

FUNDRAISING: BRIDGING TITLE IX ATHLETICS  
COMPLIANCE OF THE EQUAL TREATMENT  
REQUIREMENT AND THE ADVANCEMENT OF  
WOMEN ADMINISTRATORS IN  
INTERCOLLEGIATE ATHLETICS

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## INTRODUCTION

The softball team is changing for practice in the parking lot as there are no on site locker rooms at their field which is located about a half mile from the athletic offices; the team's male counterpart, the baseball team, enjoys use of a locker room and offices located right next to its field.<sup>1</sup> Other noted disparities include field renovations, equal access to scheduling for use of the indoor hitting facility, and coaches' salaries.<sup>2</sup> These alleged inequities have resulted in a case currently under investigation by the Department of Education's Office of Civil Rights (OCR).<sup>3</sup> Lack of funding has been a perpetual problem for athletic departments as reflected in this complaint and resulting in an increased emphasis on fundraising. Meanwhile, the Longhorn Foundation at the University of Texas under the leadership of Amy Folan, Executive Senior Associate Athletics Director has recorded five of the most successful fundraising years in Foundation history from 2013–2018, boasting its largest membership (16,500+) and raising the highest total production (\$142 million) and Annual Fund total (\$41.3 million) since the Foundation began,<sup>4</sup> despite a football team with a record of 32–31<sup>5</sup> during that time span. Successful fundraising should lead to increased opportunities for women in the athletics director position. Thus, fundraising is the key to address and remedy disparities in equal treatment under Title IX and opportunities for women in collegiate athletics.

Collegiate athletic departments generally rely on donations for facility needs, coaching salaries, student scholarships, as well as

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1. Matt Stahl, *WKU Athletics Under Investigation for Uneven Spending*, WKU HERALD (Oct. 22, 2018), [https://wkuherald.com/news/wku-athletics-under-investigation-for-uneven-spending/article\\_26a73424-d63c-11e8-9ad7-4fe891d6de55.html](https://wkuherald.com/news/wku-athletics-under-investigation-for-uneven-spending/article_26a73424-d63c-11e8-9ad7-4fe891d6de55.html).

2. *Id.*

3. Off. for Civ. Rights, *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools Search*, U.S. DEP'T EDUC. (Mar. 29, 2019, 7:30 AM), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tix.html?queries%5Bstate%5D=KY&queries%5Btod%5D=Title+IX++Athletics>.

4. Amy G. Folan, *Executive Senior Associate Athletics Director*, LONGHORN FOUND., <https://thelonghornfoundation.com/sports/2016/10/6/amy-g-folan-executive-senior-athletics-director.aspx?id=165> (last visited Apr. 10, 2019).

5. *All-Time Results*, UNIV. TEX. (Dec. 3, 2018), [https://texassports.com/sports/2013/7/21/FB\\_0721134841.aspx](https://texassports.com/sports/2013/7/21/FB_0721134841.aspx).

overall program budgets.<sup>6</sup> These are all areas that are considered under the Equal Treatment component of Title IX and can affect compliance with the federal regulations.<sup>7</sup> Under this component of Title IX athletics compliance, OCR has outlined several treatment areas designated for review.<sup>8</sup>

At many collegiate institutions, the giving of money to athletic departments has frustrated Title IX athletics compliance, with the equal treatment component suffering glaring inequities. Schools with a history of receiving “restricted” gifts<sup>9</sup> may have fundamental issues of gender-based disparities.<sup>10</sup> Athletic departments—and especially

6. Brad Wolverton & Sandhya Kambhampati, *Colleges Raised \$1.2 Billion in Donations for Sports in 2015*, CHRON. HIGHER EDUC. (Jan. 27, 2016), <https://www.chronicle.com/article/Colleges-Raised-12-Billion/235058>.

7. See 34 C.F.R. §§ 106.41(c)(1)-(10) (2017).

(c) *Equal opportunity*. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. 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) 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.

*Id.*

8. *Id.*

9. See *Increasingly, Gifts to Colleges Come with Strings Attached*, PHILANTHROPY NEWS DIG. (May 18, 2011), <https://philanthropynewsdigest.org/news/increasingly-gifts-to-colleges-come-with-strings-attached> (discussing the increasing use of restricted gifts); Marjorie Valbrun, *Letting the Donor Decide*, INSIDE HIGHER ED (Oct. 8, 2018), <https://www.insidehighered.com/news/2018/10/08/professors-question-big-donation-saint-louis-university-because-conditions-attached> (discussing a \$50 million dollar donation that came with “stipulations about faculty hiring and research funding that faculty leaders sa[id] violate[d] university polices and academic integrity and freedom”). See generally UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT [hereinafter UPMIFA] (providing guidance on how institutions should manage restricted gifts, including those received through solicitation).

