Title IX Litigation in the 1990's: The Courts Need a Game Plan

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I. INTRODUCTION

While most people agree upon the need for gender equity, especially at our institutions of higher learning, its application to women's collegiate athletics generates passionate responses from many perspectives. Feminist activists view this issue as an opportunity to advance women's equality and reverse past discrimination. Others, particularly football coaches, view gender equity as a potential threat to the very existence of college football and to the future of all intercollegiate athletics. Administrators, caught in the middle, see an administrative nightmare as all sides demand shares of increasingly limited resources.

Title IX, the law that prohibits sex discrimination in educational institutions that receive federal money, was enacted in 1972. Even

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2. "(The) only thing gender equity needs to be very careful of—don't destroy the goose that lays the golden egg." Interview with Bobby Bowden, Head Football Coach at Florida State University, Battle of the Sexes (CNN television broadcast, Jan. 9, 1994), available in LEXIS, Nexis Library, CNN File.

3. Interview with Kit Green, Associate Athletic Director for Women's Sports at the University of Washington, in Seattle, Wash. (October 10, 1993). Ms. Green has since retired from her position with the University of Washington. The Author offers his sincere appreciation, not only for her time and help with the background for this paper, but for her years of dedicated service to his alma mater.

though regulations governing Title IX's impact on athletics were promulgated between 1975 and 1980, litigation was limited throughout the 1970's and 1980's because of court-imposed hurdles and a dramatic increase in funding for women's athletics.

However, this debate has been moving from campuses to courtrooms with increasing frequency. A spate of new cases has been filed within the past two years. Courts are having to decide the compliance status of universities, and to design remedies in cases where violations exist. As courts examine this issue, key differences in the way courts enforce the law emerge. If Title IX is to succeed in creating an equitable distribution of opportunities without endangering the health of athletics as a whole, courts should not place the interests of individual plaintiffs above the interests of all athletes. Courts should concentrate on solutions that look to the long term health of athletics and the success of Title IX.

Part II of this Comment is a brief history of Title IX, from the enacting legislation through the 1980's. Part III summarizes recent decisions, identifying the issues courts are grappling with and what lines, if any, are being drawn. In Part IV, analyzes three issues which are repeatedly presented in recent cases. These issues are those upon which the courts have disagreed, or which pose potential problems in future litigation: 1) how should courts treat the tensions between the individual plaintiffs and the class-oriented goals of Title IX; 2) how much deference should school administrators be given when making budget decisions; and 3) is it appropriate to award monetary damages to successful plaintiffs?

This Comment concludes that the long term goals of Title IX, as well as the overall success of college sports, are better served by treating all claims as class actions, by giving administrators more deference than some courts have been willing to give, and by refusing to grant monetary damages. In essence, courts need to promote long term success rather than the short term goals of individuals.

6. Carol Herwig, Colgate Prevails in Title IX Appeal, USA TODAY, April 28, 1993, at 9C. Eleven cases were filed between the springs of 1992 and 1993. Id. Also, at least one case not filed at that time has been decided. Kelley v. Board of Trustees, 832 F. Supp. 237 (C.D. Ill. 1993), aff'd, 35 F.3d 265 (7th Cir. 1994), cert. denied, 115 S. Ct. 938 (1995).
II. BACKGROUND

Following hearings in 1970, Congress set about to stop sex discrimination on college campuses. That effort resulted in the adoption of Title IX of the Educational Amendments of 1972. Attempts in Congress to divest athletics from the scope of Title IX failed.

Once Title IX became law, regulations were promulgated to define and enforce the requirements of gender equity. After the regulations were finalized and enforcement began, women at various universities began to use litigation as a tool to enforce their rights. This Part briefly summarizes Title IX’s evolution in order to set a context for the examination of current trends.

A. The Requirement of Title IX

The thrust of Title IX is clear: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to, discrimination under any education program or activity receiving Federal financial assistance.” Certain institutions are exempt from this law, but most universities fall under the auspices of the statute.

As a model for Title IX, Congress used Title VI’s attempt to curb racial discrimination in higher education. However, there are important differences between enforcing gender and racial equity in education. Congress specifically defined Title IX’s purpose as ensuring equitable opportunities for both genders, not a forced mixing of the genders. The law, by focusing on opportunities for members of both genders, allowed for the continuation of separate programs for the

11. Parochial schools, 20 U.S.C § 1681(a)(3), Military schools, id. § (a)(4), and traditionally single sex schools, id. § (a)(5), have each been excluded.
12. “For purposes of this title an educational institution means any public or private . . . institution of vocational, professional, or higher education.” Id. § 1681(c).
14. The law allows for the continuation of single sex schools. See supra note 11. See also 34 C.F.R. § 106.41(b) (1994), in which the Office Of Civil Rights specifically allows for separate teams, and does not even require equal opportunity to compete in contact sports such as football.
two genders. Thus, Title IX appears to apply the discredited racial doctrine of “separate but equal” to enforce gender equity.

