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Title IX: The Trojan Horse in the Struggle for Female Athletic Coaches to Attain Equal Opportunities in Intercollegiate Sports

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**TITLE IX: THE TROJAN HORSE IN THE STRUGGLE FOR FEMALE
ATHLETIC COACHES TO ATTAIN EQUAL OPPORTUNITIES IN
INTERCOLLEGIATE SPORTS**

By: Ryan Richman

I. INTRODUCTION

The enactment of Title IX of the Education Amendments Act ("Title IX") has significantly changed the framework of women in the sports industry. Prior to the enactment of Title IX, it was "unnecessary to pay women for their coaching services," and these women had to provide money out of their own pocket for "food, travel, tournament play, and lodging."¹ For example, the head softball coach at Fullerton State, Judi Garman, "supplied \$2500 of her own money in the early 1990s to order new bleachers for the team's softball field after the school's athletic department refused to do so."² Also, prior to Title IX, there were zero full-time female coaches and this continued until five years after its enactment, when in 1977, Billie Moore was hired as the women's basketball coach at The University of California - Los Angeles.³

One of the major deterrents to women entering the coaching world is that they do not see coaching as a viable employment option because women are

¹ Jennifer K. Fazioli, *The Advancement of Female Coaches in Intercollegiate Athletics*, 13, Department of Labor Studies and Industrial Relations at the Pennsylvania State University, 13 (2004), available at <http://lser.la.psu.edu/workfam/CAGEbackground.doc> (last visited Oct. 24, 2009).

² *Id.*

³ *Id.* (However, this step forward signified a loss in a job security, because females coaches were not being hired as professionals, rather than as teachers, they were no longer afforded the tenure track teaching security and therefore, found themselves expendable); See also R. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport: A Longitudinal National Study, Twenty Seven Year Update 1977-2004*, available at http://webpages.charter.net/womeninsport/AcostaCarp_2004.pdf (last visited Oct. 24, 2009) (Even further, according to a study by Linda Jean Carpenter and Vivian Acosta, at the collegiate level, only two percent of the coaches of men's' teams and less than half of the coaches of women's' teams are female, and furthermore, *eighty percent* of all coaches at the high school level and collegiate level are male).

seeing great employment advancements in other industries, namely, law, business, and medicine.⁴ This problem is referred to as the "glass sneaker problem" and stresses that while impressive strides have been made for female athletes under Title IX, women are still instilled with the attitude that athletic employment, participation opportunities, and benefits are a gift, rather than an entitlement.⁵ The hope is that Title IX "will produce the same positive effect for female coaches as it did for female athletes but must be given the requisite time period to realize these gains."⁶

Title IX reads, "[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."⁷ In 1972, Congress passed Title IX of the Education Amendments Act with the intent of prohibiting gender-based discrimination in schools receiving federal financial assistance. The purpose of Title IX is to provide all women, on all levels, with educational opportunities in both the academic and athletic realms.⁸ Postsecondary institutions were required to comply with the regulations of Title IX within three-years of its enactment.⁹ The Department of Health Education and Welfare ("HEW") bestowed jurisdiction of Title IX to its Office of Civil Rights

⁴ *Id.* at 11.

⁵ 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) ("The term 'glass sneaker' reflects that, while impressive strides have been made for female students since Title IX's inception thirty years ago, females are still imbued with the attitude that athletic employment, participation opportunities, and benefits are a gift and not an entitlement.").

⁶ Fazioli, *supra* note 1, at 10.

⁷ Title IX of the Education Amendments, 1972, 20 U.S.C.S. §§ 1681 - 1688 (2000).

⁸ Amanda L. Paule, *How Title IX Impacts Women of Color* (2008), available at <http://womanssportsfoundation.com/Content/Articles/Issues/Equity-Issues/H/How-Title-IX-Impacts-Women-of-Color.aspx>.

⁹ Gracie-Marie Mowery, *Tenth Annual Corporate Law Symposium: Intellectual Property Law For the Twenty-First Century: Comment: Creating Equal Opportunity for Female Coaches: Affirmative Action Under Title IX*, 66 *U. CIN. L. REV.* 283, 288 (1997).

("OCR") and it has been the principal agency in charge of enforcing the statute.¹⁰ The OCR has published numerous regulations and policy interpretations of Title IX to clarify the requirements of compliance for institutions.¹¹ Although not law, these interpretations have become of utmost importance because courts have relied on them in making rulings under Title IX litigation.¹²

Under the regulations, Title IX applies to any "recipient," which is defined as "any State of political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended."¹³ There are two specific regulations that apply to intercollegiate coaches. The first, subpart D, outlines ten factors in determining whether equal opportunities are available for athletes.¹⁴ More specifically the two relevant factors being "opportunity to receive coaching" and the "assignment and compensation of coaches."¹⁵ The second, subpart E, prohibits discrimination on the basis of sex and requires equal opportunities for both sexes.¹⁶

The key focus of the law for this note, is its extension to high school and collegiate athletics. Generally, Title IX has proven to be an enormous advancement for females participating in athletics, but has not been effective in all areas, particularly for female coaches.¹⁷ Title IX has not

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ 34 C.F.R. § 106.2 (1996).

¹⁴ *See* 34 C.F.R. § 106.41 (1996).

¹⁵ *Id.*

¹⁶ *See* 34 C.F.R. §§ 106.51-61 (1996).

¹⁷ Barbara Osbrne & Marilyn V. Yarbrough, *Article: Pay Equity for Coaches and Athletic Administrators: An Element of Title IX?*, 34 U. Mich. J.L. Reform 231, 231 (2001).

impacted female coaches in the same way it successfully helped female athletes. Statistics show that by 1992, the number of young females participating in athletics had multiplied six times since Title IX was enacted,¹⁸ and this can be seen by the "year of the woman" at the Centennial Olympic Games in Atlanta.¹⁹

However, this is not the case for females trying to enter the coaching world, and in fact, is quite the opposite. When Title IX was enacted in 1972, women coached ninety percent (90%) of women's athletic teams.²⁰ The 2004 study by Vivian Acosta and Linda J. Carpenter shows that in 2004, women coached 44.1% of women's athletic teams, slightly down from the 1998 number of 47.4%.²¹ Not only has Title IX not impacted female coaches in the way it was intended to, but arguably has been a step backwards for female coaches.²² Why does transparent discrimination continue for female coaches? Because, Title IX, the legislation most often relied on for equal opportunity

¹⁸ Mowery, *supra* note 9, at 283.

¹⁹ Norris Pritam & Saibal Chatterjee, *Woman Power*, *OUTLOOK*, Aug. 14, 1996, available at <http://www.outlookindia.com/article.aspx?201895>. (However, the article reports: "Male athletes still dominate the Olympic events 2 to 1. Men can compete in 63 more medal events. And women remain barred from Olympics wrestling, boxing, the modern pentathlon and weightlifting. Worse, for some women the Olympics are nothing but a dream."); See also Tara Sullivan, *Influx of Youth Programs Propels Women's Sports*, *L.A. Daily News*, Aug. 18, 1996, available at <http://www.thefreelibrary.com/INFLUX+OF+YOUTH+PROGRAMS+PROPELS+WOMEN'S+SPORTS.-a083962324> ("In Atlanta, the U.S. won team golds in women's basketball, softball, soccer and gymnastics. The Americans won a total of 40 gold medals, 18 by women's teams or individuals. It is a remarkable upsurge for U.S. women and one that can be traced to the passage of Title IX legislation in 1972. The law, signed by President Richard Nixon, mandated full equality for women's school athletics. The 1972 U.S. Olympic team consisted of 342 men to only 96 women. In each Olympics since, the ratio of men to women has decreased. This year it was 382 men to 280 women.").

²⁰ Acosta & Carpenter, *supra* note 3, at 2.

²¹ *Id.* ("2004's 44.1% is close to the lowest representation of females as head coaches of women's teams in history. [Furthermore], Even though over half of women's teams are coached by males, very few females serve as head coaches of men's teams. The percentage of females among the coaching ranks of men's athletics remains under 2% as it has been for the last 3 decades. In 2004 17% of colleges have at least one female head coach of a men's teams and 28% have a paid female assistant of a men's team. Most of the teams having women among the coaching ranks are those which typically practice with their female team counterparts such as tennis and swimming.").

²² See e.g. Milton G. Holmen & Bonnie L. Parkhouse, *Trends in the Selection of Coaches for Female Athletes: A Demographic Inquiry*, *RESEARCH QUARTERLY FOR EXERCISE & SPORT*, 9 (1981).

litigation, has proven to have inadequate remedies and penalties against such discrimination.

This note will address the inadequacies of Title IX in "helping" female coaches, and has seven major parts. Part II addresses why females have traditionally been unable to obtain coaching positions before and after the enactment of Title IX, and the pretextual reasons for averting females away from the sports industry. Part III explains and discusses two applicable Title IX regulations that effect female coaches. Part IV details Title IX's three-prong test that was developed for compliance of the statute, and further discusses the inadequate penalties, problems, and critiques of the test. Part V traces litigation in the area of Title IX and employment discrimination of female coaches. Part VI emphasizes further discrimination in the area of females and sports, showing how equal opportunity is an industry wide predicament with an overstated case study that takes a special look into female reporters gaining access to male locker rooms. Part VII of this note addresses my suggestion on the new penalties and remedies that should be enacted by HEW to help combat the problems female coaches continue to face. Specifically, I will argue that HEW should enact a regulation or issue a policy interpretation under its mandate to expressly include withdrawing federal funds from institutions in violation of Title IX and require institutions to be in compliance with all parts of the three-prong test. I conclude in Part VIII by suggesting that the current system will only lead to more discrimination for female coaches.

