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GENDER EQUITY IN ATHLETICS: THE NEW BATTLEGROUND OF INTERSCHOLASTIC SPORTS

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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 . . . .[1]

I. INTRODUCTION

Until now, Title IX has had its most profound impact on intercollegiate athletics. Cases abound[2] and the literature is abundant.[3] Title IX has served as an effective statutory remedy for sex-based classifications in intercollegiate sports. By most accounts, Title IX has already vastly increased the athletic opportunities available for

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1 20 U.S.C. § 1681(a) (1994) (commonly referred to as "Title IX").

2 For some of the more widely cited intercollegiate cases, see Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993); Favia v. Indiana Univ. of Pennsylvania, 7 F.3d 332 (3d Cir. 1993); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993). For discussion of these cases, see *infra* part II.C.

3 *See, e.g.*, Philip Anderson, *A Football School's Guide to Title IX Compliance*, 2 SPORTS L.J. 75 (1995); B. Glenn George, *Miles to Go and Promises to Keep: A Case Study in Title IX*, 64 U. COLO. L. REV. 555 (1993); Melody Harris, *Hitting 'Em Where it Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics*, 72 DENV. U. L. REV. 57 (1994); Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1 (1992); Jennifer L. Henderson, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness*, 5 SETON HALL J.SPORT L. 133 (1995); Jodi Hudson, Comment, *Complying with Title IX of the Education Amendments of 1972: The Never-Ending Race to the Finish Line*, 5 SETON HALL J. SPORT L. 575 (1995); Jill K. Johnson, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards of Compliance*, 74 B.U. L. REV. 553 (1994); Janet Judge et al., *Gender Equity in the 1990's: An Athletic Administrator's Survival Guide to Title IX and Gender Equity Compliance*, 5 SETON HALL J.SPORT L. 313 (1995); Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, 3 YALE J.L. & FEMINISM 105 (1991); Catherine Pieronek, *A Clash of Titans: College Football v. Title IX*, 20 J.C. & U.L. 351 (1994); Andrew Richardson, *Sports Law:* Cohen v. Brown University; *A Title IX Lesson for Colleges and Universities on Gender Equity*, 47 OKLA. L. REV. 161 (1994); Symposium, *Gender Equity in Sports: An Analysis of Title IX*, 2 VILL. SPORTS & ENT. L. F. 1 (1995).

For comprehensive treatment of gender equity in athletics, see, e.g., Karen Tokarz, *Sex Discrimination in Amateur and Professional Sports*, *in* 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS (Gary A. Uberstine ed., 1994); ELLEN J. VARGYAS, BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX (1994).

women at the intercollegiate level.[4] But recently, as girls contend for better opportunities in interscholastic sports, a new battleground has emerged on the high school and middle school levels. While the struggle for gender equity in intercollegiate sports is by no means over, the purpose of this Article is to examine this newly emerging front. Clearly, without concomitant progress for younger girls in interscholastic sports, the promise of full and meaningful athletic opportunities for intercollegiate women will remain theoretically problematic and practically unrealistic.

This Article is born of our experience in litigating two federal cases based primarily on Title IX.[5] As of this writing, the litigation is ongoing, so the final story has yet to be told. Our purpose here is to provide information on the progression of this type of litigation based on our experiences. What follows is a "how-to" guide for the initiation of Title IX litigation aimed at achieving gender equity in interscholastic sports. A subsequent article will track the progress of the litigation.

II. The Title IX Mandate and its Application to Interscholastic Sports

A. *History of Title IX*

In 1972, Congress passed Title IX of the Education Amendments. The clear statutory purpose of Title IX is to eliminate discrimination on the basis of gender in educational institutions. The statute provides: "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. . . ."[6] The legislative history indicates that Title IX was to be "a strong and comprehensive measure [which would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American

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[4] At the college level, there were only 32,000 women competing in 1972. By 1989, there were more than 130,000 college women athletes. *See* Sally B. Donnelly, *Work That Body! Fewer Curves, More Muscles: A Sweat-Soaked Revolution Redefines the Shape of Beauty*, TIME, Oct. 1, 1990, at 68. By all accounts, these numbers continue to increase.

[5] The two cases are now pending in the United States District Court for the Northern District of Oklahoma. Randolph v. Owasso Indep. Sch. Dist., No. I-011, No. 96-CV-0105-K (N.D. Okla. filed Feb. 15, 1996); Bull v. Tulsa Pub. Schs., No. 96-C-0180H (N.D. Okla. filed Mar. 8, 1996).

Title IX is not the only legal basis on which to challenge discriminatory treatment on the basis of sex. Gender-based classifications can also be challenged under the 14th Amendment and 42 U.S.C. § 1983 (1994). *See* VARGYAS, *supra* note 3, at 6 n.3.

[6] 20 U.S.C. § 1681(a).

women."[7]

In 1979, the United States Supreme Court recognized a private right of action under Title IX in *Cannon v. University of Chicago*.[8] The Court's holding means that individuals can bring actions pursuant to Title IX directly, without having to exhaust administrative procedures. Thus, "aggrieved individuals can directly enforce their Title IX rights in court without first bringing their claims before an administrative agency."[9]

However, in 1984, the ability of Title IX to effectively deal with the disparity between male and female athletic programs was undercut by the Supreme Court decision in *Grove City College v. Bell*.[10] In that case, the Court held that the scope of Title IX was limited to specific programs or activities within an educational institution that directly received financial support from the federal government.[11] In the context of interscholastic athletics, the *Bell* decision meant that unless the athletic department of a school district directly received federal funds, Title IX was inapplicable to its sports programs.[12]

The holding of *Bell* and its disarming of Title IX was short-lived, as Congress subsequently passed the Civil Rights Restoration Act of 1987.[13] In this legislation, Congress made clear that the program-specific approach was not the intended application of Title IX.[14] The Act clarified that "program or activity," for purposes of Title IX, applies to any program or activity of an educational institution so long as any part of the institution receives federal financial assistance.[15] Thus, the athletic department of a school district

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7 118 CONG. REC. 5804 (1972) (remarks of Sen. Bayh).

8 441 U.S. 677 (1979).

9 VARGYAS, *supra* note 3, at 12.

10 465 U.S. 555 (1984). For additional scholarly discussion of the *Bell* case, see Karen Czapanskiy, Grove City College v. Bell: *Touchdown or Touchback?*, 43 MD. L. REV. 379 (1984); Renee Forseth et al., Comment, *Progress in Gender Equity?: An Overview of the History and Future of Title IX of the Education Amendments Act of 1972*, 2 VILL. SPORTS & ENT. L. F. 51, 62-64 (1995).

11 *Bell*, 465 U.S. at 573-75.

12 Prior to *Bell*, the United States Court of Appeals for the Third Circuit had held that Title IX was applicable to a university because it received federal financial assistance even though the athletic department did not receive any such funding. *See* Haffer v. Temple Univ., 688 F.2d 14, 16 (3d Cir. 1982).

13 Pub. L. No. 100-259, 102 Stat. 28 (Mar. 22, 1988).

14 S. REP. No. 64, 100th Cong., 2d Sess. § 4 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3, 6 ("[D]iscrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance.").