B. Administrative Regulations

After passing Title IX, Congress transferred enforcement power to the Department of Health, Education, and Welfare (HEW). Once jurisdiction was conferred to HEW, HEW promulgated rules and standards governing investigations into institutional compliance on a wide variety of issues, including athletics, and began to enforce these standards in 1980. These regulations require that, while separate teams may exist for men and women, women must be allowed to participate on men’s teams in non-contact sports if no women’s team is sponsored. The regulations further require that institutions “provide equal athletic opportunity for members of both sexes.” The regulations list ten factors to use in determining whether the requirement is satisfied.

Of these ten, the first, accommodation of the interests and abilities of both sexes, has been cited most frequently in recent Title IX decisions. The HEW policy interpretation set out three questions

15. See supra note 11; 34 C.F.R. § 106.41(b) (1994).
19. Contact sports are exempt from this requirement. Contact sports are defined as those which the purpose of or a major activity of is bodily contact. Specifically delineated as contact sports are boxing, wrestling, rugby, ice hockey, football, and basketball. 34 C.F.R. § 106.41(b) (1994).
20. Id. § 106.41(c) (1994).
21. The factors include:
1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; 2) The provision of equipment and supplies; 3) Scheduling of games and practice time; 4) Travel and per diem allowance; 5) Opportunity to receive coaching and academic tutoring; 6) Assignment and compensation of coaches and tutors; 7) Provision of locker rooms, practice and competitive facilities; 8) Provision of medical and training facilities and services; 9) Provision of housing and dining facilities and services; and 10) Publicity.

Id.

to be asked in determining compliance with this provision of the regulations:

(1) whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by the present program.23

If the answer to any of these questions is yes, the university is in compliance. If the answer to all three questions is negative, then the university is in violation of Title IX.24 Because some of this standard's terms are vague, the government attempted to provide some guidance in the investigator's manual of the Office of Civil Rights (OCR).25 For example, the manual notes that "there is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a disparity or a violation."26 However, the manual does suggest that the ratio of male to female athletes should be as close as possible to the overall ratio of male to female students.27 Courts have also provided some guidance by holding that disparities of 10.5%28 and 11.6%29 are unacceptable.

These regulations have held up under attack for fifteen years. After the regulations were promulgated, the National Collegiate Athletic Association (NCAA) filed suit to have them thrown out.30 The courts rejected the NCAA's arguments, firmly acknowledging the jurisdiction of the HEW and the power of the HEW to formulate regulations governing conduct.31

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23. Roberts, 998 F.2d at 828-29 (quoting 44 Fed. Reg. 71,418 (1979)).
24. See id. at 829.
25. See id. at 828.
26. Id. at 829-30 (quoting OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL 24 (1990)).
27. Id. at 830.
28. Id.
31. See id.
Since then, courts have routinely stated that they give "great deference" to the standards developed in the regulations.\(^32\) Even though the regulations were meant for administrative review rather than as a legal test, recent court decisions have uniformly applied the standards of the HEW and the OCR.\(^33\) This has been the case even when the court in question has stated that the regulations are in conflict with the plain meaning of the initial legislation or require results which were not Congress' intent.\(^34\)

C. Judicial Interpretations of Title IX 1979-1989

Once HEW developed regulations, the government began investigating university actions.\(^35\) In addition, women athletes began taking their universities to court seeking redress for violations.\(^36\) These cases raised a series of questions, the most predominant of which were: 1) was there an implied right of action in Title IX; 2) what programs were under the control of Title IX; and 3) what relief was appropriate in Title IX cases? The answers to these three questions governed the scope and effectiveness of Title IX litigation throughout the 1980's.

1. Implied right of action

In many early Title IX cases, defendant institutions tried to have cases dismissed by claiming that individual students could not sue under Title IX. The universities argued that the law did not give students the right to sue. They argued that the law mandated conditions for receiving federal funding, not legal rights that could be enforced by a court.

