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TITLE IX AT 50

Phyllis W. Cheng | Elizabeth Kristen | Karen Pazzani

ADR Services, Inc. | Webinar | July 19, 2022

The Speakers

Phyllis W. Cheng

Elizabeth Kristen

Karen J. Pazzani

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OVERVIEW

- History of Title IX | California Law
- Athletics
- Sexual Harassment
- Best Practices

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HISTORY

Impetus for Title IX

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Title IX Law

Title IX of the Education Amendments Act of 1972 to the 1964 Civil Rights Act (20 U.S.C. §§ 1681–1688) provides that:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

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Title IX Application

K through post-graduate educational institutions, public and private, that receive federal financial assistance, including:

- approximately16,500 local school districts
- 7,000 postsecondary institutions, charter schools, for-profit schools
- libraries and museums
- vocational rehabilitation agencies
- over 5,000 universities and colleges
- education agencies of 50 states, the District of Columbia, and territories and possessions of the United States

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Title IX Coverage

Non-discriminatory operations:

- recruitment, admissions, and counseling
- financial assistance
- athletics
- sex-based harassment
- treatment of pregnant and parenting students
- discipline
- single-sex education
- employment
- non-retaliation
- Title IX coordinator, assurance of compliance, policies and procedures

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Title IX Enforcement

- US Department of Education, Office for Civil Rights
- DOJ Office for Civil Rights
- DHHS Office for Civil Rights
- Designated Title IX Coordinator at every covered institution
- Public Schools: California State Department of Education, Civil Rights, Title IX, ADA/504, MOA Coordinator
- California Community Colleges, Vice Chancellor of Educational Equity and Success
- California State University, Title IX Compliance Officer
- University of California, Systemwide Title IX Office

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Title VII of the 1964 Civil Rights Act

Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e) prohibits employment discrimination against employees and applicants based on:

- Race
- Color
- Religion
- Sex (including gender, pregnancy, sexual orientation, and gender identity)
- National origin

The Department of Education (ED) has said there is no inherent conflict between Title IX and Title VII enforcement schemes and has stated it "will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX." (85 Fed. Reg. 30439).

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Executive Order 11246

Executive Order 11246 requires affirmative action and prohibits federal contractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. Contractors also are prohibited from discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.

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California Sex Equity in Education Act

Signing ceremony of California's version of Title IX (Assem. Bill 3133 (Roos), 1983 Reg. Sess., ch. 1117, 1983 Cal. Stat. 3, p. 4211, Cal. Ed.Code § 200 et seq.), Phyllis Cheng standing behind Governor Jerry Brown and Majority Leader Mike Roos, author. September 13, 1982.

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California Sex Equity in Education Act

Codified as Cal. Ed. Code, §§ 200 et seq. (pre-K-secondary) and 66250 et seq. (higher education)

- Bars discrimination, harassment and retaliation pre-K through university, public or private, receiving state financial assistance
- Bases include sex, disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic, including immigration status, equal rights, and opportunities in the educational institutions of the state
- Tracks all provisions of Title IX regulations plus instructional materials
- Requires promulgation of regulations by public educational institutions

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Unruh Civil Rights Act

The California Unruh Civil Rights Act (Cal. Civ. Code §§ 51-52) protects all persons from discrimination by all business establishments (i.e., law and mediation offices) in California, including, but not limited to:

- Hotels and motels
- Non-profit organizations that have a business purpose or are a public accommodation
- Restaurants
- Theaters
- Hospitals
- Barber and beauty shops
- Housing accommodations
- Public agencies (including courts)
- Retail establishments
- Governmental entities
- Educational institutions (*Brennon B. v. Superior Court*, 57 Cal.App.5th 367 (2020) rev. granted (S266254/A157026), submitted/opinion due.)

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CA FAIR EMPLOYMENT & HOUSING ACT

Cal. Gov’t Code § 11920 et seq.; Cal. Code Regs., tit. 2, § 11000 et seq.

Prohibits harassment of employees, applicants, unpaid interns, volunteers, and independent contractors by any persons and require employers to take all reasonable steps to prevent harassment. This includes a prohibition against sexual harassment, gender harassment, harassment based on pregnancy, childbirth, breastfeeding and/or related medical conditions, as well as harassment based on all other characteristics listed above.

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Cal. Gov't Code §§ 11135-11139.8

§ 11135 (a)

No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University.

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ATHLETICS

Benefit of Sports for Girls

- Girls playing sports experience **better mental and physical health** through life.
- Girls who participate in sports **achieve better grades** & more **likely to graduate.**
- Female students receiving college sports scholarships **graduate at higher rates** than female students generally.
- More than **80% percent of executive businesswomen played** sports as youth.
- High school female athletes → 7+% **higher wages later on** as working adults.

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Title IX Athletics Progress Report

- Before Title IX (1972), fewer than 300,000 girls participated in high school athletics. Today, **3,000,000+ girls participate in high school athletics nationwide.**
- Still, **over 4,000,000 boys play high school sports**, despite girls and boys making up ~50% / 50% of student bodies.
- According to the U.S. Dept. of Education, nationally, **girls are 49% of high school students, but just 42% of high school athletes**.

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Title IX Enforcement Options

- Complaint directly to **school/school board**.
- **Sue in court** (private law suits) through student(s) and their family as plaintiffs (no exhaustion req.; 2 yr. SOL)
- Complaint to **U.S. Dept. of Education**, Office for Civil Rights (OCR) (ANYONE can file – no standing req.)
- Complaint to **state athletics body** (*e.g.*, California Interscholastic Federation)
- Complaint to **California Department of Education**

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Title IX Requirements

1. Schools must offer male and female students **equal opportunities to participate** (= actual team slots filled).

2. Schools must provide male and female athletes with **equal benefits and treatment** (*e.g.*, overall uniform quality across teams).

3. **No retaliation**

<u>NOTE: Overall program analysis.</u>

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EQUAL OPPORTUNITY

- An institution must provide "**equal athletic opportunity**"
  for members of both sexes.

- In determining whether a school is providing equal opportunity, courts or bodies like OCR will look to see whether -- **the selection of sports and levels of competition effectively accommodates the interests and abilities of both sexes.**

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PARTICIPATION: 3-PART TEST

- **Part 1: Proportionality** – Male to female ratio of athletes is "substantially proportionate" to the male to female ratio of student enrollment; OR
- **Part 2: Expansion** – The school has a history and continuing practice of expanding athletic participation opportunities for the underrepresented sex; OR
- **Part 3: Full Accommodation** – The school shows it has fully and effectively accommodated the interests and abilities of the underrepresented sex.

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SUBSTANTIAL PROPORTIONALITY

- The percentage of athletes who are female **must mirror** the percentage of students who are female.
- Check CIF data: https://www.cifstate.org/coaches-admin/census/index

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History & Continuing Practice

Where members of one sex have been and are underrepresented in athletics, the institution, as an **affirmative defense**, can show a **history and continuing practice of program expansion** which is demonstrably responsive to the developing interest and abilities of the members of that sex.

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Full & Effective Accommodation

Where members of one sex are underrepresented in athletics, and the institution cannot show a continuing practice of program expansion, this affirmative defense can be used by a school to demonstrate that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

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Participation Opportunities Example Calculation

1,000 students attend a high school

- 500 females
- 500 males

<u>500 female students</u> = 1000 total students **female students**

<u>70 female athletes</u> = 200 total athletes **female athletes**

200 students play sports

- 70 females
- 130 males

50%-35% = **15% gap**

If female athletes become 50% - **need 60 more girls playing**

Courts have stated that 6.7% and 3.2% participation gaps at the high school and college levels not substantially proportional

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Participation Opportunities Example Calculation

1	School Name	City	CIF Section	Please indicate whether your school is Public, Public/Charter or Non-Public	TOTAL School Enrollment	TOTAL School Enrollment BOYS		TOTAL School Enrollment GIRLS		TOTAL School Athletes	TOTAL School Athletes BOYS		TOTAL School Athletes GIRLS		Participation Gap (%)	Number of GIRL Athletes Needed
17			CIF-NCS	Public	1583	803	50.73%	780	49.27%	963	514	53.37%	449	46.63%	2.65%	50

1	School Name	City	CIF Section	Please indicate whether your school is Public, Public/Charter or Non-Public	TOTAL School Enrollment	TOTAL School Enrollment BOYS		TOTAL School Enrollment GIRLS		TOTAL School Athletes	TOTAL School Athletes BOYS		TOTAL School Athletes GIRLS		Participation Gap (%)	Number of GIRL Athletes Needed
131			CIF-NCS	Public	1386	722	52.09%	664	47.91%	616	329	53.41%	287	46.59%	1.32%	16

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EQUAL TREATMENT & BENEFITS

Male and female athletes should receive **equivalent treatment, benefits** & opportunities in the following ("Laundry List"):

- Facilities
- Equipment & Supplies
- Scheduling of Game & Practice Times
- Travel / Transportation
- Coaching & Tutoring

Publicity & Promotion

- Medical & Training
- Medical & Training
- Recruitment
- Fundraising Opportunities
- Scholarship Opportunities (college)
- Housing & Dining (college)

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Facilities

- Practice and game facilities
  - *e.g.*, quality, size, and number

- Locker and team rooms

- Storage areas

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Equipment & Supplies

- Uniforms – *e.g.*, number of sets and quality
- Sport-Specific Equipment – *e.g.*, balls, protective gear

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Travel & Transportation

- Travel to practices, games, play-offs and tournaments
- Accommodations
- Dining allowances

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SEXUAL HARASSMENT

Title IX Regulations

- Prior to the August 14, 2020 Title IX regulations, the Department of Education defined sexual harassment through a series of guidance documents, Dear Colleague letters, and FAQs that have all been rescinded.

- The Title IX regulations, which became effective on August 14, 2020, set out a number of new regulatory requirements for colleges and universities to address sexual harassment.

- Recently, the Department of Education has issued new proposed regulations. If they become effective, they would change the scope of the conduct that educational institutions are required to address and the manner in which they address them.

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Conduct within Scope of Current Title IX Regulations

Under the current regulations, sexual harassment, means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to an educational program or activity; or

(3) Sexual Assault, dating violence, domestic violence, or stalking

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PROPOSED REVISIONS TO TITLE IX REGULATIONS

Sex-based harassment includes sexual harassment, harassment on the bases of defined characteristics, or other conduct that is:

- Quid pro quo harassment
- Hostile environment harassment, which is defined as unwelcome sex based conduct this is sufficiently severe **or** pervasive, that, based on the totally of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the institutions education program or activity
- Sexual assault, dating violence, domestic violence, and stalking

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Proposed Revisions to Title IX Regulations

Expanded characteristics:

- Sex stereotypes
- Sex characteristics
- Pregnancy or related conditions
- Sexual orientation
- Gender identity

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Expansion of Jurisdiction

Current Regulations

- An institution must only take action when they have "actual knowledge" of sexual harassment in an education program or activity against a person in the United States.
- The Title IX regulation defines "education program or activity" as the "locations, events, or circumstances over which the [institution] exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."

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Expansion of Jurisdiction

Proposed Revision

- Educational institutions required to respond when on notice of conduct that **may** be sex discrimination
- Definition of education program or activity expanded to include:
  - Conduct that occurs in a building owned or controlled by a student organization
  - Conduct that is subject to a recipient's disciplinary authority
- Educational institutions have an obligation to address sex-based harassment even if the sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or outside the United States

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Grievance Procedure

Current Regulations

- The Title IX regulations outline the detailed requirements for a grievance process to address formal complaints of sexual harassment in 34 C.F.R. § 106.45. Elements include:
  - Notice to the parties
  - Investigation of the allegations in a formal complaint
  - Opportunity for both parties to inspect and review evidence
  - An investigative report that the parties are allowed to review and respond to
  - Live hearing where each party's advisor may ask questions of the other party and witnesses
  - Written decision regarding responsibility
  - Appeal

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GRIEVANCE PROCEDURE

Proposed Revisions

Two sets of grievance procedures:

- 106.45: prompt and equitable resolution of complaints of sex discrimination
- 106.46: resolution of complaints of sex-based harassment involving a student party

106.45

- Notice of allegations
- Adequate, reliable, and impartial investigation
- Provide description of evidence relevant to allegations and reasonable opportunity to respond
- Notify the parties of the outcome
- Appeal optional
- Complete process before imposing sanctions

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GRIEVANCE PROCEDURE

Proposed Revisions

106.46

- Everything under 106.45, plus:
- Expanded notice requirements
- Investigation includes:
    - Timely notice of meetings
    - Right to advisor of choice
    - Equal opportunity to have other persons present
    - Discretion to allow expert witnesses
    - Equitable access to relevant evidence
    - Process for assessing credibility

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Grievance Procedure

Proposed Revisions

If investigator:

- Equitable access to the relevant evidence or to the same written investigation report
- If a report is used, equitable access to the relevant evidence upon request
- Reasonable opportunity to review and respond prior to decision
- Individual meetings if credibility is an issue and relevant
- Decisionmaker poses questions raised by the parties

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Grievance Procedure

Proposed Revisions

If live hearing:

- Opportunity to review the evidence and/or investigation report before live hearing
- Opportunity to respond before or during the hearing
- Physically present in same geographic locations or through technology
- Allow each party's advisor to ask questions of any party and any witnesses
- No questioning by the party personally
- Must provide advisor without charge to party for the purpose of advisor-conducting questioning

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Recent Case Law on Title IX & Sexual Harassment

- *Doe v. Regents of University of California*, __ Cal.App.5th__, 2022 WL 2286393 (June 24, 2022) (UCSB)
- *Karasek v. Regents of University of California*, 956 F.3d 1093 (9th Cir. 2020) [UC Berkeley]
- *Doe v. Regents of University of California*, 28 Cal.App.5th 44 (2018) [UCSB]
- *Donovan v. Poway Unified School Dist.*,167 Cal.App.4th 567 (2008)

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BEST PRACTICES

Best Practices: In General

- Ensure appointment of Title IX Coordinator, who is readily identifiable and accessible
- Ensure the Title IX coordinator is trained on Title IX and parallel state laws
- Ensure that Title IX and parallel state law policies and procedures are published and accessible
- Ensure that the educational institution files assurances of compliance when applying for federal and state financial assistance
- Ensure that grievance procedures comply with statutory requirements

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Best Practices: Athletics

- Regularly review athletic participation numbers by gender and survey students to see what additional sports girls want to play
- Assess all athletic facilities for gender equity paying special attention to softball/baseball disparities, weight room usage and athletic locker rooms
- Consider school publicity for athletics and whether it is gender equitable
- Make sure athletic directors and coaches are well-trained in Title IX and school practices
- Ensure booster club money is monitored and the benefits provided to athletes are gender equitable including benefits from booster clubs
- Make sure there is no retaliation against people who raise Title IX concerns

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Best Practices: Sexual Harassment

- Adopt grievance procedure that comply with current Title IX regulations and state law
- Begin considering revisions if the proposed regulations are adopted
- Ensure a timely response to reports of sexual harassment
- Maintain clear documentation of the response to sexual harassment

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THANK YOU

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30 F.4th 828
United States Court of Appeals, Ninth Circuit.

A. B. and A. M. B., by their parents and next friends, C.B. and D.B.; T. T., by her parents and next friends, K.T. and S.T.; A. P., by her parents and next friends, C.P. and M.P, Plaintiffs-Appellants,
v.
HAWAII STATE DEPARTMENT OF EDUCATION; Oahu Interscholastic Association, Defendants-Appellees.

No. 20-15570
|
Argued and Submitted February 4, 2021 Honolulu, Hawaii
|
Filed April 4, 2022

Synopsis
Background: Female high school student athletes brought action against Department of Education and interscholastic association, seeking declaratory and injunctive relief and attorneys' fees and costs and alleging unequal treatment and benefits and unequal participation, under Title IX, against both defendants and retaliation, in violation of Title IX, against Department. The United States District Court for the District of Hawai'i, Leslie E. Kobayashi, J., 334 F.R.D. 600, denied students' motion for class certification. Students appealed.

Holdings: The Court of Appeals, Collins, Circuit Judge, held that:

class of athletes was adequately numerous to satisfy numerosity requirement for class certification;

athletes established existence of common questions of law and fact that were capable of classwide resolution, as necessary to satisfy commonality requirement; and

athletes satisfied typicality requirement.

Reversed and remanded.

***830** Appeal from the United States District Court for the District of Hawaii, Leslie E. Kobayashi, District Judge, Presiding, D.C. No. 1:18-cv-00477-LEK-RT

Attorneys and Law Firms

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Lyle S. Hosoda and Addison D. Bonner, Hosoda and Bonner LLLC, Honolulu, Hawaii, for Defendant-Appellee Oahu Interscholastic Association.

Lee Brand, Roxane A. Polidora, and Athena G. Rutherford, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, California, for Amici Curiae Civil Rights Organizations.

Before: Richard R. Clifton, Ryan D. Nelson, and Daniel P. Collins, Circuit Judges.

OPINION

COLLINS, Circuit Judge:

***831** Section 901(a) of Title IX of the Education Amendments of 1972 provides that, subject to certain exceptions, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Although Title IX contains no express language creating a private cause of action, the Supreme Court has long held that the statute is enforceable through a judicially recognized implied private right of action. *See Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 65, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) (citing *Cannon*

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v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)). Invoking that right of action here, female student athletes at **Hawaii‘s** largest public high school brought this putative class action seeking declaratory and injunctive relief to redress multiple alleged violations of Title IX, including systematic discriminatory deficiencies in their school's athletic programs. The district court subsequently denied Plaintiffs' motion for class certification, holding that Plaintiffs had failed to satisfy the requirements of Federal Rule of Civil Procedure 23(a). We authorized this interlocutory appeal under Rule 23(f), and we reverse.

I

A

Plaintiffs **A.B**., her younger sister A.M.B., T.T., and A.P. are or were female student athletes at James Campbell High School (“Campbell”) in Ewa Beach on the island of Oahu.[1] At the time **A.B**. and T.T. moved for class certification in May 2019, all four were members of the Campbell girls' varsity water polo team; **A.B**. and T.T. were also members of the girls' varsity swimming team; and A.P. was also a ***832** member of the girls' varsity soccer team.[2] A.M.B. later stated that she also planned to join the swimming team. Plaintiffs allege that they and other female students at Campbell “experience grossly unequal treatment, benefits, and opportunities in relation to male athletes,” resulting in multiple violations of Title IX. As a result, **A.B**. and T.T. filed this suit in December 2018 against Defendant **Hawaii** State Department of Education (“the Department”), which is the agency that manages Campbell's operations, and Defendant Oahu Interscholastic Association, which is an unincorporated entity that administers high school athletic programs for public high schools on Oahu. In the operative second amended complaint, Plaintiffs assert three separate causes of action available under Title IX and its implementing regulations: “(1) unequal treatment and benefits in athletic programs; (2) unequal participation opportunities in athletic programs; and (3) retaliation.” *See Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 851 (9th Cir. 2014).

In their first cause of action, Plaintiffs allege that Defendants violated § 901(a) by failing to provide equal treatment and benefits. We have held that § 901(a)'s prohibition on discriminatory denial of educational benefits, as construed in the U.S. Department of Education's implementing regulation governing school athletic programs, “require[s] equivalence in the availability, quality and kinds of ... athletic benefits and opportunities provided [to] male and female athletes.” *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 964 (9th Cir. 2010) (internal quotation marks omitted) (citing 34 C.F.R. § 106.41(c)(2)–(10)); *see also* 20 U.S.C. § 1682 (authorizing federal agencies extending federal financial assistance to issue appropriate “rules, regulations, or orders of general applicability”). Plaintiffs allege that Defendants violated this requirement by “failing to provide female student athletes from Campbell with treatment and benefits that are comparable to the treatment and benefits provided to male student athletes.”

In support of this claim, Plaintiffs allege, for example, that “male athletes at Campbell have *exclusive* access” to a very large “stand-alone athletic locker room facility that is located near the athletic fields,” while “female athletes at Campbell have *no* standalone athletic locker room facility, whether located near the athletic fields or elsewhere on campus.” Plaintiffs allege that, as a result, “female athletes, including Plaintiffs, must carry their athletic gear around with them all day and have resorted to changing in teachers' closets, in the bathroom of the nearest Burger King, and even on the practice field, potentially in full view of bystanders.” Plaintiffs also allege that, in contrast to Campbell's well-equipped boys' sports programs, the girls' water polo and soccer programs have not been given adequate equipment, gear, and training facilities. Indeed, the complaint alleges that on multiple occasions, the girls' water polo team lacked any access to a pool for practice, leaving them “no choice but to hold dry-land training sessions and open-ocean swim practices.” Plaintiffs also allege that coaches for the girls' teams at Campbell are generally paid less than coaches for the boys' teams, and that some assistant coaches for the girls' teams are not paid at all.

Plaintiffs' second cause of action alleges that Defendants violated § 901(a) by failing to provide male and female students with equivalent opportunities for “participation” ***833** in athletics. *See* 20 U.S.C. § 1681(a). Relying again on the regulations implementing § 901(a)'s requirements, we have held that this obligation to provide equivalent participation opportunities requires consideration of “whether ‘the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.’ ” *Mansourian*, 602 F.3d at 964 (quoting 34 C.F.R. § 106.41(c)(1)). In addressing that question, our precedent applies a “three-part test,” under which a

school has “three options” for satisfying this obligation: “(1) showing substantial proportionality (the number of women in [interscholastic] athletics is proportionate to their enrollment); (2) proving that the institution has a ‘history and continuing practice of program expansion’ for the underrepresented sex (in this case, women); or (3) where the [school] cannot satisfy either of the first two options, establishing that it nonetheless ‘fully and effectively accommodate[s]’ the interests of women.” *Id.* at 965 (citation omitted); *see also Ollier*, 768 F.3d at 855 (applying this three-part test to high schools). Plaintiffs' complaint alleges that Defendants' management of athletics at Campbell fails to satisfy any of these alternative prongs. In particular, Plaintiffs allege that there is 6.6% “participation gap” at Campbell between “female athletic participation” (which is 41.6% of the total number of athletic “roster spots”) and “female student body enrollment” (which is 48.2% of the student body).

Plaintiffs' third cause of action is asserted only against the Department and alleges that it violated § 901(a) by retaliating against female athletes at Campbell when **A.B**., T.T., and others brought issues of Title IX compliance to the attention of Campbell administrators. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005) (holding that “the text of Title IX prohibits a funding recipient from retaliating against a person who speaks out against sex discrimination, because such retaliation is intentional ‘discrimination’ ‘on the basis of sex’ ”). Specifically, Plaintiffs allege that school administrators retaliated by threatening to cancel Campbell's girls' water polo program and by making the water polo team needlessly resubmit program paperwork. Plaintiffs further allege that these retaliatory actions created a “chilling effect among Campbell's female athletes regarding identifying and complaining about other gender inequities in athletics” to the Department.

Plaintiffs' complaint seeks only declaratory and injunctive relief against Defendants, as well as attorneys' fees and costs under 42 U.S.C. § 1988.

B

Relying on Federal Rule of Civil Procedure 23(b)(1)(B) and (b)(2), Plaintiffs moved to certify a class of “all present and future Campbell female students and potential students who participate, seek to participate, and/or are or were deterred from participating in athletics at Campbell.” After considering the evidence and arguments of both sides, the district court denied the motion.

The district court held that, as to all three claims, Plaintiffs had failed to make the required threshold showing that the class was “so numerous that joinder of all members is impracticable.” *See* Fed. R. Civ. P. 23(a)(1). The court noted that the evidence supplied by Defendants indicated that “there were 366 Campbell female student-athletes in the 2018–19 school year.” Nonetheless, because the “proposed class members are limited to the female student population from a single high school” and are thus “geographically tied to one area of **Hawai‘i**, and identifiable through school ***834** and athletic records,” the court concluded that joinder of all class members was not impracticable. Although school records could not similarly identify future or potential female student athletes at Campbell, the district court held that those “subgroups” were irrelevant to the numerosity analysis because neither was “reasonably identifiable.”

Turning to the other elements of Rule 23(a), the district court held that Plaintiffs' first and second causes of action—which alleged denial of equal treatment and equal participation opportunities—raised several common questions of law or fact that were “capable of classwide resolution,” *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) (construing Fed. R. Civ. P. 23(a)(2)), and that the individual Plaintiffs' claims under these two causes of action were “typical” of the claims of the class. Specifically, Plaintiffs alleged a number of discrete discriminatory actions with inherently systemic effects on female student athletes, and the resulting “[u]nequal access, treatment, and benefits of athletic programs is a common injury among the named Plaintiffs and proposed class.”

By contrast, the district court held that commonality and typicality were lacking with respect to Plaintiffs' third cause of action, which alleges retaliation. Commonality was absent, the court concluded, because the retaliation claim arose from a dispute between “Campbell administrators[ ] and the water polo team and their parents,” and Plaintiffs had not “allege[d] any instances of retaliation against any athletes other than members of the water polo team.” For similar reasons, the district court concluded that the alleged retaliatory actions of the Department were “unique to the named Plaintiffs” and were therefore “not typical of the proposed class.”

Lastly, the district court found that Plaintiffs would be adequate representatives of the class, without distinguishing among the three claims.

Having concluded that Plaintiffs had failed to satisfy one or more requirements of Rule 23(a), the court stated that it was "not necessary to address" the additional requirements of Rule 23(b)(1)(B) and (b)(2).

Plaintiffs timely petitioned for leave to appeal pursuant to Federal Rule of Civil Procedure 23(f), and a panel of this court granted Plaintiffs' petition. This court has jurisdiction over Plaintiffs' appeal under 28 U.S.C. § 1292(e).

II

To obtain certification of a plaintiff class under Federal Rule of Civil Procedure 23, a plaintiff must satisfy both the four requirements of Rule 23(a)—"numerosity, commonality, typicality, and adequate representation"—and "one of the three requirements listed in Rule 23(b)." *Wal-Mart*, 564 U.S. at 345, 349, 131 S.Ct. 2541. These are not "mere pleading" requirements, and a plaintiff must "affirmatively demonstrate ... compliance with the Rule—that is, he [or she] must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* at 350, 131 S.Ct. 2541. Here, the district court never reached the issue of whether Plaintiffs had shown one of the elements of Rule 23(b),[3] because it concluded that (1) ***835** Rule 23(a)'s required threshold showing of numerosity had not been made as to any of Plaintiffs' claims; and (2) Rule 23(a)'s requirements of commonality and typicality had not been shown as to Plaintiffs' retaliation claim. We review these determinations for abuse of discretion, keeping in mind that a "district court abuses its discretion where it commits an error of law, relies on an improper factor, omits a substantial factor, or engages in a clear error of judgment in weighing the correct mix of factors." *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 926 (9th Cir. 2019). Applying those standards, we reverse.

