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Fourteenth Amendment and Title IX

OBJECTIVES

Upon completing this chapter you will:

- 1) know that constitutional law uses a balancing system that recognizes the rights of the individual in relation to the rights of society;
- 2) have become aware of the relationship between the Fourteenth Amendment to the United States Constitution, Equal Protection Clause, and Title IX;
- 3) understand the concept of equity by enrollment;
- 4) be aware of how the courts view retaliation under Title IX; and
- 5) be conversant with sexual harassment, hostile environment, and quid pro quo.

INTRODUCTION

Public schools served as the agencies for race integration in the 1970s; collegiate and scholastic athletics became the agencies for sex integration beginning in the 1990s and remain so today. A review of laws, legal theories, governing structures, and court decisions will enable the professional to understand the factors that influence today's gender equity court decisions. This chapter will also consider sexual harassment under Title IX and those cases involving athletes.

LAW AND LEGAL THEORY

Laws governing equity in athletics are the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title IX, the Civil Rights Restoration Act of 1987, the Civil Rights Act of 1991, the Equity in Athletics Disclosure Act, and the 2011 changes in the implementing guidelines of Title IX. Disparate treatment and disparate impact (equity by enrollment) are found in many cases. These laws and theories were strengthened by the *Franklin v. Gwinnett* (1992) decision.

The Equal Protection Clause of the Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states that "no state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the law." An equal protection challenge must show that groups of people are being treated differently without justification. An equal protection challenge in scholastic and collegiate sport is a complaint by a group of people (women) that its members are being treated differently from others (men) in athletics and that no justification exists to warrant the difference in treatment. One woman or a group of women (class) may retain an attorney and bring a legal action against an educational institution that receives public funds (elementary, secondary, or college) for sex discrimination under the Fourteenth Amendment.

Oregon's Jerry Hunter is believed to have filed the first Fourteenth Amendment discrimination case in sport. Her filing was a defense to the crime of participating in competitive wrestling (*State of Oregon v. Hunter*, 1956). The court denied her constitutional claim, stating "that there should be at least one island on the sea of life reserved for men that would be impregnable to the assault of women" (458).

The following cases paved the way for Title IX of the Education Amendments of 1972. Note that the dates reported for these cases are settlement dates and that the impetus for the original filing occurred prior to the implementation of Title IX. *Brenden v. Independent School District* (1972, 1973), *Hollander v. Connecticut Interscholastic Athletic Conference, Inc.* (1972), *Reed v. Nebraska* (1972), and *Haas v. South Bend Community School Corporation* (1972) were cases that involved high school women requesting an opportunity to participate on men's teams when women's teams were not available. In many of these cases the school district was merely enforcing a league rule. In the *Brenden* case, the Eighth Circuit invalidated the association's policy of prohibiting women from participating in cross-country skiing, running, and tennis when no team existed for women. In the *Connecticut* case, Susan Hollander was denied an opportunity to run on the cross-country team. The court in the *Reed* case granted Debbie Reed's request to play golf. Haas, a golfer, requested and was denied a permanent injunction from the Indiana State League rule that prohibited women from playing on men's teams. The Supreme Court of Indiana reversed the trial court's decision, stating that the regulation, while fair on its face, was discriminating in effect because a women's program did not exist and thus, there was no opportunity for interscholastic competition. It should be noted that the requests were granted in Nebraska, Minnesota, and Indiana while the request in Connecticut was denied.

Morris, a tennis player, brought a similar action against the Michigan State Board of Education (*Morris v. Michigan State Board of Education*, 1973). The trial court issued an injunction; the state court of appeals affirmed. Similar situations were found in Kansas (*Gilpin v. Kansas State High School Activities Association*, 1973), Tennessee (*Carnes v. Tennessee Secondary School Athletic Association, et al.*, 1976), and Nebraska (*Bednar v. Nebraska School Activities Association*, 1976). Following the implementation of Title IX, issues of league mandates continued to be litigated in West Virginia (*Israel v. West Virginia Secondary School Activities Commission*, 1989), Illinois (*Libby v. South*

Inter-Conference Association, 1988, 1990), and Louisiana (*Habetz v. Louisiana High School Athletic Association*, 1988, 1990).

A number of young women attempted to gain membership in Little League Baseball and community recreation programs prior to the advent of Title IX. Ten-year-old Pamela Magill sought injunctive relief to be permitted to participate with males in the sport of Little League Baseball (*Magill v. Avonworth Baseball Conference, et al.*, 1973, 1975). Despite the absence of an alternative program for girls, the court dismissed the case. Success was achieved in a similar situation in which the Essex County National Organization for Women filed a class action suit on behalf of all girls 8 to 12 years of age who wanted to play Little League Baseball (*National Organization for Women v. Little League Baseball, Inc.*, 1974). In another case, "Pookie Fortin" received tremendous publicity as she gained entry to Little League Baseball (*Fortin v. Darlington Little League*, 1974, 1975). Fortin was denied access by the lower court, but the First Circuit reversed the lower court's decision.

Title IX of the Education Amendments of 1972

After considerable debate in Congress, Title IX became part of the Education Amendments of 1972. Title IX states that

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination, under any educational program or activity, receiving federal financial assistance. (20 USC Section 1681 [a])

Title IX, a federal statute, extended the principles articulated under the Fourteenth Amendment to all schools, public and private, that rely upon federal and/or state funds. Title IX is enforced by the Department of Education. Institutions in violation of Title IX are to have all federal funds withheld. Although there have been threats of withholding federal funds, the authors are not aware of an institution that has lost federal monies as a result of a Title IX violation. The result of a Supreme Court decision in 1979 (*Cannon v. University of Chicago*) enabled individuals to bring a cause of action under Title IX. In addition, Title IX was applied successfully to employment in *North Haven v. Bell* (1982).

In 1978, the Office of Civil Rights prepared a policy interpretation of Title IX. The final interpretation was published the following year. Under the topic of effective accommodations, the policy interpretation provided a three-part test that recommends the following:

- 1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollment; or
- 2) Where the members of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and

continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of the sex; or

- 3) Where the members of one sex are under-represented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program. (44 Fed. Reg. at 71,418)

In 2005, the Bush Administration recommended that prong three be satisfied by a survey to discover the interests and abilities of the female population. This was considered a good idea in light of the fact that women had been forced into the male sport model by the courts (*AIAW v. NCAA*, 1983, 1984). However, it was discovered that the surveys, in some situations, were used to suggest that women were not interested or did not have the physical skill to participate in the male-designed program and were therefore not interested in sport. Further, questions were raised as to the fact that Olympic Sports and sports such as golf and tennis that could provide professional career opportunities for both men and women were ignored. As of 2011, the United States Department of Education's Office of Civil Rights rescinded the 2005 clarification that allowed institutions to use only an Internet or an email survey to meet effective accommodations. While the survey continues to be used, it must be one aspect, not the exclusive method, of fulfilling prong three. Also, the system of evaluating non-returned surveys as an indication of lack of interest in sport has been stopped.

Complaints in the early days of Title IX were usually resolved within a school district or by an Office of Civil Rights. *Yellow Springs Exempted Village School District v. Ohio High School Athletic Association* (1981), *Gomes v. Rhode Island Interscholastic League* (1979), and *Petrie v. Illinois High School Association* (1979) were among the few complaints filed in the courts. In the *Yellow Springs* case, a school district brought an action against the Ohio High School Athletic Association, claiming that the Association rule prohibiting females from playing contact sports was unconstitutional and in violation of Title IX. When middle-school girls had successfully made the boys' basketball team, the school district was forced by the Ohio High School Athletic Association to eliminate the qualified girls or withdraw from the league. The United States District Court, Southern District of Ohio, ruled under the Constitution for the female student athletes; the court of appeals reversed the ruling. The court refused to rule on Title IX. It should be noted that this case contains a rich history of women's athletics.

Gomes (1979) and *Petrie* (1979) were cases involving men petitioning the courts, under Title IX, to be permitted to play on women's interscholastic volleyball teams. *Gomes*, a student at Rogers High School in Newport, Rhode Island, brought suit against the Rhode Island Interscholastic League while *Petrie's* action was against the Illinois High School Athletic Association. The United States District Court, District of Rhode Island, granted *Gomes* a preliminary injunction allowing him to play. The court established that *Gomes*, as an average volleyball player, would not disrupt the competitive level of the women's team, and he had successfully argued that his failure

to play would cause him irreparable harm. The defendants appealed the ruling. The United State Court of Appeals, First Circuit, addressed the case as rapidly as possible; Gomes was a senior graduating from high school with one volleyball game remaining in the season when the case was heard. The district court's judgment was vacated and the case was remanded for dismissal.

Petrie, a 16-year-old high school junior, was practicing with the volleyball team when he was informed by school officials that the league rules barred him from competition. The trial court "reasoned that the prohibitions against boys were classifications based on sex but were justified because they preserved, fostered and increased athletic competition for girls and prevented unfair competition that would arise from male dominance from the game" (*Petrie v. Illinois High School Association*, 1979, 857).

In an effort to divert attention from athletics, three cases—two in athletics (*Othen v. Ann Arbor School District*, 1981, 1982; *Bennett v. West Texas State University*, 1981, 1983, 1986) and one general college case (*Grove City College v. Bell*, 1982, 1983, 1984)—successfully petitioned the courts to make Title IX "program specific." The phrase "program specific" meant that only those programs receiving direct federal funding were under Title IX. Athletics, seldom financed with federal dollars, would no longer be under Title IX jurisdiction. The *Othen*, *Bennett*, and *Grove City* rulings brought to a halt the Title IX investigations of athletics and other areas by the Office of Civil Rights.

Disparate Treatment and Disparate Impact

Disparate treatment and disparate impact are employment discrimination legal theories that have influenced "equity in athletics" cases. These theories have been used in court decisions under the Fourteenth Amendment, Equal Protection Clause. They involve practices that appear neutral in their treatment of different groups but fall more harshly on one group than another (*Teamsters v. United States*, 1977). Disparate treatment is identified when evidence exists that there was discriminatory intent or that persons acted pursuant to a policy that is discriminatory on its face. The *Hazelwood* case provides a method of analysis for use in identifying patterns and practices of discrimination under disparate impact. The patterns and practices include history, statistics, procedures, and specific instances. Disparate impact theory in sport is "participation by enrollment" (*Hazelwood School District v. United States*, 1977). Disparate impact theory is the basis for analysis of sport participation legal violations under the Fourteenth Amendment to the U.S. Constitution and prong one of the Title IX statute.

To achieve equity in athletics under the theory of disparate impact, an institution of higher education or secondary school must show that the percentage of females and males given the opportunity to play in sport is the same as the percentage of males and females attending the institution. For example, the figures for an institution with a student body of 16,000 students (9,600 females and 6,400 males) with 600 berths in competition (with 300 under scholarship) are noted in Table 6.1.

	Enrollment	Participation	Berths	Full Scholarships
Males	6,400	40%	240	120
Females	9,600	60%	360	180
Total	16,000	100%	600	300

Under a disparate impact theory, all opportunities are to be equal for the athletes. Budgets are to reflect the cost of supporting teams of equal levels of competition. If it costs less to maintain a synchronized swimming team at an elite level of competition than to maintain a football team at the same level, the budgets required to keep each team at an elite level of competition are considered the comparable budgets. Trainers, choreographers, assistant coaches, and others are to be provided to enable males and females to achieve an elite level of recognition in their respective sports.

The Civil Rights Restoration Act of 1987

The Civil Rights Restoration Act of 1987 restored Title IX to its original strength and removed the "program specific" status. It reversed the rulings of *Othen*, *Bennett*, and *Grove City*. Title IX was once again applied to an entire institution and to all programs.

The Civil Rights Act of 1991

Disparate impact theory was strengthened by the Civil Rights Act of 1991, which placed the burden of proof on those who practiced discrimination, not on those who suffered discrimination. Founders of the act stated the following: "Plaintiffs must first prove intentional discrimination, then must provide actual injury or loss arising therefrom to recover compensatory damages, must meet an even higher standard (establishing that the employer acted with malice or reckless or callous indifference to their rights) to recover punitive damages" (House Report, 102 Cong., 1st Session at 72).

