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

Kim Turner*

Introduction

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

* Kim Turner is a senior Staff Attorney for the Gender Equity & LGBT Rights Program and the Fair Play for Girls in Sports Project of the non-profit Legal Aid At Work (formerly the Legal Aid Society-Employment Law Center) in San Francisco. She focuses on enforcing Title IX on behalf of girls and young women in federally funded K–12 schools, particularly in low-income areas, in addition to the organizational focus on workers' rights. She wishes to thank Elizabeth Kristen, Kristen Galles, Juliana Franco, David Nahmias, and Amis Pan for their contributions to this Article.

1. 42 U.S.C. § 2000e (2012).

2. 20 U.S.C. § 1681 (2012).

3. There are approximately 100,000 public elementary, middle, and high schools in the United States. *Fast Facts*, Nat'l Ctr. for Educ. Stat., https://nces.ed.gov/fastfacts/ (last visited Feb. 18, 2017). Roughly eighty-five percent of high schools offer sports programs. *See* Don Sabo & Philip Veliz, SHARP Ctr. for Women & Girls, The Decade of Decline: Gender Equity in High School Sports 23–24 (Oct. 2012), https://www.womenssportsfoundation.org/wp-content/uploads/2012/10/ocr_report_2v3100412-final.pdf. Four-year colleges and universities report employing nearly 80,000 head or assistant coaches. *See* Dep't of Educ., How Many Head Coaches Were Reported? (2014), https://ope.ed.gov/athletics/Trend/public /#/answer/3/301/main?row=-1&column=-1 (26,233 head coaches reported); Dep't of Educ., How Many Assistant Coaches Were Reported? (2014), https://ope.ed.gov/athletics/Trend/public/#/answer/3/302/main?row=-1&column=-1 (52,788 assistant coaches reported). In 2014, 14,000 women were employed as intercollegiate athletic professionals, of whom 4,154 were coaches and 7,503 were assistant coaches. *See* R. Vivian Acosta & Linda Jean Carpenter, Women in Intercollegiate Sport A (2014) (unpublished manuscript), http://www.acostacarpenter.org/2014%20Status%20of%20 Women %20in%20Intercollegiate%20Sport%20-37%20Year%20Update %20-%201977-2014%20.pdf. Thus, there are likely hundreds of thousands of coach-employees throughout the United States who could encounter discrimination actionable under Title VII or Title IX.

4. Coach-employee claims can arise in primary, secondary, and post-secondary school settings.

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

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

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

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

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

I. Background

A. Title VII and Title IX

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

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

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

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

10. 20 U.S.C. § 1681(a), (b) (2012).

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

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

13. 20 U.S.C. § 1681.

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

15. *See* 34 C.F.R. § 106.52–.57.

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

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

B. Title IX Progress and Persistent Athletics-Related Inequities

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

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

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

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

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

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

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

23. *Id.*

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

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

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

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

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

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

28. *See id.*

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

30. *See id*.

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

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

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

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

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

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

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

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

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

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

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

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

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

39. Self-reported California private and public high school data for the 2015–16 school year reveals that the total number of employed female coaches for all students is just 14,088 (twenty-three percent) in comparison to 48,304 (seventy-seven percent) employed male coaches. CAL. INTERSCHOLASTIC SPORTS FED'N, CALIFORNIA INTERSCHOLASTIC FEDERATION 2015–2016 PARTICIPATION CENSUS SUBMISSION DATA (2016), https://view.officeapps.live.com/op/view.aspx?src=http://www.cifstate.org/coaches-admin/census/2015-_2016_CIF_Participation_Census_ Public.xlsx (last visited Mar. 6, 2017).

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

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

42. *See* NAT'L FED'N OF STATE HIGH SCH. ASS'NS, *supra* note 20, at 55.

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

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

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

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

A. *Varying Patterns of Discrimination*

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

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

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

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

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

48. *Id.* at 171–72.

49. *Id.*

50. *Id.* at 183–84.

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

B. Varying Approaches to Suit, Goals, and Implications

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

51. *Id.* at 178.

52. *Id.* at 181.

