

TITLE IX AND GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS: IS IT TIME FOR A CHANGE?

INTRODUCTION

Athletics is an integral part of the educational mission of many of our nation's universities. Participation in athletics gives the student a sense that he or she can rise above the ordinary and reach his or her full potential. For college athletes, college sports offer an opportunity to learn leadership skills, perfect self-discipline, and nurture self-confidence.¹ For universities, successful sports teams generate not only revenue but also national prestige. Moreover, revenue-producing sports such as football and basketball generate alumni support and university loyalty that can translate into substantial monetary benefits for the school.² Despite the opportunities college athletics provide to students and the revenue they provide to universities, college athletics are at risk. In recent years our nation's universities are falling victim to increasing athletic budget deficits and the difficult burden of complying with the federal law, Title IX.

Title IX of the 1972 Education Amendments bans gender discrimination in classrooms and athletics. After decades of discrimination against women in educational arenas, Congress

¹Donna Lopiano, Director of Women's Sports Foundation, *National Collegiate Athletic Association, Sixth Special Convention Proceedings* 72 (1987), cited in Rodney K. Smith, An Academic Game Plan for Reforming Big-Time Intercollegiate Athletics, 67 *Den.U.L.Rev.* 213, 220 (1990).

² See Albert R. Hunt, Politics & People: *Final Four: An Escape From the Politics of Sports*, Wall Street Journal, March 31, 1994, at A15. ("Schools not only get directly rewarded for making the Final Four, or football bowl games, but enjoy enormous residual benefits: bigger crowds...more TV exposure, and increased overall alumni giving.").

enacted Title IX which declares that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance.”³ The enactment of Title IX in 1972 has prompted significant advancements in the opportunities available to female athletes. Within four years of its implementation, the number of female athletes in the United States increased by 600 percent, to include over two million participants.⁴ Universities worked to meet the increasing needs of female athletes by expanding women’s athletic programs and offering a diverse range of sports.⁵

Despite Title IX’s movement towards gender equality, gender discrimination in athletic funding still remains. Moreover, Title IX’s passage and the pressures to comply with its statutory requirements have also increased the adversarial relationship between women’s athletics and collegiate institutions. As Donna Lopiano, Director of the Women’s Sports Foundation, stated: “The accomplishment of sex equity goals and objectives is complicated by a resistant and progressively more male-dominated athletics establishment—an establishment that has historically opposed the provision of equal opportunity for women due to fears that cutbacks in revenue-producing men’s sports will undermine the financial stability of intercollegiate athletics.”⁶ There is also an underlying belief among male athletic administrators that women’s sports, like men’s minor sports, do not deserve the financial support of major revenue producing men’s sports such as football and basketball.⁷ This might account for why today women

³ Education Amendments of 1972, Pub. L. No 92-318, §§ 901-09, 86 Stat. 373-95 (codified as amended at 20 U.S.C. §1981-86 (1988)).

⁴ Susan M. Shook, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990’s: Nonrevenue Men’s Teams Join Women Athletes in the Scramble for Survival*, 71 Ind. L.J. 773, 773 (1996).

⁵ *Id.*

⁶ Matthew Daniel, *Title IX and Gender Equity in College Athletics: How Honesty Might Avert A Crisis*, Ann. Surv. Am. L. 225 (1995). Quote made by Donna Lopiano in *The Rules of the Game* 31, 32 (Richard E. Lapchick & John B. Slaughter eds., 1898; *Equity Issues and Policy Problems in Women’s Intercollegiate Athletics*).

⁷ *Id.*

comprise more than half of the undergraduate enrollment but only account for forty percent of college athletes. Furthermore, it is a strong indicator for why only nine percent of Division I schools are in compliance with Title IX.⁸

Despite Title IX's positive effects for women athletes, the Act has also created severe "unintended consequences."⁹ Athletic budgets continue to increase and few schools are making enough revenue to break even. Most universities face substantial deficits in their athletic programs, which directly affects the amount of money that can be spent on women and men's nonrevenue sports.¹⁰ Average expenses of the athletic departments in Division I-A schools in 2000 were \$20 million. At the University of Oregon the Athletic Department budget has gone up from \$12 million in 1991 to \$23 million in 1996 to \$30 million in 2001.¹¹ Despite the money spent on athletics, the average Division I-A college athletic program runs an annual deficit of \$174,000, and the athletic programs at smaller schools run greater deficits. Unable to pay their own way, athletic programs must rely on university funds, but campuswide cost cutting is making those dollars nonexistent.¹² The University of Oregon is one of many schools that have begun to phase out university subsidy to their athletic program. Although, the athletic program

⁸ Michael Lynch, *Title IX's Pyrrhic Victory, How the quest for "gender equity" is killing men's athletic programs*. Reason Magazine, April 2001.

⁹ Ross A. Jurewitz, *Playing At Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 Am. U.J. Gender Soc. Pol'y & L. 283 American University Journal of Gender, Social Policy and the Law 2000

¹⁰ Nonrevenue sports include those sports that fail to produce a profit once their expenses and operating costs have been paid. The vast majority of men's teams that have been cut are nonrevenue-producing sports, such as baseball, wrestling, diving, swimming, water polo, crew and gymnastics.

¹¹ Richard A. Sundt, *Open Letter Commenting on the University Senate Budget Committee's White Paper: Building a Bridge*. January 25, 2000. See also, *Minutes of the University Senate Meeting November 29, 2000*.

<http://darkwing.uoregon.edu/~uosenate/dirsen0001/29Nov00minutes.html>; Vice President for Administration Dan Williams spoke with the University Senate regarding concerns over the athletic department subsidy and the Autzen expansion project. Williams noted that the athletics department is an auxiliary enterprise. It must live off of its own revenues, which come from a number of places: students pay in excess of \$1 million from incidental fees and pre-paid seats at athletic events; there are private gifts; membership in the Pacific 10 Conference yields in excess of \$2 million a year from television revenues, from a share of the Rose Bowl television contract and receipts. The university subsidizes athletics with \$2 million annually, which is part of athletics \$26 million operating budget.

¹² Daniel L. Fulks, *Revenues & Expenses of Intercollegiate Athletic Programs*; See also Dan Williams, *Athletics and Academics Talk with Dan Williams*; Learning and Retirement Group, January 25, 2002. Oregon State University currently has a \$4 million plus athletic deficit which is contributing to their current financial woes.

creates the impression that it is self-supporting and generates money for the University, it does not. The University of Oregon is currently providing \$2.2 million in state funding to keep the athletic budget in the black, thus allowing the Ducks to compete at the highest level of intercollegiate sports.¹³ Since 1991 the University has subsidized Duck Athletics in the amount of \$20.5 million, and will spend some \$10 million more in the next five years.¹⁴ However, the University of Oregon athletic department is one of the very few athletic departments in the country to have developed a plan to have a balanced budget (in 2.5 years).¹⁵ Most other Division I-A universities have an average of \$1.9 million a year deficit that is covered by a subsidy from the university.¹⁶ In 1999 the University of Oregon Senate ended its year by striking an agreement with the administration and the athletic department to reduce and finally eliminate the \$2.2 million dollar subsidy. The agreement gives the athletic department four years to attain financial self-sufficiency.¹⁷ Soon the University of Oregon will join a small number of schools that do not

¹³ Richard A. Sundt, *Open Letter Commenting on the University Senate Budget Committee's White Paper: Building a Bridge*. January 25, 2000

¹⁴ *Id.*

¹⁵ Dan Williams, *Athletics and Academics Talk with Dan Williams*; Learning and Retirement Group, January 25, 2002. See also UAAA Alumni Insider: April 2000; <http://alumni.uoregon.edu/frames/insider/insider0004.htm>. The plan to achieve self-sufficiency is largely based on the expectant revenue generated by the expansion of Autzen Stadium. The expansion costs essentially rely on gifts with the exception of \$17-18 million in bond indebtedness that would be used to bridge the gaps and cash flow problems between the time the money is needed for construction and the time when all the pledged gifts come in. Because a major part of the project is gift funded, very little debt is carried that must be retired from the additional revenue. In turn, this gives athletics a chance to have additional revenues for increased costs of the other sports and to have athletics relieve itself of the dependency on the University's subsidy. The Autzen Stadium project will expand seating by 12,000. It will produce thirty-two new luxury skyboxes, sitting atop a \$20,000-square foot lounge. "When complete the news Autzen will be the financial engine that will drive the UO athletic department and it's projected \$28 million annual budget into the future." The athletic department receives \$2.2 million annually from the universities general fund budget. With the additional \$3-5 million in projected revenue from the renovated stadium, the university will be able to reallocate that \$2.2 million into a faculty salary pool. See also Dan Williams; (concerns of the faculty about the expansion program): The Autzen Stadium expansion is currently costing \$90 million. This is the biggest public works project in Eugene's history. Each of the 13,000 new seats will cost approximately \$7,000-the price of nearly 2 years tuition for an in-state student at UO. This expansion is necessary because football revenues fund the rest of the athletic department and are therefore needed to pay the skyrocketing increase in the cost of staying in the business of intercollegiate athletics. "The US government last spring gave \$100 million to support the distribution of AIDS drugs in Sub Sahara Africa and here in Eugene we are spending \$90 million for a football stadium expansion."

¹⁶ Dan Williams, *Athletics and Academics Talk with Dan Williams*

¹⁷ James Earl (Former University Senate President), *Warning 4*; http://www.uoregon.edu/oq/html/warning_4.htm. 1999.

subsidize athletics with general university funds.

As universities are constrained by tougher economic times and a tightening of university budgets, the ability of athletic programs to expand women's athletics has declined, and in some extreme cases ceased. This is problematic under Title IX because most universities have not yet fulfilled the statutory standards. Consequently, women athletes have repeatedly taken legal action against these universities, "seeking either reinstatement of their eliminated teams or an expansion in the institution's women's programs."¹⁸ In recent cases, the federal appellate courts have consistently ruled that universities not complying with Title IX must remedy the situation, and have demanded that institutions increase the proportion of athletic opportunities for female athletes to comply with the regulations implementing Title IX.¹⁹ In an attempt to comply with Title IX and ensure the growth of women's sports programs, universities have in many instances cut men's low revenue athletic programs claiming this is necessary in order to compensate for women's athletics. Therefore, many of the less prominent, nonrevenue men's programs have indirectly felt the effects of Title IX compliance. A close examination of how cuts are made suggests that although universities are obligated to promote intercollegiate athletics for their educational benefits, there seems to be a greater emphasis placed on revenue value than educational value.²⁰

The NCAA Gender-Equity Task Force states "that an athletics program can be considered gender equitable when the participants in both the men's and women's programs would accept as fair and equitable the overall program of the other gender. No individual should be discriminated against on the basis of gender, institutionally or nationally, in intercollegiate

¹⁸ Shook, 71 Ind. L.J. at 773

¹⁹ Megan Starace, *Reverse Discrimination Under Title IX: Do Men Have a Sporting Chance?* 8 Vill. Sports & Ent. L.J. 189

²⁰ Shook, 71 Ind. L.J. at 774

athletics.”²¹ Despite the NCAA’s focus on gender equity, both female and male athletes have gone to court for what they believe to be a lack of gender equity. While some women’s collegiate athletic teams have successfully used Title IX and the courts to prevent dissolution, male collegiate athletes have not achieved the same success. Although men’s athletic teams have filed reverse discrimination claims, federal courts have refused to find Equal Protection or Title IX violations.²² Therefore, men’s athletic teams at many universities are facing the risk of reduction or termination, while women’s sports are being spared and in some instances even expanded. Supporters of Title IX contend that the law has not done enough to promote women’s intercollegiate opportunities; however the law’s critics argue that Title IX has gone too far in the other direction and is now mandating affirmative action for female athletes, at the expense of men’s opportunities.²³

This paper examines many of the issues facing women’s and nonrevenue men’s intercollegiate athletics today. Part I of the paper briefly outlines the history of Title IX and its statutory and regulatory framework. Part I also looks at the three-prong test of compliance that is strictly applied by the appellate courts. Part II summarizes the recent judicial development and

²¹ NCAA, *Achieving Gender Equity; A basic guide to Title IX and gender equity in athletics for colleges and universities*, 6 (1997).