For example, when discrimination is alleged in a university athletic department, the athletic department and the university have the burden of proof (or must show evidence) of equitable participation in all forms of intercollegiate, intramural, and club sports. The athletic department and the university, not the person alleging discrimination, must demonstrate that no discrimination occurred or currently exists, and provide victims of intentional discrimination with the right to recover compensatory and punitive damages. Punitive damages are based on recklessness. Attorney fees are to be paid by the losing party.

Many colleges claim that they did not intend to discriminate; however, it should be noted that in January of 1992, the United States Office of Education sent a letter of warning about the Civil Rights Act of 1991 to all educational institutions, informing them of their responsibilities under the law. Failure to heed that warning has been considered intentional discrimination.

The *Franklin* case—a U.S. Supreme Court sexual harassment decision—enables victims of discrimination to be compensated under Title IX (*Franklin v. Gwinnett*, 1990, 1991, 1992). Judges White, Blackmun, Stevens, O'Connor, Kennedy, and Souter “held that a money damage remedy is available for an action brought to enforce Title IX” (208). Prior to this case, civil rights complaints in athletics had requested increases in the number of sports and opportunities for participation, and prohibition from dropping women’s sports. Now, plaintiffs could request monetary compensation for lost opportunities.

Equity in Athletics Disclosure Act

The 1994 reauthorization of the federal Elementary and Secondary Education Act contained a provision requiring colleges and universities to collect and disclose information concerning gender equity in intercollegiate athletics. The disclosure component of the act requires schools to publish the male-to-female ratio data for school enrollment and athletic participation on the day of the team’s first scheduled contests. Schools are to list varsity team membership, operating and recruiting expenses, and the number and gender of all coaches. All student aid that is provided to athletes, the revenue that is generated by the teams, and the coaching salaries are to be disclosed. These data are to be published yearly. Legislation—introduced in June of 1997 as the Fair Play Act—requires the United States Department of Education to publish financial and other information about sports on the Internet. The information is to be available to students to assist them in making informed choices about athletics in their selection of colleges and universities.

Rule 23, Class Actions

Class action suits are presented to a court of law when groups of people have similar complaints in an effort to suggest the importance of the issue to the court and to provide an efficient method of review for the court. For a group to become a class action suit they must satisfy the Federal Rules of Civil Procedure (2010), Rule 23, which requires that

- 1) the class is so numerous that joinder of all members is impracticable;
- 2) there are questions of law or facts common to the class;
- 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- 4) the representative parties will fairly and adequately protect the interests of the class. (Federal Rules of Civil Procedure, 2010, Rule 23[a])

THE IMPACT OF ATHLETIC GOVERNANCE ON EQUITY

Early collegiate and scholastic athletic programs were governed by men’s and women’s physical education departments. As the scandals in men’s collegiate athletics increased and as the National Collegiate Athletic Association (NCAA)—an organization external to the institutions of higher education—began to control participation and competition, colleges created athletic departments to administer men’s athletics. Collegiate

women's sports remained with women's physical education departments. Athletic directors, the leaders of men's sports, soon answered only to the university or college presidents; leaders of women's athletics remained an integral part of the university or college and answered to department chairs and deans (the regular line of administrators at the university level). In some secondary schools, athletic departments were formed but their ties were always close to the physical education department.

In 1967, the American Alliance for Health, Physical Education, Recreation, and Dance (AAHPERD), Division of Girls and Women in Sport—the agency that had created, interpreted, and disseminated rules for women's sports for years—established a governance system for collegiate women's athletics. This governance system was the Commission on Intercollegiate Athletics. Prior to the organization of the Commission, members of the Division of Girls and Women in Sport (DGWS) met with NCAA officials to ascertain the NCAA's interest in athletics for women. DGWS members were told that

the NCAA's "jurisdiction and authority" under its organic documents were "limited to male student-athletes;" that women were prohibited from participating in NCAA events; that a women's national governance organization would "consequently ... not be in conflict;" and that NCAA stood ready to offer advisory assistance in this important endeavor. (*AIAW v. NCAA*, 1983, 490)

In 1971, the DGWS Commission became the Association for Intercollegiate Athletics for Women (AIAW). The AIAW had 278 members and seven national championships in 1971. By 1980-1981, the membership had grown to 961 colleges and universities, and 39 championships were staged (*AIAW v. NCAA*, 1983, 490). The AIAW played the same role in athletics for women that the NCAA played in athletics for men—with one exception: the AIAW refused to include athletic scholarships in its programs (Hult, 1980). The AIAW members believed that the scandals in men's athletics were a result of scholarships, and the "big business" approach to sport. Two different models for collegiate athletics existed at that point in time: a scholarship ("big business") NCAA male model, and a non-scholarship (educational student-athlete) AIAW female model. For a detailed discussion of today's "big business" male model of athletics, as predicted by AIAW members, see Brake (2007), Kuznik and Ryan (2008), and Koller (2010).

The National Collegiate Athletic Association brought suit against Joseph Califano (Secretary of the United States Department of Health, Education, and Welfare), the AIAW, and AAHPERD for "declaratory and injunctive relief seeking to invalidate regulations promulgated by the Department of Health, Education, and Welfare under the auspices of Title IX of the Education Amendments of 1972" (*NCAA v. Califano*, 1978, 428).

Title IX had become law in 1972. In 1975, the Department of Health, Education, and Welfare (HEW) issued regulations affecting all aspects of education, including sport and athletics. The NCAA's action, filed in 1976, was against the presumed harm that the operating regulations and the named organizations might cause in the future.

The NCAA's complaints were that Title IX should not cover athletics because collegiate athletics was privately funded; that the requirement of treating males and females equally was arbitrary and capricious; that the requirement of providing athletic scholarship equally to men and women violated 20 USC 1681 and the Fifth Amendment to the U.S. Constitution; and that the regulations violated the "due process" requirements of the Fifth Amendment (*NCAA v. Califano*, 1978, 429).

The United States District Court for the District of Kansas found that the NCAA did not have legal standing to represent its membership in a suit against HEW. The court's decision did not consider the Title IX regulations or the NCAA's complaint. The NCAA appealed the decision to the Tenth Circuit, United States Court of Appeals (*NCAA v. Califano*, 1980). The Tenth Circuit studied the issue of standing and remanded for a clear definition; again, the court did not consider the contents of the NCAA's complaint.

The National Collegiate Athletic Association (NCAA), wishing to maintain control of athletics, created sport championships for women. The NCAA permitted colleges and universities to enter NCAA and AIAW events for the first years as the NCAA was offering only a few tournaments to replace the 39 championships sponsored by AIAW (Uhlir, 1982). The NCAA's funding for championships was changed in the early 1980s to make NCAA representation over AIAW representation highly attractive to schools. In the meantime, the AIAW lost members, sponsors, and television interests.

The AIAW then sued the NCAA, alleging Sherman Act violations (antitrust). The court, in ordering judgment for the NCAA, stated that

even if defendant's conduct were avowedly anticompetitive in purpose, this record would not support a finding that its effect on plaintiff was the product of anything but direct competition. Two plaintiffs, former presidents of AIAW who were also directors of women's athletics at Division I Institutions (the Universities of Texas and Iowa), described the economic incentives to participate in NCAA's women's championships (i.e., the "free dues and travel reimbursement") as "irresistible inducements" which the AIAW could not match. (*AIAW v. NCAA*, 1983, 506)

The AIAW appealed the decision. The United States Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision, "holding that AIAW failed to prove [that the] NCAA's dues policy, proceeds distribution formula, or sale of television rights violated the Sherman Act" (*AIAW v. NCAA*, 1984, 590). With this decision, the NCAA took over women's athletics.

LEADING CASES IN COLLEGIATE AND SCHOLASTIC ATHLETICS

The leading cases following the implementation of Title IX were *Haffer v. Temple University* (1981, 1982, 1987) at the collegiate level and *Ridgeway v. Montana High School Athletic Association* (1986, 1988) at the scholastic level. Of the thirty-six cases reviewed in this area the following themes appear: women seeking equitable participation;

elimination of sports; athletes seeking membership on opposite-sex teams; facilities; roster management; and the prong three survey. These decisions, and their certiorari to the United States Supreme Court, are to be considered before a defendant institution chooses to incur the expense of a trial.

Collegiate

Haffer v. Temple University (1981, 1982, 1987, 1988) was a class action suit against Temple University by women who were participating in athletics and those who had been deterred from participating in athletics due to sex discrimination. Their claims focused on three basic areas: the extent to which Temple University afforded women students fewer opportunities to compete in intercollegiate athletics; the alleged disparity in resources allocated to the men's and women's intercollegiate athletic programs; and the alleged disparity in the allocation of financial aid to male and female students. Their class action complaint alleged discrimination in opportunities to compete, expenditures, recruiting, coaching, travel and per diem allowance, uniforms, equipment, supplies, training facilities and services, housing and dining facilities, academic tutoring, and publicity. These actions were in violation of the Fourteenth Amendment and the Pennsylvania Equal Rights Amendment. With the exception of meals, tutoring, facilities, and scheduling, the court ruled for the plaintiffs in all areas. The case was in the courts for over 10 years and provides insight into the civil rights changes caused by the *Grove City* decisions.

Blair v. Washington State University (1989) was similar to the foregoing decisions, except that the trial court chose to exclude football in the equity calculation. The plaintiff appealed the football decision; the Supreme Court of Washington reversed the decision, requiring that football be included in all calculations for finance and participation. While this decision is precedent for the State of Washington, it has defined the role of football in equity considerations.

Cases litigated in the 1990s changed somewhat as the courts began to look at the three prong policy of accommodation interpretation of Title IX published in 1979. Often, schools (particularly universities) failed to recognize the significance of prong one that had been taken from the Fourteenth Amendment, Equal Protection Clause analysis, and used in many previous cases. It was and is precedent and is therefore an important issue in legal decisions. Prong two, program expansion for the under-represented gender, and prong three, accommodating the interests of students, are Title IX specific and thus less significant. Prong two was a stop gap for those forced to make radical program changes in a short period of time. However, after forty years those changes had to occur. Prong three, meeting the needs and talent of females, has been redefined to be used only as one factor, not the only factor, in determining compliance. Women faced with conforming to the male model of athletics are beginning to speak out.

Considerable resources have been invested, unsuccessfully, by institutions of higher education in litigating their violations of Title IX with the hope of changing the law. *Cohen v. Brown University* (1992, 1993, 1995, 1996, 1997, 2001, 2003) and *Roberts v. Colorado State Board of Agriculture* (1993[1], 1993[2], 1993[3]) are examples of this

effort. *Cohen* was a class action suit against Brown University, its president, and its athletic director for discrimination against women in collegiate athletics. Women's gymnastics and volleyball team members brought suit on behalf of "all present, future and potential Brown University women students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown" (*Cohen v. Brown University*, 1996, 161). They alleged violations of Title IX of the Education Amendments of 1972.

The suit was in response to the 1991 demotion of the gymnastics and volleyball teams from varsity to club status; men's water polo and golf were also demoted. Brown was the Ivy League volleyball champion in 1988, and the gymnastics champion in 1990. After 14 days of testimony, the United States Court of the District of Rhode Island issued a preliminary injunction restoring the volleyball and gymnastics teams to varsity status and prohibiting Brown University from eliminating or reducing the status or funding of any existing women's varsity sport pending the resolution of other Title IX claims (*Cohen v. Brown*, 1992). Brown appealed the decision.

In the 1993–1994 school year, 62% of Brown University's intercollegiate opportunities were for men and 38% were for women. Men constituted 48% of the enrollment, while women made up 52%. A 14% disparity existed between enrollment and participation. The trial court determined that they could not meet prong one, the disparate impact standard of the Fourteenth Amendment to the U.S. Constitution. The United States Court of Appeals, First Circuit, affirmed the trial court's decision (*Cohen v. Brown*, 1992). The District Court, after a lengthy bench trial, found Brown University to be in violation of Title IX and ordered that a compliance plan be submitted within 120 days. The plan, as submitted, was inadequate and forced the court to maintain varsity status for women's gymnastics, fencing, skiing, and water polo teams.

