would at most permit the MHSAA to schedule girls and boys teams in separate seasons, but the two sexes would have to split advantageous and disadvantageous sports equally. It is clearly not equitable for girls to play in all of the disadvantageous seasons and for boys to play in none of them."); *McCormick*, 370 F.3d at 302 (suggesting that the violation could be remedied either by moving the girls season to the traditional season or by alternating the burden between girls and boys in some other fashion such as alternating the years in which girls and boys play soccer in the fall).

92. See *Sports*, MHSAA, <http://www.mhsaa.com/sports/index.htm> (last visited Feb. 24, 2012). For simplicity, this description omits the scheduling of seasons for Michigan's Upper Peninsula, where golf and tennis are reversed.

93. In response to threats of lawsuit by the New York Civil Liberties Union, other holdout districts in New York City's Public School League have done the same. Mark Lelinwalla, *Title IX Issue Has PSAL Girls Soccer Coaches Yearning for a Return to Spring Schedule*, NYDAILYNEWS.COM (Oct. 4, 2010), [http://articles.nydailynews.com/2010-10-04/sports/27077187\\_1\\_girls-soccer-coaches-spring](http://articles.nydailynews.com/2010-10-04/sports/27077187_1_girls-soccer-coaches-spring). This article describes the dissatisfaction of some current multisport athletes who are forced to choose between soccer and their other fall sport. This dilemma was raised in *McCormick* as well. The Second Circuit rejected that idea that "temporary" hardship for current students outweighed the permanent discrimination that would result if the schools could continue to schedule girls sports out of sync with the vast majority of the state on a permanent basis. *McCormick*, 370 F.2d at 298.

94. See generally *Parker v. Franklin Cnty. Cmty. Schs. Corp.*, No. 10-3595, slip op. (7th Cir. Jan. 31, 2012).

games, and it sent a message that the girls team was “second class.”<sup>95</sup> In another case, the complaint filed with OCR regarding disparate treatment in Amherst, Massachusetts, mentioned briefly above, led to the school district agreeing to schedule an equal number of “prime time” games and an equal number of games “under the lights” for girls and boys teams.<sup>96</sup> Also this year, a high school league in Pennsylvania switched the nights for girls’ and boys’ basketball games midway through the season, so that each would have a similar number of Monday and Thursday and Tuesday and Friday night games.<sup>97</sup> Reportedly, the league changed after a neighboring league was the subject of an OCR complaint for scheduling girls games only on Mondays and Thursdays.<sup>98</sup>

### 3. Equal Treatment Sought in Both High School and College Athletics

In contrast to equal opportunity cases, which are primarily raised in the context of college athletics, equal treatment claims appear more equally distributed between the high school and college levels. There are several possible explanations for this difference. For one, Congress has required that colleges and universities annually submit data regarding the distribution of athletic opportunities to the Department of Education, but it currently makes no such requirements for K-12 schools.<sup>99</sup> The availability of such data makes it easier to recognize and ultimately challenge disparities in opportunities at the college level.<sup>100</sup> Because equal treatment cases are not as statistics-driven, the absence of data at the high school level does not suppress enforcement of equal treatment cases as it does in equal opportunity cases at the high school level.

Although it is also possible that high schools are more likely than colleges to have equal treatment problems, a more probable explanation is that equal treatment violations are more likely to be challenged when they appear at the

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95. *Id.* at 24–25.

96. Wilkinson, *supra* note 48.

97. *Changes Come to Schuylkill Schedule*, REPUBLICANHERALD.COM (Jan. 20, 2011), <http://republicanherald.com/sports/changes-come-to-schuylkill-schedule-1.1092950>.

98. *Id.*

99. See Erin Buzuvis, *78 Idaho School Districts Named in Title IX Complaint*, TITLE IX BLOG (July 12, 2011, 1:08 PM), <http://title-ix.blogspot.com/2011/07/78-idaho-school-districts-named-in.html>.

