

2022

Putting Teeth in the Tiger: Why Title IX Needs the Threat of Punitive Damages

Sarah K. Fields

Follow this and additional works at: <https://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

Repository Citation

Sarah K. Fields, *Putting Teeth in the Tiger: Why Title IX Needs the Threat of Punitive Damages*, 33 Marq. Sports L. Rev. 467 (2022)

Available at: <https://scholarship.law.marquette.edu/sportslaw/vol33/iss1/18>

This Symposium is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

PUTTING TEETH IN THE TIGER: WHY TITLE IX NEEDS THE THREAT OF PUNITIVE DAMAGES

SARAH K. FIELDS*

INTRODUCTION

Title IX of the Education Amendments Act of 1972 (Title IX) is only thirty-seven words long: “[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.”¹ The fiftieth anniversary on June 23, 2022, of the law’s passage was marked with hoopla and enthusiasm disproportional to its length. Films, books, articles, museum exhibits, newspaper and magazine articles, as well as publications from bloggers, vloggers, universities, corporations, and foundations have been seemingly never-ending.² Stories about the women and girls³ who benefited from the law were well disseminated, and the weaknesses and limitations of the law were analyzed. Although Title IX was intended to help women and girls gain access to education broadly, much of the celebratory coverage was about the impact of

* Professor of Communication at the University of Colorado Denver. Ph.D., University of Iowa, 2000, J.D., Washington University in St. Louis, 1994; B.A., Yale University 1990. I am grateful to James C. Larew and Claire M. Diallo for their thoughts and opinions on this topic. I am deeply appreciative of Dawn Comstock and Karen Fields who each read earlier drafts of this article and offered comments.

1. 20 U.S.C. §§ 1681(a) (2022). The entire law is 20 U.S.C. §§ 1681-1688 (2022).

2. Although hardly scientific, a google search of “Title IX 50th anniversary” returned about 3.3 million internet hits on July 25, 2022. For comparison’s sake, a google search of “Title IX 40th anniversary” on the same date revealed just about 435,000 internet hits (screenshots on file with the author).

3. Throughout this article, I refer to women, girls, and females with no disrespect or exclusion intended towards trans women and trans girls. Similarly, I refer to males, boys, and men with no disrespect or exclusion intended towards trans men and trans boys. This article is not an attempt to debate or discuss inclusion of trans athletes at any level; I use the gendered language knowing its limitations and with the intent to be as inclusive as possible. Further, I use the words sex and gender interchangeably in this article. In 1972 the common verbiage was sex and sex discrimination. As language has changed and evolved, gender and gender discrimination seem more appropriate.

Title IX on athletics. The common theme in the fiftieth anniversary coverage matches what law professor Brian L. Porto wrote in 2021, “Title IX is both a colossal achievement and a missed opportunity.”⁴ Title IX has successfully given a much larger number of girls and women an opportunity to play sports,⁵ but schools still often fail to give women and girls the sporting opportunities and experiences they give to men and boys. As noted by scholars and pundits at each significant anniversary, schools have been remarkably consistent in their failure to comply with the law.⁶ This ongoing struggle leads to the lingering question of what would motivate schools at all levels to comply with Title IX, especially in athletics?

Schools have not seemed particularly inspired to comply with Title IX perhaps because the real penalties for non-compliance are not terribly high. Although the threat of a loss of all federal funding for violating Title IX is present,⁷ to date no school has lost any federal funding. After fifty years of no implementation of this penalty, it may have lost some, if not all, of its

4. Brian L. Porto, *Unfinished Business: The Continuing Struggle for Equal Opportunity in College Sports on the Eve of Title IX's Fiftieth Anniversary*, 32 MARQ. SPORTS L. REV. 259, 302 (2021).

5. In 1971-72 roughly 3,667,000 boys and 294,000 girls participated in high school sports. In 2018-2019, approximately 5,435,000 boys and 3,403,000 girls participated in high school sports. *2018-19 High School Athletics Participation Survey*, NFHS 54 (Sept. 5, 2019), https://www.nfhs.org/media/1020412/2018-19_participation_survey.pdf. Similarly for college sports, in 1981-1982 (the first year the NCAA sponsored women's sports) roughly 74,000 women and 169,000 men competed. *NCAA Sports Sponsorship and Participation Rates Report (1956-57 through 2021-22)*, NCAA 7-8 (Oct. 27, 2022), https://ncaaorg.s3.amazonaws.com/research/sportpart/2022RES_SportsSponsorshipParticipationRatesReport.pdf. By 2017-2018, approximately 282,000 men and 219,000 women participated. *Id.* at 79-80.

6. Consider, as an example, the impressive Title IX anniversary scholarship of legal scholar Diane Heckman. She coined the phrase “glass sneaker” as a parallel to the “glass ceiling” to describe limitations on females in sport. Heckman wrote in 1992 that the law had been “a springboard” for female athletes in schools and colleges but that the focus on the enforcement of the law should be on the “quality of the programs provided.” Diane Heckman, *Women & Athletics: A Twenty-Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 62-64 (1992). Five years later, Heckman wrote that “the cases clearly exemplify that female students and educational employees are still subject to second class status The ‘glass sneaker’ still exists in the area of interscholastic and intercollegiate athletics.” Diane Heckman, *On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545, 657 (1997). For the thirtieth anniversary of the law, she noted, “females are still imbued with the attitude that athletic employment, participation opportunities, and benefits are a gift and not an entitlement.” Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551, 553 (2003). One year before the fortieth anniversary, her title said it all. Diane Heckman, *The Entrenchment of the Glass Sneaker Ceiling: Excavating Forty-Five Years of Sex Discrimination Involving Educational Athletic Employment Based on Title VII, Title IX and the Equal Pay Act*, 18 VILL. SPORTS & ENT. L.J. 429, 497 (2011).

7. *Title IX Legal Manual*, DEP'T OF JUST., at sec. VII (Aug. 12, 2021), <https://www.justice.gov/crt/title-ix#1.1%20C2%A020Assurances%20of%20Compliance>. See also Ann K. Wooster, Annotation, *Sex Discrimination in Public Education Under Title IX-Supreme Court Cases*, 158 A.L.R. Fed. 563, § 2(a) (1999).

intimidation factor. Although the courts can, and do, award injunctions and order the reinstatement of teams to give the women and girls sporting opportunities, the courts themselves have limited Title IX damages largely to compensatory damages and attorney's fees. While attorney's fees are important in motivating lawyers to accept Title IX cases, compensatory damages for missed sporting opportunities have largely been limited. In many cases, the school is simply ordered to comply with the law, without facing significant penalties for having violated the law in the first place. Without punitive damages, the law is limited: it is toothless.⁸

This essay argues that Title IX needs the potential of significant punitive damages and financial penalties to encourage institutions to comply voluntarily with the law as it applies to athletics. Waiting for schools to fix the problems after they face complaints and lawsuits is not the best strategy for creating an equitable educational experience for girls. Part I addresses Title IX itself, its history, and the details of the law as it applies to athletics. Part II explores the remedies available under Title IX and how punitive damages were and were not options. Part III examines specific incidents of Title IX violations in athletics at various institutions, particularly the University of Iowa, and Part IV recommends possible solutions to the problem. Simply put, the law needs some bite to be effective.

I. TITLE IX: THE LAW

A. *The History of the Law*

The year 1972 was a watershed year for gender equity laws.⁹ After many decades of struggle for women's legal equality in the United States, the laws passed in 1972 potentially rivaled any prior laws, save the Nineteenth Amendment giving women the right to vote in 1920.¹⁰ Theoretically, the Equal Protection Clause (EPC) of the Fourteenth Amendment reading "no state shall

8. The author—and many others—have made prior reference to Title IX as a paper and a toothless tiger. The first time this author used it in a title was: Sarah K. Fields & Lindsay Parks Pieper, *A Toothless Tiger? Sports, Title IX, and Gendered Bodies*, in *THE BUSINESS AND CULTURE OF SPORTS: SOCIETY, POLITICS, ECONOMY, ENVIRONMENT* 19-32 (Joseph Maguire et al. eds., 2019).

9. The author, like many others, has previously written on this topic. *See id.*; Sarah K. Fields, *Title IX, Race, and Recent Sport*, in *ROUTLEDGE HISTORY OF AMERICAN SPORT* 214, 214-23 (Linda J. Borish et al. eds., 2017); Sarah K. Fields, *Title IX*, in *AMERICAN SPORTS: A HISTORY OF ICONS, IDOLS AND IDEAS* 1349, 1349-52 (Murry Nelson ed., 2009); Sarah K. Fields, *A Brief Legal History of Women in Sport*, in *WOMEN, SPORT, AND PHYSICAL ACTIVITY: CHALLENGES AND TRIUMPHS* 85, 85-98 (Sharon R. Guthrie et al. eds., 2nd ed., 2009); Sarah K. Fields, *Intramural and Club Sports: The Impact of Title IX*, 33 J.C. & U.L. 521 (2007); SARAH K. FIELDS, *FEMALE GLADIATORS: GENDER, LAW, AND CONTACT SPORT IN AMERICA* (2005).

10. U.S. CONST. amend. XIX.

... deny to any person within its jurisdiction the equal protection of the laws”¹¹ should provide legal equality to all persons and that should be the most powerful gender equity law in U.S. history. “Persons” in the original meaning, however, did not include women. Enacted in 1868 after the Civil War, the EPC gave legal protections to the newly freed African American men.¹² The courts have never applied the EPC literally and, specifically, did not apply it to women for decades.¹³ Thus, women’s rights groups tried to get new legislation passed to fill the legal gaps of gender equality.

Women’s rights groups had made some legal inroads with several other laws before 1972. The first was the passage of the Equal Pay Act in 1963, but the law had several exceptions making it relatively simply to justify paying women less based on the job description.¹⁴ It was, though, proof that Congress could address gender inequality with legislation. Similarly, Title VII of the 1964 Civil Rights Act,¹⁵ which prohibits employment discrimination, was the only section of that Act which banned sex discrimination as well as race discrimination. Congressman Howard W. Smith, a Republican from Virginia and a segregationist, had offered the word “sex” as an amendment from the floor, an amendment which was received with some amusement from his colleagues and some questions about his motives. Despite the laughs, it was adopted.¹⁶ President Lyndon Johnson further bolstered the civil rights of

11. U.S. CONST. amend. XIV § 1.

12. For an examination of the floor debates and the history of the EPC, see generally Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955), for an examination of the floor debates and the history of the EPC.

13. For a fuller look at the history of the EPC and women, see SUPREME COURT DECISIONS AND WOMEN’S RIGHTS: MILESTONES TO EQUALITY (Clare Cushman, ed, 2d ed. 2011).

14. Equal Pay Act of 1963, 29 U.S.C.A. § 206(d) (2022). Exemptions included employees in bona fide executive, administrative, or professional capacities. Teachers and administrators were explicitly exempted. For a contemporary interpretation, see Jerald J. Director, *Construction and Application of Provisions of Equal Pay Act of 1963* (29 U.S.C.A. § 206(d)) *Prohibiting Wage Discrimination on Basis of Sex*, 7 A.L.R. FED. 707, §2(b)-§3 (Originally published in 1971). For a broader historical perspective, see Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581 (2018). According to the US Census, in 2020 women earned 83 cents to every dollar earned by men with racial and ethnic gaps as well. Megan Wisniewski, *What is the Gender Wage Gap in Your State?*, U.S. CENSUS BUREAU (Mar. 1, 2022) <https://www.census.gov/library/stories/2022/03/what-is-the-gender-wage-gap-in-your-state.html>.

15. Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2022). For an examination of the floor debates and the history of the EPC, see generally Dédé Koffie-Lart & Christopher J. Tyson, *Title VII of the Civil Rights Act of 1964*, 6 GEO. J. GENDER & L. 615 (2005).

16. Jo Freeman, *How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9(2) L. & INEQ. 163, 163 (1991). Freeman persuasively argued that Smith was not trying to scuttle the Civil Rights Act but was actually working on behalf of Alice Paul and the National Women’s Party (NWP). The NWP had, post-suffrage, supported legal efforts for equality for women, specifically working towards the Equal Rights Amendment. On the other hand, other scholars have argued that the addition was designed to

women when he amended Executive Order 11246 of 1965 which prohibited discrimination on the basis of race, creed, color or national origin in federal employment.¹⁷ Johnson added sex discrimination to the original order in Executive Order 11375 which he signed on October 13, 1967.¹⁸ These laws helped lay the groundwork for the culmination of the second wave of the women's rights movement which would arrive in 1972. That year, gender equity seemed most at reach with the passage of the Equal Rights Amendment which stated, "equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."¹⁹ State ratification of the ERA was, though, years away and ultimately failed. Thus, Title IX was added to the 1972 Education Amendments Act as a means of getting gender equity in education faster.

