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## Title IX in Historical Context: 50 Years of Progress and Political Gamesmanship

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## TITLE IX IN HISTORICAL CONTEXT: 50 YEARS OF PROGRESS AND POLITICAL GAMESMANSHIP

HELEN DREW, MARISSA EGLOFF & JOSIE MIDDIONE\*

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On the fiftieth anniversary of Title IX, it is important to recognize both its historic nature and how it has evolved in political and social context. This Article will begin by examining the history of women’s athletics pre–Title IX, focusing on what activities women participated in, why, and how societal norms shaped their ability to do so. Next, the Article will examine the status of women’s athletic opportunities as Title IX was first proposed, with an emphasis upon its nexus to the women’s rights movement and the Equal Rights Amendment initiative. The Article will then provide historical background for key moments in the passage and application of Title IX, including specifically the Civil Rights Restoration Act of 1987, the role of the Office of Civil Rights and the approach of the various presidential administrations in enforcing Title IX. The Article will then assess key data metrics, such as the number of women in collegiate coaching and administrative positions prior to 1972, in 1997, and

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finally, in 2019, to determine the impact of Title IX upon coaching opportunities for women. The Article will conclude by recommending concrete steps that should be taken in the current social and political environment to address continuing inequities in opportunities for women in athletics.

### I. WOMEN IN SPORTS PRE-TITLE IX (1900S TO 1972)

Following the passage of the Nineteenth Amendment in 1920, interest in women's athletics began to grow, although this was typically limited to wealthy and cisgender white women, fostered particularly at women's colleges such as Vassar College, Smith College, Mount Holyoke College, and Wellesley College.<sup>1</sup> Whereas sports such as baseball, basketball and tennis were played, competitions typically occurred within school communities, or as "play days" in which students from different schools played on mixed teams.<sup>2</sup> Of note, the focus of these events was participation, and there was a distinct animus against competition and the varsity football model, which at that point in time was wracked with recruiting and academic scandals.<sup>3</sup> This approach was codified in the 1923 Platform of the Women's Division of the National Amateur Athletic Federation, which embraced "a sport for every girl and every girl in a sport."<sup>4</sup> Even this limited success advancing women's participation in sports suffered a setback with the Great Depression,<sup>5</sup> which notably gave rise to the National Industrial Recovery Act in 1933; the statute prohibited more than one family member from holding a government job—causing many women to lose their employment.<sup>6</sup>

Meanwhile, significant legal developments would pave the way for further progress for women in sports, and in other areas as well. In 1936, in *United States v. One Package of Japanese Pessaries*,<sup>7</sup> the U.S. Supreme Court approved the medicinal use of birth control.<sup>8</sup> One year later, the Court upheld the minimum wage law for women

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1. See ELLIOTT J. GORN & WARREN GOLDSTEIN, *A BRIEF HISTORY OF AMERICAN SPORTS* 198 (2d ed. 2013).

2. See Richard C. Bell, *A History of Women in Sport Prior to Title IX*, 10 *SPORT J.* 2, 2 (2007).

3. See RICHARD O. DAVIES, *SPORTS IN AMERICAN LIFE: A HISTORY* 107–08 (2d ed. 2012).

4. See *id.* at 108.

5. See Bell, *supra* note 2, at 3.

6. See *FDR4FREEDOMS*, HOPE, RECOVERY, REFORM: THE GREAT DEPRESSION & FDR'S NEW DEAL 1933–1939, ch. 15, at 7, <https://fdr4freedom.org/hope-recovery-reform> [<https://perma.cc/9KNB-H468>].

7. See *United States v. One Package*, 13 F. Supp. 334, 344 (S.D.N.Y. 1936), *aff'd*, 86 F.2d 737 (2d Cir. 1936).

8. See *One Package*, 13 F. Supp. at 336.

in the State of Washington in *West Coast Hotel v. Parrish*.<sup>9</sup> In 1938, Congress passed the Fair Labor Standards Act<sup>10</sup> establishing a minimum wage throughout the United States without regard to sex.<sup>11</sup> It would be another twenty-seven years, however, before the Equal Pay Act was passed, mandating the same wages for the same work regardless of race, religion, color, national origin, or sex.<sup>12</sup>

The prevailing view in the 1930s that a woman's place was "in the home"<sup>13</sup> was not to be challenged until World War II, as virtually every able-bodied American man entered the military.<sup>14</sup> Branch Rickey and Phil Wrigley created the All-American Girls Baseball League in response to the cancellation of Major League Baseball seasons during World War II.<sup>15</sup> This professional fast-pitch softball league grew from four franchises to ten teams in less than a decade.<sup>16</sup> Although players were required to wear makeup and skirts, they played a competitive brand of ball that entertained millions before falling prey to the advent of television and the post-war regression into more limited roles of gender stereotyping for women.<sup>17</sup>

Ironically, post-World War II prosperity did not foster many advancements for women in the economy, athletics, or in society generally. In fact, one of the few documented policy statements concerning women's intercollegiate programs was an historic shift in the official position statement of the Division for Girls and Women in Sport simply acknowledging that such programs "may" exist.<sup>18</sup> This lukewarm approach was not altered until 1963, at which point the position statement was amended to indicate that such programs were "desirable."<sup>19</sup>

Meanwhile, as the Korean War began,<sup>20</sup> with the rise of the Union of Soviet Socialist Republics (USSR),<sup>21</sup> and the first desegregation

9. See *West Coast Hotel v. Parrish*, 300 U.S. 379, 399–400 (1937).

10. See Fair Labor Standards Act of 1938, ch. 676, § 1, 52 Stat. 1060 (current version at 29 U.S.C. 201).

11. See *id.* § 206(d).

12. See H. COMM. ON EDUC. & LABOR, LEGISLATIVE HISTORY OF THE EQUAL PAY ACT OF 1963 (AMENDING SECTION 6 OF THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED): PUB. L. NO. 88-38, H.R. 6060, 88 Cong., and S. 1409 (6) at 68.

13. See John A. Lucas & Ronald A. Smith, *Women's Sport: A Trial of Equality*, in *HER STORY IN SPORT: A HISTORY ANTHOLOGY OF WOMEN IN SPORTS* 239, 256 (Reet Howell ed., 1982).

14. See Bell, *supra* note 2, at 3.

15. See DAVIES, *supra* note 3, at 115.

16. See *id.* at 115–16.

17. See *id.* at 116–17.

18. See Bell, *supra* note 2, at 4.

19. See *id.*

20. See *Korean War*, EISENHOWER PRESIDENTIAL LIBR., <https://www.eisenhowerlibrary.gov/research/online-documents/korean-war#>: [<https://perma.cc/T38V-FTHX>] (last visited Nov. 18, 2022).

21. See *Soviet Union*, HISTORY, <https://www.history.com/topics/russia/history-of-the-soviet-union> [<https://perma.cc/UV8Q-YL3A>] (last visited Nov. 18, 2022).

cases were heard,<sup>22</sup> ultra-conservative McCarthyism was gaining traction domestically.<sup>23</sup> In the face of these societal challenges, it was not a coincidence that Americans retreated to less threatening, more traditional gender roles that emphasized domestic tranquility with a male-dominated, two-parent household with clearly defined roles—even if that meant significant retrenchment in the independence of women generally, and in athletic opportunities in particular.

Fortunately, however, the pressure for social change and the civil rights movement gave rise to a wave of feminism in the 1960s.<sup>24</sup> Betty Friedan published the groundbreaking book *The Feminine Mystique*<sup>25</sup> in 1963, challenging popularly held beliefs that women should be completely fulfilled as housewives with children.<sup>26</sup> Shortly thereafter, in 1964, the historic passage of Title VII of the Civil Rights Act<sup>27</sup> prohibiting employment discrimination on the basis of race, color, religion, national origin, or sex established a legal baseline. The following year, in a case ultimately upheld by the Fifth Circuit, *Weeks v. Southern Bell*,<sup>28</sup> a court struck down restrictive state regulations on hours and working conditions for women, thereby opening the door to many positions previously available only to men.<sup>29</sup> Also in 1965, the U.S. Supreme Court ruled against state bans on the use of contraceptives by married couples.<sup>30</sup> This was followed in 1968 by Executive Order 11246 prohibiting sex discrimination by government contractors and requiring affirmative action plans for hiring women.<sup>31</sup> One year later, in *Bowe v. Colgate-Palmolive Co.*,<sup>32</sup> the Seventh Circuit held that women must be allowed to compete for jobs for which they are physically qualified, striking down an arbitrary thirty-five-pound weight lifting limitation on women employees.<sup>33</sup> Two years later, the U.S. Supreme Court ruled that private employers could not refuse to hire mothers with preschool children.<sup>34</sup>

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22. See, e.g., *Brown v. Bd. of Educ.*, 374 U.S. 483, 486–88 (1954).

23. See *McCarthyism & the Red Scare*, UNIV. OF VA. MILLER CTR., <https://millercenter.org/the-presidency/educational-resources/age-of-eisenhower/mccarthyism-red-scare> [<https://perma.cc/83J3-J8GZ>] (last visited Nov. 18, 2022).

24. See Martha Rampton, *Four Waves of Feminism*, PAC. MAG. (Oct. 25, 2015), <https://www.pacificu.edu/magazine/four-waves-feminism> [<https://perma.cc/S58B-TYQP>].

25. See Anna Quindlen, *Introduction to BETTY FRIEDAN, THE FEMININE MYSTIQUE* 1, 2 (W.W. Norton & Co., report. 2001).

26. See *id.* at 58–60.

27. See Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e (1964).

28. See *Weeks v. S. Bell*, 408 F.2d 228, 228 (5th Cir. 1969).

29. See *id.* at 235–36.

30. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

31. See Exec. Order No. 11246, as amended, 3 C.F.R. § 202 (1965).

32. See *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 711 (7th Cir. 1969).

33. See *id.* at 714, 718.

34. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 542 (1971).

## II. TITLE IX: THE FIRST DECADE 1972–1982

It was against this tremendous backdrop of social and cultural upheaval, and the corresponding historic events of the Cuban Missile Crisis,<sup>35</sup> the assassinations of John F. Kennedy,<sup>36</sup> Robert Kennedy,<sup>37</sup> and Martin Luther King, Jr.,<sup>38</sup> and the Viet Nam War<sup>39</sup> that Title IX would be considered. At the same time, the Equal Rights Amendment, which had originally been introduced into Congress in 1923, was finally approved by Congress and sent to the states for ratification.<sup>40</sup> Although polls indicated that the majority of the U.S. population supported the measure, it became a lightning rod for conservative criticism by traditionalists such as Phyllis Schlafley.<sup>41</sup> Schlafley's organization, "Stop Taking Our Privileges" (STOP), warned of status-quo threatening potential ramifications, such as unisex bathrooms, same-sex marriages, and compulsory military service for women.<sup>42</sup>

Nevertheless, on June 23, 1972, Title IX was passed and signed into law by President Richard M. Nixon.<sup>43</sup> The intent of the law was to address increasingly glaring discrepancies in educational opportunities for women.<sup>44</sup> It is important to recognize that as late as the early 1960s, girls and boys frequently entered school buildings through different entrances, ate lunch separately, and took segregated coursework—home economics for girls and shop for boys. There were different dress codes for the sexes, different rules of conduct, and, of course, vastly different resources for athletic participation.<sup>45</sup>

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35. See *Cuban Missile Crisis*, JOHN F. KENNEDY PRESIDENTIAL LIBR. AND MUSEUM, <https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/cuban-missile-crisis> [https://perma.cc/7PGN-A5TZ] (last visited Nov. 18, 2022).

36. See *Nov. 22, 1963 Death of the President*, JOHN F. KENNEDY PRESIDENTIAL LIBR. AND MUSEUM, <https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/November-22-1963-death-of-the-president> [https://perma.cc/4PD3-SQVL] (last visited Nov. 18, 2022).

37. See *Bobby Kennedy is fatally shot*, HISTORY: THIS DAY IN HISTORY. (June 2, 2022), <https://www.history.com/this-day-in-history/bobby-kennedy-is-assassinated> [https://perma.cc/8M4X-NV5H].

38. See *Assassination of Martin Luther King, Jr.*, STAN. UNIV. MARTIN LUTHER KING, JR. RSCH. AND EDUC. INST., <https://kinginstitute.stanford.edu/encyclopedia/assassination-martin-luther-king-jr> [https://perma.cc/B3TQ-CA2E] (last visited Nov. 18, 2022).

39. See *Battlefield: Vietnam Timeline*, PBS, <https://www.pbs.org/battlefieldvietnam/timeline> [https://perma.cc/6STU-KG4H] (last visited Nov. 18, 2022).

40. See Lila Thulin, *Why the Equal Rights Amendment Is Still Not Part of the Constitution*, SMITHSONIAN MAG. (Jan. 15, 2020), <https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why-180973548> [https://perma.cc/9GRT-BG44].

41. See *id.*

42. See *id.*

43. Title IX, Educ. Amends. of 1972, 20 U.S.C. §§ 1681–88 (1972).

44. See *History of Title IX*, WOMEN'S SPORTS FOUND. (Aug. 13, 2019), <https://www.womenssportsfoundation.org/advocacy/history-of-title-ix> [https://perma.cc/4TBC-WRYD].

45. See DAVIES, *supra* note 3, at 309.

It was also during this period that many of the more elite liberal arts colleges became coeducational.<sup>46</sup> There was little suggestion, however, in the legislative history that Title IX was intended to impact athletics.<sup>47</sup> The ramifications were not appreciated until 1974 when the Tower Amendment was proposed, which would have limited the impact of Title IX upon revenue-producing sports.<sup>48</sup> Instead, the Javits Amendment was adopted, which directed the then-named U.S. Department of Health, Education and Welfare (HEW) to issue regulations that incorporated “reasonable provisions considering the nature of particular sports”—a thinly veiled reference to big-time college football and men’s basketball.<sup>49</sup>

The following year, the final HEW regulations were issued, providing elementary schools with one year to comply, whereas high schools and colleges had a three-year window.<sup>50</sup> There were multiple congressional attempts to defeat the regulations and amend Title IX, including another attempt at a version of the Tower Amendment.<sup>51</sup> Clearly, the battle for equality in women’s athletics was entering a new and more confrontational phase, culminating in an outright challenge to the HEW regulations in federal district court.<sup>52</sup> When HEW issued the Policy Interpretation in 1979 setting forth the now-infamous “three-part test” for Title IX compliance in participation opportunities, the stage was set for a slew of cases as participation of girls and women in sport began to snowball.<sup>53</sup>

In 1980, responsibility for Title IX administration was transferred from HEW to the new U.S. Department of Education (ED) and the department’s Office for Civil Rights (OCR).<sup>54</sup> As Title IX began its historic journey through the tortured halls of federal bureaucracy, significant changes were occurring within the administration of women’s sports. The Division for Girls and Women in Sport, which had fostered the traditional “play-days” and similar athletic events became the Commission on Intercollegiate Athletics for Women, and

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46. See GORN & GOLDSTEIN, *supra* note 1, at 198.

