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Progress in Gender Equity: An Overview of the History and Future of Title IX of the Education Amendments Act of 1972

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Comment

PROGRESS IN GENDER EQUITY?: AN OVERVIEW OF THE HISTORY AND FUTURE OF TITLE IX OF THE EDUCATION AMENDMENTS ACT OF 1972

I. INTRODUCTION

Although Congress enacted Title IX of the Education Amendments Act of 1972[1] twenty-three years ago to battle gender discrimination, gender discrimination in intercollegiate athletics is still a serious problem nationwide.[2] With fewer dollars available in university budgets, achieving compliance with Title IX's requirements is one of the most pressing problems facing universities today. Title IX compliance may lead universities to cut or eliminate varsity sports programs, resulting, for many, in the loss of the opportunity to participate in intercollegiate athletics. Nonetheless, universities must balance these program cuts against the substantial cost of noncompliance.

Congress enacted Title IX to eliminate gender discrimination in educational programs and activities receiving federal funding.[3] Since Title IX's enactment, Congress and the courts have expanded the scope of Title IX beyond its original aims.[4] These developments have sparked an explosion in Title IX litigation and have had a dramatic impact on intercollegiate athletic programs.[5]

1. 20 U.S.C. §§ 1681-88 (1988).

2. In a recent survey conducted of National Collegiate Athletic Association (NCAA) Division I schools by *The Chronicle of Higher Education*, women made up 50.8% of the undergraduate population and only 33.6% of the varsity athletes at the average Division I college. Debra E. Blum, *Slow Progress on Equity*, CHRON. HIGHER EDUC., Oct. 26, 1994, at A45. Moreover, female athletes received only 35.7% of the money spent on athletic scholarships. *Id.*

3. 20 U.S.C. §§ 1681-88 (1988). Title IX applies to elementary, high school and intercollegiate athletics. This Comment will focus only on intercollegiate athletics.

4. For a further discussion of the expanded scope of Title IX, see *infra* notes 26-87 and accompanying text.

5. *See generally* Stanley v. University of S. Cal., 13 F.3d 1313 (9th Cir. 1994); Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993); Roberts v. Colorado State Univ., 814 F. Supp. 1507 (D. Colo.), *aff'd in part and rev'd in part sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993); Favia v. Indiana Univ. of Pa., 812 F. Supp. 578 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993); Gonyo v. Drake Univ., 837 F. Supp. 989 (S.D. Iowa 1993); Kelley v. Board of Trustees, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 63 USLW 3488 (1995);

Title IX litigation has forced educational institutions to address the inequalities in their athletic programs. Institutions that fail to comply with Title IX may lose all federal funding.[6] Furthermore, noncompliance by an institution may result in liability to an athlete for monetary damages.[7] As a result, many colleges have taken preventive measures to ensure that they are in compliance with Title IX.[8] Such preventive measures include reshaping athletic programs in order to provide more opportunities for female athletes. For example, some schools have increased the number of women's varsity teams to reduce the disparity between male and female athletes.[9] Other schools have cut male programs to increase the percentage of women participating in athletics.[10]

Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17 (2d Cir. 1993); Tyler v. Howard Univ., C.A. No. 91-CA11239 (D.C. Super. Ct. 1993).

6. 20 U.S.C. § 1682 (1988). Termination of federal funding for Title IX noncompliance has never been utilized and critics argue that Title IX's administrative enforcement effectiveness is limited. *See* Carol Herwig, *Gender Equity*, USA TODAY, July 2, 1993, at 12C.

7. Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028 (1992) (holding monetary damages are available to enforce Title IX); Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990) (holding compensatory damages are available for certain Title IX violations). For a discussion of the necessity of monetary damages in Title IX actions, see Pamela W. Kernie, Comment, *Protecting Individuals from Sex Discrimination: Compensatory Relief Under Title IX of the Education Amendments of 1972*, 67 WASH. L. REV. 155 (1992).

8. Among the universities that have taken such preventive measures are Stanford University, the University of Massachusetts (UMass), Washington State University and Villanova University. Stanford University officials decided to add three more women's sports programs in the next three years, to offer 29 additional scholarships to women athletes and to construct more playing fields and locker rooms for women. *See* Tim Griffin, *Gender Equity: Pros and Cons of Key Issue*, EXPRESS NEWS, Jan. 17, 1994, at 6C. UMass has added a women's crew team and a women's water polo team. As a result, 54.8% of UMass athletes are male and 45.2% are female, almost exactly the same as the undergraduate enrollment percentages of 52% and 48%. Mike Jensen, *In Sports, Equity Still an Issue*, PHILA. INQUIRER, Oct. 28, 1994, at A1, A10. Sean Kelly, *'Nova Strives for Gender Equity*, THE VILLANOVAN, Oct. 7, 1994, at 1; Dave Koerner, *Washington State University: A Model of Equity*, LOUISVILLE COURIER-J., Dec. 21, 1993, at 1D. Villanova University has launched a five year program that offers additional scholarships to women athletes, places participation caps on some men's sports and increases the number of women's varsity teams. Bob Monahan, *Women Get Boost at UMass: Proposal Calls to Add Crew, Water Polo Teams*, BOSTON GLOBE, Dec. 8, 1993, at 98. Washington State University's athletic program reforms have resulted in a male-female athlete ratio that mirrors the full time undergraduate enrollment, 53% male and 47% female.

9. For examples of institutions using a cutting of male sports method to restructure their athletic programs, see *supra* note 8 and accompanying text.

10. *See* Kelley v. Board of Trustees, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 63 USLW 3488 (1995) (eliminating men's swimming team); Gonyo v. Drake Univ., 837 F. Supp. 989 (S.D. Iowa 1993) (eliminating men's wrestling team).

The central issue in most Title IX litigation is whether a university provides equal opportunities for both women and men to participate in intercollegiate athletics.[11] Equality in participation opportunities becomes an issue in the following situations: (1) when an institution demotes a sport from varsity to club status;[12] (2) when an institution eliminates a team;[13] or (3) when men's and women's sports teams do not receive equal or sufficient funding.[14]

This Comment provides an overview of Title IX, focusing upon the history of the statute and the statute's implementation regulations. The overview is followed by an analysis of the congressional actions and the benchmark cases which broadened the scope of Title IX and sparked recent litigation. This Comment then presents an analysis of recent litigation and concludes with a discussion of the impact of these changes and the future of Title IX.[15]

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11. Title IX is used primarily by women who fall victim to discriminatory practices of college athletic departments. *See, e.g.*, Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) (noting female gymnasts and volleyball athletes brought suit claiming Title IX violation for demotion of teams from varsity to club status). However, recently Title IX has been the focus of two different types of claims. Male student-athletes have filed gender discrimination claims under Title IX when their programs have been cut due to budget constraints. *See Kelley*, 832 F. Supp. at 239; *Gonyo*, 837 F. Supp. at 990. For a further discussion of these cases, see *infra* notes 185-268 and accompanying text. Female coaches also use Title IX in claiming that their compensation is illegally lower than that of their male counterparts. *See* Stanley v. University of S. Cal., 13 F.3d 1313, 1318 (9th Cir. 1994); Tyler v. Howard Univ., C.A. No. 91-CA11239 (D.C. Super. Ct. 1993). For a further discussion on equal pay in coaching, see *infra* note 297.

12. Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993). For a further discussion of this case, see *infra* notes 88-117 and accompanying text. Unlike varsity sports, club sports are precluded from official competition, they do not receive funding from the university as a recognized sports program and club sport athletes do not receive athletic scholarships. *Cohen*, 809 F. Supp. at 993.

13. Favia v. Indiana Univ. of Pa., 812 F. Supp. 578 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993); Roberts v. Colorado State Univ., 814 F. Supp. 1507 (D. Colo.), *aff'd in part and rev'd in part sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993). For a further discussion of these cases, see *infra* notes 119-181 and accompanying text.

14. *See, e.g., Cohen*, 991 F.2d at 892 (discussing lack of financial support in demoted teams); *Gonyo*, 837 F. Supp. at 993 (discussing disparity in athletic scholarships between men and women).

15. For a complete list of legal resources discussing Title IX, see Linda S. Calvert Hanson, Bibliography, *Sports, Athletics, and the Law: A Selected Topical Bibliography of Legal Resources Published During the 1990's*, 4 SETON HALL J. SPORT L. 763 (1994).

II. BACKGROUND

A. History of Title IX

1. *Legislation*

Congress enacted Title IX in 1972 to combat gender discrimination in educational programs and activities receiving federal funding.[16] The statute provides, in pertinent part: "[n]o 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. . . ."[17]

Although the language and purpose of Title IX are clear, the scope of the statute is ambiguous. This ambiguity may be attributed to the fact that Title IX was adopted by Congress without a formal hearing or committee report, leaving little legislative history.[18] The lack of legislative history fostered much uncertainty and concern about the statute's scope and its applicability to colleges and their various programs.[19] The concern over Title IX's potential effects on intercollegiate sports prompted the introduction of the Tower Amendment.[20] The proposed Tower Amendment required that

16. 20 U.S.C. §§ 1681-88 (1988). Title IX was enacted in response to hearings on sexual discrimination conducted by the House of Representatives Special Committee on Education. *See Discrimination Against Women: Hearings on H.R. 16098 § 805 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. 2 (1970).

17. 20 U.S.C. § 1681(a) (1988). Section 601 of the Civil Rights Act of 1964 (Title VI) served as a model for Title IX's language. Cannon v. University of Chicago, 441 U.S. 677, 694-95 (1979). The language of Title IX is similar to Title VI, except Title IX substituted the word "sex" for the words "race, color, or national origin." *Id.* at 695. Title VI provides, in pertinent part, that "[n]o person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000(d) (1988).

Moreover, Title VI provided the foundation for Title IX's purpose; Congress intended for Title IX to preclude the use of federal funds for supporting discriminatory practices. *Cannon*, 441 U.S. at 704. As stated by Senator Pastore, "[t]he purpose of Title VI is to make sure that funds of the United States are not used to support racial discrimination." 110 CONG. REC. 7062 (1964). Similarly, Senator Bayh stated that "[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers. . . ." 118 CONG. REC. 5806-07 (1972).

18. Jill K. Johnson, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U. L. REV. 553, 557 (1994).

19. *Id.* at 557; *see also* Thomas A. Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 36 & n.11 (1977) (noting that only two references were made concerning application of Title IX to sports).

20. 120 CONG. REC. 15,322 (1974). *See generally* MURRAY SPERBER, COLLEGE SPORTS, INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY 1-148 (1990).

revenue-producing sports, such as football and basketball, be exempt from the applicability of Title IX.[21] Congress rejected the Tower Amendment and instead adopted the Javits Amendment.[22] Unlike the Tower Amendment, the Javits Amendment did not exempt revenue-producing sports. Rather, the Javits Amendment required the Department of Health, Education and Welfare (HEW) to promulgate regulations for intercollegiate sports that took into account the nature of the particular sport.[23]

2. *HEW Regulations*

In 1974, HEW promulgated regulations for the enforcement of Title IX.[24] Pursuant to Section 106.41(c) of the Code of Federal Regulations, an institution is required to provide equal opportunity in athletics for both sexes.[25] Section 106.41(c) sets forth ten factors to be considered by the Office of Civil Rights (OCR) in determining whether a college or university is providing equal opportunity in its athletic programs:

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21. 120 CONG. REC. 15,322-23 (1974). After the passage of Title IX, it became apparent that the statute could prohibit gender discrimination in intercollegiate athletic programs. ELLEN J. VARGYAS, BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX (1994). Through the Tower Amendment, certain members of Congress attempted to have sports, such as football and basketball, exempted from Title IX because they produced revenue and created the largest disparity between the genders in sports. Johnson, *supra* note 18, at 586. Under the Tower Amendment, a sport qualified as a revenue-producing sport if it produced gross receipts or donations. 120 CONG. REC. 15,322.

22. 120 CONG. REC. 15,323; *see also* Cox, *supra* note 19, at 36 n.13.

23. Section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 612 (1984).

24. 34 C.F.R. § 106.41 (1994). Section 106.41(a) 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.

Id. at § 106.41(a). The regulations allow an institution to retain same-sex teams provided that one of two conditions are met: either (1) selection is based upon a competitive skill or the sport is a contact sport, or (2) the institution provides both men's and women's teams in the same sport. *Id.* at § 106.41(b).

After the enactment of Title IX, HEW split into the Department of Health and Human Services and the Department of Education. Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 828 & n.3 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993). The Office of Civil Rights (OCR), acting under the Department of Education's supervision, is now responsible for Title IX enforcement. *Id.*

25. 34 C.F.R. § 106.41(c) (1994); *see* Cohen v. Brown Univ., 991 F.2d 888, 896 (1st Cir. 1993).

(1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
(2) provisions of equipment and supplies;
(3) scheduling of games and practice time;
(4) travel and per diem allowances;
(5) opportunity to receive coaching and academic tutoring;
(6) assignment and compensation of coaches and tutors;
(7) provisions of locker rooms, practice and competitive facilities;
(8) provisions of medical and training facilities and services;
(9) provisions of housing and dining facilities and services; and
(10) publicity.[26]

After the publication of these regulations, HEW received more than one hundred discrimination complaints.[27] In an effort to eliminate meritless complaints, HEW issued an official policy interpretation on Title IX (Policy Interpretation).[28] The Policy Interpretation provides a framework for universities and courts to assess compliance with Title IX.[29] Compliance is determined by evaluating three areas of an intercollegiate athletic program:[30] (1) equal opportunity for each gender to participate in intercollegiate athletics;[31] (2) equal availability of athletic scholarships for female and

26. 34 C.F.R. § 106.41(c).