10. See, e.g., Eleanor Clark, *Underfunded and Unconquered: FSU Women’s Athletics Succeed Despite Unequal Funding*, WFSU NEWS (Dec. 19, 2018), <https://news.wfsu.org/post/underfunded-and-unconquered-fsu-womens-athletics-succeed-despite-unequal-funding> (discussing FSU’s potential Title IX compliance issues surrounding \$60 million dollars of a \$100 million dollar giving initiative being

athletic directors—are often presented with ethical dilemmas in accepting such gifts when there are strings attached.<sup>11</sup> The solicitation and application of donations affects Title IX compliance as well as the ability of women to secure athletic director positions at institutions with high levels of donor funding.

Therefore, fundraising continues to transform the structure of collegiate athletic departments.<sup>12</sup> With the necessity to raise more money for college athletics, the role of the athletic director has emphasized an ability to not just solicit, but deliver funds for the department.<sup>13</sup> Traditionally, fundraising has been perceived as a “Good Old Boys” network; this perception reflects the overwhelming percentage of males who serve as athletic director at institutions.<sup>14</sup> The ability to fundraise is a key requirement in the hiring of those positions, but it is also a skill set more and more women have developed.<sup>15</sup>

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earmarked for new football facilities, while only \$5 million is slated for women’s athletics).

11. For a general discussion on the impact of universities’ acceptance of restricted gifts, see Amanda Leone, *Buying Influence in College Athletics: How Much Does It Cost to Put in Your Two Cents?*, 23 SETON HALL J. SPORTS & ENT. L. 221, 224–25, 245 (2015).

12. See Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), [https://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/?utm\\_term=.2376d033e6a7](https://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/?utm_term=.2376d033e6a7) (noting that athletic departments are making more money than ever, in part due to an increase in donations).

13. *Marketing and Fundraising: So You Want to Be an AD*, NCAA, <http://www.ncaa.org/governance/marketing-and-fundraising> (last visited Apr. 11, 2019).

14. *Female Athletic Directors Almost Double Since 1990, Still Lag at D-1 Programs*, HIGHERED DIRECT (Aug. 24, 2018), <https://hepinc.com/newsroom/female-athletic-directors-show-growth-since-1990-still-lag-at-d-i-programs/> (finding that “[i]n the so-called ‘Power Five Conferences’ of the ACC, Big Ten, Pac-12, Big 12, and SEC, the numbers are lower with only five of the 65 athletic departments (7.6 %) being run by women—North Carolina State, Pitt, Penn State, Virginia and Washington.”). North Carolina State’s athletic director, Debbie Yow, is set to retire in the summer of 2019, and with her male replacement already named, the number of “Power Five” female athletic directors will be reduced to four. Adam Rittenberg, *NC State Names Boo Corrigan As Athletic Director*, ESPN (Feb. 4, 2019), <http://www.espn.com/espnw/sports/article/25884705/nc-state-names-boo-corrigan-athletic-director>.

15. For example, before being hired as the athletic director at the University of Washington, Jen Cohen worked as UW’s Senior Associate Athletic Director for Advancement and spearheaded fundraising efforts for several capital projects, including the renovation of Husky Stadium. See *Jennifer Cohen, Director of Athletics, Staff Directory*, UNIV. WASH. ATHLETICS, <https://gohuskies.com/staff.aspx?staff=3> (last visited Apr. 5, 2019).

As the current culture of sport emphasizes the necessity of fundraising, institutions will continually be forced to make decisions on whom to hire to raise that money, as well as how to spend the donations when received. This Article draws the parallel between athletics compliance with the equal treatment requirement of Title IX and the employment of women in athletics through the lens of fundraising. Part I provides a comprehensive overview of the equal treatment requirement of Title IX and how fundraising has been addressed by both policy and the courts. Part II offers a historical review of women administrators in college athletics and reviews hiring practices and traditional barriers confronting women in the NCAA. Finally, Part III offers an analysis of how the power of donations can secure career longevity for women in collegiate athletic departments and ensure legal compliance with Title IX's equal treatment component at the same time.

#### I. THE IMPACT OF FUNDRAISING ON TITLE IX'S EQUAL TREATMENT STANDARD: POLICY REVIEW AND LEGAL INTERPRETATION

After reviewing policy definitions and the development of the equal treatment component of Title IX, this Part will address the effects of raised funds on compliance.

##### *A. Title IX and Equal Treatment*

The passage of Title IX<sup>16</sup> by Congress in 1972 prohibited sex discrimination at institutions receiving federal funding.<sup>17</sup> The regulation was gradually implemented and applied to athletics in terms of participation, scholarships, and treatment.<sup>18</sup> Initially, participation received the majority of the attention, with a three-prong test adopted in 1979 to analyze the accommodation of interest in athletics.<sup>19</sup> The majority of Title IX athletic compliance cases filed

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16. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012).

17. *Id.* § 1681.

