Sex Discrimination in Coaching

R. Lawrence Dessem
University of Missouri School of Law, DessemRL@missouri.edu

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SEX DISCRIMINATION IN COACHING

R. LAWRENCE DESSEM*

Introduction

Within the past generation the United States has taken major strides to eradicate discrimination based upon "stereotyped characterizations of the sexes," particularly in the area of employment. Since 1963 Congress has passed three major pieces of legislation which address and attack the problem of sex discrimination in employment, a presidential executive order has required all federal contractors and subcontractors to agree not to discriminate against any employee on the basis of sex, and the Supreme Court has recognized the unconstitutionality of such discrimination when practiced by public employers. Legislative, executive, and judicial activity at the state and local levels has paralleled or, in some cases, exceeded the efforts undertaken by the federal government. It is therefore surprising that, despite the adoption and ac-

*Attorney, United States Department of Justice. B.A., Macalester College, 1973; J.D., Harvard Law School, 1976. The views expressed in this article do not necessarily reflect the positions or policies of the Department of Justice.


5. See, e.g., the counterparts to federal antidiscrimination law in New Jersey. The New Jersey Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to 10:5-38 (West 1976), provides that it is an unlawful employment practice "[f]or an employer, because of the . . . sex of any individual . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . ." Id. at § 10:5-12(a). The New Jersey analogue to the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1976), is found at N.J. STAT. ANN. §§ 34:11-56.1 to -56.11 (West 1965), while Article X of the Governor’s Code of Fair Practices, Exec. Order No. 21 (June 24, 1965), prohibits New Jersey state agencies from "provid[ing] grants, loans or other financial assistance to

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ceptance of such a body of law prohibiting sex discrimination in employment, in at least one area of employment, the coaching of interscholastic athletic teams, widespread sex discrimination still persists.

Of the nearly 2.2 million public secondary and elementary school teachers in this country approximately one-third supplement their teaching salaries by supervising extra-curricular activities, with between 150,000 and 500,000 of these teachers serving as coaches of interscholastic athletic teams. A recent analysis of several hundred contracts negotiated by local school districts and teacher associations has revealed widespread disparities in the salaries or stipends paid to such coaches. In at least one-half of the sample contracts analyzed, coaches were paid different salaries to coach male and female teams in the same sport. Although special factors may be found to justify these salary disparities in some cases, such disparities establish at least prima facie evidence of sex discrimination. Other available studies, and the

public agencies, private institutions or organizations which engage in discriminatory practices of an invidious nature. " [1979] 3 EML. PRAC. GUIDE (CCH) ¶ 25,720 at 8834. Although this article discusses only federal law, state statutory and administrative law such as is found in New Jersey, as well as the equal rights amendments found in many state constitutions, may provide additional bases upon which to premise legal challenges to sexually disparate coaching salaries.


8. The National High School Athletic Coaches Association estimates that there are approximately 150,000 paid coaches of public senior high school athletics in this country, while the National Federation of State High School Associations estimates that there are between one-third and one-half million individuals currently coaching high school athletics. Conversations with Mr. Carey E. McDonald, Executive Director of the National High School Athletic Coaches Association, May 15, 1979; and Mr. John E. Roberts, administrative staff member of the National Federation of State High School Associations, May 14, 1979.


10. Since Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681–1686 (1976), has been interpreted by the Department of Health, Education and Welfare (HEW) to require recipients of federal financial assistance to provide "equal athletic opportunity for members of both sexes," 45 C.F.R. § 86.41(c) (1979), differences between girls' and boys' athletic teams of a degree sufficient to justify disparate coaching salaries should not be prevalent.

11. See Bottom of the Class, SPORTS ILLUSTRATED, May 21, 1979, at 18 (state survey by the Pennsylvania School Boards Association found average pay for boys' basketball coaches to be $1,589, while girls' basketball coaches averaged only $997); Affidavit of Judith A. Lonnquist, filed in Washington Educ. Ass'n v. Shelton School Dist. No. 309, No. 6993-I (Wash. Ct. App., filed Oct. 11, 1978), a copy of which is on file with the HARVARD WOMEN'S LAW JOURNAL (analysis of several hundred extracurricular salary stipend schedules for Washington public schools during the 1975–76 through 1977–78 school years showed that the coaches of girls' basketball averaged only 56.73% to 80.51% of the salary paid to the coaches of boys' basketball, depending upon the size of the school system and the school year in question); N. BURKE, P. GAEBELMANN, G. GRANT & Y. SLATTON (AMERICAN ALLIANCE FOR HEALTH, PHYSICAL EDUCATION AND
Department of Labor's enforcement efforts in this area,\textsuperscript{12} provide further evidence of the widespread existence of such discrimination.

This article will attempt to provide a legal framework for analysis of this not uncommon payment of lower salaries or stipends to the teacher-coaches (both male and female) of girls' athletics than to the teacher-coaches of comparable or identical boys' sports. The argument advanced in this article is that even in situations in which the underpayment of girls' coaches is due to the sex of the students coached rather than the sex of the coaches themselves, the girls' coaches, as well as the girls coached, are victims of unlawful discrimination.\textsuperscript{13} The illegality of disparate payments to the coaches of boys' and girls' sports under recent federal legislation will be shown, as well as the unconstitutionality of such disparities under the fourteenth amendment.

The problem of sexually disparate coaching salaries does not necessitate new federal legislation requiring school systems to equalize salaries for substantially equal coaching positions, but instead stems from the failure of school systems to recognize the illegality of such sexually disparate salary schedules under existing federal legislation and the United States Constitution. These federal statutory and constitutional provisions will now be considered.\textsuperscript{14}

\textsuperscript{12} Equal Pay Act enforcement activity by the Department of Labor's Wage and Hour Division in coaching cases is detailed in \textit{National Education Association, supra} note 9, at 22–26.