In Congress, Representative Edith Green, a Democrat from Oregon, helped lead the initial charge for getting girls and women a more equal and less discriminatory experience in education. In June 1970, Green held hearings on gender discrimination in education, particularly in higher education, and worked on legislative language to ban it.²⁰ Originally, Green wanted to amend Title VI of the Civil Rights Act,²¹ which prohibited racial discrimination in any program receiving federal money, to include sex, but she deferred to opposition.²² The result was the thirty-seven word Title IX requiring equal opportunity for both sexes in educational settings receiving federal funding.²³

kill the bill. See CHARLES WHALEN AND BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985); GARY ORFIELD, *CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE* (1975).

17. Exec. Order No. 11,246, Equal Employment Opportunity, 30 Fed. Reg. 12,319 (Sept. 28, 1965). See also Ashley Rohleder-Webb, *50 Years of Title IX: So Much More Than Sports*, J. KAN. BAR ASS'N 30, 32 (2022).

18. Exec. Order No. 11,375, Amending Exec. Order No. 11,246, Relating to Equal Employment Opportunity, 32 Fed. Reg. 14,303 (Oct. 13, 1967).

19. *Equal Rights Amendment*, <http://www.equalrightsamendment.org/> (last visited Dec. 30, 2022). The ERA that passed Congress in 1971 was H.R.J. RES. 208, 92d Cong. (1971). For a general overview of a history of the legislation and a call for its enactment, see Bridget L. Murphy, *The Equal Rights Amendment Revisited*, 94 NOTRE DAME L. REV. 937 (2018) and Deborah Machalow, *The Equal Rights Amendment in the Age of #MeToo*, 13 DEPAUL J. FOR SOC. JUST. 1 (2019).

20. Bernice R. Sandler, *"Too Strong for a Woman": The Five Words that Created Title IX*, in *TITLE IX: A BRIEF HISTORY WITH DOCUMENTS* 9, 11 (Susan Ware, ed., 2007). For the hearings in their entirety, see *Discrimination Against Women: Hearings on Section 805 of H.R. 1609 Before the House of Rep. Special Subcomm. on Educ. of the Comm. of Educ. and Labor*, 91st Cong. (1970).

21. Title VI of Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7 (2022). The law has been called a "sleeping giant." Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1294 (2014).

22. Apparently, some African American leaders worried the addition of sex would dilute the law. Sandler, *supra* note 20, at 32-33. The Justice Department also recommended that Green focus on education

The Education Amendments Act of 1972 was a large omnibus law of which Title IX was a small and largely ignored piece. Representative Green discouraged women from lobbying for Title IX, theorizing, correctly, that flying under the radar was the best option for getting the bill signed into law.²⁴ Senator Birch Bayh, an ally of the women's rights movement, monitored the bill throughout the Senate debate.²⁵ When the Senate version of the bill deleted Title IX in committee, Bayh successfully moved that it be reinserted.²⁶ Representative Patsy Mink, a Democrat from Hawaii and the first Asian-American woman in the House, managed the bill on the House side.²⁷ The final version of the Act was complicated. It offered billions of dollars in aid to universities, including the creation of Pell Grants for low-income students, but it also curbed the use of busing for racial desegregation. The fight over the busing provisions were particularly fraught; Senator Claiborne Pell, a Democrat from Rhode Island, said that the busing provisions had created "unholy alliance of the left and right in opposition to the bill."²⁸ Given that much of the desegregation of public schools relied on busing in 1972, these

and sex discrimination. In *Celebration of the 30th Anniversary of Title IX of the Education Amendments of 1972*, 107th CONG. REC. H4861 (daily ed. July 17, 2002) (statement of Rep. Mink).

23. Although beyond the scope of this article, the last two words of Title IX in 20 U.S.C. § 1681(a) are "except that." Subsequent subsections outline all the exceptions to the law including religious schools with "contrary religious tenets," § 1681(a)(3); institutions whose primary purpose is training for the military or merchant marines, § 1681(a)(4); single sex schools provided they have been "traditionally and continually" single sex, § 1681(a)(5); "social fraternities or sororities; voluntary youth service organizations" § 1681(a)(6)(A)&(B); "boy or girl conferences," 20 U.S.C. § 1681(a)(7); "father-son or mother-daughter activities," § 1681(a)(8); and scholarships from beauty pageants, § 1681(a)(9). Many of these sections have been litigated, and a class action lawsuit has been filed challenging the religious tenet exemption, *Complaint, Hunter v. Dep't of Educ.*, No. 6:21-cv-747 (D. Or. Mar. 29, 2021). Further a Maryland district court in 2022 held that "the tax-exempt status of a private school subjects it to the same requirements of Title IX imposed on any educational institution. CPS [the defendant] cannot avail itself of federal tax exemption but not adhere to the mandates of Title IX." *Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass'n*, No. 20-3132, 2022 WL 2869041, at *3 (D. Md. July 21, 2022). That decision is likely to be appealed.

24. Sandler, *supra* note 20, at 12.

25. See WELCH SUGGS, A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX 41 (2005).

26. In *Celebration of the 30th Anniversary of Title IX of the Education Amendments of 1972*, *supra* note 22, at H4861.

27. *Firsts Among Members*, HIST. ART & ARCHIVES U.S. HOUSE OF REP., <https://history.house.gov/Institution/Firsts-Milestones/Member-Firsts/> (last visited Dec. 30, 2022); see BRIAN L. PORTO, A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS 144 (2003). Because of Mink's tireless efforts after her death in 2002, Title IX was renamed the Patsy Mink Equal Opportunity in Education Act. *The 14th Amendment and Evolution of Title IX*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix#:~:text=The%2014th%20Amendment%20provides%2C%20in,IX%20specifically%20prohibits%20sex%20discrimination> (last visited Dec. 30, 2022).

28. 1972 *Education Act: \$21-Billion in Aid, Busing Curbs*, in CQ ALMANAC 1972, at 03-385-03-398 (28th ed., 1973) <http://library.cqpress.com/cqalmanac/cqal72-1250749> (last visited Dec. 30, 2022).

provisions were a deal breaker for some members of Congress.²⁹ Representative Edith Green, who had helped create and promote Title IX, voted against the bill as a whole.³⁰ Yet, despite the breadth of the bill, Title IX has been the section that has been, perhaps, the most celebrated and most evaluated.

B. The Details of the Law

Given the brevity of the Title IX language, like most Congressionally passed laws, the administration created enforcement regulations³¹ and policy interpretations³² to evaluate if the schools were abiding by Title IX for their athletics programs.³³ Title IX was interpreted to have essentially two major components: comparable experiences for male and female athletes and roughly equitable sporting opportunities for both. The enforcement regulations very specifically listed ten elements (“the laundry list”) as examples of how to determine if the school was offering comparable experiences (often called equal benefits and treatment) for women and girls in athletics. The laundry list was:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities

29. *Id.* For comments on busing, see Richard Nixon, *Statement on Signing the Education Amendments of 1972*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/statement-signing-the-education-amendments-1972> (last visited Dec. 30, 2022). Numerous studies of busing and desegregation exist, for example, J. ANTHONY LUKAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* (1986) and BERNARD SCHWARTZ, *SWANN’S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT* (1986).

30. *House Vote on Conference Report on S. 659 Authorization of Higher Education Act of 1972*, <http://www.govtrack.us/congress/votes/92-1972/h451> (last visited Dec. 30, 2022).

31. 34 C.F.R. § 106.41 (2022).

32. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,413-23 (Dec. 11, 1979).

33. For a nuts and bolts overview as well as excellent background on the law and the related cases, see LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, *TITLE IX* (2005).

and services; (9) Provision of housing and dining facilities and services; (10) Publicity.³⁴

Recruitment was added as an eleventh element in the policy interpretations of 1979,³⁵ and the policy interpretations gave greater clarity as to how these experiences would be evaluated. Given that few schools offered many organized sporting experiences to female athletes, essentially athletic programs had to create physical space as well as to provide equipment and support for their female athletes.³⁶ This was not an easy or cheap proposition.

The other component of the law required equitable sporting opportunities for both male and female athletes. Again, given that historically sport was largely a male domain, this often meant that additional sporting opportunities (or new teams) for women and girls needed to be created, leading to questions about when the law would consider the task completed. A 1979 policy interpretation created a three-prong (or three-part) test for an institution to determine if it was complying with Title IX for athletics. The first prong is proportionality: are the intercollegiate athletic opportunities substantially equal to the proportion of male and female enrollment? The second is history: does the institution have a “history and continuing practice of program expansion” for the underrepresented sex of females? The third prong is about interest: are the interests and abilities of the females being met by the athletic program?³⁷ If a school can answer yes to any of the three parts, the school is complying with the law. In 1996 the First Circuit Court of Appeals in *Cohen v. Brown University* confirmed that the three-prong test was the appropriate means to determine Title IX athletics compliance.³⁸

In addition to equitable opportunities and experiences, Title IX requires that if an institution offers athletic scholarships (or so-called grants-in-aid) to one sex, they be offered to both sexes. The regulation language is fairly

34. 34 C.F.R. § 106.41(c) (2022). For an extensive discussion of institutions’ reluctance to comply with the laundry list of equitable treatment, see Erin E. Buzuvis & Kristine E. Newhall, *Equality Beyond the Three-Part Test: Exploring and Explaining the Invisibility of Title IX’s Equal Treatment Requirement*, 22 MARQ. SPORTS L. REV. 427 (2012).

35. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415.

36. For a broad overview of the history of women in sport as well as a case study of one institution’s struggle with gender equity, see KELLY BELANGER, *INVISIBLE SEASONS: TITLE IX AND THE FIGHT FOR EQUITY IN COLLEGE SPORTS* (2016).

37. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

38. *Cohen v. Brown Univ.*, 101 F.3d 155, 167 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

straightforward: “[t]o the extent that a recipient awards athletic scholarships or grants-in-aid, it must 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.”³⁹ The 1979 policy interpretation reiterated the basic proportionality requirement but clarified that the “the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates.”⁴⁰ Essentially, if women are forty-five percent of the athletes at a particular institution, they should receive forty-five percent of the athletic scholarship dollars or thereabouts. In 1998, the Office of Civil Rights (“OCR”), the division of what is now the Department of Education (“DOE”) tasked with monitoring and enforcing Title IX, offered a clarification: scholarships needed to be within plus/minus one percentage point.⁴¹ This relatively simple to understand formula has remained consistent.

In any discussion of Title IX, remembering that there was a time when the law did not readily apply to athletics is important. The fiftieth anniversary of the law is not necessarily the fiftieth anniversary of the application of the law to sports in schools. First, schools were given until 1978 to comply with Title IX generally.⁴² Then the courts debated whether the law required the compliance of the entire institution if any division received federal funding or if only the division that received money had to comply with Title IX. The Supreme Court ruled in 1984 that only the division receiving federal funds needed to comply with Title IX.⁴³ As almost no athletic department at any educational institution directly received federal funds, for all practical purposes, sport was exempt from Title IX. That exemption ended in 1988 with the enactment of the Civil Rights Restoration Act of 1987.⁴⁴ At this point Title IX clearly applied to athletics, but the battle over the enforcement of Title IX continued.

39. 34 C.F.R. § 106.37(c) (2022).

40. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415.

41. Mary Frances O’Shea, Nat’l Coordinator for Title IX Athletics, *Dear Colleague Letter: Bowling Green State University*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (July 23, 1998), <https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrm.html>. In 2003, additional guidance was offered to reinforce the prior guidelines. Gerald Reynolds, Assistant Sec’y for Civ. Rts., *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (July 11, 2003), <https://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.pdf>.

42. CARPENTER & ACOSTA, *supra* note 33, at 3.

43. *Grove City Coll. v. Bell*, 465 U.S. 555, 574 (1984).

