Title IX in the 21st Century

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INTRODUCTION

Title IX\(^1\) is the landmark civil rights legislation generally credited with opening doors for women and girls in scholastic sport. Since its enactment in 1972, the number of female participants and teams at the high school and collegiate level has greatly increased.\(^2\) Like any other piece of legislation, Title IX is not without critics. Boys' teams have been dropped from school sponsorship, and reverse discrimination lawsuits filed.\(^3\) Throughout the past thirty years, Title IX has been scrutinized, clarified, upheld, and defined by the courts.\(^4\)

But the Twenty-First Century brought President George W. Bush, and a politically conservative administration that has been labeled anti-civil rights, anti-quota, and anti-affirmative action. Rod Paige, a vocal anti-quota advocate, was appointed Secretary of the U.S. Department of Education. The political climate appeared ripe for an overhaul of legislation that to some seemed no longer necessary.\(^5\)

This article explores three recent developments in the Title IX timeline—the National Wrestling Coaches Association lawsuit,\(^6\) the Commission on Opportunity in Athletics,\(^7\) and the Mercer v. Duke University\(^8\) case. Each of


\(^{3}.\) See, e.g., Chalenor v. Univ. of N.D., 142 F. Supp. 2d 1154 (D.N.D. 2000); Neal v. Bd. of Tr., 198 F.3d 763 (9th Cir. 1999); Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999).

\(^{4}.\) See, e.g., Cannon v. Univ. of Chi., 441 U.S. 677 (1979) (implied private right for individual to bring a Title IX suit); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (compensatory damages can be awarded if intentional discrimination is established); Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) (clearly outlines the requirements for Title IX compliance).

\(^{5}.\) See generally, Jessica Gavora, Tilting the Playing Field: Schools, Sports, Sex and Title IX (2002).


\(^{7}.\) The Secretary of Education's Commission on Opportunity in Athletics, "Open to All," Title IX at Thirty (Feb. 28, 2003) [hereinafter Open to All]. The complete text of Open to All is included.
these developments has the potential for tremendous impact on how Title IX will be implemented and enforced in the Twenty-First Century.

NATIONAL WRESTLING COACHES ASSOCIATION LAWSUIT

On January 16, 2002, the National Wrestling Coaches Association (NWCA), Committee to Save Bucknell Wrestling, Marquette Wrestling Club, Yale Wrestling Association, and National Coalition for Athletics Equity filed suit against the U.S. Department of Education (USDE). Plaintiffs brought action on behalf of their members to protect intercollegiate and scholastic athletic opportunities and teams from further elimination that they claimed was caused directly and indirectly by Title IX. The suit was timed to take advantage of the heightened publicity surrounding the thirtieth anniversary of Title IX, as well as the conservative political climate.

Seven counts are enumerated in the complaint:

\textbf{Count I: USDE's Title IX Rules unlawfully establish a disparate impact standard and unlawfully authorize intentional discrimination.} Under this heading, the plaintiffs claim that Title IX prohibits intentional discrimination and that the Three-Part Test is gender discrimination per se. The plaintiffs rationalize that Title IX rules violate the Equal Protection Clause, Title IX, and Title IX's implementing regulations, because men are more interested in sport than women and are afforded fewer athletic opportunities than women based on interest.

\textbf{Count II: The Three-Part Test unlawfully bases compliance on enrollment rather than athletic interest.} Here the plaintiffs state that the Title IX Regulations require institutions to assess students' athletic interests by a reasonable method the institution deems appropriate. The plaintiffs claim that the Three-Part Test is not a reasonable method because disparate impact analysis requires comparison with the qualified applicant pool and not the general population, and therefore is a violation of Title IX, the implementing
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Count III: The USDE unlawfully denied petitions to amend or repeal the Three-Part Test. Here the plaintiffs make a procedural claim. Under 5 U.S.C. § 553(e), the Administrative Procedure Act (APA) authorizes any interested person to petition an agency to adopt, amend, or repeal a rule. In October of 1995, the NWCA petitioned the Department of Education to amend or repeal the Three-Part Test because it violates the rights of male athletes. The plaintiffs claim that the 1996 Clarification ignored the NWCA's perspective, therefore that agency action is arbitrary, capricious, an abuse of discretion, and not in accordance with the law.

Count IV: USDE's gender proportionality rules unlawfully abdicate its statutory duty to prevent intentional gender discrimination. The plaintiffs claim that Title IX prohibits intentional discrimination and that the USDE has failed to enforce this prohibition against institutions that cut and cap men's teams. They further claim that the 1996 Clarification effectively guarantees that institutions will cut and cap men's teams, abdicating its statutory duties to prohibit intentional discrimination.

Count V: USDE's Title IX Rules are not in effect. Plaintiffs assert another procedural claim that the 1979 Policy Interpretation and the 1996 Clarification have no force or effect because the President, pursuant to 20 U.S.C. § 1682, or the Attorney General, pursuant to Executive Order 12,250, did not approve them. In 1981 the Attorney General delegated the implementation and enforcement authority of Executive Order 12,250 to the Assistant Attorney General in charge of the Department of Justice's Civil Rights Division.

Count VI: As an interpretive rule purporting to amend a substantive rule, the Three-Part Test is null and void. Under 5 U.S.C. § 553(b)-(c), an agency must publish a notice of the proposed rulemaking in the Federal Register and provide an opportunity to comment before the agency can lawfully issue the rule. Interpretative rules, general statements of policy, or rules of agency practice are exempt from the notice and comment rulemaking requirement.