\textsuperscript{13} In many situations sexual discrimination against coaches and students will be related and intertwined, so that it will be difficult to ascertain or prove whether a school system is paying less to the coaches of girls' sports because of the coaches' sex, the sex of the students coached, or for both reasons.

\textsuperscript{14} Although this article concerns only disparate payment to the coaches of girls' and boys' sports, in many cases officials and referees for boys' sports may be paid more than are the officials and referees for comparable or identical girls' sports. Such discrimination against girls' officials has resulted in the filing of discrimination charges by the Massachusetts Division of Girls' and Women's Sports and members of the Central Western New York Board of Women Officials; both of these charges have resulted in settlements equalizing pay for the officials of the same or comparable girls' and boys' sports. Letter from Joan A. Lukey, attorney for the Massachusetts Division of Girls' and Women's Sports, to the author, July 3, 1979 (a copy of which is on file with the \textit{Harvard Women's Law Journal}); stipulation for settlement in Brigman \textit{v. New York State Pub. High School Athletic Ass'n}, Section V, Civ. No. 1973-347 (W.D.N.Y. Nov. 4, 1977) (a copy of which is on file with the \textit{Harvard Women's Law Journal}).

Salary discrimination between the coaches of girls' and boys' athletics, or between male and female coaches, may also be accompanied by sexual discrimination in regard to other extracurricular activities. "Consequently, there are several problems — not single problems [sic]: (1) Equity pay for the same sports (boys/girls), (2) equality of employment opportunity for female supervisors and coaches, (3) equality of programs for girls, (4) equity pay for programs predominantly coached or supervised by women." J. Krage (\textit{Wisconsin Education Association Council}, The
Title IX of the Education Amendments Act of 1972 provides:

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

Title IX’s prohibition against sex discrimination in “any education program or activity receiving Federal financial assistance” on its face appears to provide a strong basis upon which to challenge disparate coaching salaries as constituting illegal discrimination against both the coaches of girls’ sports and their female students. However, much of the initial litigation which has been brought under Title IX has resulted in judicial opinions exploring the coverage and procedural requirements of Title IX rather than in decisions on the merits of the claims asserted. Although the Supreme Court has held that a private right of action may be maintained under Title IX, several courts of appeals have refused to interpret Title IX to prohibit sex discrimination in employment and have struck down the regulations of the Department of Health, Education and Welfare (HEW) prohibiting such employment discrimination. These court of appeals decisions are based upon the conclusion that the intended beneficiaries of Title IX are the students in those schools receiving federal financial assistance, not their teachers. However, even if one accepts this conclusion, it still should be possible in many cases to prove that disparate coaching salaries for the coaches of girls’ sports

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17. Coaching salary differentials may involve sex discrimination both against female students and against their coaches. See Harrington v. Vandalia-Butler Bd. of Educ., 418 F. Supp. 603, 606 (S.D. Ohio 1976), rev’d on other grounds, 585 F.2d 192 (6th Cir. 1978), cert. denied, 441 U.S. 932 (1979) (“That the plaintiff’s students were the primary victims of the defendant’s actions does not detract from Mrs. Harrington’s right to equality in her working environment.”).
have a sexually discriminatory impact upon the girls themselves. Officials of the Department of Health, Education and Welfare have, in fact, recognized such a connection between discrimination against teacher-coaches and their students in issuing a Title IX regulation which provides that:

[I]n determining whether equal opportunities are available [for students] the Director will consider, among other factors: . . .

(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors; . . .20

The "[o]pportunity to receive coaching" and the "compensation of coaches" are only two of ten separate factors considered by HEW to be relevant in determining whether a school system is providing equal athletic opportunities for students of both sexes, and the regulation in which these factors are detailed further states that "[u]niform aggregate expenditures for members of each sex or unequal expenditures for male and female teams . . . will not constitute noncompliance with this section. . . ."21 Nevertheless, the provision of coaches and their compensation remain relevant factors under this Title IX regulation. Even if sexually disparate coaching salaries are not considered by HEW or the courts to be violative of Title IX in all cases, a violation of that statute should certainly be found in those cases in which teachers have declined to coach girls' sports or have chosen to coach boys' instead of girls' sports because of a sexually discriminatory pay schedule.

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20. 45 C.F.R. § 86.41(c) (1979). In analogous situations the courts have recognized the manner in which racial discrimination against teachers can infect a school system and discriminate against the students within the system. The Fifth Circuit Court of Appeals has noted that "Faculty integration is essential to student desegregation. To the extent that teacher discrimination jeopardizes the success of desegregation, it is unlawful wholly aside from its effect upon individual teachers." United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 883 (5th Cir. 1966), aff'd en banc, 380 F.2d 385 (5th Cir.), cert. denied, 389 U.S. 840 (1967).

In the cases in which courts of appeal have found employment to be outside the coverage of Title IX, no proof has been offered to show any discriminatory impact upon students stemming from sex discrimination against their teachers. See, e.g., Junior College Dist. of St. Louis v. Califano, 597 F.2d 119, 121 n.3 (8th Cir. 1979), cert. denied, 48 U.S.L.W. 3356 (U.S. Nov. 27, 1979) (No. 79-201); Isleboro School Comm. v. Califano, 593 F.2d 424, 430 n.5 (1st Cir. 1979), cert. denied, 48 U.S.L.W. 3356 (U.S. Nov. 27, 1979) (No. 79-200). Compare Caulfield v. New York City Bd. of Educ., 48 U.S.L.W. 2212, 2213 (Sept. 25, 1979) (E.D.N.Y. Aug. 8, 1979) ("[T]his court concludes that HEW could reasonably proceed in this case under Title IX on a theory that school employment practices that involve systemic discrimination against women in access to supervisory positions had, or would have, a deleterious impact on students as direct beneficiaries of federal financial assistance.").

