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KEEPING SCORE: HOW UNIVERSITIES CAN COMPLY WITH TITLE IX WITHOUT ELIMINATING MEN'S COLLEGIATE ATHLETIC PROGRAMS

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I. INTRODUCTION

Title IX of the Education Amendments enacted in 1972 has been called a "landmark civil rights law" of unquestionable magnitude.[1] Rarely is it called discriminatory or unconstitutional.[2] But, the reality of Title IX is that despite its positive effects on women, recently, it has been disproportionately disadvantaging men. This harm has especially been felt in collegiate athletics. As of 2004, over 350 men's teams have been eliminated by universities since 1972.[3] In 2009, more men's programs have been eliminated throughout the county than ever before. Kutztown University, in Pennsylvania, discontinued its men's swimming and soccer teams. University of Northern Iowa eliminated its men's baseball team.[4] Delaware State University eliminated its

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1. Marcia D. Greenberger & Neena K. Chaudhry, *Worth Fighting For: Thirty-Five Years of Title IX Advocacy in the Court, Congress and the Federal Agencies*, 55 CLEV. ST. L. REV. 491, 491 (2007).

2. Katie Thomas, *Colleges Cut Men's Programs to Satisfy Title IX*, N.Y. TIMES, May 1, 2011, *available at* http://www.nytimes.com/2011/05/02/sports/02gender.html.

3. Ryan T. Smith, *"Bull's Eye": How Public Universities in West Virginia Can Creatively Comply with Title IX Without the Targeted Elimination of Men's Sport Teams*, 110 W. VA. L. REV. 1373, 1375 (2008).

4. H. Clay McEldowney, *As Colleges Cut Athletics, Title IX Creates an Injustice to Men*, WASH. POST, Aug. 6, 2009, *available at* http://www.washingtonpost.com/wp-

wrestling team.[5] MIT, which has one of the nation's largest athletic departments, "eliminated men's teams in gymnastics, ice hockey, golf, wrestling, alpine skiing and pistol."[6] The latest cuts include the University of California, Berkley's decision to eliminate men's baseball and rugby in 2010 and the University of Delaware's decision to eliminate the men's track and cross country teams in 2011.[7]

As the country's financial problems continue to affect state budgets, more collegiate teams will likely be eliminated.[8] Universities have attempted to discontinue athletic teams, not on the basis of sex, but on the basis of student interest.[9] However, their attempts have been met with lawsuits. In early 2009, Quinnipiac University, faced with a declining budget, tried to eliminate two men's teams and one female team.[10] In response to this decision, the American Civil Liberty Union filed a lawsuit representing only the women's team.[11] The two men's teams' rights were left unrepresented. The federal judge reinstated the women's team, and the same day, Quinnipiac University eliminated a third men's team.[12]

Although unstable economic conditions have made it hard to comply with Title IX, universities are not without blame. Title IX will soon be forty years old and universities are still not adeptly employing innovative methods that would bring them into compliance without having to cut men's teams. Universities that demonstrate progression in female athletics and prepare comprehensive athletic department plans (which span over a decade) will be deemed to comply with Title IX. Along with the plan, simple roster management will allow universities to comply with Title IX without having to cut men's teams.[13] Finally, creating an effective survey that will

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dyn/content/article/2009/08/05/AR2009080503089.html.

5. *Id.*

6. *Id.*

7. Thomas, *supra* note 2; *see also* Joe Drape, *Cal-Berkeley Cuts 5 Athletic Programs*, N.Y. TIMES, Sept. 28, 2010, *available at* http://www.nytimes.com/2010/09/29/sports/29cal.html.

8. *Id.*

9. Thomas, *supra* note 2.

10. McEldowney, *supra* note 4.

11. *Id.*

12. *Id.*

13. *See* discussion *infra* Part V.B ("Fundamentally, roster management means decreasing the size of one or more teams to allow an increase in the size of another.").

measure female students' interest and abilities in athletics will also help universities to comply.

This Note will examine the developments of Title IX over the past four decades and will argue that universities should not attempt to comply with Title IX by using the *substantially proportionate* test because it disproportionately affects men's athletic teams. Instead, universities should use the *program expansion* test, or the *interest and abilities accommodation* test, which are explained in detail below. Section II of this Note explains the history, development, and legislative intent of Title IX. Section III sets out the three tests used by universities to comply with Title IX, and explores how courts have applied these tests. Section IV discusses how men's athletic teams have responded to their elimination by filing suit and evaluates their unsuccessful arguments. Section V describes three ways universities can comply with Title IX through the program expansion test and the interest and abilities accommodation test, without eliminating men's collegiate athletic teams.

II. HISTORY AND PASSAGE OF TITLE IX

A. Before Title IX

Prior to the enactment of Title IX in 1972, women were drastically underrepresented in collegiate athletics. In 1972, fewer than 32,000 women participated in collegiate athletic programs.[14] However, during that same year, 170,384 men participated in collegiate athletic programs.[15] During this time, female athletic programs averaged only 2% of the college athletic budget.[16] This disparity could be attributed to societal stereotypes and universities' lack of interest in expanding female athletic programs. Many athletic directors believed women did not derive benefits from participating in athletics.[17] Arguments against women's athletic opportunities were based on sexist beliefs and rhetoric typical of the time.[18] Athletic

14. Greenberger & Chaudhry, *supra* note 1, at 492.

15. *Id.*

16. Katherine B. Woliver, *Title IX and the "E-Mail Survey" Exception: Missing the Goal*, 18 S. CAL. INTERDISC. L.J. 463, 464 (2009).

17. *Id.* at 465.

18. *Id.*

directors who did not subscribe to such sexist beliefs were often met with resistance from collegiate budgeting committees when they sought funding for women's programs.[19]

While women's collegiate programs suffered, men's programs prospered. Men's athletic programs enjoyed locker rooms, uniforms, coaches, well-equipped gymnasiums, and—in some cases—air-conditioned buses to travel from game to game.[20] Conversely, female athletic programs were given almost no funding.[21] Women were forced to practice at facilities in the morning to avoid conflicting with men's prime-time, after-school practice schedules. [22]

B. Title IX's Passage

In 1972, Senator Birch Bayh introduced Title IX of the Education Amendments of 1972 legislation.[23] Title IX stated 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 subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[24] As stated by Senator Bayh, the purpose of this act was to

> [P]rovide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.[25]

Title IX was originally passed in response to significant concerns about discrimination against women in education.[26] Title IX was only meant to be enforced against federally-funded schools.[27] The legislative history, as well as the plain language

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19. *See id.* at 471.

