

2023

Reflection on Progress Without Equity: Title IX K-12 Athletics at Fifty

Elizabeth Kristen

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Recommended Citation

Elizabeth Kristen (2023) "Reflection on Progress Without Equity: Title IX K-12 Athletics at Fifty," *American University Journal of Gender, Social Policy & the Law*. Vol. 30: Iss. 2, Article 8.

Available at: <https://digitalcommons.wcl.american.edu/jgspl/vol30/iss2/8>

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REFLECTIONS ON PROGRESS WITHOUT EQUITY: TITLE IX K-12 ATHLETICS AT FIFTY

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I. INTRODUCTION

Title IX of the Education Amendments of 1972 (“Title IX”) turned fifty this year. Despite tremendous progress for women and girls over the last five decades, the promise of gender equity in athletics remains elusive, especially at the K-12 level. Unlike so many other civil rights laws passed in the 1960s and 1970s, Title IX remains a highly under-litigated and under-enforced statute. A basic Westlaw search for “Title VII of the Civil Rights Act of 1964” yields more than 10,000 federal cases. But the same search for “Title IX of the Education Amendments of 1972” yields about 2500 cases. Only a small fraction of those cases (about 300) include the word “athletics,” and fewer still address gender inequity at the K-12 level. This Article provides a brief overview of the “state of play” concerning gender inequity in athletics and the basic structure of Title IX athletics equity law. It then considers the *Ollier v. Sweetwater*¹ high school Title IX athletics case and lessons learned from that hard-fought litigation on behalf of a class of high school girls that sought to level the playing field at their school. It then makes nine recommendations for what changes should be made to our approach to Title IX athletics at the K-12 level to ensure more effective enforcement to achieve gender equity. Inequalities in athletics at the K-12 level require litigation and policy changes that will have substantial and positive impacts on the lives of girls and young women.

II. SCOPE OF THE INEQUITY PROBLEM

In a recent 2020 report, *Chasing Equity*, the Women’s Sports Foundation described the current situation with respect to gender equity in athletics throughout the country.² The Report observed that at “the high school level, despite girls comprising nearly half of the student body . . . , the 3.4 million opportunities for girls to play high school sports in 2017-18 fell well short of the 4.5 million opportunities for boys who played high school sports that year.”³ Although girls comprise nearly 50% of high school students, schools provide them with only 42.9% of athletic opportunities.⁴ Indeed, even after fifty years, schools give girls today just about the same number of athletic

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

2. STAUROWSKY, E. J., ET AL., WOMEN’S SPORTS FOUND., CHASING EQUITY: THE TRIUMPHS, CHALLENGES, AND OPPORTUNITIES IN SPORTS FOR GIRLS AND WOMEN 15 (2020).

3. *Id.* at 9 (citing *Participation in High School Sports Registers First Decline in 30 Years*, NFHS (Sept. 5, 2019), <https://www.nfhs.org/articles/participation-in-high-school-sports-registers-first-decline-in-30-years/>).

4. *Id.* at 7, 9.

opportunities schools provided for boys in 1972 when Congress passed Title IX.⁵ And the situation is worse for girls of color. The National Women’s Law Center found that at schools attended predominately by white students, girls have 82% of the opportunities to play sports than boys have. However, at schools attended predominately by students of color, girls have only 67% of the opportunities to play sports than boys have.⁶

In addition to the sheer lack of athletic participation opportunities for girls, when they do have a chance to play, they are relegated to worse facilities, uniforms, and equipment; inexperienced coaches; less support and publicity from their schools; and a whole host of other inequalities that send a corrosive message to girls that they are “less than” their male peers. When some brave girls, parents, and coaches have complained, schools frequently engage in unlawful retaliation against them, creating a chilled environment where others are afraid to speak up.

III. OVERVIEW OF TITLE IX ATHLETICS CLAIMS

Title IX applies to all schools that receive federal funding.⁷ At the K-12 level, Title IX athletics cases involve three basic types of claims.⁸ First, “Equal Participation Opportunities” claims, sometimes referred to as the “three-part test.”⁹ Where the girls’ share of the athletics participation slots is not proportional to their share of enrollment in the school—called substantial proportionality—the school fails part one of the test unless the

5. *Id.* at 47.

6. National Women’s Law Center, *Finishing Last*, available at <https://www.prrac.org/finishing-last-girls-of-color-and-school-sports-opportunities/> at 3 (2015).

7. See DEP’T OF EDUC. OFF. FOR CIV. RTS., TITLE IX AND SEX DISCRIMINATION (2021) (discussing whether private schools are subject to Title IX due to their receipt of Payroll Protection Program (PPP) Funds). See generally Kathleen E. Dion & Jenna M. Scoville, *Independent Schools and PPP Loans: Are You in Compliance with Title IX*, NAT’L L. REV., (Nov. 18, 2020), <https://www.natlawreview.com/article/independent-schools-and-ppp-loans-are-you-compliance-title-ix>. See also *Awah v. Mansfield Kaseman Health Clinic*, No. 8:21-CV-00938-PX, 2021 WL 6197415, at *4 (D. Md. Dec. 30, 2021) (finding a Title VI claim against an institution receiving a PPP loan survived a motion to dismiss).

8. These same claims apply at the college level where, in addition, there are claims based on unequal scholarship dollars. 45 C.F.R. § 86.37(c) (2021); see also A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415 (Dec. 11, 1979). Within this basic claim structure, there are several nuanced and additional claims beyond the scope of this discussion as they do not come into play at the K-12 level.

