TITLE IX AND HIGH SCHOOL OPPORTUNITIES: ISSUES OF EQUITY ON AND IN THE COURT

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I. INTRODUCTION

Title IX of the Education Amendments of 1972 has had a profound impact on female participation in sports at the elementary school, high school, and college levels.[1] To illustrate, the number of female university students participating in sports rose from 90,000 in 1972 to 163,000 in 2002.[2] For high school girls, the number who participated in sports rose by approximately 850%, from 294,015 in 1972 to over 2.8 million in 2002.[3] In 1972 girls made up only 7.4% of high school athletes[4] compared with 42% in 2002.[5] This increase is especially important because research demonstrates that girls who are involved in organized sports, have more self-confidence and lower rates of depression than girls who do not participate in organized sports.[6] Also, high school female athletes tend to have higher grades and are more likely to graduate from high school and go to college than their counterparts.[7]

Although girls who attend public high schools have experienced incredible gains in athletics since the passage of Title IX, the National Women's Law Center reports that female athletes continue to receive far fewer participation opportunities, inferior equipment, and inferior overall athletic opportunities compared with male athletes.[8] Indeed, there is much more to be accomplished, especially at the high school level.

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1. Suzanne Eckes, Commentary, *Another Pin for Women: The National Wrestling Coaches Associations' Title IX Case is Dismissed*, 182 EDUC. L. REP. 683 (2004) [hereinafter Eckes, *Another Pin for Women*]; Suzanne Eckes, *The Thirtieth Anniversary of Title IX: Women Have Not Reached the Finish Line*, 13 S. CAL. REV. L. & WOMEN'S STUD. 3 (2003) [hereinafter Eckes, *The Thirtieth Anniversary*].

2. Ellen Staurowsky, *Title IX in its Third Decade: The Commission on Opportunity in Athletics*, 2 ENT. L. 70, 72 (2003).

3. *Id.*

4. NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, 1971 SPORTS PARTICIPATION SURVEY (1971).

5. NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, 2001 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY (2001).

6. Kerry A. White, *25 Years After Title IX, Sexual Bias in K-12 Sports Still Sidelines Girls*, EDUC. WEEK, June 18, 1997, *available at* http://www.edweek.org/ew/index.html.

7. *Id.*

8. Nat'l Women's Law Ctr., The Battle for Gender Equity in Athletics in Elementary and Secondary Schools 1 (May 2002), http://www.nwlc.org/pdf/Battle_June2002.pdf.

The United States Supreme Court plays an essential role in interpreting and enforcing Title IX. For example, the recent Supreme Court decision, *Jackson v. Birmingham*, was a huge victory for both university and high school female athletes because it allowed coaches to report inequities between female and male sports teams without fear of being fired or demoted.[9] The composition of the Court greatly affects the outcome of these often highly contested Title IX cases. Justice Sandra Day O'Connor played an important role in protecting women's rights under Title IX.[10] In fact, Justice O'Connor cast the fifth vote in the *Jackson* decision and the deciding vote in several other important Supreme Court decisions related to women's rights.[11] Her retirement presents an unknown for Title IX proponents. If Justice Samuel Alito, who replaced Justice O'Connor, and Chief Justice John Roberts, who is also new to the Court, do not share Justice O'Connor's independent and balanced perspective, gender equity cases, particularly Title IX cases, could be in danger.

This Article examines Title IX as it pertains to high school athletics. Specifically, as a result of the *Jackson* decision, coaches may feel encouraged to report gender inequities in high school athletics because there is less fear of retaliation. As such, school districts need to pay even closer attention to Title IX compliance because they may face more challenges from coaches and other observers. In order to fully examine this issue, Part II of this Article presents an overview of Title IX and the guidelines interpreting Title IX. Part III examines key Title IX cases to highlight the most recent issues in litigation. Part IV analyzes Justice O'Connor's influence in Title IX decisions as well as Justice Alito's and Chief Justice Roberts' likely influence on future Title IX cases that come before the Court. This Article concludes by considering the future implications for Title IX and by suggesting ways for high schools to comply with Title IX.

II. TITLE IX AS IT PERTAINS TO ATHLETICS

A.Introduction to Title IX

Title IX states that "no person . . . shall, on the basis of sex, be . . . subjected to discrimination under any education program . . . receiving Federal financial assistance."[12] The law was created in response to widespread

9. 544 U.S. 167 (2005).

10. Nat'l Women's Law Ctr., Justice O'Connor's Successor Could Seriously Weaken Women's Legal Rights (Sept. 2005), http://www.nwlc.org/pdf/OconnorSwingVote UPDATE_September2005.pdf.

11. *See e.g.*, Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (finding the school district liable for peer harassment under Title IX); *Jackson*, 544 U.S. 167; Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding male students must be permitted to enroll in university nursing school); United States v. Virginia, 518 U.S. 515 (1996) (finding the state violated the Equal Protection Clause when it denied women enrollment in a publicly-funded university).

12. 20 U.S.C. § 1681(a) (2000).

academic discrimination against women.[13] Title IX was amended in 1974 to make the statute applicable to athletic programs.[14] As a result of this amendment, Title IX became the "cornerstone of federal statutory protection for female athletes and prospective female athletes in the United States."[15] Although often the focus is on athletics, Title IX prevents discrimination in all aspects of education including admissions, housing, course offerings, recruitment, financial assistance, counseling, student health, marital and parental status of students, insurance benefits, and harassment.[16]

When Title IX was enacted, its broad language made interpreting the statute's application to athletics programs difficult.[17] The regulations governing Title IX provided that an athletic program could consist of gender-segregated teams only if the sport in question was a contact sport or if the institution offered comparable teams in the sport for both genders.[18] The regulations allowed a three year phase-in period for compliance.[19]

Additionally, the regulations established criteria for determining whether a school provided equitable athletic opportunities for female and male students.[20] The regulations required the Director of Health, Education, and Welfare (HEW) to consider these factors when making such determinations.[21] It is important to note that none of the factors were required, but instead were to be considered as a whole.[22] In other words, a school was not automatically in violation of Title IX if it failed to meet one of the factors; rather, the Director of HEW was required to consider these factors in their totality.[23]

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13. *See* Staurowsky, *supra* note 2, at 72.