²² *Id.*

²³ Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Ref. 13 University of Michigan Journal of Law Reform Fall & Winter 2000 & 2001 Symposium THE STRUGGLE FOR SEX EQUALITY IN SPORT AND THE THEORY BEHIND TITLE IX. (Male athletes who have alleged an equal protection violation have attempted to show that their school impermissibly cut men’s sports based on their gender.) See also *Kelly*, 832 F. Supp. at 239. Plaintiffs also alleged that Illinois violated the Equal Protection Clause of the Fourteenth Amendment by terminating programs using gender as the sole criteria. *Id.* However, the plaintiff’s Equal Protection challenge failed on the basis that Illinois termination of the men’s swimming team served “a remedial purpose which qualifies as an important state interest which is substantially related to eradicating historical gender discrimination against women in athletics at the University of Illinois.” *Id.* at 243. Thus, even though the district court found that male swimmers at Illinois were treated differently than female swimmers on the basis of gender, the treatment passed midlevel scrutiny and did not violate the Equal Protection Clause. *Id.* See also *Gonyo v. Drake University*, 879 F. Supp 1000 (S.D. Iowa 1995): *Gonyo* is the only other reported case filed by male athletes alleging a violation of the Equal Protection clause. *Gonyo* involved a claim against Drake University, which cut men’s wrestling, and in so doing narrowed the gap between the number of scholarships offered to male athletes and the number of scholarships offered to female athletes. Male athletes alleged that the disparity violated the Equal Protection Clause. *Id.* at. 1006. However, Drake was a private school and thus not subject to the Equal Protection Clause.

interpretations of Title IX cases, including how federal circuit courts' responses have maintained that universities are failing to meet applicable gender equity in women's athletics programs. Part II also describes the currently unsuccessful reverse discrimination claims resulting from the reduction and elimination of men's athletic programs. Part III looks at how Title IX has transformed intercollegiate athletics for the better and the worse. It focuses on the increasing participation rates of female athletes since Title IX's passage, and the astounding rate of elimination of nonrevenue men's teams such as wrestling and gymnastics. Finally, Part IV discusses alternatives to increase the effectiveness of Title IX. Moreover, Part IV also suggests recommendations for Title IX reform including modifying the three-prong test used to achieve compliance.

TITLE IX

A. History

On June 23, 1972, Title IX of the Educational Act Amendments was passed by Congress and later signed into law by President Richard M. Nixon. Its purpose was to end sex discrimination in any federally funded educational and athletic program or activity.²⁴ Title IX covers interscholastic, intramural, club and intercollegiate athletic programs and provides, in pertinent part, that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance..."²⁵ Title IX was modeled after Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination on the basis of race and gender. One aspect evident from reading Title VII's history and case law is that it prohibits the use of quotas as a means to attain the statute's goal. This dislike for quotas was

²⁴ Diane Heckman, Comment, *Scoreboard: A Concise Chronological Twenty-five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 Seton Hall J. Sport. 391 (1997).

²⁵ 20 U.S.C. § 1681 (1990).

carried over into Title IX.²⁶ According to Senator Bayh, “university quotas are exactly what this amendment intends to prohibit...The amendment does not contain, nor do I think it should contain, a quota which says there has to be a 50-50 ratio. The thrust of the amendment is to do away with every quota.”²⁷ Thus, while Title IX’s broad language and limited legislative history has given rise to many interpretations of what is covered, the legislative history that does exist clearly prohibits the use of quotas as a means of compliance.

Title IX’s most controversial question concerns its scope. Initially, there was some uncertainty surrounding Title IX’s application to institutions of higher education. The vague wording, broad language, and the relative lack of legislative materials accompanying its passage, made it difficult for universities to understand Title IX’s meaning and scope.²⁸ Additionally, universities were faced with the uncertainty of whether the scope of Title IX included intercollegiate athletics. Title IX sailed through Congress with little notice. However, there was strong public reaction and lobbying efforts made by the National Collegiate Athletic Association (NCAA) after the enactment of the statute concerning Title IX’s relationship to intercollegiate athletics. The male dominated NCAA feared that Title IX would have a significant effect on male intercollegiate athletics, and worked hard through lobbying efforts and political pressure to exempt intercollegiate athletics from the scope of Title IX. The NCAA feared that Title IX and federal regulations would significantly decrease the amount of money being spent on men’s sports, especially football, and expressed fears that money once allocated to men’s teams would now have to be made available to women. Additionally, the NCAA lobbied against the passage

²⁶ Walter B. Connolly, Jr. & Jeffrey D. Adelman, *A University’s Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. Det. Mercy L. Rev. 845, 849 (1994).

²⁷ David Aronber, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX Signal Its Demise*, 47 Fla. L. Rev. 741. Quoting 117 CONG. REC. 30, 403 (1971) (statement of Senator Bayh).

²⁸ Christopher Paul Reuscher, *Giving the Bat Back to Casey: Suggestions To Reform Title IX’s Inequitable Application To Intercollegiate Athletics*, 35 Akron L. Rev. 117, 122 (2001).

of Title IX because of their adversarial relationship with the Association for Intercollegiate Athletics for Women (AIAW). In 1972, the AIAW was formed with the objective of providing a stronger framework for intercollegiate women's athletics.²⁹ While the AIAW wanted to expand the role of women in intercollegiate athletics, the NCAA lobbied fiercely to shrink women's role. NCAA executive director, Walter Byers, shared the views of many people that Title IX stood for the "possible doom of intercollegiate athletics."³⁰ As one observer noted: "The NCAA is frank to admit the tremendous lobbying effort they have been making to have athletics removed from the Guidelines because they feel they cannot exist with the present interpretation."³¹ The NCAA wanted to limit the amount of direct impact that the AIAW would have on Title IX regulations and intercollegiate athletics, and attempted to take over the AIAW to gain control of women's athletics. In 1980 the NCAA succeeded when the AIAW was dissolved.³²

After it became clear that Title IX would now cover intercollegiate athletics, a number of amendments were proposed to help define Title IX's scope and applicability to intercollegiate athletics. The NCAA backed a lobbying campaign in support of the failed Tower Amendment that was proposed by Senator John Tower in 1974. The Tower Amendment

²⁹ Cynthia J. Harris, *The Reform of Women's Intercollegiate Athletics: Title IX, Equal Protection, and Supplemental Methods*; 20 Cap. U. L. Rev. 691 at 694 Capital University Law Review Summer, 1991.

³⁰ Linda Jean Carpenter, *The Impact of Title IX on Women's Intercollegiate Sports, in Government and Sport: The Public Policy Issues 63* (Arthur T. Johnson & James H. Frey, eds. 1985) (quoting Bart Barnes, *No Sporting Chance: Girls in the Locker Room*, Wash. Post, May 12, 1974, at 14A).

³¹ *Id.*

³² Cynthia Harris, 20 Cap. U. L. Rev. 691 at 694 (In 1975, the NCAA began a five year effort to take over the AIAW and to gain control of women's athletics. In 1980, the NCAA membership voted to approve sponsorship of national championships for women. The NCAA, through the use of lucrative financial incentives, convinced many institutions to discontinue their AIAW memberships and to join the NCAA. The NCAA takeover effectively destroyed the AIAW, which lost its Division I members and, as a consequence, its income. The motive behind the NCAA takeover explained by former AIAW president, Donna Lopiano: "The NCAA pursued its two-pronged assault on women's intercollegiate athletics: to dilute or eradicate Title IX's coverage of intercollegiate athletics; and to expand into women's athletics...Either of these efforts would have been materially altered by the success of the other: the NCAA would have been far less interested in undermining Title IX had it controlled women's intercollegiate athletics and far less eager to control women's athletics had it successfully truncated Title IX coverage." *Id.* The demise of the AIAW resulted in the loss of vocal and prominent advocate of women's athletics and Title IX reforms. At most institutions, women's athletics are currently administered by the NCAA, an organization that has never supported the full enforcement of Title IX. *Id.*

attempted to grant revenue producing sports, such as football and basketball, an exemption from the reach of Title IX. Under the reasoning of the Tower Amendment, this exemption was justified because these sports produced revenue and created the largest disparity between the gender and sports.³³ Despite the NCAA's lobbying efforts Congress rejected the Tower Amendment; however, Congress approved an amendment by Senator Jacob Javits as a compromise.³⁴ Unlike the Tower Amendment, the Javits Amendment did not exclude revenue-producing sports from the reach of Title IX. Instead the Amendment required the Secretary for the Department of Health, Education, and Welfare ("HEW") to propose and prepare Title IX regulations "which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."³⁵ Although Congress attempted to reach a compromise by passing the Javits Amendment, the NCAA continued to lobby against having intercollegiate athletics fall within the jurisdiction of Title IX. In a report to the NCAA Executive Committee, the NCAA Joint Legislative Committee on Athletics and Education voiced its concerns:

The NCAA is working diligently toward changes in Title IX regulations as they pertain to women's sports on college campuses. Seemingly, a majority of senators and congressmen agree with the NCAA position that the basic law was not intended to give HEW control over intercollegiate athletics. Confusion appears to reign within HEW regarding interpretations of the legislation, and various women's activist groups have complicated the issues by disseminating false and misleading information.³⁶

However, despite the NCAA's objections HEW adopted its regulations in 1975, thereby

³³ Crista Leahy, *The Title Bout: A Critical Review of the Regulation and Enforcement of Title IX in Intercollegiate Athletics*, 24 J.C. & U.L. 489 (1998).

³⁴ See § 844, Stat. At 612 (1974). The Javits Amendment instructed the Secretary of HEW to prepare regulations for implementing Title IX that included, "with respect to intercollegiate athletics reasonable provisions considering the nature of particular sports." The Javits Amendment became law in 1974, and remains controlling today.

³⁵ Aronberg, 47 Fla. L. Rev. 741, 751 (1995).

³⁶ National Collegiate Athletic Association, 1973-74 Annual Report 38 (1974).

including intercollegiate athletics within the scope of Title IX.³⁷ Congress was likely able to ignore the NCAA's male sympathizers because of the gaining strength of the women's movement, and the mistaken belief that the Equal Rights Amendment³⁸ would be ratified.

The 1975 Regulations issued by HEW helped to clarify enforcement of Title IX, and for the first time addressed issues pertaining to college athletics. While the regulations cover Title IX's application to an educational institution's entire operations, two sections specifically pertain to college athletics.³⁹ One section requires schools to award athletic scholarships in proportion to the number of males and females participating in athletics.⁴⁰ The second section specifies when a school may maintain separate male and female athletic teams and when it must permit members of one sex to participate on the other sex's team.⁴¹ Moreover, the regulations specifically included a section entitled "equal opportunity." Under this section, HEW related that a "recipient" of federal funding "shall provide equal athletic opportunity for members of both sexes."⁴² Despite the emphasis placed on equal opportunity in determining compliance,

³⁷ Leahy, 24 J.C. & U. L. 489, 495 (1998).

³⁸ The United States Commission on Civil Rights first endorsed the proposed Federal Equal Rights Amendment in 1973, soon after it was adopted by the United States Congress and reported to the individual States for ratification. The language of the Equal Rights Amendment expresses the basic principle that government at all levels should treat women and men as individuals having equal rights under the law and provides for the implementation of this principle: Section 1: Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex. Section 2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. Section 3: The amendment shall take effect two years after the date of ratification.

³⁹ Title IX of the Education Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71, 413 (1979) (codified at 45 C.F.R. pt. 86).

⁴⁰ 34 C.F.R. § 106.37 (c)(1)(1995). Section 106.37 (c)(1) provides that "to the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics." *Id*

⁴¹ See *id.* at § 106.41(b). The regulations allow a school to maintain teams separated by sex "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* However, if a separate team is fielded for one sex but not the other, and athletic opportunities for the excluded sex have previously been limited, "members of the excluded sex must be allowed to try out for the team offered unless the sport is a contact sport." *Id.* The regulations define contract sports to include "boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact." *Id*

⁴² 34 C.F.R. § 106.41(a)(1995) provides: No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient and no recipient shall provide any such athletics separately on such basis. See also 34 C.F.R. § 106.41(c)(1995). The regulation lists ten factors to

HEW did not place this same amount of emphasis on monetary expenditures. HEW stated that “unequal aggregate expenditures for members of each sex...will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for member of each sex.”⁴³ Thus, it appeared that HEW’s interpretation of Title IX focused on compliance through equal opportunity rather than equal expenditure.⁴⁴

The 1975 Regulations attempted to clearly define what a university had to do within their athletic program to comply with Title IX, and allowed a three-year window of compliance. However, uncertainty and ambiguity in regards to the regulations permeated throughout the nation’s universities and athletic programs. Although women’s athletic programs continued to expand following the 1975 Regulations, many institutions were concerned that their athletic programs would not comply with Title IX once the three year period set by the regulations had terminated, which would subject them to the risk of losing federal funds.⁴⁵ Additionally, in the three years following the publication of the regulations, HEW received more than one hundred discrimination complaints covering fifty schools.⁴⁶ In response to the universities complaints that the regulations were ambiguous, and in an effort to promote self-compliance and elimination of the number of discrimination complaints, HEW’s Office of Civil Rights (“OCR”) issued a

consider in evaluating an athletic program’s compliance with Title IX. “In determining whether equal opportunities are available the Director will consider, among other factors:” (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice times; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity

⁴³ 34 C.F.R. § 106.37 (c)(1) (1995)

⁴⁴ Shook, 71 Ind. L.J. at 776.

⁴⁵ Jurewitz, 8 Am. U.J. Gender Soc. Pol’y & L. at 298.

⁴⁶ Shook, 71 Ind. L.J. at 776.

Policy Interpretation regarding Title IX's application to intercollegiate athletics.⁴⁷ OCR's Policy Interpretations suggested three requirements that must be followed to avoid a violation of Title IX. These three requirements together make up the Three-Prong Test of compliance. This test in recent years, both in the courts and within the nation's universities, has become the most controversial component of Title IX.

