American Journal of Law & Medicine (2023), 49: 1, 59–80
doi:10.1017/amj.2023.16

American Society of Law, Medicine & Ethics
Where Multidisciplinary Education Improves Practice

NOTES

Title IX's Unintended Consequences: The Female Athlete Triad and the Need for Special Treatment

Morgan Hill

Boston University, Boston, MA, USA
Email: morganeh@bu.edu

Abstract
This Note examines the effects of Title IX's equal treatment framework on female collegiate athletes in the context of the female athlete triad. It describes the shortcomings of Title IX's equal treatment approach and its deleterious effects on the health of female student athletes. It argues for the adoption of the special treatment approach as a remedy.

Keywords: Title IX; female athlete triad; equal treatment; special treatment; athletics

Introduction

With the passage of Title IX of the Education Amendments of 1972 ("Title IX") and the nominal elimination of gender discrimination in educational activities, female athletic participation has increased significantly.[1] At the collegiate level, participation in women's sports has increased 450% since the enactment of Title IX.[2] But increased participation in athletics has been accompanied by an increase in sport-related health problems unique to female athletes, one of which is the Female Athlete Triad ("the Triad").[3] Today, the American College of Sports Medicine defines the Triad as a "spectrum of dysfunction related to energy availability, menstrual dysfunction, and bone mineral density."[4] Manifestations of the Triad are common in athletes at all competitive levels and ages; this paper exclusively analyzes the Triad in collegiate athletes participating in Division I National Collegiate Athletics Association ("NCAA") athletics at universities that are members of one of the five "autonomy conferences."[5]

Title IX paved the way for women to participate in sports at a competitive level; in doing so, it exposed female athletes to sport-related health problems like the Triad.[6] As it stands today, Title IX — fifty years after its enactment — fails to ensure that women can thrive while participating in competitive sports at the collegiate level. This is because the legal framework of Title IX does not account for the unique plight of female student-athletes and the ways in which their experience is distinct from male student-athletes. In turn, schools are allowed to craft policies that handle student-athlete injuries in a gendered manner without violating Title IX. Athletic departments at colleges and universities are subject to Title IX's

[1] 20 U.S.C. § 1681; *see* Matzkin ET. AL., *Female Athlete Triad: Past, Present, and Future,* 23 J. OF THE AM. ACAD. OF ORTHOPAEDIC SURGEONS 424, 424 (2015).

[2] Asma Jamed, et al., *Female Athlete Triad and its Components: Toward Improved Screening and Management*, 8 MAYO CLINIC PROCEEDINGS 996, 996 (2013).

[3] *Id.*

[4] *Id.*

[5] *Id.* The autonomy conferences are the ACC, SEC, PAC 12, Big 10, and the Big 12.

[6] 20 U.S.C. § 1681.

mandates, but those schools' policies tend to cover cost of treatment for the injuries most commonly suffered by male athletes, often excluding treatment for injuries that are commonly suffered by female athletes such as the Triad.[7]

This Note will discuss the perils of the Triad and the ways in which the equal treatment framework, as it is embodied in regulations, agency guidelines, and athletic department policies, is insufficient to remedy the sex inequality issues that have led to the proliferation of Triad diagnoses in female student athletes. Part I of this Note explains the regulatory authority that governs how Title IX compliance is assessed within athletic departments. This Part also identifies the problems with the current compliance analysis and analyzes how a particular model of anti-discrimination legislation, the equal treatment theoretical framework, informs that analysis. Part II details the prevalence of the Triad and identifies some factors that contribute to its rampancy among female athletes. It also explains how the condition is diagnosed and treated and highlights the necessity of immediate and thorough treatment. Part III analyzes specific athletic department policies that limit the ability of female student-athletes with the Triad to seek treatment and get the cost of that treatment covered by athletic departments who put them in harm's way. This Part asserts that under current regulations and guidelines, athletic departments can write coverage policies that de facto exclude coverage of treatment for the Triad, thereby depriving female student athletes of necessary medical care. Part IV, the crux of this Note, examines the merits of the special treatment theoretical framework of equality, a framework seldom embodied in anti-discrimination legislation but has the potential to rectify some of the problems caused by the equal treatment framework. Part IV also analyzes Title IX's pregnancy regulation, which is one of the few regulations that scholars argue embodies the special treatment framework. This Part argues that the equal treatment framework currently embodied by athletics regulation is inadequate to remedy the sex discrimination resulting from de facto exclusion of the Triad from coverage policies. Finally, Part IV argues that incorporating the special treatment framework into athletics regulations as embodied by the current Title IX pregnancy regulation will result in progress toward equity between female and male student-athletes suffering from illnesses and injuries.

The current approach under title IX

The command of Title IX is straightforward: "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…"[8] Title IX applies broadly beyond college athletics, but because almost every college and university in the United States receives some level of federal funding, the immediate impact of the legislation was an increase in opportunities for women to participate in collegiate athletics.[9]

Title IX itself makes no reference to athletics or athletics-related issues.[10] Instead, in drafting Title IX, Congress employed broad, general nondiscrimination language, leaving the task of identification and remediation of sex discrimination to other administrative bodies.[11] Among these are the Department of Health, Education, and Welfare ("HEW"), the federal agency responsible for Title IX enforcement from

[7]20 U.S.C. § 1681; Stanford University, *Student Athlete Handbook* 109, https://s3.amazonaws.com/sidearm.sites/gostanford.com/documents/2021/11/19/2021_22_Student_Athlete_Handbook.pdf; University of Arizona, *Student Athlete Handbook* 34, https://s3.amazonaws.com/sidearm.sites/arizona.sidearmsports.com/documents/2020/7/30/2020_21_Student_Athlete_Handbook.pdf, University of Maryland, *Student Athlete Handbook* 39, https://s3.amazonaws.com/umterps.com/documents/2019/9/30/SAH_2019_20_FINAL.pdf, University of Iowa, *Student Athlete Handbook 6,* https://academics.athletics.uiowa.edu/sites/academics.athletics.uiowa.edu/files/2022-06/Handbook%202022-23%20-%20updated%206.15.22_0.pdf.

[8]20 U.S.C. § 1681.

[9]Lily Rothman, *How Title IX First Changed the World of Women's Sports,* Time (June 23, 2017), https://time.com/4822600/title-ix-womens-sports/ [https://perma.cc/H4VY-X9Q9].

[10]20 U.S.C. § 1681.

[11]20 U.S.C. § 1681; 34 C.F.R. § 106.41.

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

the time the legislation was enacted until 1980; the Department of Education, the present-day agency charged with Title IX enforcement; and the Department of Education's Office of Civil Rights ("OCR"), which promulgates policy interpretations that outline the responsibilities of schools under Title IX and establishes certain guidelines that direct Title IX compliance investigations.[12]

The Equal Treatment Framework in the Title IX Athletics Regulations

Among the many regulations promulgated under Title IX are regulations specific to athletics.[13] These regulations set forth the enforcement scheme for Title IX and have "controlling weight."[14] 34 C.F.R. 106.41(c) is the provision in Title IX's athletics regulations that protects against sex discrimination, specifically in the context of which student-athletes are afforded reimbursement for injury treatment.[15] The provision is titled "Equal Opportunity" and requires recipients of federal funds that sponsor athletics programs to "provide equal athletic opportunity to members of both sexes."[16] The regulation includes a non-exhaustive list of factors that should be considered in determining whether equal athletic opportunities are available to both male and female student athletes.[17] The list includes the "provision of medical and training facilities and services."[18] Other factors are whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; the provision of equipment and supplies; scheduling of games and practice times; travel and per diem allowance; publicity; and others.[19]

The Title IX regulations generally embody an "equal treatment" or formal equality approach to nondiscrimination between the sexes. The equal treatment approach is characterized by its use of "same treatment solutions to sex-based inequality" in order to encourage "gender-neutral" structures and institutions.[20] The Title IX athletics regulations "clearly require equal treatment in a variety of program areas."[21] Title IX, promulgated in the 1970s, is often seen as a product of its time insofar as the 1970s feminist movement found purchase in the equal treatment, or formal equality, framework.[22] In other words, the feminist movement that was the impetus for the passage of Title IX was highly reliant on arguments that women are, for all intents and purposes, "equal" or "the same as" men, and deserved to be treated equally.[23] At the time, arguments for laws that provide "'special protections' to women were avoided, as feminist activists aimed to "apply existing law to women as if women were citizens…as if the legal system had no sex."[24] Underpinning this framework is the idea that equality "merely had to be applied to women to be attained. Inequality consisted in not applying it. The content of the concept of equality was never questioned."[25]

Understanding the Title IX regulations' theoretical approach to equality — the equal treatment approach — is important, because that approach directly informs how Title IX is effectuated in

[12]Sarah McCarthy, *The Legal and Social Implications of the NCAA's Pregnancy Exception—Does the NCAA Discriminate Against Male Student-Athletes?,* 14 Vill Sports Ent. L. J. 327, 334 (2007); Ethan Brown, *Athletics and Title IX of the 1972 Education Amendments,* 10 Geo. J. Gender L. 505, 507 (2009).

[13]34 C.F.R. § 106.41

[14]*Cohen v. Brown University*, 101 F.2d 155 (1st Cir. 1996).