27. *Cohen*, 991 F.2d at 896.

28. *Id.*; *see also Title IX of the Education Amendments of 1972: A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (1979) [hereinafter *Policy Interpretation*].

29. *Policy Interpretation*, *supra* note 28, at 71,415-17. In 1990, the OCR published an Investigators Manual to aid in identifying violations of Title IX. OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL 24 (1990) [hereinafter INVESTIGATOR'S MANUAL].

30. *Cohen*, 991 F.2d at 897 (holding university may still violate Title IX even if it meets "financial and athletic equivalence standards"); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 828 (10th Cir. 1993) (holding that violation of 34 C.F.R. § 106.41(c) alone is violation of statute); Roberts v. Colorado State Univ., 814 F. Supp. 1507, 1511 (D. Colo. 1993) (holding violation of any prong of Policy Interpretation test is violation of Title IX); Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 584 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993) (predicting success on Title IX claims based on § 106.41(c)(1) alone). Further, a record of compliance in one area cannot be used as evidence of a violation in another area. *Cohen*, 991 F.2d at 897 ("[A]n institution that offers women a smaller number of athletic opportunities than the statute requires may not rectify that violation simply by lavishing more resources on those women or achieving equivalence in other respects.").

31. *See* 34 C.F.R. § 106.41(c)(1) (1994).

male athletes;[32] and (3) equal availability of all other athletic benefits.[33]

3. *Equal Opportunity to Participate and the Policy Interpretation's Three Prong Test*

The Policy Interpretation outlines a three prong test to determine whether an institution is providing an equal opportunity to participate.[34] For a university to demonstrate compliance with Title IX, it must fulfill at least one of the following requirements:

> (1) the institution provides intercollegiate participation opportunities for male and female students in numbers substantially proportionate to their respective enrollments in the institution; or
> (2) the institution has a history and continuing practice of program expansion for the members of the underrepresented sex that is responsive to the interest of and abilities of the members of that sex; or
> (3) the institution's athletic program is fully and effectively accommodating the abilities and interests of the underrepresented sex.[35]

The first prong of the test provides a "safe harbor" for colleges and universities.[36] An institution is in compliance if the ratio between the number of male and female athletes and the number of male and female undergraduates is "substantially proportionate."[37] A fixed ratio has not been established.[38] The regulations indicate,

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32. *See* 34 C.F.R. § 106.37(c) (1994).

33. *See* 34 C.F.R. § 106.41(c)(2)-(10) (1994).

34. *See Policy Interpretation, supra* note 28, at 71,418.

35. *Id.*

36. Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993). Courts have unanimously held that the plaintiff has the burden of proof in establishing that the university has failed the first prong of the test. *Id.* at 901. *See* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 829 n.5 (10th Cir.) *cert. denied*, 114 S. Ct. 580 (1993); Roberts v. Colorado State Univ., 814 F. Supp. 1507, 1511 (D.Colo. 1993) *aff'd in part and rev'd in part sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993); Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 584 (W.D. Pa. 1993); Cohen v. Brown Univ., 809 F. Supp. 978, 992 (D.R.I. 1992). If the plaintiff fails to meet her burden, a finding of substantial proportionality is made and the inquiry ends. Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 829 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993); *Cohen*, 991 F.2d at 897-98.

37. *Policy Interpretation, supra* note 28, at 71,418.

38. OCR states that "there is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in disparity or a violation." INVESTIGATOR'S MANUAL, *supra* note 29, at 7.

however, that a university is in compliance if its enrollment is 52% male and 48% female and its athletic program is 53% male and 47% female.[39]

Both the second and third prongs of the test reflect the reality that substantial proportionality is not always feasible. Under the second prong, an institution may demonstrate compliance by proving that it has a history and continuing practice of expanding its athletic programs.[40] The third prong requires that institutions "fully and effectively" accommodate the interests and abilities of the underrepresented sex.[41] Accordingly, a university is in compliance with Title IX if it provides sufficient participation opportunities to interested and able members of the underrepresented sex.[42]

B. Judicial Interpretation of Title IX

Through the enactment of Title IX, Congress attempted to eradicate gender discrimination in athletics and promote equality in athletic opportunities.[43] However, Title IX lacked the enforcement tools necessary to effectuate this change.[44] First, Title IX did

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39. *Id.*

40. *Policy Interpretation, supra* note 28, at 71,418. The burden of proof is on the defendant to establish program expansion. *Roberts*, 998 F.2d at 830 n.8; *Cohen*, 991 F.2d at 902; *Roberts*, 814 F. Supp. at 1511; *Favia*, 812 F. Supp. at 584; *Cohen*, 809 F. Supp. at 992.

41. *Policy Interpretation, supra* note 28, at 71,418. The courts of appeals in *Cohen* and *Roberts* placed the burden on the plaintiff to establish that the interests and abilities of the underrepresented sex are unmet. *Cohen*, 991 F.2d at 901-02; *Roberts*, 998 F.2d at 831. *But see Roberts*, 814 F. Supp. at 1511 (placing burden on defendant); *Favia*, 812 F. Supp. at 854 (same); *Cohen*, 809 F. Supp. at 992 (same).

42. *Cohen*, 991 F.2d at 899.

43. Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983).

44. *See* Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. AND SPORTS L. REV. 1, 4 (1992) (discussing restricted application of Title IX). Given the limited effectiveness of the statute, litigants have pursued remedies under several alternate legal theories. *Id.* at 4. Litigants have pursued their sexual discrimination claims under the due process clauses of both the Fifth and Fourteenth Amendments to the United States Constitution. *See, e.g.*, Hawkins v. NCAA, 652 F. Supp. 602 (C.D. Ill. 1987) (discussing use of due process in sexual discrimination claims); Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 443 F. Supp 753, 759 (S.D. Ohio 1978) (holding association rule and federal regulations prohibiting mixed gender competition in interscholastic contact sports deprives girls of due process under Fourteenth Amendment), *rev'd*, 647 F.2d 651 (6th Cir. 1981); Petrie v. Illinois High Sch. Bd., 394 N.E.2d 855 (Ill. App. Ct. 1979) (holding due process clause was not violated by association rules restricting membership on volleyball team to girls only).

Litigants have also pursued claims under the Civil Rights Act, 42 U.S.C. § 1983 (1988), alleging that their rights under the Fifth and Fourteenth Amendments were violated. *See* Heckman, *supra* at 4. *See, e.g.*, King v. Little League Baseball,

not expressly authorize a private right of action. Second, most intercollegiate athletic programs were excluded from Title IX because they received only indirect federal funding. Third, Title IX was silent on the availability of monetary damages. Through recent case law developments and congressional action, however, the enforcement mechanisms of Title IX have expanded and those early obstacles no longer limit Title IX litigation. This section briefly reviews the expansion of Title IX by judicial interpretation and congressional amendment.

1. *A Private Right of Action*

In 1979, the United States Supreme Court recognized a private right of action in *Cannon v. University of Chicago*.[45] The Court held that although Title IX did not expressly provide for a private right of action, the right could be implied.[46] In *Cannon*, the petitioner brought suit against two federally funded medical schools, claiming that her application for admission was denied because she was a woman.[47] The United States District Court for the District of Illi-

Inc., 505 F.2d 264 (6th Cir. 1974) (plaintiff alleging denial of rights guaranteed by Fourteenth Amendment due to prohibition against women participating on all-male cross-country team); Gilpin v. Kansas State High Sch. Activities Ass'n, Inc., 377 F. Supp. 1233 (D. Kan. 1973) (plaintiff alleging denial of rights guaranteed by Fifth Amendment due to prohibition against girls participating on all-male little league baseball team).

Other litigants have pursued claims under the Equal Protection Clause of the Fourteenth Amendment. *Accord* Sullivan v. City of Cleveland Heights, 869 F.2d 961 (6th Cir. 1989); LaFler v. Athletic Bd. of Control, 536 F. Supp. 104 (W.D. Mich. 1982); Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982); Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977); Cape v. Tennessee Secondary Sch. Athletics Ass'n, 424 F. Supp. 732 (E.D. Tenn. 1976), *rev'd*, 563 F.2d 793 (6th Cir. 1977); *see* Cynthia J. Harris, Comment, *The Reform of Women's Intercollegiate Athletics: Title IX, Equal Protection and Supplemental Methods*, 20 CAP. U. L. REV. 691, 700 (1991).

Similarly, litigants have pursued claims under state laws that prohibit sexual discrimination. Arline F. Schubert et al., *Changes Influenced by Litigation in Women's Intercollegiate Athletics*, 1 SETON HALL J. SPORTS L. 237, 254 (1991). *See, e.g.*, Aiken v. Lieuallen, 593 P.2d 1243 (Or. Ct. App. 1979) (plaintiff alleging that University of Oregon violated Oregon Equal Rights Act (ERA)). Some states have also passed legislation prohibiting sex discrimination in athletic departments. Heckman, *supra* at 4-7; *see, e.g.*, MINN. STAT. ANN. §§ 126.21, 363.01 (West Supp. 1991); WASH REV. CODE ANN. §§ 28A.85.010, 28B.100 (West 1989 & Supp. 1991) (discussing gender equity in higher education); FLA. STAT. ANN. § 228.2001 (West 1989).

45. 441 U.S. 677 (1979).

46. *Id.* at 716.

47. *Id.* at 680. Cannon filed two complaints: Cannon brought one suit against the University of Chicago and the other suit against Northwestern University. *Id.* at 680 n.1. Cannon also filed suit against the Secretary and Region Director of the OCR. *Id.* Cannon contended that she was qualified to attend both universities based on her grade point average, test scores and fulfillment of other entrance requirements. *Id.* at 680 n.2. Both universities' admission policies re-

nois dismissed the complaint because Title IX did not expressly authorize a private right of action.[48] The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision, concluding that Title IX did not include an express or implied private remedy.[49]

The Supreme Court in *Cannon* re-evaluated the lower courts' findings in light of the four-part statutory interpretation test devised in *Cort v. Ash*.[50] In recognizing a private right of action, the Court stated that the first part of the *Cort* test was satisfied because the petitioner was a member of the class of plaintiffs that Title IX was designed to protect.[51] The Court also concluded that the second part of the *Cort* test was satisfied because the legislative history

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fused to admit an applicant over the age of thirty, especially if the applicant lacked an advanced degree. *Id.* Cannon claimed that such policies were discriminatory against women because women were more likely to be older applicants because their education was more likely to be interrupted than men's education. *Id.* Furthermore, Cannon claimed that any age or advanced degree requirement violated Title IX. *Id.*

48. Cannon v. University of Chicago, 406 F. Supp. 1257, 1259 (N.D. Ill.), *aff'd*, 559 F.2d 1063 (7th Cir. 1976), *rev'd*, 441 U.S. 677 (1979). The district court concluded that no private right of action under Title IX should be inferred. *Id.*

49. *Cannon*, 441 U.S. at 683. The United States Court of Appeals for the Seventh Circuit concluded that Congress intended the termination of federal funding to be the exclusive means of enforcement. Cannon v. University of Chicago, 559 F.2d 1063, 1072-73 (7th Cir. 1976), *rev'd*, 441 U.S. 677 (1979). After the court of appeals decision, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, which authorized an award of attorney's fees to private parties in Title IX cases. *Id.* at 1078. Subsequently, the court of appeals granted petition for rehearing to consider whether the 1976 Act intended to create a private right of action. The court of appeals concluded that the 1976 Act did not intend to create such a right and its own original interpretation was correct. *Id.* at 1079-80.

50. *Cannon*, 441 U.S. at 683. In *Cannon*, the Court confronted the issue of whether a private cause of action could be implied under 18 U.S.C. § 1331. Cort v. Ash, 422 U.S. 66 (1975). Holding that no private right of action could be inferred, the *Cort* Court established a four-part test to determine whether Congress intended to create a remedy pursuant to a federal statute. *Id.* at 78. The four factors established in *Cort* were: (1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member; (2) whether there is any indication of legislative intent to create a private remedy; (3) whether implication of such a remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the states. *Id.*

51. *Cannon*, 441 U.S. at 694. The Court noted that it would have been hesitant to recognize a private right of action if Congress had written Title IX as simply a ban on discriminatory conduct or as a prohibition against the disbursement of public funds to institutions practicing gender discrimination. *Id.* at 691-92. However, because Title IX was drafted "with an unmistakable focus on a benefitted class," the Court found "reason to infer a private remedy in favor of an individual person." *Id.* at 691.

The Court further demonstrated this point by discussing the alternative forms of Title IX. The Court offered Senator McGovern's proposal as an example of a simple directive. The proposal provided, in pertinent part:

of Title IX indicated that Congress intended to create a private cause of action.[52]

The Court also found that both the third and fourth parts of the *Cort* test were satisfied. The third part was satisfied because a private right of action under Title IX would facilitate the underlying purpose of the statute by protecting a litigant against gender discrimination.[53] Lastly, the Court determined that because Title IX dealt with federal funding, the statute did not concern an area of law reserved for the states.[54] Therefore, the Court concluded that the fourth part of the *Cort* test was satisfied and that it was appropriate to infer a private right of action.[55]

2. *Direct Federal Funding*

The effectiveness of Title IX in eradicating gender discrimination was also limited because most athletic programs did not receive

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> The Secretary shall not make any grant, loan guarantee, or interest subsidy payment, nor shall the Secretary enter into any contract with any institution of higher education, or any other postsecondary institution, center, training center, or agencies representing such institutions unless the application, contract, or other arrangement for the grant, loan guarantee, interest subsidy payment, or other financial assistance contains assurances satisfactory to the Secretary that any such institution, center or agency will not discriminate on the basis of sex in the admission of individuals to any program to which the application, contract, or other arrangement is applicable.

