

II. TITLE IX BASICS

BREAKING DOWN BARRIERS



Title IX of the Education Amendments of 1972 (Title IX)⁶ prohibits sex discrimination in any educational program or activity receiving federal financial assistance. It provides in pertinent part: “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 education program or activity receiving Federal financial assistance.”⁷ While Title IX’s scope goes well beyond athletics, it provides the primary federal cause of action against sex discrimination in athletics in education.⁸

Title IX is enforceable administratively, principally through the U.S. Department of Education and its Office for Civil Rights (OCR),⁹ with the ultimate remedy of defunding the offending institution of all federal funds.¹⁰ It is also enforceable in the courts through a private right of action, the subject of *Breaking Down Barriers*.

A. TITLE IX’S COVERAGE OF ATHLETICS

Despite the brevity of its language, Title IX was intended to cover a broad range of educational activities, including all facets of school athletics programs. Congress, the Department of Education, and the courts have repeatedly confirmed this. Chapter III addresses the Title IX analytical framework for athletics discrimination claims in detail; the material below provides a brief history of the arguments made concerning Title IX’s application to athletics, as well as an introduction to the basic policy documents and court decisions that have shaped the development of the law in this area. As is clear from the legislative history, administrative guidance, and judicial interpretations discussed below, Title IX has always been intended to apply broadly to ensure equal opportunity in all aspects of athletics.

⁶ 20 U.S.C. §§ 1681-87 (1988), as amended by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687).

⁷ 20 U.S.C. § 1681(a).

⁸ There are other legal claims available to challenge athletics discrimination. Federal constitutional claims may be brought against state actors pursuant to 42 U.S.C. § 1983, while employment claims may also be brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Equal Pay Act, 29 U.S.C. § 206(d). Claims may also be available under state law, including both state constitutional and statutory provisions.

⁹ The OCR both investigates complaints and conducts compliance reviews. Complaints may be brought by any interested party. If the OCR finds a violation, it will seek to resolve the problem through a conciliation process with the offending institution. If the OCR is not able to reach an acceptable agreement, it has the authority to refer cases for enforcement proceedings either through the Department of Education or the Department of Justice. The OCR has rarely taken this course. See generally Office for Civil Rights, Department of Education, OCR Case Resolution and Investigation Manual, May 2005, available at <http://www.ed.gov/about/offices/list/ocr/docs/ocrcrm.html>.

¹⁰ 20 U.S.C. § 1682. No educational institution has, to date, lost federal funding due to a Title IX violation.

1. ENACTMENT OF TITLE IX

Title IX was enacted as an amendment to the Education Amendments of 1972, which amended the Higher Education Act of 1965. According to the Department of Health, Education, and Welfare (HEW), the agency originally charged with enforcing Title IX, “[T]he legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions.”¹¹ As the principal Senate sponsor, Senator Birch Bayh, explained, Title IX was designed to be “a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.”¹²

As initially conceived, Title IX would simply have added the word “sex” to the broad prohibition against race and national origin discrimination of all types by recipients of federal funds in Title VI of the Civil Rights Act of 1964.¹³ However, hearings held on the subject of sex discrimination primarily focused on education.¹⁴ Accordingly, a provision more narrowly tailored to address sex discrimination in education was introduced in 1971 and was eventually enacted as Title IX. Despite its application to a more limited range of recipients, however, Title IX was always intended to cover the broadest range of educational activities, including athletics. Subsequent legislative history confirms this point.

2. POST-ENACTMENT EFFORTS TO LIMIT TITLE IX'S APPLICABILITY TO ATHLETICS

While there were limited references to intercollegiate athletics during the debates surrounding the enactment of Title IX,¹⁵ it was not until shortly after Title IX was passed that intercollegiate athletics became a major focus of congressional debate. During the mid-1970s, Congress defeated several attempts to limit Title IX's application to intercollegiate athletics. The first was the Tower Amendment, offered in 1974, which would have exempted revenue-producing sports from Title IX's discrimination analysis.¹⁶ Congress rejected this amendment,

¹¹ U.S. Department of Education Athletic Guidelines; Title IX of the Education Amendments of 1972: A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,423 (1979) (hereinafter Policy Interpretation), available at <http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html>.

¹² 118 CONG. REC. 5804 (1972) (remarks of Sen. Bayh).

¹³ 42 U.S.C. § 2000d (1988).

¹⁴ *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor on § 805 of H.R. 16098*, 91st Cong., 2d Sess. (1970).

¹⁵ See 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh on privacy in athletic facilities); 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh noting that proposed Title IX will not require co-educational football teams).