20. *Id.* at 464.

21. *Id.*

22. *Id.*

23. Neal v. Bd. of Trs. of Cal. State Univ., 198 F.3d 763, 766 (9th Cir. 1999).

24. 20 U.S.C. §§ 1681(a) (2006).

25. *Neal*, 198 F.3d at 766 (noting that Senator Bayh's legislation was a floor amendment to the Education Amendments Act; therefore, the only legislative intent and scope of the act given was statements from the Senator (citing N. Haven Bd. Of Educ. v. Bell, 456 U.S. 512, 526-27 (1982))).

26. *Id.*

27. *Id.*

of the statute, unmistakably dictates that Title IX is not an affirmative action statute.[28]

Although Title IX has had the greatest impact on athletics, during its passage, this impact was barely discussed.[29] This was partially attributed to the fact that Congress's intent was to equalize women's opportunities in the classroom, rather than on the field.[30] Despite the original legislative intent, after Title IX's passage, universities made attempts to improve female athletic participation.[31] However, because of the confusing language of Title IX and its almost limitless application, schools encountered problems when they attempted to apply the new legislation.

C. The Regulations

In part, Congress expressly delegated its power to the United State Department of Health, Education and Welfare, through the Department's Office for Civil Rights ("OCR"), to promulgate regulations and interpretations to aid institutions in applying Title IX.[32] Two years after the passage of Title IX, the OCR published its proposed *Title IX Regulations*.[33] These regulations came into effect in 1975 and were known as the *Regulations*.[34] The Regulations effectively mandated that universities apply Title IX to their athletic programs. Further, the Regulations required universities to: (1) grant scholarships to both sexes proportionately to the number of male and female athletes; and (2) offer "equal athletic opportunity for members

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28. *Id.*

29. 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, 949 (1995).

30. *Id.* at 948.

31. Woliver, *supra* note 16, at 467.

32. Cohen v. Brown Univ., 101 F.3d 155, 165 n.5 (1st Cir. 1996) ("Agency responsibility for administration of Title IX shifted from the Department of Health, Education and Welfare ('HEW') to DED [the United States Department of Education ('DED')] when HEW split into two agencies, DED and the Department of Health and Human Services.").

33. Mahoney, *supra* note 29, at 950.

34. *Id.* at 954 (during the debate on the passage of the Regulations, the Department of Health, Education and Welfare (HEW) again stressed that they were respecting the original legislative intent by not making Title IX an affirmative action act).

of both sexes."[35] Although the Regulations were clear on the allocation of scholarships, universities were still unsure on how to apply the "equal opportunity" requirement.[36] The language of the equal opportunity requirement may appear to indicate that equal means proportionate.[37] Yet, as it was made clear during the passage of Title IX, the act was not meant to be affirmative action legislation.[38] Although the Regulations attempted to clarify the complex language of Title IX, it failed in resolving the real issue: what does a university need to do to comply?

D. The Interpretations

Four years after the Regulations were introduced, the OCR developed the "Policy Interpretations" (The Interpretations).[39] The Interpretations was an eleven-page document which addressed discrimination in collegiate athletics.[40] Its intended purpose was to clarify the Regulations while expanding the scope of Title IX.[41] The Interpretations gave universities a three-pronged equal opportunities test to ensure it was complying with Title IX: (1) universities must provide equal financial assistance to "members of each sex in proportion to the number of students of each sex participating in inter-collegiate athletics,"[42] (2) universities must give equivalent athletic benefits and opportunities to both sexes, and (3) universities must provide athletic programs that meet the

35. Smith, *supra* note 3, at 1378 (OCR gave ten factors for schools to consider when evaluating whether both sexes were given equal opportunity: (1) Whether the selection of sports and levels of competition effectively accommodate the interest and abilities of member of both sexes; (2) the provision of equipment and supplies; (3) scheduling of games and practice time; (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, practices and competitive facilities; (8) provision of medical and training facilities and services; (9) provision of housing and dining facilities and services; and, (10) publicity). *Id.* at 1378-79. *See also Cohen*, 101 F.3d at 165-66.

36. Danielle M. Ganzi, Note, *After the Commission: The Government's Inadequate Response to Title IX's Negative Effect on Men's Intercollegiate Athletics*, 84 B.U. L. REV. 543, 545 (2004).

37. *Id.*

38. *Id.* at 546.

39. Smith, *supra* note 3, at 1379.

40. *Id.*

41. *Id.*

42. *Id.* at 1380.

interests and abilities of the students.[43]

The Interpretations also went further in explaining how universities could meet the last prong of the three-pronged test: the interest and abilities prong. Universities could comply with Title IX by meeting one of the following interest and abilities accommodation tests:

> (1) Demonstrate that 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, show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; *or* (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion . . . [,] demonstrate that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.[44]

These three separate tests are most easily known as the substantially proportionate test, the program expansion test, and the interest and abilities accommodation test.[45]

After The Interpretations were implemented in 1979, the original legislative intent—that Title IX not be used as affirmative action legislation—was, in reality, lost.[46] Essentially, if universities chose to apply the first prong, they were effectively making Title IX affirmative action legislation.[47] As universities began to apply The Interpretations, they found that the substantially proportionate test was the easiest test to apply. As opposed to the other tests, this test was simple, and had a calculable equation.[48] In effect, universities simply needed to create enough athletic positions proportionate to the female

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43. *Id.* at 1381.

44. NAT'L CTR. FOR EDUC. STATISTICS., U.S. DEP'T OF EDUC., USER'S GUIDE TO DEVELOPING STUDENT INTEREST SURVEYS UNDER TITLE IX, 1 (Mar. 2005) [hereinafter USER'S GUIDE], *available at* http://nces.ed.gov/pubs2005/2005173.pdf.

45. *Id.*

46. Mahoney, *supra* note 29, at 953.

47. *Id.* at 954.

48. Smith, *supra* note 3, at 1382.

population on their campuses. During the 1970's, compliance using the substantially proportionate test did not create problems because there was, on average, only a 42% female population on Division I campuses.[49] In 2000, the average Division I university had a 56% female population.[50] Therefore, male students are now the minority on the average Division I campus.