Id. at 693 n.14 (citing 117 CONG. REC. 30,411 (1971)).

52. *Id.* at 694-703. The *Cannon* Court concluded that Congress intended to create a private right. First, the Court pointed to statements made by members of Congress which indicated that they assumed that private suits were authorized and necessary to the enforcement of Title IX. *Id.* at 686 n.7. Specifically, the Court quoted Senator Kennedy's statements made on the Senate floor: "As basic provisions of the civil rights enforcement scheme that Congress has created, it is essential that private enforcement be made possible by authorizing attorneys' fees in this essential area of law." *Id.* at 686-87 & n.7. Further, the Court reasoned that Congress intended that Title IX provide for a private right of action because Title IX was patterned after Title VI and Title VI was interpreted at the time of the enactment of Title IX to provide a private remedy. *Id.* at 695-96.

53. *Id.* at 707-08. The Court further reasoned that "it ma[de] little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, or on HEW, the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate." *Id.* at 705.

54. *Id.* at 709.

55. *Id.* The Court concluded that it had a right to determine whether Title IX had included implied remedy because "[s]ince the Civil War, the Federal Government and the federal courts have been the 'primary and powerful reliances' in protecting citizens against such discrimination." *Id.* at 708 (citing Steffel v. Thompson, 415 U.S. 452, 464 (1974)).

direct federal funding. In *Grove City College v. Bell*,[56] the Supreme Court held that Title IX was applicable only to specific programs or activities that directly received federal funding.[57]

Grove City College is a private, coeducational, liberal arts college, which received no direct federal funding at the time of this decision.[58] However, the College enrolled students who received direct federal Basic Educational Opportunity Grants (BEOG's) and Guaranteed Student Loans (GSL's).[59] As a result, the Department of Education concluded that the College was a recipient of "federal funding" and was required to file an Assurance of Compliance with Title IX.[60] The College refused to file the Assurance of Compliance and the Department of Education sought to terminate financial aid.[61]

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56. 465 U.S. 555 (1984). Prior to the Supreme Court's decision in *Grove*, two conflicting views existed as to whether athletic programs received the federal funding necessary to implicate Title IX. The first view was that Title IX was "program-specific." The second view considered Title IX to be "institution-wide." Johnson, *supra* note 18, at 560. Proponents of the "program-specific" view contended that application of the statute was limited to specific programs or activities that *directly* received federal funding. *Id.* at 561. To substantiate this approach, advocates of the "program-specific" view emphasized that the original version of Title IX had been discarded. Kevin A. Nelson, Note,. *Title IX: Women's Collegiate Athletics in Limbo*, 40 WASH. & LEE L. REV. 297, 300 (1983). The original version of Title IX was applicable when *any* program or activity received any federal funding. *Id.* Further, advocates of the "program-specific" view argued that Congress explicitly provided "institution-wide" coverage in other parts of Title IX, and, therefore, if Congress had so intended, it would have indicated such coverage. Johnson, *supra* note 18, at 562.

Advocates of the "institution-wide" approach argued that amendments restricting Title IX's application to programs *directly* receiving funds had not passed. Nelson, *supra* at 301 n.31. Advocates also noted that the regulations adopted an "institution-wide" approach. Johnson, *supra* note 18, at 562. They also noted that Title IX's regulations define a recipient of federal funds as "any public or private . . . institution . . . ." *Id.*; *see also* 34 C.F.R. § 106.2(h) (1994). Lastly, advocates believed that the remedial nature of the statute demanded the broadest interpretation in order to achieve its goals. Claudia S. Lewis, Note, *Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language With Its Broad Remedial Purpose*, 51 FORDHAM L. REV. 1043, 1059 (1983).

57. *Grove*, 465 U.S. at 574.

58. *Id.* at 559.

59. *Id.* BEOG's are a type of government student loan. *Id.*

60. *Id.* at 560. An Assurance of Compliance is a HEW form drafted by a university guaranteeing compliance with the requirements of Title IX. Grove City College v. Harris, 500 F. Supp. 253, 255 (W.D. Pa. 1980), *rev'd in part sub nom.* Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), *aff'd*, 465 U.S. 555 (1984).

61. *Grove*, 500 F. Supp. at 265. HEW sought to terminate the federal funding received by the students of the College. *Id.* at 255. HEW initiated a compliance proceeding, and an administrative hearing was held. *Id.* The Administrative Law Judge concluded that the federal funding received by students of the College obligated the College to execute and file an Assurance of Compliance. *Id.* at 255-56. Further, the judge entered an order terminating federal assistance until the College was in compliance with Title IX. *Id.* at 256.

The College and four of its students filed suit in the United States District Court for the Western District of Pennsylvania.[62] The district court held that the BEOG's constituted federal funding but that the Department could not terminate the students' financial aid.[63] On appeal, the United States Court of Appeals for the Third Circuit agreed with the district court that BEOG's constituted federal funding.[64] However, the Third Circuit reversed the district court's decision, holding that the Department could terminate the students' financial aid to force the College to execute an Assurance of Compliance.[65]

The Supreme Court agreed with the lower courts that the receipt of BEOG's constituted federal funding, and, therefore, the College was required to comply with Title IX.[66] However, the Court stated that indirect funding such as BEOG's did not constitute federal funding to the entire College.[67] Therefore, the Court concluded, Title IX was only applicable to the financial aid program

62. *Id.*

63. *Id.* at 273. The district court set forth several reasons for its conclusions. First, the district court concluded that HEW had no power to terminate the College's GSL program as a means of enforcing Title IX. *Id.* at 268. The court found the GSL program to be a contract of guarantee and to come within the § 902 exemption of Title IX. Therefore, Title IX enforcement was unavailable under § 901. *Id.* Second, the court concluded that HEW could not require the College to sign an Assurance of Compliance because Subpart E of the HEW's regulations, which prohibit discrimination in employment, was held invalid. *Id.* at 269. Third, the court stated that HEW could base termination of funds on the failure to sign an Assurance of Compliance. *Id.* at 209. The court determined that a termination of funds under Title IX was authorized only by a finding of sexual discrimination. *Id.* at 270. Finally, the court held that HEW was barred from terminating BEOG's by the due process clause of the Fifth Amendment without first affording hearings to those students who would be adversely affected. *Id.* at 269.

64. Grove City College v. Bell, 687 F.2d 684, 705 (3d Cir. 1982), *aff'd*, 465 U.S. 555 (1984).

65. *Id.* The court of appeals reversed the district court on several grounds. First, the court determined that the district court's finding that Subpart E was invalid was incorrect. *Id.* at 702. The court of appeals noted that since the district court's decision, the Supreme Court in North Haven Board of Education v. Bell, 456 U.S. 512 (1982), held that Title IX does reach discrimination in educational employment. *Grove*, 687 F.2d at 702. Second, the court found that HEW needed to show that the college had actually engaged in gender discrimination in order to terminate federal funding. *Id.* at 703 (citing United States v. El Camino Community College Dist., 600 F.2d 1258 (9th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); Gardner v. State of Ala., 385 F.2d 804 (5th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968)). Lastly, the court of appeals rejected the argument that a due process hearing was required for students whose federal financial aid was terminated. *Id.* at 704 (citing O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773 (1980)).

66. Grove City College v. Bell, 465 U.S. 555, 575-76 (1984).

67. *Id.* at 573. The Court found that the purpose and effect of the BEOG's was to provide funding to individual students and the financial aid department, not to attribute funding to the institution as a whole. *Id.* at 574.

and not to the institution as a whole.[68] The Court further held that the College's refusal to execute the Assurance of Compliance warranted termination of federal funds to the financial aid program.[69]

The *Grove* decision effectively removed nearly every collegiate athletic program from Title IX's reach because few athletic programs received direct federal funding.[70] Dissatisfied with that result, Congress overturned the Supreme Court's decision in *Grove* by enacting the Civil Rights Restoration Act of 1987 (Restoration Act).[71] The Restoration Act adopted the "institution-wide approach," requiring an institution as a whole to comply with Title IX if any of its programs or activities received federal funding.[72]

3. *Monetary Damages*

The Supreme Court removed the final barrier to Title IX's ineffectiveness in *Franklin v. Gwinnett County Public Schools.*[73] Prior to the Court's decision in *Franklin*, the circuit courts were split on the issue of whether monetary damages were available to plaintiffs.[74]

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68. *Id.*

69. *Id.* In his dissent, Justice Brennan noted the inconsistency of the Court's decision by stating that "[a]ccording to the Court, the 'financial aid department' at Grove City College may not discriminate on the basis of sex because it is covered by Title IX, but the college is not prohibited from discriminating in its admissions, its athletic programs or even its various academic departments." *Id.* at 601 (Brennan, J., dissenting). For a further discussion of the effect of the "specific-program" approach to civil rights laws, see Karen Czapanskiy, *Grove City College v. Bell: Touch Down or Touchback?*, 43 MD. L. REV. 379 (1984).

70. In response to *Grove*, OCR limited its investigations of gender discrimination in athletics programs. P. Michael Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 MARQ. SPORTS L.J. 149, 159-60 (1990).

71. 20 U.S.C. § 1687 (1988).

72. Congress amended Title IX by replacing the words "program" or "activity" with "recipient." *See* Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982) (per curiam) (adopting "institution-wide" approach).

73. 112 S. Ct. 1028 (1992).

74. Both Title IX and its regulations are silent on the issue of monetary damages. However, there is support for allowing such damages. One theory supporting the allowance of monetary damages in a Title IX action is that Title IX was modeled after Title VI, and Title VI allows for monetary damages. Heckman, *supra* note 44, at 21-22. Prior to the Supreme Court's decision in *Franklin*, some courts allowed monetary damages if the plaintiff proved intentional discrimination. *See* Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 788 (3d Cir. 1990) (holding monetary damages available for certain violations of Title IX; however, remanded to district court where case was dismissed without compensatory damages being awarded); Lipsett v. University of P.R., 864 F.2d 881, 884 n.3 (1st Cir. 1988); Beehler v. Jeffes, 664 F. Supp. 931 (M.D. Pa. 1986); Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982). *Contra* Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617 (11th Cir. 1990), *rev'd*, 112 S. Ct. 1028 (1992).

However, in *Franklin*, the Court unanimously held that monetary damages are available in a Title IX action.[75]

In *Franklin*, a female high school student alleged that a male high school teacher sexually harassed her.[76] The student filed an action for monetary damages under Title IX.[77] The United States District Court for the Northern District of Georgia dismissed the complaint because it found that Title IX did not expressly nor implicitly authorize an award of monetary damages.[78] The United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision.[79]

The Supreme Court reversed the lower courts. Relying on its decisions in *Bell v. Hood*[80] and *Davis v. Passam*,[81] the Court stated

75. *Franklin*, 112 S. Ct. at 1038.

76. *Id.* at 1029.

77. *Id.* at 1031. *Franklin* did not involve discrimination in college athletics. Rather, Franklin involved allegations of intentional discrimination. Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617, 618 (11th Cir. 1990), *aff'd*, 112 S. Ct. 1028 (1992). Franklin alleged that although the administration was aware of and investigated the teacher's sexual harassment, they took no action to halt it and discouraged Franklin from pressing charges. *Id.* at 618-19. Before filing suit, Franklin filed a complaint with the OCR. *Franklin*, 112 S. Ct. at 1031 n.3. OCR investigated the charges and concluded that the school district violated Franklin's rights by subjecting her to physical and verbal sexual harassment and interfered with her right to file a complaint pursuant to Title IX. *Id.* However, OCR determined that because both the principal and the teacher had resigned and the school had implemented a grievance procedure, the school was in compliance with Title IX. *Id.*

78. *Franklin*, 112 S. Ct. at 1031-32.

79. *Franklin*, 911 F.2d at 618. The court of appeals affirmed the district court's holding for several reasons. First, the court of appeals found that the question of whether a court could award monetary damages was unresolved. *Id.* at 621 (relying on Supreme Court's holding in Guardian Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582 (1983)). Second, the court of appeals concluded that because Title IX was enacted under Congress' Spending Clause power, relief should be limited to what was equitable. *Id.* at 621. Third, the court of appeals concluded that, absent an express provision by Congress or a clear directive from the Supreme Court, the court could not award monetary relief. *Id.* at 622.

80. 327 U.S. 678 (1946). The issue confronting the Court in *Bell* was whether a federal court could grant monetary damages to a plaintiff as a result of federal officers violating plaintiff's Fourth and Fifth Amendment rights. *Id.* at 679. Bell brought suit against the FBI to recover damages in excess of $3,000 that he alleged were sustained as a result of Fourth and Fifth Amendments violations. *Id.* The Court held that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal court may make use of any available remedy to make good the wrong done." *Id.* at 684.

81. 442 U.S. 228 (1979). In *Davis*, the Court determined whether a private right of action was implied from the Due Process Clause of the Fifth Amendment. *Id.* at 231. Shirley Davis was hired as a deputy administrative assistant for Senator Passerman. *Id.* at 230. Senator Passerman subsequently terminated Davis' employment because he believed his understudy should be a man. *Id.* Davis brought suit against the senator alleging that Passerman's conduct constituted sexual discrimination in violation of her Fifth Amendment Due Process right. *Id.* at 231. The

that, absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in an action brought pursuant to a federal statute.[82] The Court reasoned that because both Congress and Title IX were silent on the issue of monetary damages, monetary damages could be awarded if such damages were appropriate under Title IX.[83]

The Court examined whether monetary damages were appropriate relief under Title IX by analyzing the legislative history and intent behind the statute.[84] The Court found that Congress made no effort to restrict the right of action recognized in *Cannon*, nor did Congress make any attempt to limit the remedies available under Title IX.[85] Thereby, the Court concluded that monetary damages were available in a Title IX action.[86]

IV. TITLE IX LITIGATION

The broadened scope and enforcement remedies of Title IX have opened the door for female athletes and have offered them an equal opportunity to participate in intercollegiate sports. Recently, both male and female athletes have challenged university decisions to eliminate or demote varsity teams. These athletes claim that the university has violated Title IX by denying them an equal opportunity to participate.[87] The next section analyzes recent litigation addressing this issue.