14. *See id.*

15. Diane Heckman, *Women and Athletics: A Twenty-Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 2 (1992).

16. *See* Abigail Crouse, Comment, *Equal Athletic Opportunity: An Analysis of Mercer v. Duke University and a Proposal to Amend the Contact Sport Exception to Title IX*, 84 MINN. L. REV. 1655, 1657 (2000).

17. *See* Darryl C. Wilson, *Parity Bowl IX: Barrier Breakers v. Common Sense Makers: The Serpentine Struggle for Gender Diversity in Collegiate Athletics*, 27 CUMB. L. REV. 397, 417 (1996-1997).

18. 34 C.F.R. § 106.41(b) (1992). The regulation stated:

> 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.

Id.

19. *See* 45 Fed. Reg. 30,802, 30,962-63 (May 9, 1980) (to be codified at 34 C.F.R. pt. 106).

20. 34 C.F.R. § 106.41 (1992).

21. *Id.*

22. *See id.*

23. *See id.*

The first factor the Director of HEW was required to consider was "[w]hether the selection of sports and levels of competition effectively accommodate[d] the interests and abilities of members of both sexes."[24]

Second, the Director of HEW looked at whether the school provided male and female teams with equal equipment and supplies.[25] The equality of equipment and supplies was measured by the "quality, amount, suitability, maintenance and replacement, and availability of equipment and supplies."[26]

The third factor focused on whether the school attempted to schedule both prime practice time and events equally for girls' and boys' teams.[27]

Under the fourth factor, the Director of HEW considered the equality of travel and per diem allowances for both female and male teams.[28]

Fifth, the director of HEW looked at whether the school attempted to provide female and male students with equal opportunities to receive coaching and academic tutoring.[29]

Sixth, the Director of HEW considered whether the assignment and compensation of coaches and tutors for female and male teams were equal.[30] To determine the fairness and equality of coaches' compensation, the following factors were considered: length of contract, experience, coaching duties, working conditions, and other terms and conditions of employment.[31]

Factors seven through ten required the Director of HEW to evaluate the equality of locker rooms and practice and competitive facilities;[32] medical and training facilities and services;[33] housing and dining facilities and services;[34] and publicity.[35]

Although equal funding for individual boys' and girls' sports was not listed as a factor, schools were required to provide necessary funding so that the quality of the girls' program equaled the quality of the boys' program.[36] To illustrate, if the boys' cross-country team received new uniforms every two years, then the girls' cross-country team must be afforded the same treatment. It is important to note that even if the booster club bought the boys' team new uniforms *every* year, then the girls' team should also be given new uniforms

24. *Id.* § 106.41(c)(1).

25. *Id.* § 106.41(c)(2).

26. Laurie Priest & Liane M. Summerfield, *Promoting Gender Equity in Middle and Secondary School Sports Programs*, EDUCATION RESOURCE INFORMATION CENTER DIGESTS (ERIC), April 1994, at 3, *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/2a/20/58.pdf.

27. 34 C.F.R. § 106.41(c)(3) (1992).

28. *Id.* § 106.41(c)(4).

29. *Id.* § 106.41(c)(4)-(5).

30. *Id.* § 106.41(c)(6).

31. Priest & Summerfield, *supra* note 26, at 4.

32. 34 C.F.R. § 106.41(c)(7) (1992).

33. *Id.* § 106.41(c)(8).

34. *Id.* § 106.41(c)(9).

35. *Id.* § 106.41(c)(10).

36. Priest & Summerfield, *supra* note 26, at 3.

every year.[37] Complaints at the high school level arose when schools violated one or more of these factors.[38]

B. Interpreting the Requirements of Title IX

Shortly after the regulations were issued, the HEW received almost 100 discrimination complaints from more than fifty schools.[39] Because the HEW believed that many of these complaints showed a misunderstanding of what Title IX required,[40] several attempts were made to establish clear guidelines for schools with regard to the requirements of Title IX.[41]

1. The HEW's Policy Interpretation

The first attempt at interpreting Title IX was a document issued by the HEW entitled the "Policy Interpretation."[42] The purpose of the Policy Interpretation was to provide schools with further guidance regarding how to comply with Title IX.[43] The Policy Interpretation included a three-part test known as the "effective accommodation test."[44] This test continues to be one of the most controversial areas of Title IX.[45] The test considers three areas. First, substantial proportionality: whether the percentage of women participating in sports was proportional to the school's enrollment.[46] Second, program expansion: whether the school demonstrated a history and continuing practice of program expansion that was demonstrably responsive to the

37. *Id.*

38. *See id.*

39. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 at 71.413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

40. *See id.*

41. *See infra* Part II.B.

42. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413.

43. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,414.

44. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418. In addition to the three-part test, the Policy Interpretation listed two additional compliance factors schools may consider: whether on a program-wide basis the competitive schedules for men's and women's teams "afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; [and] whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among" those athletes. *Id.*

45. Eckes, *The Thirtieth Anniversary*, *supra* note 1, at 7-8. Although the 1979 Policy Interpretation was designed for intercollegiate athletics, the policy emphasizes that its principles also apply to intramural and interscholastic sports programs. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413.

46. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418.

developing interests and abilities of the members of the sex who were underrepresented among intercollegiate athletes.[47] Finally, full accommodation: whether the institution showed that the interests and abilities of the members of that sex had "been fully and effectively accommodated by the present program."[48]

2. The OCR's Clarification of Intercollegiate Athletic Policy Guidance

Unfortunately, the Policy Interpretation did not resolve all of the questions surrounding Title IX compliance. Therefore, in 1996, the Office for Civil Rights (OCR) issued the "Clarification of Intercollegiate Athletic Policy Guidance" (Clarification).[49] The Clarification illustrated how different factors should be considered to determine Title IX compliance.[50] The Clarification, however, proved to provide little guidance to schools.

3. The Department of Education's Commission

Despite the Policy Interpretation and the Clarification, enforcers and schools continued to struggle with interpreting the requirements of Title IX.[51] As a result of the continued confusion, the Department of Education (DOE) convened a commission to study Title IX (Commission).[52] The purpose of the fifteen-member Commission was to collect information and analyze Title IX issues based upon broad public input.[53] To gain input, the Commission held six public meetings across the country.[54] During these meetings, the Commission addressed a variety of questions that focused on the effectiveness of Title IX in promoting and creating equal opportunities for female and male student athletes.[55] The Commission also considered whether the available guidelines interpreting Title IX adequately enabled colleges and school districts to comply with Title IX's requirements.[56] Similarly, the Commission considered the usefulness of the three-part effective accommodation test, discussed above.[57]

47. *Id.*

48. *Id.*

49. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE PART TEST (1996), *available at* http://www.ed.gov/about/offices/list/ocr/docs/clarific.html.

50. *Id.*

51. Eckes, *The Thirtieth Anniversary*, *supra* note 1, at 25.

52. *See* Press Release, U.S. Dep't of Educ., Paige Creates Blue-Ribbon Panel to Examine Ways to Strengthen Enforcement, Expand Opportunity To Ensure Fairness For All (June 27, 2002), *available at* http://www.ed.gov/news/pressreleases/2002/06/06272002f.html.

53. *Id.*

54. Eckes, *The Thirtieth Anniversary*, *supra* note 1, at 13.

55. THE SECRETARY OF EDUCATION'S COMMISSION ON OPPORTUNITY IN ATHLETICS, U.S. DEP'T OF EDUC., OPEN TO ALL: TITLE IX AT THIRTY 3 (2003), *available at* http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf [hereinafter FINDINGS].

56. *Id.*

57. Press Release, U.S. Dep't of Educ., *supra* note 52.

The Commission heard strong support for retaining the test, but also heard numerous complaints about the test's ambiguity.[58]

In addition, the Commission investigated the loss of male sports teams.[59] Many people believed that Title IX required the elimination of male teams.[60] In fact, many male witnesses told the Commission they felt their teams were cut in order to comply with Title IX.[61] The Commission rebutted this claim, stating in its findings that the loss of male teams was not wholly due to Title IX enforcement.[62] Rather, the Commission noted that facility limitations and budgetary concerns put heavy pressure on educational institutions to cut back their athletic programs, which in some cases resulted in the loss of male teams.[63]

Additionally, the Commission heard testimony regarding universities' responsiveness to athletic participation and interests at the high school level.[64] The Commission concluded that universities were not appropriately responsive in this regard when designing university athletic programs.[65] In response to the miscommunication between high schools and universities, the Commission suggested that "if colleges [were] careful to factor in demonstrated athletic interest at the high school level, there may be greater likelihood that a large number of student athletes will be able to participate in college athletics."[66]

The Commission also reviewed other means of promoting female student participation in athletics. Specifically, the Commission considered whether the DOE would support efforts other than Title IX.[67] The Commission determined that an increase in allowable public-private scholarships for female athletes might provide an alternative to Title IX to increase female student participation in athletics.[68] As the scholarship program currently exists, the National Collegiate Athletic Association's (NCAA) scholarships may limit a school's ability to create additional opportunities in athletics for girls and women because of limitations related to full grants-in-aid.[69]

The Commission considered a variety of other issues including how activities such as cheerleading and bowling factored into an analysis of

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58. Erik Brady, *Commission to Look Closely at Title IX*, USA TODAY, June 28, 2002, at 9C, *available at* http://www.usatoday.com/sports/college/stories/2002-06-28-title-ix-senate.htm. *See also* CNN.com, Title IX Minority Pushes Enforcement, Not Change (Feb. 26, 2003), http://www.cnn.com/2003/EDUCATION/02/26/title.ix.report.ap/index.html.

59. FINDINGS, *supra* note 55, at 22, 24.

60. *See* Press Release, U.S. Dep't of Educ., *supra* note 52.

61. FINDINGS, *supra* note 55, at 24.

62. *Id.*

63. *Id.*

64. *Id.* at 27-28.

65. *Id.*

66. *Id.* at 28.

67. *Id.* at 32.

68. *Id.*

69. *Id.* at 28.

equitable opportunities.[70] Similarly, the Commission considered how opportunities in sports venues outside of schools, such as the Olympics, professional leagues, and community recreation programs interacted with the obligations of colleges and school districts to provide equal athletic opportunities.[71] Finally, the Commission considered how revenue-producing and large-roster teams at the university level affected the equality of athletic opportunities.[72] Some parties testified that while a number of male athletes "walked-on" to intercollegiate teams—meaning they joined the team without athletic financial aid and without being recruited—women rarely did so.[73]

Based on its findings, the Commission ultimately adopted twenty-three key recommendations and concluded that after thirty years, Title IX had made great progress in the athletic arena, but more still needed to be done to create opportunities for female athletes and to retain opportunities for male athletes.[74] With regard to high schools specifically, the Commission found that there was a general awareness of Title IX, but it was unclear whether high schools were in compliance with Title IX.[75]