100. Recent filings of administrative complaints against school districts all over the country, such as those discussed in the sources cited at footnotes 111–113, *infra* (notes discussing the mass complaints in Oregon and Washington) however, suggest that equal opportunity cases at this level are likely on the rise.

high school level. The concepts of fairness and equity at the high school level are less obscured by the increasing commercialization of intercollegiate athletics. Because high school sports have not become “big business” in the way some intercollegiate programs have, there may be less tolerance among athletes, parents, coaches, and other stakeholders for special privileges that boys teams receive when they are not linked to the perception of profit that pervades men’s athletics at the college level.

The fact of public intolerance to unequal treatment at the high school level appears to be supported by the media attention such claims receive. For example, a lawsuit challenging the new field house at North Oldham High School in Kentucky, which was built almost exclusively for the football team, drew the attention of the local National Broadcasting Company (NBC) affiliate.<sup>101</sup> Its video footage of the facility in question aired locally and was available on the station’s website.<sup>102</sup> What has engendered this burgeoning recognition of unequal treatment and the subsequent advocacy is likely due to the multiple and intersecting conditions discussed in the following Section.

### III. EXPLAINING THE INVISIBILITY OF TITLE IX’S EQUAL TREATMENT REQUIREMENT

Forty years after Title IX’s passage, college and high school athletic departments still struggle with compliance. Although violations to both equal opportunity and equal treatment mandates continue to occur, equal treatment violations are more likely to result from athletic administrators’ ignorance and misunderstanding about that aspect of the law. It is probably not the case that equal treatment is under-enforced as compared to equal opportunities. As the last Section explained, both categories of claims have been successfully litigated in the courts or enforced by OCR. Therefore, to take the case of a college athletic department that constructs a multi-use facility without a women’s locker room, it seems more likely that it did not know that it would violate the law than that it knew that it would violate the law but did not fear enforcement.

Also, unlike equal opportunity, equal treatment is not complicated by multiple prongs nor has it been the subject of numerous “clarifications.” Equal treatment is conceptually easier and consistent with the liberal discourse of equality that permeates American society. In fact, equal treatment in

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101. *Two Oldham Co. Schools Hit With Title IX Violation*, LEX18.COM (Aug. 12, 2011), <http://www.lex18.com/news/two-oldham-co-schools-hit-with-title-ix-violation>.

102. *See id.*

athletics is often assessed by a simple standard: if the male athletes had to switch places with female athletes, would they do so without complaint? Equal treatment violations are therefore probably less likely than equal opportunity cases to be the result of an administrator's erroneous determinations of compliance. To put this explanation in terms of the example from the Introduction to the Article, it seems more likely that Adrian College administrators did not consider whether a multi-use facility without a women's locker room would violate the law than that they contemplated compliance and simply reached the wrong answer. The primary reason for equal treatment's invisibility is that equal opportunity has dominated the discourse about what it means for athletic administrators to comply with Title IX. Paradoxically, it may be the case that equal treatment is, in a way, a victim of its own merit. For many reasons, equal treatment claims are not as controversial as equal opportunity claims, and thus do not appear to provoke backlash to a similar degree. Without backlash, there is less public discourse. This may also contribute to the mindset among many athletic administrators that their Title IX obligations begin and end with equal opportunity.

In the past two decades, despite the abundance of equal treatment cases and the varying and sometimes significant costs of providing equal treatment, the controversy over how much it costs to provide a quality experience to girls and women has been minimal. Arguments based on the economics of certain sports (i.e., which sports produce revenue) continue to factor into discussions of how to comply with the three-part test. But these arguments fall away when schools are forced to remedy discrepancies and deficiencies in women's programs. Even when a school is experiencing financial hardship—as many have been in the 2000s—there has been no concerted effort on the part of men's sports advocates, the general public, or school officials to excuse ongoing discrimination because of the poor economy. School officials may blame the existing discrepancies on budget issues, but they do not attempt to get out of compliance, even when financial constraints remain the same.

Conversely, Title IX's equal opportunity mandate has been a target for backlash. Advocacy groups have filed lawsuits challenging it on constitutional and other grounds, even though every appellate court since *Cohen v. Brown University* has continued to uphold the three-part test.<sup>103</sup> Activism has also generated political momentum to challenge, however, unsuccessfully, Title IX's equal opportunity mandate, such as through congressional hearings in the 1990s and the Department of Education's

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103. See, e.g., *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930 (D.C. Cir. 2004); *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91 (4th Cir. 2011).