¹⁶ 120 CONG. REC. 15,322-23 (1974) (statements of Sen. Tower); see also Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,413.

instead adopting the Javits Amendment,¹⁷ which charged HEW with issuing Title IX regulations covering, *inter alia*, intercollegiate athletics. In formulating these regulations, HEW was required to “consider . . . the nature of particular sports.”¹⁸

3. PROMULGATION OF REGULATIONS

In 1974, HEW proposed regulations that addressed sex discrimination under Title IX, including sex discrimination in athletics. The agency received approximately 10,000 comments in response to its proposed regulations,¹⁹ many of which addressed the athletics provisions.²⁰ After final regulations, which incorporated many of these comments, were published in 1975,²¹ Congress held extensive hearings that focused on the athletics regulations.²² Substantial evidence was introduced into the record regarding the pervasive nature of sex discrimination in intercollegiate athletic programs and the need for Title IX to address the problem. In addition to the statements of the principal sponsors of Title IX in both the House and the Senate,²³ testimony of many other witnesses established a thorough record of widespread discrimination against women in competitive athletics.²⁴

¹⁷ *S. Conf. Rep. No. 1026*, 93d Cong., 2d Sess. 4271 (1974). The Javits Amendment became part of the Education Amendments of 1974, Pub. L. 93-380, Title VIII, § 844, 88 Stat. 484,612 (1974). HEW was given thirty days from the date of the enactment to issue regulations.

¹⁸ Education Amendments of 1974, § 844.

¹⁹ *Sex Discrimination Regulations, Hearings Before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. and Labor*, 94th Cong., 1st Sess. 438 (1975) (hereinafter *Sex Discrimination Regulations Hearings*) (testimony of Casper Weinberger, Secretary of the Department of Health, Education and Welfare).

²⁰ As Secretary Weinberger testified, “With regard to athletics, I have to say, Mr. Chairman and members of the committee, I had not realized until the comment period closed that the most important issue in the United States today is intercollegiate athletics, because we have an enormous volume of comments about them.” *Id.* at 439.

²¹ 40 Fed. Reg. 24,128 (1975) (these regulations currently appear at 34 C.F.R. Part 106 (2006)).

²² HEW’s final regulations were subjected to congressional oversight pursuant to § 431 of the General Education Provisions Act. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 531-32 (1982). At that time, Congress could prevent implementation of the regulations by enacting, within 45 days of their issuance, a concurrent resolution disapproving them. *Id.* The procedure laid out in the General Education Provisions Act was subsequently invalidated by the Supreme Court in *INS v. Chadha*, 462 U.S. 919 (1983).

²³ See, e.g., *Sex Discrimination Regulations Hearings*, *supra* note 19, at 165-66 (statement of Rep. Mink, principal House sponsor, that intercollegiate programs were intended to be covered by Title IX) and at 171, 179 (statements of Sen. Bayh, principal Senate sponsor, that eradication of discrimination in athletic programs is an essential component of eliminating discrimination against women at all levels of education).

²⁴ See, e.g., testimony of Rep. McKinney, *id.* at 197 (noting that the average educational institution spends far less on women’s athletics than on men’s; for instance, “Ohio State University spent 1,300 times more for their men’s athletic program than for women’s sports”); Laurie Mabry, President, Ass’n of Intercollegiate Athletics for Women, *id.* at 135-36 (citing statistical evidence that, on average, women’s athletics received less than 2 percent of the total intercollegiate athletic budget in 1974-75); Kathy Kelly, President, U.S. Nat’l Student Ass’n, *id.* at 77-78 (describing differences in treatment of men’s and women’s swim teams at University of Minnesota during the 1973-74 school year; for instance, “men are guaranteed their way paid to nationals if they [qualify] The women’s swim team sold ‘T’ shirts to raise \$450 to send [a female athlete who qualified] to the national event Three qualified women swimmers stayed home.”); Lynn Heather Mack, Executive Director, Intercollegiate Ass’n of Women Students, *id.* at 305 (“Women’s teams are still forced to sell cookies to pay for uniforms and travel funds, although they may have a more successful record than their male counterpart which flies to their tournaments.”); Norma Raffel and Margaret Dunkle, Women’s Equity Action League, *id.* at 283-304 (testimony regarding discrimination against girls and women in sports); Nellie Varner, Nat’l Ass’n of State Univ. and Land Grant Colleges, American Council on Education, and Ass’n of American Univs., *id.* at 418 (“We certainly believe that athletics are an integral part of the educational process of educational institutions; we also know that gross discrimination has existed in athletic programs for women institutions of higher education and that change in this area of campus life is necessary”). *But see* Darrell Royal, President, American Football Coaches Ass’n, *id.* at 46-66; John Fuzak, President, Nat’l Collegiate Athletic Ass’n, *id.* at 98-122. Similar evidence of discrimination in college athletics was presented at Title IX hearings held in the Senate Subcommittee on Education in September 1975. *Prohibition of Sex Discrimination, 1975, Hearings Before the Subcomm. on Education of the Comm. on Labor and Public Welfare on S. 2106*, 94th Cong., 1st Sess. 49-150 (1975) (hereinafter *Hearings on S. 2106*). The testimony revealed discrepancies in the opportunity to receive coaching and in other benefits and opportunities, such as the quality and amount of equipment, access to facilities and practices times, publicity, medical, and training facilities, and housing and dining facilities. See *Hearings on S. 2106* at 56 (testimony of Margy DuVal, President, Intercollegiate Ass’n of Women Students, noting disparities in funding and treatment of male and female students at various institutions; for instance, “[a]t Ohio State University, where men operate on a \$6 million budget, the female swimmers use the pool from 6:30am to 9:30am . . . when men don’t want it”).

