

URBAN STRUGGLES: AN ANALYSIS OF TITLE IX AND URBAN HIGH SCHOOL ATHLETIC OPPORTUNITIES FOR GIRLS

*By Jennifer Pusch**

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INTRODUCTION

Since its enactment in 1972, Title IX has changed the lives of American women across the nation. Millions of women and young girls suddenly had access to educational opportunities like never before, namely, the chance to participate in school-related athletics. The legislation explicitly states that no person shall be “subjected to discrimination under any educational program or

* J.D., University of Wisconsin Law School, Spring 2014

activity” on the basis of sex.¹ Title IX makes clear that any schools which provide sports programs “must provide equitable opportunities for male and female students.”²

The number of female athletes at the high school and college level skyrocketed following the passage of the legislation. Between 1971, pre-Title IX, and 2012, the number of female high school athletes increased from under 300,000 to over 3.2 million.³ Although boys continue to out-participate girls,⁴ the increased opportunity for girls, and the corresponding decrease in inequity, has been profound. In 1971, girls made up just 7% of high school athletes.⁵ Today, they make up over 41%.⁶ While gender inequity⁷ has certainly declined since 1971,⁸ the athletic opportunities available to urban high school girls remains dismal.⁹ The SHARP Center for Women & Girl’s has published evidence of Title IX’s struggle within urban schools.¹⁰ In 2010, urban schools provided up to 11% less athletic opportunities for girls than their suburban and rural counterparts.¹¹ While athletic opportunities continue to grow across the

1. 20 U.S.C.A. § 1681(a) (West 2014).

2. WELCH SUGGS, *A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX* 5 (2005).

3. *2011-12 High School Athletics Participation Survey*, THE NAT’L FED’N OF STATE HIGH SCH. ASS’NS (2012), at 2, available at <http://www.nfhs.org/content.aspx?id=3282>.

4. *The Decade of Decline: Gender Equity in High School Sports*, WOMEN’S SPORTS FOUNDATION (Oct. 2012), available at <http://www.womenssportsfoundation.org/en/home/research/articles-and-reports/equity-issues/decade-of-decline>.

5. THE NAT’L FED’N OF STATE HIGH SCH. ASS’NS, *supra* note 3, at 2 (calculating percentages based on charts provided by the survey in Note 3.)

6. *Id.*

7. In this article, I use the terms “sex” and “gender” to refer to the inequities addressed by Title IX. I do not intend to diminish the importance of distinguishing between “sex” and “gender” or to isolate transgender individuals. Rather, to ensure both accuracy and brevity, I use the same terminology as the resources consulted in writing this article. This also includes use of the terms “girls,” “boys,” “female,” and “male.” For more information on the interplay between “sex” and “gender” in legal language, see Eric Boos, *The Unscientific Science of Gender Jurisprudence: Evaluating the Negative Impact of Normative Legal Language on Issues of Sex and Gender*, 27 WIS. J. L. GENDER & SOC’Y 229 (2012).

8. THE NAT’L FED’N OF STATE HIGH SCH. ASS’NS, *supra* note 3, at 2 (Girls made up 41% of total high school athletes in 2011-2012 versus 7% in 1971).

9. See table 2 on page 9 of DON SABO & PHIL VELIZ, *THE DECADE OF DECLINE: GENDER EQUITY IN HIGH SCHOOL SPORTS* 9 (SHARP Center for Women and Girls, Oct. 2012) [hereinafter “SABO & VELIZ (2012)”] available at <http://www.womenssportsfoundation.org/en/home/research/articles-and-reports/equity-issues/decade-of-decline>.

10. “SHARP” stands for the Sport, Health, and Activity Research and Policy Center for Women and Girls. The organization was started in 2010 as a partnership between the Women’s Sports Foundation and University of Michigan’s School of Kinesiology and Institute for Research on Women & Gender. Their mission is “to lead research that enhances the scope, experience, and sustainability of participation in sport, play, and movement for women and girls.” *Sharp Center*, WOMEN’S SPORTS FOUNDATION (Dec. 2012), available at <http://www.womenssportsfoundation.org/en/home/research/sharp-center>.

11. SABO & VELIZ (2012), *supra* note 9, at 9 tbl. 2.

nation for both boys and girls, urban schools consistently fall well below the remainder of the country's rates.¹²

Why do urban schools offer considerably less athletic opportunity to girls than the rest of the nation? This article seeks to uncover this phenomenon. Focusing solely on athletic participation at the high school level, this paper investigates why athletic opportunities for girls are lowest in urban school districts, what has been suggested to boost opportunities, including an analysis of Title IX, and what possible mechanisms exist for improving athletic opportunities for urban girls. The result yields a rational, yet unexpected answer. The lag in athletic opportunities for urban girls is not the consequence of greater discrimination, but rather the outcome of insufficient resources.

Part I of this article presents a brief history and overview of Title IX, including a review of empirical evidence demonstrating the lag in urban high schools. Part II illustrates the importance of athletic participation and its value to both the physical health and education of young girls. Part III analyzes the purpose of Title IX and demonstrates the legislation's limited capabilities to increase girls' athletic opportunity in urban communities. Last, Part IV discusses possible alternative solutions, including the associated costs and benefits. Collectively, these sections demonstrate that Title IX is not an appropriate mechanism for increasing athletic opportunities for girls within urban high schools because the deficiency is not a reflection of greater gender discrimination but rather a reflection of economic disparity.

I. TITLE IX

No 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 educational program of activity receiving federal financial assistance.¹³

This statutory language produced a multitude of litigation since its enactment in 1972.¹⁴ To better understand its relevance to this paper, I briefly summarize the history of Title IX, breakdown the mechanics of the law, and evaluate its current application in urban schools.

A. *Title IX History*

Title IX is primarily associated with the athletic opportunities it bestows to women and girls. The law, however, is part of the Education Amendments of 1972, meant to prevent discrimination in education based on sex.¹⁵ It is

12. *Id.*

13. 20 U.S.C.A. § 1681(a) (West 2014).

14. See generally Symposium, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325 (2012) [hereinafter "Symposium"].

15. Nancy Hogshead-Makar & Andrew Zimbalist, *Introduction to EQUAL PLAY: TITLE IX AND SOCIAL CHANGE* 1, 1 (2007).

imperative to understand the development of Title IX in order to fully appreciate and understand how the law has been molded from an anti-discrimination education bill into the equal athletic-opportunity enforcement mechanism it is today. The evolution of the bill demonstrates both the breadth and purpose of the legislation.

i. Build-Up

Title IX can trace its history to the social tumult of the 1960's.¹⁶ The Cold War, the civil rights movement, and the women's liberation movement are equally responsible for bringing women's athletics to the political forefront.¹⁷ The competition of the Cold War generated greater public interest in athletic events.¹⁸ This included televised women's athletics, specifically in individual sports like gymnastics and tennis.¹⁹ Any opportunity to beat the Soviet Union was generally met with approval from Americans.²⁰ Famous female athletes, such as tennis star Billie Jean King, made athletics more exciting and more acceptable for American women.²¹ As competitive women's athletics increased in popularity, the imbalance between women's and men's athletic opportunities was thrust sharply into the public eye during a time when the country was experiencing radical social change.

The civil rights movement provided the ideal political climate for addressing inequality in women's athletics in the America. The Civil Rights Act of 1964 not only forced white Americans to acknowledge the disparities between their lives and those of black Americans, but also provided a legal framework for judging equality.²² Title IX's wording is "virtually identical" to the language of the Civil Rights Act.²³ Various women's advocacy groups, such as the National Organization for Women (NOW) and the Women's Equity Action League (WEAL), also pushed equality into the political vanguard.²⁴ The organizations filed various complaints against higher education, usually alleging discrimination against women in the hiring of faculty members.²⁵ The complaints "charged that a pattern of discrimination against women existed, citing admissions quotas for female students and inadequate financial aid."²⁶ It was within this volatile political and social environment that the United States legislature evaluated Title IX as a part of the Education Amendments.²⁷

16. SUGGS, *supra* note 2, at 47.

17. *Id.* at 47-48. For a detailed description of the impact of the Civil Rights Act on the language of Title IX *see* Symposium, *supra* note 14, at 325-27.