15 20 U.S.C. § 1687 (1994). This section provides:

> For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of—
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> . . . .
>
> (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

must comply with Title IX if the school district receives any federal funding for any purpose. As one court has said: "Congress has made clear its intent to extend the scope of Title IX's equal opportunity obligations to the furthest reaches of an institution's programs."[16]

Disagreement also existed as to the available remedies under Title IX. Prior to 1992, there was a conflict among circuits on the issue of whether Title IX authorized an award of monetary damages.[17] The Supreme Court settled the issue in *Franklin v. Gwinnett County Public Schools*,[18] holding that "a damages remedy is available for an action brought to enforce Title IX."[19] The Supreme Court rejected the argument that monetary damages are improper for a violation of a statute passed pursuant to Congress's Spending Clause power.[20] While the Court did not decide whether Title IX is a Spending Clause statute, the court held that compensatory damages are allowed for "intentional violations" of Title IX.[21]

B. *The Administrative Interpretation*

1. The Regulations

Following the passage of Title IX, the United States Department of Health, Education and Welfare ("HEW"), pursuant to its congressional mandate,[22] adopted regulations interpreting Title IX in 1975.[23] HEW quickly made it clear that Title IX was applicable to educational sports programs.[24] With the creation of the United States Department of Education ("DED") as a separate entity in 1979,[25] the DED replicated its predecessor's regulations.[26] Federal

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(B) a local education agency . . . system of vocational education, or other school system . . .

any part of which is extended Federal financial assistance . . . .

Id.

16 Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265, 272 (6th Cir. 1994).

17 *Compare* Franklin v. Gwinnett County Pub. Schs., 911 F.2d 617, 622 (11th Cir. 1990) (holding that damages were not allowed under Title IX), *rev'd*, 503 U.S. 60 (1992), *with* Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 787-89 (3d Cir. 1990) (holding damages are available under Title IX).

18 503 U.S. 60 (1992).

19 *Id.* at 76.

20 *Id.* at 74-75.

21 *Id.* at 75-76.

22 Education Amendments of 1974, Pub. L. No. 193-380, Title VIII, § 844, 84 Stat. 484, 612 (1974).

23 40 Fed. Reg. 24,128 (1975) (to be codified at 45 C.F.R. pt. 86) (1996).

24 Although bills were introduced in Congress to disapprove HEW's Title IX athletic regulations, none passed. *See* VARGYAS, *supra* note 3, at 8 (citing S. Con. Res. 52, 121 CONG. REC. 22,940 (1975); H.R. Con. Res. 311, 121 CONG. REC. 19,209 (1975)).

25 *See* 20 U.S.C. §§ 3401-3510 (1994).

26 *Compare* 45 C.F.R. pt. 86 (1996) (HEW (now "HHS") regulations), *with* 34 C.F.R. pt.

courts have given the regulations considerable deference in interpreting and applying Title IX.[27] Furthermore, 34 C.F.R. § 106.41(a) includes both intercollegiate and interscholastic athletics within the "program or activity" requirements of Title IX.[28] Thus, the regulations are an important part of litigation to enforce Title IX's requirements on interscholastic athletic programs.

The regulations specify ten factors that are to be considered in the determination of whether an institution is complying with Title IX's mandate of equal athletic opportunity. Those factors are:

(1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;[29]
(2) the provision of equipment and supplies;[30]
(3) scheduling of games and practice time;[31]
(4) travel and per diem allowance;[32]
(5) opportunity to receive coaching and academic tutoring;[33]
(6) assignment and compensation of coaches and tutors;[34]
(7) provision of locker rooms, practice and competitive facilities;[35]
(8) provision of medical and training facilities and services;[36]
(9) provision of housing and dining facilities and services;[37] and
(10) publicity.[38]

The first of these factors is probably the most important. Courts have held that "an institution may violate Title IX solely by failing to effectively accommodate the interests and abilities of student athletes of both sexes."[39] The other factors (two through ten)[40] are also very important and are a part of Title IX's mandate for equality between male and female athletic programs.

106 (1996) (DED regulations). For cases noting the replication of these regulations, see *Horner*, 43 F.3d at 273; *Cohen*, 991 F.2d at 895.

27 *See, e.g.*, *Cohen*, 991 F.2d at 895 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 844 (1984)).

28 34 C.F.R. § 106.41(a) (1996).

29 *Id.* § 106.41(c)(1).

30 *Id.* § 106.41(c)(2).

31 *Id.* § 106.41(c)(3).

32 *Id.* § 106.41(c)(4).

33 *Id.* § 106.41(c)(5).

34 *Id.* § 106.41(c)(6).

35 *Id.* § 106.41(c)(7).

36 *Id.* § 106.41(c)(8).

37 *Id.* § 106.41(c)(9).

38 *Id.* § 106.41(c)(10).

39 Kelley v. Board of Trustees, 35 F.3d 265, 268 (7th Cir. 1994) (citing *Roberts*, 998 F.2d at 828; *Cohen*, 991 F.2d at 897-98).

40 34 C.F.R. § 106.41(c)(10).

2. The Policy Interpretation

In an attempt to further clarify Title IX's statutory and regulatory mandate, the Office of Civil Rights ("OCR") of HEW issued a policy interpretation of Title IX and its regulations ("Policy Interpretation").[41] While the Policy Interpretation does not possess the same "force of law" status as the Title IX statute and Title IX regulations,[42] it has been used as a standard of Title IX compliance by many courts.[43] Further, although the Policy Interpretation focuses on colleges and universities, it expressly states that its "general principles will often apply . . . to interscholastic athletics."[44]

The Policy Interpretation provides that, in order to comply with Title IX and its regulations, educational institutions must provide equal athletic opportunities in three general areas.[45] First, there must be an equivalent awarding of scholarships.[46] This requirement, however, is less relevant in the area of interscholastic athletics as scholarships are generally not awarded at the interscholastic level. Therefore, the scholarship requirements will usually not be at issue in an interscholastic Title IX case. Secondly, educational institutions must provide equal participation opportunities in athletics.[47] This requirement includes both the number of opportunities and the accommodation of both males and females in selection of sports and level of competition.[48] Finally, there must be equal treatment and benefits for both sexes.[49] The equal treatment and benefits include those factors listed in the regulations other than participation opportunities.[50]

The OCR's Policy Interpretation sets out the test which determines whether an institution is complying with Title IX's requirement of equal opportunity for participation. The overall test in the area of participation is actually composed of three individual tests:

(1) Whether intercollegiate level participation opportuni-

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41 Title IX of Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,414 (1979) [hereinafter Policy Interpretation].

42 *See* Pederson v. Louisiana State Univ., 912 F. Supp. 892, 910 (M.D. La. 1996) ("The Policy Interpretation does not have the binding effect of those rules, regulations or orders authorized by [Title IX].").

43 *See, e.g., Cohen*, 991 F.2d at 896-900.

44 Policy Interpretation, 40 Fed. Reg. at 71,413.

45 *Id.*

46 *Id.*; *see* 34 C.F.R. § 106.37(c) (1996).

47 Policy Interpretation, 44 Fed. Reg. at 71,414.

48 *See supra* notes 28-40 and accompanying text.

49 Policy Interpretation, 44 Fed. Reg. at 71,414.

50 *Id.* at 71,415-17; 34 C.F.R. § 106.41(c)(2)-(10).