II. EXPLANATIONS & PROBLEMS WITH TITLE IX

Even though Title IX was partially intended to alleviate sex-based discrimination in coaching, there are a number of explanations as to why women are not getting more positions as coaches, as well as several problems with Title IX itself. And, although Title IX was aimed at placing women's

athletic teams on an equal level to men's athletic teams, and in consequence, female coaches on the same level as male coaches, there are still a number of barriers that female coaches must overcome to really be equal.

A. Reasons for less female coaches/coaching opportunities

1. Increase in Women's Teams

First, Title IX created a colossal increase in the amount of girls and women participating in sports, thus, creating a rapid amount of new female teams on the high school and intercollegiate level.²³ Because of this increase, the demand for coaches has increased tenfold, while the supply of female coaches in the marketplace has not.²⁴ Thus, there is a "lack of sufficiently qualified women in the marketplace to fill all available positions."²⁵ As such, when these new coaching opportunities came to the forefront, men, and not women were in the best position to take these positions.

2. Male Athletic Directors

Second, the majority of athletic directors on the high school and intercollegiate level are males, and ultimately females have to deal with male athletic directors as a roadblock to coaching.²⁶ Traditionally, male

²³ See Acosta & Carpenter, *supra* note 3, at 2 ("Nationwide, more college women have more athletic teams available to them than ever before. 8.32 teams per school is the average offering for female athletes in 2004. The 2004 number of 8.32 is near the 2002 all-time high of 8.34 and far exceeds the 1972 (year Title IX was enacted) number of a little over 2 per school and the 1978 (mandatory compliance date for Title IX) number of 5.61 per school. Although the 2004 average number of 8.32 teams offered on each campus is slightly lower than the all-time high of 8.34 in 2002, more schools in 2004 offered women's athletics programs. Therefore, in 2004 female collegiate athletes had a total of 8402 teams available to them at the nation's NCAA schools.").

²⁴ See *id.*

²⁵ Osbrne & Yarbrough, *supra* note 17, at 232.

²⁶ See Acosta & Carpenter, *supra* note 3, at 3.

athletic directors have hired more male coaches than female coaches.²⁷ The procedure for recruiting and hiring female coaches is vastly different from that of male coaches.²⁸ Athletic directors searching for women's team coaches typically "circulate a job announcement, review the resumes that come in, conduct interviews, and then make someone an offer."²⁹ This is immensely different than when athletic directors search for male's team coaches, where typically:

[they] engage in active recruiting, meaning they have specific candidates in mind and seek them out, enticing them to their schools with competitive offers rather than passively posting an announcement for an open position and waiting for qualified applicants to come to them. The result being that men get paid top marketplace salaries while women's salaries continue to be depressed.³⁰

The bottom line being that the recruitment of female coaches is tremendously different than male coaches, with emphasis on the fact that the athletic director will identify the best coach when it comes to hiring a male coach and will pay whatever it takes to get him on campus.

For example, Teresa Phillips served as the head basketball coach of the Tennessee State men's basketball team for one game.³¹ Previously, the only women to ever serve as a coach for a men's Division I team were all assistants.³² However Phillips, the head athletic director, appointed herself to the position when the male coach was fired and thus, never went through a selection process.³³ Had Phillips not been the athletic director she arguably

²⁷ In all three Divisions (I, II, & III), when the athletic director is a male, the percentage of female coaches is lower than when the athletic director is a female. *Id.*

²⁸ Fazioli, *supra* note 1, at 10.

²⁹ *Id.* at 10.

³⁰ *Id.*

³¹ *Id.*

³² *See id.*

³³ *See id.*

would never have had the opportunity to coach the men's team. This is a classic showing that female coaches are often overlooked because most athletic directors are men. Moreover, Acosta and Carpenter's study found that most colleges merged the female and males' athletic department into one, and as a consequence it crunched many females out of the position in favor of the male who remained the combined athletic director.³⁴ As such, the sex of the athletic director has a direct impact on the amount of head female coaches hired.³⁵ This unequal consideration results in little incentive for females to apply to coaching jobs.

3. The Emergence of Men Coaching Female Teams

Third, Title IX itself is inherently part of the problem. Under Title IX, the budgets for female programs increased immensely from what they were prior to the amendment's enactment.³⁶ This increase allowed athletic departments to pay higher salaries to coaches for women's athletic teams who presumably would be females.³⁷ However, the increase in coaching salaries attracted many more male candidates, and in reality lowered the amount of women who could obtain these positions as many more men were applying and receiving the jobs.³⁸

Part of the intention in enacting this budget increase was to make more positions available for female coaches, but this has not been the result. Moreover, with this increase in attention for male coaches, men see coaching female teams as a "stepping stone" into coaching competitive male intercollegiate athletic teams in the future. Coaching intercollegiate women

³⁴ Acosta & Carpenter, *supra* note 3 at 14.

³⁵ *Id.*

³⁶ See Mowery, *supra* note 9, at 286.

³⁷ See *id.*

³⁸ See *id.*

at a high level, with success, can be one avenue that a male coach can take before moving on to a more "glorious" role of coaching male teams.

4. Salary Discrepancies

Fourth, the salary discrepancy that exists in the difference between women and men's pay as coaches has been a tremendous drawback and limitation to women having success as coaches.³⁹ Generally, courts have found that the lower salary of female coaches is not based directly on sex discrimination, but rather, based on other factors, and therefore, has been allowed.⁴⁰ This is unfortunate because it hinders female's attempts to gain an equal footing with male coaches on the intercollegiate level.

In general, when members of disadvantaged groups are admitted into a field where they have been historically discriminated against, there are still barriers that must be overcome to achieve the ultimate goal of being on an equal playing ground. Specifically, when women were given the opportunity to make advancements in the field of coaching there were and still are many barriers that they must overcome. A simple piece of legislation will not cure years and years of past discrimination without women overcoming other blockades that advantage their male counterparts. The salary discrepancies between female and male coaches is one such barrier, and with the courts denying equal opportunity pay to females in coaching, it seems as though this will be a long-lasting barrier that will continue to hurt females from advancing in coaching as far as they would like to. Furthermore, according to

³⁹ *Id.* at 284.

⁴⁰ See Cathryn L. Claussen, *Title IX and Employment Discrimination in Coaching Intercollegiate Athletics*, 12 U. MIAMI ENT. & SPORTS L. REC. 149 (1994); See also, *Jacobs v. College of William and Mary*, 517 F. Supp. 791, 795-98 (E.D. Va. 1980) (Holding that a women's basketball coach was unable to establish an equal work claim under Title IX because the men's coach has had duties that she did not and was employed full-time).

the Acosta and Carpenter study, women are the head coaches of female athletic teams in only seven of the twenty-five sports that they surveyed.⁴¹

5. Men have a Competitive Advantage

Fifth, because few women had the opportunity to participate in competitive athletics prior to Title IX, men have a competitive edge in the job market as it relates to coaching experience because they have been coaching for much longer than women.⁴² For instance, take for example a job opening on the intercollegiate level for a Division I women's basketball team. After narrowing down the candidates, two well-qualified candidates remain, one female and one male. They have similar credentials, except that the male has been coaching on the high school level for the past ten years, but it's the female's first attempt in trying to break into the coaching world. Who is the athletic director undoubtedly going to pick? This turn of events happens on the regular. The athletic director is going to put his chips down on the male candidate, for several reasons, one being that he thinks the male candidate's prior experience will lead the team to more success, and in turn will not put his job on the line.⁴³ To the athletic director, the female candidate may be too risky for him to gamble on. This is yet another blockade standing in the way of female coaches really being on an equal ground to male coaches.

6. Lack of Female Role Models

Sixth, the lack of female role models in coaching may have discouraged females from becoming coaches, as has the long-standing prejudice of female

⁴¹ Acosta & Carpenter, *supra* note 3, at 5.

⁴² See Fazioli, *supra* note 1, at 11.

⁴³ See *id.*

physical educators against competitive sports for women.⁴⁴ For example, Beverley Kearney, the head women's track and field coach at the University of Texas who has two NCAA outdoor track titles "affirms that one of the main reasons for her relatively rapid advancement through the college coaching ranks was because of the network she created with other head coaches during her time as an assistant coach at the University of Tennessee."⁴⁵

Conclusively, the majority of current top female coaches attribute their success to having connections and networking with other female coaches in the past who have served them as mentors.⁴⁶ Having a mentor gives women a step into the coaching world that they need because it seems men have an advantage in almost every other aspect, and arguably even this one.

7. Men want to Coach Women

Seventh, men want to coach women. The Kennebec Journal interviewed various coaches on the high school level to find out why the number of female coaches is so small as compared to male coaches.⁴⁷ Through interviews, the journal found that because women are "easier" to coach than men that men enjoy coaching women more.⁴⁸ Mary Berry, the softball coach at Mt. Blue and the junior varsity girls basketball coach at Winslow, explains, "I think females are probably easier to coach in some respect than males. . . . I

⁴⁴ *Id.* at 12 ("With fewer female examples available to demonstrate for female athletes what is possible in regards to coaching, it is more likely that there will be fewer of these athletes making the transition into the coaching profession. This results in a deficiency in female role models for the next generation of female athletes and leads to a continuation of this cycle. . . .In terms of more immediate solutions it is believed that women in athletics need to engage in more networking, not only to obtain better coaching positions and leadership roles, but also to assist each other (emphasis added) with advice learned from their individual experiences.").

⁴⁵ *Id.*

⁴⁶ *Id.* at 13.

⁴⁷ Matt DiFilippo, *Female Coaches are Hard to Find*, KENNEBEC JOURNAL, Feb. 12, 2008, available at <http://kennebecjournal,maintetoday.com/news/local/4758226.html> (last visited Nov. 29, 2009).