E. The Investigator's Manual

In 1990, the OCR issued the *Title IX Athletics Investigator's Manual* ("The Manual").[51] The purpose of The Manual was written to aid institutions having difficulties in determining which interest and abilities accommodation test to apply.[52] The Manual included steps and procedures on how a university could comply with Title IX, but failed to actually clarify the three tests—leaving many universities non-compliant and vulnerable to litigation.[53]

The Manual did reinstate Title IX's original legislative intent, however, in that Title IX was not affirmative action legislation.[54] The Manual purported to encourage universities to provide an equal number of competitive athletic positions proportionate to the percentage of male and female campus population.[55] The Manual even discouraged quotas, stating, "there is no set ratio that constitutes substantially proportionate or that, when not met, results in a disparity or violation."[56] On the other hand, The Manual included examples on what the ideal ratio of men to women in collegiate athletics should be. It purported to encourage universities to provide an equal number of competitive athletic positions proportionate to the percentage of male and female campus population.[57] This practice of the OCR saying one thing, but apparently meaning

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49. CATHERINE E. FREEMAN, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., TRENDS IN EDUCATION EQUITY OF GIRLS AND WOMEN: 2004, 25-B (Nov. 2004), *available at* http://nces.ed.gov/pubs2005/2005016.pdf.

50. *Id.*

51. Ganzi, *supra* note 36, at 549.

52. *Id.*

53. *Id.*

54. Smith, *supra* note 3, at 1385.

55. *Id.*

56. Ganzi, *supra* note 36, at 548-49 (internal quotation marks omitted).

57. *Id.*

another, left universities questioning the application of the substantially proportionate test.[58]

F. The Clarification

In 1996, the OCR wrote the *Clarifications of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (The Clarification).[59] The Clarification was published in response to universities misapplying the procedures and clarifications surrounding Title IX contained in the Manual. While the Manual, on its face, did not encourage ratios, it gave examples on how to use and apply ratios to comply with Title IX.[60]

The Clarification explained the three-part substantially proportionate test in depth, and provided universities with guidelines and factors to consider when choosing which test to apply.[61] The Clarification also included a series of hypothetical examples on how to apply Title IX in the university setting.[62] Further, The Clarification was accompanied by a letter written by the Assistant Secretary for Civil Rights, Norma Cantu. In the letter, she wrote:

> [T]he Clarification does not provide strict numerical formulas or "cookie cutter" answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.[63]

Cantu went on to say that the OCR does not require quotes, but states that the first test was a safe harbor for institutions.[64] She claimed that if the universities met the substantially proportionate test, there would be no question as

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58. *See infra* Part III.

59. Ganzi, *supra* note 36, at 549.

60. *Id.*

61. OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (1996) [hereinafter CLARIFICATION], *available at* http://www.ed.gov/about/offices/list/ocr/docs/clarific.html.

62. *Id.*

63. Letter from Norma V. Cantu to Parties Interested in Compliance with Title IX (Jan. 16, 1996) [hereinafter Cantu], *available at* http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html.

64. *Id.*

to their compliance with Title IX.[65]

The Clarification, along with Cantu's letter, affirmed the idea that it was in the universities' best interest to use the substantially proportionate test, which avoids non-compliance with Title IX. On the other hand, as Cantu points out, the test runs the risk of creating arbitrary quotas, which might negatively affect men's athletic programs.[66] Universities again were left confused about the substantially proportionate test.[67] In one breath, the OCR was encouraging the use of the substantially proportionate test, while in the other it was discouraging the negative effect of the test.[68]

G. The 2003 Further Clarification and the 2005 Additional Clarifications

In response to the mountain of case law developed in the 1990's, the OCR issued the *2003 Further Clarification* ("Further Clarification") on July 11, 2003.[69] The Further Clarification reiterated the flexibility of the three tests and pointed out that all tests could be met without cutting men's teams.[70] The Further Clarification encouraged universities to use any of the three tests which would best fit their individual needs, and discouraged eliminating men's athletic teams.[71]

Finally, in March of 2005, the OCR released *Additional Clarifications* (Additional Clarifications).[72] The Additional Clarifications emphasized that universities could comply with Title IX by meeting only one of the three tests.[73] The Additional Clarifications also stated that universities receiving any funding for their programs were deemed to be receiving federal

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*, *see infra* Part III.

69. Equity in Athletics, Inc. v. Dep't of Educ., 504 F. Supp. 2d 88, 98 (W.D. Va. 2007).

70. *Id.*

71. *Id.*

72. *Id.*

73. Ganzi, *supra* note 36, at 569 (stating that the Additional Clarification was written after several court decisions improperly held that universities which do not comply with all three of the tests fail to comply with Title IX); *see* Kelley v. Bd. of Trs., 35 F.3d 265, 267 (7th Cir. 1994).

funds and would be required to comply with Title IX.[74]

III. THREE TESTS OF TITLE IX COMPLIANCE

A. The Substantially Proportionate Test

The first, and most controversial of the tests, is the substantially proportionate test. If a university can prove it is providing athletic opportunities to both sexes proportionate to the number of males and females on its campus, it will be deemed to be in compliance with Title IX.[75] As stated in Cantu's letter preceding the Clarification, this test is a safe harbor for universities.[76] If a university has the statistical and numerical data to prove it has met this first test, no other inquiry need be made as to further its compliance with Title IX.[77]

The real issue lies in what exactly substantially proportionate means. As Title IX and the subsequent Interpretations state, proportionate does not mean equal.[78] For example, if a university has a female and male population of 50%, does the university need to provide equal number of athletic opportunities to both sexes? If the university provides 45% of the athletic opportunities to females and 55% to males, is substantial proportionality achieved?[79]

In 1996, the Court of Appeals for the First Circuit addressed these issues in *Cohen v. Brown University*.[80] In *Cohen*, the university cut funding and demoted four of its

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74. OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST – PART THREE 1 (Mar. 17, 2005) [hereinafter ADDITIONAL CLARIFICATION], *available at* http://www.nacua.org/documents/AdditionalClarificationThreePartTest_2005.pdf. Title IX applies not only to athletics, but requires universities to offer equal academic programs and clubs for both sexes in all aspects of their educational institutions.

75. USER'S GUIDE, *supra* note 44.

76. Cantu, *supra* note 63.

77. *Id.*

78. Smith, *supra* note 3, at 1382.

79. *See infra* notes 174-80.

