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TITLE IX: THE MONITORING OF PRIVATE ATHLETIC DONATIONS

TRAVIS T. TYGART*

The Florida High School Athletic Association has awarded The Bolles School1 of Jacksonville, Florida, the Carey McDonald Award for outstanding overall Florida high school athletic program every year since 1980. The Bolles School athletic programs have placed several athletes in the professional leagues and many more in National Collegiate Athletic Association (NCAA) Division I and Division II athletic programs.2 Other prestigious secondary schools have achieved similar success and have gained national recognition through their athletic accomplishments.3 The success of these schools' athletic programs originates from several factors, but primarily from the schools' commitment to insuring the highest caliber coaching, equipment, facilities, and support for its athletic teams. Frequently, financial donations from alumni, parents, friends, or other school benefactors facilitate this commitment. Without these private donations many schools would be unable to hire the best coaches, provide the teams with the nicest uniforms and equipment, or construct superior athletic facilities that attract the nation's top athletes to the program. Many of these private donations are given by wealthy parents or alumni for specific athletic programs. For example, Chipper Jones, a 1990 Bolles School graduate, gave a substantial monetary donation to the Bolles baseball program for a new locker room and adjoining baseball office.

These private donations, whether from successful major league baseball players or wealthy parents, may soon come under Title IX scrutiny.4 The schools that accept these restricted donations may violate Title IX by allocating the gifts in the manner the donor has requested.

1. The Bolles School, a private, co-educational, nonprofit, non-denominational college preparatory school, enrolls students in the day school from pre-kindergarten to postsecondary. The author is a graduate of The Bolles School, Class of 1989. He taught American Government, World History, Economics and coached the junior varsity basketball and assisted the junior varsity baseball team at The Bolles School from 1994-96. Currently, he sits on The Bolles School Board of Visitors and is the 1989 Class Representative.
2. A few of The Bolles School athletes include Dee Brown, a former NBA Dunk Contest Champion and current Toronto Raptor; Chipper Jones of the Atlanta Braves, the number one draft choice in the amateur baseball draft in 1990; and Steve Carver, a Stanford Cardinal baseball player currently with the Philadelphia Phillies.
3. Those prestigious secondary schools include Oak Hill Academy (Oak Hill, Va.), St. Anthony's Hall (New York, N.Y.), and DeMatha High (Hyattsville, Md.).
This article discusses the application of Title IX to private donations directed toward "interscholastic" athletic programs. Part I of this article discusses the history of Title IX. Part II attempts to clarify the regulatory and interpretative framework that many courts and commentators have struggled to clearly define. Lastly, Part III addresses the idea of "equivalence in other benefits and opportunities" and its impact on private athletic donations. Throughout these three sections, the article analyzes Title IX's application to interscholastic sports.

I. History of Title IX

A. Title IX: The Statute

Congress enacted Title IX of the Educational Amendments of 1972 to insure equal treatment of women in the educational arena. The statute's broad objectives are stated at the beginning: "[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 educational program or activity receiving Federal financial assistance . . . ." Today, more than twenty-five years after its passage, Title IX remains the primary vehicle in guaranteeing equal educational opportunities for women. Title IX extends to intercollegiate athletics as well, requiring that women athletes in college have the same opportunity to participate as do men.

The language of Title IX is similar to the language in Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination by federally funded programs. Title IX's language is also similar to the language of Title VII of the Civil Rights Act of 1964. The courts, in acknowledging the similarity between Title IX and Title VII, have recognized an implied private right of action allowing an individual to bring suit under Title IX. Since this recognition, there has been

5. See id.
6. See generally id.
7. Id.
10. 42 U.S.C. § 2000d (1994) ("No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").
12. See 42 U.S.C. § 2000e (1994) ("It shall be an unlawful employment practice for an employer . . . (a) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, terms, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").
a dramatic increase in the number of Title IX suits against educational institutions by females claiming gender discrimination.14

Although Title IX's ideology has been traced to the House of Representatives' subcommittee hearing on sex discrimination,15 the absence of secondary legislative materials completely failed to establish the scope of Title IX or its acceptable avenues of compliance.16 Educational institutions were unsure which programs or activities were within the scope of Title IX and how to comply with it.17 This uncertainty as to whether Title IX applied to "intercollegiate" or "interscholastic" athletic programs, led to six failed legislative attempts to limit its coverage.19

Congress then decided to clarify Title IX and its application to athletics in 1974 with the Javits Act, providing:

the Secretary [of Health, Education and Welfare] shall prepare and publish, not later than 30 days after the date of enactment of this act [August 21, 1974], proposed regulations . . . relating to the prohibition of sex discrimination in federally assisted education programs, which

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15. See Discrimination Against Women: Hearings on H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor, 91st Cong., 2d Sess. 2 (1970). Liberal feminist theory influenced the development of Title IX in that its goals of providing women access to traditionally male institutions and providing equal opportunity were similar to goals of other feminist reform movements of the 1960s and 1970s. Advocates of Title IX thought that girls should be given the same proportional number of "intercollegiate" and "interscholastic" athletic opportunities. They supported equal access in that girls' and women's sports should receive equal funding, facilities, coaching, and other support. See Note, Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression, 110 HARV. L. REV. 1627, 1634-35 (1997).


