

INTRAMURAL AND CLUB SPORTS: THE IMPACT OF TITLE IX

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I. INTRODUCTION

In 1972, the United States Congress enacted Title IX of the Education Amendments of 1972, which prohibited gender discrimination in federally funded educational settings.¹ The key provision of the law was relatively brief and simple: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”² The law itself makes no mention of athletics or of sport, but Title IX would be credited with changing the face of America’s sporting landscape by including women and girls.³ Prior to the enactment of Title IX, sport in America was a predominantly male affair with women’s presence on the fields discouraged if not flat out prohibited. After 1972, women and girls entered the athletic arena in remarkable numbers.⁴ The law, its enforcement regulations, and the various letters of

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1. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901–09, 86 Stat. 235 (codified at 20 U.S.C. §§ 1681–88 (2007)) [hereinafter Title IX].

2. 20 U.S.C. § 1681(a).

3. When the United States (U.S.) women’s soccer team won the Women’s World Cup in 1999, journalists linked their victory to Title IX: “World Cup Fever seemed to signal that 27 years after Title IX legislation mandated equal financing for girls’ athletics, women’s team sports have truly arrived.” Marc Starr & Martha Brant, *It Went Down to the Wire and Thrilled Us All*, NEWSWEEK, July 19, 1999, at 50.

4. In 1971, 294,015 females participated in high school sports; they accounted for about 5% of all high school athletes. In 1978, 2,083,040 girls participated in high school sports, accounting for about 32% of all high school athletes. LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, TITLE IX 168 (2005). In 2005–2006, 2,953,355 girls competed in high school sports, accounting for just over 41% of high school athletes. Press Release, National Federation of State High School Associations, Participation in High School Sports Increases Again; Confirms NFHS Commitment to Stronger Leadership (Sept. 18, 2006), available at http://www.nfhs.org/web/2006/09/participation_in_high_school_sports_increases_again_confirm_s_nf.aspx. In 1972, an estimated 30,000 women competed in intercollegiate varsity sport, comprising approximately 15% of collegiate athletes. CARPENTER & ACOSTA, *supra*, at 171. In 2004–2005, 164,998 women, approximately 43% of all athletes, competed in varsity sports under the auspices of the National Collegiate Athletic Association (NCAA). NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, FACT SHEET (2006), http://www.ncaa.org/about/fact_sheet.pdf. Other women compete in varsity sports under the auspices of other organizations but these NCAA

clarification and policy interpretations apply equally to all levels of sport in all federally funded schools and educational programs. Although most legal and public attention has focused on the law's impact on intercollegiate (varsity) sport, Title IX also applies to intramural and club sports in colleges and universities which receive any federal funding.⁵

Using several different collegiate policies as case samples, this article will examine the mechanisms that some institutions utilize to create participation and funding opportunities for their students in non-varsity sports and to evaluate if those mechanisms keep the school's intramural and club sports⁶ in compliance with Title IX. The first section will introduce the legal and social history of the law, as well as describe the initial enforcement regulations. The next section will discuss some of the clarification letters and policies and the lawsuits that have helped to define those enforcement mechanisms. The third section will examine, via various institutional case studies, the participation opportunities for men and women in intramural and club sports and the funding mechanisms for the club sports, to determine if these policies would forestall Title IX complaints. This section will also consider some hypothetical situations which might involve Title IX violations at the club and intramural sport level. The conclusion will argue that, although many schools have policies for intramural and club sports that on their face are gender equitable, institutions need to continue to monitor these programs and to be aware of possible violations from disparate impact of a legacy of male domination of sport⁷ at all levels of skill in the college and university system.

figures provide an example of the increase. Intramural and club sports also saw an increase between 1971 and 1976 from 276,167 to 576,167 and 31,852 to 64,375, respectively. CARPENTER & ACOSTA, *supra*, at 171.

5. 34 C.F.R. § 106.41(a) (2007). "No person shall, on the basis of sex . . . be discriminated against in any interscholastic, intercollegiate, club or intramural athletics . . ." *Id.*

6. For the purposes of this article, intramural sports are defined as those offered by the institution for students, faculty, and/or staff, and other approved members of the college or university community. These competitions are usually in league or tournament play in which the teams or individuals compete against other members of the same college or university community. Intramural sport excludes inter-school competition and can also be distinguished from recreational classes that hold no element of competition. Thus, institution or recreation department classes designed to instruct in the finer points of a sport or activity are excluded as are those courses designed simply for exercise, like a spinning class. Club sports occupy the middle ground between institutionally sponsored varsity sports (which receive greater funding and support) and intramural sports. Club sport teams may choose to participate in inter-college competition or in competition with other organizations. Club sports are organized entirely by students, and they are often funded and governed through recreational sports programs as opposed to varsity sports which are usually funded and governed through an athletic department. This article relies on the institution's self-designation of a sport as being club or intramural as defined on the institution's website.

7. See Eric Dunning, *Sport as a Male Preserve: Notes on the Social Sources of Masculine Identity and its Transformation*, in *WOMEN, SPORT, AND CULTURE* 163 (Susan Birrell & Cheryl L. Cole eds., 1994) (articulating the commonly held position of sports as a male preserve and describing that theory's history and sociological origins).

II. HISTORY OF TITLE IX

Throughout most of America's past, sport was a male prerogative.⁸ Although some women and girls competed in sport, they were the exception rather than the rule.⁹ Most Americans in the early twentieth century accepted conventional wisdom and unsubstantiated medical belief that excessive exercise would physically harm females, especially female reproductive organs, and that too much competition would make the women less feminine and ladylike.¹⁰

As the twentieth century progressed, however, and the women's rights movement grew, American attitudes towards women began to change. World War II served as a catalyst for America's social justice movements. While American men were overseas fighting the war, women at home had been encouraged to take a more active public role, joining the previously male dominated worlds of work and of sport, which resulted in a vast increase in women in production jobs and the creation of the All-American Girls Professional Baseball League.¹¹ After the war's end, these women and the men of color who had fought overseas were not comfortable returning to the pre-war status quo.¹² The rise of the Civil Rights

8. *Id.*

9. See, e.g., NANCY STRUNA, *PEOPLE OF PROWESS: SPORT, LEISURE, AND LABOR IN EARLY ANGLO-AMERICA* (1996) (describing some of the female athletes in Colonial America); ALLEN GUTTMANN, *WOMEN'S SPORTS: A HISTORY* (1991) (providing a broad overview of the history of women's sport from Ancient Egyptians through the nineteenth century and describing some of the exceptional female athletes through the ages); REET HOWELL ED., *HER STORY IN SPORT: A HISTORICAL ANTHOLOGY OF WOMEN IN SPORTS* (1982) (focusing on American women's participation in sport in the nineteenth and early twentieth centuries).

10. See SUSAN K. CAHN, *COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH CENTURY WOMEN'S SPORT* (1994) (describing the history of women's sport in the twentieth century and the arguments that women who competed in sport were more masculine and at risk of becoming lesbians); PATRICIA VERTINSKY, *THE ETERNALLY WOUNDED WOMAN: WOMEN, DOCTORS, AND EXERCISE IN THE LATE NINETEENTH CENTURY* (Univ. of Ill. 1994) (1989) (discussing the legal and medical histories of women's exclusion from sport); HELEN LENSKYJ, *OUT OF BOUNDS: WOMEN, SPORT, AND SEXUALITY* (1986) (arguing that until doctors realized that exercise led to healthy women who gave birth to healthy babies, middle and upper class women were discouraged from exercising at all; even towards the beginning of the twentieth century when doctors began to encourage mild exercise for health, they continued to discourage exercise during menstruation).

11. For example, before July, 1942, at Ford Motor Company's massive River Rouge plant, women accounted for no more than 45 of the 80,000 hourly employees each month. By July, 1944, women accounted for 16% of all those employed, but by December, 1946, after the end of the war, women constituted less than 1% of the hourly employees. Sherri A. Kossoudj & Laura J. Dresser, *The End of a Riveting Experience: Occupational Shifts at Ford after World War II*, 82 AM. ECON. REV. 519 (1992). See also W.C. MADDEN, *THE WOMEN OF THE ALL-AMERICAN GIRLS PROFESSIONAL BASEBALL LEAGUE: A BIOGRAPHICAL DICTIONARY* (1997) (describing the history of the league); BARBARA GREGORICH, *WOMEN AT PLAY: THE STORY OF WOMEN IN BASEBALL* (1993) (describing women's history in baseball); WILLIAM H. CHAFE, *THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II* (2d ed. 1991) (thoroughly analyzing the history of the U.S. since the 1940s).

12. Some African-American soldiers found they were treated better by foreigners abroad than they were by their own military. In 1943 in Brisbane, Australia, a brawl occurred when U.S. military police arrested an African-American soldier at a tavern which the military had declared off-limits to black soldiers, although the pub welcomed them as patrons. CHARLES E.

movement was closely linked with the resurgence of the women's movement, and one of the targeted areas for change was the law. The 1964 Civil Rights Act included Title VI, prohibiting discrimination on the basis of race, color, or national origin in programs receiving federal financial assistance, and Title VII, which prohibited employment discrimination on the basis of sex as well as race.¹³ In 1972, Title IX would fill the gap in Title VI, which had failed to include gender as a protected class.¹⁴ Title IX was the result of the social, political, and legal upheaval of the 1960s, and the law on its face seemed to promise gender equity for all women and girls in educational settings.