18. SUGGS, *supra* note 2, at 47.

19. *Id.*

20. *Id.*

21. *Id.* at 48.

22. *Id.* at 32.

23. Symposium, *supra* note 14, at 326.

24. SUGGS, *supra* note 2, at 38.

25. *Id.* at 39.

26. *Id.*

27. *See id.* at 32, 38-42.

ii. Legislation

The House Subcommittee on Education began drafting the precursor to Title IX in 1970.²⁸ When the bill finally passed, the amendment was practically identical to the Civil Rights Act.²⁹ Senator Birch Bayh of Indiana clarified that Title IX “was a direct reaction to the Civil Rights Act” and an “effort to ‘close this loophole’ and prohibit sex discrimination as well because ‘our national policy should prohibit sex discrimination at all levels of education.’”³⁰ While the language enumerated in the amendment does not explicitly establish the connection between Title IX and women’s athletics, judicial interpretation in subsequent case law makes clear that American courts believe “athletics are a vital and important part of the educational experience for high school and college students.”³¹ The Legislature enabled the Office of Civil Rights (OCR) within the Department of Education to enforce Title IX compliance.³²

B. Breakdown of Act/Judicial Interpretation

Litigation over Title IX continues to sculpt the meaning and application of the Act. Today, it is generally understood that all educational institutions receiving federal funds, including public and most private elementary and secondary schools, and virtually all colleges and universities, are subject to Title IX.³³ However, determining what constitutes a federally financed “program or activity,” was initially problematic for United States courts.³⁴ For example, in the 1984 case *Grove City College v. Bell*, the Supreme Court limited Title IX application to programs or activities within an institution that *directly* receive federal aid, insulating intercollegiate and interscholastic athletic departments from compliance regulations.³⁵ Congress responded four years later with the Civil Rights Restoration Act of 1988, which expressly defines “program or activity” as:

28. Symposium, *supra* note 14, at 326.

29. *Id.* at 326.

30. *Id.* at 326-27.

31. *Id.* at 327.

32. NATIONAL WOMEN’S LAW CENTER, *BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX AND ATHLETIC OPPORTUNITIES* (2d ed. 2007), 13 & n.9. The OCR is the principal unit through which complaints and Title IX compliance reviews are conducted. If the OCR finds a violation, they generally “seek to resolve the problem through a conciliation process with the offending institution” or they may completely “defund the offending institution of all federal funds.” Title IX is also enforceable through a private right of action.

33. See IRAM VALENTIN, *Title IX: A Brief History*, WOMEN’S EDUCATIONAL EQUITY ACT RESOURCE (Aug., 1997), at 1, available at <http://www2.edc.org/WomensEquity/pdffiles/t9digest.pdf>.

34. SUGGS, *supra* note 2, at 42.

35. *Grove City College v. Bell*, 465 U.S. 555 (1984).

[A] local educational agency system of vocational education, or other school system, any part of which is extended Federal financial assistance.”³⁶

Congress effectively clarified that “if any part of a school receives federal financial assistance, then Title IX compliance should reach the athletic department as well.”³⁷ This expansion of Title IX connotes that any high school that receives *any* form of federal financial assistance must comply with Title IX.³⁸

Title IX compliance regulations have been reasonably unambiguous since the law’s enactment. Legislative history, administrative guidance, and judicial interpretations of Title IX show that the Act “has always been intended to apply broadly to ensure equal opportunity in aspects of athletics.”³⁹ Specifically, courts have required that schools provide equal allocation of athletic participation opportunities.⁴⁰ Over time, courts have developed a three-prong test, which they use for determining whether an institution has provided “equal allocation” of athletic opportunity.⁴¹ The OCR determines compliance if an institution can satisfy one of the following:

1. Whether inter[scholastic]-level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among inter[scholastic] athletics, where the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among inter[scholastic] athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.⁴²

The first prong is known as the “substantially proportionate” test.⁴³ In general, it “requires a close fit between female and male enrollment and female

36. Civil Rights Restoration Act, 20 U.S.C. § 1687 (West 2010).

37. Symposium, *supra* note 14, at 344.

38. *Id.*

39. BREAKING DOWN BARRIERS, *supra* note 32, at 13. Policy Interpretation considers three basic areas where students have been subjected to prohibited discrimination in athletics: allocation of participation opportunities (relevant to this paper), athletic financial aid, and all other athletic benefits and opportunities. *Id.* at 32.

40. SUGGS, *supra* note 2, at 5.

41. BREAKING DOWN BARRIERS, *supra* note 32, at 34.

42. *Id.* at 34-35.

43. *Id.* at 35-36.

and male athletic participation.⁴⁴ The Act requires that a federally funded school must offer a substantially proportionate number of athletic opportunities for girls as it does for their male students.⁴⁵ A plaintiff bears the burden of demonstrating that the offending institution has failed prong one.⁴⁶ If the plaintiff is successful, the institution must demonstrate they fulfill prongs two or three to comply with Title IX regulations.⁴⁷

C. “Failure” in Urban High Schools

As Title IX has morphed into a legal mechanism for equalizing education-related athletic opportunities, research and study has largely focused on numbers spanning the nation.⁴⁸ Those studies show that Title IX has significantly diminished the imbalance between boys and girls opportunities.⁴⁹ The numbers reveal increased participation and opportunity at both the collegiate and high school level.⁵⁰ However, the big-picture numbers overshadow a serious issue. The latest research reveals that urban high schools provide significantly less athletic opportunity for girls than their suburban and rural counterparts.⁵¹

i. Statistics

According to the 2008 and 2012 reports authored by professors Don Sabo and Phil Veliz, young urban girls “have a narrower window of opportunity for becoming involved in sports” than both their male classmates and girls from suburban and rural communities.⁵² The 2012 report shows that in 2010, the number of athletic participation opportunities for girls in urban high schools was 11% less than their male counterparts, 11% lower than suburban girls, and

44. *Id.* at 36.

45. *Id.* at 35. Challenges against the applicability of the three-prong test to high school athletics have been made, however, the OCR has repeatedly referenced their 1979 Policy Interpretation, stating that Title IX’s “general principles will often apply to interscholastic athletic programs, which are also covered by regulations.” Symposium, *supra* note 14, at 371-72 & n287.

46. *Id.* See also *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 831 (10th Cir. 1993) (The ultimate burden must lie with the plaintiffs to show that they have been ‘excluded from participation in, or denied the benefits of’ an athletic program ‘on the basis of sex.’).

47. BREAKING DOWN BARRIERS, *supra* note 32, at 35, 39, 41.

48. DON SABO & PHIL VELIZ, GO OUT AND PLAY: YOUTH SPORTS IN AMERICA 2 (Women’s Sports Found., Oct. 2008) [hereinafter “SABO & VELIZ (2008)”] available at <http://www.womenssportsfoundation.org/home/research/articles-and-reports/mental-and-physical-health/go-out-and-play>.

49. See generally *2011-12 High School Athletics Participation Survey*, *supra* note 3, and Introduction to this article.

50. *2011-12 High School Athletics Participation Survey*, *supra* note 3 and BREAKING DOWN BARRIERS, *supra* note 32, at 3.