Commission for Equal Opportunity in Athletics in the early 2000s.<sup>104</sup> In the media, commentators blame Title IX for the demise of “minor” (non-revenue-producing) men’s sports, rather than citing the profit-seeking, arms-race culture that has created the status of minor men’s sports in the first place. On the internet, every blog, column, or news story about Title IX’s role in creating new opportunities for women and girls is targeted by a thread of public comments deriding the law and blaming it for destroying men’s wrestling, tennis, swimming, and others.

One reason why equal treatment cases produce less backlash is that equal treatment is consistent with political liberalism and some of modern America’s core values: equality, individualism, the concept of a level playing field, and public funding of education. Modern incarnations of the liberal philosophy that undergirds the United States’ political and judicial system are premised on formal equality. Despite the often problematic nature of this system, the mostly undisputed notion that women and men, when similarly situated, should be treated equally allowed for the initial passage of Title IX<sup>105</sup> and has since been able to stymie dissent in regard to equal treatment compliance. Further, there is little room within an equality discourse for an argument against equal treatment. Schools would have great difficulty in justifying a discrepancy in, for example, the quality of the uniforms the boys and girls soccer teams respectively receive in an era when, according to the dominant discourse, women have gained nearly equal footing. The growth in athletic opportunities for women and girls also insulates equal treatment arguments from a common retort to equal opportunity claims: that equal opportunity is inconsistent with formal equality principles because girls are not as interested in sports as boys and, therefore, deserve fewer opportunities.<sup>106</sup>

Additionally, equal treatment claims may be more palatable because of their consistency with the increasing acceptance for formal equality in other contexts. The political and popular culture continues to measure gender equality, largely in material terms such as wages, numbers of women in

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104. Buzuvis, *supra* note 14, at 834–36 (describing the Commission on Equal Opportunity in Athletics); *see also* Ellen J. Staurowsky, *Blaming the Victim: Resistance in the Battle over Gender Equity in Intercollegiate Athletics*, 20 J. SPORT & SOC. ISSUES 194 (1996) (*examining the May 9, 1995 U.S. congressional oversight hearing of OCR and its enforcement of Title IX in athletic departments*).

105. Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 535–36 (2007).

106. This “relative interest” theory has been rejected in every case in which it was raised. *See, e.g.,* Neal v. Bd. of Trs. of Cal. State Univs., 198 F.3d 763, 767 (9th Cir.1999); Boulahanis v. Bd. of Regents, 198 F.3d 633, 638–39 (7th Cir. 1999); Cohen v. Brown Univ., 101 F.3d 155, 174 (1st Cir. 1996); Miami Univ. Wrestling Club v. Miami Univ., 195 F. Supp. 2d 1010, 1019 (S.D. Ohio 2001).

historically male occupations, and social and political rights, among other things. Equal treatment provisions fit neatly into this measurement tool. For example, women's teams receive twenty-five dollars per diem when traveling; men's teams receive the same. Womens ice hockey team members receive ten university-provided sticks each season; men's team members do as well.

In contrast, equal opportunity claims challenge the paradigm of formal equality, making them less palatable to mainstream culture. To opponents of the three-part test, Title IX is a quota system, and thus evokes intense debate similar to that over affirmative action in the United States. In both contexts, it is assumed that a quota bestows on people opportunities that they do not deserve, which challenges and possibly subverts a system allegedly based on hard work and individualism. It is un-American, opponents argue, to simply give historically discriminated-against-persons opportunities no matter the level of past discrimination. Because men and women are (almost) equal now, they argue that there is no need for special treatment. Misconceptions around affirmative action and so-called quota systems have entered into the Title IX debate as well, but only in equal opportunity situations.