> ties for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
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> (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 the members of that sex have been fully and effectively accommodated by the present program.[51]

Again, although the Policy Interpretation uses the term "intercollegiate," the test is applicable to interscholastic athletics.[52]

As to the first test, it has been termed a "safe harbor,"[53] allowing easy determination of Title IX compliance.[54] This first test does not take into consideration females' interest in athletics; rather, it is only based on comparing enrollment with actual participation.[55] Although determination of compliance is easy under this test, actually meeting the test is probably "unlikely."[56]

Satisfaction of gender equity under the second test requires program expansion for females by the educational institution. However, this test recognizes that "Title IX does not require that [an educational institution] leap to complete gender parity in a single bound."[57] However, "in an era of fiscal austerity, few [educational institutions] are prone to expand athletic opportunities,"[58] especially of the continuous nature required by the second test.[59]

The third test, "full and effective accommodation," has been declared a very high standard for an educational institution to prove, although it may be the one on which a school most often attempts to rely.[60] The Policy Interpretation, however, does not require an educational institution to offer a sport "absent a reasonable expectation" that the sport can be sustained and competition

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51 *Id.* at 71,418.
52 *Id.* at 71,413.
53 *Cohen*, 991 F.2d at 897.
54 *Id.* at 897-98.
55 *See id.* at 899.
56 *Id.* at 898.
57 *Id.*
58 *Id.*
59 The court in *Cohen* emphasized that there must be "a *continuing* practice of program expansion." *Id.* at 903.
60 *Id.* at 898.

from other schools is available.[61] Educational institutions, however, are required to "actively encourage such competition" on behalf of the underrepresented sex.[62] Clearly, expansion of what constitutes equality in participation opportunities is one of the cores of the Policy Interpretation.

The other requirement of the Policy Interpretation relevant to interscholastic athletics is the benefits provided to sports teams. The Policy Interpretation basically tracks the factors listed in the regulations (other than participation opportunities) and expands upon them. For example, the regulations provide that compliance with Title IX may be measured by the "compensation of coaches."[63] The Policy Interpretation, on the other hand, details what factors constitute equality in compensating coaches of sports teams of different sexes. Those factors include rate of pay, duration of any contract, conditions of renewal, experience, nature of duties, and working conditions. Other benefits are also discussed in the Policy Interpretation, such as equipment, trainers, tutors, and scheduling of practices and games. Thus, the Policy Interpretation is an invaluable resource to aid in the determination of whether an educational institution is meeting Title IX's mandates.

The most recent development on the administrative level has been the issuance of the Title IX Clarification Statement by the OCR. Issued on January 16, 1996, the Title IX Clarification Statement retains and expands upon the three part analysis of equality in athletic opportunities. As to the first part, statistical proportionality can be achieved by counting, as participants, athletes who are, for example, only on the practice squad or who have been redshirted. Furthermore, substantial proportionality may be met when the educational institution would only need to add a number of athletic opportunities to comply with Title IX that is less than the number which would be required to field a whole team.

As to the second part, the OCR will consider an institution's "affirmative responses to requests by students or others for addition or elevation of sports" when analyzing program expansion. As to the last part, OCR will consider the level of unmet interest, sufficient student ability to sustain a program, and the expectation of competition when measuring full and effective accommodation. While it will provide a guide to athletic programs that may be on the verge of Title IX compliance, the Clarification Statement will

61 Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (1979).
62 *Id.*
63 34 C.F.R. § 106.41(c)(6)(1996).

have little impact on the majority of litigation seeking to improve interscholastic athletic programs that are, all too often, far from meeting Title IX mandates.

C. Title IX Case Law

Currently there are three Title IX cases involving intercollegiate athletics that are widely cited and followed by many courts.[64] First, in *Cohen v. Brown University*,[65] the university made a decision to discontinue offering women's volleyball, women's gymnastics, men's water polo, and men's golf.[66] The changes did not affect the opportunity ratios under the first prong of the Policy Interpretation's accommodation test.[67] However, the opportunity ratio at Brown already strongly favored males.[68] The members of the women's volleyball and gymnastics teams filed suit claiming Brown University was in violation of Title IX.[69] The district court issued a preliminary injunction forcing Brown to reinstate volleyball and gymnastics.[70]

Brown then appealed the preliminary injunction. First, it challenged Title IX's statutory and regulatory scheme as an unconstitutional violation of equal protection.[71] The First Circuit quickly dismissed this claim, reasoning that Title IX does not disadvantage males, but rather seeks to give opportunities to females and that the statute was within Congress's remedial powers.[72] The Court then found that the district court had correctly determined that the women athletes were likely to be successful on the merits of their case because they could prove that there was a numerical disparity under the first part of the Policy Interpretation test and that there were unmet interests of females at the university under the third part of the test.[73] This decision is significant because the court refused to merge the first and the third parts of the test, which would have allowed a university to comply with Title IX by offering athletic opportunities proportionate to the level of inter-

64 *See, e.g.*, George A. Davidson & Carla A. Kerr, *Title IX: What is Gender Equity?*, 2 VILL. SPORTS & ENT. L. F. 25, 37-42 (1995).

65 991 F.2d 888.

66 *Id.* at 892.

67 *Id.*

68 *Id.* Males were given 63.4% of the student athletic opportunities at Brown, while females had available to them 36.6% of the student athletic opportunities. *Id.*

69 *Id.*

70 *Id.* at 893.

71 *Id.* at 900.

72 *Id.* at 900-01.

73 *Id.* at 902.

ests of males and females.[74] The *Cohen* case today survives as one of the landmark cases in Title IX litigation.

The second widely cited case is the Tenth Circuit decision in *Roberts v. Colorado State Board of Agriculture*.[75] There the court was faced with an appeal by the governmental entity that controlled Colorado State University. The district court had ordered both the Board and the University to reinstate women's fast-pitch softball because it found that the discontinuation of the sport by the University caused the University to be in violation of Title IX.[76] The University claimed that simultaneous and similar cuts in the number of teams for both men and women did not, in general, violate Title IX and, specifically, the third part of the Policy Interpretation's effective accommodation test.[77] The Tenth Circuit rejected this claim, as did the *Cohen* court, because "full and effective accommodation" is not achieved by offering athletic opportunities only proportionate to the perceived interest of males and females; rather, all interests of the underrepresented sex must be accommodated.[78] Proving that there were unmet interests of females at Colorado State University was easy, as those with unmet interests were before the court.[79]

The third widely cited Title IX case is *Favia v. Indiana University of Pennsylvania*.[80] As in both *Cohen* and *Roberts*, the *Favia* court was faced with an educational institution that had cut both male and female sports teams, specifically women's gymnastics and field hockey and men's tennis and soccer.[81] Members of the women's gymnastics and field hockey teams filed suit seeking an injunction requiring the University to reinstate their teams. The district court

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[74] *Id.* at 899. By way of illustration, the court gave the following example:

> Suppose a university (Oooh U.) has a student body consisting of 1,000 men and 1,000 women, a one to one ratio. If 500 men and 250 women are able and interested athletes, the ratio of interested men to interested women is two to one. Brown takes the position that both the actual gender composition of the student body the question of and whether there is unmet interest among the underrepresented gender are irrelevant; in order to satisfy the third benchmark, Oooh U. must only provide athletic opportunities in line with the two to one interested athlete ratio, say, 100 slots for men and 50 slots for women. Under this view, the interest of 200 women would be unmet—but there would be no Title IX violation.
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> We think that Brown's perception of the Title IX universe is myopic.

[75] 998 F.2d 824.

[76] *Id.* at 826.

[77] *Id.* at 831.

[78] *Id.* at 831-32 (citing *Cohen*, 991 F.2d at 898).

[79] *See id.* at 831.

[80] 7 F.3d 332.