51. SABO & VELIZ (2012), *supra* note 9, at 9 tbl. 2.

52. SABO & VELIZ (2008), *supra* note 48, at 3-4.

22% lower than rural girls.⁵³ Some analysts argue that these numbers reflect greater gender disparity within urban schools.⁵⁴ However, the disparity between suburban and rural schools is just as significant, if not larger.⁵⁵ The imperative fact is that girls in urban schools do not experience a higher level of gender disparity than girls in suburban or rural schools.⁵⁶ Rather, urban girls experience less opportunity overall,⁵⁷ suggesting that the lack of opportunity is based on something beyond gender discrimination.

ii. Reasons for Opportunities Lag

Across the nation, athletic opportunities at the high school level vary by geographic region, type of community in which the school is located, and most importantly, economic resources.⁵⁸ Race, ethnicity, immigrant parents, and family characteristics can also affect a child's interest in sports and are often correlated to participation opportunities.⁵⁹ It is likely a combination of these factors that account for the discrepancy in urban girls opportunities in comparison with urban boys and suburban/rural girls. However, the greatest impact is resource availability, supporting the assertion that while "progress on the gender front in U.S. sports has been made, [it] remains uneven, and it is often poor and mainly urban girls who are being left behind."⁶⁰

53. This factor measures the amount of athletic opportunities available to each student based upon the school's total population of girls or boys and the corresponding athletic opportunities it offers to either gender. See SABO & VELIZ (2012), *supra* note 9, at 9 for a greater description of the data and variables used in the study.

54. Various claims have been made by women's organizations that Title IX has "unfinished business" in urban schools, as illustrated in the upcoming documentary "*In the Game*," produced by Kartemquin Films, the same filmmakers who produced "*Hoop Dreams*." This film follows the story of an inner-city Chicago girl's high school soccer team whose limited facilities and resources make participation an even greater struggle. While the article acknowledges that Title IX "doesn't do anything about [racial inequality]," it asserts that Title IX has some sort of unfinished business in urban schools. See Libby Sander, *New Movie Depicts Title IX's Unfinished Work in Underprivileged Urban Schools*, 57 THE CHRONICLE OF HIGHER EDUCATION, ISSUE 33, 19, available at <http://chronicle.com/article/New-Movie-Depicts-Title-IXs/127158>. It is certainly true that gender gaps still exist in urban school athletics, but that problem is not singular to urban schools. All public high schools deal with gender inequity problems.

55. Professor Sabo and Veliz's 2012 report shows that the inequity problem is fairly equal across the board, with rural schools actually facing the greatest percentage difference in athletic opportunities (13% difference compared with urban and suburban's 11% difference). SABO & VELIZ (2012), *supra* note 9, at 9 tbl. 2.

56. *Id.*

57. *Id.*

58. See DON SABO & PHIL VELIZ, *Progress Without Equity: The Provision of High School Athletic Opportunity in the United States, by Gender 1993-94 Through 2005-06*, at 3 (Women's Sports Found., Nov. 2011) [hereinafter "SABO & VELIZ (2011)"], available at <http://www.womenssportsfoundation.org/home/research/articles-and-reports/school-and-colleges/the-provision-of-hs-athletic-opportunity-in-the-us-by-gender-1993-94-through-2005-06>.

59. SABO & VELIZ (2008), *supra* note 48, at 4-5.

60. *Id.* at 3.

II. IMPORTANCE OF ATHLETICS

In general, participation in education-related athletics is beneficial for a student's physical health, general well-being, and is directly correlated with academic achievement.⁶¹ Sports provide a profusion of health benefits, including essential physical activity that is fundamental to both physical and mental development.⁶² Generally, athletes are less prone to use tobacco or drugs.⁶³ Furthermore, sports are favorably associated with greater academic achievement, including higher test scores, better performance on standardized tests, higher grade point average, and reduced dropout rates.⁶⁴

Additionally, there are several medically specific reasons why physical activity is "vital" for young girls.⁶⁵ "Improved self-esteem; improved muscle strength; improved flexibility; improved balance, improved bone density, lower risk for heart disease, diabetes and stroke; and improved energy levels" are among these "vital" reasons.⁶⁶ Moreover, physical activity can reduce a young woman's chance of developing osteoporosis, breast cancer, and can "help young women achieve and maintain a healthy weight."⁶⁷ Some evidence indicates that girls who do *not* participate in a team sport are *less* content with their lives than those girls who do participate.⁶⁸

In conjunction with empirical evidence, United States courts have recognized the importance of women's and girl's athletics.⁶⁹ For example, the court in *Brenden v. Independent Schools District 742* noted that:

[I]n passing Title IX, 'Congress has also recognized the importance of all aspects of education for women. . . ' that high school sports are 'an important and integral facet of the. . . education process,' and therefore, 'discrimination in high school interscholastic athletics constitutes discrimination in education.'⁷⁰

American courts and the United States legislature have labeled women's and girl's sports an integral part of education.⁷¹ Combining this congressional

61. SABO & VELIZ (2011), *supra* note 58, at 2.

62. See KEEPING SCORE: GIRLS' PARTICIPATION IN HIGH SCHOOL ATHLETICS IN MASSACHUSETTS 6 (National Women's Law Center & Harvard Prevention Research Center on Nutrition and Physical Activity Harvard School of Public Health eds., 2004) [hereinafter "KEEPING SCORE"].

63. *Id.*

64. SABO & VELIZ (2011), *supra* note 58, at 2.

65. ERIC SMALL, *The Young Female Athlete*, KIDS & SPORTS: EVERYTHING YOU AND YOUR CHILD NEED TO KNOW ABOUT SPORTS, PHYSICAL ACTIVITY, NUTRITION, AND GOOD HEALTH, Cha. 5, 54 (Newmarket Press 2002).

66. *Id.* at 54-55.

67. KEEPING SCORE, *supra* note 62, at 6.

68. SABO & VELIZ (2008), *supra* note 48, at 5.

69. Symposium, *supra* note 14, at 329.

70. *Id.* (quoting *Brenden v. Indep. Sch. Dist. 742*, 477 F.2d 1292, 1298 (8th Cir. 1973) (internal citation omitted)).

71. See *id.*

label with the physical and academic benefits suggests that girls' athletics are worth protecting and promoting. The issue we face as Americans is how we should engage our communities and government to best protect and encourage such a worthy and beneficial cause. The federal legislature enacted Title IX to defend against discriminatory practices in education.⁷² However, this may not be the most effective route for promoting girls athletic opportunities in urban schools. If the impediment in urban schools is resource related, then Title IX is neither the most appropriate nor legally constructive mechanism for increasing such opportunity.

III. TITLE IX IS NOT THE ANSWER

The historic and contemporary employment of Title IX indicates that the Act is an inappropriate legal mechanism for bolstering athletic opportunities for girls in urban high schools. United States case law demonstrates that Title IX's purpose is to prevent discrimination based on *sex*, not promote equal opportunity based on resources. The remedies available to Title IX claims are both unhelpful and insufficient in achieving greater opportunity rates. Urban girls bear less athletic opportunity not because of greater discrimination in urban communities, but because of resource limitations,⁷³ rendering Title IX ill-equipped to solve a problem more pecuniary than discriminatory in nature.

A. Historical Use of Title IX – Case Analysis

This section analyzes the historical purpose and use of Title IX in the context of athletic opportunities by examining federal cases that signify issues relevant to urban schools and the struggle to offer participation opportunities. The case law validates the broad power of the Act to counter discriminatory educational actions while simultaneously demonstrating that Title IX is limited to fighting discrimination, and not underfunding.

Favia v. Indiana University of Pennsylvania represents an important application of Title IX to institutions facing budgetary concerns.⁷⁴ The plaintiffs in *Favia* consisted of a class of female student athletes at Indiana University of Pennsylvania who claimed that the cutting of the women's field hockey and gymnastics teams violated Title IX.⁷⁵ In the face of budgetary tribulations, the school cut a number of athletic programs, including several men's and the aforementioned women's programs.⁷⁶ The school argued that the cuts were an attempt to meet the statistical standards of the substantial proportionality test.⁷⁷ The third circuit, however, would not allow the cutting of the women's programs, stating "if a university was not in compliance with Title

72. Symposium, *supra* note 14, at 327.

73. SABO & VELIZ (2012), *supra* note 9, at 9.

74. Symposium, *supra* note 14, at 347 (citing *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 335 (3rd Cir. 1993)).