III

A

Rule 23(a)(1) requires a party seeking class certification to show that "the class is so numerous that joinder of all members is impracticable." *See* Fed. R. Civ. P. 23(a)(1). As the Supreme Court has explained, this "numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *General Tel. Co. of the NW., Inc. v. EEOC*, 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). While thus eschewing any bright-line rules, the Court did go on to state that a class with only 15 members "would be too small to meet the numerosity requirement." *Id.*

Plaintiffs contend that we should apply the standards for evaluating numerosity set forth in *Jordan v. County of Los Angeles*, 669 F.2d 1311 (9th Cir. 1982), *vacated*, 459 U.S. 810, 103 S.Ct. 35, 74 L.Ed.2d 48 (1982), *on remand*, 713 F.2d 503 (9th Cir. 1983), *modified*, 726 F.2d 1366 (9th Cir. 1984). Defendants, however, contend that *Jordan* is no longer good law and in any event is distinguishable. Because the parties have pointed us to no other decision in which we have elaborated on the substantive standards for evaluating numerosity—and our own research has likewise revealed none—we begin by closely examining our decisions in *Jordan.*

In that case, the plaintiff's class action complaint alleged that the defendant county's consideration of "three types of criminal record, *i.e.*, juvenile record, arrest record, and marijuana conviction record" constituted unlawful race discrimination against Blacks in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as well as a violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981. *See* 669 F.2d at 1314–15. The district court denied plaintiff's motion to certify separate classes as to each type of criminal record, concluding that all four requirements of Rule 23(a), including numerosity, had not been satisfied. *Id.* at 1318–23. We initially reversed, holding that all four requirements had been met. *Id.*

In addressing numerosity, *Jordan* indicated that a court must consider what the evidence shows concerning "the absolute number of class members." 669 F.2d at 1319. Although the size of the class "is not the sole determining factor," we stated that, "where a class is large in numbers, joinder will usually be impracticable." *Id.* By contrast, where the size of the class is more modest, "the number of class members does not weigh as heavily" in the analysis, and "other factors" bearing upon the feasibility and convenience of joinder may assume more significance. *Id.* These potentially

countervailing factors include "the geographical diversity of class members, ***836** the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought," as well as the ability to identify and locate class members. *Id.* at 1319–20.

Applying these standards, we held that, "[a]lthough we would be inclined to find the numerosity requirement in the present case satisfied solely on the basis of the number of ascertained class members, *i.e.*, 39, 64, and 71, we need not do so since the presence of other indicia of impracticability persuade us that the requirement has been met." *Id.* at 1319. Specifically, we noted that "the relatively small size of each class member's claim and the probability that the class members may be difficult to locate combine to make it impracticable for individual class members to join in the lawsuit." *Id.* at 1319–20. We also observed that each class included "unnamed and unknown future black applicants" and that the "joinder of unknown individuals is inherently impracticable." *Id.* at 1320. Based on these reasons, we held that "the district court erred in denying class certification for failure to satisfy the numerosity requirement." *Id.*

We then proceeded to find that the plaintiff had also satisfied the commonality, typicality, and adequacy requirements of Rule 23(a). *Id.* at 1320–23. However, our analysis of the commonality and typicality factors expressly relied on the Fifth Circuit's so-called "across-the-board" rule, under which a plaintiff challenging one discriminatory practice was permitted to represent employees challenging *different* practices if all employees suffered similar injuries. *Id.* at 1320, 1322 (citing *Johnson v. Georgia Hwy. Express*, 417 F.2d 1122, 1124 (5th Cir. 1969)). Shortly thereafter, the Supreme Court explicitly rejected that "across-the-board rule," concluding that it improperly relied on a presumption that a discriminatory employment decision against the named plaintiff reflects a pervasive discriminatory policy that is then reflected in all of the defendant's various hiring practices. *See* *General Tel. Co. of the SW. v. Falcon*, 457 U.S. 147, 157–58, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). The Court consequently vacated our decision in *Jordan* for reconsideration in light of *Falcon*. *See* *Jordan*, 459 U.S. at 810, 103 S.Ct. 35.

On remand, we concluded that, in light of the Supreme Court's intervening abrogation of the across-the-board rule, as well as our "*recomputation* of the actual number of rejected black applicants," the "numerosity requirement of Rule 23" had *not* been met. *See* *Jordan*, 726 F.2d at 1367 (emphasis added), *amending* 713 F.2d at 504. In reaching that conclusion, however, we did not in any way suggest that our original decision's substantive articulation of the numerosity standards was erroneous. Moreover, *Falcon* does not address the standards for numerosity at all, and it therefore provides no basis for declining to follow our elaboration of the numerosity requirement in our initial decision in *Jordan*. *See* *Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). Accordingly, we will apply *Jordan*'s framework in assessing numerosity here.

B

We conclude that the district court's numerosity analysis was inconsistent with *Jordan* in two respects.

1

First, the district court failed to give appropriate weight to the very large size of the proposed class. Plaintiffs presented uncontroverted evidence that in the 2016–2017, 2017–2018, and 2018–2019 school years, the annual number of female student athletes at Campbell ranged between 366 and 434. Thus, even considering ***837** only currently enrolled students, the evidence amply shows that a reasonable estimate of the size of the class well exceeds 300 persons.

Defendants contend that Plaintiffs failed to make any showing that all current female student athletes have been subjected to the alleged Title IX violations and are therefore class members, but we think this argument overlooks both the substance of Plaintiffs' claims and the applicable standards for liability under Title IX. Some aspects of Plaintiffs' first cause of action, which alleges unequal treatment and benefits, explicitly rest on allegations of systemic discrimination (such as, for example, the complete lack of standalone athletic locker facilities) that, if proved, would necessarily apply to all current female student athletes. *See supra* at 832–33. As to the second cause of action for unequal participation opportunities, the three-part test we apply for evaluating such claims is framed in terms that examine the school's *overall* treatment of female athletic programs versus male athletic programs. *See supra* at 832–33. And for reasons we explain further below, we conclude that Plaintiffs' third cause of action for retaliation likewise properly rests upon asserted classwide adverse impacts on female student athletes at Campbell. *See infra* at 840–42. It follows that Plaintiffs

amply showed that the absolute number of class members as to each claim is well over 300 persons. The resulting class size qualifies as "large in numbers" by any metric, and therefore, under *Jordan*, that large class size weighs in favor of concluding that joinder of all of these persons is impracticable. 669 F.2d at 1319.

On this record, we find no countervailing case-specific considerations indicating that, despite the large class size, joinder of all class members is nonetheless practicable. In concluding that joinder of all class members was practicable here, despite the potential size of the class, the district court emphasized that all of Campbell's current female student athletes could be identified "through school and athletic records" and that all of them were local and within the jurisdiction of the court. But the standard under Rule 23(a) is not, as the district court seemed to think, whether joinder is a literal impossibility. Rather, the question is whether joinder of all class members is "*practicable*"—*i.e.*, "*reasonably* capable of being accomplished." *See Practicable*, Black's Law Dictionary (11th ed. 2019) (emphasis added); *see also Harris v. Palm Springs Alpine Ests., Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964) (" '[I]mpracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class."); *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) ("Impracticable does not mean impossible.").

Here, joinder of all class members is not "reasonably capable of being accomplished" because it would impose very substantial logistical burdens for little, if any, benefit. Where, as here, the class seeks only prospective injunctive and declaratory relief, the practical value of joining *each* of the 300+ class members as a formal party is slim to non-existent and is plainly outweighed by the substantial logistical burdens that would entail. *See Jordan*, 669 F.2d at 1319 (noting that "whether injunctive or declaratory relief is sought" is relevant to assessing whether joinder of class members is impracticable); *see also Harris*, 329 F.2d at 913 (stating that, in assessing impracticability, the court should consider "the expense and burden[ ] to the parties and the court").

2

Second, the district court also failed adequately to consider the fact that the class, ***838** as defined, included "future" Campbell female student athletes.

"The inclusion of future class members in a class is not itself unusual or objectionable," because "[w]hen the future persons referenced become members of the class, their claims will necessarily be ripe." *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010). We have recognized that when, as here, a class's membership changes continually over time, that factor weighs in favor of concluding that joinder of all members is impracticable. *See Jordan*, 669 F.2d at 1320[4]; *see also J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019) (noting that this factor weighs in favor of impracticability of joinder even if current class members are relatively fewer in number); *cf. Smith v. Swormstedt*, 57 U.S. 288, 303, 16 How. 288, 14 L.Ed. 942 (1854) (indicating, in a pre-Rules equitable suit brought by members and preachers of one branch of a church against those in the other branch, that joinder of all members would be impracticable due to the large and changing membership of the churches); *see generally* 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1762 at 227–29 (4th ed. 2021).

The district court declined to consider this factor because it concluded that future class members were not "reasonably identifiable," and the court therefore could not make a "reasonable approximation" of the number of such members. This reasoning misconstrues the significance of this factor. The fact that it may not be possible to identify future class members at the time of class certification does not mean that this factor therefore drops out of the analysis and may be set aside. On the contrary, as we held in *Jordan*, the fact that the membership of a class changes over time makes joinder of every class member all the more impracticable. *See* 669 F.2d at 1320. This case well illustrates the point. Every year, as new freshmen matriculate into Campbell and as seniors graduate, the membership of potentially 25% of the student body may be expected to turn over. Given the purely equitable nature of the claims, there is little if any benefit to continually joining, or potentially dismissing, large numbers of additional class members. That makes the impracticability analysis all the more lopsided in favor of finding numerosity.

For similar reasons, the district court abused its discretion in concluding that a "reasonable approximation" of future class members could not be made in this case. Given the three years of data in the record concerning the approximate number of current class members for each school year from 2016–2019, it is not difficult to ***839** reasonably estimate the extent to which class membership might be expected to change each year. For present purposes, all that is needed is a sufficient

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estimate of the number of future class members to allow the court to assess what weight to give to this factor when considered together with the other pertinent considerations. Here, as we have explained, the estimate of the *current* membership is well over 300 persons and already weighs heavily in favor of finding numerosity. The fact that additional persons, totaling as many as 25% of that number, would also need to be formally joined each year tips the balance even more strongly in favor of concluding that the "class is so numerous that joinder of all members is impracticable." *See* Fed. R. Civ. P. 23(a)(1).[5]

C

We therefore conclude that the district court erred in holding that Plaintiffs had not satisfied the numerosity requirement of Rule 23(a). And because that was the sole ground on which the court concluded that the requirements of Rule 23(a) had not been met as to Plaintiffs' first and second causes of action, we reverse the denial of class certification as to those claims and remand with instructions to address whether Plaintiffs also satisfied one or more of the criteria in Rule 23(b).

IV

As to Plaintiffs' third cause of action for unlawful retaliation, the district court also denied class certification on the further ground that Plaintiffs had failed to show commonality and typicality. This conclusion was also flawed.

The commonality requirement of Rule 23(a)(2) requires plaintiffs seeking class certification to show that their claims "depend upon a common contention" that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541. To establish typicality, as required by Rule 23(a)(3), plaintiffs must show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.' " *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted). Because the considerations underlying the two requirements overlap considerably, the Supreme Court has noted that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Falcon*, 457 U.S. at 157 n.13, 102 S.Ct. 2364.

The district court concluded that these two requirements were not satisfied here, because in its view Plaintiffs' retaliation claim is centered on the water polo team rather than on female student athletes as a whole. As the district court explained, the Department's retaliatory actions arose from "a dispute between Defendants, specifically limited to Campbell administrators, and the water polo team and their parents," and the only claimed instances of actual retaliation were against "members of the water polo team." This reasoning ***840** misapprehends Plaintiffs' retaliation claim and the law governing it.

Although the Department's alleged retaliatory actions were immediately directed at the water polo team, whose members and their parents had made complaints about unequal treatment, the district court failed adequately to consider Plaintiffs' contention that those actions had a classwide effect. Specifically, Plaintiffs assert that the example that the Department made of the girls' water polo team had the effect of broadly dissuading Campbell's female student athletes from "raising the issue of sex discrimination" out of fear that the Department would likewise retaliate against them. Indeed, a declaration submitted by one of the Plaintiffs' parents specifically averred that other students and parents had "expressed interest in joining the lawsuit, but were scared about the repercussions from [the Department] if they did so." This parent explained that, for example, one student who was a "star athlete" and who hoped to win college scholarships, was too afraid "to jeopardize her relationship with the school."

In addition to overlooking the broader theory of unlawful retaliation that Plaintiffs raised here, the district court failed to properly consider the legal principles that govern a retaliation claim of this nature under Title IX. On this point, we find our prior decision in *Ollier* to be instructive, and so we address that decision in some detail.

In *Ollier*, complaints concerning a high school's compliance with Title IX were made by the named plaintiffs' parents and the girls' softball coach, Chris Martinez. 768 F.3d at 853, 866–67. In response, the school fired Coach Martinez and replaced him with a "far less experienced coach," eliminated the girls' softball team's assistant coaches, and took a variety of other actions that "disrupted" the girls' softball program. *Id.* at 869.

On appeal, the defendants made a series of arguments that resemble those made by the Department here. Specifically, the *Ollier* defendants argued that the named plaintiffs "lack[ed] standing to enjoin the retaliatory action allegedly taken against Coach Martinez"; that they also "lack[ed] standing because it was not they who made the Title IX complaints"; and that classwide relief was unwarranted because "only some members of the plaintiff[s'] class ... can urge they engaged in protected activity." *Id.* at 865–66, 868. We rejected all of these contentions, concluding that they rested on too restrictive a view of Title IX's cause of action for retaliation. *Id.* at 866–69.

We held that the named plaintiffs clearly asserted a sufficient injury-in-fact to satisfy Article III, because their "prospects for competing were hampered" when the defendants "impermissibly retaliated against *them* by firing Coach Martinez." *Id.* at 865 (emphasis in original). We also recognized, however, that what the defendants characterized as "standing" arguments actually rested primarily on the general prudential rule against asserting the rights of third parties. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)); *cf. Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) (noting that "the general prohibition on a litigant's raising another person's legal rights" is "not derived from Article III," but reflects what has inexactly been called the " 'prudential' branch of standing"). Addressing the question that way, we held that the named plaintiffs *could* assert a Title IX retaliation claim based on retaliatory actions that were directed at another person (Coach Martinez) and that were triggered by complaints made by others (Coach Martinez and various parents). *Ollier*, 768 F.3d at 866–67.

***841** In reaching that conclusion, we noted that the Supreme Court had addressed a somewhat similar individual third-party retaliation claim under Title VII in *Thompson v. North American Stainless, LP*, 562 U.S. 170, 177–78, 131 S.Ct. 863, 178 L.Ed.2d 694 (2011). *See Ollier*, 768 F.3d at 866. There, both Thompson and his fiancée worked in the same company, and the allegation was that Thompson was fired in retaliation for complaints about sex discrimination made by his fiancée. *Thompson*, 562 U.S. at 172, 131 S.Ct. 863. The Court held that, because Thompson was within the "zone of interests" protected by Title VII, he had a cause of action for retaliation even though his fiancée was the one who had engaged in the protected activity that led to the retaliation. *Id.* at 177–78, 131 S.Ct. 863. We concluded in *Ollier* that this same zone-of-interest analysis applies to Title IX, and we therefore considered whether the named plaintiffs in that case were "within the 'zone of interests' that Title IX's implicit antiretaliation provisions seek to protect." *Ollier*, 768 F.3d at 866; *see also Lexmark*, 572 U.S. at 127 & n.3, 134 S.Ct. 1377 (suggesting that, in many cases, "third-party standing" is really an issue of whether the party has a cause of action under a statute, which in turn depends in part on the zone-of-interests test). Because those named plaintiffs were students who had suffered a diminished athletic experience due to retaliation, we concluded that they easily fell within Title IX's zone of interests. *Ollier*, 768 F.3d at 866. They therefore had a cause of action under Title IX to seek redress for those injuries, despite the fact that the actual Title IX complaints that led to the retaliation were "made by their parents and Coach Martinez." *Id.* at 866–67.

We similarly held that classwide injunctive relief was properly awarded in *Ollier*, despite the fact that many of the class members had not even been "members of the softball team at the time of retaliation." *Id.* at 868. In so holding, we reiterated the breadth of Title IX's zone of interests, *see id.* (citing *Thompson*, 562 U.S. at 178, 131 S.Ct. 863), and asserted that we had approved similarly broadly-defined classes that included "all current and future" female students, *id.* (citation omitted). Because the class members in *Ollier* had been affected by the retaliation and were within the zone of interests protected by Title IX's prohibition on retaliation, the district court properly extended its grant of injunctive relief "so as to vindicate the rights of former and future students." *Id.*

Although *Ollier* did not directly address the issue of class certification, *see id.* at 854 n.4, it is clear that the district court's application of Rule 23(a)'s requirements to Plaintiffs' retaliation claim in this case cannot be reconciled with *Ollier*'s analysis of the law governing such claims. Here, as in *Ollier*, the specific Title IX complaints that led to the retaliation were made only by a particular subset of people (here, particular students and parents associated with the water polo team). But the concerns those persons raised swept more broadly to include Campbell's treatment of girls' athletics generally, and Plaintiffs have likewise presented evidence that the resulting retaliation had a deterrent effect on female students more generally. *See supra* at 839–40. Thus, under *Ollier*'s reasoning, those other putative class members—even those not on the water polo team—would fall within Title IX's zone of interests and would have a cause of action for equitable relief against the Department's retaliatory actions. *See* 768 F.3d at 866–67. And, as in *Ollier*, the fact that many

of the class members were not the direct targets of the alleged retaliation would not necessarily be a bar to classwide relief. *Id.* at 868.

It follows from these conclusions that the district court abused its discretion ***842** in holding that Plaintiffs had not established commonality and typicality as to their retaliation claim. Given that the retaliation claims of both the named Plaintiffs and the class members would rest on the underlying motivation for the Department's alleged retaliatory actions in response to receiving Title IX complaints, that issue of retaliatory motive raises a common question whose answer will "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541. That is sufficient to satisfy Rule 23(a)(2).

For similar reasons, the district court erred in concluding, in effect, that the direct victims of unlawful retaliation have claims that are atypical of the claims of the indirect victims. Plaintiffs' retaliation claim is not premised solely on the injury of threatening to cancel Campbell's girls' water polo program and make the water polo team needlessly resubmit program paperwork. Instead, it is also premised on the "chilling effect" felt by female athletes throughout the high school. And where, as claimed here, the persons who raised broader concerns about Title IX compliance were met with a retaliatory response that likewise impacted female student athletes generally, the indirect victims' claims *depend* critically upon the success of the direct victims' claims. As a result, there is little prospect that the named plaintiffs' claims could be said to be burdened with defenses or issues unique to them and distinct from the other class members. *See Hanon*, 976 F.2d at 508. Plaintiffs thus established typicality under Rule 23(a)(3).

* * *

For the foregoing reasons, the district court abused its discretion in concluding that Plaintiffs had not met the requirements of Rule 23(a). We reverse the district court's order denying class certification and remand for it to consider whether Plaintiffs satisfied Rule 23(b).

REVERSED AND REMANDED.

All Citations

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Footnotes

1 A.B. and T.T. were seniors at the time this case was originally filed in late 2018 and graduated before the district court ruled on the class certification motion. A.P. was a senior at the time this case was argued and has presumably graduated. A.M.B. was a junior at the time of oral argument and is presumably a current senior. No party has suggested that this case is moot, and we perceive no basis for concluding that it is.

2 After the class certification motion was filed, but before the district court denied it, amended complaints were filed adding A.M.B. and A.P. as additional plaintiffs. All four Plaintiffs submitted declarations in support of the class certification motion.

3 In moving for class certification, Plaintiffs argued that the requisite element of Rule 23(b) was satisfied either (1) because Defendants had "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," *see* Fed. R. Civ. P. 23(b)(2); or (2) because separate actions by individual class members could, "as a practical matter, ... be dispositive of the interests of the other members" or could "substantially impair or impede [the other members'] ability to protect their interests," *see* Fed. R. Civ. P. 23(b)(1)(B).

4 Plaintiffs construe *Jordan* as standing for the broader proposition that *any* proposed class that includes future members *automatically* satisfies the numerosity requirement, because future members are inherently unidentifiable at the time of class certification and thereby cannot practicably be joined. We do not read *Jordan* as establishing such a sweeping proposition. As an initial matter, *Jordan*'s assumption that the plaintiff in that case could represent all "future" class members appears to have rested in part on its application of the Fifth Circuit's "across-the-board" rule. *See* 669 F.2d at 1320 (citing *Jack v. American Linen Supply Co.*, 498 F.2d 122 (5th Cir. 1974)). That aspect of the decision therefore did not survive *Falcon*, which would also explain why we did not mention future class members in our decision on remand in *Jordan. See* 713 F.2d at 504, *as amended*, 726 F.2d at 1366–67. Moreover, as we explicitly recognized in *Rodriguez*, the inclusion of future class members in a class definition is subject to the ripeness requirement of Article III, *see* 591

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F.3d at 1118, and so the relevant numerosity inquiry concerning future class members is whether it would be practicable to join such future members as their claims become ripe.

5 In view of this analysis, we find it unnecessary to address the parties' arguments as to whether numerosity is further established by the presence, in the class definition, of female student *non-athletes* who were deterred from participation in sports by Defendants' alleged Title IX violations.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Doe v. University of Tennessee, M.D.Tenn., May 3, 2016

768 F.3d 843
United States Court of Appeals, Ninth Circuit.

Veronica OLLIER; Naudia Rangel, by her next friends Steve and Carmen Rangel; Maritza Rangel, by her next friends Steve and Carmen Rangel; Amanda Hernandez, by her next friend Armando Hernandez; Arianna Hernandez, by her next friend Armando Hernandez, individually and on behalf of all those similarly situated, Plaintiffs–Appellees,
v.
SWEETWATER UNION HIGH SCHOOL DISTRICT; Arlie N. Ricasa; Pearl Quinones; Jim Cartmill; Jaime Mercado; Greg R. Sandoval; Jesus M. Gandara; Earl Weins; Russell Moore, in their official capacities, Defendants–Appellants.

No. 12–56348
|
Argued and Submitted June 3, 2014.
|
Filed Sept. 19, 2014.

Synopsis
Background: Female high school athletes brought class action against public school district and its administrators and board members under Title IX, alleging unequal treatment and benefits in athletic programs, unequal participation opportunities in athletic programs, and retaliation. The United States District Court for the Southern District of California, M. James Lorenz, Senior District Judge, 604 F.Supp.2d 1264, granted partial summary judgment for plaintiffs, entered various pre-trial rulings, 267 F.R.D. 339 and 735 F.Supp.2d 1222, and then granted judgment for plaintiffs after bench trial, 858 F.Supp.2d 1093. School district appealed.

Holdings: The Court of Appeals, Gould, Circuit Judge, held that:

school district did not fully and effectively accommodate interests and abilities of its female athletes;

district court did not abuse its discretion when it barred retired superintendent of different school district and assistant principal at different high school from testifying as expert witnesses at trial;

school district did not satisfy its obligation to disclose its 30 employee and eight non-employee fact witnesses through other disclosed witnesses mentioning them at their depositions;

district court did not abuse its discretion by declining to consider contemporaneous evidence at trial before issuing permanent injunction to require school district to comply with Title IX;

athletes alleged judicially cognizable injuries flowing from public school district's retaliatory responses to Title IX complaints made by their parents and coach;

athletes engaged in protected activities;

validity of permanent injunction was not impaired on basis that portion of class were not members of softball team at time of retaliation, and yet they benefited from the relief; and

causation was demonstrated.

Affirmed.

Attorneys and Law Firms

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Kristen Galles, Equity Legal, Alexandria, VA; Nancy Hogshead–Makar, Women's Sports Foundation, Jacksonville, FL, for Amicus Curiae Women's Sports Foundation, et al.

Appeal from the United States District Court for the Southern District of California, M. James Lorenz, Senior District Judge, Presiding. D.C. No. 3:07–cv–00714–L–WMC.

Before: RONALD M. GOULD and N.R. Smith, Circuit Judges, and ***851** MORRISON C. ENGLAND, JR., Chief District Judge.[*]

OPINION

GOULD, Circuit Judge:

Defendants–Appellants **Sweetwater** Union High School District and eight of its administrators and board members (collectively "**Sweetwater**") appeal the district court's grant of declaratory and injunctive relief to Plaintiffs–Appellees Veronica **Ollier**, Naudia Rangel, Maritza Rangel, Amanda Hernandez, and Arianna Hernandez (collectively "Plaintiffs") on Title IX claims alleging (1) unequal treatment and benefits in athletic programs;[1] (2) unequal participation opportunities in athletic programs; and (3) retaliation. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

On April 19, 2007, Plaintiffs filed a class action complaint against **Sweetwater** alleging unlawful sex discrimination under Title IX of the Education Amendments of 1972 ("Title IX"), *see* 20 U.S.C. § 1681 *et seq.,* and the Equal Protection Clause of the Fourteenth Amendment, *see* 42 U.S.C. § 1983.[2] They alleged that **Sweetwater** "intentionally discriminated" against female students at Castle Park High School ("Castle Park") by "unlawfully fail [ing] to provide female student athletes equal treatment and benefits as compared to male athletes." They said that female student athletes did not receive an "equal opportunity to participate in athletic programs," and were "deterred from participating" by **Sweetwater's** "repeated, purposeful, differential treatment of female students at Castle Park." Plaintiffs alleged that **Sweetwater** ignored female students' protests and "continued to unfairly discriminate against females despite persistent complaints by students, parents and others."

Specifically, Plaintiffs accused **Sweetwater** of "knowingly and deliberately discriminating against female students" by providing them with inequitable (1) practice and competitive facilities; (2) locker rooms and related storage and meeting facilities; (3) training facilities; (4) equipment and supplies; (5) transportation vehicles; (6) coaches and coaching facilities; (7) scheduling of games and practice times; (8) publicity; (9) funding; and (10) athletic participation opportunities. They also accused **Sweetwater** of not properly maintaining the facilities given to female student athletes and of offering "significantly more participation opportunities to boys than to girls [.]" Citing **Sweetwater's** "intentional and conscious failure to comply with Title IX," Plaintiffs sought declaratory and injunctive relief under 20 U.S.C. § 1681 *et seq.* for three alleged violations of Title IX: (1) unequal treatment and benefits in athletic programs; (2) unequal participation opportunities in athletic programs; and (3) retaliation.[3]

***852 A**

In July 2008, Plaintiffs moved for partial summary judgment on their Title IX claim alleging unequal participation opportunities in athletic programs. **Sweetwater** conceded that "female athletic participation" at Castle Park was "lower than overall female enrollment," but argued that the figures were "substantially proportionate" for Title IX compliance purposes, and promised to "continue to strive to lower the percentage." As evidence, **Sweetwater** noted that there are

"more athletic sports teams for girls (23) than ... for boys (21)" at Castle Park.

The district court gave summary judgment to Plaintiffs on their unequal participation claim in March 2009. *See Ollier v. Sweetwater Union High Sch. Dist.,* 604 F.Supp.2d 1264 (S.D.Cal.2009). The court found that "substantial proportionality requires a close relationship between athletic participation and enrollment," and concluded that Sweetwater had not shown such a "close relationship" because it "fail[ed] to provide female students with opportunities to participate in athletics in substantially proportionate numbers as males." *Id.* at 1272. Rejecting one of Sweetwater's arguments, the district court reasoned that it is the "actual number and the percentage of females participating in athletics," not "the number of teams offered to girls," that is "the ultimate issue" when evaluating participation opportunities. *Id.* After finding that Plaintiffs had met their burden on each prong of the relevant Title IX compliance test, the district court determined that Sweetwater "failed to fully and effectively accommodate female athletes and potential female athletes" at Castle Park, and that it was "not in compliance with Title IX based on unequal participation opportunities in [the] athletic program." *Id.* at 1275; *see Neal v. Bd. of Trs. of Cal. State Univs.,* 198 F.3d 763, 767–68 (9th Cir.1999) (laying out the three-prong test for determining whether a school has provided equal opportunities to male and female students).

