

Spring 4-17-2021

## Title IX Administers a Booster Shot: The Effect of Private Donations on Title IX

Charlotte Franklin  
charlotte.franklin@law.northwestern.edu

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/njlsp>



Part of the [Entertainment, Arts, and Sports Law Commons](#), [Law and Gender Commons](#), [Law and Society Commons](#), and the [Sports Studies Commons](#)

---

### Recommended Citation

Charlotte Franklin, *Title IX Administers a Booster Shot: The Effect of Private Donations on Title IX*, 16 *Nw. J. L. & Soc. POL'Y.* 145 (2021).  
<https://scholarlycommons.law.northwestern.edu/njlsp/vol16/iss2/5>

This Note or Comment is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Law & Social Policy by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.

# Title IX Administers a Booster Shot: The Effect of Private Donations on Title IX

Charlotte Franklin\*

## ABSTRACT

*Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination on the basis of sex in federally funded education programs or activities. Since its enactment, Title IX has dramatically increased interscholastic and intercollegiate athletic opportunities for women and girls. Despite indisputable progress since Title IX's enactment, particularly for female athletes, many high schools and universities still fail to offer equal athletic opportunities for members of both sexes. Inadequate educational resources for high school and university athletic department administrators leads to a misunderstanding of Title IX's requirements. This misunderstanding results in institutional misconduct and non-compliance with Title IX. In particular, booster club funds and private donations often result in non-compliance by schools, and administrators who do not understand the scope of the law may not even recognize this non-compliance. Sport-specific booster club funds and privately funded earmarked donations pose a threat to Title IX compliance if administrators allocate these gifts without regard for equitable distribution. To redress disparities between men's and women's athletic programs, OCR should offer more robust educational resources and implement Title IX trainings so administrators can prevent misallocating booster club funds and private donations. OCR should train representatives from high school and collegiate athletic conferences to help spread awareness to administrators at their respective institutions. In addition to OCR-mandated trainings, administrators should collaborate with the leaders of their institutions' booster clubs, alumni associations, and other prospective donors to ensure these individuals recognize the Title IX implications of their gifts. Greater understanding of Title IX is critical for everyone involved throughout the gift-giving process—from the initial donation to the departmental allocation of the funds. Ultimately, if OCR implements more substantive educational resources about Title IX, compliance with the law would improve. This compliance would help ensure equal opportunities are afforded to every student, regardless of sex.*

---

\* J.D. Candidate, Northwestern Pritzker School of Law, 2021. I am immensely grateful to Professor Daniel Gandert whose guidance and class inspired this Note, and Professor Paul Anderson, Professor Erin E. Buzuvis, Nancy Hogshead-Makar, Janis Doleschal, Professor Barbara Osborne, Jamie DiLoreto, and Doug Ackerman for sharing their expertise with me. I would also like to thank the entire staff of Northwestern's *Journal of Law and Social Policy* for their thoughtful edits as well as my family and friends for their support throughout the writing process.

## INTRODUCTION

The mother of an athlete on the local high school boys' basketball team owns a shoe store and provides her son's team with a substantial discount on their shoes. The father of a player on the school baseball team, a carpenter, donates his talents to restoring the outfield fence and bullpens at the diamond. An alum of the school donates a new scoreboard to the school's football stadium. While these gifts may be well-intentioned and seemingly innocuous, they could raise problematic legal and ethical issues in the context of the school's other athletic programs.

Booster club funding and private donations can be valuable resources for sports teams, arts programs, and student organizations in high schools and universities. Because federal and state budget cuts affect schools at all levels across the country,<sup>1</sup> booster clubs and private donors play a particularly significant role in supporting student programs. Still, it is essential to understand the repercussions that booster club activities and private donations may have on gender equity<sup>2</sup> in athletics programs. The effects of these gifts, particularly earmarked donations and single-sport booster clubs, can create a staggering imbalance between the opportunities for male and female athletes. To redress disparities between men's and women's athletic programs, the Office for Civil Rights (OCR) should provide educational resources for the public and legally mandated Title IX training programs for athletics administrators at educational institutions.

Part I of this Note provides background on Title IX, including a brief history of its legislation, OCR's compliance requirements, and significant Title IX cases. Part II discusses the effect of booster club activities and private donations on secondary schools and postsecondary institutions with respect to Title IX compliance. This section examines the consequences that private financial and in-kind donations may have on the equity of athletic opportunities for male and female student athletes. Part III proposes a recommendation to help athletic department administrators at high schools and universities understand Title IX requirements, particularly when accepting donations from booster clubs and private donors. These recommended changes to OCR policies and offerings

---

<sup>1</sup> U.S. DEP'T OF EDUC., FISCAL YEAR 2020 BUDGET SUMMARY 4 (2019), <https://www2.ed.gov/about/overview/budget/budget20/summary/20summary.pdf> (citing the President's fiscal year 2020 Budget Request reducing the Budget Authority for the Department of Education by 10% compared to the previous year).

<sup>2</sup> Sex is a biological trait determined at birth, whereas gender refers to how one identifies based on socially constructed roles, expectations, and behaviors. Jennifer Tseng, *Sex, Gender, and Why Differences Matter*, AMA JOURNAL OF ETHICS (July 10, 2008), <https://journalofethics.ama-assn.org/article/sex-gender-and-why-differences-matter/2008-07>. While Title IX only refers to discrimination "on the basis of sex," this Note uses both "sex" and "gender" since "gender" is more commonly used when referring to equity among the sexes. In June 2020, the Supreme Court ruled that Title VII's protections for employees on the "basis of sex" cover gender identity and sexual orientation. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Although the Court has not yet ruled on whether Title IX protects students against discrimination on the basis of gender identity and sexual orientation, a close reading of *Bostock* suggests that the Court may favor a similar interpretation of "sex" under Title IX as well (In his dissent, Justice Alito wrote: "What the Court has done today—interpreting discrimination because of 'sex' to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex. See Appendix C, *infra*; e.g., 20 U.S.C. § 1681(a) (Title IX)." *Id.* at 1778; Greta Anderson, 'Far-Reaching Consequences,' INSIDE HIGHER ED (June 16, 2020), <https://www.insidehighered.com/news/2020/06/16/landmark-supreme-court-ruling-could-redefine-title-ix>).

would mirror other sub-agency’s existing training programs and resources, such as those offered by the Occupational Safety and Health Administration (OSHA).