75. *Favia*, 7 F.3d at 334.

76. *Id.* at 335.

77. See BREAKING DOWN BARRIERS, *supra* note 32, at 35-36.

IX, it could not cut opportunities to women, the already underrepresented sex.⁷⁸

Favia suggests that even institutions facing budgetary constraints fall within the boundaries of Title IX's legal capacity.⁷⁹ For schools that deal with serious budget issues, as may be the case with many urban schools,⁸⁰ *Favia* serves a cautionary function. Here, Title IX was used to enforce equal athletic opportunity in the face of budgetary constraints.⁸¹ *Favia*, however, does not suggest that Title IX can be used to force the creation of girls' athletic opportunities when resources are nonexistent. "In times of economic hardship," as many urban schools face, "few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletics programs."⁸²

Alternatively, *Kelley v. Board of Trustees* makes "clear that the elimination of male opportunities can be a viable tool used by schools in their attempts to comply with Title IX."⁸³ The members of the University of Illinois men's swimming team filed suit against the school after the athletic department cut their program in an attempt to comply with the substantial proportionality test of Title IX.⁸⁴ Unlike *Favia*, *Kelley* allowed for the elimination of the program, suggesting that overrepresented boys programs can be cut to reallocate funds to girls programs in an attempt to equalize opportunity.⁸⁵

The use of Title IX to eliminate boys programs in favor of girls programs is one option for equalizing opportunity,⁸⁶ but it is not any more suitable in urban high schools than in suburban or rural high schools. As the SHARP Center's 2012 report shows, girls and boys opportunities in urban high schools experience an 11% difference.⁸⁷ Interestingly, the "difference rate" in both suburban and rural high schools is 13%, which is 2% higher than in urban high schools.⁸⁸ The dilemma, however, is that *both* boys and girls opportunities in

78. Symposium, *supra* note 14, at 348.

79. *Id.* at 347-48.

80. See generally Ellen Abbott, *School Budget Series: Urban Schools Struggle to Overcome Crowding and Poverty*, WRVO PUBLIC MEDIA (May 8, 2012), available at <http://wrvo.org/post/school-budget-series-urban-schools-struggle-overcome-crowding-and-poverty>; James Whalen, *School Funding: Urban v. Suburban* (May 2009), <http://urbanvssuburban.blogspot.com/>; Jon Geeting, *Unequal Spending Per Pupil is Killing Urban Public Schools*, KEYSTONE POLITICS (May 7, 2012), <http://www.keystonepolitics.com/2012/05/unequal-spending-per-pupil-is-killing-urban-public-schools/>.

81. Symposium, *supra* note 14, at 348.

82. *Id.*

83. *Id.* at 350. See also *Kelley v. Bd. of Trs.*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995).

84. Symposium, *supra* note 14, at 348-49.

85. See *id.* at 349-50. See generally *Kelley*, 35 F.3d 265.

86. Please note that I am not advocating for extinguishing boys programs in favor of girls. I am simply describing one method that schools have used to comply with Title IX's substantial proportionality test and how it may be applicable in urban high schools.

87. See SABO & VELIZ (2012), *supra* note 9, at 9 tbl.2.

88. *Id.*

urban schools are well below that of their suburban and rural counterparts.⁸⁹ Even if urban boys programs are cut to make way for girls programs, the resulting opportunities do not compensate for the dismal participation opportunity rates.⁹⁰ As *Kelley* fortuitously notes, “Title IX’s stated objective is not to ensure that the athletic opportunities available to women increase. Rather its avowed purpose is to prohibit educational institutions from discriminating on the basis of sex.”⁹¹ *Kelley*’s understanding and characterization of Title IX’s limitation provides significant support to the argument that the legislation is ill suited to boost urban athletic opportunities for girls.

B. Title IX Claims and Urban School Districts

Title IX violation complaints are reported to the Office of Civil Rights (OCR) by both individuals and public interest organizations.⁹² The duty of the OCR is not to “preapprove or review” a school’s compliance with the law, but to “investigate complaints of discrimination.”⁹³ In other words, Title IX’s protections do not go into affect until after the fact. For urban high school students, this post-violation relief does nothing to encourage individual plaintiffs to step forward. Unless they file directly with the OCR and the office moves forward with the investigation independently, litigation fees in a Title IX action can be enormous, with no guarantee of recovery.⁹⁴ This acts as a strong disincentive for private individuals to file Title IX actions.

The more probable plaintiff in a Title IX action is a public interest organization. For example, the National Women’s Law Center (NWLC) filed twelve administrative complaints with the OCR in late 2010, implicating

89. *Id.* The report developed a table labeled, “The Percentage of Athletic Participation Opportunities that U.S High Schools Provided to Girls and Boys.” The table depicts the number of athletic opportunities per gender as a percentage and distinguishes between urban, suburban, rural, and town community types. The 2010 urban girls show a 28% opportunity rate, while their boy counterparts show a 39% rate. Suburban girls show a 39% rate with suburban boys showing a 52% rate. Rural girls received a 50% rate and rural boys showing a 63% rate.

90. *Id.* (explaining that equalizing the urban girls’ and boys’ rates would result in a 5.5% increase for girls, bringing them up to 33.5%, which is below suburban and well-below rural girls opportunities).

91. Symposium, *supra* note 14, at 349-50.

92. *See id.* at 375. Complainants or plaintiffs in a Title IX action include, but are not limited to, individuals and public interest organizations. *See infra* Part III.C, at 17. *See also infra* Part III.B, at 16.

93. *Id.* (quoting OFFICE FOR CIV. RIGHTS, U.S. DEP’T OF EDUC., ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST—PART THREE 1 (2005), *available* at <http://www.nacua.org/documents/AddnClarificationInterCollegiateAthleticsPolicy.pdf>).

94. *See generally* *Mercer v. Duke Univ.*, 50 Fed. App’x 643, 644 (4th Cir. 2002) (Private plaintiff brought a successful claim against the university, however plaintiff’s sole award was one dollar in compensatory damages. The court ruled that “punitive damages are not available for private actions brought to enforce Title IX.”); Symposium, *supra* note 14, at 363 (“Fighting a school in order to prove discrimination is costly and time consuming, especially if winning can result in such an insignificant damage award.”).

different school districts across the country.⁹⁵ The districts span over a majority of the continental U.S including Worcester Public Schools in Massachusetts, Chicago Public Schools in Illinois, and Irvine Unified School District in California.⁹⁶ The NWLC chose these school districts because of their double-digit percentage gaps in students who are girls and the percentage of athletes who are girls.⁹⁷ The organization's data shows that these districts are indicative of a widespread lack of athletic opportunities for girls.⁹⁸ While Chicago Public Schools had the largest gap, the remaining eleven districts represent a variety of communities including suburban, rural, and urban.⁹⁹ The NWLC's complaints intimate that urban schools are not alone in their struggles with sex-based athletic discrimination, nor do their discrimination rates tower above suburban or rural rates as is often implied by popular press.¹⁰⁰

C. Title IX Remedies

As case law demonstrates, Title IX does not exist to ensure girls athletic opportunities. Rather, its purpose is to prevent sex-based discrimination in education.¹⁰¹ In addition to its limited purpose, Title IX's sole method of recovery for claimants is both unhelpful and hindering to urban schools: "The only form of recovery provided within Title IX is the discontinuation of federal funding provided to a covered program or activity that violates the law."¹⁰² Bringing a claim against an economically limited school would likely cause more harm than benefit to girls' participation opportunities by cutting off its much-needed federal funding.