Roberts v. Colorado State Board of Agriculture saw current and former members of the women's varsity fast-pitch softball team bring suit against Colorado State University, challenging the elimination of the softball and baseball teams in June of 1992 in response to budget cuts. The court posed the central question as "whether defendant's termination of the women's softball team either caused a violation of Title IX or was the perpetuation of an already existing violation of the defendants" (*Roberts v. Colorado State Board of Agriculture*, 1993[a], 1510). In using "equity-by-enrollment" figures of the undergraduate population for a 14-year period beginning in the 1980–1981 school year, the plaintiffs noted that the university's "average disparity between enrollment and athletic participation rates for women was 14.1%" (*Roberts v. Colorado State Board of Agriculture*, 1993[b], 1512). In response to the university's statement that the percentage was much better than many schools, the court responded "that if defendants are found by the Court to be in violation of Title IX, the fact the CSU's participation statistics are better than those of other schools is of no legal consequence" (*Roberts v. Colorado State Board of Agriculture*, 1993[b], 1513). CSU also failed part two of the three-prong test; no new teams had been added in the past 12 years and a number of teams had been dropped. CSU appealed the decision. The Court of Appeals for the

Tenth Circuit affirmed the trial court's decision that CSU was in violation of Title IX. CSU's petition (certiorari) to the U.S. Supreme Court was denied.

The result of two Louisiana State University cases that were combined by the courts, *Pineda, et al. v. Louisiana State University, et al.* and *Pederson, et al. v. Louisiana State University, et al.* (1996, 2000), provides a review of many gender equity issues. The issue of standing (whether the plaintiffs were among the persons harmed by the law) became apparent in *Pineda*. The plaintiffs were not university athletes; therefore, they could not be considered athletes under equal treatment. To award monetary damages, the court had to find intent on behalf of the defendants. The court noted that it "holds that the violations are not intentional. Rather, they are a result of arrogant ignorance, confusion regarding the practical requirements of the law, and a remarkably outdated view of women and athletics which created the byproduct of resistance to change" (1996, 918). The plaintiffs failed to meet the needs of women athletes. In *Pedersen*, LSU was found to have intentionally violated Title IX (2000, 864).

In *Barrett, et al. v. West Chester University of Pennsylvania of the State of Higher Education, et al.* (2003, 2006, 2009), eight members of the gymnastics team brought suit against the university when the women's gymnastics and men's lacrosse teams were eliminated in response to state budget cuts. In 1998, 25 years after Title IX became law, West Chester University's "Athletic Department created the Sports Equity Committee to obtain a basic and working knowledge of Title IX in order to begin the task of ensuring that the athletic program is in compliance with the law" (2003, 8). They used the three-prong test. Under accommodations, women were 60.8% of the undergraduate student body and 44.6% of the athletes; they fell short of compliance by over 16%. The fact they had not added a team for women for over 10 years meant prong two was violated, and it became evident that if they would keep the gymnastics team it would assist in meeting prong three, the interests and abilities of women. In 2006, plaintiffs requested attorney fees of \$207,609.50 and costs of \$12,477.82 for a total of \$220,087.32. The court awarded a total of \$148,472.59 (2006, 59). In 2009, the plaintiffs again filed a motion for the original \$220,087.32; the motion was denied (2009, 18).

Heather Mercer, a high school all-state football kicker, tried out as a walk-on player for the Duke University football team (*Mercer v. Duke University*, 1998, 1999, 2001, 2005). Although she failed to make the team, she served as a team manager and practiced with the kickers. Later in the year, she was selected to play in an intra-squad scrimmage game and kicked a field goal that won the game for her squad. She was then named to the team. The media gave Heather a great deal of attention. As a result of the attention, the coach became concerned, tried to discourage her from playing, and finally dismissed her from the team.

Mercer brought suit against Duke University, stating that she was discriminated against. The district court dismissed the case because "Title IX did not require Duke University to give a women an opportunity to play on the men's football team" (2005, 201). Mercer appealed the decision. The United States Court of Appeals for the Fourth Circuit found for Mercer, concluding "that while the contact-sport exemption would

have shielded Duke from liability had it refused to allow Mercer to try out for the team, the exception did not give Duke license to discriminate against Mercer because of her sex once Duke decided to allow her to join the team" (2005, 202). Mercer received "one dollar in compensatory damages and two million dollars in punitive damages and attorney fees" (2005, 202). The one-dollar compensatory damage award meant that the court believed that Mercer had not been damaged financially; she had not lost income or potential professional status. The punitive damage award, as explained earlier, was assessed against Duke University with the knowledge of Duke's financial positions, at a level the court hoped would stop Duke from committing such behavior in the future.

In *Brust, et al. v. Regents of the University of California* (2007, 2009), Brust, Bulala, Ludwig, and all other female athletes enrolled in the University of California, Davis filed a class action suit against the university under Title IX, the Fourteenth Amendment to the U.S. Constitution, and other state laws in 2007. Brust and Bulala were skilled field hockey players. Ludwig was a rugby player and a club member wrestler. Discovery revealed that during the 2005–2006 academic year, female enrollment was 55%, while intercollegiate varsity teams enrolled only 50% of the University of California, Davis, undergraduate students. The case is unique in that it published the details of the settlement agreement, including equitable relief, squad size, participation differential, funding, reporting, monetary relief, and attorney fees. A field hockey team was part of the settlement agreement.

Foltz, et al. v. Delaware State University (2010), a class action suit, was prompted by the university's decision to eliminate the women's equestrian team. Plaintiffs requested a temporary restraining order and preliminary injunction. Temporary restraining orders and preliminary injunctions required the university to stop its action; in this case, to stop the elimination of the equestrian team. The suit was for "present, prospective, and future female students and athletes at the university—fulfilling the numerosity requirement of Rule 23" (*Foltz, et al. v. Delaware State University*, 2010, Overview). The case continues. The value of the case is in the detailed explanation of the requirements for a class action suit.

Choike v. Slippery Rock University (2010) provides a supervised and published settlement, something not found in earlier documents. Plaintiffs were 12 members of the women's swim, water polo, and field hockey teams who filed charges against Slippery Rock University for "intentional discrimination for failure to provide equitable athletic opportunities for [SRU's] female students and equitable treatment of its female students, including its announced elimination of three viable women's athletic teams" (2010, 3). In January 2006, the university announced the elimination of eight varsity sports: men's and women's water polo, women's field hockey, men's golf, men's wrestling, and men's tennis. Soon after the announcement, students formed a committee (Save our Sports) and met with the athletic administration without success. An audit conducted in November 2005 showed participant opportunities for 2001 through 2005, with the following disparities between the number of undergraduate women enrolled in the university and the number of university women participating in collegiate

TABLE 5.1. Slippery Rock University Male to Female Sport Participation Disparities

Year	Disparity
2001	12.3%
2002	11.2%
2003	8.7%
2004	8.7%

athletics (Table 5.1). (To be in compliance with Title IX and the Fourteenth Amendment to the U.S. Constitution, the number needs to be as close to zero as possible.)

A formal student survey found that the interests of females had been met. Roster management appeared in this case as a successful means of manipulating Title IX equity. While roster management existed since the first implementation of Title IX, this is the first time it appears as a viable means of addressing equity to a court of law. Roster management is the loading of female teams with all athletes that try out, but only taking a small number of persons on the team to competitions and other events. Some schools have had as many as forty females on a tennis team, but only eight entered competition. At the same time, the males had a team of ten: eight in competition and two substitutes. Roster management is severe, as demonstrated in this and the following cases.

The athletes in *Choike* obtained an attorney and chose to file a class action suit requiring a preliminary injunction to stop the elimination of the women's teams mentioned above. The women sued the university's president and athletic director under Title IX for equal participation and unequal coaching and training, equipment and supplies, publicity, promotional materials, events transportation, uniforms, playing fields, locker rooms, and facilities.

The students' claims were successful and a case management conference was scheduled (*Choike v. Slippery Rock University*, 2006). Since that time, the parties returned to the court in 2007, 2008, and 2010 in an effort to resolve disputes. The case has the contemporary value of the *Temple* case mentioned earlier in this chapter.

In *Mansourian, et al. v. Board of Regents of the University of California, Davis (UCD), et al.*, (2008, 2010, 2011), plaintiffs claimed that the university had a long-standing women's varsity wrestling program that was eliminated. The university says there was a single wrestling program event. It appears that women varsity wrestlers were given the same experience as the men or were members of the men's team, but did not compete with men or follow NCAA rules. In 2000, when the university imposed roster limits on teams, the women were removed from the wrestling team. This removal created a media blitz causing UCD to reinstate the plaintiffs. In the fall of 2001, the women were forced to try out for the men's team using the male rules. "Plaintiffs contend that at practice the head wrestling coach was hostile to the women and did not provide them with any coaching tips, or support" (2010, 10).

Between 1995 and 2005, the University of California, Davis was short of proportionality by over a hundred varsity slots each year (2010, 14). They were warned of the inequity by the Office of Civil Rights, California National Organization for Women, and in numerous memos between collegiate administrators. No steps were taken to add programs. In 2003, plaintiffs filed an action asserting six claims. The claims included violation of Title IX based on unequal opportunities; violation of Title IX based on unequal financial assistance; retaliation in violation of Title IX; violation of 42 USC 1983; violation of the California Unruh Civil Rights Act; and violation of public policy (*Mansourian, et al. v. University of California, Davis, et al.*, 2010, 17). The court denied the motion. The athletes filed a number of complaints without success and then filed a Fourteenth Amendment equal protection claim regarding the removal of plaintiffs from the varsity wrestling program based on gender and the permanent barriers that they faced. Defendants were successful in their motions with one exception. Plaintiffs successfully presented "triable issues of fact with respect to their 1983 claims arising out of the assertion that defendants violated the Equal Protection Clause by maintaining an athletics program that discriminates on the basis of gender" (2010, 50).

In *Equity in Athletics v. Department of Education and James Madison University* (2007, 2008, 2009, 2011), the plaintiff (a nonprofit organization comprised of male student-athletes, coaches, parents, alumni, and fans) challenged the equity by enrollment requirement of Title IX. The appellate court held that the recommended accommodations did not violate the Equal Protection Clause, and therefore it was legitimate. Equity in Athletics also sought relief against James Madison University, challenging their decision to eliminate ten sports. Controversy existed over enrollment and scholarships; the court found that women had not achieved equity. The district court dismissed the Equity in Athletics constitutional, statutory, and procedural claims against the Department of Education and James Madison University.

A class action suit was brought by members of the women's rowing team against the University of Cincinnati under Title IX and the Fourteenth Amendment Equal Protection Clause, for failure to provide the team with a boathouse, minimal equipment, training facilities, coaches, and scholarships (*Miller v. The University of Cincinnati*, 2008). Cincinnati started a women's rowing team but could not afford it. The university decided to discontinue rowing and created a lacrosse team. The university was in compliance with prong one of Title IX accommodations and remained in compliance after eliminating the rowing team. Therefore, the court found for the university.

Another complaint regarding facilities, this time in softball, was *Hess, et al. v. Ramona Unified High School, District, et al.* (2007, 2008). Women softball players filed a complaint for equal facilities; the men had two fields on campus while the women practiced and played on an off-campus facility. The court required the school to build a softball facility on campus.

A decision still in process regarding opportunities for league play is *Barrs, et al. v. The Southern Conference* (2010). The suit against the league was a request to expand post-season sports from four to eight for men's and women's soccer, men's and women's tennis, women's volleyball, and women's softball. They "allege that this decision

disproportionately affected female student athletes and contend that the reduction violates Title IX" (1230). The request was for a preliminary and permanent injunction and damages. The court denied the Southern Conference's motion to dismiss the complaint. As the named plaintiffs were graduating, some of the claims became moot; the plaintiffs requested and received the opportunity from the court to expand the plaintiff group to a class action suit. This case addresses many of the complaints brought by athletes against leagues in the early days of gender equity.

Scholastic Athletics

Ridgeway v. Montana High School Athletic Association (1986, 1988), one of the most comprehensive decisions in athletics at the secondary level, was a class action suit brought on behalf of all Montana high school girls against the State Athletic Association. The lawsuit alleged violations of Title IX, the Fourteenth Amendment to the U.S. Constitution, and the Constitution of Montana. The women claimed that discrimination existed in the number of sports, seasons of play, length of seasons, practice and game schedules, and access to facilities, equipment, coaching, trainers, transportation, the school band, uniforms, publicity, and general support. The parties accepted an agreement that provided for equal opportunity and placed a court-appointed facilitator in charge. The settlement gave specific roles of enforcement to the Montana office of public instruction and to individual schools. The entire state of Montana—not just the three schools represented in the class action suit—were included in the settlement. Although the decision is precedent only in Montana, the case provides a formula for secondary schools to use in avoiding discrimination in athletics.