[15]34 C.F.R. § 106.41(c)

[16]34 C.F.R. § 106.41

[17]34 C.F.R. § 106.41(c)

[18]34 C.F.R. § 106.41(c)

[19]34 C.F.R. § 106.41(c)

[20]Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13, 13 (2000).

[21]34 C.F.R. § 106.41; Erin E. Buzuvis & Kristine E. Newhall, *Equality Beyond the Three-Part Test: Exploring and Explaining the Invisibility of Title IX's Equal Treatment Requirement,* 22 Marq. Sports L. Rev. 427, 428 (2011).

[22]Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports,* 43 Conn. L. Rev. 401, 439 (2010).

[23]*Id.*

[24]Catharine A. Mackinnon, *Reflections on Sex Equality Under Law,* 100 Yale L. J. 1281, 1286 (1991).

[25]*Id.*

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

educational institutions, including guidelines used to assess Title IX compliance and policies adopted by schools. Further, understanding the framework illustrates the regulations' inherent limitations on achieving equality in education-based sport.[26] For example, by requiring institutions to treat male and female athletes the same, Title IX regulations ignore the reality that organized sports are structured by, and for, male athletes.[27]

Organized sports at the collegiate level are largely rooted in patriarchy. What is now known as the institution of NCAA intercollegiate sports competition came into existence during the antebellum period as a response to British contempt for Americans' disregard of exercise.[28] An editor of Harvard University's student magazine, offended by the British criticism of the lack of "physical prowess" among American men, decided to convene a regatta where all crews from New England area colleges would compete.[29] The regatta quickly became an annual tradition described as a "demonstration of interest in manly pursuits," and in which an increasing number of institutions requested permission to enter the competition each year.[30] The first woman did not participate in intercollegiate athletics until 1892, and the predominant form of sports participation in the early twentieth century was intramural; thus, the regatta tradition and its progeny was built entirely without the influence of women.[31] Today, sport is still seen as "a forum for the development of masculine behaviors…and is one of the most important sites of masculinizing practice and socializing boys into many of the values, attitudes, and skills considered so important in the adult world of men."[32] Catharine MacKinnon further argues that most athletics "have been internally designed to maximize attributes that are identical with what the male sex role values in men."[33] Given the entrenchment of male values and behaviors in sport, Title IX's provision of opportunities for women to participate in a system developed by men over the preceding century came with consequences that could not be remediated by simply treating male and female athletes.

The Equal Treatment Framework in the OCR Investigator's Manual

To guide universities and their athletic departments in interpreting and applying the regulations, OCR established and compiled a set of guidelines in the Title IX Athletics Investigator's Manual.[34] The Investigator's Manual outlines the process that is used to assess Title IX compliance within college athletics and identifies the specific data points that OCR investigators evaluate in determining whether Title IX compliance exists.[35] Title IX compliance investigations are conducted by OCR in response to specific complaints and also are periodically conducted as required by the regulations.[36]

The Investigator's Manual first provides a list of components that OCR will assess to determine whether equal treatment in sport exists between the sexes.[37] The comprehensive list includes thirteen component areas that touch upon every aspect of collegiate athletic programs: athletic scholarships; accommodation of athletic interests and abilities; equipment and supplies; scheduling of games and

[26]Koller, *supra* note 22, at 418.

[27]*Id.* at 418.

[28]Guy Lewis, *The Beginning of Organized Collegiate Sport,* 22 American Quarterly 222, 227 (1970).

[29]*Id.*

[30]*Id.*

[31]Richard C. Bell, *A History of Women in Sport Prior to Title IX*, The Sport Journal (Mar. 14, 2008), https://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/ [https://perma.cc/T5LT-43PG].

[32]Koller, *supra* note 22, at 429.

[33]Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 119 (1987).

[34]Valerie M. Bonnette & Lamar Daniel, *Title IX Athletics Investigator Manual,* Dep't of Educ. Off. Civ. Rts. (1990), https://files.eric.ed.gov/fulltext/ED400763.pdf.

[35]*Id.* at 5.

[36]*Id*; 28 C.F.R. § 42.407(c).

[37]Dana Drew Shaw, *Fundraising: Bridging Title IX Athletics Compliance of the Equal Treatment Requirement and the Advancement of Women Administrators in Intercollegiate Athletics,* 86 Tenn. L. Rev. 653, 660 (2019); Janet Judge & Timothy Obrien, *Equity and Title IX in Intercollegiate Athletics: A Practical Guide for Colleges and Universities,* Ncaa (2001), http://www.ncaapublications.com/productdownloads/EQTI12.pdf.

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

practice time; travel and per diem allowance; opportunity to receive coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms; practice and competitive facilities; medical and training facilities and services; housing and dining facilities and services; publicity; support services; and recruitment of student athletes.[38]

Each component area is further broken down into a list of more specific constituent factors that help guide the investigator's analysis. The Investigator's Manual uses highly technical language to elucidate the factually complex three-step test that Title IX investigators use to determine whether there is compliance in each of the listed component areas.[39] The three-step analysis is as follows:

1) the investigator should evaluate each factor within each program component. The investigator should determine for each factor whether the benefits or services provided favor the men's program, favor the women's program are the same or, if different, have a negative effect on students of one sex.
2) Once each of the factors within a program component have been analyzed, the investigator then makes a determination for that program component. If the same or similar benefits or services are provided for all students, then there are no differences that negatively affect students of one sex, that is, result in a 'disparity.' If, for example, some factors favor men, they may be 'offset' by other factors favoring women. For factors favoring each sex to offset each other, they need to have the same relative impact within the particular program component. Thus, disparities need not be equal in number to offset each other, such as two factors favoring men are offset by two factors favoring women. Where factors favor students of one sex and are not offset by the services or benefits provided to students of the other sex under other factors, then a disparity exists for the program component, in effect, a finding that the benefits and services provided to one sex are not equivalent to those provided to the other sex.
3) Once the determination has been made for each program component, the investigator then analyzes all of the program components together to determine if there is compliance with the regulation. The investigator considers the number and significance of disparities in the program components in which nonequivalence was found and compares the disparities favoring the men's program with those disparities favoring the women's program. If these disparities offset each other, a finding of compliance is made. If the disparities are greater for one sex than the other and the difference results in lack of equal opportunity for one sex, then an overall finding of noncompliance is made."[40]

In short, each component area is evaluated to determine whether it favors the men's program, the women's program, or neither.[41] If there are disparities between the men's and women's programs in a given component area, the investigator must determine the relative impact of each disparity on the particular component area.[42] If disparities have the same relative impact on the particular program component, then the disparities are deemed offset each other and the effect, for Title IX compliance purposes, is as if the disparity within the program component does not exist.[43] Then, investigators calculate the total number of remaining disparities that do not offset each other.[44] Where the total number of disparities between the men's and women's programs are equivalent, compliance with the Title IX equal opportunity and treatment mandate under 34 CFR 106.41(c) exists.[45] At the end of the analysis, if there are more disparities for one sex than the other, then there is noncompliance.[46]

[38]Bonnette & Daniel, *supra* note 34, at 5.
[39]*Id* at 11.
[40]*Id.*
[41]*Id.*
[42]*Id.*
[43]*Id.*
[44]*Id.*
[45]*Id.*
[46]*Id.*

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

With respect to the provision of medical and training facilities and services treatment area, OCR investigators assess five constituent factors: availability of medical personnel and assistance; health accident and injury insurance coverage; availability and quality of weight and training facilities; availability and quality of conditioning facilities; and availability and qualifications of athletic trainers.[47] Within each treatment area, the Investigator's Manual specifies the type of information investigators should collect in the course of investigation.[48] When investigating the provision of medical and training services treatment area, one of the data points investigators should collect is "copies of any insurance policies covering athletes, the cost of the policy to the athletes, if any."[49] Investigators then review the insurance policy to determine whether coverage is equivalent for men and women, because differences in insurance coverage on the basis of sex may result in a violation of 34 C.F.R. § 106.39, the regulations regarding discrimination in health insurance benefits.[50]

However, insurance policies favoring athletes of one sex are not necessarily violations under § 106.41 (the athletics regulations) because policies are only one factor of several considered in Title IX compliance analyses.[51] The guidance provided in the Investigator's Manual is "not expected to elicit all information necessary to a finding," but the guidance and questions suggested in the manual are based on OCR investigative experience and thus shed light on how a compliance investigation is typically carried out.[52]

The problem with OCR's guidelines is that equality in the provision of medical services is but one factor to be considered in determining whether female student-athletes are being treated equally by the athletic department.[53] Including provision of medical services as a factor in the list of treatment areas by which equality is measured suggests that the component areas by which compliance is measured are fungible. It further suggests that inequality can be justified by treating female student-athletes more favorably in other treatment areas that may be far less consequential than provision of medical services, like publicity or recruiting.[54]

This possibility is limited by the concept of "relative impact," which is embedded in OCR's policy.[55] Relative impact plays a role in assessing athletic department compliance with Title IX because disparities between treatment of men's and women's athletics programs may offset each other only to the extent that the particular disparities have the same relative impact on the program at issue.[56] The concept of relative impact recognizes that a disparity in a certain treatment area may have greater potential than other disparities to negatively impact student-athletes of the particular sex that are being treated differently. While there is no specific formula for which treatment areas may offset others, determination of whether there is equal treatment between the sexes is done on a case-by-case basis and the relative impact of underproviding medical services to female student-athletes can in theory be offset by overproviding in any one of the other treatment areas.[57]

Thus, while the Title IX regulations and the OCR guidelines recognize that treating male and female student-athletes differently could be unacceptable depending on the context in which the sexes are being treated differently, they do not recognize that a disparity between the provision of medical services to male and female student-athletes is unacceptable on its face. OCR's Title IX compliance analysis thus demonstrates one of the chief critiques of the equal treatment framework—that it treats male and female

[47] *Id.* at 81.
[48] *Id.*
[49] *Id.*
[50] *Id.;* 34 C.F.R. § 106.39.
[51] Bonnette & Daniel, *supra* note 34, at 81.
[52] Bonnette & Daniel, *supra* note 34, at 7.
[53] *Id.*
[54] *Id.* at 26.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 25–26.