4. The DOE's Additional Clarification of Intercollegiate Athletics Policy

Shortly after the Commission's study was completed, the DOE issued the "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three" (Additional Clarification).[76] As previously noted, under the third prong of the effective accommodation test, an institution was in compliance with Title IX if it effectively accommodated the athletic interests and abilities of its students.[77] The Additional Clarification allowed institutions to administer an e-mail survey to measure student interest in sports.[78] The e-mail survey was designed to generate a high response rate.[79] The Additional Clarification, however, recognized that not all recipients would respond to the e-mail survey and stated that a non-response to the survey would be interpreted "as a lack of interest."[80]

Title IX proponents, such as the NCAA, urged the DOE to rescind the Additional Clarification's e-mail response plan and maintain the 1996

70. *Id.*
71. *Id.* at 31.
72. *Id.* at 30.
73. *Id.*
74. *Id.* at 33.
75. *Id.* at 28.
76. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST—PART THREE (2005), *available at* http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf [hereinafter ADDITIONAL CLARIFICATION].
77. *Id.* at 1.
78. *Id.* at 7.
79. *Id.*
80. *Id.*

Clarification.[81] The NCAA argued that schools should not be permitted to use the survey alone to assess female students' interests in sports.[82] Specifically, the NCAA contended that the e-mail survey methodology was flawed and that this method unfairly shifted the burden from schools to female students who now had to demonstrate they were entitled to equal opportunity.[83]

III. IMPORTANT CASES AT THE HIGH SCHOOL LEVEL

To ensure compliance with Title IX, three methods of initiating enforcement exist: (1) complaints, (2) compliance reviews, and (3) lawsuits.[84] Under the first method, a person may file a compliant with the OCR alleging gender discrimination in violation of Title IX.[85] The OCR then undertakes an investigation of the school.[86] If no settlement can be reached, the OCR audits the offending school's sports program and orders it to make any changes necessary to comply with Title IX.[87]

The second enforcement mechanism, compliance review, permits the DOE to perform periodic investigations of randomly selected public schools to verify compliance with Title IX.[88] Although no complaint must be filed for the OCR to perform a compliance review, a compliance review can occur after a complaint is filed.[89] In 2001, the OCR initiated only two Title IX reviews of athletic programs.[90]

A final alternative to enforce Title IX compliance is to file a lawsuit against the offending school.[91] Although lawsuits are costly and time consuming, sometimes they are the most efficient way of bringing a school into compliance with Title IX for two main reasons.[92] First, even after a complaint

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81. Press Release, Nat'l Collegiate Athletic Ass'n, NCAA Leadership Groups Urge Department of Education to Rescind Additional Clarification for Title IX and Maintain 1996 Clarification (April 28, 2005), *available at* http://www2.ncaa.org/media_and_events/press_room/2005/april/20050428_titleix_resolution.html.

82. *Id.*

83. *Id.*

84. Holly Hogan, *What Athletic Departments Must Know About Title IX and Sexual Harassment*, 16 MARQ. SPORTS L.J. 317, 320-22 (2006).

85. *Id.*

86. *Id.*

87. *Id.*

88. Diane Heckman, *Is Notice Required in a Title IX Athletic Action Not Involving Sexual Harassment?* 14 MARQ. SPORTS L.J. 175, 195 (2003).

89. Hogan, *supra* note 84, at 320-22.

90. *Examining the Implementation and Progress of Title IX of the Education Amendments Act of 1972, Which Prohibits Sex Discrimination in All Aspects of Education: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 107th Cong. 104 (2002).

91. Hogan, *supra* note 84, at 320. *See also* Marjorie Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 502 (1987) (describing the OCR complaint process).

92. *See* Hogan, *supra* note 84, at 320.

is filed, OCR is not required to implement a full investigation.[93] In contrast, the filing of a lawsuit inevitably will result in an investigation by one or both of the parties. Second, the party who files a complaint with OCR cannot receive monetary damages even if OCR determines that the school violated Title IX.[94] Conversely, the plaintiff in a lawsuit can obtain monetary damages. Schools are more likely to comply with Title IX if non-compliance is punished with money damages.

As a result of these benefits, lawsuits in the high school arena have increased.[95] Although most Title IX challenges have focused on inequities in higher education, there are certainly inequities between boys' and girls' athletic programs in high schools.[96] The high school cases involve similar problems as university level cases, namely inferior treatment and inadequate opportunities to participate.[97] In addition to Title IX claims, it is also important to note that several high school athletic complaints allege an Equal Protection Clause violation.[98] The Equal Protection Clause states, in part, that no person should be denied "the equal protection of laws."[99] Essentially, under the Equal Protection Clause, female athletes should not be treated differently than male athletes.

This section addresses several of the key high school Title IX cases. The cases are not discussed chronologically, but are arranged by the following themes: athletic seasons and schedules, athletic interests and opportunities, disparities in athletic programs, and retaliation claims.

A. Athletic Seasons and Schedules

Three cases have focused on the equality of athletic seasons and schedules for girls' and boys' teams.[100] These cases illustrate a trend within the courts to ensure equal scheduling opportunities in high school athletics.

In the first case, *Ridgeway v. Montana High School Ass'n*, a group of girls who attended Montana public high schools and their parents sued the Montana High School Association and various school districts alleging that the defendants unlawfully discriminated against them in violation of Title IX and

93. *See id.*

94. *See id.*

95. *See generally* Lynne Tatum, Comment, *Girls in Sports: Love of the Game Must Begin at an Early Age to Achieve Equality*, 12 SETON HALL J. SPORT L. 281 (2002) (discussing recent Title IX cases at both the high school and college levels).

96. *Id.* at 281.

