

# Sexual Orientation Harassment and Discrimination: Legal Protection for Student-Athletes

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## I. INTRODUCTION AND BACKGROUND INFORMATION

In 1986, Maureen T. "Rene" Portland, Penn State University's women's basketball coach, stated in a *Chicago Sun-Times* article that she would not allow lesbians on her teams.<sup>1</sup> In 1991, her intolerance of homosexuality and lack of "appreciation" for the homosexual lifestyle was reaffirmed in the *Philadelphia Inquirer*.<sup>2</sup> While Penn State discouraged Portland from continuing to state such policies publicly and soon thereafter adopted a university-wide nondiscrimination policy,<sup>3</sup> Portland has remained the women's basketball coach with few other steps taken to address the matter. This inaction and apathy should not come as a surprise since homophobia continues to permeate playing fields, coaching, and athletic administration and, as columnist Graham Hayes argues, "is the last stronghold of acceptable hate."<sup>4</sup>

In 2005, Portland's name was again in the news, not for her coaching success, but as the defendant in a discrimination and harassment lawsuit filed by a former player. Jennifer Harris, a top scorer and regular starter on the Lady Lions women's basketball team, was cut from the team directly after the season that year. Although Portland claimed that Harris' dismissal from the

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1. Bill Figel, *Lesbians in World of Athletics*, CHICAGO SUN-TIMES, June 16, 1986, at 119.

2. Jere Longman, *Lions Women's Basketball Coach is Used to Fighting and Winning: Rene Portland has Strong Views on Women's Rights, Lesbian Players and Large Margins of Victory*, THE PHILADELPHIA INQUIRER, March 10, 1991, at G01.

3. The Pennsylvania State University, *Policy AD42 Statement on Nondiscrimination and Harassment*, available at <http://guru.psu.edu/POLICIES/Ad42.html> (last revised May 19, 2006) (prohibits discrimination and harassment against any person because of age, ancestry, color, disability or handicap, national origin, race, religious creed, sex, sexual orientation, gender identity or veteran status).

4. Graham Hays, *Penn St. Coach Should be Packing* (Apr. 19, 2006), <http://www.clubs.psu.edu/up/psupride/articles/ESPN%2004202006.pdf>.

team was solely performance and attitude related,<sup>5</sup> Harris alleged that her dismissal was due to her perceived sexual orientation.<sup>6</sup> Harris' case against Portland "is a civil rights action seeking relief for a pattern and practice of discrimination on the basis of race, gender, and sexual orientation."<sup>7</sup> Penn State conducted an investigation independent of the lawsuit and concluded that Portland had "created a 'hostile, intimidating and offensive environment'"<sup>8</sup> based on Harris' perceived sexual orientation. The school fined Portland \$10,000, but dismissed Harris' allegations of racial discrimination. In the meantime, Harris has transferred to James Madison University where she will complete her basketball eligibility starting with the 2006-2007 season. While unable to reach a settlement in a court ordered mediation session in May of 2006, Harris and Portland eventually settled the case in February of 2007.<sup>9</sup> The terms of the settlement will remain confidential, but a spokeswoman for the National Center for Lesbian Rights stated that Penn State has agreed to take steps to protect student-athletes and others from similar treatment in the future.<sup>10</sup>

The importance of establishing a legal course of action for student-athletes who face discrimination based on their sexual orientation cannot be understated. While full inclusion and affirmation<sup>11</sup> of gay, lesbian, and bisexual student-athletes should be the ultimate goal, adoption and enforcement of diversity policies and practices is an important step to ensuring

5. Bob Hohler, *When the Fouls Get Very Personal: Player's Suit Claims Penn State Coach was Biased against Lesbians* (March 26, 2006), [http://www.boston.com/sports/colleges/womens\\_basketball/articles/2006/03/26/when\\_the\\_fouls\\_get\\_very\\_personal/](http://www.boston.com/sports/colleges/womens_basketball/articles/2006/03/26/when_the_fouls_get_very_personal/).

6. *Penn State Reprimands, Fines Coach Portland*, ASSOCIATED PRESS (Apr. 18, 2006), <http://sports.espn.go.com/new/news/story?id=2412730> (Harris says that she is not gay, yet the discrimination and harassment lawsuit is focused on her [perceived] sexuality).

7. Calla Devlin, *Jennifer Harris v. Penn State Fact Sheet*, NATIONAL CENTER FOR LESBIAN RIGHTS (2006), [http://www.nclrights.org/cases/pdf/Penn\\_State\\_Case\\_Fact\\_Sheet.pdf](http://www.nclrights.org/cases/pdf/Penn_State_Case_Fact_Sheet.pdf) (stating that Harris is African-American and Portland is white). The intersections of Harris' race, gender, and sexual orientation should not be diminished, yet the discrimination and harassment based on her perceived sexual orientation are most relevant to this analysis. See generally SUSAN K. CAHN, *COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN'S SPORT*, 110-139 (1994) (discussing black women and track and field and the intersections of race, class, and gender as relevant to sport participation); See also Jennifer E. Bruening, *Gender and Racial Analysis in Sport: Are All the Women White and All the Blacks Men?* 57(3) *QUEST*, 330-349 (2005).

8. *Penn State Reprimands*. . . , *supra* note 6.

9. Devlin, *supra* note 7.

10. Frank Fitzpatrick, *Dismissed Player Ends Suit Against Penn State, Coach: The Settlement Wasn't Disclosed. She Said She was Booted Because of a Belief She was a Lesbian*, THE PHILADELPHIA INQUIRER, Feb. 7, 2007, Sports.

11. PAT GRIFFIN, *STRONG WOMEN, DEEP CLOSETS: LESBIANS AND HOMOPHOBIA IN SPORT* 210 (1998).

a safe and productive environment for all athletes. Homophobia exists at all levels of sport and is often met with institutional indifference.<sup>12</sup> Homophobia can take the form of verbal, emotional, and/or physical abuse and can have a very negative impact on a student-athlete's sporting experience. Portland's alleged discrimination and harassment against Harris is only one example of many other instances of homophobic acts in sport that often go unreported and unresolved.

Homophobia in sport stems from the premise that sport is an expression of masculinity. Characteristics such as strength, power, and speed are associated with male heterosexuality and are often defining components of stereotypically male sports such as football, baseball, and ice hockey. "Men who rely on these masculine stereotypes often use them to assert and preserve their superiority over men who show stereotypically feminine stereotypes"<sup>13</sup> and over women who show stereotypically masculine stereotypes. In *Taking the Field: Women, Men, and Sports*, Michael Messner explains that misogyny and homophobia are used as mechanisms to establish hierarchies within male athletic teams.<sup>14</sup> Players use disparaging comments to degrade one another in order to affirm their own masculinity, to distance themselves from gays and women, and in order to belong to the group. Coaches also "use derogatory terms for gays and lesbians in order to motivate or scorn players,"<sup>15</sup> such as you "throw like a faggot."

Instead of enduring this environment, a student-athlete at Stanford University decided to come out to his football team. However, he was made to feel so uncomfortable due to his sexuality that he quit playing completely.<sup>16</sup> Because this athlete decided to come out to his team, he sacrificed his athletic career.

It is not uncommon for student-athletes to have to keep their sexuality in the closet in order to play their sport. Challenges to the status quo of heteronormativity in sport are met with resistance and retaliation. Especially

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12. *Id.*

13. Anne Gregory, *Rethinking Homophobia in Sports: Legal Protections for Gay and Lesbian Athletes and Coaches*, 2 DEPAUL J. SPORTS. L. CONTEMP. PROBS. 264, 270 (2004).

14. MICHAEL A. MESSNER, *TAKING THE FIELD: WOMEN, MEN, AND SPORTS* 35 (2002).

15. Robert DeKoven, *Homophobia Rampant in Women's Sports: Recruiters Tell Athletes that a Program is the "Gay" One, or "It Has Lots of Gays in It"* (Nov. 20, 2002), <http://www.outsports.com/campus/titleixdekoven.htm>.