44. Civil Rights Restoration Act of 1987, Pub. L. 100-259, 192 Stat. 28 (1988) (codified as 20 U.S.C. § 1687).

II. PAYING THE PRICE FOR TITLE IX VIOLATIONS: PUNITIVE DAMAGES AND OTHER REMEDIES

In theory, punitive damages are a way to encourage compliance with laws by imposing extra financial penalties on the rule-breaker. Punitive damages have a long history, having been imposed in civil litigation in the seventeenth century in England.⁴⁵ Punitive damages seem to have evolved from prior financial penalties such as fines and amercements. Fines were initially voluntary offerings made to royalty to gain favor or avoid sanctions, and amercements were a financial penalty payable to royalty for a variety of sins.⁴⁶ One of the earliest documented English jurists' comments about punitive damages and their purpose came in *Wilkes v. Wood* in 1763. The Lord Chief Justice said that the

jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.⁴⁷

Further, in the early twentieth century, U.S. courts used punitive damages to address the inequitable balance of power between consumers and owners of commercial enterprises. Although the employer generally needed to know of the misconduct of employees before being hit with punitive damages, the idea behind punitive damages was to stop the employer from ignoring the misconduct in the hopes that the harmed individual would just go away. Failure to respond was considered an abuse of power.⁴⁸ Punitive damages are still used today in with the goal of deterring future lawbreaking.

Neither the language of Title IX nor all its enforcement regulations provided an express cause of action or provisions for the award of damages, leaving it to the courts to make interpretations. The Supreme Court inferred a private cause of action under the law in *Cannon v. University of Chicago* in

45. Henry Brooke, *A Brief Introduction: The Origins of Punitive Damages*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 1, 1 (Helmut Koziol & Vanessa Wilcox eds., 2009).

46. Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1253 (1987).

47. *Id.* at 1266-67.

48. Anthony J. Sebok, *Punitive Damages in the United States*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, *supra* note 45, at 155, 163-64.

1979 after a young woman sued the university for rejecting her application to the medical school based on her sex.⁴⁹ This decision opened the door to individuals who believed their Title IX rights had been violated to directly sue the offending institution in the federal courts. Because Congress made no direction otherwise, plaintiffs in Title IX cases are not required to file complaints with the school or with the OCR before filing a lawsuit, although they often do so. OCR complaints are anonymous, and once a complaint is filed, the complainant largely disappears from the process. The OCR can choose to investigate and can choose to defer to the school's internal investigation. If a student chooses to file a lawsuit, the matter of remedies is undefined in the Title IX regulations. Historically, the courts have held that if Congress does not define the available remedies, the federal courts can.⁵⁰ The absence of specific Congressional intention in the law left the door open for the courts to make their own determinations. The courts proceeded to do so in a series of interconnected decisions about Title IX and related laws.

A. Franklin Case

In 1992 the U.S. Supreme Court in *Franklin v. Gwinnet County Public Schools* concluded that institutions liable for intentional sex discrimination could be required to pay “money damages” in addition to rectifying the situation.⁵¹ In *Franklin*, the high school-aged plaintiff had been repeatedly sexually harassed and assaulted by a teacher. By the eleventh grade, the girl was being removed from class by the teacher and raped. The student told her parents who reported the incidents to the school. The school investigated the girl's allegations, the teacher ultimately resigned, and the school created a reporting procedure for future concerns. The OCR investigation concluded that although the teacher had violated the student's rights, the school had rectified the situation with the removal of the teacher and the implementation of a school grievance procedure. The OCR then ended its investigation.⁵² The girl and her family were unsatisfied by this conclusion and sued the school district for damages. The Supreme Court reaffirmed the right of the plaintiff in a Title IX lawsuit to go directly to federal court with a complaint and the right of the courts to determine appropriate remedies given the absence of Congressional mandated remedies. The Court noted that Congress had had

49. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 677 (1979).

50. *E.g.*, *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Davis v. Passman*, 442 U.S. 228, 246-47 (1979).

51. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 74-75 (1992).

52. *Id.* at 63-64.

ample time to make any legislative limitations it wanted to Title IX and its remedies, specifically in the Civil Rights Restoration Act of 1987.⁵³

Justice Byron R. White wrote for the unanimous court, and he was joined in his opinion by Justices Harry Blackmun, John Paul Stevens, Sandra Day O'Connor, Anthony Kennedy, and David Souter. White explicitly declined to decide under what authority Congress had passed Title IX. The school district had argued that the law was passed under Congress' Spending Clause power, and a prior case had limited remedies when the violations were unintentional. In the *Franklin* case the violations were clearly intentional, and the Court declined to expand the prior case law.⁵⁴ White noted that "[t]he point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award."⁵⁵ He added that notice existed in a case where the school was being given money with the condition that it not discriminate, and he reiterated that the Congressional power under which Title IX was enacted was irrelevant.⁵⁶ At that moment, it seemed that all range of monetary damages, including punitive damages, were available to plaintiffs under Title IX, even for athletes.

Justice Antonin Scalia, however, wrote a concurring opinion in which he was joined by Chief Justice William Rehnquist and Justice Clarence Thomas. In his concurrence, Scalia was skeptical of the *Cannon* decision and the right of the courts to find an implied cause of action when Congress had not explicitly authorized one. He argued that if the courts could find an implied cause of action, they could also limit causes of action and remedies. He wrote, "[i]n my view, when rights of action are judicially 'implied,' categorical limitations upon their remedial scope may be judicially implied as well."⁵⁷ This concurrence would be the foundation upon which Scalia would build limitations on damages for Title IX in future cases.

53. *Id.* at 68, 73; 20 U.S.C. § 1687. *See also* P. Michael Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 MARQ. SPORTS L.J. 149 (1990) (examining the law and how it would strengthen Title IX's regulatory power).

54. *See* *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 28-29 (1981) (holding limited damages for Spending Clause statutes when violations are unintentional). To support his position, Justice White cited *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624, 629-31 (1984) (authorizing money damages under the Rehabilitation Act for intentional discrimination).

55. *Franklin*, 503 U.S. at 74.

56. *Id.* at 74-75.

57. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 76-77 (1992) (Scalia, J. concurring).

B. Gebser Case

In 1998 the Supreme Court again addressed damages and Title IX. In *Gebser v. Lago Vista Independent School District*,⁵⁸ a teacher had, on multiple occasions, made sexual comments to students, including the eighth-grade student who would be the plaintiff. The next school year, the plaintiff became involved in a sexual relationship with the teacher. While in the classroom, the teacher made inappropriate sexual comments generally and about the plaintiff in particular. Students who heard the suggestive remarks complained to their parents who reported the incidents to the school. The teacher and principal then met with these parents, and the teacher apologized and indicated that he would refrain from such language in the future. Soon thereafter, a police officer discovered the teacher and the eighth grader having sex and reported the incident. The teacher was fired and arrested, and the child and her parent filed a Title IX lawsuit. Justice O'Connor wrote for the five-person majority, including Justice Scalia.⁵⁹ She acknowledged that *Franklin* had determined that damages were available in Title IX cases but had not defined the parameters in which damages were acceptable. O'Connor considered the issue that the *Franklin* Court had declined to consider: under what power did Congress enact Title IX? O'Connor noted that Title IX was modeled after Title VI of the Civil Rights Act of 1964 in the sense that both laws were intended to condition federal funding on the agreement of the recipient not to discriminate, making the relationship between the government and the funding recipient contractual. Thus, she concluded that the power to enact Title IX came under the Spending Clause.⁶⁰

The Court then addressed the question of what the parameters of receiving damages under Title IX might be. O'Connor held that "unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond," an institution would not be liable for damages under Title IX.⁶¹ Further to win damages, the school or the official must have shown "deliberate indifference to discrimination."⁶² O'Connor concluded that while the school knew that the

58. 524 U.S. 274 (1998).

59. *Id.* at 276-79. Chief Justice William Rehnquist, Justice Antonin Scalia, Justice Clarence Thomas, and Justice Anthony Kennedy joined the majority. Justices Stevens, Stephen Breyer, Ruth Bader Ginsburg, and David Souter dissented.

60. *Id.* at 286-87; U.S. Const., Art. I, § 8, cl. 1.

61. *Gebser*, 525 U.S. at 290.

62. *Id.*

teacher had been making inappropriate sexual comments to students, the school did not have actual knowledge of the sexual assault. Therefore, the school could only take action when it learned of the assaults, which it did by firing the teacher. This plaintiff, thus, was unable to recover damages. The case suggested that a future plaintiff could recover damages including punitive damages if the student notified the proper officials at school who then failed to take sufficient action. In practice, the decision also suggested that a school will not be liable for the first assault.⁶³

The decision was split five to four, and the dissenters did not agree with many of O'Connor's arguments. Justice Stevens, with the other three dissenting justices, wrote that the majority was being overly narrow. He argued that by limiting damages to an institution that had actual knowledge of discrimination, schools were incentivized to insulate themselves from that knowledge, the exact opposite of what Stevens interpreted as the purpose of Title IX.⁶⁴ Justice Ruth Bader Ginsburg, writing a dissent joined by Justices Souter and Stephen Breyer, made a tort law analogy. She placed the burden on the defense to prove that it had well-publicized internal remedies to resolve the situation as a defense against the plaintiff's claims.⁶⁵ The debate over punitive damages and Title IX was not finished.

C. Davis v. Monroe County Board of Education

The *Davis* case was the next step in the evolution of Title IX and damages.⁶⁶ LaShonda Davis had been repeatedly sexually harassed and assaulted by her classmate while she was in elementary school. Her harasser made sexual comments to her and fondled her. The girl told her mother and her teachers, and her mother followed up with the teachers and the principal. The school seemed to have taken almost no action in response to these complaints. Three months into the behavior, her seat in the classroom was

63. *Id.* at 291-93. *But see Doe ex rel. Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 35 F.4th 459, 466 (6th Cir. 2022) (holding that a known culture of sexual harassment at an institution might prove actual notice prior to an assault).

64. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 293, 299-301 (1998) (Stevens, J. dissenting). *See also* Diane Heckman, *Is Notice Required in a Title IX Athletics Action Not Involving Sexual Assault?*, 14 MARQ. SPORTS L. REV. 175, 195 (2003) (critiquing the Court's failure to account for the in loco parentis relationship between students and schools and for its failure to define who should the person obligated to make a reporting official).

65. *Gebser*, 524 U.S. at 306-07 (Ginsburg, J. dissenting).

66. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). For an overview of the case, see Carie Manke, Comment, *Student-on-Student Sexual Harassment: A Case Comment on the Supreme Court's Decision in Davis v. Monroe County Board of Education*, 78 DENV. U.L. REV. 149 (2000).

moved away from his and the principal spoke to the boy, but no additional punishment seemed to have occurred. The behavior was severe enough that towards the end of the school year in May, the perpetrator was charged with and pled guilty to sexual misconduct. LaShonda's grades suffered, and her father found a suicide note the young girl had written. Frustrated with the school's inaction, the Davis family filed a Title IX lawsuit against the Monroe County Board of Education asking for punitive and other damages.⁶⁷

The Supreme Court agreed to hear the case, according to Justice O'Connor, to resolve the conflict among the circuits about whether a public school could be held responsible for student-on-student sexual harassment. In 1999, the Supreme Court rendered its verdict. Justice O'Connor, writing for the majority,⁶⁸ noted that private actions under Title IX could be filed against the schools for peer-on-peer harassment, and she reaffirmed her holding from *Gebser*. The school district had argued that because the Court had previously implied that Title IX was established under the Congressional Spending Clause, Congress would need to notify each recipient of federal funding that it might be liable for peer-on-peer harassment, which had not occurred.⁶⁹ O'Connor rejected this argument, writing that the plaintiff asked for damages because of the defendant's inaction. The plaintiff was not suing over what the boy did but over what the school district did not do after learning of the boy's behavior.⁷⁰ She concluded that damages could be awarded when "the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities" and if the "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."⁷¹ The case was remanded to the lower courts for a trial on the merits.

Justice Kennedy, joined by Chief Justice Rehnquist as well as Justices Scalia and Thomas, offered a vigorous dissent. The dissent questioned the majority's decision to allow damages under the Spending Clause without clear Congressional intent, arguing that the majority decision "eviscerates the clear-notice safeguard of our Spending Clause jurisprudence."⁷² Kennedy queried whether damages in Title IX cases were the most appropriate use of federal money, warning that "schoolchildren will learn their first lessons about

67. *Davis*, 526 U.S. at 633-35.

68. *Id.* at 632, 637-38 (Justices Stevens, Souter, Breyer, and Ginsburg joined the majority).

69. *Id.* at 640.

70. *Id.* at 641-42.

71. *Id.* at 633.

72. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 654-55 (1999) (Kennedy, J. dissenting).

federalism.”⁷³ Kennedy seemed most concerned about the intrusion of the federal government into daily school matters and, in the process, minimized the harms done to young LaShonda Davis. Kennedy wrote, “[a]fter today, Johnny will find that the routine problems of adolescence are to be resolved by invoking a federal right to demand assignment to a desk two rows away.”⁷⁴ Neither the majority nor the dissenters discussed punitive damages explicitly, leaving that conversation for future decisions.

The majority and dissenting opinions also failed to consider how the *Davis* ruling might impact Title IX in terms of athletics. The question of notice, which both deemed important, is either more complicated or much simpler when it comes to athletics. In issues of sexual harassment and sexual assault, one hopes that the institution does not know that it is occurring prior to notification. Regarding athletics, however, the institution is making the decisions that lead to a violation of Title IX in terms of sporting opportunities or comparable sporting experiences. As discussed, Title IX has explicit regulations about athletics, approved by Congress and unchanged since 1975, and how to comply with Title IX.⁷⁵ Legal scholar Diane Heckman argued the existence of the regulations themselves notify the school of its contractual obligation.⁷⁶ She noted that the considerable follow up from the administration with guidance letters, policy interpretations, and other letters offering clarifications and interpretations to the law do not at any point explicitly require additional notice.⁷⁷ Further, the Equity in Athletics Disclosure Act (EADA) requires that college and universities annually report the athletic participation opportunities, the financial expenditures on athletic scholarships, graduation rates of athletes broken down by various demographics, and the gender of coaches.⁷⁸ This EADA data is collected by the colleges and universities and self-reported to the federal government. Thus, no institution should be unaware of its own Title IX violations. O’Connor’s standard for damages of deliberate indifference would be met because the institution should know its own data. Further, because schools’ significant financial investments in sport must indicate the belief that sports are educational, failure

73. *Id.* at 657-58.

74. *Id.* at 686.

75. 34 C.F.R. § 106.4 (2022).

76. Heckman, *supra* note 64, at 211.

77. *Id.* at 214.

78. 20 U.S.C. § 1092(e) (2022); 20 U.S.C. § 1092(g) (2022) requiring the submission of the required data on an annual basis since 1996). For the implementing regulations, see 34 C.F.R. § 668.41 (2022) and 34 C.F.R. § 668.47 (2022) (Student Assistance General Provisions; Report on Athletic Program Participation Rates and Financial Support Data).

to comply with Title IX should be a severe, pervasive, and objectively offensive bar to women and girls' educational opportunities. While at that moment it seemed that violations of the Title IX athletic regulations could result in punitive damages, that moment was fleeting.

D. Mercer and Barnes Cases

1. Mercer v. Duke University

Heather Sue Mercer was a student at Duke University, and she was also a former all-state high school football placekicker. As a first-year student in 1994, Mercer tried out for the football team. She was not selected, but she did serve as a team manager in 1994 and attended practices. In the spring she was allowed to participate in conditioning drills. The seniors on the team chose her to play in the annual spring intra-squad scrimmage in the spring of 1995, and she kicked the game-winning field goal. The kick received national attention, the coach announced she was on the team, and the university happily asked her to engage the media. In the fall of 1995, she was listed on team rosters and participated in practice but played in no games. She also alleged that during that season Coach Fred Goldsmith discriminated against her because she was female. She said that she was not allowed to participate in all the drills that the other kickers and players were and that she not allowed to dress or even to sit on the sidelines during games like the other backups. She reported that Goldsmith made offensive comments to her, asking about why she wanted to play football, why she was not interested in beauty pageants, why she wanted to be with the team rather than her boyfriend, and made other gender-based comments she found insulting. In the fall of 1996, Goldsmith told Mercer she was off the team, a removal she believed was gender based as she alleged that he kept other less talented kickers on as backups. In the fall of 1997, she sued the school under Title IX.⁷⁹ She lost her district court case because she was asking for Title IX protection in a contact sport, and that lower court concluded that the contact sport exemption for Title IX invalidated her claim.⁸⁰ On appeal, the Fourth Circuit disagreed; once Duke allowed Mercer to try out

79. *Mercer v. Duke Univ.*, 32 F. Supp. 2d 836, 838 (M.D.N.C. 1998), *rev'd*, 190 F.3d 643, 644-45 (4th Cir. 1999).

80. *Mercer*, 32 F. Supp. 2d at 840. Since the contact sport exemption is beyond the scope of this article, see FIELDS, FEMALE GLADIATORS, *supra* note 9, for a discussion of how the Equal Protection Clause has been used to fill the gap.

for a contact sport, Title IX prohibited gender discrimination in her treatment. The Appellate Court sent the case back for trial.⁸¹

Mercer won her jury trial, and the jury awarded her \$2 million in punitive damages. The plaintiff's attorneys asked for \$120,000 in compensatory damages, her tuition for four years at Duke, but the jury awarded her only \$1. When it came to punitive damages, the jury was asked to consider if Duke had acted with malice or reckless indifference, and the plaintiff's attorneys asked that the award be high "enough to get Duke's attention."⁸² The jury came back with \$2 million, which certainly got the university's attention enough to immediately announce that they would appeal the award. Mercer asserted that she would use the money to establish a scholarship for female place kickers.⁸³ To put the \$2 million in context, Duke University collected approximately \$200 million in federal funding in 1997-1998,⁸⁴ money which, in theory, could have been withheld for the Title IX violations. Duke moved to have the case dismissed and to have damages waived as inappropriate or excessive. But the federal district court judge denied all motions in a long decision, laying out specific evidence to support the jury's verdict and damages award.⁸⁵ The district court judge explicitly concluded that the *Gebser* requirement of actual knowledge was met even though Mercer herself had not directly notified the president or the athletic director of her concerns.⁸⁶

Duke appealed the judgment, returning to the Fourth Circuit Court of Appeals, but the appellate court placed this case in abeyance to await the pending verdict of a Supreme Court case. The Supreme Court rendered its verdict in *Barnes v. Gorman* on June 17, 2002.⁸⁷ In an unpublished decision released after *Gorman*, the Fourth Circuit Court in the *Mercer* case vacated the compensatory and punitive damages award and remanded the question of attorney fees.⁸⁸

81. *Mercer*, 190 F.3d at 648.

82. *Jury Awards Mercer \$2 Million in Discrimination Suit*, DUKE TODAY (Oct. 20, 2000), <https://today.duke.edu/2000/10/heathersueo20.html>.

83. *Id.*

84. *Mercer v. Duke Univ.*, 181 F. Supp. 2d 525, 551 (M.D.N.C. 2001), *vacating in part*, No. 01-1512, 2002 WL 31528244 (Nov. 15, 2002), *aff'd*, 401 F.3d 199 (4th Cir. 2005).

85. *Mercer III*, 181 F. Supp. 2d at 531-54.

86. *Id.* at 539-40. *See* Heckman, *supra* note 64, at 228-29.

87. *Barnes v. Gorman*, 536 U.S. 181, 183 (2002).

88. *Mercer*, 2002 WL 31528244, at *3 (4th Cir. Nov. 15, 2002).

2. *Barnes v. Gorman*

The question that the *Mercer* court so eagerly awaited in *Gorman* was whether punitive damages could be awarded in a private right of action under the American with Disabilities Act (ADA) of 1990⁸⁹ and the Rehabilitation Act of 1973.⁹⁰ Jeffery Gorman, the plaintiff, was a paraplegic who lacked voluntary control over his lower body, forcing him to wear a catheter and a urine bag around his waist. Gorman was arrested for trespassing at a bar, and after he was arrested, he was denied the opportunity to empty his urine bag. The police van used to transport him to the station was not designed to handle his wheelchair, so he was removed from the chair and strapped to a bench with the seatbelt and Gorman's own belt. Gorman feared the urine bag would be punctured, so he removed the seatbelt. His own belt loosened, and he fell from the bench, injuring his shoulder and puncturing the urine bag. The driver was unable to lift Gorman, thus he strapped him to a van support and finished the drive. After his release, Gorman developed a bladder infection, back pain, and spasms that kept him from working. He sued the police under the ADA and the Rehabilitation Act, and a jury awarded him \$1 million in compensatory damages and \$1.2 million in punitive damages.⁹¹

The question for the courts was whether punitive damages were available by law under the ADA and Rehabilitation Act. In a judgment addressing post-trial motions, the district court vacated the punitive damages, deeming them unavailable to plaintiffs under the ADA and the Rehabilitation Act in 1999.⁹² The Eighth Circuit Court of Appeals vacated the lower court's ruling, relying on *Franklin*, and concluded that unless Congress indicated otherwise, federal courts could utilize appropriate relief, including punitive damages.⁹³ The police appealed.

The Supreme Court took a different tact. Justice Scalia, joined by Chief Justice Rehnquist as well as Justices O'Connor, Kennedy, Souter, and Thomas, wrote the majority opinion in the 9-0 ruling.⁹⁴ Scalia believed that the question to be explored was the definition of "appropriate relief" when Congress failed to articulate relief measures under the law.⁹⁵ Scalia returned to

89. 42 U.S.C. § 12132 (1990).

90. 29 U.S.C. § 794(a) (1973).

91. *Gorman*, 536 U.S. at 183-84.

92. *Gorman v. Easley*, No. 95-0475-CV-W-3, 1999 WL 34808615, at *1 (W.D. Mo. Oct. 28, 1999).

93. *Gorman v. Easley*, 257 F.3d 738, 745-47 (8th Cir. 2001).

94. *Barnes v. Gorman*, 536 U.S. 181, 182-83 (2002) (Justice O'Connor joined Justice Souter's concurrence. Justices Ginsberg and Breyer joined Justice Stevens' concurrence).

95. *Id.* at 185.

the concept of limiting damages which he had originally raised in his concurrence in *Franklin*. Scalia suggested that damages were appropriate “only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature.”⁹⁶ Scalia went back to the concept raised in *Gebser* that Title IX had created a contractual relationship between the funding agency (the federal government) and the schools. Scalia argued that the ADA and the Rehabilitation Act were similarly contractual relationships which thus allowed only remedies traditionally available under contract law: compensatory damages and injunctive relief but not punitive damages.⁹⁷ Scalia referred to Justice Kennedy’s dissent in *Davis* in which he suggested that the scope of liability might be a factor in whether a school accepted federal funding. Scalia added that schools might decline funding if they thought they might lose it to punitive damages.⁹⁸ Using that same logic, Scalia concluded that punitive damages were also unavailable under Title VI of the Civil Rights Act of 1964 because Congress had not explicitly defined available remedies.⁹⁹ Justice Souter’s concurrence agreed with the contract law analogy.¹⁰⁰ Justice Stevens concurred only in the judgment because he believed that municipalities were not subject to punitive damages absent congressional intent under a prior decision.¹⁰¹

3. The Impact of *Mercer*

The Fourth Circuit Court of Appeals decision concluding that Heather Sue Mercer could not keep the \$2 million the jury had awarded her in punitive damages was unpublished,¹⁰² and thus by Fourth Circuit rules, citation within the circuit was “disfavored.”¹⁰³ Of course, the Fourth Circuit decision was never more than persuasive outside of the circuit. However, approximately twenty subsequent cases to date have been decided in the federal courts about Title IX and punitive damages. The vast majority have cited that unpublished Fourth Circuit decision and concluded that Title IX prohibits punitive

96. *Id.* at 187.

97. *Id.* at 187-88.

98. *Id.* at 188.

99. *Id.* at 187-88.

100. *Barnes v. Gorman*, 536 U.S. 181, 190-91 (2002) (Souter, J. concurring) (questioning how to consider compensatory damages under the Spending Clause).

101. *Id.* at 193; *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (holding municipalities were not subject to punitive damages without Congressional intent).

102. *Mercer v. Duke Univ.*, No. 01-1512, 2002 WL 31528244, at *3 (4th Cir. Nov. 15, 2002).

103. *See* U.S. Ct. App. 4th Cir., Local Rule 32.1 (2022) (explaining the citation of unpublished decisions by the court).

damages.¹⁰⁴ Only one concluded that because neither their specific circuit court of appeals nor the Supreme Court have explicitly eliminated punitive damages from Title IX, they are allowed.¹⁰⁵ Thus the impact of *Mercer* has been profound: universities need not worry about the threat of punitive damages.