17. See Bemardo, supra note 16, at 313.

18. The term "interscholastic" sports in this article refers to sports competition between one or more secondary or primary schools. The term "intercollegiate" sports refers to sports competition between one or more university teams.

19. See Haffer v. Temple Univ., 524 F. Supp. 531, 534 (E.D. Pa. 1981); see also Amend. 1343 to S. 1539, 120 CONG. REC. 15,322 (1974) (offering the Tower Amendment to exclude "revenue producing" intercollegiate athletic activities from Title IX); S. 2106, 121 CONG. REC. 22,775 (1975) (noting the Tower Amendment reintroduced); 121 CONG. REC. 17,300 (1975) (offering Helms Resolution to disapprove proposed regulations applying Title IX to programs and activities not directly receiving federal funds); S. 2146, 121 CONG. REC. 23,845 (1975) (offering the Helms Amendment to limit Title IX coverage to education programs and activities directly receiving federal financial assistance); Amend. 389, 122 CONG. REC. 28,136 (1976) (offering the McClure Amendment to redefine "education program or activity" to mean "such programs or activities as are curriculum or graduation requirements of the institution"); Amend. 390, 122 CONG. REC. 28,144 (1976) (offering the McClure Amendment to define federal financial assistance as assistance received directly from the federal government). Title IX does not directly address intercollegiate or interscholastic sports. In fact, application of Title IX to sports was mentioned only twice in the congressional debates with no distinction between intercollegiate or interscholastic sports. See 118 CONG. REC. 5,808 (1972); 117 CONG. REC. 30,407 (1972).
shall include with respect to intercollegiate athletic activities reasonable provisions concerning the nature of particular sports. 20

The Javits Act clarified that intercollegiate athletics fell within the scope of Title IX and that regulations concerning Title IX would be developed by the Secretary of Health, Education and Welfare (the Secretary). There was no mention of interscholastic sports in the Javits Act. 21 Thus, it is only by analogy to intercollegiate sports that interscholastic sports are covered by the Javits Act and the Secretary's regulations.

The absence of interscholastic reference in the Javits Act, however, has not precluded the courts from applying Title IX to interscholastic sports. 22 Of course, one must question whether Congress, in the absence of any mention of interscholastic sports during the congressional debates on the Javits Act, meant for Title IX or its regulations to apply to interscholastic sports. 23

In 1975, under congressional direction to implement Title IX, the Secretary promulgated regulations concerning Title IX that included specific provisions for intercollegiate sports. 24 The Department of Health, Education, and Welfare regulations and other interpretative framework of Title IX are addressed in Part II.

B. Early Judicial Decisions Concerning Title IX's Scope

The first tier of judicial decisions focused on whether receipt of federal funds by one program within an institution subjected the entire institution to Title IX compliance. 25 The institutions advocated a "program specific" approach that subjected only the program directly receiving federal funds to Title IX compliance; 26 opponents pushed for an "institutional" approach, subjecting the entire university to Title IX if any program or activity of the institution received federal funds. 27

Under the program specific approach, if, for example, Hypothetical University's (HU) engineering department received a federal grant for research, then only HU's engineering department would be subject to Title IX compliance. If HU's athletic department did not directly receive federal funds, then HU's athletic department would not be bound by Title IX. Thus, since most institutions' athletic programs do not directly receive federal funds, they would be excluded from Title IX compliance. 28 Likewise, Title IX would be inapplicable to most secondary schools'

21. See id.
22. See id.
23. See id.; 118 CONG. REC. 5808 (1972); 117 CONG. REC. 30,407 (1972).
25. See Ingrum, supra note 9, at 759.
26. See id.
27. See id.
athletic programs since few secondary schools' athletic departments directly receive federal financial assistance.

On the other hand, however, utilizing the same hypothetical under the institutional approach, if only HU's engineering department received a federal grant for research, the entire university would be subject to Title IX, including the athletic program, which received no direct federal funds.

1. Lower Courts Adopt the "Institutional" Approach

In Haffer v. Temple University,\(^2\) the district court accepted the institutional approach advocated by the female plaintiffs and held that Title IX applied to the entire university if any part of the institution received federal funds.\(^3\) The court held that federal funds given to one Temple University program constituted indirect funding to all programs.\(^4\) The Haffer court reasoned that receipt of federal funds by one program benefitted the entire university by allowing indirect reallocation of funds.\(^5\) Thus, Title IX applied to the entire university since the university received direct funding for specific programs and indirect funding for the rest of the university.\(^6\)

2. The Supreme Court Overrules the "Institutional" Approach

In 1984, the Supreme Court in Grove City College v. Bell\(^7\) altered the reading of Title IX and adopted the program specific approach.\(^8\) In Grove City, the Court interpreted the statutory language "program or activity" to apply only to those actual programs that directly receive federal funding, meaning that direct federal funding of one program did not trigger an entire institution's obligation to comply with Title IX.\(^9\) Thus, the Court adopted the program specific approach and dramatically limited the reach of Title IX. Because few intercollegiate athletic departments directly received federal funds, Grove City effectively cabined Title IX and placed virtually all intercollegiate athletic programs beyond the statute's reach.\(^10\)

3. Congress Reinstates the Institutional Approach

In 1987, Congress overrode President Reagan's veto and enacted amendments to the Civil Rights Restoration Act of 1987 (CRRA),\(^11\) which reversed Grove City and

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30. See id. at 538-40.
31. See id. at 538-39.
32. See id. at 539.
33. See id. at 538-40.
34. 465 U.S. 555 (1984). The Reagan Administration endorsed the program specific approach when Grove City was heard by the Court. See Brian Porto, Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports, 8 Seton Hall J. Sport L. 351, 364 (1998).
35. See Grove City, 465 U.S. at 574.
36. See id.
codified the institutional approach. The Act defined the terms "program or activity" to mean "all of the operations of . . . a college, university, or other post secondary institution, or a public system of higher education . . . any part of which is extended federal financial assistance." Consequently, if any one program or activity of an educational institution receives federal financial assistance, then the entire institution is subject to Title IX compliance. Although the Restoration Act does not specifically mention athletics, there has been little doubt that the CRRA was aimed at all federally funded educational institution programs, including athletic programs.