## I. BACKGROUND

### A. *Legislative History of Title IX*

Few laws have influenced high school and collegiate sports more than Title IX. Since its enactment in 1972, Title IX has become synonymous with expanding participation opportunities for female athletes.<sup>3</sup> The name of the law refers to Title IX of the Education Amendments of 1972 (Title IX), which was enacted to prohibit discrimination on the basis of sex in any federally funded education program or activity.<sup>4</sup>

Title IX was largely modeled after Title VI of the Civil Rights Act of 1964,<sup>5</sup> which provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>6</sup> Apart from replacing the words “race, color, or national origin” in Title VI with the word “sex” in Title IX, the statutes use identical language to describe the protected class.<sup>7</sup>

Several years after the Civil Rights Act of 1964, Title IX began to take shape. In 1970, a special House Subcommittee on Education held its first hearings on sex discrimination in higher education, where legislators found pervasive discrimination against women with respect to educational opportunities.<sup>8</sup> Several legislators introduced Title IX to fill Title VI’s void of sex-based protections in federally-assisted education programs and activities.<sup>9</sup> Congresswomen Edith Green of Oregon and Patsy Mink of Hawaii co-authored the statute, and Senator Birch Bayh of Indiana introduced it.<sup>10</sup> Senator Bayh highlighted that the drafters of Title IX had deliberately used identical language to Title VI and that “educational opportunity should not be based on sex, just as we earlier said it should not be based on race, national origin, or some other discriminations.”<sup>11</sup> Senator Bayh further explained that the Education Amendments of 1972 were meant to “close the loophole” because “national policy should prohibit sex discrimination at all levels of education.”<sup>12</sup> Subject to exceptions not pertinent here, Title IX provides that:

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

<sup>3</sup> NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 45: TITLE IX AND ATHLETICS 2, <https://www.ncwge.org/TitleIX45/Title%20IX%20and%20Athletics.pdf>.

<sup>4</sup> See 20 U.S.C. § 1681(a) (2018).

<sup>5</sup> Cannon v. Univ. of Chicago, 441 U.S. 677, 684–85 (1979).

<sup>6</sup> 42 U.S.C. § 2000d (2012).

<sup>7</sup> Cannon, 441 U.S. at 694–95.

<sup>8</sup> Cohen v. Brown Univ., 101 F.3d 155, 165 (1st Cir. 1996).

<sup>9</sup> 117 CONG. REC. 30,406–07 (1971).

<sup>10</sup> *Id.*

<sup>11</sup> Summary: Amendment No. 874 to the Higher Education Bill, S.659, 118 CONG. REC. 5808 (1972); Education Amendments of 1972, S. REP. NO. 92–798, 92d Cong., 2d Sess. (1972).

<sup>12</sup> 118 CONG. REC. 5807 (1972) (statement of Sen. Birch Bayh).

under any education program or activity receiving Federal financial assistance.<sup>13</sup>

Because Title IX is often identified with promoting equity in athletics based on sex, it is especially noteworthy that neither “sports” nor “athletics” are mentioned in the original statute.<sup>14</sup> Congress passed the law with two general objectives: to avoid the use of federal funding to support discriminatory practices and to protect individual citizens against those practices.<sup>15</sup> Hence, the statute refers more broadly to “any education program or activity.”<sup>16</sup> The first mention of athletic programs was made by Senator Bayh and can be found in the legislative history of the Civil Rights Act.<sup>17</sup> Senator Bayh responded to concerns that the statute would require male and female sports teams to integrate,<sup>18</sup> explaining:

I do not read this as requiring integration of dormitories between the sexes, nor do I feel it mandates the desegregation of football fields. What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved.<sup>19</sup>

Soon after the statute’s enactment, the importance of sufficient opportunities for women in sports began gaining widespread recognition. Less than a year after the law’s enactment, *Brenden v. Independent School District* became the first case to refer to Title IX.<sup>20</sup> The court in *Brenden* noted the significance of interscholastic athletics for females as part of the total educational experience,<sup>21</sup> recognizing that “interscholastic sports are just as valuable for females as for males.”<sup>22</sup>

As litigation around Title IX commenced, concerns from Congress and lobbyists emerged as well. Fearing that Title IX would severely threaten revenue-producing collegiate sports, several legislators attempted to limit the law’s scope.<sup>23</sup> For example, in 1974, Senator John Tower of Texas proposed an amendment to Title IX (the Tower Amendment) which would have exempted revenue-producing sports from Title IX scrutiny.<sup>24</sup> The National Collegiate Athletic Association (NCAA) lobbied in support of the Tower Amendment after NCAA executive director Walter Byers publicly voiced the concern of many male athletic directors by referring to Title IX as “the possible doom of [men’s] intercollegiate sports.”<sup>25</sup> Nevertheless, Congress rejected the bill in June 1974.<sup>26</sup>

---

<sup>13</sup> 20 U.S.C. § 1681(a) (2018).

<sup>14</sup> *See id.*

<sup>15</sup> *Cannon*, 441 U.S. at 704.

<sup>16</sup> 20 U.S.C. § 1681(a).

<sup>17</sup> 117 CONG. REC. 30,407 (1971).

<sup>18</sup> *Id.*

<sup>19</sup> 117 CONG. REC. 30,399, 30,406 (1971).

<sup>20</sup> *Brenden v. Indep. Sch. Dist.* 742, 477 F.2d 1292 (8th Cir. 1973).

<sup>21</sup> *Id.* at 1298.

<sup>22</sup> *Id.*

<sup>23</sup> *See, e.g.*, 121 CONG. REC. 17,300 (1975) (remarks of Sen. Helms); 121 CONG. REC. 21,687 (1975) (remarks of Rep. O’Hara); 121 CONG. REC. 19,209 (1975) (remarks of Rep. Martin).

<sup>24</sup> 120 CONG. REC. 15,322–23 (1974).

<sup>25</sup> Loretta M. Lamar, *To Be an Equitist or Not: A View of Title IX*, 1 SPORTS L. J. 237, 241 (1994).

<sup>26</sup> 120 CONG. REC. 15,322 (1974).

Ultimately, none of the proposed legislation that would have limited Title IX during that time passed.<sup>27</sup>

In response to the attempts to narrow Title IX's scope, Senator Jacob Javits of New York proposed an alternative amendment (the Javits Amendment), which Congress passed in 1974.<sup>28</sup> The Javits Amendment, also known as the Education Amendments of 1974, authorized the Department of Health, Education, and Welfare (HEW) to issue Title IX regulations "with respect to intercollegiate athletic activities."<sup>29</sup> This amendment prompted HEW to draft regulations to clarify precisely what was required of athletic departments to comply with the law.<sup>30</sup> In 1975, HEW issued its regulation regarding Title IX enforcement as it applies to athletics:

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, and no recipient shall provide any such athletics separately on such basis.<sup>31</sup>

Additionally, the regulation provided that whenever a Title IX investigation began, high schools and colleges that receive federal funds will be given three years to comply with Title IX, and elementary schools receiving federal funds will be given one year.<sup>32</sup>

The NCAA filed a lawsuit in 1976 challenging the legality of these newly issued regulations, alleging that no athletic programs received direct federal funds.<sup>33</sup> Once again, the NCAA's efforts failed, as the Tenth Circuit dismissed the suit.<sup>34</sup> In 1979, for the first time in history, women outnumbered men in undergraduate enrollment at degree-granting institutions.<sup>35</sup> A year later, in 1980, the Department of Education Organization Act transferred HEW's federal education responsibilities to the newly established Department of Education (DOE) and directed the oversight of Title IX to DOE's Office for Civil Rights (OCR).<sup>36</sup>

It took more than a decade for Title IX to realize significant progress for gender equity in sports.<sup>37</sup> Moreover, substantial strides were made only after an initial setback in the decision of a landmark case.<sup>38</sup> In 1984, the Court held in *Grove City College v. Bell* that Title IX only applied to specific programs (e.g., a college's financial aid program) in

---

<sup>27</sup> *Id.*

<sup>28</sup> Education Amendments of 1974, Pub. L. No. 93-380, § 844 (1974).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 34 C.F.R. § 106.41(a) (2019).