18. *See id.* § 1681(a) (“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 . . .”).

19. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86). The policy addresses participation compliance:

“In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of

have been based on participation numbers at institutions.<sup>20</sup> In *Cohen v. Brown University*, the court applied the three-prong test to determine that participation opportunities were not provided in substantial proportion to female enrollment and that the university did not show either a practice of program expansion or full and effective accommodation of the interests and abilities of its female students.<sup>21</sup> Additionally, in 1996, OCR issued a Dear Colleague letter which provided some much-needed guidance regarding the three-part test for intercollegiate athletics.<sup>22</sup>

Title IX also addresses financial equality in intercollegiate athletics as it relates to scholarships. The equality analysis for scholarships is relatively simple and involves a straightforward inquiry based on numbers.<sup>23</sup> Section 106.37(c)(1) states: “To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.”<sup>24</sup> OCR provides specific guidelines in their Dear Colleague Letter to Bowling Green State University that permit a maximum 1% variance in scholarship funds (unless the discrepancy is explained by other non-discriminatory

each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

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

*Id.*

20. See, e.g., *Cohen v. Brown Univ.*, 101 F.3d 155, 163 (1st Cir. 1996).

21. *Id.* at 166.

22. Off. for Civ. Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEPT EDUC. (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

23. See Barbara Osborne, *Failing to Fund Fairly: Title IX Athletics Scholarships Compliance*, 6 TENN. J. RACE, GENDER & SOC. JUST. 83, 88 (2017) (citing 34 C.F.R. § 106.37(c)(1) (2017)).

24. 34 C.F.R. § 106.37(c)(1) (2017).

factors).<sup>25</sup> A lack of compliance with the scholarship regulations of Title IX permeates intercollegiate athletics today, and reflects the general disparities that continue to exist.<sup>26</sup>

The third component of Title IX, the Equal Treatment component, is defined clearly by OCR.<sup>27</sup> The regulation specifically addresses equal opportunity between male and female sports programs and delineates factors that will be considered in a Section 106.41(c) analysis, which include:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.<sup>28</sup>

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25. Off. for Civ. Rights, *Dear Colleague Letter: Bowling Green State University*, U.S. DEPT EDUC. (July 23, 1998), <https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>.

26. Osborne, *supra* note 23, at 91.

27. OFF. FOR CIV. RIGHTS, U.S. DEP'T OF EDUC., TITLE IX RESOURCE GUIDE 11, 13 (2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>.

28. 34 C.F.R. § 106.41(c)(1)–(10) (2017).

The NCAA has further clarified these treatment areas,<sup>29</sup> referring to them as the “laundry list”<sup>30</sup> and detailing the proper analysis to be undertaken for each factor.<sup>31</sup>

If a complaint is filed with OCR claiming unequal treatment, the laundry list is analyzed to determine if the institution is providing “equal athletics opportunities for members of both sexes.”<sup>32</sup> The three-step process includes first collecting the information to decide if there is a negative effect on one sex, identifying any offsetting factors, and then determining the degree of disparity if one exists.<sup>33</sup> This inquiry must be a comprehensive review of the overall men’s athletic programs compared to the overall women’s athletic programs. The comparison of the overall programs must be equal in effect—this is not a sport-by-sport comparison that gauges the equity between individual sports.<sup>34</sup> Inherent differences between sports and sex-neutral factors can impact the review of treatment areas, so a holistic approach is required.<sup>35</sup>

Title IX violations of the equal treatment requirement have been challenged through administrative complaints filed with OCR and litigation.<sup>36</sup> Filing a complaint with the OCR can be done anonymously and does not bar future litigation. OCR will work with

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29. JANET JUDGE & TIMOTHY O'BRIEN, EQUITY AND TITLE IX IN INTERCOLLEGIATE ATHLETICS: A PRACTICAL GUIDE FOR COLLEGES AND UNIVERSITIES 25 (2011), <http://www.ncaapublications.com/p-4268-equity-and-title-ix-in-intercollegiate-athletics-a-practical-guide-for-colleges-and-universities-2012.aspx>.

30. The laundry list includes: Provision and maintenance of equipment and supplies; Scheduling of games and practice times; Travel and per diem expenses; Opportunity to receive tutoring and assignment and compensation of tutors; Opportunity to receive coaching, and assignment and compensation of coaches; Provision of locker rooms, practice and competitive facilities; Provision of medical and training services and facilities; Provision of housing and dining services and facilities; Publicity; Support services; and Recruiting. *Id.* at 25.

31. *Id.* at 25–26.

32. *Id.* at 25.

33. *Id.* at 26.

34. “For example, one department may choose to highlight its women’s basketball team and its men’s wrestling team. The men’s basketball team may end up with equipment that is not of the same quality as the women’s team. When the superior quality of the women’s uniforms is offset by uniforms provided to the men’s wrestling team, it is a permissible disparity. To avoid such misunderstanding, information about the law and the department’s reasoning must be shared with the coaches and student-athletes.” *Id.* at 26.