In 1972, President Richard M. Nixon signed Title IX into law and sent it to the Department of Health, Education, and Welfare (HEW) to begin the complicated endeavor of promulgating enforcement regulations. Although the law's literal language was quite broad, Congress and the public had complicated understandings of what aspects of education the law would affect. At the time of Congressional debate on the bill, Title IX's implications for sport were not a major concern for most legislators; most members of Congress seemed to assume that the law was designed to open physics classes to girls and to allow all students equal access to financial assistance. The only mention of sport came briefly when the bill's co-sponsor, Senator Birch Bayh, stated on the Senate floor that the law would not mandate the desegregation of the football field or the men's locker room.¹⁵

Soon after the law's enactment, however, athletics took center stage. In 1973, *Sports Illustrated* reported that HEW was trying to decide whether it was better for the enforcement regulations to open all collegiate sports and all collegiate teams to all, or to order an equal division of facilities and funding by gender.¹⁶ *Sports Illustrated*, a popular sports periodical of the day, supported the second choice, arguing that a unisex team would simply be a male team because the long history of male sport made women and girls less prepared to compete against males for an open slot on even a unisex team.¹⁷ The magazine endorsed a kind of separate but

SILBERMAN, CRISIS IN BLACK AND WHITE 62-63 (1964). See also Phillip McGuire, *Desegregation of the Armed Forces: Black Leadership, Protest, and World War II*, 68 J. NEGRO HIST. 147 (1983) (describing the racism in the U.S. military and the struggle to desegregate the U.S. armed forces).

13. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-17 (codified at 42 U.S.C. § 2000 (2007)) [hereinafter Civil Rights Act]. See also Carl E. Brody, Jr., *A Historical Review of Affirmative Action and Its Interpretation of Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291, 304-06 (1996).

14. See WELCH SUGGS, A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX (2005) (discussing the legislative history of the law); Bernice R. Sadler, *Too Strong for a Woman: The Five Words that Created Title IX*, ABOUT WOMEN ON CAMPUS, Spring 1997, at 1 (describing the political motivation behind the law).

15. 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh). See also SUGGS, *supra* note 14, at 32-44 (giving a detailed legislative history of Title IX and its subsequent enforcement regulations).

16. Bill Gilbert & Nancy Williamson, *Programmed to Be Losers*, SPORTS ILLUSTRATED, June 11, 1973, at 65.

17. *Id.*

equal program for gender and sports.

HEW's rule-making process was complicated by the fact that, after Congress enacted Title IX, it began trying to limit the law's power over sport. An amendment was proposed to exempt revenue-producing sports from the law. After its defeat, the 1975 Javits Amendment was adopted to instruct HEW to consider the importance of intercollegiate sport and to take into account "the nature of the particular sports" when drafting Title IX's enforcement regulations.¹⁸ Not only did Congress have mixed feelings about the potential impact of the law, but the leaders of intercollegiate sport in the country also felt compelled to comment after HEW published a set of proposed regulations. The Association for Intercollegiate Athletics for Women (the only organization offering women's collegiate sport championships) feared that the regulations were too lax and allowed for continued gender discrimination in sport, and therefore, that organization wanted more stringent regulations developed.¹⁹ On the other hand, the leaders of the National Collegiate Athletic Association (NCAA), which sponsored only men's sports at the time, feared that the regulations would cause an influx of female athletes and destroy men's college sports.²⁰

Finally, in 1975, HEW presented its final version of the enforcement regulations for Title IX. After President Gerald R. Ford signed the regulations, Congress failed to disapprove of them within forty-five days and the regulations became law.²¹ The enforcement regulations narrowed Title IX's power over athletics considerably by exempting contact sports from the access to sport provisions of Title IX, thus reflecting the political and social concerns about the law's impact on traditionally male sports like football and baseball.²² The regulations also specified that if athletic scholarships were offered to one gender, they must also be

18. Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391, 395 (1997) (describing the history of both amendments and analyzing the Javits Amendment in detail).

19. Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 413-14 (2000) (describing the legislative history of the enforcement regulations).

20. *Id.*

21. *Id.* at 416.

22. 34 C.F.R. § 106.41(b) (2007). The regulation specifically says:

[W]here a recipient [of federal funding] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.

Id. Contact sport is defined later in that same section as "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involved bodily contact." *Id.* See also SARAH K. FIELDS, *FEMALE GLADIATORS: GENDER, LAW, AND CONTACT SPORT IN AMERICA* (2005) (arguing that although the Equal Rights Clause of the 14th Amendment of the U.S. Constitution fills the gap that the contact sport exemption creates and allows females to try-out for contact sport teams if no comparable female team is offered, social control still limits female access to sport, especially contact sport).

offered to the other gender,²³ and they described means to measure whether or not members of both genders were being offered equal opportunities.²⁴ Just because Congress had passed Title IX and HEW had promulgated enforcement regulations, however, did not mean that Title IX would quickly become embraced by athletic programs across the country.²⁵

III. IMPLEMENTING TITLE IX

After the enforcement regulations were announced in 1975, schools were given a grace period until 1978 to comply with the law.²⁶ In reality, they were given much longer because of the series of lawsuits filed to define the practical application and definitions of Title IX. Although the enforcement regulations required each institution to have an in-house Title IX specialist to monitor how the school would proceed with compliance and investigate any complaints about non-compliance²⁷ and the U.S. Department of Education Office of Civil Rights (“OCR”) had been charged with monitoring and enforcing Title IX,²⁸ the regulations did not specify if an individual had a private right of action. In 1979, in *Cannon v. University of Chicago*,²⁹ the U.S. Supreme Court held that individuals had private rights of action under Title IX and that the right could be exercised without exhausting the administrative remedies first.³⁰

23. 34 C.F.R. § 106.37(c) (2007).

24. 34 C.F.R. § 106.41(c) (2007). The equal opportunity list includes:

- (1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity

Unequal aggregate expenditures . . . will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

Id.

25. See Diane Heckman, *On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545 (1997) (arguing that the legal decisions involving Title IX were inconsistent in part because of the lack of legislative history and the breadth and vagueness of the law itself).

26. Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 53 (1996) (discussing the history of Title IX in great detail).

27. 34 C.F.R. § 106.8(a) (2007).

28. CARPENTER & ACOSTA, *supra* note 4, at 19–24.

29. 441 U.S. 677 (1979).

30. *Id.* at 708–09 (holding that a private right of action exists for (1) a person discriminated against on the basis of sex; (2) a private remedy is fully consistent with the enforcement of the

That same year, OCR released a policy interpretation explaining that if a school could satisfy one of three components of what it called “the three prong test,” the school would be compliant with the requirement that it must accommodate the interests and abilities of its students. The language read:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.³¹

The challenge of determining compliance for varsity sports has been a point of concern following the initial release of the policy interpretation.³² The policy interpretation and the finding that individuals had a private right of action, however, did not end the litigation attempting to clarify Title IX.

The scope of the law would be narrowed and then expanded in the mid-1980s. In 1984, the U.S. Supreme Court in *Grove City College v. Bell*³³ essentially removed collegiate athletics from the scope of Title IX by holding that departments

law; and (3) the subject matter is essentially about invidious discrimination that is not a matter of concern to the state as a whole).

31. Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,418 (Dec. 11, 1979).

32. In 2002, the Secretary of Education formed a commission on Title IX to address questions of whether the law should be changed or adapted. One of the primary charges of the commission was to examine the impact Title IX has had on men’s minor intercollegiate sports. See RITA J. SIMON, ED., *SPORTING EQUALITY: TITLE IX THIRTY YEARS LATER* (2005) (contains transcripts of the report and various essays in favor of and opposed to the commission’s comments). The only substantive change to have resulted from the report was an additional letter of clarification from the Office of Civil Rights in March, 2005. The letter encouraged schools to meet the interest and ability prong via a Model Survey done on the internet. U.S. DEP’T OF EDUC., *ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST—PART THREE* (Mar. 17, 2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf>. The letter of clarification was met with immediate skepticism from Title IX advocates who questioned whether the survey really captured issues of interest. Myles Brand, President of the NCAA, argued that it did nothing to promote interest in sport. Press Release, National Collegiate Athletic Association, Statement from NCAA President Myles Brand Regarding Department of Education Title IX Clarification (Mar. 22, 2005), available at <http://www.ncaa.org> (follow “Media & Events” hyperlink, then follow “Press Room” hyperlink, then follow “News Releases” hyperlink).

33. 465 U.S. 555 (1984).

and divisions of educational institutions needed to be direct recipients of federal funding in order to be subject to the law.³⁴ As almost no athletic departments receive direct federal funding, Title IX no longer applied to athletics. In 1988, however, Congress overrode President Ronald Reagan's veto³⁵ to pass the Civil Rights Restoration Act of 1987 (1988 Amendments), which re-expanded Title IX and applied the law to all subsets of any institution that received any federal money.³⁶

In 1992, in *Franklin v. Gwinnett County Public Schools*,³⁷ Title IX would gain power when the Supreme Court held that punitive damages were available to plaintiffs under Title IX.³⁸ Although the facts of the case did not involve sports, the holding included the entirety of Title IX and was not fact specific, thus including those lawsuits filed on behalf of student athletes.