Richard Landow, on behalf of his daughter Kayla, sued over the inequities between women and men in her school softball and baseball programs (*Landow, et al. v. School Board of Brevard County*, 2000, 2001). Among the differences were the quality of uniforms, available equipment, choice of fields for practice and game play, and locker rooms. The District Court for the Middle District of Florida found for the students and ordered the board to take the following measures:

- 1) Develop a plan that elevates the girls' softball program at Titusville and Astronaut to the level enjoyed by the boys' baseball teams at those schools.
- 2) Not later than February 1, 2001, counsel for the parties shall meet in person at a mutually convenient location in a good faith effort to determine whether they can agree upon a single plan for remedying the inequalities addressed in this Order.
- 3) Not later than March 15, 2001, the parties shall both file a joint plan with the Court, or file and serve separate proposed plans. (967)

Another case on behalf of students against a school district found the Court of Appeals for the Second Circuit affirming the district court's holding "that the decision by the School District of Mamaroneck and Pelham to schedule girls' high school soccer in the spring and boys' high school soccer in the fall, which deprives girls but not boys

of the opportunity to compete in the New York Regional and State Championships in soccer, violates Title IX" (*McCormick, et al. v. The School District of Mamaroneck and the School District of Pelham*, 2004, 302).

Three of the primary scholastic cases involved scheduling. The plaintiffs in *Horner v. Kentucky* (1994, 2000) and *Alston v. Virginia High School League, Inc.* (1999, 2000) lost. *Communities for Equity v. Michigan High School Athletic Association* (2003), after appearing in court at least nine times between 1998 and 2008, put together an equity plan and established attorney fees. Twelve female high school slow pitch softball players brought suit against the Kentucky State Board of Education for Elementary and Secondary Education and the Kentucky High School Athletic Association for discrimination in sanctioning of sports for women and refusing to sanction fast pitch softball (*Horner v. Kentucky*, 1994). Their claims were under the Equal Protection Clause, Title IX, and state law. The district court granted summary judgment for the defendants; female athletes had not been denied equal athletic opportunity. The school had offered equal opportunities in accordance with the interest and abilities of students (prong three of the Title IX implementing guidelines). Also, the plaintiffs had failed to prove intentional discrimination. Horner appealed the decision. The United States Court of Appeals, Sixth Circuit, reversed the trial court's decision and found for the plaintiffs under the Title IX claim. The court affirmed the trial court's equal protection claim. *Alston v. Virginia High School League, Inc.* (2000) was a challenge of intentional discrimination against women in the scheduling of athletic seasons. The court ruled that the Virginia High School League was not an entity subject to Title IX.

Communities for Equity v. Michigan High School Athletic Association (May, 2001, Sept., 2001, Dec., 2001, Feb., 2002, Aug., 2002, 2003, 2006, 2007, Mar., 2008, Aug., 2008) was a challenge of sex discrimination in the planning and scheduling of sport seasons and sport competitions that began in 1998 and was not resolved for ten years. In the initial court session, the standing of the plaintiffs and defendants, rather than the issue, was the discussion. In 2000, the class action was approved, and in 2001, the court determined that the Michigan School Athletic Association's scheduling of interscholastic athletic seasons violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution (Dec., 2001). A compliance plan was approved in 2003 (9). Plaintiffs continued to return to the court to bring various seasons in either the Lower or Upper Peninsula of Michigan into compliance. During that time, their certiorari to the U.S. Supreme Court in April 2007 was denied. In 2008, the United States District Court for the Western District of Michigan, Southern Division, awarded over \$4.5 million in legal fees against the Michigan High School Athletic Association (Mar., 78).

High school female ice hockey athletes suing a league for discrimination was first found in *Mason, et al. v. Minnesota State High School League* (2004), and later, a Minnesota female ice hockey enthusiast asked the U.S. Department of Education to intervene in the league issue in *Cobb & Saly v. United States Department of Education, Office of Civil Rights* (2006). In *Mason*, female ice hockey players requested a state tournament site equal to that provided the males. The men played in Xcel Energy

Center in Minneapolis, while the women played at the State Fair Coliseum, a building dedicated to horse shows. In 2000, the women filed a discrimination complaint with the Office of Civil Rights; the agency explored the difference between the two facilities, identified the University of Minnesota's women's ice hockey team facility as a potential arena, ruled that the women's high school tournament be held in that facility, and closed the investigation. The high school girls decided that the University of Minnesota women's ice hockey facility was not adequate and took their case to the courts, requesting an injunction. In 2003, the United States District Judge denied the requested injunction stating that "plaintiffs had failed to establish a likelihood of success on the merits" (7). On appeal, the defendants were denied summary judgment.

High school girls complained of discrimination in practice and competitive facilities, locker rooms, training facilities, equipment and supplies, travel and transportation, coaches, and coaching facilities, scheduling of game and practice times, publicity and funding (*Ollier, et al. v. Sweetwater Union High School, et al.*, 2008, 2009, 2010). The school failed all three prongs of Title IX: Opportunities were inadequate, a new sport had not been added for years, and while lack of interest was demonstrated for field hockey on a survey, it was noted that the team did not have a coach. They also failed the Fourteenth Amendment to the U.S. Constitution.

Parker and others sued the Indiana High School Athletic Association for violating Title IX and the Fourteenth Amendment by scheduling women's games and competitions on non-preferred days while scheduling men's events on Friday and Saturday (*Parker v. Indiana High School Athletic Association*, 2009, Sept. 2010, Oct., 2010). The school succeeded on immunity.

Schnarrs v. Girard Board of Education (2004, 2006) was a complaint by females that males were used as opponents in practice sessions in an effort to improve the females' game skills and strategies. This arrangement was believed to be causing injuries among the female players. It was recommended that athletes, male or female, be challenged by a person with one or more of the following characteristics: slightly higher skill level, slightly taller, or slightly heavier. The court found that the coaches' decision to use male athletes as competitors was a valid teaching strategy or, as they put it, a "positive exercise of judgment" (1265).

Roster Stacking in Scholastic and Collegiate Sports

Roster stacking or roster management, a system often used by schools insincere in achieving equity by enrollment, was first publicly mentioned in *Biedeger, et al. v. Quinnipiac University* (2009, 2010), but today is the focus of a number of lawsuits. In March of 2009, Quinnipiac University decided to cut three sports: women's volleyball, men's golf, and outdoor track teams. At the same time, the university decided to create competitive cheerleading (*Biediger, et al. v. Quinnipiac University*, 2009). The plaintiffs (members of the volleyball team) requested an injunction to stop the elimination of their team. The court granted the preliminary injunction, holding that the university "managed its varsity rosters—essentially, by setting artificial ceilings for men's varsity teams and floors for women's varsity teams" (July 2010, 63). Quinnipiac's

practice of requiring individual female members of the cross-country, indoor, and outdoor track teams to be counted as members of all three teams even though they practiced with only one of the teams, was found to be in violation of Title IX. This case is a classic receipt for analyzing sports for the possibility of roster management by schools and universities attempting to come into compliance with Title IX. One suspect area is the number of athletes on a team that are not included in travel and competition. The court refused to recognize a competitive cheerleading team as a varsity sport for the purposes of Title IX, and therefore refused to count the cheerleaders as female varsity athletes. It was the court's decision to deny cheerleading sport status for the purpose of gender equity that received widespread national visibility; however, the roster management component was equally important to the sport professional.

Males Complaining of University Systems for Attaining Equity

Gender equity laws and policies have encouraged administrators of athletic programs to increase opportunities so that male-to-female participation levels reflect enrollment ratios. Some administrators have made the decision to reduce male participation opportunities in athletics instead of increasing female participation. This practice is acceptable under a strict reading of the law, and its acceptance has been confirmed by the courts. It does, however, become an issue of ethics. An analysis of the nine cases brought by males since 1994 as they lost competitive opportunities include *Kelly v. Board of Trustees of the University of Illinois* (1987, 1990, 1993, 1994), *Gonyo v. Drake University* (1993, 1995), *Cooper v. Peterson* (1995), *Lichten, et al. v. State University of New York at Albany, et al.* (1996), *Boulahanis, et al. v. Board of Regents, Illinois State University, et al.* (1999, 2000), *Neal, et al. v. The Board of Trustees of the California State Universities, et al.* (1999, 2002, 2003), *Chalenor, et al. v. University of North Dakota* (2000, 2002), *National Wrestling Coaches Association, et al. v. United States Department of Education* (2003, 2004), and *College Sports Council v. Department of Education* (2005, 2006, 2007). The *Kelly* case concerned the elimination of swimming, diving, and fencing. The *Lichten* case involved tennis, swimming, and wrestling. The *Boulahanis* case was the elimination of soccer and wrestling.

Five of the cases mentioned above involved athletes who sued their universities because wrestling had been cut in an effort to bring collegiate sport competitive opportunities into compliance with gender equity. In all of the situations, the courts denied the request. In March of 1993, Drake University cut its wrestling program in response to university budget cuts and lack of support in its athletic conference and community. The scholarships of existing wrestlers were honored until each athlete's graduation. Five of the wrestlers brought a cause of action against the university, its president, and its athletic director for violations of Title IX and the Equal Protection Clause of the Fourteenth Amendment (*Gonyo, et al. v. Drake University, et al.*, 1995). Drake's Title IX case was weak, as their 1992–1993 data showed a 75.3% male to 24.7% female participation ratio in an institution with an enrollment of 57.2% females. In finding against this claim, the court stated, "Restricting universities from eliminating men's scholarship sports ... while requiring them to expand opportunities for women

in athletics ... would make it impracticable to spend less, rather than more, money on their athletic programs. Title IX does not so restrain a university's spending decisions" (1995, 1005). Members of the St. Lawrence University wrestling team—a sport that had been cut during budget constraints—brought claims against the university and its president on breach of contract, fraud, misrepresentation, estoppels, and sex discrimination. Their request for a temporary injunction was denied (*Cooper v. Peterson*, 1995).

In *National Wrestling Coaches Association, et al.*, the sport governing association attempted to stop the Department of Education from enforcing Title IX. "Specifically, plaintiffs maintain that the Department's current enforcement policies lead educational institutions to cut men's sports teams, artificially limiting the number of participants on men's teams, and otherwise impermissibly discriminating against men based on sex in the provision of athletic opportunities, thereby denying male athletes and other interested parties the equal protection of the law" (2003, 85). *College Sports Council, et al. v. Department of Education, et al.* (2005, 2006, 2007), an outgrowth of a number of the above cases involving wrestling, saw the National Wrestling Coaches Association join a number of private university wrestling clubs and others against their original defendant, the Department of Education. In 2005, the case was dismissed by the United States District Court for the District of Columbia for lack of standing, a decision from the same court (*National Wrestling Coaches Association, et al. v. United States Department of Education*, 2003). Plaintiffs then brought suit against the government accountability office for violation of the higher education amendments. The defendants moved to dismiss the lawsuit for failure to state a claim, and the motion was granted (*College Sports Council, et al. v. Government Accountability Office, et al.*, 2006).

In 1993, in the only case not representing wrestling, the University of Illinois announced the elimination of two men's varsity sports (swimming and fencing) and one varsity sport (diving) that had both men's and women's teams. Members of the men's swimming team filed an action against the Board of Trustees of the University of Illinois, alleging that the university violated Title IX and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (*Kelly v. The University of Illinois*, 1994). This lawsuit followed an Office of Civil Rights investigation in which Illinois agreed to remedy disparities in opportunities for women in a reasonable period of time. The U.S. District Court for the Central District of Illinois granted summary judgment for the university. The swimmers appealed the decision by the lower court. The court of appeals affirmed the district court's ruling. The plaintiffs were denied certiorari by the United States Supreme Court.

RETALIATION UNDER TITLE IX

The United States Supreme Court's first Title IX case and the first retaliation decision under Title IX was *Jackson v. the Birmingham, Alabama Board of Education* (1998, 2002, 2003, 2004, 2005). *Jackson* tells the story of a young male women's basketball coach who was dismissed from his coaching position for complaining "that his team was not receiving equal funding and equal access to athletic equipment and facilities" (Jackson, 2005, 1503). The District Court dismissed the complaint, ruling that

Title IX did not include a claim of retaliation; the court of appeals confirmed the district court's decision. The U.S. Supreme Court reversed the decision, stating that the "private right of action implied by Title IX encompassed claims of retaliation for complaining about sex discrimination as: (1) such retaliation was (a) by definition an intentional act, (b) a form of discrimination; and (c) 'on the basis of sex'" (*Jackson*, 2005, 1498).