Another key difference between equal treatment and equal opportunity claims is that the inherent unfairness in unequal treatment is often more easily recognizable and sympathetic, and its victims are actual and known. A parent whose athlete-son has better, safer, or otherwise more favorable playing conditions and amenities than his athlete-daughter can easily identify and label this for the discrimination that it is. In contrast, equal opportunity claims often require the public to imagine a hypothetical or unknown victim: the girl who would be an athlete if she only had the opportunity. Because this victim is not (necessarily) real, she does not invoke the same understanding, awareness, and sympathy as the victim of unequal treatment. Instead, people resent creating opportunities for this abstract victim at the perceived expense of a real and concrete boy. As a result, Title IX's equal opportunity mandate is more controversial and thus more central in the public discourse about the law.

This is not to say that it is wholly understood—both the general public and stakeholders in educational athletics alike are often confused about what the equal opportunity aspect of Title IX requires. But people have at least a sense that Title IX has something to say about disproportionate opportunities. A college athletic administrator who is considering adding a football team will probably at least inquire about the Title IX implications of such a decision from an equal opportunity standpoint. But as noted, an administrator may not scrutinize a decision to allow booster-club funds to provide special treatment for the boys baseball team or to “fit” the girls teams schedule “around” the boys' schedule. Though the unequal treatment is obvious to anyone who sees

the schedule or notices that only men play under the lights, the university's legal obligation to remedy or prevent unequal treatment seems less so.

Yet another reason why equal treatment claims may not be as controversial is that they do not challenge the hegemonic masculinity of sport in the way that equal opportunity claims do. As feminist sport scholars have explained, sport plays a significant role in maintaining a gender hierarchy that privileges men.<sup>107</sup> On a symbolic level, sport reflects and transmits shared cultural values associated with leadership and power. When sport is "impervious to the inclusion of women,"<sup>108</sup> it contributes to the cultural internalization of leadership and power as uniquely masculine traits. While the law's forcing equal treatment for female athletes is certainly destabilizing to the patriarchy, its forcing equal opportunity is a more direct threat. For one, the fact of women playing sports makes it harder to limit the association of power and strength with masculinity only.<sup>109</sup> For another, schools' decisions to comply with equal opportunity by reducing opportunities for men has created the widespread perception that equal opportunity is a zero-sum game, that women's opportunities come at the direct expense of men's.

A final explanation for the prevalence of equal treatment cases, but the lack of public discourse about equal treatment in school-sponsored sports, is that so many of the cases have, in the past decade or so, been in high schools. Section II provided two possible explanations for this trend. But these trends also affect visibility of equal treatment violations. Because high school sports are generally of interest only to the local community, publicity over inequitable treatment receives only local attention. There is little national consideration given to these issues, which in the aggregate seem substantial, but when reported on by a town's local newspaper, they seem to be only isolated incidents. Additionally, because of the general public's belief that society is now post-feminist, and thus in a post-Title IX era marked by near-equality, seeing such violations as anything but isolated incidents would threaten this belief. Also, the amateurism principle, which operates more

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107. Janet S. Fink & Donna L. Pastore, *Diversity in Sport? Utilizing the Business Literature to Devise a Comprehensive Framework of Diversity Initiatives*, 51 QUEST 310, 311 (1999); Mary Jo Kane, *Leadership, Sport, and Gender*, in WOMEN ON POWER: LEADERSHIP REDEFINED 114, 115 (Sue J. M. Freeman et al. eds., 2001); Carole Oglesby, *Intersections: Women's Sport Leadership and Feminist Praxis*, in WOMEN ON POWER: LEADERSHIP REDEFINED, *supra*, at 292; Nancy Theberge, *Gender, Work, and Power: The Case of Women in Coaching*, 15 CAN. J. OF SOC. 59, 62 (1990).

108. Oglesby, *supra* note 107, at 292.

109. Of course, it is not suggested that women playing sport *eliminates* this association. Society has not yet arrived at the post-patriarchy, as attested to by the media's tendency to marginalize, trivialize, and sexualize womens sports. Even still, Title IX has transformed society by providing a counter-narrative to the view of sport as a male enclave.

strongly in high school sports than in college sports, is much more compatible with equal treatment, because in an amateur environment, Title IX claims at that level cannot be framed as a threat to profitability as they are when challenging sex discrimination in college sports.