47. See Christina Johnson, *The Evolution of Title IX: Prospects for Equality in Intercollegiate Athletics*, 11 GOLDEN GATE U. L. REV. 759, 763–64 (1981). It should also be noted that it was during this period that the U.S. Supreme Court instituted the “intermediate” test for scrutinizing constitutionality in sex discrimination cases. *Craig v. Boren*, 429 U.S. 190, 218 (1976).

48. See DAVIES, *supra* note 3, at 311.

49. WOMEN’S SPORTS FOUND., *supra* note 44.

50. See *id.*

51. See *id.*

52. See *NCAA v. Califano*, 444 F. Supp. 425, 428 (D. Kan. 1978).

53. See *Title IX Timeline*, NAT’L CTR. FOR WOMEN & GIRLS IN EDUC. REP. 1 (2008), <https://www.ncwge.org/PDF/Title%20IX%20Timeline.pdf> [<https://perma.cc/BXR3-CYRA>].

54. See *id.*

by 1972 was hosting six national championships.<sup>55</sup> Clearly, the days of minimizing athletic achievement in favor of more traditionally feminine concepts of participation were waning. Around the same time, the governing body became the Association for Intercollegiate Athletics for Women (AIAW), which ultimately would compete with the National Collegiate Athletic Association (NCAA) for control over women's sports.<sup>56</sup> Between 1972 and 1982, the AIAW would grow from 278 members to 800 schools.<sup>57</sup> Its success, however, would herald its death knell, as it became impossible for the NCAA to dismiss the increasing power and significance of women's sports.

Although the AIAW had historically prohibited athletic scholarships and recruiting in its efforts to avoid the many ethical challenges that the NCAA experienced, it was increasingly clear that this posture was inconsistent with Title IX—and the needs and goals of the young women it sought to serve.<sup>58</sup> By 1973, the AIAW was forced to accept athletic scholarships for women, although the impact was minimal because the funds were controlled by male athletic directors.<sup>59</sup> As the AIAW sought to pressure HEW to require athletic departments to require equality in financial resources for men's and women's sports, the NCAA came to view Title IX as an existential crisis.<sup>60</sup> When significant political pressure failed to move the needle to protect traditional men's revenue-producing sports, the NCAA sought other options.<sup>61</sup> The NCAA first waived its prohibition upon participation by women in NCAA championships in 1973.<sup>62</sup> Then, in 1974, the NCAA and the AIAW met to consider alternatives.<sup>63</sup> The NCAA was seeking an affiliation.<sup>64</sup> The AIAW hoped for a joint committee to establish rules of competition.<sup>65</sup> The NCAA scoffed at the concept of joint participation in governing with the AIAW.<sup>66</sup> Clearly, there was no possibility of amicable settlement, so the NCAA took the offensive. It launched women's championship tournaments, promised to pay all expenses, eliminated institutional membership fees, promised equitable financial aid, established recruitment and eligibility rules, and guaranteed better television coverage for women's

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55. See Bell, *supra* note 2, at 4.

56. See *id.* at 4, 6.

57. See *id.* at 4.

58. See DAVIES, *supra* note 3, at 310–11.

59. See *id.* at 311.

60. See *id.*

61. See *id.* at 312.

62. Bell, *supra* note 2, at 6.

63. See *id.*

64. See *id.*

65. See *id.*

66. See *id.*



events.<sup>67</sup> The AIAW brought suit against the NCAA under the Sherman Act,<sup>68</sup> but it was unsuccessful and ultimately dissolved.<sup>69</sup>

### III. TITLE IX: THE SECOND DECADE 1982–1992

The NCAA's unilateral power over intercollegiate athletics was further solidified in 1984, when the scope of Title IX was challenged in *Grove City College v. Bell*.<sup>70</sup> The U.S. Supreme Court significantly restricted the impact of the statute, holding that only those programs that specifically received federal funding—in this case, the financial aid office—were required to be in compliance, effectively holding athletic departments exempt.<sup>71</sup> It took a congressional override of President Ronald Reagan's veto of the Civil Rights Restoration Act of 1987 to reverse the holding, once again rendering any institution receiving federal funding subject to Title IX in all of its programs.<sup>72</sup> Five years later, in 1992, the U.S. Supreme Court ruled unanimously that a student may sue for monetary damages under Title IX for sexual harassment in a school setting.<sup>73</sup> This holding was especially important because it gave rise to the prospect of institutional liability for punitive damages in individual lawsuits. As the federal government had never wielded its authority to penalize a school by denying it federal funding, this ruling finally put some potential teeth into Title IX enforcement by individual actions under the law.<sup>74</sup>

The political context of the 1980s was somewhat calmer than the decade before; however, there remained significant obstacles to improving gender equity. The recession of the early 1980s increased pressure upon collegiate athletic departments, which sought to contain costs by cutting programs.<sup>75</sup> For those that already failed to provide adequate participation opportunities for women athletes, those measures compounded the existing problems, ultimately resulting in legal liability. Such was the case at Brown University, which had been found to be in violation of Title IX, and attempted to cut two men's and two women's teams.<sup>76</sup> Ironically, prior to this

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67. *See id.*

68. *See Ass'n for Intercollegiate Athletics for Women v. NCAA*, 558 F. Supp. 487 (D.D.C. 1983), *aff'd* 735 F.2d 577 (D.C. Cir. 1984).

69. *See Bell*, *supra* note 2, at 5.

70. *See Grove City College v. Bell*, 465 U.S. 555 (1984).

71. *See id.* at 573–74.

72. *See Civil Rights Restoration Act of 1987*, Pub. L. No. 100-259, § 3(a), 102 Stat. 28 (1987).

73. *See Franklin v. Gwinnett Cnty. Schs.*, 503 U.S. 60, 76 (1992).

74. *See Ellen J. Staurowsky, Title IX and College Sport: The Long Painful Path to Compliance and Reform*, 14 MARQ. SPORTS L. REV. 95, 104 (2003).

75. *See id.* at 104–05.

76. *See Cohen v. Brown Univ.*, 101 F.3d 155, 161 (1st Cir. 1996).

case, Brown University had been proactive in increasing the size of its women's athletic program.<sup>77</sup> Budget issues arising during the 1980s and early 1990s forced retrenchment.<sup>78</sup> Consequently, the decision was made to demote four teams—two men's and two women's—to save money.<sup>79</sup> The same number of women and men athletes were impacted by the decision, but as it reinforced the pre-existing disparity in participation opportunities relative to the respective enrollments of male and female undergraduate students, the University's action was found to be in violation of Title IX.<sup>80</sup> The *Brown* decision is significant for upholding the constitutionality of the “three-part test” against a challenge that it in essence requires schools to institute quotas.<sup>81</sup> It was, however, only one of many similar situations in which men's nonrevenue sports were on the chopping block as schools struggled to balance fiscal reality with Title IX obligations.<sup>82</sup>

#### IV. TITLE IX: THE THIRD DECADE 1993–2002

It was during this decade that Title IX was first employed to address sexual harassment and sexual assault. In 1997, the OCR issued the first “sexual harassment guidance” with standards for preventing sexual harassment in school settings.<sup>83</sup> The following year, however, the U.S. Supreme Court ruled in *Gebser v. Lago Vista Independent School District*<sup>84</sup> that for a student to recover for sexual harassment by a teacher, a school must have actual notice of the misconduct and act with “deliberate indifference” to it—clearly a very high bar to recovery.<sup>85</sup> Two years later, in *Davis v. Monroe County Board of Education*, the U.S. Supreme Court reaffirmed the *Gebser* standard with respect to student-on-student conduct.<sup>86</sup> Further, the Court insisted that damages could only be recovered in cases that are “so severe, pervasive, and objectively offensive” that the victim is

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77. *See id.* at 166.

78. *See id.* at 163.

79. *See id.*

80. *See id.* at 163, 180.

81. *See id.* at 178.

82. *See, e.g.,* Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608 (6th Cir. 2002); Chalenor v. Univ. of N.D., 291 F.3d 1042 (8th Cir. 2002); Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999); Neal v. Bd. of Trs., 198 F.3d 763 (9th Cir. 1999); Kelley v. Bd. of Trs., 35 F.3d 265, 267 (7th Cir. 1994); Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168 (3d Cir. 1993).

83. *A timeline of rulings, regulations about student sex assault*, ASSOCIATED PRESS (May 15, 2017), <https://www.ap.org/explore/schoolhouse-sex-assault/a-timeline-of-rulings-regulations-about-student-sex-assault.html> [<https://perma.cc/4M2N-25ZS>].

84. *See* *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

85. *Id.* at 276.

86. *See* *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 629 (1999).

effectively deprived of an education.<sup>87</sup> By 2001, the OCR responded by clarifying that these standards are only with reference to suits for money damages, and that the OCR has a lower bar for enforcement actions.<sup>88</sup> On a more positive note, the Violence Against Women Act was passed in 1994,<sup>89</sup> as was the Gender Equity in Education Act,<sup>90</sup> as increasing attention was paid to the challenges faced by girls and women caused by sexual harassment, discrimination, and assault, particularly in school settings.

It is important to note that the less than aggressive approach taken by the U.S. Supreme Court to sexual harassment cases under Title IX played out as the Monica Lewinsky scandal engulfed the Clinton Administration in 1998. Monica Lewinsky, a young White House intern, allegedly engaged in a sexual affair with President William J. Clinton, who was ultimately impeached for denying his role in the liaison.<sup>91</sup> The challenging standards for victims of sexual assault and discrimination under Title IX that were set in this decade would become a fundamental institutional problem in the future.

Other significant historical events during this period include the Federal Bureau of Investigation's (FBI) siege at Waco, Texas,<sup>92</sup> the related Oklahoma City bombing of a federal building,<sup>93</sup> and what would become the first of far too many school shootings in Columbine, Colorado.<sup>94</sup> The most important development for the eventual evolution of Title IX, however, would be the exponential growth and use of the internet as an everyday tool, which would ultimately enable women, and women in sports, to communicate, organize, and build support networks to achieve their objectives as never before.<sup>95</sup>

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87. *Id.* at 633.

88. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 (Jan. 19, 2001).

89. Violence Against Women Act, 42 U.S.C. §§ 13925–14045(d) (1994) (transferred to 34 U.S.C. §§ 12291–12514).

90. Gender Equity in Educ. Act, 20 U.S.C. § 1681 (1994).

91. Patrick Barkham, *Clinton impeachment timeline*, THE GUARDIAN (Nov. 18, 1998, 9:26 AM), <https://www.theguardian.com/world/1998/nov/18/clinton.usa> [<https://perma.cc/4VYJ-328M>].

92. See *Waco siege*, ENCYC. BRITANNICA (Mar. 1, 2022), <https://www.britannica.com/event/Waco-siege> [<https://perma.cc/P5DX-2R85>].

93. See John Philip Jenkins, *Oklahoma City Bombing*, ENCYC. BRITANNICA (Apr. 12, 2022), <https://www.britannica.com/event/Oklahoma-City-bombing> [<https://perma.cc/4WLZ-VG8K>].

94. See *Columbine High School shootings*, ENCYC. BRITANNICA (Aug. 23, 2022), <https://www.britannica.com/event/Columbine-High-School-shootings> [<https://perma.cc/LV3C-GXL2>].

95. *The Invention of the Internet*, HISTORY (Oct. 28, 2019), <https://www.history.com/topics/inventions/invention-of-the-internet> [<https://perma.cc/HBZ3-MNSX>].

It was also during this period that the NCAA conducted a self-analysis of its implementation of Title IX, creating a Gender-Equity Task Force in 1992, which produced what should have been a groundbreaking report in 1993.<sup>96</sup> The Task Force was established following a 1991 survey of NCAA institutions, which revealed disturbing discrepancies that clearly violated Title IX.<sup>97</sup> At that time, whereas enrollment was approximately fifty percent men and women undergraduate students, male participation in intercollegiate athletics was 69.5 percent, and men's programs received about seventy percent of scholarships, seventy-seven percent of operating budgets, and eighty-three percent of recruiting funding.<sup>98</sup> Twenty years after the enactment of Title IX, the NCAA and its member institutions were not even close to gender equity.

NCAA Executive Director Richard D. Schultz responded strongly to this finding: "We must be proactive, we must be a leader. We have the resources within the NCAA, and with the people we can call on, to deal with this problem and solve this problem. This is more than a financial issue, it's a moral issue as well."<sup>99</sup>

The Task Force's goals were to provide guidance on the meaning of gender equity, analyze NCAA policies to assess their impact upon gender equity, and to make recommendations as to how schools could comply with Title IX.<sup>100</sup> The Report included this statement: "Good intercollegiate athletics programs require competitive parity, universal and consistently applied rules, and an opportunity to participate. For many years, the NCAA has sought to assure those conditions, but there is clear evidence that it has not succeeded in providing the last one to women."<sup>101</sup>

The Report defined gender equity in programming: "An athletics program can be considered gender equitable when the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender."<sup>102</sup> Moreover, at an institutional level, the Report defined gender equity as "an environment in which fair and equitable distribution of overall

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96. See NAT'L COLLEGIATE ATHLETIC ASS'N, *ACHIEVING GENDER EQUITY: A BASIC GUIDE TO TITLE IX FOR COLLEGES AND UNIVERSITIES* (1994).

97. See T. Jesse Wilde, *Gender Equity in Athletics: Coming of Age in the 90's*, 4 MARQ. SPORTS L. J. 217, 230 (1994).

98. See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 96, at 5.

99. *Title IX of the Educ. Amends. of 1972: Hearing Before the Subcomm. on Post-secondary Educ., Training, and Life-Long Learning of the H. Comm. on Econ. and Educ. Opportunities*, 104th Cong. 314 (1995) (Final Report of the NCAA Gender-Equity Task Force) [hereinafter *Hearing on Title IX*].