16. Chris Bull, *The College Sports Closet: Increased Attention from the NCAA and Pressure Applied by Gay Activists May Finally Even the Playing Field for Gay Athletes – Athletics*, THE ADVOCATE (March 5, 2002), [http://www.findarticles.com/p/articles/mi\\_m1589/is\\_2002\\_March\\_5/ai\\_83246770](http://www.findarticles.com/p/articles/mi_m1589/is_2002_March_5/ai_83246770).

in high school athletics, homophobia in sport also derives from a general sense of insecurity and from the discovery and exploration of sexuality.

Homophobia in women's athletics is used to undermine the accomplishments of female athletes and to discourage women's participation in sport.<sup>17</sup> Female student-athletes are labeled as dykes, lesbians, or butch whether they are gay or not, unless they maintain a "heterosex image"<sup>18</sup> and practice apologetic behavior.<sup>19</sup> The practice of negative recruiting especially reflects the pervasiveness of homophobia in sport.<sup>20</sup> Coaches will attempt to dissuade student-athletes from attending rival schools by insinuating that the coach and/or players at the other school are gay. This technique is often targeted at parents who are concerned that if their daughter has gay teammates she will be recruited into lesbianism.<sup>21</sup> This negative recruiting practice is less common in male athletics because it is assumed that playing sports and being gay are mutually exclusive. Negative recruiting is clearly a form of discrimination, but falls outside the realm of Title IX enforcement unless it can be proven first, that such practices have occurred and second, that the discrimination meets the conditions necessary to be considered harassment.<sup>22</sup> The cumulative effect of these manifestations of homophobia is an unsafe and unproductive environment for gay and straight student-athletes alike.

Players who face harassment and discrimination are often pressured into not reporting such instances, which is only one of the reasons that there have been so few legal cases to date involving sexual orientation discrimination in interscholastic and intercollegiate athletics. In a 2006 Dublin, Ohio, incident, a high school lacrosse player alleged that he was raped by one of the team's assistant coaches on a team bus when returning from a tournament.<sup>23</sup> Soon after the occurrence, a team meeting was held in which the victim was

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17. GEORGE H. SAGE, *POWER AND IDEOLOGY IN AMERICAN SPORT: A CRITICAL PERSPECTIVE* 75 (2nd ed. 1998).

18. GRIFFIN, *supra* note 11, at 75.

19. See generally MARY JO FESTLE, *PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN'S SPORTS* (1996) (exploring women's participation in athletics in the 20th century focusing on sexuality and the required display of femininity).

20. Mike Fish, *Women in Sports: Growing Pains; The Lesbian Issue Off the Court: Sexuality Can Be Sensitive Issue in Recruiting*, THE ATLANTA CONSTITUTION, Sept. 24, 1998, at 01G.

21. Julie A. Baird, *Playing It Straight: An Analysis of Current Legal Protections to Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 BERKELEY WOMEN'S L.J. 31 (2002).

22. BLACK'S LAW DICTIONARY 712, 733 (8th ed. 2004).

23. Rosemary Kubera, *Frank, Brian Simpson Charged with Misdemeanors in Rape Case*, SUBURBAN NEWS PUBLICATION (July 19, 2006), [http://www.snponline.com/NEWS7-19/719\\_duLacrosse.htm](http://www.snponline.com/NEWS7-19/719_duLacrosse.htm).

verbally attacked in front of the entire team by his coach "regarding the truthfulness of his allegation."<sup>24</sup> By disrupting the dynamics of the team in reporting the rape, this player was challenged to "take one for the team" in order to maintain the norm in sports culture which largely supports ritualized hazing on athletic teams,<sup>25</sup> violence against women,<sup>26</sup> and disparaging language against gays and women. Additionally, the coaches also allegedly intimidated the witnesses of the incident at the same meeting.<sup>27</sup>

A culture of silence is built into team dynamics which implies that this player should subvert his own well-being in favor of the team and that his teammates should likewise remain silent. Furthermore, a paradox is present in sport where it is common for players and coaches to congratulate each other with a pat on the backside without any sexual connotations. Outside of sport, however, a different set of social norms prevail marking this type of behavior as inappropriate. This paradoxical behavior may make it difficult for student-athletes to pursue sexual orientation discrimination and harassment cases when norms of in-sport and out-of-sport behavior are defined differently. What is undeniable is that athletics can be a hostile and homophobic atmosphere in which gay, lesbian, and bisexual student-athletes are likely to feel vulnerable, particularly without institutional policies in place to prohibit discrimination.

As the courts have not decided a case that addresses sexual orientation discrimination in athletics, an analysis of the laws and of similar cases will provide useful information for student-athletes, coaches, administrators and their legal council in addressing such discrimination. Specifically, this article will examine Title IX and the Equal Protection Clause of the Fourteenth Amendment as possible protections for student-athletes from sexual orientation discrimination in collegiate and high school athletics. Further, the article will briefly explore Title VII, the First Amendment, and certain nondiscrimination policies as possible legal courses of action for students-athletes who face discrimination based on their sexual orientation.

While harassment based on sexual orientation is arguably prohibited by law, discrimination based on sexual orientation is not an actionable claim under Title IX,<sup>28</sup> and only a few courts have ruled that the Equal Protection

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24. *Id.*

25. See generally MAKING THE TEAM: INSIDE THE WORLD OF SPORT INITIATIONS AND HAZING (Jay Johnson & Margery Holman, eds., 2004).

26. MESSNER, *supra* note 14, at 30-32.

27. Eric James, *Former Dublin Lacrosse Coaches Plead Not Guilty*, 10TV NEWS (July 26, 2006), <http://www.10tv.com/?sec=search&story=10tv/content/pool/200607/1304813763.html>.

28. Office of Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties: Title IX*, U.S. DEPARTMENT OF EDUCATION, 3

Clause prohibits sexual orientation discrimination. Yet the distinction between discrimination and harassment is not always clear, leaving the door open to interpretation.<sup>29</sup> In the face of this uncertainty, gay, lesbian, and bisexual student-athletes<sup>30</sup> may need to use a combination of laws and institutional policies in order to legally combat sexual orientation discrimination.

## II. OVERVIEW/INTERPRETATION OF THE LAWS

The two most relevant laws pertaining to sexual orientation harassment and discrimination in collegiate and high school athletics today are Title IX and the Equal Protection Clause of the Fourteenth Amendment. In 1972, Congress enacted Title IX in the wake of other legislative initiatives spawned by the women's movement aimed at mandating legal equality for women.<sup>31</sup>

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(Jan. 2001), <http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf> ("Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance.").

29. BLACK'S LAW DICTIONARY, *supra* note 22, at 733, 500. While harassment based on sexual orientation is identifiable by the presence of a hostile environment created through words, conduct, or actions that cause substantial emotional distress and serves no legitimate purpose, discrimination based on sexual orientation is more difficult to define. Discrimination is "the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap." *Id.* Furthermore, sex discrimination is "discrimination based on gender." *Id.* Sexual orientation (perceived or actual) is not explicitly included in this definition, leaving lawmakers to decide when sexual orientation discrimination is legally prohibited. However, I will argue that it is extremely difficult in an athletic context to identify discrimination based on sexual orientation that cannot also be considered harassment. For instance, if a coach repeatedly and pervasively confronts a player about being gay and makes this player feel uncomfortable, this can be considered sexual orientation harassment because of the existence of a hostile environment. If a student-athlete is removed from a team without comment by a coach due to their sexual orientation, this would constitute discrimination, because the student-athlete is being treated differently than other players. However, even though a hostile environment did not exist before the student-athlete was removed from the team, the action taken by the coach could not have served a legitimate purpose and could have caused emotional distress, making it a case of discrimination and harassment.