Initially, courts were divided on this issue.\(^37\) However, in

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33. See Roberts, 998 F.2d at 828; Cohen, 991 F.2d at 895; Favia, 812 F. Supp at 584; Cook, 802 F. Supp at 741.
35. See Pegge-Sturbing, supra note 1, at 19.
36. See Johnson, supra note 1, at 796-99.
Cannon v. University of Chicago,\textsuperscript{38} the Supreme Court settled the question by ruling that, since the legislation was designed to protect female athletes, the athletes could sue to uphold their rights. This defense has not been presented in any of the modern cases.

2. Scope of Title IX

A more successful argument that universities used in Title IX litigation was that Title IX was limited to those programs which received direct federal funding. Because athletic departments did not receive direct federal assistance, the universities argued that it was improper to apply Title IX to sports. Many courts agreed with the schools and threw out cases on this basis.\textsuperscript{39} Other courts held that the university could spend more money on athletic programs because of the aid other programs received, and that this indirect benefit triggered application of Title IX standards.\textsuperscript{40}

In Grove City College v. Bell,\textsuperscript{41} the Supreme Court ruled that the scope of Title IX was limited to those programs which received direct funding from the federal government. This ruling undercut the power of Title IX in reforming athletics. The OCR dropped dozens of investigations because of this limiting rule.\textsuperscript{42} As a result of Grove City, those cases still in the judicial system were dismissed or put on hold.\textsuperscript{43}

In response to Grove City and other Supreme Court decisions that limited the scope of various civil rights legislation, Congress passed the Civil Rights Restoration Act of 1987.\textsuperscript{44} For purposes of Title IX, Congress specifically defined an institution receiving federal funds to include all programs at that institution whether directly benefited or not.\textsuperscript{45}

\textsuperscript{38} 441 U.S. 677 (1979).
\textsuperscript{42} Cohen, 991 F.2d at 894 n.5. The OCR dropped 79 ongoing investigations because of the Grove City decision.
\textsuperscript{43} See, e.g., Haffer, 678 F. Supp at 521.
\textsuperscript{44} 20 U.S.C. §§ 1681-1688 (1988).
\textsuperscript{45} Id. § 1687(4).
With the passage of the Civil Rights Restoration Act, enforcement of Title IX moved forward. For example, *Haffer v. Temple University,*" which was put on hold when the *Grove City* decision was handed down, was revived in 1987. The court refused to dismiss the claim or to rule summarily in favor of Temple." Instead, the court ruled that Haffer would likely prevail if the facts supported the plaintiff's version." Subsequently, Temple settled the complaint out of court and this case became the model for future litigation."  

3. Available relief in private actions  

In cases where Title IX violations were shown, courts were left with the question of the relief to be granted. Courts were reluctant to impose sweeping remedies. For instance, although courts were willing to award injunctive relief to plaintiffs in private actions," courts were less likely to award monetary damages. In *Lieberman v. University of Chicago,*" the court held that Title IX did not allow for monetary compensation because Congress did not include such a remedial option in the statute. Additionally, in *Cannon v. University of Health Sciences/Chicago Medical School,*" the court refused to consider compensatory damages even where the defendant had failed to mitigate the injury to the plaintiff.

Courts rarely granted monetary damages. For instance, in 1986, a federal district court awarded damages for an intentional violation of Title IX." However, this approach was not utilized by any higher court in any other 1980's case.

III. PRESENT DOCTRINE  

With the passage of the Civil Rights Restoration Act of 1987 came a renewed call for gender equity in women's athletics and
stronger enforcement of the rights created under Title IX.\textsuperscript{54} Since 1987, litigation in this area has increased. In fact, many suits have been filed within the past two years.\textsuperscript{55} While the majority of cases in this new wave are still in the initial stages, some have been resolved. Although fact-specific, these recent decisions are useful in identifying the central legal and policy issues that other courts will have to face.

In \textit{Cook v. Colgate University},\textsuperscript{56} the Second Circuit Court of Appeals was faced with a traditional Title IX question: whether a university should be forced to increase funding for women's athletics? Members of the women's field hockey club sued after the university repeatedly denied them varsity status.\textsuperscript{57} The plaintiffs claimed that Colgate illegally denied them varsity status because the men's hockey team had varsity status and received significantly more funding as a result of that status.\textsuperscript{58} The women claimed that the university was in violation of Title IX requirements for failing to provide proportional gender opportunities.\textsuperscript{59}

Colgate asserted several defenses. The university argued that it was inappropriate to compare teams of one sport rather than to evaluate the entire program.\textsuperscript{60} Additionally, Colgate argued that they deserved the flexibility to make decisions in a responsible manner and an opportunity to develop a plan that would improve the situation.\textsuperscript{61} Finally, the university pointed out that the budget for the overall program was limited and that the university should be allowed to close the gap by cutting men's programs rather than being forced to increase women's programs in a tight budgetary period.\textsuperscript{62}