<sup>32</sup> 34 C.F.R. § 106.41(d) (2019).

<sup>33</sup> *NCAA v. Califano*, 444 F. Supp. 425, 439 (D. Kan. 1978) (holding that the NCAA did not have standing to challenge Title IX regulations), *rev'd*, *NCAA v. Califano* 622 F.2d 1382, 1391–92 (10th Cir. 1980) (holding that NCAA could, in fact, bring a case on behalf of member institutions). No federal courts, however, ultimately decided the merits of the NCAA's case.

<sup>34</sup> NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX TIMELINE: BEYOND THE HEADLINES 5, <https://www.ncwge.org/PDF/Title%20IX%20Timeline.pdf>.

<sup>35</sup> *Digest of Education Statistics, Table 303.10*, NAT'L CTR. FOR EDUC. STAT. (Nov. 2020), [https://nces.ed.gov/programs/digest/d13/tables/dt13\\_303.10.asp](https://nces.ed.gov/programs/digest/d13/tables/dt13_303.10.asp).

<sup>36</sup> 20 U.S.C. § 3441(a)(3) (2018).

<sup>37</sup> *See* Pub. L. No. 100–259, § 2, 102 Stat. 28 (codified as amended at 20 U.S.C. § 1687 (2018)).

<sup>38</sup> *Id.*

an institution that received targeted federal funds.<sup>39</sup> Thus, *Grove City* eliminated Title IX coverage of most athletic programs because athletic departments did not receive direct federal funding.<sup>40</sup> Congress reversed *Grove City* legislatively by passing the Civil Rights Restoration Act of 1987, restoring Title IX coverage to all of an institution's programs and activities, including its athletic programs.<sup>41</sup>

### B. OCR's Test for Title IX Compliance

To prove a prima facie Title IX case, a plaintiff must establish that: "(1) an educational program or activity is involved; (2) the defendant entity is a recipient of federal funds; and (3) discrimination occurred on the basis of sex in the provision or non-provision of the educational program or activities."<sup>42</sup> Conversely, an institution can prove it is compliant with Title IX in several ways. HEW's Policy Interpretation on "Title IX and Intercollegiate Athletics" clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs.<sup>43</sup> Rather than relying on a presumption of compliance standard, the final policy focuses on each institution's obligation to provide equal opportunity and outlines the factors to be considered in determining actual compliance.<sup>44</sup> In assessing whether equal athletic opportunities are available, OCR considers whether an institution effectively accommodates the athletic interests and abilities of both sexes.<sup>45</sup> In doing so, OCR applies what is known as the "three-part test."<sup>46</sup>

The three-part test provides schools with three options for compliance, and no one prong of the test is favored.<sup>47</sup> If an institution has met any prong of the test, OCR will determine that the institution meets the participation requirement.<sup>48</sup> A federally-funded institution must show that its athletic program conforms with at least one of the elements of the three-part test:

- (1) The number of male and female athletes is substantially proportionate to their respective enrollments.
- (2) The institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex.

---

<sup>39</sup> *Id.* Ironically, this opinion was given by Justice Byron "Whizzer" White, who was a three-sport college athlete himself. He won seven letters and all-conference honors in every sport he played at the University of Colorado. See Linda Greenhouse, *Byron R. White, Longtime Justice and a Football Legend, Dies at 84*, N.Y. TIMES, Apr. 16, 2002, <https://www.nytimes.com/2002/04/16/us/byron-r-white-longtime-justice-and-a-football-legend-dies-at-84.html>.

<sup>40</sup> Pub. L. No. 100-259, § 2, 102 Stat. 28 (codified as amended at 20 U.S.C. § 1687 (2018)).

<sup>41</sup> *Id.*

<sup>42</sup> 20 U.S.C. § 1681(a) (2018).

<sup>43</sup> Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 et seq. (Dec. 11, 1979) [hereinafter Policy Interpretation].

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., OCR-000016-A, DEAR COLLEAGUE LETTER: CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (Jan. 16, 1996) at 5 [hereinafter DEAR COLLEAGUE LETTER].

(3) The institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.<sup>49</sup>

While high schools and universities may satisfy one of the three prongs of the three-part test and still maintain compliance, this does not guarantee OCR will determine the institution sufficiently complies with Title IX.<sup>50</sup> The requirement to provide nondiscriminatory participation opportunities is only one of many factors that OCR examines to determine if an institution is compliant with the athletics provision of Title IX.<sup>51</sup> In making an overall assessment of compliance, “OCR considers the effective accommodation of interests and abilities in conjunction with equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided to male and female athletes.”<sup>52</sup> These other benefits include: the quality of competition, equipment, travel, scheduling, coaching, academic tutoring, locker rooms, practice and competitive facilities, medical and training services, housing and dining facilities, and publicity.<sup>53</sup> An institution’s failure to offer nondiscriminatory participation opportunities ordinarily constitutes a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.<sup>54</sup>

### C. Judicial Interpretation of Title IX

The first case to examine how a federal court would review the three-part test was *Cohen v. Brown University*.<sup>55</sup> This landmark case helped clarify how schools across the country should manage students’ athletic opportunities. In *Cohen*, female student athletes filed suit against Brown University alleging Title IX violations after the university demoted the women’s gymnastics and volleyball teams from university-funded varsity status to donor-funded varsity status.<sup>56</sup> Brown argued that Title IX is an affirmative action or quota statute and encouraged the court to adopt a “relative interests” approach to allocation of athletic resources in its interpretation of the three-part test.<sup>57</sup> Under a “relative interests” approach, Brown contended that participation opportunities for male and female students should be proportional to their interest in participating, rather than their percentage in the student body.<sup>58</sup>

The First Circuit affirmed the district court’s decision that the university violated Title IX by not effectively accommodating the interests and abilities of its female student athletes.<sup>59</sup> The court held that Title IX is an anti-discrimination statute, not an affirmative action statute.<sup>60</sup> The court upheld the district court’s interpretation of the three-part test with respect to participation opportunity requirements in deciding that Title IX does not

---

<sup>49</sup> Policy Interpretation, *supra* note 43, at 71,423.

<sup>50</sup> DEAR COLLEAGUE LETTER, *supra* note 48.

<sup>51</sup> Policy Interpretation, *supra* note 43, at 71,413–15.

<sup>52</sup> DEAR COLLEAGUE LETTER, *supra* note 48.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Cohen v. Brown Univ.*, 101 F.3d 155, 178–79 (1st Cir. 1996).

<sup>56</sup> *Id.* at 155.