Among the bills introduced during the 45 days given to Congress to disapprove the regulations were concurrent resolutions to disapprove the regulations in their entirety,²⁵ as well as resolutions to disapprove the regulations insofar as they applied to athletics.²⁶ Congress passed none of these resolutions. Thus, the Title IX regulations went into effect on an extensive and explicit record of sex discrimination in intercollegiate athletics and reflect the intent of Congress to apply the law proactively to eradicate the barriers limiting women's opportunities in sports.

4. DEVELOPMENT OF THE POLICY INTERPRETATION AND SUBSEQUENT CLARIFICATIONS

Three years after issuing the regulations and following the receipt of numerous complaints alleging discrimination in postsecondary athletics, HEW's OCR proposed a policy interpretation "to provide a framework within which . . . complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs."²⁷ After the proposed policy guidance was published, HEW received "[o]ver 700 comments reflecting a broad range of opinion" and "visited eight universities . . . to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses."²⁸ Also following the comment period, the OCR representatives "met for additional discussions with many individuals and groups, including college and university officials, athletic associations, athletic directors, women's rights organizations, and other interested parties."²⁹

The final Policy Interpretation reflects many of the comments as well as information gathered from the campus interviews.³⁰ It sets out in detail the operative rules for determining whether an athletic program is in violation of Title IX. The Policy Interpretation also documents evidence of discrimination against women in intercollegiate athletics, as both a historic phenomenon and a continuing practice. It explicitly discusses the depth and breadth of the problem, addressing discrimination in participation opportunities³¹ as well as "the

²⁵ See S. Con. Res. 46, 121 CONG. REC. 17,301 (1975); H. Con. Res. 310, 121 CONG. REC. 19,209 (1975).

²⁶ See S. Con. Res. 52, 121 CONG. REC. 22,940 (1975); H. Con. Res. 311, 121 CONG. REC. 19,209 (1975).

²⁷ Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,413.

²⁸ *Id.*

²⁹ *Id.* at 71,419-20.

³⁰ *Id.* at 71,413.

³¹ See Appendix A – "Historic Patterns of Intercollegiate Athletics Program Development," Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,419. The Policy Interpretation demonstrates, for instance, although women accounted for 48 percent of national undergraduate enrollment, they represented only 30 percent of intercollegiate athletes. It further explains that "[t]he historic emphasis on men's intercollegiate athletic programs has also contributed to existing differences in the number of sports and scope of competition offered men and women." *Id.*

absence of a fair and adequate level of resources, services, and benefits” for women’s athletics.³²

A policy clarification issued by the OCR on January 16, 1996 (the 1996 Clarification), explains the Policy Interpretation’s equal participation opportunities requirement in more detail.³³ To prepare the final document, the OCR issued a draft to more than 4,500 interested parties on September 20, 1995, and took into consideration over 200 written comments. The 1996 Clarification also responded, in part, to a request from two members of Congress that the OCR clarify how institutions could comply with particular aspects of the three-part participation test set forth in the Policy Interpretation. This request originated in May 1995 hearings held by the Post-Secondary and Lifelong Learning Subcommittee of the U.S. House of Representatives’ Committee on Economic and Educational Opportunities. The hearings included criticism of the three-part test from two institutions that had been found in violation of Title IX – Brown University and Eastern Illinois University.³⁴

On July 11, 2003, the OCR issued a letter further clarifying certain issues related to Title IX’s three-part participation test (the 2003 Clarification).³⁵ The 2003 Clarification was issued following the Department of Education’s creation of a Commission on Opportunity in Athletics in June 2002, which was asked to investigate and report on whether the longstanding Title IX compliance standards, laid out in the Policy Interpretation and the 1996 Clarification, should be changed. Although the Commission recommended extensive changes to the Department’s Title IX athletics policies that would have substantially limited opportunities for women,³⁶ the Department declined to adopt any of those recommendations, recognizing the broad support throughout the country for the goals and spirit of Title IX. The OCR thus issued the 2003 Clarification to reaffirm the standards set forth in the Policy Interpretation and the 1996 Clarification and to “strengthen Title IX’s promise of nondiscrimination in the athletic programs of our nation’s schools.”³⁷

³² *Id.*

³³ See Office for Civil Rights, Department of Education, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996) (hereinafter 1996 Clarification), available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html>.

³⁴ For a more detailed discussion of the attacks on the three-part test in Congress, see Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POLICY 51, 69-74 (Spring 1996).