80. 101 F.3d 155, 173 (1st Cir. 1996); *see also* Mahoney, *supra* note 29, at 955. (*Cohen* is considered the grandparent to all current Title IX litigation. The Court in *Cohen* gave deference to the Regulation, the Interpretation and the Investigator's Manual. This marked the first time these subsequent publications of the OCR were given such great weight in the eyes of the courts.); *See* Smith, *supra* note 3, at 1382; *see generally* Woliver *supra* note 16.

varsity teams to club status.[81] The four teams cut were women's gymnastics, women's volleyball, men's water polo, and men's golf.[82] The plaintiffs, the women participants of the gymnastic and volleyball teams, sued the university, alleging that its collegiate athletic program violated Title IX of the Education Amendments of 1972.[83] They sought to enjoin the university from cutting funding and demoting the team's status.[84]

The court found that the university violated Title IX because it had not provided its female and male athletes with equal opportunities.[85] The court examined whether the university met any of the three tests outlined in the OCR's Policy Interpretations,[86] specifically, whether the university's participation opportunities were substantially proportionate to enrollment. Women comprised 48% of the student body, but only 37% of the athletic positions were available to women.[87] The university had an 11% difference between the participation opportunities and the university's percentage of men and women. The court held that the university did not meet the first test because an 11% gap was not substantially proportionate.[88]

In 1993, the Court of Appeals for the Tenth Circuit held in *Roberts v. Colorado State Board of Agriculture*[89] that Colorado State University failed to meet the substantially proportionate test with a 7.5% disparity between female participation in athletics and female undergraduate enrolment.[90] In *Roberts*, the women's softball team was stripped of its varsity status and filed suit for injunctive relief under the theory that the university had violated Title IX of the Education Amendments of 1972.[91] The university argued that it met the substantially

81. *Cohen*, 101 F.3d at 161.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 162.
86. *Id.* at 165-67.
87. *Id.* at 163.
88. *Compare id. with* Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993).
89. *Roberts*, 998 F.2d at 830.
90. *Id.*
91. *Id.* at 827.

proportionate test.[92] The court rejected this argument. The court reasoned that the Investigators Manual supplied by the OCR suggested that female participation rates in athletics should be equal to the university's female population.[93]

The OCR has instructed its Title IX compliance investigators that "[t]here is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a disparity or a violation." However, in the example immediately preceding this statement, the Manual suggests that substantial proportionality entails a fairly close relationship between athletic participation and undergraduate enrollment.[94]

Since *Cohen* and *Roberts,* the OCR provided further guidance as to how a university can meet the substantially proportionate test, thus ensuring it was protected under the test's safe harbor.[95] The Clarification published in 1996 by the OCR stated that universities which were within 5% of the female student body population would be deemed to be in the safe harbor of the test.[96] However, the Clarification did not say that if a university did not meet this 5% rule, it would not have met the substantially proportionate test.[97] Yet again, universities were left wondering how to comply with the substantially proportionate test.[98]

The confusion that surrounds this test raises the question of its validity.[99] If courts, universities and even the OCR have trouble determining how to apply the test without creating quotas, perhaps this test should not be used.[100] When universities apply the substantially proportionate test, it predominately ends in eliminating prosperous male teams to create female teams.[101] This clearly contradicts the legislative intent that Title IX is not a quota system.[102] The program

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92. *Id.*

93. *Id.* at 830.

94. *Id.* at 829-30 (internal citations omitted).

95. CLARIFICATION, *supra* note 61.

96. *Id.*

97. *Id.*

98. *See supra* Part II.

99. Smith, *supra* note 3, at 1382-83.

100. *See infra* Part V.

101. *See generally* Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 827 (10th Cir. 1993). *Cf. infra* Part IV.

102. Neal v. Bd. of Trs. of Cal. State Univ., 198 F.3d 763, 766 (9th Cir. 1999)

expansion test and interest and abilities accommodation test qualitatively evaluate universities' athletic programs, and are superior to the substantially proportionate test, which only evaluates the quantitative characteristics.[103]

B. Program Expansion Test

If a university did not meet the substantially proportionate test, it still had two options to comply with Title IX. The Interpretations stated that a university could meet the program expansion test by proving that it had a "history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of [the underrepresented] sex."[104] This seemingly clear test did not clarify how, exactly, a university can demonstrate compliance. The Clarification better explained how a university could meet this test:

> In effect, part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.
>
> . . . .There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex. In addition, the institution must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities.[105]

The Clarification suggested the program expansion test looked at what the university had done with its athletic program since the passage of Title IX and whether it was making good faith efforts to meet the interests and abilities of the underrepresented sex.[106] This test allowed universities to meet Title IX using a more objective test as opposed to the substantially proportionate test which appeared to be a strictly

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(quoting 188 CONG. REC. 5,808 (1972)).

103. *See* discussion *infra* Part V.

104. USER'S GUIDE, *supra* note 44, at 2.

105. CLARIFICATION, *supra* note 61.

106. Paul Anderson & Barbara Osborne, *A Historical Review of Title IX Litigation*, 18 J. LEGAL ASPECTS SPORT 127, 146-47 (2008).

a numerical analysis.[107] However clear the Clarification had made this test, courts still use their own methodology when evaluating the second test's validity.[108]

In *Cohen*, the court entered a lengthy discussion regarding the program expansion test. The court suggested that the substantially proportionate test was a starting point for evaluating whether or not a university had violated Title IX.[109] The court reasoned that even when a university did not meet the 5% safe harbor, if it could prove that there was a history of program expansion which met the interests and abilities of the underrepresented sex, it could satisfy Title IX.[110] First, universities needed to show that they had made steps to increase participation opportunities for female athletes. Second, universities had to show that female athletic expansion is continuing.[111]

The court examined Brown University's program expansion since the passage of Title IX in 1972. The court started by examining the Brown University's past program expansion opportunities and compared it to the schools current plan for program expansion.[112] It found that the university had developed thriving women's athletic teams from 1971 to 1977.[113] Further, the university's merger with Pembroke College had added a considerable number of female teams.[114] Nevertheless, only one female team had been added during the 1980's—women's track. Despite the lack of growth throughout the 1980's, several women's athletic programs had won Ivy League Championship titles from 1980 to 1991.[115] The university also built several new facilities to accommodate the women's athletic programs.[116] The court then analyzed the university's current plans for program expansion and found that the university had decreased the funding of women's

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107. *Id.*

108. *See generally* Neal v. Bd. of Trs. of Cal. State Univ., 198 F.3d 763, 763 (9th Cir. 1999); Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996).

109. *Cohen*, 101 F.3d at 170.

110. *Id.* at 175.

111. *Id.*

112. *Id.*

113. *Id.* at 166.

114. *Id.* at 180.