21. 45 C.F.R. § 86.41(c) (1979).
Since "[a]ny person who believes himself or any specific class of individuals to be subjected to discrimination" may file a Title IX complaint with the Department of Health, Education and Welfare, teachers may themselves initiate administrative investigations of sexual disparity in coaching salaries. Additionally, teachers can argue that students' rights to equal athletic opportunities may be asserted in private actions not only by students and their parents, but that teachers should be afforded standing to assert the rights of their students as to any coaching salary differentials.

"Traditionally the assertion [of jus tertii, the right of a third party] has been allowed when (1) the relationship between the in-court claimant and the third party is of a substantial nature and (2) where the ability of the third party to assert his own rights may be impaired." Teachers should be able to prove a substantial identity of interest between themselves and their students in regard to the issue of parity of coaching salaries, especially since the line between sex discrimination against students and against their coaches will often not be easily ascertained. Students, who are only in school for a limited period of time, certainly could have no more interest in equal pay for their coaches than do those coaches themselves, and the fact that most students are minors may make their ability to assert their own interests more doubtful than with other plaintiffs. Since the teacher-coaches in many cases may therefore be the only persons with both the requisite interest in parity of coaching salaries and the ability to vindicate this interest, they should be granted jus tertii standing.

22. 45 C.F.R. § 80.7(b) (1979). This procedure has been incorporated by reference into HEW’s regulations implementing Title IX. 45 C.F.R. § 86.71 (1979) ("Interim Procedures").

23. One of the major disadvantages of Title IX enforcement by the Department of Health, Education and Welfare is that back pay and damages may only be ordered in administrative compliance proceedings if "the failure to make such payment will result in the present administration of federal funds in a discriminatory manner." In re Lovelady Independent School Dist., Texas, No. S-109 at 10 (HEW Civil Rights Reviewing Authority, Feb. 23, 1979). This condition for monetary relief will rarely be met in situations involving sexually disparate coaching salaries. An even more serious problem with administrative enforcement of Title IX is HEW’s inability to investigate and process all charges filed with it in a timely manner; officials of the Department have themselves admitted that "As a practical matter, HEW cannot hope to police all federally funded education programs." Cannon v. University of Chicago, 441 U.S. 677, 708 n.42 (1979).


25. See Fed. R. Civ. P. 17(c) ("If an infant . . . does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem.").


27. Cf. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (In which "the owners of private
Some of the above problems with teacher standing to challenge sexually disparate coaching salaries in private actions under Title IX might be solved by convincing students and their parents to file Title IX claims themselves or to join in actions brought by teacher-coaches. One possible problem with such claims, though, might be the reluctance of courts to award backpay or damages to teachers on the basis of such student complaints. Despite the existence of these problems in the enforcement of Title IX by students, teachers, or the Department of Health, Education and Welfare, violations of both students’ and teachers’ Title IX rights still should be alleged in complaints challenging sexually discriminatory coaching salary schedules. For even if eventually unsuccessful on the merits, such claims would at least serve to highlight the manner in which sex discrimination against, and the interests of, female athletes and their coaches are often so strongly intertwined.

Title VII

Although most courts have concluded that Title IX does not generally prohibit sex discrimination in employment, Title VII of the Civil Rights Act of 1964 is specifically addressed to the employer-employee relationship and prohibits discrimination in employment on the basis of sex. However, despite the attractiveness of Title VII to teachers faced with sexually discriminatory coaching salaries, several courts have held that the payment of disparate salaries to the coaches of boys’ and girls’ athletic teams is not prohibited by that act.

In the cases of Kenneweg v. Hampton Township School District and Jackson v. Armstrong School District, in which both males and females coached girls’ athletic teams, two different federal judges from the Western District of Pennsylvania concluded that Title VII is inapplicable to alleged sex discrimination based upon the sex of the students...

schools were entitled to assert the rights of potential pupils and their parents. . . .’’ Griswold v. Connecticut, 381 U.S. 479, 481 (1965)); Runyon v. McCrary, 427 U.S. 160, 175 n.13 (1976) (‘‘It is clear that the schools have standing to assert these arguments on behalf of their patrons.’’).

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coached (rather than upon the sex of the coaches themselves). The judges reasoned:

It is clear from the statute [Title VII] that the sex of the plaintiffs must be the basis of the discriminatory conduct. . . . [D]isparity in treatment not based on plaintiffs' sex is not a valid claim under Title VII. . . . If plaintiffs coaching female sports are being paid less than individuals coaching male sports, there is no valid claim of gender based discrimination as to these plaintiffs. Here plaintiffs are not being discriminated against because of their sex.33

It should be noted initially that both Kenneweg and Jackson were solely Title VII cases and therefore, even if accepted as valid interpretations of Title VII, the reasoning of the cases does not foreclose a contrary result under the different language of Title IX, the Equal Pay Act, or the United States Constitution. Title VII of the Civil Rights Act of 1964 makes it unlawful "... to discriminate against any individual . . . because of such individual's . . . sex."34 The language of Title IX is broader, however, providing that "No person . . . shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving federal financial assistance . . . ."35 If otherwise applicable, Title IX is therefore not by its terms restricted to the prohibition of discrimination on the basis of the discriminatee's sex. The Equal Pay Act's prohibition against discrimination "between employees on the basis of sex," on the other hand, focuses on the com-


(It) would not be a violation of Title VII if an employer's health insurance policy denied pregnancy benefits for [the dependent daughters of employees] so long as the exclusion applied equally to non-spouse dependents of male employees and non-spouse dependents of female employees. Since male and female employees have an equal chance of having pregnant dependent daughters, male and female employees would be equally affected by such an exclusion.