B. Policy Interpretation-The Three-Prong Test of Compliance

The Policy Interpretation issued in 1979 by the OCR was designed to provide colleges and universities with detailed instruction on how to comply with Title IX. The OCR's stated purpose in issuing the Policy Interpretation was to "provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs."⁴⁸ The OCR's Policy Interpretation was reviewed neither by Congress nor the President, and was meant only to clarify the meaning of "equal opportunity" consistent with Title IX and the 1975 Regulations.⁴⁹ However, the Policy Interpretation has become one of the most powerful and controversial components of Title IX compliance. As one commentator has suggested:

Title IX was originally crafted by elected representatives and was dramatically altered seven years later through the Policy Interpretation, by unelected, anonymous bureaucrats, unaccountable to the public at large. As a result, a statute that had been designed to prohibit discrimination on the basis of sex was now transformed by the Policy Interpretation into an affirmative action law that mandated gender quotas."⁵⁰

It has also been suggested that the Policy Interpretation was a deliberate attempt by the

⁴⁷ *Id.*

⁴⁸ U.S. Department Health, Education and Welfare, Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413 (1979).

⁴⁹ Aronberg, 47 Fla. L.Rev. 754-755.

⁵⁰ Donald C. Mahoney, *Taking a Shot at The Title: A Critical Review of Judicial and Administrative Interpretations of Title IX as Applied to Intercollegiate Athletic Programs*, 27 Conn. L. Rev. 943, 945 (1995).

OCR to rewrite the regulations and to bypass the legislative-veto procedure.⁵¹ Regardless of the motives behind the actions of the OCR the fact remains that Congress never reviewed what would become one of the most controversial components of Title IX.

The Policy Interpretation suggested three requirements that must be followed to avoid a violation of Title IX. The three parts include (1) compliance in financial assistance (scholarships) based on athletic ability;⁵² (2) compliance in other program areas (includes factors two through ten from the list of compliance factors listed in footnote 42);⁵³ (3) compliance in meeting the interests and abilities of male and female students (addressing factor one from the list of ten compliance factors).⁵⁴ The three-part test thus gives a university three separate avenues to choose from when determining how to best provide each sex with a nondiscriminatory opportunity to participate in intercollegiate athletics within Title IX's framework. If a university meets any prong of three-part test, OCR will determine that the university is in compliance with Title IX.

To comply with the first part of the Policy Interpretation, educational institutions must make scholarship aid available to men and women in "substantially equal amounts," although an exact split of scholarship money is not required.⁵⁵ The second part of the Policy Interpretation does not require "identical benefits, opportunities, or treatment," as long as "the overall effect of any differences in negligible."⁵⁶ This second area, which deals with "equivalence" in other athletic benefits and opportunities, specifically defines "equivalence" as meaning, "equal or

⁵¹ *Id.* at 954

⁵² OCR Policy Interpretation, 44 Fed. Reg. 71, 414, 71, 415 (1979); 34 C.F.R. 106.37(c)(1)(1995)

⁵³ OCR Policy Interpretation, 44 Fed. Reg. 71, 414 71, 415-17(1979); 34 C.F.R. 106.41(c)(2)-(10)(1995)

⁵⁴ OCR Policy Interpretation, 44 Fed. Reg. 71, 414 71, 417-18(1979); 34 C.F.R. 106.41(c)(1)(1995)

⁵⁵ OCR Policy Interpretation, 44 Fed. Reg. 71, 415 (1979.)

⁵⁶ *Id.*

equal in effect.”⁵⁷ There are several nondiscriminatory factors that will justify the unequal treatment between women and men’s sports, including the “football exception,” which recognizes that there are unique aspects to certain sports.⁵⁸ The inequalities allowed by the football exception are excusable only if “any special demands associated with the activities of sports involving participants of the other sex are met to an equivalent degree.”⁵⁹

The third part of the Policy Interpretation is the most important and controversial, and the area where most Title IX litigation has focused. Under part three of the three-part test, OCR determines whether a university is fully and effectively accommodating the interests and abilities of the underrepresented sex.⁶⁰ The Effective Accommodation section provides its own three-pronged test for determining whether an educational institution is complying with the equal opportunities requirement of the regulation.⁶¹ To demonstrate compliance with Title IX under Effective Accommodation, an institution must establish only one of the following three criteria to satisfy part three of the three-part test. (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing

⁵⁷ *Id.*

⁵⁸ *Id.* The Policy Interpretation states that such unique aspects “may include rules of play, nature/replacement of equipment, rates of injury resulting from participation, nature of facilities required for competition, and the maintenance/upkeep requirements of those facilities.” The regulations allow a school to maintain teams separated by sex “where selection for such teams is based upon competitive skill or the activity involved is a contact sport.” *Id.* However, if a separate team is fielded for one sex but not the other, and athletic opportunities for the excluded sex have previously been limited, “members of the excluded sex must be allowed to try out for the team offered unless the sport is a contact sport.” *Id.* The regulations define contract sports to include “boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.” *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Charles Beveridge, *Title IX and Intercollegiate Athletics: When Schools Cut Men’s Athletic Teams*, 1996 U. Ill. L. Rev. 809, 820 (1996).

interest and abilities of the member of that sex; or (3) Whether it can be demonstrated that the interests and abilities of the members of...[the underrepresented] sex have been fully and effectively accommodated by the present program.⁶²

In essence these regulations impose a presumption that if an inequality exists between male and female athletic programs, the burden to justify this inequity falls upon the university. The first prong of Part three was designed as a “safe harbor” provision for universities that are trying to demonstrate Title IX compliance.⁶³ It allows a university “which does not wish to engage in extensive compliance analysis to stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic participants.”⁶⁴ Under prong one, the rates of participation of women and men in the athletics program should be substantially proportionate to their respective rates of enrollment as full time undergraduate students. Therefore, if women are 52 percent of the full-time undergraduate enrollment and men are 48 percent, then 52 percent of the athletics participants should be women and 48 percent should be men.⁶⁵ This portion of the policy interpretation has proven to be the most controversial and the clause most frequently applied by the courts in determining Title IX compliance.

A university complies with the second prong if it can show a “history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex.”⁶⁶ Part two looks at an institution’s past and remedial efforts to provide nondiscriminatory participation opportunities through program expansion.⁶⁷

OCR will review the entire history of the athletics program and focus on whether an institution

⁶² Title IX of the Education Amendments of 1972: A Policy Interpretation: Title IX & Intercollegiate Athletics, 44 Fed. Reg. 71, 413, 71, 418 (1979).

⁶³ *Cohen v. Brown University*, 879 F. Supp. 185, 202 (D.R.I. 1995).

⁶⁴ *Cohen v. Brown University*, 991 F.2d 888, 897-98 (1st Cir. 1993).

⁶⁵ NCAA, *Achieving Gender Equity; A basic guide to Title IX and gender equity in athletics for colleges and universities*, 6 (1997).

⁶⁶ NCAA, *Achieving Gender Equity*, 27 (1997).

⁶⁷ *Id.*

has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex. Improvements in the quality of competition, and of other athletic benefits provided to women athletes, while not considered under the three-part test, can be considered by OCR in making an overall determination of compliance.⁶⁸ Although it seems unlikely that a school can meet prong two if opportunities for the underrepresented sex have been cut, if a school “can show a history and continuing practice of program expansion for that sex it might still be considered in compliance.”⁶⁹ The budget cuts within athletic departments and universities have made prong two a difficult and rather unattractive alternative for universities to choose.

Under part three of the three-part test, OCR determines whether an institution is fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex.⁷⁰ This prong recognizes that while “disproportionately high athletics participation rates by an institution’s students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, and institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination.”⁷¹ Thus, if a university can demonstrate that female students are less interested in participating in intercollegiate athletics, a school is not guilty of discrimination simply because of individual preferences. An institution does not comply with prong three if (1) there is unmet interest in a particular sport; (2) sufficient ability to sustain a team in the sport; and (3) a reasonable expectation of competition for the team.⁷² The Policy Interpretation suggests that the third prong may be used to show compliance if the first two prongs are not met. Thus, if a school is unable to show substantial proportionality

⁶⁸ *Id.*

⁶⁹ Beveridge, 1996 U. Ill. L. Rev. 809, 821 (1996).

⁷⁰ NCAA, *Achieving Gender Equity*, 29 (1997).

⁷¹ *Id.*

⁷² *Id.*

or program expansion, it might still succeed by accommodating the interests and abilities of the underrepresented sex. The third prong of the three-prong test has proven to have little significance for universities wishing to comply with Title IX. Universities have difficulty demonstrating in court, against female plaintiffs who have had their sport eliminated, that they are meeting the interests and abilities of the underrepresented sex. The third prong, like the second prong, of the three-part test has played almost no role in the universities efforts to comply with Title IX leaving substantial proportionality as the sole basis for determining Title IX compliance.

Despite the regulations presented in 1975 and the Policy Interpretation presented in 1979, uncertainty surrounding the application and enforcement of Title IX still remains. The OCR can determine if a university is complying with the three-prong test by initiating an investigation itself, or responding to a complaint; however in reality the OCR has lacked the resources to initiate investigations into when universities have failed to comply with Title IX, and proof of noncompliance is therefore dependent on complaints.⁷³ Although a university who is not in compliance runs the risk of losing federal funding, the inability of the OCR to fully investigate compliance concerns accounts for why the OCR has yet to terminate federal funding at a single university.⁷⁴ Thus, it can be argued that OCR's Title IX enforcement has proved to be largely ineffective.

The NCAA should take a more active role in determining if universities are complying with Title IX and achieving gender equity. Although the NCAA has no legal obligation to enforce Title IX, as the monopoly in terms of running both men's and women's athletic competition, it should team with OCR to ensure that universities are achieving gender equity and

⁷³ *Id* at 25.

⁷⁴ Carol Herwig, *Gender Equity*, USA Today, July 2, 1993, at 12C. After extensive research I could not find any new information that would seem to suggest that this statistic has changed.

obtaining Title IX compliance. The NCAA now says, “it deplores the unequal treatment women athletes receive at most of its colleges and that it has a program to correct that.”⁷⁵ In 1993, the NCAA began this program described as “certification.” It requires each Division I college to show progress in gender equity in order to gain certification. A college must be certified to compete in the NCAA.⁷⁶ The certification program requires every Division I college to do a self-study explaining how it plans to expand women’s sports and improve gender equity. The NCAA reviews the plan and, if it is acceptable, certifies that the college meets association standards. Once certified, some colleges often do not even bother to follow their plans. Even if it wanted to catch those problems, the NCAA could not because it is so far behind in certifying colleges.⁷⁷ The NCAA has been largely inconsistent in its determination of which universities should receive certification, resulting in little effectiveness in achieving gender equity in women’s sports.⁷⁸ According to an NCAA spokesman, “By August 1999, almost 200 of the 305 Division I colleges should have been certified, according to the NCAA’s schedule. But four years after starting the certification process, only 142 schools have finished it, putting the NCAA about a year behind schedule.”⁷⁹ The NCAA has never denied certification to a university, despite their lack of gender equity.⁸⁰ Additionally, the OCR has been inconsistent with their promotion of gender equity and overall Title IX compliance, largely due to lack of manpower

⁷⁵ Karen Dillon, *NCAA Certification Program does Little to Improve Gender Equity*, October 09, 1999; Money Games Inside the NCAA.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* Southern University provided men athletes a dozen showers with tiled walls. Women athletes got two portable shower stalls with torn curtains and plastic pipes running across the floor. The showers didn’t even work—hadn’t for a couple of years. That wasn’t unusual at Southern where women got only a quarter of the athletic operating expenses. The NCAA certified Southern anyway, meaning the University met NCAA standards for gender equity. *See also*; The University of Kentucky, where the proportion of athletes who are women dipped from 32 percent in 1995 to 31.3 in 1997. A spokesman said Kentucky added a women’s softball team last year but also bulked up its men’s basketball, football, and baseball squads. *Id. See also*; Southwest Missouri State University was certified in 1997 when it projected three years ago it would add at least 90 women athletes by 2001. Today, it still needs 85 women. *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

and budget constraints. If the NCAA and the OCR joined together with the goal of achieving gender equity and Title IX compliance they might effectively accomplish what they cannot alone, Title IX enforcement.

Additionally, there has been strong criticism that the proportionality test has been used to mandate quotas in intercollegiate athletics, in direct violation of the true intent of Title IX. Because the last two parts of the three-prong test have had little significance in Title IX compliance, the proportionality test has become the singular significant factor for determining compliance, and its application has dominated Title IX litigation. The courts' adoption of the Policy Interpretation has produced harmful results for athletic programs, and has limited the opportunities for universities to prevail within the courts. The failure of universities to reach the necessary female participation numbers to meet the proportionality requirement has resulted in a significant losing streak for Title IX defendants: more than 30 Title IX court cases have been brought over the past decade, with female plaintiffs prevailing in every case.⁸¹ This trend will continue if Title IX remains unchanged, as a recent survey found that 645 out of 646 NCAA schools would fail the proportionality test.⁸² Thus, although the Policy Interpretation was intended to clarify the existing regulations and provide guidance to universities, the federal courts have instead adopted it as the sole basis for determining liability in Title IX lawsuits. By doing so, they have ensured that universities will have no success in cases that allege that women's sports are not getting their fair share.