100. See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 96, at 5.

101. *Id.*

102. *Hearing on Title IX, supra* note 99, at 315.

athletics opportunities, benefits and resources is available to women and men and in which student-athletes, coaches and athletics administrators are not subject to gender-based discrimination.”<sup>103</sup>

Further, the Report identified four principles of gender equity: 1) requiring the NCAA and its members to comply with federal and state laws regarding gender equity; 2) prohibiting NCAA legislation that would prevent compliance; 3) adopting NCAA legislation to enhance compliance; and 4) conducting NCAA activities “in a manner free of gender bias.”<sup>104</sup>

Unfortunately, these lofty ideals were not entirely reflected in the Guidelines produced by the Task Force. Less than two inches down the page from the enunciation of the fourth principle, the second Guideline specifically acknowledges that football and men’s basketball have historically generated disproportionate revenue.<sup>105</sup> The Task Force then concludes that:

While this fact cannot be used to set those programs outside of gender-equity considerations, it should be understood that, at some institutions, maintaining the revenue-generating capacity of sports, as well as increasing the revenue-generating capacity of women’s sports, are essential to enhancing opportunities for women athletes. Maintaining current revenue-producing programs as one aspect<sup>106</sup> of long-range planning for increasing women’s opportunities is preferable to decreasing the currently provided participation opportunities for men—especially when such maintenance may result in revenues available for both women’s and men’s programs. Evidence that available resources from revenue-generating activities are equitably distributed to men’s and women’s programs should be apparent in the evaluation of an institution’s planning for gender equity.<sup>107</sup>

The Report continued to acknowledge the tremendous difference in athletic participation at the high school and collegiate level by sex: “Currently, more than 3.4 million male and 1.9 million female student-athletes participate at the high-school level, compared with 186,045 male and 96,467 female student-athletes in NCAA sports.”<sup>108</sup> The Report noted that this discrepancy “may not reflect interest accurately, but may instead reflect historic inequalities in opportunities

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103. *Id.*

104. *Id.* at 315–16.

105. *See id.* at 316.

106. Emphasis in original.

107. *Hearing on Title IX, supra* note 99, at 316.

108. *Id.* at 317.

for girls and women in sports,” reminding schools that this would not excuse compliance from obligations to offer equal recruiting and scholarship resources to both men’s and women’s programs.<sup>109</sup>

Overall, the Guidelines seem to provide a roadmap to build a better, more equitable collegiate athletics system. Further recommendations included: 1) offering different sports for women; 2) creating activities to support accelerated growth of woman athletes; 3) financial measures, including increasing revenues, cutting costs and redistributing revenues; 4) expanding women’s sport and championship opportunities; and, 5) providing camps and clinics for youth to facilitate athletic development, including establishing relationships with the National Federal of State High School Associations to improve the quality of coaching for women’s programs.<sup>110</sup> The Guidelines incorporated the OCR’s ten factors for assessing equality in athletics programming.<sup>111</sup> Notably, they also emphasized the importance of equitable recruiting and hiring practices for coaches and athletic department administrators:

The enthusiasm, time and commitment for personnel recruitment in the men’s programs should also be reflected in the women’s programs.<sup>112</sup> Aggressive efforts are needed to recruit and hire more female coaches, administrators and staff members for employment in intercollegiate athletics.<sup>113</sup> Institutions should also continue to encourage and develop increased educational experiences for women in intercollegiate athletics through internships, graduate assistantships and other mentored learning opportunities to increase the pool of women candidates for coaching, administrative and staff employment.<sup>114</sup>

To this end, the Report encouraged the appointment of women to NCAA committees and as faculty athletics representatives, and endorsed the creation of a Senior Woman Administrator at every school.<sup>115</sup> The Report also recommended an annual NCAA report of the number of women administrators in specific positions and the total number of the administrative positions at every single institution, identified by name.<sup>116</sup> Schools were also advised to routinely conduct self-analyses of participation opportunities and equity in

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109. *Id.*

110. *See id.* at 317.

111. *See id.* at 318.

112. *See id.*

113. *See Hearing on Title IX, supra* note 99, at 318.

114. *Id.*

115. *See id.* at 322.

116. *See id.*

athletic experience with the objective of achieving Title IX compliance as soon as possible.<sup>117</sup>

Sadly, the seeds of failure were sown into the Report as well. In addition to the reference to the hallowed position of revenue-generating sports, the recommendations also exempted football and basketball (both men's and women's) from a provision that would create one female volunteer coach in all men's and women's sports programs.<sup>118</sup> This exemption completely eliminated the potential pipeline for development of women coaches in football and basketball, contributing in large measure to the continuing scarcity of female coaching talent in those positions today. Perhaps most importantly, however, was the complete and utter dismissal of any NCAA fiscal responsibility for instituting compliance measures.<sup>119</sup> Rather, the Report delegated this, the most critical component to achieving gender equity, directly to NCAA member schools:

The responsibility for providing necessary financial resources falls to individual institutions, just as does funding for all aspects of higher education. And, as in other programs, that responsibility must reside with the institutions' governing bodies, not just athletics departments. The facts that these are difficult economic times or that difficult decisions must be made are true, but they do not alter that responsibility. Chief executive officers and governing boards, and legislatures must identify the resources necessary to provide equal opportunity to all students.<sup>120</sup>

Finally, the Report completely failed to consider the possibility of instituting NCAA penalties to compel compliance—even though over two decades of federal law had failed to effectively address gross disparities in athletic opportunities for women. In this regard, it is important to note that in 1988, not long before the creation of the Task Force, the NCAA's blatant power to compel institutional compliance with its own rules had been demonstrated in the seminal case of *NCAA v. Tarkanian*.<sup>121</sup> Tarkanian, an incredibly successful men's basketball coach at the University of Nevada at Las Vegas (UNLV), had violated multiple NCAA rules over an extended period of time.<sup>122</sup> Despite Tarkanian's cult-like status among UNLV alumni,

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117. *See id.* at 318.

118. *See id.* at 322.

119. *See Hearing on Title IX, supra* note 99, at 323.

120. *See id.*

121. *See NCAA v. Tarkanian*, 488 U.S. 179 (1988).

122. *See id.* at 181.

and UNLV's clear desire to continue his employment, the NCAA was able to compel UNLV to fire him.<sup>123</sup>

At a time when the NCAA's authority over its member institutions and its financial resources was arguably reaching its apex, the express refusal of the NCAA to exercise its considerable power to enforce gender equity speaks volumes about the extent of its actual commitment to the lofty principles articulated in the Report. The contrast between Executive Director Schultz's enunciated objectives and the actual impact of the Task Force could not have been more stark. Almost as a postscript, it was at the end of this period that the NCAA won a U.S. Supreme Court case determining that the organization itself was not subject to Title IX.<sup>124</sup>

#### V. TITLE IX: THE FOURTH DECADE: 2002–2012

The first decade of the new millennium was dominated by the events of 9/11,<sup>125</sup> the Iraq War,<sup>126</sup> and the Great Recession.<sup>127</sup> The elections of George W. Bush in 2000<sup>128</sup> and Barack Obama in 2008<sup>129</sup> would have outsized ramifications for the evolution of Title IX. During the same time frame, social media became a dominant form of communication.<sup>130</sup> This would have a dramatic impact upon the capacity of girls and women to generate support for gender equity—although much of this would not transpire until the following decade. Finally, the increasing polarity of the American public, which arguably began with the contested 2000 presidential election, gained momentum with

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123. *See id.* at 196.

124. *See* NCAA v. Smith, 525 U.S. 459, 470 (1999) (Defendant claimed that the NCAA was subject to Title IX because it received dues from member schools which in turn were recipients of significant amounts of federal funds. The U.S. Supreme Court dismissed this argument. It is important to note that the NCAA expended significant resources to litigate this case up to the U.S. Supreme Court, rather than use them to address rampant gender inequity issues in athletics).

125. *See Module 1: Events of the Day, 9/11* MEMORIAL & MUSEUM, <https://www.911memorial.org/learn/resources/911-primer/module-1-events-day> [<https://perma.cc/UJ2H-HUQK>] (last visited Nov. 18, 2022).

126. *See The Iraq War 2003–2011*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/time-line/iraq-war> [<https://perma.cc/GLM6-6QZY>] (last visited Nov. 18, 2022).

127. *See The Great Recession & Its Aftermath*, FEDERAL RESERVE HISTORY (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/great-recession-and-its-aftermath> [<https://perma.cc/BF2R-3QYS>].

128. *See* Thomas E. Mann, *Reflections on the 2000 U.S. Presidential Election*, BROOKINGS INST. (Jan. 1, 2001), <https://www.brookings.edu/articles/reflections-on-the-2000-u-s-presidential-election> [<https://perma.cc/N9HJ-GQGR>].

129. *See* Adam Nagourney, *Obama Wins Election*, N.Y. TIMES (Nov. 4, 2008), <https://www.nytimes.com/2008/11/05/us/politics/05campaign.html> [<https://perma.cc/Z8FJ-WXZV>].

130. *See History of Social Media (It's Younger Than You Think)*, BROADBAND, <https://www.broadbandsearch.net/blog/complete-history-social-media> [<https://perma.cc/VCR2-S4TF>] (last visited Nov. 18, 2022).



the election of Barack Obama and continues to have tremendous significance for the application of Title IX to date.<sup>131</sup>

By this time, Title IX had increased opportunities for women in education as well as in sports. By 2002, high school sports participation by girls had risen from 294,015 in 1972 to over 2.8 million in 2002.<sup>132</sup> At the collegiate level, this number rose from 90,000 in 1972 to 163,000 in 2002.<sup>133</sup> This, in combination with the impact of the budget cuts from the late 1980s and the early 1990s, gave rise to the perception that perhaps Title IX was now going “too far” and compromising opportunities for male athletes.<sup>134</sup>

Meanwhile, supporters of men’s nonrevenue generating sports, such as wrestling and swimming, who had been unsuccessful in litigation attempts alleging reverse discrimination claims,<sup>135</sup> brought political pressure to bear in Congress.<sup>136</sup> In response, the OCR issued the “Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test” in 1996,<sup>137</sup> explicitly denying that the Three-Part Test requires quotas and finding it necessary to emphasize: “nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men.”<sup>138</sup>

In February 2002, the National Wrestling Coaches Association brought suit against the U.S. Department of Education, alleging that the now-infamous Three-Part Test required unconstitutional quotas constituting reverse discrimination against male student-athletes.<sup>139</sup> The Department’s motion to dismiss for lack of standing was granted,<sup>140</sup> but later that year, the Department created the Commission on Opportunity in Athletics, which became in and of itself a forum to entertain the very same allegations that had been the basis for the lawsuit.<sup>141</sup> The Commission’s composition was suspect from the start. As noted by commentator Ellen Staurowsky, “[t]hey all work for, or were educated at, institutions with the greatest

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131. See *The Partisan Divide on Political Values Grows Even Wider*, PEW RSCH. CTR. (Oct. 5, 2017), <https://www.pewresearch.org/politics/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider> [<https://perma.cc/EXG4-VXR3>].

132. See Staurowsky, *supra* note 74, at 99.

133. See *id.*

134. See *id.* at 106.

135. See, e.g., *Kelley v. Univ. of Ill. Bd. of Trs.*, 832 F. Supp. 237 (N.D. Ill. 1993).

136. See Staurowsky, *supra* note 74, at 106.

137. See OFF. FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> [<https://perma.cc/J5SH-DE4P>].

138. *Id.* at 4.

139. See *Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ.*, 263 F. Supp. 2d 82, 97 (D.D.C. 2003).

140. See *id.* at 85.

141. See Staurowsky, *supra* note 74, at 107.

financial investment in the National Collegiate Athletic Association, the Division I institutions that have been most visible and vocal with regard to the difficulties they face in complying with Title IX.”<sup>142</sup> Notably, the Commission was stacked with representatives from the PAC-10, the Big 10, the Southeast Conference, the Big East, and the ACC.<sup>143</sup> Significantly, the Commission members demonstrated little understanding of key OCR documents, including the 1996 Clarification, although the Commission was charged with composing recommendations to revise existing regulations.<sup>144</sup>

Predictably, the Commission’s Final Report, euphemistically entitled “Open to All: Title IX at Thirty,”<sup>145</sup> was heavily criticized.<sup>146</sup> Two of the Commission members, Julie Foudy, President of the Women’s Sports Foundation, and Donna de Varona, a former Olympic swimmer and sportscaster, refused to sign the report, instead issuing their own Minority View on the Report of the Commission on Opportunity in Athletics, which they urged Secretary of Education Roderick Paige to incorporate into the record.<sup>147</sup> He refused, but several key Democratic leaders in Congress cautioned that any significant changes to Title IX policies would prompt congressional review.<sup>148</sup>

Ultimately, a Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance was issued by the OCR in July 2003.<sup>149</sup> First, the absurdity of having to provide “Further Clarification” on regulations first issued in 1979 defies comprehension.<sup>150</sup> This impression is further buttressed by the language in the document:

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142. Ellen Staurowsky, *The Title IX Commission’s Flawed Lineup*, 74 J. PHYSICAL EDUC., RECREATION & DANCE 5 (2003).

143. See Ellen Staurowsky, *Title IX in Its Third Decade: The Commission on Opportunity in Athletics*, 2 ENT. & SPORTS L.J. 70, 83 (2016).

144. See *id.* at 84.

145. See SEC’Y OF EDUC. COMM’N ON OPPORTUNITY IN ATHLETICS, “OPEN TO ALL”: TITLE IX AT THIRTY (Feb. 28, 2003), <https://www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf> [<https://perma.cc/26M9-A997>].

146. See Diana Jean Schemo, *WOMEN’S SPORTS; Title IX Dissenters to Issue Report Criticizing Proposed Changes to Women’s Athletics*, N.Y. TIMES (Feb. 25, 2003), <https://www.nytimes.com/2003/02/25/sports/women-s-sports-title-ix-dissenters-issue-report-criticizing-proposed-changes.html> [<https://perma.cc/U2HV-RYC4>].

147. See *Foudy & de Varona Plan Minority Opinion to Title IX Report*, SPORTS BUS. J. (Feb. 25, 2003), <https://www.sportsbusinessjournal.com/Daily/Issues/2003/02/25/Sports-Society/Foudy-De-Varona-Plan-Minority-Opinion-To-Title-IX-Report.aspx> [<https://perma.cc/BYU3-U8JX>].

148. See Staurowsky, *supra* note 143, at 87–88.

149. See OFF. FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., FURTHER CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE REGARDING TITLE IX COMPLIANCE (July 11, 2003), <https://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> [<https://perma.cc/9T77-ZR2C>].