⁴⁸ *Id.*

think that draws some of the high-quality coaches to the women's game."⁴⁹ Traditionally, high school women's games were inferior on all levels to male games.⁵⁰ For instance, basketball games were six-on-six (as opposed to five-on-five for males), and some women were not allowed to cross half court.⁵¹ In that era, female coaches coached almost all high school female teams because men thought it was a step down to coach these teams. However, when the women's game began to evolve and draw bigger crowds, male coaches began to consider coaching female teams as a serious option.⁵² This begs the question that now, because more often males are coaching female teams, female coaches are competing against men and women for these jobs, while male coaches trying to coach male teams are competing almost solely against male applicants.⁵³ In conclusion, the Journal found that of the 52 head varsity coaching jobs in the immediate area (including both men and women's teams) that males coach a total of 48, or 92%.⁵⁴

B. Pre-textual Reasons for Less Female Coaches

1. Male Coaches Win Championships

First, there is a stigma in the coaching world that because male coaches win championships that it de facto proves that male coaches are

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See id.*

⁵² *See id.* (Ted Rioux, a women's coach at Waterville said, "he originally started coaching girls because it was the first job that opened up. While at the time, he viewed that as a stepping stone to a boys job, he came to love the attitudes of the female players. . . . You definitely get the same amount of intensity and passion for the game [from women]. Any coach is looking for kids who are passionate about the game.").

⁵³ DiFilippo, *Female Coaches are Hard to Find*.

⁵⁴ *Id.*

better than their female counterparts.⁵⁵ However, this can be explained by the fact that "male coaches are more likely to have the higher paying jobs, the status positions at major institutions and therefore, the budgetary, facility, recruiting and staffing recourses to maintain their successful and advantaged positions."⁵⁶ Consequently, it is not surprising that female coaches do not win as many championships as male coaches under these circumstances. Of course, more male coaches are going to win more championships, first, because there are just simply more male coaches out there, and second, because male coaches simply get the better, higher paying jobs that translate into championships. It is highly unlikely that a female coach will coach the North Carolina Men's Basketball team to an NCAA championship, at least not anytime soon.

2. Women's Traditional Family Role

Second, women are still seen, stereotypically at that, as the ones who should be there for their children. Although much of this stigma has disappeared altogether, "[t]he traditional family roles of the wife staying at home and raising children and the husband providing the income has not completely disappeared."⁵⁷ Heidi Deery, who is the head coach for a varsity girls basketball team in Canada said that she does not "think a lot of women would be willing to give up that time away [from home with their kids]" to coach sports, where the job involved long road games and night practices.⁵⁸

⁵⁵ *Coaching - Do Female Athletes Prefer Male Coaches? The Foundation Position*, Women's Sports Foundation (2008), available at <http://www.womenssportsfoundation.org> (last visited on Oct. 24, 2009).

⁵⁶ *Id.*

⁵⁷ DiFilippo, *supra* note 47.

⁵⁸ From another perspective, Brenda Beckwith, a high school women's coach explains, "If you're a woman, and you're the provider, the mom to your family, and you have kids, you've got to give up a lot. . . . Like, I give up a lot seeing my kids. Then you've got to look at the financial aspect - who's going to take care of your kid?" *Id.*

Although this stigma has been fading rapidly, even female coaches themselves believe this to still be a problem that must have a workable solution. Certainly, the extreme workloads that coaches take on make it hard to balance family life.

3. Women are Less Intense and Demanding

Third, some scholars argue that women do not get these jobs because they are less intense, demanding, and not strong enough.⁵⁹ Again, ascribing broad characteristics to women is the root of discrimination, and as such, simply cannot justify why women do not have as many coaching positions as their male counterparts.⁶⁰ It is one thing to say coach Jane Doe is not as intense and demanding as a particular coaching job requires, but undoubtedly the same can be said for many male coaches. It is a completely different thing, and not to mention, stereotypical and discriminatory, to generalize that *all* female coaches are less intense and demanding than male coaches. This premise is just as faulty, discriminatory, and stereotypical as saying white men can't jump, jocks are stupid, or men can't cook. Statements like these are the product of ignorance in our society and by adhering to them we only perpetuate the root of the problem.

4. Women do not have the Skills or Knowledge

Lastly, another argument put forward for why males dominate the coaching industry is that older female coaches do not have the skills or knowledge to coach at highly competitive levels.⁶¹ However, this is just

⁵⁹ *Coaching*, *supra* note 55.

⁶⁰ *See id.*

⁶¹ *Id.*

false, for example, look at older female coaches such as Pat Summit,⁶² the head coach of the University of Tennessee women's basketball team, C. Vivian Stringer, the head coach of the Rutgers University women's basketball team, and Jody Conradt, a former head coach of the University of Texas women's basketball team. These three coaches are arguably the best coaches in collegiate women's basketball history. The concern is that these arguments cannot be put forward to justify why men have more coaching opportunities, as they are all based on notions of discrimination because all women cannot be generalized into one broad category. Anyone trying to make an argument based on these faulty premises are feeding the fire of discrimination.

III. APPLICABLE TITLE IX REGULATIONS

Congress gave HEW the power to interpret and enforce Title IX.⁶³ And, in 1975, HEW set forth regulations as to how Title IX was to be interpreted and enforced.⁶⁴ The regulations fall into six different categories: "general matters related to discrimination on the basis of sex, coverage, admissions, treatment of students once they are admitted, employment and procedures."⁶⁵ There are two pertinent sections, subpart D and subpart E, which are

⁶² In fact, Pat Summit does not only have the most wins in NCAA women's basketball history, but is the all-time-winningest coach in NCAA basketball history, men or women, in any division.

⁶³ See generally Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, Dec. 11, 1979 (Office for Civil Rights, a new unit in Department of Education under HEW was established to interpret Title IX and enforce violations of the statute).

⁶⁴ 34 C.F.R. § 106.1 (1975) ("The purpose of this part is to effectuate Title IX of the Education Amendments of 1972 . . . which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. . . .The effective date of this part shall be July 21, 1975."); see also *An Annotated Summary of the Regulation for Title IX, Education Amendments of 1972*, NOW Legal Defense and Education Fund, available at <http://www.maec.org/annotate.html> (last visited Feb. 18, 2010).

⁶⁵ *Id.*

applicable to the issue of discrimination of female coaches on the intercollegiate level.

A. Subpart D. Athletics

Subpart D, "Discrimination on the Basis of Sex in Education Programs and Activities Prohibited," specifies certain criteria that schools must have in order to comply with Title IX; such as how many female athletes it needs to have.⁶⁶ Specifically, section 106.41 includes athletic regulations.⁶⁷ Section 106.41(c) requires that "[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes."⁶⁸ This section also lists ten factors "in determining whether equal opportunities are available,"⁶⁹ however, these "are only 'factors' to be considered in assessing program wide compliance, and thus are not necessarily sufficient in and of themselves to support a lawsuit."⁷⁰

It is important to note that this section addresses the sex of athletes and not the coach, but is important in determining whether the institution is providing equal opportunities to the sexes of both athletes. However, it is

⁶⁶ See 34 C.F.R. § 106(D) (1975).

⁶⁷ 34 C.F.R. § 106.41(a) (1993) ("No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.").

⁶⁸ 34 C.F.R. § 106.41(c) (1993).

⁶⁹ *Id.* ("In determining whether equal opportunities are available the Director will consider, among other factors: (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity.").

⁷⁰ Claussen, *supra* note 40, at 153.

noteworthy that factor five and six, the opportunity to receive coaching and the assignment and compensation of coaches, are included in the section requiring equal opportunities for athletes.⁷¹ Thus, in order for a plaintiff to show a violation of Title IX through either of these factors it may require proving that a lack of coaches or lower compensation for one sex of coaches "has had a negative effect on the athletes."⁷² Thus, it is important to consider the inter connectedness of showing a lack of equal opportunities for athletes of an underrepresented sex and lack of coaches or lower compensation of coaches, arguably most of which will be females.

B. Subpart E. Employment

Subpart E, "Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited," lays forth employment education regulations as they pertain to Title IX.⁷³ Section 106.51(a) provides that "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefore, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance."⁷⁴ Section 106.51(2) states that all employment decisions should be operated in a non-discriminatory fashion "and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect

⁷¹ 34 C.F.R. §§ 106.41(c)(5)-(6).

⁷² Claussen, *supra* note 40, at 154.

⁷³ See 34 C.F.R. § 106(E) (1975).

⁷⁴ 34 C.F.R. § 106.51(a)(1).

any applicant's or employee's employment opportunities or status because of sex."⁷⁵

HEW clearly intended this regulation to provide equal opportunities for female coaches and to ensure they were not discriminated against based on their sex. Section 106.51(b) states that the provisions in Subpart E apply to among other things, recruitment, hiring, pay and compensation, and a catch-all for "[a]ny other term, condition, or privilege of employment."⁷⁶ Thus, making it clear that Title IX clearly applies to female coaches at intercollegiate institutions receiving federal funding.

Furthermore, § 106.53(a) provides that:

A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.⁷⁷

HEW implemented this provision to ensure institutions would recruit and hire members of an unrepresented sex that has been discriminated against in the past, all but targeting the female sex. However, this section also provides

⁷⁵ 34 C.F.R. § 106.51(a)(2).

⁷⁶ 34 C.F.R. § 106.51(b) ("The provisions of this subpart apply to: (1) Recruitment, advertising, and the process of application for employment; (2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring; (3) Rates of pay or any other form of compensation, and changes in compensation; (4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists; (5) The terms of any collective bargaining agreement; (6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave; (7) Fringe benefits available by virtue of employment, whether or not administered by the recipient; (8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training; (9) Employer-sponsored activities, including those that are social or recreational; and (10) Any other term, condition, or privilege of employment.").