The district court ruled for the plaintiffs.\textsuperscript{63} The court determined compliance by comparing the two hockey programs, although the court noted that even an evaluation of the entire program would have gone against the university.\textsuperscript{64} The court held that the university

\textsuperscript{55} See supra note 6.
\textsuperscript{56} 992 F.2d 17 (2d Cir. 1993).
\textsuperscript{57} Id. at 18 (varsity status had been denied in 1979, 1983, 1986 and 1988).
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.; Cook v. Colgate University, 802 F. Supp. 737, 742 (N.D.N.Y. 1992), vacated and remanded, 992 F.2d 17 (2nd Cir. 1993).
\textsuperscript{61} 992 F.2d 17.
\textsuperscript{62} Cook, 802 F. Supp. at 749-50.
\textsuperscript{63} Id. at 751.
\textsuperscript{64} Id. at 742.
could not ignore the gender equity issue by claiming poverty, and that Title IX required the university to increase women's opportunities until equity existed.

The appellate court reversed on the grounds that the action was moot. Because the plaintiffs had all graduated or would graduate before the next season began, injunctive relief would no longer help them. The court did not address the merits of the district court's decision.

A different question was presented in Favia v. Indiana University. Rather than women demanding an expansion of their program, this case concerned university attempts to curtail some opportunities women already enjoyed. IUP wanted to eliminate women's gymnastics and field hockey and men's soccer and tennis as a way to lower the athletic department's budget. The plaintiffs, representing all present and future female students who might wish to participate in the two programs, argued that the move would violate Title IX because women were already underrepresented in the program. Prior to the budget cuts, women had 37.7% of the athletic opportunities, but comprised a majority of the student body as a whole. These cuts aggravated the gender disparity in the athletic department by lowering the percentage of women athletes to 36.5%.

The university argued that they had a good history of expanding women's programs since the inception of Title IX and would therefore pass the second prong of the accommodation test. The university further argued that eliminating two men's and two women's programs simultaneously was fair, and thus not in violation of Title IX. The university believed that because eliminating two programs from each gender was, in itself, an equitable decision, past discrimination should be deemed irrelevant. In essence, the university asked for a clean slate.

66. Id.
67. Cook, 992 F.2d at 17.
68. Id. at 19.
70. Id. at 579.
71. Id. at 580.
72. Id. at 581.
73. Id.
74. Id. at 585.
75. See supra note 23 and accompanying text.
76. 812 F. Supp. at 580.
77. Id.
However, the court held that, because the university was not in current compliance with Title IX standards, the university must take action to remedy its past discriminatory effects on women's athletics.\footnote{Id. at 584-85.} Further, the court rejected IUP's argument that its decision to cut two programs of each gender should be allowed as the university could not ignore its present problems when making decisions for the future.\footnote{Id.} Finally, the court rejected the university's claim of poverty as an excuse for its failure to solve the inequities of the twenty years since the inception of Title IX.\footnote{Id. at 585.}

Soon after Favia was decided, the First Circuit Court of Appeals affirmed a similar decision in Cohen v. Brown University.\footnote{991 F.2d 888 (1st Cir. 1993), aff'd 809 F. Supp. 978 (D. R.I. 1992).} Cohen represented a class consisting of all present and future female athletes at Brown who were interested in participating in intercollegiate athletics.\footnote{809 F. Supp. at 979.} The named plaintiffs were members of the women's gymnastics and volleyball teams.\footnote{Id.} As a cost cutting measure, the university decided to cut the two women's programs along with two men's programs, golf and water polo.\footnote{991 F.2d at 892.}

Like the plaintiffs in Favia, Cohen argued that women had suffered from past discriminatory practices by the university\footnote{809 F. Supp. at 985-86.} and that the current cutbacks were illegal because the women's programs to be eliminated made up a larger percentage of women's opportunities than did the targeted men's programs.\footnote{Id. at 986.}

The university responded by claiming that the makeup of the student body as a whole was the wrong standard to use in evaluating an athletic department.\footnote{Id. at 987.} Rather, the university argued that opportunity, not participation, was the proper standard.\footnote{Id.} Absent statistics showing that they violated this standard, the university argued that they should not be held in violation of Title IX for cutting the two men's and two women's programs.\footnote{Id. at 988.}

