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Title IX at 45: Equal Treatment of Students in High School Athletic Programs

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TITLE IX AT 45: EQUAL TREATMENT OF STUDENTS IN HIGH SCHOOL ATHLETIC PROGRAMS

SUZANNE E. ECKES*

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I. INTRODUCTION

It is the 45th anniversary of Title IX of the Education Amendments of 1972, and some high schools continue to struggle with their compliance in athletics by showing a preference for boys' athletic programs.¹ A 2015 report issued by the U.S. Department of Education's Office for Civil Rights ("OCR") indicated that there were 3,609 complaints related to athletics in 2013-2014.² While much of the litigation in this area has traditionally

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1. See California Women's Law Ctr., *Title IX Victory in the Ninth Circuit on Sweetwater* (2014), <http://www.cwlc.org/download/title-ix-victory-in-the-ninth-circuit-on-sweetwater-2014-2/>; see also Jane Ann Morrison, *It Looks Like School District Isn't Playing Fair with Girls Sports*, L.V. REV. J., Oct. 17, 2011, at 1B; Jennifer Smith Richards, *Girls' Access Called Unequal in Columbus Schools*, *Columbus Dispatch* (Nov. 11, 2010), at 1B; Josh Verges, *Title IX Investigation Advances: U.S. Agency Examining Gender Equity in Sioux Falls, 11 Other School Districts*, ARGUS LEADER, Feb. 27, 2011, at 1, ProQuest.

2. See U.S. Dep't of Educ. Office for Civil Rights, *Protecting Civil Rights, Advancing Equity: Report to the President and Secretary of Education* (Apr. 2015), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf>; see also Travis Waldron, *Why the Number of Gender-Related Athletic Discrimination Complaints is Drastically Increasing*, THINK PROGRESS (May 6, 2015), <https://thinkprogress.org/why-the-number-of-gender-related-athletics-discrimination-complaints-is-rapidly-increasing-8b369e431c97#.2kl8kxelj>.

addressed high school accommodation claims, more recent litigation has begun to also focus on equal treatment claims that might include scheduling or facility disparities involving athletics.³ For example, in April 2016, ten female softball players sued under Title IX in federal court in Portland, Oregon.⁴ In this complaint, the plaintiff's sought injunctive relief to remedy the inequities that exist between the softball and baseball team facilities.⁵ Others have filed complaints with the U.S. Department of Education ("ED") regarding similar inequalities. In Canton, Ohio a father filed a complaint with the ED arguing that the girls' softball team did not have equitable facilities when compared to those of the boys' team.⁶ Specifically, the girls went eight seasons without a home field whereas the boys only went two seasons without a home field.⁷ Likewise, in Lexington, South Carolina parents filed a complaint with the ED related to unfairness involving facilities between the boys' baseball team and girls' softball team.⁸

In recent years, several courts have addressed these issues regarding the multitude of inequalities between male and female sports.⁹ In these lawsuits, female plaintiffs or their parents typically allege violations of Title IX of the Education Amendments of 1972 and/or the Equal Protection Clause of the Fourteenth Amendment when the athletic facilities are inadequate or the athletic team's schedules are inopportune.¹⁰ Because K-12 athletic programs

3. See generally *Parker v. Franklin County Cmty. Sch. Corp.* (Parker II), 667 F.3d 910 (7th Cir. 2012); see Erika Denslow, *A Spectator Sport Without Spectators, Discrimination in Girls' Athletics: Parker v. Franklin County Cmty. Sch. Corp.*, 1 TENN. J. RACE, GENDER & SOC. JUST. 277, (2012); see also Kerensa E. Barr, Comment, *How the "Boys of Fall" are Failing Title IX*, 82 UMKC L. Rev. 181, 195, 2013-2014 (2013) (arguing that more attention has been paid to Title IX accommodation claims than equal treatment claims where female plaintiffs contend that athletic programs do not meet their interest and abilities).

4. See Julia Jacobo, *Oregon Girls Softball Team File Title IX Lawsuit Against School District*, ABC NEWS (Apr. 6, 2016, 1:15 PM), <http://abcnews.go.com/US/oregon-girls-softball-team-files-title-ix-lawsuit/story?id=38192077>.