<sup>57</sup> *Id.* at 169.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 170–71.

mandate exact parity or impose a gender-based quota system.<sup>61</sup> The court also held that Brown’s “relative interests” approach to allocation of athletic resources was not a reasonable interpretation of the three-part test because it failed to fully and effectively accommodate the interests and abilities of the university’s female students.<sup>62</sup>

The university argued that the gender disparity in its athletic opportunities did not reflect discrimination, but instead demonstrated a lack of interest among its female students that was unrelated to a lack of opportunities.<sup>63</sup> The court rejected the argument that women are less interested than men in participating in athletics and, accordingly, found that this argument did not justify an unequal distribution of athletic opportunities.<sup>64</sup> In denouncing the university’s approach, the court explained that the university’s argument rested on “stereotyped notions of women’s interests and abilities.”<sup>65</sup> Federal courts have repeatedly rejected this argument, reasoning that the approach would “freeze the status quo that is the very target of all desegregation processes.”<sup>66</sup>

HEW’s Policy Interpretation also states that lower rates of female participation in athletics reflects a historical lack of opportunities for women to participate in sports.<sup>67</sup> The Ninth Circuit articulated that the drafters of Title IX regulations recognized a deep-seated social issue and a need to resolve it: “Male athletes had been given an enormous head start in the race against their female counterparts for athletic resources, and Title IX would prompt universities to level the proverbial playing field.”<sup>68</sup>

To increase awareness among prospective students of schools’ commitments to providing equitable athletic opportunities for its male and female students, Congress passed the Equity in Athletics Disclosure Act (EADA) in 1994.<sup>69</sup> The EADA requires federally assisted co-educational postsecondary institutions that offer intercollegiate athletic programs to prepare an annual report detailing the breakdown by gender of their athlete participation, staffing, revenues, and expenses by men’s and women’s teams.<sup>70</sup> The schools submit their data to the DOE’s Office of Postsecondary Education, which publishes the

---

<sup>61</sup> *Id.* at 170. (“No aspect of the Title IX regime at issue in this case—inclusive of the statute, the relevant regulation, and the pertinent agency documents—mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.”).

<sup>62</sup> *Id.* at 171.

<sup>63</sup> *Id.* at 178.

<sup>64</sup> *Id.* at 179.

<sup>65</sup> *Id.* (“[T]here exists the danger that, rather than providing a true measure of women’s interest in sports, statistical evidence purporting to reflect women’s interest instead provides only a measure of the very discrimination that is and has been the basis for women’s lack of opportunity to participate in sports.”).

<sup>66</sup> *Id.* at 171. Federal courts have overwhelmingly rejected the “relative interests” approach in *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 767 (9th Cir. 1999); *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004); *Pederson v. La. State Univ.*, 213 F.3d 858, 878 (5th Cir. 2000).

<sup>67</sup> *See* Policy Interpretation, *supra* note 43, at 71,419 (“Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men. During the 1977–78 academic year women students accounted for 48 percent of the national undergraduate enrollment [5,496,00 of 11,267,00 students]. Yet, only 30 percent of the intercollegiate athletes are women.”).

<sup>68</sup> *Neal*, 198 F.3d at 767.

<sup>69</sup> *See* Improving America’s Schools Act of 1994, Pub. L. No. 103–382, § 360B (1994).

<sup>70</sup> 34 C.F.R. § 668.47(a) (2006).

information for public access.<sup>71</sup> While OCR is not involved with EADA reporting, the data is an effective tool to assist OCR in monitoring Title IX compliance.

Publishing this data also allows the public to comprehend the exponential growth in student athlete participation trends. Before Title IX was enacted, fewer than 30,000 women participated in college sports.<sup>72</sup> As of 2019, a record-high 241,735 women participated in varsity sports at the collegiate level.<sup>73</sup> Seven times more women compete in college athletics now than in 1972.<sup>74</sup> Female participation rates in high school and collegiate sports have also increased dramatically since Title IX's enactment. In 1972, the number of female high school athletes was fewer than 300,000.<sup>75</sup> By 2019, that number had risen to over 3.4 million.<sup>76</sup> Ensuring educational institutions abide by their Title IX obligations is imperative not just for the sake of the institutions, but for the well-being of the student athletes as well.<sup>77</sup> Despite this extraordinary progress, however, discrimination against female athletes persists.<sup>78</sup>

#### *D. Booster Clubs, Alumni Associations, and Other Private Donors*

Secondary schools and higher education institutions have a responsibility under Title IX to ensure their athletic programs provide equivalent benefits and services to both sexes.<sup>79</sup> This responsibility applies regardless of the source of funding for these benefits and services.<sup>80</sup> A public institution “cannot avoid its legal obligation by substituting funds from private sources for funds from tax revenues.”<sup>81</sup> Once a university receives a monetary donation, the funds become public money, subject to Title IX's legal obligations in their disbursement.<sup>82</sup> Likewise, once an athletic department accepts external funds from booster clubs, alumni associations, or any other private donors, the gift falls under Title IX's legal requirements.<sup>83</sup>

<sup>71</sup> *The tools you need for Equity in Athletics analysis*, OFF. OF POSTSECONDARY EDUC., U.S. DEP'T. EDUC., <https://ope.ed.gov/athletics/#/> (last visited Nov. 11, 2020).

<sup>72</sup> NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AND ATHLETICS: PROVEN BENEFITS, UNFOUNDED OBJECTIONS in TITLE IX AT 40, at 8 (2012), <http://www.ncwge.org/TitleIX40/Athletics.pdf> [hereinafter TITLE IX AT 40].

<sup>73</sup> *Generate Trend Data: What is the total unduplicated count of participants reported for varsity sports teams?*, OFF. OF POSTSECONDARY EDUC., U.S. DEP'T. EDUC., <https://ope.ed.gov/athletics/Trend/public/#/answer/2/201/table/?row=-1&column=-1> (filter by gender).

<sup>74</sup> *Id.* (filter by gender).

<sup>75</sup> TITLE IX AT 40, *supra* note 72, at 8.

<sup>76</sup> *2018–19 High School Athletics Participation Survey*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS, [https://www.nfhs.org/media/1020412/2018-19\\_participation\\_survey.pdf](https://www.nfhs.org/media/1020412/2018-19_participation_survey.pdf).

<sup>77</sup> See Tara Parker-Pope, *As Girls Become Women, Sports Pay Dividends*, N.Y. TIMES (Feb. 16, 2010), <https://www.nytimes.com/2010/02/16/health/16well.html>.

<sup>78</sup> Wesley Jenkins, *Hundreds of Colleges May Be Out of Compliance With Title IX. Here's Why.*, CHRONICLE OF HIGHER EDUC. (Oct. 23, 2019), <https://www.chronicle.com/article/hundreds-of-colleges-may-be-out-of-compliance-with-title-ix-heres-why/>. Girls of color face even more barriers to equal athletic opportunities because of sex and race discrimination. See NWLC AND POVERTY & RACE RSCH. ACTION COUNCIL, FINISHING LAST: GIRLS OF COLOR AND SCHOOL SPORTS OPPORTUNITIES (2015), <https://nwlc.org/resources/finishing-last-girls-color-and-school-sports-opportunities/>.

<sup>79</sup> Policy Interpretation, *supra* note 43, at 71,413.