Throughout this time period, courts published a variety of decisions addressing essentially four areas: access to existing sports teams at the high school level,³⁹ clarification of acceptable ways of applying Title IX to different groups of plaintiffs,⁴⁰ clarification that Title IX did not protect men's teams,⁴¹ and requests to elevate certain women's club sports to varsity status to comply with the law.⁴²

34. *Id.* at 574–75. See also Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 32 (1992) (discussing the impact of *Grove City* on Title IX).

35. Irvin Molotsky, *House and Senate Vote to Override Regan on Rights*, N.Y. TIMES, Mar. 23, 1988, at A1.

36. Civil Rights Restoration Act of 1987 (1988 Amendments), 28 Pub. L. No. 100-259, 102 Stat. 28 (codified at 20 U.S.C. § 1687 (2007)).

37. 503 U.S. 60 (1992).

38. *Id.* at 76.

39. Countless access cases have been filed regarding both high school and college and university varsity sports. For a description of many of them, see Heckman, *supra* note 25, and Tracy J. Johnson, Comment, *Throwing Like a Girl: Constitutional Implications of Title IX Regarding Gender Discrimination in High School Athletic Programs*, 18 N. ILL. U. L. REV. 575 (1998).

40. See *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507 (D. Colo. 1993) (holding that a court could reinstate a specific sport and that the second prong of compliance (history of expansion) required a consistent and continuing pattern of expansion); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578 (W.D. Pa. 1992) (holding that institutions cannot cut women's varsity sports teams even for non-discriminatory reasons, like budget, unless cuts do not result in a Title IX violation). See also Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992–93: Defining the "Equal Opportunity" Standard*, 1994 DET. C.L. REV. 953 (1994) (describing these and other cases in detail).

41. See *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763 (9th Cir. 1999) (holding that Title IX did not prevent universities from cutting men's teams in order to comply with the law); *Chalenor v. Univ. of N.D.*, 142 F. Supp. 2d 1154 (D. N.D. 2000) (holding that schools could cut men's sports rather than adding women's sports in order to meet the proportionality prong even if funding for the men's sport was secure). See also Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551 (2003) (exploring more recent Title IX cases).

42. In *Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated*, 992 F. 2d 17 (2d Cir. 1993), the Colgate women's ice hockey club wanted to be elevated to varsity status as the school was not in compliance with Title IX. Eventually the case was vacated as moot when the plaintiffs filing the case graduated and hence lost standing. After this case, female students and

*Cohen v. Brown University*⁴³ was, however, the most significant case regarding the enforcement of Title IX. The First Circuit Court of Appeals concluded that the first question about compliance dealt with how many participants were involved in sports and not how many teams an institution offered.⁴⁴ The court also concluded that OCR's three prong compliance test was an appropriate means to determine compliance with Title IX.⁴⁵ The court was most supportive of the proportionality prong, and it was skeptical of Brown University's attempt to use the interest prong, writing, "interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience."⁴⁶

IV. TITLE IX, INTRAMURALS, AND CLUB SPORTS

Although an estimated 5.5 million students currently participate in intramural and recreational sports programs,⁴⁷ compared to the approximately 487,000 varsity athletes who compete annually in various athletic associations,⁴⁸ Title IX lawsuits have focused overwhelmingly on collegiate varsity sports.⁴⁹ Litigators and legal scholars alike have paid little attention to the connection between Title IX and intramural and club sports offered by recreation programs at colleges and universities across the country. This lack of attention is despite the fact that Title IX applies to

teams charging Title IX violations tended to file class action suits.

43. 101 F.3d 155 (1st Cir. 1996).

44. *Id.* at 173.

45. *Id.* at 166–67.

46. *Id.* at 179.

47. National Intramural-Recreational Sports Association, About NIRSA, <http://www.nirsa.org/about/Default.aspx> (last visited Apr. 20, 2007).

48. In 2004–2005, 384,742 varsity athletes competed in NCAA sponsored events. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 4. Additionally, roughly 50,000 student athletes compete in varsity college sports through the National Association of Intercollegiate Athletics (NAIA), but this number includes students from some Canadian colleges as well as U.S. colleges. National Association of Intercollegiate Athletics, About the NAIA, <http://naia.cstv.com/member-services/about/> (last visited Apr. 20, 2007). Another 13,000 compete in the National Christian College Athletic Association (NCCAA). NATIONAL CHRISTIAN COLLEGE ATHLETIC ASSOCIATION, 2006–07 MEMBERSHIP DIRECTORY (2006), <http://www.thenccaa.org/Downloads/2006-07%20Member%20Directory.pdf>. Another 49,000 (approximately) compete in two-year colleges via the National Junior College Athletic Association (NJCAA). E-mail from Mary Ellen Leicht, Associate Director, NJCAA, to Sarah K. Fields, Assistant Professor, Sport, Exercise, and Humanities Program, The Ohio State University (Mar. 15, 2007, 13:10 EDT) (on file with author).

49. An increasing number of Title IX lawsuits are challenging high schools and high school athletic associations. See Lynne Tatum, Comment, *Girls in Sports: Love of the Game Must Begin at an Early Age to Achieve Equality*, 12 SETON HALL J. SPORT L. 281 (2002) (arguing that in order to see increased numbers of participants at the collegiate level, Title IX must be enforced at the high school level); Ray Yasser & Samuel J. Schiller, *Gender Equity in Interscholastic Sports: The Final Saga: The Fight for Attorneys' Fees*, 34 TULSA L.J. 85 (1998) (describing part three of a Title IX lawsuit against a high school); Ray Yasser & Samuel J. Schiller, *Gender Equity in Interscholastic Sports: A Case Study*, 33 TULSA L.J. 273 (1997) (describing part two of the same Title IX lawsuit); Ray Yasser & Samuel J. Schiller, *Gender Equity in Athletics: The New Battleground of Interscholastic Sports*, 15 CARDOZO ARTS & ENT. L.J. 371 (1997) (describing part one of the same Title IX lawsuit).

all sports at all educational settings receiving federal funding: the enforcement regulations specifically state that “[n]o person shall, on the basis of sex, be excluded from . . . or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient”⁵⁰

The lack of published legal scholarship on the matter should not be taken as a sign that intramural and club sport programs are inherently less likely to have Title IX problems than their varsity counterparts; nor does the dearth of scholarship and published legal decisions mean the topic is unworthy of study.⁵¹ The lack of scholarship is reflected in a level of confusion on campuses about the law and its implication for intramural and club sports; one student newspaper blamed Title IX because the women’s club soccer team was not a varsity sport.⁵² Because Title IX and its enforcement regulations specifically place intramural and club sports with varsity interscholastic programs, the varsity sport rules and cases provide an accurate analogy for how to address issues of access and equal opportunity within intramural and club sports.⁵³

Intramural and club sports are popular college activities and their purpose and scope differ from each other.⁵⁴ Intramural sports are organized largely by the institution, which provides officials, facilities, leagues, and schedules. Intramurals are usually limited to competition between students at the same school. Ohio State University (OSU), for instance, prides itself on its intramural program in its comprehensive handbook describing the program:

In 1914, Ohio State, along with the University of Michigan, became the first universities to formally organize and manage an intramural sports program for students on their respective campus. We have come a long way since then, but our goal is still the same: To provide the OSU community with opportunities to engage and interact in a fair, safe, recreational sports program at a wide range of skill levels. The Intramural Program offers over 40 different individual/dual and team

50. 34 C.F.R. § 106.41(a) (2007). The same phrasing is used to discuss issues of opportunity. 34 C.F.R. § 106.41(c) (2007).

51. See Roger I. Abrams, *Sports Law Issues Just Over the Horizon*, 3 VA. SPORTS & ENT. L.J. 49 (2003) (arguing that only examining sports law cases after they happen is shortsighted and encouraging scholars to anticipate and address potential areas of litigation).

52. Abby Brownback, *Tilting the Playing Field: Title IX Leaves Students Unsatisfied in Pursuit of Athletic Equality in Numbers, Funding*, KAN. STATE COLLEGIAN, Jan. 27, 2007, available at <http://media.www.kstatecollegian.com/media/storage/paper1022/news/2007/01/23/News/Tilting.The.Playing.Field-2683735.shtml> (last visited Apr. 20, 2007).