44 Fed. Reg. 23,805 (1979). Thus, although an employee may not receive as complete medical insurance coverage for a daughter as for a son, since the disparity in coverage is not based upon the sex of the employee, the EEOC has determined that such discrimination is not violative of Title VII.

35. 20 U.S.C. § 1681(a) (1976). See also 45 C.F.R. § 86.51(a)(1) (1979) ("No person shall, on the basis of sex, . . . be subjected to discrimination in employment . . . under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance."); 45 C.F.R. § 86.54 (1979) ("A recipient shall not make or enforce any policy or practice which, on the basis of sex: (a) Makes distinctions in rates of pay or other compensa-

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parity of particular jobs, and under this provision women coaches should receive equal pay for substantially equal coaching responsibilities whether or not some men also receive less for their coaching.\(^{36}\)

Even under Title VII, however, proper pleading and proof may avoid the results of the *Kenneweg* and *Jackson* cases. In many cases it may be possible to prove an historic practice of sex discrimination in coaching within a school system. Even if a school system has no women teachers qualified to coach boys' major contact sports such as football and basketball, men may have been preferred over qualified women to coach boys' teams in non-contact sports such as golf, tennis, track or swimming. To so restrict women to coaching girls' sports would constitute "discrimination . . . with respect to [the women's] terms [and] conditions . . . of employment, because of such individual's . . . sex."\(^{37}\) and thus would violate Title VII regardless of the salaries paid to the coaches of comparable boys' and girls' sports.\(^{38}\)

More importantly, the reasoning of the *Kenneweg* and *Jackson* courts — that Title VII does not prohibit coaching salary disparities which are based on the sex of the students coached — may be challenged even if one accepts the proposition that a Title VII plaintiff must show discrimination based upon her own sex. For even if a school system has not unlawfully excluded women from coaching boys' sports, it is very likely that the majority of boys' coaches will be male and a majority or at least a significant minority of the girls' coaches will be female. Assume, for instance, that nine of the ten boys' coaches at a particular school are male, while three of the five girls' coaches are female.\(^{39}\) In such a situation a lower rate of pay for the girls' coaches will have a disparate impact on the female coaches, since sixty percent of the lower-paid coaches are women while the higher-paid class of coaches is ninety percent male. Considering all of the coaches together, seventy-five percent of the female coaches are at the lower-paid rank, while only

\(^{36}\) See text accompanying notes 44–71, infra.


\(^{38}\) See *Marshall v. Kirkland*, 602 F.2d 1282, 1298–1301 (8th Cir. 1979); *Haas v. South Bend Community School Corp.*, 259 Ind. 515, 525, 289 N.E.2d 495, 500 (1972) ("[I]t should not be seriously contended that a female coach will be required if girls are permitted to compete [in interscholastic athletics]. . . . [L]icensed teachers are quite capable of supervising students of both sexes."") (dictum).

\(^{39}\) At the present time approximately 25% of the high school athletic coaches in this country are female, and these females are overwhelmingly assigned to coach girls' athletic teams. Conversation with Mr. Carey E. McDonald, Executive Director of the National High School Athletic Coaches Association, May 15, 1979.
eighteen percent of the male coaches receive this lower salary. Even if
the school could justify the fact that males predominately coach boys’
athletics, it seems unlikely that it could justify the salary differentials
between substantially equal coaching positions. The mere desire to
spend less on girls’ than on boys’ athletics is contrary to Title IX’s
mandate of equal educational opportunity, and it is unlikely that a school
could rebut such a prima facie showing of disparate impact by proof of
legitimate job-relatedness or business necessity.  

Unfortunately, in neither Kenneweg nor Jackson did the plaintiffs
attempt to introduce evidence showing either that women had tra-
ditionally coached girls’ athletics or that women coached only or primar-
ily girls’ athletics. Instead, judgment was granted for the defendants on
a motion to dismiss in one case and on a motion for summary judgment
in the other. However, a disparate impact analysis similar to that
described above has been adopted in several other Title VII cases.

In finding the seniority transfer rules of two employee units (one of
which was over sixty percent female, the other one-hundred percent
male) violative of Title VII’s prohibition against sex discrimination, one
federal district judge concluded:

It is not necessary to show that the complained of practice
adversely affects only females in order to demonstrate a violation
of Title VII. A practice or procedure that has mixed effects may be
presumptively violative of Title VII when the benefits or det-
riments of the practice bear a significant correlation to race or
sex.  

Another federal district judge reached the same conclusion in an earlier
Title VII case involving race discrimination:

When is a procedure racially discriminatory? Only when the im-
 pact falls solely on black employees? Only when the beneficiaries
of the practice are solely white employees? . . . This court
concludes . . . that a practice or procedure which has mixed racial
effects may nevertheless be presumptively violative of Title VII
where the benefits or detriments therefrom bear a significant corre-
lation to race.  