9. *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 854 (9th Cir. 2014) (citing 44 Fed. Reg. 71413, 71418 (Dec. 11, 1979)).

number of girls needed to reach proportionality is too small to form a viable team.¹⁰ If a school cannot show substantial proportionality, it may avoid Title IX liability if it meets part two of the test by demonstrating, as an affirmative defense, that the school has a history *and* continuing practice of program expansion for girls.¹¹ Very few schools can meet this test since Title IX is entering its fiftieth year, and schools have not steadily expanded athletics opportunities for girls over those five decades. Under the third part of the test, a school can provide equal participation opportunities if it shows that it effectively meets all female students' interests and abilities.¹² Schools struggle to meet this part of the test as well because female students almost always want to play sports in far greater numbers.¹³

The second primary type of Title IX athletics claim at the K-12 level is a claim that schools are providing girls with unequal athletic treatment and benefits.

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 recruitment benefits, provision of equipment and supplies, scheduling of games and practices, availability of training facilities, opportunity to receive coaching, provision of locker rooms and other facilities and services, and publicity.¹⁴

Most schools are not in compliance with equal athletic treatment and benefits standards. For example, one or two male athletic teams (usually

10. *See id.* at 855-56.

11. *Id.* at 857.

12. *Id.* at 858-59. Note that in another recent case, the court found that plaintiffs bear the burden of proof on the third part of the test. *Gordon v. Jordan Sch. Dist.*, 522 F. Supp. 3d 1060, 1092 (D. Utah 2021) (“The Tenth Circuit’s decision in *Roberts* makes clear that plaintiffs bear the burden of establishing that defendants fail to fully and effectively accommodate the athletic interests and abilities of their female students—that is, plaintiffs bear the burden of proving that there is unmet interest in a particular sport, sufficient ability to sustain teams in the sport, and a reasonable expectation of competition for those teams. *See Roberts v. Colo. State Bd. of Agric.*, 998 F.2d at 829 n.5 (10th Cir. 1993)”).

13. *See, e.g.,* Legal Aid at Work, SAN FRANCISCO RECREATION & PARKS DEP’T, GIRLS SPORTS SURVEY (2020) available at <https://legalaidatwork.org/wp-content/uploads/2021/06/Summary-SFRPD-Fair-Play-Girls-Sports-Survey-Findings-5.21.21-FINAL.pdf> (last visited Jan. 26, 2022).

14. *Ollier v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d 1093, 1110 (S.D. Cal. 2012); *enforced*, *Ollier v. Sweetwater Union High Sch. Dist.*, No. 07CV714-L JMA, 2014 WL 1028431, at *11 (S.D. Cal. Mar. 17, 2014) (order granting motion to enforce permanent injunction and setting order to show cause why defendant should not be held in contempt); *vacated*, *Ollier v. Sweetwater Union High School Dist.*, No. 07-CV-00714-L-JLB, 2020 WL 4336169, at *1 (S.D. Cal. July 28, 2020) (order adopting report and recommendation); and *aff’d*, *Ollier*, 768 F.3d 843 at 851 (citing 34 C.F.R. 106.41(c)).

football and baseball) are often provided with athletic benefits far superior to those given to any female team. The inequity in benefits for female athletes is typically present in every factor Title IX considers, including uniforms, equipment, coaching, access to athletic locker rooms, and publicity/promotion. Schools sometimes attempt to evade responsibility for athletics inequity by suggesting that outside funding from booster clubs explains the disparities. However, schools cannot escape Title IX liability by allowing external funding to create gender inequity.¹⁵

The third type of Title IX athletics claim in K-12 grades is a claim of retaliation. Anyone in the school community who raises concerns about gender inequity in athletics is covered by this anti-retaliation provision.¹⁶ Because athletics-oriented Title IX claims are almost always claims involving harm to a group of student athletes and their peers, these retaliation claims (as well as the participation and treatment and benefits claims) can be, and arguably should be, pursued as class-wide claims.¹⁷

15. See Letter from John E. Palomino, Reg'l Civil Rights Dir., U.S. Dep't of Educ. Off. for Civ. Rts., to attorney Karen Gilyard (Feb. 7, 1995) (on file with the U.S. Dep't of Educ.) ("OCR emphasizes that, in order for the School District to be in continuing compliance with 34 C.F.R. §106.41, it must assure that services, benefits and opportunities in its athletic program are provided on an equivalent basis to both boys and girls, *including* those services, benefits and opportunities that are provided through the use of "outside" financial assistance such as donations, fund-raising by coaches, and booster clubs."); see also *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1048 (8th Cir. 2002) ("Once a [school] receives a monetary donation, the funds become public money, subject to Title IX's legal obligations in their disbursement.").

16. "Teachers and coaches . . . are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are the only effective adversaries of discrimination in schools." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005). And note that the retaliatory action and effects may sweep more broadly than just against the individual who complained. For example, in *Ollier*, the Court found that the class had a retaliation claim based on actions taken in response to the parent complaints (including the firing of the softball coach). *Ollier*, 768 F.3d at 865 (finding viable "[p]laintiffs' claim, which asserts that [[d]efendants] impermissibly retaliated against *them* by firing [the softball coach] in response to Title IX complaints he made on plaintiffs' behalf . . . [because they sought] to vindicate not [the coach's] rights, but Plaintiffs' own rights.").