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

idiosyncrasies as fungible, in turn creating a need to "compare exclusively female characteristics to cross-sex analogues," which often "results in reliance on strained analogies."[58]

One of these exclusively female characteristics is the Triad. Because the disorder results from conditions and external pressures that are uniquely female, and the Title IX regulations and OCR investigative framework measure equality by comparing an institution's treatment of men to treatment of women, the Title IX and OCR framework for identifying and eliminating disparities between men's and women's programs are ineffective in the context of the Triad. The concept of relative impact is not sufficient to account for the disproportionate negative impact that the unequal provision of medical services has on athletes with the Triad.

Emergence and prevalence of the female athlete triad

In 1981, the first year in which the NCAA officially recorded the number of participating athletes each year, around 75,000 women participated in collegiate athletics.[59] The NCAA has informally collected data on the number of participating athletes since 1957, but the statistics from 1957 to 1981 were made available only in five-year intervals and included recreational, rather than just varsity, sports programs.[60] In 2021, the NCAA determined that 219,177 women participated in college sports throughout the country, close to a twelve percent increase in participation rates from just ten years earlier.[61]

The participation increase has been gradual, as female participation in athletics did not match that of males until 2005.[62] And a number of other variables aside from Title IX have contributed to the increase in participation, including changes in student populations, budget fluctuations, and the popularity of a given sport at different points in time.[63] With respect to budgets, while increases in funding have allowed schools to accommodate more athletes, a 2021 study found that the NCAA spent $4,285 on average per male athlete and $2,588 per female athlete.[64] Further, while more than half of students at NCAA schools are women, women only receive forty-four percent of athletic opportunities and schools spend an average of twenty-nine percent of their recruiting budget on recruiting women.[65]

Despite the significant impact Title IX has had in improving women's access to athletic opportunities, "numerous questions remain as to whether an unacceptable atmosphere of both explicit and implicit discrimination continues to haunt intercollegiate athletic programs."[66] Indeed, the mere provision of opportunities for women to participate in collegiate athletics, an institution shaped by and for males, has led to unintended and lingering consequences. One of those consequences is a pervasive disorder known as the "Female Athlete Triad."[67] The Triad exemplifies why Title IX remains an ineffective framework for addressing gender discrimination in collegiate athletics. Without the provision of additional resources beyond the opportunity to earn a roster spot, female student-athletes — specifically those affected by the Triad ,— will remain unable to reap the same benefits from collegiate athletics that their male

[58]Linda J. Krieger, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality,* 13 Golden Gate U. L. Rev 513, 538 (1983).

[59]*NCAA Sports Sponsorship and Participation Rates Report*, Nat'l Collegiate Athletics Ass'n (Dec. 1, 2021), https://ncaaorg.s3.amazonaws.com/research/sportpart/2021RES_SportsSponsorshipParticipationRatesReport.pdf.

[60]*Id.*

[61]*Id.*

[62]*Id.*

[63]*Id.*

[64]Jaclyn Diaz, *The NCAA's Focus on Profits Means Far More Gets Spent on Men's Championships,* NPR (Oct. 27, 2021), https://www.npr.org/2021/10/27/1049530975/ncaa-spends-more-on-mens-sports-report-reveals.

[65]*The Battle for Gender Equity in Athletics in Colleges and Universities,* National Women's Law Center (Jun. 21, 2022), https://nwlc.org/resource/the-battle-for-gender-equity-in-athletics-in-colleges-and-universities/ [https://perma.cc/7E8W-8X8U].

[66]Brian Snow & William E. Thro, *Still on the Sidelines: Developing the Nondiscrimination Paradigm Under Title IX*, 3 Duke J. Gender L. & Pol'y 1, 9 (1996).

[67]Natalie Richard et al., *Female Athlete Triad: Low Energy Availability, Menstrual Dysfunction, Altered Bone Mineral Density,* 3 Physician Assistant Clinics 313, 313 (2018).

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

counterparts do. Title IX regulations must acknowledge the unique plight of female student-athletes in order to fulfill the legislation's original purpose of eliminating discrimination in education.

Diagnosing the Triad

Athletes suffering from the Triad experience a combination of three primary conditions: low energy availability, menstrual dysfunction, and low bone mineral density.[68] There is emerging research that male athletes also suffer from a similar disorder, and the medical community is beginning to work toward redefining the Triad as "Relative Energy Deficiency in Sport (RED-S)" to emphasize that the disorder can manifest in athletes of all genders.[69] Because this Note examines the Triad through the lens of anti-discrimination legislation that relies on the gender binary, it does not analyze the needs of trans students with respect to treatment and diagnosis of the Triad. The effort to reconceptualize the Triad to RED-S reflects an increasing awareness that trans athletes are also suffering from the disorder.[70]

Medical research indicates that female athletes are more susceptible to the Triad in large part because of the unique societal and institutional pressures that women face.[71] The Triad was first named and defined in 1992 by the American College of Sports Medicine ("ACSM").[72] The Triad was originally defined as a result of the discovery that there was a correlation between disordered eating, amenorrhea, and musculoskeletal injuries among female athletes. When the Triad was defined, it was identified by the three medical phenomena that characterized the condition: disordered eating, amenorrhea, and osteoporosis.[73] All three conditions had to be present in order for a physician to diagnose a female athlete with the Triad.[74]

Because the Triad presents itself in a variety of different ways, and because its symptoms vary greatly from person to person, under the original guidelines for diagnosis many female athletes who were likely suffering from the Triad were not diagnosed, and thus were unaware that they were not seeking or receiving necessary medical care.[75] In response, the ACSM updated the diagnostic guidelines and recharacterized the Triad as a disorder identifiable by the presence of one of three phenomena, which exist on an continuum: low energy availability (with or without disordered eating), menstrual dysfunction, and low bone mineral density ("BMD").[76] A person can, however, be diagnosed with the Triad without suffering from all three components simultaneously.[77]

Energy availability is the balance between what is put into the body and what is expended from the body, either through physical activity or through natural metabolic processes.[78] Low energy availability, as seen in athletes with the Triad, is a negative balance between energy intake and energy output and is defined as less than 30 kcal/kg of fat-free mass per day.[79] For the purposes of diagnosing the Triad, the focus is on determining how much dietary energy, supplied by nutrition intake, is available at the end of

[68]Jamed, *supra* note 2, at 996.

[69]Jennifer L. Carlson, *The Female Athlete Triad/Male Athlete Triad and Relative Energy Deficiency in Sport (RED-S),* Reference Module in Biomedical Sciences (2021).

[70]*Id.*

[71]De Souza, et al., *The Role of Energy Availability in Reproductive Function in the Female Athlete Triad and Extension of its Effects to Men: An Initial Working Model of a Similar Syndrome in Male Athletes,* 49 Sports Med. 125; Roberta Sherman & Ron Thompson, *Managing the Female Athlete Triad,* Ncaa (2014), https://athletewellness.uncg.edu/wp-content/uploads/2014/05/Coaches-Handbook.pdf.

[72]Elizabeth Matzkin et al., *Female Athlete Triad: Past, Present, and Future,* 23 J. Am. Acad. Orthopedic Surgeons 424, 424 (2015).

[73]*Id.*

[74]*Id.*

[75]*Id.*

[76]Jennifer P. Dailey & Jessica R. Stumbo, *Female Athlete Triad,* 45 Primary Care: Clinics in Office Practice 615, 616 (2018).

[77]Emily J. Curry et al., *Female Athlete Triad Awareness Among Multispecialty Physicians,* Sports Med. Open 1, 2 (2015).

[78]Dailey & Stumbo, *supra* note 76, at 616.