B

Before trial, the district court decided three other matters at issue in this appeal. First, it granted Plaintiffs' motion to exclude the testimony of two Sweetwater experts because (1) the experts' conclusions and opinions "fail[ed] to meet the standard of Federal Rule of Evidence 702" because they were based on "personal opinions and speculation rather than on a systematic assessment of [the] athletic facilities and programs" at Castle Park, and (2) the experts' methodology was "not at all clear."

Second, it granted Plaintiffs' motion to exclude 38 of Sweetwater's witnesses because they were not timely disclosed, reasoning that "[w]aiting until long after the close of discovery and on the eve of trial to disclose allegedly relevant and non-cumulative witnesses is harmful and without substantial justification." Because Sweetwater "offered no justification for [its] failure to comply with" Federal Rule of Civil Procedure 26(a) and (e), the district court concluded that exclusion of the 38 untimely disclosed witnesses was "an appropriate sanction" under Federal Rule of Civil Procedure 37(c)(1).

Third, it considered Sweetwater's motion to strike Plaintiffs' Title IX retaliation claim as if it were a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss that claim, and denied it on the merits. *See Ollier v. Sweetwater Union High Sch. Dist.,* 735 F.Supp.2d 1222 (S.D.Cal.2010). In so doing, the district court determined that Plaintiffs had standing to bring their Title IX retaliation claim—a claim the court viewed as premised on harm to the class, not harm to the softball coach whose ***853** firing Plaintiffs alleged was retaliatory. *See id.* at 1226 ("Plaintiffs ... have set forth actions taken against the plaintiff class members after they complained of sex discrimination that are concrete and particularized."). The district court also concluded that Plaintiffs' retaliation claim was not moot after finding that class members were still suffering the effects of Sweetwater's retaliatory conduct and that Sweetwater's actions had caused a "chilling effect on students who would complain about continuing gender inequality in athletic programs at the school." *Id.* at 1225.

C

After a 10–day bench trial, the district court granted Plaintiffs declaratory and injunctive relief on their Title IX claims alleging (1) unequal treatment of and benefits to female athletes at Castle Park, and (2) retaliation. *See Ollier v. Sweetwater Union High Sch. Dist.,* 858 F.Supp.2d 1093 (S.D.Cal.2012).

The district court concluded that Sweetwater violated Title IX by failing to provide equal treatment and benefits in nine different areas, including recruiting, training, equipment, scheduling, and fundraising. *Id.* at 1098–1108, 1115. Among other things, the district court found that female athletes at Castle Park were supervised by overworked coaches, provided with inferior competition and practice facilities, and received less publicity than male athletes. *Id.* at 1099–1104, 1107. The district court found that female athletes received unequal treatment and benefits as a result of "systemic administrative failures" at Castle Park, and that Sweetwater failed to implement "policies or procedures designed to cure the myriad areas of general noncompliance with Title IX." *Id.* at 1108.

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The district court also ruled that **Sweetwater** violated Title IX when it retaliated against Plaintiffs by firing the Castle Park softball coach, Chris Martinez, after the father of two of the named plaintiffs complained to school administrators about “inequalities for girls in the school's athletic programs.” *Id.* at 1108; *see id.* at 1115. The district court found that Coach Martinez was fired six weeks after the Castle Park athletic director told him he could be fired at any time for any reason-a comment the coach understood to be a threat that he would be fired “if additional complaints were made about the girls' softball facilities.” *Id.* at 1108.

Borrowing from “Title VII cases to define Title IX's applicable legal standards,” the district court concluded (1) that Plaintiffs engaged in protected activity when they complained to **Sweetwater** about Title IX violations and when they filed their complaint; (2) that Plaintiffs suffered adverse actions—such as the firing of their softball coach, his replacement by a less experienced coach, cancellation of the team's annual awards banquet in 2007, and being unable to participate in a Las Vegas tournament attended by college recruiters—that caused their “long-term and successful softball program” to be “significantly disrupted”; and (3) that a causal link between their protected conduct and **Sweetwater's** retaliatory actions could “be established by an inference derived from circumstantial evidence”—in this case, “temporal proximity.” *Id.* at 1113–14. Finally, the district court rejected **Sweetwater's** non-retaliatory reasons for firing Coach Martinez, concluding that they were “not credible and are pretextual.” *Id.* at 1114. The district court determined that **Sweetwater's** suggested non-retaliatory justifications were *post hoc* rationalizations for its decision to fire Coach Martinez—a decision the district court said was impermissibly retaliatory. *See id.*

D

Sweetwater timely appealed the district court's decisions (1) to grant partial ***854** summary judgment to Plaintiffs on their Title IX unequal participation claim; (2) to grant Plaintiffs' motions to exclude expert testimony and 38 untimely disclosed witnesses; (3) to deny **Sweetwater's** motion to strike Plaintiffs' Title IX retaliation claim; and (4) to grant a permanent injunction to Plaintiffs on their Title IX claims, including those alleging (a) unequal treatment of and benefits to female athletes at Castle Park, and (b) retaliation.[4]

II

We review *de novo* a district court's grant of a motion for summary judgment to determine whether, viewing the evidence in the light most favorable to the nonmoving party, there exists a genuine dispute as to any material fact and whether the district court correctly applied the substantive law. *See* Fed.R.Civ.P. 56(a); *Cameron v. Craig,* 713 F.3d 1012, 1018 (9th Cir.2013).

Title IX of the Education Amendments of 1972 states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). Title IX's implementing regulations require that schools provide “equal athletic opportunity for members of both sexes.” 34 C.F.R. § 106.41(c). Among the factors we consider to determine whether equal opportunities are available to male and female athletes is “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.” *Id.* § 106.41(c)(1). In 1979, the Office of Civil Rights of the Department of Health, Education, and Welfare —the precursor to today's Department of Health & Human Services and Department of Education—published a “Policy Interpretation” of Title IX setting a three-part test to determine whether an institution is complying with the “effective accommodation” requirement:

> (1) Whether ... participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among ... athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among ... 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.

See 44 Fed.Reg. 71,413, 71,418 (Dec. 11, 1979). We have adopted this three-part test, which by its terms provides that

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an athletics program complies with Title IX if it satisfies any one of the above conditions. *See Neal,* 198 F.3d at 767–68.[5]

***855 A**

Sweetwater contends that the district court erred in granting summary judgment to Plaintiffs on their Title IX unequal participation claim because (1) there is "overall proportionality between the sexes" in athletics at Castle Park; (2) Castle Park "expanded the number of athletic teams for female participation over a 10–year period"; (3) "the trend over 10 years showed increased female participation in sports" at Castle Park; and (4) Castle Park "accommodated express female interest" in state-sanctioned varsity sports. Relatedly, Sweetwater argues that there was insufficient interest among female students to sustain viable teams in field hockey, water polo, or tennis.

Plaintiffs, on the other hand, contend that (1) the number of female athletes at Castle Park has consistently lagged behind overall female enrollment at the school-that is, the two figures are not "substantially proportionate"; (2) the number of *teams* on which girls could theoretically participate is irrelevant under Title IX, which considers only the number of female *athletes;* and (3) "girls' interest and ability were not slaked by existing programs."

The United States as *amicus curiae* sides with Plaintiffs and urges us to affirm the district court's award of summary judgment. The Government says that the district court "properly analyzed" Castle Park's athletic program under the three-part "effective accommodation" test, and that it correctly concluded that Sweetwater "failed to provide nondiscriminatory athletic participation opportunities to female students" at Castle Park. The Government's position rejects Sweetwater's argument that Title IX should be applied differently to high schools than to colleges, as well as the idea that the district court's "substantial proportionality" evaluation was flawed.[6] We agree with the Government that the three-part test applies to a high school. This is suggested by the Government's regulations, *See* 34 C.F.R. § 106.41(a) (disallowing sex discrimination "in any interscholastic, intercollegiate, club or intramural athletics"), and, accordingly, apply the three-part "effective accommodation" test here. Although this regulation does not explicitly refer to high schools, it does not distinguish between high schools and other types of interscholastic, club or intramural athletics. We give *Chevron* deference to this regulation. *See* note 5, supra. *See also McCormick ex rel. McCormick v. School Dist. of Mamaroneck,* 370 F.3d 275, 300 (2d Cir.2004) (applying three-part test to high school districts); *Horner v. Ky. High Sch. Athletic Ass'n,* 43 F.3d 265, 272–75 (6th Cir.1994) (same).

B

In 1996, the Department of Education clarified that our analysis under the first prong of the Title IX "effective accommodation" test—that is, our analysis of whether "participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments," 44 Fed.Reg. at 71,418—"begins with a determination of the number of participation opportunities afforded to male and female athletes." Office of Civil Rights, U.S. Dep't of Educ., ***856** *Clarification of Intercollegiate Athletics Policy Guidance: The Three–Part Test* (Jan. 16, 1996) ("1996 Clarification"). In making this determination, we count only "actual athletes," not "unfilled slots," because Title IX participation opportunities are "real, not illusory." Letter from Norma V. Cantú, Assistant Sec'y for Civil Rights, Office of Civil Rights, U.S. Dep't of Educ., to Colleagues (Jan. 16, 1996) ("1996 Letter").

The second step of our analysis under the first prong of the three-prong test is to consider whether the number of participation opportunities—*i.e.,* athletes—is substantially proportionate to each sex's enrollment. *See* 1996 Clarification; *see also Biediger v. Quinnipiac Univ.,* 691 F.3d 85, 94 (2d Cir.2012). Exact proportionality is not required, and there is no "magic number at which substantial proportionality is achieved." *Equity In Athletics, Inc. v. Dep't of Educ.,* 639 F.3d 91, 110 (4th Cir.2011); *see also* 1996 Clarification. Rather, "substantial proportionality is determined on a case-by-case basis in light of 'the institution's specific circumstances and the size of its athletic program.' " *Biediger,* 691 F.3d at 94 (quoting 1996 Clarification).[7] As a general rule, there is substantial proportionality "if the number of additional participants ... required for exact proportionality 'would not be sufficient to sustain a viable team.' " *Id.* (quoting 1996 Clarification).

Between 1998 and 2008, female enrollment at Castle Park ranged from a low of 975 (in the 2007–2008 school year) to a high of 1133 (2001–2002). Male enrollment ranged from 1128 (2000–2001) to 1292 (2004–2005). Female athletes ranged from 144 (1999–2000 and 2003–2004) to 198 (2002–

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2003), while male athletes ranged from 221 (2005–2006) to 343 (2004–2005). Perhaps more helpfully stated, girls made up 45.4–49.6 percent of the student body at Castle Park but only 33.4–40.8 percent of the athletes from 1998 to 2008. At no point in that ten-year span was the disparity between the percentage of female athletes and the percentage of female students less than 6.7 percent. It was less than 10 percent in only three years, and at least 13 percent in five years. In the three years at issue in this lawsuit, the disparities were 6.7 percent (2005–2006), 10.3 percent (2006–2007), and 6.7 percent (2007–2008).[8]

There is no question that exact proportionality is lacking at Castle Park. **Sweetwater** concedes as much. Whether there is substantial proportionality, however, requires us to look beyond the raw numbers to "the institution's specific circumstances and the size of its athletic program." 1996 Clarification. Instructive on this point is the Department of Education's guidance that substantial proportionality generally requires that "the number of additional participants ... required for exact proportionality" be insufficient "to sustain a viable team." *Biediger,* 691 F.3d at 94 (internal quotation marks omitted).

At Castle Park, the 6.7 percent disparity in the 2007–2008 school year was equivalent to 47 girls who would have played ***857** sports if participation were exactly proportional to enrollment and no fewer boys participated.[9] As the district court noted, 47 girls can sustain at least one viable competitive team.[10] Defendants failed to raise more than a conclusory assertion that the specific circumstances at Castle Park explained the 6.7% disparity between female participation opportunities and female enrollment, or that Castle Park could not support a viable competitive team drawn from the 47 girls. As a matter of law, then, we conclude that female athletic participation and overall female enrollment were not "substantially proportionate" at Castle Park at the relevant times.

C

Participation need not be substantially proportionate to enrollment, however, if **Sweetwater** can show "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of" female athletes. 44 Fed.Reg. at 71,418; *see also Neal,* 198 F.3d at 767–68. This second prong of the Title IX "effective accommodation" test "looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion." 1996 Clarification. The Department of Education's 1996 guidance is helpful: "There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of" female students. *Id.* The guidance also makes clear that an institution must do more than show a *history* of program expansion; it "must demonstrate a continuing (*i.e.,* present) practice of program expansion as warranted by developing interests and abilities." *Id.*

Sweetwater contends that Castle Park has increased the number of teams on which girls can play in the last decade, showing evidence of the kind "history and continuing practice of program expansion" sufficient to overcome a lack of "substantial proportionality" between female athletic participation and overall female enrollment. But **Sweetwater's** methodology is flawed, and its argument misses the point of Title IX. The number of *teams* on which girls could theoretically participate is not controlling under Title IX, which focuses on the number of female *athletes. See Mansourian,* 602 F.3d at 969 ("The [Prong] Two analysis focuses primarily ... on increasing the number of women's athletic opportunities rather than increasing the number of women's teams.").

The number of female athletes at Castle Park has varied since 1998, but there were more girls playing sports in the 1998–1999 school year (156) than in the 2007–2008 school year (149). The four most recent years for which we have data show that a graph of female athletic participation at Castle Park over time looks nothing like the upward trend line that Title IX requires. The number of female athletes shrank from 172 in the 2004–2005 school year to 146 in 2005–2006, before growing to 174 in 2006–2007 and shrinking again to 149 in 2007–2008. As Plaintiffs suggest, these "dramatic ups and downs" are far from the kind of "steady march ***858** forward" that an institution must show to demonstrate Title IX compliance under the second prong of the three-part test. We conclude that there is no "history and continuing practice of program expansion" for women's sports at Castle Park.

D

Female athletic participation is not substantially proportionate to overall female enrollment at Castle Park. And there is no history or continuing practice of program expansion for women's sports at the school. And yet, **Sweetwater** can still satisfy Title IX if it proves "that the interests and abilities of" female students "have been fully and effectively accommodated by the present program." 44 Fed.Reg. at 71,418; *see also Neal,* 198 F.3d at 767–68. This, the third prong of the Title IX "effective accommodation" test, considers whether a gender imbalance in athletics is the product of impermissible discrimination or merely of the genders' varying levels of interest in sports. *See* 1996 Clarification. Stated another way, a school where fewer girls than boys play sports does not violate Title IX if the imbalance is the result of girls' lack of interest in athletics.

The Department of Education's 1996 guidance is again instructive: In evaluating compliance under the third prong, we must consider whether there is (1) "unmet interest in a particular sport"; (2) ability to support a team in that sport; and (3) a "reasonable expectation of competition for the team." *Id.* **Sweetwater** would be Title IX-compliant unless all three conditions are present. *See id.* Finally, if an "institution has recently eliminated a viable team," we presume "that there is sufficient interest, ability, and available competition to sustain" a team in that sport absent strong evidence that conditions have changed. *Id.; see also Cohen v. Brown Univ.,* 101 F.3d 155, 180 (1st Cir.1996).

Sweetwater contends that (1) Plaintiffs were required to, but did not, conduct official surveys of female students at Castle Park to gauge unmet interest; (2) field hockey is irrelevant for Title IX purposes because it is not approved by the California Interscholastic Federation ("CIF"); and (3) in any event, field hockey was eliminated only because interest in the sport waned.

Sweetwater's arguments are either factually wrong or without legal support. First, Title IX plaintiffs need not themselves gauge interest in any particular sport. It is the school district that should evaluate student interest "periodically" to "identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex." 1996 Clarification. Second, field hockey *is* a CIF-approved sport.[11] But even if it were not, **Sweetwater's** position is foreclosed by Title IX's implementing regulations, which state that compliance "is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association." 34 C.F.R. § 106.6(c); *see also Biediger,* 691 F.3d at 93–94 (noting that we are to determine whether a particular "activity qualifies as a sport by reference to several factors relating to 'program structure and administration' and 'team preparation and competition' " (quoting Letter from Stephanie Monroe, Assistant Sec'y for Civil Rights, Office of Civil Rights, U.S. Dep't of Educ., to Colleagues (Sept. 17, 2008))). Third, the record makes clear that Castle Park cut its field hockey team not because interest in the sport waned, but because it was unable to ***859** find a coach. And the school's inability to hire a coach does not indicate lack of student interest in the sport.

Castle Park offered field hockey from 2001 through 2005, during which time the team ranged in size from 16 to 25 girls. It cut the sport before the 2005–2006 school year before offering it again in 2006–2007. It then cut field hockey a second time before the 2007–2008 school year. The Department of Education's guidance is clear on this point: "If an institution has recently eliminated a viable team ..., there is sufficient interest, ability, and available competition to sustain a[ ] ... team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists." 1996 Clarification; *see also Cohen,* 101 F.3d at 180. Castle Park's decision to cut field hockey twice during the relevant time period, coupled with its inability to show that its motivations were legitimate, is enough to show sufficient interest, ability, and available competition to sustain a field hockey team.

E

We conclude that **Sweetwater** has not fully and effectively accommodated the interests and abilities of its female athletes. The district court did not err in its award of summary judgment to Plaintiffs on their Title IX unequal participation claim, and we affirm the grant of injunctive relief to Plaintiffs on that issue.

III

We review a district court's evidentiary rulings, such as its decisions to exclude expert testimony and to impose discovery sanctions, for an abuse of discretion, and a showing of prejudice is required for reversal. *See Estate of Barabin v. AstenJohnson, Inc.,* 740 F.3d 457, 462 (9th Cir.2014) (en banc); *see also United States v. Chao Fan Xu,* 706 F.3d 965, 984 (9th Cir.2013) (exclusion of expert testimony); *R*

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& R Sails, Inc. v. Ins. Co. of Pa., 673 F.3d 1240, 1245 (9th Cir.2012) (imposition of discovery sanctions for Rule 26(a) and (e) violations).

In non jury cases such as this one, "the district judge is given great latitude in the admission or exclusion of evidence." *Hollinger v. United States,* 651 F.2d 636, 640 (9th Cir.1981). The Supreme Court has said that district courts have "broad latitude" to determine whether expert testimony is sufficiently reliable to be admitted. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 153, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). And "we give particularly wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1)," which is "a recognized broadening of the sanctioning power." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.,* 259 F.3d 1101, 1106 (9th Cir.2001); *see also R & R Sails,* 673 F.3d at 1245 (same); *Jeff D. v. Otter,* 643 F.3d 278, 289 (9th Cir.2011) ("[A] district court has wide discretion in controlling discovery.") (alteration in original) (internal quotation marks omitted).

A

We first address the exclusion of defense experts. Federal Rule of Evidence 702 governs the admissibility of expert testimony. It provides that a witness "qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if":

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> ***860** (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed.R.Evid. 702.

"It is well settled that bare qualifications alone cannot establish the admissibility of ... expert testimony." *United States v. Hermanek,* 289 F.3d 1076, 1093 (9th Cir.2002). Rather, we have interpreted Rule 702 to require that "[e]xpert testimony ... be both relevant and reliable." *Estate of Barabin,* 740 F.3d at 463 (alteration and ellipsis in original) (internal quotation marks omitted). A proposed expert's testimony, then, must "have a reliable basis in the knowledge and experience of his discipline." *Kumho Tire,* 526 U.S. at 148, 119 S.Ct. 1167 (internal quotation marks omitted). This requires district courts, acting in a "gatekeeping role," to assess "whether the reasoning or methodology underlying the testimony" is valid and "whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 592–93, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) ("*Daubert I* "). It is not "the correctness of the expert's conclusions" that matters, but "the soundness of his methodology." *Estate of Barabin,* 740 F.3d at 463 (internal quotation marks omitted).

The district court excluded the proposed testimony of Peter Schiff—a retired superintendent of a different school district who would have testified about "the finances of schools and high school athletic programs, as well as equitable access to school facilities at Castle Park,"—because it could not "discern what, if any, method he employed in arriving at his opinions." The district court also found that Schiff's "conclusions appear to be based on his personal opinions and speculation rather than on a systematic assessment of ... athletic facilities and programs at [Castle Park]." Further, the district court called Schiff's site visits "superficial," and noted that "experience with the nonrelevant issue of school finance" did not qualify him "to opine on Title IX compliance."

Similarly, the district court excluded the proposed testimony of Penny Parker—an assistant principal at a different high school who would have testified about the "unique nature of high school softball and its role at Castle Park,"—because her "methodology is not at all clear" and "her opinions are speculative ... inherently unreliable and unsupported by the facts."

We assume without deciding that (1) Schiff and Parker's proposed testimony was relevant, and (2) Schiff and Parker were qualified as Title IX experts under Rule 702. Nonetheless, we conclude that the district court did not abuse its discretion when it struck both experts' proposed testimony. The record suggests that the district court's determination that Schiff and Parker's proposed testimony was based on, at best, an unreliable methodology, was not illogical or implausible.

Schiff did not visit Castle Park to conduct an in-person investigation until *after* he submitted his initial report on the case. And when he did visit, his visit was cursory and not inseason: Schiff only walked the softball and baseball fields. His opinion that the "girls' softball field was in excellent shape," then, was based on no more than a superficial visual

examination of the softball and baseball fields. Schiff—who Sweetwater contends is qualified "to assess the state of the athletic facilities for both boys and girls teams" at Castle Park because of his "experience on the business side of athletics," his "extensive[ ]" work with CIF, and his high school baseball coaching tenure—did not enter the softball or baseball dugouts (or batting ***861** cages), and yet he sought to testify "on the renovations to the softball field, including new fencing, bleachers, and dugout areas."

Parker's only visit to Castle Park lasted barely an hour. And that visit was as cursory as Schiff' s: Parker—a former softball coach who Sweetwater offered as an expert on "all aspects of the game of softball,"—"toured the Castle Park facilities," including the softball and baseball fields and boys and girls locker rooms, and "was present while both a baseball and a softball game were being played simultaneously." She "observed the playing surfaces, dugout areas, field condition, fencing, bleachers, and amenities," but only from afar. Like Schiff, Parker took no photographs and no measurements. She did not speak to anyone at Castle Park about the fields. And she admitted that her proposed testimony about the softball team's allegedly inferior fundraising and accounting practices was speculative.

Schiff and Parker based their proposed testimony on superficial inspections of the Castle Park facilities. Even if a visual walkthrough, without more, *could* be enough in some cases to render expert testimony admissible under Rule 702, it certainly does not *compel* that conclusion in all cases. Moreover, as the district court found, Schiff and Parker's conclusions were based on their "personal opinions and speculation rather than on a systematic assessment of [Castle Park's] athletic facilities and programs." But personal opinion testimony is inadmissible as a matter of law under Rule 702, *see Daubert v. Merrell Dow Pharm., Inc.,* 43 F.3d 1311, 1319 (9th Cir.1995)("*Daubert II* "), and speculative testimony is inherently unreliable, *see Diviero v. Uniroyal Goodrich Tire Co.,* 114 F.3d 851, 853 (9th Cir.1997); *see also Daubert I,* 509 U.S. at 590, 113 S.Ct. 2786 (noting that expert testimony based on mere "subjective belief or unsupported speculation" is inadmissible). We cannot say the district court abused its discretion when it barred Schiff and Parker from testifying at trial after finding their testimony to be "inherently unreliable and unsupported by the facts." The district court properly exercised its "gatekeeping role" under *Daubert I,* 509 U.S. at 597, 113 S.Ct. 2786.

B

We next address the exclusion of fact witnesses. The general issue is whether witnesses not listed in Rule 26(a) disclosures —and who were identified 15 months after the discovery cutoff and only ten months before trial—were identified too late in the process.

The Federal Rules of Civil Procedure require parties to provide to other parties "the name ... of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses." Fed.R.Civ.P. 26(a)(1)(A)(i). And "[a] party who has made a disclosure under Rule 26(a) ... must supplement or correct its disclosure" in a "timely manner if the party learns that in some material respect the disclosure ... is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." *Id.* R. 26(e). A party that does not timely identify a witness under Rule 26 may not use that witness to supply evidence at a trial "unless the failure was substantially justified or is harmless." *Id.* R. 37(c)(1); *see also Yeti by Molly,* 259 F.3d at 1105. Indeed, Rule 37(c)(1) is "intended to put teeth into the mandatory ... disclosure requirements" of Rule 26(a) and (e). 8B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2289.1 (3d ed.2014).

***862** The district court excluded 38 Sweetwater witnesses as untimely disclosed, in violation of Rule 26(a) and (e), in part because it found "no reason why any of the 38 witnesses were not disclosed to [P]laintiffs either initially or by timely supplementation." The district court concluded that "the mere mention of a name in a deposition is insufficient" to notify Plaintiffs that Sweetwater "intend[s] to present that person at trial," and that to "suggest otherwise flies in the face of the requirements of Rule 26." And the district court reasoned that "[w]aiting until long after the close of discovery and on the eve of trial to disclose allegedly relevant and noncumulative witnesses is harmful and without substantial justification."

A "district court has wide discretion in controlling discovery." *Jeff D.,* 643 F.3d at 289 (internal quotation marks omitted). And, as we noted earlier, that discretion is "particularly wide" when it comes to excluding witnesses under Rule 37(c)(1). *Yeti by Molly,* 259 F.3d at 1106.

Sweetwater argues that exclusion of 30 of its 38 witnesses was an abuse of discretion because (1) "Plaintiffs were made aware" of those witnesses during discovery—specifically, during Plaintiffs' depositions of other Sweetwater witnesses, and (2) any violation of Rule 26 "was harmless to Plaintiffs." Of the remaining eight witnesses, Sweetwater contends that untimely disclosure was both justified because those witnesses were not employed at Castle Park before the discovery cutoff date, and harmless because they were disclosed more than eight months before trial. We conclude that the district court did not abuse its discretion by imposing a discovery sanction. The record amply supports the district court's discretionary determination that Sweetwater's lapse was not justified or harmless.

Initial Rule 26(a) disclosures were due October 29, 2007. At least 12 of Sweetwater's 38 contested witnesses were Castle Park employees by that date. The discovery cutoff was August 8, 2008, and lay witness depositions had to be completed by September 30, 2008. At least 19 of the 38 witnesses were Castle Park employees by those dates. And yet, Sweetwater did not disclose any of the 38 witnesses until November 23, 2009, more than 15 months after the close of discovery and less than a year before trial.

Sweetwater does not dispute that it did not formally offer the names of any of the 38 witnesses by the October 29, 2007, deadline for initial Rule 26(a) disclosures (or by the August 8, 2008, discovery cutoff, for that matter). Nor does it dispute that it did not "supplement or correct its disclosure or response," *see* Fed.R.Civ.P. 26(a)(1), by offering the witnesses' names in accord with Rule 26(e). Instead, Sweetwater contends that because other disclosed witnesses had mentioned the contested witnesses at their depositions, Plaintiffs were on notice that the contested witnesses might testify and were not prejudiced by untimely disclosure. Sweetwater contends, in essence, that it complied with Rule 26 because Plaintiffs knew of the contested witnesses' existence.