The trial court rejected the university's argument. Pointing to the language of the OCR's policy interpretation, the court found that the

\begin{itemize}
\item \footnote{Id. at 584-85.} 
\item \footnote{Id.} 
\item \footnote{Id. at 585.} 
\item \footnote{991 F.2d 888 (1st Cir. 1993), aff'd 809 F. Supp. 978 (D. R.I. 1992).} 
\item \footnote{809 F. Supp. at 979.} 
\item \footnote{Id.} 
\item \footnote{991 F.2d at 892.} 
\item \footnote{809 F. Supp. at 985-86.} 
\item \footnote{Id. at 986.} 
\item \footnote{Id. at 987.} 
\item \footnote{Id.} 
\end{itemize}
law required opportunities proportional to the makeup of the student body. Thus, the court concluded that Brown violated Title IX and should not be allowed to cut these programs. The court specifically held that a university found to be in violation could design a program that did not include the specific sports named in the suit, but only if this program satisfied the requirements of Title IX.

In Roberts v. Colorado State Board of Agriculture, the Tenth Circuit Court of Appeals was also faced with a case involving budget cutbacks, but procedural and factual differences raised new issues and led the court to a different analysis. The most striking factual difference between Roberts and the circumstances of Favia and Cohen is that the proposed cuts did close the gender gap.

Because the softball program would lose eighteen positions, while the elimination of the baseball program would lower men’s opportunities by fifty-five slots, the University argued that the reductions should be allowed under Title IX. In addition, the university argued that to bar this budget plan would unduly hinder its ability to administer the program in a responsible manner. The women countered that, as the underrepresented gender, any cut to their programs would be a violation of Title IX.

As a result, the court did not fashion the remedy in such a way as to protect or benefit the largest amount of women, but rather it had to focus on the needs of the individual plaintiffs.

The district court found that the university had a history of being in violation of Title IX, that this proposed cut would lower the overall number of women’s opportunities, and that Title IX did not allow for such reduction. The court stated that the effect that cutting the softball team had on gender equity should be scrutinized on its own, and not along with the cutting of baseball. The

90. 991 F.2d at 899.
91. 809 F. Supp. at 1001; 991 F.2d at 906.
93. Unlike Favia or Cohen, this case was not filed as a class action, but was filed on behalf of the current softball players only.
95. 998 F.2d at 833.
96. 814 F. Supp. at 1514.
97. 998 F.2d at 833.
98. 814 F. Supp. at 1512.
99. Id.
100. Id.
101. Id. at 1514.
district court further held that the university would have to restart the softball program as a competitive team.\textsuperscript{102} The court of appeals upheld the decision except that it vacated the district court's order requiring that such program be top flight.\textsuperscript{103}

Recently, in \textit{Kelley v. University of Illinois},\textsuperscript{104} the district court addressed the issue of reverse discrimination under Title IX. The university eliminated its men's swimming program as part of a cost-cutting measure.\textsuperscript{105} In response, the members of the team sued to retain the team. The men based their claim on the fact that the university had left the women's swimming program intact.\textsuperscript{106} The men argued that this prevented them from swimming for the university based solely on their gender in violation of Title IX.\textsuperscript{107}

The university argued that the team was cut in order to bring the department into line with Title IX.\textsuperscript{108} Because of the influence of football, the lack of a women's football program, and the school's budgetary constraints the only way to achieve overall equity was to offer women opportunities which were denied to men.\textsuperscript{109} Thus, a discriminatory impact on an individual sport was not only allowable, but necessary to achieve overall equality.\textsuperscript{110}

The court agreed with the university.\textsuperscript{111} Although the court acknowledged that this result was not intended by Title IX, the regulations accompanying the law required overall equity even if it meant reverse discrimination.\textsuperscript{112} The court attacked the regulations as possibly going against the plain meaning of the enabling legislation,\textsuperscript{113} but left the rules intact.

While other cases are progressing through the system,\textsuperscript{114} the preceding cases provide a cross-section of some of the major issues facing the courts, and of the different solutions these courts have used.

\begin{enumerate}
\item[102.] \textit{Id.} at 1507.
\item[103.] \textit{Roberts}, 998 F.2d at 834-35.
\item[105.] \textit{Id.} at 239.
\item[106.] \textit{Id.}
\item[107.] \textit{Id.}
\item[108.] \textit{Id.} at 240, 242. In addition, the Big Ten Conference, of which Illinois is a member institution, mandated overall department proportionality. \textit{Id.} at 240.
\item[109.] See \textit{id.}
\item[110.] See \textit{id.} at 242.
\item[111.] \textit{Id.}
\item[112.] \textit{Id.} at 243.
\item[113.] \textit{Id.} at 241.
\item[114.] See, \textit{e.g.}, Gonyo v. Drake Univ., 837 F. Supp. 989 (S.D. Iowa 1993).
\end{enumerate}
IV. BALANCING INTERESTS IN TITLE IX LITIGATION

Although recent cases vary factually, certain central questions have surfaced in many of them. These questions, and how courts resolve them, will have more of an impact on the future of Title IX than any individual ruling. This Part discusses three of these central issues: class status, apportioning budgetary cutbacks, and compensatory damages.