<sup>80</sup> *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1048 (8th Cir. 2002).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

Booster clubs are volunteer-run organizations that raise funds and provide support for student programs at secondary schools and colleges.<sup>84</sup> Booster clubs, which ordinarily qualify for 501(c)(3) tax exemption, offer financial support for equipment and programs not included in a school's official budget.<sup>85</sup> Booster clubs are unique, however, in that they focus their support on specific needs such as athletics, music, theater, and other programs.<sup>86</sup> In high schools, booster clubs are often run and organized by the parents of students in the organizations they seek to support.<sup>87</sup> At the university level, the clubs are generally run and supported by alumni, community athletic supporters, and other fans at the university.<sup>88</sup> The NCAA outlines its definitions of a booster or "representative of the institution's athletic interests"<sup>89</sup> as one who is known or should have been known "by a member of the institution's executive or athletics department" to have:

- (a) participated in or to be a member of an agency or organization promoting the institution's intercollegiate athletics program;
- (b) made financial contributions to the athletics department or to an athletics booster organization of that institution;
- (c) been requested (by the athletics department staff) to assist [or be assisting] in the recruitment of prospective student-athletes;
- (d) assisted [or be assisting] in providing benefits to enrolled student-athletes or their families; or
- (e) been involved otherwise in promoting the institution's athletics program.<sup>90</sup>

The role of boosters is to provide "student-athletes with a positive experience through their enthusiastic efforts," which can include "contributions to university programs and other gift-in-kind arrangements."<sup>91</sup> Some schools have several sport-specific booster clubs while other schools have one unified booster club that supports all sports at the school.<sup>92</sup>

The source of the funding donated to an athletic department is irrelevant with respect to the institution's compliance with Title IX.<sup>93</sup> Booster club funds and private gifts earmarked for a particular purpose do not relieve schools from their obligation to provide equal opportunities.<sup>94</sup> One court noted: "A school may not skirt the requirement of

<sup>84</sup> Sandra Pfau Englund & Drew Pfau Englund, *Booster Club 101: From the Beginning*, PARENTBOOSTERUSA, <https://parentbooster.org/videos/booster-club-101>.

<sup>85</sup> *What is a Booster Club?*, PTO TODAY (Sept. 5, 2019), <https://www.ptotoday.com/pto-today-articles/article/8967-what-is-a-booster-club>.

<sup>86</sup> *Id.*

<sup>87</sup> Interview with Doug Ackerman, President, New Trier High Sch. Booster Club (Dec. 3, 2019).

<sup>88</sup> Interview with Jamie DiLoreto, Assoc. Athletics Dir. of Mktg. & Fan Engagement, Bos. Coll. (Dec. 10, 2019).

<sup>89</sup> *Guidelines for Representatives of Athletics Interest: NCAA Division III Bylaw 13.02.9*, NCAA, <https://www.ncaa.org/sites/default/files/Booster%20Guidelines%20with%20definitions.pdf> (last visited Mar. 11, 2020).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Peter S. Finley, *Title IX and Booster Club Management: Experts' Suggestions for Managing Challenging Scenarios*, 16 *ESSAYS IN EDUC.* 3 (2006), <https://openriver.winona.edu/cgi/viewcontent.cgi?article=1139&context=eie>.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

providing both sexes equal opportunity in athletic programs by providing one sex more than substantially proportionate opportunity through the guise of outside funding.”<sup>95</sup> OCR further elaborated on the role that private funds, as opposed to institutional funds, play with respect to institutions’ Title IX responsibilities:

The private funds that are used to support District athletic programs, although neutral in principle, are likely to be subject to the same historical patterns that Title IX was enacted to address. In the experience of the OCR, sponsors, as a whole, are more interested and willing to assist boys teams than girls teams, and male-oriented booster activities generate more public interest than girls activities. If all benefits are not considered in examining interscholastic athletics, the purpose and effect of the Title IX requirements could be routinely undermined by the provision of unequal benefits through private financial assistance.

While OCR acknowledges that this policy may be seen as discouraging private initiatives (which are unquestionably valuable to recipients and students), we cannot diminish the protection of Title IX by exempting benefits, treatment, services or opportunities provided to athletes through the use of private funds. Private fundraising, including student-initiated fundraising, has been, and continues to be, permissible under Title IX. It should also be noted that this does not mean that teams must “share” proceeds from fundraising activities. It does, however, place a responsibility upon the district to ensure that benefits, services, treatment and opportunities overall, regardless of funding sources, are equivalent for male and female athletes.<sup>96</sup>

Occasionally, boosters incorrectly view the funds they generate as belonging to the club and thus resist direction regarding how to spend the money.<sup>97</sup> When booster clubs assert control over the allocation process of these funds, it leaves athletic directors and other administrators with little or no oversight in the process.<sup>98</sup> By excluding administrators from the allocation process, boosters and other donors may disburse funds freely and at their own discretion.<sup>99</sup> If an interscholastic or intercollegiate team accepts a donation, the school itself is also accepting that donation regardless of whether the athletic department or institution is involved in the process.<sup>100</sup> Accounting for all funds used by athletic programs, whether institutional or otherwise, is a critical component for ensuring Title IX compliance.<sup>101</sup> Typically, colleges and universities accept unrestricted donations less frequently than high schools.<sup>102</sup> At the college level, more formal and tight-knit

---

<sup>95</sup> *Chalenor v. Univ. of N.D.*, 142 F. Supp. 2d 1154 (D.N.D. 2000), *aff’d*, 291 F.3d 1042 (8th Cir. 2002).

<sup>96</sup> *Jurupa Unified School Dist.*, OCR File No. 09-01-1222 (Feb. 7, 1995).

<sup>97</sup> *Finley*, *supra* note 92, at 3.

<sup>98</sup> *See id.*

<sup>99</sup> *Id.*

<sup>100</sup> Interview with Nancy Hogshead-Makar, CEO, Champion Women (Dec. 3, 2019).

<sup>101</sup> Interview with Paul Anderson, Dir., Sports L. Program and Nat’l Sports L. Inst., and Professor, Marquette Univ. L. Sch. (Dec. 4, 2019).

<sup>102</sup> Interview with Barbara Osborne, Adjunct Professor, Univ. of N.C. Sch. of Law. (Dec. 6, 2019).

relationships tend to exist between athletic departments and outside fundraising organizations, and formal guidelines and policies often ensure more collaboration and oversight from the athletic department.<sup>103</sup>

## II. IMPLICATIONS OF BOOSTER CLUB AND PRIVATE FUNDING

Ultimately, the root cause of most Title IX violations in high school and college athletic programs can be traced back to a single issue—administrators’ lack of training about gender equity responsibilities.<sup>104</sup> Administrators, including coaches and even athletic directors, often erroneously assume donations and booster club funds need not be factored into the overall assessment of an athletic program’s offerings.<sup>105</sup> Without realizing it, coaches may accept private gifts for their teams without considering institutional consequences.<sup>106</sup>

The absence of Title IX training programs and subsequent lack of education surrounding Title IX in athletics may result from several factors. Some scholars argue the statute’s scant legislative history “handicapped [Title IX] from its inception,”<sup>107</sup> perhaps fostering greater controversy and confusion than necessary upon its enactment. These misconceptions may still persist in athletic departments today. Other Title IX experts point to the time that has passed since the statute’s enactment as a reason that many administrators fail to understand Title IX and its scope.<sup>108</sup> A former commissioner of sports and athletics in Milwaukee Public Schools, for example, noted one instance where the Title IX coordinator of a major university did not know that Title IX even encompassed gender equity in athletics.<sup>109</sup>

The lack of institutional training programs perpetuates a misunderstanding of and unfamiliarity with the statute, which inevitably leads to improper conduct and greater likelihood of non-compliance with Title IX.<sup>110</sup> The most common challenges administrators confront when dealing with gifts from booster clubs, alumni associations, and other private donors are sport-specific booster clubs and privately funded earmarked donations.<sup>111</sup> A lack of education and understanding of Title IX’s requirements often exacerbates the issue of misapplied donations and booster club funds.<sup>112</sup>

A major obstacle to gender equity in interscholastic and intercollegiate athletics is sport-specific booster clubs.<sup>113</sup> Booster clubs that sponsor sports that generate more revenue and draw larger crowds—such as football and men’s basketball—inevitably garner more community support and raise more money than other sport-specific booster clubs.<sup>114</sup>

---

<sup>103</sup> *Id.*

<sup>104</sup> Interview with Janis Doleschal, Former Comm’r of Sports and Athletics for Milwaukee Pub. Schs. (Dec. 6, 2019).