17. Note that in *Ollier*, the Ninth Circuit approved a class-wide Title IX athletics retaliation claim. 768 F.3d at 868 ("It is not a viable argument for [a school] to urge that a class may not sue a school district for retaliation in a Title IX athletics case." (cleaned up)). In *A. B. v. Hawaii State Dep't of Educ.*, No. 20-15570, 2022 WL 996575 (9th Cir. Apr. 4, 2022), the Ninth Circuit reversed and remanded a lower court order denying class certification. The Court found that the plaintiffs, female high school athletes, met the numerosity requirements of Rule 23(a) and that their class wide retaliation claims also

IV. OLLIER V. SWEETWATER

*Ollier v. Sweetwater*¹⁸ perfectly illustrates all of the significant Title IX athletics claims and the issues facing high school girls endeavoring to vindicate their civil rights. Although the hard-fought litigation provides a cautionary tale regarding how some schools do the exact wrong thing in the face of Title IX athletics concerns, it also provides some hope and guidance for how schools can change their culture and athletics programs. Legal Aid at Work litigated the *Ollier* case along with co-counsel from the California Women’s Law Center and Manatt, Phelps & Phillips. The case started in 2006 and is ongoing today. Indeed, the school is under a ten-year court-

could proceed. *Id.* at *9; see also *id.* at *10 (“And where, as claimed here, the persons who raised broader concerns about Title IX compliance were met with a retaliatory response that likewise impacted female student athletes generally, the indirect victims’ claims depend critically upon the success of the direct victims’ claims. As a result, there is little prospect that the named plaintiffs’ claims could be said to be burdened with defenses or issues unique to them and distinct from the other class members.”). While Title IX athletics claims can be pursued on an individual basis or on behalf of one team, such claims may require additional careful pleading. For example, in *Thomas v. Regents of Univ. of Cal.*, No. 19-CV-06463-SI, 2020 WL 3892860, at *10 (N.D. Cal. July 10, 2020), the court granted defendant’s motion to dismiss an individual woman soccer player’s claim against the University of California, Berkeley (UC Berkeley). She was dismissed from the women’s soccer team along with other women, while fewer men were dismissed from the men’s soccer team. *Id.* at *1. Although UC Berkeley had an athletic participation gap, the court found that plaintiff was replaced on the team by other women and so “[P]laintiff has not tied her release from the team to any alleged system-wide participation gaps at UC Berkeley.” *Id.* at *10. While the court was likely incorrect in its analysis here, it shows one of the challenges of bringing participation claims as individual claims. In contrast, in *Working v. Lake Oswego Sch. Dist.*, No. 3:16-CV-00581-SB, 2017 WL 2954363, at *4 (D. Or. June 29, 2017), *report and recommendation adopted*, No. 3:16-CV-0581-SB, 2017 WL 3083256 (D. Or. July 19, 2017), individual softball players sought to amend their complaint to add class-wide claims challenging inequities in the entire high school athletics program. The court granted leave to amend and found that “the Student Athletes seek to remedy unequal treatment for all LOHS female athletes and, as such, they have grounded their equal treatment claim in the School District’s alleged system wide failures.” *Working*, 2017 WL 2954363 at *3. The court similarly found the plaintiffs could also pursue their claims of unequal athletic participation opportunities. *Id.* at *7 (“The Student Athletes’ allegations of unequal opportunities in several sports that impact not only the Student Athletes but also other current and prospective athletes are sufficient to establish injury and confer standing here.”). Of course, bringing Title IX cases as class actions does not guarantee success. See generally *Gordon v. Jordan Sch. Dist.*, 522 F. Supp. 3d 1060, 1089 (D. Utah 2021) (failing, after a bench trial, to establish equal protection and Title IX claims for girls’ tackle football). The *Gordon* case is on appeal to the Tenth Circuit.

18. See *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 851 (9th Cir. 2014) [hereinafter “School District”].

ordered compliance plan until 2024.

The *Ollier* case began when a parent of a softball player saw serious inequities between the softball and baseball fields at Castle Park High School (“CPHS”) in Chula Vista, California, in the San Diego area. CPHS is a Title I school¹⁹ in a low-income neighborhood and predominately attended by Latinx students.²⁰ When the softball parent learned more about Title IX, he felt empowered to call the school principal to complain about Title IX violations. He also met with the athletic director and softball coach to discuss the problems.²¹ Unfortunately, instead of remedying the obvious inequities, the school fired the longtime softball coach, replaced him with a less experienced coach (who was coaching two other teams), and took other adverse actions against the female high school athletes.²² While the softball parent’s initial concern was over the obvious differences in facilities, a closer look at the athletics program at the school demonstrated across-the-board inequalities in the entire athletic program for girls.²³ Plaintiffs, a class of present and future female student-athletes,²⁴ won a motion for summary adjudication on the issue of the school’s failure to provide equal athletic participation opportunities for girls.²⁵ Despite the clear Title IX violations, the School District fought this case every step of the way, forcing Plaintiffs to engage in a successful ten-day bench trial with testimony from all named class representative Plaintiffs and two expert witnesses.²⁶ At trial, plaintiffs

19. See DEP’T OF EDUC. OFF. OF STATE SUPPORT, IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES (2018), <https://www2.ed.gov/programs/titleiparta/index.html> (“Title I, Part A (“Title I”) of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act (“ESEA”) provides financial assistance to local educational agencies (“LEAs”) and schools with high numbers or high percentages of children from low-income families to help ensure that all children meet challenging state academic standards.”).

20. See *Castle Park Senior High Summary of Selected Facts*, CIVIL RIGHTS DATA COLLECTION (2017), <https://ocrdata.ed.gov/profile/9/school/224518/summary>.