The district court did not abuse its discretion by rejecting Sweetwater's argument. The theory of disclosure under the Federal Rules of Civil Procedure is to encourage parties to try cases on the merits, not by surprise, and not by ambush. After disclosures of witnesses are made, a party can conduct discovery of what those witnesses would say on relevant issues, which in turn informs the party's judgment about which witnesses it may want to call at trial, either to controvert testimony or to put it in context. Orderly procedure requires timely disclosure so that trial efforts ***863** are enhanced and efficient, and the trial process is improved. The late disclosure of witnesses throws a wrench into the machinery of trial. A party might be able to scramble to make up for the delay, but last-minute discovery may disrupt other plans. And if the discovery cutoff has passed, the party cannot conduct discovery without a court order permitting extension. This in turn threatens whether a scheduled trial date is viable. And it impairs the ability of every trial court to manage its docket.

With these considerations in mind, we return to the governing rules. Rule 26 states that "a *party* must, without awaiting a discovery request, provide to the other parties ... the name and, if known, the address and telephone number of each individual likely to have discoverable information." Fed.R.Civ.P. 26(a)(1)(A) (emphasis added). Compliance with Rule 26's disclosure requirements is "mandatory." *Republic of Ecuador v. Mackay,* 742 F.3d 860, 865 (9th Cir.2014).

The rule places the disclosure obligation on a "party." That another witness has made a passing reference in a deposition to a person with knowledge or responsibilities who could conceivably be a witness does not satisfy a party's disclosure obligations. An adverse party should not have to guess which undisclosed witnesses may be called to testify. We—and the Advisory Committee on the Federal Rules of Civil Procedure—have warned litigants not to " 'indulge in gamesmanship with respect to the disclosure obligations' " of Rule 26. *Marchand v. Mercy Med. Ctr.,* 22 F.3d 933, 936 n. 3 (9th Cir.1994) (quoting Fed.R.Civ.P. 26 advisory committee's note (1993 amend.)). The record shows that the district court did not abuse its discretion when it concluded that Sweetwater's attempt to obfuscate the meaning of Rule 26(a) was just this sort of gamesmanship. There was no error in the district court's conclusion that "the mere mention of a name in a deposition is insufficient to give notice to" Plaintiffs that Sweetwater "intend[ed] to present that person at trial."

The district court did not abuse its discretion when it concluded that Sweetwater's failure to comply with Rule 26's disclosure requirement was neither substantially justified nor harmless. *See* Fed.R.Civ.P. 37(c)(1). Sweetwater does not argue that its untimely disclosure of these 30 witnesses was substantially justified. Nor was it harmless. Had Sweetwater's witnesses been allowed to testify at trial, Plaintiffs would have had to depose them—or at least to consider which witnesses were worth deposing—and to prepare to question them at trial. *See Yeti by Molly,* 259 F.3d at 1107. The record demonstrates that the district court's

conclusion, that reopening discovery before trial would have burdened Plaintiffs and disrupted the court's and the parties' schedules, was well within its discretion. The last thing a party or its counsel wants in a hotly contested lawsuit is to make last-minute preparations and decisions on the run. The late disclosures here were not harmless. *See Hoffman v. Constr. Protective Servs., Inc.,* 541 F.3d 1175, 1180 (9th Cir.2008).

Nor did the district court abuse its discretion by finding that the untimely disclosure of the eight remaining witnesses also was not harmless. Allowing these witnesses to testify and reopening discovery would have had the same costly and disruptive effects. Nor was it substantially justified merely because the eight witnesses were not employed at Castle Park until after the discovery cutoff date. Sanctioning this argument would force us to read the supplementation requirement out of Rule 26(e). We will not do that.

***864** **Sweetwater** did not comply with the disclosure requirements of Rule 26(a) and (e). That failure was neither substantially justified nor harmless. The district court did not abuse its discretion when it excluded **Sweetwater's** 38 untimely disclosed witnesses from testifying at trial.

C

The next issue concerns whether the district court abused its discretion by declining to consider contemporaneous evidence at trial. On April 26, 2010, the district court set a June 15, 2010, cutoff date for **Sweetwater** to provide evidence of "continuous repairs and renovations of athletic facilities at Castle Park" for consideration at trial. Improvements made after June 15, 2010, but before the start of trial on September 14, 2010, the district court explained, would not be considered. **Sweetwater** did not then object to the district court's decision.

On appeal, however, **Sweetwater** argues that injunctive relief should be based on contemporaneous evidence, not on evidence of past harm. And if the district court had considered contemporaneous evidence at trial, **Sweetwater** speculates, it would have found Castle Park in compliance with Title IX and would not have issued an injunction.

This argument fails for several reasons. First, a "trial court's power to control the conduct of trial is broad." *United States v. Panza,* 612 F.2d 432, 438 (9th Cir.1979). Establishing a cutoff date after which it would not consider supplemental improvements to facilities at Castle Park—especially one that was only 90 days before trial—aided orderly pre-trial procedure and was well within the district court's discretion.

Second, the district court *did* consider some of **Sweetwater's** remedial improvements, "particularly with respect to the girls' softball facility," but concluded that "those steps have not been consistent, adequate or comprehensive" and that "many violations of Title IX have not been remedied or even addressed." **Sweetwater's** contention that "the District Court appeared to ignore key evidence of changed facilities" is unpersuasive.

Third, even if contemporaneous evidence showed that **Sweetwater** was complying with Title IX at the time of trial, the district court *still* could have issued an injunction based on past harm. *See United States v. Mass. Mar. Acad.,* 762 F.2d 142, 157–58 (1st Cir.1985). The plaintiff class included *future* students, who were protected by the injunction. "Voluntary cessation" of wrongful conduct "does not moot a case or controversy unless subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 719, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (alteration in original) (internal quotation marks omitted).

Fourth, the district court found no evidence that **Sweetwater** had "addressed or implemented policies or procedures designed to cure the myriad areas of general noncompliance with Title IX." In light of the systemic problem of gender inequity in the Castle Park athletics program, the district court did not abuse its discretion by issuing an injunction requiring **Sweetwater** to comply with Title IX.

IV

We review *de novo* a district court's decision to deny a Rule 12(b)(6) ***865** motion to dismiss.[12] *See Dunn v. Castro,* 621 F.3d 1196, 1198 (9th Cir.2010). Similarly, whether a party has standing to bring a claim is a question of law that we review *de novo. See Jewel v. Nat'l Sec. Agency,* 673 F.3d 902, 907 (9th Cir.2011). But we review a district court's fact-finding on standing questions for clear error. *See In re ATM Fee Antitrust Litig.,* 686 F.3d 741, 747 (9th Cir.2012).

Article III of the Constitution requires a party to have standing to bring its suit. *See Lujan v. Defenders of Wildlife,*

504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The elements of standing are wellestablished: the party must have suffered (1) an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of," meaning the injury has to be "fairly traceable to the challenged action of the defendant"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560–61, 112 S.Ct. 2130 (alteration, ellipsis, citations, and internal quotation marks omitted).[13] "In a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.,* 511 F.3d 974, 985 (9th Cir.2007) (en banc).

The district court held that Plaintiffs had standing to bring their Title IX retaliation claim, but gave few reasons for its decision. *See* ***Ollier***, 735 F.Supp.2d at 1226. On appeal, **Sweetwater** argues, as it did before the district court, that Plaintiffs lack standing to enjoin the retaliatory action allegedly taken against Coach Martinez because students may not "recover for adverse retaliatory employment actions taken against" an educator, even if that educator "engaged in protected activity on behalf of the students." **Sweetwater** contends that while Coach Martinez would have had standing to bring a Title IX retaliation claim himself, the "third party" students cannot "maintain a valid cause of action for retaliation under Title IX for their coach's protected activity and the adverse employment action taken against the coach."

We reject this argument. It misunderstands Plaintiffs' claim, which asserts that **Sweetwater** impermissibly retaliated against *them* by firing Coach Martinez in response to Title IX complaints he made on Plaintiffs' behalf. With their softball coach fired, Plaintiffs' prospects for competing were hampered. Stated another way, Plaintiffs' Title IX retaliation claim seeks to vindicate not Coach Martinez's rights, but Plaintiffs' own rights. Because Plaintiffs were asserting their own "legal rights and interests," not a claim of their coach, the generally strict limitations on third-party standing do not bar their claim. *See Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

***866** Justice O'Connor correctly said that "teachers and coaches ... are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are the only effective adversaries of discrimination in schools." *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 181, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005) (alteration and internal quotation marks omitted). **Sweetwater's** position—that Plaintiffs lack standing because it was not they who made the Title IX complaints—would allow any school facing a Title IX retaliation suit brought by students who did not themselves make Title IX complaints to insulate itself simply by firing (or otherwise silencing) those who made the Title IX complaints on the students' behalf. We will "not assume that Congress left such a gap" in Title IX's enforcement scheme. *Id.*

An injured party may sue under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.,* if he "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Thompson v. N. Am. Stainless, LP,* 562 U.S. 170, 131 S.Ct. 863, 870, 178 L.Ed.2d 694 (2011) (internal quotation marks omitted). Plaintiffs, of course, do not bring their suit under the APA, but the Supreme Court has extended its "zone of interests" jurisprudence to cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* whose antiretaliation provisions are analogous here. *See Thompson,* 131 S.Ct. at 870. And students like Plaintiffs surely fall within the "zone of interests" that Title IX's implicit antiretaliation provisions seek to protect. *See Jackson,* 544 U.S. at 173–77, 125 S.Ct. 1497.

Finally, the Supreme Court has foreclosed **Sweetwater's** position. Faced with the argument that anti-retaliation provisions limit standing to those "who engaged in the protected activity" and were "the subject of unlawful retaliation," the Court has said that such a position is an "artificially narrow" reading with "no basis in text or prior practice." *Thompson,* 131 S.Ct. at 869–70.[14] Rather, "any plaintiff with an interest arguably sought to be protected by" a statute with an anti-retaliation provision has standing to sue under that statute. *Id.* at 870 (alteration and internal quotation marks omitted). Students have "an interest arguably sought to be protected by" Title IX——indeed, students are the statute's very focus.

Coach Martinez gave softball players extra practice time and individualized attention, persuaded volunteer coaches to help with specialized skills, and arranged for the team to play in tournaments attended by college recruiters. The softball team was stronger with Coach Martinez than without him. After Coach Martinez was fired, **Sweetwater** stripped the softball

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team of its voluntary assistant coaches, canceled the team's 2007 awards banquet, and forbade the team from participating in a Las Vegas tournament attended by college recruiters. The district court found these injuries, among others, sufficient to confer standing on Plaintiffs. We agree.

Plaintiffs have alleged judicially cognizable injuries flowing from **Sweetwater's** retaliatory responses to Title IX complaints ***867** made by their parents and Coach Martinez. The district court's ruling that Plaintiffs have Article III standing to bring their Title IX retaliation claim and its decision to deny **Sweetwater's** motion to strike that claim were not error.

V

We review a district court's decision to grant a permanent injunction for an abuse of discretion, but we review for clear error the factual findings underpinning the award of injunctive relief, *see Momot v. Mastro,* 652 F.3d 982, 986 (9th Cir.2011), just as we review for clear error a district court's findings of fact after bench trial. *See Spokane Arcade, Inc. v. City of Spokane,* 75 F.3d 663, 665 (9th Cir.1996). However, we review *de novo* "the rulings of law relied upon by the district court in awarding injunctive relief." *Sierra Forest Legacy v. Sherman,* 646 F.3d 1161, 1177 (9th Cir.2011) (internal quotation marks omitted).

We come to the substance of Plaintiffs' retaliation claim, an important part of this case. "Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex.... Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Jackson,* 544 U.S. at 178, 180, 125 S.Ct. 1497. The Supreme Court "has often looked to its Title VII interpretations ... in illuminating Title IX," so we apply to Title IX retaliation claims "the familiar framework used to decide retaliation claims under Title VII." *Emeldi v. Univ. of Or.,* 698 F.3d 715, 724–25 (9th Cir.2012), *cert. denied,* ––– U.S. ––––, 133 S.Ct. 1997, 185 L.Ed.2d 866 (2013) (internal quotation marks omitted).

Under that framework, a "plaintiff who lacks direct evidence of retaliation must first make out a *prima facie* case of retaliation by showing (a) that he or she was engaged in protected activity, (b) that he or she suffered an adverse action, and (c) that there was a causal link between the two." *Id.* at 724. The burden on a plaintiff to show a *prima facie* case of retaliation is low. Only "a minimal threshold showing of retaliation" is required. *Id.* After a plaintiff has made this showing, the burden shifts to the defendant to "articulate a legitimate, non-retaliatory reason for the challenged action." *Id.* If the defendant can do so, the burden shifts back to the plaintiff to show that the reason is pretextual. *See id.*

A

The district court found that Plaintiffs had made out a *prima facie* case of retaliation: They engaged in protected activity when they complained about Title IX violations in May and July 2006 and when they filed their complaint in April 2007. They suffered adverse action because the softball program was "significantly disrupted" when, among other things, Coach Martinez was fired and replaced by a "far less experienced coach." And a causal link between Plaintiffs' protected conduct and the adverse actions they suffered "may be established by an inference derived from circumstantial evidence"—in this case, the "temporal proximity" between Plaintiffs' engaging in protected activity in May 2006, July 2006, and April 2007, and the adverse actions taken against them in July 2006 and spring 2007.

Sweetwater contends that these findings were clearly erroneous because (1) "At most, the named plaintiffs who attended CPHS at the time of the complaints can legitimately state they engaged in protected activity"; (2) the district court did not ***868** articulate the standard it used to determine which actions were "adverse" and did not, as **Sweetwater** says was required, evaluate whether Plaintiffs "were denied access to the educational opportunities or benefits provided by the school as a direct result of retaliation"; and (3) there was no causal link between protected activity and adverse action because Coach Martinez was fired to make way for a certified, on-site teacher, not because of any Title IX complaints.

"In the Title IX context, speaking out against sex discrimination ... is protected activity." *Id.* at 725 (alteration and internal quotation marks omitted). Indeed, "Title IX empowers a woman student to complain, without fear of retaliation, that the educational establishment treats women unequally." *Id.* That is precisely what happened here. The father of two of the named plaintiffs complained to the Castle Park athletic director in May 2006 about Title IX violations; Plaintiffs' counsel sent **Sweetwater** a demand letter in July 2006 regarding Title IX violations at Castle Park;

and Plaintiffs filed their class action complaint in April 2007. These are indisputably protected activities under Title IX, and the district court's finding to that effect was not clearly erroneous.

It is not a viable argument for **Sweetwater** to urge that a class may not "sue a school district for retaliation in a Title IX athletics case." As we have previously held: "The existence of a private right of action to enforce Title IX is well-established." *Mansourian v. Regents of Univ. of California,* 602 F.3d 957, 964 n. 6 (9th Cir.2010). Further, a private right of action under Title IX includes a claim for retaliation. As the United States Supreme Court has said: "Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex.... Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Jackson,* 544 U.S. at 178, 180, 125 S.Ct. 1497. Nor is it a viable argument for **Sweetwater** to complain that only some members of the plaintiff's class who attended CPHS when complaints were made can urge they engaged in protected activity. That the class includes students who were not members of the softball team at the time of retaliation, and who benefit from the relief, does not impair the validity of the relief. *See Thompson v. N. Am. Stainless, LP,* 562 U.S. 170, 131 S.Ct. 863, 870, 178 L.Ed.2d 694 (2011) (holding that Title VII "enabl[es] suit by any plaintiff with an interest arguably sought to be protected.") (internal quotations and alteration omitted); *Mansourian,* 602 F.3d at 962 (approving a class of female wrestlers "on behalf of all current and future female" university students). The relief of injunction is equitable, and the district court had broad powers to tailor equitable relief so as to vindicate the rights of former and future students. *See generally Dobbs on Remedies,* §§ 2.4, 2.9.

Under Title IX, as under Title VII, "the adverse action element is present when 'a reasonable [person] would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable [person] from making or supporting a charge of discrimination.' " *Id.* at 726 (alterations in original) (quoting *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)). **Sweetwater** does not argue—because it cannot argue—that the district court's adverse action findings do not satisfy this standard.[15] The district court found that ***869** Plaintiffs' "successful softball program was significantly disrupted to the detriment of the program and participants" because: (1) Coach Martinez was fired and replaced by a "far less experienced coach"; (2) the team was stripped of its assistant coaches; (3) the team's annual award banquet was canceled in 2007; (4) parents were prohibited from volunteering with the team; and (5) the team was not allowed to participate in a Las Vegas tournament attended by college recruiters. It was not clear error for the district court to conclude that a reasonable person could have found any of these actions "materially adverse" such that they "well might have dissuaded [him] from making or supporting a charge of discrimination." *Id.* (internal quotation marks omitted).

We construe the causal link element of the retaliation framework "broadly"; a plaintiff "merely has to prove that the protected activity and the [adverse] action are not completely unrelated." *Id.* (internal quotation marks omitted). In Title VII cases, causation "may be inferred from circumstantial evidence, such as the [defendant's] knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory" conduct. *Yartzoff v. Thomas,* 809 F.2d 1371, 1376 (9th Cir.1987). *Emeldi* extended that rule to Title IX cases. *See* 698 F.3d at 726 ("[T]he proximity in time between" protected activity and allegedly retaliatory action can be "strong circumstantial evidence of causation."). Plaintiffs have met their burden: They engaged in protected activity in May 2006, July 2006, and April 2007. Coach Martinez was fired in July 2006 and the annual awards banquet was canceled in Spring 2007. The timing of these events is enough in context to show causation in this Title IX retaliation case. That the district court found as much was not clearly erroneous. Plaintiffs state a *prima facie* case of Title IX retaliation.

B

Sweetwater offered the district court four legitimate, nonretaliatory reasons for firing Coach Martinez: First, Castle Park wanted to replace its walk-on coaches with certified teachers. Second, Coach Martinez mistakenly played an ineligible student in 2005 and forced the softball team to forfeit games as a result. Third, he allowed an unauthorized parent to coach a summer softball team. Fourth, he filed late paperwork related to the softball team's participation in a Las Vegas tournament—a mishap that **Sweetwater** said created an unnecessary liability risk. The district court rejected each reason, concluding that all four were "not credible and are pretextual."

Sweetwater argues on appeal that the district court committed clear error by disregarding these legitimate, nonretaliatory reasons because it "failed to evaluate and weigh the evidence before it" when it "looked past the abundance of uncontradicted information preexisting the Title IX complaints ... and focused almost entirely" on Coach Martinez's termination. **Sweetwater** also adds that Castle Park did not renew Coach Martinez's contract in part because "he was a mean and intimidating person" who often spoke in a "rough voice" and could be "abrasive." Coach Martinez, **Sweetwater** contends, "did not possess the guiding principles required ***870** of a coach because he constantly failed to follow the rules" at Castle Park.

Sweetwater disregards the salient fact that the district court held a trial on retaliation. The district court could permissibly find that, on the evidence it considered, **Sweetwater's** non-retaliatory reasons for firing Coach Martinez were a pretext for unlawful retaliatory conduct. First, **Sweetwater** contends that Castle Park fired Coach Martinez "primarily" because he allowed an unauthorized parent to coach a summer league team, but also that this incident merely "played a role" in his firing, and that the reason given Martinez when he was fired was that Castle Park "wanted an on-site coach." These shifting, inconsistent reasons for Coach Martinez's termination are themselves evidence of pretext. *See Hernandez v. Hughes Missile Sys. Co.,* 362 F.3d 564, 569 (9th Cir.2004) ("From the fact that Raytheon has provided conflicting explanations of its conduct, a jury could reasonably conclude that its most recent explanation was pretextual.").

Second, the district court's findings underlying its conclusion that **Sweetwater's** "stated reasons for Martinez's termination are not credible and are pretextual" are convincing and not clearly erroneous. Coach Martinez was not fired as part of a coordinated campaign to replace walk-on coaches with certified teachers, as **Sweetwater** contends. There was a preference for certified teachers in place long before Coach Martinez was hired, and there was no certified teacher ready to replace him after he was fired. Nor was the district court required by the evidence to find that Coach Martinez was fired because he played an ineligible student and forced the softball team to forfeit games as a result. This incident occurred during the 2004–2005 school year, but Coach Martinez was not reprimanded at the time and was not fired until more than a year later. Also, eligibility determinations were the responsibility of school administrators, not athletics coaches. **Sweetwater's** argument that it fired Coach Martinez because he let an unauthorized parent coach a summer softball team is specious. Not only was Coach Martinez absent when the incident occurred, but he forbade the parent from coaching after learning of his ineligibility to do so. Moreover, the summer softball team in question "was not conducted under the auspices of the high school." Finally, while Coach Martinez did file late paperwork for the Las Vegas tournament, he was not then admonished for it. As with the ineligible player incident, the timing of his termination suggests that **Sweetwater's** allegedly nonretaliatory reason is merely a *post hoc* rationalization for what was actually an unlawful retaliatory firing. *See Gaffney v. Riverboat Servs. of Ind., Inc.,* 451 F.3d 424, 452 (7th Cir.2006) (concluding that a district court's finding that "defendants first fired the plaintiffs and then came up with *post hoc* rationalizations for having done so" was not clearly erroneous).

On the record before it, the district court correctly could find that Coach Martinez was fired in retaliation for Plaintiffs' Title IX complaints, not for any of the pretextual, non-retaliatory reasons that **Sweetwater** has offered.

C

Having determined that the district court did not clearly err when it found (1) that Plaintiffs established a *prima facie* case of Title IX retaliation, and (2) that **Sweetwater's** purported non-retaliatory reasons for firing Coach Martinez were pretextual excuses for unlawful retaliation, we conclude that it was not an abuse of ***871** discretion for the district court to grant permanent injunctive relief to Plaintiffs on their Title IX retaliation claim. We affirm the grant of injunctive relief to Plaintiffs on that issue.[16]

VI

We reject **Sweetwater's** attempt to relitigate the merits of its case. Title IX levels the playing fields for female athletes. In implementing this important principle, the district court committed no error.

AFFIRMED.

All Citations

768 F.3d 843, 89 Fed.R.Serv.3d 1292, 309 Ed. Law Rep. 624,
95 Fed. R. Evid. Serv. 544, 14 Cal. Daily Op. Serv. 11,066,
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Footnotes

* The Honorable Morrison C. England, Jr., Chief District Judge for the U.S. District Court for the Eastern District of California, sitting by designation.

1 Neither of **Sweetwater's** briefs on appeal includes argument on Plaintiffs' unequal treatment and benefits claim. Thus, **Sweetwater** has waived its appeal on that claim. *See Hall v. City of L.A.,* 697 F.3d 1059, 1071 (9th Cir.2012).

2 Plaintiffs' 42 U.S.C. § 1983 sex-based discrimination claim dropped out of the case in July 2010, when the district court severed it from the Title IX claims upon agreement of the parties.

3 Plaintiffs' retaliation claim was premised on (1) the July 2006 firing of Chris Martinez, "a highly qualified and well-loved softball coach," which occurred shortly after Castle Park received a formal Title IX complaint; (2) a ban on a parent-run snack stand during softball games; and (3) a ban on parental assistance in softball coaching.

4 **Sweetwater** also gave notice of its intent to appeal the district court's decision to certify the Plaintiffs' proposed class. However, neither of **Sweetwater's** briefs on appeal includes argument on the district court's decision to grant class certification. **Sweetwater's** appeal on that issue is waived. *See Hall,* 697 F.3d at 1071.

5 We give deference to the Department of Education's guidance according to *Chevron USA v. Natural Resources Defense Council,* 467 U.S. 837, 843–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Mansourian v. Regents of Univ. of Cal.,* 602 F.3d 957, 965 n. 9 (9th Cir.2010).

6 On appeal, **Sweetwater** propounds a new theory that, with respect to the first prong of the "effective accommodation" test, "the idea of proportionality relies on percentages, rather than absolute numbers." The Government calls this theory, which has no precedential support, "flatly incorrect."

7 An institution that sought to explain a disparity from substantial proportionality should show how its specific circumstances justifiably explain the reasons for the disparity as being beyond its control.

8 That there are "more athletic sports teams for girls (23) than ... for boys (21)" at Castle Park is not controlling. We agree with Plaintiffs that counting "sham girls' teams," like multiple levels of football and wrestling, despite limited participation by girls in those sports, is "both misleading and inaccurate." It is the number of female athletes that matters. After all, Title IX "participation opportunities must be real, not illusory." 1996 Letter.

9 In 2005–2006 (6.7 percent; 48 girls) and 2006–2007 (10.3 percent; 92 girls), the disparity was even greater.

10 The Department of Education says only that a 62–woman gap would likely preclude a finding of substantial proportionality, but that a six-woman gap would likely not. 1996 Clarification.

11 See Field Hockey, Cal. Interscholastic Fed'n, http://www. cifstate.org/index.php/other-approved-sports/field-hockey (last visited July 28, 2014).

12 Because the district court construed **Sweetwater's** motion to strike Plaintiffs' Title IX retaliation claim as a Rule 12(b)(6) motion to dismiss that claim, *see* ***Ollier****,* 735 F.Supp.2d at 1224, we do the same.

13 **Sweetwater** does not contest that Plaintiffs' alleged harm is "fairly traceable" to them. **Sweetwater's** argument against redressability is premised on the idea that prospective injunctive relief cannot redress past harm. Because Plaintiffs' harm is ongoing, that argument fails. *See McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck,* 370 F.3d 275, 284–85

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(2d Cir.2004); *see also* *N. Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 553 n. 15, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) (Powell, J., dissenting). Only Plaintiffs' alleged injury in fact, then, is at issue in our analysis.

14 *Thompson v. North American Stainless, LP* was a Title VII case, but the Supreme Court's reasoning applies with equal force to Title IX.

15 Rather, **Sweetwater** contends that the district court applied the wrong standard and that Plaintiffs, to show adverse action, must prove "that they were denied access to the educational opportunities or benefits provided by the school as a direct result of retaliation." Our decision in *Emeldi v. University of Oregon,* however, illustrates that **Sweetwater's** position is simply not the law.

16 We also affirm the grant of injunctive relief to Plaintiffs on their Title IX unequal treatment and benefits claim, any objection to which **Sweetwater** waived on appeal by not arguing it. *See* *Hall,* 697 F.3d at 1071.