Subsequent *Mercer* decisions, however, still left plaintiffs with the opportunity to recover their attorney's fees. After the Fourth Circuit ruled that she was ineligible for punitive damages, the case was remanded to reconsider the attorney fees which had been previously awarded. The district court had originally granted Mercer's request for about \$341,000 in fees, and \$48,0000 for costs, for a total award of approximately \$389,000.¹⁰⁶ After the Fourth Circuit vacated the punitive damages award, leaving Mercer with only \$1 in compensatory damages, Duke asked the court to vacate all attorney's fees which the Fourth Circuit did. The Fourth Circuit remanded to the lower court the case to reconsider what, if any, fees Mercer should be awarded since the Fourth Circuit never overturned the holding that Duke was liable for its sex discrimination.¹⁰⁷ The district court concluded that even though Mercer had not convinced a jury that her compensatory damages were significant, she had persuaded the jury that she suffered discrimination. The court wrote "Mercer's

104. *Harrington v. Lesley Univ.*, 554 F. Supp. 3d 211, 233 (D. Mass. 2021); *Jaeckle v. Flagler Coll., Inc.*, No. 3:19-cv-1323-J-32MCR, 2020 WL 5016901, at *1-2, *order clarified by* No. 3:19-CV-1323-J-32MCR, 2020 WL 5096587 (M.D. Fla. Aug. 28, 2020); *Doe 1 v. Baylor Univ.*, No. 6:16-CV-173-RP, 2020 WL 1557742, at *6 (W.D. Tex. Apr. 1, 2020); *Hauff v. State Univ. of N.Y.*, 425 F. Supp. 3d 116, 138 (E.D.N.Y. 2019); *Thomaston v. Baldwin Cnty. Bd. of Educ.*, No. 18-00372-KD-B, 2019 WL 3069863, at *6, *report and recommendation adopted by* No. 18-00372-KD-B, 2019 WL 3069399 (S.D. Ala. July 12, 2019); *Ruvalcaba v. Angleton Indep. Sch. Dist.*, No. 3:18-CV-00243, 2019 WL 2996536, at *6, *report and recommendation adopted by* No. 3:18-CV-00243, 2019 WL 2994638 (S.D. Tex. July 9, 2019); *Doe v. Sch. Bd. of Miami-Dade Cnty.*, 403 F. Supp. 3d 1241, 1268 (S.D. Fla. 2019); *Sadeghian v. Univ. of S. Ala.*, No. 18-00009-JB-B, 2018 WL 7106981, at *20 (S.D. Ala. Dec. 4, 2018), *report and recommendation adopted by* No. 18-00009-JB-B, 2019 WL 289818 (S.D. Ala. Jan. 22, 2019); *Biggs v. Edgecombe Cnty. Pub. Schs. Bd. of Educ.*, No. 4:16-CV-271, 2018 WL 4471742, at *9 (E.D.N.C. Sept. 18, 2018); *Pejovic v. State Univ. of N.Y. at Albany*, No. 117-CV-1092, 2018 WL 3614169, at *7 (N.D.N.Y. July 26, 2018); *C.M. v. Pemberton Twp. High Sch.*, No. 16-9456, 2017 WL 2815069, at *6 (D.N.J. June 29, 2017); *Ayala v. Omogbehin*, No. H-16-2503, 2016 WL 7374224, at *4 (S.D. Tex. Dec. 20, 2016); *Benacquista v. Spratt*, 217 F. Supp. 3d 588, 607 (N.D.N.Y. 2016); *Peterson v. New England Inst. of Tech.*, No. 14-63, 2014 WL 2573653 (D.R.I. June 9, 2014); *Minnis v. Bd. of Sup'rs of La. State Univ. & Agric. & Mech. Coll.*, 972 F. Supp. 2d 878, 889 (M.D. La. 2013); *Doe v. Fournier*, 851 F. Supp. 2d 207, 223 (D. Mass. 2012); *Frechel-Rodriguez v. Puerto Rico Dep't of Educ.*, 478 F. Supp. 2d 191, 198-99 (D.P.R. 2007); *Hooper v. N.C.*, 379 F. Supp. 2d 804, 811 (M.D.N.C. 2005); *Alston v. N.C. A&T State Univ.*, 304 F. Supp. 2d 774, 784 (M.D.N.C. 2004).

105. *K.J. v. St. Joseph Sch. Dist.*, No. 18-6113-CV-SJ, 2019 WL 267743, at *7 (W.D. Mo. Jan. 18, 2019).

106. *Mercer v. Duke Univ.*, 181 F. Supp. 2d 525, 553-54 (M.D.N.C. 2001).

107. *Mercer v. Duke Univ.*, 301 F. Supp. 2d 454, 458 (M.D.N.C. 2004).

litigation vindicated her personal right, as well as the rights of others, to be free from discrimination on the basis of gender in accordance with Title IX.”¹⁰⁸ Thus the court concluded that Mercer’s lawsuit had addressed a significant legal issue and “advanced an important public goal.”¹⁰⁹ The court then addressed how much Mercer could win in attorney fees. After much math and careful calculation of fees for the legal staff, as well as a determination of how much time was spent on the issue of punitive damages (for which the lawyers could not be compensated), the court awarded Mercer almost \$350,000,¹¹⁰ less than Mercer’s team asked for but significantly more than the zero for which Duke had argued. Duke appealed to the Fourth Circuit again, but the university lost after the Fourth Circuit affirmed the district court decision.¹¹¹ Mercer’s victory was important: without the possibility of punitive damages or attorney fees, few lawyers would be able to prosecute a Title IX claim on a contingency basis.¹¹²

E. Title IX, Punitive Damages, and Municipalities

Private actions against school districts have another level of complication for plaintiffs. While *Barnes v. Gorman* and *Mercer v. Duke University* each suggested the courts would not be friendly to punitive damages in Title IX actions, an earlier Supreme Court decision had restricted punitive damages against municipalities. In the 1981 decision of *City of Newport v. Fact Concerts, Inc.*, the Court concluded that Newport was not liable for punitive damages after withdrawing a concert permit from the plaintiff after a performer substitution, and the plaintiff filed a lawsuit under 42 U.S.C. § 1983.¹¹³ The Court concluded that municipalities are not subject to punitive damages, and because public school districts are considered the equivalent of municipalities, most courts have rejected punitive damages under Title IX against school districts since 1981.¹¹⁴ Justice Stevens interpreted *City of Newport* to mean that no new reasoning was needed to deny punitive damages

108. *Id.* at 461-62.

109. *Id.* at 465.

110. *Id.* at 470.

111. *Mercer v. Duke Univ.*, 401 F.3d 199, 212 (4th Cir. 2005).

112. For a broad overview of this decision, see Sabrina Bosse, Note, *Is the Price of Victory Just?: Attorney’s Fees, Punitive Damages, and the Future of Title IX in Mercer v. Duke University*, 13 VILL. SPORTS & ENT. L.J. 319, 350-51 (2006).

113. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

114. 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, 172-74 (2009).

in *Barnes v. Gorman*.¹¹⁵ Thus, between *Mercer* and *City of Newport*, plaintiffs suing public schools at the K-12 level for Title IX violations of any kind seem unlikely to receive punitive damages despite the *Franklin* decision. Scholars suggest that this could have a chilling effect on Title IX cases. One law review article argued, “instead of encouraging Title IX compliance, attorneys’ fees awards only encourage schools and other recipients to settle once a complaint has been filed.”¹¹⁶ Another law review concluded that “[n]ot faced with the potential for punitive damages for even their most egregious violations, schools may simply find that paying compensatory damages is cheaper than complying with Title IX.”¹¹⁷

III. FAILURE TO COMPLY

Many schools still do not comply with the athletics requirements of Title IX. In 2021, law professor Brian Porto wrote “the persistence of litigation seeking equitable participation opportunities for women in college sports almost fifty years after the passage of Title IX is no surprise. Despite the tremendous growth over time in the number of those opportunities, gender equity remains the exception, not the rule, in college sports.”¹¹⁸ Consider the University of Iowa and its complicated history with women and sports.

A. *The University of Iowa*

1. A Tradition of Women’s Sports

Like most universities, the University of Iowa (UI) did not offer strong support to women’s sports prior to 1972. The Department of Physical Education and Dance (PE and Dance) coordinated some club-type sports for women, but only with the passage of Title IX was the university inspired to formalize a structure of sport for women. In an unusual move, the university chose to create separate men’s and women’s athletic departments rather than placing the women into the existing men’s athletic department. Dr. Christine H.B. Grant was appointed the first (and would be the only) Athletic Director for the Women at the University of Iowa in 1973. Grant reported to the head of PE and Dance who, in turn, reported to the Dean of the College of Liberal

115. 536 U.S. 181, 192-93 (2002).

116. Pohlman, *supra* note 114, at 183.

117. Charles L. Rombeau, Constitutional Developments, *Barnes v. Gorman and Mercer v. Duke University: The Availability of Punitive Damages in Title IX Litigation*, 6 U. PA. J. CONST. L. 1192, 1192 (2004).

118. Porto, *supra* note 4, at 291.

Arts. In 1974, Grant's budget almost doubled from about \$7,500 to \$14,000.¹¹⁹ The men's athletic department was separate from the colleges and managed by the men's athletic director (AD), Bump Elliot. Grant, Elliot, and the university president worked together to increase women's sporting opportunities even before Title IX regulations required them to do so. The institution added eleven women's varsity sports in 1974-1975, and by 1980 the number of scholarships for women had gone from zero to eighty.¹²⁰ Grant developed national prominence as an expert in, and advocate for, Title IX, and she was a constant media and legislative presence as she fought for gender equity in sport. In the meantime, UI, under her leadership, was touted as being a model of excellence in women's sport with competitive women's teams and large crowds.¹²¹ In 1992, Grant and UI committed to meeting the proportionality prong of Title IX by 1997.¹²² The institution was already in compliance because the university had a history of creating women's sports teams, adding crew in 1994¹²³ and soccer in 1997.¹²⁴

When Grant retired in 2000, women's athletics at UI changed. The university decided to merge the men's and women's athletic departments into one, and the male men's athletic director became the head of women's athletics as well. The goal was to save money, but the committee which recommended the merger also advised that the top two positions in athletics be held by one male and one female administrator. After Grant's retirement, the top position was always held by a man, and, until 2014, the second position was held by a woman.¹²⁵ No additional women's sports were added after Grant's retirement. In 2006, Gary Barta became the UI athletic director, and

119. Maureen K. Lienau, *The Metamorphosis of the Department of Intercollegiate Athletics for Women at the University of Iowa, 1974-1984*, 1-2 (August 1989) (unpublished Ph.D. dissertation, University of Iowa) (on file with the University of Iowa).

120. Scott Dochterman, *Remembering Dr. Christine Grant: Women's Sports Pioneer and Title IX Champion*, *ATHLETIC* (May 22, 2022), <https://theathletic.com/3325073/2022/05/22/iowa-womens-athletics-title-ix-dr-christine-grant/>.

121. *Id.*

122. T. Jesse Wilde, *Gender Equity in Athletics: Coming of Age in the 90's*, 4 *MARQ. SPORTS L.J.* 217, 248 (1994).

123. Erin Jordan, *Some Say False Gender Balance in University of Iowa Athletics*, *GAZETTE* (Mar. 6, 2016, 5:00 AM), <https://www.thegazette.com/news/some-say-false-gender-balance-in-university-of-iowa-athletics/>.

124. *Iowa Women's Athletics, 50 Years*, *HAWKEYE SPORTS*, <https://hawkeyesports.com/women/> (last visited Dec. 30, 2022).

125. Ryan J. Foley, *Coach's Lawsuit Assails Iowa AD's Record on Gender Equality*, *AP NEWS* (Mar. 7, 2016), <https://apnews.com/article/dc88cf1c098e401387ef48297573c02c>.

things changed even more. The University of Iowa began to have problems with Title IX and gender equity complaints.