A. Class Status

Suits filed against universities for Title IX enforcement rarely deal with a single plaintiff. Rather, these cases are usually attempts to force universities to offer more and better opportunities for women athletes in general. As a result, most cases are filed as class actions, representing all potential female athletes at an institution, present and future.115

However, not all cases have been class actions. In some cases, the plaintiffs have sought to protect only their individual interests.116 These cases present the additional problem of balancing an individual's (or small group's) grievances with the overall intent.

Unfortunately, recent courts have tended to focus on the needs and interests of individual plaintiffs to the detriment of long term goals. Recent decisions have not advanced the cause of gender equity as well as decisions in class action cases would have. This has led to undue intervention in athletic departments, and could result in an inefficient use of judicial resources. In order to ensure that the long-term interests of Title IX, women athletes, and universities are advanced, courts need to view all Title IX cases as class actions whenever possible, especially when fashioning remedies.

When courts do not treat cases as class actions, they place the interests of the named plaintiffs above those of female athletes as a group. This can result in rulings that provide relief for the named plaintiffs, but ignore the overall problems and do not ensure better treatment of women athletes in the future. For example, in Cook v. Colgate University,117 the district court ruled that Colgate was in violation of Title IX and issued an injunction forcing the school to fund a varsity women's field hockey team. However, the appellate

115. Six of the eleven cases filed between the springs of 1992 and 1993 were class actions. See Herwig, supra note 6, at 9C.
116. See, e.g., Roberts, 998 F.2d at 824; Cook, 992 F.2d at 17.
117. 802 F. Supp. at 751.
court vacated the judgment, not because of the merits of the case, but because the graduation of the named plaintiffs had rendered the claim moot.\textsuperscript{118} Had this been a class action case, future female field hockey players would have been under the protection of the injunction. Instead, future players will have to repeat the process.

While Title IX was written to protect women from discrimination, the intent was to affect the opportunities of all women.\textsuperscript{119} By sacrificing the interests of future female athletes for their own, these plaintiffs are misusing the leverage Title IX has created. By allowing them to do so, the courts risk undermining the potential of Title IX to ensure equitable distribution of resources.

Universities can also be unduly injured by a lack of class status. In \textit{Roberts v. Colorado State Board of Agriculture},\textsuperscript{120} the court agreed with the university that the department should be allowed flexibility in designing a program that achieves gender equity, but left in place the district court injunction requiring CSU to field a softball team.\textsuperscript{121} The court felt compelled to require specific changes in the department, not because such changes were necessarily the best method of gaining compliance, but because the lack of class status required a remedy tailored to the needs of the individual softball players who were plaintiffs in the case.\textsuperscript{122}

Yet another adverse consequence of not having class status is a potential waste of judicial resources. When the current players graduate from CSU, new athletes may have to initiate a suit in order to maintain the injunction. If future field hockey players at Colgate wish varsity status, they may have to take the university to court again. The doctrine of collateral estoppel will not necessarily apply. In \textit{Cook}, for instance, the initial injunction was vacated,\textsuperscript{123} meaning there was never a final decision on the merits. Rearguing these questions is not an efficient use of judicial resources.

While plaintiffs certainly have the right to bring actions to address their individual grievances, courts should take into account the goals of Title IX and the legitimate interests of the universities and other female athletes by presumptively treating all Title IX litigation as an action to benefit the class. Only in rare circumstances would class

\begin{itemize}
\item \textsuperscript{118} \textit{Cook}, 992 F.2d at 20.
\item \textsuperscript{119} \textit{See generally Graf, supra note 9.}
\item \textsuperscript{120} 998 F.2d 824 (10th Cir.), cert. denied, 114 S. Ct. 580 (1993).
\item \textsuperscript{121} \textit{Id.} at 835.
\item \textsuperscript{122} \textit{Id.} at 833.
\item \textsuperscript{123} \textit{See supra note 68 and accompanying text.}
\end{itemize}
status be inappropriate, and plaintiffs should have the burden of showing why it should not be applied in their case.