[79]*Id.*

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

each day after all exercise and training is complete.[80] A healthy athlete's energy availability meets or equals their total energy expenditure.[81]

However, energy intake and energy output can be difficult to measure because they are largely self-reported statistics.[82] For a litany of reasons, athletes being evaluated for the Triad do not always accurately or reliably report their exercise or eating tendencies.[83] At the collegiate level, athletes are not in control of their exercise regimen, and may over or underestimate the energy that they use in a given session of exercise.[84] Athletic departments, through coaches and other staff, plan and establish "required activit[ies] with an athletics purpose" that athletes must attend and participate in to be considered a member of a collegiate team.[85] Further, energy availability is associated with the body's natural fluctuations in reproductive and metabolic hormone concentrations and therefore the energy availability calculation involves more than just the ratio of dietary energy intake to exercise energy expenditure.[86] Lastly, with respect to eating tendencies, there is the possibility of "underreporting of intake, modified intake during the period of reporting and imprecise recording of portion sizes."[87]

Menstrual dysfunction also exists on a continuum.[88] At one end of the continuum is eumenorrhea, which is normal or regulation menstruation, and at the other end is amenorrhea, which is the absence of menstruation. [89] Menstrual dysfunction is heavily tied to energy availability because a negative energy balance suppresses the body's reproductive function to conserve energy for other, more essential physiologic processes.[90]

The continuum of BMD ranges from optimal bone density to osteoporosis.[91] Low BMD is also highly correlated to menstrual dysfunction and disordered eating. With respect to menstrual dysfunction, BMD is affected because low estrogen, resulting from amenorrhea, in turn inhibits bone remodeling and resorption, which decreases BMD. BMD is also affected by disordered eating, because BMD accrues throughout a female's adolescence and reaches the optimal level by age eighteen ninety percent of the time.[92] After reaching optimal levels at the end of adolescence, BMD can only be maintained or lost.[93] Maintenance is achieved through adequate, balanced nutrition and moderate physical activity.[94] Low bone density increases risk of injury and fracture and may not be fully reversible.[95]

The modern practice of recognizing the Triad and its symptoms as existing on a continuum has allowed for more accurate diagnoses and more prompt recognition of the Triad's manifestations.[96] Prior to the 2007 revised guidelines on diagnosing the Triad, between one and four percent of patients presented all three requisite symptoms and were diagnosed.[97] When the guidelines were updated, one study found that seventy-eight percent of high school female athletes in the sample had one or more of

[80]Mary Jane de Souza et al., *2014 Female Athlete Triad Coalition Consensus Statement on Treatment and Return to Play of the Female Athlete Triad,* Brit. J. Sports Med. 1, 2 (2014).
[81]*Id.*
[82]Matzkin, *supra* note 1, at 425.
[83]*Id.*
[84]Nat'l Collegiate Athletics Ass'n, *Division I Manual* 251 (2020), https://www.ncaapublications.com/productdownloads/D121.pdf.
[85]*Id.*
[86]De Souza, *supra* note 80, at 4.
[87]*Id.*
[88]Dailey & Stumbo, *supra* note 76, at 2.
[89]De Souza, *supra* note 80, at 2.
[90]Dailey & Stumbo, *supra* note 76, at 616.
[91]Jamed, *supra* note 2, at 996.
[92]Matzkin, *supra* note 1, at 430.
[93]*Id.*
[94]*Id.*
[95]Aurelia Nattiv et al., *American College of Sports Medicine Position Stand: The Female Athlete Triad,* 39 Med. & Sci. in Sports & Exercise 1867, 1870 (2007).
[96]Matzkin, *supra* note 1 at 426.
[97]*Id.*

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

the symptoms of the Triad, reflecting increased awareness of the Triad's prevalence after the guidelines for diagnosis were updated and made more comprehensive.[98]

In addition to the updated definition and guidelines for diagnosis, the Female Athlete Triad Coalition (the "Coalition") in 2013 identified eleven risk factors commonly associated with the Triad that physicians should screen for.[99] The risk factors include certain physical ailments and manifestations, personality traits and tendencies, including stress fractures, dieting, history of menstrual regularity, perfectionism, and obsessiveness.[100] While any person can present the risk factors associated with the Triad, female college athletes are more at risk because they experience "societal pressures to be thin, lose weight, 'look good'" in addition to the pressures to perform and succeed that are associated with participating in college athletics.[101] In addition, disordered eating, a component condition of the Triad, usually develops or worsens during periods of transition like leaving home for college and adjusting to the daily demands of being a student-athlete.[102]

The Need for Immediate Treatment

Redefining the component conditions that must be present to support a diagnosis of the Triad was an essential and intentional step taken by the ACSM to highlight the importance of recognizing "subclinical abnormalities."[103] Subclinical abnormalities are illnesses that exist below the surface of clinical detection.[104] Identifying them before they progress allows for early intervention by a medical professional.[105] Identifying subclinical abnormalities is vital to effectively treating the Triad, because the component conditions of the Triad – low energy availability, menstrual dysfunction, and low bone density – eventually worsen in the absence of intervention into the more chronic disorders that characterized the original 1992 definition of the Triad: clinical eating disorders, amenorrhea, and osteoporosis.[106]

Medical guidance is clear that medical interventions should not be deferred until the athlete has reached the far side of the continuum. In other words, when one component condition of the Triad has clearly manifested, whether it is disordered eating alone, amenorrhea alone, or osteoporosis alone, the athlete should seek professional treatment right away.[107] This is in large part because the negative health effects of the Triad do not dissipate when an athlete reaches the far side of the relevant continuum.[108] Student-athletes suffering from clinical eating disorders, amenorrhea, and osteoporosis face an increased risk of developing another chronic illness.[109] Eating disorders alone increase the risk of depressive disorders, anxiety disorder, substance abuse, inpatient hospitalization and suicide attempts.[110] Suicide attempts occur in up to twenty percent of patients with anorexia nervosa and up to thirty-five percent of patients with bulimia nervosa.[111] Depression itself is a significant risk factor for low bone mineral density.[112]Athletic-associated amenorrhea can induce endothelium-dependent arterial vasodilation, an abnormal dilation of the blood vessels which decreases blood pressure and has been recognized as a

[98]Anne Z Hoch et al., *Prevalence of the Female Athlete Triad in High School Athletes and Sedentary Students,* Clinical J. Sport Med. 1, 1 (2009).
[99]De Souza, *supra* note 80, at 3.
[100]*Id.*
[101]Sherman & Thompson, *supra* note 71.
[102]*Id.*
[103]De Souza, *supra* note 80, at 2.
[104]*Id.*
[105]*Id.*
[106]*Id.*
[107]*Id.*
[108]*Id.*
[109]*Id.*
[110]*Id.* at 560.
[111]Debra L. Franko & Pamela K. Keel, *Suicidality in Eating Disorders: Occurrence, Correlates, and Clinical Implications,* 26 Clinical Psychology Rev. 769 (2006).
[112]Raz Yirmiya & Itai Bab, *Major Depression is a Risk Factor for Low Bone Mineral Density, A Meta-Analysis,* 66 Biological Psych. 423, 423 (2009).

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

marker of future cardiovascular risk.[113] Additionally, amenorrhea is associated with infertility, miscarriage or other problems during pregnancy due to the hormone imbalance that often causes amenorrhea.[114] Thus, not only is it dangerous for an athlete to suffer from one component condition of the Triad, which up to sixty percent of athletes do; it is especially dangerous if an athlete is suffering from all three conditions at once, given that conditions compound onto each other.[115]

Aside from the detrimental health effects of the Triad, the disorder has significant effects on physical performance, the importance of which cannot be overstated for Division I level athletes who may earn thousands per year in scholarship dollars based on athletics ability and performance.[116] Those scholarship dollars are revocable or reducible based on a decline in performance or diminished athletic ability.[117] For student-athletes whose participation in collegiate athletics and in higher education is contingent upon receiving an athletic scholarship, an untreated injury presents the concomitant risk of loss of ability to play but also loss of ability to earn a degree. Untreated injury could even impose limitations of an athlete's ability to pursue a desired career path.

These problems are well-documented ones, but most observable instances of injuries causing loss of scholarship and consequently loss of educational and career opportunity are in male athletes. For example, former University of Oklahoma basketball player Kyle Hardrick tore his meniscus because of a fall during practice in 2009.[118] After undergoing surgery and while sidelined due to rehabbing his knee, his coaches at Oklahoma informed him that his scholarship would be revoked and encouraged Hardrick to find a college more "suitable" for him.[119] Battling depression, Hardrick transferred to a junior college where he dealt with the continuing effects of his knee injury.[120] He ultimately dropped out of the junior college and began working an oil field job for Halliburton.[121]

Because the revocation of an athletic scholarship is so discretionary, it is vital to an athlete's maintenance of the scholarship that all injuries and ailments are identified and treated as quickly as possible. Although not the case for Hardrick, an athlete's diagnosis and efforts toward rehabilitation and returning to peak level of athletic ability might be a factor that a coach considers in deciding whether to revoke an athletic scholarship. Female athletes could easily find themselves in Hardrick's shoes; after all, they are subject to many of the same pressures as male athletes, such as pressure to perform from coaches and universities, intense practice schedules that damage the body physically, and the desire to balance it all in order to maintain an athletic scholarship.[122] Hardrick's story represents the potential for devastation on student-athletes of *any* sex whose scholarships are revoked on grounds of injury.

Once an athlete is diagnosed with the Triad, the Coalition recommends that the athlete be treated specifically to remediate their low energy availability.[123] The Coalition recommends four possible treatments, depending on how the low energy availability developed.[124] The first option is giving the athlete a referral for nutritional education, which involves consultation with a sports dietitian and

[113]Jamed et al., supra note 2, at 1000.

[114]*Amenorrhea*, The Mayo Clinic, https://www.mayoclinic.org/diseases-conditions/amenorrhea/symptoms-causes/syc-20369299#:~:text=If%20you%20don't%20ovulate,or%20other%20problems%20with%20pregnancy [https://perma.cc/9QAA-3ZPQ].