2. Problems in Field Hockey

On January 28, 2015, four UI field hockey players filed a complaint about the University of Iowa's athletic department with the OCR.¹²⁶ They alleged gender bias because their coach was fired in August 2014; AD Barta said the coach was fired because of abusive behavior towards athletes, but a university investigation found no policy violations.¹²⁷ The field hockey coach was fired in 2014, just three years after a male strength and conditioning coach received a coaching award three months after thirteen football players were hospitalized with rhabdomyolysis (a medical condition caused by overexertion) because of his assigned workout.¹²⁸ The complaint stated that the university treated grievances from female athletes differently than male athletes, investigated female coaches differently than their male counterparts and with different standards and practices, allowed male coaches to use techniques not permitted with female coaches, and held female coaches to a higher standard than male coaches. Further, the players argued that the university's behavior violated Title IX because "the university's stereotype-motivated reaction to a minority group of females on the team who are emotionally upset by the methods of the female coach also harms the females who complained. It enables stereotypes about them as well as the coach and completely undermines the experience of the entire team."¹²⁹

Nothing came immediately of the players' OCR complaint, but the field hockey coach, Tracey Griesbaum, filed a lawsuit alleging gender and sexual orientation discrimination. Her partner, Jane Meyer, a former assistant athletic director, was reassigned from her position after expressing concern about Griesbaum's termination. Ultimately, Meyer, too, was fired, and she also filed

126. Chandler Ackers et al., *Re: Chandler Ackers, Jessy Silfer, Natalie Cafone and Dani Hemeon on Behalf of Themselves and Others Similarly Situated v. The University of Iowa*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Jan. 28, 2015), <https://s3.documentcloud.org/documents/2800034/Office-of-Civil-Rights-Complaint-of-Student.pdf>.

127. Mark Emmert, *Iowa Settles Athletic Discrimination Cases for \$6.5M*, HAWK CENT. (May 19, 2017, 6:41 PM), <https://www.hawkcentral.com/story/sports/college/iowa/2017/05/19/tracey-griesbaum-iowa-hawkeye-gary-barta-settlement/333218001/>.

128. Pat Harty, *Kirk Ferenz Trusted Chris Doyle to a Fault as Shown in 2011*, HAWKFANATIC (June 16, 2020), <https://hawkfanatic.com/2020/06/16/kirk-ferenz-trusted-chris-doyle-to-a-fault-as-shown-in-2011/>.

129. Danny Payne, *Iowa Field-Hockey Players File Title IX Complaint Against University*, DAILY IOWAN (Feb. 6, 2015), <https://dailyiowan.com/2015/02/06/iowa-field-hockey-players-file-title-ix-complaint-against-university/>; see Ackers et al., *supra* note 126, at 5.

a lawsuit with the same allegations. In 2017, a jury found in Meyer's favor, and just before the start of Griesbaum's trial, the university settled with the pair for \$6.5 million.¹³⁰

Meanwhile the field hockey players were not finished talking to the OCR. On December 29, 2017, the University of Iowa signed a Voluntary Resolution Agreement with the OCR in connection with a Title IX complaint filed on September 2, 2015, which alleged the university did not give female athletes the same opportunities as male athletes. The university was careful to emphasize that the resolution agreement was not in any way connected to the field hockey players' Title IX complaint filed in January 2015;¹³¹ however, a local newspaper reported that the complaint was filed by the same field hockey players and the same attorneys who had filed the January complaint. The players told the paper that they had filed an additional complaint when nothing came of the January complaint about the termination of their coach.¹³² The agreement meant that the university would monitor and release data about equipment and supplies, recruitment, locker rooms, and practice and competitive facilities to establish that there were no disparities between genders, and any existing disparities were not because of gender discrimination.¹³³ The OCR report, according to a local newspaper, found potential problems in these areas, specifically noting that the university spent more than double the amount of money on male athletes' equipment, that the men's teams had more recruiting trips, that the softball locker room was inadequate, and that only the football team stayed in local hotels the night before home competitions.¹³⁴ The OCR had concluded that UI had not violated Title IX in "scheduling games and practice times, travel and per diem, coaching, medical and training, publicity, and support services."¹³⁵ Further, the university asserted that they were meeting the proportionality prong by only being essentially six female athletes short of compliance.¹³⁶ A local news

130. Emmert, *supra* note 127; see Pamela Bass, *Second Generation Gender Bias in College Coaching: Can the Law Reach that Far?*, 26 MARQ. SPORTS L. REV. 671, 688-92 (2016) (using the coach's firing as a case study).

131. Brooklyn Draisey, *UI Signs Agreement With Civil Rights Office to Prove Title IX Compliance*, DAILY IOWAN (Feb. 9, 2018), <https://dailyiowan.com/2018/02/09/university-of-iowa-signs-agreement-with-ocr-to-prove-title-ix-compliance/>.

132. Erin Jordan, *Feds Resolve University of Iowa Gender Equity Complaint*, GAZETTE (Aug. 15, 2022, 11:44 AM), <https://www.thegazette.com/education/feds-resolve-university-of-iowa-gender-equity-complaint/>.

133. Draisey, *supra* note 131.

134. Jordan, *supra* note 132.

135. Draisey, *supra* note 131.

136. *Id.*

report suggested otherwise: in 2015-2016, women made up fifty-two percent of all undergraduates but only forty-nine percent of athletes, leaving the university fifty-four female athletes short of compliance.¹³⁷

The attorneys who had past dealings with the university under gender equity were not thrilled with the resolution. Jill Zwagerman, who represented the field hockey coach and the assistant AD who settled their discrimination case, said, “[w]hat the OCR is doing here is finding there are violations and letting the University of Iowa fix them after the fact without holding them accountable.”¹³⁸ Her law partner, Tom Newkirk, likened the resolution to a probation agreement in which if the university promised to stay out of trouble for a year, then there were no repercussions.¹³⁹

3. Cutting Women’s Swimming and Diving

On August 21, 2020, the first fall semester of the COVID-19 pandemic, members of four athletic teams at the University of Iowa received text messages telling them to attend team meetings in the basketball arena. The roughly 100 members of the women’s and men’s swimming and diving teams as well as the members of the men’s gymnastics team and men’s tennis teams were all seated in socially distanced chairs placed six feet apart on the floor of the arena when AD Barta arrived. Barta told the students that after the 2020-2021 school year, all four sports would be eliminated. According to the students, he talked for about two minutes and then left as the shocked, frustrated, and angry students remained to process the news.¹⁴⁰

Later Barta would explain that his decision was not personal; it was just business. A few weeks earlier the Big 10 Conference, of which UI is a part of, announced that it was postponing all of its fall sports until at least the spring of 2021.¹⁴¹ This meant that football, which both generated and consumed huge

137. Jordan, *supra* note 132.

138. *Id.*

139. *Id.*

140. Pat Forde, *Iowa’s Elimination of Four Sports Shows the Cruel Side of College Athletics*, SPORTS ILLUSTRATED (Aug. 25, 2020), <https://www.si.com/college/2020/08/25/iowa-cuts-sports-swimming-gymnastics-tennis>.

141. *Id.* Big Ten Commissioner Kevin Warren said he made the decision to postpone the fall seasons because of concerns about the mental and physical health of the students competing during the pandemic. He cited the many uncertainties about the long-term risk of the virus to the athletes, but his announcement was met with anger and resistance from some coaches and players. Emily Giambalvo, *Big Ten Becomes First Major College Football Conference to Cancel Fall Season*, WASH. POST (Aug. 11, 2020, 3:02 PM), <https://www.washingtonpost.com/sports/2020/08/11/big-ten-cancels-fall-college-football-season/>. Although positive tests for Covid-19 in August of 2020 were decreasing slightly, there was still no vaccine or treatment. Hospitalizations and deaths were still above the epidemic threshold has defined by the Centers for

amounts of money for UI, was postponed for the fall (although in mid-September 2020, the Big 10 announced football would restart in October 2020).¹⁴² Barta told the students, and the press later, that the university could not afford to keep the four cut sports because of their costs. Iowa had collected \$55.6 million earlier in the summer of 2020 from its Big 10 revenue share, and Barta told the press that the university intended to apply for a \$75 million loan.¹⁴³ Barta still claimed that the athletic deficit would be almost \$75 million.¹⁴⁴ Money seemed tight for the University of Iowa athletics.

The distribution of the money in Iowa athletics was more complicated than it appeared. According to the press, UI had given their football coach a ten-year contract in 2010 worth \$42 million and had earlier that summer paid \$1.1 million in a severance package to the strength and conditioning coach who had been accused of racism and abuse (the same coach in 2011 who had athletes hospitalized with rhabdomyolysis).¹⁴⁵ Comparatively, the annual game-day operating cost of the four teams being cut (men's and women's swimming and diving as well as men's tennis and men's gymnastics) totaled about \$900,000.¹⁴⁶ Total annual budgetary outlay, including salaries, scholarships, and facility expenses for the cut sports totaled just under \$5 million.¹⁴⁷

UI was not the only institution to worry about money during the pandemic and to cut teams for financial exigency reasons. For example, Stanford University cut eleven sports (including both men's and women's teams), while the University of Minnesota cut men's gymnastics, tennis, and track.¹⁴⁸ An

Disease Control and Prevention. *COVIDView: A Weekly Surveillance Summary of U.S. COVID-19 Activity*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/pdf/covidview-08-28-2020.pdf> (Aug. 28, 2020). Medical and public health professionals worried that the fall of 2020 would see a spike in the numbers of cases, hospitalizations, and deaths from the virus. Nicole Chavez, *Another Wave of Coronavirus Will Likely Hit the US in the Fall*, CNN (May 2, 2020), <https://www.cnn.com/2020/05/02/health/coronavirus-second-wave-fall-season/index.html>.

142. Reese Oxner, *Big Ten Reverses Decision, Will Start Football Season in October*, NPR (Sept. 16, 2020, 12:31 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/09/16/913522262/big-ten-reverses-decision-will-start-football-season-in-october>.

143. Forde, *supra* note 140.

144. That deficit turned out to be about \$45 million. Robert Read, *Hawkeye Athletics Deficit Lower Than Initially Anticipated*, DAILY IOWAN (Aug. 23, 2021), <https://dailyiowan.com/2021/07/20/hawkeye-athletics-deficit-lower-than-initially-anticipated/>.

145. Forde, *supra* note 140.

146. *Id.*

147. *Id.*

148. Aishwarya Kumar, *The Heartbreaking Reality—and Staggering Numbers of the NCAA Teams Cut During the Pandemic*, ESPN (Nov. 6, 2020), https://www.espn.com/olympics/story/_/id/30116720/the-heartbreaking-reality-staggering-numbers-ncaa-teams-cut-pandemic; *see also* Alex Scarborough, *Stanford*

ESPN report concluded that 352 college sports teams were eliminated between March and November of 2020 because of pandemic caused financial limitations.¹⁴⁹ This report found that only about seven more men's teams were cut than women's, meaning that an almost equal number of men's and women's teams were eliminated.¹⁵⁰

The challenge for schools who want to cut women's teams is Title IX. Unfortunately for the men, they have not been able to use Title IX to have their sports reinstated.¹⁵¹ The women, however, could argue that cutting their team placed the university in violation of the law. In the past, various women had succeeded in getting their sports reinstated after they established that their schools were not in compliance with Title IX.¹⁵²

Four members of the University of Iowa's swimming and diving team chose to follow this course. On September 25, 2020, about a month after the cuts were announced, Sage Ohlensehlen, Christina Kaufman, Alexa Puccini, and Kelsey Drake filed a class action lawsuit¹⁵³ against the University of Iowa alleging that by cutting their team, the university had violated Title IX. Specifically, the plaintiffs argued that the university was not providing their female students equal opportunities in sport because (1) female athletes were not substantially proportionate to the female undergraduate enrollment; (2) the institution had no history and continuing practice of program expansion for women; and (3) the university had not established that they were meeting the interests and abilities of their female students. The plaintiffs asked for

to Cut 11 Varsity Sports, Cites Pandemic as Breaking Point, ESPN (July 8, 2020), https://www.espn.com/college-sports/story/_/id/29429478/stanford-cut-11-varsity-sports-cites-pandemic-breaking-point.

149. Kumar, *supra* note 148.

150. *Id.*

151. *Gonyo v. Drake Univ.*, 837 F. Supp. 989, 990, 996 (S.D. Iowa 1993) (men's wrestlers sued to have team reinstated under Title IX and failed); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1047 (8th Cir. 2002) (concluding that the university could cut a men's team rather than adding female athletes in order to comply with the proportionality prong); *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 112 (W.D. Va. 2007), *aff'd*, No. 07-1914, 2008 WL 4104235 (4th Cir. Aug. 20, 2008), *cert. denied*, 556 U.S. 1127, *remanded to* 675 F. Supp. 2d 660 (W.D. Va. 2009), *aff'd*, 639 F.3d 91 (4th Cir. 2011) (holding that universities could decide how to comply with Title IX and confirming the legality of the three-part test), *cert. denied*, 565 U.S. 1111 (2012).