Two collegiate cases decided near the same time as the *Jackson* case, *Wells v. Board of Trustees of the California University, et al.* (2005, 2006) and *Burch v. Regents of the University of California, et al.* (2006), did not seem to be influenced by *Jackson*. Mr. Wells was hired as men's and women's track coach by Humboldt State University in 1980 on a one-year contract. David Wells complained that women's athletics was disproportionately funded in relation to men's. His comments caused the university to appoint a faculty committee to conduct an investigation; the investigation confirmed that the funding for the teams was disproportionate and in violation of Title IX. The violation was ignored. Wells also conducted his own evaluation and further discovered that a large sum of money, \$270,000, was unaccounted for in the athletic department. He filed complaints with administrators, the state auditor, and the Office of Civil Rights in 2001.

In April 2003, Wells received a contract for 10 months, rather than 12 months as his previous contracts had been, and his track team's budget was reduced by \$104,000. He sued for retaliation under Title IX. He lost; his year-to-year contract did not give him the right to a renewed contract. Thus, his case was not a constructive discharge.

Michael Burch, head wrestling coach for men at the University of California, Davis, was a part-time employee of the athletic department in addition to a lecturing position. Burch made a weak wrestling team successful and received a local coach of the year award. He also complained about the status of wrestling for women. Shortly after the equity complaint, his coaching contract was not renewed.

Burch sued the university for retaliation, claiming he was punished for his "positive advocacy" for the women wrestlers who practiced with his team but could not compete in events. Under a university-imposed roster management system, the wrestling team was capped at 30 and as a result, the women were removed from the roster. Burch was successful against the athletic director, associate athletic director, and assistant chancellor for student affairs. Among the five components of the holding of the court for the plaintiff were: a) the fact issues as to whether reasons given for termination were pre-textual, and b) the coach's claims of gender discrimination affecting wrestlers were protected by the First Amendment. Holdings for the defendant were that: a) the coach's complaint of no separate women's wrestling team did not violate Title IX, b) the university provided gender neutral explanation of termination, c) there were fact issues as to whether the university would have terminated the coach in absence of his statements, and d) the chancellor had no involvement with termination decisions and was not liable for free speech violations (Burch, 2006).

Kiser, the male women's basketball coach on a yearly renewable contract at Clark College, was dismissed. He filed a cause of action against the college for retaliation,

stating that his job had been threatened by the athletic director (AD) if he continued to make Title IX allegations (*Kiser v. Clark College*, 2008). He claimed that there existed "a consistent pattern of inequality between the College's men's and women's basketball teams. He said the differences were in budget, travel accommodations, and the AD's hostility toward the women's teams" (2). The college said he was fired for misappropriation of funds. The trial court found for the college; Kiser appealed. The court of appeals reversed and remanded the case for further proceedings. There is a possibility of retaliation, but because the coaching position was under a year-to-year contract, Kiser may have a difficult time succeeding.

Dr. Eve Atkinson was hired as Lafayette College's athletic director in 1989. One of her first responsibilities was to bring the college into compliance with Title IX. The detailed court document of 2009 identifies the rocky road she faced in attempting to satisfy compliance, morale, management, and competitive decisions. She was also faulted for encouraging athletes and coaches to take a stand against the management's suggestion to move athletics from NCAA Division One to Division Three (*Atkinson v. Lafayette College, et al.*, 2002, 2003, 2006, 2009). The college cited poor judgment, poor performance, and insubordination as the bases for her dismissal, while she cited retaliation for her work with Title IX and age discrimination. Following a nine-year battle, the U.S. District Court for the Eastern District of Pennsylvania concluded that Dr. Atkinson "has not met the burden of pointing to evidence that would allow a fact finder to discredit the College's legitimate, non-discriminatory reasons for her termination" (2009, 612).

Following *Jackson*, there appear to be a number of suits among people who had experienced problems in their coaching positions and also had defended equity principles for females. Thus, they sued for retaliation under Title IX for their loss of employment. In many of these cases, particularly among secondary schools, the districts were successful in the courts, claiming incompetence, insubordination, unethical conduct, and poor competitive records. Many of the secondary-school personnel lost their year-to-year contract coaching positions but retained their teaching positions. Obviously, some did not fully understand the rights of the school district in a year-to-year contract.

During that same time, a number of persons who claimed retaliation received successful settlements. Fresno State University of the California University system awarded Linda L. Vivas, the university's volleyball coach, \$5.85 million when she sued for sex discrimination and retaliation (Lipka, 2007). "Although individuals can't sue public institutions in California for punitive damages, Vivas was awarded the above sum for past and future economic losses and emotional distress" (Redden, 2007a).

Five months later, a Fresno jury ordered the same university to pay Stacy Johnson-Klein \$19.1 million. The former women's basketball coach sued for sex discrimination and retaliation for her advocacy for women's athletics (Redden, 2007b). A similar case was recently settled by Fresno University with Diane Milutinovich, the former associate athletic director, for \$3.5 million (Redden, 2007b). Jaye Flood, former head women's volleyball coach at Florida Gulf Coast University, received just under \$3 million for her suit filed shortly after she was terminated in January 2008 for speaking

out about inequities, and the head women's golf coach at the same university received \$500,000 to settle her claim (Funk, 2009).

SEXUAL HARASSMENT

Sexual harassment includes actions of employees, supervisors, teachers, coaches, principals, and students. Litigation has involved same- and opposite-sex relationships. Claims are usually filed under Title IX and 42 USC 1983. In these decisions, courts examine the responsibility of the agency (including knowledge or direct involvement in the incident, a negligent or reckless standard), Title VII standards (for hostile environments), and quid pro quo (a strict liability standard). The two major kinds of sexual harassment are hostile environment and quid pro quo.

Hostile Environment and Quid Pro Quo

Hostile environment usually involves behaviors of continuous harassment of a sexual nature. It involves repeated, unwanted requests for sex, offensive touching, or threats of a sexual nature. Offensive pictures, stories, and jokes are often evaluated in the context of what is considered appropriate behavior in the community. Quid pro quo, a strict or automatic liability standard, means that certain benefits are conditioned on sexual relationships. Business benefits, high grades, or money are among the conditions.

In *Faragher v. City of Boca Raton* (1994, 1996, 1997, 1998), the U.S. Supreme Court found that employers were vicariously liable for a hostile work environment. The employer was liable to the victim whether the employer knew (or should have known) of the harasser's conduct. Faragher resigned her lifeguard position with the City of Boca Raton, Florida, and brought a cause of action against the city and her immediate supervisors, stating that the supervisors had created a sexually hostile environment, "repeatedly subjecting Faragher and other female lifeguards to uninvited and offensive touching, by making lewd remarks, and by speaking of women in offensive terms, and that this conduct constituted discrimination in the terms, conditions, and privileges of her employment in violation of Title VII and the Civil Rights Act of 1964" (*Faragher v. City of Boca Raton*, 1998, Syllabus). The district court found the City of Boca Raton liable for the harassment of its supervisors; the Eleventh Circuit reversed, holding that the supervisors were not acting within the scope of their employment. The U.S. Supreme Court agreed with the district court.

Female soccer players brought an action under Title IX and 42 USC 1983 against a group of University of North Carolina administrators, alleging hostile environment and sexual harassment against the women's soccer coach and others. The graphic descriptions of hostile environment and sexual harassment in this case enables a reader to recognize such actions in a specialized educational environment like sport. Also, administrators will note that the action was brought against the head and assistant coaches, an athletic trainer, the estate of a former chancellor, an assistant to the chancellor, former and current athletic directors, and an assistant athletic director. Each was sued individually and in their official capacity (*Jennings v. University of North Carolina at Chapel Hill, et al.*, 2002, 496). Plaintiffs brought eight claims:

- 1) 42 USC 1983, violation of constitutional rights under First, Fourth, and Fourteenth Amendments against all defendants;
- 2) Rights under Title IX against all defendants;
- 3) Intentional interference with plaintiff one's contractual relationships with the U.S. Soccer Federation against the head coach;
- 4) For assault by plaintiff one against the head coach;
- 5) For battery by plaintiff one against the head coach;
- 6) For constructive fraud by plaintiff two against head coach and University, in general;
- 7) For negligent retention of head soccer coach by both plaintiffs against the University, in general; and
- 8) For invasion of privacy by both plaintiffs against the head coach and University. (497)

Defendants stated that all claims should be dismissed for lack of jurisdiction, failure to state a claim upon which relief could be granted, and sovereign immunity (Jennings, 2002, p. 497). The United States Court for the Middle District of North Carolina ruled on each of the above claims as they related to each defendant personally and in their official capacity. The following claims remained following the 2002 decision:

- 1) 42 USC claim brought by plaintiffs against the head and one assistant coach, estate of former university chancellor, assistant to the chancellor, former and current athletic directors, and assistant athlete director in their personal capacity;
- 2) Title IX claims against UNC by both plaintiffs;
- 3) state law claims against head coach by one plaintiff for intentional interference with a contractual relationship; for assault; and for battery; and
- 4) state law claim brought against head coach by both plaintiffs for invasion of privacy. (515, 516)

In the 2004 decision, the university was denied the privilege of submitting evidence under seal (Jennings, 2004). The 2007 U.S. Court of Appeals ruled on many of the detailed facts identified in 2002. The holding was:

- 1) Coaches' alleged actions, if proven, constituted sexual harassment based upon sex, as required for liability under Title IX;
- 2) coach's alleged behavior, if proven, was sufficiently severe or pervasive to create hostile or abusive environment; and

- 3) player alleged report to university's counsel, if proven, provided university with actual notice of hostile environment, as required for university to be liable under Title IX. (*Jennings, et al. v. University of North Carolina*, 2007, Holding)

In 2007, the United States Court of Appeals, Fourth Circuit, ruled against Jennings on the Title IX and 42 USC 1983 claims, demonstrating the kinds of detailed situations that need to be met to succeed under these laws. The allegations against the coaches for sexual harassment and hostile environment; and against the university for failure to act, if proper notice was given, remained. No further decision has been reported.

Faculty to Student Sexual Harassment

A female student in a Texas public high school had a sexual relationship with her male teacher; however, she did not report the incidents to school officials. Later, the police discovered the couple having sex. The teacher was arrested and the school district terminated his employment (*Gebster, et al. v. Lago Vista Independent School District*, 1998). The student filed suit against the school district for sexual harassment under state law, Title IX, and 42 USC 1983. The trial court dismissed the federal claims and remanded the case to state court as a negligence claim. The appellate court affirmed the trial court's dismissal of the federal claims. U.S. Supreme Court review was sought and received. The Court found that the "student was not allowed to recover for sexual harassment by one of the district's teachers unless an official of the district had actual notice of and was deliberately indifferent to the misconduct" (*Gebster, et al.*, 1998, Overview). For a school district to be held liable under *respondeat superior* or constructive notice, they must be aware of the situation. *Respondeat superior* refers to tort liability of the person in charge; constructive notice requires that the individual must be warned of the situation if he/she is to be held liable. *Respondeat superior* is a tort theory, while constructive notice is a civil rights theory.

In this case, the Supreme Court established a standard for sexual harassment cases in school districts. The plaintiff must prove that the abuse occurred, that the school authorities were properly informed, and that they did nothing about it. In a recent case, *Jane Doe, et al. v. School Board of Broward County, Florida, et al.* (2010), the United States Court of Appeals, Eleventh Circuit, grappled with the issue of who needs to be informed in the school and the actions the informed person is expected to take. In this situation, the principal was informed and requested written notice; hearings were held and the teacher was exonerated. Questions were raised by the court as to the discovery process and who was invited to provide written testimony.