⁷⁷ 34 C.F.R. § 106.53(a).

that an institution may not discriminate on the basis of sex in hiring, even if there was no past discrimination. Section 106.54 also provides a specific compensation provision prohibiting distinctions in pay based on sex⁷⁸ and unequal pay for the employees of one sex for equal work of the employees of the other sex.⁷⁹ Lastly, section 106.55 was aimed at eliminating jobs as being classified for one sex and stopping the fast track job progression of male employees.⁸⁰

Thus, the regulations interpreting Title IX were intended to combat discrimination on the basis of sex in athletic programs and employment at federally funded institutions. Although HEW's regulations have been successful in clarifying what constitutes discrimination on the basis of sex for athletes and coaches, the regulations are silent on an appropriate remedy as to the violation of these regulations. I later argue that an appropriate remedy section should be added to the regulations to ensure institutions comply with Title IX. Furthermore, section 106.61 is a statutory "out" for an institution. It provides that "[a] recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the

⁷⁸ This begs the question that courts have ruled the opposite in almost all cases, ruling that different pay to male and female coaches is based on other factors.

⁷⁹ 34 C.F.R. § 106.54 ("A recipient shall not make or enforce any policy or practice which, on the basis of sex: (a) Makes distinctions in rates of pay or other compensation; (b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.").

⁸⁰ See 34 C.F.R. § 106.55 (A recipient shall not: (a) Classify a job as being for males or for females; (b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or (c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 106.61.").

employment function concerned.”⁸¹ If an institution can show based on the stereotypes above, that a male coach is essential to the successful operation of intercollegiate athletics than the institution may not have to comply with Title IX at all.

With the lack of remedies for a Title IX violation, it is no surprise that from 1972 to 1993, the percentage of women’s athletic teams coached by females dropped from 90 percent to 48 percent, suggesting that coaching jobs on the intercollegiate level are sex-segregated.⁸² The relatively low to no access women have to coaching male athletic teams is beginning to boil over to female athletic teams, causing women to lose their cartel over it. It is my argument that an appropriate remedy must be instituted to stop this atrocious behavior.

IV. TITLE IX’S THREE-PRONG TEST

In 1979, HEW issued a policy interpretation known as the 1979 Intercollegiate Athletics Policy Interpretation, which was intended as “a measure of compliance for the requirement found in the Regulations relating to athletic participation opportunities.”⁸³ It was issued in a response known as the Tower Amendment, which was ultimately rejected.⁸⁴ The Amendment was in response to those trying to protect men’s intercollegiate athletics, who thought Title IX was in direct opposition to men’s athletics, and sought “to exempt sports that produced gross revenue or donations from Title IX

⁸¹ 34 C.F.R. § 106.61.

⁸² Acosta & Carpenter, *supra* note 3, at 5.

⁸³ Lina Jean Carpenter & Vivian Acosta, *Title IX - Two for One: A Starter Kit of the Law and a Snapshot of Title IX’s Impact*, 55 CLEV. STATE L. REV. 503, 505 (2007).

⁸⁴ The Living Law (2010), available at <http://www.titleix.info/History/The-Living-Law.aspx>.

compliance determinations.”⁸⁵ The 1979 Intercollegiate Athletics Policy Interpretation was simply introduced to clarify confusion with Title IX. As Carpenter and Acosta explained:

Policy interpretations are not intended to change a statute’s regulations but rather to clarify them. In some ways, policy interpretations can be likened to a teacher who realizes that the students are confused. Instead of simply repeating word for word the previous explanation, the good teacher tries to find new words and methods of description which bring about a better understanding of the original concepts. Policy interpretations do not have the force of law but do have the right to great deference by the courts.⁸⁶

The 1979 policy interpretation outlined three areas where an institution could illustrate compliance with Title IX. This became known as the “three-prong test” for institution compliance with Title IX. The “three-prong test” consists of the institution showing: (1) whether participation opportunities for female and male athletes are *proportionate* to the amount of female and male students enrolled at the institution; (2) whether the institution can demonstrate a history of continuing expansion of athletic opportunities for female athletes; or (3) whether the institution is fully and effectively accommodating the “interest and abilities” of female athletes.⁸⁷ The institution can demonstrate compliance with Title IX by simply meeting *any one* of the three requirements of the three-prong test, which ultimately is the problem with the test as explained below.⁸⁸

⁸⁵ *Id.*

⁸⁶ Carpenter, *supra* note 82, at 504.

⁸⁷ *A Policy Interpretation: Title IX and Intercollegiate Athletes*, Office for Civil Rights, Dec. 11, 1979, available at <http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html> (last visited Jan. 15, 2010) (emphasis added).

⁸⁸ *Clarification of Intercollegiate Athletics Policy Guidelines*, Office for Civil Rights, Jan. 16, 1996, available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> (“Institutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas. For example, if an institution chooses to and does comply with part three of the test, OCR will not require it to provide substantially proportionate participation opportunities to, or demonstrate a history and continuing practice of program expansion that is responsive to the developing interests of, the underrepresented sex.”).

A. Part I: Substantially proportionate

Under part one of the three-pong test, the OCR will objectively measure an institution's athletic participation opportunities for female athletes compared to the full time enrollment of female undergraduate students.⁸⁹ OCR will find that the institution is providing discriminatory participation opportunities for females if the participation and enrollment ratio is not *substantially proportional* to the amount of females enrolled at the institution.⁹⁰

The OCR will first analyze the number of participation opportunities offered to male and female athletes in the institution's athletic program.⁹¹ The next step is for the OCR to determine whether the number of athletic opportunities available to female and male athletes, as determined in step one, is substantially proportionate to the full time undergraduates of each respective gender.⁹² The institution is in compliance with Title IX when the athletic opportunities are considered by the OCR to be in substantial proportion to the female and male undergraduate enrollment.⁹³ This test is to

⁸⁹ *Id.*

⁹⁰ *Id.* (emphasis added) (Explaining that the "OCR focuses on the interests and abilities of the underrepresented sex only if the institution provides proportionately fewer athletic opportunities to members of one sex and has failed to make a good faith effort to expand its program for the underrepresented sex. Thus, the Policy Interpretation requires the full accommodation of the underrepresented sex only to the extent necessary to provide equal athletic opportunity, i.e., only where an institution has failed to respond to the interests and abilities of the underrepresented sex when it allocated a disproportionately large number of opportunities for athletes of the other sex.").

⁹¹ *Id.*

⁹² *Id.* ("[B]ecause in some circumstances it may be unreasonable to expect an institution to achieve exact proportionality--for instance, because of natural fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality--the Policy Interpretation examines whether participation opportunities are "substantially" proportionate to enrollment rates.").

⁹³ *Id.*

be on a case-by-case basis "because this determination depends on the institution's specific circumstances and size of its athletic program."⁹⁴

B. Part II: Continuing Expansion of Athletic Opportunities for Females⁹⁵

The second prong of the three-part test investigates whether an institution "can show that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex."⁹⁶ The OCR will look into two time frames when examining this: (1) an institution's past efforts, and (2) an institution's future commitment to the expansion of females in their athletic programs.⁹⁷

First, the OCR will "review the entire history of the athletic program" and examine whether the institutions past efforts have expanded participation opportunities for female athletes. Here, the focus is on whether these efforts were "responsive to developing interests and abilities" of female athletes, rather than on fixed intervals of time.⁹⁸

There are several factors the OCR will consider as evidence of an institution's history of program expansion, including, but not limited to:

- [1] an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex; [2] an institution's record of increasing

⁹⁴ *Clarification of Intercollegiate Athletics Policy Guidelines.*

⁹⁵ *Id.* ("[I]t is appropriate for parts two and three of the test to focus only on the underrepresented sex. Indeed, such a focus is required because Title IX, by definition, addresses discrimination. Notably, Title IX's athletic provisions are unique in permitting institutions--notwithstanding the long history of discrimination based on sex in athletics programs--to establish separate athletic programs on the basis of sex, thus allowing institutions to determine the number of athletic opportunities that are available to students of each sex. (By contrast, Title VI of the Civil Rights Act of 1964 forbids institutions from providing separate athletic programs on the basis of race or national origin.).").

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and [3] an institution's affirmative responses to requests by students or others for addition or elevation of sports.⁹⁹

After assessing the past efforts of the institution, the OCR will examine the future, continuing efforts of the institution.¹⁰⁰

In addition to the institution demonstrating a history of participation opportunities provided to female athletes in accordance to their developing interest and ability, the institution must also demonstrate an ongoing, continuing expansion of female's opportunities in athletics at the institution. Again, the OCR has a number of factors it will consider, though it will not limit its inquiry to evidence which may indicate an institution's continuing expansion of opportunities for female athletes, including:

[1] an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and [2] an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities... [and 3] an institution's efforts to monitor developing interests and abilities of the underrepresented sex, for example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.¹⁰¹

For the last factor, the OCR cites as an example that an institution could conduct non-discriminatory periodic evaluations of interests and abilities of female athletes and take timely action to implement their results.¹⁰²

Part two of the three-prong test also requires that the institution implement a specific plan on how it intends to introduce athletic programs in accordance to the interests and abilities of female athletes. If the OCR

⁹⁹ *Id.*

¹⁰⁰ *Clarification of Intercollegiate Athletics Policy Guidelines.*

¹⁰¹ *Id.*

¹⁰² *Id.*

decides that the past and continuing efforts of an institution have implemented opportunities for female athletes then the institution has satisfied prong two of the three-prong test.

C. Part III: Accommodating the Interest and Abilities of Female Athletes

The third part of the three-prong test requires an institution to fully and effectively accommodate the interests and abilities of its students who are members of the underrepresented sex. Where an institution has disproportionate high athletic participation from male athletes, but not from female athletes, it may indicate an institution is not fulfilling its requirement to provide equal opportunities to both sexes. Hence, an institution can satisfy part three of the three-prong test if it can show that the disparity is not due to discrimination but rather to the low interest and abilities of female athletes.¹⁰³ In consequence, this compels the institutions to implement policies and programs to persistently measure and evaluate underrepresented athletic interest in sports and to respond adequately and quickly. This means that institutions must install policies to respond to female athletic interests and abilities.