³⁵ See Office for Civil Rights, Department of Education, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (June 11, 2003) (hereinafter 2003 Clarification), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>.

³⁶ See U.S. Dep’t of Educ., Secretary’s Commission for Opportunity in Athletics, *Open to All: Title IX at Thirty*, Washington, D.C., 2002, available at <http://www.ed.gov/about/bdscomm/list/athletics/report.html>. But see *Minority Views on the Report of the Commission on Opportunity in Athletics*, Feb. 2003, available at http://www.womenssportsfoundation.org/binary-data/WSF-ARTICLE/pdf_file/944.pdf.

³⁷ See 2003 Clarification, *supra* note 35.

On March 17, 2005, without prior notice or opportunity for public comment, the OCR issued yet another policy document, this time retrenching from some of the commitments it had made in the 2003 Clarification.³⁸ Although the 2005 Clarification has yet to be tested in court, there are substantial questions about whether it authorizes practices that courts would find to be consistent with applicable statutory and constitutional standards. These questions are discussed in Chapter III.

5. SUPREME COURT INTERPRETATIONS OF THE SCOPE OF TITLE IX

The Supreme Court has addressed the scope of Title IX in several seminal decisions. Most of these interpretations have confirmed and applied Title IX's broad scope. Indeed, in the most notable instance in which the Court narrowed the coverage of Title IX, Congress overturned the Court's interpretation by passing an amendment to the law.

a. Title IX's Broad Application to All Programs and Activities: *Grove City College v. Bell* and the Response of Congress

In *Grove City College v. Bell*,³⁹ the Supreme Court narrowly interpreted Title IX's "program or activity" language to apply only to those specific programs or activities within an institution that directly received federal financial assistance.⁴⁰ The decision effectively insulated intercollegiate athletics departments from Title IX claims.⁴¹

Congress overruled the *Grove City* decision by enacting the Civil Rights Restoration Act of 1987 (the Restoration Act).⁴² The Restoration Act defines the terms "program" and "activity" broadly, bringing each and every part and program of a school, college, or university within Title IX's purview if the institution receives federal assistance for any purpose.⁴³

³⁸ See Office for Civil Rights, Department of Education, Additional Clarification of Intercollegiate Athletics Policy. Three-Part Test (Mar. 17, 2005) (hereinafter 2005 Clarification), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html/>

³⁹ 465 U.S. 555 (1984).

⁴⁰ *Id.* at 570-73. The only form of federal financial aid plaintiff Grove City College received was federally guaranteed students loans. The Court thus restricted application of Title IX to the college's financial aid program.

⁴¹ See *Bennett v. West Tex. State Univ.*, 799 F.2d 155, 159 (5th Cir. 1986) (dismissing all Title IX claims including those implicating athletic scholarship awards); *Haffer v. Temple Univ.*, No. 80-1362 (E.D. Pa. Feb. 14, 1985) (order dismissing all Title IX claims except those involving discrimination in the award and allocation of athletic scholarships); *O'Connor v. Peru State Coll.*, 605 F. Supp. 753, 760-61 (D. Neb. 1985), *aff'd*, 781 F.2d 632 (8th Cir. 1986) (no recovery for nontenured instructor on sex discrimination claim under Title IX where division at state college for which she worked received no direct federal funds).

⁴² 20 U.S.C. § 1687 (1988).

⁴³ For a discussion of this issue, see *Cohen v. Brown Univ.*, 809 F. Supp. 978, 982-83 (D.R.I. 1992) (*Cohen I*), *aff'd*, 991 F.2d 888 (1st Cir. 1993) (*Cohen II*). At least one court failed to notice the existence of the Restoration Act following its enactment. See *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 700 F. Supp. 269 (W.D. 1988) (adopting program-specific approach and failing to mention Restoration Act). The decision, was later vacated in an unreported order. See *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, No. 84-648 (W.D. Pa. Aug. 17, 1989).

Congress made clear that this broad coverage reflected its original intent in enacting Title IX and that the Court's *Grove City* analysis significantly misinterpreted the purposes of the law. The congressional debates associated with the Restoration Act reflect a remarkable consensus that Title IX should provide redress for the serious problem of sex discrimination in competitive athletics. Numerous senators and representatives expressly relied on Title IX's early successes in reducing sex discrimination in athletics as a compelling reason for the enactment of the Restoration Act.⁴⁴ Because Title IX's current applicability to intercollegiate athletics is principally based in the Restoration Act, these debates not only ratified the remedial intent of the Congress that initially enacted Title IX, but also are properly viewed as contemporaneous legislative history of the Title IX that exists today.⁴⁵