[115]Nattiv et al., supra note 95, at 1870; Jenna C. Gibbs et al., *Prevalence of Individual and Combined Components of the Female Athlete Triad,* 45 Med. & Sci. in Sports & Exercise 985 (2013).

[116]Nat'l Collegiate Athletics Ass'n, *supra* note 84, at 208-210.

[117]*Id.* at 216.

[118]Martin Kessler, *Power and the NCAA: One Athlete's Fall From the Big 12 to the Oil Fields,* Wbur (Oct. 13, 2017), https://www.wbur.org/onlyagame/2017/10/13/kyle-hardrick-story-ncaa-show [https://perma.cc/D4S3-PHM5].

[119]*Id.*

[120]*Id.*

[121]*Id.*

[122]Molly Hensley-Clancy, *Reeling from Suicides, College Athletes Press NCAA: 'This is A Crisis,'* The Washington Post (May 20, 2022), https://www.washingtonpost.com/sports/2022/05/19/college-athletes-suicide-mental-health/ [https://perma.cc/Z3N3-AF5B].

[123]De Souza et al., *supra* note 80, at 6.

[124]*Id.* at 6.

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

sometimes an exercise physiologist.[125] The second option involves giving the athlete a referral to both a physician and a sports dietitian for nutritional counseling.[126] The third option is a referral for nutritional education alone.[127] The last recommended course of treatment is evaluation and management with a physician, nutritional counseling with a sports dietitian, and referral to a mental health practitioner for psychological treatment.[128]

In addition to these baseline treatment recommendations, an athlete may need to follow a more specific recommendation for treatment promulgated by the Coalition.[129] These treatments may include cognitive behavioral therapy and consultation with an endocrinologist or an orthopedic surgeon.[130] Further, these are only the preliminary, non-pharmacological recommendations suggested for initial management of athletes with the Triad.[131] Pharmacological treatment may be necessary depending on the level of disordered eating an athlete experiences and where one year of non-pharmacological treatment has proved ineffective.[132] Pharmacological treatment may include administration of hormones such as oestrogen and progesterone or injection of a bone anabolic.[133]

Improvements in an athlete's condition are not often observed immediately after treatment begins; progress can take anywhere from several months to several years.[134] And the risk of relapse into disordered eating is high – specific triggers such as weight changes as a result of lessened mobility and physical activities increase the risk of relapse.[135] Due to the Triad's unique nature and the ways in which treatment is given and recovery is measured, athletes suffering from the Triad will likely require continued health care beyond the initial medical intervention.[136] Continued care is necessary throughout the recovery process for a patient to achieve full recovery.

The Cost of Immediate Treatment

Effective treatment of the Triad is resource-intensive and time-consuming because it often involves consultation with a multidisciplinary team of medical professionals.[137] All courses of treatment recommended by the ACSM include consultation with a sports dietitian.[138] It is common for collegiate athletic departments to have a registered dietitian ("RD") on staff with whom student-athletes may consult at no cost.[139] However, when the athlete is recommended for treatment by a professional who is not on staff in the athletic department and not at the student-athlete's immediate disposal, the costs can become significant. For example, treatment of the Triad may involve athlete consultation with a mental health practitioner.[140] The NCAA's five autonomy conferences are required to make mental health services and resources available to student-athletes through the athletics department.[141] In many cases,

[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.* at 8.
[130] *Id* at 8-9.
[131] *Id.*
[132] *Id.*
[133] *Id.* at 11, 13.
[134] *Id.* at 9.
[135] Angela Picot Derrick, *Eating Disorder Relapse is Common,* Eating Disorder Recovery Center (Nov. 28, 2019), https://www.eatingrecoverycenter.com/blog/recovery/Eating-Disorder-Relapse-is-Common [https://perma.cc/P59J-R524].
[136] De Souza, *supra* note 80, at 14.
[137] *Id.*
[138] *Id.* at 3.
[139] Aaron J. Riviere et al., *Nutrition Knowledge of Collegiate Athletes in the United States and the Impact of Sports Dietitians on Related Outcomes: A Narrative Review,* Nutrients, 1 (2021).
[140] De Souza, *supra* note 80, at 6.
[141] Michelle Brutlag Hosick, *Access to Mental Health Services Guaranteed by Autonomy Conferences,* Ncaa (Jan. 24, 2019), https://www.ncaa.org/news/2019/1/24/access-to-mental-health-services-guaranteed-by-autonomy-conferences.aspx [https://perma.cc/M3JV-RHY6].

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

the extent of mental health services provided by the athletic department is the opportunity to consult with a licensed psychologist who specializes in working with student-athletes regarding sports performance.[142] Many athletic departments advertise the optimization of athletic performance as a goal of the sport psychology department.[143]

While these licensed psychologists are trained as such and practice in a wide variety of areas, many athletic departments tout their psychologists' expertise in the area of performance enhancement or refer to their in-house psychologists as the "sport psychology" group.[144] Some schools even have a specific "sports neuropsychologist" on staff.[145] Mental health care to address sport-focused problems is not necessarily mutually exclusive with mental health care provided to non-athletes. Cognitive behavioral therapy, one of the most widely applied psychological approaches, is recommended by the American Psychological Association for use to address problems faced by student-athletes.[146] The approach has also proven effective for the general student population in addressing mental health obstacles.[147] However, the sport-focused terminology employed by "sport psychology" teams in athletic departments and present in the materials distributed to student-athletes conveys that schools view their psychology team as a resource to address specifically sport-focused problems, such as performance or practice anxiety.

Further, should pharmacological intervention be required for effective treatment, most student-athletes will need to venture outside of the athletic department, because many schools do not have a licensed psychiatrist on staff permitted to prescribe medications.[148] The average cost of one visit with a licensed psychiatrist can range between $100 and $200, while the cost of the initial consultation can range between $300 and $500.[149] For student-athletes, who are not paid by the universities they attend for participation in sport, the cost of seeing a psychiatrist even when necessary to manage a chronic illness may be insurmountable.[150]

At most universities, student-athletes can access mental health services through the student health center. But due to practical concerns such as the high demand for services and lack of resources, student-athletes likely cannot rely on campus health centers to get the type of in-depth care needed to treat the

[142]Stanford University, *Student Athlete Handbook* 109, https://s3.amazonaws.com/sidearm.sites/gostanford.com/documents/2021/11/19/2021_22_Student_Athlete_Handbook.pdf; University of Arizona, *Student Athlete Handbook* 34, https://s3.amazonaws.com/sidearm.sites/arizona.sidearmsports.com/documents/2020/7/30/2020_21_Student_Athlete_Handbook.pdf, University of Maryland, *Student Athlete Handbook* 39, https://s3.amazonaws.com/umterps.com/documents/2019/9/30/SAH_2019_20_FINAL.pdf

[143]Stanford University, *Student Athlete Handbook* 109, https://s3.amazonaws.com/sidearm.sites/gostanford.com/documents/2021/11/19/2021_22_Student_Athlete_Handbook.pdf; University of Arizona, *Student Athlete Handbook* 34, https://s3.amazonaws.com/sidearm.sites/arizona.sidearmsports.com/documents/2020/7/30/2020_21_Student_Athlete_Handbook.pdf, University of Maryland, *Student Athlete Handbook* 39, https://s3.amazonaws.com/umterps.com/documents/2019/9/30/SAH_2019_20_FINAL.pdf, University of Iowa, *Student Athlete Handbook 6,* https://academics.athletics.uiowa.edu/sites/academics.athletics.uiowa.edu/files/2022-06/Handbook%202022-23%20-%20updated%206.15.22_0.pdf.

[144]Stanford University, *Student Athlete Handbook 75,* https://s3.amazonaws.com/sidearm.sites/gostanford.com/documents/2021/11/19/2021_22_Student_Athlete_Handbook.pdf; University of Maryland, *Student Athlete Handbook* 39, https://s3.amazonaws.com/umterps.com/documents/2019/9/30/SAH_2019_20_FINAL.pdf.

[145]145 University of Iowa, *Student Athlete Handbook 6,* https://academics.athletics.uiowa.edu/sites/academics.athletics.uiowa.edu/files/2022-06/Handbook%202022-23%20-%20updated%206.15.22_0.pdf.

[146]*Sports Psychology,* American Psychological Association (2008), https://www.apa.org/ed/graduate/specialize/sports [https://perma.cc/2BJE-LWEE].

[147]Tomonari Irie, et al., *Relationship Between Cognitive Behavioral Variables and Mental Health Status Among University Students: A Meta-Analysis*, PLoS ONE 1 (2019).

[148]Stanford University, *Student Athlete Handbook 75,* https://s3.amazonaws.com/sidearm.sites/gostanford.com/documents/2021/11/19/2021_22_Student_Athlete_Handbook.pdf; University of Maryland, *Student Athlete Handbook* 39, https://s3.amazonaws.com/umterps.com/documents/2019/9/30/SAH_2019_20_FINAL.pdf.

[149]Meaghan Rice, *How Much Does a Psychiatrist Cost Without Insurance?,* Talkspace. com, https://www.talkspace.com/blog/how-much-does-a-psychiatrist-cost/ [https://perma.cc/6T5U-3UKQ].

[150]Joe Nocera, *The Difference Between an Unpaid and a Paid Student-Athlete? Not Much.,* N.Y. Times (Oct. 23, 2021), https://www.nytimes.com/2021/10/23/business/college-endorsement-deals.html [https://perma.cc/XDS8-RS8Q].