30. See generally Leilana McKindra, *Transgendered Athletes Create a 'New Frontier' of Issues*, THE NCAA NEWS, Apr. 10, 2006 at A2-A3. While transgender and transsexual student-athletes also face discrimination and should certainly be included in any discussion of constitutional rights, the scope of this article is not sufficiently broad to address the specifics of the transgender and transsexual student-athlete experience. However, conclusions drawn from this article may prove to be useful for transgender and transsexual student-athletes.

31. SARAH K. FIELDS, *FEMALE GLADIATORS: GENDER, LAW, AND CONTACT SPORT IN AMERICA* 5 (2005) (describing the legislation that immediately preceded Title IX and led to its enactment: the Equal Pay Act of 1963 requires that men and women receive equal pay for equal work

Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance."<sup>32</sup> Specifically, Congress passed Title IX into law with two primary objectives in mind: "to avoid the use of federal resources to support discriminatory practices in education programs and to provide individual citizens effective protection against those practices."<sup>33</sup> While Title IX has been most visibly used as a means for achieving gender equity in athletics, it has also been used often in other, non-sport contexts, such as a defense against sexual harassment.

If harassment reaches a level so "severe, pervasive, and objectively offensive"<sup>34</sup> that it prevents victims from accessing the educational opportunities or benefits provided by the school, then it is an actionable claim under Title IX. Additionally, the use of Title IX has been extended to protect students from "sexual harassment based on sexual orientation focused on the gender-based motivations behind the harassment."<sup>35</sup> As will be discussed below, this interpretation of the law has opened the door for student-athletes who face harassment based on their actual or perceived sexual orientation. Title IX as of yet, however, does not provide explicit protection against discrimination based on sexual orientation.

The Equal Protection Clause of the Fourteenth Amendment asserts that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>36</sup> The purpose, then, is to prevent similarly situated people from being treated differently. Under the Equal Protection Clause, three groupings of people are considered suspect classifications and these classifications are prohibited under the law, except in exceptionally compelling circumstances:

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and the 1964 Civil Rights Act includes Title VII, which prohibits discrimination on the basis of race and sex in employment and advancement.).

32. 20 U.S.C. §§ 1681 (2006).

33. Civil Rights Division, *Title IX Legal Manual*, U.S. DEPARTMENT OF JUSTICE, 8 (2001), <http://www.usdoj.gov/crt/cor/coord/ixlegal.htm#Introduction>.

34. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

35. *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000). *See also* *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000). *See generally* Raine Dozier, *Beards, Breasts, and Bodies: Doing Sex in a Gendered World*, 19(3) GENDER & SOCIETY, 297-316 (2005). Sex is commonly defined as biologically based, whereas gender is understood to be socially constructed. In general, society expects individuals to perform the gender that corresponds to their sex; however, "effeminate" men and "masculine" women challenge this binary and are often ridiculed because they do.

36. U.S. CONST. amend. XIV.

race, alienage, and national origin.<sup>37</sup> In order to legally group people using these distinctions, the state must show that differential treatment is absolutely necessary to accomplish a compelling state interest.<sup>38</sup> For all classifications other than gender, the disparity of treatment must only be shown to be rationally related to a legitimate state interest.<sup>39</sup> Thus far, classifications based on sexual orientation have only been held to this lesser, or mild level of scrutiny—meaning that the state does not need to provide as much justification for grouping people based on sexual orientation than it does the more suspect categories.<sup>40</sup> Gender, however, has been determined to be worthy of an intermediate level of scrutiny,<sup>41</sup> which could bode well for applying an increased level of scrutiny to sexual orientation in the future.

Importantly, the Equal Protection Clause is only applicable to state actors, yet determining who is considered a state actor can be a troublesome issue, especially in an athletic context. All public secondary schools, state colleges, and state universities are state actors.<sup>42</sup> Additionally, private secondary schools, colleges, and universities can be considered state actors if some degree of state action is present.<sup>43</sup> State action can be determined in one of three ways: the public function theory, the entanglement theory, or the

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37. GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 213 (3rd ed. 2002).

38. *Id.* at 213-214.

39. *Id.* at 213.

40. *See generally* *Romer v. Evans*, 517 U.S. 620 (1996) (holding that a Colorado amendment to the Constitution violated the equal protection clause because it allowed discrimination against homosexuals and prevented the state from protecting them) and *Lawrence v. Texas* 539 U.S. 558 (2003) (over-turning *Bowers v. Hardwick* 478 U.S. 186 (1986), and holding that a Texas law prohibiting homosexual sodomy violated Due Process Clause of the Fourteenth Amendment). The Supreme Court used rational basis review in *Romer* and in *Lawrence*, the level of scrutiny was not stated, but language used in the opinion was similar to that of rational basis review.

41. WONG, *supra* note 37, at 336 (explaining that a series of court cases in the 1970s led the Supreme Court to determine that gender was worthy of more scrutiny than non-suspect classes, such as intelligence and physical disability, yet it has not reached a level of strict scrutiny. For example, "a factual basis for any gender classification must exist," not simply assumptions or social norms.). *See generally* *Reed v. Reed*, 404 U.S. 71 (1971) (ruling that gender-based classifications must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 76); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (ruling that sex rarely influences the ability to perform or contribute to society); *Craig v. Boren*, 429 U.S. 190 (1976) and upheld in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (holding that gender classification must be substantially related to a sufficiently important governmental interest).

42. WONG, *supra* note 37, at 196-197.

43. Stacy Altman, *State Action*, in *LAW FOR RECREATION AND SPORT MANAGERS* 435 (Doyice J. Cotton & John T. Wolohan eds., 3rd Ed., 2003).



balancing approach.<sup>44</sup> For example, in *Brentwood Acad. v. Tennessee High School Secondary Athletic Association*,<sup>45</sup> the United States Supreme Court ruled in 2001 that the actions of the THSSA could be considered state action under a newly created theory of entwinement.<sup>46</sup> A subsequent ruling, interpreted this theory in finding that another state association was not a state actor.<sup>47</sup>

In 2004, the Michigan Supreme Court ruled that the Michigan High School Athletic Association (MHSAA) was not a public body under the entwinement theory, offering three primary reasons for ruling as such: the MHSAA does not receive its primary funding through state authority, it was not created by state or local governing authority, and it is not an agency of its member schools.<sup>48</sup>

Along similar lines, although a close ruling, in *NCAA v. Tarkanian*<sup>49</sup> the U.S. Supreme Court ruled that the NCAA should not be considered a state actor. Collegiate athletic conferences, however, are often considered to be state actors.<sup>50</sup> So long as state action exists, the Equal Protection Clause of the

44. WONG, *supra* note 37, at 197-198. Public function occurs when an essential government service has no counterpart in the public sector and is thus provided by a private entity. The focus of the entanglement theory is the amount of state and/or federal aid directly or indirectly given to the private organization. The balancing approach is not widely used, but in effect balances the merits of allowing an organization to continue its classification system against the rights of the individual, which may allow for judicial intervention on the individual's part.

45. *Brentwood Acad. v. Tennessee High Sch. Secondary Athletic Ass'n.*, 531 U.S. 288 (2001).

46. *Id.* at 298 ("The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it."). See also *Indiana High School Athletic Association v. Carlsberg*, 694 N.E. 2d 222 (Ind. Ct. App. 1997); *Indiana High School Athletic Association v. Reyes*, 694 N.E. 2d 249 (Ind. 1997); *Barnhorst v. Missouri State High School Activities Ass'n.*, 504 F. Supp. 449 (W.D. Mo. 1980).

47. *Breighner v. Michigan High School Athletic Ass'n, Inc.*, 683 N.W.2d 639 (Mich. 2004).