95. *Rally for Girls' Sports: She'll Win More Than a Game*, NATIONAL WOMEN'S LAW CENTER 1 (Nov. 10, 2010), available at <http://www.nwlc.org/resource/rally-girls-sports-shell-win-more-game>.

96. *See id.* at 4 for a complete list of complaints and schools districts.

97. *Center Files Title IX Complaints Against 12 School Districts*, NATIONAL WOMEN'S LAW CENTER (Nov. 10, 2010), <http://www.nwlc.org/press-release/center-files-title-ix-complaints-against-12-school-districts>.

98. *Id.*

99. *Rally for Girls' Sports*, *supra* note 94, at 4-5.

100. *See generally* Sander, *supra* note 54. A short article from the Chicago Daily Herald in February 2012 personifies this misconception. The article suggests that while Title IX has greatly advanced girls' athletic opportunities, various hurdles remain. It states that Title IX's biggest challenges "are found in inner cities, where funding always seems to be an issue." Patricia Babcock McGraw, *Despite Title IX Progress, There's Still More to Do*, CHICAGO DAILY HERALD, Feb. 4, 2012, at ML2. While the statement is accurate that discrimination in urban schools exists, the article misconstrues the data to imply that urban schools have greater levels of discrimination than their suburban and rural counterparts. As Don Sabo and Phil Veliz demonstrate, discrimination rates in urban schools are no higher than rates in suburban or rural schools. Rather, it is an overall resource limitation that accounts for urban schools' lower opportunity rates for both boys and girls. *See* SABO & VELIZ (2012), *supra* note 9, at 9 tbl.2.

101. *See* Symposium, *supra* note 14, at 349-50. *See also* discussion *supra* Part III.A.

102. Symposium, *supra* note 14, at 329.

As of today, Title IX claims can enjoin a judicially created private right of action, despite the limited recovery method provided for in the Act.¹⁰³ *Cannon v. University of Chicago* led to the creation of the private right; however, this case did not involve athletics.¹⁰⁴ The claim alleged that the plaintiff was denied admission to medical school based on her sex.¹⁰⁵ The court allowed for a private action on the grounds that the legislative history demonstrated Congress assumed Title IX would be enforced by a private action, similar to Title VI of the Civil Rights Act of 1964.¹⁰⁶ Since this 1979 case, private individuals have been able to sue schools for Title IX violations.¹⁰⁷ *Franklin v. Gwinnett County Public Schools* expands this notion and allows private individuals to recover monetary damages in Title IX suits.¹⁰⁸

Despite the options available to plaintiffs, any remedy, whether judicially created or explicit in the statute, fails to offer adequate solutions to urban girls and their limited athletic prospects. The discontinuation of federal funding would remove valuable resources from urban schools. Similarly, a monetary recovery for a single individual does not benefit urban public school athletic programs; it benefits only the claimant who files suit. Title IX's remedies allocate recoveries that are either harmful to the public institution or limited to private individuals. Its statutory and judicially developed remedies do nothing to encourage greater participation opportunity for urban high school girls.

The historical usage of Title IX and its remedies, whether by private individuals or public interest organizations,¹⁰⁹ does not reflect the type of problem urban high schools face today.¹¹⁰ While case law mentioned above involved federally funded institutions under budget constraints, as urban schools often are, they dealt with discrimination issues and not with resource limitations.¹¹¹ The Title IX solution to discriminatory practices is not the answer to urban budgetary limitations. Its limited remedies (discontinuation of federal funds¹¹² or recovery for individual plaintiffs)¹¹³ cannot produce greater athletic opportunities for urban high school girls. The pivotal question is what might produce greater opportunity for urban girls so that they may experience both the physical and mental benefits of athletics.¹¹⁴

103. *Id.* at 335. *See also Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979).

104. Symposium, *supra* note 14, at 335.

105. *Canon*, 441 U.S. at 680.

106. Symposium, *supra* note 14, at 335-36.

107. *See id.* at 335.

108. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992).

109. Symposium, *supra* note 14, at 375. *See also supra* notes 95 and 103.

110. *See SABO & VELIZ* (2012), *supra* note 9, at 9 tbl.2.

111. *See Symposium, supra* note 14, at 347, 350. *See also Favia*, 7 F.3d at 335; *Kelley*, 35 F.3d at 269-70.

112. Symposium, *supra* note 14, at 329.

113. *See Franklin*, 503 U.S. at 76. *See also discussion supra* Part III.C.

114. *See discussion supra* Part II.

IV. PROPOSED ALTERNATIVES FOR IMPROVING ATHLETIC OPPORTUNITIES FOR GIRLS IN URBAN HIGH SCHOOLS

This section will explore different options for generating athletic opportunities, discussing each option's costs as well as its benefits. The purpose of this section is not to argue for a specific route. Rather, the goal is to introduce alternative mechanisms that offer new insight to social organizations and governmental entities equipped with the ability to instruct changes, including single-sex education, state and local funding, and federal tax incentives.

A. *Using Title IX*

As this paper has already revealed, Title IX's purpose is to address sex discrimination, not funding disparities.¹¹⁵ A small portion of the urban opportunity deficiencies, however, does come from sex-based discrimination.¹¹⁶ This imbalance can be addressed under Title IX remedies. If a public interest organization or individual files a complaint with the OCR, as the National Women's Law Center has,¹¹⁷ a favorable finding would result in either cutting boys programs in favor of girls programs, or it may result in the institution losing its federal assistance. The benefit of this remedy is that urban girls may have slightly more athletic opportunities. However, the cost will diminish boys' athletic opportunities.¹¹⁸ Furthermore, if the school refuses or simply cannot reallocate its funding, it may lose federal funding altogether,¹¹⁹ harming both girls and boys athletic programs.

B. *Single-Sex Education*

A popular avenue for avoiding the discriminatory issues of coeducational schools is the development of single-sex educational institutions.¹²⁰ All funding for athletics at an all-girls school is distributed to girls athletic programs, suggesting that these schools can allocate more resources towards girls athletic programs than their coed counterparts. Additionally, research suggests there are

115. See Symposium, *supra* note 14, at 349-50. Additionally, the vast majority of Title IX complaints are not filed in response to athletic discrimination but rather sexual harassment or unequal access to academic courses and disciplines. In 2001, only 99 out of 4,500 complaints filed with the OCR were athletic-related complaints. Leila Brammer, *Thirty Years of Title IX: A Review of Gender Equity in American Education*, 1 FORUM ON PUB. POLICY 129,132 (2005) (noting Erik Brady, *Time Fails to Lessen Title IX Furor*, USA TODAY, June 19, 2002 at D1).

116. SABO & VELIZ (2012), *supra* note 9, at 14.

117. NATIONAL WOMEN'S LAW CENTER, *supra* note 96.

118. See *supra* Part II, at 10-11. High school-aged boys' physical benefit from sports is just as crucial as the benefits to high school-age girls. Reassigning funds in a way that eliminate boys' athletic programs is an option that should not be taken lightly and used only as a last resort.