[81] *Id.* at 335. However, the cuts saved men's athletics only $35,000 while women's athletics were saddled with a $110,000 hit. *Id.*

authorized the preliminary injunction, but the University failed to appeal. However, after the time to appeal had run, the University filed a motion to modify the injunction that requested permission to replace gymnastics with women's soccer. The University sought to support the modification on the basis that a change in circumstances surrounding the athletic programs supported modification. The district court denied the motion. On appeal, the Third Circuit held that the district court did not abuse its discretion in denying the motion to modify. The Third Circuit was satisfied with the district court's holding that the proposed modification would not ameliorate any Title IX violation.

One of the most important recent Title IX cases is *Pederson v. Louisiana State University*.[82] In *Pederson*, the plaintiffs sought an injunction requiring Louisiana State University ("LSU") to begin fielding teams in women's soccer and women's fast-pitch softball, as well as a declaration that LSU's athletic program was in violation of Title IX.[83] In discussing the law of Title IX, the court noted its disapproval of the Policy Interpretation's three part test,[84] as well as the holdings of *Cohen* and *Roberts* which stated that the first part was a "safe harbor" based entirely on enrollment rather than interest.[85] However, the court found that LSU had not effectively accommodated female athletes and lacked a history of expanding opportunities for females.[86] Thus, the court held that LSU was in violation of Title IX.[87] This case is important because it underscores the fact that educational institutions are very often not in compliance with Title IX and will be found to have violated Title IX even when a court "waters down" the legal standards.

III. Practical Problems

The substantive law surrounding Title IX is relatively clear. Equally apparent to most observers is the fact that many interscholastic sports programs are not in compliance. Still, there are formidable problems that stand in the way of Title IX litigation.

A. *Anti-Solicitation Rules*

Many state bar association rules prohibit direct contact by a lawyer with a prospective client. Therefore, although an attorney

82 912 F. Supp. 892.
83 *Id.* at 897.
84 *Id.* at 910-11.
85 *Id.* at 913-14.
86 *Id.* at 917.
87 *Id.*

may be aware that a large disparity exists between boys and girls athletic programs in a school district, the attorney is often prohibited from making direct contact with the girls or their parents. The American Bar Association Model Rules of Professional Conduct, widely copied throughout the nation, contains such a restriction.[88] Model Rule 7.3(a) provides:

> A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.[89]

Similarly, in states where the professional rules for attorneys follows the American Bar Association's Model Code of Professional Responsibility, Disciplinary Rule 2-104(A) provides:

> A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice . . . .[90]

The premise behind these rules is that prospective clients "may already feel overwhelmed by the circumstances giving rise to the need for legal services" and "may find it difficult fully to evaluate all available alternatives."[91]

However, soliciting clients for Title IX litigation may be considered a constitutionally protected form of speech. In 1978, the Supreme Court held that anti-solicitation rules were unenforceable as applied in *In re Primus*.[92] In that case, pregnant mothers in Aiken County, South Carolina were forced to submit to sterilization "as a condition of the continued receipt of medical assistance under the Medicaid program."[93] Edna Smith Primus was an attorney in private practice in the area and had a relationship with both the American Civil Liberties Union ("ACLU") and the South Carolina Council on Human Relations.[94] She attended a meeting with the pregnant mothers and representatives of a local group serving the poor.[95] After the meeting, the ACLU agreed to provide legal services to the women and Primus informed one of the women of

88 MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3(a) (1983).
89 *Id.*
90 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A) (1981).
91 MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3(a) cmt. 1 (1983).
92 436 U.S. 412 (1978).
93 *Id.* at 415.
94 *Id.* at 414-15.
95 *Id.* at 415.

the free legal representation.[96] Subsequently, the South Carolina Supreme Court found Primus had solicited a client in violation of its ethical rules.[97]

The United States Supreme Court, however, reversed the sanction. The Court first determined that Primus's conduct came "within the generous zone of First Amendment protection reserved for associational freedoms."[98] Accordingly, the Court then held that the disciplinary rule had to be justified under a high level of scrutiny.[99] Because of the Court's reliance on the associational relationship in *Primus*, it is unclear whether direct participation in a public interest group is required. The Court specifically characterized the petitioner as "seeking to further political and ideological goals through associational activity."[100]

Further, solicitation of clients for Title IX cases could be permissible, without the protection of the First Amendment, if the primary motive is not the lawyer's pecuniary interest.[101]

B. Willing Plaintiffs, Attorney's Fees and Costs

> "Hell hath no fury like the parent of an athletic daughter scorned."[102]

We were first contacted by a highly respected volleyball coach in Tulsa who was concerned about the failure of the Tulsa Public Schools to offer girls the opportunity to play interscholastic volleyball. This coach was running her own leagues and camps out of a local Young Men's Christian Association ("YMCA"). She contacted Professor Yasser after one of the players in one of her adult leagues, a law student, heard her bemoaning the lack of interscholastic opportunities for girls to play volleyball. The law student told the coach about a Sports Law class taught by Professor Yasser at the University of Tulsa College of Law, and the coach called the professor. This led to an initial meeting between the coach and the professor, at which time the two agreed to hold a meeting for coaches, parents, and players interested in kick-starting girls' interscholastic volleyball in Tulsa. This first meeting was held at a local YMCA.

This initial meeting in turn led to a series of meetings in which

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96 *Id.* at 416.
97 *Id.* at 421.
98 *Id.* at 431.
99 *Id.* at 432 (citing Buckley v. Valeo, 424 U.S. 1 (1976); Bates v. Little Rock, 361 U.S. 516 (1960)).
100 *Primus*, 436 U.S. at 414.
101 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3(a)(1983).
102 Ray Yasser, *quoted in*, David Hill, *A Price for Equity*, TCHR. MAG., Aug. 1996.

interested parents and coaches mulled over their options with Yasser and Schiller, who were by this time associated with the cause. Parents and coaches were advised to first make a good faith effort to work through the system by making requests for Title IX compliance to school administrators. Invariably, school administrators did not know what Title IX required, and exhibited little enthusiasm for taking the necessary steps to move into compliance. With a growing sense of frustration, a number of the parents moved toward the litigation option. The parents from Owasso, Oklahoma were somewhat advanced in their resolve, and the decision was made to file their suit first.

We agreed to seek attorney's fees from the defendants, pursuant to 42 U.S.C. Section 1988.[103] This, of course, required that we prevail on the merits. We were willing to undertake that risk, confident that the existing legal framework ensured our ultimate success. Parents put together a modest "war chest" to defray the costs of litigation. Under Section 1988, these costs are also recoverable by the prevailing party.

IV. The Class Action Complaint

With assistance from the National Women's Law Center, we drafted the following complaint,[104] which is annotated with our comments in bold type.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RON RANDOLPH, as parent and	)	Case No.
next friend of his minor	)	
daughter, AMANDA M. (MIMI)	)	96-CV-0105K
RANDOLPH; COY E. & CANDACE L.	)	
BROWN, as parents and next	)	CLASS ACTION
friend of their minor	)	
daughter; HAYLEY E.BROWN;	)	
ROBERT C. & SUSAN J. PARKER	)	
as parents and next friend	)	

[103] 42 U.S.C. § 1988 (1994).