48. Bradley T. French, *Freedom of Information Act*, 83 U. DET. MERCY L. REV. 19 (2005).

49. *NCAA v. Tarkanian*, 488 U.S. 179 (1988). The NCAA found University of Nevada, Las Vegas men's basketball coach Jerry Tarkanian to have engaged in improper recruiting. The NCAA imposed sanctions against UNLV and required UNLV to discipline Tarkanian. Tarkanian brought suit against UNLV and the NCAA claiming he was denied due process under the 14th Amendment. In a 5-4 decision, the U.S. Supreme Court ruled that the NCAA was not a state actor and, therefore, did not have to offer due process. The NCAA was ruled not to be a state actor because its members created policies independent of any particular state, specifically, it did not use the color of Nevada law, and it did not have governmental power to impose the sanctions against Tarkanian. Instead, UNLV had the option to give up their membership in the organization, rather than impose the sanctions.

50. *Stanley v. Big Eight Conference*, 463 F. Supp. 920 (D.C. Mo. 1978) (court held Big 8 conference to be state actor because membership composed of state schools) and *Behagen v. Intercollegiate Conference of Faculty Representatives*, 346 F. Supp. 602 (D. Minn. 1972) (both

Fourteenth Amendment might provide a channel through which student-athletes can seek protection against sexual orientation discrimination when Title IX falls short.

### III. SEXUAL ORIENTATION HARASSMENT CLAIMS

The following section will offer a brief review of select cases that have used Title IX and the Equal Protection Clause in instances of sexual orientation harassment.

#### A. Title IX

A series of court decisions have determined first, that Title IX prohibits sexual harassment; second, that both sex based and gender based sexual harassment<sup>51</sup> are impermissible; and third, that discrimination based on sexual orientation is not prohibited by Title IX. In 1998, the U.S. Supreme Court decided that sexual harassment is an actionable claim under Title IX in *Gebser v. Lago Vista Independent School District*.<sup>52</sup> Alida Gebser was a public high school student in Texas who had engaged in a secret sexual relationship with one of her male teachers. Once their relationship was exposed, Gebser brought a lawsuit against the school district claiming that the teacher had sexually harassed her. However, because she had not reported her relationship with the teacher to any school official, the court found her claim to be insufficient. Importantly, though, had school officials known of the harassment and done nothing to rectify the situation, the school and school district would have been liable.<sup>53</sup> Thus, *Gebser* set the precedent for establishing that a school and a school district can be held liable for teacher-against-student sexual harassment and reaffirmed that sexual harassment can constitute discrimination on the basis of sex under Title IX.

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parties conceded state action). However, after *Tarkanian*, the status of conferences is less clear. See *Hairston v. Pac-10 Conference*, 893 F. Supp. 1485 (W.D. Wash.1994) *aff'd.*, 101 F.3d 1315 (9th Cir. 1996) (court ruled plaintiffs failed to distinguish *Tarkanian* and so would not confer status of state actor on conference). Although the court in *Hairston* ruled that the plaintiff was not a state actor, the court's reasoning leaves the door open to argue again that conferences are state actors, making their current status unclear.

51. See generally *Montgomery*, 109 F. Supp. 2d 1081. Sex based harassment is harassment targeted at an individual because they are biologically a male or a female. Gender based harassment is targeted at an individual's gender, for example their expression of femininity or masculinity.

52. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

53. *Id.* at 292.

Applying the standards established in *Gebser*,<sup>54</sup> the U.S. Supreme Court in *Davis v. Monroe County Board of Education*<sup>55</sup> ruled that student-against-student sexual harassment was also impermissible under Title IX. A classmate of Aurelia Davis, a fifth grade student in Georgia, subjected her to continual sexual harassment, which included attempted touching of her breasts and genital areas, as well as making vulgar comments.<sup>56</sup> Although Davis and her mother reported the incidents, the harassment was allowed to continue and the offending student faced few consequences. Davis alleged that the school board's deliberate indifference to the classmate's persistent sexual advances "created an intimidating, hostile, offensive, and abusive school environment."<sup>57</sup> The court ruled in favor of Davis because the harassment had become so extreme that the victim's educational experiences had been harmed.<sup>58</sup> The court warned, however, that peer harassment was less likely to support a Title IX claim than teacher-against-student harassment, because children often engage in behaviors that would not be acceptable for adults.<sup>59</sup> Nevertheless, it can be contended that both of the aforementioned cases support protection against coach-against-athlete and athlete-against-athlete sexual harassment.

Significantly, more recent cases have determined that student-against-student harassment under Title IX also applies to cases of sexual harassment that target gender nonconformity. Jesse Montgomery was a public school student in Independent School District No. 709 where he experienced harassment over a period of eleven years. His harassment ranged from verbal taunts, including "fag, princess, and homo," to countless instances of physical abuse, such as punching, kicking, mock raping, and groping.<sup>60</sup> Montgomery alleged that the harassment was directed at both his gender and at his perceived sexual orientation. Additionally, he claimed that the school district failed to prevent the harassment (verbal, emotional, and physical) from occurring, with the result that he was deprived of the ability "to access

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54. *Id.*

55. *Davis*, 526 U.S. 629.

56. *Id.* at 633.

57. *Id.* at 636.

58. *Id.* at 633.

59. *Id.* at 652. The Court further explained that whether gender-oriented conduct rises to the level of actionable "harassment" depends on a constellation of surrounding circumstances, expectations, and relationships. "Damages are not available for simple acts of teasing and name-calling among school-children, however, even when these comments target differences in gender." *Id.*

60. *Montgomery*, 109 F. Supp. 2d at 1084.

significant portions of the educational environment."<sup>61</sup> The District Court ruled that Title IX prohibits discrimination on the basis of sex, but not discrimination based on perceived or actual sexual orientation.<sup>62</sup> However, the court ruled that in this case the harassment was based on Montgomery's gender as well as his sex because he was harassed because "he did not meet stereotyped expectations of masculinity."<sup>63</sup> According to the court, this gender-based discrimination was not allowed under the law. Relying on language in Title IX that is similar to that found in Title VII,<sup>64</sup> which prohibits discrimination "because of sex" and on previous cases that addressed related issues,<sup>65</sup> the court ruled that Montgomery was protected against harassment that targeted nonconformance to the stereotypes about his gender.

*Ray v. Antioch Unified School District*<sup>66</sup> addressed a very similar set of facts to those addressed in *Davis*. The District Court decided in favor of Daniel Ray, an eighth grade student who had been "repeatedly threatened, insulted, taunted, and abused"<sup>67</sup> and permanently injured due to his perceived homosexuality. The court relied heavily on the standards set forth in *Davis* that established the necessary conditions for liability for sexual harassment under Title IX. For a school to be held liable, it must be deliberately indifferent to actual knowledge of sexual harassment that is so severe, pervasive, and objectionable that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.<sup>68</sup> Notably, the court went on to state that even though the harassment was not sexual in nature, it was clearly based on a "perceived belief about the Plaintiff's

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61. *Id.* at 1085.

62. *Id.* at 1090.

Thus, unlike the Fourteenth Amendment, Title IX prohibits only discrimination based on sex and does not extend to any other form of invidious discrimination. For these reasons the Court concludes that, to the extent that plaintiff asserts Title IX claims based on discrimination due to his sexual orientation or perceived sexual orientation, these claims are not actionable and must be dismissed.

63. *Id.* at 1090.

64. WONG, *supra* note 37, at 729 (explaining that Title VII of the Civil Rights Act of 1964 is an employment law that prohibits discrimination because of an individual's race, color, religion, sex or national origin).

65. Price-Waterhouse v. Hopkins, 490 U.S. 228 (1989) (U.S. Supreme Court ruling that discrimination based on gender stereotyping was actionable under Title VII); Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998) (U.S. Supreme Court ruling that same-sex harassment claims are not necessarily precluded by Title VII).