21. *Ollier v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d 1093, 1108 (S.D. Cal. 2012).

22. *Id.* at 1113-14.

23. *Id.* at 1111-12.

24. *Ollier v. Sweetwater Union High Sch. Dist.*, 251 F.R.D. 564, 565 (S.D. Cal. 2008) (defining the certified class as: “All present and future CPHS female students and potential students who participate, seek to participate, and/or are or were deterred from athletics at CPHS.”).

25. *Ollier v. Sweetwater Union High Sch. Dist.*, 604 F. Supp. 2d 1264, 1272, 1275 (S.D. Cal. 2009), *aff’d*, 768 F.3d 843, 855 (9th Cir. 2014).

26. Defendant’s expert witnesses were excluded on a *Daubert* motion. *Ollier v. Sweetwater Union High Sch. Dist.*, 267 F.R.D. 339, 342 (S.D. Cal. 2010), *aff’d*, 768 F.3d 843, 861 (9th Cir. 2014) (noting one of defendant’s proffered experts was rejected in part

prevailed on their athletics treatment and benefits claims as well as their retaliation claim. Once the district court issued its findings of fact and conclusions of law, the School District moved for reconsideration and unsuccessfully appealed to the Ninth Circuit.

In the meantime, the School District continued to flout Title IX, ignoring the court's order to come into compliance with Title IX, prompting plaintiffs to file a successful enforcement motion and the judge to issue an order to show cause why they should not be held in contempt for disregarding a court order to provide equity for girls.²⁷ Plaintiffs fully expected the litigation to continue and the School District to vigorously fight compliance every step of the way. In keeping with that expectation, plaintiffs asked for, and the magistrate judge ruled, that the court-supervised joint compliance plan would be in effect for ten years in light of the necessary culture shift that needed to take place.²⁸ During this litigation, many people asked why the School District chose to continue to fight in the face of clear liability. The answer was elusive, but a few developments have shed some light on the subject since then.

First, the prevailing culture in the high school and the School District did not value girls' athletics in the same way it valued boys'. This type of ingrained culture is common among school districts, school communities, and society at large. Such bias often is subtle and invidious and manifests itself in school personnel commenting that "it has just always been this way" when confronted with information that boys have the only athletic locker room or exclusive access to a team clubhouse. Many schools value boys' football and baseball above all other sports, while schools usually do not view girls' sports as equally important. Therefore, schools routinely discriminate against female athletes by providing an unjustified amount of resources to favored male teams. Without a lengthy monitoring period and commitment to change, schools may simply repeat the same Title IX

because of plaintiffs' argument that she relied on outdated gender stereotypes, including that girls would not want athletic "cubbies" for storage because of "spiders."). Pls.'s Mem. of P&A, 2010 WL 3487194 at 22 (S.D. Cal. Mar. 8, 2010).

27. See *Ollier v. Sweetwater Union High Sch. Dist.*, No. 07CV714-L JMA, 2014 WL 1028431, at *11 (S.D. Cal. Mar. 17, 2014), *vacated*, No. 07-CV-00714-L-JLB, 2020 WL 4336169 at *2 (S.D. Cal. July 28, 2020).

28. Magistrate Judge McCurine issued a Report and Recommendation on the parties' Joint Compliance Plan and, *inter alia*, ordered a ten-year compliance period. Report & Recommendation at 3, *Ollier v. Sweetwater Union High Sch. Dist.*, No. 07CV714-L JMA, 2014 WL 1028431 (S.D. Cal. Mar. 17, 2014) (McCurine, Mag. J.) (No. 246) (noting that this period was necessary "for a new culture to be established and to take root.").

violations.²⁹

Second, outside counsel for the School District appeared to be unfamiliar with the basics of Title IX athletics law. In the *Ollier* case, in response to plaintiffs' counsel's demand letter, the School District hired counsel to conduct an investigation. In that report, the investigator found indeed that there were grave disparities between girls' and boys' athletics. However, the investigator excused such inequities by saying: "[t]he statistics showing numbers of athletes participating will always be skewed because the school has approximately 110 football players."³⁰ There is no football exception to Title IX.³¹ One serious problem is that many firms and third-party investigators who counsel school districts are not well versed in athletics law.³² Another issue is that the law has not been as well developed as it

29. See, e.g., *Cruz v. Alhambra*, Case No. CV 04-1460 ABC (Mcx), 2012 WL 13167766 at *1 (C.D. Cal. Sept. 25, 2012), where Alhambra High School and the City of Alhambra settled a Title IX case with monitoring lasting from 2005-2011. At the end of the monitoring period, plaintiffs opposed defendants' motion to end court jurisdiction because the school had not complied with the Agreement. See *id.* (No. 211, 215, 221-224). The court ordered an additional compliance period. See *id.* (No. 221 & 229). The case continued until 2013 when the parties stipulated to its dismissal. See *id.* (No. 234). However, in 2019, the same school was the subject of an OCR complaint and resolution agreement centering on some of the very same issues that had been resolved by the *Cruz* settlement. See OCR Resolution Agreement, Case No. 09-16-1548 at 1-3, available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09161548-b.pdf>; see also Letter from Zachary Pelchat, Team Leader, Dep't of Educ. Off. for Civ. Rights to Denise Jaramillo, Superintendent, Alhambra Unified Sch. Dist. (Apr. 29, 2019) (on file with U.S. Dep't of Educ. Off. for Civ. Rights). The long-running case, *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D. R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993), provides another example of how long change can take. The agreement in that case has been in place since 1998. See Transcript of Fairness Hearing at 6, *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992) (No. 396).