[104] This complaint is modeled on the complaint in the case of Thomsen v. Fremont Public School District #1, No. 4CV95-3124 (Dist. Of Neb.) (Filed April 10, 1995). It was provided to us by Deborah Brake and Judith Appelbaum from the National Women's Law Center in Washington, D.C. They served as co-counsel with Alan G. Stoler of Omaha, Nebraska and Kristen M. Galles and William C. Crenshaw of Powell, Goldstein, Frazer & Murphy in Washington, D.C.

of their minor daughter,)
SARAH J. PARKER; ROBERT C. &)
SUSAN J. PARKER, as parents)
and next friend of their)
minor daughter, REBEKAH S.)
PARKER; ROBERT F. & VICKI L.)
RANDOLPH, JR., as parents)
and next friend of their)
minor daughter, TERI JO)
RANDOLPH; JIM & KAY PIGG, as)
as parents and next friend)
of their minor daughter,)
MELISA PIGG; TOM & BECKY)
MARTIN, as parents and next)
friend of their minor)
daughter, SHERA MAE MARTIN;)
and on behalf of all others)
similarly situated,)
Plaintiffs,)
v.)

OWASSO INDEPENDENT SCHOOL)
DISTRICT NO. I-011, a/k/a)
OWASSO PUBLIC SCHOOLS; DALE)
JOHNSON, individually and in)
his official capacity as)
Superintendent; RICK DOSSETT,)
individually and in his official)
capacity as Principal; JOHN)
SCOTT, individually and in his)
official capacity as Athletic)
Director; and Does 1 through)
50,)
Defendants.)

The above-captioned Plaintiffs, as parents and next friends of their minor daughters, and on behalf of all others similarly situated ("Plaintiffs"), respectfully file this Complaint against Defendants, OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a

OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; RICK DOSSETT, individually and in his official capacity as Principal; JOHN SCOTT, individually and in his official capacity as Athletic Director; and Does 1 through 50, and allege as follows:

STATEMENT OF THE CASE

1. This action is posed as a class action for declaratory and injunctive relief brought on behalf of female students at Owasso Public Schools ("Owasso") in Owasso, Oklahoma. **[While a purely pecuniary consideration might argue for a number of smaller actions, all with statutory fees available, a class action provides the greatest opportunity to "fix the system."]** The named plaintiffs are also seeking compensatory damages in their individual capacities. Defendants have violated (1) Title IX of the Education Amendment of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX") and the regulations adopted thereto, and (2) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, by intentionally denying the female students at Owasso (1) an equal opportunity to participate in interscholastic and other school-sponsored athletics and (2) the equal treatment and benefits that must necessarily accompany an equal opportunity to participate.

2. Defendants' denial of equal participation and equal treatment and benefits constitutes intentional discrimination against the named plaintiffs and all members of the class based solely on their gender. Specifically, as to unequal participation opportunities, Defendants have discriminated against female students at Owasso in the accommodation of student interests and abilities in athletics by knowingly and intentionally selecting and offering sports and levels of competition in a manner which discriminates against female students. Notwithstanding the significant number of female students at Owasso who have the interest and abilities necessary to participate in athletics, Defendants have refused to provide them with an equal opportunity to do so. Furthermore, as to unequal treatment and benefits, Defendants have discriminated against Owasso's female students in the following areas: (1) equipment and supplies; (2) scheduling of games and practice times; (3) travel; (4) opportunity to receive qualified coaching; (5) assignment and compensation of coaches; (6) provision of locker rooms and facilities for both practice and competition; and (7) publicity.

3. This action seeks to redress the deprivation of the named

plaintiffs' rights and the rights of the class to an equal opportunity to participate in interscholastic and other school-sponsored athletics and to receive the equal treatment and benefits which must necessarily accompany an equal opportunity to participate. This action seeks a declaratory judgment that Defendants have violated the rights of Owasso's female students under federal law and the United States Constitution. This action further seeks an injunction requiring Defendants to immediately cease their discriminatory practices and to remedy the effects of their discriminatory practices and to remedy the effects of their discriminatory conduct.

4. Plaintiffs seek injunctive relief which, among other things, requires that Defendants sponsor and fund a sufficient number of additional athletic teams for female students to obtain meaningful participation opportunities which are comparable to those offered to male students enrolled at Owasso.

5. Plaintiffs further seek injunctive relief which requires that Defendants provide the girls' athletic teams at Owasso with equal treatment and benefits as Owasso already provides to its boys' athletic teams.

6. The named Plaintiffs, in their capacities as the parents and next friends of their minor daughters, seek monetary relief in order to compensate them for their damages resulting from Defendants' discrimination in its athletics program, including, among other things, (1) the actual out-of-pocket costs incurred in paying for equipment and supplies for their daughters to participate in interscholastic and other school-sponsored athletics which would not be incurred by parents of boys similarly situated, (2) the damages associated with their daughters' lost opportunities to participate in athletics, (3) the damages associated with their daughters' reduced opportunities to obtain college athletic scholarships, and (4) the emotional distress and other damages resulting from their daughters' being subjected to unequal treatment and benefits in athletics on the basis of gender.

JURISDICTION AND VENUE

7. The first claim arises under 20 U.S.C. § 1681, *et seq.* and its interpreting regulations. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).

8. The second claim also arises under 20 U.S.C. § 1681 *et seq.* and its interpreting regulations. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).

9. The third claim arises under the Equal Protection Clause

of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).

10. Jurisdiction for declaratory and other relief is invoked pursuant to 28 U.S.C. §§ 2201(a) and 2202.

11. Venue is proper pursuant to 28 U.S.C. § 1391(b). These claims arose in Owasso, Oklahoma, which is within the jurisdiction of this Court.

THE PARTIES

[This section of the complaint introduces the athletes as real people who have suffered real discrimination.]

12. Plaintiff Ron Randolph is the father of Mimi Randolph, a 15-year-old 10th grade student at Owasso High School. Mimi is a talented athlete who participates in interscholastic softball. She has thus endured the unequal treatment and benefits directed by Owasso toward their female athletes. In addition, her opportunities to participate in interscholastic and other school-sponsored athletics are not comparable to the opportunities afforded to boys who are similarly situated. The Randolphs are residents of Owasso, Oklahoma, which is within the jurisdiction of this Court.

13. Plaintiffs Candace and Coy Brown are the parents of Hayley Brown, a 13-year-old 8th grade student at Owasso Middle School. Hayley is a talented athlete who participates in softball. Her opportunities to participate in interscholastic and other school-sponsored athletics are not comparable to the opportunities afforded to boys who are similarly situated. The Browns are residents of Owasso, Oklahoma, which is within the jurisdiction of this Court.

14. Plaintiffs Susan and Robert Parker are the parents of Sarah J. Parker, a 16-year-old 11th grade student at Owasso High School. Sarah is a talented athlete who participates in interscholastic soccer. She has thus endured the unequal treatment and benefits directed by Owasso toward their female athletes. In addition, her opportunities to participate in interscholastic and other school-sponsored athletics are not comparable to the opportunities afforded to boys who are similarly situated. The Parkers are residents of Owasso, Oklahoma, which is within the jurisdiction of this Court.

15. Plaintiffs Susan and Robert Parker are the parents of Rebekah S. Parker, a 14-year-old 9th grade student at Owasso High School. Rebekah is a talented athlete who participates in inter-

scholastic soccer. She has thus endured the unequal treatment and benefits directed by Owasso toward their female athletes. In addition, her opportunities to participate in interscholastic and other school-sponsored athletics are not comparable to the opportunities afforded to boys who are similarly situated. The Parkers are residents of Owasso, Oklahoma, which is within the jurisdiction of this Court.

16. Plaintiffs Vicki L. and Robert F. Randolph are the parents of Teri Jo Randolph, a 12-year-old 6th grade student at Owasso Middle School. Teri Jo is a talented athlete who participates in softball and basketball. Her opportunities to participate in interscholastic and other school-sponsored athletics are not comparable to the opportunities afforded to boys who are similarly situated. The Randolphs are residents of Owasso, Oklahoma, which is within the jurisdiction of this Court.