66. *Ray*, 107 F. Supp. 2d 1165.

67. *Id.* at 1167.

68. *Id.* at 1168.

sexuality, i.e. that Plaintiff was harassed on the basis of sex."<sup>69</sup> Thus, the court concluded that Title IX prohibits harassment based on perceived sexuality.

The decisions in *Montgomery* and *Ray* indicate, respectively, that harassment based on gender nonconformity and harassment based on actual or perceived sexual orientation might not be tolerated under Title IX. Although these cases do not involve athletics, they have broadened the scope and applicability of Title IX for all. For student-athletes these court decisions may provide significant protection against harassment, whether sexual in nature or not, by fellow student-athletes and/or coaches. However, it should be noted that the court in *Montgomery* affirmed that sexual orientation discrimination, when not considered harassment, is not prohibited under Title IX.<sup>70</sup> As will be discussed later in this article, it is not always easy to distinguish discrimination from harassment.

### B. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment has also been used to protect students from sexual orientation harassment, most notably in *Nabozny v. Podlesny*.<sup>71</sup> Despite seeking protection from school administrators, Jamie Nabozny was continually harassed and physically abused by fellow students because of his sexual orientation. Throughout both middle school and high school, Nabozny was subject to verbal taunts of "fag" and "queer" as well as numerous counts of assault, while student spectators watched and laughed at the proceedings. Nabozny attempted suicide on more than one occasion, ran away from home, and was eventually treated for Post Traumatic Stress Disorder. Mary Podlesny, the school principle, told Nabozny that he should expect such treatment if he was "going to be so openly gay."<sup>72</sup> In seeking legal protection, Nabozny alleged that the defendants violated his Fourteenth Amendment right to equal protection by discriminating against him based both on his gender and his sexual orientation. Ruling for Nabozny, the U.S. Court of Appeals for the Seventh Circuit stated that the "positing and prohibiting [of] homosexual rights"<sup>73</sup> was evidence enough of the status of homosexuals as a definable minority. The court went on to state that it was

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69. *Id.* at 1170.

70. *Montgomery*, 109 F. Supp. 2d 1081.

71. 92 F.3d 446 (7th Cir. 1996).

72. *Id.* at 451.

73. *Id.* at 457.

"unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation."<sup>74</sup> Accordingly, the ruling in *Nabozny* suggests that gay, lesbian, and bisexual student-athletes are protected by the Equal Protection Clause from sexual harassment. The court, however, did not draw a clear distinction between harassment and other forms of discrimination.<sup>75</sup>

#### IV. SEXUAL ORIENTATION DISCRIMINATION CLAIMS

As the discussion of the cases concerning sexual orientation harassment and discrimination suggest, student-athletes are not fully protected under any one law. Some courts have interpreted Title IX to prohibit sexual orientation harassment, but none have ruled it applicable to sexual orientation discrimination. The language of the Equal Protection Clause ensures equal protection under the law, and although the court provided such protection in *Nabozny*, discrimination against gay, lesbian, and bisexual student-athletes was subjected only to rational basis review.<sup>76</sup> In this section, a further look at Title IX and the Equal Protection Clause, in addition to Title VII, the First Amendment, and certain nondiscrimination policies, will help elucidate possible legal courses of action for student-athletes who face discrimination based on their sexual orientation.

##### A. Title IX

The idea that Title IX prohibits harassment based on sexual orientation, but not discrimination based on sexual orientation, was reinforced by the revised sexual harassment guidelines issued by the Office of Civil Rights in 2001.<sup>77</sup> Created in response to some of the cases discussed above<sup>78</sup> and to a Title VII sexual harassment case,<sup>79</sup> the guidelines state that:

[G]ender-based harassment, including that predicated on sex stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from the [educational] program. Thus, it can be discrimination on the basis of

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74. *Id.* at 458.

75. *Id.* (Throughout their opinion, the court used the terms harassment and discrimination interchangeably, never indicating the explicit difference between the two.)

76. *Id.*

77. Office of Civil Rights, *supra* note 28.

78. See *Davis*, 526 U.S. 629 & *Gebser*, 524 U.S. 274.

79. *Oncale*, 523 U.S. 75 (Title VII also was ruled to cover same-sex sexual harassment).

sex or. . . on the basis of the victim's failure to conform to stereotyped notions of masculinity and femininity.<sup>80</sup>

While these guidelines make it clear that harassment based on gender and gender nonconformity are prohibited under Title IX, the guidelines are less clear on what might be defined as harassment and what might be defined as discrimination. The guidelines do specify that if discrimination takes the form of non-sexual verbal taunts, the student-athlete does not have a claim under Title IX. However, if the harassment directed at gay, lesbian, or bisexual student-athletes "is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program"<sup>81</sup> this is a valid claim of action under Title IX. Looking at Title IX in this way, it may be argued that much of the discrimination a student-athlete would face based on their actual or perceived sexual orientation would create a hostile environment, which would then be considered harassment and not allowed. The ambiguity of the distinction between sexual orientation harassment and discrimination leaves heterosexual and homosexual student-athletes subject to such discrimination with a tenuous course of action. It is possible, however, that since the U.S. Supreme Court has not spelled out the parameters of sexual orientation discrimination and sexual orientation harassment in reference to Title IX, that future district and appeals court judges may make their own decisions about Title IX's applicability to sexual orientation discrimination that run counter to the current interpretation and guidelines.

One legal scholar has suggested that a viable legal option for gay student-athletes may be to pursue the gender nonconformity precedent established in *Montgomery*.<sup>82</sup> If student-athlete can prove that they were discriminated against because they look or act "stereotypically" gay, then they could possibly be protected under the law. Julie Baird goes on to say, however, that while this may be a viable option for some, feminine lesbians and masculine gay men are left out of this equation.<sup>83</sup> She posits that, for example, "even the most sympathetic court will have difficulty in separating gender discrimination from sexual orientation discrimination in the case of a lesbian who looks or acts feminine and faces discrimination solely because of her sexual orientation."<sup>84</sup> Baird suggests, then, that Title IX may provide protection for

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80. *Id.* at v.

81. *Id.* at 3.

82. Baird, *supra* note 21.

83. *Id.*

84. *Id.* at 60.

some lesbians and gay student-athletes who wish to pursue a gender nonconformity claim as protection against discrimination.

### B. The Equal Protection Clause

Although only applicable to state actors, the Equal Protection Clause may provide more protection for student-athletes who face discrimination, but not necessarily harassment, due to their sexual orientation. In *Flores v. Morgan Hill Unified School District*,<sup>85</sup> the U.S. Court of Appeals for the Ninth Circuit confirmed the ruling in *Nabozny*<sup>86</sup> stating that students discriminated against due to their sexual orientation were protected under the Equal Protection Clause because it is unconstitutional to "treat persons similarly situated"<sup>87</sup> differently. Classmates of the student plaintiffs in *Flores* had regularly subjected them to homophobic harassment and discriminatory actions without facing school imposed consequences. The court in *Flores* concluded that the plaintiffs' constitutional rights had been violated. In doing so, the court relied on its earlier decision in *High Tech Gays v. Defense Industry Security Clearance Office*, in which it held that homosexuals are a definable group entitled to a mild level of scrutiny (but not strict scrutiny) for equal protection purposes under the constitution.<sup>88</sup>

Even though *Nabozny* and *Flores* were found to be protected under the Equal Protection Clause against sexual orientation harassment, David Cohen warns that courts may "permit, under the Constitution, other forms of education discrimination based on sexual orientation, as they have unfortunately permitted, under the Constitution, discrimination against gays and lesbians in other areas of the law."<sup>89</sup> While this is certainly a concern, *Massey v. Banning Unified School District*<sup>90</sup> demonstrates that some courts are willing to use the Equal Protection Clause to prohibit sexual orientation discrimination that does not involve harassment.<sup>91</sup> When asked if she was a lesbian by a fellow eighth grade classmate, Ashly Massey replied in the

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85. *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003).