B. Gender Equity in Tight Budgetary Times

When Title IX was written, and the regulations promulgated, most related actions were expected to involve women seeking expansion of women’s programs to equal the men’s programs. However, economic realities have transformed this area of the law. Now, many cases involve efforts by universities to cut back programs and questions of how much of the burden women’s programs should bear. A proper balance between the need to achieve gender equity and the need to maintain healthy athletic programs is necessary to ensure the long term success of Title IX without threatening the health of intercollegiate athletics as a whole.

Plaintiffs argue that, because they already suffer from discrimination, universities should not be allowed to inflict more harm on them. They argue that schools could achieve better gender equity and more reasonable budgets by cutting men’s programs such as football. Universities, on the other hand, point to the rapid increase in funding for women’s athletics to show that many steps have been made. The universities argue that, in order to maintain a healthy program, they must be allowed a certain amount of deference to make tough decisions. They argue that women’s programs should not be immune to the consequences of shrinking budgets so long as gender equity is an important factor in making budgetary decisions.

If a university were to try to achieve a better financial outlook by eliminating only women’s programs, when the women were underrepresented to begin with, there would be little debate about the illegality or unfairness of such a move. However, these recent cases have dealt with attempts to balance the pain of budget cutbacks between the genders. These cases are more difficult to label as fair or unfair, and the legal decisions are consequently more complicated and controversial.

125. See Roberts, 998 F.2d at 824; Cohen, 991 F.2d at 888; Kelley, 832 F. Supp. at 237; Favia, 812 F. Supp. at 578.
Even so, some cases have been easy to interpret. Both Cohen v. Brown University\(^{129}\) and Favia v. Indiana University\(^{130}\) involve efforts to worsen the gender gap in the name of fiscal responsibility. The courts were adamant that, where one gender is underrepresented, the university may not apportion the bulk of the cutbacks to that gender's programs. These two cases are examples of what Title IX can accomplish when properly applied. As the court in Cohen noted, universities can comply with Title IX by any method they choose so long as such compliance takes place.\(^{131}\)

However, some cases have gone beyond this rule when enforcing Title IX. In Roberts v. Colorado State Board of Agriculture,\(^{132}\) for instance, the court cited the rule from Cohen that the university could achieve gender equity by cutting men's programs while leaving women's programs intact or while cutting women's programs at a slower rate.\(^{133}\) However, the court then ruled that CSU could not cut the women's softball team in conjunction with the men's baseball team even though the bulk of the cuts fell on the men's program.\(^{134}\) And in Kelley v. University of Illinois,\(^{135}\) the court stated in dicta that it could have prevented the university from disbanding the women's diving team along with the men's swimming team if the move had been challenged,\(^{136}\) despite the fact that the men's swimming team had twenty-eight members while the women's diving team had only one.\(^{137}\) Thus, the court sided with the Roberts court by denying universities the right to close the gender gap by cutting women's programs at a slower rate than men's programs.\(^{138}\)

The district court in Cook v. Colgate University\(^{139}\) went even further, requiring the university to add a women's program while it was cutting men's programs, despite the effort of the university to leave all existing women's programs intact.\(^{140}\) The appellate court

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129. 991 F.2d at 888.
130. 812 F. Supp. at 578.
131. Cohen, 991 F.2d at 898-99 n.15.
132. 998 F.2d at 824.
133. Id. at 830 (citing Cohen, 991 F.2d at 898-99 n.15).
135. 832 F. Supp. at 237.
136. Id. at 242.
137. Id. at 239.
138. Id. at 242.
140. Id. at 751.
reversed on technical grounds, but did not strike down the merits of the case.\textsuperscript{141}

While no one should be proud of the way in which women athletes have been treated in the past by athletic departments, courts need to be careful to make decisions based on the future, not on past discriminatory policies. As long as a university uses gender equity as an important factor, the final policy should be left up to those administrators who are in the best position to evaluate the needs of the department. Going as far as the court in \textit{Roberts} prevents those who must worry about the health of an entire program from functioning properly.

C. Compensatory Damages

As mentioned above,\textsuperscript{142} the traditional rule in Title IX cases has been to deny monetary damages while granting injunctive relief. Because the law's scope was limited to those institutions receiving federal funds, the rights created under Title IX were not judged to warrant an award of damages when those rights were denied.\textsuperscript{143} Rather, the stick most courts used in forcing compliance was the threat of cutting off federal funds to the institution.\textsuperscript{144} The courts should continue to follow this doctrine because, especially in tight budgetary times, granting compensatory damages will only restrict the opportunities of future athletes of both genders.