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14. Id.
15. Id.
16. Complaint at 11, Nat'l Wrestling Coaches Ass'n (No. 02-0072).
17. Id. at 11-12.
18. Id. at 12.
19. Id.
20. Id.
22. Complaint at 13, Nat'l Wrestling Coaches Ass'n (No. 02-0072).
This prohibits agencies from using an interpretive rule to add specific new regulatory factors to an existing substantive rules enumeration of regulatory factors. The plaintiffs claim that the 1979 Policy Interpretation is an interpretive rule that creates the Three-Part Test that adds new regulatory factors, therefore becoming a substantive rule subject to the notice and comment rulemaking requirements.25

Count VII: As an interpretive rule purporting to amend a substantive rule and prior regulatory interpretation, the 1996 Clarification is null and void. In this Count, plaintiffs repeat the argument and rationale of Count VI with regard to the 1996 Clarification.26 Plaintiffs claim that the Clarification directs schools to count participants instead of participation opportunities and expressly authorizes placing an arbitrary cap on men’s teams or cutting men’s teams solely to achieve gender proportionality under the Three-Part Test, which effectively amends the 1979 Policy Interpretation and the implementing regulations without following the required notice and comment procedures.27

The plaintiffs seek declaratory and injunctive relief.28 Requests for declaratory judgment include claims that:

- Title IX rules violate the substantive discrimination prohibitions of Title IX and the Equal Protection Clause;
- the USDE unlawfully denied petitions to amend or repeal the unlawful Title IX rules;
- the USDE consciously adopted a policy that authorizes intentional discrimination in violation of its statutory duty to prevent discrimination;
- the USDE substantively amended Title IX regulations under the guise of interpretation without following the APA mandated notice and comment rulemaking procedures; and
- Title IX rules have not met the procedural requirements of 20 U.S.C. § 1682 and therefore have no force or effect.29

The injunctive relief requested includes:

- Order vacating the 1996 Clarification and the Three-Part Test and remanding them for rulemaking consistent with the holdings in this

24. Complaint at 13, Nat’l Wrestling Coaches Ass’n (No. 02-0072).
25. Id.
26. Id. at 13-14.
27. Id. at 14.
28. Id. at 14-15.
action and in accordance with a schedule set by this court;

- Order remanding all Title IX rules on athletes to USDE with instructions that USDE commence notice and comment rulemaking to amend those rules, consistent with Title IX, the U.S. Constitution, and this court’s declaratory relief in this action; and

- Order staying all disparate impact components of Title IX rules until USDE promulgates a final rule pursuant to this court’s order.30

The USDE filed a timely motion to dismiss that relied primarily on procedural issues.31 The primary argument was that the plaintiffs did not have standing.32 Additionally, the government argues that plaintiffs must show that redress is likely as opposed to merely speculative.33 Additionally, the government asserts that there is no private right of action against the government under Title IX or the Administrative Procedure Act (APA) because the plaintiffs have an adequate Title IX remedy against the institutions directly.34 Alternatively, they claim that the plaintiffs have not filed a timely challenge to the 1979 Three-Part Test based on the six-year statute of limitations.35

Several special interest groups in support of Title IX were disappointed with the USDE’s motion from the perspective of wanting it to be a stronger statement in support of the current legislation.36 These groups filed an amicus brief in support of the motion to dismiss and provided additional legal arguments to support the government’s motion.37

The National Women’s Law Center brief lends further weight and support to the procedural claims from the USDE’s motion to dismiss that the plaintiffs do not meet the minimum requirement of Article III necessary to establish standing and that plaintiffs cannot trace their alleged injuries to the Title IX

30. Id.
31. Defendant’s Motion to Dismiss, Nat’l Wrestling Coaches Ass’n (No. 02-0072) (filed on May 29, 2002).
32. Id.
33. Id.
34. Id.
35. Id.
36. The National Women’s Law Center, American Association of University Women (AAUW), American Volleyball Coaches Association (AVCA), Intercollegiate Women’s Lacrosse Coaches Association (IWLCA), National Fastpitch Softball Coaches Association (NFSCA), Women’s Basketball Coaches Association (WBCA), and the Women’s Sports Foundation (WSF).
37. National Women’s Law Center Brief of Amici Curiae at 1, Nat’l Wrestling Coaches Ass’n (No. 02-0072).
regulations and policies they challenge. It also provides additional legal arguments to support the motion to dismiss, explaining why the Three-Part Test does not create a quota or preferential treatment. The brief illustrates that schools can and do comply with the Three-Part Test by adding women's opportunities rather than cutting men's opportunities and that all three prongs of the test are viable means for schools to show compliance.

The brief also attacks the plaintiffs' premise that women are inherently less interested than men in participating in athletics, calling it stereotypical and legally flawed. The brief cites Pederson v. Louisiana State University and Cohen v. Brown University to show that courts have emphatically rejected arguments premised on women's lack of interest in athletics. It also provides numerous studies that demonstrate the interest of girls and women in participating in athletics.

The brief concludes by providing extensive statistical data on the number of women's sports that have also declined since Title IX was enacted, and on the many sports, both men's and women's, that have grown significantly during this time period. Particularly relevant is the data related to the decline in wrestling programs, indicating that the highest rate of decline occurred during the 1984 to 1988 time period when Title IX's application to intercollegiate athletics was suspended. The decline in the number of women's field hockey and gymnastics teams is demonstrated, as well as the increase in women's crew, softball, and soccer. Similarly, the growth of men's baseball, crew, football, lacrosse, squash, track, and volleyball is cited.