⁸¹ Women's Sports Foundation, *Gender Equity in Athletics-Title IX (2000)*.

⁸² Doug Bedell, *Line of Skirmish: Title IX Gathers Force, but Football Powers Huddle to Fight Back*, Dallas Morning News, May 18, 1995, at B1. "The one school in compliance was not disclosed." See also Erik Brady, *Weighing Equality: College Sports Still Tip Scale Toward Men*, USA Today, Nov. 7, 2000 at C1 (stating that a USA Today survey of 94 Division I-A football schools found that nine would pass Title IX's proportionality test).

THE COURTS' INTERPRETATION OF TITLE IX

Within the last decade three different United States Circuit Courts of Appeals' decisions have propelled Title IX back into the forefront, and once again significantly altered the way that Title IX is applied to universities' intercollegiate athletics programs.⁸³ Together these cases demonstrate the willingness of the courts to strictly enforce Title IX, by addressing the discriminatory practices that directly affect female intercollegiate athletes.

WOMEN AS PLAINTIFFS

A. *Cohen v. Brown University*⁸⁴

Cohen, considered the most prominent Title IX case, construed the Effective Accommodation section as it is applied today.⁸⁵ *Cohen* was a class action suit against Brown University for violating Title IX. In 1991, as a direct result of budget concerns, Brown announced that it planned to demote four sports from varsity status: women's gymnastics, women's volleyball, men's golf, and men's water polo.⁸⁶ Members of the women's gymnastics team and volleyball teams filed a class action suit against Brown. The plaintiffs argued that the University's elimination of these athletic teams violated Title IX's ban on gender

⁸³ *Roberts v. Colorado State University*, 814 F. Supp. 1507 (D.C. Colo 1993), aff'd in part and rev'd in part sub nom. *Roberts v. Colorado Board of Agric.*, 998 F.2d 824 (10th 1993); *Favia v. Indiana University of Pa.*, 812 F. Supp 578 (W.D.Pa.), affirmed 7 F.3d 332 (3d Cir. 1993); *Cohen v. Brown University*, 809 F. Supp. 978 (D.R.I. 1992), affirmed 991 F.2d 888 (1st Cir.1993), affirmed 101 F.3d 155 (1996).

⁸⁴ *Cohen v. Brown University*, 809 F. Supp. 978 (D.R.I. 1992).

⁸⁵ Thomas Evans, *Title IX and Intercollegiate Athletics: Primer on Current Legal Issues*, 5 Kan. J.L. Pub. Pol'y 55 (1996). *Cohen* is viewed as most responsible for the widespread use of the overall student enrollment as an indispensable factor in a Title IX investigation.

⁸⁶ *Cohen*, 809 F. Supp. at 981. The decision to cut these programs was made in response to a university wide mandate to cut 5-8% from the budget over the next several years. *Id.* The demotions saved the athletic department \$77,813 per year: \$37,127 from women's volleyball, \$24,901 from women's gymnastics, \$9,250 from men's water polo, and \$ 6,545 from men's golf. *Id.* Additionally, the teams were also deprived of significant privileges that they enjoyed before the demotion. Varsity teams began to receive priority over intercollegiate club teams with regard to practice time and access to trainers. *Id.* at 82.

discrimination.⁸⁷ Additionally, Cohen sought prohibition against the elimination or reduction in status of any other university funded women's teams unless the percentage of athletic participation opportunities equaled the percentage of female undergraduate students.⁸⁸ Cohen argued that the OCR three-part test should be applied to determine Brown's compliance.⁸⁹ Cohen's primary argument focused upon the "interest and abilities" factor found in the Policy Interpretations. District Court Judge Pettine noted that the Policy Interpretation and the Investigators Manual do not carry significant judicial weight; however she gave deference to the three-part test and stated that a finding of non-compliance under Title IX can be established by this method.⁹⁰ As one commentator noted:

This meant that not only was OCR's three part test relevant to determining Title IX compliance, but the test alone could represent the start and finish of an entire Title IX inquiry, without any consideration of the other nine factors set forth in the regulations. As a result, enormous weight suddenly transferred to the first step of the three part test: the controversial proportionality rule."⁹¹

The court found that Brown failed each of the three parts of the Policy Interpretation's test, and held that Brown did not effectively accommodate the interests and abilities of female athletes.⁹²

An injunction was ordered requiring Brown to reinstate the women's teams to varsity status.

⁸⁷ *Cohen*, 809 F. Supp. at 980. The plaintiffs contended that Brown's violation of Title IX was allegedly exacerbated by Brown's decree to demote the two women's teams without first making adequate reduction in men's programs or, alternatively, adding other women's teams to mitigate the loss. *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 981; *See* discussion on pg. 14.

⁹⁰ *Cohen*, 809 F. Supp at 981. Judge Pettine stated that "the Policy Interpretation and the unpublished Investigator's Manual do not carry the force of law or establish controlling standards for this Court...I believe the Policy Interpretation, and to a slightly lesser extent the Investigators Manual, are important guides in unraveling the requirements of the athletic regulation." *Id.*

⁹¹ Aronberg, 47 Fla. L.Rev. 741 at 774.

⁹² *Cohen I*, 809 F. Supp. at 991-93. The court in deciding Prong I, examined the difference in the percentages of opportunities and undergraduate population. The court concluded Brown failed to satisfy part-one of the test because it maintained a 13.01% disparity between female intercollegiate athletes and females enrolled at the undergraduate level. *Id.* at 991. For Prong II, The court held that "Brown does not have a continuing practice of program expansion even though it can point to impressive growth in the 1970's." *Id.* The court noted that since 1977 Brown has added only women's track to sports available to women. *Id.* As for Prong III, the court found "in denying full varsity status to women...Brown has not accommodated the interests and abilities of women...under existing athletic programs. *Id.*

On appeal, the First Circuit, which referred to *Cohen* as a “watershed case,”⁹³ affirmed the district court’s decision. The First Circuit agreed with the district court in that the Policy Interpretation is entitled to “substantial deference,” as is the three-part test.⁹⁴ Thus, the Circuit Court endorsed the three-part test, including the proportionality test, despite noting that “it seems unlikely, even in this day and age, that the athletic establishments of many coeducational universities reflect the gender balance of their student bodies.”⁹⁵ Additionally, the Circuit Court endorsed the eliminating of male teams as way to achieve gender equity under the Policy Interpretations’ proportionality test:

Title IX does not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender.⁹⁶

The First Circuit’s analysis in *Cohen* has defined the standards for Title IX compliance in the 1990’s, while in the process made the three-part test the basis for which Title IX compliance claims will be assessed.

B. *Favia v. Indiana University of Pennsylvania*⁹⁷

In *Favia v. Indiana University of Pennsylvania* (“IUP”), members of the women’s gymnastics and field hockey teams sued IUP alleging it violated Title IX by eliminating these teams. During the 1990-91 IUP had an undergraduate enrollment of 10,793 students, 44.4% male and 55.6% female.⁹⁸ However, women comprised only 36.2% of the total number of

⁹³ *Cohen*, 991 F. 2d at 891.

⁹⁴ *Id.* at 896-97.

⁹⁵ *Id.*

⁹⁶ *Id.* at 898 n.15.

⁹⁷ *Favia v. Indiana University of Pennsylvania*, 812 F. Supp. 578 (W.D. Pa. 1993), affirmed, 7 F.3d 332 (3d Cir. 1993).

⁹⁸ 812 F. Supp 578 at 580.

athletes at the University.⁹⁹ Finding that IUP failed each part of the three-part test, the district court granted, and the Third Circuit upheld, reinstatement of the women’s gymnastics and field hockey teams.¹⁰⁰ When the district court applied the Policy Interpretation to the facts of the case, the court concluded that IUP’s athletic program did not comply with Title IX.¹⁰¹ The district court reasoned that IUP did not meet the first prong of the test, (substantial proportionality), because the university failed to provide women with participation opportunities in intercollegiate athletics proportionate to the percentage of women athletes and undergraduates.¹⁰² The court found that IUP failed to satisfy the second requirement, (continuing practice of expanding athletic opportunities), because of the recent decrease in the number of women athletic teams at IUP.¹⁰³ Finally, the court determined that IUP failed to meet the third prong, (the full and effective accommodation test), because the university eliminated opportunities for female intercollegiate athletes in the face of demonstrated interest and ability.¹⁰⁴ Thus, IUP failed to satisfy the necessary one out of three prong requirement of the three-prong test of compliance. The court held “that although two men’s teams were cut in order to maintain equality, that fact did not translate into equal opportunity for both sexes.”¹⁰⁵

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 584-85; The court ordered IUP: (1) to restore the women’s gymnastics and field hockey teams to their former status in the intercollegiate athletic program; (2) provide the coaching staff, uniforms, equipment, facilities, publicity, travel opportunities and all other incidentals of an intercollegiate athletic team to the women’s gymnastics and field hockey teams on a basis equal to that provided during the previous academic year; and (3) to fund the two teams in an amount equal to that provided during the previous school year. *Id.* at 584-85.

¹⁰¹ *Id.* at 584.

¹⁰² *Id.*

¹⁰³ *Id.* The court noted that “the levels of opportunities for women to compete went from low to lower, and the 1991 cuts were not responsive to the needs, interests and abilities of...women students.” This discrepancy was rooted in the fact that for every \$8.00 spent on men’s athletic programs, only \$2.75 was spent on women’s programs. *Id.*

¹⁰⁴ *Id.* at 585.

¹⁰⁵ *Id.* at 582. Holding that equality in team numbers was not parallel to equality in number of opportunities for underrepresented sex.

C. *Roberts v. Colorado State University*¹⁰⁶

In *Roberts v. Colorado State University* (“CSU”) members of the women’s softball team filed suit challenging the university’s discontinuation of their sport. During the 1991-92 school year, women comprised 35.2% of the total athletes at CSU; however, women represented 47.9% of the undergraduate student population.¹⁰⁷ The district court found for the plaintiffs, and required that CSU reinstate the women’s softball team. Moreover, the district court adopted the holding in *Cohen* “that the Policy Interpretation’s three part test can by itself determine noncompliance with Title IX and determined that CSU failed the test.”¹⁰⁸ As in *Cohen* the district court relied heavily on the first prong, proportionality, in its determination that CSU was not in compliance. The district court found that the 10.5% disparity between women’s athletic participation and women’s enrollment failed the proportionality test.¹⁰⁹ The Tenth Circuit affirmed the ruling of the district court, while expressing concern that in “times of economic crisis, institutions will face difficulty in continuing a practice of expansion”¹¹⁰ Nonetheless, the Tenth Circuit concluded that “a financial crisis cannot justify gender discrimination.”¹¹¹

D. Summary

The application and interpretation of Title IX is straightforward and consistent in lawsuits brought by female plaintiffs. The court will first determine whether one of three general areas, substantial proportionality, continuing practice of expanding athletic opportunities, or full and effective accommodation, is applicable to an effective accommodation analysis and determine whether a university has effectively accommodated female athletes pursuant to the Policy

¹⁰⁶ 814 F. Supp. 1507 (D. Colo), affirmed in part, reversed in part, *Roberts v. Colorado State Bd. Of Agric.*, 998 F.2d 824 (10th Cir.) cert denied, 114 S. Ct. 580 (1993).

¹⁰⁷ 814 F. Supp 1507 at 1518.

¹⁰⁸ *Id.* at 1511.

¹⁰⁹ *Id.* at 1513.

¹¹⁰ *Roberts*, 998 F.2d at 835.

¹¹¹ *Id.*

Regulations, and the three-prong analysis. Thus, the trilogy of cases discussed above firmly establish that, absent any changes to Title IX, women plaintiffs will obtain judicial victories in seeking equal intercollegiate athletic opportunities.

MEN AS PLAINTIFFS: REVERSE DISCRIMINATION UNDER TITLE IX

In this era of financial uncertainty and university wide cutbacks, universities have been faced with the difficult predicament of balancing their budgets and complying with Title IX. While many schools wish to comply with Title IX standards by expanding opportunities for women athletes, most cannot afford to do so. As a result of *Cohen*, *Roberts*, and *Favia* many universities are being forced to cut men's teams, while keeping, and even continuing to expand women's teams.¹¹² Critics contend that this interpretation of Title IX appears to transform the legislation from a statute that prohibits discrimination to a statute that encourages it.¹¹³ As the next two cases demonstrate, some male athletes have been denied athletic opportunities, but unlike women, they have not been successful under Title IX.

A. Kelley v. Board of Trustees of University of Illinois¹¹⁴

In 1993, the University of Illinois eliminated four varsity athletic teams, men's varsity swimming, men's varsity fencing, and men and women's varsity diving.¹¹⁵ The University's decision to eliminate these programs was "motivated by budget considerations...including the

¹¹² See Charles P. Beveridge, *Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletic Teams*, 1996 U. Ill. L. Rev 809 (1996).

¹¹³ George A. Davidson & Carla A. Kerr, *Title IX: What is Gender Equity?* 2 Vill. Sports & Ent. L.F. 25, 26, (1995).