The court stated, "In the case of teacher-on-student sexual harassment, our analysis is governed by the Supreme Court's decision in *Gebser v. Lago Vista Independent School District* (1998).... Title IX liability arises only where an official of the school district who at a minimum has authority to institute corrective measure on the district's behalf, has actual notice of and is deliberately indifferent to, the teacher's misconduct (Id. at 277,118 S. Ct. at 1993)" (*Jane Doe, et al. v. School Board of Broward County, Florida*,

et al., 2010, 1254). Jane Doe filed suit in the Southern District of Florida under Title IX and 42 USC 1983, seeking compensatory and punitive damages. The defendants responded with immunity. The court found that the evidence did not show an inference to claims presented and that the plaintiff failed to show a causal relationship between the principal's actions and the plaintiff's claims of assault.

Assault by Male Athletes

A female basketball team member alleged sexual assault by three members of the men's basketball team (*Jane Doe v. University of the Pacific*, 2010). She reported the incident to the university, which investigated the incident, expelled one male, suspended the other two males, and suggested that there be no contact between the men's and women's basketball team members. The female basketball player sued the university under Title IX, stating that the institution did not prevent the assault, failed to respond appropriately to the complaint, and retaliated against both teams through the policy limiting unsupervised social action between team's members. The district court ruled for the university on all claims, by granting the university's motion in its entirety (*Jane Doe v. University of the Pacific*, 2010, 4).

The Tiffany Williams story is an incident of gang rape by athletes, this time basketball players from the University of Georgia (*Williams v. Board of Regents of the University System of Georgia, et al.*, 2007). Williams was invited by one of the males to his room for consensual sex. A second and a third male entered the room and engaged in nonconsensual sex with the defendant. About a year after the rapes, the university held a hearing in which it was decided not to sanction the players. Williams sued. The United States District Court for the Northern District of Georgia dismissed the Title IX, 42 USC 1983 claim, and the request for injunctive relief. Ms. Williams appealed. The Title IX claims against the University of Georgia Athletics and Athletic Association were reversed and remanded as it was discovered that appropriate persons had knowledge of previous harassment, and were deliberately indifferent. Her quest for injunctive relief was also reversed and remanded. All other district court rulings were affirmed. No further information was available at the time of press.

Plaintiffs Lisa Simpson and Anne Gilmore were sexually assaulted in Simpson's apartment by football players and high school students on a recruiting visit to the University of Colorado, Boulder (*Simpson, et al. v. University of Colorado, et al.* (2004, 2005, 2007). The Boulder campus officials were aware that sexual assaults could occur on these visits if supervision was not maintained. The local district attorney held a meeting with university officials, warning of such behavior. It was believed that the coaching staff not only knew of but condoned the behavior. Simpson and Gilmore each filed complaints, which were combined. They sought relief under Title IX and 20 USC 1681(a), claiming that the university knew of the sexual harassment of female students by the football recruiting program and failed to take any action to prevent the assault.

The University of Colorado filed a summary judgment, contending that the Title IX claims were not established. The district court granted the motion, stating that "no

rational person could find (1) that CU had actual notice of sexual harassment by CU students, by football players and recruits before Plaintiffs' assaults or (2) that CU was indifferent to such harassment" (*Simpson*, 2005, 1235). There was lack of evidence of notice and indifference. The plaintiffs appealed. The U.S. District Court reversed the grant of summary judgment to CU and remanded for further proceedings. They stated that

the evidence before the district court would support findings that by the time of the assaults on Plaintiffs, (1) Coach Barnett, whose rank in the CU hierarchy was comparable to that of a police chief in a municipal government, had general knowledge of the serious risk of sexual harassment and assault during college-football recruiting efforts; (2) Barnett knew that such assaults had indeed occurred during CU recruiting visits; (3) Barnett nevertheless maintained an unsupervised player-host program to show high-school recruits "a good time"; and Barnett knew, both because of incidents reported to him and because of his own unsupportive attitude, that there had been no change in the atmosphere since 1997 (when the prior assault occurred) that would make such misconduct less likely in 2001. A jury could infer that "the need for more or different training [of player-hosts was] so obvious, and the inadequacy so likely to result in [Title IX violations], that [Coach Barnett could] reasonably be said to have been deliberately indifferent to the need. (2007, 1184-1185)

SUMMARY

Gender equity laws are the Fourteenth Amendment to the United States Constitution, Title IX, the Civil Rights Restoration Act of 1967, the Civil Rights Act of 1991, and the Equity in Athletics Disclosure Act. The Fourteenth Amendment and Title IX identify and give basic rights. The Civil Rights Act of 1987 restored Title IX to its original intent following the "program specific" approach that resulted from the *Grove City* case. The Civil Rights Act of 1991 provides attorney fees and punitive damages, and requires the defendant to take the lead in disproving the charge of discrimination in the civil rights area. The *Franklin v. Gwinnett* (1992) case verified the operation of the 1991 statute. The Equity in Athletics Disclosure Act provided society with factual information on which of its members could make decisions.

Disparate treatment and disparate impact (equity by enrollment) have become the bases of many court decisions. Court cases have come from athletes and their parents, coaches, athletic personnel, and others. Note should be made that no school that has been sanctioned by the Office of Civil Rights or the courts under Title IX has lost its federal or state funding. Court decisions have been provided under the impact of athletic governance, collegiate and scholastic women seeking equity, roster stacking, complaints by male athletes, retaliation, and sexual harassment.

6

Americans with Disabilities Act (ADA)

OBJECTIVES

Upon completing this chapter, you will:

- 1) understand the relationship between various laws applicable to accommodating people with disabilities in sport settings;
- 2) be able to explain what a plaintiff is required to establish to bring a claim for violation of the ADA;
- 3) be able to apply the steps necessary to make a determination about modifying sport rules or eligibility for people with disabilities;
- 4) understand the detailed requirements for stadium accessibility; and
- 5) know how to conduct an individualized inquiry assessment of a person with a disability who has requested a modification of policies and procedures.

INTRODUCTION

Providing equal opportunity for people with disabilities is the fundamental principle of the Americans with Disabilities Act (ADA) of 1990 (U.S. Department of Justice, 2011). Sport opportunities for people with disabilities have expanded since passage of the ADA. With the enactment of the ADA, efforts have been focused on including people with disabilities in sport, as both participants and spectators. Historically, full participation and equal opportunity in sport and recreation services have been a challenge for people with disabilities (Fay & Wolff, 2000). This can be attributed to physical barriers to participation, such as inaccessible sport and recreation facilities, as well as a fundamental lack of understanding of the needs of people with disabilities while participating in sport or while attending sporting events.

Today, providing a barrier-free and inclusive environment for people with disabilities has become an emerging priority in sport management and “is now (or should be) an integral part of any discussion when making programming decisions or facility

renovations" (Grady & Andrew, 2003, p. 231). Despite the substantial progress made in enhancing access to sport for people with disabilities, sport managers continue to face challenges in implementing the provisions of the ADA into their facilities (Grady & Andrew, 2003). While the ADA is the most-recognized law mandating access for people with disabilities in the United States, the legal precursors to the ADA are also relevant to certain segments of sport management.

SECTION 504 OF THE REHABILITATION ACT

As public awareness of the need to educate children with disabilities grew, the United States Congress enacted federal legislation and provided funding to assist school districts in educating children with disabilities. In 1973, Congress passed the Rehabilitation Act. Section 504 of the act states that

No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall solely by reason of his handicap, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (45 CFR 84)

The scope of Section 504 of the Rehabilitation Act includes schools which educate children as well as entities which receive federal funds. This includes colleges and universities as well as cultural venues, such as performing arts centers, which may rely on federal funds to support their operations. While similar to the goals of the ADA in ensuring access to programs and services, knowledge of the specific requirements of Section 504 of the Rehabilitation Act may be required depending on the type of sport program or service being offered.

AMERICANS WITH DISABILITIES ACT (ADA)

President George H. W. Bush signed the Americans with Disabilities Act (ADA) into law on July 26, 1990. The ADA was enacted to provide a national mandate to eliminate discrimination faced by people with disabilities on a day-to-day basis (42 USC 12101[b]). Discrimination includes "denial of services, aids, or benefits, provision of different service or in a different manner, and segregation or separate treatment" based on disability status (U.S. Department of the Interior, n.d.). The ADA supplements existing federal and state statutes designed to accommodate persons with one or more disabilities. The ADA is a remedial statute (meaning its goal is to remedy the effects of past discrimination) and is modeled after the Civil Rights Act of 1964 and the Rehabilitation Act of 1973. It provides civil protection in employment, in government services (including transportation and schools), and in public accommodations to people with disabilities. To establish a prima facie case of discrimination under the ADA, the plaintiff must prove: (1) that she has a disability, (2) that she is a qualified individual, and (3) that she was subject to unlawful discrimination because of her disability (*Morisky v. Broward County*, 1996).

ADA Titles

The ADA contains five titles which detail legal rights provided to persons with disabilities.

Title I: Employment

Title II: Public Services

Title III: Public Accommodation

Title IV: Telecommunications

Title V: Miscellaneous Provisions

Title I protects people with disabilities from employment discrimination in businesses with 15 or more employees. Businesses that fall within the scope of ADA are required to provide reasonable accommodation so that the individual with a disability may perform the required tasks of his/her job. For example, an arena that provides a ticket taker who has chronic back pain with a chair to take periodic breaks while taking tickets may constitute a reasonable accommodation.

The key provisions of the ADA applicable to sport, physical activity, and recreation services are Title II and Title III (Grady & Andrew, 2003). Title II mandates that public entities, including state and local governments, give people with disabilities an equal opportunity to benefit from all of their programs, services, and activities (42 USC 12132). Title II incorporates aspects of Section 504 of the Rehabilitation Act. Title II is enforced in schools and is a factor when sport and physical activity facilities are municipally owned. Title II is important in creating individualized educational programs (IEPs) for students with disabilities that include or should include physical activity and aquatics.

Educational components of Title II are also addressed under the Individuals with Disabilities Education Act (IDEA). IDEA "requires public schools to make available to all eligible children with disabilities a free appropriate public education in the least restrictive environment appropriate to their individual needs" (U.S. Department of Justice, n.d.). IDEA requires public schools to develop an Individualized Education Program (IEP) for each child that reflects his/her needs (U.S. Department of Justice, n.d.).

Title III provides protection for individuals with disabilities seeking access to places of public accommodation (42 USC 1282). Title III specifically mentions sport, recreation, and play facilities and is usually the area of greatest concern in sport and physical activity. "Title III of the ADA outlaws not just intentional discrimination but also certain practices that have a disparate impact upon persons with disabilities even in the absence of any conscious intent to discriminate," also known as *de facto* discrimination (*Indep. Living Res. v. Oregon Arena Corp.*, 1169). With respect to *de facto* violations, places of public accommodation under Title III are only required to "take remedial measures that are (a) effective, (b) practical, and (c) fiscally manageable" (*Ass'n for Disabled Am., Inc. v. Concorde Gaming Corp.*, 1362).

Title IV addresses telecommunication and telephone services with the FCC and individual states working on complaints. Title V involves retaliation, nondiscrimination

in service benefits, and attorney fees for prevailing parties in actions brought to enforce the ADA. The Equal Employment Opportunities Commission (EEOC) is responsible for providing technical assistance for Title I. The Department of Justice (DOJ) is to provide technical assistance for Titles II and III.

Definition of Disability

The term "disability," for the purposes of the ADA, means that an individual has:

- A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- B) a record of such an impairment; or
- C) being regarded as having such an impairment. (42 USC 12101, Section 3[2])

A physical or mental impairment is "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; specific sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine or any mental or psychological disorder" (29 CFR 1630.2[h]). Major life activities are caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working (29 CFR 1630.2[I]).

Purpose of the ADA

The purpose of the act is:

- 1) To provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- 2) To provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- 3) To ensure that the Federal Government plays a central role in enforcing the standards established in this act on behalf of individuals with disabilities; and
- 4) To invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities. (42 USC 12101, Section 2[b])

Title I

Title I is "an anti-discrimination statute that requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities be given" (29 CFR 1630.1[a] Purpose). It reaffirms Title VII of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973. The phrase "qualified individual with a disability" refers to a person who is able to perform the essential functions of a job with or without reasonable accommodations. Under the ADA and Section 504, no employer can discriminate against a qualified individual with a disability

in the application and interview process, hiring, assignments, evaluation, promotion, and termination. Compensation, training, disciplinary action, leaves, in-service opportunities, and other terms, conditions, and privileges of employment must be the same. Employers have the same obligations to current employees who become disabled while employed.