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The Rights of School Employee-Coaches Under Title VII and Title IX in Educational Athletic Programs

Kim Turner*

Introduction

School employee-coaches may remedy unlawful employment practices under Title VII[1] and Title IX.[2] Questions of whether, when, and how to bring claims under one or both statutes are complex. This Article explores under what circumstances school employees, particularly coaches,[3] have the right under Title VII and/or Title IX to address sex discrimination and retaliation within educational programming at the primary, secondary, and post-secondary levels. Specifically, in the athletics context, how do coaches,[4] whether also teachers, directors,

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1. 42 U.S.C. § 2000e (2012).
2. 20 U.S.C. § 1681 (2012).
3. There are approximately 100,000 public elementary, middle, and high schools in the United States. *Fast Facts*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/ (last visited Feb. 18, 2017). Roughly eighty-five percent of high schools offer sports programs. *See* DON SABO & PHILIP VELIZ, SHARP CTR. FOR WOMEN & GIRLS, THE DECADE OF DECLINE: GENDER EQUITY IN HIGH SCHOOL SPORTS 23–24 (Oct. 2012), https://www.womenssportsfoundation.org/wp-content/uploads/2012/10/ocr_report_2v3100412-final.pdf. Four-year colleges and universities report employing nearly 80,000 head or assistant coaches. *See* DEP'T OF EDUC., HOW MANY HEAD COACHES WERE REPORTED? (2014), https://ope.ed.gov/athletics/Trend/public /#/answer/3/301/main?row=-1&column=-1 (26,233 head coaches reported); DEP'T OF EDUC., HOW MANY ASSISTANT COACHES WERE REPORTED? (2014), https://ope.ed.gov/athletics/Trend/public/#/answer/3/302/main?row=-1&column=-1 (52,788 assistant coaches reported). In 2014, 14,000 women were employed as intercollegiate athletic professionals, of whom 4,154 were coaches and 7,503 were assistant coaches. *See* R. Vivian Acosta & Linda Jean Carpenter, Women in Intercollegiate Sport A (2014) (unpublished manuscript), http://www.acostacarpenter.org/2014%20Status%20of%20 Women %20in%20Intercollegiate%20Sport%20-37%20Year%20Update %20-%201977-2014%20.pdf. Thus, there are likely hundreds of thousands of coach-employees throughout the United States who could encounter discrimination actionable under Title VII or Title IX.
4. Coach-employee claims can arise in primary, secondary, and post-secondary school settings.

or professors, who are subjected to either discrimination, retaliation, or both, evaluate and vindicate their rights?

Both Title VII and Title IX are theoretically available to a coach-employee[5] to address workplace discrimination concerning the coach's employment conditions, as well as female players' experiences—insofar as these conditions relate to and affect the coach's employment. However, employees deciding whether to proceed under Title VII and/or Title IX must analyze multiple factors, including the varying approaches courts take throughout the United States in resolving these claims. First, one must consider whether the alleged unlawful acts were directed solely at the coach or against the coach and female athletes in the school—female athletes being the historically underrepresented sex.[6] Second, one must evaluate the coach's goals and whether desired remedies, such as reinstatement, monetary damages, or injunctive relief are available. Third, one must review administrative prerequisites, such as exhaustion requirements, that present potential avenues and roadblocks to relief. Fourth, one should consider statute-specific questions such as the required standards to establish unlawful conduct and applications of preemption principles.

This Article explores how these considerations affect whether coaches should proceed under Title VII, Title IX, or both. Part I provides background on Title VII and Title IX and discusses how Title IX requires gender equity in athletics in federally funded educational institutions. Part II explains what factors coaches should consider when deciding to bring Title VII and Title IX claims, such as varying patterns of discrimination; varying approaches to suits, goals, and implications; administrative exhaustion differences; the scope of actions and relief; and standards and treatment of retaliation under each statute. Part III examines courts' divergence concerning whether Title VII preempts claims under Title IX. The Article concludes by highlighting the ramifications of proceeding under Title VII, Title IX, or both.

5. This analysis is restricted to coach-employees rather than coach-volunteers. "It is generally held that unpaid volunteers are not employees for the purpose of the civil rights statutes because they are not susceptible to discriminatory practices, and the remedy of back pay would be inappropriate for them." FARRELL ET AL., 45A AM. JUR. 2D JOB DISCRIMINATION § 112 (2d ed. 2017). Yet, a volunteer may not be seeking backpay in bringing a civil rights case. *See* Marie v. Am. Red Cross, 771 F.3d 344, 353 (6th Cir. 2014) ("[R]emuneration is not an independent antecedent requirement, but rather it is a non-dispositive factor that should be assessed in conjunction with the other . . . factors to determine if a volunteer is an employee.").

6. If the coach suffers discrimination or retaliation because of the athletes' sex, and not due to the coach's sex, a Title IX claim is arguably the only available mechanism for redress.

I. Background

A. *Title VII and Title IX*

In bringing a discrimination claim, a coach must choose whether to sue under Title VII, Title IX, or both. Title VII of the Civil Rights Act, which prohibits employment discrimination, initially excluded educational institutions when passed in 1964.[7] Congress amended the law in 1972 to include educational institutions.[8] Title VII prohibits employers from firing, failing to hire, or in any way discriminating against an employee because of the employee's sex.[9] Title IX of the Education Amendments of 1972 prohibits educational institutions from engaging in sex discrimination.[10] Title IX became law in June 1972,[11] eight years after Title VII and several months after Title VII's amendment to include educational institutions.[12] Specifically, Section 901(a) of Title IX provides that "no person," on the basis of sex, shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[13] Title IX and its regulations proscribe sex discrimination, including in employment, and requires educational institutions to make non-discriminatory employment decisions.[14] Title IX further prohibits segregation or classification of applicants or employees due to sex in any manner that may adversely impact applicants' or employees' opportunities or status.[15] Both Title VII and Title IX can remedy compensation inequities.[16]

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7. "This Title shall not apply to . . . an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

8. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 105.

9. 42 U.S.C. § 2000e-2 (2012). Title VII also prohibits discrimination based on race, color, national origin, religion, and pregnancy. While neither Title VII nor Title IX explicitly mention sexual orientation or gender identity, courts have held that each statute's definition of "sex" encompasses sexual orientation and gender identity. *See, e.g.*, G.G. *ex. rel*. Grimm v. Gloucester City Sch. Bd., 822 F.3d 709, 723 (4th Cir. 2016), *cert. granted*, 137 S. Ct. 369 (2016) (deferring to Department of Education regulations requiring schools to treat transgender students in a manner consistent with their gender identity to avoid a Title IX claim); Rene v. MGM Grand Hotel, 305 F.3d 1061, 1068 (9th Cir. 2002) (*en banc*) (openly gay man facing sexual orientation-based harassment may state Title VII cause of action).

10. 20 U.S.C. § 1681(a), (b) (2012).

11. Title IX of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 235.

12. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 105.

13. 20 U.S.C. § 1681.

14. *Id.*; *see also* 34 C.F.R. § 106.51–.61 (2016).

15. *See* 34 C.F.R. § 106.52–.57.

16. *See id.* § 106.54 (Title IX prohibits discriminatory compensation). Title IX can be implicated in addition to Title VII, which also prohibits an employer from discriminating based on gender when setting or changing compensation. 42 U.S.C. § 2000e-2(a)(1) (2012). The Equal Pay Act, not discussed at length in this Article, also forbids employers from paying employees at a rate less than employees of the opposite sex for equal work on jobs requiring the same skill, effort, and responsibility performed under the same conditions. 29 U.S.C. § 206(d) (2012).

Title VII did not cover educational employees at the time the law was initially being considered and legislated—thus, Title IX was developed in the context of Title VII's failure to address discrimination in educational institutions.[17] Moreover, nothing in the plain language of Title IX[18] suggests that employment in federally funded educational institutions is not covered by the statute's prohibition on discrimination. Thus, Title IX protects students and employees from sex discrimination in any federally funded educational program or activity.[19]

B. Title IX Progress and Persistent Athletics-Related Inequities

Although gender discrimination within educational sports has lessened to some degree in recent decades, stark inequities persist between female and male athletes, between coaches of female athletes versus male athletes, and between female and male coaches. Currently, many more girls and women play interscholastic competitive sports in elementary, middle, and high school than before 1972—over 3.3 million females play high school sports today,[20] compared to approximately 310,000 before Title IX.[21] Nearly 193,000 women currently play varsity sports within the National Collegiate Athletic Association (NCAA), compared to only 30,000 before Title IX.[22] Despite these great strides, boys and men continue to dominate educational athletic programs, even though "[w]omen now make up more than half of all undergraduates,"[23] and girls comprise roughly half of all pri-

17. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521, 530–31 (1982) ("Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of § 901(a)." The "postenactment [legislative] history of Title IX . . . confirms Congress's desire to ban employment discrimination in federally financed education programs."); Henschke v. N.Y. Hosp.-Cornell Med. Ctr., 821 F. Supp. 166, 172 (S.D.N.Y. 1993) ("it is the opinion of this Court that the legislative history of Title IX demonstrates an intent on the part of Congress to have Title IX serve as an additional protection against gender-based discrimination in education programs receiving federal funding regardless of the availability of a remedy under Title VII").

18. *See generally* 20 U.S.C. § 1681 (2012).

19. No carve-out exists for employment under Title IX. *See N. Haven*, 456 U.S. at 530 ("employment discrimination comes within the prohibition of Title IX"). Further, Title IX regulations expressly state that Title IX stands independently of sex discrimination claims under other statutes, such as Title VII and the Equal Pay Act. 34 C.F.R. § 106.6(a) (2016) ("The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by . . . Title VII of the Civil Rights Act of 1964 . . . the Equal Pay Act . . . and any other Act of Congress or Federal regulation.").

20. *See* NAT'L FED'N OF STATE HIGH SCH. ASS'NS, PARTICIPATION STATISTICS 2015–16 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 55 (2016), http://www.nfhs.org/Participation Statistics/PDF/2015-16_Sports_Participation_Survey.pdf.

21. Allen Barra, *Before and After Title IX: Women in Sports*, N.Y. TIMES (June 16, 2012), http://www.nytimes.com/interactive/2012/06/17/opinion/sunday/sundayreview-titleix-timeline.html?_r=0.

22. Maya Dusenbery & Jaeah Lee, *Charts: The State of Women's Athletics, 40 Years After Title IX*, MOTHER JONES (June 22, 2012, 5:00 AM), http://www.motherjones.com/politics/2012/06/ charts-womens-athletics-title-nine-ncaa.

23. *Id.*

mary and secondary school student bodies. In fact, male students have over one million more athletic participation opportunities at the high school level[24] and over 60,000 more athletic participation opportunities at the post-secondary level than female students.[25] Despite clear prohibitions within Title IX and other laws against gender-based discrimination in interscholastic athletics among federally funded educational institutions, many female athletes in primary, secondary, and post-secondary athletic programs face inequitable treatment, which also affects their coaches.[26]

Sports participation among females is linked to improved physical, mental, academic, and economic outcomes for girls and women.[27] But participation often hinges on having well-resourced, supported, experienced, and dedicated coaches. Girls who play sports receive better grades and are significantly more likely to graduate.[28] The sports-academic success correlation is particularly strong for girls of color.[29] Graduation rates for African-American female athletes are higher than for their non-athlete counterparts.[30] Similarly, Latina athletes report receiving higher grades than non-athletes, and the percentage of Latina athletes scoring in the top quartile of standardized tests exceeds that of non-athlete Latinas.[31] At the collegiate level, students who earn sports scholarships graduate at higher rates than the general student body.[32] Further, youth sports participation is linked to later employment success. Executive businesswomen attribute involvement in sports to their success by providing leadership skills, discipline, and the ability to work on a team.[33] Finally, economist Betsey Stevenson finds that girls who participate in high school sports have higher

24. NAT'L FED'N OF STATE HIGH SCHOOL ASS'NS, *supra* note 20, at 55.

25. Dusenbery & Lee, *supra* note 22.

26. *See, e.g.*, *id.* (percentage of female coaches coaching women's teams has steadily dropped since Title IX).

27. *See* WOMEN'S SPORTS FOUND., BENEFITS—WHY SPORTS PARTICIPATION FOR GIRLS AND WOMEN 1–2 (2011), https://www.womenssportsfoundation.org/wp-content/uploads/2016/08/benefits-why-sports-participation-for-girls-and-women-the-foundation-position.pdf.

28. *See id.*

29. *See* NAT'L WOMEN'S LAW CTR., FINISHING LAST: GIRLS OF COLOR AND SCHOOL SPORTS OPPORTUNITIES 7 (2015), https://nwlc.org/wp-content/uploads/2015/08/final_nwlc_girlsfinishing last_report.pdf ("Although often overlooked, girls—particularly girls of color—drop out at high rates. . . . Playing sports increases the likelihood that they will graduate from high school, have higher grades, and score higher on standardized tests.").

30. *See id.*

31. FEMINIST MAJORITY FOUND., *Empowering Women in Sports*, *in* THE EMPOWERING WOMEN SERIES, No. 4 (1995), http://feminist.org/research/sports/sports6.html.

32. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA RECRUITING FACTS (July 2016), https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf.

33. *New Nationwide Research Finds: Successful Women Business Executives Don't Just Talk a Good Game . . . They Play(ed) One*, PR NEWSWIRE (Feb. 8, 2002), http://www.prnewswire.com/ news-releases/new-nationwide-research-finds-successful-women-business-executives-dont-just-talk-a-good-game-they-played-one-75898622.html.

rates of labor force participation and earn seven percent higher wages later in life.[34]

Yet, many female athletes and their coaches face discrimination, preventing girls and women from experiencing a truly level playing field. Coaches of female teams, similar to the athletes they oversee, are often subject to inequity in the terms and conditions of their employment and receive subpar opportunities, treatment, and benefits.[35] A recent Women's Sports Foundation study revealed that among coaches of female teams, "[a]lmost half (48%) of the female [college] coaches [surveyed] and just over a quarter of the male coaches (27%) in the study reported 'being paid less for doing the same job as other coaches.'"[36] Further, "[t]hirty-three percent of female coaches indicated that they were vulnerable to potential retaliation if they ask for help with a gender bias situation" and "[m]ore than 40% of female coaches said they were 'discriminated against because of their gender,' compared to 28% of their male colleagues."[37] The National Federation of State High School Associations notes that retaliation against complainants, including coaches, is one of the top ten sports law issues impacting secondary school athletics programs.[38] More often, coaches of

34. *See* Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports* 4 (Nat'l Bureau of Econ. Res., Working Paper No. 15728, Feb. 2010), http://www.nber.org/papers/w15728.pdf (calculation controls for demographics, family background, school characteristics, and wage premiums).

35. Although female athletes are typically the underrepresented sex, they should experience equity in participation opportunities through Title IX. The athletes playing school-sponsored sports should receive the same treatment and benefits regardless of gender, including equal access to equipment, supplies, teams, coaching quality, facilities, fundraising opportunities, and more. For more information on Title IX equity requirements in educational sports programming, see generally NAT'L WOMEN'S LAW CTR., CHECK IT OUT, IS THE PLAYING FIELD LEVEL FOR WOMEN AND GIRLS AT YOUR SCHOOL? (Sept. 2000), https://nwlc.org/wp-content/uploads/2015/08/Checkitout.pdf.

36. WOMEN'S SPORTS FOUND., BEYOND X'S AND O'S: GENDER BIAS AND COACHES OF WOMEN'S SPORTS 2 (2016), https://www.womenssportsfoundation.org/wp-content/uploads/2016/08/beyond-xs-osfinal-for-web.pdf. For more information regarding coach-employees' claims and issues, such as gender pay disparities, see Diane Heckman, *The Entrenchment of the Glass Sneaker Ceiling: Excavating Forty-Five Years of Sex Discrimination Involving Educational Athletic Employment Based on Title VII, Title IX and the Equal Pay Act*, 18 JEFFREY S. MOORAD SPORTS L.J. 429, 497 (2011) ("While the Equal Pay Act mandates equal pay for those doing equal jobs, surprisingly this federal statute has not proven a successful tool in the arsenal of those seeking equality in athletic employment compensation.").

37. WOMEN'S SPORTS FOUND., *supra* note 36, at 2.

38. *See* Lee Green, *Top Ten Sports Law Issues Impacting School Athletics Programs*, NAT'L FED'N OF ATHLETICS ASS'NS (May 20, 2015), https://www.nfhs.org/articles/top-ten-sports-law-issues-impacting-school-athletics-programs/ ("The typical high school sports retaliation suit involves a coach, student-athlete or parent who either voices concerns to school officials regarding an alleged Title IX issue or files a formal complaint to the U.S. Office for Civil Rights (OCR) and then suffers some form of disadvantageous treatment or negative consequences from school personnel as 'blowback' for having expressed his or her point of view on the issue.").

female teams have fewer privileges and female coaches represent a smaller share of coaches of male or female student teams.[39]

Coaches often know firsthand about gender disparities in athletic programs that prevent female athletes from experiencing equitable educational environments and inhibit coaches from doing their jobs. One of Title IX's basic requirements is that schools provide female students with equal athletic participation opportunities in proportion to their enrollment in the school[40]—a requirement that schools often flout. For example, if female students comprise forty-nine percent of the student body, female student-athletes should be approximately forty-nine percent of the athletic program unless the school demonstrates a history and continuing practice of adding female participants or that females do not wish to play in greater numbers.[41] But across the nation, girls make up just forty-two percent of high school sports participants,[42] leaving a seven percent gap between girls' enrollment and their sports participation. Thus, schools do not offer sufficient sports opportunities for females, additionally reducing opportunities to coach female teams.

Title IX also requires gender equality with regard to the quality and quantity of facilities, uniforms, and scheduling of games and practices, among other program components experienced by male and female athletes and teams.[43] Coaches often scramble to equalize such treatment and benefits to no avail. Despite clear mandates, compared to male student-athletes, girls and women play on worse fields and in second-rate gyms, receive inferior uniforms, and play games and practice at inconvenient times when parents, guardians, school staff, and others struggle to attend.[44] Female athletes may have to use distant off-campus fields and gyms, while male athletes are centrally located

39. Self-reported California private and public high school data for the 2015–16 school year reveals that the total number of employed female coaches for all students is just 14,088 (twenty-three percent) in comparison to 48,304 (seventy-seven percent) employed male coaches. Cal. Interscholastic Sports Fed'n, California Interscholastic Federation 2015–2016 Participation Census Submission Data (2016), https://view.officeapps.live.com/op/view.aspx?src=http://www.cifstate.org/coaches-admin/census/2015-_2016_CIF_Participation_Census_ Public.xlsx (last visited Mar. 6, 2017).

40. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979); *see also* Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 856–57 (9th Cir. 2014) (affirming district court's judgment that 6.7% is an unacceptable gap between girls' enrollment and participation in athletics); Biediger v. Quinnipiac Univ., 691 F.3d 85, 91, 105–07 (2d Cir. 2012) (describing a non-compliant 3.62% disparity between female enrollment and female athletic participation).

41. *See Ollier*, 768 F.3d at 854.

42. *See* Nat'l Fed'n of State High Sch. Ass'ns, *supra* note 20, at 55.

43. *See* 34 C.F.R. § 106.41(c) (2016); Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71,415; *Ollier*, 768 F.3d at 859 (finding unequal treatment and benefits for class of female athletes). *See generally* Ollier v. Sweetwater Union High Sch. Dist., 858 F. Supp. 2d 1093 (S.D. Cal. 2012) (addressing unequal treatment and benefits issues).

44. *See, e.g.*, Weaver v. Ohio State, 71 F. Supp. 2d 789 (S.D. Ohio 1998).

on campus. Female athletes commonly lack medical and training services, such as appropriate injury-related prevention and support.[45] These are just some inequities girls and women face when institutions violate the law, negatively impacting their coaches.

II. Considerations for Coaches' Rights Under Title VII and Title IX

A. *Varying Patterns of Discrimination*

Whether discrimination is based on the gender of the coach or the athlete dictates whether the coach may bring a Title VII or Title IX claim. Coaches who notice inequities may be understandably frustrated because discrimination can hinder being able to effectively assist players. They may report concerns to athletic directors, principals, superintendents, school boards, or other administrators.[46] Coaches may cite both inequities against female athletes and those they themselves experience. Whether coaches complain about discrimination toward themselves or their female players implicates whether they should bring a Title VII or a Title IX claim.

If coaches speak up on behalf of their teams, they may face retaliation. Common forms include threats of termination or other adverse conduct, reduction in pay or benefits, reassignment, constraints on efforts to continue coaching the team, suspension, or termination. In *Jackson v. Birmingham Board of Education*,[47] a school teacher who became the high school girls' basketball coach complained about inequities in the female sports program, such as his team's limited access to practice opportunities compared to male players and lack of reasonable school gym access.[48] After being terminated for his complaints, Coach Jackson brought a Title IX retaliation claim.[49] The Supreme Court held that Jackson was entitled to pursue a retaliation claim as a coach.[50]

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45. *See, e.g.*, *Supreme Court Eyes Gender Equity in Sports*, NBC NEWS (Nov. 30, 2004), http://www.nbcnews.com/id/6618661/ns/us_news/t/supreme-court-eyes-gender-equity-sports/#.WL441vnytEY.

46. A union collective bargaining agreement (CBA) may also govern a coach's employment. Contract issues, such as whether the CBA governs the dispute, impact the nature of a coach's complaint processes regarding on-the-job inequities. However, discrimination and retaliation claims such as those brought under Title VII or Title IX are not generally preempted by a CBA, depending on the terms of the CBA. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 59–60 (1974) (employee not precluded from litigating discrimination claims under Title VII despite existence of arbitration clause governing all disputes arising under a collective bargaining agreement); Nelson v. Univ. of Maine Sys., 914 F. Supp. 643, 651 n.8 (D. Me. 1996) (allowing Title IX claim notwithstanding CBA).

47. 544 U.S. 167 (2005).

48. *Id.* at 171–72.

49. *Id.*

50. *Id.* at 183–84.

The Supreme Court's *Jackson* decision validated the plaintiff's argument that "Title IX's private right of action encompasses suits for retaliation."[51] The Court additionally agreed that "teachers and coaches . . . are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators."[52] However, thousands of coaches nationwide are still standing in the same shoes as Jackson, noticing long-running, deep-seated inequities. Many coaches are mistreated and fearful about speaking up due to potential adverse action. Those who complain must cautiously proceed and weigh their options to vindicate their rights. Coaches of female athletes who encounter discrimination and/or retaliation must determine how to avail themselves of administrative and judicial remedies. In fact, players also may experience retaliation when a coach complains and is subsequently demoted or fired, thereby destabilizing the female students' team and program.[53] Thus, in defining the claim, the coach must clarify whether discrimination or retaliation targeted the coach alone, other coaches of female teams, the female athletes, or some combination thereof.[54]

B. Varying Approaches to Suit, Goals, and Implications

While a coach may bring claims individually and apart from female athletes, inequities experienced by female athletes and any complaints made by the coach about such inequities may be factually relevant and central to the case. For example, in *Harker v. Utica College*,[55] a college women's basketball coach brought Title VII and Title IX claims regarding employment inequity and discriminatory administration of the female athletic program, such as unequal booster club funding.[56] In *Weaver v. Ohio State*,[57] the discharged coach of a female field hockey team claimed Title IX retaliation, along with Title VII and Equal Pay Act claims, arising in part from complaints she made regarding poor field quality harming her athletes.[58] The court rejected Weaver's claims in part because "there [was] no evidence that plaintiff ever framed her complaints concerning the field

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51. *Id.* at 178.
52. *Id.* at 181.
53. *See* Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 871 (9th Cir. 2014) (affirming judgment in favor of high school female athletes' class Title IX retaliation claim regarding, in part, the termination of their coach after he complained about gender inequities as to the team, although the coach was not a plaintiff).
54. *See* Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1158–59, 1163 (C.D. Cal. 2015) (upholding student-athletes' federal Title IX claims based on allegations that university and its employees harassed and discriminated against them for sexual orientation).
55. 885 F. Supp. 378 (N.D.N.Y. 1995).
56. *Id.* at 381–83.
57. 71 F. Supp. 2d 789 (S.D. Ohio 1998).
58. *Id.* at 791.

in terms of Title IX sex discrimination" and because complaints were more akin to "unfair treatment in general," suggesting coaches should be explicit in complaints about how gender imbalances potentially pose legal violations.[59] In *Miller v. Board of Regents of the University of Minnesota*,[60] several coaches of female teams at the University of Minnesota-Duluth asserted Title VII sex-based discrimination claims, Title IX retaliation claims, and other claims based on inequity in employment and the treatment of female athletes.[61] Thus, a coach may pose a complaint regarding both the unequal treatment she experienced on the job and the inequity faced by her players as student-athletes.

A coach of female athletes may bring a Title IX employment-related claim within the same suit as the female athletes asserting their own Title IX claims. In *Biediger v. Quinnipiac University*,[62] athletes filed a Title IX athletic participation claim when Quinnipiac University proposed eliminating its women's volleyball team.[63] The coach, Robin Sparks, filed a Title IX claim for discrimination in employment, which survived the defendants' motion to dismiss.[64] Ultimately, "Plaintiffs agreed to sever their other theories for Title IX relief, including Coach Sparks's individual retaliation claim . . . ."[65] Notably, Coach Sparks did not assert Title VII claims.[66] Similarly, in *Paton v. New Mexico Highlands University*,[67] female athletes asserted Title IX claims along with their coaches, who brought successful Title IX retaliation claims stemming from complaints of unequal treatment.[68] Coaches and athletes bringing claims together may help a court better understand the common discriminatory environment experienced by both athletes and coaches.[69] Thus, a coach-employee should contemplate whether to bring a Title VII and/or Title IX suit alone or in concert with athletes to anticipate and address any possible conflicts of interest that could arise in such a case.[70]

Coaches who report inequity and discrimination that could impact female athletes and trigger retaliation must evaluate their goals to de-

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59. *Id.* at 793–94.

60. No. 15-cv-03740-RHK-LIB, 2015 WL 5721601 (D. Minn. Sept. 28, 2015).

61. *Id.*

62. 691 F.3d 85 (2d Cir. 2012).

63. *Id.* at 91.

64. *See* Biediger v. Quinnipiac Univ., No. 3:09-cv-621, 2010 WL 2017773, at *1 n.1 (D. Conn. May 20, 2010) ("Robin Lamott Sparks, the Quinnipiac University women's volleyball coach, is also a named plaintiff in this case. She, however, is suing only on her own behalf and is not claiming to represent the putative class at issue here.").

65. *Biediger*, 691 F.3d at 92 n.2.

66. *Id.*

67. 275 F.3d 1274 (10th Cir. 2002).

68. *See id.* at 1274–76.

69. *See generally Biediger*, 691 F.3d 85; *Paton*, 275 F.3d 1274.

70. *See generally Biediger*, 691 F.3d 85; *Paton*, 275 F.3d 1274.

cide how to proceed.[71] First, they should consider whether they seek reinstatement.[72] Second, if they were paid or received other benefits, they should consider whether to seek damages, including emotional distress damages.[73] Relatedly, female coaches should evaluate whether they were paid less than male counterparts and whether to seek compensation for gender-based pay differences.[74] Third, they should consider whether to seek injunctive relief to make program changes.[75] Such changes could be limited to those affecting the coach or also encompass the entire athletic program.[76] For example, a coach may seek improved anti-sexual harassment and anti-discrimination policies, changes to the athletes' treatment and benefits, or both.[77] Coaches' goals will implicate their statutory and administrative strategies.