40. See generally Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); McDonnell-Douglas
Thus, by actually putting on proof as to the disparate impact under Title VII which coaching salary differentials have upon women coaches, results such as those in the Kenneweg and Jackson cases can be avoided and Title VII can be effectively used to challenge such salary disparities. 43

THE EQUAL PAY ACT

The Plaintiff's Case

The Equal Pay Act of 1963 44 presents few of the problems inherent in the use of Title VII or Title IX to challenge sexually disparate coaching salaries, and, perhaps as a result, it has proven to be the most effective legal weapon against the disparate payment of the coaches of boys' and girls' athletic teams. 45

The Equal Pay Act prohibits discrimination:

between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of

43. Proof of a sexually disparate impact under Title VII can also be used to challenge a school system's "coupling" of teaching positions to specific coaching skills and responsibilities. For instance, a school system may limit its search for English or math teachers to applicants who can also coach varsity football. This type of coupling is subject to challenge under Title VII since it should be possible to prove that inclusion of such coaching responsibilities in a job description will disqualify many more women than men from consideration for the teaching position. In the absence of proof by the school board that there is a business necessity requiring the coupling of the teaching and coaching vacancies, such coupling should be held violative of Title VII.


45. One study of administrative enforcement efforts challenging the disparate payment of the coaches of boys' and girls' athletic teams has concluded that "there is little doubt that the Equal Pay Act is the most appropriate approach to bring about parity in coaches' salaries." NATIONAL EDUCATION ASSOCIATION, supra note 9, at 7. Civil actions may be brought under the Equal Pay Act by either the Equal Employment Opportunity Commission, 29 U.S.C. §§ 216(c), 217 (1976), or directly by the aggrieved employees themselves. 29 U.S.C. § 216(b) (1976). Prior to July 1, 1979, responsibility for the federal government's enforcement of the Equal Pay Act was exercised by the Department of Labor rather than the Equal Employment Opportunity Commission. See Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978).
which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . . 46

In determining the applicability of the Equal Pay Act, the focus is upon the jobs occupied by the relevant male and female employees. The mere similarity of jobs is not sufficient to bring the Equal Pay Act into play (although Title VII may apply in such cases); the jobs must instead be shown to be "substantially" the same. 47

Regulations promulgated under the Equal Pay Act provide guidance as to the determination of job equality under the act. 48 The interpretations of equal skill, effort, responsibility, and working conditions which these regulations set forth build upon the Department of Labor's more general conclusions that although jobs must be substantially equal for the provisions of the Equal Pay Act to apply, such jobs "are usually not identical in every respect" and that "Congress did not intend that inconsequential differences in job content would be a valid excuse" for sex discrimination. 49 Furthermore, "[a]pplication of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance." 50

In adjudging a local school district in violation of the Equal Pay Act, one federal district court has found the job of girls' softball coach to be substantially equal to that of boys' baseball coach. 51 In comparing the two coaching positions the court considered the nature of the games, the number of players supervised, the lengths of practices and playing seasons, the amount of travel required with the teams, and other responsibilities of the coaching jobs. 52 While it should not be difficult to show

49. 29 C.F.R. § 800.120 (1979).
50. 29 C.F.R. § 800.121 (1979).
52. Id. at 5720–21. The mere fact that one coach was coaching girls and the other coaching boys was not considered by the Woodbridge court and should be of no significance under the Equal Pay Act, without proof that one job requires or involves different skill, effort, responsibility or working conditions. Cf. Marshall v. City of Torrington, 23 Wage and Hour Cas. 364 (D. Conn. 1977) (job of female matron in girls' gym and locker area substantially equal to job of male custodian in boys' gym and locker area for purposes of Equal Pay Act); Mize v. State Div. of Human Rights, 38 A.D.2d 278, 328 N.Y.S.2d 983 (App. Div. 1972), aff'd without opinion, 31 N.Y.2d 1032, 294 N.E.2d 851, 342 N.Y.S.2d 65, modified on other grounds, 33 N.Y.2d 53, 304 N.E.2d 231, 349 N.Y.S.2d 364 (1973) (position of police matron, supervising women prisoners, is substantially equal to job of police turnkey, supervising male prisoners, and therefore female matrons are entitled
substantial equality between the jobs of coaching such sports as softball and baseball or girls' and boys' basketball, a more difficult problem may be presented in attempting to compare coaching jobs where there are not direct counterpart teams for both boys and girls in the same sports. Plaintiffs should be careful to point out, however, that it is the coaching jobs that are being compared rather than the sports coached. The requirements of the Equal Pay Act are therefore met by proof that the same skill, effort, and responsibility is necessary in coaching the relevant sports at issue and that despite different rules and playing conditions the coaches are performing substantially equal jobs under similar working conditions.

**Employer Defenses**

Once the plaintiff establishes that particular jobs are substantially equal within the terms of the Equal Pay Act, once she shows "that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions."53 Those fours exceptions are for "payment . . . made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . ."54 It is this last exception, which legitimates "differential[s] based on any other factor other than sex," upon which school districts will most likely rely in defending against challenges to sexually discriminatory coaching salaries.55

Such a defense might well be premised upon the argument that women coaches of girls' sports are being paid less than male coaches of boys' sports because of their students' sex rather than because of their

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55. If a school system can convince a court that its payment of lower salaries to girls' coaches is "based on any other factor other than sex," it will have established a defense not only to an Equal Pay Act claim, but also to any correlative Title VII claims. See 42 U.S.C. § 2000e-2(b) (1976) ("It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29."); City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702, 711–12 (1978).
own sex and that the rationale of the Kenneweg and Jackson cases is therefore applicable.66 Both of these cases involved only Title VII, however, and while Title VII may only reach discrimination based upon the sex of the plaintiff-employee, a plaintiff under the Equal Pay Act need only show discrimination between employees "on the basis of sex. . . ." Thus the statutory language does not pose the same problem which was found determinative in Kenneweg and Jackson. Salary discrimination based upon the sex of the students coached is by its very terms not "based on any other factor other than sex" and therefore fails to satisfy this defense to a claim under the Equal Pay Act. Furthermore, it would be anomalous for a court to accept as a defense to one federal antidiscrimination law (the Equal Pay Act) a school board justification which most likely is itself violative of another federal antidiscrimination statute (Title IX).