115. *Id.*

116. *Id.*

athletics to a meager budget.[117] Many of the women's athletic teams were partially being donor-funded and not fully funded by the university itself.[118] Although the university had 16 male and 16 female funded teams, the court still found there was not a current acceptable plan for program expansion.[119]

C. Interest and Abilities Accommodation Test

Universities' last option to comply with Title IX is to satisfy the interest and abilities accommodation test. This test requires universities to show that the interest and abilities of the underrepresented sex are being effectively accommodated by the current athletic programs.[120] The OCR's 2005 Additional Clarifications stated that a university will be deemed to have automatically satisfied this third test unless it was proven that, (1) there was sufficient student interest in a sport that was currently not being offered, (2) there was an ability to sustain this sport not being offered, and (3) that there was intercollegiate competition in the university's region to sustain the sport.[121] The real issue, the courts addressed, was whether the university evaluated the underrepresented students' interests and abilities; if it did continually evaluate, did the university change its current athletic program to accommodate the changing interests?[122]

The Fifth Circuit held in *Pederson*[123] that a university must continually evaluate the interests and abilities of the underrepresented sex and provide athletic programs accordingly; failure to do so would result in a Title IX violation.[124] In *Pederson*, females interested in playing fast-pitch softball and soccer sued the university alleging it violated Title IX.[125] They specifically claimed the university failed to accommodate the interest and abilities of the females on

117. *Id.*
118. *Id.* at 162.
119. *Id.*
120. USER'S GUIDE, *supra* note 44 at 2.
121. ADDITIONAL CLARIFICATION, *supra* note 74.
122. *See* Pederson v. La. State Univ., 213 F.3d 858, 878 (5th Cir. 2000).
123. *Id.*
124. *Id.*
125. *Id.* at 864.

campus.[126] The main thrust of the plaintiff's argument was that LSU did not provide a women's softball team and, if it did offer such a team, women would participate.[127]

The court examined the university's current method of evaluating the interest and abilities of the women on campus.[128] The university did not have a soccer or softball team for over ten years. The university had nine sports for women and only seven for men. The university claimed that it offered a healthy amount of sports for women; if the university added more sports for women, it would not encourage women to take interest in athletics.[129]

The court mocked the university's argument that there was no interest from women to play these sports by pointing out that, "an institution with no coach, no facilities, no varsity team, no scholarships, and no recruiting in a given sport must have on campus enough national-caliber athletes to field a competitive varsity team in that sport before a court can find sufficient interest and abilities to exist."[130] The court concluded that the university failed to provide women with varsity teams, which rightfully should have been provided.[131]

More recently in 2006, the Western District of Pennsylvania, the court in *Choike v. Slippery Rock University of Pennsylvania*, analyzed the importance of universities' continued evaluation of the women's interest and abilities, but found that universities must take actions to add teams where there are women's interest and abilities.[132] In *Choike*, the plaintiffs sued the university for eliminating three female teams.[133] In 2000, the university had hired a consultant to evaluate whether the university was in compliance with Title IX. Although the university had more female teams than male teams, the consultant found that the university did not meet

126. *Id.*

127. *Id.* at 878.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 879.

132. Barbara Osborne & Robin Ammon, *Eliminating Women's Teams: A Comparative Analysis of Favia v. Indiana University of PA (1992), Barrett v. West Chester University (2003), and Choike v. Slippery Rock University (2006)*, 18 J. LEGAL ASPECTS SPORT 39, 51 (2008).

133. *Id.*

any of the three tests of Title IX. The university took proactive steps to comply with Title IX.[134] First, it cut numbers from male teams and added those spots to female teams. Since the university had 54.3% female, the university felt roster management would be difficult. Second, it made a plan to add a women's lacrosse team. Lastly, the university developed a sports interest survey to be distributed to the female student body.[135]

In 2005 the state of Pennsylvania decreased state funding to the university and administrators decided to cut five male and three female teams to save money.[136] As a result, the female teams sued the university and asked their teams be reinstated.[137] During the preliminary hearing, the court rejected the university's roster management tactic, but suggested that if the university actually obtained proportionality, roster management would comply with Title IX.[138] The court then evaluated the university's method of evaluating women's interests and abilities.[139] The court found that the university had not completed a yearly evaluation.[140] It only conducted an evaluation in 2004. The court reasoned that if the university was to comply with the third test, it would need to be constantly and consistently evaluating the interest and abilities of the women then taking that information and adjusting their athletic program accordingly.[141]

The three tests' legal rationale is to determine when a university is discriminating. The large list of factors provided by the OCR was only meant as guideposts for courts.[142] After analyzing the litigation that surrounds the three tests of Title IX, it becomes clear that universities continually have problems meeting Title IX.[143] Although universities feel that they are within compliance, the minute they eliminate women's

134. *Id.*
135. *Id.* at 52.
136. *Id.*
137. *Id.* at 53.
138. *Id.* at 54.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 59.
143. *See* discussion *supra* Part III.A.

teams, they become vulnerable to attack.[144] Universities relying on the substantially proportionate test may avoid litigation from female teams but could face litigation from the discontinued male teams.[145] Universities which use the program expansion and interest and abilities accommodation test have consistently misapplied the requirements of the test.[146] Proper application of the program expansion and the interest and abilities accommodation test would allow universities to comply with Title IX without elimination of any teams.[147] Thus, litigation could be avoided completely. Further, application of the latter two tests embodies Title IX's original legislative intent.[148]

D. Discussion: The Three Tests

The burden of proof involved in Title IX is complex. The plaintiff has the initial burden of proving that the university has failed to meet the substantial proportionality test.[149] This becomes easy for plaintiffs to prove since universities are required to publically disclose the numbers of athletic opportunities it provides women and men. This disclosure is mandatory under the Equity in Athletics Disclosure Act of 1994.[150] If there exists more than a 5% variation between the total population of women on campus and the proportion of female athletic opportunities, the university will not fall within the safe harbor of the first test.[151] For example, if a university has a total female population of 45% and females make up 40% of all student athletes, the university will fall within this safe harbor.[152] Likewise, if a university has a total female

144. *Id.*

145. *Compare* Cohen v. Brown Univ., 101 F.3d 155, 162-75 (1st Cir. 1996) *and* Pederson v. La. State Univ., 213 F.3d 858, 858-79 (5th Cir. 2000); *with* discussion *infra* Part IV.A.

146. Osborne & Ammon, *supra* note 132, at 55.

147. *See generally* discussion *infra* Part V.

148. *See, e.g.*, Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 831 (10th Cir. 1993).