35. *Id.*

36. *See generally* *Beasley v. Ala. State Univ.*, 3 F. Supp. 2d 1325 (M.D. Ala. 1998) (in *Beasley*, a student filed a claim against a state university and its officers under Title IX and the equal protection clause, however, the claim was dismissed due to lack of standing).

the institution, either allowing the school to self-investigate or opting to investigate itself.<sup>37</sup> Eventually the individual complainant loses control of the process, as it is the institution and OCR who work together to find some type of resolution.<sup>38</sup>

### *B. The Trending Concerns of Equal Treatment*

OCR clearly articulates the areas of athletics that are evaluated for equal treatment. Further aiding in the analysis is the fact that the NCAA has expressly endorsed the OCR's "laundry list" for evaluating athletics compliance with regard to the treatment and benefits components of Title IX. Although institutions are required to evaluate the entire list, the following two sections discuss the areas that are often the focus of complaints and current trend observations in intercollegiate athletics.

#### 1. Locker Rooms and Practice and Competitive Facilities

Several factors are considered when determining facility compliance, including availability, maintenance, and quality.<sup>39</sup> Many times, this evaluation uncovers noncompliance. For example, Adrian College built a multi-sport complex that lacked women's locker rooms. A year later, the College built a hockey arena for men's and women's hockey, but the women's locker room was smaller and had inferior amenities.<sup>40</sup> Other facility factors include signage, number of bathroom and shower stalls, and location of the facility in regard to the locker room.

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37. Erin E. Buzuvis & Kristine E. Newhall, *Equality Beyond the Three-Part Test: Exploring and Explaining the Invisibility of Title IX's Equal Treatment Requirement*, 22 MARQ. SPORTS L. REV. 427, 438 (2012).

38. *Id.* at 439.

39. See Osborne, *supra* note 23, at 86–87.

40. Dean Cousino, *Former Adrian College Softball Coach Discusses Title IX Complaint*, DAILY TELEGRAM (Nov. 15, 2012, 2:00 PM), <https://www.lenconnect.com/article/20121115/NEWS/121119734>. See generally Doug Lederman, *Adrian College Agrees to Fix Title IX Violations*, INSIDE HIGHER ED. (Sept. 14, 2011), <https://www.insidehighered.com/quicktakes/2011/09/14/adrian-college-agrees-fix-title-ix-violations> (discussing a settlement between Adrian College and OCR: The college was required to remedy gender inequities in their athletics programs, including the addition of another sports team and locker room).

## 2. Medical and Training Facilities and Services

With the rise in concussion awareness and mental health concerns, the provision of proper and quality medical care is subject to heightened scrutiny. Factors to be assessed include availability of medical personnel, insurance coverage, strength and conditioning facilities, availability of strength and conditioning facilities, and availability and qualification of athletic trainers.<sup>41</sup> The emotional, mental, and physical health of female athletes<sup>42</sup> has particularly been discussed and highlighted as an area of concern. At the 2019 NCAA National Convention, the Power Five conferences committed to addressing mental health services and resources.<sup>43</sup> Equal treatment would promote the availability and quality of these resources and services.

### *C. Understanding Fundraising in the Context of Equal Treatment*

Most attention and publicity given to Title IX violations has focused on the equal opportunity regulation, while equal treatment is under-examined by academics and overlooked by administrators.<sup>44</sup> Commonly, equal treatment is affected by donations because money is raised for upgrades, travel, meals, and other program needs.<sup>45</sup> Issues surrounding fundraising and donor gifts to athletics are

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41. See Osborne, *supra* note 23, at 86–87.

42. See generally Marin Christensen, *Female Athletes Aren't Treated the Same As Men, It's Time GW Turns the Tide*, GW HATCHET (Apr. 9, 2018, 2:05 AM), <https://www.gwhatchet.com/2018/04/09/female-athletes-arent-treated-the-same-as-men-its-time-gw-turns-the-tide/> (opinion article highlighting the concerns for female athletes surrounding mental health and physical injury).

43. See generally Michelle B. Hosick, *Access to Mental Health Services Guaranteed by Autonomy Conferences*, NCAA (Jan. 24, 2019, 6:58 PM), <http://www.ncaa.org/about/resources/media-center/news/access-mental-health-services-guaranteed-autonomy-conferences> (noting that at the 2019 NCAA Convention, the Atlantic Coast, Big Ten, Big 12, Pac-12 and Southeastern conferences unanimously adopted legislation guaranteeing access to mental health services and resources for Division I student athletes).