Local school boards may nevertheless attempt to argue that the Equal Pay Act was not meant to cover a case in which both male and female coaches of girls’ sports are paid less than the coaches of boys’ sports and that the "factor other than sex" defense therefore applies. The Equal Pay Act prohibits discrimination "between employees on the basis of sex by paying wages . . . at a rate less than the rate . . . [paid] to employees of the opposite sex. . . ."58 A school board could argue that where males are receiving the same amount for coaching girls’ sports as is paid to female coaches, the statute’s requirement of sexually discriminatory pay rates has not been met. The flaw in such an argument is that instead of focusing on individual instances of sexually discriminatory salary disparities the argument attempts to expand the inquiry to consider all substantially equal coaching jobs. However, under the Equal Pay Act "[o]nce plaintiff has established that women employees perform work equal to that of one or more men employees, in terms of skill, effort and responsibility . . . [there is] established a prima facie case."59 The fact that an employer is not discriminating against all women or that some men are being paid less than other men is therefore irrelevant to the question whether an individual female coach is being paid less than a comparable male coach in violation of the Equal Pay Act.60

56. See text accompanying notes 31-33, supra.
58. Id.
60. See Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972). The Title VII disparate
To allow a lower rate of pay for some men coaching girls’ athletics to provide a defense for the underpayment of females coaching girls’ athletics runs contrary to the spirit of both the Equal Pay Act and its proviso that “an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of the subsection, reduce the wage rate of any employee.”

As one Congressman remarked during debate on the Equal Pay Act: “The objective of equal pay legislation . . . is not to drag down men workers to the wage levels of women, but to raise women to the levels enjoyed by men in cases where discrimination is still practiced.”

Just as an employer cannot avoid the requirements of the Equal Pay Act by paying some men the lower wage paid to women, neither can an employer legitimate sexually discriminatory wages by paying some women at the higher rate paid to men. Thus a school board could not defend its lower salaries for girls’ coaches by showing that some women hold higher paid positions as boys’ coaches. The Supreme Court has held that an employer remained in violation of the Equal Pay Act even after women began to fill positions on its higher-paid and formerly all-male night shift. The Court reasoned that:

If, as the Secretary proved, the work performed by women on the day shift was equal to that performed by men on the night shift, the company became obligated to pay the women the same base wage as their male counterparts on the effective date of the Act. To permit the company to escape that obligation by agreeing to allow some women to work on the night shift at a higher rate of pay as vacancies occurred would frustrate, not serve, Congress’ ends.

impact test of the Wells and United States Steel cases, discussed in the text accompanying notes 41-42, supra, could also be used to support an argument that “It is not necessary to show that the complained of practice affects only females in order to demonstrate a violation of [the Equal Pay Act].” Wells v. Frontier Airlines, 381 F. Supp. 818, 821 (N.D. Tex. 1974).

Many of the girls’ coaches in a particular school system can be expected to be women and most, if not all, of the boys’ coaches will be men. The Labor Department’s regulations under the Equal Pay Act provide that:

[S]ituations will be carefully scrutinized where employees of only one sex are concentrated in the lower grades of the wage scale, and where there does not appear to be any material relationship other than sex between the lower wage rates paid to such employees and the higher rates paid to employees of the opposite sex.


The purpose of the Equal Pay Act would be defeated if a school district could immunize its lower rate for female coaches by hiring a few males to coach girls' sports at the lower rate or by permitting a few women to coach boys' teams at the higher rate. Employers cannot evade their duties to all women employees by treating a few males or females differently from other employees of their sex. Thus, in Hodson v. American Bank of Commerce, the Fifth Circuit Court of Appeals found a violation of the Equal Pay Act despite the fact that some of an employer's female employees were being paid more than comparable male employees:

The Secretary contends that under the district court's reasoning an employer could consistently hire women at a lower starting rate and be protected by the fact that some women, after long periods of service, ultimately reached higher salary levels than men subsequently hired. This, it is contended would cripple the administration of the Act by offering an easy method of evasion. The mere presence of a few women in the upper part of the wage scale would permit widespread discrimination against women as a group. This could result automatically through general periodical increments added to a discriminatory starting salary, or deliberately through the selection of a few women for favorable treatment or a few men for unfavorable treatment — the result of which would be to give protective coloration to a generally discriminatory pattern. It is enough to say that we agree.

In addition to arguing that the sex of students coached constitutes a "factor other than sex" justifying disparate coaching salaries, school

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Brewing Co., 457 F.2d 221, 227 (7th Cir. 1972) ("It is irrelevant that the male technicians in the Analytical Lab are now also receiving the lower wage or that the jobs in the MQC Lab are now open to women at the higher rate, since we have found those circumstances to be part of a plan to circumvent the Act's requirement that the wages of the women in the Analytical Lab be raised."); Hodgson v. Square D Co., 3 Empl. Prac. Dec. ¶ 8016 at 6037 (E.D. Ky. 1970), aff'd in part, rev'd in part on other grounds, 459 F.2d 805 (6th Cir.), cert. denied, 409 U.S. 967 (1972) ("If women perform the same type of work, equal in skill, effort and responsibility, as do men, they must be paid an equal wage, notwithstanding their right to apply for and perhaps obtain jobs in the higher wage classifications. The purpose of the Act is not to prevent unequal access to jobs, but to prevent unequal pay for essentially equal jobs. If two jobs are equal in all respects, except for a wage disparity, the ability of both sexes to occupy those positions does not satisfy the Act.").