53. *See* Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 871 (9th Cir. 2014) (affirming judgment in favor of high school female athletes' class Title IX retaliation claim regarding, in part, the termination of their coach after he complained about gender inequities as to the team, although the coach was not a plaintiff).

54. *See* Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1158–59, 1163 (C.D. Cal. 2015) (upholding student-athletes' federal Title IX claims based on allegations that university and its employees harassed and discriminated against them for sexual orientation).

55. 885 F. Supp. 378 (N.D.N.Y. 1995).

56. *Id.* at 381–83.

57. 71 F. Supp. 2d 789 (S.D. Ohio 1998).

58. *Id.* at 791.

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

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

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

59. *Id.* at 793–94.
60. No. 15-cv-03740-RHK-LIB, 2015 WL 5721601 (D. Minn. Sept. 28, 2015).
61. *Id.*
62. 691 F.3d 85 (2d Cir. 2012).
63. *Id.* at 91.
64. *See* Biediger v. Quinnipiac Univ., No. 3:09-cv-621, 2010 WL 2017773, at *1 n.1 (D. Conn. May 20, 2010) ("Robin Lamott Sparks, the Quinnipiac University women's volleyball coach, is also a named plaintiff in this case. She, however, is suing only on her own behalf and is not claiming to represent the putative class at issue here.").
65. *Biediger*, 691 F.3d at 92 n.2.
66. *Id.*
67. 275 F.3d 1274 (10th Cir. 2002).
68. *See id.* at 1274–76.
69. *See generally Biediger*, 691 F.3d 85; *Paton*, 275 F.3d 1274.
70. *See generally Biediger*, 691 F.3d 85; *Paton*, 275 F.3d 1274.

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

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

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

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

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

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

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

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

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

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

79. *Id.*

80. *See id.*

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

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

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

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

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

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

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

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

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

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

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

88. *Id.*

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

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

89. *Id.*

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

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

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

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

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

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

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

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

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

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

D. Scope of Action and Relief

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

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

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

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

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

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

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

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

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

E. Standards Under Title VII vs. Title IX

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

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

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

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

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

111. *Id.* at 65, 69–71.

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

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

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

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

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

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

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

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

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

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

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

120. *Id.*

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

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

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

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

F. Retaliation

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

III. Preemption

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

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

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

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

126. *Id.* at 867.

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

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

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

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

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

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

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

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

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

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

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

134. *Id.* at 180.

135. *Id.*

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

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

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

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

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

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

138. *Id.* at *2.

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

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

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

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

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

144. *Id.*

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

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

B. Courts Holding Title VII Preempts Title IX

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

146. *Id.*
147. No. 2:16-cv-00273-DS, 2016 WL 4287542 (D. Utah Aug. 15, 2016).
148. *Id.* at *3.
149. *Id*. (court relied on Winter v. Pa. State Univ., 172 F. Supp. 3d 756, 775 (M.D. Pa. 2016) ("[I]f Congress intended for Title VII to preempt employment discrimination claims under Title IX, it could have drafted Title IX, which was enacted *after* Title VII, to state as much.") (emphasis in original)).
150. *See, e.g.*, Mehus v. Emporia State Univ., 295 F. Supp. 2d 1258, 1272 (D. Kan. 2004) (volleyball coach's Title IX and Title VII discrimination claims permitted). In *Mehus*, as in other cases, the court relied on *Cannon*, *Franklin*, and *Bell* to support the plaintiff's implied right of action under Title IX regarding employment discrimination, sustainable with Title VII claims. *Id.*
151. 66 F.3d 751, 758 (5th Cir. 1995).
152. *Id.* at 752.
153. *Id.* at 758.
154. *Id.* at 753.
155. *Id.* at 755.

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

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

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

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

157. *See id*. at 752.

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

159. *Id.*

160. *Id.*

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

162. *Id.* at 791.

163. *Id.*

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

165. *Id.* at 840.

166. *See id.*

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

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

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

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

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

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

169. *Id.* at *4.

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

171. *Id.* at 193.

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

173. *Id.* at *5.

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

C. Courts Split or Undecided on Preemption

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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