Thus, for several reasons discussed in this Section, the comparatively more controversial nature of Title IX's equal opportunity requirement causes it to dominate the public discourse with regard to Title IX. In contrast, equal treatment issues fail to provoke such ire. Equal treatment is consistent with liberal political philosophy, comparatively less-challenging to hegemonic masculinity and, often, because it frequently arises in the high school setting, compatible with amateur values of sport. Thus, even claims that threaten resources for boys' and men's sports, such as those with implications for booster clubs and sharing "prime time" use of facilities, while not universally embraced, are not vilified to the extent that equal opportunity claims are. Although some equal treatment defendants have dug in their heels, for example, MHSAA and the Brevard County School District, none have challenged the validity of equal treatment or have used political influence to convene congressional hearings or regulatory commissions seeking reform. Even equal treatment cases that produced remedies of considerable costs, such as those of Adrian College and the Chillicothe, Ohio school district, have not triggered a public outcry against Title IX. As a consequence, public awareness about the equal treatment aspect of Title IX does not extend beyond the institutions, students, and other local stakeholders affected by the case. This ignorance allows existing violations to continue and new violations to occur.

#### IV. RAISING AWARENESS AND PROMOTING COMPLIANCE

The previous Section explored reasons for the relative invisibility of Title IX's equal treatment mandate. The goal of this Section is to use those reasons as the basis for recommendations aimed at improving awareness about Title IX's equal treatment mandate and, in turn, compliance.

##### *A. Awareness and Enforcement*

As described above, the public plays a crucial role in Title IX enforcement, both by using the courts for private enforcement and by triggering public enforcement by OCR. It is therefore imperative that members of the public who are potential complainants, whether they be students, parents, coaches, or community members, realize that Title IX covers more than an equal number of opportunities and requires the remediation of

inequities between male and female athletic teams.

Lately, there have been several examples of strategic, high-volume, complaint filing by advocacy groups and (apparent) unaffiliated individuals. Earlier this year, for example, the National Women's Law Center filed twelve administrative complaints against twelve school districts located in each of OCR's twelve compliance regions.<sup>110</sup> These complaints, which generated both national and local media coverage,<sup>111</sup> challenged gross disparities in the number of athletic opportunities for girls and boys and alleged noncompliance with each of the three prongs of 1979 Policy Interpretation's test for measuring equal opportunity. Since then, an anonymous individual(s) has filed complaints against dozens of school districts and hundreds of high schools in the states of Washington, Oregon, Idaho, and California.<sup>112</sup> Like the National Women's Law Center's complaints, these mass filings only allege violations with the three-part test and equal opportunity.<sup>113</sup> These mass filings have also generated much attention for the lack of Title IX compliance at the high school level. Even as OCR has found grounds to dismiss these complaints,<sup>114</sup> each contributed to raising awareness about Title IX's requirement for equal opportunity. Although advocates and activists might understandably prioritize equal opportunity enforcement—not having opportunities at all is a worse injustice than not having opportunities of equal quality—the consequence of omitting equal treatment from these highly visible enforcement campaigns could make it more difficult for girls and

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110. Katie Thomas, *Women's Group Cites 12 Districts in Title IX Complaint*, N.Y. TIMES, Nov. 11, 2010, at B18.

111. Jane Ann Morrison, *It Looks Like School District Isn't Playing Fair with Girls Sports*, LAS VEGAS REV. J., Oct. 17, 2011, at 1B; Michael Carvell, *Title IX Figures Come up Short*, ATLANTA J. & CONST., Nov. 11, 2010, at C2; Jenny Dial, *HISD Cited in Title IX Complaints*, HOUS. CHRON., Nov. 11, 2010; Jeffery Javier, *Feds Investigate Title IX Complaint vs. DV Unified*, ARIZ. REPUBLIC, Mar. 4, 2011, at 4; Javier Serna, *Wake Co. Faces Title IX Probe*, NEWS OBSERVER (Raleigh, NC), Jan. 6, 2011; Jennifer Smith Richards, *Girls' Access Called Unequal*, COLUMBUS DISPATCH, Nov. 11, 2010, at 1B; Josh Verges, *Title IX Investigation Advances: U.S. Agency Examining Gender Equity in Sioux Falls, 11 Other School Districts*, ARGUS LEADER, (Sioux Falls, SD), Feb. 27, 2011; Dan Albano, *Title IX Complaint Filed against Irvine Schools*, OCVARISITY.COM (Nov. 10, 2010), <http://www.ocvarsity.com/articles/girls-23537-sports-irvine.html>.