149. Smith, *supra* note 3, at 1383.

150. Pub. L. 103-382, § 360B(c), 108 Stat. 3969 (1994) (This act requires colleges and universities to account on how their athletic opportunities, resources, and dollars are allocated among males and females.).

151. Cantu, *supra* note 63.

152. *Id.*

population of 45%, but females only make up 38% of all student athletes, the university will not be in this safe harbor.

Once a plaintiff has proven the university does not comply with the substantial proportionately test, the university has the burden of proving it meets Title IX by use of the second or third tests.[153] Many universities start by trying to prove compliance through the second test.[154] As the court in *Cohen* points out, the university must provide actual evidence that it has a history and tradition of program expansion.[155] The *Cohen* court also looked at circumstantial evidence, such as, for example, whether the university has, in the past, had an atmosphere of fostering women's athletics.[156]

If the university fails to prove compliance with the second test, it has the burden to show it meets the interest and abilities of the underrepresented sex.[157] A University must show evidence that it has a concrete policy and action plan to evaluate the interests and abilities of women on its campus.[158] The court in *Choike* stated that surveying the underrepresented sex is evidence that proves the university makes such an evaluation. Conversely, the court in *Choike* emphasized the need to be consistently evaluating the interests and abilities of the underrepresented sex.[159] Doing so once every few years is not considered continual evaluation. Further, as the court in *Pederson* held, even if surveying takes place, universities need to adjust their athletic programs if women show interest and abilities for certain sports.[160] If a university simply ignores the surveys, it will be deemed to have violated Title IX. Thus, plaintiffs will prevail in seeking injunctive relief.

IV. MALE'S ATTEMPTS TO SEEK INJUNCTIVE RELIEF

The cases following Title IX's passage were comprised

153. Smith, *supra* note 3, at 1382.
154. *Id.*
155. Cohen v. Brown Univ., 101 F.3d 155, 178 (1st Cir. 1996).
156. *Id.*
157. Smith, *supra* note 3, at 1382.
158. *Id.*; *see also Cohen*, 101 F.3d at 179.
159. Osborne & Ammon, *supra* note 132, at 54.
160. Pederson v. La. State Univ., 213 F.3d 858, 878 (5th Cir. 2000).

primarily of female plaintiffs.[161] The reason for this was that universities failed to take action to comply with Title IX.[162] After the first ground-breaking cases of Title IX were decided, many universities began to comply with this act. Starting in the late 1980's, male athletes began contesting Title IX's application. Many of their complaints claim types of reverse discrimination; they sought protection under the Constitution.[163]

A. Men Seek Protection Under The Constitution

In *Boulahanis v. Board of Regents*, the Court of Appeals for the Seventh Circuit evaluated whether discontinued male athletic teams could challenge a university's decision to eliminate athletic programming on the basis of sex.[164] In 1993, Illinois State University assembled a committee to evaluate whether it was in compliance with Title IX.[165] Recent litigation at the University of Illinois motivated Illinois State University's decision to take a comprehensive look at their current athletic program.[166] The committee evaluated the current student body make-up; enrollment at the university was 45% male and 55% female.[167] Despite the fact that women were the majority on campus, athletic participation was 66% male and 34% female.[168] Further, the university had not added a female athletic team in over ten years, and had never conducted a survey of female students' interest and abilities in athletics.[169] The committee submitted a report to the university's officials, indicating that the current athletic

161. Anderson & Osborne, *supra* note 106, at 135-37.

162. Woliver, *supra* note 16 at 467.

163. *See* Boulahanis v. Bd. of Regents, 198 F.3d 633, 636 (7th Cir. 1999).

164. *Id.* at 635.

165. *Id.*

166. *See* Kelley v. Bd. of Trs., 35 F.3d 265, 265 (1994) (the University of Illinois was sued when the male swim team members claimed the university made athletic cuts based only on sex; the male members challenged the schools decision on the basis that they violated Title IX. The court held that the university's decision to elimination the men's athletic team did not violate Title IX as long as men's participation in athletics is substantially proportionate to their enrollment).

167. *Boulahanis*, 198 F.3d at 635.

168. *Id.*

169. *Id.* at 636 (It can be implied that because the University eliminated the men's soccer and men's wrestling team solely on the basis of sex, that they had not conducted a survey of student interest.).

program was not in compliance with Title IX.[170] Because the university could not show a history and tradition of adding female teams, and since it had never surveyed the student body, the only choice for compliance was to use the substantially proportionate test.[171]

In response, the university developed ten options to achieve such proportionality: (1) drop men's wrestling; (2) drop men's wrestling and men's soccer; (3) drop men's wrestling, soccer, and tennis; (4) drop men's wrestling and add women's soccer; (5) drop men's soccer and add women's soccer; (5) drop men's wrestling and soccer and add women's soccer; (6) drop men's wrestling, tennis, and soccer and add women's soccer; (7) add women's soccer; (8) add women's soccer and increase all women's program funding; (9) drop men's wrestling and soccer, add women's soccer, adjust the existing men's roster, and increase women's funding; (10) drop men's soccer and wrestling, add women's soccer, adjust men's rosters, and adjust funding in the entire athletic program.[172] The university decided to implement the last option, finding that it would bring female and male athletic participation to 51.72% and 48.29%, respectively; thus, it would fully comply with Title IX through the substantially proportionate test.[173]

Nevertheless, after the university made such cuts, men from the wrestling and soccer teams sued the university.[174] They claimed that the university's decision was based solely on sex; thus, the gender-conscious decision amounted to gender discrimination.[175] The thrust of their argument was that if Title IX was interpreted to permit universities to eliminate teams on the basis of sex, then Title IX violated the Equal Protection Clause.[176] The men's team argued that discrimination based on sex was only permissible if there was an important government objective, and the university's actions taken were substantially related to that objective.[177]

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170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 637.
176. *Id.* at 639.
177. *Id.*

After evaluating their argument, the court examined the legislative reasoning behind Title IX.[178] The court pointed out that resolving inequalities in athletics was an important government objective.[179] Women had been underrepresented in collegiate athletic programs for decades and Title IX was meant to protect women's rights to equal opportunities.[180] The court held that the university's important government objective—increased opportunities for female athletes—justified the use of sex as the main consideration for its decision to cut the men's teams.[181] The court concluded that, "[w]hile the effect of Title IX and the relevant regulation and policy interpretation is that institutions will sometimes consider gender when decreasing their athletic offerings, this limited consideration of sex does not violate the Constitution."[182]