150. See *id.* at 2.

First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations.<sup>151</sup> All three prongs have been used successfully by schools to comply with Title IX, and the test offers three separate ways of assessing whether schools are providing equal opportunities to their male and female students to participate in athletics.<sup>152</sup> If a school does not satisfy the “substantial proportionality” prong, it would still satisfy the three-prong test if it maintains a history and continuing practice of program expansion for the underrepresented sex, or if “the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program.”<sup>153</sup> Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX.<sup>154</sup>

Claims that this regulation, which has resulted in so much litigation and required an infinite amount of administrative time and effort in both the private and public sectors on a continuing basis, has worked well can only be met with incredulity. Moreover, the assertion that the safe harbor is only one of three legitimate avenues for compliance belies legal and economic reality. The only one of the three options in the Three-Part Test that can provide any certainty—and therefore guarantee compliance and lack of legal liability—is the safe harbor. Arguably, any college counsel who advises her client to rely upon either of the other two prongs is at the very least courting litigation and possibly committing malpractice. Clearly, for Title IX to be effective and provide sustained, consistent equality of opportunity for everyone, a more effective mechanism must be found. That aspect will be addressed below.

The Further Clarification was followed in 2005 by the issuance of an Additional Clarification of Intercollegiate Athletics Policy: Three Part Test—Part Three,<sup>155</sup> which allowed institutions to satisfy the third prong by an email survey. This approach severely limited the capacity of the Three-Part Test to accurately assess compliance as determined by measuring unmet interest. First, email surveys

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151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. See OFF. FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST—PART THREE (Mar. 17, 2005), <https://www2.ed.gov/about/offices/list/ocr/letters/200503017-additional-clarification-three-part-test.pdf> [<https://perma.cc/EK95-DVTR>].

are notoriously unreliable, especially where, as in this instance, non-responses were considered to be indications of lack of interest.<sup>156</sup> Secondly, prospective student athletes are unlikely to matriculate at institutions lacking the teams, facilities, and coaches that would be necessary for competition.<sup>157</sup> Finally, such surveys are prone to reflecting past discrimination that impedes interest in potential women athletes.<sup>158</sup> The Further Clarification was so problematic that even the NCAA objected, adopting a resolution opposing it.<sup>159</sup>

Following the election of Barack Obama in 2008, the OCR withdrew the 2005 guidance, issuing *Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part Three*, which essentially reinstated the prior standard under the 1979 regulations.<sup>160</sup> In so doing, the document specifically rejected the use of a survey alone to assess an institution's compliance by serving unmet student interest in athletics.<sup>161</sup> Once again, the implementation of Title IX was dictated by the changing political landscape of the executive branch, but at least this time, the change in approach was protective of the interests of women athletes.

On March 11, 2009, the Obama Administration launched the White House Council on Women and Girls, comprised of the head of every federal agency and major White House office.<sup>162</sup> In signing the Executive Order creating the Council, President Obama stressed:

[T]he purpose of the Council is to ensure that each of the agencies in which they're charged takes into account the needs of women and girls in the policies they draft, the programs they create, the legislation they support and that the true purpose of our government is to ensure that in America, all things are still possible for all people.<sup>163</sup>

During this same time period, the author was engaged with multiple other parents and high school girl athletes who were seeking

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156. See Joanna L. Grossman, *Defending Equality in Athletics: The Obama Administration Repeals a Controversial Bush Era Policy*, FINDLAW (Apr. 27, 2010), <https://supreme.findlaw.com/legal-commentary/defending-equality-in-athletics-the-obama-administration-repeals-a-controversial-bush-era-policy.html> [<https://perma.cc/3XHH-LBJK>].

157. See *id.*

158. See *id.*

159. See *id.*

160. See OFF. FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST—PART THREE* (Apr. 20, 2010), <https://www2.ed.gov/about/offices/list/ocr/docs/title9-qa-20100420.html> [<https://perma.cc/U4CQ-HTBN>].

161. See *id.*

162. See *White House Council on Women and Girls*, OBAMA WHITE HOUSE ARCHIVES, <https://obamawhitehouse.archives.gov/administration/eop/cwg> [<https://perma.cc/ZHE7-9HPB>] (last visited Nov. 18, 2022).

163. *Id.*

to establish a varsity girls ice hockey program in Western New York.<sup>164</sup> Although multiple other girls' sports had been added over time to the public high schools in the region, the effort to add girls' ice hockey met stiff resistance from school boards, boys' ice hockey coaches, and even some parents.<sup>165</sup> Consequently, the author sought to enlist the support of the White House Council, requesting that a letter be sent to the school boards asking that they "consider" adopting girls' ice hockey as a sanctioned varsity sport.<sup>166</sup> Several emails eventually resulted in a telephone call to the author from a Council staffer, who noted that although the Council was "very sympathetic" to the initiative, they felt compelled to refrain from becoming involved because the matter fell within the jurisdiction of the Department of Education—the Secretary of which, by definition, was a member of the Council.<sup>167</sup> Apparently, the lofty purposes articulated by the president were not consistent with issuing even an innocuous letter requesting that local school boards entertain the possibility of providing equal access to athletics for young women in the Western New York area.

The Obama Administration was very proactive in expanding the reach of Title IX in the area of sexual assault cases.<sup>168</sup> A study completed in 2007 revealed stunning statistics that one out of every five women on a college campus was a victim of an attempted or completed sexual assault.<sup>169</sup> Similarly, 800 reported rapes and more than 3,800 other sexual assaults were recorded in a single year in public high schools.<sup>170</sup> In response, the OCR issued policy guidance in 2011 recognizing that Title IX's protections against sexual assault extended to all students, including student-athletes.<sup>171</sup> This document

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164. See *History of Girls Varsity Hockey*, WNY GIRLS VARSITY ICE HOCKEY FED'N, <http://wnygirlshockey.com/history.html> [https://perma.cc/5QMR-A68J] (last visited Nov. 18, 2022).

165. See *id.*

166. Email from Jordan Brooks, White House Council on Women and Girls, to author (Feb. 9, 2010) (on file with author).

167. *Id.* See also OBAMA WHITE HOUSE ARCHIVES, *supra* note 162.

168. See *Obama Administration Commemorates 40 Years of Increasing Equality and Opportunity for Women in Education and Athletics*, OBAMA WHITE HOUSE ARCHIVES (June 20, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/20/obama-administration-commemorates-40-years-increasing-equality-and-oppo> [https://perma.cc/F7L4-MYB4].

169. See Christopher P. Krebs, Christine H. Lindquist, Tara D. Warner, Bonnie S. Fisher & Sandra L. Martin, *CAMPUS SEXUAL ASSAULT (CSA) STUDY* (Dec. 2007), <https://www.ojp.gov/pdffiles1/nij/grants/221153.pdf> [https://perma.cc/6Y8K-ER3K].

170. Donna A. Lopiano & Connee Zotos, *Athlete Welfare and Protection Policy Development in the USA*, in *SAFEGUARDING, CHILD PROTECTION AND ABUSE IN SPORT* 97, 99 (Melanie Lang & Mike Hartill eds., 2014).

171. See OFF. FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE* (Apr. 4, 2011) (rescinded), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [https://perma.cc/6ZD4-VWZY].

specified that all students, including student-athletes, must be subject to the same procedures to handle sexual assault claims.<sup>172</sup> The detailed requirements to address sexual assault imposed upon schools by the policy guidance contrasted sharply with the high bar to individual recovery of damages posed by the U.S. Supreme Court cases of the late 1990s.

Meanwhile, the OCR pivoted to a much more aggressive policy of pursuing institutions that failed to meet their obligations in handling sexual assault claims.<sup>173</sup> The publication of official settlements negotiated by the OCR in 2010 with two schools—Notre Dame College of South Euclid, Ohio and Eastern Michigan University of Ypsilanti, Michigan—signaled a new era in the approach to the administration of sexual assault claims under Title IX.<sup>174</sup> As part of these measures, schools were required to develop procedures to handle sexual assault allegations, designate Title IX coordinators, and train personnel how to investigate and resolve claims.<sup>175</sup> Assistant Secretary of Education Russlyn Ali cited these changes as part of an ambitious plan to “change the culture on the college campuses” and “cure the epidemic of sexual violence on our college campuses across the country.”<sup>176</sup> It was in 2012, as this period came to a close, that the “Fierce Five” U.S. Olympic Gymnastics team won a gold medal in London,<sup>177</sup> with Larry Nassar as team physician.<sup>178</sup>

## VI. TITLE IX: THE FIFTH DECADE 2013–2022

The second decade of the new millennium found the nation reeling from the Boston Marathon bombing<sup>179</sup> and a congressional fight over the Affordable Care Act that shut down the federal government

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172. *See id.*

173. *See* Kristen Lombardi, *Education Department touts settlement as ‘model’ for campus sex assault policies*, CTR. FOR PUBLIC INTEGRITY (Dec. 8, 2010), <https://publicintegrity.org/education/education-department-touts-settlement-as-model-for-campus-sex-assault-policies/> [<https://perma.cc/2PM7-ZYC3>].

174. *See id.*

175. *See id.*

176. *Id.*

177. *See* Olympic Talk, *How the Fierce Five Olympic gymnastics team got its nickname*, NBC SPORTS (Apr. 16, 2020, 10:50 AM), <https://olympics.nbcsports.com/2020/04/16/fierce-five-olympic-gymnastics-team-nickname/> [<https://perma.cc/JW9R-CGGP>].

178. *See* Lansing State J. & IndyStar, *Who Is Larry Nassar? A Timeline of His Decades-Long Career, Sexual Assault Convictions and Prison Sentences*, USA TODAY, <https://www.usatoday.com/pages/interactives/larry-nassar-timeline/> [<https://perma.cc/446G-YUYC>] (last visited Nov. 18, 2022).

179. *See* *Boston Marathon Bombing*, HISTORY (June 7, 2019), <https://www.history.com/topics/21st-century/boston-marathon-bombings/> [<https://perma.cc/DQK2-E6V7>].

due to lack of funding.<sup>180</sup> The U.S. Supreme Court struck down a provision in a federal law that defined marriage as exclusively between heterosexual couples.<sup>181</sup> In 2014, the first Title IX allegation was brought against Larry Nassar by a Michigan State student, only to have Nassar cleared of misconduct.<sup>182</sup> Over the course of the next several years, however, collegiate athletics would be rocked by numerous revelations of serial sexual assault and abuse on campuses including Michigan State University,<sup>183</sup> The Ohio State University,<sup>184</sup> the University of Southern California,<sup>185</sup> Baylor University,<sup>186</sup> and the University of Michigan.<sup>187</sup> #MeToo became the rallying cry for women across the country who had experienced sexual assault and found support on social media as they came forward to hold their attackers accountable.<sup>188</sup> The LGBTQ+ movement would gain strength, with the U.S. Supreme Court legalizing same sex marriages in *Obergefell v. Hodges*.<sup>189</sup> Amidst these significant social dynamics, the political discourse became increasingly contentious,<sup>190</sup> building up to the election of Donald Trump as president in 2016,<sup>191</sup> and

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180. See Remarks by the President on the Affordable Care Act and the Government Shutdown, WHITE HOUSE (Oct. 1, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/10/01/remarks-president-affordable-care-act-and-government-shutdown> [<https://perma.cc/4LDP-3CHP>].

181. See *U.S. v. Windsor*, 570 U.S. 744, 775 (2013).

182. See Wajeeha Kamal, *A timeline of Nassar's abuse, charges and Michigan State's response*, THE STATE NEWS (Jan. 26, 2021), <https://statenews.com/article/2021/01/a-timeline-of-nassar-abuse-charges-and-michigan-states-response> [<https://perma.cc/J44G-AKQN>].

183. See *id.*

184. See NPR, *Lawsuits Against Ohio State University Over Sex Abuse By A Team Doctor Are Dismissed*, ASSOC. PRESS (Sept. 22, 2021, 7:28 PM), <https://www.npr.org/2021/09/22/1039899108/ohio-state-sex-abuse-doctor-richard-strauss> [<https://perma.cc/2EFD-PE6N>].

185. See Marjorie Valbrun, *Education Dept. Penalizes University of Southern California*, INSIDE HIGHER ED (Feb. 28, 2020), <https://www.insidehighered.com/news/2020/02/28/education-department-investigation-finds-university-southern-california-violated?v2> [<https://perma.cc/6U8U-F2KQ>].

186. See Nicole Chavez & Jay Croft, *Ex-frat leader's plea deal is the latest in a series of Baylor sex assault scandals*, CNN (Dec. 12, 2018, 3:58 PM), <https://www.cnn.com/2018/12/12/us/baylor-sex-assault-cases-timeline/index.html> [<https://perma.cc/KHV4-D5AT>].

187. See Samuel Dodge, *Timeline of the Dr. Robert Anderson abuse scandal at University of Michigan*, MLIVE (Jan. 2, 2022, 9:00 AM), <https://www.mlive.com/news/ann-arbor/2022/01/timeline-of-the-dr-robert-anderson-abuse-scandal-at-university-of-michigan.html> [<https://perma.cc/LP8L-KQSX>].

188. See Tarana Burke, *History & Inception*, ME TOO., <https://metoomvmt.org/get-to-know-us/history-inception> [<https://perma.cc/85TW-W7UG>] (last visited Nov. 18, 2022).

189. See *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

190. See *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/W5JJ-BNAF>].

191. See Megan McRaney, *Political polarization paved way for Trump, will continue into 2020 race*, EMORY UNIV. (June 29, 2018), [https://news.emory.edu/stories/2018/06/er\\_abramowitz\\_grat\\_alignment/campus.html](https://news.emory.edu/stories/2018/06/er_abramowitz_grat_alignment/campus.html) [<https://perma.cc/S4NJ-UFWH>].

culminating in the January 6, 2021, assault on the U.S. Capitol by protestors attempting to overturn the election of incoming President Joe Biden.<sup>192</sup>

The second Obama Administration continued to utilize Title IX to address sexual assault and discrimination on college campuses and in schools across the country. The White House Council on Women and Girls created the White House Task Force to Protect Students from Sexual Assault in 2014.<sup>193</sup> The Task Force published *A Guide for College Presidents, Chancellors and Senior Administrators* to provide a blueprint for action to prevent sexual violence on campuses.<sup>194</sup> Also in 2014, the OCR issued a document—Questions and Answers on Title IX and Sexual Violence—which further built upon the 2011 Dear Colleague Letter.<sup>195</sup> This expanded effort to effect broad-based change to deter sexual assault and harassment on school and college campuses and to respond with empathy to victims incorporated several new elements that would provoke controversy for many years to come. Some of the provisions implemented to encourage reporting of sexual assault and harassment included: 1) procedures that discouraged live testimony and cross-examination of complainants;<sup>196</sup> 2) allowing utilization of a single investigator model, in which one person at an institution was responsible for investigating as well as resolving sexual assault or discrimination allegations;<sup>197</sup> 3) imposition of a preponderance of the evidence standard for determining responsibility;<sup>198</sup> 4) expanding the definition of sexual harassment to include speech, emails, and rumors;<sup>199</sup> and 5) requiring schools to institute continuous programming designed to educate students, faculty, and staff about sexual assault and harassment, as well as to deter it.<sup>200</sup> Although no institution lost federal funding as a result of the newly aggressive enforcement

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192. See Scott MacFarlane & Cassidy McDonald, *January 6 timeline: Key moments from the attack on the Capitol*, CBS NEWS (Jan. 7, 2022, 7:35 AM), <https://www.cbsnews.com/live-updates/january-6-capitol-riot-timeline-key-moments> [<https://perma.cc/VQ6W-2ELR>].