Court held that monetary damages could be pursued absent a clear congressional declaration prohibiting such recovery against federal employees. *Id.* at 246-47.

82. *Franklin*, 112 S. Ct. at 1033-34. The court stated that "[f]rom the earliest years of the Republic, the Court has recognized the power of the judiciary to award appropriate remedies to redress injuries actionable in federal court. . . ." *Id.* at 1033 (citing Marbury v. Madison, 1 Cranch 137 (1803)).

83. *Id.* at 1034.

84. *Id.* at 1035-36.

85. *Id.* The two amendments to Title IX enacted after *Cannon* that led the Court to conclude that Congress did not intend to limit the remedies available in a suit brought under Title IX were: (1) the Civil Rights Remedies Equalization Amendment of 1986, codified at 42 U.S.C. § 2000d-7 (1993), and (2) the Civil Rights Restoration Act, codified at 20 U.S.C. § 1687 (1988).

86. *Franklin*, 112 S. Ct. at 1034. *See* John Tortora, Note, *Compensatory Damages Are in Intentional Sexual Discrimination Cases (Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028 (1992))*, 3 SETON HALL J. SPORT L. 197 (1993) (discussing inappropriateness of monetary damages).

87. *See* Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17 (2d Cir. 1993) (female athletes sought to promote ice hockey team from club to full varsity status).

A. *Cohen v. Brown University*[88]

In *Cohen*, the United States Court of Appeals for the First Circuit established that "equal opportunity to participate lies at the

88. Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993). In 1994, the parties entered into a partial settlement agreement. *See* Settlement Agreement and Stipulation of Dismissal in Regard to Equality of Treatment at 1, Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992) (No. 92-0197-P) [hereinafter Settlement Agreement].

The Settlement Agreement specifically stated that it was not designed to resolve or affect any claims concerning whether Brown was effectively accommodating the interests and abilities of the members of the plaintiff class in accordance with Title IX. Settlement Agreement, *supra*, at 1. The general principle of the Settlement Agreement was to ensure continuing comparability of the women's and men's varsity programs on a department-wide basis. *Id.*

Specifically, the Settlement Agreement addressed the following areas:

(1) *Funding*

The parties agreed that sufficient resources will continue to be provided to all varsity teams to allow each team to continue to compete and that the University maintains the discretion in distribution as long as it does not disproportionately affect one gender in favor of the other. *Id.* Comparability is to be determined by the nature of the programs rather than the cost based on either a team-by-team basis or an overall gender basis. *Id.* at 5.

(2) *Locker Rooms, Practice and Competitive Facilities*

The parties agreed that locker rooms will be allocated equitably on a program-wide basis among men and women student athletes. *Id.* at 6. They also agreed that Brown would continue to ensure that practice and associated facilities and/or competitive areas be maintained to the same extent for teams of both genders on a program-wide basis. *Id.* at 6.

(3) *The Scheduling of Games and Practice Times*

Brown University agreed to continue its current scheduling practices. *Id.* at 8.

(4) *Weight Room*

Brown University agreed to provide access to its intercollegiate weight room to all student athletes on a first come, first serve basis. *Id.* at 9.

(5) *Program-Wide Financial Support*

The parties agreed that Brown would provide equitable financial support on a program-wide basis for equipment and supplies, video recording and playback, training trips, post-season competition, travel and per diem and coaching allocation. *Id.* at 10-15.

(6) *Training Services and Facilities*

The parties agreed that Brown would continue to adhere to its current schedule allocating athletic trainers for home practices and home and away competitions. *Id.* at 15. The Settlement Agreement also provided that teams engaging in outdoor practices would have access to a communicating device to contact a trainer in the event of an emergency. *Id.* at 16.

(7) *Housing and Dining Services and Facilities*

The parties agreed that Brown must continue to provide men's and women's teams with comparable housing and dining services and facilities. *Id.*

(8) *Publicity and Promotion*

The parties agreed that Brown's Sports Information Director (SID) would provide substantially the same amount of attention to the men's and women's teams, and that as long as SID employs two individuals on a full time basis, one will be responsible for the women's program. *Id.* Each media and recruiting guide provided to teams will be provided in a similar format and comparable size. *Id.* at 17-19. Public address systems used to announce athletic competitions must be used on a comparable basis for men's and women's sports. *Id.* Additionally, the

core of Title IX's purpose." Further, the court upheld the application of the three-prong Policy Interpretation test as the proper measure in determining whether the institution provided an equal opportunity.[89]

1. *Facts*

In the 1990-91 academic year, Brown University funded a total of thirty-one varsity athletic teams, sixteen male and fifteen female.[90] These teams consisted of 894 undergraduates, 566 men (63.3%) and 328 women (36.7%).[91] These totals were significantly disproportionate to the percentages of men and women enrolled as undergraduates which were 52.4% (2,951) and 47.6% (2,683).[92] In May 1991, Brown University demoted four of the thirty-one varsity teams to club status in order to comply with a university-wide directive aimed at decreasing its budget.[93] The demotion eliminated funding for men's golf, men's water polo, women's gymnastics and women's volleyball.[94] As a result, the number of athletes participat-

number of promotional events for home competitions must be substantially equivalent for men's teams and women's teams. *Id.*

(9) *Recruiting*

The parties agreed that Brown would base its recruiting budgets on a formula considering the needs of the teams and the competition, among institutions, for recruits. *Id.* at 19.

(10) *Admissions*

Brown University agreed to ensure that women and men student-athletes and potential student-athletes are given comparable consideration for admission. *Id.* at 20.

(11) *Reporting*

The parties agreed that Brown will make an annual report regarding its compliance with the Settlement Agreement for the academic year just completed to submit to Plaintiffs' counsel no later than June 1 of each year. *Id.*

89. Cohen v. Brown Univ., 991 F.2d 888, 897, 903 (1st Cir. 1993). *See also* Policy Interpretation, *supra* note 28, at 71,415-17. For a discussion of the Policy Interpretation, see *supra* notes 34-42 and accompanying text.

90. *Cohen*, 809 F. Supp. at 980. The following sports were offered to both men and women: basketball, crew, cross-country, ice hockey, lacrosse, soccer, squash, swimming, tennis, fall track and spring track. *Id.* Baseball, football, golf, water polo and wrestling were provided only to men, and field hockey, gymnastics, softball and volleyball were exclusively offered to women. *Id.*

91. *Id.* at 981.

92. *Id.* at 980.

93. *Id.* at 981.

94. *Id.* at 980. Brown University initially classified the four demoted teams as "club varsity." However, the teams were later categorized as "intercollegiate clubs." *Id.* An "intercollegiate club" is a team which is permitted to participate in intercollegiate competition as long as it raises its own funds. *Id.* at 981. Unfortunately, many schools with varsity programs are reluctant to compete against club teams. *Id.* at 993. Once Brown demoted its women's volleyball team from varsity to club status, some schools dropped them from their future game schedules. *Id.*

ing in varsity athletics was reduced from 894 to 836, which consisted of 529 men (63.4%) and 305 women (36.6%).[95]

In April 1992, members of the women's gymnastics and volleyball teams filed a class action suit against Brown.[96] Plaintiffs alleged that Brown's demotion of the women's gymnastics and volleyball teams to club status violated Title IX[97] and denied them an equal opportunity to participate in intercollegiate athletics.[98] The female athletes affected by the demotion sought a preliminary injunction ordering the reinstatement of the women's gymnastics and volleyball teams to full varsity status.[99] The female athletes also sought prohibition against any future elimination or reduction of the sta-

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School officials at Brown University acknowledged that the "intercollegiate club" level is clearly below the varsity level and stated that "athletes at the varsity level are more skilled and the level of competition is generally more intense." *Id.*

95. *Cohen*, 809 F. Supp. at 992-93. The decision to cut these programs was made in response to a university-wide directive to cut 5-8% from the budget over several years. *Id.* at 981. Brown expected to realize a total savings of $77,800 per year. *Id.* The savings were apportioned as follows: (a) women's volleyball- $37,127; (b) women's gymnastics- $24,901; (c) men's water polo- $9,250; and (d) men's golf- $6,545. *Id.*

96. *Id.* at 979. Suit was filed on behalf of plaintiffs and "all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown." *Id.* The importance of plaintiffs' use of this language was exhibited in the Second Circuit's holding in Cook v. Colgate Univ., 992 F.2d 17 (2d Cir. 1993). In *Cook*, the Second Circuit vacated an order requiring Colgate to promote women's ice hockey from club to varsity status because the plaintiffs' graduation rendered the matter moot. *Id.* at 19. In *Cook*, the United States District Court for the Northern District of New York held that Colgate's refusal to promote women's ice hockey to varsity status violated Title IX. Cook v. Colgate Univ., 802 F. Supp. 737, 751 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17 (2d Cir. 1993). The district court rejected Colgate's defenses that: (1) Title IX and 34 C.F.R. § 106.41 prohibit discrimination in an athletic program as a whole, maintaining that the decision to retain women's ice hockey as a club sport does not implicate the entire program; and (2) that it would be improper to compare a women's club team with a men's varsity team. *Id.* at 742. A major factor relied upon by the district court was the spending disparity in the athletic budget. *Id.* The court referred to Colgate's first argument as "ironic" due to the fact that in the 1990-91 school year, the school spent $654,909 on men's sports and $218,970 on women's athletics. *Id.* These facts showed that in addition to failing to accommodate female interest, the university had not provided financial equality across the entire athletic program. *Id.* The district held that a comparison between varsity and club status was proper and ordered Colgate to promote the women's club hockey team to varsity status. *Id.* at 751.

97. 20 U.S.C. § 1681 (1988).

98. *Cohen*, 809 F. Supp. at 980. Plaintiffs alleged that Brown's demotion of the varsity volleyball and gymnastics teams exacerbated the university's discriminatory treatment of women, making these athletes "second class status." *Id.* Plaintiffs further asserted that the demotion exemplified Brown's continuing failure to provide women with equivalent "opportunities" to participate in intercollegiate athletics in violation of Title IX's prohibition of gender-based discrimination. *Id.*

99. *Id.*

tus of women's athletic teams funded by the university.[100] The prohibition was to last until the percentage of athletic opportunities for women was nearly equivalent to the percentage of women undergraduates.[101] The United States District Court for the District of Rhode Island concluded that Brown violated Title IX by failing to provide women athletes with an equal opportunity to participate in intercollegiate athletics.[102] The court issued a preliminary injunction requiring Brown to restore the women's gymnastics and volleyball teams to their former varsity status.[103]

2. *Analysis*

In applying the Policy Interpretation test, the district court found that Brown failed to satisfy any of the three prongs: (1) substantial proportionality; (2) continuing practice of program expansion; and (3) full and effective accommodation.[104] Brown failed the first prong of the test because a 11.6% disparity existed between the percentage of women enrolled and the number of participating woman athletes at the university.[105] Despite their "impressive growth" in the 1970's, Brown also failed the second prong by not providing a continuing practice of program expansion for women's athletics.[106] The district court also determined that Brown had

100. *Id.*

101. *Id.*

102. *Id.* at 999. Because women athletes at Brown were not receiving the same opportunities as male athletes, the court concluded that Brown was not effectively accommodating the interests and abilities of the women athletes on the gymnastics or volleyball teams. *Id.*

103. *Cohen*, 809 F. Supp. at 980. In reaching its decision, the district court considered the Title IX statute, regulations, *Policy Interpretation*, and INVESTIGATOR'S MANUAL. The district court used the *Policy Interpretation* and INVESTIGATOR'S MANUAL to evaluate what constitutes equal opportunity within the scope of Title IX and to establish the specific criteria for evaluating athletic programs as a whole. *Id.* at 988-89. The district court stated that compliance with 34 C.F.R. § 106.41(c) was a two part process. *Id.* See *supra* notes 24-26, 30-33 and accompanying text for a discussion of the two part process required. First, the university must comply with the three-prong test outlined by the Policy Interpretation. Second, it must satisfy the requirements of 34 C.F.R. § 106.41(c) concerning competitive opportunities. *Id.* at 998-1000. For a discussion of competitive opportunities, see *supra* notes 24-42 and accompanying text.

104. *Cohen*, 809 F. Supp. at 981.

105. *Id.* The court found that the demotion of the four teams left 529 men (63.4%) and 305 women (36.6%) participating in varsity sports, while during the same year 2917 men (51.8%) and 2716 women (48.2%) were enrolled as undergraduates. *Id.*

106. *Id.* Since the late 1970's, Brown's undergraduate enrollment has consisted of approximately 51-52% men and 48-49% women. *Id.* During this same period, the percentage of intercollegiate athletes has remained fairly constant at 61% men and 39% women. *Id.* The only women's team added since 1977 was

failed to comply with the third prong of the test by not fully and effectively accommodating the interests and abilities of Brown's female athletes.[107]

The district court did not require Brown to increase the number of women's teams to comply with Title IX.[108] Instead, the court stated that Brown could down-scale its varsity program or extinguish it entirely.[109] However, the district court determined that if Brown insisted on retaining its varsity programs, it would have to increase the number of women varsity athletes or demonstrate that an insufficient number of women were interested or qualified to compete at the varsity level.[110] The district court, in asserting this proviso, implied that Brown was unable to make this showing because two female teams were waiting for an opportunity to engage in varsity competition.[111]

3. *Decision of the Court of Appeals*

On appeal, Brown challenged the district court's interpretation of the third prong of the Policy Interpretation test.[112] Brown

winter track in 1982. *Id.* The district court rejected Brown's assertion that equating "expansion" with increased numerical participation was overly restrictive and that expansion should be linked to creating a better quality program. *Id.*

107. *Id.* The court stated that keeping the women's gymnastics and volleyball teams at an "intercollegiate club" level was not sufficient to satisfy the third part of the Policy Interpretation test. *Id.* at 991-92. The United States Court of Appeals for the First Circuit expressed a similar view stating that "the institution can satisfy the third benchmark by ensuring participatory opportunities at the intercollegiate level when, and to the extent that, there is 'sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.' " Cohen v. Brown Univ., 991 F.2d 888, 898 (1st Cir. 1993) (citing *Policy Interpretation, supra* note 28).