Additionally, the CRRA does not mention interscholastic sports. The secondary school cases dealing with Title IX do not address the issue of whether Title IX applies through the institutional or program specific approach. Although not directly addressed, it seems that the courts by analogy will hold secondary schools to the institutional approach. The advocates of Title IX could successfully argue that Title IX applies to every secondary school within a public school district even if the participating school did not directly receive federal funds as long as the public school district receives federal financial assistance. This is a logical extension of the CRRA's institutional approach. Assuming the public school district has received direct federal financial assistance, under an institutional approach, all of its programs or activities have benefitted and thus would be subject to Title IX. Moreover, the school district's programs or activities would include each individual school and that school's specific programs and activities. Thus, it seems logical that every program in a public school that does not receive direct federal assistance could be subject to Title IX compliance if the school district receives any federal financial assistance even though the discriminating school does not receive any federal funds.

II. The Regulations and an Interpretative Framework

A. The Regulations

In June 1974, in response to the Javits Act, the Secretary of Health, Education and Welfare (the Secretary) issued its proposed regulations for enforcing Title IX. The proposals were followed by a period for comment during which almost 10,000 responses were received.

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39. See Porto, supra note 34, at 364 (citing Diane Heckman, Women & Athletics: A Twenty Year Retrospective on Title IX, 9 U. Miami Ent. & Sports L. Rev. 1, 12-13 (1992)).
40. Civil Rights Restoration Act § 908.
42. See Cohen, 991 F.2d at 894.
In 1975, the Secretary issued final regulations incorporating many of the suggestions made during the comment period. After final regulations were presented, Congress held extensive hearings concerning the athletic regulations. Congress had forty-five days to disapprove the final regulations by concurrent resolution. During this forty-five-day period, several bills were introduced to disapprove of the regulations altogether, while other bills were introduced to disapprove only the portions aimed at athletics. The final regulations overcame this opposition and became effective on July 21, 1975.

While the regulations cover Title IX's application to the entire educational institution, two sections of the regulations directly address Title IX and college athletics. One section requires schools to award athletic scholarships to male and female athletes in the same proportion. Interestingly, this section specifically mentions intercollegiate and interscholastic athletic programs.

The vast majority of secondary schools, of course, do not provide financial aid. For those private schools that do provide financial aid, however, a school may violate Title IX if more male athletes receive financial aid than do female athletes. Traditionally, secondary schools that provide financial aid do not consider the aid to be athletic scholarships, but a large percentage of the aid may go to students who participate on athletic teams. Thus, females at the school, if not receiving an equal proportion of the financial aid, could argue that the school is in violation of Title IX for failure to fund the female students in proportion to the number of females playing sports. This is a difficult argument since most secondary schools that provide aid to students do not consider the aid to be an athletic scholarship and provide it based on academic merit or financial need. There are no cases on this issue; however, if this situation arose, a plaintiff arguably would have a valid Title IX argument.

The second section of the final regulations concerning Title IX specifies when a school may maintain separate male and female athletic teams. Additionally, this

46. See Brake & Catlin, supra note 43, at 55.
47. See id. at 56.
48. See id.
49. See Charles Spitz, Gender Equity in Intercollegiate Athletics as Mandated by Title IX of the Education Amendments Act of 1972: Fair or Foul?, 21 SETON HALL LEGIS. J. 621, 628-29 (1997); see also 44 Fed. Reg. 71,413 (1979) (explaining the regulations "so as to provide a framework within which . . . complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs").
51. See id. § 106.37(c)(1).
52. See id.
53. See id. § 106.41(b); see also Spitz, supra note 49, at 628. The regulation allows separate teams "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b). The contact sports include "boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact." Id.
section of the final regulations requires an institution to provide an equal athletic opportunity for both sexes. In 1979, Congress split the Department of Health, Education and Welfare (DHEW) into the Department of Health and Human Services (DHHS) and the Department of Education (DED). The DHEW's Title IX regulations remained with DHHS's set of regulations. At the same time, DED replicated the regulations as part of its own regulatory arsenal. In short, both DHHS and DED assert authority to enforce Title IX. Because DED is the principle enforcing agent of educational regulations, post-1979 cases and commentaries have looked to the DED's treatment of the regulations.

The federal courts have given the DED regulations considerable deference in interpreting Title IX. The DED regulations include both intercollegiate and interscholastic athletics within the "program or activity" requirements of Title IX. Therefore, the regulations also are utilized when examining interscholastic athletics and Title IX.