97. *See id.*

98. *See, e.g.*, Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, No. 1:98-CV-479, 2000 U.S. Dist. LEXIS 675 (W.D. Mich. Jan. 21, 2000), *aff'd*, 377 F.3d 504 (6th Cir. 2004), *reaff'd*, 459 F.3d 676 (6th Cir. 2006); Alston v. Va. High Sch. League, Inc., 144 F. Supp. 2d 526 (W.D. Va. 1999).

99. U.S. CONST. amend. XIV, § 1.

100. Ridgeway v. Mont. High Sch. Ass'n, 858 F.2d 579 (9th Cir. 1988); *Cmtys. for Equity*, 2000 U.S. Dist. LEXIS 675; *Alston*, 144 F. Supp. 2d 526.

the Equal Protection Clause.[101] The plaintiffs explained that high school sports seasons were typically scheduled uniformly throughout the country.[102] The plaintiffs argued that the defendants discriminated against them by scheduling the boys' sports seasons to coincide with athletic seasons in the rest of the country, while failing to do this for the girls' sports seasons.[103]

Under the supervision of the district court and a negotiation facilitator, the parties entered into a settlement agreement.[104] The facilitator determined that the school district should, among other things, reschedule the seasonal placement of several girls' sports to achieve equity.[105] The parties eventually reappeared before the district court, which held that the defendants had not complied with the settlement agreement.[106] However, the district court also held that the schools' placement of athletic seasons did not violate equal protection; therefore, the schools did not need to reschedule the seasons.[107]

The Ninth Circuit Court of Appeals, however, held that the plaintiffs did not properly present the issue of seasonal placement to the district court; therefore, the district court should not have ruled on that issue.[108] The court of appeals did not express an ultimate opinion on the issue of seasonal placement.[109] Instead, it focused on the settlement agreement reached by the parties.[110] The court of appeals held that the schools must continue to create greater equality in athletics and the court would maintain jurisdiction to ensure that equality was accomplished through compliance with Title IX and the settlement agreement.[111]

In a similar case, *Communities for Equity v. Michigan High School Athletic Ass'n*, a group of female Michigan high school athletes and their mothers alleged that the scheduling of girls' and boys' athletic seasons was inequitable and violated Title IX and the Equal Protection Clause.[112] Specifically, the plaintiffs alleged that the Michigan High School Athletic Association (MHSAA), which was responsible for scheduling athletic seasons, scheduled athletic seasons and tournaments for girls' sports during a less desirable time of the year than the boys' seasons.[113] The MHSAA argued, among other things, that scheduling girls' and boys' sports in different seasons was necessary because there was an insufficient number of coaches and

101. 858 F.2d 579.
102. *Id.* at 585.
103. *Id.*
104. *Id.* at 583.
105. *Id.* at 586.
106. *Id.* at 587.
107. *Id.*
108. *Id.* at 589.
109. *Id.*
110. *Id.*
111. *Id.*
112. 178 F. Supp. 2d 805, 807 (W.D. Mich. 2001) *aff'd*, 377 F.3d 504 (6th Cir. 2004), *reaff'd*, 459 F.3d 676 (6th Cir. 2006).
113. *See id.*

qualified game officials in Michigan to schedule all boys' and girls' sports during concurrent seasons.[114] The district court rejected this justification for scheduling sports during nonconcurrent seasons.[115] The court ordered the MHSAA to change its scheduling of high school athletic seasons so that the schedule disadvantaged and advantaged boys' and girls' teams equally.[116] This decision was affirmed by the Sixth Circuit Court of Appeals in 2006.[117]

In a final case involving the scheduling of sports seasons, *Alston v. Virginia High School League*, a group of high school female athletes and their parents filed suit against the Virginia High School League (VHSL) for violating Title IX and several other laws.[118] The plaintiffs alleged that the VHSL's athletic season schedule constituted intentional sex discrimination against female athletes because scheduling changes prohibited girls, but not boys, from playing certain sports due to scheduling conflicts.[119] Specifically, the VHSL uniformly scheduled boys' sports in the same season regardless of the size of their respective schools.[120] As a result, for example, all boys' basketball teams played during the winter season.[121] In contrast, the VHSL scheduled girls' sports seasons based on school size.[122] Consequently, some girls' basketball teams played in the fall while others played in the winter.[123] The plaintiffs argued this scheduling method was discriminatory because it forced them to give up sports they previously played due to scheduling conflicts, while boys experienced no such conflicts.[124] The VHSL filed a motion for summary judgment on the Title IX claim, and argued, among other things, that its scheduling method was not discriminatory.[125] The court rejected VHSL's motion for summary judgment, finding there were multiple issues of material fact to be decided under the Title IX claim.[126]

B. Athletic Interests and Opportunities

In addition to ensuring equity in sports' season schedules, courts have addressed issues involving the athletic opportunities available to female and male high school students. These cases illustrate how high schools may

114. *Id.* at 830-31.
115. *Id.* at 850-51.
116. *Id.* at 862.
117. Cmty's for Equity v. Mich. High Sch. Ath. Ass'n., 459 F.3d 676 (6th Cir. 2006).
118. 144 F. Supp. 2d 526, 527-28 (W.D. Va. 1999).
119. *Id.* at 528.
120. *Id.*
121. *Id.*
122. *Id.* at 528-29.
123. *Id.* at 528.
124. *Id.* at 529.
125. *Id.*
126. *Id.* at 536, 540.

attempt to effectively accommodate athletic interests.[127] They also demonstrate possible inconsistencies among high schools when trying to decide what constitutes enough "interest" to accommodate a specific athletic interest.[128] In addition, they emphasize that plaintiffs need to prove defendants had actual knowledge of the discriminatory effect in order to establish an equal protection violation or receive monetary damages for a Title IX violation.[129]