119. See Symposium, *supra* note 14, at 329.

120. For the purposes of this paper, I examine only all-girls schools.

supplementary benefits to single-sex education.¹²¹ Studies show that “girls and boys tend to respond to different teaching styles,” and thus separate learning environments are in fact more conducive to learning than coeducation environments.¹²²

A 1992 American Association of University Women study found that “America’s coeducational, public elementary and secondary schools disadvantaged girls. . . [F]ormal curriculum materials excluded, stereotyped, or subordinated women. . .” and “[t]eachers paid more attention to boys than to girls.”¹²³ This disadvantage exacerbated young girls’ decline in self-esteem as they moved into early adulthood, resulting in higher cases of eating disorders, depression, teenage pregnancy, and other similar negative consequences.¹²⁴ In contrast, single-sex schools produced young girls with greater self-confidence and higher competence levels, with the effects being greatest amongst poor Hispanic and African American students.¹²⁵

Despite the academic, athletic, and social benefits to single-sex schools, arguments have been brought forth against such schools. The National Organization for Women (NOW) and two New York City civil rights organizations filed complaints against an all-girls school, The Young Women’s Leadership School of East Harlem, with violating Title IX.¹²⁶ These claims exemplify how single-sex schools can face Title IX violations based on their gender-based exclusionary admissions policy and practices.¹²⁷ The No Child Left Behind Act of 2006 largely resolves these issues.¹²⁸ A provision within the regulations published by the act allows for single-sex education both within single-sex schools and single-sex classrooms at coeducational schools.¹²⁹ This includes all-girl and all-boy science, math, and physical education classes.¹³⁰ These regulations have clarified the legal status of single-sex schools.¹³¹

121. See, e.g., Amanda Elizabeth Koman, *Urban, Single-Sex, Public Secondary Schools: Advancing Full Development of the Talent and Capacities of America’s Young Women*, 39 Wm. & Mary L. Rev. 507, 509 (1998).

122. *Id.* at 508.

123. *Id.*

124. *Id.* at 509.

125. *Id.*

126. *Id.* (quoting Administrative Complaint at 1, NOW v. New York City Bd. of Educ. No. 02-96-1184 (U.S. Dep’t of Educ., Office for Civil Rights, filed Aug. 22, 1996)).

127. Koman, *supra* note 120, at 509.

128. See *The Legal Status of Single-Sex Public Education*, NAT’L ASS’N FOR SINGLE SEX PUB. EDUC., <http://www.singlesexschools.org/policy-legalstatus.htm> (last visited Feb. 28, 2014).

129. *Id.*

130. See *id.*

131. An important exception to the legality of single-sex schools is outlined in the famous *United States v. Virginia Military Institute*, 518 U.S. 515 (1996). The Supreme Court struck down the school’s male-only admissions policy on the grounds that it violated the Equal Protection Clause of the 14th Amendment. *Id.* at 519. Writing for the majority, Justice Ginsburg found that VMI failed to provide “exceedingly persuasive justification” for its sex-based policy, and that a proposed alternative women’s school would not provide the same rigorous military training and courses. *Id.* at 534. A broad reading of this case suggests that

While single-sex schools provide numerous benefits to girls athletics and education, the administrative and financial aspects of converting or developing single-sex schools is no simple task.¹³² Additionally, there are many benefits to coeducation, just as there are to single-sex schools.¹³³ Given that research has shown that single-sex schools have the greatest positive effect on poor minority girls,¹³⁴ who represent a substantial portion of the population in urban areas,¹³⁵ single-sex schools may be a viable option for developing more athletic opportunity for girls within urban communities.

C. State Government Level Budget and Resource Sharing

While Title IX is primarily a matter of federal law, the majority of funding for public educational institutions comes from state and local government levels.¹³⁶ According to the U.S. Department of Education, the United States Constitution leaves administration and funding of public education for grades K-12 to the states.¹³⁷ With limited funding provided at the federal level,¹³⁸ state and local governments carry the majority of the burden.

single-sex military schools are illegal while all other single-sex education schools remain legitimate. Additionally, VMI is a post-secondary educational institution. *Id.* at 520. For the purposes of this paper, single-sex education need only be legal at the elementary and secondary levels.

132. Teachers in single-sex education classrooms and schools must be trained appropriately. *See Single-Sex Education*, NATIONAL ASSOCIATION FOR SINGLE SEX PUBLIC EDUCATION, <http://www.singlesexschools.org/home-introduction.htm> (last visited Jan. 18, 2013). This training would undoubtedly require increased funding for both training and purchasing new educational materials.

133. Coeducation classrooms and schools reflect real life and prepare youth for interactions with the opposite gender, and society at large, more so than a single-sex school. *See generally*, Fred A. Mael, *Single-Sex and Coeducational Schooling: Relationships to Socioemotional and Academic Development*, 68 REVIEW OF EDUC. RESEARCH, 101 (1998). Some coeducational advocates view single-sex education for girls as emphasizing male dominant views like competitiveness and individuality which do not improve male-female equity. *Id.* at 103.

134. Koman, *supra* note 120, at 509.

135. *See generally*, National Center for Education Statistics, *School Attendance Boundary Survey*, <http://nces.ed.gov/surveys/sdds/index.aspx>. The School District Demographics System can be used to search each school district in the United States and provide a racial breakdown of each district's attendees.

136. U.S. DEP'T OF EDUC, 10 FACTS ABOUT K-12 EDUCATION FUNDING 1 (2005), <http://www2.ed.gov/about/overview/fed/10facts/10facts.pdf>. *See also* Judy Woodruff, *Finance: How Do We Fund Our Schools?*, WHERE WE STAND: AMERICAN'S SCHOOLS IN THE 21ST CENTURY (Sept. 5, 2008), <http://www.pbs.org/wnet/wherewestand/reports/finance/how-do-we-fund-our-schools/197/>.

137. *Id.* The federal government has provided assistance to state and local governments in an effort to supplement, and not replace, state funding. The two most well-known federal assistance in public education includes the Elementary and Secondary Education Act of 1965 and the No Child Left Behind Act of 2001, meant to hold schools "accountable" for their students' achievements. *See id.* *See also* NAT'L ASS'N FOR SINGLE SEX PUB. EDUC., *supra* note 127 (discussing the effect of the No Child Left Behind Act on the legality of single-sex educational institutions).

It is difficult to ask state governments to stretch their budgets to increase monetary support for girls high school athletic programs in urban communities. As a result, the options are limited for state governments. One option may be to allocate all federal funding towards urban schools,¹³⁹ specifically designating a portion for girls athletic or physical education programs. However, specific requirements generally accompany acceptance of federal funding.¹⁴⁰ State redirection of federal funding for K-12 public education would require federal approval. Therefore, state and local governments should focus on their own sources of funding for public education.

Generally, state governments provide funding for public education through sales and income taxes.¹⁴¹ Locally, governments fund public schools through property taxes.¹⁴² The problem is apparent. States have different income and sales tax levels across the nation, including some states that do not have any income¹⁴³ or sales tax,¹⁴⁴ and property taxes differ dramatically across districts.¹⁴⁵ In poorer neighborhoods, where property values are significantly lower, the revenue generated from property taxes is distinctly lower than in wealthier neighborhoods.¹⁴⁶ For example, in 2005, over 50% of states provided fewer resources to their highest-poverty districts than their more affluent counterparts.¹⁴⁷ New York averaged a funding difference of over \$2,000 per student between wealthier communities and impoverished neighborhood schools.¹⁴⁸

138. In 2004-05, state and local funding for public K-12 education accounted for 83% of total funding. U.S. DEP'T OF EDUC., *supra* note 136. Of the remaining funding, only 8.3% came from the federal government. *Id.*

139. Almost all federal funding for public education is given directly to state or local school districts. It is to be used for the purposes defined in the Elementary and Secondary Education Act and No Child Left Behind Act. *Id.* Any of the mandates within these Acts are only applicable in a state which accepts federal funding. If a state does not accept federal funding, they are not subject to the program mandates. *Id.*

140. *Id.*

141. Woodruff, *supra* note 136.

142. *Id.*

143. Nine states do not currently have income taxes. These include Alaska, Florida, New Hampshire, Nevada, South Dakota, Tennessee, Texas, Washington, and Wyoming. *States Without A State Income Tax*, IRS, <http://www.irs.gov/uac/States-Without-a-State-Income-Tax> (last visited April 6, 2014).

144. Sales taxes span a variety of goods and services, including clothing and liquor; however, there are five states that do not have any sales taxes: Alaska, Delaware, Montana, New Hampshire, Oregon. *State Sales Tax Rates: Sales Tax Rates by States*, SALES TAX INSTITUTE, <http://www.salestaxinstitute.com/resources/rates> (last updated Mar. 1, 2014).

