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FREE SHOES FOR PRIMARY AND SECONDARY SCHOOLS: PLAYING BY THE RULES OF TITLE IX

PATRICIA A. CERVENKA*

I. INTRODUCTION

Many credit Title IX with providing opportunities for girls to participate in athletics in greater numbers. The National Federation of State High School Associations shows that the number of girls participating increased from 294,015 in 1971-72 to 2,908,390 in 2004-05, almost a tenfold increase.¹ In the same time period the number of boys participating increased by 443,000.² Girls' participation has dramatically increased so the big picture has been focused. Now attention is being drawn to some of the smaller aspects of Title IX compliance.

"Shoe deals sidestep rules on equality in schools," ran the headline in *The Oregonian*.³ The journalist went on to say that "Nike, Adidas and Reebok sponsor about 300 high school basketball teams nationwide . . . [a]bout [seventy-five] percent of the high school teams sponsored by Nike . . . are boys teams That figure is driven by a market in which boys buy far more basketball merchandise than girls do."⁴ A follow-up story appeared the following Sunday telling readers that "[w]hen private donors give shoes or other perks to boys' teams . . . the school 'shall ensure that teams of the other sex receive equivalent benefits or services.'"⁵

Another story appeared in the *Indianapolis Star* on July 6, 2006.⁶ It

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1. Nat'l Fed'n of State High Sch. Ass'ns, <http://www.nfhs.org> (last visited Aug. 7, 2006).
2. *Id.*
3. Rachel Bachman, *Shoe Deals Sidestep Rules on Equality in Schools*, THE OREGONIAN, June 12, 2006, at A1.
4. *Id.*
5. Susan Nielsen, *Title IX in Oregon - Nikes for the Boys, Bare Feet for the Girls*, THE OREGONIAN, June 18, 2006, at C1.
6. Mark Alesia, *All Not Equal in Shoe Deals*, INDIANAPOLIS STAR, July 9, 2006, available at

became known that one of the prep basketball stars, who was in Indianapolis for the Nike basketball camp because he may be a future professional basketball player, has shoes and gear provided by Nike for his Medford, Oregon high school team.⁷ However, the girls' teams at the same school have to pay for their own shoes, which sell for as much as \$150.⁸ The mother of one of the girls complained and was rebuffed by the school officials, so she took her story to the media to bring attention to the situation.⁹

When a company offers to give a school's basketball team free shoes or any other kind of equipment or gear, it may seem like a welcome gift. First, the gift would save the players or the school money because neither has to buy the shoes, uniforms or other equipment that has been donated. Second, the gift may be in recognition that the school's athletic program is successful and has star players that are of interest to the donor company. The athletes may be provided an endorsement in the future, and in the course of their high school or college career, they would be wearing or using the company's specific brand.

But what happens when the company gives the gift to only the girls' team or to only the boys' team and not the other gender in either case? The statutes and regulations of Title IX step in and give guidance to primary and secondary schools. This article will consider the applicable statutory and regulatory language concerning gifts of shoes and other equipment; the administrative policies and judicial interpretations that have been applied to the statutory and regulatory language; and the efforts that have been made to educate the administrators of school districts, booster organizations and parents about gifts of free gear and equipment.

II. FEDERAL STATUTES

It is not within the scope of this article to repeat the entire legislative history of Title IX. The reader is directed to other sources that cover the history in full detail.¹⁰ Nevertheless a few background notes about the legislative history are necessary.

In 1970, Congresswoman Edith Green (OR) held hearings on sex-based discrimination in higher education . . . People of good will

<http://www.indystar.com/apps/pbcs.dll/article?AIN=/20060709/SPO>.

7. *Id.*

8. *Id.*

9. *Id.*

10. William Duncan, *Title IX at Thirty: Unanswered Questions*, 3 MARGINS 211-17 (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, 18-47 (2003).

disagreed over the best way to end discrimination against women. Consequently, members of the House and Senate introduced five competing bills to end discrimination. The House-Senate Conference Committee reconciled the differences between two competing bills . . . [and] [a]fter approval by the House and Senate, President Richard Nixon signed the [The Education Amendments] into law on June 23, 1972.¹¹

Title IX section 901 of the Education Amendments of 1972 states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹² Section 902 of the same act authorized each federal department and agency that gives federal financial assistance to education programs or activities to issue the rules and regulations to carry out the purpose of section 901 while meeting the purposes of the statute authorizing the financial assistance. Congress also gave some guidance on enforcement by saying that “[c]ompliance with any requirement adopted pursuant to this section may be effected by the termination of or refusal to grant or to continue assistance.”¹³

The story in *The Oregonian* was correct when it stated that companies are not bound by Title IX when donating shoes. It is the schools receiving federal assistance that must comply with the federal statutes and regulations. The onus passes to the school administrators to ensure that both genders are being treated fairly. The school must either provide equivalent gear for the team or ask the donor to give equivalent gear to the other gender’s team. If schools do not comply, then they can be denied federal financial assistance.