The regulations list ten factors that are to be used when determining whether an educational institution is in compliance with Title IX's mandate of equal athletic opportunity. Section 106.41(c) states that:

in determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) The scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

54. See 34 C.F.R. § 106.41(b).
55. See 20 U.S.C. §§ 3401-3510 (1994); see also Shook, supra note 38, at 775 n.12.
58. See Cohen, 991 F.2d at 894.
61. See 34 C.F.R. § 106.41(a).
62. See Yasser & Schiller, supra note 60, at 375.
63. See § 106.41(c).
Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but [DED] may consider the failure to provide necessary funds for teams of one sex in assessing the equality of opportunity for members of each sex.64

The first of these factors is probably the most utilized factor in determining Title IX compliance.65 The courts have held that an educational institution may violate Title IX for "failing to accommodate the interests and abilities of members of both sexes" as mandated by section one of the regulation.66 The other factors of the regulation that are used to determine if an educational institution has provided "equivalence of benefits and opportunities" will be the focus of this article.67

B. The Policy Interpretation

In 1979, the Office of Civil Rights (OCR) of the DHEW issued a Policy Interpretation attempting to further define Title IX and its regulations.68 In the Policy Interpretation, the OCR expanded on the meaning of "equal opportunity" in intercollegiate athletics.69 The Policy Interpretation's purpose was to explain the factors that the DED will use in determining whether an institution's athletic program is in compliance with Title IX.70 The Policy Interpretation was divided into three areas of inquiry to determine Title IX compliance: athletic scholarships;71 equivalence in other athletic benefits and opportunities;72 and effective accommodation of student interests and abilities.73

While the Policy Interpretation does not have the force of law as does Title IX and the regulations, most courts use it as a guide in a Title IX analysis.74 Additionally, although the Policy Interpretation specifically addresses intercollegiate athletics, it states that its "general principles will often apply . . . to interscholastic athletics."75

The main focus of Title IX litigation has involved the effective accommodation of student interest and abilities prong of the Policy Interpretation,76 which is also

64. Id.
65. See Yasser & Schiller, supra note 60, at 375.
66. Kelley v. Board of Trustees, 35 F.3d 265, 268 (7th Cir. 1994); see also Cohen v. Brown Univ., 991 F.2d 888, 897-98 (1st Cir. 1993).
67. See Yasser & Schiller, supra note 60, at 375.
69. Id.
71. See 34 C.F.R. § 106.37(c) (1999).
72. See id. § 106.41(c)(2)-(10).
73. See id. § 106.41(c)(1).
74. See Yasser & Schiller, supra note 60, at 376.
76. Id. at 71,418.
section 1 of the regulations. This area is often seen as the only area of a Title IX violation. The Policy Interpretation established the three-prong effective accommodation of student interest and abilities test adopted by most courts.

Early Title IX plaintiffs focused their arguments on the effective accommodation issue, which provides a cause of action for plaintiffs who have not been given an opportunity to participate compared to plaintiffs who have not been provided the equivalent benefits and opportunities, although they have received the opportunity to participate.

The first step in remedying gender discrimination in athletic competition is to accommodate the interests of females in participating by providing the females with the opportunity to participate in athletics. This explains why the majority of Title IX litigation involves securing the interests of females to participate on athletic teams. After the opportunity to participate has been guaranteed, the next step for equality is to insure that the benefits and opportunities of women are equal to those of men. This second stage requires equal benefits and opportunities. This analysis is discussed in Part III.

C. Investigator's Manual

In 1990, the Office of Civil Rights of the Department of Education (OCR) issued a Title IX Athletics Investigator's Manual to assist OCR personnel in conducting

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77. See 34 C.F.R. § 106.41(c)(1).
78. See Yasser & Schiller, supra note 60. This area is the most frequently litigated and most well known to most who have studied Title IX. Cohen v. Brown University, 101 F.3d 155 (1st Cir. 1996), addressed this area of a Title IX analysis. This case does not have significant impact on the high schools as long as the three-prong test of effective accommodation of student interest and abilities is met.
79. See 44 Fed. Reg. at 71,418; see also Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 584 (W.D. Pa. 1993) (rellying on the effective accommodation test alone, although mentioning disparities in athletic scholarships, and finding a Title IX violation when the university eliminated women's gymnastics and field hockey teams); Roberts v. Colorado State Univ., 814 F. Supp. 1507, 1511 (D. Colo. 1993) (applying the effective accommodation test alone to the termination of the women's varsity softball team and finding a Title IX violation); Cohen v. Brown Univ., 809 F. Supp. 978, 978 (D.R.I. 1992) (applying the effective accommodation test alone to the university's demotion of women's gymnastics and volleyball teams from varsity status to club status and finding a Title IX violation). The three-prong test established by the Policy Interpretation is as follows:

1. Whether intercollegiate level participation opportunities for male and female students are provided in number substantially proportionate to their respective enrollments; or
2. Where members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history of continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion as 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.
80. See cases cited supra note 79.
athletic investigations. The Investigator's Manual reiterates the three major areas of investigation established by the Policy Interpretation and states that "[a]n investigation may be limited to less than all three of these major areas where unique circumstances justify limiting a particular investigation to one or two of these major areas." This language seems to suggest a Title IX violation occurs only when all three areas of the Policy Interpretation are violated by an institution. Most courts, however, will find a Title IX violation if merely one area is violated by the institution.