5. See *id.*

6. See generally Kelli Young, *Dad of Former Northwest Softball Player Filed Title IX Complaint*, CANTONREP.COM (May 7, 2015, 2:25 PM), <http://www.cantonrep.com/article/20150506/NEWS/150509451> (the parent argued for equal practice times and game facilities, noting that the boys were given a new field).

7. See *id.*

8. See Tim Flach, *Lexington High Softball Field Unsafe, Players' Parents Say*, THE STATE (Mar. 10, 2016, 10:10 PM), <http://www.thestate.com/news/local/article65328302.html>.

9. See Suzanne E. Eckes & John Minear, *Friday Night Lights*, PRINCIPAL LEADERSHIP, Jan. 2015, 10-12.

10. See Title IX of the Education Amendments, 20 U.S.C. § 1681(a) (1972); see also U.S. CONST. amend. XIV, § 1.

have received increased scrutiny from the courts in recent years, this article explores litigation involving high school athletic programs that focus on disparities with facilities and schools in an effort to highlight the existing legal obligations of school districts.¹¹ It concludes with some suggestions for school officials to create more parallel athletic environments.

II. CONTEXT

As noted above, female students who file complaints about inequitable facilities or schedules often rely on Title IX and the Equal Protection Clause.¹² Title IX is a federal law that prohibits discrimination based on sex by educational institutions that receive federal financial assistance.¹³ Title IX was enacted pursuant to Congress' spending power.¹⁴ Federal funding will only be given to recipients that do not engage in discrimination.¹⁵ The OCR of the U.S. Department of Education is responsible for enforcement of Title IX.¹⁶ Congress enacted this law in order to prohibit using federal money to support discriminatory practices, and to give individual citizens effective protection against those practices.¹⁷

Title IX does not specifically discuss athletic opportunities but the laws implementing regulations do.¹⁸ There are three areas of compliance that are generally examined when determining whether athletic programs are providing equal opportunities to both males and females: 1) whether the school district effectively accommodated the interests and abilities of both males and females ("effective accommodations"); 2) whether there was an equivalence in various athletic benefits, services, and opportunities ("equal treatment"); and 3) whether there was an equivalence with regard to financial assistance ("equal financing").¹⁹ Although most litigation has involved

11. See Elizabeth Kristen & Cacilia Kim, *Unequal Play*, 38 L.A. LAWYER 24 (2015).

12. See Young, *supra* note 6, at _.

13. See Title IX of the Education Amendments, 20 U.S.C. § 1681(a) (1972).

14. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1012 (5th Cir. 1996) (explaining that Title IX was enacted pursuant to Congress' spending power).

15. See Eckes & Minear, *supra* note 9, at 10 (in order to receive federal funding the recipient must not discriminate); see also *Davis v. Monroe Cty. Bd. of Educ.*, 562 U.S. 629, 659 (1999).

16. See Neena K. Chaundry & Marica D. Greenberger, *Seasons of Change: Communities for Equity v. Michigan High School Athletic Ass'n*, 13 UCLA WOMEN'S L.J. 1, 13, 2003-2005 (2003).

17. See Eckes & Minear, *supra* note 9, at 10.

18. See introduction *infra*.

19. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413-14 (Dec. 11, 1979). See also 34 C.F.R. § 106.41(c)(3) (2017); 34 C.F.R. § 106.37(c) (2017).

effective accommodations (#1), equal treatment claims (#2) have started to receive increased attention.²⁰ This article focuses on equal treatment claims.²¹ Equal treatment requires that access to facilities, uniforms, equipment, and coaching, for example, must be equal in quality. It should also be noted that enforcement of Title IX can occur through the courts or by triggering enforcement by the OCR.²²