<sup>105</sup> Interview with Erin E. Buzuvis, Professor of Law, W. New England Univ. Sch. of Law. (Dec. 5, 2019).

<sup>106</sup> *Id.*

<sup>107</sup> Title IX was adopted without formal hearings or a committee report. *See* S. Rep. No. 798, 92d Cong., 2d Sess. 221–22 (1972); 118 CONG. REC. 5802 (1972).

<sup>108</sup> Interview with Janis Doleschal, *supra* note 104.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *See* Finley, *supra* note 92.

<sup>112</sup> *Id.*

<sup>113</sup> Interview with Nancy Hogshead-Makar, *supra* note 100.

<sup>114</sup> *Id.*

Title IX experts have called it “the surest way to get in trouble,” and argue that administrators should consider consolidating separate booster clubs for distinct teams into one unified booster club.<sup>115</sup>

When schools have more sport-specific booster clubs for men’s teams, it can lead to imbalances among male and female athletic opportunities.<sup>116</sup> For example, Boston College offers various athletics booster organizations as a way of encouraging fan involvement with its sports programs.<sup>117</sup> The college recognizes five booster clubs on campus, including the “Varsity Club” for all sports, the “Gridiron Club” for football, the “Hoop Club” for men’s basketball, the “Fast Break Club” for women’s basketball, and the “Pike’s Peak Club” for men’s ice hockey.<sup>118</sup> Accordingly, the Fast Break Club must compete with the fundraising powers of three men’s sport-specific booster clubs.<sup>119</sup> Unless funds generated by the general all-sport Varsity Club or institutional funds from elsewhere in the athletic department are allocated towards women’s sports, a discrepancy in opportunities based on gender is likely to result.

*Daniels v. School Board of Brevard County* illustrates an example of separate sport-specific booster clubs causing disparities.<sup>120</sup> In *Daniels*, members of a girls’ high school varsity softball team and the father of one of the players sued the school board under Title IX.<sup>121</sup> The players and father alleged disparities between the girls’ softball and boys’ baseball programs as a result of separate funding from the school’s sport-specific booster clubs.<sup>122</sup> On the player’s motion for preliminary injunction, the district court held in part that “where the school board had acquiesced in [a] funding system which involved separate booster clubs for each team, it could be held responsible for the consequences of that approach.”<sup>123</sup> The board could not avoid Title IX obligations despite its best efforts to deny liability and place blame on the greater success of one booster club over another.<sup>124</sup>

The basis of the school board’s defense was that the board itself provided equal funding for its boys’ and girls’ programs.<sup>125</sup> Each team at the school had separate booster clubs that engaged in individual fundraising efforts.<sup>126</sup> The board alleged that it could not be held liable for a violation of Title IX if the fundraising activities of one booster club were more successful than those of another.<sup>127</sup> The court rejected this argument, stating that, according to Title IX, it was indeed the school board’s responsibility to ensure equal athletic opportunities existed for male and female student athletes.<sup>128</sup> The fact that the school allocated its institutional funds equitably was irrelevant since the booster clubs garnered disproportionate funds.

---

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Interview with Jamie DiLoreto, *supra* note 88.

<sup>118</sup> *Id.*

<sup>119</sup> *BC Booster Clubs*, BOS. COLL. ATHLETICS, [https://bceagles.com/sports/2015/9/21/BC\\_0921152659.aspx](https://bceagles.com/sports/2015/9/21/BC_0921152659.aspx) (last visited Feb. 27, 2020).

<sup>120</sup> *Daniels v. Sch. Bd. of Brevard Cty., Fla.*, 985 F. Supp. 1458, 1462 (M.D. Fla. 1997).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

Moreover, sport-specific booster clubs threaten more than just women's teams—they may lead to imbalances among male sports, as well. While Title IX affects allocation of booster club funds between men's and women's sports, it does not impose requirements for the allocation of booster club funds between different men's sports.<sup>129</sup> A lack of regulation of fund disbursement between men's sports presents a challenge for non-revenue generating men's sports. For instance, a football-specific booster club at a school may raise more money for its team than the men's golf-specific booster club raises. The football team may also have a larger school-issued budget than the golf team, which further compounds the disparity in spending. Still, an example like this—spending on football instead of golf—would not constitute a Title IX violation.<sup>130</sup> Ultimately, sport-specific booster clubs threaten more than just female athletes' access to equal athletic opportunity.

Earmarked and directed donations present another major challenge to Title IX compliance. A gift designated to a specific sport, while ostensibly less problematic than individualized booster clubs, may still present issues.<sup>131</sup> When an institution accepts funding from an outside source such as a booster club or an alumni donor, the institution is permitted to use the funds in the manner specified by the outside source as long as the institution offsets any inequalities that result.<sup>132</sup> Schools cannot use a donor's condition on a gift to justify a failure to comply with Title IX.<sup>133</sup> An inability to offset disparate funding caused by earmarked donations is not a means to circumvent Title IX compliance.<sup>134</sup>

For example, a former collegiate basketball player may choose to donate to her college team, or a mother may want to demonstrate her gratitude for the high school baseball program that provided her son with lifelong friends; schools often depend on these types of donors. Intercollegiate athletic programs, especially women's programs, would be hard-pressed to succeed without such funding.<sup>135</sup> These donations, when applied properly, can be invaluable for schools. However, when a school receives money from a booster club or outside donor that is earmarked for a specific athletic program, and the donation consequently creates an imbalance in opportunities, it is the school's responsibility to resolve that imbalance.<sup>136</sup>

If such outside funding results in disparities among athletic opportunities, the school has several options for resolving inequities. To avoid having to reject donations for a specific program, schools may allocate institutional funds to other programs.<sup>137</sup>

---

<sup>129</sup> Kerensa E. Barr, *How the "Boys of Fall" Are Failing Title IX*, 82 UMKC L. REV. 181, 196 (2013).

<sup>130</sup> *Id.*

<sup>131</sup> Ted Kinder, *Oversight of Booster Clubs Essential for Gender Equity*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS (July 17, 2014), <https://www.nfhs.org/articles/oversight-of-booster-clubs-essential-for-gender-equity/>.

<sup>132</sup> Finley, *supra* note 92, at 7.

<sup>133</sup> PEG PENNEPACKER, N.M. ACTIVITIES ASS'N, BOOSTER CLUBS AND TITLE IX: TOUGH TIMES AND TOUGH DECISIONS 1, <https://www.nmact.org/file/Booster%20Clubs%20and%20Title%20IX.pdf> (last visited Mar. 11, 2020).

<sup>134</sup> Interview with Barbara Osborne, *supra* note 102.