30. Mary T. Hernandez, *Report of Investigation of Alleged Title IX Violations at Castle Park High School*, Sept. 29, 2006, Trial Ex. 56 at 44.

31. Title IX Policy Interpretation: Title IX and Intercollegiate Athletics, *supra* note 8 at 71421.

32. For example, a basic site inspection became very contentious when counsel for the School District attempted to improperly cabin plaintiffs' rights to discovery in a high school Title IX athletics putative class action. *T.S. v. Red Bluff Joint Union High Sch. Dist.*, No. 2:17-CV-00489-TLN-EFB, 2017 WL 2930702, at *2 (E.D. Cal. July 10, 2017) ("Plaintiffs seek to represent all female athletes in all sports, not just those in which they participate. Defendant does not present the court with any evidence suggesting plaintiffs may only represent the sports they themselves play in a complaint for system-wide violations. Nor does defendant present evidence plaintiffs may not provide only some examples of violations when raising a claim for system-wide violations. Accordingly, defendant failed to show Magistrate Judge Brennan's ruling on the scope of the inspection was clearly erroneous.").

should have been, nor as effectively enforced by the Department of Education's Office for Civil Rights. Indeed, the *Ollier* case was the first trial of a high school athletics treatment and benefits case. Yet, the federal district judge assigned to the case, carefully understood and applied Title IX, even in areas where the law was underdeveloped. For example, at the time of trial, the Ninth Circuit had not yet decided whether Title VII retaliation standards would apply in a Title IX case. Plaintiffs argued that they should, the district judge applied Title VII standards, and the Ninth Circuit eventually issued a decision confirming that Title VII standards indeed apply in a Title IX context.³³ Similarly, the district court determined, relying on the appropriate facts and law, that the termination of the softball coach was a harm not only to the coach as an individual but to the collective group of athletes who comprised the class. The Ninth Circuit unanimously and unequivocally affirmed the lower court's decision.³⁴

Third, the School District underestimated the plaintiff class representatives (high school students and younger). For example, their approach to the plaintiffs at trial was to use a bullying and intimidating style of cross-examination, especially against the youngest plaintiff. The trial transcripts are replete with examples of this type of conduct. Yet, the plaintiffs were brave, scrappy, and persistent; and they testified persuasively at trial about the sex discrimination and retaliation they and their families experienced.³⁵ Title IX relies on individual plaintiffs to pursue claims. Because it is so challenging for young girls to be plaintiffs in a lawsuit against their school, especially when retaliation occurs, plaintiffs rarely bring such claims. However, when they do proceed, it is critical to bring them as class actions. School is time-limited, and litigation takes a long time. If an individual plaintiff brings a suit and then graduates before it is resolved, the case may become moot. However, with a class action, even if plaintiffs graduate, the case can continue and bring benefits to future generations.

Fourth, the School District appeared to underestimate plaintiffs' counsel. Although non-profit lawyers conducted most of the work of the case with limited trial and appellate experience, the team doggedly pursued justice for

33. See *Emeldi v. Univ. of Or.*, 698 F.3d 715, 724 (9th Cir. 2012).

34. See *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 865 (9th Cir. 2014) (“Stated another way, Plaintiffs’ Title IX retaliation claim seeks to vindicate not Coach Martinez’s rights, but Plaintiffs’ own rights.”).

35. See Veronica Ollier Lewandowski, *A Class Action Hero Fights to End Gender Discrimination in High School Sports*, THE IMPACT FUND (Feb. 17, 2017), <https://www.impactfund.org/social-justice-blog/veronicas-story> (detailing Veronica Ollier’s personal story as told to The Impact Fund when she was inducted into the Class Action Hall of Fame).

their clients. Because the case took a long time to result in the payment of attorneys' fees to plaintiffs' counsel, the organizations were required to be in a position to pursue litigation for years with no prospect of payment until plaintiffs invested significant resources. Having a law firm assist as pro bono counsel was critical.

Finally, many members of the school board and the School District superintendent at the time were indicted and convicted in a corruption scandal.³⁶ While the scandal was not directly linked to the Title IX lawsuit, it evidenced a lack of fiduciary responsibility for the School District leadership, general mismanagement, and a lack of attention to core issues like Title IX compliance. While not all school districts experience this type of scandal, school boards often lack the awareness of the details of Title IX athletics compliance at their schools. After so many years of hard-fought litigation, the School District ultimately began the long, slow process of making changes to comply with Title IX. The school board members were replaced with members who were interested in and supportive of gender equity in school athletics across the district. The new superintendent at the time hired an in-house general counsel for the School District and discontinued the services of the outside counsel who had litigated the losing side of the case. The new general counsel then reached out to plaintiffs' counsel to set an in-person meeting for what the superintendent called "an apology tour." The superintendent and general counsel meaningfully listened to plaintiff's counsel about what had gone wrong in the lawsuit and committed to making change. The new Title IX compliance team in the School District genuinely sought to achieve the 2014 court-ordered Joint Compliance Plan goals.³⁷ And the parties began a long, detailed, and ultimately collaborative process of bringing the school into compliance with Title IX. The more than fifty-page Joint Compliance Plan provided clear benchmarks for the school and School District to meet in every area where the court found Title IX violations. Notably, the school provided (and continues to provide) reports to plaintiffs' counsel and the court four times a year. Plaintiffs' counsel diligently reviews (and continues to review) the reports, provides feedback, and meets with the School District annually while conducting a site visit at CPHS. Because the process had been proceeding smoothly, counsel submitted a joint motion to the court to withdraw the motion to enforce, which had been pending with the district

36. See Albert Fulcher, *Sweetwater Board Members Arraigned on Corruption Charges*, PATCH NEWS (Jan. 13, 2012), <https://patch.com/california/imperialbeach/sweetwater-board-members-arraigned-on-corruption-charges>.