¹¹⁴ *Kelley v. University of Ill.*, 832 F. Supp. 237 (C.D. Ill. 1993).

¹¹⁵ 832 F. Supp. 237 (C.D. Ill. 1993), affirmed, 35 F.3d 265 (7th Cir. 1994), cert. denied, *U.S.*, 115 S. Ct. 938 (1995). The teams were selected for termination after athletic department officials evaluated the teams relative opportunities for success in the future. The court noted that men's swimming was selected because it was historically unsuccessful; it was not a widely offered high school sport and it had a small spectator following. *Id.* at 269.

need to comply with Title IX.”¹¹⁶ During the 1992-1993 school year, there were 25,846 students; 56% of the students were men. However, 76.58% of the athletes participating in intercollegiate athletics at Illinois were men while women comprised a mere 23.42%.¹¹⁷ In the first reverse discrimination suit of its kind, plaintiffs alleged that the University of Illinois violated Title IX and the Equal Protection Clause of the Fourteenth Amendment by discriminating against them on the basis of sex by disbanding the men’s swimming team, but sparing the women’s team.¹¹⁸ Unlike female plaintiffs who sued under Title IX, the plaintiffs in *Kelley* alleged the University of Illinois violated the Equal Protection Clause by terminating programs using gender as the sole criteria.¹¹⁹ Additionally, plaintiffs argued that the regulation and the Policy Interpretation distorted Title IX, and “through some alchemy of bureaucratic regulation...transformed...a statute which prohibits discrimination on the basis of sex into a statute that mandates discrimination against males.”¹²⁰ Despite this argument the district court granted summary judgment in favor of Illinois, finding that Illinois’ termination of the men’s swimming team did not violate Title IX or the Fourteenth Amendment’s Equal Protection Clause.¹²¹ The court observed that although the termination of the men’s swimming team excluded the members from varsity participation, the overall percentage of male athletes was substantially proportionate to

¹¹⁶ *Kelley v. Bd. Of Trs.*, 35 F.3d 265, 269 (7th Cir. 1994); Discussing reasons why men’s swimming was eliminated. The University chose to maintain the women’s swimming program “because such action would put the University at risk of violating Title IX.” *Id.*

¹¹⁷ *Id.* at 240.

¹¹⁸ *Kelley*, 832 F. Supp. at 239. However, the plaintiff’s Equal Protection challenge failed on the basis that Illinois termination of the men’s swimming team served “a remedial purpose which qualifies as an important state interest which is substantially related to eradicating historical gender discrimination against women in athletics at the University of Illinois.” *Id.* at 243. Thus, even though the district court found that male swimmers at Illinois were treated differently than female swimmers on the basis of gender, the treatment passed midlevel scrutiny and did not violate the Equal Protection Clause. *Id.* The court specified that “in limited circumstances, a gender based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.” *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* 267.

¹²¹ *Id.* at 243.

male undergraduate enrollment, and thus only women could wield the “Title IX sword.”¹²² The court appeared to be stating that because the university complied with the first prong of the Policy Interpretation with respect to male athletes its elimination of men’s sports did not violate Title IX. Moreover, if the court had applied the two remaining prongs of the three prong test, (history and continuing practice of program expansion and interests and abilities of the underrepresented sex), the plaintiffs claims would have probably also failed because they were not the underrepresented sex. Male athletes represented almost 77% of the athletes, thus it would have been difficult for them to present evidence that the university did not have a continuing practice of expanding men’s programs. Moreover, it would have been difficult for the plaintiffs to make a successful argument that the university failed to accommodate their interests and abilities.

Although the court granted summary judgment to the University of Illinois there was some indication that the court was sympathetic to the plight of male athletes. Notably, the court readily admitted that the Title IX statute neither sanctioned nor anticipated the three-part test that would later “convert Title IX from a statute which prohibits discrimination on the basis of sex...into a statute which provides ‘equal opportunity for members of both sexes.’”¹²³ The court went as far as to acknowledge that the male swimmers were “innocent victims” caught up in Illinois’ efforts to comply with Title IX. However, the court concluded that innocent parties must often shoulder the burden in an attempt to remedy past discrimination, which includes the effects of a “historical de-emphasis on athletic opportunities for women.”¹²⁴ Additionally, the court recognized that “Congress, in enacting Title IX, probably never anticipated that it would

¹²² *Id.*

¹²³ *Id.* at 241.

¹²⁴ *Id.* at 244.

yield such draconian results.”¹²⁵ Although the court recognized that the regulations could have been written differently, they followed the lead of *Cohen* and *Roberts* and gave substantial deference to OCR’s Policy Interpretation.

Affirming the district court, the United States Court of Appeals for the Seventh Circuit found that Illinois did not violate Title IX because Title IX was intended to benefit the underrepresented sex, which at Illinois was female intercollegiate athletes.¹²⁶ The Circuit Court also determined that Illinois’ decision to terminate men’s swimming while retaining women’s swimming was “prudent” because eliminating women’s swimming would have left the school vulnerable to a finding of noncompliance with Title IX.¹²⁷

B. *Gonyo v. Drake University*¹²⁸

The Seventh Circuit was confronted with a similar case in *Gonyo v. Drake University*. Drake University discontinued its men’s varsity wrestling team for financial reasons, and because other schools within their conference eliminated their wrestling teams.¹²⁹ The court noted that only 24.7% of the athletes at Drake were women, whereas women comprised 57.2% of the student population. *Gonyo*’s claim again focused upon a violation of Title IX and the Equal Protection Clause. The court denied the Title IX claim and held, “that the mere fact that men were overrepresented on Drake’s athletic teams demonstrates that Drake has already effectively accommodated the wrestlers’ interests and abilities.”¹³⁰ Thus, the court found that the disproportionate number of male to female athletes in the athletic program prevented a finding

¹²⁵ *Id.*

¹²⁶ *Kelley*, 35 F.3d at 270. The court determined that “the University could eliminate the men’s swimming program without violation of Title IX since even after eliminating the program, men’s participation in athletics would continue to be more than substantially proportionate to their presence in the University’s student body.” *Id.*

¹²⁷ *Id.* at 269.

¹²⁸ 837 F. Supp. 989 (S.D. Iowa 1993).

¹²⁹ *Id.* at 992. The University justified its decision by explaining that the students of Drake showed no interest in the program, it is not a revenue producing sport, and that other schools have eliminated the program when faced with a similar situation. *Id.*

¹³⁰ *Id.* 989

that Drake violated Title IX, and denied the plaintiffs' injunction for reinstatement.

The Circuit Court affirmed the district court ruling. Citing the First Circuit in *Cohen*, the court determined that the Policy Interpretation, as “a considered interpretation of the regulation by the administering agency deserved substantial deference.”¹³¹ Moreover, the court held that public interest “weighs in favor of permitting colleges and universities to chart their own course in providing athletic opportunities without judicial interference or oversight, absent a clear showing that they are in violation of the law.”¹³² Therefore, applying the provision of proportional participation, the Circuit Court affirmed the district court's finding of no Title IX violation.

C. Summary

The *Kelley* and *Gonyo* cases present an alarming trend that has begun to change the face of intercollegiate athletics.¹³³ As a result of Title IX, many male athletes will lose opportunities to participate in intercollegiate athletics. Both *Kelley* and *Gonyo* demonstrate the court's approval of universities' adoption of team elimination, rather than expansion of programs with additional opportunities for women, as a necessary and acceptable method of compliance with Title IX. Thus, male athletes in small, non-revenue producing sports such as wrestling, swimming and gymnastics run the risk of losing the opportunity to take part in intercollegiate athletics. Unlike women in similar sports, it appears that male athletes are without legal

¹³¹ 837 F. Supp 989 (S.D. Iowa 1993).

¹³² *Id.*

¹³³ Both the Seventh Circuit and the Ninth Circuits have reviewed decisions addressing issues of reverse discrimination under Title IX. In *Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999), the Seventh Circuit examined this issue when male athletes at a state university challenged the elimination of the men's soccer and wrestling programs as a violation of Title IX. The court applied the strict proportionality test and determined that the university was in compliance with Title IX. *Id.* at 635. The Ninth Circuit also reviewed this issue recently in *Neal v. Board of Trustees*, 198 F.3d 763 (9th Cir. 1999) where male athletes also brought suit against a state university, alleging that the reduction of the number of roster spots on its men's wrestling team violated Title IX. Like the cases before it, the court utilized the substantial proportionality prong and found that the University was in compliance. The Ninth Circuit went on to conclude that “a university where male athletes are overrepresented can achieve Title IX compliance by reducing sufficiently the number of roster sports available to men.” *Id.* at 771.

recourse.

There can be little argument that without Title IX, most female athletes would continue to be denied opportunities to compete in intercollegiate athletics. Women have paid and continue to pay for blatant and long-standing discriminatory actions that have prevented them from having the same athletic opportunities as men. It is these types of disparities between male and female intercollegiate sports that Title IX is attempting to remedy. However, “what the majority of courts have failed to realize is that the goal of Title IX is to expand and promote women’s participation, not to sound the death knell of men’s sports.”¹³⁴ Thus, as demonstrated by the *Kelley* and *Gonyo* decisions, mandating that universities comply with the strict proportionality prong results in the loss of male participation in intercollegiate athletics, usually with regards to nonrevenue producing sports.

TITLE IX RAMIFICATIONS

A. Impact on Women

Enforcement of Title IX’s mandate of gender equity in intercollegiate athletics has altered the landscape of women’s sports, and has resulted in tremendous growth of women’s interscholastic and intercollegiate athletics. Since the enactment of Title IX, female participation in competitive sports has reached extraordinary heights. Fewer than 300,000 female students participated in interscholastic athletics in 1971.¹³⁵ By 1998-99, that number exceeded 2.6

¹³⁴ Michael Lynch, *Title IX’s Pyrrhic Victory*; Reason Magazine, April 2001. See also, David Fleming, *The Fleming File: Abolish Title IX*. www.cnnsi.com, April 26, 1999. “Perhaps the most despicable thing in all of this is that the only group of people in a position to speak up and stop the ongoing bastardization of Title IX—namely, female athletes, coaches and administrators—sit by and, with nothing but a wry smile on their face, silently do nothing. College athletes aren’t separated by gender, they’re divided by economics. It’s football and basketball and everyone else. But instead of speaking up and calling for changes to Title IX, female athletes seem to be saying Hey, we’ve got ours, fellas. Tough luck.”

¹³⁵ National Federation of State High School Associations, Annual Sports Participation Survey: High School Participation, Gender Equity in Sports, University of Iowa, at <http://bailiwick.lib.uiowa.edu/ge/statistics.htm#220>

million, with significant increases each year.¹³⁶ To put these numbers in perspective, since Title IX was enacted, the number of girls playing high school sports has gone from one in twenty-seven, to one in three.¹³⁷ Moreover, sports participation among younger girls has also seen an dramatic increase; a 1998 report found that the number of girls ages six to eleven who regularly participate in sports such as soccer, volleyball, and basketball increased eighty-six percent since 1987, from 2 million to 3.8 million.¹³⁸ The significant number of women playing interscholastic sports has also mirrored the significant rise in the number of females playing intercollegiate athletics. The percentage of college athletes who are women increased from fifteen percent in 1972 to thirty-seven percent in 1998.¹³⁹ Furthermore, between 1978 and 1996, there was a net gain of 1658 women's sports programs throughout the country, while during this same period of time there was only a net gain of seventy-four sports programs for men.¹⁴⁰ Before Title IX, colleges offered an average of 2.5 intercollegiate sports for women. By 1988, that number had risen to an average of 7.31.¹⁴¹ The statistics show that the proportion of female athletes is also getting closer to the proportion of female undergraduates at Division I institutions, even as the number of women undergraduates continues to rise. Thus, some universities are nearing "substantial proportionality," one of the three ways in which a college can comply with Title IX's requirements for the number of female athletes that an institution ought to have on varsity

(last modified Aug. 30, 2000) (on file with the University of Michigan Journal of Law Reform) [hereinafter Gender Equity in Sports].

¹³⁶ National Federation of State High School Associations, Summary of Athletic Participation Totals by School Year, at http://www.nfhs.org/1999_part_index.htm#year.

¹³⁷ Michael Dobie, *Evening the Score: Women's Wide-Ranging Success as Athletes--From Basketball to Ice Hockey--Is Redefining the World of Sports*, *Newsday* (New York), July 11, 1999, at A18.

¹³⁸ John Hanc, *The Games Girls Play*, *Newsday* (New York), Oct. 26, 1998, at B15.

¹³⁹ Rick Mahoney, *Gender Equity Report Shows Gains Made By Women*, *Bus. First of Buffalo*, June 30, 1997 at 4. (Discussing substantial increases in women's sports programs.)