The defendants in Roberts v. Colorado State University argued that a plaintiff had to demonstrate a violation of 34 C.F.R. §§ 106.37(c), 106.41(c)(1), (2)-(10) in order to sustain a claim of discrimination under Title IX. The Roberts court held that a violation of 34 C.F.R. § 106.41(c)(1) by itself was sufficient to establish a Title IX cause of action. Although the language in the Policy Interpretation and the Investigator's Manual is inconsistent, the court held that an evaluation of every area of an institution is neither required nor necessary for a Title IX violation.

Not all circuit courts have addressed whether a Title IX violation must occur in all three areas of the Policy Interpretation as indicated in the Investigator's Manual, or if a violation of one area of the Policy Interpretation is sufficient to establish a Title IX violation. The courts that have addressed the issue have recognized a Title IX violation when an institution violates only one area of the Policy Interpretation.

A defendant institution in a Title IX suit should argue the Policy Interpretation of the Investigator's Manual as one avenue of defense. Although the court will likely find a violation if only one area of the Policy Interpretation is breached, a defendant has legitimate substantive grounds on which to base a defense that a violation in all three areas are required for liability, as suggested by the Policy Interpretation.

If this defense is allowed, Title IX may never apply to an interscholastic program since most secondary schools do not provide athletic financial assistance scholarships. Since a defendant would argue that all three areas of the Policy Interpretation need to be violated in order to sustain a Title IX cause of action, in the absence of athletic financial assistance scholarships, it would be impossible for a secondary school to violate 34 C.F.R. § 106.37(c), the scholarship provision, and thus violate Title IX. A defendant, therefore, would argue that Title IX does not apply to interscholastic athletic programs. Although the Supreme Court has applied

81. See Roberts, 814 F. Supp. at 1510.
82. Id.; see also Valerie M. Bonnette, U.S. DEPT OF EDUC., TITLE IX ATHLETICS INVESTIGATOR'S MANUAL 7 (1990).
83. See Roberts, 814 F. Supp. at 1510.
84. See id. at 1511; Favia, 812 F. Supp. at 578; Cohen, 809 F. Supp. at 978 (supporting that a violation of one area of the Policy Interpretation is sufficient to sustain a Title IX violation).
85. See Roberts, 814 F. Supp. at 1507.
86. See id. at 1511.
87. Many private schools, however, do offer financial aid based on financial need rather than solely on athletic ability.
Title IX to secondary schools, it has never addressed whether Title IX applies to secondary school athletics.88

III. Equivalence in Other Athletic Benefits and Opportunities

A. Cook v. Colgate University

Cook v. Colgate University90 is one of the few decisions to directly address the equivalence in other athletic benefits and opportunities portion of Title IX. Many commentators believe that the Cook decision is a bad decision since the court's analysis is different than the majority of Title IX opinions.91 On closer examination, however, it appears that the Cook court's reasoning is different only because the Title IX violation involved was different. The violation in the Cook case was in the equivalence in other athletic benefits and opportunities area, not in the usual effective accommodation of students' interests area. Therefore, the Cook decision is unique and is the leading case on a Title IX equivalence in other athletic benefits and opportunities analysis.

The Second Circuit vacated the Cook decision on mootness grounds.91 The court reasoned that all of the plaintiffs had either graduated or planned to do so prior to the year in which Colgate was required to provide the relief granted by the district court.92 Therefore, no decision by the court could affect their rights against the university.93 Although the district court decision was vacated, the reasoning of the district court still illustrates a court's process in examining whether an institution has provided an equivalent benefit and opportunity to the plaintiffs.94

In defending its position of unequal funding between the men's hockey team and the women's hockey team, Colgate University put forth evidence that its overall athletic department, not just the men's and women's hockey teams, should be analyzed by the court to determine if Colgate violated Title IX.95 Although the court did examine the overall athletic program, it held that Title IX invites a comparison between separate teams in a particular sport because the teams are designed to protect not only a particular class of persons, but individuals as well.96

Colgate argued that comparing the men's varsity ice hockey team to the women's club ice hockey team was like comparing "apples and oranges."97 The court held that Colgate permissibly sponsored separate ice hockey teams for each gender since

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91. See Cook v. Colgate Univ., 992 F.2d 17, 19 (2d Cir. 1993).
92. See id.
93. See id.
94. See generally Ades, supra note 41.
96. See generally id.
97. Id. at 743.
the sport was a contact sport. However, since separate teams existed, the court could compare the two teams in a Title IX analysis.

The *Cook* court suggested that an educational institution could alleviate any Title IX problems in the equivalence in other athletic benefits and opportunities area if there was only one school-sponsored hockey team on which both sexes were eligible to participate. This single team would provide both sexes the same athletic benefits and opportunities.

From this language, educational institutions seem to have an option when fielding teams. The institution may have one team in a particular sport so long as both sexes have an opportunity to participate on the team. If this opportunity is granted, the court should not compare the two teams for failing to provide equivalence in other athletic benefits and opportunities since both sexes will have the equivalent opportunity once on the team. Thus, the institution should avoid 34 C.F.R. § 106.41(c)(2)-(10) scrutiny by fielding just one team on which both males and females may participate.