108. *Cohen*, 809 F. Supp. at 999. The district court was explicit in the exact nature of the relief it was granting, stating that "Brown has wide latitude in structuring its intercollegiate athletic program. . . . [It may] drastically reduce the number of intercollegiate teams it sponsors . . . or it may decide to eliminate the varsity program altogether." *Id.*

109. *Id.* at 993. The district court noted that "the Investigator's Manual states that 'Title IX does not require institutions to offer athletics programs nor, if any athletics program is offered, is there any requirement that the program be particularly good . . . .' " *Id.* (quoting INVESTIGATORS MANUAL, *supra* note 29, at 10).

110. *Id.*

111. *Id.* The court stated that it was only "marginally significant" that Brown demoted two men's teams along with the two women's teams because males still occupied a greater percentage of varsity slots than women with respect to their undergraduate enrollments. *Id.*

112. Cohen v. Brown Univ., 991 F.2d 888, 899 (1st Cir. 1993). Brown argued that the Policy Interpretation "countervails the enabling legislation [suggesting that] to the extent students' interests in athletics are disproportionate by gender, colleges should be allowed to meet those interests incompletely as long as the school's response is in direct proportion to the comparative levels of interest." *Id.*

argued that female athletes are fully accommodated if a university provides opportunities in proportion to the ratio of interested and able women to that of interested and able men.[113] Under Brown's formulation, if 500 men and 250 women were interested and were able to participate, the institution would only need to maintain a 2:1 ratio of student-athletes, irrespective of the male-female percentage of the undergraduate student body.[114]

The United States Court of Appeals for the First Circuit affirmed the district court and rejected Brown's approach.[115] The First Circuit held that "[t]he fact that the over-represented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender."[116] Thus, the court required Brown to provide each member of the underrepresented gender with the opportunity to participate in varsity athletics in order to satisfy proportionality.[117]

B. *Favia v. Indiana University of Pennsylvania*[118]

In *Favia*, the United States Court of Appeals for the Third Circuit affirmed the district court's holding that Indiana University of Pennsylvania's (IUP) termination of women's athletic programs violated Title IX.[119] The Third Circuit held that when a university is faced with making program cuts, it will not be allowed to terminate any women's sports when it has failed to comply with Title IX.[120]

1. *Facts*

During the 1990-91 academic year, IUP enrolled 10,793 undergraduate students, 4,790 men (44.3%) and 6,003 women (55.6%).[121] IUP supported eighteen varsity teams with a total of 503 athletes, 313 men (62.2%) and 190 women (37.7%).[122] In

113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* Under Title IX, as defined by the Policy Interpretation's three-prong test, the underrepresented sex must be accommodated in and of itself and without comparison with the represented sex. *Policy Interpretation*, *supra* note 28, at 71,418. The First Circuit found Brown's reading of Title IX flawed due to the extreme level of self-compliance required by Brown to assess the interest level of each sex and serve the interests of each sex. *Cohen*, 991 F.2d at 899-900.
117. *Cohen*, 991 F.2d at 899. The First Circuit remanded the case to the district court for trial.
118. 812 F. Supp. 578 (W.D. Pa. 1992), *aff'd*, 7 F.3d 332 (3d Cir. 1993).
119. Favia v. Indiana Univ. of Pa., 7 F.3d 332, 343 (3d Cir. 1993).
120. *Id.* at 335.
121. *Favia*, 812 F. Supp. at 580.
122. *Id.*

August 1991, IUP, faced with substantial cuts in both state and federal aid, was forced to make university-wide budget cuts.[123] Consequently, IUP eliminated women's varsity gymnastics and field hockey teams and men's varsity soccer and tennis teams for the 1992-93 season.[124] After these cutbacks, IUP's varsity athletics program consisted of 397 athletes, 248 men (63.49%) and 149 women (36.51%).[125] IUP also decreased athletic scholarship awards.[126] In 1990-91, IUP awarded $314,178 in athletic scholarships with female athletes receiving, in aggregate, $67,423 (21%).[127]

In October of 1992, members of the women's gymnastics and field hockey teams brought a class action suit against IUP in the United States District Court for the Western District of Pennsylvania.[128] Plaintiffs alleged that IUP systematically discriminated against female athletes in its intercollegiate athletic program in violation of Title IX.[129] Plaintiffs sought a preliminary injunction ordering IUP to reinstate the women's teams and prohibit further elimination of other women's teams.[130] The district court granted the injunction.[131]

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123. *Id.* In 1991, IUP, like Brown University, was faced with severe financial problems. In response to the financial situation, the Department of Athletics was forced to reduce its budget by $350,000. *Id.*

124. *Id.* IUP has three categories of athletic teams: (1) intercollegiate varsity teams, which belong to the NCAA and bring the most money and prestige to the university; (2) club teams, which are informal, basically student-run organizations; and (3) intramural teams, which are open to all students. *Id.* The university provides its varsity teams with full and part-time coaches, designated schedules, rules and regulations, access to ice, water, storage and locker space, professional and athletic trainers and a traveling budget for away games. *Id.* IUP does not provide the same assistance to club teams and intramural teams. *Id.* At the time of the 1991 cutback, IUP had roughly eighteen varsity sports, eighteen club sports and forty-four intramural sports. *Id.* Half of the eighteen varsity sports were female. *Id.*

125. *Id.* Plaintiffs also submitted evidence which established program-wide inequality favoring men's athletics. *Id.* Plaintiffs demonstrated that men's football and basketball teams were given more scholarships than other sports; certain men's facilities were better maintained than the women's facilities; incentives were offered for students to attend men's games; and the university provided country club memberships and complimentary use of cars for coaches of male teams. *Id.* at 582.

126. *Favia*, 812 F. Supp. at 582.

127. *Id.* The school estimated its 1991 cutbacks saved $110,000 as a result of terminating the women's teams and only $35,000 from eliminating the men's teams. *Id.*

128. *Id.* at 578.

129. *Id.* at 579. The action against IUP was brought on behalf of the female students or potential students who participate, seek to participate or are deterred from participating in intercollegiate athletics sponsored by IUP. *Id.*

130. *Id.* at 585.

131. *Favia*, 812 F. Supp. at 585.

2. *Analysis*

a. District Court Decision

Based on the Policy Interpretation's three-pronged test, the district court determined that IUP did not comply with Title IX.[132] In applying the first prong of the test, the district court found that IUP failed to establish substantial proportionality between the percentage of women athletes and undergraduates.[133] The district court explained that the 1991 cuts resulted in a decrease in an already disproportionately low percentage of female athletes.[134] The district court also determined that by eliminating women's athletic teams, IUP failed the second prong because it was unable to demonstrate a continuing practice of "expanding athletic opportunities."[135] The district court noted that IUP had exhibited a history of program expansion for women's athletics.[136] However, IUP's record since the 1991 cuts did not demonstrate a continuance of this practice.[137] Therefore, the district court concluded that IUP could not satisfy the second prong of the test.[138]

Finally, the district court concluded that IUP failed the third prong of the test because it was unable to show that it had fully and effectively accommodated the interests and abilities of female athletes.[139] The district court found that the previous existence of women varsity teams indicated that the interests and abilities of many female athletes at IUP remained unaccommodated.[140] Finding that

132. *Id.* at 584. For a discussion of the *Policy Interpretation*, see *supra* notes 27-42 and accompanying text.

133. *Favia*, 812 F. Supp. at 584.

134. *Id.* at 584-85. Before the 1991 cuts, although only 37.7% of the university's intercollegiate athletes were women, 55.6% of the student body was women. *Id.* After the cuts, the percentage of women athletes decreased to 36.5%. *Id.* at 585.

135. *Id.* The second prong of the Policy Interpretation test requires a university to have a history and continuing practice of program expansion for members of an underrepresented sex that is responsive to the interest and abilities of the members of that sex. *Id.* (citing *Policy Interpretation*, *supra* note 28).

136. *Id.*

137. *Id.* The court found that "[since 1991] the level 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." *Id.*

138. *Favia*, 812 F. Supp. at 585.

139. *Id.* IUP continued to honor the scholarships of those women whose teams had been eliminated. *Id.* IUP offered to assist athletes in transferring to other schools and promised to upgrade the women's soccer team to varsity status. *Id.* However, these actions were insufficient to satisfy the third prong of the Policy Interpretation test. *Id.*

140. *Id.* The district court found that IUP failed to recognize the obvious desire of women athletes to compete in certain sports. *Id.*

IUP had failed each prong of the test, the district court granted plaintiffs' motion for a preliminary injunction and ordered reinstatement of the women's gymnastics and field hockey teams.[141]

Two months after the preliminary injunction was issued, IUP filed a motion to modify the preliminary injunction.[142] The university sought to modify the order by attempting to substitute a women's soccer team for a women's gymnastics team.[143] IUP argued that women's soccer would further the goals of Title IX by creating more participation opportunities for female athletes and that the substitution would save the athletic department money.[144] IUP further argued that the money saved by substituting women's soccer for gymnastics would be used to recruit more female athletes in other sports.[145] The district court denied IUP's motion, stating that if it were to permit the school to dissolve the gymnastics team it would, in effect, make "the original plaintiffs [who prevailed] in this case losers."[146] On appeal, the Third Circuit affirmed the district court's holding.[147]

b. Decision of the Court of Appeals

The United States Court of Appeals for the Third Circuit did not conduct an independent analysis of IUP's compliance with Title IX. Rather, the court considered whether the district court abused its discretion by denying IUP's motion to modify the prelim-

141. *Id.* In response to the Title IX violations, 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) to 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 1991-92 school year; and (3) to fund the two teams in an amount equal to that provided during the previous school year. *Id.* at 578.

142. Favia v. Indiana Univ. of Pa., 7 F.3d 332, 336 (3d Cir. 1993).

143. *Id.*

144. *Id.* IUP asserted that the modification would increase the percentage of females participating in athletics from the current 39% to 43% and that it would reduce the imbalance between male and female athletic opportunities to a greater extent than by adding field hockey and gymnastics. *Id.* Moreover, the modification would parallel a national trend toward female participation in soccer. *Id.* IUP also argued that this arrangement would save the athletic department money, due in part to the lesser equipment costs. *Id.* at 342 n.17.

145. *Id.* at 342.

146. *Id.* at 336-37 (quoting Appellants' Appendix at 167). The district court denied IUP's request for modification of the injunction because IUP had failed to show that the circumstances had changed "enough to make continued enforcement of the [preliminary] injunction inequitable." *Id.* at 335.

147. *Favia*, 7 F.3d at 335.

inary injunction.[148] The Third Circuit found that the proposed substitution would bring IUP closer to compliance and that the replacement of the gymnastics program with the soccer program would increase the percentage of female athletes.[149] However, the court observed that the substitution would decrease the overall percentage of athletic expenditures for women, thereby, moving IUP further from the goals of Title IX.[150] Therefore, the court held that the district court did not abuse its discretion.[151]

By not allowing IUP to rearrange its program in an attempt to comply with Title IX, the Third Circuit signaled that athletic programs will be analyzed based upon the Policy Interpretation's three-part test. Further, the court established that fulfillment of the Policy Interpretation's third prong will be extremely difficult if a university eliminates any women's team.[152] The next case reflects a similar approach.

C. *Roberts v. Colorado State University*[153]

In *Roberts*, the United States Court of Appeals for the Tenth Circuit upheld the district court's ruling that Colorado State University (CSU) failed to satisfy the Policy Interpretation's three-prong test.[154] In doing so, the Tenth Circuit reaffirmed the idea that equal opportunity to participate is the key to Title IX compliance.[155]

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148. *Id.* at 340.

149. *Id.* at 342. The Third Circuit found that modification of the injunction would increase the percentage of female athletes from 38.97% to 43.02%. *Id.*

150. *Id.* at 343. The statistics suggest that although women's participation in athletics would increase by substituting soccer for gymnastics, expenditures would be reduced from $150,000 (gymnastics) to $50,000 (soccer). *Id.*

151. *Id.* at 344. The Third Circuit added that nothing in the order would prevent IUP from adding the soccer team and keeping gymnastics in order to bring itself closer to Title IX compliance. *Id.* Further, the Third Circuit held that the non-competitive status of three members of the gymnastics team did not require a mandate of relief prior to the entry of a final injunction in order to arrive at equitibility. *Id.* at 344 n.23.

152. Johnson, *supra* note 18, at 582.

153. 814 F. Supp. 1507 (D. Colo.), *aff'd in part and rev'd in part sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993).

154. Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 830 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993).

155. *Id.* See *supra* notes 34-42 and accompanying text for a complete discussion of the Policy Interpretation three-part test.