¹⁴⁰ *Id.*

¹⁴¹ Cynthia Harris, *The Reform of Women's Intercollegiate Athletics: Title IX, Protection, and Supplemental Methods*. 20 *Cap. U. L. Rev.* 691, 704 (1991).

teams.¹⁴²

These increased participation numbers alone do not represent the extent in which the role of women in sport has changed since Title IX's enactment. More female athletes than ever before are competing in traditionally male athletic activities.¹⁴³ In 1997-98 there were 779 girls competing on high school football teams, 1,262 on high school baseball teams, and 1,907 on high school wrestling teams.¹⁴⁴ Fifteen years earlier, in the 1983-84 season, these numbers were 13, 137, and 0 respectively.¹⁴⁵ Girls and women are also making inroads in other traditionally male dominated sports, including boxing, wrestling, stock car driving and weight lifting.¹⁴⁶

By providing many new opportunities, Title IX has helped to further women's interests in sports, as well as increase their potential to become intercollegiate and professional athletes. These changes in women's sports have been accompanied by increased status and respect for female athletes and a growing enthusiasm for women's sports in popular culture.¹⁴⁷ Women's intercollegiate basketball has benefited from this growing enthusiasm, with a significant rise in the level of attendance over the last decade.¹⁴⁸ While attendance at men's Division I basketball

¹⁴² Welch Suggs, *Uneven Progress for Women's Sports: A Chronicle survey finds gains at big-time football powers, struggles at the 'have-nots.'* The Chronicle of Higher Education: Athletics; April 7, 2000 at pg. 3.

¹⁴³ Mariah Burton Nelson, Introduction: *Who We Might Become, in Nike Is a Goddess: The History of Women in Sports*, at ix, xvii (Lissa Smith ed., 1998) ("Girls and women are pinning male opponents to wrestling mats, racing horses and cars and yachts alongside their brothers, and playing pro basketball against men. Almost a thousand girls are playing high school football. Women have pitched in college baseball games and kicked in college football games.").

¹⁴⁴ *Gender Equity in Sports: Equity in Athletics Disclosure Act: 1997-1998 Gender Equity Report.* www.ncaa.org.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Lucy Danziger, Conclusion: *A Seismic Shift in the Culture, in Nike Is a Goddess*, at 315, 317 ("What happens among talented sportswomen at the elite levels makes its way into the culture. It's our version of the trickle-down concept: When women get paid to play basketball in front of 17,000 spectators, the rest of us, contenders in our own world of sports, feel a little bit more legitimate and take our pursuits more seriously.").

¹⁴⁸ Melanie Jackson, *Women's Programs Packing the House: Women's College Basketball* Espn.com; January 25, 2002. <http://espn.go.com/ncw/jackson> (The most notable sellout came Jan. 5th for a game between Connecticut and Tennessee that drew a women's NCAA Division I record 24,611 fans. Tennessee has led the nation in attendance in six of the past seven seasons, and averaged more than 15,000 fans a game in 2001. Uconn's Gampel Pavilion, meanwhile, has recorded 61 consecutive sellouts since December 1997.) (2000-01 Attendance leaders; Tennessee 15,510, Texas Tech 12,660, Connecticut 12,265, Iowa State 11,370, and New Mexico 8,712). *Id.* This

games dipped slightly last season, overall attendance at women's games has slowly increased every year since 1992. For the 2000-01 season, 6,519,667 fans, or an average crowd of 1,524, attended women's college basketball games, including NCAA tournament games. Both are NCAA records, and represent a 2.5 percent increase from 1999-2000 season. Since the first NCAA season was held in 1982, when games drew an average of 432 fans, there has been a 252.7 percent increase in attendance. Even 10 years ago, women's games only averaged 931 fans.¹⁴⁹

At the University of Oregon, the women's basketball team ranked 13th in national attendance, averaging 5,150 fans per game for the 2000-01 season.¹⁵⁰ The heightened interest in women's athletics has also led to the development of women's professional leagues, which have had notable successes in recent years, particularly women's basketball. The Women's National Basketball Association started its inaugural season in 1997 with 50 million television viewers tuning in to three networks.¹⁵¹ By the second and third seasons, nearly one million viewers a week watched the WNBA play on national television.¹⁵² Moreover, capitalizing on the attention generated by the women's national soccer team with their win in the Women's World Cup, the first women's professional soccer league, Women's United Soccer Association, was founded in 2001.¹⁵³ There is little doubt that opportunities for women athletes are at an all time high, and public interest and support for women's sports only continues to grow.

Although female participation in intercollegiate athletics appears to be on the rise, Title

year's best attended games. Uconn at Tennessee 24,611, UNLV at New Mexico 17,215, Minnesota at Wisconsin 17,142, and Notre Dame at Uconn 16,294). *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ www.ncaa.org: Information made available on the NCAA Women's Basketball website.

¹⁵¹ History of the WNBA, at http://www.wnba.com/basics/historyof_wnba.html

¹⁵² *Id.*

¹⁵³ See *Women's United Soccer Association*; http://www.wusa.com/about_us/history/; April 14, 2001; The WUSA kicks off with Brandi Chastain's Bay Area CyberRays facing off against Mia Hamm's Washington Freedom at historic RFK Stadium in Washington, D.C. The Freedom defeated the CyberRays, 1-0 in front of 34,148 (the largest crowd in WUSA history.)

IX has not succeeded in ending the long history of discrimination against girls and women in sports. While it can be argued, “in one generation young girls have gone from hoping there is a team to hoping they can make a team,”¹⁵⁴ the reality is that women still face an uphill battle in an effort to achieve gender equity. While female athletic participation in high school has reached its highest level with 2.6 million female athletes, this still pales in comparison to the 3.8 million high school male athletes.¹⁵⁵ This disparity in interscholastic athletics participation has carried over into intercollegiate athletics. After almost 30 years, only three dozen of the top 300 programs are in compliance.¹⁵⁶ While women comprise over half of the undergraduates in our colleges and universities, and opportunities for female athletes to participate in intercollegiate varsity sports increased 40% since 1992, female athletes are still just 40% of college varsity athletes nationwide.¹⁵⁷ At the University of Oregon these statistics are slightly lower. In the 2000 school year females represented 52% of the undergraduate population, but represented only 38% of universities athletes, a fourteen percent differential.¹⁵⁸ Moreover, as of 1997, women in Division I colleges, while representing over half of the student body, receive only 41% of athletic scholarship dollars, while men receive \$159 million more in scholarship dollars every year.¹⁵⁹ The University of Oregon allocates \$3,517,765 for men’s athletic scholarships, while

¹⁵⁴ Michael Lynch, *Title IX’s Pyrrhic Victory: How the quest for “gender equity” is killing men’s athletic programs*. Reason Magazine. www.reasononline.com, April 2001, at 3.

¹⁵⁵ National Federation of State High School Associations, 1999 Athletic Participation Survey Index, at http://www.nfhs.org/1999_part_index.htm

¹⁵⁶ John Weistart, *Title IX and Intercollegiate Sports: Equal Opportunity*; Duke Law Magazine: Spring 2000. Available at <http://www.law.duke.edu/alumni/spring99mag/title9.htm>

¹⁵⁷ National Collegiate Athletic Association (NCAA), *Participation Statistics Report: 1982-97 and 1997-1998*. (Available from National Women’s Law Center; www.nwlc.org).

¹⁵⁸ Facts and Figures: *The Chronicle of Higher Education*; Participation of Female Students on Athletic Teams. (2000). <http://chronicle.com>; The University of Oregon ranks last in the proportion of Female Students on Athletic Teams in the Pac-10 Conference. Washington State University and the University of Washington lead the conference with a three percent differential between the percentage of female undergraduates and female athletes.

¹⁵⁹ NCAA Gender Equity Study, April 1997; Available at www.ncaa.org; Report provides summary information concerning personnel, revenues, expenses and other comparative variables of men’s and women’s intercollegiate athletics programs at NCAA member institutions. The NCAA provides a gender equity report about every five years, with reports published in 1992 and 1997.

women receive \$1,193,040, 34% of the overall scholarship aid.¹⁶⁰ While operating expenses for NCAA women's programs from 1992 to 1996 grew by 89%, men's operating expenses grew by 139% over the same period. As of 1997 only 26% of college sport operating budgets and 28% of the athletics recruiting dollars are allocated to women's sports.¹⁶¹ These statistics place the University of Oregon on par with the national average. The University allocates \$390,169 or 69% for the men's recruiting budget, while women receive \$171,360 or 31%¹⁶² Additionally, men's athletics receive \$10,076,460 or 74% for their operating budget, while women receive \$3,571,059 or 26%.¹⁶³ Moreover, according to the NCAA's 1997 Gender Equity Study, Division I-A institutions are spending \$3.00 on men's sports to every \$1.00 they spend on women's sports.¹⁶⁴ In 1997, 25 years after Title IX was passed, men's sports received 78% of the athletics-operating budget and 75% of the recruiting budget.¹⁶⁵ Thus, although Title IX has provided women more avenues in their pursuit of athletics, educational institutions continue to provide a greater number of athletic opportunities for male athletes at all levels of education.

B. Impact on Men

Statistics show that men receive more money and participation opportunities within our

¹⁶⁰ *Id.* Athletic Scholarships: Proportions for Female Athletes (2000). The University of Oregon ranks seventh in the Pac-10 Conference, while the University of California leads the conference with women athletes receiving 46% of athletic scholarships.

¹⁶¹ NCAA Gender Equity Study, April 1997; Available at www.NCAA.org

¹⁶² Facts and Figures: *The Chronicle of Higher Education*; Recruiting budgets for Men's and Women's Teams. This places the University of Oregon fifth among the members of the Pac-10 Conference. The University of Washington leads the Pac-10 Conference with men receiving 65% and women receiving 35% of the recruiting budget.

¹⁶³ *Id.* Operating Budgets for Men's and Women's Teams; The University of Oregon ranks five in the Pac-10 Conference in recruiting dollars allocated to women's athletics. The University of Washing leads the Pac-10 conference with men receiving 65% of the recruiting budget and women receiving 35%. It is interesting to note that the University of Washington is the only university in the Pac-10 with a female athletic director which might account for why the university ranks in the top half of all categories, (operating expenses, athletic scholarships, participation, recruiting budget) that pertain to male and female athletics. University of Oregon ranks seventh in the total money allotted for operating expenses. Washington State University leads the Pac-10 Conference with men receiving 66% of the operating budgets and women receiving 34%.

¹⁶⁴ Gender Equity Study

¹⁶⁵ *Id.*

universities; however this is not the true for all intercollegiate male athletes. Schools across the country have been caught between balancing their budgets and complying with Title IX. As a result, many universities have been forced to cut less popular and low revenue men's programs, while keeping, or continuing to expand women's teams. As Michael Lynch in *Reason Magazine* contends, "Title IX of the 1972 Amendments to the Education Act sought to give women equal access to educational programs, including athletics. Now it's evicting men from the locker room."¹⁶⁶ Between 1981 and 1999, NCAA and NAIA colleges eliminated 40% of their wrestling teams.¹⁶⁷ Since Title IX's passage there are now 64 fewer men's swimming teams and 46 fewer water polo teams.¹⁶⁸ Additionally, after losing more than 100 teams since 1974, men's gymnastics can be found at only 31 sponsoring schools, below the forty-school minimum required to hold a NCAA championship.¹⁶⁹ Even more surprising, these losses have occurred even though NCAA membership has grown to more than 900 institutions, compared to 704 members in 1974.¹⁷⁰

Proponents of Title IX argue that Title IX is not discriminating against male athletes. Title IX advocates argue that NCAA participation opportunities for male and female athletes have grown to record levels. Over the last ten years, NCAA female sports participation has increased from 89,212 to 145,832 and NCAA male sports participation has increased from 177,156 to 207,592.¹⁷¹ Moreover, the data shows that lost opportunities for some men whose sports have been dropped have resulted in new opportunities for men in other sports. For instance, between 1982-83 and 1998-99, 992 men's gymnastics, 1,593 men's wrestling, 573

¹⁶⁶ Lynch, *Title IX's Pyrrhic Victory*. at 2.

¹⁶⁷ Ann Coulter, *Title IX Defeats Male Athletes*. USA Today, Editorial/Opinion Section; July 25, 2001. See also <http://www.usatoday.com/news/comment/2001-07-025-ncguest2.htm>

¹⁶⁸ J. Dennis Hastert, *The Unintended Consequences of Title IX*; (1995).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Women's Sports Foundation, *Possible Changes to Title IX Athletic Program Regulations: The Foundation Response*. Available at www.womenssportsfoundation.com. Statistics taken from NCAA 2000.

women's gymnastics and 229 women's field hockey participation opportunities were lost. During that same period, men's football, soccer and lacrosse opportunities increased by 15,795, 5,281 and 2,000 respectively as did numerous women's sports.¹⁷² Additionally, Title IX proponents argue that athletic departments choose to spend their athletic dollars on football at the expense of nonrevenue men's sports and that is not the fault of Title IX. Division I-A athletic programs on average spend 52% of their total operating budgets, 52% of their scholarship budgets, and 65% of their total recruiting budgets on football, even though 67% of Division I-A football programs and 86% of all football programs lose money.¹⁷³ Thus, the refusal of athletic programs to cut football costs has forced less popular nonrevenue male sports to bear the burden of Title IX compliance. Title IX proponents refuse to include nonrevenue male athletes with female athletes as those who have been discriminated against. According to the Women's Sports Foundation:

The purpose of laws prohibiting discrimination is to bring the disadvantaged population up to the level of the advantaged population, not to treat male athletes in minor sports like female athletes who weren't given the chance to play. Rather than cutting men's teams and unfairly blaming Title IX, all sports should be asked to operate on smaller budgets so all athletes continue participating.¹⁷⁴

Thus, although men's non-revenue sports continue to be cut, their elimination cannot be solely based on universities inability to comply with Title IX.