17. Plaintiffs Kay and Jim Pigg are the parents of Melisa Pigg, a 16-year-old 10th grade student at Owasso High School. Melisa is a talented athlete who participates in interscholastic softball. She has thus endured the unequal treatment and benefits directed by Owasso toward their female athletes. In addition, her opportunities to participate in interscholastic and other school-sponsored athletics are not comparable to the opportunities afforded to boys who are similarly situated. The Piggs are residents of Owasso, Oklahoma, which is within the jurisdiction of this Court.

18. Plaintiffs Becky and Tom Martin are the parents of Shera Martin, a 16-year-old 11th grade student at Owasso High School. Shera is a talented athlete who participates in interscholastic softball. She has thus endured the unequal treatment and benefits directed by Owasso toward their female athletes. In addition, her opportunities to participate in interscholastic and other school-sponsored athletics are not comparable to the opportunities afforded to boys who are similarly situated. The Martins are residents of Owasso, Oklahoma, which is within the jurisdiction of this Court.

19. Defendant Owasso Independent School District No. I-011, a/k/a Owasso Public Schools, is a public school district authorized by 70 Okla. Stat. § 1-101 *et seq.* to operate and control Owasso Public Schools, where the Plaintiffs' daughters are students. Therefore, Owasso's conduct is considered state action under 42 U.S.C. § 1983. Defendant Owasso is located in Owasso, Oklahoma, which is within the jurisdiction of this Court. Since the passage of Title IX, Owasso has received and continues to receive federal financial assistance and the benefits therefrom. Therefore,

all programs at Owasso, including athletics, are subject to the requirements of Title IX.

20. Defendant Johnson is the Superintendent of Schools at Owasso. Mr. Johnson is a resident of the state of Oklahoma and thus is subject to the jurisdiction of this Court.

21. Defendant Dossett is the Principal of Owasso's High School. Mr. Dossett is a resident of the state of Oklahoma and thus is subject to the jurisdiction of this Court.

22. Defendant Scott is the Athletic Director at Owasso High School. Mr. Scott is a resident of the state of Oklahoma and thus is subject to the jurisdiction of this Court.

23. The named Plaintiffs are ignorant of the true names and capacities of Does 1-50, but believe them to be employees of Owasso or members of the Owasso School Board. Plaintiffs will seek to amend this Complaint to set forth their true names and capacities when they are ascertained. Plaintiffs are informed and believe, and on that basis allege, that each of these fictitiously named defendants is responsible in some manner for the discriminatory actions alleged herein and that each is a resident of the State of Oklahoma and thus is subject to the jurisdiction of this Court.

CLASS ALLEGATIONS

24. The named Plaintiffs bring these claims on behalf of their minor daughters, and, pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, for declaratory and injunctive relief, on behalf of all present and future female students enrolled at Owasso who participate, seek to participate, or are deterred from participating in interscholastic and/or other school-sponsored athletics at Owasso.

25. Each of the named Plaintiffs' daughters is a student at Owasso and is an athlete who is subjected to Owasso's unequal treatment and benefits.

26. In bringing this lawsuit, Plaintiffs seek to require Defendants to comply with Title IX and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by ending their discriminatory policies toward the girls' athletics programs in Owasso. Accordingly, Plaintiffs seek injunctive relief requiring Owasso to fund and sponsor girls' sports so that the interests and abilities of all female students at Owasso are accommodated in a non-discriminatory manner. Plaintiffs propose to represent all female students at Owasso who wish to participate in

any interscholastic and other school-sponsored athletics that are not funded and sponsored by Owasso. In addition, Plaintiffs, whose daughters are currently athletes at Owasso, seek declaratory and injunctive relief to remedy discrimination against current and future female athletes at Owasso regarding their receipt of treatment and benefits which are not comparable to those received by the male athletes.

27. The class is so numerous that joinder of all members is impractical. It is unknown how many of the current Owasso female students or how many future Owasso female students would seek to participate in interscholastic or other school-sponsored athletics, if additional opportunities were available. Moreover, joinder of all members is impractical because members of the class who may suffer future injury are not capable of being identified at this time.

28. There are many questions of law and fact common to the class, including: (a) whether female students at Owasso are being deprived of equal opportunities to participate in interscholastic and other school-sponsored athletics, (b) whether female students at Owasso are receiving unequal treatment and benefits in comparison to the male students at Owasso, and (c) whether Defendants have been and are discriminating against girls in Owasso's interscholastic and other school-sponsored athletic programs in violation of Title IX and the United States Constitution.

29. The claims of the named Plaintiffs are typical of the claims of the class. The types of gender discrimination which Plaintiffs' daughters have suffered as a result of their gender include: (1) exclusion from opportunities to participate in the interscholastic and other school-sponsored athletic programs at Owasso and/or (2) receipt of unequal treatment and benefits in Owasso's interscholastic or other school-sponsored athletic programs. These are typical of the types of gender discrimination which members of the class have suffered, are suffering, and, unless this Court grants relief, will continue to suffer.

30. The named Plaintiffs will fairly and adequately represent and protect the interests of the class. Plaintiffs intend to prosecute this action rigorously in order to secure remedies for the entire class.

31. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.

GENERAL ALLEGATIONS
THE REQUIREMENTS OF TITLE IX

32. Title IX, enacted in 1972, provides in relevant 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.

20 U.S.C. § 1681(a). The Civil Rights Restoration Act of 1987 made Congress' intent plain that "program or activity," as used in Title IX, applies to any program or activity so long as any part of the public institution receives federal financial assistance. 20 U.S.C. § 1687. Thus, Owasso is subject to Title IX even if none of the funding for either its girls' or boys' athletic programs comes specifically from federal sources.

33. In 1975, the Department of Health, Education and Welfare (the predecessor of the United States Department of Education ("DOE")) adopted regulations interpreting Title IX. These regulations are codified at 34 C.F.R. pt. 106. (the "Regulations").

34. With regard to athletic programs, 34 C.F.R. § 106.41(a) provides that interscholastic athletics are included within the "program or activity" requirements of Title IX:

> 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. . . .

35. 34 C.F.R. § 106.41(c) specifies ten (10) factors that are to be considered in the determination of equal athletic opportunity:

1. Whether the selection of sports and levels of competition effectively accommodate the interest 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.

Another factor to be considered is a school's "failure to provide necessary funds for teams for one sex." *Id.*

36. In 1979, the Office of Civil Rights of the Department of Education ("OCR") issued a policy interpretation of Title IX and the Regulations. This policy interpretation is found at 44 Fed. Reg. 71413 (1979) (the "Policy Interpretation").

37. The Policy Interpretation provides that, in order to comply with Title IX and 34 C.F.R. § 106.41(c), schools must provide equal athletic opportunities in three general areas: (1) awarding of scholarships (aimed primarily at problems at the intercollegiate level); (2) participation opportunities (including both the number of opportunities and whether the selection of sports and the level of competition effectively accommodate the interests and abilities of members of both sexes); and (3) treatment and benefits. 44 Fed. Reg. at 71414. Although the scholarship regulations are not at issue in this complaint, equal participation opportunities and equal treatment and benefits are.