53. The OCR policy interpretations include the word intercollegiate in the title. Policy Interpretation: Title IX and Intercollegiate Athletics, *supra* note 31. However, the scope of the application begins: “This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.” *Id.*

54. Information for this section came primarily from college and university websites. Because websites and policies can change quickly and without notice, be aware that all websites were accessed in April, 2007. These examples are simply that and do not suggest that they are the norm for institutions offering intramural and club sports.

sport activities throughout the academic year with approximately 25,000 participants annually. The intramural sports department is also very committed to promoting the development of leadership qualities in students. Student employment opportunities include officiating, supervising, scorekeeping, equipment managing, and office administrating. Over 300 students are hired each school year Our ability to offer a diverse program affords students the opportunity to understand different sport cultures and styles of competition. It is the hope of the intramural sports staff that their dedication to the overall development of students will assist in fostering the student's commitment to recreation and pave the way for a healthy lifestyle long after their time at Ohio State.⁵⁵

Washington State University in Pullman, Washington, similarly characterizes its intramural program: "Participation in the program is voluntary and determined by interest. Participation can provide one with opportunities to have fun, learn new sports, meet people from other cultures, test one's physical ability, as well as offer a break from routine."⁵⁶ Some intramural programs are provided for students at no additional cost⁵⁷ and others charge a fee for participation.⁵⁸

Club sports at most schools are student-run organizations that receive some funding or support (in terms of facilities, supervision, or guidance) from the recreation program or department of the institution,⁵⁹ the athletic department,⁶⁰ or from the school's general student organization funds as a whole.⁶¹ Some colleges and universities allow their club sports to use the institutions' logos and emblems,⁶² and others do not.⁶³ Many club sports provide the opportunity to

55. OHIO STATE RECREATIONAL SPORTS, INTRAMURAL HANDBOOK 1 (2006), <http://recsports.osu.edu/uploads/2006-07%20IM%20Handbook.pdf>.

56. WASHINGTON STATE UNIVERSITY RECREATION, 2005-06 HANDBOOK 3 (2005), http://urec.wsu.edu/urec/im/handbook/handbook_05.pdf.

57. Email from John Kearney, Statistician, Webmaster, and Head Secretary, Yale College Intramurals, to Sarah K. Fields, Assistant Professor Sport, Exercise, and Humanities Program, Ohio State University (Mar. 16, 2007, 15:52 EDT) (on file with author).

58. WASHINGTON STATE UNIVERSITY RECREATION, *supra* note 56, at 8.

59. Ohio State Recreational Sports: Sport Clubs, <http://recsports.osu.edu/clubs.asp> (last visited Apr. 20, 2007) (reporting that the Ohio State University recreational sports program as a whole is a member of the Office of Student Affairs).

60. Yale University Bulldogs Official Athletic Site, Club Sports Overview, http://yalebulldogs.cstv.com/links/club_sports.html (last visited Apr. 20, 2007).

61. Sport Club Federation, <http://scf.wustl.edu/> (last visited Apr. 20, 2007). This is the club sport umbrella program at Washington University in St. Louis.

62. Ohio State University allows clubs to use logos and emblems provided they first fill out required forms with the university's trademark and licensing departments. Ohio State Recreational Sports: Sport Clubs: Marketing/Sponsorship, http://recsports.osu.edu/clubs_marketing.asp (last visited Apr. 20, 2007).

63. See Eric Lukas, *Club Sports: The Long Road to Recognition*, COLUMBIA DAILY SPECTATOR, April 5, 2006, LEXIS, News Library, UWIRE file. Columbia University's men's ice hockey club said they sent gift baskets to the President and the Athletic Director to celebrate a successful season, and the letter with the baskets was on stationary with the Columbia athletics logo. That letter got the team in trouble for using a logo limited to varsity sports. Columbia said

compete against other clubs from other colleges and universities and/or community-based club organizations.

The missions of the clubs often seem to involve promoting personal growth, providing recreation opportunities, and providing competitive opportunities, potentially against club teams from other schools or organizations. For example, Ohio State University offers a sweeping description of its goals for club sports on its website:

The Sport Club program is designed to serve individual interests in different sports and recreational activities. Participation in the program enhances and promotes the element of good sportsmanship, the development of skills, the well-being derived from physical activity, and the social aspect within each sport. If competition is desired, opportunities exist in varying degrees within individual clubs.⁶⁴

Yale University, on the other hand, focuses more on the competitive nature of their club sport program, posting on their website: “Although some clubs remain solely recreational, most are highly competitive. National collegiate championships have been won by croquet, fishing, polo pony, rugby, sailing, and skeet shooting. Additionally, numerous individual national collegiate championships have been won by a variety of club athletes.”⁶⁵ Later on that same website, however, the focus on competition is toned down in the statement of purpose: “1) To fill the need for uniquely structured sport activities that may be competitive, recreational, or instructional in nature. 2) To provide a learning experience through student involvement in fund raising, organization, administration, budgeting, leadership, and scheduling- in addition to athletic skill in a favorite sport.”⁶⁶

A. Equal Access

Determining equal access to an intramural or club program is a challenge. Institutions are subject to the three prong test under Title IX and can establish compliance by meeting the proportionality prong, showing a history of expansion of opportunities, or establishing that the interests and the abilities of the students are being met.⁶⁷ Each institution will have its own evidence regarding their history of expansion and its own evidence of meeting the interests and abilities of its students, and that evidence will likely be unique to that institution; therefore, this section will attempt to evaluate if institutions can meet the proportionality prong of the Title IX test. Failure to meet this prong’s requirement does not mean the institution is in violation of Title IX, provided they can meet one of the other two prongs’ requirements.

With respect to varsity sports, courts have clearly stated that the issue is not the

they limited use of the logo because of increasing emphasis on marketing and on protecting the University’s intellectual property. *Id.*

64. Ohio State Recreational Sports: Sport Clubs, *supra* note 59.

65. Yale University Bulldogs Official Athletic Site, *supra* note 60.

66. *Id.*

67. Policy Interpretation: Title IX and Intercollegiate Athletics, *supra* note 31.

number of teams offered, but the number of participation slots available on those teams that determines whether or not Title IX is being satisfied.⁶⁸ Intramural and club sports differ from varsity sports in that often no prescribed number of slots exist: in many intramural programs, any student who can find a team can play, and many club sports have a no-cut policy. Additionally the number of teams and, consequently, the number of participants in any one sport (in both intramural and club sports) will likely vary from year to year as student interest and engagement varies. On the one hand, this suggests that colleges and universities that offer open-enrollment intramural or club sports program can argue that they are, in fact, meeting the interests of the students of both genders. On the other hand, intramural and club sports programs are not actually open-enrollment if the college or university determines, especially for intramural sports, what leagues or teams will be offered for men and women. The number of available leagues and teams dictate the number of participation or actual playing slots for men and women.

1. Intramural Sports

Colleges and universities that offer intramural sports for their students usually have one of two different organizational systems to determine leagues. Some, like Yale University, rely on existing organizational structures outside of the athletic program. Every undergraduate at Yale is automatically assigned to a residential college where they can live and eat during their time at the school.⁶⁹ The intramural program is designed around the residential college. The school decides what sports and what leagues will be offered, and each residential college automatically has one team enrolled in each league.⁷⁰ The students in the college recruit and build teams, and although the intramural program requires a minimum number of athletes on the team to avoid a forfeit, no maximum exists.⁷¹ In theory, each team can accommodate as many students who want to participate. As a practical matter, the number of playing slots is limited by the rules of the game and the number of leagues for each sport offered.⁷² In this system, the playing slots can be counted.⁷³

68. *Cohen v. Brown Univ.*, 101 F.3d 155, 163–64 (1st Cir. 1996). The purpose of counting slots and not teams is simple: some teams have significantly larger rosters than others, and the law is not meant to say that if a school offers football (a large roster sport) for males, offering golf (a small roster sport) for females is acceptable. Further, the roster spots must be real participation slots and not just appear so on paper. *See also* *Choike v. Slippery Rock Univ. of Pa.*, No. 06-622, 2006 WL 2060576, at *20–23 (W.D. Pa. July 21, 2006).

69. Yale University, The Residential Colleges, http://www.yale.edu/yalecollege/publications/ycps/chapter_i/colleges.html (last visited Apr. 20, 2007).

70. Email from John Kearney, Statistician, Webmaster, and Head Secretary, Yale College Intramurals, to Sarah K. Fields, Assistant Professor Sport, Exercise, and Humanities Program, Ohio State University (May 1, 2007, 15:12 EST) (on file with author).

71. *Id.*

72. *Id.*

73. The 1996 Clarification Letter (Guidance on Participation and Proportionality) from Norma Cantu (January 19, 1996) specifically states that varsity athletes who are on the team but do not play receive numerous benefits from their role on the team, such as coaching, tutoring, and other “important non-tangible benefits derived from being a member of an intercollegiate athletic

Like many schools, Yale intramural sports tend to be in one of three categories: co-ed, men's, and women's sport.⁷⁴ Usually, if a sport is offered as a single-gender sport, parallel opportunities exist for the other gender, for example men's and women's soccer.⁷⁵ Golf and bowling are open to any undergraduate but one team participant must be female; however, the rules do not require that one male be on the team, thus allowing an all female team.⁷⁶ Yale also offers several sports that, although traditionally deemed men's sports, are open to any eligible student regardless of gender—for example, baseball and ice hockey.⁷⁷ Unlike designated co-ed sports, these sports have no minimum gender participation requirements, meaning that theoretically an all-male team could face an all-female team. However, this open-sport approach does not apply to field hockey, a traditionally female sport. Field hockey at Yale is limited to eligible female athletes only.⁷⁸

In two sports, Yale offers more leagues and thus more teams and thus more playing slots for men than for women. In touch football, Yale offers a men's league and a co-ed league but no women's league.⁷⁹ While women have the opportunity to play football in the co-ed league, fewer spots on the playing field are open to women. The men's league has six players per team on the field at a

team.” CARPENTER & ACOSTA, *supra* note 4, at 229–30. However, that discussion is about varsity athletes who receive many more benefits from just being on a team than do members of an intramural team. The Office of Civil Rights has not investigated the benefits of being on an intramural team without playing. Therefore, arguably the only benefits to intramural participation are actually playing in a game and social interaction with others on the team. As players on intramural teams spend less time together playing and practicing than do varsity athletes, this section focuses on the benefits of actually playing the game.