Although the OCR's Policy Interpretation, and the courts' adoption of the substantial proportionality test, can be seen as contributing to the loss of nonrevenue men's sports, universities' treatment of intercollegiate football also shares in the blame. Most schools do not want to cut football funding because of the sport's potential revenue-generating status. As a result, male sports including men's gymnastics, golf and wrestling are left vulnerable. Despite

¹⁷² *Id.*

¹⁷³ Women's Sports Foundation, *Gender Equity in Athletics/Title IX* (1996).

¹⁷⁴ *Id.*

the fact that most university athletic departments claim that intercollegiate sports exist to enhance the educational environment for all athletes, the reality is that many athletic departments see football as the most important aspect of the university.

While athletic departments and universities often give the impression that their football team is producing enough revenue to sustain nonrevenue sports, in most cases this is false. In 1999, the most recent year for which complete data is available, 37 of 104 Division 1-A schools were losing money on football, with an average loss of \$1 million per school. That is up from 27 money losers in 1985, when the average loss was \$400,000.¹⁷⁵ Among the schools making money in 1999, the average profit was \$6.4 million, almost triple the average profit of \$2.2 million at 60 schools in 1985.¹⁷⁶ Although more than sixty athletic departments turned a profit on their football program, experts point out that football underwrites other sports only at powerhouse football universities such as the University of Notre Dame.¹⁷⁷ There are “only 50 universities in the over 800 member institutions of the NCAA where football is contributing beyond its own support.”¹⁷⁸ As one commentator has suggested, “there are no football geese laying golden eggs. There are only fat geese eating the food that could fund additional athletic opportunities for women and nonrevenue men’s sports.”¹⁷⁹ Although large crowds pack college stadiums and television networks offer hefty contract deals, the enormous cost of supporting such a large team leaves little money to support themselves, let alone other teams.

¹⁷⁵ Chris Isidore, *College Teams Fail Econ 101*. CNN Money; Money Magazine: November 13, 2001. Information made available by Daniel Fulks, author of a report on revenue and expenses of intercollegiate athletics for the NCAA.

¹⁷⁶ *Id.*

¹⁷⁷ Rick Horrow, *Schools Get Creative in Trying to Maintain a Profit with College Football*; www.cbssportsline.com; December 27, 2001. Notre Dame, for example, uses football surplus revenue to fund the athletic department and university general fund-operating budget. Post-Season appearances for the school during the last 15 years have contributed between \$80 million and \$100 million to that fund.

¹⁷⁸ *Id.*

¹⁷⁹ Donna Lopiano, *Gender Equity in Sports: Whose Responsibility is It?* The Women’s Sports Foundation.

C. The University of Oregon—A Case Study

The University of Oregon (“UO”) is included in a select group of universities whose football team contributes beyond its own support. “Football puts the wind in the sails of every sport but one at the UO. Without the money brought in by football and to much lesser extent basketball, the rest of the university’s athletic teams would be dead in the water.”¹⁸⁰ Football generates 51 percent of the athletic departments revenue, which totaled almost \$28 million in 1999-2001. The University spends about 8.6 million to field the football team; however it generates 11.6 million in gate receipts, television and radio revenue, advertising income and conference revenue sharing.¹⁸¹ Unlike most Division I-A schools the UO uses the \$6.03 million football profit and \$1.04 million basketball profit to cover the \$5 million that it costs to cover nonrevenue sports.¹⁸²

Although the UO athletic program does turn a profit they still are reliant upon general university funds to help keep the athletic department in the black. The UO has chosen to expand its football stadium to increase revenue and as a result phase out its reliance on general university funds. According to Associate Athletic Director, Dave Heke “the reason behind the stadium expansion is simple. The only way for the athletic department to grow and stay competitive in revenue and nonrevenue sports is to bring in more money, and the obvious source is to cash in on the success of the football team.”¹⁸³ Within the next four years the athletic department will phase out its reliance on subsidies from the general university fund, and will join a select few of

¹⁸⁰ Greg Bolt, *In UO Athletics, the Breadwinner is Football: By the Numbers, UO cashing in on high-flying football program*. The Register Guard, October 21, 2001 at 14a. Men’s football generates a profit of \$6.03 million while men’s basketball generates a profit of \$1.47 million.

¹⁸¹ *Id.*

¹⁸² *Id.* Nonrevenue sports are men’s and women’s golf, tennis and track, including cross-country, men’s wrestling and women’s volleyball, softball, soccer and basketball. “The two track teams are the most expensive sports for the university in terms of the shortfall between revenue and expenses and the successful and popular women’s basketball team falls more than \$600,000 short of balancing its budget.”

¹⁸³ *Id.*

Division I-A university athletic departments operating entirely on its own funds.

The Autzen Stadium expansion project will help to generate more revenue and will hopefully allow the athletic department to add the sports it needs to meet the requirements of Title IX. Tom Larson, the athletic department's finance director, said "that the stadium should bring in an additional \$4.5 million the first year. And should the Duck's star continue to shine, that forecast may well be eclipsed."¹⁸⁴ The athletic department is hoping to use the new stadium revenue to help the UO achieve compliance under Title IX. The university has plans to add one or two women's sports in the coming two years. Among the list of sports that are being seriously considered are crew, lacrosse and swimming and diving.¹⁸⁵ Another option to achieve Title IX compliance is eliminating some men's sports. However, the UO already offers the fewest male intercollegiate sports of any Pac-10 school, so they are determined to avoid this step if at all possible.¹⁸⁶

The UO athletic department also has plans to use the stadium revenue to increase funding for existing nonrevenue sports, and to create a revenue reserve fund, to ensure that the athletic department does not fall back into the red when the football team has had a couple of years when they do not end the season in the Top 25.¹⁸⁷ For the past two years the budgets for nonrevenue sports have been frozen to make money available for the initial expansion of the Autzen project. The UO is an interesting case study; in that in a few short years it will join a select few university athletic departments that are completely self-funded. However, like many university athletic departments whether self-funded or not they continue to be faced with the difficult choices concerning how they will comply with Title IX.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

ALTERNATIVES AVAILABLE TO INCREASE THE EFFECTIVENESS OF TITLE IX

Nothing in Title IX's statutory language or legislative history supports the use of proportionality as a means to measure gender equity; however most courts have relied on *Cohen* and enforced the Policy Interpretation's three-part test and its emphasis on the proportionality prong as a measure of compliance under Title IX.¹⁸⁸ By choosing to focus on only the substantially proportional prong, courts have effectively elevated its significance over the second and third prongs and limited the ways in which universities can comply with Title IX. Therefore, universities continue to cut men's low revenue producing sports as a means of complying with the proportionality test.

While men's nonrevenue sports have been directly affected by the judicial deference placed on the substantial proportionality prong, both women's and men's nonrevenue sports have suffered from the oversized budgets and enormous rosters of our nation's college football teams. Lowering a football roster size while leaving other men's nonrevenue sports intact would help to further opportunities for male athletes, and would allow for funds traditionally reserved for the football team to be distributed to women's sports teams.

A. Courts Should Focus on Qualified Applicant Pool and Not Substantial Proportionality

The original purpose of Title IX was to eliminate discrimination in education. The only examination courts have made in cases involving Title IX compliance is whether a university's athletic offerings are substantially proportionate to the percentage of each gender in the undergraduate population. However, the proper inquiry should compare the proportion of male and female student athletes with the proportion of male and female students willing to participate in intercollegiate athletics. There is no definite system for measuring the actual interests and

¹⁸⁸ *Aronberg*, 47 Fla. L. Rev. 741, at 782.

abilities of undergraduate students. However, the application of the strict proportionality prong incorrectly assumes that the percentage of men and women who are interested in intercollegiate athletics is the same as the percentage of men and women enrolled at a university.

While discrimination is one of the reasons for low participation in college athletics, relying upon substantial proportionality to determine if there is discrimination is valid only if male and female college students are equally interested in taking part in intercollegiate athletics, and the evidence suggests this is not the case. Title IX supporters argue that the rise in women's athletics since the establishment of Title IX demonstrates that women are equally as interested in sports as men, and given the opportunity and a non-discriminatory environment, the proportion of women athletes within an athletic program would be equal to that of men.¹⁸⁹ Thus, as Donna Lopiano, of the Women's Sports Foundation contends, "if you build it they will come."¹⁹⁰

However, despite the growth in women's athletics, the numbers suggest that women on university campuses have less interest in sports than men. In *Cohen*, Brown University presented evidence that eight times as many male students participated in its intramural program. Moreover, Brown reported, four times as many men take part in intramurals nationally.¹⁹¹ Men also outnumber women in both interscholastic and intercollegiate sports. In 1997 75,000 more male athletes competed in intercollegiate athletics than female athletes, and 1.2 million more competed in high school athletics.¹⁹² Additionally, since 1979 the number of women athletes participating in intercollegiate athletics has seen little change despite increased opportunities.¹⁹³ Therefore, the proportionality test incorrectly assumes that the percentage of men and women

¹⁸⁹ Jurewitz, 8 Am. U.J. Gender Soc. Pol'y & L. 283, at 332.

¹⁹⁰ Donna Lopiano, *Equity in Women's Sports-A Health and Fairness Perspective*; www.womenssportsfoundation.com

¹⁹¹ Appellant's Brief in Appeal from the District Court at 7, *Cohen II*, 101 F. 3d 155 (1st Cir.1996).

¹⁹² Jurewitz, 8 Am. U.J. Gender Soc. Pol'y & L. 283, at 332.

¹⁹³ Aronberg, 47 Fla. L. Rev. 741, 766 (Proportion of women athletes in college athletics only rose 3% between 1979 and 1992, rising from 33% to nearly 36%.

interested in intercollegiate athletics is equal to the percentage of men and women enrolled in the university.

To determine whether a university complies with Title IX, the focus should shift from substantial proportionality to an emphasis on the “qualified applicant pool.” This pool is the “number of male and females that have the ability and the desire to participate in intercollegiate sports.”¹⁹⁴ The lower percentage of women in athletics than in the undergraduate student population does not in itself prove that discrimination is taking place within a university’s athletic department. Few students can begin participating in a sport once they reach college; instead most intercollegiate athletes begin playing sports in high school or elementary school.¹⁹⁵

According to Walter B. Connolly and Jeffrey Adelman:

The relevant population used in determining the pool of able and interested athletes should be high-school-aged athletes who are interested in participating in intercollegiate sports, because varsity teams recruit almost exclusively high school athletes and not students currently at the university. The enrollment population should only be relevant for club and intramural teams, i.e., teams that do not recruit.¹⁹⁶

Women athletes currently comprise more than forty percent of high school athletes and over thirty-eight percent of intercollegiate athletes.¹⁹⁷ The statistics would seem suggest that high school athletics, the primary supplier of athletes for intercollegiate athletics, reflect the “athletic interests and abilities of their women students.”¹⁹⁸ Although discrimination might be one of the reasons that there are a lower number of women athletes competing, it is unfair to force universities to provide 54.9% of athletic spots (national average percentage of female

¹⁹⁴ Reuscher, 33 Akron L. Rev. 117, at 147.

¹⁹⁵ George A. Davidson & Carla A. Kerr, 2 Vill. Sports & Ent. L.F. 25, 29 (1995).

¹⁹⁶ Walter B. Connolly, Jr. & Jeffrey D. Adelman, *A University’s Defense to A Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. Det. Mercy L. Rev. 845, 880 (1994).

¹⁹⁷ Jurewitz, 8 Am. U.J. Gender Soc. Pol’y & L. 283, at 332.

¹⁹⁸ *Id.*

undergraduates) when only 40.8% of athletes participating in interscholastic sports are women.¹⁹⁹ The present Title IX test, substantial proportionality, forces universities to create athletic opportunities for women, although their interests and abilities in fact may not be proportionate to the number of female undergraduates. Requiring universities to grant opportunities based solely on gender, without consideration of other factors, is contrary to the intent of Title IX. If the focus was shifted away from substantial proportionality and instead emphasized the number of willing participants that enroll at an institution, universities would have greater statistical success in satisfying compliance under Title IX.²⁰⁰

B. Courts Should Adopt the Pederson Standard

If a qualified applicant pool is not used and courts continue to apply the OCR's Policy Interpretations as a means to measure compliance, the standard advocated by the court in *Pederson v. Louisiana State University*²⁰¹ should be applied. In *Pederson*, the plaintiffs represented a class of female students seeking injunctive relief under Title IX when the university did not accommodate their athletic interests.²⁰² In 1993 LSU decided to add two new women's sports, soccer and softball, but by 1995 they had recruited few athletes, awarded few scholarships, and provided no facility for the teams to play.²⁰³ In reaching her decision, Judge Doherty challenged the legitimacy of the Policy Interpretation "as an agency document not approved by Congress or the President, that is also susceptible, in part, to an interpretation, distinctly at odds with the statutory language."²⁰⁴ The court found that the Policy Interpretation was useful in "identifying issues which arise under Title IX and establishing an analytical

¹⁹⁹ Reuscher, 33 Akron L. Rev. 117, at 147

²⁰⁰ Felice M. Duffy, *Twenty-Seven Years Post Title IX: Why Gender Equity in College Athletics Does not Exist*, 19 QLR 67, 94 (2000).