38. According to the Policy Interpretation, compliance in the area of equivalent participation opportunities is to be determined by the following three-part test:

> (1) whether interscholastic and other school-sponsored athletic participation[105] 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 interscholastic and other school-sponsored athletics, 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 interscholastic and other school-sponsored athletics and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.[106]

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[105] Although the Policy Interpretation refers to "intercollegiate" sports, it is applicable to all recipients of federal education funds, including high schools, and is, thus, applicable to interscholastic high school sports, as well as intercollegiate sports. *See* 34 C.F.R. § 106.11 (1996); *see also*, 44 Fed. Reg. 71,413, 71,413 (1979) (the Policy Interpretation's "general principles will often apply to . . . interscholastic athletic programs which are also covered by the Regulations").

[106] *See* 44 Fed. Reg. At 71418.

39. Under both the Regulations and the Policy Interpretation, compliance in the area of equal treatment and benefits is assessed based on an overall comparison of the male and female athletic programs, including an analysis of factors (2) through (10) of 34 C.F.R. § 106.41(c) listed above and an analysis of whether the necessary funds are provided for teams of both sexes.

40. The Regulations require that sponsors of interscholastic and other school-sponsored athletics (such as Owasso) take such remedial actions as are necessary to overcome the effects of gender discrimination in violation of Title IX. *See* 34 C.F.R. § 106.3(a). On information and belief, Owasso has not taken any significant recent remedial actions and any remedial actions which Owasso has taken in the past twenty (20) years have been insufficient to satisfy Owasso's obligations under Title IX.

41. The Regulations further require that sponsors of interscholastic and other school-sponsored athletics comply with the Regulations within three years of their effective date (which was July 21, 1975). Now, more than twenty (20) years later, Owasso has still not fully complied with Title IX.

THE U.S. CONSTITUTION

42. The Fourteenth Amendment to the United States Constitution requires that a state shall not "deny to any person within its jurisdiction the full protection of the laws."

43. Under 42 U.S.C. § 1983, Defendants may be held personally liable for their actions in violating Plaintiffs' daughters' rights under the Fourteenth Amendment.

INJUNCTIVE RELIEF

44. Plaintiffs are entitled to injunctive relief to end Defendants' unequal, discriminatory, and unlawful treatment of female student athletes. Because of Defendants' acts and omissions, Plaintiffs' daughters continue to be deprived of the rights guaranteed to them by the United States Constitution and the laws of the United States. Failure to grant the injunctive relief requested will result in irreparable harm to Plaintiffs' daughters in that Plaintiffs' daughters' Fourteenth Amendment rights will be violated and that Plaintiffs' daughters will never be able to participate in interscholastic and other school-sponsored athletics on an equal basis with their male classmates, if at all. Accordingly, Plaintiffs do not have an adequate remedy at law for this harm. This threatened harm far outweighs any possible harm that granting injunctive relief might

cause Defendants. Finally, the injunctive relief sought would in no way disserve the public interest but, on the contrary, would prevent discrimination based on gender and would promote the goal of full equality before the law.

ATTORNEYS' FEES

45. Plaintiffs have been required to retain the undersigned attorneys to prosecute this action. Plaintiffs are entitled to recover reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

FIRST CLAIM FOR RELIEF: TITLE IX
(UNEQUAL PARTICIPATION OPPORTUNITIES)
(CLASS ACTION AGAINST OWASSO ONLY)

46. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 46 inclusive of this Complaint.

47. By offering certain opportunities to male students to participate in interscholastic and other school-sponsored athletics, Owasso has demonstrated its determination that athletic opportunities provide educational benefits that should be supported by the school system. Plaintiffs agree with this determination that athletic opportunities provide valuable educational benefits. For this very reason, Plaintiffs contend that their daughters—and all of the female students at Owasso—should have equal access and opportunity to receive these same benefits that the male students at Owasso already have. Owasso historically has not provided, and currently does not provide, its female students with such equal access and opportunity.

48. Owasso has intentionally violated Title IX by knowingly and deliberately discriminating against female students at Owasso, including the daughters of Plaintiffs, by among other things, failing to provide equal opportunities for females to participate in interscholastic and other school-sponsored athletics.

49. Several of the named Plaintiffs have on numerous occasions informed Owasso that its actions discriminate against their daughters and against all of Owasso's female students and that these actions constitute violations of the Title IX rights of these students. Despite the fact that Plaintiffs have drawn these inequities to the attention of Owasso, and requested relief, Owasso has knowingly and consciously continued to fail and refuse to take any of the necessary actions to remediate any existing violations, even though the Regulations mandate that it do so.

50. On information and belief, Plaintiffs allege that Owasso

has failed to comply with each of the three (3) parts of the test for determining the equal opportunity to participate in athletics under Title IX described in Paragraph 39 above. In particular, on information and belief, Plaintiffs allege that:

(1) The ratio of female to male athletes at Owasso is not substantially proportionate to the overall ratio of female to male students at Owasso.
(2) Owasso does not have a history or continuing practice of program expansion.
(3) Owasso has failed to effectively accommodate the interests of the female students.

51. Female students have historically been, and continue to be, underrepresented in Owasso's interscholastic and other school-sponsored athletic programs. Despite this underrepresentation and despite the interest and abilities of the female students to participate in additional sports (such as volleyball), Owasso has failed to accommodate this and other interests.

52. Owasso's conduct has persisted despite the information provided and the requests made by Plaintiffs and despite the mandates of the Regulations, particularly 34 C.F.R. §§ 106.3(a) and 106.41(d).

53. Owasso's conduct violates 20 U.S.C. § 1681 *et seq.*, as interpreted by 34 C.F.R. §§ 106.31 and 106.41 and the Policy Interpretation thereof.

54. As a result of Owasso's conduct, the named Plaintiffs have incurred extensive damages, including, among other things, (1) the actual out-of-pocket costs incurred in paying for their daughters to participate in athletics when boys who are similarly situated would not have to pay, (2) the damages associated with their daughters' lost opportunities to participate in athletics, (3) the damages associated with their daughters' reduced opportunities to obtain college scholarships, and (4) the emotional distress and other damages resulting from their daughters' being subjected to unequal treatment and benefits in athletics on the basis of gender.

SECOND CLAIM FOR RELIEF: TITLE IX
(UNEQUAL TREATMENT AND BENEFITS)
(CLASS ACTION AGAINST OWASSO ONLY)

55. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 55 inclusive of this Complaint.

56. Owasso, by its conduct, has intentionally violated Title IX

by knowingly and deliberately discriminating against female students, including the daughters of Plaintiffs, by, among other things, failing to provide female athletes at Owasso with the same treatment and benefits which are comparable overall to the treatment and benefits provided to male athletes.

57. Many of the named plaintiffs have on numerous occasions informed Owasso that its actions constitute violations of Plaintiffs' daughters' Title IX rights, as do their failure and refusal to take actions to remediate any existing violations. Despite being provided this information, Owasso continues to refuse to remediate its violations of Title IX. **[Of course the petitioners must research this issue in order to back up this allegation.]**

58. On information and belief, Plaintiffs allege that Owasso has failed to comply with Title IX by failing to provide female athletes with comparable treatment and benefits including, but not limited to, the following areas: **[This is the opportunity to lay out the most glaring of the violations.]**

(1) Owasso funds interscholastic and other school-sponsored athletics in a manner that discriminates against female athletes.

(2) Owasso provides male athletes with newer equipment and supplies that are of better quality than those provided to female athletes. Owasso also provides male athletes with newer uniforms of better quality on a more frequent basis than those provided to female athletes.

(3) Owasso unfairly discriminates against female athletes in the scheduling of their game and practice times.

  (a) Girls' varsity softball games are regularly scheduled in the early afternoon. In order to participate, team members must miss class, thus adversely affecting academic performance. Parents and other supporters find it difficult to attend.