There are several factors the OCR will consider, including “whether there is [1] unmet interest in a particular sport;¹⁰⁴ [2] sufficient ability to

¹⁰³ *Id.* (The OCR cites an example “where it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated.”).

¹⁰⁴ *Id.* (“OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others: [1] requests by students and admitted students that a particular sport be added; [2] requests that an existing club sport be elevated to intercollegiate team status; [3] participation in particular club or intramural sports; [4] interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports; [5] results of questionnaires of students and admitted students regarding interests in particular sports; and [6] participation in particular interscholastic sports by admitted students.”)

sustain a team in the sport;¹⁰⁵ and [3] a reasonable expectation of competition for the team.”¹⁰⁶ An institution will be found to be violating part three of the three-prong test if all three of the conditions above are present.¹⁰⁷ In summary, HEW’s 1979 policy interpretation of Article IX gives institutions three separate ways to provide compliance with the statute. This gives institutions substantial “flexibility and control” of their athletic programs, but more importantly institutions must comply with the three-prong test while at the same time making sure it does not discriminate on the basis of sex as required by Title IX.¹⁰⁸

D. Penalty under the Three-Prong Test

The OCR implemented a withdrawal of federal funds from the institution as a penalty for being in violation Title IX, however, to the athlete’s detriment, this is rarely enforced.¹⁰⁹ The institution may also be required by the OCR or a court order to change their athletic programs in order to comply

¹⁰⁵ *Id.* (“OCR will determine whether there is sufficient ability among interested students of the underrepresented sex to sustain an intercollegiate team. OCR will examine indications of ability such as: [1] the athletic experience and accomplishments--in interscholastic, club or intramural competition--of students and admitted students interested in playing the sport; [2] opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and [3] if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.”).

¹⁰⁶ *Clarification of Intercollegiate Athletics Policy Guidelines.* (“OCR determines whether there is a reasonable expectation of intercollegiate competition for a particular sport in the institution’s normal competitive region. In evaluating available competition, OCR will look at available competitive opportunities in the geographic area in which the institution’s athletes primarily compete, including: [1] competitive opportunities offered by other schools against which the institution competes; and [2] competitive opportunities offered by other schools in the institution’s geographic area, including those offered by schools against which the institution does not now compete.”).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *What is the three-prong test?*, available at <http://sandra-ramirez.tripod.com/id17.html> (last visited on Feb. 16, 2010); see also *Requirements Under Title IX of the Education Amendments of 1972*, Office for Civil Rights, available at <http://www2.ed.gov/about/offices/list/ocr/docs/interath.html> (last visited Feb. 16, 2010).

with the three-prong test and "pay damages to the students for their lost opportunities."¹¹⁰

Even though many institutions are in violation of Title IX's three-prong test, no institution *has ever lost any federal funds as a result of their violation*.¹¹¹ Moreover, the OCR blames this result on their insufficient budget and amount of workers to fully enforce Title IX.¹¹² Nevertheless, this cannot be the case, as many institutions have had to pay substantial damages to students for lost opportunities.¹¹³ It seems the OCR is blaming their lack of capacity for their failure of enforcing Title IX to its fullest, when in fact, all signs lead to the conclusion that the actual punishment for violating Title IX is *not in proportion* to the violation. Institutions will continue to knowingly violate Title IX and the three-prong test if an appropriate remedy or penalty is not enforced.

If the OCR is not going to withdrawal federal funds from the institution, and the only remedy appears to be private damages, an institution has no incentive to be in compliance with Title IX. However, if the OCR's enforcement of Title IX rises to a level of withdrawing federal funds, an institution might take Title IX more seriously and take more proactive steps to be in compliance with the statute. I argue, that the appropriate remedy here is for the OCR and Congress to ensure that proper punishment is implemented when an institution is in violation of Title IX, which will be discussed in depth later in this note.

Congress acknowledged this problem in 1994, when it passed the Equality in Athletics Disclosure Act ("EADA").¹¹⁴ The law "requires all institutions of

¹¹⁰ *Id.*

¹¹¹ *Id.* (emphasis added).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

higher education to report each year on athletic participation numbers, scholarships, program budgets and expenditures, and coaching salaries by gender."¹¹⁵ It was intended to assist the OCR for their lack of capacity by requiring all institutions to submit yearly reports to show their athletic numbers instead of the OCR investigating, but has not been very successful for lack of enforcement.¹¹⁶ These remedies set forth are not appropriate, nor do they solve the problem, and although, the three-prong test in theory is a great tool for enforcing Title IX, in practice, it has proven all but futile.

E. Problems & Critiques with the Three-Prong Test

As noted above, the main efforts of enforcement of Title IX are OCR's three-prong test. Many believe the three-prong test is an adequate means of enforcement for Title IX; however, many critics disapprove of the three-prong test as mere minimum standards that are made easy for an institution to comply with.¹¹⁷ Nonetheless, even if minimum standards are not complied with, the remedy appears to be grossly inappropriate to the violation. Before I specifically discuss the criticisms, I must note that it is commendable that the OCR has admitted and attempted to rectify the problems surrounding compliance with Title IX, however inadequate they may be.

¹¹⁵ *What is the three-prong test?; see also Equity in Athletics Disclosure Act*, U.S. Department of Education, available at <http://www2.ed.gov/finaid/prof/resources/athletics/eada.html> (last visited on Feb. 16, 2010) ("The Equity in Athletics Disclosure Act requires co-educational institutions of postsecondary education that participate in a Title IV, federal student financial assistance program, and have an intercollegiate athletic program, to prepare an annual report to the Department of Education on athletic participation, staffing, and revenues and expenses, by men's and women's teams. The Department will use this information in preparing its required report to the Congress on gender equity in intercollegiate athletics.").

¹¹⁶ *Id.*

¹¹⁷ Robin Preussel, *Successful Challenge, Ruling Reversed: Why the OCR Survey Proposal may be Well-Intentioned But Misguided*, Yale Law School Student Scholarship Papers (2005), available at http://digitalcommons.law.yale.edu/student_papers/15 (last visited on Feb. 16, 2010).

1. Model Survey Critique

Under the Bush Administration in 2005, the OCR attempted “to provide further guidance on recipients' obligations under the three-part test, which was described only in very general terms in the Policy Interpretation.”¹¹⁸ The OCR described more factors it would consider in determining whether the institution has fully complied with the third prong of the three-prong test. Under the third compliance option, an institution is in compliance if “the institution is fully and effectively accommodating the athletic interests and abilities of its students who are underrepresented in its current varsity athletic program offerings.”¹¹⁹ The OCR provided that an institution could rely on “Model Surveys” as an acceptable method to measure student interest in participating in sports to satisfy the third-prong.¹²⁰ The OCR stated that:

[w]hen the Model Survey is properly administered to all full-time undergraduate students, or to all such students of the underrepresented sex, results that show insufficient interest to support an additional varsity team for the underrepresented sex will *create a presumption of compliance* with part three of the three-part test and the Title IX regulatory requirement to provide nondiscriminatory athletic participation opportunities.¹²¹

¹¹⁸ *Additional Clarification of Intercollegiate Athletics Policy: Three Part Test - Part Three*, Office of Civil Rights, Mar. 17, 2005, available at <http://www2.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html> (last visited on Feb. 18, 2010).

¹¹⁹ *Id.* (“An institution will be found in compliance with part three unless there exists a sport(s) for the underrepresented sex for which all three of the following conditions are met: (1) unmet interest sufficient to sustain a varsity team in the sport(s); (2) sufficient ability to sustain an intercollegiate team in the sport(s); and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region. Thus, schools are not required to accommodate the interests and abilities of all their students or fulfill every request for the addition or elevation of particular sports, unless all three conditions are present. In this analysis, the burden of proof is on OCR (in the case of an OCR investigation or compliance review), or on students (in the case of a complaint filed with the institution under its Title IX grievance procedures), to show by a preponderance of the evidence that the institution is not in compliance with part three.”).

¹²⁰ *Id.*

¹²¹ *Id.* (emphasis added).

This "presumption of compliance" can only be overcome by a high standard of showing an "unmet interest sufficient to sustain a varsity team."¹²² If the Model Survey shows insufficient interest, which most of the time it does, the OCR will discontinue their compliance review of the institution's implementation of the three-part test.¹²³

Contrary to the OCR's intentions, these new factors and compliance mechanisms clarify absolutely nothing. Not only does this mark a dramatic departure from the OCR's previous policy and make just about obsolete everything it has done since the implementation of Title IX, but it shifts the burden of proving compliance under the three-prong test from the institution to the student/plaintiff.¹²⁴ As female scholars, Hogshead and Lopiano explain, this new policy gives institutions an "out" that violate both prong one and two of the three prong test by deeming the institution "in compliance with the law under Prong 3 of the athletic participation provision if they simply e-mailed a 'model survey' to *current* students to determine their interests and abilities and found interest by the underrepresented sex to be lacking."¹²⁵ Virtually the OCR is allowing *non-responses* to email

¹²² The survey creates a presumption of compliance with Title IX so long as the institution did not recently eliminate a woman's team or a recent request to elevate an existing woman's club to varsity status. *Id.*

¹²³ *Id.*

¹²⁴ Nancy Hogshead-Makar & Donna Lopiano, *Foul Play, Inside Higher Ed*, Mar. 24, 2005, available at <http://www.insidehighered.com/views/2005/03/24/lopiano> (last visited on Feb. 18, 2010).