74. YALE INTRAMURALS, INTRAMURAL ELIGIBILITY, <http://www.yale.edu/intramurals/rules/eligibility.doc> (last visited Apr. 20, 2007).

75. YALE INTRAMURALS, MEN'S SOCCER, <http://www.yale.edu/intramurals/rules/soccerrules.doc> (last visited Apr. 20, 2007); YALE INTRAMURALS, WOMEN'S SOCCER, <http://www.yale.edu/intramurals/rules/soccerrules.doc> (last visited Apr. 20, 2007).

76. YALE INTRAMURALS, COED GOLF, <http://www.yale.edu/intramurals/rules/coedgolfrules.doc> (last visited Apr. 20, 2007); YALE INTRAMURALS, COED BOWLING, <http://www.yale.edu/intramurals/rules/bowlingrules.doc> (last visited Apr. 20, 2007).

77. YALE INTRAMURALS, BASEBALL, <http://www.yale.edu/intramurals/rules/baseballrules.doc> (last visited Apr. 20, 2007); YALE INTRAMURALS, ICE HOCKEY, <http://www.yale.edu/intramurals/rules/coedicehockeyrules.doc> (last visited Apr. 20, 2007).

78. YALE INTRAMURALS, FIELD HOCKEY, <http://www.yale.edu/intramurals/rules/fieldhockeyrules.doc> (last visited Apr. 20, 2007). Yale's position that field hockey is a female-only sport matches the decisions of several law suits involving high school sport. *See Williams v. Sch. Dist. of Bethlehem*, 799 F. Supp. 513 (E.D. Pa. 1992), *rev'd*, 998 F.2d 168 (3d Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994); *Kleczek v. Rhode Island Interscholastic League, Inc.*, 768 F. Supp. 951 (D. R.I. 1991); *B.C. v. Cumberland Reg'l Sch. Dist.*, 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987). Each case in the end denied a high school boy the right to compete on his high school field hockey team. *See also* FIELDS, *supra* note 22, at 132–53 (discussing the cases and their social context in greater detail). Yale, however, has had a policy of female only intramural field hockey that pre-dates the court cases (the author played intramural field hockey in 1987 at Yale) so that while their policy is parallel to the court decisions, the decisions did not inspire the policy.

79. YALE INTRAMURALS, FOOTBALL, <http://www.yale.edu/intramurals/rules/footballrules.doc> (last visited Apr. 20, 2007).

time.⁸⁰ The co-ed league also has six players per team on the field but no more than three players can be one gender.⁸¹ Therefore while the teams can be as large as the students want them to be, the men of each residential college share time for nine playing positions and the women share time for three. Similarly, intramural basketball for men is offered at three league levels (designated “A,” “B,” and “C”), while only one league is offered for women.⁸² Again, the difference is fifteen playing spots (five players on three teams) for men versus five playing spots (five players on one team) for women. Additionally in squash, Yale intramurals offer five competitive slots for men and only three for women.⁸³

Given that roughly 49% of Yale’s undergraduate population is female,⁸⁴ in order to comply with the proportionality prong of Title IX, Yale would need to provide a roughly even number of playing slots in intramurals to both men and women. Men, however, have an extra eighteen playing slots from the extra teams in football, basketball, and the extra slots in squash. Women have an extra seven playing slots from field hockey, and they have three reserved slots in bowling and both spring and fall golf (one of the four slots on each team must be occupied by a woman). Totaling all available sports, Yale offers undergraduates 208 playing slots.⁸⁵ Because a number of co-ed teams vary on the number of one gender allowed to play at one time,⁸⁶ determining the total percentage of slots for women is impossible since it will fluctuate. However, women are guaranteed seventy-four of the total 208 slots and men are guaranteed eighty-two of those slots. Women have about 47.4% of the guaranteed slots and men about 52.6%.⁸⁷ An additional twenty-one slots are open to both genders with the remaining varying based on the rules of the specific game. Thus compliance with the proportionality prong of Title IX would be determined if a court felt the intramural numbers substantially mirrored the enrollment numbers.⁸⁸

80. *Id.*

81. *Id.*

82. YALE INTRAMURALS, HOOPS, <http://www.yale.edu/intramurals/rules/hoopsrules.doc> (last visited Apr. 20, 2007).

83. YALE INTRAMURALS, SQUASH, <http://www.yale.edu/intramurals/rules/squashrules.doc> (last visited Apr. 20, 2007).

84. Yale University, Yale Facts, <http://www.yale.edu/admit/visit/facts.html> (last visited Apr. 20, 2007).

85. Number comes from totaling number of individuals allowed on the field or in competition at one time. For swimming, table tennis, and tennis which had various events with the possibility of one competitor competing in multiple events, the total number of events was tallied as if a single competitor entered just one event. For cross-country, which had no limit on the number of participants, the total number of scoring positions was selected. Yale Intramurals, General Rules and Information, <http://www.yale.edu/intramurals/rules.htm> (last visited Apr. 20, 2007) (clicking on hyperlinks for specific sport to see rules).

86. Golf (both spring and fall) and bowling guarantee one slot for women but allow up to four slots each for women. Ultimate requires at least one member of each gender on the field but allows up to five members of the seven person team to be of one gender. Co-ed soccer similarly requires two members of each gender on the field, but allows a maximum of six members of the eleven players on the field to be one gender. *Id.*

87. *Id.* Total numbers were based on rule and eligibility requirements.

88. “An institution satisfies prong one provided that the gender balance of its intercollegiate

Other schools, like Ohio State University, allow students to organize as many intramural teams as they like and then the intramural program creates a schedule to accommodate all available teams.⁸⁹ Students unable to find a team on their own are encouraged to register as something like free agents and the intramural program organizers help them find a team.⁹⁰ Team rosters are capped at sixteen.⁹¹ Like Yale, most OSU intramurals are offered as either co-ed teams or single-gender teams with leagues for both men and women, for example, male and female flag football leagues.⁹² Like Yale, on occasion more leagues are offered for men than for women. For example, in outdoor soccer, a man may participate in up to three leagues (men's, fraternity, or co-recreational),⁹³ while a woman can compete in only two leagues (women's or co-recreational).⁹⁴ Just as for Yale, the lesser number of leagues results in a lesser number of playing slots available to female students compared to male students. Similarly the three men's leagues in basketball, flag-football, and softball play twice weekly; however, OSU only schedules the other leagues (including women's leagues) to play only once a week.⁹⁵ Determining compliance under Title IX's proportionality prong is based on the entire program, but because of the annual variation in the intramural structure at OSU, examining the number of playing slots and games available to men and women help indicate proportionality.

However, OSU has factored gender equity into its intramural program. Two sports' rules (sand volleyball and outdoor soccer) specifically note that each men's team may have one female on the roster. No men are allowed on the women's team rosters.⁹⁶ Additionally, the rules of flag football and basketball contain

athletic program substantially mirrors the gender balance of its student enrollment." *Cohen v. Brown Univ.*, 101 F.3d 155, 200 (1st Cir. 1996). Additionally, Yale has an uneasy history with Title IX. In 1976, the Yale Varsity Women's Crew team (which included several future Olympian rowers) entered the Senior Women's Administrator's office and stripped, exposing the phrase "Title IX" written on their bodies, and reading a statement protesting the lack of a women's boathouse. The incident received national attention. *Yale Women Strip to Protest a Lack of Crew's Showers*, N.Y. TIMES, Mar. 4, 1976, at 33. See also A HERO FOR DAISY (50 Eggs Productions 1999) (describing the incident and the context in detail).

89. Ohio State Recreational Sports, Intramural F.A.Q.s, http://recsports.osu.edu/intra_faqs.asp (last visited Apr. 20, 2007).

90. *Id.*

91. *Id.*

92. The one exception appears to be indoor cricket, which is listed on the program website as a men's league. Ohio State Recreational Sports, Programs/Fees, http://recsports.osu.edu/intra_programsfees.asp (last visited Apr. 20, 2007). Interestingly, the indoor cricket rule sheet makes no gender specification requirements. OHIO STATE RECREATIONAL SPORTS, INDOOR CRICKET RULES, <http://recsports.osu.edu/uploads/Indoor%20Cricket.pdf> (last visited Apr. 20, 2007).

93. Co-ed (short for co-educational) and co-rec (short for co-recreational) are different names for the same mixed gender idea. The word choice in the essay mimics the institution's word choice.