112. See, e.g., Wendy Owen, *Oregon Schools Failing to Give Girls Equal Opportunity to Play Sports, Complaint Says*, OREGONIAN, June 28, 2011; Kevin Gaboury, *100 Idaho Schools Face Title IX Complaints*, LEWISTON MORNING TRIB. (Idaho), July 13, 2011; Jacques Von Lunen, *Area Schools Face Civil Discrimination Complaint*, BELLINGHAM HERALD (Wash.), Mar. 18, 2011.

113. See, e.g., Wendy Owen, *supra* note 112; Gaboury, *supra* note 112; Von Lunen, *supra* note 112.

114. Wendy Owen, *Feds Won't Pursue Title IX Civil Rights Complaint Against Oregon Schools, Says Attorney*, OREGONIAN, Oct. 10, 2011; Kira M. Cox, *Washington State Under Review for Title IX Compliance*, BELLINGHAM HERALD (Wash.), May 3, 2011.

women to secure both equal opportunity and equal treatment in the long run. Advocates and activists should, therefore, endeavor to include equal treatment claims in these campaigns.

OCR could also promote awareness of the equal treatment components of Title IX by making it the subject of clarification. Since the 1979 Policy Interpretation, equal opportunity obligations have been the subject of multiple policy clarifications and “Dear Colleague” letters,<sup>115</sup> yet the agency has not used this approach to raise awareness of an educational institution’s equal treatment obligations. This is despite the high volume of cases and other reports of such institutions’ failure to, one, provide female student-athletes equal access to facilities and, two, fully understand the inequities produced by booster club funds. Either of these issues (or both) seems a ripe topic for an agency’s “clarification” that could also serve as a general reminder about the equal treatment requirement overall.

### *B. Awareness and Reporting*

Another strategy that could help raise awareness about Title IX’s equal treatment mandate is the inclusion of indicia of equal treatment in existing and pending disclosure legislation. The Equity in Athletics Disclosure Act (EADA) requires colleges and universities subject to Title IX to report information about the athletic opportunities that they provide to the OCR<sup>116</sup> on

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115. See, e.g., Norma Cantu, Assistant Secretary for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, OFFICE FOR CIV. RIGHTS, U.S. DEP’T OF EDUC. (Jan. 16, 1996), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> (providing further clarification of the three-part test); Gerald Reynolds, Assistant Secretary for Civil Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*, OFFICE FOR CIV. RIGHTS, U.S. DEP’T OF EDUC. (July 11, 2003), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> (emphasizing the flexibility of the three-part test and the agency’s disfavor of compliance by contraction); James F. Manning, Delegated the Authority of the Assistant Secretary for Civil Rights, *Dear Colleague Letter*, OFFICE FOR CIV. RIGHTS, U.S. DEP’T OF EDUC. (Mar. 17, 2005), available at <http://www.nacua.org/documents/AddnClarificationInterCollegiateAthleticsPolicy.pdf> (allowing universities to demonstrate compliance with prong three by administering an interest survey); Letter from Margaret Spellings, Sec’y of Educ. to Steven Geoffrey Gieseler, Pac. Legal Found. (Mar. 27, 2008), available at <http://www2.ed.gov/about/offices/list/ocr/letters/title-ix-2008-0327.pdf> (re-affirming the application of the three-part test to high school athletics); Stephanie Monroe, Assistant Secretary for Civil Rights, *Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance*, OFFICE FOR CIV. RIGHTS, U.S. DEP’T OF EDUC. (Sept. 17, 2008), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html> (clarifying how OCR determines which athletic activities can be counted under the three-part test); Russlynn Ali, Assistant Secretary for Civil Rights, *Dear Colleague Letter*, OFFICE FOR CIV. RIGHTS, U.S. DEP’T OF EDUC. (April 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (rescinding the interest survey policy).