In addition to Title IX, some student plaintiffs bring a claim under the Fourteenth Amendment's Equal Protection Clause.²³ The Equal Protection Clause states "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."²⁴ The Equal Protection Clause requires that similarly situated individuals be treated the same.²⁵ Courts have interpreted the Equal Protection Clause as providing more protection for certain categories of discrimination than others.²⁶ For example, it is more difficult for plaintiffs arguing discrimination based on sex to prove an equal protection violation than those arguing discrimination based on race because the state must only demonstrate an important reason as opposed to a compelling reason for its differential treatment.²⁷ In other words, the court has employed different levels of scrutiny for different types of classifications; whereas racial classifications are subject to strict scrutiny, sex-based classifications are examined under the intermediate scrutiny standard.²⁸ Under the intermediate scrutiny standard it must be demonstrated that there is an exceedingly persuasive justification that the government-imposed, sex-based classification is based on an important governmental objective and that the means employed are substantially related to the achievement of those objectives. The third level of judicial scrutiny is referred to as rational basis which requires a legitimate government objective

20. See Erin Buzuvis & Kristine Newhall, *Equality Beyond the Three-Part Test: Exploring and Explaining the Invisibility of Title IX's Equal Treatment Requirement*, 22 MARQ. SPORTS L. REV. 427, 2011-2012 (2012); see also Elizabeth Kristen & Cacilia Kim, *Unequal Play*, 38 L.A. LAW. 24 (2015).

21. See Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71, 414.

22. See Suzanne E. Eckes, *Title IX and High School Opportunities: Issues of Equity on and in the Court*, 21 WIS. WOMEN'S L. J. 175 (2006).

23. See generally *Cohen v. Brown Univ.*, 101 F.3d 155, __ (1st Cir. 1996); see also *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

24. U.S. CONST. amend. XIV, § 1.

25. See *City of Cleburne*, 473 U.S. at 439 (e.g., if female basketball players are forced to play on a Friday afternoon with no concession stand, band, or working showers, while the boys are given Friday nights with concessions, a band, and a newly remodeled locker room, similarly situated individuals would not have been treated the same).

26. See generally *id.*; *Cohen v. Brown Univ.*, 101 F.3d at __.

27. See *Cohen*, 101 F.3d at 166-68.

28. See *id.*

with a minimally rational relation between the means and the ends.²⁹

III. ILLUSTRATIVE CASES

In recent years, courts have addressed an increasing number of legal cases involving equity issues involving athletic facilities and schedules in high schools. Female plaintiffs have generally been successful in this litigation. This section highlights some illustrative decisions from the past twenty years to provide guidance to school officials struggling with this issue. Earlier Title IX lawsuits that focused on facilities, as well as litigation addressing accommodation claims, athletic interests, and opportunities available for female athletes, are not included in this analysis.³⁰ The discussion below will only focus on the Title IX and equal protection claims, and will only include lawsuits; OCR investigations and cases that settled before reaching trial are beyond the scope of this piece.³¹

In one case, a member of the girls' basketball team raised the issue that half of her games were scheduled on Mondays through Thursdays, while the boys' team had nearly all of their games scheduled on primetime nights (Friday and Saturday nights).³² The plaintiff's mother and her basketball coach had requested that the high school's athletic director schedule more of the girls' games during the primetime slots.³³ The athletic director explained that there had been an agreement between the school and the Indiana High School Athletic Association which prevented her from modifying the schedule.³⁴ Specifically, school corporations enter into two- or four-year contracts for play with the athletic association.³⁵ The athletic director further clarified that some of the other athletic directors declined to rearrange the schedule, and that if she moved the girls to a more opportune time, the girls

29. See Suzanne Eckes & Stephanie McCall, *The Potential Impact of Social Science Research on Legal Issues Surrounding Single-Sex Classrooms and Schools*, 50 EDUC. ADMIN. QUARTERLY 195, 199 (2014).

30. See, e.g., *Ridgeway v. Mont. High Sch. Ass'n*, 858 F.2d 579 (9th Cir. 1988); *Lambert v. W.Va. State Bd. of Educ.*, 447 S.E.2d 901 (W. Va. 1994); *Cmtys. for Equity v. MHSAA*, 80 F. Supp. 2d 729 (W.D. Mich. 2000); *Horner v. Ky. High Sch. Athletic Ass'n*, 206 F.3d 685 (6th Cir. 2000).

31. See *Cook v. Florida High Sch. Athletic Ass'n*, No. 09-cv-00547 (M.D. Fla. 2009) (noting that this an example of a case that settled before reaching trial).