38. Id. at 2.
39. Id. at 3-6.
40. Id. The brief cites U.S. GEN. ACCT. OFF., NO. 01-128, GENDER EQUITY: MEN'S AND WOMEN'S PARTICIPATION IN HIGHER EDUCATION 40 (2000); to show that all three prongs are used to prove compliance. Id. Between 1994 and 1998, OCR reviewed seventy-four Title IX participation cases - only twenty-one schools were in compliance under the proportionality prong; over two-thirds were in compliance under part two or part three of the test.
41. National Women's Law Center Brief of Amici Curiae at 6-11, Nat'l Wrestling Coaches Ass'n (No. 02-0072).
42. 213 F.3d 858, 878 (5th Cir. 2000).
43. 101 F.3d 155, 178-79 (1st Cir. 1996).
44. National Women's Law Center Brief of Amici Curiae at 7-8, Nat'l Wrestling Coaches Ass'n (No. 02-0072).
45. Id. at 8-9.
46. Id. at 11-16.
47. Id. at 12.
48. Id. at 12-13.
49. National Women's Law Center Brief of Amici Curiae at 13, Nat'l Wrestling Coaches Ass'n
The NWCA responded by filing Plaintiffs' Opposition to Defendant's Motion to Dismiss and Plaintiffs' Cross-Motion for Summary Judgment on June 17, 2002. In the Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss and in Support of Plaintiffs' Cross-Motion for Summary Judgment, the plaintiffs rebut the government's claims that they do not have standing because they have suffered an injury in fact, the interest injured is arguably within the zone of interests to be protected or regulated by the statutory and constitutional guarantees in question, and review of the administrative action is not otherwise precluded. The procedural arguments reflect those made in the initial complaint, and the substantive challenges are based on the premise that women are not as interested as men in sports.

Not to be outdone by their political opposites, The Independent Women's Forum (IWF) filed a Memorandum in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss and Cross-Motion for Summary Judgment, advancing arguments on the merits of the plaintiffs' claims. The IWF memorandum tries the Trojan horse approach and begins by stating it supports Title IX and joins the National Women's Law Center in its praise of the outstanding beneficial effect Title IX has had in helping women and girls achieve equal opportunity in high school and collegiate sports. It then blames the proportionality test for sabotaging equal opportunity by creating a quota system that has harmed men's sports. The IWF opposes the use of quotas because they demean the legitimate athletic accomplishments of women. It further states that it has never contended that women are "inherently less interested in athletics than men," but that women as a group tend to participate in athletic activities at lower rates than men. The IWF focuses on a basic truth of human existence—that men and women are different—and that the difference explains the difference in the rate of

(No. 02-0072).

50. Plaintiffs' Opposition to Defendant's Motion to Dismiss and Plaintiffs' Cross-Motion for Summary Judgment, Nat'l Wrestling Coaches Ass'n (No. 02-0072).

51. Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss and Plaintiffs' Cross-Motion for Summary Judgment at 7-14, Nat'l Wrestling Coaches Ass'n (No. 02-0072).

52. Id. at 9.

53. Memorandum of Independent Women's Forum in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss and Cross-Motion for Summary Judgment, Nat'l Wrestling Coaches Ass'n (No. 02-0072).

54. Id. at 1.

55. Id. at 1, 3.

56. Id. at 2.

57. Id. at 3.
participation in athletics, boldly suggesting that women's lesser interest in sports is physiological based on lower levels of testosterone.\textsuperscript{58} It concedes that women's participation in athletics rose dramatically after the enactment of Title IX as a direct result of increased opportunity and elimination of exclusionary barriers.\textsuperscript{59} However, it claims that current participation has leveled off, indicating that the purpose and goals of Title IX have been fulfilled and further efforts to increase opportunities will have diminishing returns.\textsuperscript{60}

U.S. District Judge Emmet G. Sullivan dismissed the lawsuit on June 11, 2003 in a forty-six page ruling.\textsuperscript{61} The court provides a detailed and comprehensive review of the statutory and regulatory framework of Title IX.\textsuperscript{62} It also painstakingly details the cases that have defined Title IX over the past thirty years.\textsuperscript{63} The court states that no fewer than eight federal circuit courts have upheld the constitutionality of Title IX, as well as the 1979 Policy Interpretation, and the 1996 Clarification.\textsuperscript{64} It also establishes that in each case the plaintiff is a regulated party or association of regulated parties and the defendant is a federally funded institution.\textsuperscript{65}

The court then reviews the plaintiffs' claims that Title IX, the 1975 Regulations, the 1979 Policy Interpretation, and the 1996 Clarification have reduced and limited participation opportunities for male athletes.\textsuperscript{66} The court summarizes the facial challenge that Bucknell University and Marquette University eliminated their wrestling teams, and that Yale demoted its varsity wrestling team to club status, as a direct result of Title IX.\textsuperscript{67} It also restates the procedural claims made related to the unlawful denial of the petition to amend or repeal, that the USDE has abdicated its enforcement responsibilities, and that the implementing regulations are actually substantive rules that did

\textsuperscript{58} Memorandum of Independent Women's Forum in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss and Cross-Motion for Summary Judgment at 5, \textit{Nat'l Wrestling Coaches Ass'n} (No. 02-0072). The IWF cites THEODORE D. KEMPER, SOCIAL STRUCTURE AND TESTOSTERONE 184 (1990) to support this claim.

\textsuperscript{59} Memorandum of Independent Women's Forum in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss and Cross-Motion for Summary Judgment at 6, \textit{Nat'l Wrestling Coaches Ass'n} (No. 02-0072).

\textsuperscript{60} \textit{Id.} at 6-7.

\textsuperscript{61} See generally, \textit{Nat'l Wrestling Coaches Ass'n}, 263 F. Supp. 2d 82.

\textsuperscript{62} \textit{Id.} at 87-93.

\textsuperscript{63} \textit{Id.} at 93-97.

\textsuperscript{64} \textit{Id.} at 94-95.

\textsuperscript{65} \textit{Id.} at 97.

\textsuperscript{66} \textit{Nat'l Wrestling Coaches Ass'n}, 263 F. Supp. 2d at 97-98.