<sup>135</sup> Jeré Longman, *A Welcome Funding Source for College Athletics: Women Investing in Women's Sports*, N.Y. TIMES (Dec. 3, 2019), <https://www.nytimes.com/2019/12/03/sports/women-donations-college-athletics.html>.

<sup>136</sup> Bob Butler, *Title IX Issues Involving Booster Clubs and Facilities—How Equity Impacts Both*, AWSA, <https://awsa.memberclicks.net/update-article--title-ix-issues-involving-booster-clubs-and-facilities---how-equity-impacts-both> (last visited Mar. 11, 2020).

<sup>137</sup> Interview with Erin E. Buzuvis, *supra* note 105.

Alternatively, schools may negotiate with the donor to allocate his or her gift to other programs as well.<sup>138</sup> Ideally, the negotiated donation should free up institutional funds that can be applied towards enhancing other programs to maintain gender equity.<sup>139</sup> However, it is not always possible for schools to offset a donor's gift to one program by applying institutional funds to other programs, as tight budgetary constraints are a reality for many athletic departments.<sup>140</sup>

If an earmarked donation provides benefits or services to athletes of one sex that are greater than what the institution is capable of providing to the other sex, the institution must take action to ensure benefits and services are equivalent for both sexes.<sup>141</sup> As one possible action, the athletic director may discuss a potential compromise with the donor by requesting that his or her gift be dispersed more widely.<sup>142</sup> It is critical for administrators to be well-versed in Title IX's purpose and obligations, so they are prepared to engage in conversations like these.<sup>143</sup> Alumni donors, on the other hand, may not be exposed to Title IX or its requirements on a daily basis and therefore may not be aware of the intricacies of the law. Thus, administrators should clearly explain to these private donors the significance of Title IX compliance before requesting that the donor's gift be shared with another program in addition to his or her program of choice.

OCR has confronted disparities resulting from directed donations on several occasions. Unlike sport-specific booster clubs, some booster clubs may operate on a general basis and distribute funds to all teams within a school. Still, even seemingly egalitarian funders like these may direct their gifts unevenly. In October 2012, OCR investigated and found the Hingham Public School District violated Title IX by failing to provide equivalent benefits and services to its male and female athletes. The investigation found that the district dispersed necessary equipment evenly, but booster clubs provided gifts such as varsity jackets, warm-ups, travel bags, shoes, trophies, gifts, and stipends to "volunteer coaches."<sup>144</sup> According to OCR's Resolution Agreement, the district was to develop and implement a comprehensive policy to regulate booster club funding and "other private donations flowing into the athletics program."<sup>145</sup> Just as the Resolution Agreement mandated Hingham Public School District regulate booster club funding, other public school district administrators should maintain close oversight of the institutions in their district.

Additionally, upon investigation, OCR found in 2014 that Indiana Public Schools violated Title IX because of disparities in athletic participation opportunities for girls.<sup>146</sup> These disparities were largely due to unequal allocation of money raised by booster

---

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (The COVID-19 pandemic has only exacerbated financial concerns for many athletic departments. *List of College Teams Cut Because of Coronavirus Pandemic*, ASSOCIATED PRESS (July 8, 2020), <https://apnews.com/article/fd7075343269ea7e08bb2965b78bbbc5>).

<sup>141</sup> See Finley, *supra* note 92, at 6.

<sup>142</sup> *Id.*

<sup>143</sup> Interview with Barbara Osborne, *supra* note 102.

<sup>144</sup> Letter from Thomas J. Hibino, Reg'l Dir., Office for Civil Rights, to Dorothy Galo, Superintendent, Hingham Pub. Sch. Dist. (Oct. 26, 2012) (on file with the Department of Education).

<sup>145</sup> *Id.*

<sup>146</sup> Press Release, Office for Civil Rights, U.S. Department of Education and Indianapolis Public School Reach Agreement to Provide Equal Access to Interscholastic Athletics for Female Students (Feb. 26, 2014) (on file with Department of Education).

clubs.<sup>147</sup> Following the investigation, the district agreed to “create and implement a comprehensive policy” so that it could regulate booster club funding and any other donations to the athletic programs at each high school.<sup>148</sup> If the district found that any disparities favoring athletes of one sex over the other resulted from directed donations, it agreed to take action to ensure that the benefits and services were equivalent for both sexes.<sup>149</sup> Districts often require booster clubs at high schools to be approved by the district itself,<sup>150</sup> which is one way to promote accountability and oversight in this process.

### III. RECOMMENDATION

Booster club funding and private donations, financial or otherwise, are invaluable resources for the success of schools’ athletic programs. The purpose of this Note is not to discourage such gifts. On the contrary, booster club, alumni, and community support should be encouraged. Nonetheless, because booster club activities and private donations may lead to disparities in opportunities between male and female athletes, administrators must understand their responsibilities under Title IX. Thus, to help combat potential disparities in opportunities caused by sport-specific booster clubs and earmarked donations, OCR should develop educational resources for the public and partnership training programs for administrators at institutions covered by Title IX. To help create and implement these resources, OCR should look to other administrative agency’s training policies and programs.

While OCR offers some Title IX-related educational resources for administrators and the public, these materials are helpful only to the extent that administrators voluntarily seek them out. On the DOE website, OCR provides a link to a Title IX Resource Guide, calling it “a useful tool for schools and their Title IX coordinators to understand schools’ obligations under Title IX.”<sup>151</sup> The guide outlines several sections including the “Scope of Title IX,” “Responsibilities and Authority of a Title IX Coordinator,” and “Application of Title IX to Various Issues,” which includes a section on athletics.<sup>152</sup> The guide covers the core aspects of Title IX and its application to athletics programs.<sup>153</sup> Aside from the Resource Guide, OCR provides an online archive of documents published in the Federal Register.<sup>154</sup> Though helpful, these resources do not remedy the confusion surrounding Title IX and its requirements. To promote education surrounding Title IX, OCR should offer free resources on its website and mandate compliance training for school administrators. To help develop these tools, OCR officials should look to resources implemented by other administrative agencies, such as the Occupational Safety and Health Administration (OSHA).

---

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Butler, *supra* note 136.

<sup>151</sup> *Title IX and Sex Discrimination*, OFFICE FOR CIVIL RIGHTS (Apr. 2015), [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html).

<sup>152</sup> *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP’T. OF EDUC., *TITLE IX RESOURCE GUIDE* (Apr. 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>.

<sup>153</sup> *Id.*

<sup>154</sup> *Reading Room (eFOIA Index)*, OFFICE FOR CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX> (last visited Mar. 11, 2020).