32. See *Parker v. Ind. High Sch. Athletic Ass'n (Parker I)*, 2010 U.S. Dist. LEXIS 107497, *4-6 (S.D. Ind. Oct. 6, 2010), *vacated sub nom. Parker v. Franklin Cty. Cmty. Sch. Corp. (Parker II)*, 667 F.3d 910, __ (7th Cir. 2012).

33. See *id.*

34. See *id.* (noting the Indiana High School Athletic Association is a non-profit corporation that administers interscholastic athletic competitions among its member high schools).

35. See *id.*

would have fewer opposing teams to play.³⁶

As a result, the parent filed suit in federal court alleging Title IX violations against her daughter's public school district.³⁷ She argued that school officials engaged in discrimination when they scheduled basketball practices and games in a way that negatively impacted the girls.³⁸ In addition, the plaintiff sued thirteen other conference and non-conference school defendants, claiming that they agreed to schedule the girls' basketball games in non-primetime slots.³⁹ In this "equal treatment" claim alleging discrimination in athletic scheduling, the parent explained in court that only 53% of high school girls' basketball games were scheduled on primetime nights compared to 95% of the boys' games.⁴⁰ She also highlighted the negative affect this scheduling disparity had on the female athletes, including disproportionate academic burdens resulting from a greater number of weeknight games, reduced school and community support, and psychological harms based on a feeling of inferiority.⁴¹

Granting the school district's motion for summary judgment, the federal district court held that the scheduling disparity was not so great that it deprived the girls of their equal athletic opportunities.⁴² On appeal, the United States Court of Appeals for the Seventh Circuit vacated the lower court's decision.⁴³ According to the court, there were no other sports that offset the disadvantage to girls caused by the basketball schedule.⁴⁴ Specifically, because the girls' games were held on weeknights, there were no bands or cheerleaders present at their games, and the athletes had little community support.⁴⁵ Moreover, when games occurred during the week, the court found that the girls struggled to finish their homework, and their

36. *See id.*

37. *See generally* Parker v. Franklin Cty. Cmty. Sch. Corp. (Parker II), 667 F.3d 910, (7th Cir. 2012).

38. *See id.* at 923.

39. *See id.* at 914 (highlighting that plaintiffs sued fourteen additional Indiana school corporations).

40. *See id.* at 916-17.

41. *See id.* at 923.

42. *See* Parker v. Ind. High Sch. Athletic Ass'n (Parker I), 2010 U.S. Dist. LEXIS 107497 at *16 (S.D. Ind. Oct. 6, 2010), *vacated, sub nom.* Parker v. Franklin Cty. Cmty. Sch. Corp. (Parker II), 667 F.3d 910 (7th Cir. 2012).

43. *See Parker II*, 667 F.3d at 913, 924, 929 (holding that the Title IX claim survived summary judgment because a jury could determine that the present disparity was substantial enough to deny equal athletic opportunity and explaining that the school corporation had not gone far enough to remedy the harmful effects of this disparity); *see also* Denslow, *supra* note 3, at 283.

44. *See Parker II*, 667 F.3d at 922.

45. *See id.* at 914.

athletic achievements seemed less important than the boys' achievements.⁴⁶ The court also reasoned that the scheduling disparity was systemic and highlighted a letter from the OCR to the defendants that raised concerns about scheduling high school basketball practices.⁴⁷ This letter highlighted that institutions of education sometimes place male sports in a position of superiority.⁴⁸ The Equal Protection Clause was also at issue in the case.⁴⁹ The district court granted summary judgment to the school district on the basis of sovereign immunity.⁵⁰ However, the Court of Appeals for the Seventh Circuit held that the school district should not be immune and therefore remanded this issue back to the district court to examine the equal protection argument.⁵¹

In addition to the Seventh Circuit Court of Appeals, other federal circuit and district courts have weighed in on similar issues.⁵² To illustrate, in a class action lawsuit against a California school district, the female student athletes claimed that they were intentionally and unlawfully discriminated against under Title IX with respect to practice and competitive facilities, equipment, travel, funding, and locker rooms.⁵³ The federal district court hearing this case granted the plaintiffs declaratory and injunctive relief, ordering the defendants to comply with Title IX in all aspects of their athletic programs and activities at the high school and to correct the specific violations identified in the lawsuit.⁵⁴ Affirming the federal district court's opinion, the Ninth Circuit Court of Appeals found that although the district had made some attempts to provide more equitable treatment and benefits, especially with regard to facilities, the district still fell short of its obligations.⁵⁵ As a result, the court noted that in order to comply with Title

46. *See id.* at 914, 924.