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

Triad.[151] Historically, wait times for a mental health provider at many campus health centers have ranged from two to three weeks.[152] And due to the need to prioritize the students who express immediate desire to harm themselves, students seeking care for chronic disorders like depression and eating disorders may have to wait longer than anticipated to secure an initial appointment with a provider at a campus health center.[153]

Taken together, the resources available to student-athletes through the athletic department are a suitable place to start for student-athletes who need treatment for a run-of-the mill ailment or injury or help balancing the normal demands of being a student-athlete. But the Triad is a complex ailment that often requires multi-disciplinary and resource-intensive treatment, and the resources available within athletic departments are not sufficient to handle the demands of treatment for a student-athlete with the Triad.

How the equal treatment framework perpetuates disparities between treatment of male and female student athletes

When a college athlete is injured as a result of participation in their sport or is diagnosed with a certain sport-related condition like the Triad, Title IX leaves universities with discretion to decide how that athlete is going to obtain the necessary medical care.[154] More specifically, schools have leave to decide whether the athlete is going to receive care through the university at all and, if so, whether the university is going to pay for that treatment.[155] Universities most commonly handle this task through their athletic departments, which operate within the constraints of the Title IX regulations and measure compliance according to the OCR Investigator's Manual.[156]

Disparate Impact of Athletic Department Policies

A university's decision to pay for the cost of treatment for a student-athlete's injury or illness depends in large part upon policies adopted by the individual athletic departments. These policies outline the specific criteria that must be met before an athlete's medical care can be paid for by the university. A survey of seventy percent of all Division I institutions revealed that athletic departments generally cover the entire cost of treatment for student-athlete injuries where the prerequisites for such coverage are met.[157] Eighty-four percent of survey respondents indicated that they cover the cost of all qualifying injuries to a student-athlete.[158] Thus, these athletic department policies are the most direct authority controlling which student-athletes will get treatment paid for by the university.

Athletic departments are subject to Title IX, so department policies are crafted with an eye toward compliance as assessed by the regulations and the OCR guidelines. Thus, the athletic department policies

[151]Megan Thielking, *A Dangerous Wait: Colleges Can't Meet Soaring Student Needs for Mental Health Care*, Stat News (Feb. 6, 2017), https://www.statnews.com/2017/02/06/mental-health-college-students/ [https://perma.cc/D4PK-DH3Z].

[152]*Id*; *U.S. Department of Education Announces Nearly $5.8 Million of Bipartisan Safer Communities Act Funding for West Virginia as Part of Continued Efforts to Address Youth Mental Health Crisis,* U.S. Department of Education (Sept. 14, 2022), https://www.ed.gov/news/press-releases/us-department-education-announces-nearly-58-million-bipartisan-safer-communities-act-funding-west-virginia-part-continued-efforts-address-youth-mental-health-crisis [https://perma.cc/4XNM-ECGS].

[153]*Id.*

[154]Karen Weaver, *If College Athletes Return, Who Will Pay the Medical Bills?,* Forbes (Apr. 20, 2020), https://www.forbes.com/sites/karenweaver/2020/04/20/if-college-athletes-return-who-will-pay-the-medical-bills/?sh=4000d1a17752 [https://perma.cc/4R2R-LJ7L].

[155]*Id.*

[156]34 C.F.R. 106.41; Judge & Obrien, *supra* note 37.

[157]*Survey: Most DI Schools Provide Injury Coverage,* Ncaa (May 25, 2016), https://www.ncaa.org/news/2016/5/25/survey-most-di-schools-provide-injury-coverage.aspx [https://perma.cc/YT5P-ML96].

[158]*Id.*

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

suffer from the same deficiencies that the regulations and the OCR guidelines do. The policies are crafted such that the provisions regarding coverage for treatment of injuries or illnesses will never reach the Triad: even if a female athlete suffering from the Triad is appropriately and timely diagnosed, the policies at many universities restrict payment for treatment of injuries and illnesses to those sustained under a particular set of circumstances. Because inequities in treatment of male and female student athletes with respect to the provision of medical services is permissible under the OCR guidelines, athletic departments are able to create and enforce policies that de facto exclude coverage for treatment of the Triad.[159]

As a threshold matter, most institutions' athletic departments will only pay for an athlete's treatment if the injury or illness in question occurs under a certain set of circumstances and is reported and diagnosed in a particular manner.[160] Generally, the athlete must sustain the injury in a practice or a game which was under supervision by a coach or member of the athletic staff.[161] In many cases, the injury or illness must have been sufficiently related to sports participation such that it can be considered an "athletics-related" condition.[162] Some athletic departments go as far as defining an "injury" so narrowly that it only includes ailments actually caused by a student-athlete's participation in a supervised practice or game.[163] Further, many institutions require student-athletes to immediately report any injury or illness to athletic training staff, who must evaluate the student athlete and authorize a particular course of treatment.[164] The language of these requirements varies by institution, but many set forth the same general prerequisites that an athlete must meet before the institution will consider covering the cost of treatment.

Because of the invisible nature of the Triad and the difficulty in pinpointing an exact moment when an athlete began suffering from the Triad, these requirements effectively preclude female athletes who are suffering from the Triad from getting treatment paid for by the universities that they devote themselves to. The general difficulty of diagnosing the Triad and the delicate nature of reporting its signs or symptoms is well-known and is emphasized in literature that is distributed to collegiate coaches. [165] And each one of the component conditions of the Triad is invisible in a way that a broken leg or a torn ACL is not. Thus, athletes may be reluctant to report their experiences and coaches and athletes alike may be wholly unaware that the condition is a problem worth reporting.[166]

Furthermre, each individual component condition of the Triad presents challenges for making accurate and timely diagnoses.[167] Disordered eating is difficult to identify because, in the context of athletics, signs of a person suffering from disordered eating may appear as an athlete working harder to

[159]De Souza, supra note 80.

[160]*Student-Athlete Handbook,* University of Florida, https://floridagators.com/documents/2021/7/19/2020_21_Student_Athlete_Handbook.pdf, *Student-Athlete Handbook,* University of Southern California, https://saas.usc.edu/files/2019/08/1920-USC-Student-Athlete-Handbook-8.26.19.pdf, *Student-Athlete Handbook,* Michigan State University, https://www.sass.msu.edu/application/files/2116/2983/8922/Handbook_2021-22.pdf.

[161]*Student-Athlete Handbook,* University of Florida, https://floridagators.com/documents/2021/7/19/2020_21_Student_Athlete_Handbook.pdf, *Student-Athlete Handbook,* University of Southern California, https://saas.usc.edu/files/2019/08/1920-USC-Student-Athlete-Handbook-8.26.19.pdf, *Student-Athlete Handbook,* Michigan State University, https://www.sass.msu.edu/application/files/2116/2983/8922/Handbook_2021-22.pdf.

[162]*Student-Athlete Handbook,* University of Florida, https://floridagators.com/documents/2021/7/19/2020_21_Student_Athlete_Handbook.pdf, *Student-Athlete Handbook,* University of Southern California, https://saas.usc.edu/files/2019/08/1920-USC-Student-Athlete-Handbook-8.26.19.pdf, *Student-Athlete Handbook,* Michigan State University, https://www.sass.msu.edu/application/files/2116/2983/8922/Handbook_2021-22.pdf.

[163]*Student-Athlete Handbook,* University of Virginia, https://athletics.virginiasports.com/compliance/pdf/S-AHandbook2017-18.pdf.

[164]*Student-Athlete Handbook,* Michigan State University, https://www.sass.msu.edu/application/files/2116/2983/8922/Handbook_2021-22.pdf, *Student-Athlete Handbook,* University of Virginia, https://athletics.virginiasports.com/compliance/pdf/S-AHandbook2017-18.pdf.

[165]Sherman & Thompson, *supra* note 71, at 15.

[166]*Id.*

[167]*Id.*

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

perform better, and thinness or leanness can lend itself to a presumption of health.[168] Aside from physical appearance, character traits often associated with good athletes are also character traits of people suffering from disordered eating.[169] A perfectionist athlete with disordered eating who is constantly trying to achieve their ideal weight or appearance may be mistaken for a driven athlete who never allows themselves to feel satisfied even with a good performance.[170] An athlete with disordered eating who puts in extra hours of training to burn more calories may be mistaken for an exceptionally hard working athlete willing to invest additional time to meet athletic goals.[171]

Amenorrhea is difficult to identify because female athletes seldom think it is a condition worthy of reporting; it is "so common among female athletes that sport personnel and athletes sometimes think of it as 'normal' in the sport environment."[172] Poor skeletal health usually is not apparent until fracture occurs.[173] All of these difficulties are further compounded by gender biases in health care.[174] The belief that a woman complaining of health problems is merely hormonal or suffering from psychosomatic pain and the tendency of doctors to undervalue a woman's complaints of pain set a female student-athlete with the Triad back even further in their journey to being diagnosed and effectively treated.[175]