Some plaintiffs opt to proceed under state law as opposed to federal law.[78] In a 2016 case, a head women's basketball coach at San Diego State University won a $3 million verdict in state court using state law claims,[79] without relying on Title IX or Title VII.[80] The case addressed unequal treatment for women coaches and athletes.[81] Claims for monetary damages against a state-funded entity, such as a state university or public school, have separate procedural require-

71. *See* Lee Green, *Top Ten Sports Law Issues Impacting School Athletics Programs*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS (May 20, 2015), https://www.nfhs.org/articles/top-ten-sports-law-issues-impacting-school-athletics-programs/ (discusses retaliation against complainants).

72. *Id.* Note, in general, at the high school level, girls' teams more often have "walk-on" coaches versus teacher-coaches (although such walk-on coaches are nonetheless regularly paid, even if it is simply a small stipend). Where girls' teams have more walk-on coaches than boys' teams, there also may be a Title IX violation. Walk-on coaches usually have less access to the student body for recruiting purposes, fewer options to use school facilities, less teacher-level stature, and fewer overall privileges in comparison to those afforded permanent teacher-coaches who are more often male and overseeing male teams. *See generally* Inglewood Teachers Ass'n v. Inglewood Unified Sch. Dist., No. LA-CE-2503, 1989 WL 1701137 (Cal. PERB 1989).

73. Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (plaintiff student-athletes sought damages for tangible and economic injuries, available under Title IX to claimants).

74. Miller v. Bd. of Regents of the Univ. of Minn., No. 15-cv-03740-RHK-LIB, 2015 WL 5721601 (D. Minn. Sept. 28, 2015).

75. *See generally* Biediger v. Quinnipiac Univ., 691 F.3d 85, 91 (2d Cir. 2012) (plaintiffs sought injunctive relief); Paton v. N.M. Highlands Univ., 275 F.3d 1274, 1280 (10th Cir. 2002) (same).

76. *See generally* Weaver v. Ohio State Univ., 71 F. Supp. 2d 789, 798 (S.D. Ohio 1998); Harker v. Utica Coll. of Syracuse Univ., 885 F. Supp. 378, 392 (N.D.N.Y. 1995).

77. *See generally Biediger*, 691 F.3d at 91; *Paton*, 275 F.3d at 1280; *Weaver*, 71 F. Supp. 2d at 798; *Harker*, 885 F. Supp. at 392.

78. Burns v. San Diego State Univ., No. 37-2014-00003408-CU-CO-CTL, 2016 WL 6895091 (Cal. Super. Ct. 2016) (coach asserted state contract claim).

79. *Id.*

80. *See id.*

81. *Id.*; *SDSU Ordered to Pay $3M to Ex-Coach Beth Burns*, NBC 7 SAN DIEGO (Sept. 29, 2016, 7:23 AM), http://www.nbcsandiego.com/news/sports/Coach-Beth-Burns-Lawsuit-Verdict-395264421.html.

ments.[82] A plaintiff may be required to notify a government entity before filing suit, depending on state law.[83]

C. *Exhaustion Under Title VII and Lack Thereof Under Title IX*

Unlike Title IX, a major implication of proceeding under Title VII is its exhaustion requirement.[84] In California, among other states, if an employer violates Title VII and the issue cannot be resolved through a union or with the employer directly, the employee must first file a charge with the federal Equal Employment Opportunity Commission (EEOC) or the state counterpart, such as the California Department of Fair Employment and Housing (CDFEH).[85] In fact, a coach cannot file in court until the appropriate EEOC or CDFEH administrative procedure has been exhausted and a "right to sue" letter issued.[86] The employee must file a charge with the EEOC within 300 days of the discriminatory act.[87] Notably, in states lacking an agency with a workshare agreement with the EEOC, employees only have 180 days to file a charge with the EEOC.[88]

After conducting an investigation, the EEOC will determine whether there is reasonable cause to believe an employee's charge is

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82. *See, e.g.*, Roe *ex rel.* Callahan v. Gustine Unified Sch. Dist., 678 F. Supp. 2d 1008, 1039 (E.D. Cal. 2009) ("As Gustine Unified School District is an arm of the state, it is protected by the Eleventh Amendment and is immune from Plaintiff's state law claims in this Court. The Eleventh Amendment does not, however, bar Plaintiff's claims against the individual defendants because . . . they are sued in their individual capacity.").

83. California, like many other states, requires plaintiffs to present written claims to public entities, which must be acted upon or rejected before a plaintiff can sue for money damages against a public entity, such as a school, for nearly all types of claims. *See* CAL. GOV'T CODE §§ 905, 905.2, 945.4 (1963); Munoz v. State, 33 Cal. App. 4th 1767, 1776 (Cal. Ct. App. 1995).

84. In 2015, the EEOC received 63,900 Title VII charges, and the OCR received 2,939 Title IX-related complaints. U.S. EQUAL EMP. OPPORTUNITY COMM'N, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 CHARGES FY 1997–FY 2016, https://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm; U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, DELIVERING JUSTICE: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION, FISCAL YEAR 2015 at 26 (2016), http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2015.pdf.

85. *See e.g.*, Martin v. Lockheed Missiles & Space Co., 29 Cal. App. 4th 1718, 1726–27 (1994) ("an EEOC right-to-sue notice satisfies the requirement of exhaustion of administrative remedies only for purposes of an action based on Title VII").

86. *Id.* at 1726. To prevent denial of civil claims because the plaintiff failed to exhaust all remedies, the employee must state claims in the EEOC charge, even though failure to exhaust may be equitably excused by the court. *See, e.g.*, Atkinson v. Lafayette Coll., No. Civ.A 01-CV-2141, 2003 WL 21956416 (E.D. Pa. 2003) ("The Court finds that [former athletic director] Plaintiff's Title VII retaliation claims cannot be presented to this Court because the allegations in her Complaint do not fall 'fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom.'") (citation omitted).

87. *Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (last visited Feb. 14, 2017), https://www.eeoc.gov/employees/timeliness.cfm.

88. *Id.*

true.[89] If the EEOC decides that reasonable cause does not exist, the agency dismisses the charge and notifies the aggrieved party and the respondent.[90] After dismissal, the EEOC will notify the aggrieved party of the right to sue.[91] An employee generally must complete this administrative process before filing suit under Title VII, a critical difference with Title IX.[92] If, however, the EEOC decides there is cause to believe discrimination occurred, the agency may attempt to resolve the matter informally.[93] If the EEOC cannot reach agreement with the employer, the agency may sue on behalf of the employee.[94] If the EEOC decides not to sue, the agency will issue a right-to-sue letter.[95] After receiving an EEOC right-to-sue letter, the employee has ninety days to file a lawsuit.[96]

In stark contrast to such detailed Title VII exhaustion requirements, Title IX plaintiffs need not exhaust administrative remedies before bringing private actions.[97] In *Cannon v. University of Chicago*, the Supreme Court stated that "[b]ecause the individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time, it makes little sense to require exhaustion."[98] Courts have rejected defendants' claims that exhaustion is required under Title IX.[99] Title IX's lack of administrative exhaustion requirements has subsequently led certain courts to pronounce that potential Title IX employment discrimination claims must first be filed under Title VII if the relevant facts implicate Title VII.[100] However, other courts reject funneling coaches' employment discrimina-

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89. *Id.*

90. *See* 42 U.S.C. § 2000e-5(b) (2012).

91. *What You Should Know*, U.S. Equal Emp. Opportunity Comm'n (last visited Feb. 15, 2017), https://www1.eeoc.gov//eeoc/newsroom/wysk/conciliation_litigation.cfm?renderforprint=1; *see also infra* text accompanying notes 94–96.

92. *What You Should Know*, *supra* note 91.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Cannon v. Univ. of Chi., 441 U.S. 677, 706–08 n.41 (1979).

98. *Id.* at 706 n.41 (1979). *Cannon* emphasized the need for an implied private right of action under Title IX because an administrative complaint "does not assure those persons the ability to activate and participate in the administrative process . . . "; "the complaint procedure . . . does not allow the complainant to participate in the investigation or subsequent enforcement proceedings"; and "even if those proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant." *Id.* at 706 n.41.

99. *Id. Accord* Greater L.A. Council on Deafness, Inc. v. Cmty. Television of S. Cal., 719 F.2d 1017, 1021 (9th Cir. 1983) (exhaustion not required under § 504 of the Rehabilitation Act because it incorporates Title IX's administrative procedures, and the Supreme Court has found these inadequate); Shuttleworth v. Broward Cty, 639 F. Supp. 654, 658 (S.D. Fla. 1986); Zentgraf v. Tex. A & M Univ., 492 F. Supp. 265, 268 (S.D. Tex. 1980) ("In pursuing a private action [under Title IX], individual plaintiffs are not required to exhaust their administrative remedies before filing suit.").

100. *See, e.g.*, Lakoski v. James, 66 F.3d 751, 754 (5th Cir. 1995).

tion claims through the Title VII apparatus and permit immediate Title IX claims.[101]

The statute of limitations for Title IX tracks the most analogous state statute.[102] In many states, the statute of limitations for Title IX is at least one year, notably longer than the 300 days afforded by the EEOC to file a charge and obtain a right-to-sue letter, thus, providing Title IX plaintiffs with longer timelines.[103] Should the employee wish to make an administrative complaint to the U.S. Office for Civil Rights (OCR) instead of pursuing litigation, the employee must file within 180 days of the discriminatory act, with certain exceptions for continuing violations.[104] OCR may refer the charge to the EEOC or maintain jurisdiction concurrently with the EEOC depending on the nature of the complaint.[105]

D. Scope of Action and Relief

The type of relief afforded, at one point in history, was a major consideration in whether to pursue a Title VII or Title IX claim. Title IX now generally provides rights and remedies analogous to those afforded under Title VII—the right to sue and seek injunctive, declaratory, and monetary damages (albeit without the caps imposed by Title VII).

The relevant history of Title IX begins with *Cannon*, in which the Supreme Court acknowledged an implied private right of action for Title IX enforcement.[106] In *North Haven Board of Education v.*

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101. Ivan v. Kent State Univ., 92 F.3d 1185, at *2 n.10 (6th Cir. 1996) (reviewing both Title VII and Title IX claims).

102. "When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." Wilson v. Garcia, 471 U.S. 261, 266–67 (1985). The Ninth Circuit has joined all other circuits that considered the issue and held that Title IX claims are subject to the applicable state statute of limitations for personal injury actions. Stanley v. Trs. of Cal. State Univ., 433 F.3d 1129, 1135–36 (9th Cir. 2006) (Title IX suit against state university trustees governed by California's personal injury statute of limitations). In California, an aggrieved party must commence a personal injury action for an alleged wrongful act or neglect within two years. CAL. CIV. PROC. CODE § 335.1 (West 2003). Minnesota also follows this practice. *See, e.g.*, Deli v. Univ. of Minn., 863 F. Supp. 958, 962 (D. Minn. 1994) (Title IX claim barred by relevant statute of limitations when former women's gymnastics head coach brought both Title VII and Title IX claims, among others; court applied one-year statute of limitations to plaintiff's Title IX claim, based on Minnesota Human Rights Act).

103. *Compare* CAL. CIV. PROC. CODE § 335.1 (West 2003) *and* Deli v. Univ. of Minn., 863 F. Supp. 958, 962 (D. Minn. 1994), *with Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (last visited Feb. 14, 2017), https://www.eeoc.gov/employees/timeliness.cfm.

104. *See How the Office for Civil Rights Handles Complaints*, U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS (last visited Feb. 9, 2017) http://www2.ed.gov/about/offices/list/ocr/complaints-how.html.

105. *See* U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, CASE PROCESSING MANUAL 31–32 (2015).

106. Cannon v. Univ. of Chi., 441 U.S. at 717. *See also supra* text accompanying notes 98–100.

Bell,[107] the Supreme Court recognized that Title IX incorporated private rights of action to remedy employment discrimination by educational institutions.[108] *North Haven* also explicitly upheld the validity of Title IX regulations pertaining to employees in federally funded educational institutions.[109] In *Franklin v. Gwinnett County Public Schools*,[110] a high school student brought a Title IX action seeking damages for intentional gender-based discrimination in connection with sexual harassment and abuse by a coach-teacher. The Court held that monetary damages were available in Title IX enforcement actions, and relief was not limited to back pay and prospective relief.[111] The clear availability of punitive damages under Title VII, lacking under Title IX, may impact a complainant's course of action.[112] Yet, there are no statutory caps on damages under Title IX as opposed to the caps imposed by Title VII.[113] Notice issues that arise with regard to damages must be heeded.[114]

E. Standards Under Title VII vs. Title IX

There are similar frameworks for asserting coaches' sex discrimination or retaliation claims under Title VII and Title IX. Several circuits agree that Title VII's burden-shifting analysis applies to Title IX claims.[115] The Department of Justice explains its position with this

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107. 456 U.S. 512 (1982).

108. *Id.* at 524 (Title IX intended to close loopholes in civil rights legislation, such as Title VII, which previously did not apply to employment discrimination regarding work at educational institutions).

109. *Id.* at 538 ("Examining the employment regulations [Subpart E] . . . we nevertheless reject petitioners' contention that the regulations are facially invalid."). Under § 902 of Title IX, the Department of Health, Education, and Welfare (HEW) (preceding the Department of Education/OCR), interpreted "person" in § 901(a) of Title IX to encompass employees as well as students and issued regulations (Subpart E) prohibiting federally funded education programs from discriminating on the basis of sex with respect to employment. *See id.* at 516–17.

110. 503 U.S. 60 (1992).

111. *Id.* at 65, 69–71.

112. *Compare* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 529 (1999) ("punitive damages are available in claims under Title VII"), *with* Mercer v. Duke Univ., 50 F. App'x 643, 644 (4th Cir. 2002) (citing Barnes v. Gorman, 536 U.S. 181 (2002)) (holding that "the Supreme Court's conclusion in *Barnes* that punitive damages are not available under Title VI compels the conclusion that punitive damages are not available for private actions brought to enforce Title IX").

113. 42 U.S.C. § 1981a-(b)(3) (2012) (limitation on compensatory and punitive damages for Title VII claims); Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 680 (1999) (Kennedy, J., dissenting) ("there are no damages caps on the judicially implied private cause of action under Title IX") (the majority did not hold otherwise on this issue).

114. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 181–82 (2005) (explaining "private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue" and that "recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979 . . .") (citation omitted).

115. *See* Johnson v. Baptist Med. Ctr., 97 F.3d 1070, 1072 (8th Cir. 1996) (method of evaluating Title IX gender discrimination claims is the same for Title VII cases); Murray v. N.Y.U. Coll. of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995); Preston v. Virginia *ex rel.* New

language: "In resolving employment actions, the courts have generally held that the substantive standards and policies developed under Title VII to define discriminatory employment conduct apply with equal force to employment actions brought under Title IX."[116] Further, the Department "takes the position that Title IX and Title VII are separate enforcement mechanisms."[117]

To survive summary judgment on a Title IX claim, a plaintiff must establish a prima facie discrimination case.[118] Under both Title IX and Title VII, if the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its adverse action.[119] To prevail, the plaintiff must then show that the defendant's purported reason for the adverse action is pretext for a discriminatory motive.[120] Although the burden shifts between the parties, the plaintiff bears the ultimate burden of demonstrating that the defendant engaged in discrimination.[121] "Because it is well settled that Title VII does not require proof of overt discrimination, direct proof of discriminatory intent is not required" for Title IX claims.[122]

River Cmty. Coll., 31 F.3d 203, 207 (4th Cir. 1994) (Title VII considerations shape contours of rights under Title IX); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 831–32 (10th Cir. 1993); Lipsett v. Univ. of P.R., 864 F.2d 881, 899 (1st Cir. 1988) (applied Title VII burden-shifting analysis in employment context to Title IX claim).

116. *Title IX Legal Manual, IV.B.2. Relationship to Title VII*, U.S. DEP'T. OF JUST., https://www.justice.gov/crt/title-ix#2 (last visited Feb. 12, 2017).

117. *Id.* ("Individuals can use both statutes to attack the same violations. This view is consistent with the Supreme Court[']s decisions on Title IX[']s coverage of employment discrimination, as well as the different constitutional bases for Title IX and Title VII.").

118. Llamas v. Butte Cmty. Coll. Dist., 238 F.3d 1123, 1126 (9th Cir. 2001); *Lipsett*, 864 F.2d at 899; Burch v. Regents of Univ. of Cal., 433 F. Supp. 2d 1110, 1126–27 (E.D. Cal. 2006).

119. *See Llamas*, 238 F.3d at 1126.

120. *Id.*

121. *See* Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143 (2000).

122. Mehus v. Emporia State Univ., 295 F. Supp. 2d 1258, 1272 (D. Kan. 2004) (citations omitted). In *Mansourian v. Regents of the University of California*, the Ninth Circuit stated:

> Universities' decisions with respect to athletics are even more "easily attributable to the funding recipient and . . . always—by definition—intentional." . . . Institutions, not individual actors, decide how to allocate resources between male and female athletic teams. Decisions to create or eliminate teams or to add or decrease roster slots for male or female athletes are official decisions, not practices by individual students or staff. Athletic programs that fail effectively to accommodate students of both sexes thus represent "official policy of the recipient entity" and so are not covered by *Gebser*'s notice requirement.

602 F.3d 957, 968 (9th Cir. 2010) (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998)) (school liable for monetary damages in private litigation under Title IX for teacher/student sex harassment if school had actual knowledge of misconduct and was deliberately indifferent).

F. Retaliation

Courts have found that Title IX retaliation claims should follow Title VII standards, although some courts suggest different analytical standards.[123] To establish a retaliation claim under either Title VII or Title IX, the plaintiffs must show: (1) they engaged in protected activity, (2) they suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action.[124] In *Ollier v. Sweetwater Union High School District*,[125] the Ninth Circuit stated: "The Supreme Court 'has often looked to its Title VII interpretations . . . in illuminating Title IX,' so we apply to Title IX retaliation claims 'the familiar framework used to decide retaliation claims under Title VII.'"[126] Thus, Title VII and Title IX retaliation claims apply similar analyses. Some courts have been more amenable to Title IX retaliation claims than Title IX discrimination claims and have more narrowly defined the elements of Title VII and Title IX retaliation claims.[127]

III. Preemption

Whether or not Title IX in fact preempts Title VII is a key and central issue for how such statutes do and do not operate in concert. While

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123. In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court held that "[t]he text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under § 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." 133 S. Ct. 2517, 2534 (2013). Yet, "*Nassar*, a Title VII case, went to some lengths to differentiate Title VII from Title IX with regard to prohibitions on retaliation." Varlesi v. Wayne State Univ., 643 F. App'x 507, 518 (6th Cir. 2016) (appellate court affirmed district court finding for plaintiff in which Title IX retaliation claim hinged on protected activity being a significant factor in defendant taking adverse action, as opposed to the "but for" cause); *see also* Miller v. Kutztown Univ., No. 13-3993, 2013 WL 6506321, at *3 (E.D. Pa. Dec. 11, 2013) (court rejected argument "that Title IX retaliation claims must be proven according to traditional principles of but-for causation").

124. Lowrey v. Texas A & M Univ. Sys., 11 F. Supp. 2d 895, 909–10, 912 (S.D. Tex. 1998).

125. 768 F.3d 843 (9th Cir. 2014).

126. *Id.* at 867.

127. *See, e.g.*, Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242, 252 (5th Cir. 1997) ("[T]itle IX affords an implied cause of action for retaliation under 34 C.F.R. § 100.7(e) and [] the employees of federally funded educational institutions are members of the class for whose special benefit this provision was enacted."); *Lowrey*, 11 F. Supp. 2d at 911 ("Because a Title IX retaliation claim only covers conduct protected by Title IX, a plaintiff may only recover under Title IX when the defendant retaliated against her 'solely as a consequence of complaints alleging noncompliance with the substantive provisions of Title IX.'"). Applying similar reasoning, a district court within the Third Circuit cited case law suggesting opposition to an alleged violation of Title IX is insufficient to establish a Title VII retaliation claim, finding the anti-retaliation provisions of Titles VII and IX non-identical and thus, ruling the plaintiff could not use the anti-retaliation aspect of Title VII as evidence of activity opposing Title IX inequities. Lamb-Bowman v. Delaware State Univ., 152 F. Supp. 2d 553 (D. Del. 2001).

there is a circuit split, as described further below, Title IX is a necessary, additional civil rights protection afforded to educational employees to counter sex-based discrimination, along with Title VII.[128] Several courts find Title IX should not be used to circumvent administrative processes imposed by Title VII.[129] Whereas several others find Title IX is a necessary additional civil rights safeguard with Title VII, rejecting preemption.[130] And several courts finding Title IX is preempted by Title VII nevertheless find that a Title IX retaliation claim may proceed alongside a Title VII discrimination claim.[131] Discussion above as to how such claims are similarly and distinctly addressed further elucidates as to why a plaintiff would seek to assert one or another claim or both. Notably, the courts finding Title IX is preempted by Title VII regularly overlook the Supreme Court's holding in *North Haven*, and related opinions, refusing to reject Title IX's employment-specific regulations and the acknowledged implied private right of action for employment-related discrimination in educational institutions.[132] These differences may be critical to plaintiffs framing their claims.

A. *Courts Holding Title VII and Title IX Do Not Preempt Each Other*

A district court in the First Circuit found plaintiffs may assert a gender discrimination or harassment claim under both Title VII and Title IX. In *Plaza-Torres v. Rey*,[133] a teacher alleged she was forced to resign because she was continually sexually harassed by a student.[134] The court, relying on *New Haven*, was not persuaded by the defendant's argument that the plaintiff's sexual harassment claim should have been filed under Title IX rather than Title VII.[135] The court held that either statute was available:

> Subsequent discussions of the [*North Haven* decision] suggest that an employee of an educational institution may bring a private cause of action for sex discrimination/sexual harassment under

128. Note that many key decisions discussed do not address these issues in the context of educational athletic programs. However, the variance in such fact patterns does not necessarily affect the substantive outcome, which renders these decisions instructive for potential coach claims. The discussion here offers only a sampling of recent decisions.

129. *See, e.g.*, Lakoski v. James, 66 F.3d 751, 758 (5th Cir. 1995).

130. The Supreme Court rejected arguments previously adopted by several courts of appeals that Title IX and Equal Protection Clause claims could not proceed together. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009); *see also* Waid v. Merrill Area Pub. Sch., 91 F.3d 857 (7th Cir. 1996).

131. Glickstein v. Neshaminy Sch. Dist., No. Civ. A. 96-6236, 1997 WL 660636, at *15–16 (E.D. Penn. Oct. 22, 1997) (Title VII preemption nuances discussed at length).

132. 456 U.S. 512, 538 (1982).

133. 376 F. Supp. 2d 171 (D.P.R. 2005).

134. *Id.* at 180.

135. *Id.*

> Title IX or Title VII. Thus, absent a decision to the contrary by the U.S. Supreme Court or the First Circuit Court, we refuse to hold that the availability of a cause of action for sex discrimination in employment under Title IX preempts a cause of action under Title VII. Instead, in keeping with the current case law, we hold that a plaintiff, employee of an educational institution, who has suffered sex discrimination in his/her employment may file a cause of action under Title VII or Title IX.[136]

A district court in the Fourth Circuit held that Title IX retaliation claims are not preempted by Title VII in *Jones-Davidson v. Prince George's County Community College*.[137] The court noted the Fourth Circuit "has not squarely addressed whether Title VII preempts employment discrimination claims brought under Title IX," but explained "there is some authority within this circuit suggesting that Title VII and Title IX employment discrimination claims can proceed simultaneously, particularly where the plaintiff seeks equitable relief . . . ."[138] The court "reject[ed] Defendant's argument that Plaintiff's Title IX [retaliation] claim should be dismissed because it is duplicative of the Title VII claim."[139] In *Preston v. Virginia ex rel. New River Community College*,[140] the Fourth Circuit considered a Title IX retaliation claim and found "[a]n implied private right of action exists for enforcement of Title IX . . . [which] extends to employment discrimination on the basis of gender by educational institutions receiving federal funds."[141]

In *Ivan v. Kent State University*,[142] the Sixth Circuit permitted the plaintiff to bring both Title IX and Title VII claims.[143] There, the court rejected the notion "that Title VII preempts an individual's private remedy under Title IX" so as to avoid Title VII's detailed, express, and comprehensive provisions.[144] Thus, simply because Title VII presents a well-developed remedial scheme does not militate toward Title VII's preemption of Title IX, even beyond retaliation claims.

A district court held in the Tenth Circuit that Title VII does not preempt Title IX in *Fox v. Pittsburg State University*.[145] The court noted that "[t]he Tenth Circuit has not addressed whether Title IX applies to allegations of sexual harassment perpetrated by one university

136. *Id.* (citations omitted). *See also* Lipsett v. Univ. of P.R., 864 F.2d 881, 897 (1st Cir. 1988) (plaintiffs may assert Title IX claim for gender discrimination).

137. No. 13-cv-02284-AW, 2013 WL 5964463 (D. Md. Nov. 7, 2013).

138. *Id.* at *2.

139. *Id.* (court reviewed plaintiff's Title IX and VII claims together, but ultimately found factual allegations fell short of prima facie retaliation claim).

140. 31 F.3d 203 (4th Cir. 1994).

141. *Id.* at 205–06 (citation omitted).

142. No. 94-4090, 1996 WL 422496 (6th Cir. July 26, 1996).

143. *Id.* at *2 n.10.

144. *Id.*

145. No. 14-CV-2606-JAR-KGG, 2016 WL 6037558, at *2 (D. Kan. Oct. 14, 2016).

employee on another university employee," but concluded that "the balance of authority in other circuits and jurisdictions recognize Title IX liability for employee-on-employee sex discrimination and harassment."[146] In *Russell v. Nebo School District*,[147] the federal district court in Utah similarly denied the defendant's motion to dismiss an elementary school employee's Title IX sex discrimination claims brought with a Title VII claim for sex discrimination, harassment, retaliation, among other causes of action.[148] The *Russell* court stated "federal courts are split on the issue" but "conclud[ed] that Title VII does not preempt Title IX and [thus] the Nebo Defendants' motion on this issue [was] denied."[149] Other district court decisions in the Tenth Circuit also suggest Title VII and Title IX discrimination claims may proceed simultaneously.[150]

B. Courts Holding Title VII Preempts Title IX

The Fifth Circuit held that Title VII preempts Title IX claims in *Lakoski v. James*.[151] Lakoski, a university professor, brought Title IX and Section 1983 claims for sex discrimination after being denied tenure.[152] Lakoski did not, however, bring Title VII claims, leading the court to reverse the district court's judgment for the plaintiff.[153] The Fifth Circuit held that Title IX cannot be used to "bypass [] the remedial process of Title VII" because "Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions."[154] The court explained: "We are persuaded that Congress intended Title VII to exclude a damage remedy under Title IX for individuals alleging employment discrimination."[155] The court added: "Title IX prohibits the same employment practices proscribed by Title VII . . . [and] individuals seeking money damages for employment discrimination on the basis of sex in federally funded educational institutions may not assert

146. *Id.*

147. No. 2:16-cv-00273-DS, 2016 WL 4287542 (D. Utah Aug. 15, 2016).

148. *Id.* at *3.

149. *Id*. (court relied on Winter v. Pa. State Univ., 172 F. Supp. 3d 756, 775 (M.D. Pa. 2016) ("[I]f Congress intended for Title VII to preempt employment discrimination claims under Title IX, it could have drafted Title IX, which was enacted *after* Title VII, to state as much.") (emphasis in original)).