1. *Facts*

During the 1991-92 academic year, CSU funded seventeen varsity teams for both male and female athletes, with women comprising 35.2% of the total athletes.[156] In the same year, women comprised 47.9% of the undergraduate student population.[157] In June 1992, CSU faced financial problems due to state cutbacks and eliminated the women's varsity softball and the men's varsity baseball programs.[158] After the elimination of the programs, women comprised 37.7% of the varsity athletes and 48.2% of the total undergraduate population.[159]

The members of the women's varsity softball team filed suit against CSU in the United States District Court for the District of Colorado.[160] Plaintiffs claimed that the university violated Title IX by denying them an equal opportunity to participate in intercollegiate athletics.[161] Plaintiffs sought the reinstatement of the varsity softball team and additional relief in the form of monetary damages.[162]

a. District Court Decision

The district court concluded that CSU's athletic program did not satisfy the first prong of the Policy Interpretation test.[163] CSU argued that the 10.6% disparity between the number of female athletes and the number of female undergraduates was substantially proportionate.[164] The district court ruled that the 10.6% disparity was not substantially proportionate.[165]

156. *Roberts*, 814 F. Supp. at 1512. From 1980 to 1993, the average disparity between enrollment and athletic participation rates for women was 14.1%. *Id.*

157. *Id.*

158. *Id.* at 1509. Women's softball and men's baseball provided participation opportunities for eighteen women and fifty-five men. *Id.* at 1514.

159. *Id.* at 1512. Prior to the 1992 cuts, the disparity between the percentage of women enrolled at CSU and the percentage of women participating in athletics at CSU was 12.7%. *Id.* Subsequent to the cuts, the disparity was 10.5%. *Id.*

160. *Id.*

161. *Roberts*, 814 F. Supp. at 1512.

162. *Id.* at 1509-10.

163. *Id.* at 1513. Plaintiffs submitted an affidavit (Plaintiffs' Exhibit 54) of Dr. Mary Gray, a professor of mathematics and statistics at American University, which stated that the difference between the proportion of the total women student population and the total women student athlete population at CSU is statistically significant and that the pattern had developed over the last ten years and not merely by chance. *Id.*

164. *Id.* CSU officials believed that 10.6% was an acceptable disparity. Although a set ratio has not been established, there have been general standards established. See *supra* note 38 and accompanying text.

165. *Roberts*, 814 F. Supp. at 1516. See *supra* note 38 and accompanying text.

The district court also concluded that CSU was unable to meet the second prong of the test because CSU did not have a continuing practice of program expansion.[166] Although CSU instituted several women's teams in the 1970's, it had not added any women's teams in twelve years.[167] In arriving at its decision, the district court further noted that CSU had failed to respond to a 1983 Title IX compliance review of CSU's athletic department by the OCR.[168] That investigation found that "benefits, opportunities, and treatment [were] not equivalent in the areas of equipment and supplies, locker rooms, coaching, recruitment, publicity, support services and the effective accommodation of student interests and abilities."[169] The district court found that the university had not taken appropriate remedial action.[170]

The district court also concluded that CSU failed to meet the requirements of the third prong by failing to accommodate effectively and fully the interests and abilities of its female athletes.[171] The district court determined there was enough interest and talent existing among women undergraduates to require CSU to fund women's softball.[172] Based on CSU's failure to comply with at least one prong of the three-prong test set forth in the Policy Interpretation, the district court ordered reinstatement of the softball team.[173]

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166. *Roberts*, 814 F. Supp. at 1516. This is based on the standard set by the second prong of the Policy Interpretation test and the courts' findings in both *Cohen* and *Favia*. See *supra* notes 40-41 and accompanying text for a discussion of Title IX compliance by expanding the underrepresented gender's athletic program.

167. *Roberts*, 814 F. Supp. at 1515.

168. *Id.* The district court recognized that CSU was put "on notice" that female athletes' participation rates were not substantially proportionate to female undergraduate enrollment. *Id.*

169. *Id.*

170. *Id.* This is violative of the third prong of the Policy Interpretation test requiring a showing that an institution's athletic program is fully and effectively accommodating the abilities and interests of the underrepresented sex.

171. *Id.* at 1517.

172. *Roberts*, 814 F. Supp. at 1517. Plaintiffs Jennifer Roberts and Aimee Rice Ainsworth testified persuasively at trial about their dedication to softball and the amount of time they had invested in training for their participation. *Id.* The women also noted that the team finished third in the Western Athletic Conference in 1992. *Id.*

173. *Id.* at 1518. The district court issued a permanent injunction requiring CSU to reinstate the women's intercollegiate softball program and to provide the women's softball team with all of the incidental benefits accorded other varsity teams at CSU. *Id.*

b. Decision of the Court of Appeals

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the injunction and upheld the district court's findings.[174] The Tenth Circuit recognized that in times of financial hardship, universities will face difficulty in continuing a practice of expansion.[175] However, the Tenth Circuit agreed with the district court's conclusion that the plain language of the statute requires a continuing practice of expansion.[176] The Tenth Circuit further noted that expansion cannot be attained by eliminating both women's and men's teams in order to increase the percentage of female athletic opportunities.[177]

The Tenth Circuit similarly rejected CSU's interpretation of the third prong of the Policy Interpretation test.[178] CSU argued that even if there was interest and ability among the female student body, the statute only requires that the university accommodate the women to the extent it accommodates the men.[179] Based on this argument, CSU stated that members of the women's softball team had no basis for relief because the university also eliminated the men's baseball team.[180] Relying on the reasoning in *Cohen*, the Tenth Circuit rejected this argument and stated that the statute requires full and effective accommodation of the underrepresented sex regardless of opportunities for the overrepresented sex.[181] The Tenth Circuit concluded that, based on the findings of fact by the district court, plaintiffs had met the burden of showing that CSU had not accommodated their interests and abilities fully and effectively.[182]

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174. Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 830 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993). The Tenth Circuit, however, reversed the district court's order requiring CSU to organize a fall season for the softball team. *Id.*

175. *Id.* The Tenth Circuit stated that the ordinary meaning of the word "expansion" may not be manipulated. *Id.* Compliance under the third prong of the Policy Interpretation test requires "improving the relative percentages of women participating in athletics by making cuts in both women's and men's sports programs." *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 831.

179. *Roberts*, 998 F.2d at 831.

180. *Id.*

181. *Id.*

182. *Id.* at 832. The Tenth Circuit agreed with the district court's finding that CSU had violated the third prong of the Policy Interpretation test. *Id.* The OCR agreed that a Title IX violation is likely in a situation similar to *Roberts*:

> OCR investigative experience indicates that where budget restrictions have led a recipient to eliminate sports previously offered, there is frequently a compliance problem with this program component. The ten-

As *Cohen, Favia* and *Roberts* demonstrate, compliance with Title IX does not require a university to create women's teams where there was no interest or expectation of competition.[183] However, if there is unaccommodated interests and abilities among female athletes, current judicial interpretation suggests that a university must provide these athletes with intercollegiate athletic opportunities.[184] This poses an interesting question for male athletes who have been stripped of their sports programs. As the next two cases point out, males have not been successful in asserting rights under Title IX.

D. *Kelley v. Board of Trustees of the University of Illinois*[185]

Although Title IX provides a federal cause of action for gender discrimination in intercollegiate athletics, male student-athletes traditionally have not alleged gender discrimination in violation of Title IX. However, male athletes have recently turned to Title IX causes of action in an attempt to safeguard male athletic programs from extinction.[186] The following is a discussion of the most recent litigation addressing this issue.

1. *Facts*

In 1992-93, the University of Illinois (Illinois) enrolled 25,846 undergraduate students.[187] Male students comprised 14,427 (56%) of the total undergraduate enrollment and female students comprised 11,419 (44%).[188] During 1992-93, 474 athletes, 363 men (76.6%) and 111 women (23.4%), participated in Illinois' varsity

> dency is for institutions to eliminate a sport previously offered to women who are already underrepresented in the institution's athletic programs. The result has been that women are now more disadvantaged by the elimination of a women's team despite sufficient interest and ability to sustain a viable team. In this situation, the institution may well be in violation of this program component. In effect, the participation rates of men and women are not proportionate to their enrollment rates such that women are underrepresented in the athletics program, and the institution is not meeting expressed interests and abilities of female students. Therefore, the institution is not equally effectively accommodating the athletic interests and abilities of male and female students.

Id. (quoting INVESTIGATOR'S MANUAL, *supra* note 29).

183. Johnson, *supra* note 18, at 588.

184. *Roberts*, 998 F.2d at 832.

185. 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 63 USLW 3488 (1995).

186. *Id.*; *see also* Gonyo v. Drake Univ., 837 F. Supp. 989 (S.D. Iowa 1993).

187. *Kelley*, 832 F. Supp. at 240. Illinois is a large state university with many branches across the state of Illinois. The affected athletes attended the University of Illinois at Urbana-Champaign. *Id.* Illinois is a member of the prestigious Big Ten Athletic Conference. *Id.*

188. *Id.* Total enrollment at Illinois has decreased since 1990-91. *Id.*

sports programs.[189] On May 7, 1993, primarily in response to budgetary constraints,[190] Illinois announced its intention to eliminate men's varsity swimming, men's varsity fencing, men's varsity diving and women's varsity diving[191] for the 1993-94 school year.[192] Although Illinois intended to disband the teams, Illinois continued to honor the scholarships awarded to those athletes affected by this decision.[193]

2. *Background*

In September 1993, members of the men's swimming team brought suit against Illinois in the United States District Court for the Central District of Illinois.[194] Plaintiffs sought a preliminary injunction ordering the reinstatement of the men's swimming

189. *Id.*

190. *Id.* The district court found that budgetary constraints were the primary, but not the sole, motivation for the reduction in the athletic program. *Id.* at 240. More than ten years earlier, OCR investigated Illinois and found it was not in compliance with Title IX. Kelley v. Board of Trustees, 35 F.3d 265, 269 (7th Cir. 1994), *cert. denied*, 63 USLW 3488 (1995). However, OCR refrained from further action based on Illinois' representations that it would comply with Title IX. *Id.* Clearly, the threat of an imminent OCR penalty did not spark Illinois to action. The district court mentioned that Illinois' athletic program faced a deficit of nearly $600,000. *Id.*

191. *Kelley*, 35 F.3d at 269. The teams were selected for termination after athletic department officials evaluated the teams' relative opportunities for success in the future. *Id.* 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.* Illinois apparently made no examination of the effect of termination on the affected athletes.

192. Kelley v. Board of Trustees, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 63 USLW 3488 (1995). The district court noted that during 1992-93, the total participation in athletics decreased, but men's participation increased and women's participation decreased. *Id.* Illinois, in reducing the athletic program, was attempting to comply with Title IX as well as with Big Ten Conference requirements. *Id.* The Big Ten Conference gender policy was implemented by the member schools to achieve a rate of participation of 60% men and 40% women in varsity athletics. *Id.* The district court noted that compliance with the Big Ten's requirements is necessarily subsidiary to compliance with Title IX. *Id.* at 241 n.5.

193. *Id.* at 240. Eleven scholarships were awarded to the men's swimming team which was comprised of 28 individuals. *Id.* at 239. The women's team received 14 scholarships for disbursement among 18 members. *Id.* By honoring the scholarships, Illinois avoided any potential breach of contract claims by the affected scholarship athletes.

194. *Id.* at 239. The male swimmers did not bring their action as a class action, ignoring the lesson taught in Cook v. Colgate, 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17 (2d Cir. 1993) (suit by female ice-hockey players to elevate team from club to varsity status was determined moot due to plaintiffs' graduation). Failing to bring the suit as a class action might subject the plaintiffs to an eventual dismissal for lack of standing.

team.[195] Plaintiffs alleged that Illinois discriminated against them in violation of Title IX because Illinois disbanded only the men's swimming team and not the women's swimming team.[196] Plaintiffs also alleged that Illinois violated the Equal Protection Clause of the Fourteenth Amendment by terminating programs using gender as the sole criterion.[197]

3. *Analysis*

a. District Court Decision

The district court granted summary judgment in favor of Illinois and its co-defendants.[198] In reaching its decision, the district court first noted that *Kelley* was a case of first impression nationally.[199] Although the district court recognized that Title IX itself might be interpreted differently on its face, the court stated that it must give deference to the prior case law and regulations behind Title IX.[200] Therefore, the district court held that Illinois' termination of the men's swimming team was in compliance with Title IX because: (1) Title IX permits the elimination of athletic programs as long as the underrepresented gender is not affected; (2) Title IX permits disbanding the men's swimming team while retaining the women's swimming team; and (3) the Equal Protection Clause of the Fourteenth Amendment permits terminating a men's team while preserving a women's team in order to remedy past discrimination against women.[201]

In deciding the Title IX claim, the district court focused on the third prong of the Policy Interpretation test,[202] in order to invalidate the plaintiffs' claims.[203] Plaintiffs argued that the elimination

195. *Kelley*, 832 F. Supp. at 239.

196. *Id.*

197. *Id.*

198. *Id.* at 244. Illinois' co-defendants were various athletic department officials. *Id.* The case was decided on a motion for summary judgment when the defendants' motion to dismiss was converted because the defendants included matters outside the pleadings. *See* FED. R. CIV. P. 12(b)(6).

199. *Kelley*, 832 F. Supp. at 240-41.

200. *Id.* at 242. The district court noted that on its face, Title IX might support the male plaintiffs' claim. *See id.* at 241. The district court noted that Title IX has evolved from a pure discrimination statute into a statute that provides "equal opportunity" for each gender in a flexible context. *Id.*

201. *Id.* at 241, 243.

202. *Id.* at 241. The third prong requires that "the underrepresented gender's interests and abilities [ ] be accommodated by 'expansion' of the athletic program." *Id.* (citing *Policy Interpretation, supra* note 28, at 71,418).