Nevertheless, the institution may still be in violation of the Policy Interpretation and the regulations' mandate for effective accommodation of interests and abilities. Imagine a school that provides one hockey team for both sexes. Although females would have the equivalence in benefits and opportunities if they made the team, they would be at a disadvantage in making the team in a sport as physical as hockey. Thus, the women would have a legitimate Title IX claim based on the lack of accommodation in participating in hockey if a large number of interested women failed to make the single coed team.

Although this is another concern for Title IX, which falls outside the scope of this article, it is important to note that an educational institution may attempt to circumvent Title IX's equivalence in other athletic benefits and opportunities requirement by following Cook's one team suggestion only to place itself in a Title IX violation by failing to accommodate student interests in participation.

1. *Steps for Determining Gender Discrimination Under Title IX*

In determining Title IX compliance, the *Cook* court, in the absence of sufficient precedent, adopted the three-step process used by the courts for determining discrimination under Title VII. Using this process, a plaintiff must first establish a prima facie case of discrimination. "If the plaintiff succeeds . . . the burden shifts to the defendant to come forward with evidence of some legitimate, non-discriminatory reasons for its conduct." "If the defendant establishes legitimate reasons for its conduct, the plaintiffs . . . must show that the reasons advanced by the defendant are a pretext or a cover for discriminatory motives."

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98. See id.
99. See id.
102. See Cook, 802 F. Supp. at 743.
103. Id.
104. Id.
In order to establish a prima facie case, plaintiffs must show the following:
(1) the athletic department is subject to the provisions of Title IX;
(2) the plaintiffs are entitled to protection of Title IX; and
(3) the plaintiffs have not been provided equal athletic opportunities.\textsuperscript{105}

If the plaintiffs prove a prima facie case, they have established a rebuttable presumption of a Title IX violation.\textsuperscript{106} "This presumption, however, will disappear from the case if the [defendant] comes forward with legitimate nondiscriminatory reasons for its decisions not to upgrade the women's team."\textsuperscript{107} If introduced, the plaintiffs must show the reasons are merely a pretext for discrimination.\textsuperscript{108}

2. Comparing Men's and Women's Hockey Teams

In determining that the plaintiffs established a prima facie case and had not been provided equal athletic benefits and opportunities, the \textit{Cook} court considered the list of factors in 34 C.F.R. § 106.41(c)(2)-(10).\textsuperscript{109} In \textit{Cook}, the court determined that the men's hockey team received fifty times as much financial support from the university as the women's hockey team.\textsuperscript{110} In addition, the women had to pay $25 in annual dues while the men made no payments.\textsuperscript{111} The \textit{Cook} court also examined the two teams' equipment. The men's hockey team was outfitted with uniforms, skates, pads, helmets, and gloves. A machine and a worker to sharpen the men's skates were provided free of charge.\textsuperscript{112} In contrast, the women had to use old inadequate equipment. They also had to buy their own skates at a cost of approximately $160 each and had to pay between $2 and $3 regularly to have the skates sharpened.\textsuperscript{113}

Additionally, the court examined the locker rooms.\textsuperscript{114} The men's locker room was "very large, roughly fifty feet [by] fifty feet, with all of the amenities associated with a Division I varsity program," with carpeting, director chairs, individual lockers and a stereo.\textsuperscript{115} In contrast, the women's locker room was very small, roughly fifteen feet by fifteen feet.\textsuperscript{116} Additionally, the women had to share the locker room with other athletic teams.\textsuperscript{117}

Examining the travel arrangements of the two hockey teams, the \textit{Cook} court found that the men's hockey team "traveled on buses with a commercial driver, . . . the players stayed in comfortable accommodations on overnight trips[, and] all the

\textsuperscript{105} \textit{See id.}
\textsuperscript{106} \textit{See id.}
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{See id.}
\textsuperscript{110} \textit{See id. at 744.}
\textsuperscript{111} \textit{See id.}
\textsuperscript{112} \textit{See id.}
\textsuperscript{113} \textit{See id.}
\textsuperscript{114} \textit{See id. at 745.}
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{See id.}
\textsuperscript{117} \textit{See id.}
travel arrangements were made by [university] support personnel.\textsuperscript{118} In contrast, the women’s team had to pay Colgate twenty-five cents per mile to rent a van, provide their own driver, and make their own travel arrangements.\textsuperscript{119} On most overnight trips, the women could only afford to stay at the homes of team members.\textsuperscript{120}

The \textit{Cook} court also compared the coaches of the two teams. "The men's team had a full-time head coach and one full-time assistant coach; the men's coaches received a total salary of $86,500.00 per year."\textsuperscript{121} "In contrast, the women's team had been coached by volunteer students who were paid a few hundred dollars a year from the team's budget."\textsuperscript{122}

The \textit{Cook} court found that the plaintiffs had established a prima facie case resulting in the presumption that the university was in violation of Title IX.\textsuperscript{123} The court concluded that Colgate did not provide the women with equal benefits and opportunities as required by 34 C.F.R. § 106.41 (c)(2)-(10).\textsuperscript{124}