193. See WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, THE SECOND REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 3 (Jan. 5, 2017), <http://www.changingourcampus.org/resources/not-alone/Second-Report-VAW-Event-TF-Report.PDF> [<https://perma.cc/3SCP-XCBT>].

194. See *infra* Appendix A.

195. See OFF. FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 29, 2014) (rescinded), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/KVS5-JYJ2>].

196. See *id.* at 31.

197. See *id.* at 10–13.

198. See *id.* at 13.

199. See *id.* at 3.

200. See *id.* at 38.



of Title IX,<sup>201</sup> several were subjected to expensive investigations by the OCR.<sup>202</sup>

The Obama-era Title IX policies, together with the #MeToo movement, increasing awareness of the vulnerability of the LGBTQ+ population to sexual assault and the well-publicized serial sexual assault scandals at high-profile universities certainly increased public awareness of the rampant epidemic of sexual assault and harassment, including at institutions subject to Title IX. Unfortunately, however, the measures taken in response by the OCR had some fundamental flaws.

In the effort to provide a more welcoming forum for those victimized by sexual assault, the OCR's new protocols placed sexual assault respondents at a significant disadvantage. Although the NCAA is a private association,<sup>203</sup> many of its members are public institutions.<sup>204</sup> Those institutions are therefore subject to due process and Fifth and Fourteenth Amendment requirements.<sup>205</sup> Consequently, when a student, staff or faculty member is the respondent to an allegation of sexual assault that carries the potential of loss of educational opportunity, scholarship—in the case of a student-athlete, in particular—or employment, the constitutional right to confront and cross-examine witnesses should be protected. Similarly, given the potential ramifications of a negative outcome, the single investigator model in which a single person serves as prosecutor, judge, and jury is highly problematic. Finally, the use of the preponderance of the evidence standard (or essentially a finding of 51 percent probability of fault) is inappropriate given the seriousness of the allegations and the potential ramifications in any associated civil or criminal cases that may arise. Obviously, however, these protections have to be balanced with the very sensitive nature of sexual assault and harassment claims and the important policy objective of fostering

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201. See Paige Sutherland, Kimberly Atkins Stohr & Tim Skoog, *Title IX, 50 years later: Why female athletes are still fighting for equality*, WBUR (June 23, 2022), <https://www.wbur.org/onpoint/2022/06/23/title-ix-50-years-later-why-female-athletes-are-still-fighting-for-equality> [<https://perma.cc/LH47-GMWA>].

202. See Max Larkin, *The Obama Administration Remade Sexual Assault Enforcement on Campus. Could Trump Unmake It?*, WBUR (Nov. 25, 2016), <https://www.wbur.org/news/2016/11/25/title-ix-obama-trump> [<https://perma.cc/TFT6-X4CP>].

203. See *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

204. See NAT'L COLLEGIATE ATHLETIC ASS'N, INSTITUTIONAL CHARACTERISTICS OF NCAA MEMBER SCHOOLS EXECUTIVE SUMMARY (2017), [https://ncaaorg.s3.amazonaws.com/research/demographics/2017RES\\_institutionalcharacteristicsSummary.pdf](https://ncaaorg.s3.amazonaws.com/research/demographics/2017RES_institutionalcharacteristicsSummary.pdf) [<https://perma.cc/NLW4-DD5W>].

205. See *Due Process and the NCAA: Hearing Before the H.R. Subcomm. on the Const. of the Comm. on the Judiciary*, 108 Cong. 30 (2004) (statement from the U.S. Government Printing Office).

a climate that is supportive of victims and encourages reporting of these incidents.

Predictably, the Obama-era approach resulted in numerous lawsuits brought by respondents claiming that their due process rights had been violated, that the institution had failed to follow its own procedures, or that a wrongful disciplinary action had been taken in violation of Title IX, as well as assorted other claims.<sup>206</sup> The 2016 Republican Party Platform rejected the extension of Title IX protections to the LGBTQ+ community and rebuked the Obama approach: “The Administration’s distortion of Title IX to micromanage the way colleges and universities deal with allegations of abuse contravenes our country’s legal traditions and must be halted before it further muddles this complex issue and prevents the proper authorities from investigating and prosecuting sexual assault effectively with due process.”<sup>207</sup>

Following Trump’s election, incoming Secretary of Education, Betsy DeVos, quickly withdrew the 2011 Dear Colleague Letter and the Questions and Answers guidance from 2014 via yet another Dear Colleague Letter in 2017.<sup>208</sup> Once again, the implementation of Title IX was subject to the shifting political landscape, leaving administrators, faculty, students, and staff in uncertainty for over three years as Secretary DeVos embarked upon an ambitious attempt to create new regulations under Title IX addressing sexual assault and harassment.<sup>209</sup> After numerous hearings, considerable public comment and significant criticism,<sup>210</sup> the new regulations were finally issued in May 2020 with an effective date of August 14, 2020, overwhelming school and college administrators who were struggling with the many concerns associated with the COVID-19 epidemic.<sup>211</sup>

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206. See, e.g., *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016); *Collick v. William Paterson Univ.*, No. 16-471(KM)(JBC), 2016 WL 6824374 (D.N.J. Nov. 17, 2016); see also *Doe v. Cornell Univ.*, No. EF2017-0146, 2017 WL 8229500 (N.Y. Sup. Ct. Dec. 15, 2017).

207. See REPUBLICAN PLATFORM 2016, *Title IX* 35, [https://prod-cdn-static.gop.com/media/documents/DRAFT\\_12\\_FINAL%5b1%5d-ben\\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5b1%5d-ben_1468872234.pdf) [<https://perma.cc/N92L-PCX9>].

208. See OFF. FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: NOTIFICATION OF WITHDRAWAL (Sept. 22, 2017) (rescinded), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [<https://perma.cc/B2X9-8XNQ>].

209. See Ellen Cranley, *Betsy DeVos released a proposal to overhaul Title IX that would bolster the rights for those accused of sexual misconduct*, BUSINESS INSIDER (Nov. 16, 2018, 11:58 AM), <https://www.businessinsider.com/betsy-devos-proposed-a-sexual-assault-rule-title-ix-overhaul-protecting-accused-2018-11> [<https://perma.cc/N4MJ-9Z3Y>].

210. See Laura Meckler & Susan Svrluga, *Nearly 100,000 comments on Betsy DeVos’s plan to overhaul rules on sexual assault probes*, WASH. POST (Jan. 30, 2019, 7:10 PM), [https://www.washingtonpost.com/local/education/nearly-100000-comments-on-betsy-devos-plan-to-overhaul-rules-on-sexual-assault-probes/2019/01/30/ce441956-24b9-11e9-ad53-824486280311\\_story.html](https://www.washingtonpost.com/local/education/nearly-100000-comments-on-betsy-devos-plan-to-overhaul-rules-on-sexual-assault-probes/2019/01/30/ce441956-24b9-11e9-ad53-824486280311_story.html) [<https://perma.cc/VXJ4-XZR2>].

211. See Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*,

The final regulations included many changes to the prior approach, including: 1) allowing postsecondary institutions to elect whether to have mandatory reporting for all employees;<sup>212</sup> 2) redefining sexual harassment to require “severe *and* pervasive,” rather than “severe *or* pervasive” conduct;<sup>213</sup> 3) allowing schools to choose either the preponderance of the evidence or a clear and convincing standard for Title IX hearings;<sup>214</sup> 4) requiring live hearings with cross-examination of witnesses at the postsecondary level;<sup>215</sup> and 5) limiting the responsibility of institutions for off-campus incidents.<sup>216</sup> Although many Title IX coordinators took the position that the new regulations were “a floor, not a ceiling,” certainly the diametric change in approach to Title IX enforcement sent shock waves through campuses across the country.<sup>217</sup> As the 2020 election approached, it was clear that the role of Title IX in protecting the rights of girls and women in education as a whole, and athletics in particular, would be determined by the outcome.

On President Joe Biden’s first day in office, he signed an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.<sup>218</sup> The order specifically affirmed that the U.S. Supreme Court’s decision in *Bostock v. Clayton County*,<sup>219</sup> including LGBTQ+ individuals in protection against discrimination on the basis of sex for the purposes of Title VII, also applies to Title IX.<sup>220</sup> Further, President Biden directed Education Secretary Miguel Cardona to conduct a comprehensive review of existing regulations, policies and directives that conflict with the imprimatur of Title IX.<sup>221</sup> Shortly thereafter, the OCR published a

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INSIDE HIGHER ED (May 7, 2020), <https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations?v2> [<https://perma.cc/D29K-CCLV>].

212. See OFF. FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., SUMMARY OF MAJOR PROVISIONS OF THE DEP’T OF EDUC. TITLE IX FINAL RULE 1 (2020), <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf> [<https://perma.cc/E86V-RGZY>].

213. *Id.* (emphasis in original).

214. *See id.* at 5.

215. *See id.* at 6–7.

216. *See id.* at 2.

217. Madison Pauly, *Betsy DeVos Rewrote Campus Sexual Assault Rules, But Survivor Activists Aren’t Backing Down*, MOTHER JONES (Aug. 27, 2020), <https://www.motherjones.com/politics/2020/08/devos-campus-sexual-assault-title-ix/> [<https://perma.cc/U3DA-YTRL>].

218. *See Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, WHITE HOUSE BRIEFING ROOM (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation> [<https://perma.cc/L43X-DXRV>].

219. *See Bostock v. Clayton Cnty.*, 590 U.S. 140 (2020).

220. WHITE HOUSE BRIEFING ROOM, *supra* note 218.

221. *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, WHITE

document, Q&A: Questions and Answers on the Title IX Regulations on Sexual Harassment,<sup>222</sup> which expanded the ways in which schools could be considered to be on notice of incidents<sup>223</sup> and emphasized that the DeVos-era requirements are minimum standards with schools having the authority to investigate beyond those parameters.<sup>224</sup>

On the fiftieth anniversary of Title IX, June 23, 2022, the U.S. Department of Education finally released 700 pages of new proposed regulations.<sup>225</sup> The proposed regulations effectively overturned almost all of the DeVos era regulations that became effective less than two years previously. In particular, the proposed regulations: 1) reinstate the applicability of Title IX to off-campus sites, including institutional programs abroad;<sup>226</sup> 2) require mandatory reporting by all institutional employees who become aware of sexual discrimination;<sup>227</sup> 3) expand institutional responsibility for complaints filed after a student leaves a program due to discrimination;<sup>228</sup> 4) withdraw the requirement of mandatory cross-examination and live hearings;<sup>229</sup> 5) allow students to elect to participate in hearings remotely;<sup>230</sup> 6) require use of the preponderance of the evidence standard in hearings unless the institution utilizes the clear and convincing standard in all other similar proceedings;<sup>231</sup> 7) require institutions to investigate reports of sexual discrimination even if a formal complaint has not been filed, and address any discriminatory issues discovered;<sup>232</sup> 8) specifically extend the protections of Title IX to pregnancy and pregnancy-related conditions, such as lactation;<sup>233</sup> and 9) explicitly

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HOUSE (Mar. 8, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity> [https://perma.cc/FQ4C-DAC7].

222. OFF. FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS & ANSWERS ON THE TITLE IX REGULATIONS ON SEXUAL HARASSMENT (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf> [https://perma.cc/EXZ8-AUK3] (updated June 28, 2022).

223. *See id.* at 10–11.

224. *See id.* at 3.

225. *See* U.S. DEP'T OF EDUC., *The U.S. Dep't of Educ. Releases Proposed Changes to Title IX Reguls., Invites Public Comment* (June 23, 2022), <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment> [https://perma.cc/29TV-NNH4].

226. *See* U.S. DEP'T OF EDUC., FACT SHEET: U.S. DEPARTMENT OF EDUCATION 2022 PROPOSED AMENDMENTS TO ITS TITLE IX REGULATIONS, <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf> [https://perma.cc/H42Y-T5CA] (last visited Nov. 18, 2022).

227. *See id.* at 2.

228. *See id.*

229. *See id.* at 3.

230. *See id.* at 1.

231. *See id.* at 3.

232. *See* U.S. DEP'T OF EDUC., *supra* note 226, at 2.

233. *See id.*

apply Title IX to the LGBTQ community.<sup>234</sup> Of note, the proposed regulations do *not* address the application of Title IX to transgender participation in athletics.<sup>235</sup> The Department of Education stated that this matter will be addressed in subsequent proposed regulations to be issued at some future date.<sup>236</sup>

In the interim, twenty state attorneys general have stated their intention to sue the Department of Education in an effort to “safeguard the integrity of women’s sports” by prohibiting transgender women from participating in competition.<sup>237</sup> And so, as Title IX approaches the half-century mark, the controversy over its scope and application continues to impede consistent widespread provision of equality of opportunity for women and girls at educational institutions in general and in athletics in particular.

#### VII. THE METRICS: OPPORTUNITIES FOR WOMEN IN COLLEGIATE COACHING & ATHLETIC ADMINISTRATION

Nowhere is the inequity more apparent than in the realm of collegiate coaching. According to the Gender Bias and Coaches of Women’s College Sports Report, in 1972 before the incorporation of women’s sports into the NCAA, women’s teams were coached by more than ninety percent females.<sup>238</sup> By 2014, only forty-three percent of women’s teams were coached by women, and less than three percent of the coaches of men’s teams were women.<sup>239</sup> In 1971–1972, 32,000 women were participating in college sports compared with 224,000 in 2019–20.<sup>240</sup> This means before 1972 only approximately fifteen percent of intercollegiate athletic participants were women.<sup>241</sup> This number doubled to 30.8 percent in 1984.<sup>242</sup> Prior to Title IX, colleges offered an average of 2.5 intercollegiate sports for women;<sup>243</sup>

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234. *See id.* at 3.

235. *See id.*

236. *See id.*

237. *See* Jonathan Matisse, *20 states sue over Biden admin school, work LGBT protections*, ASSOC. PRESS NEWS (Aug. 30, 2021), <https://apnews.com/article/sports-business-us-supreme-court-c462bcdd2ef65573712a916177e1ca32> [<https://perma.cc/5FJB-WMUM>].