94. OHIO STATE RECREATIONAL SPORTS, OUTDOOR SOCCER RULES, <http://recsports.osu.edu/uploads/Outdoor%20Soccer.pdf> (last visited Apr. 20, 2007).

95. Ohio State Recreational Sports, Programs/Fees, *supra* note 92. No written explanation is given on the university website as to why the men's leagues play more often.

96. OHIO STATE RECREATIONAL SPORTS, SAND VOLLEYBALL RULES,

identical language not found in other rules:

In activities with separate divisions for men's and women's competition, no person may participate in a division of the opposite sex without first obtaining permission from the Assistant Director. When an activity is not offered to both men and women (in separate divisions) or there is not enough of one sex to form a league, that sex will have the opportunity to compete with the opposite sex.⁹⁷

This same language is included verbatim in the Intramural Handbook, meaning that it, in fact, applies to all sports and all leagues, even those that have commonly been dominated by one gender (usually men in the case of the most competitive twice-weekly competitive men's leagues).⁹⁸ Those schools that rely purely on student-organized intramural programs may be in a better position to argue that they are accommodating students' interests and abilities better than those schools that have predetermined teams with differing numbers of leagues by gender. OSU's decision to offer more games for some men's leagues, however, could be a Title IX violation because it offers more participation opportunities for men unless the institution could establish that women did not want to play as often as men.

2. Club Sports

Access to club sports is completely voluntary. Schools generally run club sports programs in a similar manner to any other student club: if the students are interested enough to organize the club and run it, and if they can find sufficient participation, then they can be a club. Washington University in St. Louis and OSU have similar approaches to creating club sports. Washington University requires that proposed clubs submit a written constitution "justifying the organization's existence" and a list of student signatures indicating "significant interest on campus." The sport is then approved by a two-thirds vote of the student-run Sports Club Federation.⁹⁹

Ohio State is more proactive about recruiting new clubs; its website announces:

Can't find a sport club that you want to join? Do you want to form your own sport club? It's easy! Just follow these steps:

- Must have at minimum eight people interested in joining the club
- Complete the Sport Club Application, Code of Conduct, and Emergency Contact information attached on the side of this page

<http://recsports.osu.edu/uploads/Sand%20Volleyball.pdf> (last visited Apr. 20, 2007); OHIO STATE RECREATIONAL SPORTS, OUTDOOR SOCCER RULES, *supra* note 94.

97. OHIO STATE RECREATIONAL SPORTS, FLAG FOOTBALL RULES, <http://recsports.osu.edu/uploads/Flag%20Football.pdf> (last visited Apr. 20, 2007); OHIO STATE RECREATIONAL SPORTS, BASKETBALL RULES, <http://recsports.osu.edu/uploads/Basketball.pdf> (last visited Apr. 20, 2007)

98. OHIO STATE RECREATIONAL SPORTS, 2006-07 INTRAMURAL HANDBOOK 3 (2006), <http://recsports.osu.edu/uploads/2006-07%20IM%20Handbook.pdf>.

99. SPORTS CLUB FEDERATION CONSTITUTION, <http://scf.wustl.edu/private/files/SCFConstitution.doc> (last visited Apr. 20, 2007).

- Come before the Appeal and Review Board¹⁰⁰

The Code of Conduct form (which must be signed by each club member) focuses mostly on the behavior requirements of the members both on and off-campus and warns that the University might impose sanctions, such as withholding funding or limiting access to University facilities, if the members do not behave appropriately.¹⁰¹ It also carries a liability waiver.¹⁰² The application form, however, is a bit more complicated. OSU requires that each club create a mission statement—the application says such a statement serves as advertising for the club—and a constitution.¹⁰³ Those clubs that post constitutions on their team websites frequently mention the University Non-Discrimination Policy, which includes prohibiting gender discrimination.¹⁰⁴ Interestingly, even the Ohio State All-Girl Cheer Team says that any OSU student is eligible to participate but that their main focus is to compete in All-Girl divisions at national competitions.¹⁰⁵ The men's rugby club similarly includes a non-discrimination policy but photos suggest that only men, in fact, participate.¹⁰⁶ Given the emphasis on non-discrimination and consistency of the application policy for forming club sports, Title IX violations for access are unlikely, provided the procedures and standards for approving applications for club teams are gender neutral and that the results

100. Ohio State Recreational Sports, Form a Club, http://recsports.osu.edu/clubs_formaclub.asp (last visited Apr. 20, 2007).

101. OHIO STATE RECREATIONAL SPORTS, 2005–2006 SPORT CLUBS APPLICATION, CODE OF CONDUCT/EMERGENCY MEDICAL RELEASE FORM (2005), <http://recsports.osu.edu/uploads/Code%20of%20Conduct%20and%20Emergency.pdf>. OSU clubs have a history of less than ideal public behavior which would explain the emphasis on good behavior. In November, 1999, the OSU women's rugby club garnered unwanted national media attention when a photo of some of the players posing topless in front of the Lincoln Memorial in Washington, D.C., ran in the Columbus newspaper. Other papers picked up the story and the Midwest Rugby Union (the regional government body for the sport) banned the team from competition for the rest of the season. Emily Kimball, *Feminism on the Field: Athletes, Coaches Ponder the Politics of Shirt Removal*, BROWN DAILY HERALD, Nov. 19, 1999, LEXIS, News Library, UWIRE File.

102. OHIO STATE RECREATIONAL SPORTS, 2005–2006 SPORT CLUBS APPLICATION, CODE OF CONDUCT/EMERGENCY MEDICAL RELEASE FORM, *supra* note 101.

103. OHIO STATE RECREATION SPORTS, 2005–2006 SPORT CLUB APPLICATION (2005), <http://recsports.osu.edu/uploads/Sport%20Clubs%20Application%20v.1.1.1.pdf>.

104. *See, e.g.*, BUCKEYE MASTERS SWIM CONSTITUTION, <http://bmsc.org.ohio-state.edu/> (last visited Apr. 20, 2007); CONSTITUTION OF THE AIKIDO YOSHOKAI AT THE OHIO STATE, http://www.cse.ohio-state.edu/~egnot/Aikido/_private/aikido_constitution.pdf (last visited Apr. 20, 2007). The Ohio State University Student Activities Office (with whom Club Sports are affiliated via the Recreational Sports program) offers a sample constitution on its website and requires that each club include a non-discrimination policy at least as broad as that of the University. Their recommended language is: "This organization and its members shall not discriminate against any individual(s) for reasons of age, color, disability, gender identity or expression, national origin, race, religion, sex, sexual orientation, or veteran status." CONSTITUTION AND BY-LAWS GUIDELINES FOR STUDENT ORGANIZATIONS, <http://ohiounion.osu.edu/posts/documents/Sampleconstitution.pdf> (last visited Apr. 20, 2007).

105. The Ohio State All Girl Cheer Team, Team Member Contract, <http://www.osuagc.com/RulesConstitution.htm> (last visited Apr. 20, 2007).

106. OHIO STATE RUGBY, OSURFC CONSTITUTION (2002), <http://www.osurugby.com/Constitution.doc>.

show no gender bias.

B. Equal Opportunities

Determining whether or not an intramural or club sport program violates the equal opportunity component of Title IX is in one respect simple, yet in another sense quite complicated. The simple part is looking at the list of components that the enforcement regulations suggest be used to determine equal opportunity. The list includes:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

Unequal aggregate expenditures . . . will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.¹⁰⁷

The first component, interest and ability, has been addressed in the previous section. Several of the subsequent components specifically do not apply to intramural programs (travel, coaching, compensation of coaches, provision of locker rooms, and housing), thus leaving only a few components to consider for intramural sports. Club sports are usually funded to some small degree by the institution, and thus, while the student members of the clubs themselves generally decide how to spend their funding, the question of how funding is awarded by the institution is relevant to Title IX.

1. Intramural Sports

Intramural sports by nature have fewer financial benefits and perks than varsity or even club sports, and thus the laundry list of equal-opportunity requirements for intramural programs is relatively short. Several, however, still apply: “the provision of equipment and supplies,” “scheduling of games and practice time” (if practice time is supplied for any intramural team), “provision of facilities,” and

107. 34 C.F.R. § 106.41(c) (2007).

“publicity.”¹⁰⁸

Many colleges and universities approach all four of these categories in a facially gender-neutral way. OSU, for example, provides some equipment and officials by sport, and on paper, at least, no gender differences appear. In roller hockey, for instance, the players are required to wear a helmet with face guard, hockey gloves, skates, and shin guards.¹⁰⁹ Players must furnish their own sticks and skates, but the intramural department will provide goalie equipment, helmets, hockey gloves, and shin guards.¹¹⁰ Yale has a similar policy for ice hockey, supplying helmets to all along with all goalie equipment (including the stick), but requiring participants to provide their own additional equipment.¹¹¹ For other sports with fewer equipment needs, equipment (like basketballs) can be checked out from the recreational services desk on a University ID card as needed.¹¹² Title IX violations with regard to equipment would only occur if, through intent or neglect, the equipment furnished to women was consistently of inferior quality than that furnished to men, or if access to equipment was unevenly granted.