145. Woodruff, *supra* note 140.

146. Amy M. Azzam, *The Funding Gap*, 62 EDUC. LEADERSHIP 93, 93 available at <http://www.ascd.org/publications/educational-leadership/feb05/vol62/num05/-The-Funding-Gap.aspx>.

147. *Id.*

148. *Id.*

For state and local governments, the funding gap between affluent and poorer communities is something they can control. The Education Trust¹⁴⁹ recommends that states adopt the following practices in order to reduce the funding gaps: reduce reliance on local property taxes to fund education; target extra funds to help low-income children; fix funding gaps for individual schools within districts; and improve state education funding in terms of increased spending on public education.¹⁵⁰

While the Education Trust recommendations focus on overall funding gaps, state and local governments can use the same tactics for increasing athletic opportunities for girls in public schools. Rather than allowing individual schools the autonomy to allocate their institution's funding, states can mandate that funds be used for specific purposes, just as the federal government has with No Child Left Behind.¹⁵¹

Despite attempts to reallocate funding equitably across a state, state or local governments can still fail to adequately redistribute public education funding without reforming its funding distribution formulas.¹⁵² According to Professor Bruce Baker of Rutgers's Graduate School of Education, state and local school finance systems can actually perpetuate the inequities local lawmakers try to avoid.¹⁵³ Baker reports that "state aid formulas - often designed to promote equity and adequacy - can work against their own stated objectives,"¹⁵⁴ creating gaps that Baker calls "stealth inequities."¹⁵⁵ Therefore, in any attempt to mandate reallocation of state or local funding for girls athletic programs, lawmakers and administrators should concentrate specifically on the formulas they use for determining such funding amounts.

D. Federal Tax Incentives - Community Development Entities & Income Tax Deductions

A specific avenue for producing greater athletic opportunities for urban girls is through the federal tax system. In an attempt to encourage investment in urban communities, Congress enacted section 45D of the Internal Revenue Code.¹⁵⁶ Section 45D provides tax credits to investors who invest in a qualified

149. The Education Trust is a Washington D.C.-based organization dedicated to closing education gaps in American public schools, focusing specifically on improving access to education for low-income children. For more information, see THE EDUC.TRUST (2009), <http://www.edtrust.org/dc/about>.

150. Azzam, *supra* note 145, at 93.

151. *See supra* note 138 and accompanying text.

152. BRUCE D. BAKER & SEAN P. CORCORAN, CTR. FOR AM. PROGRESS, THE STEALTH INEQUITIES OF SCHOOL FUNDING: HOW STATE AND LOCAL SCHOOL FINANCE SYSTEMS PERPETUATE INEQUITABLE STUDENT SPENDING 51 (2012), *available at* <http://www.americanprogress.org/wp-content/uploads/2012/09/StealthInequities.pdf>.

153. *Id.* at 2.

154. *Id.*

155. *Id.*

156. I.R.C. § 45D (2012).

community development entity (CDE).¹⁵⁷ A CDE is a corporation or partnership that's "primary mission" is "serving or providing investment capital for low-income communities or low-income persons."¹⁵⁸ A qualified investment is traditionally either "an equity investment in or loan to a 'qualified active low-income community business,' [or] financial counseling to businesses located in and residents of low-income communities."¹⁵⁹ A CDE designed to provide or sponsor urban high school athletics could generate funding for girls programs. To do this, however, certain tax regulations and standards must be met.

The traditional CDE is a corporation or partnership that derives at least half of its gross income from activity (i.e. sales, manufacturing) in the eligible low-income area.¹⁶⁰ The federal legislature developed the concept of a CDE for the purpose of increasing the flow of investment capital to poorer communities.¹⁶¹ The tax credit may also be allowed for investments made to nonprofits in qualifying areas.¹⁶² Qualified CDE's must reinvest in the communities in which they are located.¹⁶³ A donation or sponsorship of a girls high school athletic program is arguably a reinvestment into the community. While CDE's focus is on investment capital, improving athletic opportunities for girls, accompanied by the corresponding health and social benefits,¹⁶⁴ could be an unexpected but beneficial consequence of the CDE or New Markets Tax Credit (NMTC).¹⁶⁵ The federal government could consider implementing a specific tax credit for both investors and the CDE's that reinvest in girls high school athletics in poor urban areas.¹⁶⁶

One issue with this solution is that CDE's are meant to generate capital investment flow in urban areas.¹⁶⁷ The federal government may not define

157. BORIS BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS § 27.7.2 (West, Westlaw through 2014 amendments).

158. *Id.*

159. *Id.*

160. Robert Rapoza, *Making the New Markets Tax Credit Count*, 15 CMTY. INVS., no. 2, Aug. 2003, <http://www.frbsf.org/publications/community/investments/0308/article1a.html>.

161. *Id.*

162. BITTKER & LOKKEN, *supra* note 156.

163. *See* Rapoza, *supra* note 159..

164. *See supra* Part II, at 10-11.

165. BITTKER & LOKEEN, *supra* note 156.

166. The National Policy Advisory Board, developed as part of the Don Sabo and Phil Veliz's 2008 report, *see infra* Part IV.E.i. and note 170, suggest that corporations and non-profit organizations, many that could qualify as Community Development Entities, should work with schools and communities in order to support the provision of sports programs for children. SABO & VELIZ (2008), *supra* note 48, at 170. The support from academic experts on athletic programs for children in public educational institutions suggests that there are individuals and organizations that can be utilized in the development of CDE's who reinvest in community athletic programs. The academic insight and support may be useful in persuading government officials or the Internal Revenue Service that CDE's who reinvest in local athletic programs for girls are adequate CDE's that should be eligible for the associated tax credits.

167. Rapoza, *supra* note 159.

“reinvestment” to include sponsoring public high school sports teams. If that is the case, a second option at the federal tax level is for the government to increase the amount of the deduction for charitable contributions to a public school. Currently, the federal government allows a deduction of up to 50% of adjusted gross income for contributions made to public schools by individuals,¹⁶⁸ and up to 10% of taxable income for contributions made by corporations.¹⁶⁹ The issue with a donation to public schools is that once the donation is made, the school determines how to allocate the resources. To counter this, the federal government could even consider creating a specific tax deduction or credit for donations made to girls athletic programs in urban schools. While providing a credit is essentially identical to increasing funding for the program in terms of government revenue and spending, taxpayers are more open to the idea of rewarding private donations rather than increasing public spending.¹⁷⁰

E. Alternative Options

i. Internal Processes

Within each public educational institution, internal processes dictate much of the institution’s funding distribution and athletic activity management. While it is likely that the school’s district has its own policies on athletic funding, an institution can take steps on its own to improve athletic opportunities for young girls. In a 2008 report from the Women’s Sports Foundation, the foundation’s National Policy Advisory Board recommended that school administrators focus their girl-centered sports on “fun and friendships,” which encourages

168. 26 U.S.C. § 170 is the statute allowing deductions for individuals who make charitable donations to qualifying schools. A school eligible for the charitable deduction must be an “educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.” 26 U.S.C. § 170(b) (2014). The majority of public high schools in question would likely fall into this category, making contributions to the schools appealing to taxpayers at both the individual and corporate level.