44. See Kristen Galles, *Title IX and the Importance of a Reinvigorated OCR*, ABA (July 1, 2010), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol37\\_2010/summer2010/title\\_ix\\_and\\_the\\_importance\\_of\\_a\\_reinvigorated\\_ocr/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol37_2010/summer2010/title_ix_and_the_importance_of_a_reinvigorated_ocr/). The three-prong test relating to participation is detailed while very little mention of equal treatment accompanies dialogue or research on compliance.

45. See Osborne, *supra* note 23, at 86–87.

commonly misunderstood as they are not specifically covered in the laundry list of treatment factors.<sup>46</sup>

Although raised funds may be allocated to a specified program or project, the impact of acceptance of targeted donations may affect the athletic department's compliance with Title IX. "No matter in what form donations arrive—cash, ticket 'taxes,' equipment, endowments, services—once expended or provided to teams, those donations must be considered in the institution's evaluation of its equity obligations."<sup>47</sup> Targeted donations may be accepted, but that money will be looked at as the institution's as a whole.<sup>48</sup> Thus, acceptance of any gift must account for the impact on equal treatment of men's and women's sports.

Additionally, institutions should have a consistent approach to athletic fundraising as Title IX requires that the opportunity to fundraise be applied in a non-discriminatory manner.<sup>49</sup> Both men's teams and women's teams should have the opportunity to fundraise equally, and university resources should support and aid all programs in securing donations.<sup>50</sup> Support services and institutional personnel within the athletic department should be provided similarly to men's and women's programs.<sup>51</sup>

Most importantly, gifts provided for student-athletes from donations, both monetary and non-monetary, are viewed as gifts provided to the institution as a whole.<sup>52</sup> Regardless of the type of donations received—cash, equipment, endowments, services—once spent or provided to teams, those donations must be considered in the institution's evaluation of its gender equity obligations. Private sponsorships are not prohibited by Title IX or OCR's policy directives as a means to supplement financial resources for an athletic

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46. *See id.*

47. NCAA, GENDER EQUITY PLANNING: BEST PRACTICES 7, <http://www.ncaa.org/sites/default/files/Final%2Bonline%2Bversion.pdf>.

48. *Id.*

49. David Kelley, *Fundraising and Gender Equity: Clearing Up the Confusion*, NAT'L FED'N ST. HIGH SCH. ASS'NS (Apr. 13, 2016), <https://www.nfhs.org/articles/sports-fundraising-and-gender-equity-clearing-up-the-confusion/>.

50. *See* JUDGE & O'BRIEN, *supra* note 29, at 53.

51. *Id.* at 50. Although not specifically listed, the administrative support for fundraising should be included in any analysis of equality because the NCAA's Title IX compliance checklist includes consideration of whether "administrative support from the various areas within the athletics department [are] available for all teams." *Id.*

52. *Id.* at 54 ("[I]nstitutions must be aware that even though targeted donations are received for a particular purpose, all of the money that comes in is considered the institution's money as a whole.").

department.<sup>53</sup> However, institutions must be aware that even though targeted donations are received for a particular purpose, all of the funds are considered the institution's money. The outside funds do not alleviate the equal treatment requirement; as one court stated: "Once a university receives a monetary donation, the funds become public money, subject to Title IX's legal obligations in their disbursement."<sup>54</sup> If an institution accepts funding, then an equal treatment analysis may trigger the need to reallocate some budgeted money from men's programs to women's programs in order to offset the effect of the targeted donation.

## II. THE INFLUENCE OF TITLE IX AND FUNDRAISING ON THE HIRING OF WOMEN ADMINISTRATORS

Current statistics show that women accounted for only 11.2% of athletic directors at the Division I (DI) level for the 2016–2017 academic year.<sup>55</sup> Title IX and other federal employment laws work to improve the opportunities for women in intercollegiate athletics, as well as prohibit sex discrimination based in the hiring process. Although fundraising has become an essential skill required of athletic directors, at the end of the day, it is a subjective evaluation that influences who is hired to the position.

### *A. The Role of Federal Legislation in Assisting the Gender Disparity in the Role of Athletic Director*

Federal legislation exists to address employment discrimination. Based on statistics of administrators in intercollegiate athletics that

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53. Katrina Berishaj & Gregory DiBella, *Athletics & Title IX of the 1972 Education Amendments*, 15 GEO. J. GENDER & L. 255, 273 (2014); see also Off. for Civ. Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*, U.S. DEPT' EDUC. (July 11, 2003), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> ("[P]rivate sponsorship of athletic teams will continue to be allowed. Of course, private sponsorship does not in any way change or diminish a school's obligations under Title IX.")