Similarly, game scheduling, provision of facilities, and publicity generally are gender equitable. OSU, for example, makes no distinction in its announcement of scheduling games—preferring to make these determinations by sport rather than gender.¹¹³ The games themselves, at OSU, are usually played on comparable if not identical fields and courts.¹¹⁴ OSU and Washington University in St. Louis publicize men’s and women’s intramurals in the same manner, usually on the same posters and websites.¹¹⁵ Should a school, however, fail to publicize intramurals comparably, a Title IX violation would be likely.

Inequitable provision of facilities and game scheduling would be a Title IX violation. If an institution consistently provided better facilities to men’s intramurals than to women’s, it would be problematic. For example, perhaps the intramural program consistently has the men’s basketball leagues playing on the varsity basketball competition court while the women’s basketball leagues play on practice courts. Qualities of outdoor fields can also vary, and if men’s games were scheduled on better groomed and maintained fields than women’s games, this could be a violation as well. Even if the decisions were made based on tradition or

108. *Id.*

109. OHIO STATE RECREATIONAL SPORTS, ROLLER HOCKEY RULES, <http://recsports.osu.edu/uploads/Roller%20Hockey.pdf> (last visited Apr. 20, 2007).

110. *Id.*

111. YALE INTRAMURALS, ICE HOCKEY, <http://www.yale.edu/intramurals/rules/coedicehockeyrules.doc> (last visited Apr. 20, 2007).

112. OHIO STATE RECREATIONAL SPORTS, RPAC FACT SHEET, <http://recsports.osu.edu/uploads/RPAC%20fact%20sheet.pdf> (last visited Apr. 20, 2007).

113. OHIO STATE RECREATIONAL SPORTS, SPRING QUARTER SCHEDULE, <http://recsports.osu.edu/uploads/Spring%20Quarter%20Schedule-2007.pdf> (last visited Apr. 20, 2007).

114. *See, e.g.*, Ohio State Recreational Sports, Softball FR-07 Schedule/Brackets, http://recsports.osu.edu/intra_view_schedule.asp?ID=1627 (last visited Apr. 20, 2007).

115. OHIO STATE RECREATIONAL SPORTS, SPRING QUARTER SCHEDULE, *supra* note 113; WASHINGTON UNIV., INTRAMURAL SPORTS 2006–2007 INTRAMURAL SPORTS CALENDAR, <http://www.rescomp.wustl.edu/~im/forms/06-07/Schedule.doc> (last visited Apr. 20, 2007).

past scheduling—for example, men’s top level intramurals have usually played on the best courts—this does not absolve the institution from its Title IX responsibilities.

Game scheduling has similar potential for problems unless a concerted effort is made to be certain that the scheduling is equitable. For example, some intramural times are more likely to promote participation than others: game times that conflict with classes are obviously problematic in drawing participants, as are game times that are extremely late at night or early on weekend mornings. Sometimes, because of the lack of field and court space, only inopportune times are available. As long as men’s and women’s intramural programs share those times, no Title IX violation is likely.¹¹⁶

2. Club Sports

The same laundry list from the enforcement regulations spelling out how to determine if the women’s sports programs are receiving equal benefits apply to club sports as well. Because the students who run the club sports make their own decisions about how to allocate their resources, the Title IX issues for club sports likely center on how the institution determines the allocation of facilities and funding. This is particularly difficult to determine as many of these decisions occur behind closed doors. The sample institutions used in this article have posted some of their policies publicly, yet, as is often the case at institutions, the policies sometimes change faster than the publications do.¹¹⁷ Thus, these sample policies are used only as case studies and broad examples.

Like intramural sports, access to facilities and equipment must be comparable for men’s and women’s club sports. If any benefits are offered to men, then they must also be offered to women. For example, if the college or university provides tape to the men’s club soccer team, then it must do so for the women’s club team as well. If the institution provides facilities to club sports, the decisions regarding that allocation must be equitable and cannot be based on past history. Scheduling the men’s rugby club games and practices on the best field simply because of tradition is a violation of Title IX if the women’s teams are not afforded the same or similar access.

An easy and gender neutral way to make facility decisions is based on who turns in requests in a timely manner.¹¹⁸ Club teams that fail to attend mandatory

116. Different seasons for male and female teams in the same sport have been held to be a Title IX violation. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, No. 1:98-CV-479, 2002 U.S. Dist. LEXIS 14220 (W.D. Mich. Aug. 1, 2002) (holding that scheduling girls’ teams to play in non-traditional seasons was a Title IX violation). However, this holding would be unlikely to carry over to intramural or club sports as it was based in part on an argument that girls competing in a non-traditional season had fewer collegiate scholarship opportunities.

117. Email from Klajdi Rrumbullaku, Sport Club Budget Committee Coordinator at Ohio State University, to Sarah K. Fields, Assistant Professor, Sport, Exercise, and Humanities Program, Ohio State University (Mar. 13, 2007, 14:30 EDT) (on file with author) (describing how OSU was trying a new allocation approach in 2007 and would decide later in the school year which system—the old one posted on the website or the new trial one—to use in the future).

118. *See, e.g., Ohio State Recreational Sports, Facility Request,*

meetings of the Sport Club Federation (the governing body of club sports) at Washington University in St. Louis risk funding or facility privileges, subject to a vote of the primarily student-composed committee.¹¹⁹ Some institutions have the recreation staff decide how best to allocate facilities based on club sport and other requests.¹²⁰

Typically, club sports fund themselves via membership dues, fundraising events, private/corporate donations or sponsorships, and allocations from the institution.¹²¹ In essence, schools tend to have either staff or student committees making budgeting decisions. The University of Iowa has each club sport submit a budget, and then the Sport Club Staff of the Division of Recreational Services makes allocations and announces the decisions at a fall meeting to club representatives.¹²² This type of funding, which is mostly discretionary, holds the greatest risk of Title IX violations if the staff relies significantly on history or tradition, which could result in greater funding for men's clubs.¹²³

Ohio State University uses a tier-system approach to help determine facilities and resource allocation.¹²⁴ The allocations are made by student-run committees.¹²⁵ The system used in 2006–2007 created five divisions (development, semi-collegiate, collegiate, intercollegiate, and martial arts).¹²⁶ The clubs are placed in a division based on a combination of number of participants, levels of competition, and years of being a club.¹²⁷ The goal is to allocate resources and facilities as fairly as possible.¹²⁸ However, given the longer history of men's sport at all levels, some men's clubs have been in existence longer than women's club sports, which gives the men's teams an advantage under the tier system.¹²⁹ Additionally in order

<http://recsports.osu.edu.facilityrequest.asp> (last visited Apr. 20, 2007) (warning that clubs that do not submit requests by the deadline will be placed on the low end of the priority list).

119. SPORT CLUB FEDERATION CONSTITUTION, *supra* note 99.

120. UNIVERSITY OF IOWA RECREATIONAL SERVICES, SPORTS CLUBS MANUAL 11–12, http://www.recserv.uiowa.edu/programs/clubs/master_copy.pdf (last visited Apr. 20, 2007).

121. Ohio State Recreational Sports, Sport Clubs, FAQs, How Are Clubs Funded?, http://recsports.osu.edu/clubs_faqs.asp (last visited Apr. 20, 2007).

122. UNIVERSITY OF IOWA RECREATIONAL SERVICES, *supra* note 120, at 11–12.

123. See *Pederson v. La. State Univ.*, 912 F. Supp. 892 (M.D. La. 1996), *rev'd* in part and *aff'd* in part, 213 F.3d 858 (5th Cir. 2000). The women's lawsuit accused Louisiana State University of violating Title IX and the appellate court found that the institution did just that, writing, a "review of the record convinces us that an intent to discriminate, albeit one motivated by chauvinist notions as opposed to one fueled by enmity, drove LSU's decisions regarding athletic opportunities for its female students." 213 F.3d at 882. Chauvinism, thus, is not an excuse.

124. Email, Klajdi Rrumbullaku, *supra* note 117.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. For example, the OSU men's rugby club was founded in 1966. Ohio State Buckeyes Rugby, Club History, <http://www.osurugby.com/history.asp> (last visited Apr. 20, 2007). The women's rugby club was founded in 1999. Ohio State Women's Rugby, About the Team, <http://www.osuwrfc.com/about.cfm> (last visited Apr. 20, 2007). This may not be completely accurate as OSU women had a rugby club in 1999 that got in trouble, *supra* note 101, so the team

to remedy past discrimination, women's club sports arguably should be elevated in the tier system to allow them to rise to the same level as men's sport. For example, the women's club sport might need more funding to make up for a lower level of alumni support (if a women's club team has not been in existence as long, they have fewer alumni) or the club might need funding for coaches to teach the sport to women not offered the opportunity to have learned the sport in the past.¹³⁰

Club sports at Washington University in St. Louis follow a written procedure whereby members request funding from a committee composed of their peers. Clubs present a written budget with a justification and an explanation, which the Allocation Committee (composed of five undergraduate students who are members of recognized club sports) reviews.¹³¹ The Committee may make additional requests for information and may request a brief presentation from a club member.¹³² The budget proposal must be broken out by travel, equipment, instruction, facilities, and other needs.¹³³ Each category needs to be fully explained and designed with a certain frugality, like combining multiple games in one road trip.¹³⁴ All clubs are required to fundraise an additional 30% beyond the budget the Committee allocates to them. Various fines exist for missed deadlines and failure to fundraise.¹³⁵

This type of procedure is, on its face, gender neutral. If, however, the Allocation Committee was gender biased and consistently allocated more money to men's clubs, a Title IX violation would exist. At Washington University in St. Louis, though, a search of the spring 2004 budgets revealed that comparable men's and women's club teams received comparable allocations.¹³⁶ That University also provides an appeal system for any team that feels the allocation was unfair; giving credence to the argument that funding at Washington University is in compliance with Title IX.¹³⁷

Funding of club sports at the Utah Valley State College (UVSC), however, has

may have re-formed after that experience. Regardless, the length of club history might effect current funding.