¹²⁵ *Id.* (Hogshead and Lopiano go on to enforce their stance by explaining: "The model survey issued by the department fails to provide a valid measure of women's interest in sports and, instead, institutionalizes the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports. The use of surveys rests on the stereotyped notion that women are inherently less interested in sports than men, which is contradicted by the country's experience of Title IX and fundamental principles of civil rights law. Male athletes have never had to prove they were interested in sports to receive opportunities to play. Schools simply assumed male athletes were interested in sports, hired a coach who recruited athletes to play and offered varsity athletic experiences. Lo and behold, if you do the same for women, they too will play. We know of no instance in which a high school or college started a varsity women's team, hired a coach and then had the coach return his or her paycheck because they could not find enough women to play.").

surveys to be tantamount to non-interest by females, which provides for a presumption of compliance with Title IX. Thus, someone who does not open a survey, who opens it but does not complete the survey, or has changed his or her email, etc., may be counted as having non-interest in the sport. Keeping this in mind, there is no clear mechanism for surveying putative applicants who are still high school athletes who may attend an institution in the future. The point is how could such a disparate group of high school students possibly fill out surveys to potential institutions that they have interest in a sport when they do not read, or even receive these emails?

In theory and practice, this new policy makes it next to impossible for an institution to be in violation of Title IX so long as a mere survey is sent out to students. It seems as though the OCR left behind its common-sense in creating this loophole, contrary to OCR's own policy over the past forty years and the courts analysis that surveys of interest of its students is insufficient,¹²⁶ which has virtually stopped any hope of Title IX accomplishing what it had set out to. Thus, in theory, an institution is obligated to expand its sports programs to accommodate the interests of its female students, but in practice, with the installment of surveys as a compliance mechanism, the intended outcome is unlikely.

¹²⁶ Cohen v. Brown University, 879 F.Supp 185, 206 (R.I. 1995) (The court stated this type of survey for compliance under the third prong is "illogical" and "circular", and rejected the idea of surveying current students as a mechanism for being in compliance with the third-prong. The court stated: "What students are present on campus to participate in a survey of interests has already been predetermined through the recruiting practices of the coaches. What teams are established and can recruit or qualify for admissions preferences has already been predetermined by Brown. Thus, the interest present on campus is controlled by Brown; to then suggest that Brown must only satisfy the relative interests of students present on campus is circular.").

2. Three Alternative Methods of Compliance Critique

Another critique of three-prong test is rooted in the proportionality requirement of prong one. At most institutions, "the percentage of student athletes who are female is lower than the percentage of female college students."¹²⁷ The main cause of this is that the three-prong test does "not mandate that universities attain substantial proportionality."¹²⁸ More specifically, the central critique here is that OCR's three-prong test allows for three distinct and alternative methods of complying with Title IX.¹²⁹ Thus, an institution can be in violation of any two of the prongs as long as it provides sufficient evidence that it is meeting the minimum standards of one of the prongs, thus, inviting abuse of the system.

Further, an institution's efforts to attain proportionality, under prong one, are often ignored due to budget constraints and its otherwise easier criteria to meet under the other two prongs of the test. Thus, preventing institutions "from achieving proportionality by simply adding opportunities for women."¹³⁰ While other options exist for an institution to comply with the proportionality prong, such as reducing athletic opportunities or spending for male athletic teams, institutions would rather not upset male athletes, their coaches, and fans, and rather comply with one of the two remaining prongs of the test.¹³¹

¹²⁷ Erin E. Buzuvis, *Survey says . . . A critical analysis of the new Title IX Policy and Proposal for Reform*, 91 IOWA L. REV. 821, 823 (2006).

¹²⁸ *Id.* at 824.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *See id.*

V. TITLE IX LITIGATION

Traditionally, Title IX litigation was concerned primarily with equal opportunities for female athletes.¹³² However, it has begun to shift its focus to other areas, including equal opportunities for female coaches and salary disparities between male and female coaches.¹³³

I. HEW's Authority to Interpret Title IX

At first, litigation surrounding intercollegiate coaching concerned mainly whether HEW had the authority to interpret Title IX and if so, whether it was interpreting it correctly. In *Islesboro Sch. Comm. V. Califano*, the court held that HEW exceeded its authority in interpreting Title IX by extending its coverage to discrimination on the basis of sex because nothing in the statute included employees.¹³⁴ The court stated that the language, on its face, was intended to cover "the beneficiaries of the federal monies, i. e., either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government."¹³⁵

However, this framework changed with the United States Supreme Court decision in *North Haven Board of Education v. Bell*. The North Haven Board of Education received federal funds for its education programs and activities and as a result, had to comply with Title IX's prohibition on gender discrimination.¹³⁶ Elaine Dov, a teacher at North Haven filed a complaint with HEW "alleging that North Haven had violated Title IX by refusing to rehire

¹³² See Claussen, *supra* note 40.

¹³³ *Id.*

¹³⁴ *Islesboro Sch. Comm. V. Califano*, 593 F.2d 424, 426 (1st Cir. 1979).

¹³⁵ *Id.*

¹³⁶ *North Haven Board of Education v. Bell*, 456 U.S. 512, 516 (1982).

her after a one-year maternity leave."¹³⁷ HEW began to investigate the school board's employment practices and sought information concerning its hiring policy.¹³⁸ However, because of previous precedent, the North Haven Board refused to comply with the request because the Supreme Court had ruled that HEW lacked authority to regulate employment practices under Title IX.¹³⁹ The North Haven Board contended that Title IX's prohibition of federally funded education programs discriminating on the basis of gender did not extend to employment.¹⁴⁰

Contrary to the North Haven Board's arguments and previous court decisions, the Court upheld HEW's authority to enforce and regulate Title IX, holding that Title IX did in fact prohibit employment discrimination.¹⁴¹ The Court effectively broadened the scope of Title IX with its monumental decision in *North Haven*, but limitations still existed. The Court disagreed with the Court of Appeals, and concluded the authority of HEW was limited to terminating funds based on the "program specific" nature of the statute.¹⁴² Thus, HEW only had the ability to terminate funding to a specific program it

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 522.

¹⁴¹ *North Haven Board of Education*, 456 U.S. at 536, 553-54 (quoting *Romeo Community Schools v. HEW*, 438 F.Supp. 1021 (ED Mich. 1977), *aff'd*, 600 F.2d 581 (CA6), cert. denied, 444 U.S. 972 (1979)) ("Finally, Congress delegated the administration of Title IX to the Department of HEW. In contrast, Title VII and the Equal Pay Act are administered by the Department of Labor and EEOC. It is most unlikely that Congress would intend not only duplicate substantive legislation but also enforcement of these provisions by different departments of government with different enforcement powers, areas of expertise, and enforcement methods. The District Court in [*Romeo*] correctly observed: 'These governmental agencies, particularly the EEOC, were established specifically for the purpose of regulating discrimination in employment practices. These agencies have the expertise and their enabling legislation has provided them with the investigative and enforcement machinery necessary to compel compliance with regulations against sex discrimination in employment. HEW does not have similar enforcement authority.'").

¹⁴² *Id.* at 537.

finds in violation of Title IX, as opposed to the funding for the entire institution. However, the Court failed to define the term "program," leaving that open to interpretation.

The Court was later given the opportunity to define "program" in *Grove City College v. Bell*. The Court found that Grove City College was a recipient as defined under Title IX, and it made no difference that it received only indirect assistance through its students as opposed to direct assistance.¹⁴³ The Court held:

the fact that federal funds eventually reach the College's general operating budget cannot subject Grove City to institution-wide coverage. Grove City's choice of administrative mechanisms, we hold, neither expands nor contracts the breadth of the "program or activity" -- the financial aid program -- that receives federal assistance and that may be regulated under Title IX.¹⁴⁴

The Court concluded that students receiving federally funded aid does not trigger institution-wide coverage under Title IX, but rather the funds represent federal financial assistance to the institution's own financial aid program, and thus, only that particular program may be regulated under Title XI.¹⁴⁵

Nevertheless, Congress responded to this, and passed the Civil Rights Restoration Act of 1987, which all but overturned *Grove City College* by extending the coverage of Title IX to all programs of a recipient institution

¹⁴³ *Grove City College v. Bell*, 465 U.S. 555, 569-70 (1984) (The Court explained: "With the benefit of clear statutory language, powerful evidence of Congress' intent, and a longstanding and coherent administrative construction of the phrase "receiving Federal financial assistance," we have little trouble concluding that Title IX coverage is not foreclosed because federal funds are granted to Grove City's students rather than directly to one of the College's educational programs.").

¹⁴⁴ *Id.* at 572.

¹⁴⁵ *Id.* at 573-74.

if it received *any* financial aid at all.¹⁴⁶ In *Franklin v. Gwinnett County Pub. Sch.*, the Court stated that Congress passed the statute "to correct what it considered to be an unacceptable decision on our part in *Grove City College v. Bell*."¹⁴⁷

II. Defining "program or activity"

The first and only case to address a claim of sex discrimination in intercollegiate athletic employment during the first twenty years of Title IX's existence was *O'Connor v. Peru State College*. *O'Connor* concerns a female physical education teacher and women's basketball coach who alleged employment discrimination in violation of Title IX after Peru State choose not to rehire her.¹⁴⁸ *O'Connor* alleged that

the reasons given by Peru State for non-renewal were pretextual and that she was being dismissed in retaliation for her complaints and activities to improve the status of the women's athletic program in general, and the women's basketball program in particular. She alleged that Peru State was and had been according their women's athletic program unequal treatment in terms of facilities, equipment, and financial assistance compared to that given the men's programs.¹⁴⁹

However, the 8th Circuit never addressed her arguments after it affirmed the District Court's ruling that Title IX did not apply to her situation.¹⁵⁰

The District Court reached its conclusion based on the program-specific standard set out in *Grove City*, and accordingly, *O'Connor* did not meet the federal funding definition because the funds Peru State received did not go

¹⁴⁶ 20 U.S.C.S. § 1687 (2002) ("For the purposes of this title, the term "program or activity" and "program" mean all of the operations of . . . any part of which is extended Federal financial assistance..").

¹⁴⁷ *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 73 (1992).