54. *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1048 (8th Cir. 2002). The court went on to explain that a school may not skirt the requirement of providing both sexes equal opportunity in athletic programs by providing one sex more than substantially proportionate opportunity through the guise of "outside funding." *Id.* Furthermore, the University would still be subject to Title IX if accepting the funds although there was no obligation to take the donation. *Id.*

55. RICHARD LAPCHICK, INST. FOR DIVERSITY AND ETHICS IN SPORT, 2017 COLLEGE SPORT RACIAL AND GENDER REPORT CARD 3 (2017), <http://nebula.wsimg.com/5665825afd75728dc0c45b52ae6c412d?AccessKeyId=DAC3A56D8FB782449D2A&disposition=0&alloworigin=1>.

reveal that men vastly outnumber women,<sup>56</sup> it could be implied that employment discrimination contributes to the significant gender gap.<sup>57</sup> Administrative positions, in particular, are vulnerable to implicit biases<sup>58</sup> and gender assumptions. This vulnerability necessitates statutory protection.

Beyond female athlete equality issues, Title IX is also discussed frequently regarding issues surrounding women's employment in athletics. Title IX prohibits discrimination based on sex for positions within collegiate athletic departments, including athletic directors.<sup>59</sup> If an individual believes they were a victim of employment discrimination, the claim is referred to the Equal Employment Opportunity Commission (EEOC) by OCR.<sup>60</sup> Additionally, Title IX prohibits the consideration of marital or parental status as a factor in the hiring of women, and there should be no differentiation of a person who is the head of household or principal wage earner in a family.<sup>61</sup> These are common concerns that reflect implicit biases for women seeking athletic director positions.

In addition to the protection provided by Title IX, women seeking employment in collegiate athletic departments are also protected by Title VII. Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees or applicants on the basis of sex, as well as race, color, national origin, or religion.<sup>62</sup> Like Title IX, Title VII also protects the plaintiff from retaliation by their employer.<sup>63</sup> Title VII procedure differs in that a

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56. See generally R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL, NATIONAL STUDY: THIRTY-SEVEN YEAR UPDATE (2014), <http://acostacarpenter.org/2014%20Status%20of%20Women%20in%20Intercollegiate%20Sport%20-37%20Year%20Update%20-%201977-2014%20.pdf> (updating a longitudinal study that tracks the participation of women in intercollegiate athletics). "Females represent about 57% of the students on campus in 2014. Females represent 36.2% of the athletics administrative staffs yet only 22.3% of the head administrators (athletics directors). In 2014, 11.3% of athletics programs have NO FEMALE anywhere in their administrative structures." *Id.* at 35.

57. Erin Buzuvis, *Coaches in Court: Legal Challenges to Sex Discrimination in College Athletics*, 6 TENN. J. RACE, GENDER & SOC. JUST. 41, 44 (2017).

58. *Id.* at 45.

59. Off. for Civ. Rights, *Nondiscrimination in Employment Practices in Education*, U.S. DEPT EDUC. (Aug. 1991), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

60. *Id.*

61. *Id.*

62. 42 U.S.C. § 2000e-2(a) (2018).

63. See 42 U.S.C. § 2000e-3(a) (2018); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005).

complaint must be filed with the EEOC or an equivalent state agency prior to commencing a lawsuit.<sup>64</sup> Filing a suit under Title IX, therefore, has advantages over Title VII: a Title VII plaintiff must get agency approval to sue and will likely be subject to statutory limits on their relief.<sup>65</sup>

### *B. Athletic Success, Fundraising, and Women*

Historically, several institutions structured their athletic departments so men's programs were separate from women's programs.<sup>66</sup> During the 1990s when Title IX litigation increased, many athletic departments abandoned the dual approach and housed all athletic teams under one organizational structure.<sup>67</sup> The gradual merger resulted in women assuming roles subject and subordinate to their male counterparts.<sup>68</sup> Of the last few Power Five schools to merge men's and women's athletic departments (The University of Arkansas in 2007,<sup>69</sup> The University of Tennessee in 2011,<sup>70</sup> and The University

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64. See Buzuvis, *supra* note 57, at 47.

65. See *id.*

66. Welch Suggs, *Women's Athletics Departments Verge on Extinction*, CHRON. HIGHER ED., Nov. 19, 2004, at A33 ("Until the 1970s, women's sports and men's sports had nothing to do with each other. Men's athletics departments looked much like today's coed athletics programs—entities nearly independent of the universities they represent, employing full-time coaches, trainers, and administrative staff. Female athletes played in a lower-key, all-women's world. In it, their coaches and athletics directors were full-time professors of physical education who coached on the side. These professor-coaches were fiercely protective of the mission of educational sports, fearing that the overemphasis on commercialism and win-at-all-costs mentality of men's sports could pollute their own teams.").

67. See Ellen J. Staurowsky, *Title IX and College Sport: The Long Painful Path to Compliance and Reform*, 14 MARQ. SPORTS L. REV. 95, 105 (2003).