\textsuperscript{67} \textit{Id.}
not have proper notice and comment rulemaking procedures, and were not approved by the President.68

Judge Sullivan then details the various motions made in this case.69 The proper standard governing motions to dismiss is stated as follows:

A complaint may be dismissed for lack of subject matter jurisdiction only if ""it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."" In our review, this court assumes the truth of the allegations made and construes them favorable to the pleader.70

The court further explains that the plaintiff bears the burden of establishing the court’s jurisdiction and may rely on materials outside of the pleadings without converting a motion to dismiss to one for summary judgment.71

Judge Sullivan then explains the plaintiffs’ motion for leave to file a second amended complaint.72 The plaintiffs sought to expand the complaint in the following key areas: (1) to add the Secretary of Education and the Assistant Secretary of Civil Rights as defendants;73 (2) to amend the composition of plaintiff NWCA to include coaches, alumni, general public, and federally funded colleges, universities, high schools, and associations of high schools;74 (3) to add additional sources of authority for granting relief, including the court’s equitable powers;75 (4) to include a claim that the promulgation of the 1979 Policy Interpretation and the 1996 Clarification constitute ultra vires acts undertaken by the agency;76 and (5) to add numerous factual allegations regarding enforcement actions.77 The court then explains its discretionary ability to grant or deny leave to amend a complaint under Federal Rule of Civil Procedure 15(a).78 The court also cites several D.C. district and circuit court cases that support denying a motion to amend a complaint if the proposed claim would not survive a motion to dismiss.79

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68. Id. at 98-99.
69. Id. at 100-04.
70. Id. at 100 (citing Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 315 F.3d 338 (D.C. Cir. 2003)).
71. Nat'l Wrestling Coaches Ass'n, 263 F. Supp. 2d at 100-01 (citing FED. R. CIV. P. 12(b)(1)).
72. Id. at 101-04.
73. Id. at 101.
74. Id.
75. Id. at 101-02.
77. Id. at 102-03.
78. Id. at 103.
79. Id. at 103-04.
court then evaluates the plaintiffs’ allegations and proposed amendments in a
discussion of the merits of the defendant’s motion to dismiss.80

The issue of standing is the first substantive matter explored by the court. As membership organizations, all of the plaintiffs must “establish standing in their own right or on behalf of their members.”81 Plaintiffs must meet all three prongs of the associational standing rule established by the Supreme Court:

1. Would the members have standing to sue in their own right?

2. Are the interests the association seeks to protect germane to the organization’s purpose?

3. Is the participation of individual members in the lawsuit required in the claim asserted or the relief requested?82

Because the NWCA alleges harm to the organization due to a decrease in dues-paying members, the court explores NWCA’s standing as an organization as well as its associational standing.83

As an organization, Article III requires three elements: injury in fact, causation, and redressibility.84 On a motion to dismiss, the court presumes that the general allegations include the specific facts that are necessary to support the claim.85 Accordingly, the court evaluates each of the plaintiffs’ claims.86 In evaluating organizational standing, the court concludes that coaches and athletes have injury in fact while alumni, spectators, and institutional members do not.87 However, in analyzing the causation and redressability prongs, plaintiffs fail to prove that the Three-Part Test represents a substantial factor in the institutions’ decision-making process.88 Likewise, even if the court granted the relief requested, institutions would continue to make discretionary decisions about capping, cutting, and adding teams based on multiple factors.89

As for associational standing, although some members may have standing to sue in their own right, and the interests plaintiffs seek to protect are relevant

80. Id. at 104.
81. Nat’l Wrestling Coaches Ass’n, 263 F. Supp. 2d at 104 (citing Nat’l Collegiate Athletic Ass’n v. Califano, 622 F.2d 1382, 1387 (10th Cir. 1980)).
82. Id. at 105.
83. Id.
84. Id.
85. Id. at 106 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).
87. Id. at 106-08.
88. Id. at 111.
89. Id. at 112.
to their organization purpose, the relief requested does require the participation of individual institutional members.\textsuperscript{90} The court holds that plaintiffs do not have standing under Counts I and II.\textsuperscript{91}

The abdication claim in Count IV fails to state a legally recognizable claim.\textsuperscript{92} The procedural defects claimed in Counts V, VI, and VII also fail for lack of standing based on the same causation and redressability failures enumerated in Counts I and II.\textsuperscript{93}

The court does find that the plaintiffs have standing under Count III.\textsuperscript{94} In a motion to dismiss, the court must accept the plaintiffs' allegations to be true. Therefore, the improper denial of a petition to amend or repeal the Three-Part Test is an injury in fact.\textsuperscript{95} Further, the court recognizes direct causation of the injury by the USDE and the ability to redress the injury by remand.\textsuperscript{96}

Although the court found a showing of standing for Count III, it finds that the allegations are insufficient to confer jurisdiction.\textsuperscript{97} The Administrative Procedure Act (APA) does not apply to interpretive rules, and the plaintiffs concede that the 1979 Policy Interpretation and proposed 1996 Clarification are interpretive rules.\textsuperscript{98} Additionally, the plaintiffs' October 1995 letter in response to the proposed 1996 Clarification was clearly not a petition to amend or repeal.\textsuperscript{99} Even if the response could be construed as a petition to amend or repeal, the plaintiffs' request that the court order the USDE to embark on a new rulemaking process is inappropriate.\textsuperscript{100} The appropriate remedy would not be to promulgate the rule requested, but to remand the issue for further explanation or reconsideration by the agency.\textsuperscript{101}

Judge Sullivan's lengthy decision reflects the seriousness of the allegations against a landmark civil rights statute's regulatory enforcement scheme.\textsuperscript{102} The court finds that the plaintiffs have fallen "far short of what is

\begin{thebibliography}{10}
\bibitem{90} Id. at 124.
\bibitem{91} \textit{Nat'l Wrestling Coaches Ass'n}, 263 F. Supp. 2d at 124-25.
\bibitem{92} Id. at 127.
\bibitem{93} Id.
\bibitem{94} Id. at 126.
\bibitem{95} Id.
\bibitem{96} \textit{Nat'l Wrestling Coaches Ass'n}, 263 F. Supp. 2d at 126.
\bibitem{97} Id. at 128.
\bibitem{98} Id.
\bibitem{99} Id.
\bibitem{100} Id.
\bibitem{101} \textit{Id.} at 128 (citing Henley v. FDA, 873 F.Supp. 776, 780 (E.D.N.Y. 1995)).
\bibitem{102} Id. at 129.
\end{thebibliography}
required to establish standing under the circumstances presented." The court holds that it does not have jurisdiction and grants the defendant’s motion to dismiss for all Counts, except Count III. Defendant’s motion to dismiss for failure to state a claim is granted with respect to Count III, and the plaintiffs’ action is dismissed in its entirety.