47. *See id.* at 922.

48. *See id.* at 922-23 (stating that “[i]n enforcing the Title IX regulatory requirements pertaining to the scheduling of games, OCR also examines the day of the week on which competitive events are scheduled and assesses whether the scheduling of competitions by a given recipient allows athletes of both sexes an equivalent opportunity to compete before audiences.”).

49. *See generally id.* at 925-29.

50. *See id.* at 929.

51. *See id.*

52. *But see* Jones v. Beverly Hills Unified Sch. Dist., 2011 U.S. Dist. LEXIS 64497 at *29 (C.D. Cal. Apr. 25, 2011) (granting summary judgment to school district in equal facility claim).

53. *See* Ollier v. Sweetwater Union High Sch. Dist. (Ollier I), 858 F. Supp. 2d 1093, 1100-1104 (S.D. Cal. 2012).

54. *See id.* at 1116.

55. *See* Ollier v. Sweetwater Union High Sch. Dist. (Ollier II), 768 F.3d 843, 864 (9th Cir. 2014).

IX, the district must implement policies and procedures that address the remaining areas of non-compliance and maintain those areas that have demonstrated compliance.⁵⁶ Another federal court in California addressed similar questions related to unequal fields, facilities, and game times.⁵⁷ This class action lawsuit eventually ended in a settlement agreement where the district agreed to construct two new softball fields, a new girl's locker room, equal access to weight rooms and more desirable practice and game times.⁵⁸ Additionally, the district paid the plaintiffs over \$700,000 in attorney's fees and other costs.⁵⁹

Likewise, a Florida federal district court held that disparities between the boys' baseball and girls' softball programs at two high schools violated Title IX.⁶⁰ For example, while the boys could play games and hold practices at night, the girls could not.⁶¹ Granting the female softball players a preliminary injunction against the school district, the court explained that night games were more prestigious, added flexibility for scheduling practices, and increased attendance and parental involvement at games.⁶² Only three years earlier, the same judge addressed a similar issue in that same school district and found that the members of the girls' softball team were entitled to a preliminary injunction when the school district denied them many of the benefits given to the boys' baseball team.⁶³

In New York, two families affiliated with the girls' softball team filed a lawsuit claiming that school officials violated Title IX when they rented Dwyer Stadium for all of the boys' home varsity baseball games, while the girls played on an allegedly substandard field.⁶⁴ As part of an agreement, the school district agreed to build a new softball facility with several amenities for the girls.⁶⁵ The district was later ordered by a federal judge to pay

56. See *Ollier I*, 858 F. Supp. 2d at 1116.

57. See generally *Cruz ex rel. Cruz v. Alhambra Sch. Dist.*, 601 F. Supp. 2d 1183 (C.D. Cal. 2009).

58. See *id.* at 1187-88.

59. See *id.* at 1201.

60. See *Landow ex rel. Landow v. Sch. Bd. of Brevard Cty.*, 132 F. Supp. 2d 958, 966 (M.D. Fla. 2000).

61. See *id.* at 963.

62. See *id.* at 967.

63. See *Daniels v. Sch. Bd. of Brevard Cty.*, 985 F. Supp. 1458, 1462-63 (M.D. Fla. 1997) (finding that the school board favored boys' teams with a lighted field, a batting cage, a scoreboard, better bleachers and bathrooms, and a concession stand while the girls' teams had none of these).

64. See *Myers v. Bd. of Educ. of the Batavia City Sch. Dist.*, 2014 U.S. Dist. LEXIS 120687 at *274175, * (W.D.N.Y. Sept. 7, 2014).