116. See 20 U.S.C. § 1092(g) (2011); see also 34 C.F.R. § 668.47 (2011).

an annual basis. OCR, in turn, makes this information available to the public in an online format.<sup>117</sup> Schools are required to report the number of opportunities available to male and female athletes as well as the gender breakdown of the student body as a whole.<sup>118</sup> Accordingly, potential plaintiffs and complainants can use that information as a way to evaluate the school's compliance with Title IX's equal opportunity mandate.<sup>119</sup> Anyone who reviews an institution's EADA disclosure can quickly surmise the institution's compliance with the proportionality prong of the three-part test and can also use this information as the basis for assessing its compliance with both prongs two and three.<sup>120</sup> Next, because a school must report athletic-related student aid, its EADA disclosure can also serve as the basis for assessing whether that institution complies with the requirement that athletic scholarship dollars be distributed proportionally to the percentage of athletic opportunities for each gender.

In contrast to equal opportunity and scholarships, EADA disclosures are considerably less-useful in assessing an institution's compliance with its equal treatment obligations. Schools must report total expenditures and revenues for each sport by gender, as well as game-day expenses and recruiting expenses.<sup>121</sup> But these reporting obligations do not break down expenses by the program areas of the equal treatment laundry list, except for recruiting, which is not one of the nine program components listed in Title IX's equal treatment regulation, but is a recognized "other factor."<sup>122</sup> Although a

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117. See *The Equity in Athletics Data Analysis Cutting Tool*, OFFICE OF POSTSECONDARY EDUC., <http://ope.ed.gov/athletics/> (last visited Feb. 24, 2012).

118. See *id.*

119. Of course, colleges and universities can make it more challenging for the public to use EADA reports to promote enforcement by manipulating participation data to give the appearance of proportionality. See, e.g., Katie Thomas, *College Teams, Relying on Deception, Undermine Gender Equity*, N.Y. TIMES, Apr. 25, 2011, at A1.

120. Compliance with proportionality is apparent on the face of an EADA report, as one simply needs to convert the total number of male and female students to their respective percentages, convert the total number of athletic opportunities for each sex to their respective percentages, and compare whether the percentage of athletic opportunities for each sex is similar to the percentage of students of each sex in the student body. Compliance with prong two can also be assessed by examining EADA reports over time for evidence that the institution has a "history and continuing practice" of expanding opportunities for the underrepresented sex. EADA data do not provide direct evidence of unmet interests for the underrepresented sex, which is measured by prong three, but because it identifies which sports an institution does and does not offer, it can suggest the possibility of unmet interest when compared to others in that institution's conference or other evidence of likely interest in a particular sport.

121. See *The Equity in Athletics Data Analysis Cutting Tool*, *supra* note 117.

122. 34 C.F.R. § 106.41(c)(2)–(10).

disparity in total expenditures by gender may signal possible inequities at the program level, evidence of a disparity in aggregate expenditures does not itself promote public enforcement of Title IX's requirement of equal treatment, especially in light of the regulatory provision stating "[u]nequal aggregate expenditures for members of each sex . . . will not constitute noncompliance."<sup>123</sup>

In light of the ways that EADA reporting continues to push equal treatment off the collective radar, EADA reform presents another opportunity to raise the profile of the equal treatment obligations and violations. Congress could modify the reporting requirements in such a way as to make equal treatment compliance as assessable as compliance with the equal opportunity requirement and scholarship regulation. Because compliance is not measured by dollars spent, but by overall "availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes,"<sup>124</sup> such reform would require implementation of a qualitative assessment tool to measure equal treatment. Perhaps it could follow the model of the NCAA's Self-Study Instrument, which has required<sup>125</sup> Division I institutions to assess compliance with the various program requirements incorporated in Title IX's equal treatment mandate.<sup>126</sup>

### *C. Awareness Through Member Certification and Education*

The NCAA's requirement that member institutions internally assess compliance with gender equity and Title IX raises, more generally, the potential of the NCAA (and, by extension, its counterparts for community colleges, the National Junior College Athletic Association, and for high schools, such as the National Federation of State High School Associations and its member associations) to serve as another context in which the relative invisibility of equal treatment can be addressed. Because these are private organizations, they have the power to determine membership based on their

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123. *Id.* § 106.41(c).