86. *Nabozny*, 92 F.3d 446.

87. *Flores*, 324 F.3d at 1137.

88. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990).

89. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 257 (2005).

90. *Massey v. Banning Unified Sch. Dist.*, 256 F. Supp. 2d 1090 (C.D. Cal. 2003).

91. *Id.* Although the discrimination Massey faced may be considered harassment due to its frequency, severity, and pervasiveness, the court did not describe it as such. This further blurs the distinction between what constitutes discrimination and what constitutes harassment.



affirmative. The following day, Massey was not allowed to attend gym class because her presence in the locker room made the physical education teacher and her classmates uncomfortable. Massey was forced to sit outside the principal's office for the next week and one-half during the time allotted for her physical education class and was "made to feel that she was being punished because of her sexual orientation."<sup>92</sup> Massey and the school district settled out of court, but not before the court decided against the defendant's attempt for qualified immunity by stating that "it is clearly established in the Ninth Circuit that discrimination on the basis of sexual orientation violates the Equal Protection Clause."<sup>93</sup> This case is significant because there was no harassment involved, yet the court made it clear that Massey had a viable claim under the Equal Protection Clause for being discriminated against due to her sexual orientation.

A recent case at the University of Florida also indicates that legal protection against sexual orientation discrimination may be gaining more support. Only a week after reporting that she was being discriminated against due to her sexual orientation, co-captain of the softball team Andrea Zimbardi was dismissed from the team. She promptly filed a lawsuit against the University of Florida alleging that she had been dismissed from the team due to her sexual orientation.<sup>94</sup> Although Zimbardi and the University of Florida settled out of court and the school "did not admit liability and continue[d] to deny that she was released for anything regarding her sexual orientation,"<sup>95</sup> the settlement was still groundbreaking. As part of the settlement, the school agreed to begin sexual orientation nondiscrimination training for its staff, agreed to amend its nondiscrimination materials to include sexual orientation,<sup>96</sup> and agreed to create a reporting method for alleged

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92. *Id.* at 1091.

93. *Id.* at 1095.

94. Antonya English, *UF Settles Suit with Ex-Catcher*, ST. PETERSBURG TIMES (FLORIDA), January 24, 2004, at 3C.

95. *Id.*

96. The University of Florida, *University of Florida Athletics 2006-2007*, 35 (2006), <http://www.gatorzone.com/osl/pdf/handbook/2006.pdf>.

The University shall actively promote equal opportunity policies and practices conforming to laws against discrimination. The University is committed to non-discrimination with respect to race, creed, color, religion, age, disability, sex, sexual orientation, marital status, national origin, political opinions or affiliations, and veteran status. This commitment applies in all areas to students, faculty, Administrative and Professional staff and Career Service personnel. The University realizes that it must continue to intensify its concern and devote itself to the elimination of conditions from which discrimination spring.

discrimination.<sup>97</sup> As the out of court settlements in the *Massey* and *Zimbardi* cases indicate, each plaintiff had a viable claim under the law and had a reasonable chance to win their cases.

### C. Other Legal Avenues: Title VII, the First Amendment, and Nondiscrimination Policies

In addition to Title IX and the Equal Protection Clause, Title VII has also been touted by some as a means of defending against sexual orientation discrimination. As was mentioned earlier, the *Montgomery* court applied language from Title VII to a Title IX case in order to determine that it was unlawful to discriminate on the basis of gender stereotypes.<sup>98</sup> This reasoning was influenced by decisions in both *Price-Waterhouse v. Hopkins*<sup>99</sup> and *Oncale v. Sundowner Offshore Services, Inc.*,<sup>100</sup> in which the courts ruled that discrimination based on gender stereotyping was not allowed under Title VII. A few concerns arise, however, when considering the use of Title VII itself to instances of sexual orientation discrimination against student-athletes.

The first is that Title VII is an employment law, which precludes student-athletes, even those receiving scholarships, from being subject to its protection.<sup>101</sup> Additionally, Title VII includes specific protected classifications of people that limit its jurisdiction to: race, color, religion, ancestry, national origin, and sex.<sup>102</sup> The Equal Protection Clause does not include this limiting language which gives it a wider scope.

Finally, although Title VII has been used to successfully defend against discrimination based on gender nonconformity, it does not provide explicit protection for those discriminated against due to their sexual orientation. For example, in *Price-Waterhouse*, Ann Hopkins was denied partnership because her employer, Price-Waterhouse, acted "on the basis of a belief that a woman cannot be aggressive, or that she must not be."<sup>103</sup> The court ruled that Price-Waterhouse's decision was made on the basis of Hopkins' gender, which is

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97. English, *supra* note 94.

98. *Montgomery*, 109 F. Supp. 2d 1081.

99. *Price-Waterhouse*, 490 U.S. 228 (1989) (Discrimination based on gender stereotyping was actionable under Title VII).

100. *Oncale*, 523 U.S. 75.

101. *Rensing v. Indiana State Univ.*, 444 N.E. 2d 1170 (Ind. 1983) (ruling that student-athletes are not considered employees of colleges and universities, and therefore a student-athlete paralyzed during a football game could not receive worker's compensation from the University).

102. 42 U.S.C. § 2000e-2(a) (2006).

103. *Price-Waterhouse*, 490 U.S. at 250.

unacceptable under the law.<sup>104</sup> Similarly, it is impermissible under the law to use the factors of strength and aggressiveness necessary in coaching against female coaches to prove their deviance and unfitness to work with youth.<sup>105</sup> As with the gender nonconformity protection offered by Title IX, this ruling is essential in helping to protect gays and lesbians who do not conform to the stereotypes of their gender. However, for those who are perceived to be gender-role appropriate (e.g. feminine lesbians), but are discriminated against because of their sexual orientation, this law provides no protection.<sup>106</sup>

What this implies for student-athletes is that Title VII does not provide direct protection under the law. However, when applied to Title IX, Title VII language may provide protection for those who do not conform to gender stereotypes through behavior and/or appearance (e.g. effeminate men or masculine women). In particular, gender nonconformity may be a significant source of discrimination targeted at female athletes.

In one significant case, the First Amendment has also been used as a weapon against sexual orientation discrimination.<sup>107</sup> In *Yost v. University of Maryland*,<sup>108</sup> the plaintiff, field hockey player Vicki Yost, claimed that she was forced to keep her sexual orientation to herself as it "was not acceptable to the University of Maryland."<sup>109</sup> Yost further claimed that it was her coach's goal "to suppress any athletic student conduct, speech, appearance, assembly, and association in conflict with that image [of heterosexuality]."<sup>110</sup> The field hockey coach used the threat of a lost scholarship and place on the team if Yost acted otherwise.<sup>111</sup> The District Court decided in favor of the University without reaching Yost's First Amendment claim. The court determined that Yost lacked standing because she was no longer a student-athlete at the

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104. *Id.*

105. Baird, *supra* note 21, at 50.

106. For example, a high school female student who looks and acts stereotypically heterosexual and is not recruited because a college coach suspects that she is a lesbian would not have a Title VII claim of action.

107. U.S. CONST. amend. I, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Specifically, freedom of expression is often used rather than freedom of speech because certain non-verbal types of communication are protected under the First Amendment.

108. *Yost v. University of Maryland*, No. HAR 93-471 1993 U.S. Dist. LEXIS 17648 (D. Md. Nov. 19, 1993).

109. *Id.* at \*5.