Although the court dismissed this case on jurisdictional grounds, it opens a door for future litigation in this area. Judge Sullivan indicates that educational institutions may challenge the USDE’s regulations and interpretations as long as they meet the “case or controversy” requirements of Article III and satisfy Federal Rule of Civil Procedure 12. An institution that is denied federal funding due to a lack of compliance with Title IX has a cause of action under the legislation itself. Likewise, institutions may challenge specific enforcement actions by the USDE under Title IX or the APA.

The court also opens the door for the plaintiffs to make a claim against individual funded educational institutions. The court indicates that plaintiffs could challenge the institutions’ conduct under the regulations. The USDE regulations and policy interpretations could also be challenged in the context of an educational institution’s action in conformity with the rules.

The plaintiffs have sixty days to appeal and have indicated intent to do so. Even if plaintiffs fail to prevail in the appeal, the lawsuit has had an impact. The filing of the lawsuit renewed debate on Title IX and heightened speculation that President Bush supported changes to the legislation. It may have also prompted the Secretary of Education to create the Commission on Opportunity in Athletics.

SECRETARY OF EDUCATION’S COMMISSION ON OPPORTUNITY IN ATHLETICS

In June 2002, the Secretary of Education, Rod Paige, formed the first

103. Id.
104. Id.
105. Id. at 130.
107. Id.
108. Id.
109. Id.
110. Id.
113. Id.
federal advisory panel to study Title IX—the Commission on Opportunity in Athletics. The purpose of the Commission was to collect information, analyze issues, and obtain broad public input directed at improving the application of current federal standards for measuring equal opportunity for men and women and boys and girls to participate in athletics under Title IX.

The Commission is an example of partisan politics at its best. The Commission Charter directs that the membership of the Commission will be fairly balanced to reflect representation of a wide range of interests and perspectives relating to men’s and women’s athletics. The actual membership of the Commission indicates significant bias. The fifteen-member panel has a reasonable gender composition of eight women and seven men. Of the women, three represent major NCAA Division I interests, two represent politically conservative women’s groups, and three are former or current athletes. All seven men represent major Division I-A athletics interests for a total of ten of fifteen commissioners representing interests of major Division I-A athletics programs. Although the Commission was supposed to reflect a wide range of interests and perspectives, zero members represent NCAA Divisions II or III, which comprise the majority of NCAA institutions. Likewise, zero represent high schools, junior colleges, or NAIA institutions also subject to Title IX.

The process for the Commission was structurally flawed and politically biased as well. In order to collect information, analyze issues, and obtain broad public input, the Commission held four town hall meetings across the country. The staff of the Office for Civil Rights (OCR) determined who would make presentations to the Commission at these meetings. The presenters selected indicated a strong political bias. At the Atlanta Town Hall Meeting, only four of fifteen presenters were politically aligned with current Title IX regulation. In Chicago, only four of thirteen spoke on behalf of the current regulations. In Colorado Springs, only two of twelve were pro-Title IX. At the final Town Hall Meeting in San Diego, only five of thirteen

114. See Open to All, supra note 7.
115. Id. at 46.
116. Id. at 47.
117. Id. at 53-56.
118. Id.
119. Open to All, supra note 7, at 50-52.
120. Id. at 50.
121. Id. at 50-51.
122. Id. at 51.
presenters spoke on behalf of the legislation.\textsuperscript{123}

The OCR staff granted presentation opportunities to organizations and individuals affiliated with men’s discontinued teams: six represented wrestling, two represented swimming, and two represented gymnastics.\textsuperscript{124} Four presentations were made by football coaches or representatives of football interests in spite of any legal association between Title IX and football.\textsuperscript{125} Five of the presenters represented schools sued for compliance problems, but no presenters represented plaintiffs who have made Title IX complaints.\textsuperscript{126} Similarly, no presenters represented women’s sports that have been discontinued or emerging sports that have benefited from Title IX.\textsuperscript{127} The USDE staff ignored requests by the Commission members for expert testimony rather than passionate and often misinformed sport representatives.\textsuperscript{128}

It is said that how you define the problem will determine the solution, and the Commission was charged with answering seven specific questions.\textsuperscript{129} The first question itself set the political tone for the Commission: instead of asking whether Title IX standards work to promote equal opportunity in athletics, the focus was shifted to whether Title IX promotes opportunities for men and women.\textsuperscript{130} This is a particularly interesting approach because the legislation was not concerned with promoting opportunities for men from its inception.\textsuperscript{131} Other questions go broadly beyond the scope of Title IX, looking at programs such as the Olympics, community recreation programs, and professional sport.\textsuperscript{132}

The final commission report was issued on February 28, 2003.\textsuperscript{133} It included findings answering the seven questions and offered twenty-three

\textsuperscript{123} \textit{Id.} at 51-52.

\textsuperscript{124} \textit{Open to All, supra} note 7, at 50-52.

\textsuperscript{125} \textit{Id.} Title IX does not require women to be allowed to try out or participate in football, and no school offers women’s football as a varsity sport. Football programs have not decreased, nor has football spending decreased, because of Title IX.

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} Donna de Varona & Julie Foudy, \textit{Minority Views on the Report of the Commission on Opportunity in Athletics}, Feb. 2003, at 19 [hereinafter \textit{“Minority Report”}]. The complete text of \textit{Minority Report} is included within this publication.