For example, the plaintiffs in *Horner v. Kentucky High School Athletic Ass'n* challenged the athletic opportunities offered at high schools in Kentucky.[130] A group of female high school athletes sued the Kentucky High School Athletic Association (Association) and the Kentucky State Board for Elementary and Secondary Education (Board), alleging the Association's failure to sanction fast-pitch softball violated the Equal Protection Clause, Title IX, and Kentucky law.[131] Although the Association did not sanction softball for girls, it sanctioned baseball for boys.[132] The plaintiffs argued this arrangement constituted discrimination because it diminished the girls' ability to compete for college athletic scholarships, compared with boys who could play baseball and compete for scholarships.[133] In response, the Board and Association contended that their decision not to sponsor fast-pitch softball was valid and not discriminatory because it complied with their self-imposed "25% rule."[134] The rule required at least 25% of the member schools to indicate a willingness to participate in order to sanction a new sport.[135] The Board and Association noted that, at the time of the lawsuit, only between 9% and 17% of member schools were interested in creating girls' fast-pitch softball.[136] The defendants filed a motion for summary judgment based on this argument.[137]

The district court granted the defendants' motion for summary judgment, holding that the defendants had complied with Title IX because they offered equal opportunities in accordance with the interests and abilities of students.[138] The district court also held that the defendants did not violate the Equal Protection Clause because they permitted students to participate in sanctioned sports without gender restriction.[139]

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127. *See, e.g.*, Horner v. Ky. High Sch. Athletic Ass'n, 206 F.3d 685, 694-95 (6th Cir. 2000).

128. *See, e.g.*, *id.*

129. *See, e.g.*, *id.* at 697.

130. *Id.* at 687-88.

131. *Id.* at 687.

132. *Id.*

133. *Id.* at 688.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

The Sixth Circuit Court of Appeals affirmed in part and reversed in part.[140] The court found there was no equal protection violation because the plaintiffs failed to prove the Board and Association intentionally discriminated against them; mere disparate impact was insufficient to establish an equal protection violation.[141] However, the court of appeals reversed the district court's judgment with regard to the Title IX claim and remanded the case to the district court.[142]

While the girls' appeal was pending, the Kentucky General Assembly amended the statute regulating high school sports.[143] The amended statute directed the Board and Association to promulgate regulations requiring schools to offer the sport for which the NCAA offers athletic scholarships when one of two similar sports was offered.[144]

On remand, the district court again granted summary judgment for the defendants, holding the legislature's amendment rendered the plaintiffs' Title IX claim moot.[145] Perhaps most importantly, the district court also held that Title IX did not provide plaintiffs with a right to compensatory damages unless they presented proof of intentional discrimination.[146] The Sixth Circuit affirmed the district court's ruling.[147]

C. Disparities in Athletic Programs

Another line of high school Title IX cases focused on disparities between female and male sports teams. In particular, two Florida cases examined disparities between the boys' baseball programs and the girls' softball programs.[148] Both cases emphasized the need for school districts to provide equitable facilities for girls and boys.[149] As noted, although funding for specific boys' and girls' sports is not required for Title IX compliance, schools are required to provide necessary funding so the quality of the girls' program equals the quality of the boys' program.[150] Also, high schools have to ensure equal equipment and supplies are available for boys' and girls' teams.[151]

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140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 689.
146. *Id.*
147. *Id.* at 698.
148. Landow v. Sch. Bd. of Brevard County, Fla., 132 F. Supp. 2d 958 (M.D. Fla. 2000); Daniels v. Sch. Bd. of Brevard County., 985 F. Supp. 1458 (M.D. Fla. 1997).
149. *Landow*, 132 F. Supp. 2d at 958-59; *Daniels*, 985 F. Supp. at 1460-62.
150. *See* Eckes, *Another Pin for Women*, *supra* note 1, at 684-87; Eckes, *The Thirtieth Anniversary*, *supra* note 1, at 7 (listing factors the Director of HEW must consider in evaluating whether athletic opportunities were afforded equally to males and females).
151. Eckes, *Another Pin for Women*, *supra* note 1, at 684-87; Eckes, *The Thirtieth Anniversary*, *supra* note 1, at 7.

In the first disparity case, *Daniels v. School Board of Brevard County*, two members of a girls' varsity softball team and their fathers sued the school board under Title IX and the Florida Educational Equity Act because of disparities between the high school girls' softball and boys' baseball programs.[152] The girls alleged that the boys were unfairly given a lighted playing field, a scoreboard, a batting cage, bathroom facilities, superior bleachers, a concession stand, and a press box, while the girls' team did not have such amenities.[153]

The court held that the cumulative effect of the inequalities between the two athletic programs was significant enough to give the athletes a substantial likelihood of success on the merits in the Title IX and Florida Act claims.[154] The court subsequently entered a preliminary injunction ordering the school to take steps toward equalizing the facilities at the boys' baseball field and the girls' softball field.[155]

Similarly, in *Landow v. School Board of Brevard County*, a group of girls who played softball at two high schools in the same school district sued the district, alleging there were disparities between the girls' softball and boys' baseball programs.[156] The school district relegated the girls' softball teams to an off-campus field while the boys' teams remained on campus.[157] Additionally, the girls rarely had access to lights, and they had no scoreboard controls, concession stands, or press boxes, although the boys' teams did.[158] The court found that the disparities between the girls' and boys' resources violated Title IX and subsequently issued a preliminary injunction.[159]

D. Retaliation

The most recent case to enter the Title IX arena involved a retaliation claim. In *Jackson v. Birmingham Board of Education*, the question before the court was whether an individual against whom a school had retaliated for complaining about sex discrimination in violation of Title IX could invoke Title IX's private right of action provision.[160] This case is particularly important because it was a United States Supreme Court case.