Northwestern University Example

Northwestern University's athletic department policy is illustrative of the policies typically adopted by Division I autonomy schools,[176] and it exemplifies the inflexibility of athletic departments with regard to covering the cost of treatment for conditions like the Triad and in turn highlights the disparate treatment of female athletes that the current Title IX regulations and OCR guidance authorizes.[177] Northwestern's student-athlete handbook outlines the athletic department's policies with regard to covering the cost of treatment for an athlete's injuries.[178] The policy includes a non-exhaustive list of treatments that the athletics department will not cover on behalf of a student-athlete.[179] It provides that the following are non-coverable medical conditions: "injuries/illnesses that are not the direct result of intercollegiate athletics participation during the dates of the primary competitive season and designated off-seasons," "medical expenses for procedures or visits that are not pre-authorized by a NUDAR (Northwestern University Department of Athletics and Recreation) team physician," "injuries/illnesses that are recurrences of old injuries/illnesses, which were sustained before participation in the intercollegiate sports program," and "prescription medication cost for psychological illness."[180]

All of this means that a student-athlete at Northwestern suffering from one component condition of the Triad, which is enough for a medical professional to diagnose the student-athlete with the Triad, might be told that the condition is not sufficiently traceable to athletics participation, and thus is not a "direct result" of such participation. Given the initial difficulty in identifying an athlete with the Triad,

[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* at 17.
[173] *Osteoporosis,* The Cleveland Clinic, https://my.clevelandclinic.org/health/diseases/4443-osteoporosis.
[174] *Gaslighting in Women's Health: No, It's Not Just in Your Head,* Katz Institute For Women's Health, https://www.northwell.edu/katz-institute-for-womens-health/articles/gaslighting-in-womens-health [https://perma.cc/CY42-DTVQ].
[175] Camile Noe Pagan, *When Doctors Downplay Women's Health Concerns,* N.Y. Times (May 13, 2018), https://www.nytimes.com/2018/05/03/well/live/when-doctors-downplay-womens-health-concerns.html [https://perma.cc/23EZ-KF2M].
[176] *Student-Athlete Handbook,* Northwestern University, https://nusports.com/documents/2016/1/5/2015_2016_Student_Athlete_Handbook.pdf?id=13834.
[177] *Id.*
[178] *Id.* at 33.
[179] *Id.*.
[180] *Id.*

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

diagnosis may be delayed to a point where it is impossible to identify a causal relationship between sports participation in the Triad.

Using disordered eating as an example demonstrates why tracing a particular condition to a single cause is an impossible task in the student-athlete context. In a study of female student-athletes, respondents with disordered eating tendencies listed several causes for them, including parents and "society" generally.[181] Further, since Northwestern excludes coverage for recurring injuries or illnesses sustained before participating at the collegiate level, student-athletes who experience relapse into an eating disorder during their time as a collegiate athlete are not eligible for coverage of the treatment, despite data reflecting that participation in a collegiate level sport is a risk factor for an eating disorder and that a third of all patients treated for an eating disorder relapse in the first few years after completing treatment.[182] Additionally, Northwestern does not extend coverage the cost of medication for psychological treatment,[183] even where a student-athlete diagnosed with the Triad due to a more advanced clinical eating disorder might require a prescription for antidepressants in order to effectively treat their condition.[184]

The difficulty in connecting female athletes' injuries with single moments or causes is reflected by the NCAA's Injury Surveillance System ("ISS"). The ISS records injuries sustained by collegiate athletes both in practices and in games. For an injury to be reportable to the ISS, the injury (1) must have occurred as a result of participation in an organized practice or contest; (2) must have required medical attention by a team certified athletic trainer or physician; and (3) must have resulted in restriction on the athlete's athletic participation or performance for at least one day.[185] A comprehensive survey of the ISS revealed that the most in-game injuries occur in football and wrestling, which are predominantly male sports.[186] Among women's sports, women's soccer causes the most in-game injuries, but the overall occurrence of injuries is still only the fourth-highest overall.[187] The most commonly recorded injury is a ligamentous injury to the ankle, occurring most frequently in men's football and men's basketball.[188]

Application of Northwestern's student-athlete coverage policy to athletic-related conditions commonly suffered by male athletes, like ligamentous injuries to the ankle, reveals the disparate impact of such coverage policies when viewed in comparison to the application of the policy to conditions commonly suffered by female athletes, like the Triad. Again, Northwestern's coverage policy explicitly precludes financing for treatment of the following: injuries/illnesses that are not the direct result athletics participation, medical expenses that are not pre-authorized by a NUDAR team physician, treatment for recurrences of old injuries/illnesses, which were sustained before participation in the intercollegiate sports program, and prescription medication for psychological illness.[189] Ankle injuries, most commonly sustained by male athletes, do not fall under any of the express prohibitions of Northwestern's policy. While Northwestern's policy does not explicitly include any threshold criteria that must be met in order for an athlete's injury to be paid for by the school, it can be implied from the list of explicit exclusions that that those common threshold criteria, that the injury is sustained in a practice or a game

[181]Marina Tosi et al., *The Female Athlete Triad: A Comparison of Knowledge and Risk in Adolescent and Young Adult Figure Skaters, Dancers, and Runners,* 32 J. Pediatric And Adolescent Gynecology 165, 167 (2019).

[182]Derrick, *supra* note 134.

[183]Pagan, *supra* note 175.

[184]Aurelia Nattiv, *The Female Athlete Triad,* Am. College of Sports Med. 1867, 1875 (2007).

[185]Jennifer M. Hootman et al., *Epidemiology of Collegiate Injuries for 15 Sports: Summary and Recommendations for Injury Prevention Initiatives,* 42 J. Athletic Training 311, 311 (2007).

[186]*A Hidden History: Women in College Football,* College Football Hall of Fame (Dec. 30, 2020), https://www.cfbhall.com/about/blog/womenincollegefootball/; Shannon Scovel, *Why Iowa Became the First Power Five School to Add a Women's Wrestling Program—And What It Could Mean for the Future,* Ncaa (Oct. 6, 2021), https://www.ncaa.com/news/wrestling/article/2021-10-06/why-iowa-became-first-power-five-school-add-womens-wrestling-and-what-program-means [https://perma.cc/V9GL-N7NB].

[187]Hootman et al., *supra* note 184, at 318.

[188]*Id.* at 316.

[189]*Supra* note 175, at 33.

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

which was under supervision by a coach or member of the athletic staff, must also be met.[190] Ankle injuries likely meet the common threshold criteria that institutions require to cover the cost of treatment for an injury. This is supported by the robust reporting of ankle injuries in the ISS, which requires that injury is sustained in the course of an athletic related activity and was tended to by a member of the team's athletic training staff in order to be reportable.[191]

Northwestern's coverage policy mirrors the policies adopted by other Division I autonomy schools.[192] It thus embodies the status quo approach for collegiate athletic departments: cover the cost of treatment for common male injuries, but implicitly exclude injuries and ailments that are so commonly plaguing female athletes. These same athletic departments are subject to the commands of Title IX and are able to maintain these under its present framework.[193] Thus, Title IX emerges an ineffective framework for remedying this type of sex discrimination in collegiate athletics. Title IX must do more to ensure that female athletes have equitable access to treatment for the conditions that uniquely affect them.

Special treatment: a new approach

The equal treatment framework embodied in Title IX regulations, and accordingly in the OCR Investigator's Manual and athletic department policies, is often criticized for ignoring the role that immutable differences between men and women play in entrenching a male-dominant society.[194] These critics believe that "women occupy a different and inferior or subordinate position in this society" and therefore that "'special' concern and responsiveness" needs to be directed at the social and biological differences between men and women.[195]

Such criticism has given way to a new theoretical framework for anti-discrimination policy: the "special treatment" framework. Distinct from the equal treatment framework, the special treatment framework recognizes that affirmative steps are needed in order to actually end sex discrimination and provide equal opportunities for women.[196] Special treatment advocates, referred to by some as "difference feminists," argue that "equal treatment of men and women results in inequality in circumstances where women's needs differ from the needs of men."[197] Therefore, special treatment advocates believe that in situations where women are in unique and incomparable positions with respect to men, "positive action is required for women to have truly equal opportunities" and the law should not force "strained analogies" to avoid the label of "different."[198] Additionally, special measures adopted to reach de facto equality between the sexes are not considered discriminatory.[199]

[190] *Id.*

[191] Hootman et al., *supra* note 184, at 311.

[192] Stanford University, *Student Athlete Handbook* 109, https://s3.amazonaws.com/sidearm.sites/gostanford.com/documents/2021/11/19/2021_22_Student_Athlete_Handbook.pdf; University of Arizona, *Student Athlete Handbook* 34, https://s3.amazonaws.com/sidearm.sites/arizona.sidearmsports.com/documents/2020/7/30/2020_21_Student_Athlete_Handbook.pdf, University of Maryland, *Student Athlete Handbook* 39, https://s3.amazonaws.com/umterps.com/documents/2019/9/30/SAH_2019_20_FINAL.pdf, University of Iowa, *Student Athlete Handbook 6,* https://academics.athletics.uiowa.edu/sites/academics.athletics.uiowa.edu/files/2022-06/Handbook%202022-23%20-%20updated%206.15.22_0.pdf.

[193] 34 C.F.R. § 106.41(a).

[194] *Id.* at 1297.

[195] *See* Catharine A. Mackinnon, Sexual Harassment of Working Women 117 (1979).

[196] Emily McNee, *Pregnancy Discrimination in Higher Education: Accommodating Student Pregnancy,* 20 Cardozo J. L. & Gender 63, 79 (2013).