²⁰¹ 912 F. Supp. 892 (M.D. La. 1996).

²⁰² *Id.* at 900.

²⁰³ *Id.* at 901.

²⁰⁴ *Id.* at 911-912.

framework” for reviewing Title IX claims.²⁰⁵ However, the *Pederson* court rejected the decision reached in *Cohen*, and “most emphatically” rejected the entire concept of proportionality, and found previous judicial interpretations to be “erroneous in this regard.”²⁰⁶ In reaching its decision the court explained that the proportionality test is based on the incorrect assumption that “interest and ability to participate in sports is equal between all men and women at all campuses.”²⁰⁷ The court noted “that it seems much more logical that interest in participation and levels of ability in male and female populations will vary from campus to campus and region to region and will change with time. To assume, and thereby mandate, an unsupported and static determination of interest and ability as the cornerstone of the analysis can lead to unjust results.”²⁰⁸

The *Pederson* court recognized that the Policy Interpretation should play a role in the court’s analysis, but unlike in *Cohen*, it should not be given substantial deference. The court reasoned that the entire concept of proportionality is not found within the statute or regulations, and actually contradicts the original antidiscrimination statute.²⁰⁹ The court noted that § 1681(b)²¹⁰ specifically prohibits the kind of proportionality endorsed by the Policy Interpretation and ensuing court decisions. The court held that “the proportionality requirement is an overly mechanical, utterly baseless rule that contradicts Title IX and thus cannot serve as either a safe

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 913.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 913-914

²¹⁰ 20 U.S.C. § 1681(b); “Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area. *Provided*, that this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.”

harbor or a test of Title IX compliance.”²¹¹ The court determined that a “proper and effective accommodation analysis requires a court to examine whether a school has selected sports appropriate to the student populations interests and that the level of competition reflects the ability of athletes available to participate.”²¹²

Instead of focusing upon substantial proportionality, the court held that a proper reading of the Policy Interpretation requires consideration of all factors of the three-prong test to determine if an institution has effectively accommodated the athletic interests of each sex. Unlike the court in *Cohen*, which relied on the strict proportionality prong of the three-prong test, the *Pederson* court looked at all three prongs to determine if the university complied with Title IX. The court first looked at the effective accommodation prong of the test and found “it crucial that a school attempt to discover, through such methods as interviews and questionnaires, the interests and abilities of its students.”²¹³ The court determined that LSU never tried to learn what the interests and abilities of its student population were, and thus failed the first prong of the three-part test.²¹⁴ Additionally, the court determined that LSU failed the second prong of the three-part test, history and continuing practice of program expansion, by failing to add women’s teams for 14 years.²¹⁵ Consequently, although the court did not rely on substantial proportionality as the sole means for determining compliance they still found LSU in violation of Title IX by considering all factors included in the Act, regulations, and Policy Interpretation.

Pederson’s analysis of Title IX compliance is sound and should be adopted by other courts. The court was correct to reject substantial proportionality as a “safe harbor.” Although, courts can still compare the proportion of female undergraduates to the proportion of female

²¹¹ *Pederson*, at 914.

²¹² *Id.* at 915.

²¹³ *Id.* at 912.

²¹⁴ *Id.* at 915.

²¹⁵ *Id.* at 916.

athletes, this should not be the definitive factor in determining Title IX compliance. By adopting the *Pederson* interpretation, there would be less emphasis placed on the controversial substantial proportionality element of compliance, thereby allowing universities greater flexibility in determining the way they reach compliance. Additionally, the *Pederson* analysis enforced the importance of the remaining two prongs (continuing practice of expanding athletic opportunities, whether the interests and abilities of the members of the underrepresented sex have been fully accommodated), of the three-prong test, that courts have largely ignored in favor of the substantial proportionality test. Thus, by adopting the *Pederson* interpretation there would be less emphasis placed on the controversial substantial proportionality element of compliance.

C. Tackling the Football Problem

The First Circuit in *Cohen I* began its opinion by noting that “for college students, athletics offers an opportunity to develop leadership skills, learn teamwork, build self-confidence, and perfect self-discipline,” which leads to learning that becomes “invaluable in attaining career and life success.”²¹⁶ The court in *Cohen* emphasized that the purpose of intercollegiate athletics is to provide educational benefits for its athletes. However, due to athletic deficits and the elimination of men’s and women’s nonrevenue sports, some men and women student athletes are unable to enjoy the benefits that should be afforded to them through participation in intercollegiate athletics. The majority of male and female athletes participating in nonrevenue sports are by definition student athletes. Most nonrevenue athletes play their sport for the love of the game and competition, with the understanding that in most instances there is no professional league to join when their intercollegiate competition is complete. Although the same can be said for athletes competing in revenue sports, including football and basketball, most Division I athletes participating in revenue sports see their intercollegiate experience not as

²¹⁶ *Cohen v. Brown University* (Cohen I), 991 F.2d 888, 891 (1st Cir. 1993).

a way to enhance their education but rather as a stepping-stone into the professional ranks.²¹⁷ If the goal of intercollegiate athletics is to provide educational benefits to all student athletes, then football should not be elevated above all other sports while in the process denying opportunities to women's and men's nonrevenue student athletes.

A controversial issue within Title IX is how to promote compliance within schools that maintain football programs. College football offers a tremendous amount of opportunity solely to men. The large roster numbers maintained by college football teams prevents many schools from meeting the substantial proportionality test. Women have no sport that compares in size to football (an average Division I-A team retains over 100 players),²¹⁸ so it is difficult for athletic departments to comply with Title IX. Disregarding the scholarships offered in football, most schools offer more scholarships to women's programs than to men's.²¹⁹ In *Blair v. Washington State University*,²²⁰ the Washington State Supreme Court refused to allow Washington State to remove football calculations to determine participation opportunities. "To exclude football, an all male program, would only serve to perpetuate the discriminatory policies and diminished opportunities of women."²²¹

While there have been unsuccessful efforts to exempt football from Title IX, capping the

²¹⁷ *Athletics and Academics Talk with Dan Williams*, Learning and Retirement Group; January 25, 2002. On a sport-by-sport basis, the worse graduation rate is obtained by black male basket ball players who have a 35% graduation rate, still higher than general black male student population of 31%. The University of Oregon has major national bragging rights in academic success of their athletes: the UO graduation rate is much better than the national average-male athletes' graduation rate is 60% compared to 56% for all UO male students, and the figures are even better for female athletes (67% vs. 60% for all females). UO student athletes also have GPAs slightly higher than that of the general population. And UO graduates an astounding 91% of student athletes that complete their eligibility requirements, a much higher rate than the national average of 74%. These UO numbers for overall student graduation rate, GPA, and graduation rate for those completing eligibility are at the top of the NCAA Division I teams that competed in bowl games this year.

²¹⁸ Robert C. Farrell, *Title IX or College Football?* 32 Hous. L. Rev. 993, 1052 (1995).

²¹⁹ Charles Beveridge, *Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletic Teams*; University of Illinois Law Review (1996) at 840. In total, disregarding football, Division I schools can offer 136.3 scholarships to men and 227 scholarships to women.

²²⁰ 740 P.2d 1379 (Wash.1987).

²²¹ *Id.* at 1383.

maximum number of players that may participate on the team and reducing the football roster size are viable alternatives available to athletic programs. Moreover, if enforced they will allow for increased compliance with Title IX. Currently, the NCAA allows for eighty-five football scholarships;²²² however, many college football teams maintain somewhere between 100 to 120 players. The NCAA should cap the number of athletes participating in college football, and limit participation numbers to those similar to the National Football League (“NFL”). The NFL teams maintain rosters of only forty-seven team members, and yet most would agree that the league maintains the highest level of football in the country.²²³ If athletic departments decreased football participation to the Division I standard of eighty-five, approximately twenty positions would be eliminated at most universities, and the money saved could be applied to other areas of athletics. Additionally, if athletic departments reduced their teams to the sixty-five-person mark, usually used for travel games, twenty additional scholarship funded slots would open, and the money could be used to promote other athletic programs and Title IX compliance.²²⁴ Allowing universities to maintain present participation levels in the excess of 100 players only adds to the cost of maintaining an already overwhelming football budget, while at the same time limiting athletic opportunity and availability of funds for male and female nonrevenue sports. If college athletic departments decrease the size of their football squads, Title IX compliance and continuation of men’s nonrevenue sports will result. If the goal of a university is to grant each student athlete an educational opportunity, then cutting football down to size is a viable option.

²²² 1995-96 NCAA Division I Manual, Bylaws art. 15.5.5.1

²²³ Beveridge, *University of Illinois Law Review* (1996).

²²⁴ William C. Rhoden, *Sports of the Times: A Partisan Spin on Title IX*, *N.Y. Times*, Apr. 22, 1995 § 1, at 31 (noting that one athletic director attending an NCAA symposium on Title IX compliance said that if he eliminated 20 football scholarships, he would save \$250,000 in scholarship money alone).

CONCLUSION

Since the passage of Title IX in 1972 the increase in participation of women in intercollegiate athletics has continued to expand. During the rapid growth of women's interest and participation in athletics after the passage of Title IX, colleges and universities had the resources to expand female intercollegiate opportunities. However, the escalating athletic costs and tightening of university budgets has limited the amount of money that universities can continue to spend on the overall expansion of women's athletics. Many colleges and universities are being forced to cut their overall athletic budget, which has resulted in an overall decline in many men's nonrevenue producing sports. Thus, Title IX has delivered some amount of justice to women athletes such as Amy Cohen, who was unjustly denied the opportunity to participate in intercollegiate athletics because of athletic budget cuts. However, Title IX has had the opposite effect on some nonrevenue men's sports. Male athletes such as Bill Kelley have learned that, "Title IX's regulatory framework has forced low revenue men's sport to pay the cost of gender equity."²²⁵

Title IX was passed with the goal of providing each sex with equal educational opportunity; however despite making initial gains the statute is failing in promoting gender equity in intercollegiate athletics. The three-part test, and OCR's and *Cohen's* application of it are where most of the blame falls. By limiting compliance to substantial proportionality instead of the accommodation of each sex's relative athletic interest, or qualified applicant pool, the OCR and the courts have limited and removed the ways in which universities and athletic departments can achieve compliance. As Norma Cantu expressed, "Title IX cannot be fairly

²²⁵ Aronberg, 47 Fla. L. Rev. 741, at 811.

enforced through “cookie cutter” formulas that require statistical equality.”²²⁶ However, courts have continued to use these cookie cutter formulas, usually in the form of substantial proportionality, resulting in the elimination of men’s nonrevenue sports. The elimination of men’s intercollegiate athletics produces an inequitable result. Eliminating men’s nonrevenue sports does create opportunities for woman athletes. However, although Title IX was designed to encourage female participation in athletics, it was not designed to deny athletic opportunity to interested athletes.

Although courts’ strict application of the substantial proportionality prong of the three-prong test is one reason for cutting men’s nonrevenue sports, football also shares in the blame. Football consumes more than half of the athletic budgets at most universities fielding a football team. Football teams are allotted eighty-five scholarships, which limits the amount of opportunities available to men’s nonrevenue sports. Additionally, the financial burdens of maintaining a football program directly affect men and women’s nonrevenue sports. Exempting football from Title IX is probably not a viable option; however, cutting the participation numbers and reducing the number of scholarships might help to enforce Title IX while at the time ensure the existence and growth of nonrevenue men’s sports. Unfortunately, placing restrictions on football is unlikely to be embraced. The NCAA, which generated \$331,713,818²²⁷ in 2000-01 is unlikely to support a proposal that would limit revenue from its largest moneymaker. However, if universities want to provide educational opportunities to all of their student athletes there must be changes to the football program.

There is little doubt that the Title IX has created significant opportunities for women in

²²⁶ Letter from Norma V. Cantu, Assistant Secretary of Civil Rights, to Colleges and Universities explaining the Education Department’s final version of its report, “*Clarification of Intercollegiate Athletics Policy Guidance*,” at 2 (Jan.19, 1996).

²²⁷ NCAA, 2000-01 Revenue Review. Available at www.ncaa.org

athletics; however, almost thirty years after its passage some changes need to be made. Congress should encourage the OCR to eliminate or reform the three-part test to reflect the changes in intercollegiate athletics. “Drafted in response to a time when few opportunities existed for female students in intercollegiate athletics, the three-part tests’ methods for compliance reflect circumstances and assumptions that no longer exist.”²²⁸ A better approach to Title IX is to guarantee that each gender will be able to participate in intercollegiate athletics at a rate proportional to their ability and interest.

²²⁸ Jennifer Lynn Bothelho, *The Cohen Courts’ Reading of Title IX: Does it Really Promote a De Facto Quota Scheme?*, 33 New Eng. L. Rev. 743 (1999).