¹⁴⁸ *O'Connor v. Peru State College*, 781 F.2d 632, 633-34 (8th Cir. 1986).

¹⁴⁹ *O'Connor v. Peru State College*, 605 F. Supp. 753, 758 (D. Neb. 1985), *aff'd*, 781 F.2d 632 (8th Cir. 1986).

¹⁵⁰ *O'Connor*, 781 F.2d at 639.

directly to the physical education department.¹⁵¹ However, the Appellate Court acknowledged that the District Court's holding was not mandated by *Grove City* because neither *Grove City* nor *North Haven* "provide[d] general guidelines as to the proper definition of the "program or activity" receiving federal funds."¹⁵² The Appellate Court recognized two basic approaches that had been established by the Courts.¹⁵³ The first approach defines the "program or activity" from an institutional standpoint.¹⁵⁴ The Court explained, "[f]or example, the relevant program is declared to be the department in which the plaintiff teaches, and the court then looks to the existence of any funds bearing that particular department's name."¹⁵⁵ This approach creates the "result that the more broadly an institution may use its federal funds, the less encompassing will be its Title IX coverage."¹⁵⁶ The Appellate Court disapproved of the District Court using this approach and instead adopted the second approach.¹⁵⁷ The second approach equates the purpose of the federal

¹⁵¹ *Id.* at 639-40 (quoting 20 U.S.C.S. § 1681; citing 20 U.S.C.S. § 1057 (1982)) ("Finally, O'Connor argues that the district court erred when, in rejecting her Title IX claim, it held that Peru State did not receive federal funds within the meaning of the statute's program-specific requirement, as interpreted by the Supreme Court in [*Grove City*]. Title IX prohibits sex discrimination 'under any education program or activity receiving Federal financial assistance.' The federal financial assistance relied upon by O'Connor was a Title III grant, awarded to Peru State in part for student and faculty research. A central research facility was to be established, and the college then was to select the projects and departments that were to have access to the facility and funds. The district court held that the "program or activity" as to which O'Connor had to show federal funding was the physical education department and that the Title III grant did not constitute federal financial assistance under Title IX because the funds did not go "direct" to the physical education department and because other departments of the college also benefited. The program funded, the court concluded, was only the research grant project itself.").

¹⁵² *Id.* at 640.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *O'Connor*, 781 F.2d at 640.

¹⁵⁷ *Id.* at 641 ("The district court's approach also seems to equate O'Connor's argument with arguments for institution-wide coverage, which it is not. The concern in *Grove City* was with attribution of receipts by a part to the whole, not with attribution of receipts by a whole -- the research program -- to one of its parts -- physical education. The Supreme Court in *Grove City* expressly rejected the argument that Title IX forbids discrimination only in the administration of the federal financial aid funds and not in the administration

funds to the "program or activity" and encompasses all parts "of the entity in which the monies *could* have been used."¹⁵⁸ However, this did not change the outcome of the case, because the Court found that the funding relied on by O'Connor was academics, and thus, Title IX coverage did not extend to Peru State's athletic program.¹⁵⁹

III. Equal Opportunity for Women under Title IX

Two Supreme Court cases have helped enforce equal opportunities for women under Title IX. *Cannon v. University of Chicago*, decided in 1979, held that a private party could enforce Title IX.¹⁶⁰ And then, in 1992, in *Franklin*, the court ruled that plaintiff's could receive money damages for intentional discrimination under Title IX.¹⁶¹ Both of these cases resulted in institutions attempting to take actions to give women equal opportunities. However, these attempts were more focused on complying with court decisions rather than on truly attempting to give equal opportunities to women, and as

of the *entire* financial aid program. The Court merely disapproved the 'ripple effect' theory of determining the scope of Title IX coverage -- i.e., a party may no longer argue that discrimination is prohibited in Program A because federal funds for Program B freed general university funds to be shifted to Program A.").

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 642-43 ("The discriminatory conditions of which O'Connor complains, however, go to her coaching rather than her teaching duties. Even though at Peru State athletics is administratively a part of the physical education division, we do not believe that intercollegiate sports, while important to the higher education experience, constitute 'academics' within the contemplation of Title III. The statute lists as special concerns, for example, development of faculty and academic programs, utilization of libraries and laboratories, and acquisition of equipment for academic programs, 20 U.S.C. § 1507 (b); athletic competition would not seem to similarly 'strengthen [a college's] capacity to make a substantial contribution to the higher education resources of the Nation.' Thus, we agree that Title IX coverage did not extend to Peru State's athletic programs,⁹ and we affirm the district court's dismissal of O'Connor's claims under that statute and under Title VII and section 1983.").

¹⁶⁰ *Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979) ("Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination.").

¹⁶¹ *Franklin*, 503 U.S. 60, n. 8 ("We conclude that a money damages remedy is available under Title IX for an intentional violation irrespective of the constitutional source of Congress' power to enact the statute.").

such, it is my suggestion that incentives for compliance or more stringent penalties for violations need to be put in place.

VI. CASE STUDY: FEMALE REPORTERS

A. Background

The issue surrounding female reporters in men's sports teams locker rooms stems from two conflicting, but simultaneous rights. On the one hand, there is the male's constitutional right to privacy, and in contrast, there is the females right to equal protection in the workplace by being able to obtain the same information her male equivalent is able to. Not only are female reporters disadvantaged by not being able to obtain the same information as their male counterparts, but also even when they are allowed access to the locker room, they are frequently mocked and harassed by many players.¹⁶² For example, in 1989, Paola Boivin entered the St. Louis Cardinals locker room to inquire about an interview with Terry Pendelton.¹⁶³ As soon as she entered the locker room, a teammate shouted, "Are you here to interview somebody or to look at a bunch of guys?"¹⁶⁴ Almost simultaneously, a male jock strap landed on her head and she fled the locker room in embarrassment.¹⁶⁵ Many female reporters go as far as saying that even when they are allowed access into male locker rooms that they still feel as though they are not on an even playing field with male reporters because of the constant badgering that they receive.¹⁶⁶

¹⁶² See Randy Druzin, *Women Reporters in the Men's Locker Room, 2008*, available at <http://www.womenssportsfoundation.org/Content/Articles/Issues/Media-and-Publicity/W/Women-Reporters-in-the-Mens-Locker-Room.aspx> (last visited, Nov. 28, 2009).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See *id.* (Noting that: "The lot of the female sports reporter is much better today than it was two decades ago, when women took their first steps into the locker room, tiptoeing through a minefield of jockstraps and naked men.").

B. The Ludtke Case

Female reporters were denied access to male locker rooms on a regular basis until about the middle of the 1970s when a famous case landed before New York's Southern District Court. This seminal case, *Ludtke v. Kuhn*, allowed female reporters equal access to male locker rooms.¹⁶⁷ In 1975, the commissioner of the Major League Baseball Association ("MLB"), Bowie Kuhn, issued an order that no female sports reporters were allowed in the locker rooms of major league baseball teams, specifically during the World Series.¹⁶⁸ Plaintiff, Melissa Ludtke, an employee of *Sports Illustrated* was a female sports reporter who was denied access to the New York Yankees locker room during the 1977 World Series.¹⁶⁹ The commissioner allowed male reporters into the locker rooms post-game and went as far as admitting that "male sports reporters may enter the locker room after a ball game for the purpose of interviewing ballplayers and that such fresh-off-the-field interviews are important to the work of sports reporters."¹⁷⁰ This statement reeks of discrimination because of sex on its face, and it was an uphill battle for the commissioner to disprove this after biting his tongue.

The issue surrounding the case was "the undisputed fact that all accredited female sports reporters [were] excluded from the Yankees clubhouse at Yankee Stadium solely because they are women, whereas, all accredited male sports reporters (to the extent that space limitations permit) [were] permitted access to the clubhouse after games for the purpose of interviewing

¹⁶⁷ See *Ludtke v. Kuhn*, 461 F. Supp. 86 (S.D.N.Y. 1978).

¹⁶⁸ As an interesting side note, Kuhn's "unified stand" of not allowing female reporters into male locker rooms was triggered by the National Hockey League allowing female reporters to conduct interviews in male locker rooms after the 1975 All-Star Game. *Id.*

¹⁶⁹ *Id.* at 88.

¹⁷⁰ *Id.*

players.”¹⁷¹ The Court quickly dismissed Defendant’s arguments that females were excluded from the locker room to: (1) protect the privacy of the players who are undressing; (2) protect the MLB as a “family sport”; and (3) preserve the tradition of decency and propriety.¹⁷² Even if these rationales were the feasible reasons for not allowing females into male locker rooms after the game, the Commissioner’s words still spoke of discrimination because of sex.

Ludtke put forth two main arguments: (1) Kuhn’s actions were discrimination against women thus violating the equal protection clause, and (2) Kuhn’s actions interfered with her right to freedom of the press thus violating her rights under the First Amendment.¹⁷³ Ludtke argued that she was placed at a competitive disadvantage as to her male counterparts because male reporters obtained a great deal of information from locker room interviews.¹⁷⁴ She claimed that this was discrimination by definition because excluding female reporters from male locker rooms did not give them “the same access to the news and newsmakers as their male colleagues and competitors.”¹⁷⁵ She went on to stress that other professional sports leagues, such as the National Hockey League or the National Basketball Association, admit female reporters to their locker rooms and they have found that a substantial part of their material comes from having access to the locker rooms.¹⁷⁶

¹⁷¹ *Id.* at 92.

¹⁷² *Id.* (“Another critical consideration is the admission that there are several other less sweeping alternatives to the present policy of blanket exclusions of women reporters. Counsel for defendants admitted that those players who are desirous of undressing can retreat to their cubicles in the clubhouse. There the players can be shielded from the “roving eyes” of any female reporters by having each cubicle furnished with a curtain or swinging door. It is also conceded that the player who is undressed and wishes to move about in that state can use a towel to shield himself from view.”).