203. *Id.* The equal opportunity provision of Title IX states that "a recipient which operates or sponsors interscholastic or intercollegiate, club or intramural

of an athletic program directly contravened the third prong of the regulations which promotes expansion of an institution's athletic program in order to comply with Title IX.[204]

The district court relied on *Cohen* for the proposition that eliminating athletic teams to comply with Title IX is within the scope and spirit of Title IX.[205] The district court thus implicitly authorized Illinois to reduce opportunities for the overrepresented gender, rather than create new opportunities for the underrepresented gender, in order to meet Title IX.[206] The district court also signalled that the women's athletic teams at Illinois are effectively untouchable as long as women remain the underrepresented gender.[207] The district court's findings further indicated that Illinois was not required to disband teams on an equal basis, as disbanding a women's team would result in Illinois' further noncompliance with Title IX.

Plaintiffs also challenged Illinois' actions on the basis of the Equal Protection Clause of the Fourteenth Amendment.[208] Plaintiffs alleged two violations of the Equal Protection Clause: (1) Illi-

athletics shall provide equal athletic opportunity for members of both sexes." *Id.* (quoting 20 U.S.C. § 1681(c)).

204. *Kelley*, 832 F. Supp. at 241. The district court found that:

> Even if the University's decision were [sic] not based on financial or budgetary reasons, but made solely to move closer to substantial proportionality (that is, to increase participation opportunities for women to a level equivalent with the percentage of female undergraduate enrollees), the failure to cut women's programs would still be countenanced by Title IX.

Id. (citing Cohen v. Brown Univ., 991 F.2d 888, 898 n.15 (1st Cir. 1993)). Furthermore, the district court stated that "[u]nder Title IX, the University could cut men's programs without violating the statute because men's interests and abilities are presumptively met when substantial proportionality exists." *Id.* The district court found that the percentage of male athletes was substantially proportionate to the male enrollment. *Id.* at 242.

205. *Id.* at 241. The court quoted this key section of *Cohen*:

> But, 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 (or reducing them to a much lesser extent).

Cohen v. Brown Univ., 991 F.2d 888, 898 n.15 (1st Cir. 1993), *quoted in Kelley*, 832 F. Supp. at 241.

206. *Kelley*, 832 F. Supp. at 241. The district court, while expressing its condolences to the plaintiffs, noted that women as a class have "to pay for discriminatory actions and attitudes which have historically excluded them from the athletic opportunities given to men, as represented by current statistical disparities among athletes in universities and colleges across the country." *Id.* at 244.

207. *Id.* at 242.

208. *Id.*

nois denied plaintiffs equal protection of the laws by creating an illegal gender classification; and (2) the defendants conspired together to deny plaintiffs their civil rights in violation of Title IX and the Fourteenth Amendment.[209] Applying intermediate scrutiny to these Fourteenth Amendment challenges, the district court found that Illinois' actions complied with Title IX and, therefore, satisfied the Equal Protection Clause.[210] The district court noted that Title IX is a remedial statute aimed at eradicating discrimination against underrepresented athletes.[211] Therefore, the district court held that Illinois' "[c]ompliance with Title IX serves a remedial purpose which qualifies as an important state interest which is substantially related to eradicating historical discrimination against women in athletics at the University of Illinois."[212]

The district court closed by acknowledging that the male swimmers were innocent parties caught up in Illinois' efforts to comply with Title IX.[213] However, the district court supports its unsympathetic position by saying that innocent parties must share the burden in order to remedy past discrimination.[214]

b. The Decision of the Court of Appeals

Plaintiffs appealed the district court's grant of summary judgment in favor of Illinois to the United States Court of Appeals for

209. *Id.* To succeed on an Equal Protection claim, "a plaintiff must allege that the government intentionally discriminated against plaintiff by classifying him or her for different treatment under the law than one similarly situated." *Id.* Clearly, Illinois as a state-run university was a governmental actor for constitutional purposes.

210. *Id.* at 243. The district court restated the test for permissible gender discrimination as whether the discrimination serves an important governmental objective and whether the interest is substantially related to achieve the result. *Id.* (citing Craig v. Boren, 429 U.S. 190, 197 (1976)). Further, the court stated: "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.* (quoting Mississippi Univ. for Women v. Hogen, 458 U.S. 718, 728 (1982)) (internal quotations omitted).

211. *Kelley*, 832 F. Supp at 243.

212. *Id.* at 242. Initially, the district court dismissed the equal protection claim after finding no violation. *Id.* The district court noted that to prevail on a conspiracy claim, the plaintiff must first demonstrate an equal protection violation. *Id.* Therefore, the district court also dismissed the conspiracy claim after dismissing the equal protection claim. *Id.*

213. *Id.* The district court stated that it was likely the male swimmers' plight was never envisioned by Congress when it passed Title IX. *Id.* This ties into plaintiffs' argument that Title IX was solely designed to be a statute of expansion of opportunities, not constriction of opportunities.

214. *Id.*

the Seventh Circuit.[215] The Seventh Circuit unanimously affirmed the district court's grant of summary judgment in favor of Illinois.[216]

On appeal, Plaintiffs argued that Title IX had been transformed into "a statute that mandates discrimination against males."[217] Plaintiffs then presented a hypothetical, designed to illustrate the irrationality of the district court's interpretation of Title IX:

> If a university is required by Title IX to eliminate men from varsity athletic competition then the same Title IX [sh]ould require the university to eliminate women from the academic departments where they are over-represented and men from departments where they have been over-represented. Such a result would be ridiculous.[218]

The Seventh Circuit stated that the regulations implementing Title IX were valid agency-promulgated regulations that merited deference by the court.[219] The Seventh Circuit then answered plaintiffs' assertion that the Policy Interpretation's "substantial proportionality" test establishes a quota system.[220] The Seventh Circuit responded by reasoning that the numerical goals of substantial proportionality are not a requirement of Title IX.[221] Rather, they merely create a presumption that a school is in compliance with Title IX.[222] The court termed "substantial proportionality" a safe

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215. Kelley v. Board of Trustees, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 63 USLW 3488 (1995).

216. *Id.* at 272-73.

217. *Id.* at 270. The plaintiffs claimed that bureaucratic regulation was the catalyst for the change in Title IX. *Id.*

218. *Id.* The Seventh Circuit agreed that the proposed result was ridiculous. *Id.* The Seventh Circuit then stated that Congress termed discrimination in athletic programs a unique problem. *Id.*

219. *Id. See also* Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

220. *Kelley*, 35 F.3d at 270. The plaintiffs argued that a quota system contravenes Title IX. *Id.*

221. *Id.*

222. *Id.* The Seventh Circuit was silent on the issue of whether Title IX would be unconstitutional if it mandated substantial proportionality. *Id.* at n.6. The court stated that Title IX does not require that schools achieve substantial proportionality. *Id.* at 270. The court noted that schools can achieve Title IX compliance by demonstrating that "it has a continuing practice of increasing the athletic opportunities of the underrepresented gender or that its existing programs effectively accommodate the interests of that sex." *Id.* It is nearly impossible for a school to show continuing expansion in light of budget deficits. See *infra*, notes 285-96 and accompanying text. It is also difficult to accommodate all interests

harbor for schools.[223] The Seventh Circuit next stated that Title IX does not require a university to support parallel teams. Thus, unequal disbanding is permissible.[224] The Seventh Circuit lauded Title IX's flexibility, stating that it permits universities to choose from many options in complying with Title IX.[225]

The Seventh Circuit also rejected the plaintiffs' Fourteenth Amendment arguments.[226] The Seventh Circuit stated that Illinois only terminated the men's swimming program based on gender in order to comply with Title IX—a valid federal statute.[227] The Seventh Circuit dismissed any attack on Title IX's constitutionality because the court found that Title IX's purpose was to remedy past discrimination.[228] The Seventh Circuit emphatically stated that remedying sexual discrimination was an important governmental objective.[229]

The Seventh Circuit then addressed the plaintiffs' argument that program elimination without expansion of opportunities for women evidences that Title IX is not substantially related to the goal of remedying past discrimination.[230] In response, the Seventh Circuit reiterated that Title IX is not a statute that mandates expan-

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when there is no substantial proportionality because substantial proportionality presumes that interests are effectively accommodated. *Id.*

223. *Id.* at 271.

224. *Id.* The Seventh Circuit noted the flexible approach seemingly offered by Title IX as evidenced by its lack of a requirement that a university require parallel teams in all sports. *Id.*

225. *Kelley*, 35 F.3d at 271. The court seemingly ignored the constraints of athletic budgets and ignored the practical lesson taught by all of the Title IX cases: constriction of male athletic programs is the only safe way to comply with Title IX.

226. *Id.* at 272.

227. *Id.* The Seventh Circuit ignored the fact that compliance with Title IX was a secondary concern for Illinois: The cuts were sparked by budget reductions. Kelley v. Board of Trustees, 832 F. Supp. 237, 240 (C.D. Ill. 1993), 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 63 USLW 3488 (1995).

228. *Kelley*, 35 F.3d at 271. The Seventh Circuit cited Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 565-66 (1990), for the proposition that Congress has vast power under the Due Process Clause to remedy past discrimination. The Seventh Circuit did not distinguish racial discrimination, the subject of *Metro Broadcasting*, from sexual discrimination. Nor did the Seventh Circuit mention that *Metro Broadcasting* is often criticized for its remedial discrimination language.

229. *Kelley*, 35 F.3d at 272. *See also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982). The Seventh Circuit noted that plaintiffs never argued that remedying sexual discrimination was not an important governmental objective. *Kelley*, 35 F.3d at 272.

230. *Kelley*, 35 F.3d at 272.

sion—team elimination is a valid means of compliance with Title IX.[231]

The holdings by the district court and the Seventh Circuit in *Kelley* essentially signal the death knell for small, non-mainstream male athletic programs. The *Kelley* holdings firmly entrench team elimination as a necessary method of compliance with Title IX and end claims that Title IX is solely a statute for expanding opportunities. Similarly, in the next case, a court maintains the position that elimination of men's teams is a valid method of complying with Title IX.

E. *Gonyo v. Drake University*[232]

1. *Facts*

In the 1992-93 academic year, Drake University (Drake) sponsored seven men's varsity athletic teams and five women's varsity athletic teams.[233] The male to female ratio for the twelve teams was 60.6% male and 39.4% female.[234] By comparison, the undergraduate student body population during that time period consisted of 57.2% females and 42.8% males.[235] On March 11, 1993, Drake publicly announced its intention to discontinue men's varsity wrestling due to financial concerns and because other schools in Drake's athletic conference discontinued their wrestling programs.[236]

231. *Id.* The Seventh Circuit stated that Title IX enables decisions to consider gender so that opportunities for women, the underrepresented gender, are not reduced. *Id.*

232. 837 F. Supp. 989 (S.D. Iowa 1993).

233. *Id.* at 996.

234. *Id.* at 992. Drake spent roughly 53% of its athletic scholarships on women athletes and 47% on men's athletic scholarships in 1992-93. *Id.* at 992-93. Excluding football, Drake expended 71% of its overall nonscholarship budget on men's Division I and Division III level sports while only spending 29% on women's Division I sports. *Id.* at 993. In comparing the Division I sports (excluding football), the district court found that Drake spent 65% of its overall nonscholarship athletic budget on men's sports and 35% on women's athletics. *Id.* As for the overall athletic budget (excluding football), Drake spent 52.9% on men's Division I sports and 47.1% on women's sports. *Id.* As to the total expenditures of the athletic budget, the district court found that Drake spent 56% on men's sports at Division I or Division III levels and spent 44% on women's sports. In Divisions I and III sports, 24.7% were women and 75.3% were men. Considering participation in only Division I sports, 39.4% were women and 60.6% were men. These two sets of figures are in stark contrast to the undergraduate enrollment figures: 52.7% female, 42.8% men. *Id.*

235. *Id.*

236. *Id.* Drake cited "lack of support by the students and community for the wrestling program" as its reasons. *Id.* Further, the court noted that "[w]restling is not a revenue producing sport, such as football and basketball. In recent years,

2. *Background*

Plaintiffs, members of the men's wrestling team, filed suit in the United States District Court for the Southern District of Iowa, seeking a preliminary injunction ordering Drake to reinstate the men's wrestling program.[237] Plaintiffs brought suit alleging: (1) Drake's action violated Title IX and that Title IX was unconstitutional as applied; (2) Drake's decision violated the Equal Protection Clause of the Fourteenth Amendment; and (3) Drake breached its contract with the plaintiffs.[238]

The district court did not address the merits of the Title IX claim. Instead, the court considered only whether a preliminary injunction should be issued.[239] Plaintiffs claimed that Drake's decision to discontinue the wrestling program constituted gender discrimination in violation of Title IX.[240] More specifically, plaintiffs stated that Drake's decision violated Title IX because more athletic scholarship dollars went to women student athletes.[241] The plaintiffs argued that the regulations required that each sex have reasonable opportunity to receive athletic scholarships proportionate to each gender's participation in intercollegiate athletics.[242]

3. *Analysis*

After considering all the factors for issuing a preliminary injunction, the district court denied the plaintiffs' motion.[243] Plaintiffs asserted that if the preliminary injunction was not issued, they would not be able to complete their intercollegiate wrestling ca-

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many other colleges and universities, due to budget constraints, have discontinued their wrestling programs at the Division I level . . . ." *Id.*

237. *Gonyo*, 837 F. Supp. at 990.

238. *Id.*

239. *Id.* at 993. In order for a district court to grant a preliminary injunction, the plaintiffs must show: (1) a threat of irreparable harm; (2) a balance of that harm and the possible injury inflicted on others if the injunction is granted; (3) the probability of succeeding on the merits of the case; and (4) the public interest involved. *Id.* (citing Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981)).