The rule against compensatory damages has remained largely intact, with the exceptions to this rule remaining limited. For instance, the exception to the rule found in \textit{Beehler v. Jeffes},\textsuperscript{145} that damages could be awarded in cases of intentional violation of Title IX, is still restricted. The requirement of willfulness makes this remedy more akin to punitive damages rather than consequential ones. Few athletic departments need to worry about this exception because most modern cases involve good faith efforts to run the program rather than malice toward the plaintiffs.

Another exception to the rule which has developed involves damage awards in employment discrimination suits,\textsuperscript{146} but this exception is also limited in its application to collegiate funding cases.

\begin{footnotes}
\item[141.] Cook v. Colgate Univ., 992 F.2d 17 (2d Cir. 1993).
\item[142.] See supra notes 50-53 and accompanying text.
\item[143.] See supra notes 52-53.
\item[144.] See supra note 51.
\item[146.] See Paddio v. Board of Trustees, 61 Fair Empl. Prac. Cas. (BNA) 86 (E.D. La. 1993).
\end{footnotes}
Because employment discrimination suits have traditionally awarded monetary damages, the court in Paddio ruled, in part, that the plaintiff should not have to give up that remedy simply because the statute upon which she based her claim, in part, does not call for compensation to the plaintiff. Because unequal funding cases have not traditionally involved a monetary remedy, athletic departments have little to fear from this exception.

While these exceptions appear to be a sensible effort to balance the goals of Title IX with protecting and compensating injured parties in the most egregious cases, there is a danger if courts go too far. While no court has awarded damages in a simple disproportionality case, such as those listed in Part III, damages can be awarded to successful plaintiffs. If courts begin to award monetary damages, especially in cases of universities cutting back programs for financial reasons, the health of the overall program will be threatened.

There is a good argument to be made for awarding damages in these cases. The plaintiffs in these cases often can lose a season of competition, or at least several months of training, while the case goes to court. For example, if the plaintiff's in Cohen are not able to have official practices with paid coaches prior to the court decision, their gymnastics performance will be harmed and a case can be made that they deserve compensation for their injury.

However, Roberts shows that courts are willing to issue sweeping preliminary injunctions should the need arise to prevent such injuries. The potential harm of monetary damages outweighs the need for them as a policy matter. If a court awards a large amount of money to a small group of athletes, already strapped programs will be forced to offer even fewer opportunities overall. Indeed, monetary damages could do enough harm to programs to outweigh the good which Title IX has achieved.

V. CONCLUSION

Title IX has greatly advanced women's intercollegiate athletics. Between 1972 and 1990, expenditures for women's athletics rose from almost nothing to millions of dollars annually at most institutions.
There is still much to do because most schools are still budgeting in a discriminatory manner to some degree. But schools have been moving in the right direction.

Ironically, as women’s programs are being funded at record levels, Title IX cases are being filed more frequently. While women athletes certainly deserve equal opportunities to compete, these cases, and some of the rules being adopted by courts, pose a potential threat to the health of intercollegiate athletics as a whole. This is particularly true if the courts disregard the practical aspects of their rulings. Courts need to be careful to balance gender equity with pragmatism.

First, courts need to view Title IX cases as class actions wherever possible. Class actions are most likely to achieve long term benefits for women while also giving universities the most flexibility in designing a solution. Without class status, the court must remedy only the problems of the individual parties, ignoring the needs of future potential plaintiffs. A lack of class status will also burden institutions by forcing them to design a solution to fit the needs of the individuals regardless of whether that solution will benefit the most women. Finally, a lack of class status increases the likelihood that future cases will need to be filed.

Second, courts need to avoid placing gender equity on a higher priority than the health of the entire athletic program. Especially in cases where universities are trying to cut back funding, the court should allow the institution to balance the pain. So long as the university takes gender equity into consideration, the courts should allow cuts to be made in a sensible fashion. Specifically, the courts should allow universities to cut women’s programs when they are cutting men’s programs at a significantly faster rate, as the university attempted to do in Roberts.

Thirdly, the courts should avoid the temptation to award monetary damages in most Title IX actions. While a woman who is prevented from competing in her sport because opportunities are not equal certainly suffers and may deserve to be compensated, the problems outweigh the benefits. By awarding damages, a court would be placing the needs of the few plaintiffs above the needs of the athletes to come.

For the most part, Title IX has worked to advance the opportunities for women athletes. The threat of court action plays an important role in this process. Provided that courts keep the goals of Title IX and the long term effects of their decisions in mind, this process can continue to benefit women and bring about a more equitable situation that will benefit all. However, if the courts ignore the long term
consequences and the original goals, and instead narrowly focus on the particular complaint of a particular plaintiff, the courts will run the risk of doing more harm than good and threatening the overall health of intercollegiate athletics.