In determining whether Colgate had a legitimate, nondiscriminatory reason for its conduct, the court held that the school's claimed lack of funds was not legitimate.\textsuperscript{125} The \textit{Cook} court held that a school could always use a "lack of funds" excuse to deny equality since it costs money to implement equal women's programs.\textsuperscript{126} The court further held that it would be contrary to the spirit and meaning of Title IX to allow educational institutions to avoid providing equal facilities due to a lack of money.\textsuperscript{127} The court recognized that an educational institution could allocate hundreds of dollars into the men's programs while claiming no funds for the women's programs.\textsuperscript{128} This approach would give the men potentially the finest and most expensive facilities in the country while the institution would have no accountability for failing to provide equal facilities to the women. Although the \textit{Cook} court did state that there is no requirement of an educational institution to spend equal amounts of money on the men's and women's athletic teams, it held that Colgate violated Title IX for not providing equivalent benefits and opportunities to the female athletes, and it had no legitimate nondiscriminatory reason for doing so.\textsuperscript{129}

\begin{flushright}
118. Id.
119. See id.
120. See id.
121. Id.
122. Id.
123. See id.
124. See id.
125. See id. at 750.
126. Id.
127. See id.
128. See id.
129. See id.
\end{flushright}
B. The Cook Decision and Private "Interscholastic" Athletic Donations

In light of the Cook decision, it is necessary for each "interscholastic" educational institution to recognize their potential Title IX liability for failing to provide equal athletic benefits or opportunities to female athletes. These institutions must understand the analysis a court will undertake if a suit is filed against the institution. Additionally, the school must take steps to prevent a lawsuit by providing an equal athletic opportunity.

1. Analysis for Title IX Violation by an "Interscholastic" Institution

a) Receiving Federal Funds?

An educational institution first should determine if it receives federal funds, thus requiring Title IX compliance. In the interscholastic setting, this determination is complicated. The courts, with little discussion, seem to assume that public schools receive federal funds and are subject to Title IX.130 A public school has a valid position that Title IX is inapplicable if the school receives no direct federal funds even if the school district receives funds. Although a court could extend Title IX to all the public schools in a public school district that receives federal funds, no court has directly addressed this issue.

The receipt of federal funds is an even more difficult question for private schools. A private school that directly receives federal funds is clearly subject to Title IX. The courts have determined that the receipt of federal funds includes all funds received by an institution from the federal government.131 The receipt of federal funds by an institution's students is also considered subject to Title IX.132 The funds available to students that will subject an institution to Title IX liability include: National Direct Student Loans, Basic Educational Opportunity Grants, Supplemental Education Opportunity Grants, College Work Study Grants, and Department of Education Grants.133 Although most federal funds received by students are for postsecondary education, one has to question what will occur if students begin to use state vouchers at private schools. This form of voucher payment to private schools may be sufficient to subject the school to Title IX liability.

If a private school does not receive direct federal funds, then it should not be subject to Title IX.134 But the definition of private schools that do not directly receive federal funds is murky. If a "private" school is a government recognized nonprofit or tax-exempt entity, there is an argument that a court should subject the school to Title IX scrutiny. By receiving preferred tax treatment, the school receives additional funds that it otherwise would not have received if it were not a preferred tax entity; the schools do not directly receive federal funds, but by not having to

132. See id.
133. See id.
pay certain taxes, the school retains funds it otherwise would have to pay. Thus, because of the school's tax status, it essentially receives federal funds.

The courts have not addressed this argument in the Title IX context; however, the courts have addressed it in the context of Title VII and the Rehabilitation Act, which both require a receipt of federal funds before the statutes apply. The courts have held in the Title VII and the Rehabilitation Act context that tax-exempt status alone was insufficient to bring the organizations within the statutes.\textsuperscript{135}

Although the little precedent available supports a finding that tax-exempt status alone is insufficient for Title IX liability, a plaintiff may have a legitimate argument since the private tax-exempt schools arguably do receive funds from the federal government by not having to pay additional taxes.\textsuperscript{136} Additionally, the courts seem to apply the concept of receiving federal funds liberally under Title IX, thereby expanding its reach. In a situation where a tax-exempt school does not provide an equal opportunity, a court could apply the "federal funds received" requirement liberally and hold the school subject to Title IX.

\textit{b) Equal Opportunity and Benefits of Private Donations}

Assuming Title IX applies, in light of the \textit{Cook} decision, it is necessary for all educational institutions to eliminate the benefits and opportunities distinctions between men's and women's teams of the same sport. Although spending does not have to be equal, the benefits and opportunities for women will be compared to those benefits and opportunities for men under a Title IX analysis. Thus, the institution in question should ensure that both teams' facilities, practice times, uniforms, and travel arrangements are equal.

If the men's programs provide the finest benefits and opportunities, then the women's program must have the finest benefits and opportunities. If the men's programs provide substantially adequate benefits or opportunities, then the women's program also must have substantially adequate benefits and opportunities. However, if the men's programs are just adequate, then the women's programs likewise only have to be just adequate.

The courts do not use one concrete rule or test in analyzing whether equal benefits and opportunities exist for the women's programs. Under \textit{Cook}, the courts will simply compare the teams, rather than overall programs, and determine whether equality exists.

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\textsuperscript{135} See Bachman \textit{v.} American Soc'y of Clinical Pathologists, 577 F. Supp. 1257, 1264 (D.N.J. 1983); Baptiste \textit{v.} Cavendish Club, Inc., 670 F. Supp. 108, 109-10 (S.D.N.Y. 1987) (holding the club was a private club and not subject to Title VII; since the club did not receive federal funds but was a tax-exempt entity, this was not enough to hold it subject to Title VII).