In *Jackson*, a public high school girls' basketball coach complained to his supervisors when he learned that the girls' team was not receiving equal funding and equal access to athletic equipment.[161] The coach argued that the

152. 985 F. Supp. at 1459.
153. *Id.* at 1460-62.
154. *Id.* at 1462.
155. Daniels v. Sch. Bd. of Brevard County., 995 F. Supp. 1394, 1394-95 (M.D. Fla. 1997).
156. 132 F. Supp. 2d 958, 958-59 (M.D. Fla. 2000).
157. *Id.* at 959-60.
158. *Id.*
159. *Id.* at 966-67.
160. 544 U.S. 167, 171 (2005).
161. *Id.*

lack of funding made it difficult for him to perform his job functions.[162] The coach also requested that school officials provide the girls' basketball team with equipment equivalent to the boys' equipment.[163] After making the complaint, the coach received negative work evaluations and was later removed from his coaching position.[164] In his lawsuit, the coach alleged that the school board violated Title IX by retaliating against him for complaining about sex discrimination within the athletic program.[165] The Board argued that the coach could not bring a claim under Title IX because Title IX's private right of action provision did not encompass retaliation claims.[166] Alternatively, the Board argued that even if Title IX's private right of action encompassed retaliation claims, the coach was not entitled to invoke this provision because he was not a direct victim of sex discrimination.[167]

The Eleventh Circuit Court of Appeals, basing its decision on precedent, affirmed the district court's holding that Title IX's private right of action provision did not include retaliation claims.[168] The court of appeals explained that the DOE's Title IX regulation expressly prohibited retaliation, but did not create a private cause of action.[169] The court further explained in a later decision that even if Title IX created a cause of action for retaliation, the coach was not within the class of persons the statute protected.[170]

Because the Eleventh Circuit's holding was in direct contrast to the holdings in two other circuits,[171] the U.S. Supreme Court granted *certiorari* to resolve this conflict.[172] The Court reversed the Eleventh Circuit and held that Title IX's private right of action provision created a cause of action for individuals who reported sex discrimination if schools subsequently retaliated against them.[173] Writing for the majority, Justice O'Connor reasoned that when a funding recipient retaliated against someone for complaining of sex discrimination, it constituted intentional discrimination "on the basis of sex" and therefore violated Title IX.[174] O'Connor explained that retaliation was an

162. *Id.*
163. *Id.*
164. *Id.* at 172.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333, 1346 (11th Cir. 2002).
171. *Compare* Lowrey v. Tex. A & M Univ. Sys., 117 F.3d 242, 253 (5th Cir. 1997) (holding that Title IX created a private right of action for retaliation), *and* Preston v. Va. *ex rel.* New River Cmty. Coll., 31 F.3d 203, 206 (4th Cir, 1994) (holding that Title IX created a private right of action for retaliation), *with Jackson*, 309 F.3d at 1347 (holding that Title IX does not imply a private right of action for retaliation for individuals who complained about gender discrimination suffered by others).
172. *Jackson*, 544 U.S. 167.
173. *Id.* at 183-84.
174. *Id.* at 174.

intentional act by definition, and it constituted discrimination because it subjected the individual to differential treatment.[175] The Court explained that Title IX's broad language prohibiting discrimination "on the basis of sex" did not require that the victim of the retaliation also be the victim of the initial Title IX violation.[176] Specifically, the Court explained that the statute's "on the basis of sex" requirement was satisfied in this case because the coach spoke out against sex discrimination.[177] Furthermore, the Court explained that the holding was consistent with Congress' intent in enacting Title IX.[178] Relying on a prior case interpreting Congress' intent, the Court reasoned that Congress enacted Title IX not only to prevent the use of federal money to support discriminatory practices, but also "to provide individual citizens effective protection against those practices."[179] This objective, according to the Court, would not be achieved if those who complained about sex discrimination were not effectively protected from retaliation.[180]

In his dissenting opinion, Justice Thomas argued that whistleblowers, such as the coach, should not be given protection unless explicitly stated by Congress.[181] In fact, Thomas explained that Congress was required to "speak unambiguously in imposing conditions on funding recipients through its spending power."[182] Thomas further pointed out that other civil rights laws have specific provisions addressing retaliation; therefore, the lack of such a provision in Title IX implied Congress did not intend for individuals to have the right to bring retaliation claims under Title IX.[183] Additionally, Thomas explained that retaliation claims did not satisfy Title IX's requirement that the discrimination was "on the basis of sex."[184]

Despite Thomas's dissent, the *Jackson* decision clarified that schools may be required to pay compensatory and punitive damages for retaliation claims.[185] It is important to note that even though the Court permitted retaliation claims to be filed under Title IX, the plaintiff was still required to prove there was a causal relationship between the Title IX violation complaints and the retaliation.[186]

175. *Id.* at 173-74.
176. *Id.* at 179.
177. *Id.*
178. *Id.* at 179-80.
179. *Id.* at 180 (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1978)).
180. *Id.*
181. *See id.* at 184 (Thomas, J., dissenting).
182. *Id.*
183. *Id.* at 189-91.
184. *Id.* at 186-91.
185. *See id.* at 182-84 (majority opinion).
186. *Id.* at 184.

IV. EFFECT OF THE SUPREME COURT ON TITLE IX

Although the *Jackson* decision was a victory for Title IX proponents, the new composition of the Supreme Court may have a negative impact on future Title IX decisions. During Justice O'Connor's tenure on the Court, the Supreme Court decided cases affecting women's legal rights by only slight margins. Although Justice O'Connor joined the Court as a conservative, she became a centrist who regularly voted for both liberal and conservative measures; therefore, hers was often the deciding vote. In addition to being the swing vote in *Jackson*, Justice O'Connor was the pivotal vote in several other Title IX cases.[187] For example, Justice O'Connor was the swing vote in a decision holding that a claim may be brought under Title IX to challenge peer sexual harassment[188] and in another case holding that a state university could not exclude men from its nursing school.[189] Her retirement leaves many wondering how future Title IX cases will be decided.