130. See CARPENTER & ACOSTA, *supra* note 4, at 60, 84–85 (arguing that Title IX prohibits schools from accepting donations for men's sports without matching the benefits the donations bought for the women's sports). See also *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1048–49 (8th Cir. 2002) (concluding a school cannot bypass Title IX requirements by providing one sex a more than proportionate opportunity through the guise of outside funding).

131. SPORT CLUB FEDERATION CONSTITUTION, *supra* note 99.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Sports Club Federation, Index of Private Budgets, <http://scf.wustl.edu/private/budgets/spring04/> (click on team name hyperlink) (last visited Apr. 20, 2007). Men's rugby received \$1,862 and women's rugby received \$1,430; men's soccer received \$1,678 and women's soccer received \$1,819; men's lacrosse received \$1,967 and women's lacrosse received \$2,277. *Id.*

137. WASHINGTON UNIVERSITY IN ST. LOUIS, STUDENT UNION, HOW THINGS WORK: A GUIDE TO STUDENT UNION 48–52 (2005), <http://su.wustl.edu/forms/copyappeal.php> (click on Student Group Resources and then How Things Work hyperlink).

already caused concern and raised the suggestion that Title IX might be violated. UVSC moved from the National Junior College Athletic Association to the NCAA in 2003. At that time, sixteen sports were given varsity status, and the remainder was divided into two groups.¹³⁸ One group, extramural clubs, consisted of clubs that were sponsored and supported by the athletic department in 2003.¹³⁹ Other club sports were operated under the Office of Student Life.¹⁴⁰ The funding of these two groups was dissimilar even when the sports the clubs played were the same.¹⁴¹ In 2005, the faculty advisor to both the men's and the women's rugby teams realized that the women's team received less funding (the men's team was funded by athletics and the women's via the Office of Student Life), and he complained to the school's Title IX compliance officer.¹⁴² The school increased the women's funding for that year by \$3,400, and the following year, UVSC changed its policy so that all clubs (be they club sports or the chess club) were funded exactly same.¹⁴³ In 2006–2007, each club received about \$250 per semester.¹⁴⁴ An assistant state attorney representative saw no discrimination under the old tier system, but the school changed its policy anyway.¹⁴⁵

V. CONCLUSION

Often when Title IX is linked to club or intramural sports, the public discourse has focused on how Title IX prevents men's club teams from achieving varsity status¹⁴⁶ or how the law results in the promotion of women's club teams to varsity level.¹⁴⁷ Some men's clubs have actually linked themselves to women's clubs in the hopes that if and when the institution promotes the women's club to varsity

138. Jordan Burke, *UVSC Club Funding Fair?*, DESERET MORNING NEWS (Salt Lake City), Dec. 5, 2006, LEXIS, News Library, UWIRE file.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. See Jeremy Reynolds, *Texas Tech Hockey Left Skating in Shadows of Title IX*, DAILY TOREADOR, Oct. 4, 2006, LEXIS, News Library, UWIRE file (arguing that only Title IX requirements kept the men's ice hockey club from becoming a varsity sport); Jeremy Reynolds, *Title IX Leaves Some Texas Tech Athletes with No Choice*, DAILY TOREADOR, Nov. 17, 2005, LEXIS, News Library, UWIRE file (claiming men's varsity sports like swimming, diving, gymnastics, and soccer were reduced to club status because of Title IX requirements); Jeff Johnson, *Syracuse Continues to Lack an NCAA Hockey Team*, DAILY ORANGE, Sept. 25, 2005, LEXIS, News Library, UWIRE file (suggesting that the men's club team could not be elevated without adding women's ice hockey as a varsity sport which would be too expensive).

147. Joseph Person, *U.S.C. Equestrian Team Wins National Championship*, THE STATE, April 28, 2005, LEXIS, News Library, UWIRE file (noting that the University of South Carolina team won the title eight years after being promoted from a club to varsity to comply with Title IX); Alex P. Kellogg, *Following Title IX Probe, UCLA Reinstates Women's Rowing as Varsity Sport*, CHRON. OF HIGHER EDUC., Mar. 21, 2001, at 44 (noting that rowing had been a club sport for ten years prior to the decision).

status, the men's club will be carried along.¹⁴⁸

Club sports are expensive propositions. The dream for many club teams of becoming a varsity sport includes the dream of full financial support and full use of the institution's facilities.¹⁴⁹ Brigham Young University (BYU) took a novel approach in 2003 when, instead of elevating its men's club soccer team to varsity, the University went even further and made the team a professional minor league soccer team, competing in the Premier Development League.¹⁵⁰ At the time of the move, the University was in some danger of a Title IX violation with varsity sports, so elevating the men's club to varsity would have been impossible. One reporter at the time warned that BYU's gender disparity in club sports, like varsity sports, was problematic and suggested that an inquiry from OCR or a lawsuit was possible.¹⁵¹

In fact, all colleges and universities should be aware of potential Title IX violations when it comes to intramural and club sports.¹⁵² Institutions need to be aware of the requirements to provide equal access and equal opportunity in terms of funding and facilities to intramural and club sports. Institutions should be responsive to their students' interests and abilities and be sure that they are providing adequate intramural leagues with comparable scheduling and equipment provision. They should be acutely aware of the need to be equitable when it comes to funding club sports and not to inadvertently fund on the basis of history or other traditions that might result in inequitable funding for women's club sport. Institutions should be particularly wary of relying on history or tradition in scheduling sports because consistently awarding men's teams better field space or

148. Marianne E. Graham, *Women's Ice Hockey Coming to Pitt*, THE PITT NEWS, Sept. 23, 1998, LEXIS, News Library, UWIRE file. As of 2007, Pitt had not promoted men's or women's ice hockey to varsity status. University of Pittsburgh, Official Athletic Site, <http://pittsburghpanthers.cstv.com/> (click on hyperlinks to men's and women's sports, noting neither team is listed) (last visited Apr. 20, 2007). Only occasionally will a men's club indicate that they prefer to compete on the club rather than varsity level. See Larry Porter, *Club Status Works Best for Creighton Men*, OMAHA WORLD HERALD, Sept. 22, 1996, at 4C (noting that as a varsity sport the men's crew team had to travel further and spend more to compete against other varsity men's teams as opposed to competing against more regional club crew teams).

149. See Ben Roberts, *Cool Cats Frozen Out of Big Money: Fund Themselves*, KENTUCKY KERNAL, Sept. 16, 2003, LEXIS, News Library, UWIRE file (noting the men's ice hockey club has a \$55,000 budget and only \$1,000 of university support); Sarah-Jane Wilson, *Colorado Baseball Team Not Safe at Home*, COLORADO DAILY, May 8, 2003, LEXIS, News Library, UWIRE File (bemoaning the loss of the baseball club's university field space which was to become the practice field for the women's varsity soccer team).

150. Patrick Kinahan, *Cougs Score in Jump from Club to PDL*, SALT LAKE TRIB., Feb. 26, 2003, at C1.

151. Welch Suggs, *Brigham Young U. Enters Semipro Soccer League*, CHRON. OF HIGHER EDUC., Mar. 21, 2003, at 39.

152. When the University of Notre Dame drafted a new Title IX grievance procedure in 2006, a University representative specifically mentioned that if a student was concerned about a student club, for example, being limited by gender, the student could activate the grievance procedure. Eileen Duffy, *Notre Dame Strengthens Sexual Discrimination Policy*, THE OBSERVER, Oct. 25, 2006, LEXIS, News Library, UWIRE file. Although the representative said nothing specifically about club sports, the reasoning behind the policy in general suggests that institutions are aware of and concerned about gender discrimination and club sports.

more desirable practice or game times would be a violation of Title IX. In 1994, legal scholars Diane M. Henson and Boyce C. Cabaniss wrote that “universities now ignore Title IX only at their peril.”¹⁵³ While that statement may have been a bit strong at the time, colleges and universities today should be aware of Title IX and its implications for club and intramural sports in order to avoid future lawsuits.

153. Diane M. Henson & Boyce C. Cabaniss, *It's Not Whether You Win or Lose but Whether You Get to Play: Title IX Finally Expands Participation Opportunities for Female Athletes in the 1990s*, 13 REV. LITIG. 495, 528 (1994).