\textsuperscript{129} \textit{Open to All, supra} note 7, at 3.

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{See Nat’l Wrestling Coaches Ass’n}, 263 F. Supp. 2d at 93-94.

\textsuperscript{132} \textit{Open to All, supra} note 7, at 3.

\textsuperscript{133} \textit{Id.}
recommendations, fifteen of which were unanimously approved. The recommendations focused around four themes: Commitment, Clarity, Fairness, and Enforcement. The recommendations that had the unanimous support of the Commissioners, were fairly innocuous, and generally emphasized current policies.

Under the heading of “Commitment,” the Commission recommended that the USDE “reaffirm its strong commitment to equal opportunity and the elimination of discrimination for girls and boys, women and men.” The Commission describes this recommendation as fully supporting Title IX as it currently exists.

Unanimous recommendations under the heading “Clarity” responded to the proliferation of misunderstanding and misinformation reported by the general public regarding implementation of Title IX. In Recommendation 3, the Commission desired clear, consistent, and understandable written guidelines for implementation of Title IX; a national education effort; and consistent enforcement across all regional offices. They also encouraged Congress to redesign the Equity in Athletics Disclosure Act to simplify it. It also recommended that “[t]he Office for Civil Rights should disseminate information . . . to help schools determine whether activities they offer qualify as athletic opportunities.”

Under the heading of “Fairness,” the Commission unanimously recommended that the OCR “should not, directly or indirectly, change current policies in ways that would undermine Title IX enforcement.” In response to the impassioned testimony of those representing men’s teams that have been eliminated by schools, the Commission sought to emphasize that cutting teams in order to demonstrate compliance with Title IX is a disfavored practice. The Commission also recommended that more needs to be done to stimulate student interest in sport at younger age levels. The Commission also aimed a recommendation at the NCAA, “to review its scholarship and other guidelines to determine if they adequately promote or hinder athletic

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134. Id. at 4.
135. Id.
136. Id. at 33.
137. Open to All, supra note 7, at 33 (Recommendation 3).
138. Id. at 35 (Recommendation 9).
139. Id. at 36 (Recommendation 10).
140. Id. at 34 (Recommendation 4).
141. Id. at 34 (Recommendation 5).
142. Open to All, supra note 7, at 35 (Recommendation 7).
participation. This is a particularly interesting recommendation as the Commission has no authority over the NCAA.

The area of “Enforcement” generated a lot of the most controversial recommendations, but the unanimous recommendations were again, fairly straightforward. Although the OCR has worked cooperatively with schools to encourage compliance with Title IX rather than withhold federal funding, the Commission recommended that they “explore ways to encourage compliance with Title IX, rather than merely threatening sanctions.” In the same recommendation they encouraged OCR to aggressively enforce Title IX standards, an apparent contradiction.

Also under the heading of “Enforcement,” the Commission made specific recommendations regarding the Three-Part Test. In response to claims that “substantial proportionality” is actually interpreted as “strict proportionality,” the Commission recommended that OCR should clarify the meaning of substantial proportionality to allow for a reasonable variance in the relative ratio of athletic participation of men and women. The Commission also recommended that schools could quantify the third part of the Three-Part Test “by comparing the ratio of male/female athletic participation at the institution with the demonstrated interests and abilities shown by regional, state or national youth or high school participation rates or national governing bodies, or by the interest levels indicated in surveys of prospective or enrolled students at that institution.” This is consistent with the Commission’s desire to encourage compliance with Title IX using any of the three parts equally, rather than favoring proportionality as a “safe harbor,” which often eliminates opportunities rather than create new ones. The Commission also recommends reshaping the second part of the Three-Part Test, including by designating a point at which a school can no longer establish compliance through this part. Additional ways of demonstrating equity beyond the existing Three-Part Test should be explored by the USDE.

A minority report written by Donna de Varona and Julie Foudy was issued on the same day as the Commission Report, further demonstrating the political

143. Id. at 37 (Recommendation 13).
144. Id. at 34 (Recommendation 6).
145. Id.
146. Id. at 37 (Recommendation 14).
147. Open to All, supra note 7, at 39 (Recommendation 19).
148. Id. at 39 (Recommendation 21).
149. Id. at 40 (Recommendation 22).
150. Id. at 40 (Recommendation 23).
polarity of the process. Foudy and de Varona reported that they did not join the report of the Commission because adequate discussion and representation of minority views within the majority report were unsuccessful. The Minority Report reiterates the successes of Title IX and emphasizes the benefits of participation in athletics for girls. They also contradict the data presented in the Commission Report relevant to girls’ lack of interest in sport, attributing lesser participation to persistent discrimination and lesser opportunity. Additionally, they refute the Commission Report finding that opportunities for men in intercollegiate athletics have decreased.

The Minority Report, unlike the Commission Report, defends the Three-Part Test as a flexible and fair standard for schools to use to determine compliance. It emphasizes that the Three-Part Test does not impose quotas. The Minority Report further supports OCR’s efforts in providing guidance on compliance with Title IX, while echoing the Commission Report recommendations that enhanced technical assistance and consistent interpretation are needed. It also emphasizes that every federal appellate court to consider the issue has affirmed the Three-Part Test.