238. *See* WOMEN’S SPORTS FOUND., *BEYOND X’S & O’S: GENDER BIAS & COACHES OF WOMEN’S COLLEGE SPORTS 2* (2016), <https://files.eric.ed.gov/fulltext/ED570470.pdf> [<https://perma.cc/Q2WW-JVZC>].

239. *See id.*

240. *See* Ken Reed, *Title IX at 50: Time to Celebrate and Rededicate*, LEAGUE OF FANS (June 23, 2022), <https://www.leagueoffans.org/2022/06/23/title-ix-at-50-time-to-celebrate-and-rededicate> [<https://perma.cc/44T4-GY2T>].

241. *See* Wilde, *supra* note 97, at 220.

242. *See id.* at 220–21.

243. *See id.* at 229–30.

by 1977 that number rose to 5.6<sup>244</sup> and in 1984 it increased even farther to 6.9.<sup>245</sup> Between 1984 and 1988, there were 450 new NCAA women's teams created<sup>246</sup> and the average number of women's teams offered by colleges in 1988 was 7.3.<sup>247</sup>

Unfortunately, however, the significant increase in opportunities for women student-athletes did not translate into a corresponding growth in opportunities for women coaches. The number of women serving as head coaches for Division 1 (D1) women's basketball programs between 2007–2008 and 2021–22 averaged approximately sixty-two percent,<sup>248</sup> ranging from a low of fifty-six percent in 2015–2016 to a high of seventy percent in 2021–22.<sup>249</sup> This disappointingly skewed population belies the fact that there are currently qualified women in the coaching pipeline serving as assistant coaches in D1 women's programs. During the 2021–22 season, the percentage of women assistant coaches in D1 programs ranged from 58.3 percent in the Sun Belt Conference (SBC) to seventy-five percent in the Appalachian Athletic Conference (AAC).<sup>250</sup>

Even more concerning is the significant disparity in coaching salaries by gender. The average salary of the head coach of a women's D1 basketball program in 2021–2022 was \$750,000, and the average salary of the head coach of a men's D1 basketball program for the same season was \$3,004,593—or approximately 400 percent *more*.<sup>251</sup> This statistic is especially troubling because there were no women serving as head coaches for any D1 men's basketball program, meaning that they are effectively precluded from this compensation level. Male head coaches even earned more than their female counterparts when coaching women's D1 programs, with an average salary of \$785,000 compared to \$733,000—a difference of \$52,000 annually.<sup>252</sup> Although *USA Today* lauded the increase in compensation for women's basketball coaches,<sup>253</sup> it is clear there is still a vast

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244. *See id.* at 230.

245. *See id.*

246. *See id.*

247. *See* Wilde, *supra* note 97, at 230.

248. *See infra* Appendix A.

249. *See infra* Appendix B.

250. *See infra* Appendix E.

251. *See* Lindsay Schnell, Erick Smith & Steve Berkowitz, *'Tip of the iceberg': Pay for women's college basketball coaches is skyrocketing. How high can it go?*, USA TODAY (Mar. 11, 2022), <https://sports.yahoo.com/tip-iceberg-pay-women-college-152336435.html?src=rss> [<https://perma.cc/9QEX-YWA7>]; *see also infra* Appendix F; Appendix G.

252. *See* Schnell, Smith & Berkowitz, *supra* note 251; *see also infra* Appendix I.

253. *Salaries are booming as paydays grow quickly for women's college basketball coaches*, USA TODAY (Mar. 11, 2022, 2:25 PM), <https://www.usatoday.com/story/sports/ncaaw/2022/03/11/salaries-women-ncaa-basketball-coaches-growing/9432776002> [<https://perma.cc/QG6P-MTXA>].

and gendered disparity in the earning capacity of coaches in men's basketball programs as compared to, and even within, women's D1 basketball programs. This is illustrated further by the difference in the total amount of compensation paid out by the various conferences to the coaches of the men's and women's basketball programs. The difference exceeded \$30 million in each of the Southeastern Conference (SEC), the Big 10, the Atlantic Coast Conference (ACC), and the Big 12—at \$39,046,908.<sup>254</sup>

Not surprisingly, this corresponds with the total expenses incurred for the respective men's and women's D1 basketball programs across the conferences. With roughly equal undergraduate enrollment percentages, in each of the ACC,<sup>255</sup> the Big Twelve,<sup>256</sup> the Big Ten,<sup>257</sup> the PAC-12,<sup>258</sup> and the SEC,<sup>259</sup> the expense of the men's basketball program as compared to the women's in 2003 ranged from 66.82 percent of the total of both programs (in the ACC) to 61.22 percent in the Big Twelve.<sup>260</sup> Similarly, the revenue earned by the men's teams in those conferences in 2003 relative to the overall percentage of the combined men's and women's programs ranged from 94.46 percent (Big Ten) to 84.43 percent (the Big Twelve).<sup>261</sup> Due to the COVID-19 pandemic, the statistics for 2020 were not comparable. Using the data from 2019, however, there was only incremental change, if any, in the relative investment in men's versus women's programs in these conferences.<sup>262</sup> In 2019, each of these conferences spent well in excess of sixty percent of the total amount of their basketball programs on the men's side of the house—with very minimal decreases in the relative proportion of revenue earned by the men's programs as compared to the women's.<sup>263</sup>

#### VIII. COMPARISON TO PROFESSIONAL SPORTS TEAMS

When looking at the progress made in the four major sports leagues compared with women's and men's basketball, the difference is shocking. One would believe that Title IX would cause there

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254. *Infra* Appendix J.

255. *See infra* Appendix K.

256. *See id.*

257. *See id.*

258. *See id.*

259. *See id.*

260. *See id.*

261. *See infra* Appendix M.

262. *See* Heather Dinich, *NCAA budget for men's basketball tournament almost twice as much as women's budget*, ESPN (Mar. 26, 2021), [https://www.espn.com/mens-college-basketball/story/\\_/id/31141363/ncaa-budget-men-basketball-tournament-almost-twice-much-women-budget](https://www.espn.com/mens-college-basketball/story/_/id/31141363/ncaa-budget-men-basketball-tournament-almost-twice-much-women-budget) [<https://perma.cc/W4GX-VLER>].

263. *See infra* Appendix L.

to be more women in collegiate sports coaching and administration than in professional sports. However, that is not the case. The organization charts of all teams across the four major sports leagues (National Football League (NFL), Major League Baseball (MLB), National Basketball Association (NBA), and National Hockey League (NHL)) were examined in March 2022 to determine if the sports industry had an isolated problem of getting women involved in higher level positions or if it was a societal issue.<sup>264</sup> The names of all individuals who held a position with a vice president title or higher which were considered to be the front office were gathered. The attached Exhibit<sup>265</sup> was used to determine the percentage of women in each sports league in a front office position, which was then compared to the percentages of women in specific front office roles in sports to data from the Bureau of Labor Statistics<sup>266</sup> on people employed in the United States.

The league with the worst percentage of females was the National Football League.<sup>267</sup> The National Football League had 21.11 percent of women in front office positions.<sup>268</sup> The NFL does have a public Personal Conduct Policy that has been in place since 1997.<sup>269</sup> The Policy was then updated in 2007<sup>270</sup> and then revised again in 2014.<sup>271</sup> However, the Policy has not been revised since. The NFL also has the Rooney Rule,<sup>272</sup> which mandates that each team and the League must interview one minority candidate for a front office position. This policy does not guarantee that a minority will be hired, though. During this past off season only two non-white males were hired to fill seven vacant head coaching positions.<sup>273</sup> There

264. *See infra* Appendix P.

265. *See id.*

266. U.S. BUREAU OF LAB. STAT., WOMEN IN THE LABOR FORCE: A DATABOOK, BLS REPORTS (Mar. 2022), <https://www.bls.gov/opub/reports/womens-databook/2021/home.htm> [<https://perma.cc/LGP6-K9ZU>].

267. *See infra* Appendix O.

268. *Id.* While this Article was being written, the Baltimore Ravens and the Las Vegas Raiders each hired a woman president. Notably, Las Vegas Raiders President Sandra Douglass Morgan is the first Black woman to become president of an NFL franchise. *See Jacob Lev, Las Vegas Raiders hire Sandra Douglass Morgan as first Black female president in NFL history*, CNN (July 7, 2022, 10:06 PM), <https://www.cnn.com/2022/07/07/sport/nfl-raiders-president-first-black-woman-spt/index.html> [<https://perma.cc/3D27-TZ39>].

269. *See* Karisa Maxwell, *A Beginner's Guide to Understanding the NFL Personal Conduct Policy*, VICE (Dec. 8, 2015, 11:00 AM), <https://www.vice.com/en/article/qkg9q5/a-beginners-guide-to-understanding-the-nfl-personal-conduct-policy> [<https://perma.cc/93UA-DSDL>].

270. *See id.*

271. *See id.*

272. Noah Strackbein, *NFL Adopts Changes to Rooney Rule, Includes Women for First Time*, SPORTS ILLUSTRATED (May 19, 2020, 3:56 PM), <https://www.si.com/nfl/steelers/news/nfl-changes-rooney-rule> [<https://perma.cc/5K73-QW4K>].

273. Vinnie Iyer, *Ranking NFL's new head coaches: Jets, Eagles find best hires for*



were many qualified women and minorities passed over for less qualified white males.<sup>274</sup> This rule was changed in 2020 to include women and minorities.<sup>275</sup>

The league that ranked second worst for percentages of females in front office positions was the NHL, or National Hockey League. The NHL had 21.84 percent women in its front office positions.<sup>276</sup> The NHL is only slightly better than the NFL. In 2020, the NHL was considering implementing a Code of Conduct; however, this did not occur.<sup>277</sup> The NHL formed the Executive Inclusion Committee (EIC) in 2020, which focuses on decreasing racism and fostering diversity across the League.<sup>278</sup> The EIC also works to bring diversity into the front office. However, this program was just started in 2020,<sup>279</sup> so the results of the program are not showcased in this research.<sup>280</sup>

Major League Baseball, or MLB, has 22.17 percent females in front office positions.<sup>281</sup> In 2021, under the leadership of Michele Meyer-Shipp, the MLB updated its code of conduct following some incidents in the League involving harassment and discrimination.<sup>282</sup> Meyer-Shipp has created a sexual harassment policy that can be easily accessed online by the public, whereas all the other leagues except for the NFL have not publicized their efforts to address this

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2021; *Lions edge Texans for worst*, SPORTING NEWS (Jan. 29, 2021), <https://www.sportingnews.com/us/nfl/news/nfl-head-coach-rankings-best-worst-new-hires/8glmx885q8ii15cl60jtexkrm> [<https://perma.cc/6SD8-L2N7>].

274. Alex Reimer, *NFL Teams Egregiously Passing On Black Head Coaches Shows Rooney Rule Can't Change Biases*, FORBES (Jan. 22, 2021, 10:30 AM), <https://www.forbes.com/sites/alexreimer/2021/01/22/nfl-teams-egregiously-passing-on-black-head-coaches-shows-rooney-rule-cant-change-biases/?sh=7c9100b41802> [<https://perma.cc/KW9W-UX47>].

275. Kevin Patra, *NFL instituting changes to Rooney Rule*, NFL (May 18, 2020, 4:36 PM), <https://www.nfl.com/news/nfl-instituting-changes-to-rooney-rule> [<https://perma.cc/PG7F-3Z34>].

276. *Infra* Appendix O.

277. See Matt Ledger, *NHL Code of Conduct: Dawn of a New Era*, LAST WORD ON SPORTS (Jan. 9, 2020), <https://lastwordonsports.com/hockey/2020/01/09/nhl-code-of-conduct-dawn-of-a-new-era> [<https://perma.cc/8HYT-CMUR>].

278. Alex Kinkopf, *Gutierrez Named to Inclusion Council, Proud of NHL's 'Proactive Approach'*, NAT'L HOCKEY LEAGUE (Sept. 8, 2020), <https://www.nhl.com/coyotes/news/gutierrez-named-to-inclusion-council-proud-of-nhls-proactive-approach/c-318940296> [<https://perma.cc/MJF8-W3GR>].

279. See Ledger, *supra* note 277.

280. The NHL has recently seen an encouraging surge in the hiring of female assistant general managers. See, e.g., Tom Canavan, *NJ Devils Name Kate Madigan as Assistant GM, Becomes 6th Woman in NHL to Hold Title*, NBC N.Y. (July 7, 2022, 12:04 PM), <https://www.nbcnewyork.com/news/sports/nj-devils-name-kate-madigan-as-assistant-gm-becomes-6th-woman-in-nhl-to-hold-title/3765028> [<https://perma.cc/VSF8-65HG>].

281. See *infra* Appendix O.

282. See Alden Gonzalez, *MLB updates code of conduct pertaining to harassment, discrimination in wake of allegations*, ESPN (Feb. 9, 2021), [https://www.espn.com/mlb/story/\\_id/30869616/mlb-updates-code-conduct-pertaining-harassment-discrimination-wake-allegations](https://www.espn.com/mlb/story/_id/30869616/mlb-updates-code-conduct-pertaining-harassment-discrimination-wake-allegations) [<https://perma.cc/5D9S-YPJJ>].

issue.<sup>283</sup> The MLB also has a hotline for anonymous tips for employees or fans to report discrimination or harassment.<sup>284</sup> Additionally, the MLB presents the Katy Feeney Leadership Symposium for women executives in baseball during the Winter Meeting.<sup>285</sup> This Symposium is designed to support female employees in MLB while also creating opportunities for growth within the organization.<sup>286</sup> In 2017, the MLB created a new Front Office Diversity Initiative through its Diversity Fellowship Program.<sup>287</sup> This program selects college graduates from diverse backgrounds and helps participants develop skills necessary for front office positions.<sup>288</sup>

The sports league with the most women in the front office was the National Basketball Association (NBA). The NBA had 25.09 percent women in front office positions.<sup>289</sup> Even after the crisis at the Dallas Mavericks organization in 2017,<sup>290</sup> the NBA did not establish any League wide policies that must be followed by all teams. Following their crisis, the NBA had small group discussions with experts regarding sexual harassment.<sup>291</sup> Adam Silver encouraged teams to follow steps that were mandated for the Dallas Mavericks,<sup>292</sup> which had documented over twenty years of a toxic work environment,<sup>293</sup> but

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283. See MAJOR LEAGUE BASEBALL, *Major League Baseball Code of Conduct: Harassment and Discrimination*, <https://img.mlbstatic.com/mlb-images/image/upload/mlb/prhgf/bkes4p7rn0b6qaa.pdf> [<https://perma.cc/TQ8N-Q2C5>] (last visited Nov. 18, 2022).