152. *See Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 344 (3d Cir. 1993) (reinstating women's field hockey and gymnastics teams); *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1518-19 (D. Colo.) (reinstating the women's softball team), *aff'd in part, rev'd in part*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

153. Complaint, *Ohlensehlen v. Univ. of Iowa*, No. 3:20-cv-00080-SMR-SBJ (S.D. Iowa Sept. 25, 2020). Title IX lawsuits are often filed as class action lawsuits so that if the named plaintiffs leave school for any reason, the lawsuit is not deemed moot. *See e.g.*, *Cook v. Colgate Univ.*, 802 F. Supp. 737, 751 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17, 18 (2d Cir. 1993).

reinstatement of the team and for additional sporting opportunities for women at UI.¹⁵⁴

The key matter at issue was whether the University of Iowa met the proportionality prong of Title IX. The university failed to meet the history prong because it had been roughly twenty since it had added a women's sport team, and the university had no evidence that it was meeting the third prong option of interests and ability.¹⁵⁵ Thus the battle was whether the university was meeting its Title IX obligations under the proportionality prong—was the number of athletic opportunities for women proportional to the undergraduate female enrollment at the institution? The complaint argued that UI was not based, in part, on the report from the prior 2018 OCR investigation of the university. In that OCR report, the federal agency had found no evidence that the university was complying with the law under either the history or the interest and ability prong. Further, the report did not conclude that the university met the proportionality prong. The complaint, also relying on data provided to the DOE under the EADA, suggested that UI was counting male practice squad players as female athlete opportunities and was roughly forty-seven to sixty-one roster opportunities short for women.¹⁵⁶ However, when the complainants examined the rosters published on university websites, the numbers were even more out of line with Title IX requirements: the university was short some 113 sports opportunities for women.¹⁵⁷ These numbers were all before the university eliminated the four teams. After the cuts, the complaint estimated that the university still was short eighty-one athletic opportunities for women.¹⁵⁸

In December 2020, Judge Stephanie Rose, herself an alum,¹⁵⁹ granted an injunction to the swimmers, forbidding Iowa from dropping the swimming team that year. After a two-day hearing, the judge called it “a very difficult case,” but she awarded the injunction because of the harms to the swimmers

154. Complaint, *Ohlensehlen v. Univ. of Iowa*, *supra* note 153, at 32-33.

155. OCR had released a clarification letter in 2010 which reinstated 1996 standards in evaluating the interests and ability prong. The institution could not use surveys alone to comply with this prong but instead needed to use a combination of requests for a sport to be added, requests for elevation of a club sport to varsity status, participation in club and intramural sports, interviews with stakeholders, surveys, current participation in sports, and high school and local amateur participation in sports. Russlynn Ali, Assistant Sec'y for Civ. Rts., *Dear Colleague Letter*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Apr. 10, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf>.

156. Complaint, *Ohlensehlen v. Univ. of Iowa*, *supra* note 153, at 18-20, 22.

157. *Id.* at 22-23, 26.

158. *Id.* at 26.

159. She earned her BA and JD from UI. *Stephanie Rose*, BALLOTEDIA, https://ballotpedia.org/Stephanie_Rose (last visited Dec. 30, 2022).

and the public. The team had already been impacted: four of the six coaches had either left or announced their departure as had fifteen of the thirty-five swimmers.¹⁶⁰ After the injunction, the university saw the writing on the wall and announced that the women's swimming and diving team would be fully reinstated regardless of the outcome of the still pending lawsuit.¹⁶¹

In September of 2021, the University and the plaintiffs agreed to a settlement. In addition to their already achieved victory of keeping the women's swimming and diving team alive, the university agreed to add a women's wrestling program. UI would be the first of the largest and most powerful of the athletic conferences, the Power Five, to offer varsity women's wrestling. The cut men's teams remained eliminated.¹⁶² The university was enthusiastic about adding women's wrestling, with the men's wrestling coach exclaiming, "being the first is huge," and Barta calling it "an exciting and historic day for Iowa athletics."¹⁶³ The university also submitted to some conditions. UI agreed to make good faith efforts to promote women's wrestling and encourage the other Power Five schools to add women's wrestling. It agreed to cap the number of slots on the women's rowing team which had been unusually high. Finally, it agreed to an outside monitor (approved by both parties) who would conduct a Title IX review annually through 2024 to be sure the institution was complying with all elements of the athletics regulations of Title IX. The report was to be made public each fall.¹⁶⁴

The lead plaintiff, Sage Ohlensehlen, was pleased with the victory but admitted the lawsuit had taken a toll on her.

It was very difficult and I was treated differently in the community. I had a lot of support, but there were also a lot of

160. *Judge Halts University of Iowa Plan to Drop Women's Swimming*, AP NEWS (Dec. 23, 2020), <https://apnews.com/article/womens-swimming-iowa-coronavirus-pandemic-iowa-city-courts-e107c11e6c1bbe9228e1f86c7840b6f0>.

161. Robert Read & Austin Hanson, *Iowa Reverses Decision to Cut Women's Swimming and Diving Program Amid Title IX Battle*, DAILY IOWAN (Feb. 15, 2021), <https://dailyiowan.com/2021/02/15/iowa-reverses-decision-to-cut-womens-swimming-and-diving-program-amid-title-ix-battle/>.

162. Chris Werner, *Title IX Settlement a Catalyst in Launching Iowa Women's Wrestling*, Barta Says, DAILY IOWAN (Sept. 24, 2021), <https://dailyiowan.com/2021/09/23/title-ix-settlement-a-catalyst-launching-iowa-womens-wrestling-barta-says/>.

163. Steve Batterson, *A Hawkeye First, Iowa Adds Women's Wrestling Team*, QUAD-CITY TIMES (Oct. 8, 2021), https://qctimes.com/sports/college/wrestling/a-hawkeye-first-iowa-adds-womens-wrestling-team/article_f0f3e9f1-bc97-58b6-80cd-e525cf6faf3f.html.

164. Chole Peterson, *University of Iowa, Women's Swimmers Reach Settlement in Title IX Lawsuit*, DAILY IOWAN (Oct. 7, 2021), <https://dailyiowan.com/2021/10/07/university-of-iowa-womens-swimmers-reach-settlement-in-title-ix-lawsuit/>.

people who did not support me and made it very clear. My family lost a lot of friends. I, personally, lost a lot of friends. I had relatives who said very rude things to me about this because, for some reason, people tend to think that female athletes aren't as deserving as male athletes because their sports don't bring in as much money.¹⁶⁵

Ohlensehlen changed her own plans. She had intended to earn her law degree at the University of Iowa, but because of the backlash of pursuing the lawsuit, she went to law school in Texas. She “wanted to be someplace where I wasn't known as the girl who sued Iowa.”¹⁶⁶

The settlement, in the end, included not just saving women's swimming and diving and adding women's wrestling, but also attorney's and expert fees. The federal district court found the attorney's fees of \$307,545 and costs and expenses (including the expert witness fees) of \$92,444.14 were reasonable, awarding a total of about \$400,000.¹⁶⁷

The University of Iowa in a matter of twenty years or so went from being a paragon of Title IX and gender equity success to being an institution facing multiple complaints and lawsuits. The university spent millions on settlements and attorney fees to say nothing of the personnel hours spent collecting data and fighting the lawsuit. The university, however, was not in any real danger of losing federal funding, of which they received more than \$431 million in research funding alone (not including federal funding through Pell grants and other non-research support) in fiscal year 2021.¹⁶⁸ Nor was the university at risk of a large punitive damage verdict against them in the Title IX cases. Despite having two complaints made against its athletic department a few years earlier, the institution still cut women's swimming and diving, perhaps because it deemed the risk minimal.

B. Other Schools, Other Lawsuits

Just as the University of Iowa was not alone in cutting sports teams in the pandemic crisis of 2020, neither was it alone in being pressured to reinstate at

165. Chloe Peterson, *Ohlensehlen, UI Reach Settlement in Title IX Lawsuit*, DAILY IOWAN (Sept. 23, 2021), <https://dailyiowan.com/2021/09/23/ohlensehlen-ui-reach-settlement-in-title-ix-lawsuit/>.

166. *Id.*

167. *Ohlensehlen v. Univ. of Iowa*, No. 3:20-cv-00080, 2021 WL 6689534, at *1-2 (S.D. Iowa Oct. 6, 2021).

168. Stephen Pradarelli, *UI Research Funding Sets New Record in FY 2021*, UNIV. OF IOWA (July 12, 2021), <https://research.uiowa.edu/impact/news/ui-research-funding-sets-new-record-fy2021>.

least the women's teams because of Title IX. In fact, this was so common that a large law firm released a statement warning schools to evaluate their Title IX risks before cutting women's sports.¹⁶⁹ Dartmouth College in 2020 cut men's and women's swimming and diving, men's and women's golf, and men's lightweight crew to navigate a projected \$150 million deficit. In January 2021, all five sports were reinstated after Title IX issues were raised, and the women's teams threatened a lawsuit. The college also agreed to undergo a gender equity review and to create a gender equity plan to comply with the law in the future.¹⁷⁰ Stanford University reinstated all eleven sports (including men's, women's, and co-ed teams) it had cut from varsity status during the pandemic. The university cited its decision based on increased philanthropic support,¹⁷¹ but a Title IX lawsuit had also been filed.¹⁷² Michigan State University was sued after cutting the women's swimming and diving team. The athletes' Title IX lawsuit failed to engender injunctive relief from the district court judge, but on appeal, the court reversed part of the decision and remanded the case.¹⁷³ Fresno State was sued by its women's lacrosse players after the team was cut, and the court ruled that although the proportionality prong had been met, the equal treatment requirement had not.¹⁷⁴

The list of complaints and concerns about Title IX violations in athletics in terms of equal participation opportunities as well as equal treatment and benefits at both the college and the K-12 levels are long. Infamously in 2021, Division I female basketball players at the NCAA women's national basketball championships very publicly identified the disparities between their treatment and that of the men participating in the NCAA's March Madness

169. Sarah Hartley & Bryan Cave Leighton Paisner, *Considering Cutting Varsity Sports Teams Due To COVID-19 Financial Strains? Make Sure You Comply with Title IX First!*, JDSUPRA (Feb. 3, 2021), <https://www.jdsupra.com/legalnews/considering-cutting-varsity-sports-2786707/>.

170. *Dartmouth Reinstates Five Sports After Title IX Concerns*, ESPN (Jan. 29, 2021), https://www.espn.com/college-sports/story/_/id/30801372/dartmouth-reinstates-five-sports-title-ix-concerns.

171. Jeremy Rubin, *Stanford to Reinstate All 11 Discontinued Varsity Sports*, STAN. DAILY (May 18, 2021, 10:49 AM), <https://stanforddaily.com/2021/05/18/stanford-to-reinstate-all-11-discontinued-varsity-sports/>.

172. Billy Witz, *Stanford Faces Two Lawsuits for Decision to Cut Sports*, N.Y. TIMES (May 13, 2021), <https://www.nytimes.com/2021/05/13/sports/stanford-sports-cuts-lawsuit.html>.

173. *Balow v. Mich. State Univ.*, No. 1:21-cv-44, 2021 WL 650712, at *1 (W.D. Mich. Feb. 19, 2021), *vacated and remanded*, 24 F.4th 1051, 1054, 1060-62 (6th Cir. 2022) (the appellate court ruled the district court had erred in looking at average team size). Michigan State University has appealed the case to the Supreme Court. Steve Berkowitz, *Michigan State Asks Supreme Court to Take Title IX Case Caused by Cut of Swimming Teams*, USA TODAY (July 29, 2022, 10:15 PM), <https://www.usatoday.com/story/sports/college/2022/07/29/michigan-state-asks-supreme-court-title-ix-swimming-team-case/10189615002/>.

174. *Anders v. Cal. State Univ., Fresno*, No. 1:21-CV-179, 2021 WL 1564448, at *19, *reconsideration denied*, No. 1:21-cv-179, 2021 WL 3115135, at *1, 5 (E.D. Cal. July 22, 2021).