¹⁷³ *Ludtke*, 461 F. Supp. at 96.

¹⁷⁴ *Id.* at 91.

¹⁷⁵ *Id.*

¹⁷⁶ *See id.*

The Federal District Court granted an injunction prohibiting the enforcement of the commissioner's rule that barred females from entering male locker rooms.¹⁷⁷ The Court found that the commissioner's actions violated the reporters due process and equal protection rights because the barring of female reporters from the locker rooms was not substantially related to the protection of the privacy of the players, while at the same time depriving Ludtke of equal protection.¹⁷⁸ More specifically, Kuhn's policy was based solely on sex that results in a denial of Ludtke's equal opportunity to "pursue her profession as a sports reporter."¹⁷⁹ The Court also noted that there were less restrictive alternatives than excluding women altogether.¹⁸⁰ As a result, the Court issued an injunction enjoining the MLB from enforcing Commissioner Kuhn's policy of total exclusion of accredited female sports reporters from male locker rooms.¹⁸¹

C. Post Ludtke

Many players supported the movement toward equal access to the locker room, but there were some who protested the decision. One such player was the NBA's Toby Knight, who was quoted as saying, "We're not a nudist colony putting on an exhibition. . . and the locker room did not change overnight."¹⁸² At first, many women were met with resentment from not only players, but also some high-level department figures. In 1979, the Fort Myers News-Press tried to win equal access rights for reporter Michele Himmelberg to enter the

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Ludtke*, 461 F. Supp. at 92.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 99.

¹⁸² Druzin, *supra* note 60.

locker room of the National Football League's Tampa Bay Buccaneers.¹⁸³ Later that season, before a Buccaneers' game in Minnesota, after arriving at the stadium, Himmelberg learned that all reporters would be denied access from the Vikings locker room because of one female reporter. . . . Himmelberg.¹⁸⁴ After the Bucs-Vikings game, all the reporters were herded like cattle into a designated room to await interviews there. Himmelberg remembers waiting there for a long time, and as deadlines approached the reporters began to become impatient and two reporters cornered her and ordered, "What are you doing here anyway? . . . you're just a pervert trying to get a look at these guys."¹⁸⁵ After filing her stories, she returned to her hotel and erupted into tears.¹⁸⁶ Not only were the professional players and management shunning female reporters, but their male counterparts were also confronting them.

However, by the mid-1980s, all the major professional sports leagues, the MLB, NFL, NHL, and NBA, had adopted policies to comply with the ruling in *Ludtke* to allow equal access to locker rooms for female reporters. After the four major professional sports leagues enacted policies to ensure equal opportunities for female reporters, they became more commonplace in male locker rooms.¹⁸⁷ Nevertheless, another problem would arise from women gaining access to male locker rooms under the law. Just because female reporters were allowed access to male lockers rooms it did not mean that they were welcomed or wanted there by the athletes themselves, who still had negative attitudes about allowing women in their locker rooms after games.¹⁸⁸

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See Druzin, *supra* note 60.

One simple example illustrates this point. In 1990, Lisa Olson, a sports reporter for the *Boston Herald*, was conducting an interview after a game in the New England Patriots locker room. While in the locker room, "a group of Patriots surrounded the reporter and made aggressive, vulgar comments."¹⁸⁹ She began receiving death threats after the event triggered a national debate.¹⁹⁰ She began getting messages like "Leave Boston or Die," and her tires were slashed with a message that read, "next time it will be your throat."¹⁹¹ This forced Olson to flee to Australia for five years.¹⁹² When she returned to the United States to take a writing job at *The New York Daily News*, thinking that this had all blown over, the death threats began again when athletes began speaking out about disapproving of female reporters in *their* locker rooms.¹⁹³

Rachel Bachman, a female sports reporter who covered the Portland Trailblazers in the late 1990s, explained how there are very few boundaries between athletes and sports reporters:

Female reporters suffer a lot of harassment because some men don't understand or respect that the women are in the locker room to do a job. . . . I have had athletes either ask me out or make inappropriate suggestions sexually. It's a horrible position to be in because you have to keep writing about these men after you have rebuffed them, and often they are not very understanding about the reason you say no.¹⁹⁴

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* (emphasis added). "Reggie White wrote that he couldn't see a legitimate reason 'for forcing male athletes to walk around naked in front of women who aren't their wives.' White claimed to have seen female reporters 'ogling guys in the locker room,' and encouraged players to fight against equal access for female reporters. . . . [and while,] New York Knicks guard Charlie Ward was distributing copies of the article to his teammates, [he] claimed having women in the locker room violated the sanctity of marriage." *Id.*

¹⁹⁴ Druzin, *supra* note 60.

Females have to constantly feel as though they are outsiders to the sports industry, especially with actions like these perpetuating the stereotypes of women in the world of sports. The take away point being that although women have legally gained access to male locker rooms, problems and stereotypes surrounding the issue of women being in the locker rooms still exist.

D. Link to Title IX

The case illustration above shows that the problem of discrimination in sports for women goes beyond just coaching on the intercollegiate level. The discrimination that women face in the sports industry is widespread, and many of the same reasons and stereotypes that Melissa Ludkte and other reporters like herself were and continue to be discriminated against for, are the same for females on the intercollegiate coaching level. It is not because women are not smart enough, it is not because women are not able enough, *it is* because of institutional discrimination and stereotypes that women continue to struggle with equal opportunities in the sports industry. The more this type of absurdity is allowed to go on for, the further away women are going to be pushed away from the industry. Continuous rejection will eventually lead women to reach a tipping point of frustration and all but give up.

VII. PROPOSAL/SUGGESTIONS

Title IX and the OCR's three-prong test have not been effective in eliminating discrimination for female coaches on the intercollegiate level. As mentioned above, inappropriate remedies have been put into place for an institution in violation of Title IX, and it is my suggestion that stronger remedies and penalties need to be enacted in order to begin to alleviate the ongoing discrimination against female coaches. Despite the roadblocks that are in the way of women receiving equal opportunities in the sports industry,

there is still hope. HEW's ability to enforce and regulate Title IX offers the most promise for achieving equal opportunities.

Under current enforcement mechanisms, institutions can almost walk away free when they are in violation of Title IX, leaving little redress for a plaintiff.¹⁹⁵ Rather than correct the institutional flaws of the enforcement of Title IX and the bigger picture, plaintiffs are stuck into bringing a private action against the institution that has no guarantee of being successful, and can also prove to be costly.¹⁹⁶ Not until institutions have reason to be deterred from violating Title IX will we truly see the positive effects that Title IX can have for female coaches and athletes.

It is my suggestion that HEW should enact an enforcement regulation or another policy interpretation to Title IX. In the alternative, Congress could amend the statute itself to include certain enforcement mechanisms, but this process would probably take longer, be more complex, and create more barriers to enactment. HEW should create an enforcement mechanism that will deter institutions from violating Title IX, thus ensuring that federal funds are used towards the right programs and creating equal opportunities. There is a simple solution and it starts with making the punishment proportionate to the violation. Again, although withdrawal of federal funding is a legal option for Hew, no institution has ever lost any federal funds as a result of their violation.¹⁹⁷ HEW needs to enact more stringent regulations that will remove federal funding from an institution when they are in violation of Title IX. In addition, HEW could do a better job overseeing the federal funding and ensure that funding is being used for the equal opportunity of women.

¹⁹⁵ See *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 108.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

Not only does HEW have to create stronger mechanisms, but it also has to actually enforce violations. In the past, due to lack of personnel, or for whatever other reason, HEW has done a particularly lousy job at enforcing its own mechanisms. Institutions need to have an incentive for complying with Title IX or else they will continue to violate it like they have in the past. Institutions will then be forced to take an active role in creating equal opportunities for women if they want to continue to receive federal funding.

The following recommendations are for HEW and I suggest they be called the "Three Strikes and you are Out Rule:"

1. Twice a year, every institution receiving federal funding must give a detailed report as to where every dollar is being spent. Anyone in violation will have their federal funding removed until they can produce the report.
2. The first time an institution is in violation of Title IX, reduce its federal funding in half. Once the institution can show that it is back in compliance with Title IX, return the institution to its initial level of funding.
3. The second time an institution is in violation of Title IX, reduce its federal funding to zero. Once the institution can show that it is back in compliance with Title IX, return the institution to its initial level of funding.
4. Three Strikes and you are Out Rule: The third time an institution is in violation of Title IX, remove its federal funding completely with no opportunity to get it back.

Furthermore, as explained above, prong two of the three-prong test is extremely easy for an institution to comply with, making prong one and prong three virtually meaningless because an institution only needs to comply with

one prong.¹⁹⁸ I suggest two alternative options for HEW. The stronger option being that HEW makes it mandatory for an institution to be in compliance with all three prongs of the test. This ensures that an institution cannot simply be in compliance by some loop-hole because currently allowing this is counterintuitive to the purpose of Title IX. A weaker alternative is for HEW to make complying with prong two of the test tougher not to render the other two prongs of the test virtually dead.

VIII. CONCLUSION

Current regulations and enforcement of Title IX are not sufficient to ensure equal opportunities for female coaches on the intercollegiate level. There are certain institutional stereotypes and fallacies surrounding female coaches that can only be cured by time, and not by HEW or Congress or any other legislative making body. However, HEW and Congress can do everything in its power to ensure that women are receiving equal opportunities on a theoretical level. Discrimination against women in the sports industry has been an ongoing problem before and ever since Title IX was enacted and is more widespread than just female coaches, as exemplified by female reporters. The key is for HEW to strike a balance between giving the school an incentive to be in compliance with Title IX and offer women equal opportunities, while at the same time not being too drastic in reducing an institution's federal funding to counteract Title IX's goals and actually increase discrimination against female coaches.

¹⁹⁸ See *Additional Clarification of Intercollegiate Athletics Policy: Three Part Test - Part Three*, *supra* note 117.