In the concurrence opinion, Judge Harlington Wood expanded on the idea that the university had other options besides cutting the two men's teams.[183] First, he stated that the ideal situation was one in which the university had funding to accommodate both sex's athletic endeavors.[184] On the other hand, the reality was that universities were at the mercy of the state budget. Judge Wood suggested that if the universities "tighten up"[185] the athletic budget and cut a little bit of funding from all teams, this extra money could support new female teams. Although the teams might need to cut numbers, it would avoid complete elimination of men's athletic teams.[186]

B. Men Seek Protection Under Title IX

In *Chalenor v. University of North Dakota*,[187] the United States Court of Appeals for the Eighth Circuit held that the university's decision to cut men's wrestling did not violate Title

178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 641.
182. *Id.* at 639 (quoting Kelley v. Bd. of Trs., 35 F.3d 265, 272 (7th Cir. 1994)).
183. *Id.* at 641-42 (Wood. J., concurring).
184. *Id.*
185. *Id.* at 642.
186. *Id.*
187. Chalenor v. Univ. of N.D., 291 F.3d 1042, 1044 (8th Cir. 2002).

IX.[188] In May 1998, the University of North Dakota was notified that it had to cut $95,000 from its athletic budget.[189] A month later, the university announced it would eliminate the men's wrestling program for the 1999-2000 season.[190] In December 1999, the plaintiff wrestlers from the discontinued program sued the university. Summary judgment was granted in the university's favor.[191]

The plaintiffs appealed the summary judgment. The main thrust of their argument was that the university's decision to eliminate men's wrestling was an example of sex discrimination.[192] Title IX explicitly forbids such actions. The university contended that the only reason it eliminated the men's wrestling team was for lack of funding.[193] The university further argued that men could not claim protection under Title IX because they were not an underrepresented sex.[194] The plaintiffs countered this claim, stating that the purpose of Title IX was to protect athletic opportunities for both sexes.[195]

The Court of Appeals examined whether or not men are protected under Title IX.[196] They stated that the original language of Title IX was that no person be excluded from any program "on the basis of sex."[197] The court found this language to be ambiguous; therefore, they gave deference to the OCR Regulations and Interpretations to determine Title IX's effect.[198] After reviewing OCR's Interpretations, the court found that the phrasing, "both sexes," used in all OCR publications, indicated that Title IX was meant to protect men, as well as women.[199] The court concluded that, although men were entitled to protection under Title IX, they were only afforded protection when they were the underrepresented

188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 1043.
192. *Id.*
193. *Id.*
194. *Id.* at 1046.
195. *Id.*
196. *Id.* at 1045.
197. *Id.* (quoting 34 C.F.R. § 106.41 (2000)).
198. *Id.*
199. *Id.* at 1047.

sex.[200] The facts of the case make it clear that the university's enrollment was 52% male, yet they held 73% of the athletic opportunities on the campus.[201] Given those numbers, the court did not find that men were an underrepresented sex; thus, the university did not violate Title IX when it eliminated the men's wrestling team on the basis of sex.[202]

Men whose athletic programs were eliminated have continually failed to prove that they deserve protection under Title IX or the Constitution. Further, unlike female teams, men do not have public interest groups fighting for their rights.[203] Women have several public interest groups fighting for their rights, such as the American Association of University Women and The Women's Sports Foundation.[204] Universities, therefore, are in the best position to protect men's teams through proactive planning, which will allow them to use the second and third test to comply with Title IX. The use of these two tests can protect many male athletic teams from elimination.

V. THE THREE-STEP SOLUTION TO SAVE MEN'S ATHLETIC TEAMS

The substantial proportionality test is no longer the proper way universities should be complying with Title IX. This test has proven to cause harsh results for male athletic teams.[205] Further, the test is seemingly outdated.[206] When Title IX became effective legislation, women were a minority on Division I campuses.[207] Since the 1990's, this has not been the case.[208] Women now make up the majority on numerous

200. *Id.*

201. *Id.* at 1044.

202. *Id.*

203. *See* McEldowney, *supra* note 4 (after the passage of Title IX, several public interest groups were formed to force universities to comply with Title IX and its progeny. The groups sought female integration into college athletics, and encouraged male athletic elimination).

204. *See, e.g.*, Letter from Lisa M. Maatz to Members of the U.S. Senate (Mar. 20, 2009).

205. *See generally* discussion *supra* Parts I, III.A.

206. *See id.*

207. FREEMAN, *supra* note 49, at 10.

208. *Id.* at 71.

campuses.[209] Using the substantially proportionate test would require campuses to create more athletic opportunities for women than for men. This approach is particularly problematic, however, at universities where women's interest in additional athletic programs is limited. Effectively, even if universities do not have the interest from their female populations to fill these athletic teams, they still must offer and fund these positions for fear of not complying with Title IX.[210] Consequently, male athletes feel the negative effects of this test when used by universities.[211]

Although universities have the uncomplicated solution of eliminating men's teams to meet the substantially proportionate test, simple proactive preparation will allow universities to save men's team while also comply with Title IX. Universities willing to make efforts to comply with both the program expansion test and the interest and abilities accommodation test will be able to avoid costly litigation.[212] The key to success lies in formulating comprehensive ten-year plans, which involve roster management and complete surveying.

A. Ten-Year Athletic Department Plan

Compliance with Title IX requires proper planning.[213] Universities need to create comprehensive plans outlining goals for their athletic programs. As the courts in *Cohen* and *Choike* suggested, having funding and scholarship plans for female teams is crucial in examining Title IX under the program expansion test.[214] Funding includes improving facilities and purchasing new equipment for female athletes.[215] Further, the court in *Cohen* found the number of female championship titles to be a factor when examining compliance.[216]

The case law in *Cohen* suggests that a university needs to

209. *Id.*
210. *See generally* Smith, *supra* note 3.
211. *Compare* discussion *supra* Part III.A., *with* discussion *supra* Part IV.
212. *See* discussion *infra* Part V.
213. *See generally* Cohen v. Brown Univ., 101 F.3d 155, 184 (1st Cir. 1996).
214. *Id.*; Osborne & Ammon, *supra* note 132, at 54.
215. *See* Smith, *supra* note 3, at 1378.
216. *Cohen*, 101 F.3d at 184.

compile a comprehensive ten- year attack plan.[217] This plan should include how and when the university will improve facilities. This plan should state a specific number of championship titles female teams should work to obtain in the next ten years. It should also include plans on how the university will increase the public's awareness of female athletics. Therefore, when courts evaluate a university's compliance, plans which allocate funding for publicizing and promoting female sporting event ticket sales will be seen as favorable. [218]The bottom line is that universities need a plan showing a good faith effort to promote and expand female athletics.[219]

After a plan has been developed, universities should create active steps for its implementation. Simply creating a ten-year plan will not show compliance. If universities start early in implementing a plan, when or if it becomes necessary to eliminate teams, universities will be able to eliminate unsuccessful female teams and will easily be able to carry the burden of showing compliance with Title IX.