III. INITIAL INTERPRETIVE CASES

“Starting almost immediately after its passage, however, Congress was besieged by proposals to restrict the reach of Title IX and to cabin athletics from equal opportunity requirements.”¹⁴ “At its inception, the broad proscriptive language of Title IX caused considerable consternation in the academic world. The Academy’s anxiety chiefly centered around identifying which programs, particularly in terms of athletics, might come within the

11. The Sec’y of Educ. Comm’n on Opportunity in Athletics, *Open to All, Title IX at Thirty*, at 14 (Feb. 28, 2003), available at <http://www.ed.gov/about/bdscomm/list/athletics/report.html>.

12. Education Amendments of 1972, Pub. L. No. 92-318, 902, 86 Stat. 374 (codified at 20 U.S.C. 1681-88 (2000)).

13. *Id.*

14. Samuels & Galles, *supra* note 10, at 19.

scope of the discrimination provision and, relatedly, how the government would determine compliance.”¹⁵

The courts wrestled with the phrase “education program receiving federal financial assistance.” In the *North Haven* decision in 1979, the Second Circuit reviewed the meaning of the phrase in an educational institution’s employment issue.¹⁶ At the time the phrase was a matter of contention and litigation in courts of appeals and a number of district courts.¹⁷ The Second Circuit reviewed the statute’s legislative history and held “that [the Department of Health Education and Welfare] has authority under Title IX to promulgate the employment discrimination regulations at issue here.”¹⁸ The Supreme Court affirmed the Second Circuit’s decision based on detailed analysis of the legislative history of the 1972 Act because the Court was “reluctant to read into [section] 901(a) a limitation not apparent on its face.”¹⁹

In the 1984 *Grove City* case, the Supreme Court held that Title IX compliance requirements would be limited to the specific program receiving federal assistance. “Although the legislative history contains isolated suggestions that entire institutions are subject to the nondiscrimination provision whenever one of their programs receives financial assistance . . . we cannot accept the Court of Appeals’ conclusion that in these circumstances *Grove City* itself is a ‘program or activity’ that may be regulated in its entirety.”²⁰

IV. SUBSEQUENT FEDERAL LEGISLATION

In the face of *North Haven*, *Grove City* and other confusing decisions about the breadth of compliance required under Title IX, Congress passed the Civil Rights Restoration Act of 1987 which stated that “[t]he Congress finds that—(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972” and that “(2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.”²¹ Congress went on to say that the phrase

15. *Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993).

16. *North Haven v. Hufstedler*, 629 F.2d 773 (2d Cir. 1979).

17. *Id.* at 774.

18. *Id.* at 786.

19. *Grove City Coll. v. Bell*, 465 U.S. 555, 564 (1984).

20. *Id.* at 570-71.

21. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 2 (1-2), 102 Stat. 28 (1988).

“‘program or activity’ and ‘program’ mean all the operations of . . . a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education or other school system.”²² Congress wanted everyone to understand that it was not just the specific institutional department receiving the financial assistance that was required to comply with Title IX.

V. FEDERAL REGULATIONS

In the Education Amendments of 1972, Congress authorized the Department of Health Education and Welfare (HEW) to issue regulations to give guidance to institutions and school districts in how to deal with Title IX in all phases of their education program such as recruitment, admissions, financial aid, textbooks and athletics. In 1974, HEW issued the regulations that included words similar to the original wording of the statute as well as ten particular factors that should be considered while ensuring equal opportunity in athletics. The regulations were approved after a comment period and much Congressional debate and became effective as law on July 21, 1975.²³

The regulations relevant to equipment used in athletic programs stated that

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis . . . Equal Opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors The provision of equipment and supplies[.]²⁴

Since the passage of the Education Amendments and the subsequent regulations, the word “interscholastic” has been used for primary and secondary schools. The fact that primary and secondary schools were included was made clear by the words used in a Fall 1975 memorandum. The Director of the Office for Civil Rights issued a memorandum “intended for the guidance of educational institutions receiving Federal financial assistance from HEW as to their major first year responsibilities under the Department’s

22. *Id.* § 3 (a).

23. 40 Fed. Reg. 24128 (1975) (to be codified at 45 C.F.R. pt. 86) (2000).

24. 34 C.F.R. § 106.41 (2005).