124. *See 1979 Policy Interpretation, supra* note 12.

125. In April 2011, the Division I Board of Directors decided to suspend the current athletics certification program for two years, pending a review aimed at improving the process by reducing redundant reporting obligations and streamlining certification for institutions that do not have a problem complying with gender equity or other areas measured by the certification process self-study instrument. Michelle Brutlag Hosick, *Board Directs Alternative Approach to Division I Certification*, NCAA (Apr. 28, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/April/Board+directs+alternative+approach+to+Division+I+certification>.

126. 2010–11 NCAA DIVISION I ATHLETICS CERTIFICATION SELF-STUDY INSTRUMENT (2010–2011).



own compliance standards. As mentioned, the NCAA has required its largest member institutions, those in Division I, to internally assess—as a condition for membership—their compliance with the NCAA’s gender equity requirement that overlaps with Title IX. Division II and III members are also expected to engage in self-study, but they are not required to submit them to the NCAA as a condition for membership. The NCAA’s self-study instrument is one of the few requirements on educational institutions to assess compliance with the program areas incorporated into Title IX’s equal treatment mandate. To complete the instrument, the institution must gather quantitative and qualitative data—through methods such as interviews of coaches and athletes—to assess whether the athletic department engages in equal treatment in the aggregate. This process forces an institution to focus on equal treatment as a component of Title IX and has the potential to raise awareness, at least among the self-study participants, about an institution’s obligations to provide equivalent benefits and amenities to male and female athletes.

As such, the NCAA Division I Board of Directors’ decision this year to suspend the certification self-study for two years pending reform raises concern. The reform efforts’ stated goal of streamlining the certification process for those institutions that meet dashboard indicators of compliance<sup>127</sup> could be a particular setback to equal treatment compliance precisely because equal treatment cannot be measured on a dashboard. Because of the nature of the requirement, participation rates, and financial reports, the kinds of data that can be easily gathered and reported cannot be used to assess whether the institution provides equivalent benefits to athletes of both sexes in specific areas of access to facilities, scheduling of competition, uniforms and equipment, publicity, coaching, and the rest of the program areas.

Outside of the self-study requirements that the NCAA imposes on its members, the NCAA has the potential to combat the relative invisibility of Title IX’s equal treatment requirement in additional ways. Others have recommended that the NCAA improve coaches’ Title IX literacy by promoting the expectation or requirement that coaches engage in professional development, such as workshops and seminars, related to Title IX, like they already do for other issues like cardiopulmonary resuscitation (CPR), diet and nutrition counseling, fundraising, individual sport skills, sexual harassment, stress management, and student life.<sup>128</sup> Currently, the NCAA offers an extensive and comprehensive Title IX training at its Gender Equity Issues Forum every year, which provides good coverage of Title IX’s equal treatment

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127. Hosick, *supra* note 125.

128. Staurowsky & Weight, *supra* note 13.

mandate.<sup>129</sup> However, the time and expense of attending such a conference usually requires institutions to limit participation to the athletic department's Senior Woman Administrator, or otherwise a small delegation of coaches or administrators. Few, if any, send their entire coaching staff. If a professional development expectation arose for all coaches, it would be imperative that this training carve out the time and devote itself to equal treatment issues, notwithstanding participants' desires to vet (and vent) the more controversial equal opportunity aspect of Title IX.

#### V. CONCLUSION

As shown in this Article, Title IX's equal treatment requirement is often successfully enforced by plaintiffs and complainants; yet, awareness about this aspect of the law is relatively low, eclipsed by the more complex and controversial equal opportunity requirement. Equal opportunity, although a target for backlash, at least does not have to work to keep itself on the public radar. In contrast, Title IX advocates and other stakeholders in athletics should be conscientious about raising the profile and the stakes of equal treatment and, in this way, ensure that both aspects of Title IX are fully realized.

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129. Erin Buzuvis, *NCAA Gender Equity Issues Forum*, TITLE IX BLOG (May 3, 2011, 11:05 AM), <http://title-ix.blogspot.com/2011/05/ncaa-gender-equity-issues-forum.html>.