B. Roster Management

Roster management has been a favored practice of universities, not only to meet budget needs, but also to comply with Title IX. Fundamentally, roster management means decreasing the size of one or more teams to allow an increase in the size of another. The court in Cohen stressed how roster management can be used to expand women's athletics.[220] The court noted that complete elimination of men's teams is a drastic and premature move if universities could just decrease the number of men on a given team.[221] Judge Harlington Wood's concurrence in Boulahanis supports the idea of roster management.[222] Judge Wood spoke to the idea that universities need to think creatively when dealing with Title IX.[223] He examined the idea that male athletic programs need to forgo

217. *See* discussion *supra* Part III.B.

218. *See* discussion *supra* Part III.B; *Cohen*, 101 F.3d at 162-75.

219. *Id.*

220. *Id.* at 173-74.

221. *Id.*

222. Boulahanis v. Bd. of Regents, 198 F.3d 633, 636 (7th Cir. 1999).

223. *Id.*

part of their funding in order to shift money to female teams.[224]

A more drastic approach to roster management for Division I universities would be to decrease the sizes and scholarships of football teams. The average football team has seventy-five players. Putting a cap at sixty-five players would open ten more spots for women athletes and shift the respective scholarship funding. There are those who oppose such changes for two reasons: (1) scholarships are necessary to run large Division I football programs; and, (2) large football programs bring in substantial revenue for the university.[225] It would appear that the solution lies with the NCAA. If the NCAA puts caps on the size of the football teams and the amount that football programs could spend, then roster management could be achieved without sacrificing competitive, revenue-generating football programs.[226]

C. Enforced Survey System

Compliance with Title IX under the interest and abilities accommodation test requires universities to create comprehensive surveys to evaluate the interests of female populations.[227] As the court in *Pederson* points out, universities need to create a proper survey, and effectively survey on a yearly basis. [228] Universities that only periodically survey the underrepresented sex, with a survey that is below standards, will not be deemed to comply with Title IX.

Further, there has been debate on what is considered to be effective survey methods.[229] In the *2005 Additional Clarifications*, the OCR, addresses the use of email surveys.[230] Although the OCR encourages this survey method, many have found it to be ineffective.[231] There have been several articles criticizing email surveys.[232] They argue that students receive

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224. *Id.*

225. Smith, *supra* note 3, at 1397.

226. *Id.*

227. USER'S GUIDE, *supra* note 44, at 2.

228. Pederson v. La. State Univ., 213 F.3d 858, 882 (5th Cir. 2000) (The instructions on remand points to the fact that the LSU is required to "gauge the athletic interests of incoming students through surveys and like materials.").

229. Woliver, *supra* note 16, at 463.

230. ADDITIONAL CLARIFICATION, *supra* note 74.

231. Woliver, *supra* note 16, at 463.

232. *Id.*

vast amounts of email; therefore, students tend to ignore surveys sent this way.[233] There are many simple solutions to this problem. First, universities could require students to fill out the survey as a condition to enrollment. Currently, universities put holds on student records or enrollment if students have outstanding library fines. Second, universities could require teachers to pass out the surveys during the first day of class. Many universities require attendance on the first day as a condition to stay in the class. These two methods would ensure each student is being surveyed on their current interest and abilities.

Even if the survey has complete participation, it still needs to be created in a way that effectively asks all the right questions to evaluate the interest and abilities of the female student population. In March of 2005, The Department of Education commissioned the National Center for Education Statistics (NCES) to develop a handbook for universities trying to create their own survey.[234] The handbook is a comprehensive manual which shows universities how to create effective surveys.[235] The NCES stresses the importance of keeping the survey simple, easy to read, and using no prejudicial terms.[236] Universities' surveys need to fully evaluate women's participation in athletics in high school and determine if those women stopped playing because of lack of interest or opportunity at the university level.[237] The survey needs to ask if the students have interest in playing varsity athletics at the university level.[238] If the surveys are effectively administered and it is determined the university is meeting females' interest and ability, it will be able to show full compliance.[239]

VI. CONCLUSION

After almost 40 years, Title IX of the Education Amendments of 1972 has improved participation of women in

233. *Id.* at 475.
234. USER'S GUIDE, *supra* note 44, at 2-3.
235. *Id.* at 9-11.
236. *Id.*
237. *Id.*
238. *Id.*
239. *See* discussion *supra* Part III.C.

the athletic arena.[240] There is no doubt that this legislation has led to the development of competitive female college and professional athletic teams. The positive effects of Title IX have been seen in every aspect of society. Females now make up a substantial portion of the President's Cabinet, and are captains of industry. Despite its achievements, Title IX, like most legislation, has its dark sides. Title IX has virtually killed certain men's collegiate sports, such as men's wrestling, swimming, and gymnastics. More men's teams have been eliminated than female teams have been created.[241]

Universities have other options for complying with Title IX than simply cutting men's athletic teams. The substantially proportionate test is not the ideal way universities should be complying with Title IX. The substantially proportionate test deviates from Title IX's original legislative intent.[242] Effectively, this test makes Title IX affirmative action legislation. Although, throughout the 1970's, it would appear the OCR wanted Title IX to work in a manner like affirmative action. However, recent OCR publications have reversed this train of thought.[243] The OCR is receptive to the idea of universities complying with Title IX using the latter two tests.[244]

Despite the OCR's recent endorsement of the program expansion test and interest and abilities accommodation test, courts heavily scrutinize whether universities have fully complied with these given tests.[245] The problem is that universities are not implementing comprehensive plans that include roster management, which has proven successful in complying with Title IX. Further, universities are not creating effective surveys, which also cause non-compliance problems. Universities should focus on these areas if they want to comply with Title IX without further destroying men's collegiate athletic programs.

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240. *See* discussion *supra* Part III.D.
241. *See* discussion *supra* Parts IV.A, IV.B.
242. *See supra* Part II.A-G.
243. *See* discussion *supra* Parts II.A, III.D.
244. Cantu, *supra* note 63.
245. *See generally* Cohen v. Brown Univ., 101 F.3d 155, 184 (1st Cir. 1996).