Title IX regulation in the area of athletics and athletic scholarships.”²⁵ The memorandum “was issued to the Chief State School Officers, Superintendents of Local Educational Agencies, and College and University Presidents” specifically stating that the HEW Title IX regulations “apply to each segment of the athletic program of a federally assisted educational institution whether or not that segment is the subject of direct financial support through the Department.”²⁶

The memorandum directed:

School districts, as well as colleges and universities, are obligated to perform a self-evaluation of their entire education program, including the athletics program, prior to July 21, 1976. School districts which offer interscholastic or intramural athletics at the elementary school level must immediately take significant steps to accommodate the interest and abilities of elementary school pupils of both sexes, including steps to eliminate obstacles to compliance such as inequities in the provision of equipment.²⁷

In addition, applicants for federal financial assistance for a program or activity must submit a written assurance that programs and activities will be operated in compliance with Title IX requirements.²⁸ The Director determines the form of the assurance; therefore, there is no model form.

VI. POLICY INTERPRETATION - 1979

To assist educational institutions and entities in the implementation of the Title IX regulations, the HEW's Office for Civil Rights issued a Policy Interpretation in 1979 explaining that “[e]quipment and supplies include but are not limited to uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies, instructional devices, and conditioning and weight training equipment.”²⁹

“Compliance will be assessed by examining, among other factors, the equivalence for men and women of . . . quality . . . amount . . . suitability . . . maintenance and replacement . . . and availability”³⁰ Although the title of

25. 40 Fed. Reg. 52655-57 (1975).

26. *Id.* at 52655.

27. *Id.*

28. 34 C.F.R. § 106.4(a).

29. *A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. § 3(a) (Dec. 11, 1979) available at <http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html> (last visited Aug. 2, 2006).

30. *Id.*

the policy uses the phrase "intercollegiate athletics," the policy says that "its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate."³¹

VII. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE BECOMES DEPARTMENT OF EDUCATION

In the 1970s, HEW contained many layers of bureaucracy that Congress thought confusing and cumbersome when dealing with education programs. In 1978 and 1979, Congress held hearings to find ways of improving access to the education programs under the HEW. In 1979, Congress passed the Department of Education Organization Act³² to "greatly improve the management of Federal education programs through the creation of a clearly-ordered, well-defined structure."³³ Several of the existing HEW offices were transferred to the newly established Department of Education.³⁴ Section 203 of the Act establishes the Office for Civil Rights authorizing the Assistant Secretary for Civil Rights "to collect or coordinate the collection of data necessary to ensure compliance with civil rights laws within the jurisdiction of the Office for Civil Rights."³⁵

VIII. INVESTIGATOR'S MANUAL

The Title IX Athletics Investigator's Manual (Manual) is an aid to understanding how school districts and/or their components are reviewed and evaluated for interscholastic complaints and how the problems with components are balanced. "Interscholastic athletics investigations may involve investigation of all high schools, and occasionally the junior high schools, in an entire school district, and school districts may range in size from one to several hundred schools."³⁶ In general, the investigations based on complaints about interscholastic athletics use the same methods as elementary and secondary investigations. Each school in the district will be sent a data request, then the regional office will investigate those schools "where

31. *Id.*

32. Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) (codified in scattered sections of title twenty of the United States Code).

33. S. Rep. No. 96-84, at 6 (1979).

34. *Id.* at 6-7.

35. Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668.

36. VALERIE M. BONNETTE, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL (1990).

responses to the data requests indicate compliance problems.”³⁷ Sometimes a random sample may be selected. If one school within a district is found to be in violation, then all schools within the district must issue assurances of compliance, “including those that were not investigated based on the random sampling.”³⁸

Although vendors are not mentioned specifically, the Manual does say that Office for Civil Rights usually has no authority to investigate independent booster clubs. “If booster clubs provide benefits and services to athletes of one sex that are greater than what the institution is capable of providing to athletes of the other sex, then the institution shall take action to ensure that benefits and services are equivalent for both sexes.”³⁹ Thus, it is reasonable to apply that same line of thinking to vendors or other outside organizations.

The Manual does provide some helpful information about the Office for Civil Rights’ tours and visual inspections of athletic facilities. Though other program components may be inspected, there are generally five components inspected, the first one being “equipment and supplies.”⁴⁰ Generally the Office of Civil Rights’ investigators are looking for the same or similar benefits, not exact duplication.

IX. OFFICE FOR CIVIL RIGHTS

The Office for Civil Rights, as part of the Department of Education, maintains a website⁴¹ with a document library that contains the OCR Case Resolution and Investigation Manual, the policy clarifications and interpretations that have been issued since 1972, and complaint forms, as well as contact information. They are easily reached by email for reference questions.

X. NATIONAL SCHOOL BOARD ASSOCIATION

Another resource for information and guidance is the National School Board Association (NSBA). The NSBA website offers news of conferences, recent lawsuits, and resources to assist those involved with school law. In one of their publications, the NSBA offers seven points of review for school boards in order to determine their Title IX compliance, including “the

37. *Id.*

38. *Id.* at 10.