The ADA requires that reasonable accommodations for the physical or mental limitations of a qualified applicant be made. Reasonable accommodations include facility access, restructuring job tasks with accommodations in mind, modifying work schedules, and providing readers, special computers, and interpreters. While the ADA's role is to remove barriers and to force employers to examine perceived barriers, the ADA does not relieve an employee or applicant with a disability from the obligation to perform the essential functions of the job. The purpose is to enable persons with disabilities to compete in the workplace and be measured on the same performance standards as all employees.

Accommodations are required unless the accommodation places an undue hardship on the employer. Factors to be considered in determining undue hardship are:

- nature and cost of accommodation;
- overall financial resources of agency;
- size, budget, and profitability of business; and
- financial impact of the recommended accommodation.

An undue hardship defense is also available under Title II (discussed below). These decisions are made by the Equal Employment Opportunity Commission (EEOC) on a case-by-case basis.

The ADA does not require an employer to hire an applicant or retain an employee who poses a "direct threat" to the health or safety of other employees or clients. A "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodations. Direct threat situations in sport and physical activity nearly always involve safety (i.e., the safety of the clients, participants, and employees). In these situations, safety requirements are based on real risks—not speculations, stereotypes, or generalizations about persons with disabilities.

Title I enforcement is similar to the enforcement of Title VII of the Civil Rights Act of 1964. The investigation is conducted by the EEOC. Furthermore, a right to file a lawsuit exists.

Title II

Title II of the ADA, Nondiscrimination on the Basis of Disability in State and Local Government Services, prohibits discrimination in services, programs, and activities provided or made available by state and local governments or their instrumentalities. The receipt of federal financial assistance is not required for the enforcement of Title II. The statute extends the provisions of Section 504 of the Rehabilitation Act of 1973 to state and local governments, including schools and municipal recreation facilities.

The sport professional employed in Title II environments is to inform clients and students of their rights. In addition, the professional must analyze facilities, programs, policies, and procedures for physical and psychological barriers. Lastly, the professional is to assess for violations and retain written documentation.

Title III

With Title III of the ADA (public accommodations and services operated by private entities), sport and physical activities are specifically covered in Section 301(7). Included in this section are the following:

- I) a park, zoo, amusement park, or other place of recreation;
- J) a nursery, elementary, secondary, undergraduate, or post-graduate private school, or other place of education;
- K) a daycare center, senior citizen center, or other social service center establishment; and
- L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation. (Title III, Section 301[7])

Title III requires that all privately operated, non-residential buildings become accessible to and usable by individuals with disabilities. Title III prohibits discrimination against persons with disabilities in the full and equal enjoyment of goods, services, facilities, privileges, and advantages of any public accommodation provided by private individuals or organizations. Discrimination under Title III would include provision of different services or benefits to people with disabilities than are provided to able-bodied patrons, as well as providing services and benefits in a different manner to people with disabilities. A place of public accommodation is a facility operated by a private entity whose operations affect commerce and fall into one of the following categories: lodging, eating, entertainment, recreation, service, and education. Public accommodations include restaurants, hotels, shopping malls, grocery stores, museums, and recreation centers, among others.

Under Title III, facilities must comply with the required approach, entry, and use standards. Use standards are programs, policies, and procedures. Accommodations for people with mobility impairments, visual impairments, hearing impairments, and mental capacity issues are to be made. When strict compliance is not possible, minor deviations are permitted. However, no deviation that is a safety risk is allowed.

The Department of Justice (DOJ) recommends a detailed written plan that establishes a good faith effort to be prepared. Plans are to include goals, objectives, programs, services, evaluations (including assessment tools), and methods of integrating results. The U.S. Attorney General, Office of Civil Rights, investigates violations of the ADA. When violations are identified, a compliance review is initiated.

The DOJ's Civil Rights Division is responsible for Titles II and III compliance reviews and complaints. The Equal Employment Opportunities Commission (EEOC) is responsible for Title I complaints. States with laws similar to the ADA and cities

with building codes that mirror the ADA standards also play a role in the resolution of violations of the ADA.

DEFENSES TO DISABILITY DISCRIMINATION

While the ADA creates numerous obligations for the sport business, there are several defenses available to a service provider that can be used to deny a policy modification request or to protect the health and safety of other patrons (Grady & Andrew, 2003). Under Title II, a public entity is not required to take actions that would result in undue hardship, including undue financial and administrative burdens (U.S. Department of Justice, 2005). Undue hardship refers to "an action requiring significant difficulty or expense" when considered in light of several factors (42 USC 12111[10]).

The factors considered are the same as an undue hardship defense under Title I in the employment context and include the nature and costs of the accommodation requested, the overall financial resources of the facility providing reasonable accommodation, the number of employees at the facility, the effect on expenses and resources resulting from providing the accommodation, the overall financial resources of the covered entity, and the type of operation of the covered entity (42 USC 12111[10, A]). Under Title II, the public entity is "required to make reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination, unless the service provider can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity being provided" (U.S. Department of Justice, 2002). The fundamental alteration defense was raised by the PGA, where the Supreme Court held that allowing Casey Martin to use a golf cart during PGA qualifying tournaments would not fundamentally alter the nature of the golf tournaments (*PGA Tour v. Martin*, 2000, 690).

Similarly, Title III requires "reasonable modification of policies, practices, or procedures of a public accommodation unless doing so would fundamentally alter what is offered" (*PGA Tour v. Martin*, 2000, 668).

Title III also requires the removal of architectural or structural barriers that prevent access to public accommodations, when their removal is readily achievable (42 USC 12182[b]). If barrier removal is not readily achievable, the public accommodation must make its goods or services available to people with disabilities through alternative methods, if such alternative methods are readily achievable (42 USC 12182[b]). For example, if a stadium only sells tickets online, the facility must establish an alternative sales method, such as calling on the telephone or buying tickets in person at the box office, to accommodate patrons who, because of their disability, cannot purchase tickets online.

While Title III does not allow for an undue hardship defense for the failure to construct new facilities in accordance with the ADA's implementing regulations and ADA Accessibility Guidelines (28 CFR 36.406, Appendix A), an undue hardship defense can still be raised related to policies and procedures using an administrative burden theory (Grady & Andrew, 2003). In *PGA Tour v. Martin* (2000), discussed below, the PGA asserted that if their organization had to review numerous appeals by other golfers with disabilities requesting accommodations, the administrative process would constitute an undue hardship (1002). The court referred to *Washington v.*

Indiana High Sch. Athletic Ass'n (1999, 852) where the Seventh Circuit analyzed the individualized assessment requirement for a learning-disabled student athlete waiver from an eight-semester limit on competition. The court in *Washington* stated that the few case-by-case analyses that the athletic association "would need to conduct hardly can be described as an excessive burden" (852). Citing this rationale, the Ninth Circuit in *Martin* rejected the undue burden argument, finding that an individualized determination would not impose an intolerable burden on the PGA (*PGA Tour v. Martin*, 2000, 1002).

As mentioned earlier in the context of Title I, the "direct threat" exception can be raised as a defense when there is concern about health or safety of others given the nature of the person's disability or due to the auxiliary aid that the person uses, such as a wheelchair. "Direct threat" is often an issue in the context of emergency evacuation of people with disabilities (Grady & Andrew, 2007). For example, seating patrons in wheelchairs in a path designated as the emergency evacuation route used by able-bodied patrons would raise "direct threat" concerns, as other patrons may not be able to evacuate quickly and efficiently in an emergency due to the presence of the wheelchairs, as well as the potential inability of patrons in wheelchairs to evacuate quickly. To utilize the direct threat defense, the service provider must conduct an individual assessment of the risk to the health and safety of others (McGovern, n.d.). "The assessment must include a consideration of how reasonable accommodations such as rule changes or adaptive equipment would eliminate or minimize the risk and enable participation in the activity" (McGovern, n.d.).

CASES

The following are examples of cases that have examined the application of the ADA in sport: *Martin v. PGA Tour*, 2000; *Anderson v. Little League Baseball, Inc.*, 1992; *Bowers v. the National Collegiate Athletic Association, et al.*, 2003; as well as several cases discussed below involving age eligibility issues of interscholastic athletes with learning disabilities.

Modifications of Rules and Policies

Casey Martin's decision from the United States Supreme Court is the most often mentioned court decision in sport related to the Americans with Disabilities Act. The Professional Golf Association (PGA) uses a three-stage qualifying tournament as the most popular means of gaining entry into its tour. Stages one and two permit a participant to use a golf cart while playing; players must walk the course in the third stage. Martin, a professional golfer, has Klippel-Trenaunay-Weber Syndrome, a degenerative circulatory disorder that meets the ADA definition of a disability. He petitioned the PGA, with comprehensive medical support, requesting an accommodation under Title III to use a golf cart during the third stage of qualifying. Martin was denied the accommodation.

Martin filed an action against the PGA under Title III of the ADA. The District Court of Oregon entered a preliminary injunction permitting him to enter the tournament. After a trial, the injunction became permanent. An underlying issue was

whether Title III, which includes public accommodations, could be applied in professional sport. The United States Court of Appeals for the Ninth Circuit affirmed the lower court's decision, stating that the golf course was a place of public accommodation and that the use of a cart during the tour would not fundamentally alter the tournament. The United States Supreme Court affirmed.

In another high-profile case, Judge Lawrence Anderson of Phoenix, Arizona, a wheelchair user, was selected to coach a 1992 All-Star National Little League competition (*Anderson v. Little League Baseball, Inc.*, 1992). However, the president and CEO of Little League Baseball adopted a policy stating that a coach in a wheelchair could coach from the dugout but not from a coach's box. The safety of the players was the rationale for the decision.

Judge Anderson had been an on-field coach of his son's team for three years. Coach Anderson saw the policy as a way to eliminate him from coaching if his team made the finals. In 1991, Judge Anderson's team was eliminated early in the competition. During 1992, the local branch of Little League Baseball allowed him to continue to assume his preferred coaching position on the field. When it appeared that his 1992 team was going to be successful in the national tournament, he filed an injunction to stop enforcement of Little League's policy (or, in the alternative, asked the court to allow him to participate fully by coaching on the field). The injunction requested that he be "involved to the full extent of his responsibilities as a coach" (344). He asked the court to stop Little League Baseball from intimidating or threatening players, parents, coaches, officials, umpires, and other participants in the game. Anderson also requested that the court forbid Little League Baseball from attempting to induce a boycott of the game. The restraining order was granted. Anderson coached his team in the national tournament.

Eligibility

Bowers v. the National Collegiate Athletic Association, et al. (2003) involved a high school football player who had been recruited by Temple University, the University of Iowa, Delaware State University, the University of Massachusetts, and the University of Memphis. The player was denied eligibility to play by the NCAA Clearinghouse. This intercollegiate athletics clearinghouse had a rule that in order for athletes to be eligible to play at the collegiate level, they must have satisfactorily completed 13 core courses in secondary schools. A diagnosed learning disability prevented Bowers from taking several of the core courses and instead, he took special education classes which did not satisfy the core courses requirement.

Bowers's action was against the NCAA, its clearinghouse, and others for violation of the ADA and the Rehabilitation Act. His request for a preliminary injunction to be declared eligible to play was denied. He then added the universities to the complaint. The district court granted summary judgment for the clearinghouse and, in part, for the NCAA and a number of the individual colleges and universities. Claims were subsequently made against other universities. The universities and colleges claimed Eleventh Amendment and sovereign immunity. The United States Court of Appeals for the

Third Circuit dismissed the appeals of the Universities of Iowa, Memphis, and Massachusetts. The appellate court also found that Temple University had a valid claim for contribution against the University of Massachusetts and Delaware State University. Thus, the court remanded the case to the district court. The protracted litigation in *Bowers*, which lasted over a decade and produced twelve court opinions, demonstrates the complex issues raised by these cases, often involving numerous defendants. The case also highlights the need to provide a clearinghouse system that better protects the rights of student-athletes with learning disabilities.