37. Amended Joint Compliance Plan, *Ollier v. Sweetwater Union High Sch. Dist.*, No. 07CV714-L JMA, 2014 WL 1028431 (S.D. Cal. Mar. 17, 2014) (No. 248).

judge since 2014, and the court granted the motion to withdraw in 2020.³⁸ Monitoring and court oversight continue.

V. LESSONS LEARNED AND HOPES FOR THE FUTURE

The lessons learned from the *Ollier* case, and my nearly two decades litigating and enforcing Title IX athletics matter at the K-12 level, point toward nine steps that I believe are critical to achieving gender equity in athletics.

A. *One: Improved Education for the School Community*

Each school community member should understand what Title IX means for gender equity in athletics. School community members include the school board members, the school district superintendent, school principals, teachers, parents, and students.³⁹ Certain other members of the school community should have more in-depth knowledge of the specifics of Title IX athletics. These roles include the Title IX coordinator, the athletic director, and athletic coaches. The nature of the ongoing need for education for these individuals would vary depending on their role. Still, free or low-cost training should be available through non-profits or athletic organizations.⁴⁰ In addition, even where members of the community cannot have complete information about all Title IX elements, community members can examine critical common sense-based indicators for possible violations and engage with the school to fix any problems they identify.⁴¹

B. *Two: Improved Training for the Legal Community*

Similarly, the legal community needs better education about Title IX legal standards. The legal community includes plaintiffs' lawyers, who might enhance the number of attorneys able and available to bring Title IX enforcement actions. For example, the plaintiffs' Title VII employment bar

38. Order Adopting Report & Recommendation, *Ollier v. Sweetwater Union High Sch. Dist.*, No. 07CV714-L JMA, 2014 WL 1028431 (S.D. Cal. Mar. 17, 2014) (Burkhardt, Mag. J.) (No. 353).

39. Free resources are available on Fair Play for Girls in Sports website. See *Fair Play for Girls in Sports*, LEGAL AID AT WORK, <https://legalaidatwork.org/our-programs/fair-play-for-girls-in-sports/> (last visited Nov. 25, 2021).

40. See *Title IX Elective Course*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS, <https://nfhslearn.com/courses/title-ix> (last visited Nov. 26, 2021).

41. See OPENING DOORS AND OPPORTUNITIES FOR GIRLS: A TITLE IX COMPLIANCE CHECK LIST: TOP 14 QUESTIONS TO ASK & ACT ON, CALIFORNIA TITLE IX COALITION 1 (2014) <https://www.aauw-ca.org/documents/2021/01/title-ix-checklist.pdf/> (last visited Jan. 26, 2022).

might cross-train to learn to develop and litigate Title IX athletics cases. However, training alone will not address the problem since these athletics cases often must be pursued as class actions and can take many years to resolve. Therefore, only counsel who have experience with (or training in) class actions⁴² and the time and money to pursue a case against an institution that may have the incentive to fight on for a decade or more are well-positioned to bring these cases.⁴³ There also needs to be training for the defense bar, especially those advising and representing school districts, so that defense attorneys can provide sound counsel to clients who are violating (or at risk of violating) Title IX. Government attorneys also would benefit as even attorneys in agencies responsible for athletics equity are not always fully updated about Title IX legal standards. In addition, judges and mediators would benefit from training regarding Title IX athletics. Including modules, panels, and other similar educational opportunities in legal and judicial conferences are critical. Such training is especially important now as several recent cases further develop Title IX athletics laws as described above.

C. *Three: Better Access to Data and Information.*

K-12 schools can sometimes fly under the radar with respect to athletics inequity because there is no uniform and easy way to check to see if they are complying with Title IX. For example, there is no federal law requiring reporting of data and information about athletics participation numbers and treatment and benefits issues.⁴⁴ Some states have established data collection requirements for K-12 schools. In California, SB 1349 requires all public primary, secondary, and charter schools offering competitive interscholastic sports in California to report on their school website (or school district website if no school site exists) information about boys' and girls' athletic participation by the end of each school year.⁴⁵ Unfortunately, in a 2017

42. See *The Impact Fund Class Action Training Institute*, IMPACT FUND, <https://www.impactfund.org/training-institute> (last visited Nov. 11, 2021).

43. These cases have generally not sought damages, just injunctive and declaratory relief and civil rights attorneys' fees. The 2022 Supreme Court case *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1571 (2022) held that emotional distress damages are not available for claims arising from statutes enacted under Congress' Spending Clause power such as Title IX.

44. HIGH SCHOOL ATHLETICS DATA COLLECTION BILLS OF 2009, NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION.

45. See *SB 1349: School Athletics Data Reporting*, LEGAL AID AT WORK, <https://legalaidatwork.org/factsheet/sb-1349-school-athletics-data-reporting/> (last visited Nov. 16 2021); Cal. Educ. Code § 221.9 (West 2015).

report, Legal Aid at Work's Fair Play for Girls in Sports Project found that based on a sample review of more than 100 schools, more than half of the schools in California were failing to post the required data.⁴⁶ Even schools that were posting data, were not posting it in a consistent way such that parents and other members of the school community could easily ascertain whether the school was affording equal athletic participation for girls.⁴⁷ Another resource available in California is the website for the California Interscholastic Federation, which provides a spreadsheet of participation data for many California high schools.⁴⁸ Other states have taken different approaches. The State of Washington Department of Public Instruction requires schools to provide data to the state as part of an annual evaluation.⁴⁹ There should be uniform and easy access to athletics information across the United States.