65. See *id.*

\$68,545.20 in legal fees to the justice center that represented the families.⁶⁶

Female athletes have not always been successful in their claims. For example, alleging violations under Title IX and the Equal Protection Clause, the female plaintiffs argued that the Minnesota State High School League refused to schedule the girls' hockey state tournament at the Xcel Energy Center where the boys were holding their tournament.⁶⁷ Instead the girls were scheduled to play at a university that they alleged was an inferior facility.⁶⁸ The court denied female athletes' request for a preliminary injunction because the girls did not demonstrate a substantial likelihood of success on the merits on their claims that the two hockey facilities were not "comparable facilities."⁶⁹

While practice and game times were the focus of the litigation discussed, it is also important to note that there is litigation focused on particular sport seasons.⁷⁰ To illustrate, the United States Court of Appeals for the Second Circuit upheld a district court's order finding a Title IX violation when two school districts scheduled the girls' soccer season in the spring and the boys' soccer season in the fall, which the court found deprived the girls from playing in the New York Regional and State Championships.⁷¹ The seasons were scheduled this way to avoid facility conflicts.⁷² The court had also highlighted that Title IX has not ended the long history of continuing to place male athletic programs in a position of superiority, stating that "[s]cheduling the girls' soccer season out of the championship game season sends a message to the girls on the teams that they are not expected to succeed and that the school does not value their athletic abilities as much as it values the abilities of the boys."⁷³ The district court's injunction did need to be modified to allow the school districts to submit a plan outlining how the girls' soccer season would take place in the fall or would be alternated with the boys.⁷⁴

66. See *Myers v. Bd. of Educ. of the Batavia City Sch. Dist.*, 2016 U.S. Dist. LEXIS 120687 at *14 (W.D.N.Y. Sept. 4, 2016).

67. See *Mason v. Minn. State High Sch. League*, 2003 U.S. Dist. LEXIS 23460 at *3 (D. Minn. Dec. 30, 2003).

68. See *id.* at *4.

69. *Id.* at *12 (conceding that while the university facility might have fewer seats, there was insufficient evidence presented about attendance figures to be able to ascertain whether the seating was adequate or not).

70. See *Eckes & Minear*, *supra* note 9 at ___.

71. See *generally McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 302-03 (2d Cir. 2004).

72. See *id.* at 282.

73. See *id.* at 295.

74. See *id.* at 302-03.

Similarly, a federal district court in Michigan ruled that a high school athletic association violated the Equal Protection Clause by scheduling athletic seasons and tournaments for female sports at less advantageous times during the academic year than boys' sports.⁷⁵ In this class action lawsuit, the federal district court held that the association violated the Equal Protection Clause when it scheduled five of the six girls' sports during non-traditional seasons.⁷⁶ The court reasoned that the association sent the psychological message that girls were second-class citizens.⁷⁷ The athletic association admitted that girls' sports were "fitted around" the boys' sports to avoid sharing facilities.⁷⁸ Also, no boys' teams were scheduled during these non-advantageous seasons.⁷⁹ According to the court, this approach disadvantaged female athletes in a variety of ways, including limiting their opportunities to participate by making them choose between sports that they used to play in different seasons.⁸⁰ The United States Sixth Circuit Court of Appeals affirmed.⁸¹

Finally, a group of parents alleged that the administrators of the interscholastic athletic competition in Virginia violated both Title IX and the Equal Protection Clause when girls were given a less advantageous schedule than given to boys.⁸² When a school was reclassified into a new division, the boys' teams were permitted to stay in the same season but the girls were made to switch seasons.⁸³ The parents argued that the way the girls' seasons were scheduled effectively made them give up sports.⁸⁴ When examining this case, the court found that questions of fact existed around whether administrators had attempted to fit girls' sports schedules around the boys'

75. See *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 377 F.3d 504, 515 (6th Cir. 2004), *vacated on other grounds*, *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 544 U.S. 1012 (2005).

76. See *generally* *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 862 (W.D. Mich. 2001).

77. See *Cmtys. for Equity*, 377 F.3d at 509 (explaining that the way the seasons were scheduled suggested that girls' athletics were less valuable than boys' athletics).