68. Suggs, *supra* note 66 ("After the passage of Title IX of the Education Amendments of 1972, most colleges eliminated those women's departments, moving women's teams into men's departments and naming the women's athletics director the associate athletics director. Only a handful of colleges maintained separate departments."); see also Deborah L. Rhode & Christopher J. Walker, *Gender Equity in College Athletics: Women Coaches As a Case Study*, 4 STAN. J. C.R. & C.L. 1, 29 (2008).

69. *Arkansas to Merge Men's, Women's Athletic Programs*, ESPN (Nov. 15, 2007), <http://www.espn.com/college-sports/news/story?id=3112264>.

70. Mechelle Voepel, *Women in Athletic Departments: Welcome or Marginalized?*, ESPNW (June 21, 2017), <http://www.espn.com/espnw/culture/feature/article/19686799/women-athletic-departments-welcomed-marginalized>.

of Texas at Austin in 2017<sup>71</sup>), none of the mergers resulted in a woman taking the lead role as athletic director.<sup>72</sup>

With merged departments, the emphasis on generating revenue has continued to escalate.<sup>73</sup> Fundraising is consistently listed in the job description for athletic directors.<sup>74</sup> In the past, many female athletic directors at the Division I level have acknowledged the challenge of securing donor gifts.<sup>75</sup> However, the past decade has seen an increase of women in fundraising positions as many organizations have emphasized the need to secure funds as an essential role of the athletic director.<sup>76</sup>

Since donations can be linked to athletics success,<sup>77</sup> there is extreme pressure to hire an individual who not only manages the internal operations of an athletic department, but also can bring in the money. Women are commonly overlooked in the fundraising process, yet evidence shows that females are increasing giving to athletic departments.<sup>78</sup> Female donors should not be disregarded because they constitute a significant segment that is growing in size and importance.<sup>79</sup> Additionally, since the 1990s, it has been shown that women are outliving men and will control both their personal and

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71. Brian Davis, *As Chris Del Conte Takes Over, How Will Texas Women's Athletics Be Impacted?*, HOOKEM.COM (Dec. 12, 2017), <https://www.hookem.com/story/chris-del-conte-takes-will-texas-womens-athletics-impacted/>.

72. *See supra* notes 69–71.

73. Leone, *supra* note 11, at 225.

74. *See* NCAAMARKET, <https://ncaamarket.ncaa.org/jobseekers/> (last visited Apr. 5, 2019). A general search of “athletic director” positions provides a current listing of open positions with job descriptions.

75. *See* Jerome Quarterman et al., *Challenges Confronting Female Intercollegiate Athletic Directors of the NCAA Member Institutions by Division*, 40 C. STUDENT J. 528, 536–37 (2006). This study surveyed Division I female athletic directors, finding that nearly 75% of respondents stated that their biggest challenges were associated with budget and fundraising, Title IX issues including gender and pay equity, and facilities. *Id.* at 535.

76. *See Women Athletic Directors Lead Two of the Top Five College Football Programs*, WOMEN LEADERS C. SPORTS, <https://www.womenleadersincollegesports.org/WL/Resources/Leadership-Content/sandy-barbour-jen-cohen-top-five-football-programs.aspx> (last visited Apr. 5, 2019).

77. Rhode & Walker, *supra* note 68, at 26 (discussing how donations can make possible “adequate salaries, facilities, scholarships, staff, equipment, travel, recruiting, marketing, and other operational support”).

78. *See* Rodoula Tsiotsou, *Investigating Differences Between Female and Male Athletic Donors: A Comparative Study*, 11 INT'L J. NONPROFIT & VOLUNTARY SECTOR MARKETING 209, 211 (2006).

79. *Id.* at 220.

familial finances at some point in their lives.<sup>80</sup> Developing both male and female donors is a necessity for athletic department growth and stability, and a female athletic director's approach to fundraising may benefit the overall athletic department—especially where there is disparity in equal treatment that can be remedied only through unallocated funding.

### III. THE OPPORTUNITY FOR FUNDRAISING TO EFFECTIVELY IMPACT EQUAL TREATMENT AND CAREER ADVANCEMENT

A cultural shift in intercollegiate athletics continues to occur as the NCAA wrestles with how to address the increasing power of FBS schools that generate billions of dollars—much of which come from donors.

#### *A. Restructuring the Approach to Fundraising: Unrestricted Gifts and General Athletic Fund Contributions*

The nature of a contribution made to an athletic department can positively impact Title IX equal treatment athletic compliance through simple adjustments and philosophies. First, recognizing that restricted gifts may be accepted but may need to be offset could require adjusting program budgets.<sup>81</sup> This approach may require additional resources and attention to fundraising for sports that do not consistently have donor funding.<sup>82</sup> Another tactic adopted by athletic departments is to designate a certain percentage of any gift to be allocated to a general athletic fund.<sup>83</sup> This general fund can then be used to address immediate and constant equal treatment concerns. The allocated money is available to remedy any ongoing or historic disparities, while the remainder can be applied as the donor desires.