110. *Id.*

111. *Id.*

University.<sup>112</sup> While it is unclear how the court would have ruled, Yost's First Amendment claim is a compelling approach to combating sexual orientation discrimination and one that is worth further inquiry.<sup>113</sup> Similar to the gender non-conformity claim, if a student-athlete is denied the ability to dress or act in ways that do not align within accepted boundaries for their gender, then their constitutional right to freedom of expression is improperly restricted.<sup>114</sup>

Ann Gregory addresses protection for student-athletes against sexual orientation discrimination that might exist apart from federal law.<sup>115</sup> Specifically, she points to states that have nondiscrimination policies in their constitutions that include sexual orientation discrimination. Along the same lines, many cities and counties also have ordinances prohibiting sexual orientation discrimination in public and/or private employment, public accommodations, education, and housing practices.<sup>116</sup> Nine states and the District of Columbia prohibit discrimination or harassment based on sexual orientation in educational facilities<sup>117</sup> and four states "explicitly prohibit discrimination or harassment on the basis of gender identity."<sup>118</sup> Student-athletes competing in states, cities, and counties with these protective laws,

112. Lack of standing is common in Title IX cases. Additionally, student-athletes limited to four years of athletic eligibility may decide not to file a Title IX complaint because only a small window of time exists in which they are able to file and complete the complaint.

113. See generally *Tinker v. Des Moines*, 393 U.S. 503 (1969) (ruling that three students who wore black arm bands in a public school to protest the Vietnam War should be allowed to do so under the First Amendment. The court ruled that students do not give up their constitutional rights upon entering school; however, schools do have the right to maintain authority in order to avoid the disruption of educational process.); See also *Williams v. Eaton*, 468 F. 2d 1079 (10th Cir. 1972) (Several University of Wyoming black football players planned on displaying black armbands during a game against the Brigham Young University football team in protest of the Church of Jesus Christ of Latter-Day Saints due to racial matters. The Trustees' decision to ban the students from participating was upheld by the court citing *Tinker*.)

114. See generally *Doe v. Yunits*, 2000 WL 33162199 (Mass. Super. 2000) (ruling that a male-to-female transgender student had a first amendment right to wear clothing consistent with her gender identity and that treating her differently than biological girls was discrimination on the basis of sex).

115. Gregory, *supra* note 13.

116. HUMAN RIGHTS CAMPAIGN FOUNDATION, *Recent developments in sexual orientation and gender identity law* (June 2003), <http://www.hrc.org/Template.cfm?Section=Home&Template=/ContentManagement/ContentDisplay.cfm&ContentID=13085>.

117. WOMEN'S SPORTS FOUNDATION, *It Takes A Team! Laws, Policies and Procedures*, 1 (2006), [http://www.womenssportsfoundation.org/binary-data/WSF\\_ARTICLE/pdf\\_file/1030.PDF](http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/1030.PDF) (listing the nine states: California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, Vermont, Washington, and Wisconsin).

118. *Id.* at 1 (listing the four states: California, Maine, Minnesota, and New Jersey). HOUGHTON MIFFLIN COMPANY, *THE AMERICAN HERITAGE STEDMAN'S MEDICAL DICTIONARY* (2002). Gender identity can be defined as "person's sense of being male or female, resulting from a combination of genetic and environmental influences."

thus have a clear means of legal protection against discrimination based solely on sexual orientation.

Gregory also suggests that student-athletes have a course of action based on college and university nondiscrimination clauses, many of which include sexual orientation. For example, the relevant section of The Ohio State University's nondiscrimination policy states the following: "Discrimination against any individual based upon protected status, which is defined as age, color, disability, gender identity or expression, national origin, race, religion, sex, sexual orientation, or veteran status, is prohibited."<sup>119</sup> This nondiscrimination statement clearly covers sex and sexual orientation, and goes so far as to protect gender identity and expression. The breadth of this nondiscrimination policy is not uncommon and can be found in policies of both public and private colleges and universities. Additionally, the NCAA has a *Principle of Nondiscrimination* in its manual for each division which suggests that each of its members prohibit gender and sexual orientation discrimination, among other forms of discrimination.<sup>120</sup>

Finally, individual athletic departments may have their own nondiscrimination policies. Again, using The Ohio State University as an example: "the department values diversity in its people - be that diversity expressed by heritage, race, belief, sexual preference or gender."<sup>121</sup> Some athletic departments may even draft their nondiscrimination policies to parallel the language in Title IX and then include many protected groups in addition to just sex. In these settings, such policies would be used in a breach of contract argument if discrimination or harassment is present. Gregory explains that "student-athletes should have valid breach of contract claims against the universities when the university does not meet the expectations of the student when the student has relied on information in the student handbook and promotional materials."<sup>122</sup> Student-athletes in both public and private educational institutions of higher learning may use this cause of action if a sufficient sexual orientation discrimination policy exists.

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119. OFFICE OF HUMAN RESOURCES, THE OHIO STATE UNIVERSITY, *Affirmative Action, Equal Employment Opportunity, and Non-Discrimination/Harassment Policy 1.10*, (2004), <http://hr.osu.edu/policy/policy110.pdf>.

120. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2006-07 NCAA DIVISION I MANUAL, 2.6 *The Principle of Nondiscrimination*, 4 (2006), [http://www.ncaa.org/library/membership/division\\_i\\_manual/](http://www.ncaa.org/library/membership/division_i_manual/).

121. THE OHIO STATE DEPARTMENT OF ATHLETICS, THE OHIO STATE UNIVERSITY, *Our Mission* (2006), <http://ohiostatebuckeyes.collegesports.com/genrel/mission.html>.

122. Gregory, *supra* note 13, at 287.

Secondary school student-athletes may have a more difficult time employing nondiscrimination policies to combat against sexual orientation discrimination. While nondiscrimination policies certainly exist in school districts across the nation, many policies do not yet include sexual orientation.<sup>123</sup> The National Federation of State High School Associations, the governing body for high school athletics, does not promote or endorse a nondiscrimination policy of any kind for its members. Guidelines are set forth for preventing and reporting incidents of sexual harassment, but mention of discrimination is missing.<sup>124</sup> Additionally, even *The Coaches Code of Ethics* fails to consider nondiscrimination an important component of coaching.<sup>125</sup> While state and local laws and nondiscrimination policies may provide a remedy for sexual orientation discrimination, the applicability of federal laws remains unclear.

## V. ANALYSIS AND DISCUSSION

The difficulty in determining a legal course of action for student-athletes who face sexual orientation discrimination is twofold: first, the distinction between harassment and discrimination in Title IX and the Equal Protection Clause cases and regulations are insufficiently clear, and second, the courts have yet to rule in a case that specifically addresses sexual orientation discrimination in athletics. This does not mean, however, that no legal protection exists for student-athletes who are discriminated against because of their actual or perceived sexual orientation. Additionally, the need to establish and determine legal courses of action for student-athletes is underscored by the widespread presence of homophobia in sport.

Both Title IX and the Equal Protection Clause have been shown to prohibit harassment, sexual and non-sexual, targeted at gay, lesbian, and bisexual student-athletes. First, the courts ruled in *Gebser*<sup>126</sup> that Title IX disallowed teacher-against-student sexual harassment, and then in *Davis*<sup>127</sup> the

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123. HUMAN RIGHTS CAMPAIGN FOUNDATION, *School Laws: State by State* (2006), available at [http://www.hrc.org/Template.cfm?Section=Youth\\_Schools&CONTENTID=20814&TEMPLATE=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66](http://www.hrc.org/Template.cfm?Section=Youth_Schools&CONTENTID=20814&TEMPLATE=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66).

124. THE NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, *Sexual Harassment and Hazing: Your Actions Make a Difference!* (2007), <http://www.nfhs.org/Core/Search.aspx?query=sexual%20harassment>.

125. THE NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, *The Coaches Code of Ethics*, (2006), available at [http://www.nfhs.org/web/2004/01/the\\_coaches\\_code\\_of\\_ethics.aspx](http://www.nfhs.org/web/2004/01/the_coaches_code_of_ethics.aspx) (last visited December 14, 2006).