64. 447 F.2d 416 (5th Cir. 1971).
65. Id. at 421. An analogy can perhaps also be drawn to the Department of Labor's position on the removal of employees of one sex from a job so as to leave only employees of the other sex performing that particular job: "If a prohibited sex-based wage differential had been established or maintained in violation of the Act when the same job was being performed by employees of both sexes, the employer's obligation to pay the higher rate for the job cannot be avoided or evaded by the device of confining the job to members of the lower paid sex." 29 C.F.R. § 800.114(c) (1979).
districts might also defend such coaching cases by arguing that the coaches of boys' sports are paid more than the coaches of girls' sports because additional pressures associated with coaching the more highly visible and popular boys' sports prevent a finding that the two types of coaching constitute "equal work." To counter such an argument coaches may be obtained to testify that, to paraphrase the Fourth Circuit Court of Appeals, coaching "pressure" "is as much a function of attitude and experience" as it is of external factors; if such "pressure" actually stems in part from external sources, it constitutes merely "a peripheral part of [a coach's] employment" unrelated to the skill, effort, responsibility, or working conditions entailed in a coaching position.

A variant of the pressure argument is that a school district receives much greater income (in gate receipts) from boys' sports than from girls' sports and that this greater profitability justifies higher payments to the coaches of boys' sports. In considering such an income defense it should be initially determined whether the boys' sports in question are really profitable or if their gate receipts are in fact necessary to support the greater expense of such sports to the school district.

Even if the school district's argument is factually supported, such a defense can be challenged on another ground:

Pressure and spectators [and consequently, one could argue, the income brought in by a sport] are often determined by other factors which may be discriminatory. As long as male sports are enhanced by the attendance of cheerleaders, bands, pep squads, the press,


67. Brennan v. Prince William Hosp. Corp., 503 F.2d 282, 290 (4th Cir. 1974), cert. denied, 420 U.S. 972 (1975) (holding that male orderlies' physical ability to restrain confused or violent patients better than female nurses' aides is not sufficient to warrant a finding that the positions do not entail "equal work" for the purposes of the Equal Pay Act). See also Letter from Norman J. Chachkin, Associate Director of Policy Planning and Research, HEW Office for Civil Rights, to Pat Meyer, July 8, 1977, a copy of which is on file with the HARVARD WOMEN'S LAW JOURNAL ("[P]ublic pressure involved" does not . . . appear to relate to either the skill, effort, or responsibility required of coaches or to the conditions under which they work.").

68. Cf. Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589 (3d Cir.), cert. denied, 414 U.S. 866 (1973) (payment of higher wages to male employees in the employer's men's department than to female employees in the women's department upheld, due to the finding that the greater profitability of the men's department was a "factor other than sex" justifying the otherwise sexually discriminatory wages). The acceptance of a revenue defense to claims of disparate pay for the coaches of boys' and girls' athletics would render most such claims ultimately unsuccessful, since in a recent nationwide poll of public school teachers less than four percent of the teachers polled worked in school systems in which "girls' sports produce as much revenue as boys' sports events." NATIONAL EDUCATION ASSOCIATION, supra note 9, at 31, 34.
the school principal and the superintendent, as long as they are seen as the school’s representatives in traditional rivalries and are the recipients of the major school awards, and as long as they are scheduled in prime time at the most convenient locations, girls’ sports will not be their equal. Thus pressure and the number of spectators may be directly related to the unequal treatment of the two programs.69

Furthermore, athletics have “come to be generally recognized as a fundamental ingredient of the educational process,”70 and it is therefore no more appropriate for a school district to consider “profits” in setting coaching salaries than in establishing stipends for the supervision of other extracurricular activities or determining salaries for classroom teaching.71

Since a defendant school district therefore should find it difficult to justify disparate coaching salaries for the coaches of girls’ and boys’ sports as legitimately based upon “any other factor other than sex,” or to establish any of the other defenses to an Equal Pay Act claim, the Equal Pay Act will in many cases provide the best statutory basis upon which to challenge such disparate coaching salaries.

Constitutional Law

In addition to the statutory bases for challenging sexually disparate coaching salaries discussed above, coaching pay differentials based upon the sex of the students coached may also be so arbitrary as to violate teachers’ fourteenth amendment rights to equal protection and due process. Such a constitutional challenge may, in fact, provide the best legal theory upon which to argue for the levelling-up of the salaries of male, as well as female, coaches of girls’ sports. It is irrational to pay teachers at different rates due to the sex of their students for jobs that in all other respects are identical, just as it would be irrational to pay teachers less because they are teaching at a single sex high school or at a

71. Cf. Cape v. Tennessee Secondary School Athletic Ass’n, 424 F. Supp. 732, 741 (E.D. Tenn. 1976), rev’d on other grounds, 563 F.2d 793 (6th Cir. 1977) (per curiam) (“[T]he objectives of sustaining crowd interest and support (game receipts) are insufficient justifications to support a sex-based classification resulting in disparate educational opportunities.”).
school containing primarily minority or foreign-born students. The school systems in the above instances would have, in effect, created an irrebuttable presumption that the difficulty of a teacher’s task varies directly with the sex or race of his or her students, and since such a presumption involves a classification based upon gender or race and is not “necessarily or universally true in fact” it should be declared unconstitutional.\textsuperscript{72}