169. *Id.*

170. In his article, “Do Tax Expenditures Create Framing Effects?,” Edward Zelinsky notes how “tax expenditures [i.e. exemptions, deductions, credits] can be designed to be economically and procedurally equivalent to comparable direct outlays.” Edward Zelinsky, *Do Tax Expenditures Create Framing Effects? Volunteer Firefighters, Property Tax Exemptions, and the Paradox of Tax Expenditure Analysis*, 24 V.A. TAX REV. 797, 799 (2005). Taxpayers, however, persist in believing that the two are different when they are in fact economically similar. Zelinsky argues that an “important explanation for that paradox is that, for many people, tax expenditures create framing effects . . . it is . . . the label that controls.” *Id.* This label “obscur[es] for some the similarity of substantively identical economic policies.” *Id.* Essentially, if the federal or state governments wish to take increase funding for public school athletics, their increased budgetary spending may be better received by the public if the funding is extracted from tax expenditures for charitable donations rather than specifically allocating more money from their budgets towards girls high school athletics.

recruitment at an elementary school age.¹⁷¹ Additionally, schools can develop internal mechanisms for identifying and engaging girls with late entries in organized athletics in order to “ease their transition into sports during the sixth to eighth grades.”¹⁷²

On a larger scale, school boards and school districts should reverse cuts in physical education offerings, and even make such physical education classes mandatory.¹⁷³ One negative trend that decreases athletic opportunities for urban girls, and often boys, is the invention of the “pay to play” athletic program.¹⁷⁴ In an attempt to deal with decreased funding and increased budgetary constraints, various public schools charge athletes or their families for athletic participation.¹⁷⁵ The result is that many schools and communities who already suffer from low athletic participation rates further reduce participation among children from poorer families.¹⁷⁶

The National Policy Advisory Board recommends that specific policies should be “put in place that help less affluent families and their aspiring athletes to fully participate in school and community programs.”¹⁷⁷ These “policies,” whatever they may be, cannot be purely idealistic. Like the problems state governments encounter with their funding distribution formulas,¹⁷⁸ public educational institutions cannot simply promote equitable distribution of funds in theory. Schools should investigate and report on the success or failure of its policies that attempt to “help less affluent families and their aspiring athletes to fully participate in school programs,”¹⁷⁹ and promote those policies which actually achieve the anticipated results.

ii. Public Education and Media Attention

“Title IX’s successes also have depended on public-information campaigns that highlight the value of women’s sports participation.”¹⁸⁰ Like many public policy issues, an informed debate has historically “helped Title IX by gaining media coverage for women’s sports and highlighting academic research.”¹⁸¹ Media attention concerning Title IX in urban public high schools

171. SABO & VELIZ (2008), *supra* note 48, at 168. The National Policy Advisory Board consists of recognized leaders from academic research, education, health, and sports associations. The board includes members of the United States Olympic Committee Executive Committee, National Federal of State High School Associations, and various professors from different academic institutions throughout the United States. *Id.* at 172.

172. SABO & VELIZ (2008), *supra* note 48, at 168.

173. *Id.* at 169.

174. *Id.* at 170.

175. Davis et al., *Pay-to-Play Sports Keeping Lower-Income Kids Out of the Game*, 15 U. MICH. C.S. MOTT’S CHILD. HOSP.: NAT’L POLL OF CHILD. HEALTH (2012), <http://mottnpch.org/sites/default/files/documents/051412paytoplayreport.pdf>.

176. *Id.*

177. *Id.*

178. *See supra* Part IV.C, at 24.

179. SABO & VELIZ (2008), *supra* note 48, at 170.

180. Hogshead-Makar & Zimbalist, *supra* note 15, at 5.

181. *Id.*

over the last several years, however, has been predominantly negative.¹⁸² While the attention brings urban athletic struggles to the forefront, it incorrectly identifies Title IX as the culprit responsible for the lag in opportunity.¹⁸³ Continued media attention can be helpful, as media attention increases public awareness, but the focus should be on underfunding rather than Title IX “failures.”¹⁸⁴

In addition to media attention on the status of Title IX, attention to research regarding related Title IX statistics and strategies for enforcing its regulations are vital to improving athletic access for young girls.¹⁸⁵ This research is “instrumental in bolstering legislative, administrative, and litigation strategies” for Title IX enforcement.¹⁸⁶ Organizations, such as the Women’s Sports Foundation, have instigated research for the purpose of “foster[ing] public discussion and policy debate over” girls athletics and activity in the United States.¹⁸⁷ The Foundation’s board members believe that “for those who seek gender equity in interscholastic sports, evidence-based research can underpin advocacy and policy reform.”¹⁸⁸ The idea is that media coverage of academic research shows “both the health and career benefits of sports participation” for women, but also emphasizes “the barriers that continue to limit girls’ and women’s sports participation.”¹⁸⁹ For urban girls athletic opportunities at the high school level, further research, investigation, and media attention may be another avenue for pushing the deficiency to the consideration of the legislative and administrative bodies equipped with the ability to increase such opportunities.

CONCLUSION

Title IX has played a pivotal role in increasing athletic opportunities for high school girls across the United States. Since 1972, women and girls’ participation in athletics has opened the doors for more opportunities than just athletics.¹⁹⁰ Women became coaches, recruiters, administrative officials, educational professionals and governmental representatives.¹⁹¹ For young girls and women, Title IX provides access to valuable physical activity that not only improves health and overall physical well-being, but also substantially

182. *See supra* text accompanying notes 54 and 99.

183. *See supra* Part III.A, at 14-15. *See also supra* text accompanying note 99 (discussing an article that exemplifies these types of misconceptions about Title IX).

184. Here I am referring to the “failures” discussed by the media in notes 54 and 99. This includes Title IX’s “unfinished business” discussed in note 54 and the supposed greater gender discrimination in urban areas discussed in note 99.

185. *See* Hogshead-Makar & Zimbalist, *supra* note 15, at 5.

186. *Id.*

187. SABO & VELIZ (2008), *supra* note 48, at 6.

188. SABO & VELIZ (2011), *supra* note 58, at 2.

189. Hogshead-Makar & Zimbalist, *supra* note 15, at 5.

190. *See id.*

191. *See generally id.* (referring to the collateral accomplishments achieved in the struggle to enact Title IX).

increases their odds for academic achievement from elementary to post-secondary education.¹⁹²

However, recent research and statistics demonstrate that girls in urban high schools have the least amount of access and opportunity than any community-type school, regardless of gender.¹⁹³ Despite accusations made in recent media attention,¹⁹⁴ this lag in opportunity does *not* reflect an increase in discrimination.¹⁹⁵ Rather, it reflects an overall imbalance of economic resources across school districts.¹⁹⁶ This imbalance in funding suggests that Title IX is an inappropriate mechanism for boosting athletic opportunity in urban communities.¹⁹⁷

While enforcement of Title IX and its regulations is still desirable in public educational institutions, the solution to increasing athletic opportunity for girls in urban high schools is not specifically within this legislation.¹⁹⁸ Other avenues can provide greater and more profound opportunities for young girls, including single-sex education, state and local government budget reallocation, federal tax incentives, modification of internal policies, increased public education, and media attention on the benefits of sports for young girls.¹⁹⁹ The dispositive fact is that urban high school girls receive less athletic opportunity not because they are discriminated against more than girls in suburban or rural high schools, but because their schools and school districts are underfunded.²⁰⁰ Because of this finding, I conclude that greater Title IX enforcement in urban school districts is *not* the answer to girls' athletic opportunity deficiencies.

192. See generally discussion *supra* Part II.

193. See, e.g., *High School Athletics Participation Survey*, *supra* note 3. See also SABO & VELIZ (2012), *supra* note 9, at 9 tbl.2; SABO & VELIZ (2008), *supra* note 48, at 6; SABO & VELIZ (2011), *supra* note 58, at 2.

194. Title IX has essentially become a scapegoat for urban schools' dismal athletic opportunity rates for young girls across the country. See generally *supra* text accompanying note 54; *supra* Part IV.E.ii, at 29.

195. See SABO & VELIZ (2012), *supra* note 9, at 9.

196. See *id.*

197. See generally discussion *supra* Part III.

198. *Id.*

199. See generally discussion *supra* Part IV.

200. See SABO & VELIZ (2012), *supra* note 9, at 9 tbl.2. See generally discussion *supra* Part III.