D. Four: More Engagement at the State Level

State-level resources to ensure compliance with Title IX and similar state law requirements are also critical. State athletic associations can help educate and advise schools about the requirements of Title IX. Unfortunately, state athletic associations have at times been a barrier to Title IX compliance. For example, in *Communities for Equity v. Michigan High School Athletics Association*, the state athletic association forced girls to participate in their sport out of season to the detriment of girls, requiring litigation to remedy such Title IX inequities.⁵⁰ In another recent case, the

46. See SB 1349: School Athletics Data Reporting, Legal Aid at Work, <https://legalaidatwork.org/factsheet/sb-1349-school-athletics-data-reporting/> (last visited Nov. 16 2021); Cal. Educ. Code § 221.9 (West 2015).

47. See Missing Report Cards, Legal Aid at Work 1 (2017). <https://legalaidatwork.org/wpcontent/uploads/2017/06/SB1349.WhitePaper.pdf> (last visited Jan. 26, 2022).

48. See *Participation Census*, CALIFORNIA INTERSCHOLASTIC FEDERATION (Feb. 1, 2021), <https://www.cifstate.org/coachesadmin/census/index#:~:text=It%20is%20Calif%20law%20that,end%20of%20each%20school%20year>.

49. See *Sex Equity in Athletics*, WASHINGTON OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION, <https://www.k12.wa.us/policy-funding/equity-and-civil-rights/resources-school-districts-civil-rights-washington-schools/sex-equity-athletics> (last visited Nov. 16, 2021).

50. See *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 855 (W.D. Mich. 2001), *aff'd sub nom. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, Inc.*, 377 F.3d 504 (6th Cir. 2004), *cert. granted, judgment vacated*, 544 U.S. 1012, 125 S. Ct. 1973, 161 L. Ed. 2d 845 (2005), *and aff'd*, 459 F.3d 676 (6th Cir. 2006) ("To the extent that Plaintiffs have demonstrated that female high school athletes are denied the benefits of school athletic programs as a result of the scheduling system of Defendant MHSAA that they would otherwise enjoy if they were male, Plaintiffs have

district court found the Oahu Interscholastic Association to be bound by Title IX (on a motion to dismiss), affirming that state athletic associations must adhere to gender equity mandates in administering school sports.⁵¹ The merits of the underlying Title IX case continue to be litigated.⁵²

In addition to state athletic associations, state departments of education could play a more active role in enforcing state Title IX equivalent statutes such as the one in California.⁵³

Finally, more states should adopt a law like California's Fair Play Act, AB 2404,⁵⁴ which requires gender equity in community parks and recreation programs. These programs play a critical role in ensuring girls learn about and have access to sports in their youth community athletics programs.⁵⁵

E. Five: More Federal Enforcement and Support

The federal Department of Education Office for Civil Rights ("OCR") has a role in enforcing Title IX athletics.⁵⁶ However, the administrative process is slow and cumbersome, sometimes taking many years to resolve an athletics complaint, by which time the complaining female student has often graduated. Moreover, OCR does not litigate compliance issues under Title IX (unlike the federal Equal Employment Opportunity Commission, which litigates Title VII cases). OCR can litigate Title IX cases through the Department of Justice, but the agencies have not brought K-12 Title IX athletics cases. Moreover, OCR has the power to withdraw federal funds from schools that fail to comply with Title IX. But, again, OCR has not meaningfully carried out this threat. Schools that receive federal funding certify to the Department of Education that they comply with Title IX. Still, there is no apparent independent effort to check whether schools submit

proved a Title IX violation.”).

51. See *A.B. v. Haw. State Dep't of Educ.*, 386 F. Supp. 3d 1352, 1358 (D. Haw. 2019); *Alston v. Va. High Sch. League, Inc.*, 144 F. Supp. 2d 526, 535 (W.D. Va. 1999).

52. See *A.B.*, 386 F. Supp. 3d at 1358 (D. Haw. 2019); see also *supra* note 17.

53. See Cal. Educ. Code § 221.8 (West 2021).

54. See Cal. Gov't Code § 53080 (West 2021).

55. *Equality for Girls in Sports Under AB 2404*, LEGAL AID AT WORK, <https://legalaidatwork.org/factsheet/equality-for-your-girls-in-your-parks/> (last visited Nov. 30, 2021); see also Kim Turner, *Making Community Youth Sports Fair and Accessible for Girls, Once and for All*, NAT'L RECREATION AND PARK ASS'N (Jan. 1, 2021), <https://www.nrpa.org/parks-recreation-magazine/2021/january/making-community-youth-sports-fair-and-accessible-for-girls-once-and-for-all/>.

56. See *Tips for Filing a Title IX Civil Rights Complaint with US Department of Education*, LEGAL AID AT WORK, <https://legalaidatwork.org/factsheet/tips-filing-civil-rights-complaint-us-dept-education/> (last visited Nov. 30, 2021).

these certificates accurately independently. Nor is there any OCR-level penalty for schools that courts find to violate Title IX.