Nor can the distinction in treatment of girls’ and boys’ coaches withstand constitutional scrutiny under traditional equal protection analysis. Since such salary disparities involve a sexual classification, school boards should be required to show that such disparities are “substantially related to achievement of an important governmental objective,” rather than merely that a rational relationship exists between the classification of coaches on the school’s salary scale and the school board objectives sought to be advanced by that classification.\textsuperscript{73} Even if the courts will not apply such a heightened scrutiny to coaching salary differentials, it is questionable whether school boards could show that even a rational relationship exists between the payment of different salaries to persons performing identical work and the advancement of any legitimate governmental objective.\textsuperscript{74}

As for the argument that the teachers are not being discriminated against on the basis of their sex, the Supreme Court has recognized in regard to racial classifications that “[f]ew principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the


In Weinberger v. Salfi, 422 U.S. 749 (1975), the Supreme Court limited the application of the irrebuttable presumption doctrine to cases “already shown to be appropriate for intermediate review.” L. TRIBE, AMERICAN CONSTITUTIONAL LAW \S 16-32, at 1097 (1978). Thus in order to employ irrebuttable presumption analysis to successfully challenge sexually disparate coaching salaries, such salary disparities must be shown to involve a sexual classification necessitating heightened judicial scrutiny.


\textsuperscript{74} Cf., e.g., Trister v. University of Miss., 420 F.2d 499, 502–04 (5th Cir. 1969) (university could not, consistently with equal protection clause, prohibit some law school professors from practicing law while allowing similarly situated professors to continue such practice); Orr v. Thorp, 308 F. Supp. 1369, 1372 (S.D. Fla. 1969) (state statute which prohibited employees in only one county of state from joining teacher organizations violated equal protection clause); Alabama State Teachers Ass’n v. Lowndes County Bd. of Educ., 289 F. Supp. 300, 305–06 (M.D. Ala. 1968) (denial of benefits of state teacher tenure law to teachers in eight Alabama counties violated equal protection clause).
race of his companions. . . ." It should therefore also be unconstitu-
tional for a school system to discriminate against teacher-coaches either
because of their own sex or because of the sex of the students whom they
coach.

The Supreme Court, in *Stanton v. Stanton*\(^7\) has upheld a mother’s
challenge to the partial discontinuation of child support upon her daugh-
ter’s eighteenth birthday, since under the state’s law of majority the
support would have continued until the age of twenty-one had the child
been a male. The *Stanton* Court concluded that “in the context of child
support . . . no valid distinction between male and female may be
drawn.”\(^7\) The coaches of girls’ sports might argue by analogy that, just
as parents cannot constitutionally be paid differing amounts of child
support based upon the sex of the child supported, school athletic
coaches cannot constitutionally be paid differing amounts of compensa-
tion based upon the sex of the students coached.\(^7\)

Theories of constitutional law based upon the equal protection and
due process clauses of the fourteenth amendment, especially when
combined with the federal statutory claims discussed previously, should
thus provide the basis for successful challenges to sexually discrimina-
tory coaching salary differentials.

**Conclusion**

Despite passage of the federal legislation discussed in this article and
the generally successful use of this, and other, legislation to combat
discrimination on the basis of sex in many areas of American life, in the

Texarkana*, 478 F.2d 262, 266 (8th Cir. 1973) (“Penalizing a person for the race of his associates is
just as racially discriminatory as penalizing a person because of his or her own race.”); *Dom-
browski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) (Stevens, J.) (if proven on remand, discrimina-
tion against an attorney based upon the race of his clients, by the landlord of a building which was a
public accommodation, would violate federal civil rights legislation).

\(^76\) 76. 421 U.S. 7 (1975).

\(^77\) 77. *Id.* at 17.

Security Act under which widows, but not widowers, receive benefits based on the earnings of a
deceased spouse] discriminates among surviving children solely on the basis of the sex of the
surviving parent.”) (dictum); *Califano v. Westcott*, 99 S. Ct. 2655, 2660 (1979) (argument
rejected that since exclusion of families with unemployed mothers from Social Security benefits
always affects “one man, one woman, and one or more children . . . the statute is ‘gender-based’
law struck down despite the argument that the statute’s racial classification applied equally to all
races).
payment of coaches of secondary and elementary school athletic teams sex discrimination is still widespread.79 Perhaps in part due to the relatively small sums paid to teachers to coach such athletic teams,80 legal challenges to such pay disparities have, however, been few.

Despite the fact that the sums of money involved in individual cases may be small, the effects of sexually disparate coaching salaries, involving discrimination in educational and athletic opportunities as well as in employment, cannot be measured in monetary terms alone. The payment of a smaller stipend to the coaches of girls’ sports than to comparable coaches of boys’ sports clearly indicates that girls’ athletics are still not generally considered to be as important as athletics for boys. So long as the current practice of disparate pay for the coaches of male and female athletic teams continues, not only the young female athletes and their coaches, but American society as a whole, will suffer. Hopefully the statutes and constitutional provisions discussed in this article will be used to challenge and eliminate such sexually disparate salary practices and thereby further both equal athletic opportunities for female students and equal employment opportunities for their teacher-coaches.

79. See text accompanying notes 1–14, supra.
80. See the listing of back pay settlements in administrative actions brought by the Department of Labor to challenge sexually disparate coaching salaries in NATIONAL EDUCATION ASSOCIATION, supra note 9, at 22–26.