[197] D'Andra Millsap, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act,* 32 Hous L. Rev. 1411, 1425 (1996); Martha Albertson Fineman, *Feminist Legal Theory,* 13 Am. U. J. Gender Soc. Pol'y & L. 13, 17 (2005).

[198] *Id.* at 1425-1426.

[199] United Nations Convention on Ending All Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

The Effect of the Special Treatment Framework in the Title IX Pregnancy Regulations

Proponents of the special treatment framework argue that "equal treatment of the sexes actually results in inequality for women. In these situations, positive action to change the institutions… is essential in achieving women's equality because those institutions are, for the most part, designed with a male prototype in mind."[200] The special treatment approach is seldom embodied in federal statutes and regulations, but Professor Deborah Brake argues that the special treatment framework is incorporated into the Title IX regulations by way of the "marital or parental status" regulation.[201]

Specifically, Brake argues that the special treatment framework is embodied in the Title IX regulations regarding accommodations for pregnant students.[202] The Department of Education's standard for treatment of pregnant students in schools is generally set out by a regulation entitled "Marital or parental status."[203] The regulation generally requires educational institutions receiving federal funds not to

> discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.[204]

Brake argues the special treatment framework is at play in 34 CFR 106.40(b)(5), another provision of the "Marital or parental status" regulation which specifically addresses students who are pregnant or recovering from pregnancy related conditions.[205] This regulation governs where an institution receiving federal funds does not have a policy in place regarding treatment of temporary disabilities, or where the policy in place regarding temporary disabilities does not cover pregnant students.[206] The regulation provides that

> in the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.[207]

Brake argues that this provision embodies a special treatment framework because it provides that pregnant students be given a reasonably necessary medical leave, followed by reinstatement at the same status, regardless of the nature of the leave provided to students with other medical conditions.[208] In other words, this provision adopts a special treatment approach because it provides for "an absolute protection for pregnancy" rather than a comparative approach.[209]

The pregnancy regulation acknowledges the unique position women occupy in the education sector; pregnancy is one area in which women cannot be like men, and thus cannot be treated as

[200]Krieger, *supra* note 58, at 515.
[201]Deborah L. Brake, *The Invisible Pregnant Athlete and the Promise of Title IX,* 31 Harv J. L. & Gender 323, 339 (2008).
[202]*Id.*
[203]34 C.F.R. § 106.40.
[204]34 C.F.R. § 106.40(b).
[205]34 C.F.R. § 106.40(b)(5).
[206]34 C.F.R. § 106.40(b)(5).
[207]*Id.*
[208]Brake, *supra* note 200, at 339.
[209]*Id.*

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

such. By incorporating a special treatment framework into the pregnancy regulations, at least one Title IX regulation has already acknowledged that some conditions are so unique to certain people that special standards for treatment need to be established in order prevent sex discrimination.[210]

Special Treatment in Athletics Could Help Address Problems Presented by the Triad

If athletic departments use the offsetting analysis outlined in the OCR guidelines, they use an equal treatment framework that assesses equality on a holistic basis, meaning that the effects of sex inequality in one treatment area can be offset by favorable treatment in another area.[211] This approach results in net equality in the eyes of the regulatory framework.[212] Yet, despite nominally ensuring net equality between the sexes, the equal treatment framework present in the OCR guidelines allows athletic departments to promulgate and enforce policies that de facto exclude the Triad from the conditions for which athletic departments will cover the cost of treatment. Because so many female student-athletes, particularly at the NCAA level, suffer from the Triad, the ultimate result is a deprivation of necessary medical treatment for those athletes. Ultimately, the Title IX athletics regulations, in mandating equal treatment, fail to protect female student-athletes, who by merely participating in collegiate athletics are being exposed to the perils of the Triad.

The Title IX pregnancy regulation does what the athletics regulation — and thus the OCR guidelines — do not, in that it acknowledges pregnancy as a condition unique to women and treats pregnancy as if it is not comparable to any other condition to prevent sex discrimination that could occur because of a condition that is uniquely female. Premising the pregnancy regulation is the idea that certain conditions affect women so disproportionately that, for purposes of anti-discrimination law, those conditions must be treated specially to achieve actual equality between the sexes: in other words, the special treatment framework.[213]

This principle, though currently absent from the Title IX athletics regulations and OCR guidance, can easily be integrated into the existing guidelines for assessing Title IX compliance within athletic departments. Rather than eliminating OCR's extant multi-step test that includes offsetting and the principle of relative impact, OCR and the Department of Education could easily modify the policy to exclude the provision of medical services from the list of factors that are used to assess compliance.[214] Consequently, disparities in the provision of medical services and payment for treatment of those services between male and female-student athletes would be unacceptable. The foundation for such a rule would be the special treatment framework. Rules that treat men and women equally in this area are inadequate tools to remedy sex discrimination, because some medical conditions, like the Triad, affect women disproportionately and therefore.[215] Thus, athletic departments would have to rewrite their coverage policies to remove the sort of de facto sex discrimination embodied by the current policies. If Title IX required actual rates of coverage of treatment for female and male student-athletes to be equal, policies would then be informed by actual data regarding which injuries and illness student-athletes are suffering. Athletic departments would still have discretion to craft policies that exclude coverage for treatment of certain conditions, yet those exclusions would not be proxies for sex discrimination as they are now.

[210] 34 C.F.R. § 106.40(b)(5).
[211] Judge & Obrien, *supra* note 37, at 25.
[212] *Id.*
[213] Koller, *supra* note 22, at 422.
[214] Judge & Obrien, *supra* note 37, at 25.
[215] Brake, *supra* note 200, at 338-339.

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

Limitations of Special Treatment, Particularly in Athletics

While the special treatment framework can be embedded into the athletics regulation to address the disparate treatment of female student-athletes who are seeking treatment for conditions like the Triad, the framework can be problematic in that it recognizes maleness as "normal" and marks women as not "normal," which thereby requires them to be treated differently.[216] In the realm of athletics, this is particularly problematic because athletics, more so than other domains, are male-structured. Sport is a patriarchal institution that not only reinforces male hegemonic structures but also plays a role in developing male gender identities.[217] Thus, incorporating the special treatment framework into the already male domain of sports does not nothing to remedy the outdated ideologies surrounding women and their inferior role in society; rather, it perpetuates the idea that women are less than and need to be singled out for protection.[218] It is true that the special treatment framework does nothing to address the continued subordination of women in all aspects of society, but it does address the discrete issue posed by the Title IX athletics regulations by mandating that athletic departments recognize the ways in which women in organized sports are biologically more susceptible to the Triad and its accompanying adverse effects.

Conclusion

Title IX has facilitated progress toward gender equity in collegiate athletics insofar as it has increased participation opportunities for women in sport. Yet in certain instances, Title IX still fails to improve the quality of the female student-athlete experience and has failed to create an environment in which female student-athletes are given resources that allow them to thrive at the same level that their male counterparts do. The prevalence of the Triad among female student-athletes exemplifies this phenomenon.

By embracing an equal treatment framework, the athletics regulations allow collegiate athletic departments to craft policies that discreetly permit discrimination on the basis of sex.[219] In espousing a model of equality that focuses only on holistic equality of treatment, the athletics regulations fail to consider the ways in which modern life is gendered. In sport specifically, where the paradigm is made by and for male athletes, focus on holistic equality of treatment is palpably harmful to female athletes. Instead, the athletics regulations should embrace the special treatment framework. Despite its shortcomings, at the foundation of the special treatment framework is the principle that women are biologically different than men and as such, there may be instances where those biological differences, and their accompanying societal expectations, are used as grounds for sex discrimination.[220] The Triad exemplifies this in that its component conditions manifest because of both characteristics unique to female anatomy and as a result of societal expectations of women. Amenorrhea may result from the sensitivity of the female reproductive system in its reaction to excessive exercise and at the same time eating disorders may result from societal pressures that encourage women to be thin.

Thus, the special treatment framework, in acknowledging that holistic equality of treatment is not effective at combating sex discrimination, can do some of the initial work of removing sex discrimination in athletics. With respect to the Triad specifically, a special treatment framework would ensure that female-student athletes are not deprived of necessary medical care while their male counterparts get timely treatment just because their injuries are "visible" in a way that the Triad is not. Gender equality in sport can only be realized upon recognition that sport affects men and women differently. If regulatory authorities embrace this framework, the regulations, guidelines, and athletic department policies will

[216]Brake, *supra* note 200, at 344.
[217]Koller, supra note 22.
[218]Millsap, *supra* note 196, at 1427.
[219]34 C.F.R. § 106.41(c).
[220]Krieger, *supra* note 58, at 515.

https://doi.org/10.1017/amj.2023.16 Published online by Cambridge University Press

accordingly be crafted with an eye toward equally mitigating the harmful effects of sport on both women and men, rather than just toward nominal compliance with Title IX.

Morgan Hill earned a J.D from Boston University School of Law in 2023. She also holds a B.A in Media Studies and a B.A. in American Studies from the University of Virginia. She will join Mintz Levin as a litigation associate in the Fall of 2023.

Cite this article: Hill, M. (2023), 'Title IX's Unintended Consequences: The Female Athlete Triad and the Need for Special Treatment', *American Journal of Law & Medicine*, **49**, pp. 59–80. https://doi.org/10.1017/amj.2023.16