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80. See Ellen J. Staurowsky, *Women and Athletic Fundraising: Exploring the Connection Between Gender and Giving*, 10 J. SPORT MGMT. 401, 403 (1996).

81. For example, if a donor provides daily meals for a specific team, then whether or not other teams receive daily meals must also be evaluated. Supplementing a program's budget to also have daily meals may be necessary to offset the meal donation.

82. Leo Goldman & Austin Horn, *Left Behind: As Columbia Spending Rises, Women's Sports Funding Stagnates*, COLUM. SPECTATOR (Mar. 8, 2018, 6:00 AM), <https://www.columbiaspectator.com/sports/2018/03/08/left-behind-as-columbia-spending-rises-womens-sports-funding-stagnates-2/>.

83. Several institutions have general funds for athletics. See *Wooden Athletic Fund*, <https://woodenathleticfund.com/about-us/wooden-athletic-fund.html> (last visited Apr. 5, 2019).

Furthermore, athletic departments are addressing concerns regarding restricted gifts through creative fundraising ideas that will incentivize their donors to contribute to the annual fund.<sup>84</sup> Research shows that one significant factor for donors is the desire to have priority seating.<sup>85</sup> Many fundraising initiatives center on providing better seats as well as additional benefits such as parking to solicit general fund donations. Obviously, the success of the athletic teams directly contributes to the demand for tickets, so on-field performance can affect the success of this strategy.<sup>86</sup> Overall, better understanding of donor incentives, including gender differences in motivation, can help athletic directors lead successful fundraising campaigns.

*B. Women's Access to the Athletic Director Position Through Fundraising*

Male-dominated industries like sports have presented barriers for women to advance to highest ranks due to several factors, including experience, hostile environment, and lack of mentors.<sup>87</sup> In college athletics at the Division I level, the two areas most valued by hiring committees for the athletic director position are fundraising experience and sport supervision of a football program.<sup>88</sup> Considering that women do not play collegiate football, the challenge has been for women to distinguish the management of a program as a business concept based on a skill set independent of gender while also pursuing opportunities to prove their ability to secure donor funds.

At the conclusion of the 2018 NCAA Football regular season, women ran two of the athletic departments that housed AP Top-25 football programs: the University of Washington and Penn State University.<sup>89</sup> Arguably, a national ranking reflects competent leadership in the athletics department which can be undertaken by women. Currently at the Division I level, women make up 13% of all athletic directors, and the majority of these women have experience

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84. See *UVA Priority Points*, VA. ATHLETICS FOUND., <http://virginiaathleticsfoundation.com/priority-points/> (last visited Apr. 5, 2019).

85. James M. Gladden, Daniel F. Mahony & Artemisia Apostolopoulou, *Toward a Better Understanding of College Athletic Donors: What Are the Primary Motives?*, 14 *SPORT MARKETING Q.* 18, 19 (2005).

86. *Id.*

87. Elizabeth A. Taylor & Janelle E. Wells, *Institutionalized Barriers and Supports of Female Athletic Directors: A Multilevel Perspective*, 10 *J. INTERCOLLEGIATE SPORT* 157, 160 (2017).

88. *Id.* at 160.

89. See *Women Athletic Directors*, *supra* note 76.

primarily in fundraising and/or marketing.<sup>90</sup> The ability to secure donations is a distinguishing feature for women pursuing an athletic director position, and this fundraising focus provides the capacity to remedy any Title IX equal treatment disparities.

#### CONCLUSION

The fundraising aspect of intercollegiate athletics has direct impact on Title IX's equal treatment areas as well as the potential for women to secure the athletic director position. Of even greater value is the impact of addressing equal treatment and career advancement of women for future generations. The residual effect of increasing the number of women athletic directors is that these women in the athletic director position can influence the department as a whole. According to *Women in Intercollegiate Sport*, the percentage of female coaches was higher in athletic departments that were headed by women than in those headed by men.<sup>91</sup> The awareness of the equal treatment concerns, coupled with the increasing presence of women in fundraising (as both donors and solicitors), presents a positive approach for the future success of athletic departments—free from worries of Title IX noncompliance and sex-based employment discrimination litigation.

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90. Press Release, Women Leaders in College Sports, NCAA Division I, II, and III Athletic Director Research (Jan. 24, 2019), <https://www.womenleadersincollegesports.org/WL/about/press-releases/athletic-director-updated-research.aspx>.

91. Alexandra Vollman, *Female Athletic Directors: A Scarce but Positive Influence*, INSIGHT INTO DIVERSITY (Feb. 15, 2016), <http://www.insightintodiversity.com/female-athletic-directors-a-scarce-but-positive-influence/>. “Specifically, in Division I departments led by women, 46.8 percent of coaches were female, compared with 43 percent in departments led by men. In the other two divisions, an even greater disparity existed.” *Id.*