Certainly, decisions favoring gender equity could be jeopardized in future Title IX athletic cases depending on the leaning of the new court. If Justice Alito and Chief Justice Roberts, who both recently joined the Court, do not share Justice O'Connor's independent and balanced perspective, gender equity could be in danger. Looking at Justice Alito's opinions prior to joining the Supreme Court can help shed light on how the new Court will rule on gender equity cases, specifically Title IX cases.

Several observers contend that with the addition of Justice Alito to the Court, the center will most certainly shift to the right.[190] A brief review of Justice Alito's opinions while he was a judge on the Third Circuit Court of Appeals, arguably affirms this view. It is important to note that Judge Alito was only involved in a few Title IX cases, none of which focused on athletics.[191] Although not directly on point, these cases involved equity and gender, and suggest that Justice Alito may interpret Title IX conservatively and favor schools over female athletes in Title IX cases. For example, Judge Alito and other members of the Third Circuit affirmed, without opinion, two district court decisions that rejected student claims of sexual harassment by other students.[192] Additionally, Judge Alito was part of a 7-5 en banc majority which

187. *See, e.g.*, Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 646-47 (1999) (finding the school district liable for peer harassment under Title IX); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 731-32 (1982) (holding male students are permitted to enroll in university nursing school); United States v. Virginia, 518 U.S. 515, 519 (1996) (finding the state violated the Equal Protection Clause when it denied women enrollment in a publicly funded university).

188. *Davis*, 526 U.S. at 646-47.

189. *Hogan*, 458 U.S. at 731-32.

190. Nat'l Women's Law Ctr., A Changing Supreme Court and Women's Rights (May 2006), http://www.nwlc.org/pdf/SupremeCourtFactSheetMay06.pdf.

191. Nat'l Women's Law Ctr., Judge Alito Has Taken Positions That Would Undermine Critical Anti-Discrimination Protections For Women (2006), http://saveourcourts.civilrights.org/remote-page.jsp?itemID=28328720.

192. *Id.*

held that a school had no duty to protect its students from sexual harassment by other students.[193] Furthermore, in another opinion, Judge Alito argued that the plaintiff's allegation that she was subjected to comments and reprimands after complaining of sexual harassment "[did] not rise to the level of the 'adverse employment action' required for a retaliation claim."[194]

Like Justice Alito, Chief Justice Roberts likely will vote in favor of schools rather than female athletes in Title IX cases. In fact, the *Washington Post* recently reported that Chief Justice Roberts argued that the Supreme Court should curb the reach of Title IX.[195]

Because of the recent changes to the Supreme Court and the Court's significant influence on Title IX, school officials should certainly pay attention to future Title IX cases in the Supreme Court. The recent shift in the membership of the Supreme Court will likely have negative ramifications for future Title IX cases. It appears unlikely that Justice Alito and Chief Justice Roberts will approach Title IX cases in the same fashion as Justice O'Connor. Likely, both new justices will view Title IX from a more conservative viewpoint than Justice O'Connor, suggesting that Title IX will be interpreted more narrowly.

V. CONCLUSION

Although universities, rather than high schools, are typically in the spotlight for Title IX violations, Title IX compliance is equally important at the high school level. As the case law suggests, issues of gender equity in athletics abound at the high school level. Given the rise in Title IX violation lawsuits, high schools' compliance with Title IX is increasingly important. School administrators who want to avoid costly litigation can look to case law for guidance on how to comply with Title IX. The case law suggests that school officials need to ensure gender equity in athletic opportunities and avoid disparities between athletic programs for boys and girls. School officials should also ensure that athletic seasons and schedules and overall athletic programs are equitable. If equity is not maintained, the potential for lawsuits is great.

School officials who wish to avoid Title IX lawsuits must also be mindful of the *Jackson* decision. The *Jackson* decision is particularly significant because it protects individuals who accuse academic institutions of sex discrimination from retaliation. Specifically, teachers and coaches who are fired for complaining about Title IX violations may file suit against the school under Title IX. As a result, the *Jackson* decision may trigger more litigation at

193. *The Nomination of Samuel Alito: A Watershed Moment for Women*, SPECIAL REPORT (Nat'l Women's Law Ctr., Washington D.C.), Dec. 15, 2005, at 37, *available at* http://www.nwlc.org/pdf/NWLCAlitoReport12-15-05.pdf (discussing D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992)).

194. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1301 (3rd Cir. 1997).

195. R. Jeffrey Smith, Jo Becker & Amy Goldstein, *Documents Show Roberts Influence in Reagan Era*, WASHINGTON POST, July 27, 2005, at A1.

the high school level. Such lawsuits may be warranted as one study found that 62% of employees who report sexual harassment suffered subsequent retaliation.[196] Indeed, the *Jackson* decision will likely prompt reports of bias that would have otherwise remained unreported.

Although case law provides school officials with some guidance on how to comply with Title IX, school officials must remain cognizant of pending Title IX lawsuits, particularly at the Supreme Court level. Because the new composition of the Supreme Court is likely to have a great effect on how courts interpret Title IX, school officials should pay close attention to Supreme Court Title IX cases to determine what is required of them.

196. Greg Stohr, *Sex-Bias Retaliation Suits Allowed, High Court Rules*, BLOOMBERG.COM, May 4, 2005, http://www.bloomberg.com/apps/news?pid=10000087&sid=aG.KpsyklY6w&refer=top_world_news.