**b. Title IX's Application to Employment:
*North Haven Board of Education v. Bell***

In *North Haven Board of Education v. Bell*,⁴⁶ the Supreme Court upheld the Title IX regulations that prohibit gender-based employment discrimination. These provisions, which were part of the original Title IX regulations promulgated in 1975, were challenged as being beyond the scope of the HEW's authority. The Supreme Court rejected the argument that these regulations exceeded the agency's authority, explaining, in language with applicability well beyond the facts of the particular case, that "[t]here is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'"⁴⁷ Accordingly, the Court held that "Section 901(a)'s broad directive that

⁴⁴ See, e.g., Remarks of Sen. Riegle, 130 CONG. REC. S2267 (daily ed. Mar. 2, 1984); Joint Explanation by Sen. Kennedy and Sen. Packwood of Civil Rights Act of 1984, 130 CONG. REC. S4585-86 (daily ed. Apr. 12, 1984) (the Civil Rights Act of 1984 was the precursor to the Restoration Act); Remarks of Sen. Stevens, 130 CONG. REC. S4601 (daily ed. Apr. 12, 1984); Remarks of Rep. Coleman, 130 CONG. REC. H6806 (daily ed. June 25, 1984) ("Before Title IX became law, sex discrimination was an open, accepted practice on many campuses. Among the problems . . . [a]thletic scholarships for women were virtually nonexistent . . . One of the best examples of women gaining equal access in education thanks to Title IX has been in the area of athletics."); Remarks of Rep. Kaptur, 130 CONG. REC. E3492 (daily ed. Aug. 8, 1984); Remarks of Sen. Hatch, 130 CONG. REC. S11,253 (daily ed. Sept. 17, 1984) ("I personally do not know of any Senator in the Senate – there may be a few, but very few – who does not want Title IX implemented so as to continue to encourage women throughout America to develop into Olympic athletes."); Remarks of Sen. Kennedy, 130 CONG. REC. S11,448 (daily ed. Sept. 19, 1984) ("The participation of women in sports in high schools and colleges has soared since the enactment of Title IX . . . But suddenly, on February 28, 1984, all of our progress against discrimination in each of these areas was placed at risk by the decision of the Supreme Court of the United States in the case known as Grove City College against Bell."); Remarks of Sen. Exon, 130 CONG. REC. S12,423 (daily ed. Sept. 29, 1984); Remarks of Sen. Byrd, 130 CONG. REC. S12,642 (daily ed. Oct. 2, 1984); Remarks of Rep. Simon, 130 CONG. REC. E4164 (daily ed. Oct. 2, 1984); Remarks of Sen. Hatfield, 130 CONG. REC. S13,249 (daily ed. Oct. 3, 1984); Remarks of Sen. Chaffee, 133 CONG. REC. S2243 (daily ed. Feb. 19, 1987); Remarks of Sen. Packwood, 134 CONG. REC. S168 (daily ed. Jan. 27, 1988) ("Prior to the Grove City case, everyone – and I mean Republican, Democrat, conservative, liberal: Gerald Ford, Richard Nixon, Jimmy Carter, right up until the Regan administration – thought that the Title IX regulations meant institution-wide coverage. And this, very frankly, is how we finally were able to get universities and other educational units, schools, high schools, to give equal treatment to women in athletics. This was the opening wedge."); Remarks of Rep. Schroeder, 134 CONG. REC. H592 (daily ed. Mar. 2, 1988); Remarks of Sen. Mitchell, 134 CONG. REC. S2738 (daily ed. Mar. 22, 1988); Remarks of Sen. Mikulski, 134 CONG. REC. S2741 (daily ed. Mar. 22, 1988).

⁴⁵ See *Cohen II*, 991 F.2d at 901 (relying in part on the Restoration Act debates in analyzing congressional findings regarding Title IX).

⁴⁶ 456 U.S. 512 (1982).

⁴⁷ *Id.* at 521 (quoting *U.S. v. Price*, 383 U.S. 787, 801 (1966)) (alteration in original)).

'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students."⁴⁸ Thus, employment discrimination is covered under both Title IX and Title VII.⁴⁹

The Court also noted that the failure of Congress to disapprove of the Title IX regulations creates the inference that "it considered those regulations consistent with legislative intent."⁵⁰ This analysis provides useful support for the athletics regulations as well as the employment regulations at issue in *North Haven*. It also buttresses the argument that the Policy Interpretation properly effectuates congressional intent. While there was no disapproval process for the Policy Interpretation, the Interpretation was in effect when Congress passed both the Civil Rights Restoration Act and other amendments to Title IX,⁵¹ supporting the inference that Congress considered it consistent with legislative intent.

**c. Title IX's Application to Retaliation:
*Jackson v. Birmingham Board of Education***

In *Jackson v. Birmingham Board of Education*, the Supreme Court held that individuals who protest sex discrimination and who are then punished by their schools as a result of their protest may sue under Title IX to challenge the retaliation.⁵² In reaching this result, the Court emphasized Title IX's broad scope and held that retaliation based on an individual's complaints of sex discrimination is a form of differential treatment that amounts to discrimination on the basis of sex.⁵³ The Court also emphasized that protection from retaliation extends to all individuals who protest discrimination, whether or not that discrimination was directed against those individuals in the first instance. Indeed, the Court recognized that plaintiffs such as the girls' high school basketball coach who brought suit in *Jackson* are often "better able [than students] to identify discrimination" and may be the "only effective adversar[ies] of discrimination."⁵⁴

⁴⁸ *Id.* at 520.