150. *See, e.g.*, Mehus v. Emporia State Univ., 295 F. Supp. 2d 1258, 1272 (D. Kan. 2004) (volleyball coach's Title IX and Title VII discrimination claims permitted). In *Mehus*, as in other cases, the court relied on *Cannon*, *Franklin*, and *Bell* to support the plaintiff's implied right of action under Title IX regarding employment discrimination, sustainable with Title VII claims. *Id.*

151. 66 F.3d 751, 758 (5th Cir. 1995).

152. *Id.* at 752.

153. *Id.* at 758.

154. *Id.* at 753.

155. *Id.* at 755.

Title IX either directly or derivatively through § 1983."[156] *Lakoski* suggests that when a plaintiff coach brings within the Fifth Circuit a Title IX claim for sex discrimination against an educational institution, for money damages, the court may reject such a claim, contending Title VII is the only statutory vehicle to vindicate such rights through the courts, whereas Title IX is the manner by which to compel federal funds removal.[157] However, for Title IX retaliation claims, the Fifth Circuit recognized an implied private right of action in *Lowrey v. Texas A&M University System*.[158] There, the Fifth Circuit supported a private right of action on the basis that "[T]itle VII does not afford a private remedy for retaliation against employees of federally funded educational institutions who complain about noncompliance with the substantive provisions of [T]itle IX."[159] The court explained that a "private right of action for retaliation would serve the dual purposes of [T]itle IX, by creating an incentive for individuals to expose violations of [T]itle IX and by protecting such whistleblowers from retaliation."[160]

Within the Seventh Circuit, a district court in Illinois, in *Ludlow v. Northwestern University*,[161] held that "Ludlow's Title IX claim is one for employment discrimination and therefore preempted under Title VII . . . ."[162] Relying on *Lakoski*, the court dismissed the claim with prejudice.[163] But in *Burton v. Board of Regents of the University of Wisconsin System*,[164] a district court of Wisconsin noted that "*Ludlow* was not a retaliation case," holding "Title VII does not preempt [plaintiff's] Title IX retaliation claim."[165] Thus, certain Seventh Circuit district courts have followed the Fifth Circuit's *Lakoski-Lowrey* approach in permitting Title IX retaliation claims, but not discrimination claims that arguably can be brought under Title VII.[166]

An Eighth Circuit district court also agreed with the Fifth Circuit's holding that Title VII preempts Title IX. In *Capone v. University*

156. *Id.* at 758. The Fifth Circuit attempted to distinguish Supreme Court Title IX jurisprudence: "Unlike Dr. Lakoski's suit, neither *Cannon* nor *Bell* nor *Franklin* required the Court to address the relationship between Title VII and Title IX." *Id.* at 754. Note that *Lakoski* "limit[ed] [its] holding to individuals seeking money damages under Title IX directly or derivatively through § 1983 for employment practices for which Title VII provides a remedy, expressing no opinion whether Title VII excludes suits seeking only declaratory or injunctive relief," thus opening the door for non-monetary Title IX discrimination employee claims in the Fifth Circuit. *Id.* at 753.

157. *See id.* at 752.

158. 117 F.3d 242, 254 (5th Cir. 1997).

159. *Id.*

160. *Id.*

161. 125 F. Supp. 3d 783 (N.D. Ill. 2015).

162. *Id.* at 791.

163. *Id.*

164. 171 F. Supp. 3d 830 (W.D. Wis. 2016), *reconsideration denied*, No. 14-CV-274-JDP, 2016 WL 3512287 (W.D. Wis. June 22, 2016).

165. *Id.* at 840.

166. *See id.*

of Arkansas,[167] a district court in Arkansas held that "[i]n *Lakoski v. James*, the Fifth Circuit . . . was 'not persuaded that Congress offered Title IX to employees of federally funded educational institutions so as to provide a bypass to Title VII's administrative procedures.'"[168] Further, the court stated that it "agrees with the Fifth Circuit's reasoning in *Lakoski*, and rules that Ms. Capone may not assert a private right of action under Title IX for sex-based employment discrimination that falls within the ambit of Title VII."[169] Similarly, in *Cooper v. Gustavus Adolphus College*,[170] a Minnesota district court cited *Lakoski* in "join[ing] others in . . . concluding that there is no private action for damages available to a college employee under Title IX for sex discrimination" in light of "Title VII remedies for employment discrimination."[171]

Eleventh Circuit district courts have found Title VII preempts Title IX, such as in *Torres v. School District of Manatee County*,[172] where a district court of Alabama noted that "[n]either the Supreme Court nor the Eleventh Circuit have addressed the issue of whether Title VII preempts Title IX when school employees seek redress for discrimination and retaliation unrelated to their students."[173] Ultimately, *Torres* reasoned:

> If the Court were to hold otherwise, it would "eviscerate Title VII's technical and administrative requirements, thereby giving plaintiffs who work at federally funded institutions unfettered ability to bring what are in reality Title VII sexual discrimination claims without adhering to the same rules required of every other employment discrimination plaintiff in the country."[174]

Thus, several courts find Title VII, rather than Title IX, is the sole means for educational employees, such as coaches, to address discrimination, but some recognize certain exceptions for Title IX retaliation claims.

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167. No. 5:15-CV-5219, 2016 WL 3455385 (W.D. Ark. June 20, 2016).

168. *Id.* at *4 ("disagree[ing] with the *Preston* Court's characterization of *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), as extending the *Cannon* private right of action 'to employment discrimination on the basis of gender by educational institutions receiving federal funds'"). *Capone* noted "the Supreme Court has never directly addressed this issue, and only a few circuit courts of appeals have; the Eighth Circuit does not appear to be among them." *Id.* at *3.

169. *Id.* at *4.

170. 957 F. Supp. 191 (D. Minn. 1997).

171. *Id.* at 193.

172. No. 8:14-cv-1021-T-33TBM, 2014 WL 4185364 (M.D. Fla. Aug. 22, 2014).

173. *Id.* at *5.

174. *Id.* at *6. *See also* Morris v. Wallace Cmty. Coll.-Selma, 125 F. Supp. 2d 1315, 1343 (S.D. Ala. 2001) ("In light of the weight of authority that a Title IX claim of employment discrimination may not be maintained to the extent that Title VII provides a parallel remedy, and of the plaintiff's failure to provide any support for a contrary conclusion, the Court rules that the plaintiff's Title IX claim is precluded by Title VII.").

C. Courts Split or Undecided on Preemption

Second Circuit district courts vary on the preemption issue. For example, a court within the Southern District of New York held in *AB ex rel. CD v. Rhinebeck Central School District*,[175] "Title IX was intended by Congress to function as an additional safeguard against gender-based discrimination in the context of federally funded education programs; notwithstanding the possibility of other available remedies, including without limitation those available under Title VII."[176] Another judge in the Southern District of New York in *Henschke v. New York Hospital-Cornell Medical Center*[177] found that "the legislative history of Title IX demonstrates an intent on the part of Congress to have Title IX serve as an additional protection against gender-based discrimination in educational programs receiving federal funding regardless of the availability of a remedy under Title VII."[178] *Henschke* continued, "[t]here is no suggestion in either the Supreme Court opinion or the Second Circuit opinion in *North Haven* that the scope of Title IX's protection against employment discrimination would not extend to an action by an individual who is also seeking relief under Title VII."[179] The Western District of New York court held otherwise in *Gardner v. St. Bonaventure University*,[180] dismissing the plaintiff's Title IX discrimination claim because Title IX would have allowed an "additional remedy" to that under Title VII.[181] Second Circuit district courts have therefore diverged in approaching the preemption issue.

In the Third Circuit, a Western District of Pennsylvania court found in *Kazar v. Slippery Rock University of Pennsylvania*[182] that Title VII preempts Title IX:

> The [*Torres*] court explained, as the Fifth Circuit had done in *Lakoski*, that Congress did not intend for Title IX to be used to bypass the extensive remedial process of Title VII. This, as the court explained, would upset the carefully balanced remedial scheme set up by Title VII for dealing with employment discrimination cases and allow plaintiffs to ignore these requirements simply because they work at a federally funded educational institution.[183]

175. 224 F.R.D. 144, 153 (S.D.N.Y. 2004).
176. *Id.* at 153.
177. 821 F. Supp. 166 (S.D.N.Y. 1993).
178. *Id.* at 172.
179. *Id.*
180. 171 F. Supp. 2d 118 (W.D.N.Y. 2001).
181. *Id.* at 127 ("to permit Gardner to pursue both a Title VII claim and a Title IX claim with regard to the alleged employment discrimination would provide Gardner with an additional remedy not available to Title VII claimants whose employers are not educational institutions in receipt of federal funds").
182. No. CV 13-60, 2016 WL 1247233 (W.D. Pa. Mar. 30, 2016).
183. *Id.* at *13 (citation omitted).

However, an Eastern District of Pennsylvania court did not find preemption in *Winter v. Pennsylvania State University*.[184] In *Winter*, the court "conclude[d] that plaintiffs may pursue a private right of action seeking damages for employment discrimination claims against schools receiving federal funding and that Title VII would not preempt such a claim."[185] Third Circuit district courts are thus inconsistent on preemption.

Courts in neither the D.C. Circuit nor the Ninth Circuit have squarely addressed the preemption issue. One district court within the Ninth Circuit noted in *Padula v. Morris*,[186] "the preemption issue has not been decided by the Ninth Circuit, [and] there is a split among the other circuits regarding Title IX's preemptive effect on Title VII claims."[187]

Conclusion

Plaintiffs deciding whether to bring gender discrimination and/or retaliation claims under Title VII and Title IX should consider, among various factors, the manner in which one poses the complaint, the plaintiff's goals, exhaustion requirements, the statute of limitations, available remedies, analytical standards applied to claims, and potential preemption. Several courts allow coach-employees to address their discrimination and related retaliation claims under both Title VII and Title IX if administrative requirements are met. Before certain courts, coach-employees may be more likely to succeed on a Title IX employment-related retaliation claim as opposed to a Title IX employment discrimination claim, based on Title VII preemption arguments forwarded by such courts. Yet, Title IX's plain statutory language lacking a carve-out for employment, accompanied by explicit employment-related regulations, along with the implied right of action conferred by the Supreme Court, suggests that plaintiffs should be permitted to bring Title IX discrimination and/or retaliation claims in relation to on-the-job discrimination in the athletics context and beyond, along with or in lieu of Title VII.

In addition to preemption considerations, advantages and disadvantages of bringing Title IX and Title VII claims need to be considered. The clear availability of punitive damages under Title VII is

184. 172 F. Supp. 3d 756 (M.D. Pa. 2016).

185. *Id.* at 774 (rejects *Lakoski* analysis); *see also* Kemether v. Pa. Interscholastic Athletic Ass'n, 15 F. Supp. 2d 740 (E.D. Pa. 1998). In *Kemether*, the plaintiff alleged Title VII disparate treatment and Title IX discriminatory treatment with the court refraining from finding preemption. The court explained that the Title VII and Title IX claims could proceed simultaneously in part because "plaintiff went through the proper EEOC procedures, [and thus] there was no attempt on her part 'to circumvent the remedial process of Title VII.'" *Kemether*, 15 F. Supp. 2d at 768.

186. No. 2:05-cv-00411-MCE-EFB, 2008 WL 4370075 (E.D. Cal. Sept. 24, 2008).

187. *Id.* at *3 (citation omitted).

counterbalanced by the lack of statutory caps on damages in Title IX. Further, the lack of an administrative exhaustion requirement presents a clear-cut benefit to proceeding under Title IX instead of Title VII. Plaintiffs' counsel must explore both statutory routes and their interplay when deciding how to structure claims for employees alleging workplace discrimination in educational athletics and elsewhere in the campus context to ensure a level playing field for all.

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Editor's Note: Additions are indicated by Text and deletions by ~~Text~~.

Court of Appeal, Second District, Division 6, California.

John DOE, Plaintiff and Appellant,
v.
The REGENTS OF the UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents.

2d Civ. No. B283229
|
Filed 10/9/2018

Synopsis

Background: After university committee determined student violated code of conduct by sexually assaulting victim student, the Superior Court, Santa Barbara County, No. 16CV04867, Donna D. Geck, J., denied student's petition for writ of administrative mandate. Student appealed.

[Holding:] The Court of Appeal, Gilbert, P.J., held that university's hearing violated student's due process rights.

Reversed and remanded.

West Headnotes (13)

[1] **Mandamus** Scope and extent in general

The scope of the Court of Appeal's review from a judgment on a petition for writ of mandate is the same as that of the trial court.

1 Cases that cite this headnote

[2] **Administrative Law and Procedure**
Procedural fairness or impartiality in general

The Court of Appeal reviews the fairness of an administrative proceeding de novo.

[3] **Mandamus** Meetings and proceedings of boards or other bodies

Administrative mandamus statute's requirement of a "fair trial" means that there must have been a fair administrative hearing. Cal. Civ. Proc. Code § 1094.5(b).

[4] **Education** Students

A university's rule-making powers and its relationship with its students are subject to federal constitutional guarantees.

[5] **Education** Proceedings and review

In disciplining college students, the fundamental principles of fairness require, at a minimum, giving the accused students notice of the charges and an opportunity to be heard in their own defense.

2 Cases that cite this headnote

[6] **Education** Proceedings and review

Where student discipline is at issue, university must comply with its own policies and procedures; the formal rules of evidence do not

apply.

4 Cases that cite this headnote

[7] **Evidence** Rule of completeness in general

The purpose of the rule of completeness is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. Cal. Evid. Code § 356.

[8] **Constitutional Law** Disciplinary proceedings
Education Proceedings and review

University's hearing for student's alleged violation of student conduct code violated his due process rights, where university considered sexual assault response team (SART) report without giving student timely and complete access to report. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[9] **Constitutional Law** Disciplinary proceedings
Education Proceedings and review

University's hearing for student's alleged violation of student conduct code violated accused student's due process rights, where university provided untimely disclosure of medication alleged victim was taking and subsequently precluded student from offering evidence of medication's side effects without an expert. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[10] **Constitutional Law** Disciplinary proceedings
Education Proceedings and review

University's hearing for student's alleged violation of student conduct code violated accused student's due process rights, where student's counsel was not allowed to actively participate in hearing, but university's counsel was allowed to actively participate. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[11] **Constitutional Law** Disciplinary proceedings
Education Proceedings and review

University's hearing for student's alleged violation of student conduct code violated accused student's due process rights; university selectively applied formal rules of evidence to student's detriment by precluding student's mother from offering testimony about side effects of medication taken by accuser, but allowed officer to offer expert medical opinion on causation though she was not a medical expert. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[12] **Constitutional Law** Disciplinary proceedings
Education Proceedings and review

University's hearing for student's alleged violation of student conduct code violated accused student's due process rights, where university allowed accuser to decline to respond to student's questions about accuser's medication's side effects. U.S. Const. Amend. 14.

3 Cases that cite this headnote

[13] **Constitutional Law** Disciplinary proceedings
Education Proceedings and review

University's hearing for student's alleged violation of student conduct code violated accused student's due process rights; university reached finding based on speculation by noting student suffered from hereditary neurological disorder that caused tremors, but concluded the condition did not necessarily make the assault impossible, and it may have even exacerbated the physical sensations accuser described. U.S. Const. Amend. 14.

Witkin Library Reference: 7 Witkin, Summary of Cal. Law (11th ed. 2017) Constitutional Law, § 758 [Disciplinary Action Against Students; In General.]

****844** Superior Court County of Santa Barbara, Donna D. Geck, Judge (Santa Barbara County) (Super. Ct. No. 16CV04867)

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Nye, Peabody, Stirling, Hale & Miller, LLP, Jonathan D. Miller, Alison M. Bernal, Santa Barbara, for Defendants and Respondents The Regents of the University of California, Margaret Klawunn, and Henry T. Yang.

Opinion

GILBERT, P. J.

***46** Due process - two preeminent words that are the lifeblood of our Constitution. Not a precise term, but most everyone knows when it is present and when it is not. It is often most conspicuous by its absence. Its primary characteristic is fairness. It is self-evident that a trial, an adjudication, or a hearing that may adversely affect a person's life must be conducted with fairness to all parties.

Here, a university held a hearing to determine whether a student violated its student code of conduct. Noticeably absent was even a semblance of due process. When the accused does not receive a fair hearing, neither does the accuser.

John Doe (John) was suspended from the University of California, Santa Barbara (UCSB) for eight quarters (two years) because he was found guilty of sexual misconduct in violation of UCSB's student conduct code (Student Conduct Code). He appeals the superior court's decision denying his petition for a writ of administrative mandate to compel UCSB to rescind his suspension. (Code Civ. Proc., § 1094.5, subd. (g).)

****845** John was denied access to critical evidence; denied the opportunity to adequately cross-examine witnesses; and denied the opportunity to present evidence in his defense. UCSB denied John a fair hearing. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

John Doe and Jane Roe (Jane) were undergraduate students at UCSB. On the night of June 26, 2015, Jane attended a birthday party for John's girlfriend (eyewitness one) that was held in the apartment John shared with eyewitness one and another roommate (eyewitness two). Jane was intoxicated and decided to lie down under the covers on a mattress against the living room wall.

John returned home also intoxicated and wanted to lie down. Eyewitness one told him to lie down on the mattress for a nap because they were going to the beach later. He lay down fully clothed on top of the covers facing the wall with his back to Jane. Eyewitnesses one and two were talking, sitting on the couch, approximately two-and-a-half feet away.

Jane alleged that while she was asleep on the mattress, John sexually assaulted her. She alleged he aggressively fondled and sucked her breasts while she was in an incapacitated state and unable to consent; removed the ***47** bottom half of her clothing; and penetrated her vagina and anus with his fingers and/or penis without her consent.

On June 28, 2015, two days after the alleged assault, Jane was medically examined by the Santa Barbara County Sexual Assault Response Team (SART). She reported the sexual assault to campus police, but declined to divulge the identity of the suspect or location of the sexual battery. On June 30, 2015, Jane's complaint was sent to UCSB's title IX office. The office attempted to contact Jane for further information, but she did not respond and the file was closed.

One month later, on July 31, Jane informed campus police that she wished to proceed with her complaint. On August

3, 2015, the title IX office initiated an investigation.

On September 16, 2015, the office of judicial affairs (OJA) notified John that he was being placed on interim suspension pending an investigation into the incident, and was not allowed on campus or permitted to live in UCSB housing.

John contested the interim suspension and denied that he assaulted or had sexual contact with Jane. He attended an informal hearing with Suzanne Perkin, the assistant dean of students, on September 29, 2015. At that time, he submitted a statement to the OJA, as well as eyewitness statements and photographs to support his claim that he had not committed any of the alleged acts. On October 1, 2015, Perkin e-mailed campus police detective Dawn Arviso to "reconfirm that there is physical evidence of an assault in this case." The detective replied by e-mail that "[t]he SART report states 'bruising and laceration noted in anal area.' " The detective, however, did not provide the SART report to Perkin. The detective's e-mail about the SART report was not disclosed to John or his counsel until several months later. Therefore, John could not respond to the SART report while attempting to contest his interim suspension. On October 5, 2015, the vice chancellor consulted with Perkin and then upheld John's interim suspension with modifications.

According to UCSB, the Santa Barbara County Sheriff's office requested that the title IX office place its investigation on hold from November 4, 2015, to December 15, 2015.[1] It was not until May **846 17, 2016, nearly a year after the alleged assault, that the title IX office concluded its investigation and issued a report finding Jane's claims were substantiated. The investigation took 173 *48 working days (nearly 10 months) from the date the investigation was initiated (August 3, 2015) to the date the report was issued (May 17, 2016), excluding the time the investigation was placed on hold.

UCSB's written policies require prompt investigation of complaints for sexual harassment and sexual violence. (Univ. of Cal. Policy - Sexual Harassment and Sexual Violence (2014) § (V)(B)(4)(g) ["The investigation shall be completed as promptly as possible and in most cases *within 60 working days* of the date the request for formal investigation was filed. This deadline may be extended on approval by a designated University official" (italics added)].) The record does not reveal the reason for the delay here.

UCSB charged John with violating sections 102.08 and 102.09 of UCSB's Student Conduct Code. Section 102.08 prohibits "[p]hysical abuse, sexual assault, threats of violence, or other conduct that threatens the health or safety of any persons." Section 102.09 prohibits conduct amounting to sexual harassment. Violations of the Student Conduct Code that warrant a suspension or dismissal from UCSB are heard by the sexual/interpersonal violence conduct committee (Committee).

On June 29, 2016, one year after the alleged conduct, John was notified that a hearing before the Committee was scheduled for July 12, 2016, to determine if he had violated the Student Conduct Code. John was notified that he had until July 11, 12 days later, within which to submit any information he wanted the Committee to review, along with the name and contact information of any witnesses. His witness list and information would be combined with the initial incident report, the title IX officer's investigation notes and report, and UCSB's internal correspondence and notifications to the parties to create the "hearing packet." John was advised that if he wished to review the hearing packet in advance of the hearing, he could make an appointment to review it with the director of judicial affairs in her office prior to the hearing, or he could review it at the hearing.

On July 6, 2016, John submitted his list of exhibits, evidence, and witnesses for the hearing. Jane submitted no witness information or evidence at that time.

On the afternoon of July 11, 2016, the day before the scheduled hearing, the Committee chair continued the hearing to August 16, 2016, "to ensure all requested information is gathered, made available for review in a timely manner to all parties prior to a hearing, and available for review by the [Committee] during the hearing." John objected to the continuance, explaining that he and his witnesses had already made travel arrangements. He stated that rescheduling created a hardship and prejudiced his defense; his key *49 witness (eyewitness one) would be studying abroad after July 26th and would be unable to attend the hearing. The OJA overruled his objection, explaining the Committee had "the right to postpone the hearing for a reasonable period of time to allow consultation with University General Counsel."

Prior to the August 16th hearing, Jane submitted her list of witnesses and two documents -- the cover page of her SART report and a second SART document that listed her current medications. John submitted a list of witnesses, detailed declarations from his roommates (eyewitnesses one and two), photographs of the living **847 room, and the report of a polygraph examiner.

On August 16, 2016, a two-member Committee conducted a hearing to determine if John had sexually assaulted Jane

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in violation of the Student Conduct Code.

Testimony at the Administrative Hearing

Our review of the evidence is hindered by the state of the administrative record. The Student Conduct Code requires the OJA or UCSB's general counsel to audio record the proceeding and keep summary minutes of the hearing. (UCSB Student Conduct Code, § D, subd. 1.(d)(2)(c)(iv).) Nothing in the administrative record indicates an audio recording of the proceeding was made, and there is no transcript of the hearing. The minutes of the hearing included in the administrative record set forth the testimony, but are replete with redactions and ellipses. This court, therefore, is unable to determine whether portions of the testimony were omitted from the minutes.

Jane explained that she was good friends with John and eyewitness one and had spent the night at their apartment many times. She testified that on the night of the incident, she drank wine and mango margaritas, played beer pong, and "hung out" in the living room with the eyewitnesses and others attending the party. At some point, she felt "pretty drunk" and decided to lie down on the mattress of the bottom bunk bed situated against the wall in the living room. The bottom bunk had a full size mattress and was barely three feet from the couch. Eyewitness one lent Jane pajamas and she lay on her side under the covers facing the back of the couch. The room was well lit and quiet. Several lamps were on and no music was playing.

Jane testified that, as she was sleeping in the bunk bed, "an intense, throbbing pain jerked [her] out of [her] sleep." She felt her "shirt scrunched up to her neck" and could tell her "stomach and breasts were exposed." She was "completely disoriented and unsure where [she] was or who was touching [her]." She said she "feared for [her] life, not knowing when this person would stop." She stated she "started to panic ... yet [she] was frozen, ***50** paralyzed." She "pretended to be asleep [so] this person would eventually leave [her] alone." Jane testified that she could hear two people sitting on the couch next to her. She opened her eyes and realized she was in the living room. She said the two people on the couch were immersed in deep conversation. Jane said, "I resumed to act as though I was asleep. The sucking and biting went on for several minutes. ... [H]e unhooked my bra; I realized this wasn't going to end." She heard the click of a cell phone camera and believed her assailant was taking photos of her naked breasts.

Jane testified that her assailant pulled her shirt down to cover her breasts and then pulled the blanket over to cover her. She wondered if she should yell out for attention in the hope that someone would hear her. She rolled over onto her back and the assailant briefly stopped. She then felt "fingers penetrating [her] vagina and anus." Eventually, the person assaulting her got up and she realized it was John. She said she was in a complete state of shock and disbelief that a good friend was assaulting her.

Jane said that John returned to the bed and the assault continued. Jane did not want a confrontation and did not want anyone to know. She felt pain in her anus again, "worse pain that [she] felt in [her] life." She started to mumble, hoping it would appear she was talking in her sleep. Eyewitness one came over to check on her. Jane stated she told eyewitness one "in ****848** French that [she] did not feel good and wanted to go home." Eyewitness one got Jane water and then returned to the couch. Jane stated her "attempt at being rescued and going home [was] futile," the "fear was debilitating," she knew John was still there, and she started hyperventilating. She "started making noises again ... but did not yell," and John stopped.

Eyewitness one came back and Jane told her, "[W]hoever's behind me is hurting me badly," this time in English. Jane said her "butt and nipples hurt." Jane testified eyewitness one tried to reassure her, telling her she "must be having a bad dream" and that her pants were still on. Jane claimed that eyewitness one pulled back the blanket, and when she saw that Jane's bottom half was bare (pajamas and underwear completely off), she screamed for everyone to get out of the apartment and started to cry. The eyewitnesses then walked Jane home, and Jane told them what happened.

John testified and denied all of Jane's accusations. He said he returned to the apartment around midnight to 12:30 a.m., after playing beer pong at another location. He was very intoxicated and was nodding off while sitting on the floor next to the eyewitnesses. Eyewitness one told him to lie down for a nap on the bottom bunk with Jane, since the top bunk was covered with luggage and other items. John lay down fully clothed on top of the covers facing the wall, with his back to Jane. John testified that "[t]he first [he] heard ***51** of [Jane's] allegations was when she woke [him] up by basically yelling about someone hurting her." He was awakened from a deep sleep, thought she was having a nightmare, got up, and left eyewitness one "to figure out what was wrong."

John testified he has a genetic neurological disorder, a "form of palsy," which affects his motor skills, especially when tired or drunk. John's mother testified about his nervous system disorder, describing it as a movement

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disorder with tremors. They claimed his condition would render it difficult for him to unzip his pants while intoxicated, much less perform the acts alleged by Jane. John stated he could not take off a bra "quickly, smoothly, or quietly."

Eyewitness one testified by Skype and provided a declaration. She started dating John their freshman year in 2011. She was sitting on the couch, with her arm along the back of it, and the bed was often in her peripheral vision. Jane was under the covers, John was on top of the covers, and the two were lying back to back. She saw Jane wake up in the bed confused, disoriented, and mumbling in foreign languages that eyewitness one did not speak. She thought Jane was having a bad dream, and John was still asleep facing the wall. She said he usually "sleeps like a rock." She denied screaming or crying out when Jane woke up. She said she did not see or hear any sexual assault and maintained it was physically impossible for any of Jane's allegations to be true.