78. See *id.* at 506.

79. See *id.*

80. See *id.*

81. See *id.* at 515.

82. See *Alston v. Va. High Sch. League, Inc.*, 144 F. Supp. 2d 526, 527 (W.D. Va. 1999).

83. See *id.* at 528-29.

84. See *id.* at 529. (explaining that 5 of the 6 girls' sports were scheduled during non-traditional seasons or during seasons of the year when the sport is not typically played. Under this arrangement, for example, girls who played basketball would have fewer chances to be nationally ranked or would be at a disadvantage with college recruiting)

seasons.⁸⁵ According to the court, a jury should decide the evidence around these decisions to schedule seasons and determine whether the association reaffirmed sex-based scheduling rules that intentionally caused discrimination.⁸⁶ As a result, the plaintiffs' motion for a declaratory judgment and the association's motion for summary judgment were denied.⁸⁷

It should also be noted that parents are not the only ones who might complain about such inequities. Coaches are often at the forefront and may voice concerns. In *Jackson v. Birmingham*, the U.S. Supreme Court ruled that retaliation against someone who complained about sex discrimination is a form of intentional sex discrimination under Title IX.⁸⁸ *In this case, the basketball coach complained to the administration that the girls were not receiving equal access to athletic equipment and facilities.*⁸⁹ *Shortly after he voiced these concerns, he began to receive negative work evaluations and was subsequently removed from his coaching position.*⁹⁰ The Court found that the coach could pursue a private cause of action claiming retaliation even though he is not a direct victim of discrimination.⁹¹ Specifically, it is a form of sex discrimination under Title IX when someone who complains about sex discrimination is then retaliated against.⁹² In *Ollier*, discussed earlier, the court also addressed retaliation under Title IX and found that the district had not effectively addressed retaliation.⁹³ Thus, the plaintiffs' motion to enforce the earlier injunction was granted.⁹⁴

Although a complex issue, these cases offer helpful guidance to K-12 school officials. In sum, these cases suggest that school districts and related athletic associations must ensure that there is equality between girls and boys in athletic programs.⁹⁵ Under the Title IX regulations, even though identical benefits, opportunities, and treatment are not required, the overall effect of any difference must be negligible.⁹⁶ Also, school districts can be found in

85. *See id.* at 538.

86. *See id.* at 534-36.

87. *See id.* at 540.

88. *See generally* *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005).

89. *See id.*

90. *See id.* at 171-72.

91. *See id.* at 173-74.

92. *See id.*

93. *See id.*; *see also* *Ollier v. Sweetwater Union High Sch. Dist.* (Ollier I), 858 F. Supp. 2d 1093, 1113-14 (S.D. Cal. 2012).

94. *See Ollier I*, 858 F. Supp.2d at 1116.

95. *See generally* *Jackson*, 544 U.S. 167; *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 377 F.3d 504 (6th Cir. 2004), *vacated on other grounds*, 544 U.S. 1012 (2005); *see also* *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 302-03 (2d Cir. 2004).

96. *See generally* 34 C.F.R. § 106.41 (2017); *Jackson*, 544 U.S. 167; *Cmtys. For*

violation of Title IX if there is retaliation against the person who voiced complaints about any disparities based on sex in the athletic program.⁹⁷

IV. ADDRESSING THE ISSUE

With regard to athletic programs, Title IX and its implementing regulations require an equal opportunity for boys and girls to participate in school sporting activities.⁹⁸ Thus, school officials should be sure to offer males and females equal access to athletic opportunities by scheduling practices, games, and seasons in an equitable manner.⁹⁹ Also, it is important to highlight that it does not matter if facilities and schedules are controlled by outside groups (e.g., state athletic associations) since the athletic opportunities must still be equal.¹⁰⁰ According to Erin Buzuvis and Kristine Newhall, the OCR and courts have rather consistently held that this fact does not absolve school districts from their legal obligation to provide equal treatment with regard to facilities.¹⁰¹ In fact, “there is a strong likelihood that discrimination against female student athletes are creating feelings of inferiority with their male counterparts that have long-lasting negative effects—effects that courts seriously consider when deciding Title IX lawsuits.”¹⁰²