⁴⁹ Some courts have held, however, that Title IX claims that are also cognizable under Title VII must be brought under Title VII to ensure adherence to Title VII's administrative exhaustion requirements. *See, e.g., Lowery v. Tex. A&M Univ.*, 117 F.3d 242 (5th Cir. 1997); *Morris v. Wallace Cmty Coll. – Selma*, 125 F. Supp. 2d 1315 (S.D. Ala. 2001); *see also infra* note 98.

⁵⁰ 456 U.S. at 530-35.

⁵¹ *See infra* notes 82-86 and accompanying text for discussion of the Civil Rights Remedies Equalization Act.

⁵² 544 U.S. 167 (2005).

⁵³ *Id.* at 174-77.

⁵⁴ *Id.*

Accordingly, any plaintiff - a student, coach, teacher, or other employee - can bring a retaliation claim under Title IX, even if the retaliatory action was not based on the plaintiff's own sex.⁵⁵

The Court also recognized that allowing retaliation claims under Title IX is essential to ensure that the law's protections become effective. "Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished."⁵⁶ Moreover, the Court stated, "[W]ithout protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied."⁵⁷

B. DEFINITION OF RECIPIENT

All educational institutions that receive federal funds – including public and some private elementary and secondary schools and virtually all colleges and universities – are subject to Title IX.⁵⁸ The Supreme Court has confirmed that those funds need not be received directly. In *Grove City College v. Bell*, for example, the Court held that the fact that students of the college received federally guaranteed student loans was sufficient to subject the school to coverage under Title IX.⁵⁹ In *National Collegiate Athletic Association v. Smith*,⁶⁰ moreover, the Court held that an entity qualifies as a recipient of federal funds when it receives federal aid either itself or through an intermediary.⁶¹

The Court has also made clear that entities receiving only the benefit of federal funds, rather than the funds themselves, cannot be subjected to Title IX on that basis alone. In *Smith*, the Court held that the National Collegiate Athletic Association (NCAA) could not be treated as a recipient of federal funds, and therefore subject to Title IX, by virtue of its collecting dues from member institutions that themselves received federal funds. The Court

⁵⁵ *Id.* at 174-77.

⁵⁶ *Id.* at 181.

⁵⁷ *Id.*

⁵⁸ See 20 U.S.C. § 1681(a).

⁵⁹ See 465 U.S. 555, 573-4 (1984).

⁶⁰ 525 U.S. 459 (1999).

⁶¹ *Id.* at 466-69 (relying on *Grove City Coll. v. Bell*, 465 U.S. 555 (1984), and *Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1998)). The latter case has been superseded by enactment of a statute, the Air Carrier Access Act, under which there is an implied private right of action for disabled air travelers. See *Love v. Delta Air Lines*, 310 F.3d 1347, 1358 (11th Cir. 2002).

stated that “[a]t most, the Association’s receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage.”⁶²

But the Court *has* recognized that there may be circumstances in which entities will be covered by Title IX even absent a direct link to federal aid. In *Smith*, the Court left open the possibility that the NCAA is subject to Title IX because its member institutions, which are recipients of federal funds, have ceded controlling authority over their federally funded athletics programs to the NCAA.⁶³

This theory of coverage was adopted by the court in *Communities for Equity v. Michigan High School Athletic Association*.⁶⁴ The court held that “any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid.”⁶⁵ It noted that a contrary ruling would encourage recipients of federal funds to transfer control over those funds to others; this could potentially permit both parties to avoid Title IX liability and therefore “would allow federal funds to promote gender discrimination so long as the recipients of those funds empowered someone else to promulgate the discriminatory policies.” According to the court, the meaning and purpose of Title IX did not warrant “such a formalistic interpretation.”⁶⁶ After holding the “controlling authority” theory to be legally viable, the court found that the Michigan High School Athletic Association clearly exercises such controlling authority over schools with respect to the scheduling of sports seasons because it sets the beginning and closing dates of a season and the dates of championship tournaments, and punishes those who play the sport outside of these designated dates; in addition, no school or schools has the power to change the seasons apart from seeking action within MHSAA.⁶⁷

⁶² 525 U.S. at 468.