Eyewitness one stated that due to John's condition, his movements are not smooth or fluid. "[I]t would have been impossible for him to make any kind of movements toward [Jane], who was under [the] covers, without being noticed by me and my other roommate, and [he] certainly could not unhook a bra ...." When she and eyewitness two returned to the apartment after walking Jane home, they examined the mattress, sheets, and cover "for any visible signs or smells of bodily fluids" consistent with anal or vaginal penetration, but found none. Eyewitness one said Jane was her best friend at the time. She reiterated that if John had done anything, "I would have been on [Jane's] side."

In response to questions from the Committee, eyewitness one stated that when Jane got up from the bed, she was wearing a short sleeve shirt and underwear, but not ****849** the pajama bottoms. Eyewitness one said that frequently when Jane slept over, she would remove her pajama bottoms if she was hot.

Eyewitness two provided a declaration in which he corroborated eyewitness one's testimony and maintained that what Jane described was "not physically possible." John produced the sofa and mattress at the hearing to demonstrate the proximity of the eyewitnesses.

***52** Dr. Louis Rovner, a polygraph examiner, testified by telephone. John's counsel retained him to administer a polygraph examination of John. Rovner holds a B.A., an M.A., and a PhD. in biopsychology. He is a member of the panel of experts of the Los Angeles County Superior Court, Criminal Division. He has published numerous articles about polygraph-related issues for scientific and professional journals.

Rovner opined that John's complete denial of the allegations against him was truthful. Rovner testified that given John's score on the exam, he was "absolutely certain" John was telling the truth when John responded to his questions about the night in question. The Committee asked if it would affect the test result if the person was intoxicated during the events he or she was questioned about. Rovner responded that any opinion from him on that question "would be pointless speculation."

The SART Report Evidence

Prior to the August 16th hearing, Jane submitted to the Committee two pages from the SART report. The first page is the cover page, containing only Jane's name. The second page identifies the name of the medical professional who performed the SART exam (Cynthia Hecox), and notes that Jane was taking Viibryd, a prescription antidepressant.[2] In the recommendation section on the second page, it states that Jane "was advised to take [a] warm bath in Epsom salt and relax anal muscles to help sooth discomfort." These two pages were included in the hearing packet. The record does not include details regarding how or when the hearing packet for the August 16th hearing was given to John. John states he received it the night before the hearing.

At the hearing, the Committee questioned Detective Arviso about the e-mail she sent to Assistant Dean Perkin on October 1, 2015. The e-mail reads: "[T]he SART report states 'there was bruising/laceration noted in the anal area.' " But the two pages of the SART report submitted by Jane do not contain this information. The Committee relied on the detective's recollection that this statement was in fact in the SART report. The Committee asked the detective if there were any other details from the report that could be shared. The detective testified, "I'm not able to disclose anything in great detail ... case is open criminally; limits what I am able to share." The Committee then asked the detective whether this reference to "bruising/laceration" was unusual in a SART report. She testified that "it is not uncommon when there is an assault that this verbiage would be seen in a SART report," and stated the findings of the SART exam were consistent with the allegations in this case.

***53** When questioned by John about how the "anal area" was defined in the SART report (i.e., was the bruising and laceration inside or outside), the detective stated: "That's exactly how it was written; my understanding looking at this particular sentence in exam ... within the butt ****850**

cheeks; I don't know what damage was done internally." The Committee then inquired: "Why was the sentence that you sent to Ms. Perkin from the [SART] exam the only portion that was shared or could be shared?" The detective responded that the information in the SART report was confidential because it was an ongoing investigation.

The detective testified that other than this "small snippet" that she selected from the report, it would not be "appropriate to disclose what additional findings came through [the] SART exam." When John asked if the findings in the SART report could have been caused by anything other than what Jane alleged, the detective said: "Well that's a rough question for me to answer; I would say the findings in [the SART report] certainly could have occurred based on [the] allegations in [the] criminal case; I don't know what else could have caused it. ... It's out of my realm, my scope to answer the questions." The complete SART report was not produced at the hearing or disclosed to John or his counsel.

The Viibryd Evidence

John was aware that Jane was taking an antidepressant prior to the hearing, but states he did not learn the name of the medication until the night before the August 16th hearing, when he received the hearing packet.

At the hearing, John asked Jane about the possible side effects of Viibryd, and its side effects when combined with alcohol. Jane refused to answer the question, stating, "It's my private medical information." John, attempting to explain his line of questioning, stated that Viibryd "has many side-effects" that "become severe when alcohol is consumed ... such as hallucinations and sleep paralysis and night terrors."

John's mother attempted to testify about the side effects of Viibryd. She called the manufacturer of Viibryd that morning and wanted to testify about what she had learned from the manufacturer. The Committee chair stated he could not accept this information in this format. When John persisted in asking his mother about Viibryd and the effects of sleep paralysis, the chair stated UCSB's general counsel advised him not to accept the testimony. John again asked his mother about the side effects of Viibryd, and general counsel interjected, stating: "You're trying to circumnavigate the procedures here. You do not have the expertise to lay the foundation for this type of evidence. We appreciate you feel you wish you had more time on the SART exam but ***54** you [had] the opportunity to look at it prior to the hearing, but you can't backdoor this. If you have other relevant questions as to your mother having experience with your [central nervous system] diagnosis, that would be appropriate." John was not allowed to introduce any evidence about Viibryd.

The Committee's Findings

The Committee found by a preponderance of the evidence that John violated the Student Conduct Code. The Committee noted that both John and Jane "agreed that the room was well lit during the incident, and there was little ambient noise in the apartment ...." The Committee found that "it would have been possible for an assault as described to occur without the attention of witnesses who were facing each other and conversing." The Committee concluded that "[t]he results of the physical SART exam corroborate the report of vaginal and/or anal penetration with fingers and/or a penis." Relying in part on the SART report, the Committee rejected John's theory that Jane's use of alcohol while taking Viibryd caused Jane to hallucinate the incident. The Committee ****851** found the SART report supported the claim that a physical assault was committed, and, therefore, the use of Viibryd was unlikely to have caused Jane to fabricate the report. The Committee found Jane's "testimony and evidence provided throughout the investigation and hearing" more consistent than John's.

The Committee believed John suffered from a hereditary neurological disorder that causes tremors, but it concluded that "the condition would not necessarily make the assault as described impossible, and it may have even exacerbated the physical sensations [Jane] described and physical evidence described in relation to the incident." The Committee rejected the polygraph evidence because John was drunk at the time of the incident and "there is no scientific evidence regarding the validity of polygraph examinations in this scenario."

The Committee recommended John be suspended for two years (eight quarters), starting fall 2016. On September 2, 2016, the vice chancellor of student affairs notified John that she agreed with the Committee's recommended sanction. John sought review of the vice chancellor's decision. The chancellor affirmed the sanction, but adjusted the suspension to include the time John had already served on interim suspension. Therefore, his eight-quarter suspension was effective fall 2015 through summer 2017.

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The Superior Court Proceedings

John filed a petition for a writ of administrative mandate in the superior court to challenge UCSB's decision. (Code Civ. Proc., § 1094.5.) John ***55** contended he was deprived of due process during the administrative hearing because, among other reasons, the Committee chose to apply the rules of evidence on an ad hoc basis and to withhold critical and exculpatory evidence. He argued he had not been able to see the SART report, about which the detective testified, and was not allowed to present evidence about the side effects of Viibryd.

At the hearing in the superior court on April 13, 2017, John's counsel informed the court that the Santa Barbara County District Attorney's Office had decided not to pursue any charges against John. John's counsel argued that a short continuance would allow John to get a copy of the SART report for the court's consideration. The superior court declined to continue the hearing or take further evidence outside the administrative record. A complete copy of the SART report is not included in the record on appeal.

The superior court denied the petition for a writ of mandate, noting that "[t]he better practice may have been to find a way to let [John] see the SART report or exclude any reference to a small portion of the findings in the report given out of context." Nevertheless, the court concluded the admission of a small portion of the SART report and the detective's testimony were not prejudicial because the SART exam was not the sole supporting evidence for the Committee's conclusions. The court also concluded John had not demonstrated he was prejudiced by the timing of the Committee's disclosure, the day before the hearing, of Jane's use of Viibryd or its exclusion of his mother's testimony.

DISCUSSION

John argues UCSB deprived him of his due process right to a fair hearing because it withheld critical evidence, improperly excluded relevant evidence, and selectively applied the formal rules of evidence. He also argues UCSB abused its discretion by reaching findings that were not supported by substantial evidence in light of the whole record.

****852** *Standard of Review*

[1]"The scope of our review from a judgment on a petition for writ of mandate is the same as that of the trial court." (*Department of Corrections & Rehabilitation v. State Personnel Bd.* (2015) 238 Cal.App.4th 710, 716, 189 Cal.Rptr.3d 619.) Our review appears to be an amalgamation of the three standards of review that govern appellate practice. We determine "whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc., § 1094.5, subd. (b).) "Abuse of discretion is ***56** established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Ibid.*) We review UCSB's findings for "substantial evidence in the light of the whole record." (*Id.*, subd. (c).)

[2] [3] [4] [5] [6]We review the fairness of the administrative proceeding de novo. (*Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1073, 210 Cal.Rptr.3d 479.) " 'The statute's requirement of a " 'fair trial' " means that there must have been "a fair administrative hearing." ' " (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 239, 200 Cal.Rptr.3d 851, quoting *Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 96, 167 Cal.Rptr.3d 148.) "[T]he University's rule-making powers and its relationship with its students are subject to federal constitutional guarantees." (*Goldberg v. Regents of University of California* (1967) 248 Cal.App.2d 867, 875, 57 Cal.Rptr. 463.) In disciplining college students, the fundamental principles of fairness require, at a minimum, "giving the accused students notice of the charges and an opportunity to be heard in their own defense." (*Id.* at p. 881, 57 Cal.Rptr. 463; *Goss v. Lopez* (1975) 419 U.S. 565, 581, 95 S.Ct. 729, 738, 42 L.Ed.2d 725, 738.) "Where student discipline is at issue, the university must comply with its own policies and procedures." (*Doe*, at p. 1073, 210 Cal.Rptr.3d 479.) "[T]he formal rules of evidence do not apply ...." (*Id.* at p. 1095, 210 Cal.Rptr.3d 479.)

UCSB Rules

UCSB's Student Conduct Code provides: "Students who are subject to University discipline shall be afforded procedural due process, which is a basic principle underpinning the proper enforcement of University policies and campus regulations. The primary purpose of any University disciplinary proceeding is to determine the guilt or innocence of the accused student. Deviations from established procedures shall not invalidate a finding of a

hearing body unless the deviation significantly affected the result. It is recognized that University faculty, staff, and students are principally engaged in the business and the pursuit of education, and are not legally trained personnel. As such they should be guided more by principles of fairness and common sense than by formal rules of evidence or procedure." (UCSB Student Conduct Code, § B.)

The Student Conduct Code requires UCSB and its designated officials to "[m]onitor the process to ensure the maintenance of procedural due process." (UCSB Student Conduct Code, § D, subd. 1.(d)(2)(c)(iii).) "Proceedings will provide a prompt, fair, and impartial investigation and resolution." (OJA Sexual/Interpersonal Violence Response Procedures for Sexual Assault Dating or Domestic Violence, and Stalking (rev. Feb. 25, 2014) Proc. & Process When Reporting to Univ.)

***57** In disciplinary hearings, the Committee "[s]hall receive verbal and documentary evidence of the kind on which reasonable persons are accustomed to rely in serious ****853** matters and may exclude irrelevant or unduly repetitious evidence." (UCSB Student Conduct Code, § D, subd. 1.(d)(2)(d)(iv).) An accused student "[s]hall have the right to confront and question all witnesses." (*Id.*, subd. 1.(d)(2)(a)(v).)

"The accused has the right to due process as outlined in the *Campus Regulations*. Among these rights are: [¶] (i) The right to written notice of the charges, [¶] (ii) To be accompanied at the hearing by an advisor of his/her choice, [¶] (iii) To be present for the duration of the hearing, [¶] (iv) To produce witnesses and evidence pertaining to the case, [¶] (v) To question all witnesses, [¶] [and] vi To simultaneously with the accuser, be informed in writing of the outcome of any institutional disciplinary proceeding, the institution's procedures for appealing the results of the proceeding, any change to the results that occur prior to the time that such results become final, and when such results become final." (OJA Sexual/Interpersonal Violence Response Procedures for Sexual Assault, Dating or Domestic Violence, and Stalking, *supra*, Proc. & Process When Reporting to Univ., Rights of the Accused.)

Lack of a Fair Hearing

Limited Access to the SART Report

John contends he was deprived of a fair hearing when the Committee allowed the detective to testify about a single phrase from the SART report without requiring production of the entire report to the Committee and to him. Without access to the complete SART report, John did not have a fair opportunity to cross-examine the detective and challenge the medical finding in the report. The accused must be permitted to see the evidence against him. Need we say more?

The Committee need not strictly adhere to the "formal rules of evidence or procedure," but these rules serve as a guide for the Committee to arrive at a decision based on "principles of fairness and common sense." (UCSB Student Conduct Code, § B.) We refer to these rules to illustrate where fairness is lacking.

For example, the best evidence rule (now the secondary evidence rule in California) precludes oral testimony to prove the content of a writing. (Evid. Code, § 1523.) "The principal rationale advanced for the best evidence rule is to insure that the trier of fact is presented with the exact words of a writing." (Note, ***58** *The Best Evidence Rule: A Critical Appraisal of the Law in California*(1976) 9 U.C. Davis L.Rev. 257, 258.) "[T]he chance of error is substantial when a witness purports to recall from memory the terms of a writing. [¶] The rule is also thought to help prevent fraud." (*Id.* at p. 259.) "The final rationale offered for the rule is that inspection of an original document could reveal valuable information not disclosed ...." (*Ibid.*) This is because it is unfair to have a witness testify about the contents of a writing without producing the actual writing for examination.

Here, the only substantive portion of the SART report considered by the Committee, and provided to John prior to the hearing, was the phrase quoted in the detective's e-mail of October 1, 2015. Without the complete SART report, the trier of fact was left to rely on the detective's recollection and veracity. To argue that it is fair to allow the detective to testify about the contents of the SART report, but preclude the accused and the trier of fact from seeing the report, strains credulity. (See *Goss v. Lopez, supra*, 419 U.S. at p. 582, 95 S.Ct. at p. 740, 42 L.Ed.2d at p. 739 [student must be told "the basis of the accusation"].)

[7]In addition, the rule of completeness, Evidence Code section 356, would have allowed John to inquire into the whole of the SART report, once a portion ****854** of the report was quoted during the detective's testimony. "The purpose of Evidence Code section 356 is 'to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.' " (*People v. Clark* (2016) 63 Cal.4th 522, 600, 203 Cal.Rptr.3d 407, 372 P.3d 811.) It was unfair

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to allow the detective to select and describe only a portion of the SART report, without producing the complete report. John's lack of access to the entire report prevented effective cross-examination and hampered his ability to present a defense.

[8]Here, the detective testified that the single phrase in the SART report was consistent with Jane's allegations. But when questioned by John about other potential causes of the SART finding, the detective said it was outside the scope of her expertise. The detective's inability to answer whether the finding in the SART report could be caused by anything other than Jane's allegations underscores the unfairness of allowing the detective to testify about the report when she had not authored the report or conducted the medical examination, and was unqualified to give an expert opinion on causation. Allowing the detective to select and describe a portion of the report denied John the opportunity to effectively challenge the evidence used to determine his guilt. (Cf. *Doe v. Regents of University of California*, *supra*, 5 Cal.App.5th at p. 1098, 210 Cal.Rptr.3d 479 [unlike this case, failure to disclose interview notes not before the hearing panel did not prevent the student "from having a meaningful opportunity to present his defense"].)

***59** The Committee relied on the SART evidence to find that John sexually assaulted Jane and violated the Student Conduct Code. It concluded that this evidence corroborated Jane's "report of vaginal and/or anal penetration with fingers and/or a penis." The Committee also found that John's "theory that [Jane's] antidepressant combined with alcohol precipitated the incident is unlikely, especially when combined with the findings of the physical SART exam ...." The SART report was critical evidence, but the Committee did not have the report. At a minimum, UCSB should have required the detective to provide a complete copy of the SART report.

The Committee should not have considered the SART evidence without giving John timely and complete access to the report. (See *Doe v. University of Southern California*, *supra*, 246 Cal.App.4th at p. 247, 200 Cal.Rptr.3d 851 ["common law requirements for a fair hearing under Code of Civil Procedure section 1094.5 do not allow an administrative board to rely on evidence that has never been revealed to the accused"].) Without this evidence, the Committee could have concluded there was not a preponderance of evidence that John violated the Student Conduct Code. The error was prejudicial and requires reversal.

Other Cumulative Errors

In the event of a future administrative hearing in this case, we discuss additional cumulative errors that occurred at the hearing.

[9]John contends that UCSB's untimely disclosure of the Viibryd evidence deprived him of the opportunity to obtain an expert to testify about the side effects of Viibryd, and the opportunity to effectively cross-examine Jane. He also argues UCSB inconsistently applied its policies and procedures and selectively applied formal evidentiary rules, to his detriment. We agree. While UCSB's rules provide "no formal right to discovery," the Committee's rulings during the hearing placed John in a catch-22; he learned the name of the medication Jane was taking too late to ****855** allow him to obtain an expert opinion, but the Committee precluded John from offering evidence of the side effects of Viibryd without an expert. (*Doe v. Regents of University of California*, *supra*, 5 Cal.App.5th at p. 1095, 210 Cal.Rptr.3d 479.)

The Committee recognized the relevance of the Viibryd issue, but it rejected John's claim about insufficient notice by stating John "*already* had knowledge" about Jane's use of antidepressant medications; he just did not know what exact medication she was taking until the night before the hearing. No reputable expert could have offered an opinion without knowing the exact medication Jane was taking. Because no formal right to discovery exists in UCSB's student conduct hearings, and the formal rules of evidence ***60** do not apply, John should have been allowed to introduce evidence of the side effects of Viibryd through his mother's testimony or some other informal method.

[10]Moreover, John's counsel was not allowed to actively participate in the hearing. "Students are to represent themselves. The role of the attorney or advisor is therefore limited to assistance and support of the student in making his/her own case." (UCSB Student Conduct Code, § D, subd. 1.(d)(2)(a)(ii); *Doe v. Regents of University of California*, *supra*, 5 Cal.App.5th at pp. 1082-1084, 210 Cal.Rptr.3d 479 [student not deprived of fair hearing where counsel not allowed to actively participate].) The Committee, however, permitted UCSB's general counsel to actively participate and to make formal evidentiary objections. This unfairness is magnified when UCSB's general counsel is allowed to make formal evidentiary objections, which UCSB's policies and procedures do not permit. A student, whose counsel cannot actively participate, is set up for failure because he or she lacks the legal training and experience to respond effectively to formal evidentiary objections.

[11]The Committee also selectively applied the formal rules

of evidence to John's detriment. The Committee precluded John's mother from offering testimony about the side effects of Viibryd based on a lack of foundation. But it allowed the detective to offer an expert medical opinion on causation, even though she was not a medical expert and had not authored the SART report.

[12]Finally, the Committee inexplicably allowed Jane to decline to respond to John's questions about the side effects of Viibryd on the ground that it was her "private medical information." This deprived John of his right to cross-examine Jane and impeded his ability to present relevant evidence in support of his defense. (See, e.g., *Doe v. Claremont McKenna College* (2018) 25 Cal.App.5th 1055, 1070, 236 Cal.Rptr.3d 655 [when a disciplinary determination turns on the complaining witness's credibility, the accused student is entitled to a process by which the complainant answers his questions]; *Doe v. Regents of University of California*, *supra*, 5 Cal.App.5th at p. 1084, 210 Cal.Rptr.3d 479.) Here, John could not present evidence of the side effects of Viibryd through his mother's testimony and Jane was not required to answer his questions.

The Committee's refusal to hear John's evidence of the side effects of Viibryd was prejudicial. Jane's behavior, as described by eyewitness one, was consistent with John's theory that Jane was experiencing the side effects of consuming alcohol while taking Viibryd.

Without hearing all of John's evidence, the Committee rejected John's defense, concluding that Jane's allegations were corroborated by the physical ***61** finding in the SART report. Thus, the error in excluding John's evidence of the side effects of Viibryd was compounded by admitting only a portion of the SART report.

****856** [13]The Committee reached a significant finding based on nothing more than speculation. While it believed John suffered from a hereditary neurological disorder that causes tremors, it concluded "the condition would not necessarily make the assault as described impossible, and it may have even exacerbated the physical sensations [Jane] described and physical evidence described in relation to the incident." We question the committee's expertise to arrive at this startling conclusion.

It is ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy. This case turned on the Committee's determination of the credibility of the witnesses. Credibility cannot be properly decided until the accused is given the opportunity to adequately respond to the accusation. The lack of due process in the hearing here precluded a fair evaluation of the witnesses' credibility. In this respect, neither Jane nor John received a fair hearing.

In light of our conclusion, it is unnecessary to discuss John's remaining contention concerning sufficiency of the evidence.

DISPOSITION

The judgment is reversed and the matter is remanded to the superior court with directions to grant John's petition for a writ of administrative mandate. John is awarded costs on appeal.

Yegan, J., and Perren, J., concurred.

All Citations

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Footnotes

1 The administrative record does not include documentation of any such request by the sheriff's department.

2 The second page of the SART report and minutes of the committee hearing refer to "Vybryyd." The superior court confirmed that the correct spelling for the medication is "Viibryd," and refers to it as such. For clarity, we use the spelling used in the superior court.

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PERSPECTIVE

Title IX at 50

By Phyllis W. Cheng

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

— Title IX of the 1972 Education Amendments (20 U.S.C. Sections 1681-1688)

2022 marks the 50th Anniversary of Title IX, a groundbreaking federal law that has significantly expanded educational opportunities for women and girls in education and in every facet of society.

Title IX had its genesis during the summer of 1970, when Congress focused on sex bias in education at a set of hearings on discrimination against women before a House Education Subcommittee chaired by Rep. Edith Green (Ore.). A year later, noting the link between educational discrimination and employment opportunities, Sen. Birch Bayh (Ind.) introduced an education amendment to combat "the continuation of corrosive and unjustified discrimination against women in the American educational system."

Today, Title IX applies to virtually all school districts, colleges and universities as recipients of federal grants, contracts or loans. Recipients include approximately 17,600 local school districts, over 5,000 postsecondary institutions, charter schools, for-profit schools, libraries, museums, vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and U.S. territories.

Title IX is interpreted through detailed regulations of the former U.S. Department of Health, Education and Welfare and now the U.S. Department of Education. The regulations provide that each recipient institution must operate its education program or activity in a nondiscriminatory manner free of discrimination based on sex, including sexual orientation and gender identity. Some key obligations include: self-evaluation; designation of responsible individual and adoption of grievance procedure; dissemination of policy; counseling; financial assistance; health and insurance benefits and services; athletics; housing; comparable facilities; access to course offerings; recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment, which encompasses sexual assault and other forms of sexual violence; treatment of pregnant and parenting students; treatment of LGBTQI+ students; discipline; single-sex education; and employment. Further, no recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in a proceeding under Title IX.

The law is enforced by the Department of Education's Office for Civil Rights. In addition to the risk of losing federal funds, the U.S. Supreme Court has interpreted that individuals also have an implied private right of action under Title IX. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

Higher Education

Before Title IX, women were often excluded from or had limited access to educational programs. Elite colleges and universities set quotas for the admission of women or prohibited them from attending altogether. Once admitted to schools, women had less access to scholarships; were excluded from "male" programs, such as medicine and law; and faced more restrictive rules, such as early curfews, than their male peers. Discrimination extended beyond students. Women faculty were more frequently denied tenure than their male counterparts, required to take pregnancy and maternity leaves, or prohibited from entering faculty clubs. In part as a result of these inequalities, in 1970 only 8% of women age 19 and older were college graduates as compared with 14% of men.

After Title IX, women's participation in higher education has reached or even exceeded parity in many areas. Women's full-time enrollment grew from two-fifths in 1972 to more than half (59.2%) in 2020, according to the National Student Clearinghouse. Women now earn the majority of bachelor's, master's and doctoral degrees.

As to professional schools, recall that neither Justices Sandra Day O'Connor nor Ruth Bader Ginsberg were offered a law firm job after graduating at the top of their law school classes. Because of Title IX, women now outnumber men in law schools (54.9%), comprise nearly half (42%) of California lawyers, and represent more than one-third (38%) of judicial officers. Similarly, women students are now in the majority in medical schools (53.5%) and dental schools (52.6%), and are nearly half (41.2%) of business schools.

However, most graduate degrees and certificates awarded to women continue to be concentrated in the more traditional female fields of education, health sciences, public administration and services, and social and behavioral sciences. Women still lag behind in many STEM fields, in which men earn about three-fourths of master's degrees (72.2%) and doctoral degrees (75.1%) in engineering, and two-thirds (64.5%) of master's degrees and three-fourths (74.2%) of doctoral degrees in mathematics and computer sciences.

Sports

The growth of women's and girls' interscholastic and intercollegiate sports has been one of the most effective results of Title IX. The availability of more athletic scholarships for women has opened up a previously nonexistent opportunities for female athletes.

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Although still behind their male counterparts, female sports now comprise 36% of intercollegiate athletic operating dollars, 42% of college athletic scholarship dollars, and 32% of athletic team recruitment spending.

Since Title IX, U.S. women have competed and won gold, silver and bronze medals in the Olympics Games. The number of women competing at the Olympics has increased significantly from 34 per cent of the total at Atlanta 1996 to an expected new record of 48.8% at Tokyo 2020, and a commitment to reach full gender equality for the Olympic Games Paris 2024. In October 2018, the Youth Olympic Games Buenos Aires 2018 were the first fully gender-balanced Olympic event ever. In addition to being the most gender-balanced Summer Games in history, Tokyo 2020 will see full gender representation across all 206 teams.

Sexual Harassment

In 1986, Cornell University surveyed women students and found that 78% had experienced sexist comments. That same year, a Massachusetts Institute of Technology study found that 92% of women students had experienced unwanted sexual attention. In 1980, a University of Rhode Island study found that 70% of women students reported being sexually insulted. As a result of these concerns, the Office for Civil Rights issued regulations and guidance requiring that:

- A school has a responsibility to respond promptly and effectively. If a school knows or reasonably should know about sexual harassment or sexual violence that creates a hostile environment, the school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.
- Even if a student or his or her parent does not want to file a complaint or does not request that the school take any action on the student's behalf, if a school knows or reasonably should know about possible sexual harassment or sexual violence, it must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.
- A criminal investigation into allegations of sexual harassment or sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.

In response, many educational institutions have developed investigative and hearing procedures that protect victims who file sexual harassment or assault complaints. However, students against whom Title IX complaints have been lodged have sometimes successfully challenged the lack of due process in these administrative proceedings.

Conclusion

Title IX has evolved and matured over a half century. The law has thrown open previously closed doors for women and girls in our educational institutions. It promises to be as expansive going forward.

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