OSHA, an agency of the Department of Labor, is responsible for ensuring “safe and healthful working conditions for working men and women” through the enforcement of the Occupational Safety and Health Act.<sup>155</sup> OSHA has promulgated over one hundred standards requiring employers to train employees in the safety and health aspects of their jobs.<sup>156</sup> Many standards are specific in outlining the nature, frequency, and scope of the required training, while others are more general.<sup>157</sup> Some standards require an annual review or refresher training.<sup>158</sup> OSHA offers myriad outreach, compliance assistance services, and general education information to help employers train their workers and subsequently comply with OSHA’s requirements.<sup>159</sup> For example, the OSHA Outreach Training Program offers resources such as free brochures, fact sheets, and brief educational videos on a variety of pertinent worker safety topics.<sup>160</sup> The agency also offers access to in-person training sessions through the OSHA Training Institute Education Centers, a national network of nonprofit organizations authorized by OSHA to deliver occupational safety and health training for workers.<sup>161</sup> OSHA’s website provides a searchable schedule where individuals who are interested in finding sessions can filter by course title, education center location, and state.<sup>162</sup>

Additionally, the agency offers on-site consultation programs to promote safe workplaces and help train employers so they can properly educate workers in their businesses.<sup>163</sup> Through the OSHA Alliance Program, OSHA collaborates with groups committed to worker health and safety, such as unions, trade or professional organizations, businesses, community-based organizations, and educational institutions.<sup>164</sup> Alliance Program participants work closely with OSHA to develop and share information with workers and employers to instruct them on their rights and responsibilities under the Occupational Safety and Health Act.<sup>165</sup> Once completed, the educational products that the Alliance Program participants develop with OSHA become available to the public as free resources.<sup>166</sup> Ultimately, the Alliance Program aims to increase workers’ access to effective workplace health and safety tools and information about workers’ rights. Since the enforcement of OSHA-mandated training and its provision of various educational resources, millions of workers have become aware of health and safety protection on the job.<sup>167</sup>

---

<sup>155</sup> *About OSHA*, U.S. DEP’T. LABOR, <https://www.osha.gov/aboutosha> (last visited Mar. 11, 2020).

<sup>156</sup> John Hall, *It’s Training Time*, 26 No. 1 ALA. EMP. L. LETTER 5 (2015).

<sup>157</sup> See Occupational Safety and Health Admin., U.S. Dep’t. Labor, TRAINING REQUIREMENTS IN OSHA STANDARDS (2015), <https://www.osha.gov/Publications/osha2254.pdf>.

<sup>158</sup> *Id.*

<sup>159</sup> *Training Requirements and Resources*, U.S. DEP’T. LABOR, <https://www.osha.gov/training/library> (last visited Mar. 11, 2020).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Searchable Schedule*, U.S. DEP’T. LABOR, [https://www.osha.gov/dte/eed/course\\_otiec\\_search\\_public.html](https://www.osha.gov/dte/eed/course_otiec_search_public.html) (last visited Mar. 11, 2020).

<sup>163</sup> *The OSHA Alliance Program*, U.S. DEP’T. LABOR <https://www.osha.gov/alliances/whatis> (last visited Mar. 11, 2020).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See *All About Osha*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., U.S. DEP’T. LABOR 3 (2018), [https://www.osha.gov/Publications/all\\_about\\_OSHA.pdf](https://www.osha.gov/Publications/all_about_OSHA.pdf).

Using OSHA’s training policies and programs as a model, OCR should mandate Title IX trainings to improve compliance among athletic programs in secondary and postsecondary educational institutions. Offering fact sheets, brochures, and educational videos is a simple and economical way that OCR can improve awareness among Title IX administrators as well as the general public. Similar to the resources on worker safety that employers use to educate themselves and their workers about OSHA requirements, the resources created by OCR would help Title IX coordinators educate themselves and their colleagues. Booster club members or other potential donors to athletic programs could also use these resources to gain a more thorough understanding of their gifts’ implications. With respect to consulting services, OCR should develop an inter-organizational partnership program modeled on the OSHA Alliance Program whereby representatives committed to gender equity collaborate and visit schools to instruct athletic administrators about Title IX.

One organization that would be an ideal candidate for participation in such a program would be the Association of Title IX Administrators (ATIXA). ATIXA is a professional association for Title IX administrators at K–12 schools and universities who are interested in serving their institutions and districts more effectively.<sup>168</sup> Through ATIXA, members collaborate “to explore best practices, establish industry standards, share resources, empower the profession, and advance the worthy goal of gender equity in education.”<sup>169</sup> With more than 5,000 active members, ATIXA hosts annual conferences, publishes weekly newsletters, and offers certification trainings and webinars.<sup>170</sup> ATIXA offers specific resources including Title IX training checklists, webinars on OCR regulations, case law, and model policies for best practices.<sup>171</sup> This independent nonprofit also offers on-site and off-site consulting services for its members as well as for non-members.<sup>172</sup> OCR may consider partnering with ATIXA or creating its own training tools and consulting services using ATIXA’s resources as a guide.

OCR should also partner with organizations such as the NCAA and National Federation of State High School Associations to promote awareness about Title IX on campuses. Ideally, officials from OCR’s twelve enforcement offices<sup>173</sup> would form partnerships with and train leaders from individual high school and collegiate conferences within their regional jurisdiction. Once trained, these conference representatives could return to their respective institutions to educate athletic department staff members about the scope of Title IX and how to implement best practices. These inter-organizational training programs would offer OCR a streamlined approach to broaden its geographic reach and educate more administrators about Title IX. For example, directors from OCR’s Chicago enforcement office would be responsible for training the Big Ten’s representative, and directors from OCR’s New York office would train the representative from New York State Public High School Athletic Association (NYSPHSAA).

---

<sup>168</sup> *Mission & Vision*, ATIXA, <https://www.atixa.org/about/> (last visited Jan. 30, 2021).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Resources*, ATIXA, <https://www.atixa.org/resources/> (last visited Jan. 30, 2021).

<sup>172</sup> *Consulting*, ATIXA, <https://www.atixa.org> (last visited Jan. 30, 2021).

<sup>173</sup> *About OCR*, OFFICE FOR CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last visited Jan. 30, 2021) (“Most of OCR’s activities are conducted by its 12 enforcement offices throughout the country. These enforcement offices are organized into 4 divisions carrying out OCR’s core work—preventing, identifying, ending, and remedying discrimination against America’s students.”).

Promoting education about Title IX is a proactive solution to potential misconduct and non-compliance. OCR's mission is "to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights."<sup>174</sup> Offering educational resources for the public and developing inter-organizational training programs for administrators would help OCR further this aim.

#### CONCLUSION

Inadequate educational resources for athletic department administrators in high schools and universities leads to a misunderstanding of Title IX's requirements.<sup>175</sup> Inevitably, this confusion results in institutional misconduct and non-compliance with Title IX. In particular, booster club funds and private donations—while valuable resources when distributed properly—may lead to schools' non-compliance, and administrators who do not understand the scope of the law may not even recognize this non-compliance. Sport-specific booster clubs and earmarked donations pose a threat to Title IX compliance if administrators allocate these gifts without regard for equitable distribution.

OCR should offer more robust educational resources and implement Title IX trainings so administrators can prevent misallocating booster club funds and private donations. OCR should train representatives from high school and collegiate conferences to help spread awareness to administrators at their respective institutions. In addition to OCR-mandated trainings, administrators should collaborate with the leaders of their institutions' booster clubs, alumni associations, and other prospective donors to ensure these individuals recognize the Title IX implications of their gifts. A greater understanding of Title IX is critical for all stakeholders involved throughout the process—from the initial donation to the departmental allocation of the funds. This improved understanding, in turn, would lead to increased compliance with the law. This compliance would ensure equal opportunities are afforded to every student, regardless of sex.

---

<sup>174</sup> *Id.*

<sup>175</sup> Interview with Janis Doleschal, *supra* note 104.