School districts might consider performing gender equity audits to analyze whether they are in compliance with Title IX and the Equal Protection Clause.¹⁰³ In so doing, it would be helpful to identify sports in which there is a girls’ and a boys’ team.¹⁰⁴ For example, with softball and baseball, the American Association of University Women suggests that district officials might examine facility quality, and whether the concession stands; scoreboard, dug outs, uniforms, and bleachers are similar in comparison.¹⁰⁵ They should also evaluate whether there is equity with the coaching staff.¹⁰⁶ Likewise, game schedules should be assessed—do boys consistently get the

Equity, 337 F.3d ___; *McCormick*, 370 F.3d 275.

97. See generally *Jackson*, 544 U.S. 167; *Ollier I*, 858 F. Supp. 2d 1093.

98. See generally 34 C.F.R. § 106.41.

99. See *id.*

100. See generally *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 377 F.3d 504, ___ (6th Cir. 2004), *vacated on other grounds*, 544 U.S. 1012, ___ (2005).

101. See Buzuvis & Newhall, *supra* note 20, at 442.

102. See Eckes & Minear, *supra* note 9, at ___.

103. See AAUW, *Know the Score: Investigate Title IX Compliance in High School Athletics: Decide What You Want to Do*, <http://www.aauw.org/resource/title-ix-compliance/> (last visited Feb. 27, 2017).

104. See *id.*

105. See *id.*

106. See *id.*

primetime slots? Travel and related expenses should be equitable. School districts are not required to spend identical amounts between male and female athletic programs, but equal treatment and benefits must be provided.¹⁰⁷ Also, the OCR could better highlight awareness of the equal treatment requirement under Title IX. Buzuvis and Newhall suggest that this could be clarified, for example, through a “Dear Colleague” letter in the same way it has done so with the equal opportunity obligations.¹⁰⁸ It is important to note that in a 2015 Dear Colleague letter, the OCR released guidance reminding school districts to designate a Title IX coordinator.¹⁰⁹ The impetus behind this letter was based partly on the OCR’s finding that schools that have appointed coordinators have been more effective in providing equal education opportunities.¹¹⁰

More awareness needs to be raised about the equal treatment requirement under Title IX. Specifically, some school officials may not realize that Title IX not only applies to the equal number of athletic opportunities available for both males and females, but that school districts are also obligated to address inequities between male and females’ treatment in sports.¹¹¹ It would be helpful for school districts to provide specific training in this area for coaches. At the same time, professional organizations could create webinars reminding school personnel of their legal obligations in this area. Of course, whether a school district is in compliance with Title IX and its implementing regulations will depend largely on the specific facts at that particular school district.¹¹²

V. CONCLUSION

This article examined the current legal landscape of equal treatment claims under Title IX. While the media and the courts have begun to highlight these claims more within the high school context, more attention is warranted. The court opinions discussed demonstrate that on Title IX’s 45th anniversary, some high schools continue to violate Title IX and the Equal Protection Clause, as they still remain favoring boys over girls in athletics.¹¹³ As the

107. See 34 C.F.R. § 106.41 (2017).

108. See Buzuvis & Newhall, *supra* note 20, at 455.

109. See U.S. Dep’t of Educ., *Dear Colleague Letter* (Apr. 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.

110. See *generally id.*

111. See 34 C.F.R. § 106.41.

112. See Eckes & Minear, *supra* note 9 at __.

113. See *generally* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, __ (2005); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 377 F.3d 504, __ (6th Cir. 2004),

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judge observed in the *Ollier v. Sweetwater* case, “[e]qual athletic treatment is not a luxury. It is not a luxury to grant equivalent benefits and opportunities to women. It is not a luxury to comply with the law. Equality and justice are not luxuries.”¹¹⁴

vacated on other grounds, Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n, 544 U.S. 1012 (2005); *see also* McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 302-03 (2d Cir. 2004).

114. *See* Ollier v. Sweetwater Union High Sch. Dist. (Ollier I), 858 F. Supp. 2d 1093, 1115 (S.D. Cal. 2012) (citing Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992)).