The Minority Report also makes recommendations. The strongest recommendation is that the current Title IX policies be preserved without change. Strong enforcement and further education regarding methods of compliance echo recommendations of the Commission Report. Likewise, they discourage cutting or reduction of men’s teams and encourage the NCAA to review legislation regarding scholarships. However, the Minority Report goes a step further, recommending the USDE encourage educational institutions to address the escalating costs of intercollegiate athletics as a way to free up resources to fund women’s sports as well as men’s non-revenue

151. Minority Report, supra note 128.
152. Id. at 1.
153. Id. at 2-3 (Findings 1-3).
154. Id. at 3 (Finding 4).
155. Id. at 4 (Finding 3).
156. Minority Report, supra note 128, at 5 (Finding 7).
157. Id. at 7 (Finding 12).
158. Id. at 6-7 (Findings 8-9).
159. Id. at 7 (Finding 10).
160. See id. at 10-12.
161. Minority Report, supra note 128, at 10 (Recommendation 1).
162. Id. at 10-11 (Recommendations 2-3).
163. Id. at 11 (Recommendation 4).
164. Id. at 12 (Recommendation 6).
sports.\textsuperscript{165} It also recommends expansion of the Equity in Athletics Disclosure Act to include secondary schools.\textsuperscript{166}

The \textit{Minority Report} responds directly to several of the Commission recommendations that they believe would critically weaken Title IX.\textsuperscript{167} They express concern that Recommendations fifteen, seventeen, and twenty would substantially reduce the number of athletic opportunities that females are entitled to under current Title IX regulation.\textsuperscript{168} Similarly, the \textit{Minority Report} provides data on the lost opportunities and scholarships that might occur if a reasonable variance from the proportionality standard was allowed.\textsuperscript{169} They also believe that the use of interest surveys as described in Recommendation 18 supports the legally condemned and stereotypical notion that women are inherently less interested in sports than men.\textsuperscript{170} Rather than expand the measurement of interests and abilities as in Recommendation 19, the \textit{Minority Report} supports the “explicit and detailed guidance on the appropriate and lawful ways to evaluate interests and abilities” under the current Title IX regulations.\textsuperscript{171}

This article focuses on the unanimous recommendations of the Commission because Secretary Paige announced that the USDE would not consider recommendations of the Commission that did not have unanimous approval.\textsuperscript{172} It appears that Secretary Paige is a man of his word –the Clarification Letter released on July 11, 2003 reflects the broadest and least controversial recommendations made by the Commission.\textsuperscript{173} Although Gerald Reynolds, Assistant Secretary for Civil Rights, does some political posturing in his description of the charge of the Secretary’s Commission on Opportunities in Athletics and its process, the end result is a document that strengthens Title IX, the 1979 Policy Interpretation, and the 1996 Clarification.\textsuperscript{174} The Clarification Letter outlines the components of the

\begin{itemize}
\item \textsuperscript{165} \textit{Id.} at 11-12 (Recommendation 5).
\item \textsuperscript{166} \textit{Minority Report, supra} note 128, at 12 (Recommendation 7).
\item \textsuperscript{167} \textit{See id.} at 12-18.
\item \textsuperscript{168} \textit{Id.} at 12-15.
\item \textsuperscript{169} \textit{Id.} at 15-16.
\item \textsuperscript{170} \textit{Id.} at 16-17.
\item \textsuperscript{171} \textit{Minority Report, supra} note 128, at 17.
\item \textsuperscript{173} \textit{Letter from the U.S. Department of Education, Office for Civil Rights, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance} (July 11, 2003) [hereinafter 2003 Clarification Letter]. The complete text is of the 2003 Clarification Letter is included within this publication.
\item \textsuperscript{174} \textit{Compare id.} para. 3-4, \textit{with Open to All, supra} note 7, at 46-49, \textit{and} the criticisms of the
\end{itemize}
Three-Part Test and emphasizes that all three parts of the test are effective means of compliance.  

Other recommendations of the Commission that are supported in the Clarification Letter include:

- A commitment by the OCR to undertake an education campaign to explain the flexibility of the Three-Part Test, to give practical examples of the ways that schools can comply, and to provide schools with technical assistance.

- A clarification that Title IX does not require cutting or elimination of teams to establish compliance, and a promise for OCR to seek remedies that do not involve that disfavored practice in negotiating compliance agreements.

- A promise to aggressively enforce Title IX and an assurance that enforcement will be consistent from region to region.

- Assurance that private funding of athletics teams may continue, with a caution that the source of funding does not change or diminish a school's obligations under Title IX.

The worst fears of Title IX advocates, regarding the potential negative impact of the Commission and potential changes to Title IX, have not been realized. However, Commission Recommendation 23—a unanimous recommendation—gives carte blanche latitude for the OCR to explore other ways of demonstrating equity beyond any of the current measurements or any of the recommendations.

HEATHER SUE MERCER V. DUKE UNIVERSITY AND FRED GOLDSMITH

The third development has been in litigation for the longest, but the most recent decision in the case may be a significant setback for Title IX enforcement. Heather Sue Mercer was a high school all-state place kicker in New York. She enrolled at Duke University in August 1994, and attempted to join the Duke football team. Mercer was required to “try out,” although


176. *Id.* at 2.

177. *Id.* at 2-3.

178. *Id.* at 3.

179. *Id.*


182. *Id.*
no other player had ever had a "try out."  
183 She attended practices, practiced kicking, participated in fitness training, and served as team manager for the fall 1994 season.  
184 Mercer continued to practice with the team in spring training, but was not allowed to attend summer training in 1995.  
185 For the next two years, Mercer continued to practice but was not given a uniform or allowed to participate fully in training.  
186 She did not play in any intercollegiate game, but did participate in a spring, intrasquad scrimmage in spring 1996, kicking a game-winning field goal.  
187 During this period, the coaching staff, including Goldsmith, told Mercer that she was "on the team."  
188 Further, Goldsmith and Fred Chatham, kicking coach, told the news media that she was on the team.  
189 Mercer was listed as a member of the football team by the university on NCAA roster documents and was pictured in the Duke football yearbook.  
190 In February 1997, Goldsmith told Mercer that she had "no right" to be on the team.  
191 Mercer left, and filed an action against Duke University and football coach, Fred Goldsmith, claiming a violation of Title IX, and asserting state law claims for negligent misrepresentation and breach of contract.

The trial court granted the defendants' motion for failure to state a claim upon which relief can be granted, holding that a student could be excluded from participation in a contact sport based on gender under the "contact" sport exclusion in Title IX, 45 C.F.R. § 86.41.  
194 Mercer appealed the district court's order.