284. See MAJOR LEAGUE BASEBALL, *MLB Harassment Policy*, <https://www.mlb.com/official-information/harassment-policy> [<https://perma.cc/5TQ6-DWAJ>] (last visited Nov. 18, 2022).

285. See J.R. Gamble, *Take The Field Steers Women Towards Careers In MLB*, SHADOW LEAGUE (Dec. 11, 2018), <https://theshadowleague.com/take-the-field-steers-women-towards-career-in-mlb> [<https://perma.cc/L92Y-V3WN>].

286. See *id.*

287. See *id.*

288. See *id.*

289. Marissa Egloff, Title IX Data, Professional Sports (2022) (unpublished dataset) (on file with author).

290. See Jon Wertheim & Jessica Luther, *Exclusive: Inside the Corrosive Workplace Culture of the Dallas Mavericks*, SPORTS ILLUSTRATED (Feb. 20, 2018), <https://www.si.com/nba/2018/02/21/dallas-mavericks-sexual-misconduct-investigation-mark-cuban-response> [<https://perma.cc/9D6W-4ZX4>].

291. Alana Glass, *Harassment Isn't New for Women in Sports. Is the NBA Finally Listening?*, FORBES (Feb. 27, 2018), <https://www.forbes.com/sites/alanaglass/2018/02/27/harassment-isnt-new-for-women-in-sports-is-the-nba-finally-listening/?sh=36f735357367> [<https://perma.cc/3BUD-898Y>].

292. Ben Rohrbach, *NBA memo 'strongly encourages teams to adopt new harassment policies'*, YAHOO SPORTS (Sept. 21, 2018), <https://sports.yahoo.com/nba-memo-strongly-encourages-teams-adopt-new-harassment-policies-183055474.html> [<https://perma.cc/S5PQ-J85D>].

293. Molly Evans, *Investigation Into Dallas Mavericks Reveals Sexual Misconduct Over 20 Years*, NPR (Sept. 19, 2018, 6:02 PM), <https://www.npr.org/2018/09/19/649615551/investigation-into-dallas-mavericks-reveals-sexual-misconduct-over-20-years> [<https://perma.cc/R7TG-7L4X>].

these measures were not required for other teams. The NBA also has a database of diverse candidates that it uses for hiring.<sup>294</sup> However, the NBA does not have a policy in place against sexual harassment or a policy to hire more women or minorities, which is very surprising considering they have the most women in front office positions.

Across all four leagues the team with the most women is the Atlanta Hawks with thirty women in front office positions.<sup>295</sup> The team with the second most number of women was the San Francisco Giants, with twenty-six women in front office positions.<sup>296</sup> The New Jersey Devils come in third with twenty-two women in front office positions.<sup>297</sup> Tied for fourth place are the Philadelphia Seventy-Sixers, the Washington Wizards, and the Jacksonville Jaguars.<sup>298</sup> The NFL team with the most women is the Jacksonville Jaguars, with twenty-one females in front office positions.<sup>299</sup> The Dallas Mavericks currently have sixteen females in front office positions.<sup>300</sup> The NFL team with the second highest number of women is the Philadelphia Eagles, with eighteen females in front office positions.<sup>301</sup> The NFL team with the third most females in the front office is the Detroit Lions with sixteen.<sup>302</sup> The Detroit Lions is one of only six teams with a female owner.<sup>303</sup> The other teams with female owners or CEOs in the NFL are the Buffalo Bills, the Tampa Bay Buccaneers, the New Orleans Saints, the Washington Football Team, and the Indianapolis Colts.<sup>304</sup>

The MLB, NHL, and NFL do not have any female coaches in the highest level coaching positions.<sup>305</sup> The coaching positions considered “high level” coaching position in the MLB are Manager, Bench Coach, Hitting Coach, Pitching Coach, First Base Coach, and Third Base Coach.<sup>306</sup> The coaching positions considered “high level” in the

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294. See Marc J. Spears, *The state of diversity and inclusion in NBA front offices*, THE UNDEFEATED (Mar. 9, 2020), <https://theundefeated.com/features/the-state-of-diversity-and-inclusion-in-nba-front-offices> [<https://perma.cc/U39Y-RLSQ>].

295. See *infra* Appendix P.

296. See *id.*

297. See *id.*

298. See *id.*

299. See *id.*

300. See *id.*

301. *Infra* Appendix P.

302. *Id.*

303. *Infra* Appendix Q.

304. *Id.*

305. *Infra* Appendix R.

306. In April, 2022, Rachel Balkovec became the first woman to manage an MLB affiliate, the Tampa Tarpons, a single A club affiliated with the New York Yankees. Rina Torchinsky, *Rachel Balkovec, the 1st woman to manage an MLB-affiliated team, debuts with a win*, NPR (Apr. 9, 2022, 2:10 PM), <https://www.npr.org/2022/04/09/1091879805/rachel-balkovec-the-1st-woman-to-manage-an-mlb-affiliated-team-debuts-with-a-win#>

NHL are Head Coach, Assistant Coaches, and Goaltending Coach. The coaching positions considered “high level” in the NFL are Head Coach, Special Teams Coordinator, Offensive Coordinator, and Defensive Coordinator. The NBA has five female coaches.<sup>307</sup> The coaching positions considered high level coaching positions in the NBA are Head Coach and Assistant Coaches.

The NFL has the Women’s Career in Football Forum that was started in 2017 to bring females into football operations positions.<sup>308</sup> Since the program started, 118 women have been hired in a wide array of positions.<sup>309</sup> This is a rare opportunity for females looking to get into coaching, scouting or operations positions. In 2019, the NBA partnered with the National Basketball Coaches Association to create a more inclusive pool of coaching candidates.<sup>310</sup> The NBA is clearly doing something correct in its coaching practices. It is possible that there are more female coaches in the NBA because of the Women’s National Basketball Association. The NBA may be the first league to have a female head coach, which could break multiple barriers for women coaches in all leagues.

The MLB has a Diversity Pipeline Program that was started in 2016.<sup>311</sup> Fifty-one women have been hired in full-time positions in baseball operations departments since the program started.<sup>312</sup> Lastly, the NHL has the NHL Coaches’ Association Female Coaches Development Program.<sup>313</sup> This program allows female coaches at the college level to connect with male coaches in the NHL and the AHL<sup>314</sup> and

:-:text=Press-.Rachel%20Balkovec%2C%20first%20woman%20to%20manage%20an%20MLB%2Daffiliated%20team,affiliated%20Tampa%20Tarpons%20on%20Friday [https://perma.cc/XR5A-FBX5].

307. *Infra* Appendix R.

308. See *Women’s Careers in Football Forum*, NAT’L FOOTBALL LEAGUE, <https://operations.nfl.com/inside-football-ops/community-impact/giving-back-to-nfl-communities/womens-careers-in-football-forum> [https://perma.cc/DG2C-HUQE] (last visited Nov. 18, 2022).

309. Hayley Elwood, *Careers in Football Forum Continuing to Make an Impact*, CHARGERS (Mar. 25, 2021), <https://www.chargers.com/news/2021-nfl-womens-careers-in-football-forum-impact> [https://perma.cc/HW4L-6WPJ].

310. See Jeff Zillgitt, *Becky Hammon’s shot at coaching raises question, when will NBA hire a woman as head coach?*, USA TODAY (Jan. 7, 2021, 11:55 AM), <https://www.usatoday.com/story/sports/nba/2021/01/06/nba-womens-assistant-coaches-becky-hammon-breakthrough/4141408001> [https://perma.cc/Q8CZ-G73Y].

311. Anthony Castrovine, *MLB sees continued increase in diversity*, MAJOR LEAGUE BASEBALL (Apr. 10, 2018), <https://www.mlb.com/news/major-league-baseball-increases-diversity-c271509694> [https://perma.cc/8BSS-W744].

312. *See id.*

313. See ASSOC. PRESS, *Emily Engel-Natzke joins Washington Capitals as NHL’s first woman video coach*, ESPN (June 30, 2022), [https://www.espn.com/nhl/story/\\_id/34173345/emily-engel-natzke-joins-washington-capitals-first-woman-nhl-video-coach](https://www.espn.com/nhl/story/_id/34173345/emily-engel-natzke-joins-washington-capitals-first-woman-nhl-video-coach) [https://perma.cc/5WEM-9A5Y].

314. See Amalie Benjamin, *Female hockey coaches benefit from NHL counterparts’ development program*, NAT’L HOCKEY LEAGUE (Mar. 29, 2021), <https://www.nhl.com/news>

provide the candidates with possible job opportunities.<sup>315</sup> This program started in 2020.<sup>316</sup> On June 30, 2022, Emily Engel-Natzke became the first woman to hold a full-time position on an NHL coaching staff when she was named video coach for the Washington Capitals.<sup>317</sup> The NHL is on the right path with creating opportunities for women coaches.

All four leagues are clearly struggling to make a change with the systemic problem of discrimination towards women. This is not a problem that is faced by the leagues alone; it is found in all industries. However, one positive of the sports leagues is they all have programs to try to get women into the front office and into coaching positions. Hopefully, these programs will help break the glass ceiling for women in sports, especially as diversity at the leadership table will lead to change in society as a whole. Diversity in the front office and in coaching would allow the sports leagues to create the best possible experience for their players, employees, and fans.

#### IX. LESSONS TO BE LEARNED: RECOMMENDATIONS FOR IMPROVEMENT

Clearly, the sports industry grapples with challenges in including girls and women in both participation and employment opportunities. Professional men's sports leagues have belatedly recognized the need to implement programs to develop and mentor qualified women for coaching and administrative positions. Still, progress has been painfully slow, and fraught with controversy and litigation.<sup>318</sup> Although Title IX has increased participation opportunities for women over the course of the last fifty years, the student-athlete experience, particularly at the collegiate level in elite conferences, remains far less than equitable in many settings.<sup>319</sup> Moreover, it is clear that

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[/female-hockey-coaches-benefit-from-nhl-counterparts-development-program/c-322898322](https://perma.cc/Z4Z4-QGHC) [https://perma.cc/Z4Z4-QGHC].

315. *Female Coaches Development Program*, NAT'L HOCKEY LEAGUE COACHES ASS'N, <https://www.nhlcoaches.com/female-coaches-development-program> [https://perma.cc/56PA-NBWM] (last visited Nov. 18, 2022).

316. *See id.*

317. *Emily Engel-Natzke makes history as NHL's first full-time female coach*, N.Y. POST (July 1, 2022, 7:11 PM), <https://nypost.com/2022/07/01/emily-engel-natzke-becomes-nhls-first-full-time-female-coach> [https://perma.cc/P9SZ-YDMC].

318. *See, e.g., Mike Fisher, Washington Owner Daniel Snyder Alleged Sexual Harassment Details Exposed by Ex-Employees in Congress*, FANNATION (Feb. 3, 2022, 3:31 PM), <https://www.si.com/nfl/commanders/news/washington-commanders-owner-daniel-snyder-alleged-sexual-harassment-congress> [https://perma.cc/XJX8-F95N].

319. Meredith Cash, *4 college basketball stars blasted the NCAA for the 'crazy' 2021 March Madness weight room scandal*, THE INSIDER (Mar. 15, 2022, 12:58 PM), <https://>

similar progress has not been made in establishing equity in employment for women within the coaching ranks of the NCAA. What should have been a call to reform in the 1993 Gender Equity Report instead vanished into the bowels of history. Persistent, intensive efforts by a dedicated team of researchers were required to interpret the actual Report,<sup>320</sup> although it was cited in many contemporaneous publications.<sup>321</sup> The Report's recitation of the many failures of Title IX at age twenty remain mostly current today, three decades later.

The primary problem with fair, consistent implementation of Title IX to address inequities in education, employment, and athletics is the political landscape within which it is enforced. Dear Colleague Letters, OCR guidance memos, and even regulations fall prey to the vacillations of political exigencies, as demonstrated by the current whipsaw from the Obama-era policies to the Trump OCR regulations and back to the emerging Biden Era revised regulations. The only way to protect against this constantly changing framework is to amend the actual legislation. Title IX itself should be revised to: 1) explicitly include athletics opportunities in educational institutions; 2) specifically apply to the NCAA and any other association composed of institutions that are recipients of federal funding; 3) incorporate a range of graduated penalties for violations; 4) require the OCR to conduct a minimum number of random audits of secondary schools and colleges on an annual basis; and, 5) eliminate the much-maligned Three-Part Test and require schools to crunch the numbers for proportional representation and program expenses on an every two year basis.

This could be implemented as follows. First, it is important in setting the tone for implementation and enforcement to explicitly state in the law itself that achieving gender equity in athletics is a key goal of the legislation. Without that overarching premise, much of the remaining structure loses credibility. Arguably, much of the troubled history of Title IX hinges upon the tenuous basis for its application to collegiate athletics from the beginning, which stalled its implementation for at least two decades.

Secondly, it is imperative that the NCAA, the National Federation of High School Athletic Associations, and any other governing body with authority over institutions receiving federal funds itself be subject to the same requirements. The NCAA's typical "pass the buck" approach

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[www.insider.com/college-basketball-stars-blast-ncaa-for-crazy-weight-room-scandal-2022-3](https://www.insider.com/college-basketball-stars-blast-ncaa-for-crazy-weight-room-scandal-2022-3) [<https://perma.cc/F8FD-SH5R>].

320. See *Gender Equity Report Card*, WOMEN'S SPORTS FOUND. (Nov. 5, 1997), [https://www.womenssportsfoundation.org/articles\\_and\\_report/gender-equity-report-card](https://www.womenssportsfoundation.org/articles_and_report/gender-equity-report-card) [<https://perma.cc/B7YY-ZQCF>].

321. See, e.g., Wilde, *supra* note 97, at 230.

in which it delegates responsibility to its member institutions inevitably causes its gender equity policies to ring hollow when it fails to hold itself to the same standards and ultimately renders it incapable of providing leadership in holding its members accountable.<sup>322</sup>

Third, although individuals have occasionally been successful in bringing suits under Title IX, it is fundamentally important to realize that *no* institution has ever been divested of federal funding as a result of noncompliance. The problem is that the sanction provided by law—which itself is explicitly subject to congressional review if implemented—is akin to the atomic bomb. Because the consequences are so dire, it is never used. A better approach would be to provide for graduated penalties depending upon the level of noncompliance and the impact of the violations upon gender equity in participation, equity and employment. As institutions and people respond to monetary incentives, a schedule of fines that corresponds to the program revenue at issue would be most likely to be effective.

Fourth, as individual lawsuits to compel compliance take years to resolve and often encounter standing issues, it is important that the OCR have the capacity to assess program compliance on a regular schedule. Random audits would be especially helpful in motivating those responsible for Title IX implementation to reach and sustain gender equity program wide. This would certainly require additional OCR staffing, but ultimately the practice should increase efficiency by allowing the OCR to focus upon preventative, as opposed to punitive, actions and encouraging the development of ongoing, constructive relationships between the OCR and the institutions to foster compliance.