  (b) The boys' baseball team practices during school, for credit. This is referred to as "6th hour credit." In fact, 6th hour credit scheduling generally discriminates against female athletes.

  (c) Basketball games are scheduled in a manner which unfairly discriminates against female athletes.

(4) Female athletes are discriminated against in regard to travel, both to away games and to practice sites.

(5) Female athletes have fewer opportunities to receive coaching because several of Owasso's female teams have fewer coaches and more players per coach than the male teams. Moreover, Owasso has permitted the use of volun-

teer coaches in a manner which discriminates against female athletes.

(6) Owasso selects coaches for female athletic teams with less care and attention than for male athletic teams. As a result, the coaches of the female athletic teams often have less expertise than the coaches of the male athletic teams.

(7) Owasso compensates coaches for the girls' and boys' teams in a manner which discriminates against female athletes.

(8) Owasso recently spent a large sum of money to build a new football stadium. Owasso has not spent any comparable sums of money to build or renovate any of the girls' athletic facilities. In fact, Owasso has consistently claimed that they could not put money into the girls' athletics because of budgetary constraints.

(9) Owasso has plans to build an indoor practice facility for baseball which will not adequately provide equal benefits to girls softball.

(10) Owasso has constructed a high quality baseball stadium complete with press box, scoreboard, dugouts, lights, sod infield, sprinkler system, and bleachers. Although land is available on campus, Owasso has refused to provide any comparable girls' softball facility.

(11) The provision of medical and training facilities and services are inequitable in that the male athletes have superior access to these facilities and services, while the female athletes have very limited access to these facilities and services.

(12) Owasso consistently provides less publicity for its female athletic teams than for its male athletic teams. Owasso also provides substantially more support for the male teams than the female teams in that the school band plays at the male athletic contests but not at the female athletic contests, and male athletics are advertised more aggressively than female athletics.

59. The gross imbalance in the treatment of female and male athletes at Owasso, as detailed above, demonstrates Owasso's intentional and conscious failure to comply with Title IX.

60. Owasso's conduct has persisted despite the information provided by and the requests made by Plaintiffs and despite the mandates of the Regulations, particularly 34 C.F.R §§ 106.3(a) and 106.41(d), and the Policy Interpretation.

61. Owasso's conduct violates 20 U.S.C. § 1681 *et seq.*, as interpreted by 34 C.F.R. §§ 106.31 and 106.41 and the Policy Interpretation thereof.

THIRD CLAIM FOR RELIEF: EQUAL PROTECTION
(CLASS ACTION AGAINST ALL DEFENDANTS)

62. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 62 inclusive of this Complaint.

63. Defendants, by their (1) failure to provide equal athletic opportunities for female students and (2) failure to provide female athletes with the same treatment and benefits as the male athletes (as detailed above), have purposely discriminated against female students, including the daughters of the named Plaintiffs, on the basis of gender, and have intentionally deprived them of their rights to equal protection secured by the Fourteenth Amendment to the United States Constitution.

64. Defendant Johnson, as Superintendent of Schools at Owasso, has consistently refused to sponsor additional participation opportunities for female athletes. For example, Mr. Johnson has failed and refused to endorse girls' volleyball as an interscholastic sport at Owasso, despite the requests of parents and students that he do so. Mr. Johnson has failed and refused to remedy the unequal treatment and benefits received by Owasso's female athletes—despite the numerous complaints of the named Plaintiffs and other parents and athletes. Therefore, Mr. Johnson's actions constitute a knowing disregard for Plaintiffs' daughters' constitutional rights.

65. Defendant Dossett, as Principal at Owasso High School, has consistently refused to sponsor additional participation opportunities for female athletes. For example, Mr. Dossett has failed and refused to endorse girls' volleyball as an interscholastic sport at Owasso, despite the requests of parents and students that he do so. Mr. Dossett has also failed and refused to remedy the unequal treatment and benefits received by Owasso's female athletes—despite the numerous complaints of the named Plaintiffs and other parents and athletes. Therefore, Mr. Dossett's actions constitute a knowing disregard for Plaintiffs' daughters' constitutional rights.

66. Defendant Scott, as Athletic Director at Owasso High School, has failed and refused to sponsor additional participation opportunities for female athletes. For example, Mr. Scott has failed and refused to endorse girls' volleyball as an interscholastic sport at Owasso, despite the requests of parents and students that he do so. Mr. Scott has also failed and refused to remedy the unequal treatment and benefits received by Owasso's female athletes—despite the numerous complaints of the named Plaintiffs and other

parents and athletes. Therefore, Mr. Scott's actions constitute a knowing disregard for Plaintiffs' daughters' constitutional rights.

67. Section 1983 of Title 42 of the United States Code provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

68. When Defendants engaged in the improper actions described above, they were acting under color of law for purposes of the Equal Protection Clause of the United States Constitution and 42 U.S.C. § 1983. Under this section, each of the individual Defendants is liable on an individual basis for his violation of the Plaintiffs' daughters' constitutional rights under the Fourteenth Amendment.

RELIEF REQUESTED

WHEREFORE, on each of their claims, Plaintiffs respectfully pray that this Court:

A. Certify this action as a class action for declaratory and injunctive relief on behalf of all present and future female students at Owasso who participate, seek to participate, or are deterred from participating in interscholastic and/or other school-sponsored athletics at Owasso.

B. Enter an order declaring that Defendants have engaged in a past and continuing pattern and practice of discrimination against female students on the basis of gender in violation of Title IX and the regulations promulgated thereunder (including both unequal participation opportunities and unequal treatment and benefits), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

C. Issue a permanent injunction (a) restraining Defendants and their officers, agents, employees, successors, and any other persons acting in concert with them, from continuing to maintain practices and policies of discrimination against female students on the basis of gender, and (b) requiring Defendants, immediately upon issuance of the injunctive order, to adopt and implement a budget and plan which corrects and remediates Defendants' violation of Title IX and the Fourteenth Amendment. Such a plan should include, among other things, (1) allowing female students the equal opportunity to participate in interscholastic and other school-sponsored athletics, including a girls' volleyball team for the 1996 fall season and (2) providing female athletes with treatment and benefits comparable to those provided to male athletes.

D. Grant an expedited hearing and ruling on the permanent injunction requested in C above.

E. Award the named Plaintiffs monetary relief as permitted by Title IX, 42 U.S.C. § 1983, and other applicable law, including but not limited to, (1) the actual out-of-pocket costs incurred in paying for equipment and supplies for their daughters to participate in interscholastic and other school-sponsored athletics which would not be incurred by parents of boys similarly situated, (2) the damages associated with their daughters' lost opportunities to play interscholastic and other school-sponsored athletics, (3) the damages associated with their daughters' reduced opportunities to obtain college athletic scholarships, and (4) the emotional distress and other damages resulting from their being subjected to unequal treatment and benefits in athletics on the basis of gender.

F. Award Plaintiffs their reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

G. Order such other and further relief as the Court deems appropriate.

H. Designate that the trial take place before the U.S. District Court in Tulsa, Oklahoma.

Dated:_____

NICHOLS, NICHOLS & KENNEDY

BY: _____

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V. The End of the Beginning

Although this Article ends with the filing of the complaints, the beginning of the struggle for gender equity in interscholastic athletics in Oklahoma has really just begun. The ultimate outcome of our litigation has yet to be decided, but we are confident that the groundwork is laid for significant reform. In a subsequent Article, we will consider the structure subsequently built on this foundation.