OCR can play an essential role in providing amicus support in Title IX athletics case as it connected with *Ollier* and more recently, in *Balow v. Michigan State University*.⁵⁷ Other federal strategies might include more detailed audits from the Government Accountability Office with congressional hearings to bring light to these critical issues.⁵⁸

F. Six: More Funding for Title IX Athletics Enforcement and Education

A broader range of funding should be available to support Title IX athletics enforcement and education. Sports is a multi-billion dollar industry, yet very little (if any) of those funds support Title IX compliance efforts. Similarly, private companies, foundations, and other funders have generally not prioritized Title IX athletics equity enforcement and education. Lack of funding for class action litigation is a persistent barrier to bringing Title IX athletics cases.⁵⁹ Despite the tremendous benefits to girls and women from playing sports, including seven percent higher wages for girls as adults when they participate in high school sports, there is little funding to ensure equity for girls in sports.⁶⁰

G. Seven: More Representation in Media at all Levels

During the Olympics, female athletes are celebrated, and their athletic competitions are available on television and accessible to millions worldwide. Unfortunately, that access ends when the Olympics do. Women and girls have struggled to see equality in the media representation for female athletes.⁶¹ Note that recent legal changes entitling athletes to earn income

57. See Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants and Urging Reversal of the Issue Addressed Herein, *Balow v. Mich. State Univ.*, No. 21-1183 (6th Cir. May 26, 2021); see also *id.* at 2 (collecting athletics cases where amicus support was provided).

58. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-754R, K-12 EDUCATION: HIGH SCHOOL SPORTS ACCESS AND PARTICIPATION (2017).

59. See *About Our Grant Program*, IMPACT FUND, <https://www.impactfund.org/about-legal-case-grants> (last visited Nov. 27, 2021).

60. See Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports 4-5* (Nat'l Bureau of Econ. Rsch., Working Paper No. 15728, 2010); see also *Sports for Girls' Success*, FAIR PLAY FOR GIRLS IN SPORTS (2021), <https://legalaidatwork.org/wp-content/uploads/2021/05/Benefits-of-Sports-for-Girls-Flyer.pdf> (last visited Jan. 26, 2022).

61. See Kim Turner, *The World is Eager to Cheer on Women in Sports Year Round — Not Just During the Olympics*, SACRAMENTO BEE (Aug. 25, 2021), <https://www.sacbee.com/opinion/op-ed/article253615298.html>.

from their name, image, and likeness and other changes to how athletes are paid means it is ever more critical for women to have equal access to these income streams.⁶²

H. Eight: College and Professional Opportunities for Women

Female students at the K-12 level need to know that there is some future for them in sports participation, whether a college scholarship or a future job as a professional athlete, coach, trainer, athletics administrator, or sports reporter. Women's representation in sports and sports-related positions has lagged for decades, and this matter needs to be addressed as well. Women who are represented in these levels of sport should be very intentional about ensuring that they reach K-12 girls with messages of sports equity and what Title IX requires.

In addition, we must ensure that women playing sports experience pay equity. The Women's National Basketball Association's new contract addresses pay and benefits gender equity.⁶³ The U.S. Women's National Soccer team also has fought for equal pay.⁶⁴ Yet the very public inequities experienced by these elite women athletes even fifty years after Title IX shows how much work is left to be done.

I. Nine: End Acceptance of the Status Quo

For too long, our culture has relegated women and girls to an inferior sphere in athletics. Remediating this problem is a collective responsibility that requires engagement from all segments of our communities. We cannot allow schools to use lack of funding as an excuse to treat girls unequally, as even meager resources must be apportioned equitably. Moreover, the reason

62. See Janilyn Brouwer Daub et al., *Are College Athletes Employees? Courts and NLRB Weigh In*, NAT'L L. REV. (Oct. 11, 2021), <https://www.natlawreview.com/article/are-college-athletes-employees-courts-and-nlr-weigh>; Payton Titus, *How Female Athletes and Women's Sports Can Benefit from NIL*, TAMPA BAY TIMES (July 6, 2021), <https://www.tampabay.com/sports/gators/2021/07/06/how-female-athletes-and-womens-sports-can-benefit-from-nil/>.

63. See Matt Ellentuck, *The WBNA's New CBA, Explained*, SB NATION (Jan. 14, 2020), <https://www.sbnation.com/wnba/2020/1/14/21062768/wnba-cba-player-salaries-paid-maternity-leave-revenue-sharing>.

64. See Ailsa Chang et al., *The U.S. Women's Soccer Team Struggle for Equal Pay Featured in New 'LFG' Documentary*, NPR (June 29, 2021, 4:49 PM), <https://www.npr.org/2021/06/28/1011037722/the-u-s-womens-soccer-team-struggle-for-equal-pay-featured-in-new-lfg-documentar>; see also Lauren Romero, *The Gender Pay Gap in Professional Sports Persists*, THE DAILY CALIFORNIAN (Oct. 29, 2021), <https://www.dailycal.org/2021/10/29/the-gender-pay-gap-in-professional-sports-persists/>.

for inequity is usually not lack of resources but unfair and unlawful devaluation of girls and young women in sports.

VI. CONCLUSION

Although we are celebrating the 50th anniversary of Title IX, we have a long way to go to reach equality for girls in sports at the K-12 level. State and federal government agencies and officials, school communities, the media, the legal profession and the courts, foundations and philanthropists, all have a role to play in changing the current inequities in athletes for girls and women. Implementing the nine practical and achievable steps suggested here will move us closer to achieving Title IX's promise.