(the women's tournament was not allowed to use the term March Madness at the time).¹⁷⁵ Numerous other lawsuits are pending regarding Title IX violations in athletics at the college level¹⁷⁶ and the K-12 level.¹⁷⁷ A 2022 study found that Title IX enforcement, especially when it comes to sporting opportunities and equitable treatment, is usually only policed by the students, their parents, and their coaches. The emotional burden on these people of calling out administrators and school boards in their communities is steep. Further, OCR investigations of athletic complaints are slow; the study found that of thirty-nine complaints, the average resolution time was two years, often forcing the girls to participate (if opportunities exist) under unequal conditions through their graduation while still suffering the stigma of having complained.¹⁷⁸ As reporters noted, "[i]t's a reminder that Title IX can be monitored and aggressively enforced. But for 50 years it hasn't been."¹⁷⁹

IV. POSSIBLE SOLUTIONS

Even after fifty years, Title IX is not meeting its potential when it comes to providing equal participation opportunities and equal treatment and benefits for women and girls in sport. This is not, however, an intractable problem. Various scholars have offered suggestions as to who, by themselves or in conjunction with others, can implement Title IX more effectively.

A. *The NCAA*

The NCAA as an organization is not directly subject to Title IX. However, the vast majority of its member schools are, and thus it would seem that the NCAA should have a vested interest in keeping their members in compliance

175. Alan Blinder et al., *Women's Basketball is a Renewed Flashpoint For an Embattled NCAA*, N.Y. TIMES (April 4, 2021), <https://www.nytimes.com/2021/04/04/sports/ncaabasketball/womensbasketball-ncaa-tournament.html>.

176. See *Niblock v. Univ. of Ky.*, No. 5:19-394, 2020 WL 7028707, at *2 (E.D. Ky. Nov. 30, 2020) (allowing various Title IX complaints against the university to move forward); *Portz v. St. Cloud State Univ.*, 16 F.4th 577, 585 (8th Cir. 2021) (holding that the district court correctly determined Title IX violations in providing equal participation opportunities but wrong in its decision that the university denied equal treatment and benefits).

177. See e.g., *A. B. v. Haw. State Dep't of Educ.*, 30 F.4th 828, 831 (9th Cir. 2022) (allowing a Title IX complaint regarding violations of equal opportunities and equal benefits and treatment to move forward); Jaelyn Watson & Alexandra Gopin, *Field Conditions, Amenities Fuel Many Title IX Legal Disputes*, CAP. NEWS SERV. (Apr. 11, 2022), <https://cnsmaryland.org/2022/04/11/title-ix-high-school-field-lawsuits/> (listing various threatened and filed lawsuits about Title IX violations).

178. Jacob Richman & Alexandra Gopin, *Title IX Has Not Meant Equality for High School Girls Sports*, CAP. NEWS SERV. (Apr. 11, 2022), <https://cnsmaryland.org/2022/04/11/title-ix-girls-sports-equality/>.

179. *Id.*

with the law and in protecting the rights of their athletes. On its face, the NCAA seems supportive of the law. The organization helpfully offered a website addressing frequently asked Title IX questions,¹⁸⁰ and it planned a year-long celebration of Title IX's fiftieth anniversary, offering an online toolkit to help its members celebrate the law.¹⁸¹ The organization also took a lawsuit all the way to the Supreme Court to argue that it did not need to comply as an organization with the law.¹⁸²

However, the NCAA could act. First, it could require compliance with the law by all its member schools as a threshold to participate in NCAA sanctioned events. The organization's Campus Sexual Violence Policy states that a specified representative of each member school must annually attest that the institution is complying with elements of the policy to minimize the likelihood of athletes being involved in sexual assaults. Failure to report bars the school from hosting NCAA championships the following year.¹⁸³ The NCAA could do something similar with the equal opportunities and the equal treatment and benefits clauses. This would actually be a return to the Certification Program that the NCAA had in place from 1993 to 2011, requiring each institution to do a self-study every ten years on racial and gender equity, laying out plans to do better until equality was reached.¹⁸⁴ Law professor Brian L. Porto also encouraged the NCAA to reduce the number of scholarships for football from eighty-five to sixty and cap the size of the football roster in order to save money and sporting opportunities for women's teams or other men's teams if Title IX requirements are already being met.¹⁸⁵ Law professor Erin Buzuvis suggested that Congress offer the NCAA antitrust status in exchange for limiting athletic department spending.¹⁸⁶ The NCAA has power over its members and could use that power to promote, educate, and require its members to comply with Title IX. This would require a commitment that has not been present thus far in the organization given that a

180. *Title IX Frequently Asked Questions*, NCAA, <https://www.ncaa.org/sports/2014/1/27/title-ix-frequently-asked-questions.aspx> (last visited Dec. 30, 2022).

181. Gail Dent, *NCAA Kicks Off Title IX at 50 Celebration*, NCAA (Jan. 25, 2022, 2:19 PM), <https://www.ncaa.org/news/2022/1/25/media-center-ncaa-kicks-off-title-ix-at-50-celebration.aspx>.

182. *NCAA v. Smith*, 525 U.S. 459 (1999). The NCAA was not an initial supporter of Title IX in the 1970s and instead actively tried to undermine the law as it related to athletics. SUGGS, *supra* note 25.

183. *NCAA Bd. of Governors, Policy on Campus Sexual Violence*, NCAA 2-3, https://ncaaorg.s3.amazonaws.com/ssi/violence/NCAA_CampusSexualViolencePolicy.pdf (Apr. 27, 2021).

184. Porto, *supra* note 4, at 299.

185. *Id.*

186. Erin E. Buzuvis, *Title IX in U.S. College Sports*, in OXFORD HANDBOOK OF AMERICAN SPORTS LAW 405, 406 (Michael A. McCann ed., 2018).

NCAA funded report found that “Gender disparities in the NCAA championships stem from the structure and culture of the NCAA itself.”¹⁸⁷ But it could be done.

B. The Department of Education

The DOE oversees the OCR, and there are steps that the organizations could take to improve Title IX compliance. The OCR seems understaffed; Congress and the DOE could increase its staffing levels so that more complaints could be investigated more quickly. With more staff, OCR could follow up on Voluntary Resolution Agreements with schools to be certain that schools are doing what they indicated they would. Currently the work is largely complaint driven, putting the onus on children, young adults, and their parents to complain even if an OCR investigation has uncovered problems at the institution. Further, the OCR or DOE could work to protect the young athlete whistleblowers who have the courage to complain.¹⁸⁸

Additionally, DOE and OCR could offer clarifications or revisions about some counting issues. The EADA requires colleges and universities to report information about the number of athletes by gender, but when the count of athletes occurs is important. Most schools count female athletes on the first day of practice which is when the largest number show up. Many leave the team when it is apparent that they will not actually get a chance to compete. This is sometimes called roster manipulation, and schools have been accused of artificially inflating the number of sporting opportunities for females in athletics in these practices. Further, currently schools often count the men on women’s practice squads as women.¹⁸⁹ This should stop so that the counts, which should be made public and corrected if inaccurate, are truly representative of the numbers of women and girls participating.

C. The Courts

As discussed in Part II, the courts created the private right of action for Title IX and then created the right to recover damages. The courts also took away the punitive damages option under Title IX. In 2022, the Supreme Court

187. Victoria Jackson, *NCAA Gender Inequality is a Feature, Not a Bug*, GLOB. SPORT MATTERS (Nov. 9, 2021), <https://globalsportmatters.com/opinion/2021/11/09/ncaa-gender-inequity-feature-not-bug-title-ix/>.

188. Others have noted that OCR needs help. See Porto, *supra* note 4, at 300-03; Harry Bushnell, *After 50 Years, Title IX Compliance in College Sports Still Lags: The Reason? ‘It has No Teeth’*, YAHOO! SPORTS (June 23, 2022), <https://sports.yahoo.com/title-ix-compliance-college-sports-enforcement-department-of-education-office-for-civil-rights-161545634.html>.

189. Porto, *supra* note 4, at 293-94, 301; Buzuvis & Newhall, *supra* note 34, at 456.

also eliminated damages for intentional infliction of emotional distress in private actions to enforce statutes authorized by the Spending Clause.¹⁹⁰ Justice John Roberts, writing for the majority, was joined by Justice Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. Justices Sonia Sotomayor, Stephen Breyer, and Elena Kagen dissented. Roberts explicitly held that Title IX had been enacted under the Spending Clause,¹⁹¹ and the dissenting justices agreed with this holding but disagreed that intentional infliction of emotional distress damages are barred.¹⁹²

The strong six justice majority rejecting these damages makes it unlikely that the Supreme Court will rethink its opposition to punitive damages under Title IX. Legal scholar Diane Heckman evaluated then-Judge Roberts' comments on Title IX during his confirmation hearings and was not optimistic that he would be a supporter. She further analyzed in 2012 the coalition of Justices Rehnquist, Scalia, Thomas, and Kennedy who were willing, if not eager, to restrict Title IX's applicability and damages.¹⁹³ Although only Justice Thomas remains of that block, their replacement justices (Roberts, Gorsuch, and Kavanaugh) are likely, based on the 2022 decision, to continue the restrictions they advocated.¹⁹⁴ A change from the Court seems unlikely.¹⁹⁵

D. Congress

Congress holds the greatest power in this matter. Given that it was Congressional failure to legislate a private right of action and damages, a correction seems appropriate. Congress has overridden Supreme Court restrictions on Title IX in the past,¹⁹⁶ and it is time to do it again. In September 2021, Representative Debbie Dingell, a Democrat from Michigan, introduced HR 5396 giving a private cause of action and establish standards of liability for harassment based on sex. Much of the bill gives greater protections to those facing sexual harassment or assault-types of discrimination. The bill also

190. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1576 (2022).

191. *Id.* at 1567, 1569.

192. *Id.* at 1577 (Breyer, J dissenting).

193. Diane Heckman, *Batter Up: A Look at the Supreme Court's Lineup, Including the Interaction with the New Chief Umpire on the Bench, As Title IX Marks Its Fortieth Anniversary*, 22 MARQ. SPORTS L. REV. 461, 513 (2012).

194. Justices Kavanaugh and Gorsuch both clerked for Justice Kennedy who was a strong proponent of limiting punitive damages for laws enacted under the Spending Clause.

195. *But see* Pohlman, *supra* note 114, at 186.

196. Civil Rights Restoration Act of 1987, S. 557, 100th Cong. (1988). The law was passed over President Ronald Reagan's veto.

says that Title IX would be amended with this language: “[i]n an action brought against a covered entity by (including on behalf of) an aggrieved person who has been subjected to discrimination prohibited under this title (including its implementing regulations), the plaintiff may recover equitable and legal relief (including compensatory and punitive damages), and attorney’s fees (including expert fees).”¹⁹⁷ This would include sporting discrimination. The bill should be further amended to include damages for intentional infliction of emotional distress.

Unfortunately, the bill is going nowhere fast. After its introduction, it was referred to the House Committee on Education and Welfare where it has languished without hearings thus far. With only five Democratic co-sponsors and no parallel bill in the Senate,¹⁹⁸ its prospects are bleak at the moment. The language of the bill, however, is a good model for future legislation.

CONCLUSION

Title IX is an incredibly important piece of legislation. It has offered girls and women remarkable opportunities in the classroom and on the fields of play. It is a cultural icon—not many laws have clothing lines named after them.¹⁹⁹ The nation has celebrated this fiftieth anniversary as we have all the other significant anniversaries of the law with applause and hope for improved enforcement in the future. Title IX, though, is at best a toothless tiger, and some have called it a paper tiger.²⁰⁰ The threat of a loss of federal funding for violations have faded, and the courts have taken away punitive damages. Children and young adults are forced to report violations by the adults supervising their sporting experiences, and if the young athletes can summon that courage, they face community backlash, and the best they can hope for is that their courage will give future generations a better situation. Currently, the only thing that really stops schools from behaving badly is the threat of bad publicity from news reports of their violations, but these only happen after the fact.

The fastest way to make sure that the paper tiger of Title IX is has a bite is for Congress to enact legislation allowing punitive damages. Schools might not be so quick to risk Title IX complaints and lawsuits if they face potentially

197. Title IX Take Responsibility Act, H.R. 5396, 117th Cong. (2021).

198. *Id.*

199. See e.g., TITLE NINE, <https://www.titlenine.com/> (last visited Dec. 30, 2022).

200. The author has done so in repeated talks and various publications, and it was in the title of at least one article. Doris Kirby et al., *Title IX: The Paper Tiger Gets Teeth*, 34 AGB REPS. 4, 22-25 (1992) (written optimistically after the *Franklin* ruling).

millions of dollars in damages rather than just mitigation and attorneys' fees. One big judgment against a major university would likely have a trickle-down effect to even the local K-12 schools. The tiger needs teeth.