Finally, as prongs two and three of the Three-Part Test have proven to be essentially useless, it is time to face reality and assist institutions in effectively achieving proportional representation in participation opportunities, employment (especially coaching positions), and expenses. Title IX should require institutions to assess each of these categories on a regular basis, report them to the OCR, and address deficiencies as needed. Due to the ebb and flow of student enrollment populations, personnel, and expenses, it would make more sense to require this assessment on a biennial basis, rather than annually. Instead of requiring athletic department

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322. See, for example, the NCAA investigation of Baylor for sexual harassment violations, in which the NCAA concluded that it could *not* hold Baylor responsible for conduct within the Athletic Department, ostensibly because similar conduct was occurring campus wide. See, e.g., Meghan Durham, *Baylor provided impermissible benefits and violated recruiting rules*, NCAA (Aug. 11, 2021), <https://www.ncaa.org/news/2021/8/11/general-baylor-provided-impermissible-benefits-and-violated-recruiting-rules.aspx> [<https://perma.cc/YX4X-PDZQ>].

personnel to frantically crunch numbers every October as they receive final enrollment figures for undergraduates, the reports should be compiled on at least a two-year cycle. The OCR should then review them in context, with regard to unusual events (e.g., whether the women's basketball team qualified for the Sweet 16, thereby skewing expenses one year) and addressing the data in a broader context of five- to ten-year periods. This perspective would also provide the basis for determining whether and to what extent penalties for any violations would be appropriate. Institutions which routinely disregard Title IX requirements over lengthy periods should face correspondingly larger penalties.

Much has changed since 1972. Unfortunately, in terms of equity for girls and women in education, athletics, and employment in sports, much remains the same. It is incumbent upon this generation to remedy the intrinsic flaws in the Title IX infrastructure that have prevented women from achieving their full potential for fifty years.



## APPENDIX

## APPENDIX A

DIVISION I WOMEN'S BASKETBALL HEAD COACHES<sup>323</sup>

Year	Male	Female
2007–08	36%	64%
2008–09	34%	66%
2009–10	34%	66%
2010–11	36%	64%
2011–12	38%	62%
2012–13	40%	60%
2013–14	41%	59%
2014–15	41%	59%
2015–16	44%	56%

## APPENDIX B

DIVISION I WOMEN'S BASKETBALL HEAD COACH<sup>324</sup>

Year	Male	Female
2017	41%	60%
2018	41%	6%
2019	38%	62%
2020	38%	62%
2021	36%	64%
2022	30%	70%

## APPENDIX C

DIVISION I WOMEN'S BASKETBALL ASSISTANT COACHES<sup>325</sup>

Year	Male	Female
2012	35%	65%
2021	33%	67%

323. *Among Division I Women's Basketball Head Coaches, Women on the Decline While Men Rise*, INFOGRAM, [https://infogram.com/gender\\_divide\\_in\\_womens\\_ncaa\\_division\\_i\\_head\\_basketball\\_coaches](https://infogram.com/gender_divide_in_womens_ncaa_division_i_head_basketball_coaches) [<https://perma.cc/6X22-DZQQ>].

324. *NCAA Demographics Database*, NAT'L COLLEGIATE ATHLETIC ASS'N (Dec. 2021), <https://www.ncaa.org/sports/2018/12/13/ncaa-demographics-database.aspx> [<https://perma.cc/D6PS-VEAR>].

325. *Id.*

APPENDIX D  
WOMEN'S BASKETBALL HEAD COACH SEX BY DIVISION<sup>326</sup>

<b>Division</b>	<b>Head Coach Sex</b>	<b>Percentage</b>
AAC	Female	82%
AAC	Male	18%
ACC	Female	64%
ACC	Male	36%
Big 10	Female	86%
Big 10	Male	14%
Big 12	Female	50%
Big 12	Male	50%
C USA	Female	64%
C USA	Male	36%
MAC	Female	58%
MAC	Male	42%
MWC	Female	55%
MWC	Male	45%
PAC-12	Female	83%
PAC-12	Male	17%
SBC	Female	69%
SBC	Male	31%
SEC	Female	79%
SEC	Male	21%

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326. Egloff, *supra* note 289, W/M Basketball Coaches.

APPENDIX E  
WOMEN'S BASKETBALL ASSISTANT COACH SEX BY DIVISION<sup>327</sup>

Conference	Percent Male	Percent Female
AAC	25.0%	75.0%
ACC	31.8%	68.2%
Big 10	34.1%	65.9%
Big 12	30.0%	70.0%
C USA	38.1%	61.9%
MAC	31.4%	68.6%
MWC	39.4%	60.6%
PAC-12	30.6%	69.4%
SBC	41.7%	58.3%
SEC	38.1%	61.9%

APPENDIX F  
WOMEN'S BASKETBALL HEAD COACH AVERAGE PAY<sup>328</sup>

<b>Average of School Pay</b>
743,833.49

APPENDIX G  
MEN'S BASKETBALL HEAD COACH AVERAGE PAY<sup>329</sup>

<b>Average of School Pay</b>
3,004,593.18

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327. *Id.*

328. *Women's Basketball Head Coach Salaries*, USA TODAY (Mar. 10, 2022, 10:24 AM), <https://sports.usatoday.com/ncaa/salaries/womens-basketball/coach> [<https://perma.cc/T3JA-9AQL>].

329. *Men's Basketball Head Coach Salaries*, USA TODAY (Mar. 15, 2022, 2:14 PM), <https://sports.usatoday.com/ncaa/salaries/mens-basketball/coach> [<https://perma.cc/VSB4-2XFF>].

APPENDIX H  
WOMEN'S BASKETBALL HEAD COACH SUM OF  
SCHOOL PAY BY CONFERENCE<sup>330</sup>

<b>Conference</b>	<b>Sum of School Pay</b>
SEC	12,790,261.00
Big Ten	9,898,223.00
ACC	6,954,405.00
PAC-12	6,744,856.00
Big 12	6,035,000.00
Big East	3,536,660.00
MAC	700,276.00
AAC	575,000.00
MAAC	536,097.00
WCC	490,337.00
ASUN	320,000.00
Summit	315,000.00
(blank)	300,019.00
MVC	300,000.00
OVC	276,708.00
S-Belt	262,500.00
Big South	216,000.00
Horizon	184,335.00
WAC	145,000.00
Ivy	N/A
Southern	N/A

APPENDIX I  
WOMEN'S BASKETBALL HEAD COACH SALARY  
MALE VS. FEMALE COACH<sup>331</sup>

<b>Sex</b>	<b>Average of School Pay</b>
F	721,193.09
M	782,774.96

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330. USA TODAY, *supra* note 328.

331. *Id.*

APPENDIX J  
MEN'S BASKETBALL HEAD COACH SUM OF  
SCHOOL PAY BY CONFERENCE<sup>332</sup>

Conference	Sum of School Pay
SEC	51,719,090.00
Big Ten	43,614,590.00
ACC	40,351,290.00
Big 12	39,650,408.00
Pac-12	29,300,983.00
Big East	17,171,538.00
AAC	5,350,000.00
WCC	2,139,244.00
ATL 10	1,722,950.00
MWC	1,400,000.00
WAC	643,903.00
MAC	406,147.00
MEAC	333,125.00
Summit	300,000.00
SWAC	255,000.00
MAAC	

APPENDIX K  
EXPENSES BY CONFERENCE FOR MEN'S AND WOMEN'S  
BASKETBALL IN 2003<sup>333</sup>

Conference	Men's Basketball Expense	Women's Basketball Expense
AAC	66.65%	33.35%
ACC	66.82%	33.18%
Big 12	61.22%	38.78%

332. USA TODAY, *supra* note 329.

333. *Equity in Athletics Data Analytics*, U.S. DEP'T EDUC. OFF. OF POSTSECONDARY EDUC., <https://ope.ed.gov/athletics/#> [<https://perma.cc/FAM5-MD7C>] (select "Download Custom Data" option; then search by conference, university or college within the conference, year, and "Basketball").

<b>Conference</b>	<b>Men's Basketball Expense</b>	<b>Women's Basketball Expense</b>
Big 10	63.63%	36.37%
C USA	57.11%	42.89%
MAC	55.49%	44.51%
MWC	62.58%	37.42%
PAC-12	63.72%	36.28%
SEC	63.98%	36.02%
SBC	58.90%	41.10%

APPENDIX L  
EXPENSES BY CONFERENCE FOR MEN'S AND WOMEN'S  
BASKETBALL IN 2019<sup>334</sup>

<b>Conference</b>	<b>Men's Basketball Expense</b>	<b>Women's Basketball Expense</b>
AAC	70.38%	29.62%
ACC	69.22%	30.78%
Big 12	65.46%	34.54%
Big 10	66.77%	33.23%
C USA	60.35%	39.65%
MAC	58.68%	41.32%
MWC	63.23%	36.77%
PAC-12	67.58%	32.42%
SEC	68.48%	31.52%
SBC	57.24%	42.76%

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334. *Id.*

APPENDIX M  
REVENUES BY CONFERENCE FOR MEN'S AND WOMEN'S  
BASKETBALL IN 2003<sup>335</sup>

<b>2003 Conference</b>	<b>Men's Basketball Revenue</b>	<b>Women's Basketball Revenue</b>
AAC	83.35%	16.66%
ACC	94.39%	5.61%
Big 12	84.43%	15.57%
Big 10	94.46%	5.54%
C USA	68.53%	31.47%
MAC	67.06%	32.94%
MWC	85.15%	14.85%
PAC-12	90.76%	9.24%
SEC	90.81%	9.19%
SBC	69.66%	30.34%

APPENDIX N  
REVENUES BY CONFERENCE FOR MEN'S AND WOMEN'S  
BASKETBALL IN 2019<sup>336</sup>

<b>2019 Conference</b>	<b>Men's Basketball Revenue</b>	<b>Women's Basketball Revenue</b>
AAC	71.71%	28.29%
ACC	86.09%	13.91%
Big 12	82.86%	17.14%
Big 10	91.56%	8.44%
C USA	62.64%	37.36%
MAC	58.87%	41.13%
MWC	69.19%	30.81%
PAC-12	87.90%	12.10%
SEC	87.56%	12.44%
SBC	58.49%	41.51%

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335. *Id.*

336. *Id.*

APPENDIX O  
LEAGUE TOTAL<sup>337</sup>

League	Percentage Females
NHL	21.84%
NFL	21.11%
MLB	22.17%
NBA	25.09%

APPENDIX P  
FEMALES BY TEAM<sup>338</sup>

Team	Number of Females VP or Higher
ATL Hawks	30
SF Giants	26
NJ Devils	22
JAC Jaguars	21
PHI Sixers	21
WAS Wizards	21
IND Pacers	20
SEA Mariners	19
CLE Cavaliers	19
PHI Flyers	19
PHI Eagles	18
BOS Red Sox	17
SD Padres	17
CLT Hornets	16
DAL Mavericks	16
DET Lions	16

337. Egloff, *supra* note 289.

338. Email from Marissa Egloff, Author, to Valerie Brankovic, Editor-in-Chief, WM. & MARY J. RACE, GENDER & SOC. JUST. (Sept. 21, 2022, 8:35 PM) (on file with author).



<b>Team</b>	<b>Number of Females VP or Higher</b>
NY Yankees	15
BALT Ravens	15
SEA Seahawks	15
LA Chargers	15
ATL Braves	15
LA Dodgers	15
TEX Rangers	15
WAS Nationals	15
CLE Indians	15
NY Mets	14
MINN Wild	14
MIN Vikings	14
MINN Twins	14
SF 49ers	14
WAS Capitals	14
MIL Bucks	13
TOR Blue Jays	13
NO Pelicans	13
SEA Kraken	13
HOU Astros	13
NASH Predators	12
WIN Jets	12
MIA Dolphins	12
LA Rams	12
CHI Bulls	12
OKC Thunder	12
MINN Timberwolves	12
MIL Brewers	12
CIN Reds	12

<b>Team</b>	<b>Number of Females VP or Higher</b>
PHI Phillies	12
UT Jazz	12
LA Clippers	11
NY Giants	11
BUF Sabres	11
CHI White Sox	11
DET Pistons	11
SAC Kings	11
MEM Grizzlies	11
TB Buccaneers	11
ORL Magic	11
GB Packers	11
PIT Penguins	11
CHI Blackhawks	11
TEN Titans	10
ANA Ducks	10
STL Blues	10
CLE Browns	10
NY Jets	10
BOS Celtics	10
OAK Athletics	10
NY Islanders	10
TB Lightning	10
CHI Bears	10
KC Royals	10
LA Kings	10
PHX Suns	10
GS Warriors	10
STL Cardinals	10

<b>Team</b>	<b>Number of Females VP or Higher</b>
LA Lakers	9
NO Saints	9
PHX Coyotes	9
HOU Rockets	9
IND Colts	9
CHI Cubs	9
PITT Pirates	9
POR Blazers	8
AZ D-backs	8
LV Raiders	8
LV Golden Knights	8
MIA Marlins	8
FL Panthers	8
DEN Broncos	8
AZ Cardinals	8
SA Spurs	7
TB Rays	7
BALT Orioles	7
DET Tigers	7
NY Knicks	6
COL Blue Jackets	6
BUF Bills	6
VAN Canucks	6
CIN Bengals	5
TOR Maple Leafs	5
COL Rockies	5
DEN Nuggets	5
BKN Nets	5
DAL Cowboys	5

<b>Team</b>	<b>Number of Females VP or Higher</b>
NE Patriots	5
HOU Texans	5
NY Rangers	5
MON Canadiens	5
DAL Stars	5
KC Chiefs	5
PIT Steelers	5
TOR Raptors	4
WAS Football Team	4
MIA Heat	4
OTT Senators	4
ATL Falcons	3
DET Redwings	3
CO Avalanche	3
CAR Hurricanes	3
CAL Flames	3
SJ Sharks	2
CAR Panthers	2
LA Angels	2
BOS Bruins	1
EDM Oilers	1

APPENDIX Q  
FEMALE CEO/OWNERS<sup>339</sup>

<b>League</b>	<b>Percentage Female CEO or Owner</b>
MLB	7.14%
NBA	5.00%
NFL	18.42%
NHL	8.11%

339. *Id.*

APPENDIX R  
FEMALE COACHES<sup>340</sup>

<b>League</b>	<b>Percentage of Female Coaches</b>
MLB	0.00%
NBA	2.81%
NFL	0.00%
NHL	0.00%

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340. *Id.*