126. *Gebser*, 524 U.S. 274.

127. *Davis*, 526 U.S. 629.

court extended this protection to student-against-student sexual harassment, regardless of the sex of the offenders or their victims. The court made it clear in *Davis* that in order for a student to have legal standing the school must have knowledge of the harassment and have deliberately done nothing to stop it. This is an important aspect of the case to note in that homophobia in sport is often met with silence.<sup>128</sup> Although this puts a burden on the shoulders of the student-athlete to report the harassment, not reporting the behavior is detrimental to their chances of being successful with their claim. In *Montgomery*<sup>129</sup> it was determined that sexual harassment based on gender nonconformity was impermissible, and finally, in *Ray*<sup>130</sup> the court ruled that sexual harassment based on sexual orientation was also not allowed under Title IX. It is important to restate that this succession of court cases leaves one significant deficiency: the court has made a distinction between harassment and discrimination based on sexual orientation without defining clearly what constitutes each. Title IX prohibits the former and not the latter, yet what is considered discrimination as opposed to what is considered harassment is not clear.

For a complete analysis, however, it is important to look at the original purpose of Title IX: "to avoid the use of federal resources to support discriminatory practices in education programs and to provide individual citizens effective protection against those practices."<sup>131</sup> It would seem from this purpose that by allowing sexual orientation discrimination to occur federal resources would be supporting discrimination in education, which is clearly what the law is trying to avoid. Additionally, the *OCR Revised Sexual Harassment* guidelines for Title IX indicate that if sexual harassment rises to a level that limits or denies "a student's ability to participate in or benefit from the school's program,"<sup>132</sup> then a Title IX claim would apply. Participation on an athletic team is certainly an educational benefit that would be denied if a student-athlete, due to his or her sexual orientation, lost a scholarship or a place on a team. While the language and interpretation of Title IX thus far has limited scope in prohibiting sexual orientation discrimination, Title IX has proven to be a malleable law over the years, with many different interpretations and guidelines offered since its enactment. If a court were to look at Title IX's original purpose in combination with the cases that have

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128. GRIFFIN, *supra* note 11, at 66-67.

129. *Montgomery*, 109 F. Supp. 2d 1081.

130. *Ray*, 107 F. Supp. 2d 1165.

131. Civil Rights Division, *supra* note 33, at 8.

132. Office of Civil Rights, *supra* note 28, at iv.

established the impermissibility of harassment under its rule, then sexual orientation discrimination should be prohibited as well.

The Equal Protection Clause is another legal avenue of protection for student-athletes who face sexual orientation discrimination. Again, through case law it has been made clear that sexual harassment due to sexual orientation is prohibited under the Equal Protection Clause,<sup>133</sup> but a clear distinction has not been made that sexual orientation discrimination is prohibited. Where the Equal Protection Clause falls short in protecting gay, lesbian, and bisexual athletes is first, that it only applies to state actors, and second, that only the lowest level of scrutiny is applied to cases of disparate treatment. Sexual minorities are considered a protected class as determined by *High Tech Gays*<sup>134</sup> but without an intermediate or high level of scrutiny, there is still room for courts to decide that states may have a legitimate interest that is rationally related to the disparate treatment. For example, removing an athlete from a team for being gay may be considered such "subtle" discrimination that it would survive rational basis review.<sup>135</sup> In an opinion affirming an intermediate level of scrutiny for gender, Justice Brennan stated: "What differentiates sex from such non-suspect statuses as intelligence or physical disability. . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."<sup>136</sup> As with sex, sexual orientation does not impact an individual's ability to contribute to society. The crux of the Equal Protection Clause is that gay, lesbian, and bisexual student-athletes have the right not to be treated differently from their heterosexual peers. Courts nationwide should look to the Ninth Circuit in ruling that "discrimination on the basis of sexual orientation violates the equal protection clause."<sup>137</sup>

Finally, because no federal law explicitly prohibits sexual orientation discrimination, student-athletes may need to turn to nondiscrimination policies as the next best means of protection. In *Montgomery*,<sup>138</sup> the plaintiff not only used Title IX as a defense, but also used the Minnesota Human Rights Amendment (MHRA) as well. The court ruled that *Montgomery* was protected under the MHRA based on discrimination targeted at his gender, but

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133. *Nabozny*, 92 F.3d 446.

134. *High Tech Gays*, 895 F.2d 563.

135. Gregory, *supra* note 13, at 283.

136. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (stating that a married female Air Force officer can claim her husband as a dependant, because administrative convenience is not a justifiable reason to prevent her from doing so).

137. *Massey*, 256 F. Supp. 2d at 1095.

138. *Montgomery*, 109 F. Supp. 2d 1081.



the addition of sexual orientation to the MHRA did not occur until after the period of time when he was being discriminated against. What this shows, however, is that in states that have similar human rights laws student-athletes have another legal option for protection.

In looking to university handbooks for protection, Gregory explains that a breach of contract defense is viable when a school discriminates against sexual orientation if it is clearly stated as protected in their nondiscrimination policy.<sup>139</sup> All of the necessary components of a contract are found in a handbook nondiscrimination policy: universities compete in a free market for students and offer a certain level of protection through their advertising and nondiscrimination policy. Students accept this offer by enrolling in the school based on the expectation that they will be protected. With regard to scholarship athletes, students provide the consideration component of the contract through a good faith attempt to participate as part of the team on behalf of the college or university.<sup>140</sup> Student-athletes at both public and private educational institutions are thus able to use this method of legal recourse.

## VI. CONCLUSION

After reviewing Title IX, the Equal Protection Clause, and several other potential avenues for protecting against sexual orientation discrimination, a few recommendations can be offered. First, the language of the enforcement regulations of Title IX should be altered to include sexual orientation and a clear distinction should be made between discrimination based on sexual orientation and harassment based on sexual orientation. In an athletic context, it is arguable that there is insufficient difference between the two.<sup>141</sup> Second, sexual orientation, alongside gender, should be held to an intermediate level of scrutiny for the purpose of the Equal Protection Clause. This will force offenders to prove an increased level of necessity for treating gay, lesbian, and bisexual student-athletes differently than their heterosexual peers.

Until changes occur in federal law, it is important for both state and local legislatures to pass protective laws and for sport managers to establish broad

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139. Gregory, *supra* note 13.

140. *Id.*

141. Greg Sandoval, *Going Behind the Back: College Recruiters Raise Issue of Sexual Orientation*, THE WASHINGTON POST, Jan. 24, 2003, at D01 (For example, it is difficult to argue that negative recruiting in the form of lesbian baiting used against college coaches is simply discrimination and not also harassment. The same applies for a student-athlete who is not recruited because of their actual or perceived sexuality.).

and inclusive nondiscrimination policies that include not only sex and gender, but sexual orientation, gender identity, and gender expression. Coaches and student-athletes must be made aware of these policies, including the federal laws that prohibit sexual harassment, and should be used to enforce them. A reporting system, at both the high school and collegiate levels, should be established for alleged discrimination so that incidents can be resolved before rising to a level that requires legal intervention. Additionally, sexual orientation should be included in any nondiscrimination training session in which athletic department staff may participate. Event managers should make fans and supporters aware of nondiscrimination policies and should attempt to curtail offensive signs and chants that attack players or coaches due to their actual or perceived sexuality. Athletic departments and schools should be proactive in establishing an atmosphere of tolerance, respect, and inclusiveness to reduce the likelihood of litigation. Homophobic language should be curbed and negative recruiting practices eliminated. Finally, an important step in eradicating sexual orientation discrimination is for student-athletes like Jennifer Harris, whether homosexual or heterosexual, to take a stand against homophobia and heterosexism and demand equal protection under the law.

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