⁶³ The Court also remanded the case for further factual development on the question of whether the NCAA directly or indirectly received federal financial assistance through the National Youth Sports Program (NYSP) it administered. *Id.* at 469. Through the NYSP, the NCAA directs federal funds to projects across the nation aimed at establishing sports programs for economically disadvantaged youth. See <http://www.nyscorp.org/nysp/home.html>. The NCAA’s authority over members’ sports programs and its involvement in the NYSP were addressed in *Smith v. NCAA*, 266 F.3d 152 (3rd Cir. 2001). The Third Circuit held that having authority over members’ sports programs does not subject the NCAA to Title IX because NCAA members may choose not to follow NCAA rules, and are not therefore wholly controlled by the NCAA. *Id.* at 155-57. The Court also held that involvement in the NYSP would subject the NCAA to Title IX if the plaintiff could provide factual support for her allegations that the NCAA effectively controlled the NYSP. *Id.* at 161-62. These findings applied to the NCAA alone and are not necessarily applicable to evaluating whether any state *high school* association controls athletics programs of its member schools.

⁶⁴ 178 F. Supp. 2d 805 (W.D. Mich. 2001), *aff’d* 377 F.3d 504 (6th Cir. 2004).

⁶⁵ *Id.* at 851 (citing *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 80 F. Supp. 2d 729, 735 (W.D. Mich. 2000)).

⁶⁶ 178 F. Supp. 2d at 852. The court also held that the “controlling authority” theory is consistent with the contractual nature of Congress’ Spending Clause power to set conditions for the use of federal funds. It reasoned that the Michigan High School Athletic Association essentially “accepts the conditions in which member schools must operate when it implicitly contracts with the federal government to become responsible for organization of interscholastic athletic programs funded in part by federal resources.” *Id.*

⁶⁷ *Id.* at 855.

The court also held that MHSAA was a state actor for purposes of a constitutional claim under 42 U.S.C. § 1983 because (1) it had a large public school membership; (2) it received revenue from gate receipts and broadcast fees that would otherwise have gone to public member schools; (3) its representative council included a representative of the state superintendent; (4) its employees were eligible for the state retirement system; and (5) it exercised adjudicative power over public member schools by establishing rules and enforcing sanctions.⁶⁸ The court relied on *Brentwood Academy v. Tennessee Secondary School Athletic Association* in its analysis of the state action issue.⁶⁹ The plaintiff in *Brentwood*, a private school, argued that the defendant, a statewide athletic association of public and private member schools, was a state actor for purposes of § 1983 because of its close involvement with state school officials and its public member schools.⁷⁰ The Supreme Court agreed that the association was pervasively entwined with state officials and public schools, listing among the evidence the association's funding by public member schools, the association's receipt of ticket revenue, and the involvement of association employees in the state retirement system.⁷¹

C. PRIVATE RIGHT OF ACTION

Although Title IX as enacted provided explicitly only for administrative enforcement of the law by the OCR, Congress and the federal courts have recognized that, for individuals to be effectively protected under the statute, they must also be able to pursue their claims in court.

In *Cannon v. University of Chicago*,⁷² the Supreme Court's first decision directly addressing Title IX, the Court held that Title IX includes an implied private right of action without any requirement that administrative remedies be exhausted. As a result, aggrieved individuals can directly enforce their Title IX rights in court without first bringing their claims before an administrative agency. The Court's decision rested in large part on its determination that Title IX was expressly modeled on Title VI of the Civil Rights Act of 1964 and should thus generally track Title VI interpretations.⁷³ The Court determined that by the time "Title IX was

⁶⁸ *Id.* at 847.

⁶⁹ 531 U.S. 288 (2001).

⁷⁰ *Id.* at 293-94. Many state athletic associations may well be subject to constitutional claims as state actors under *Brentwood*.

⁷¹ *Id.* at 298-300. The Supreme Court is hearing another aspect of the *Brentwood* case during the current term and has been asked to revisit the state action issue.

⁷² 441 U.S. 677 (1979).

⁷³ *Id.* at 694-98.

enacted, the critical language in Title VI had already been construed as creating a private remedy.⁷⁴ Accordingly, the Court determined that Congress must have intended a similar enforcement scheme for Title IX.

The Court also found that a private right of action was critical to achieve Congress's intent "to provide individual citizens effective protection against [discriminatory] practices."⁷⁵ As the Court recognized, the statutory defunding remedy is often not as well-suited to achieve this purpose as is a private right of action.⁷⁶ In addition, the Court found that deficiencies in the administrative process – which continue to limit the efficacy of administrative relief today – supported both the existence of a private remedy and the refusal of Congress to impose an exhaustion requirement.⁷⁷ First, inadequate resources leave the government unable to address all Title IX violations. Further, individual complainants do not have the right to participate in the investigation and enforcement of their complaints, the agency is not required to provide relief to the individual complainant as part of the compliance agreements it obtains, and the agency can opt not to investigate a particular complaint. *Cannon's* discussion of the limitations of the administrative process remains particularly applicable to the question of the proper deference due by the courts to the OCR resolutions of complaints and compliance reviews.⁷⁸

The Court subsequently decided, in a unanimous opinion in *Franklin v. Gwinnett County Public Schools*,⁷⁹ that a monetary damages remedy is available under Title IX in cases of intentional discrimination. The Court relied on the well established principle that all remedies are presumed to be available to accompany a federal right of action "unless Congress has expressly indicated otherwise."⁸⁰ As the Court stated, "Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe."⁸¹

⁷⁴ *Id.* at 696.