McPherson v. Michigan High School Athletic Association, Inc. (1996); *Reaves v. Mill, et al.* (1995); *University Interscholastic League v. Buchanan and Bomar* (1993); *Pottgen v. The Missouri High School Activities Association* (1994); and *Sandison and Stanley v. Michigan High School Athletic Association* (1995) involved scholastic athletic association rules denying eligibility to students over 19 years of age. These rules originated as safety measures. Buchanan, Bomar, Pottgen, Sandison, and Stanley each had learning disabilities, and as a result lost two or more years in completing elementary school. Reaves lost only one year. Each sought an injunction to permit them to play interscholastic sports in his/her 19th year. All were successful in the lower courts. The Missouri State High School Activities Association appealed the *Pottgen* case to the United States Court of Appeals for the Eighth Circuit. The court of appeals reversed the decision, denying Pottgen the opportunity to play another year, arguing that the issue was the passage of time. Thus, he was not able to meet the age requirement in spite of his disability. Rhodes's denial of a request for an extension of Ohio High School Athletic Association's eight-semester eligibility rule so he could play high school football was influenced by the *Pottgen* decision (*Rhodes v. Ohio High School Athletic Association*, 1996).

A novel case which even the court admitted "push[ed] the margins of federal disability discrimination laws" was *Shepherd and Hollonbeck v. USOC* (1975). The consolidated case was filed by elite Paralympic athletes who challenged "the USOC's purported failure to provide them with the services, benefits and financial and other support routinely provided to their Olympic counterparts" (2006), in violation of the ADA as well as the Rehabilitation Act. The plaintiffs claimed that "it is discriminatory for the USOC to provide them programming, privileges, and financial support inferior to that provided non-disabled athletes under the Olympic program" (1975-1976). The district court ruled against the Paralympic athletes, finding it "irrelevant that the USOC chooses to provide Olympic programming only to Olympic athletes as long as the gateway to that program operates in a nondiscriminatory manner.... Plaintiffs are afforded a participation opportunity defined by their disability, the benefits of which are lesser based not an additional layer of discrimination but by operation of eligibility criteria beyond the reach of the ADA and Rehabilitation Act" (1995). The court effectively concluded that "Paralympic athletes' expectations for the equitable allocation of benefits between Paralympians and Olympians competing on behalf of the United States under the auspices of the USOC is not a matter which courts, through the ADA, may mandate or enforce" (1995). The Court of Appeals affirmed.

Stadium Accessibility

Stadium accessibility is an area that has experienced much high-profile litigation and required complex interpretations about what level of accessibility is required in sport facilities. Guidelines and standards used in meeting the laws related to accessibility include the Americans With Disabilities Act Accessibility Guidelines for Buildings and Facilities, the Uniform Federal Accessibility Standards, as well as the 2010 Standards for Accessible Design. Two distinct standards related to accessibility exist, depending on the year of construction and date of first occupancy. For "existing" facilities (those constructed prior to 1993), Title III requires the removal of existing architectural barriers in facilities considered places of public accommodation, where removal is "readily achievable," meaning without much difficulty or expense. Facilities intended for first occupancy and building alterations started after January 1993 (referred to as "new" facilities) are required to be in full compliance with all accessibility requirements. A comprehensive listing of "Stadium accessibility" requirements is published by the Department of Justice (U.S. Department of Justice, n.d.).

As large-scale renovations to old college stadiums are contemplated, such as adding luxury suites or expanding the existing seating bowl, when do such renovations trigger additional obligations under the ADA (Grady & Andrew, 2008)? There are specific rules set forth in the ADA and related standards for facilities that undergo renovations. Under Title III, renovations (referred to as "alterations" in the ADA) made by places of public accommodation after January 26, 1992, must be "readily accessible to and useable by individuals with disabilities" to "the maximum extent feasible" (42 USC 12183[a]; 28 CFR 36.402). The facility must also ensure that the area of modification or alteration or expansion complies with the ADA Accessibility Guidelines (ADAAG) for new construction (Hymas & Parkinson, 2003). For facilities that fall within the scope of Title II, public entities must ensure that the altered portions of the facility are accessible but have a choice in applying either the ADAAG or the Uniform Federal Accessibility Standards (UFAS) to the altered portion of the facility (28 CFR 35.151).

"Alterations" refer to any additions, programmatic changes, or major renovations (not routine painting and decorating). These alterations include exterior approaches, entries, and uses of buildings. "A public entity that undertakes alterations ... must take that opportunity to make the facilities accessible" (*Association for Disabled Americans v. City of Orlando*, 2001, 1319). In addition, the sport facility must ensure that the area of modification or alteration or expansion complies with the ADAAG for new construction (Hymas & Parkinson, 2003).

Determining whether a renovation is significant enough to trigger the accessibility guidelines for new construction was the main issue in dispute in a lawsuit brought by the Michigan Paralyzed Veterans of America against the University of Michigan regarding a planned \$226 million renovation of Michigan Stadium, more commonly known as "The Big House." The plans, announced in 2007, called for increasing the seating capacity to over 108,000, including adding 28 luxury boxes and 3,200 indoor and outdoor club seats, while only increasing the number of accessible seats from 90 to 282. The University of Michigan classified the extensive and costly project as

necessary to "repair" severe crumbling of the concrete base of the bowl, not to change or alter the stadium or its seating.

The U.S. Department of Education Office of Civil Rights (OCR), which joined as a co-plaintiff in the case, believed the scope of the project constituted a "renovation." If deemed a renovation, this would trigger the updating of various sections of the stadium, including the seating bowl, to meet the 1% of accessible seating requirements for "new" sport facilities (U.S. Department of Justice, n.d.). In defense of its position, the university phrased the issue as follows: "The principal issue in this case presented by OCR is whether a phased concrete project ... constitutes an 'alteration' of the Stadium which would trigger ... the establishment of a percentage of wheelchair places (of all seats) in the alteration, as well as a requirement for dispersion of these places" ("University's Response," 2007). The university's position was that, as a public institution, the university is required to provide accessibility to wheelchair users to the stadium "when viewed in its entirety" which they argued had consistently been done ("University's Response," 2007).

The university argued that its efforts plainly satisfied the "program accessibility" requirement, which assesses whether a program or activity is readily accessible to and usable by individuals with disabilities, and that no patron with a ticket had been denied access to accessible seating. The Department of Education disagreed, finding that the changes to the physical structure of the stadium constituted an alteration. The university entered into a settlement with the Michigan Paralyzed Veterans of America and the federal government in exchange for dropping the lawsuit. Under the settlement, the university agreed to implement a plan for enhancing access for people with disabilities, including providing at least 329 wheelchair-accessible seats when the renovation project concluded in 2010, at a cost of about \$2 million (Nelson, 2008).

As ADA litigation has evolved and become more nuanced, so has the nature of the claims raised by plaintiffs. In *Feldman v. Pro Football, Inc.*, plaintiffs included deaf people and people with hearing impairments who regularly attend Washington Redskins football games. Plaintiffs argued that the Washington Redskins and FedEx Field failed to provide them with equal access to the information and announcements broadcast over the stadium's public address system, in violation of the ADA (699). The Redskins and FedEx Field offered fans with hearing impairments assistive listening devices; however, these devices did not benefit the plaintiffs. In 2003, plaintiffs requested that the Redskins make all announcements on the JumboTron available with closed captioning. By 2006, when the case was filed, the only captioning that occurred was an emergency evacuation video. Some aural content also began to be captioned, but not all that the plaintiffs requested. The captioning was placed on LED boards that were not within the line of sight of the JumboTron, making it difficult to both watch the JumboTron and the captioning. Also, the music played in the stadium was not captioned.

The district court ruled in favor of plaintiffs' motion for summary judgment, holding that the ADA requires defendants to provide auxiliary aids for the aural content broadcast over FedEx Field's public address system, including music lyrics (709). The court found that the Redskins could provide auxiliary access to the music lyrics

without undue burden. However, because the ADA does not dictate a particular auxiliary aid be used, the appellate court declined to require captioning as the means of access for the music lyrics. Defendants appealed the district court's summary judgment ruling and asked the appellate court to decide "whether the deaf and hearing-impaired game spectators require access to music lyrics in order to fully and equally enjoy defendants' goods, services, privileges, and facilities" (383).

The appellate court agreed with the district court that Title III required the Redskins to provide fans equal access to the aural information broadcast over the public address system, including "music with lyrics, play information, advertisements, referee calls, safety/emergency information, and other announcements" (390). Furthermore, the court found that the music played over the public address system during Redskins home games "is part of the football game experience that defendants provide as a good or service" (384). In fact, the court stated that "defendants 'provide more than a football game.' They provide an entertainment experience. This experience includes aural and visual components that, although not part of the game action, play an important role in generating support for the game and promoting spectator attendance" (391). Thus, while the ADA requires full and equal access to the music lyrics, the court did not require the auxiliary aids and services take a particular form, such as through captioning. The appellate court noted, "When an auxiliary aid of some kind is required, the regulations acknowledge (1) that the type of aid necessary for effective communication inevitably will vary with context and (2) that the auxiliary aid requirement is a flexible one" (392). The court further stated that "full and equal enjoyment is not so capacious as to mean that an individual with a disability must achieve an identical result or level of achievement as persons without a disability" (392). The district and appellate courts' opinions in *Feldman* suggest that the courts appear to be more willing to balance what the ADA requires with the practical realities of providing accessibility to a modern-day sporting event with an excess of 70,000 spectators. This case also suggests that with increased ADA requirements, future courts may be willing to adopt a broader application of the ADA to all aspects of managing accessibility at sport and entertainment events.

2010 REVISIONS TO THE ADA

Significant changes to the ADA that have application to sport facilities were enacted in 2010. The requirements provide specific guidance for sport facilities in the following areas: ticket sales for wheelchair spaces, ticket prices, ticket transfers, hold and release policies, the secondary ticket market, and the number of accessible and companion seats that must be sold together. According to guidance provided by the Department of Justice, "as of March 15, 2011, venues that sell tickets for assigned seats must implement policies to comply with the new ticketing requirements" (U.S. Department of Justice, 2011, p. 1). According to the U.S. Department of Justice (2011), the new regulations were necessary because "over the past 20 years, some public and private venues, ticket sellers, and distributors have not provided the same opportunity to purchase tickets for wheelchair-accessible seats and non-accessible seats" (p. 1).

These regulations were designed to offer guidance to sport facilities in terms of ticket sales and seating for wheelchair users. The 2011 regulations apply to selling tickets for assigned seats at events such as concerts, plays, and sporting events (U.S. Department of Justice, 2011). The requirements are identical for Title II and Title III entities and apply to tickets sold for single events and those sold for a series of events (e.g., subscriptions or season tickets; U.S. Department of Justice, 2011).

SUMMARY

The ADA has five titles, three of which have a direct connection to and impact on sport and physical activity professionals. Title I covers employment discrimination. Title II prohibits state and local governments from discriminating against people with disabilities. Title III, the public accommodations and services area provision, mandates access to sport facilities and impacts how stadiums and other sport facilities provide access to patrons and participants with disabilities.

DISCUSSION QUESTIONS

1. How can the legal requirement to provide accessibility become an opportunity for a sport facility to reach out to new customers or enhance the stadium experience for current fans? Explain your ideas in the context of a response to the general manager of a medium size sport facility who claims that complying with the ADA is just “too costly”.
2. How do the defenses provided in the ADA legislation give sport organizations sufficient protection to operate without fundamentally altering the nature of sport competition?

ACTIVITY

1. Review the 2010 ADA regulations (http://www.ada.gov/ticketing_2010.htm). Design a ticket sales policy for a sporting event that complies with the 2010 ADA requirements related to ticket sales.

REFERENCES

- Americans With Disabilities Act of 1990, Public Law No. 101-336, 104 Stat. 327 (Codified at 42 USCA 1202–1213).
- Anderson v. Little League Baseball, 794 F. Supp. 342 (1992).
- Association for Disabled Americans v. City of Orlando, 153 F. Supp. 2d 1310 (2001).
- Association for Disabled Americans, Inc. v. Concorde Gaming Corp., 158 F. Supp. 2d 1353 (2001).
- Bowers v. National Collegiate Athletic Association, et al., 346 F. 3d 402 (2003).
- Fay, T., & Wolff, E. (2000). Critical change factors model: Understanding the integration process of sport opportunities for athletes with disabilities into national governing bodies and the United States Olympic Committee. *Proceedings of the 2000 Pre-Olympic Congress: International Congress on Sport Science, Sports Medicine and Physical Education*.
- Feldman v. Pro Football, 579 F. Supp 2d 697 (2008); 419 Fed. Appx. 381 (2011).