39. *Id.* at 5.

40. *Id.* at 6.

41. Office for Civil Rights, Overview of the Agency, www.ed.gov/print/about/offices/list/ocr/index.html?src=oc (last visited Sept. 6, 2006).

updating of their district's Title IX Self-Evaluation Study, training personnel about Title IX requirements, reviewing procedures for adding or eliminating athletic programs, and reminding school boards to "[b]e aware that lack of funds will not excuse failure to comply with Title IX if the program is challenged."⁴²

XI. STATE STATUTES

School administrators are advised to also research their state laws because a few state legislatures have taken action on the gender discrimination issue by passing laws directly within their education statutes or in the general civil rights laws. Some examples are California, Washington, Rhode Island, and Hawaii. The California statute outlines the history of women in high school athletic participation, states where some of the problems are and then says that "[e]ducational institutions at all levels are strongly encouraged to take immediate active steps toward full compliance with Title IX and California's gender equity in athletics laws by reviewing all aspects of their athletic program"⁴³ The State of Washington directs its superintendent of public instruction to "develop regulations and guidelines to eliminate sex discrimination as it applies to . . . recreational and athletic activities for students. . . ."⁴⁴ The State of Maine says it "is unlawful to exclude a person . . . or deny . . . benefits in any academic . . . program."⁴⁵ Rhode Island specifically says benefits cannot be denied "in all public elementary and secondary schools."⁴⁶ One of the most direct statutory statements is found in Hawaii law: "No person, on the basis of sex, shall be excluded from participating in, be denied the benefits of, or be subjected to discrimination in athletics offered by a public high school"⁴⁷

XII. SAMPLE CONSENT DECREES

Searches for cases litigated specifically over the lack of equivalent equipment and supplies for primary and secondary schools yield very little results. According to Ray Yasser, a law professor at the University of Tulsa

42. Cynthia Lutz Kelly, *Participation in Athletic Programs: Clearing the Title IX and Equal Protection Hurdles*, in *LEGAL HANDBOOK ON SCHOOL ATHLETICS, 5-12* (1997).

43. CAL. EDUC. CODE § 66271.6(m) (2006).

44. WASH. REV. CODE § 28A.640.020(1) (2006).

45. ME. REV. STAT. ANN. tit. 5, § 4602 (2006).

46. R.I. GEN. LAWS § 16-38-1.1 (2006).

47. HAW. REV. STAT. § 302A-461 (2006).

who has worked with the Schiller Law Firm⁴⁸ of Cookeville, Tennessee, to handle about forty Title IX cases, “[a]ll of them have settled favorably for the plaintiffs The issue of schools accepting shoe-company donations for only one gender has come up before . . . but has not become public because none of his cases went to trial. The irony of the shoe thing is, every time we’ve done it, we’ve raised it, all I had to do is ask the shoe companies [a]nd if they’re giving shoes to the boys, they’ll give them to the girls. They’re further ahead of the curve than some of the administrators are.”⁴⁹

Professor Yasser and his former student Samuel Schiller published an article presenting their complaint for a class action suit against the Owasso Public Schools. The annotated consent decree and the procedure for attorneys’ fees for the Owasso case are in subsequent articles.⁵⁰ In addition, Schiller has posted model consent decrees from school districts in the State of Oklahoma.⁵¹

XIII. CONCLUSION

One goal of Title IX is to provide equal opportunity for girls and boys to participate on athletic teams throughout their scholastic career. In addition to participating on the teams, girls and boys should also receive the similar and equivalent clothing, equipment and supplies for participation on the teams. Offers of free equipment and supplies may be welcomed in these days of tight school budgets, but the offers should be evaluated with the filter of Title IX. Primary and secondary school boards and administrators have many resources to use for guidance in evaluating their compliance with Title IX in all aspects of their athletic programs. The numbers show that participation has increased dramatically for girls in the years since Title IX so something like free shoes can be readily accommodated into the overall compliance picture.

48. Schiller Law Firm, <http://www.schillerlawfirm.com> (last visited Sept. 6, 2006) (containing model consent decrees).

49. Bachman, *supra* note 3, at A8.

50. See Ray Yasser & Samuel J. Schiller, *Gender Equity in Interscholastic Sports: A Case Study*, 33 TULSA L.J. 273 (1997); Ray Yasser & Samuel J. Schiller, *Gender Equity in Athletics: The Battleground of Interscholastic Sports*, 15 CARDOZO ARTS & ENT. L.J. 371 (1997); Ray Yasser & Samuel J. Schiller, *Gender Equity in Athletics: The Final Saga, the Fight for Attorneys Fees*, 34 TULSA L.J. 85 (1998).

51. Schiller Law Firm, *supra* note 48.