⁷⁵ *Id.* at 704. The Supreme Court affirmed *Cannon's* reasoning in *Jackson*. It stated that a private right of action was necessary to ensure that individuals would be fully protected from retaliation for protesting discrimination. 544 U.S. at 173-74.

⁷⁶ *See id.* at 704 n.37.

⁷⁷ *Id.* at 706 n.41 & 708 n.42. Deficiencies in the administrative process have been cited by courts in holding that a plaintiff's ability to sue under Title IX does not supplant the ability to bring a simultaneous claim under 42 U.S.C. § 1983 for constitutional violations arising from the same set of facts. But there is a circuit split on that issue. Compare *Cmtys. for Equity v. Mich. High Sch. Athl. Ass'n*, 459 F.3d 676, 690 (6th Cir. 2006), and *Seamons v. Snow*, 84 F.3d 1226, 1234 (10th Cir. 1996), with *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756-59 (2d Cir. 1998), and *Pfeiffer v. Marion Center Area Sch. Dist.*, 917 F.2d 779, 789 (3rd Cir. 1990).

⁷⁸ *See infra* note 389 and accompanying text, suggesting that given the lack of procedural protections, little if any deference should be extended to the OCR determinations.

⁷⁹ 503 U.S. 60 (1992).

⁸⁰ *Id.* at 66.

⁸¹ *Id.* at 75.

Moreover, Congress has confirmed that damages are available against state defendants. In 1986, Congress enacted the Civil Rights Remedies Equalization Act (CRREA),⁸² which expressly waives a state's sovereign immunity under the Eleventh Amendment for actions under Section 504 of the Rehabilitation Act, Title VI, Title IX, and other similar statutes.⁸³ Title IX and CRREA were passed, at least in part, pursuant to the power of Congress under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause.⁸⁴ As the Supreme Court has recognized, Congress clearly and unequivocally has the power to waive states' Eleventh Amendment immunity when it enacts statutes under this constitutional power.⁸⁵ Furthermore, Congress is independently authorized to require states to waive their immunity as a condition of receipt of federal funds. Following enactment of the CRREA, therefore, state defendants in Title IX claims may not benefit from Eleventh Amendment rights if they accept federal funds.⁸⁶

⁸² 42 U.S.C. § 2000d-7 (2007).

⁸³ In *Atascadero State Hosp. v. Scanlon*, the Supreme Court held that, in the absence of an express waiver, the Eleventh Amendment barred suits in federal courts for monetary damages against state agencies arising under § 504 of the Rehabilitation Act. 473 U.S. 234, 246 (1985). By direct implication, *Atascadero* applied to the other civil rights federal funding statutes, including Title IX. Congress responded by enacting the Civil Rights Remedies Equalization Act.

⁸⁴ Although the Supreme Court has not decided the source of congressional power for enacting Title IX, see *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 n.8 (1992), the legislative history and purpose of Title IX and CRREA demonstrate that they were enacted at least in part pursuant to Congress' enforcement powers under the Fourteenth Amendment. See, e.g., *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (recognizing twin purposes of Title IX "to avoid the use of federal resources to support discriminatory practices," and "to provide individual citizens effective protection against those practices"). Even if Title IX was also enacted pursuant to Congress' Spending Clause powers, it can be simultaneously grounded in the Fourteenth Amendment, as the Supreme Court has long recognized multiple sources of constitutional authority for a given legislative enactment. See, e.g., *Griffin v. Breckenridge*, 403 U.S. 88, 107 (1971).

For statements in the legislative record supporting the Fourteenth Amendment as a basis of congressional authority for Title IX and the CRREA, see 110 CONG. REC. 6553 (1964) (statement of Sen. Douglas); 110 CONG. REC. 1529 (1964) (statement of Rep. McCulloch); 110 CONG. REC. 1519 (1964) (statement of Rep. Celler); 110 CONG. REC. 1512 (1964) (statement of Rep. Madden); 118 CONG. REC. 5982 (1972) (statement of Sen. Gambrell); 118 CONG. REC. 5166 (1972) (statement of Sen. Griffin); 132 CONG. REC. 28,624 (1986); 131 CONG. REC. 22,346 (1985) (remarks of Sen. Cranston).

⁸⁵ See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 59 (1996).

⁸⁶ See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 672 (1974) (a state may effectively waive its Eleventh Amendment immunity by participating in a program for which Congress has conditioned participation on such a waiver). Note that sovereign immunity applies only to state defendants, not to private entities or local public schools. Moreover, sovereign immunity protects state defendants only from damages, not from injunctive relief.