\textsuperscript{136} It is important to remember that a plaintiff in a public school who has been discriminated against can bring a claim under the 14th Amendment since the state actor requirement is met. A private school plaintiff does not have the 14th Amendment cause of action since there is no state action. Thus, Title IX may provide a broader remedy for discrimination than the 14th Amendment by allowing a claim against a private school that is tax-exempt but does not otherwise receive federal funds.
2. Restricted Private Donations and Title IX

Where Title IX requires schools to parade equal facilities, equipment, coaching staff, and travel accommodations, it arguably also requires schools to carefully monitor restricted private donations by parents, alumni, or friends of the school to men's programs. If a men's program receives a large donation either by a single gift or multiple gifts, the school should insure that these gifts do not provide the men's program with more benefits and opportunities than the women's team in that sport. If the men's team receives large private donations, eventually, assuming the women's team is not receiving private donations, the school may have to alter its budget to insure the women's team is receiving equal treatment.

According to the Cook court, dollar-for-dollar spending is not necessary; however, the women must be given equal benefits and opportunities. At some point, if the men's team continues to receive private donations without additional spending on the women's teams, the facilities and opportunities for the men will surpass the benefits and opportunities for the women in the same sport. At this point, the plaintiffs could prove a prima facie violation of Title IX. If shown, the school would have to assert a legitimate nondiscriminatory reason to rebut the presumptive Title IX violation. Here, the school could assert the receipt of the private donation as the legitimate, nondiscriminatory reason for the disparity between the treatment of the men's and women's teams.

Assuming the school provided both programs with equal funding from its budget, the additional benefit provided by the private donation may cause the school to violate Title IX. Although the courts have not addressed this defense to determine whether it is a pretext to discrimination, the court would be forced to hold that private donations could force a school into a Title IX violation.

As a public policy matter, allowing private donations to enhance a school or athletic program should be encouraged. Individuals that possess the wealth to distribute funds for the benefit of others should not be discouraged.137 Although this argument has never been asserted by an educational institution, it may be a valid defense to a section 106.41(c)(2)-(10) attack involving private donations.

3. An Institution's Solutions?

Secondary schools have several options in handling restricted private donations directed to a boys' sports team.138 First, the school can simply decline to accept

137. Of course, the donors could be encouraged to give to the women's program, but many donors, like Chipper Jones, want their donations to go directly to the programs in which they participated.

138. This article assumes that in general the men's teams receive a larger percentage of private donations than the women's teams. It seems logical that private donors to specific sports teams either have a child/grandchild on the team or they played the sport. There are two reasons for this assumption. First, since more men played high school sports in the past, the pool of potential donors is larger for the men's teams. Second, assuming more boys than girls play high school sports today, especially with the large number of athletes comprising the average football team, the pool of potential donors is larger for men's sports. Interestingly, both of these reasons seem to be addressed by Title IX by providing an opportunity to a larger number of women.
the gifts if the school believes that the gift will provide greater benefit to the boys' teams than the girls' teams. Although this option would resolve the Title IX problems, it is not appealing or realistic. Since many private secondary schools use private gifts in order to meet budget demands, these gifts enhance an area of the school that otherwise would not receive additional funds. To deny accepting a gift from a parent, alumni or friend of the school would hurt the recipient athletic program and the institution's relationship with the donor.

Another option a school has is to accept the restricted private donations and to reallocate additional funds to the women's team. This option would allow the school to accept the restricted private donation for the men's team while the school would allocate additional funds from its budget to insure that equal facilities and opportunities existed for both men and women. It would allow the donation to be received in the manner the donor specifies; however, the school would have to increase its own funds on the women's team in order to insure equality. This option is not realistic either. The school would be forced to spend money in rough proportion to the amount of private donations it received. The school would have to generate the funds to spend from a presumably limited budget, and the school would have no method to annually estimate the amount of private donations they would receive. The budget allocation for the women's program might have to come the year following the large private donation.

Lastly, the school could set up a general athletic fund or booster club which would receive and distribute all private donations. This body would include representatives from both men's and women's teams in order to fairly distribute any private donations. Of course, this body could give weight to the donor's preferences, but ultimate allocation would be up to the members of the athletic fund or booster club even if the donation was given for a specific purpose. The members would monitor the spending to insure equal representation of both men's and women's athletic teams and would protect the interests of both sexes.

This approach may discourage private gifts from coming into the school. If a private donor wants to give for a specific program but has no assurances that his/her gift will go to that program, then the donor may be reluctant to give the donation. This result would ultimately hinder the school's overall athletic program.

D. Conclusion

It is hard to imagine that the authors of Title IX intended its reach to prevent the receipt of private donations by secondary educational institutions. From its inception, Title IX has gradually evolved into a more expansive weapon in remedying unequal athletic programs at the collegiate and secondary level. From Title IX's invasion into all programs and activities of an educational institution receiving federal financial assistance, the legislature and the courts seem inclined to apply Title IX broadly.

An educational institution should be cognizant of its potential for Title IX liability in handling its private athletic donations. Following the Cook decision, educational institutions at both the postsecondary and secondary level must insure an equal athletic benefit and opportunity for men and women. This mandate requires
substantially equal facilities, uniforms, travel arrangements, and coaches. The educational institutions must be cautious of a restricted private donation and its impact on a Title IX analysis. The institutions should establish a policy concerning the receipt of donations that will insure equality between the men's and women's programs. The alternative is for the institution to prepare to defend its acceptance of the private donation in a court of law.