The Court of Appeals for the Fourth Circuit reversed the motion to dismiss and remanded the case for further proceedings, holding: Where a university permits a member of the opposite sex to try out for a single sex team in a contact sport, the university is subject to Title IX and cannot subsequently discriminate against the athlete on the basis of her sex.

185. Id.
186. Id.
188. Mercer, 32 F. Supp. 2d at 838.
190. Id. at 533.
191. Id.
194. Mercer, 32 F. Supp. 2d at 840 (citing 34 C.F.R. § 106.41(b)).
195. Mercer, 190 F.3d at 643-44.
196. Id. at 644.
After a jury trial, the jury awarded Heather Sue Mercer $1.00 in compensatory damages and $2 million in punitive damages.\textsuperscript{197} Duke University then moved for judgment as a matter of law, or alternatively for a new trial and/or a remittitur, which was denied.\textsuperscript{198} Mercer moved for attorney's fees pursuant to 42 U.S.C.S. § 1988(b) as a prevailing party, which was granted for $388,799.83.\textsuperscript{199}

The court cited Franklin v. Gwinnett County Public Schools,\textsuperscript{200} as authority for awarding punitive damages.\textsuperscript{201} In that case, the Supreme Court held that a general presumption exists that all appropriate remedies are available unless Congress has expressly indicated otherwise.\textsuperscript{202} This has been interpreted in subsequent Title IX decisions to allow compensatory and punitive damages.\textsuperscript{203}

Duke University appealed, challenging the award of punitive damages and attorney's fees and costs.\textsuperscript{204} Duke's primary argument was that "punitive damages are not available in private actions brought to enforce Title IX."\textsuperscript{205} The Fourth Circuit decision put Title IX followers on their heels, holding that punitive damages are not available for private actions brought to enforce Title IX.\textsuperscript{206}

The court based its holding on the recent Supreme Court decision in Barnes v. Gorman.\textsuperscript{207} In Barnes, the Supreme Court held that punitive damages may not be awarded in private actions brought to enforce section 202 of the ADA\textsuperscript{208} or section 504 of the Rehabilitation Act.\textsuperscript{209} In Barnes, the Supreme Court first determined that punitive damages are not available for private actions brought under Title VI of the Civil Rights Acts of 1964.\textsuperscript{210} The Fourth Circuit rationalized that because Title IX is modeled after Title VI, punitive damages are not available for private actions brought to enforce Title IX.

\begin{itemize}
  \item \textsuperscript{197} Mercer, 181 F. Supp. 2d at 535.
  \item \textsuperscript{198} Id. at 529.
  \item \textsuperscript{199} Id. at 553-54.
  \item \textsuperscript{200} 503 U.S. 60 (1992).
  \item \textsuperscript{201} Mercer, 181 F. Supp. 2d at 544-45.
  \item \textsuperscript{202} Id. at 544 (citing Franklin, 503 U.S at 66).
  \item \textsuperscript{203} Id. at 544 (citing Proctor v. Prince George's Hosp. Ctr., 32 F. Supp. 2d 820, 829-30 (D. Md. 1998)).
  \item \textsuperscript{204} Mercer v. Duke Univ., 50 Fed. Appx. 643 (4th Cir. 2002).
  \item \textsuperscript{205} Id. at 644.
  \item \textsuperscript{206} Id.
  \item \textsuperscript{207} Id. (citing Barnes v. Gorman, 536 U.S. 181 (2002)).
  \item \textsuperscript{208} Id. (citing 42 U.S.C.A. § 12132 (2000)).
  \item \textsuperscript{209} Mercer, 50 Fed. Appx. at 644 (citing 29 U.S.C.A. § 794 (2000)).
  \item \textsuperscript{210} Id. (citing Barnes, 536 U.S. at 189).
\end{itemize}
IX and vacated the $2 million award of punitive damages.\textsuperscript{211}

To add insult to injury, the court ruled that Mercer’s failure to file a cross-appeal prevents her from now seeking a new trial on compensatory damages, even though a jury award of compensatory damages may be inextricably tied to the award of punitive damages.\textsuperscript{212} The court then remanded the case to district court for reconsideration of whether a nominal award of $1.00 in damages precludes the award to Mercer for attorney’s fees.\textsuperscript{213}

The Fourth Circuit decision based on Title VI and ADA rationale would seem to conflict with the prior Supreme Court holding that Title IX claimants are entitled to all available remedies.\textsuperscript{214} It is possible that it was the intention of a fairly conservative court to limit the available remedies. It is also possible that the Fourth Circuit ruling will cause a conflict in the circuits that would precipitate Supreme Court review of the case. Should the decision that punitive damages are no longer available for victims of intentional discrimination under Title IX stand, future plaintiffs will have considerably less protection than they have had for the past decade.

CONCLUSION

Title IX, its implementation, and enforcement certainly generates impassioned response from across the political spectrum. On one end, conservatives claim that Title IX is a quota system creating statutory privilege that actually diminishes women’s accomplishments. Conservative politicians claim that women already have equality based on their interests, no further protections are necessary, and the current legislation harms boys and men. On the other end of the spectrum, liberals and feminist extremists shout that without Title IX women’s opportunities will be eliminated and women will suffer dramatically. The political extremists are both focused solely on numbers —how you count the numbers of participants and the numbers of opportunities that could be lost.

Somewhere in between there is a middle ground where common sense and fairness prevails. The legal battles will likely continue for some time. When all male and female athletes would be satisfied were they forced to accept what the other gender was allocated, only then will the goals of Title IX be achieved. Then we won’t have to prognosticate about the future of Title IX because the need for the statute will be eliminated.

\textsuperscript{211} Id.
\textsuperscript{212} Id. at 644-45.
\textsuperscript{213} Id. at 646.
\textsuperscript{214} See Franklin, 503 U.S. at 66.