240. *Id.* at 990. Although other claims were set forth, the Title IX discrimination allegations were the main thrust of the plaintiffs' action and therefore most analysis was based on the Title IX claim. *Id.*

241. *Id.* (citing 34 C.F.R. § 106.37(c)(1)). Drake was also violating Title IX by providing more athletic opportunities for men. *Id.*

242. *Gonyo*, 837 F. Supp. at 995.

243. *Id.* at 996. A preliminary injunction would have required Drake to reinstate the wrestling program and fund it until the case was decided on the merits. *Id.*

reers at Drake.[244] However, the district court found that no irreparable harm would occur because the affected wrestlers were free to transfer to other schools to continue wrestling.[245] The district court held that "the harm to the plaintiffs in failing to issue a preliminary injunction is not in the nature of harm to their legal rights."[246]

In considering the potential harm to Drake as well as to the plaintiffs, the district court found that the scale tipped in favor of Drake and, therefore, it did not issue the injunction.[247] In this determination, the district court recognized two injuries that an injunction could create. First, Drake would be under a considerable financial burden if it were forced to maintain a wrestling team for the 1993-94 season.[248] Second, institutions of higher education enjoy the prerogative of allocating their resources as they see fit without judicial directive.[249] The district court stated that any impingement on that prerogative requires a showing of irreparable harm.[250] The district court concluded by stating: "that the harm to Drake in issuing a preliminary injunction is far greater than the harm to plaintiffs in not doing so."[251]

The district court then addressed the final element for determining a preliminary injunction—the probability that plaintiffs will

244. *Id.* The district court noted that the plaintiffs' desire to finish their education at Drake was laudable and understandable, but Title IX does not establish right to participate in intercollegiate athletics. There is also no constitutional right to participate in intercollegiate athletics. *Id.* at 994.

245. *Id.* at 993. All but one of the wrestlers transferred to other universities and planned to continue their intercollegiate wrestling careers. *Id.* Further, the district court found that "[n]o wrestler currently under scholarship at Drake has been denied continued scholarship availability through their anticipated graduation date, so long as they remain eligible for such scholarships under the university's athletic scholarship guidelines." *Id.* at 992.

246. *Id.* at 994. Having concluded that no legal rights were involved, the district court noted that, for a preliminary injunction to be granted, the plaintiffs must be able to ultimately prevail on the merits of the case. *Id.*

247. *Gonyo*, 835 F. Supp. at 994.

248. *Id.* It would have been possible to assemble a 1993-94 wrestling team, but at great cost to the university. *Id.* The district court did not consider this to be a viable option, considering that the initial cuts were made as a result of university-wide cutbacks. *Id.* at 992.

249. *Id.* The district court stated that "[a]cademic freedom, of course, does not immunize defendants from civil liability, including injunctive relief, for any violations of the law, . . . but courts should be very cautious about overriding, even temporarily, a school's decisions in these areas, especially absent a showing that plaintiffs are likely to ultimately prevail." *Id.* (internal citations omitted).

250. *Id.* at 996. The district court noted that overriding this prerogative is possible only if there is a showing that "the plaintiffs are likely to ultimately prevail." *Id.*

251. *Id.* at 995.

succeed on the merits of the claim.[252] Plaintiffs claimed that Drake violated Title IX when it discontinued the men's wrestling program.[253] Additionally, plaintiffs claimed that Title IX is unconstitutional, based on the Equal Protection Clause, as it applied to them.[254] However, the district court concluded that the plaintiffs would be unlikely to prevail on these issues.[255] As to the Title IX violation, plaintiffs relied heavily on the disparity in the scholarship awards for men and women.[256] However, plaintiffs' scholarships were not rescinded and the district court questioned plaintiffs' standing to bring the claim.[257] Further, the district court questioned the validity of the remedy requested.[258] The district court concluded that Drake had "legitimate, nondiscriminatory reasons" for the disparity in scholarship allocations offered to men and women.[259] Therefore, the district

252. *Gonyo*, 837 F. Supp. at 995.

253. *Id.*

254. *Id.* In assessing the Title IX constitutionality claim, the district court weighed heavily the fact that the plaintiffs had not lost their athletic scholarships. *Id.*

255. *Id.* The district court noted that "the purposes of [Title IX] are to avoid having federal resources used in support of discriminatory practices and to protect individuals against such practices." *Id.* Further, the district court observed that Title IX is a remedial statute designed to protect women, who were historically underrepresented in Drake's athletic program, and to eviscerate past discriminatory treatment against them. *Id.*

256. *Id.* Title IX states that "no person shall, on the basis of gender, 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 . . . ." *Id.* (quoting 20 U.S.C. § 1681(a) (1988)) (internal quotations omitted). The district court stated that historically, women and not men were underrepresented at Drake. *Id.* at 996.

257. *Gonyo*, 837 F. Supp. at 995. In order for the male students to have a valid claim, they must be able to show that they were discriminated against solely on the basis of their gender. *Id.* at 996. Plaintiffs were unable to do so. *Id.* Showing gender discrimination against the male students was particularly difficult because the plaintiffs did not lose their scholarships. *Id.* at 995.

258. *Id.* The district court doubted that ordering a reinstatement of the wrestling team would be effective to eradicate a Title IX violation. *Id.* Further, the district court found that "injunctive relief might well undermine the underlying purpose of Title IX, which is to protect the class for whose benefit the statute was enacted." *Id.* at 996.

259. *Id.* at 995. Even if Drake had a discriminatory purpose for eliminating the wrestling team, "[u]nder HEW policy interpretation, if any resulting disparity in this respect can be explained by adjustments taking into account legitimate, nondiscriminatory factors, then an institution may be found to be in compliance with Title IX." *Id.* (quoting *Policy Interpretation, supra* note 28, at 71,415). Further, the district court noted that three-fourths of the student-athletes are male, and three-fourths of its nonscholarship athletic budget goes to men's sports even though they constituted a minority in the student body. *Id.* Finally, the district court noted that "the record fails to show that plaintiffs are, on the basis of their

court found plaintiffs' claim that Drake violated Title IX to be meritless.[260]

Plaintiffs also challenged Drake's action on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment.[261] Plaintiffs first asserted that by cutting the wrestling team, Drake violated the Equal Protection Clause.[262] The district court found that because Drake, as a private university, was not acting under "color of state law," Drake's actions could not be considered "state action." Therefore, the Equal Protection Clause did not apply to Drake.[263] Moreover, the district court found that Title IX was constitutional as applied to the plaintiffs.[264]

The court also summarily disposed of the plaintiffs' state law breach of contract claim.[265] Because Drake continued to honor its outstanding scholarships and because there was no evidence of any other existing contracts between Drake and the plaintiffs, the district court concluded that no contracts were breached.[266] In reaching this conclusion, the district court noted that public interest "weighs in favor of permitting colleges and universities to chart

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gender, excluded from participation in, or denied the benefits of, or subjected to discrimination in Drake's athletic program." *Id.* at 996.

260. *Id.*

261. *Id.* at 994.

262. *Gonyo*, 837 F. Supp. at 994. However, a cause of action based on the Equal Protection Clause must be brought against someone who acted under the color of state law by depriving a person of rights, privileges or immunities secured by the Constitution or the laws of the United States. *Id.* (citing 42 U.S.C. § 1983 (1988)).

263. *Id.* (citing Imperiale v. Hahnemann Univ., 966 F.2d 125 (3d Cir. 1992) (per curiam); Imperiale v. Hahnemann Univ., 776 F. Supp. 189 (E.D. Pa. 1991) (setting forth standard for valid Equal Protection claim)).

264. *Id.* at 996. The court noted that the plaintiffs provided no evidence to support the claim of unconstitutionality other than a showing that other Division I wrestling programs are being phased out. *Id.* Further, Drake did not consider Title IX in determining to disband the wrestling program. *Id.* The court commented that there is no constitutional right to participate in college athletics and summarily dismissed the validity of the claim. *Id.* Further, the court noted that "Drake is trying to remedy disparity in its athletic programs by encouraging greater athletic participation by women through scholarship offerings to them. It is women, not men who have historically been and still are underrepresented in Drake's athletic program." *Id.*

265. *Id.* at 994.

266. *Id.* at 994-95. However, the court was troubled by the fact that top Drake officials knew for several years that the wrestling program might be abolished. *Id.* at 995 n.3. Top officials at Drake allowed the wrestling coach to continue to recruit students, not disclosing the fact that the team would be cut, under the pretense that Drake was "total[ly] committed" to the wrestling program. *Id.* Additionally, the court noted that if the students knew in advance that the wrestling team would be dropped, they probably would not have attended Drake and the team could have been disbanded because of lack of wrestlers. *Id.*

their own course in providing athletic opportunities without judicial interference or oversight, absent a clear showing that they are in violation of the law."[267]

Kelley and *Gonyo* represent a defeat at the judicial level for male athletes caught in the wake of universities' attempts to comply with Title IX. The Seventh Circuit's holding in *Kelley* and the district court's decision in *Gonyo* demonstrate that elimination of athletic programs, rather than expansion of programs with additional opportunities for women, is an acceptable method of achieving compliance with Title IX.[268] Further, these decisions implicitly permit reverse discrimination against male athletes in the name of Title IX compliance.

V. IMPACT OF TITLE IX LITIGATION

In the last twenty-three years, Title IX has undergone substantial changes in its application and enforcement ability. In light of these changes, Title IX compliance has become a great concern among intercollegiate athletic departments. Universities must determine what constitutes compliance to avoid costly gender discrimination litigation and monetary damages.[269] The recent litigation discussed in this Comment establishes guidelines for universities to consider when attempting to achieve Title IX compliance in intercollegiate varsity athletic programs. Further, these cases provide a glimpse into the future of Title IX litigation.

A. Title IX Compliance in the 1990's

The goals of Title IX are clear: universities must provide student-athletes with an equal opportunity to participate in intercollegiate athletics.[270] Recent litigation clearly establishes that the courts will focus solely on the three-prong Policy Interpretation test to determine Title IX compliance.[271] A university is deemed to be

267. *Gonyo*, 837 F. Supp. at 996.

268. Kelley v. Board of Trustees, 35 F.3d 265, 271 (7th Cir. 1994), *cert. denied*, 63 USLW 3488 (1995).

269. *See, e.g.*, Franklin v. Gwinnet County, 112 S. Ct. 1028 (1992).

270. Favia v. Indiana Univ. of Pa., 812 F. Supp. 578 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993); Roberts v. Colorado State Univ., 814 F. Supp. 1507 (D. Colo.), *aff'd in part and rev'd in part sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993); Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993); Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17 (2d Cir. 1993).

271. Courts will disregard a university's compliance with any other provision in the regulations. Courts may consider twelve other factors in assessing compliance with the equal athletic opportunity regulation. *See* 34 C.F.R. § 106.41(c)(1)

in compliance with Title IX if it satisfies one of the three prongs of the Policy Interpretation test.[272] Therefore, it is necessary to determine what courts have held that each of the three prongs requires.

The first prong, substantial proportionality, has been interpreted by the courts as requiring a tight numerical fit between athletic participation and undergraduate enrollment.[273] As *Cohen*,[274] *Roberts*[275] and *Favia*[276] suggest, only a small disparity between athletic participation and student enrollment is acceptable, and ideally, universities should attempt to demonstrate identical percentages.[277]

The second prong of the test has been interpreted by the courts as requiring a university to exhibit a history and a continuing practice of program expansion for members of the underrepresented sex.[278] As evidenced by *Roberts* and *Favia*, the courts have focused on the continuing practice of program expansion.[279] Thus, the university must be able to demonstrate that it has recently added programs for the underrepresented sex and will continue to do so in the future.[280]

The third prong of the Policy Interpretation test has been interpreted by the courts as requiring a university to fully and effectively accommodate the interests and abilities of the underrepresented sex.[281] The First Circuit in *Cohen* explained the

(1994). For example, in *Cohen*, the district court found that Brown University satisfied HEW regulations regarding the competitive schedules; however, the district court concluded that Brown was not in compliance with Title IX because it failed to satisfy the three-prong test. *Cohen*, 809 F. Supp. at 994.

272. Cohen v. Brown Univ., 991 F.2d 888, 898 (1st Cir. 1993).

273. *See Policy Interpretation*, *supra* note 28, at 71,418. For a full discussion of the first prong of the Policy Interpretation test, see *supra* notes 34-42 and accompanying text.

274. *Cohen*, 809 F. Supp. 978.

275. Roberts v. Colorado State Univ., 814 F. Supp. 1507 (D. Colo.), *aff'd in part and rev'd in part sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993).

276. Favia v. Indiana Univ. of Pa., 812 F. Supp. 578 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3rd Cir. 1993).

277. *Roberts*, 814 F. Supp. at 1518 (noting disparity of 1.7% is acceptable).

278. *Policy Interpretation*, *supra* note 28, at 71,418. For a full discussion of the second prong of the Policy Interpretation test, see *supra* notes 35-43 and accompanying text.

279. *See Favia*, 812 F. Supp. at 584-85; *Roberts*, 814 F. Supp. at 1516.

280. Few universities can show a continuing practice of program expansion because universities are eliminating programs due to budget constraints. *See* Cohen v. Brown Univ., 991 F.2d 888, 898 (1st Cir. 1993).

281. *Policy Interpretation*, *supra* note 28, at 71,418. A university need not expend resources in order to create new women's teams for sports in which no females have an interest or for sports that would not have any reasonable expectation of competition. *See* Johnson, *supra* note 18, at 587 (commenting on

accommodation requirement by stating that a university must provide 250 athletic slots if 250 athletes demonstrate an interest and ability to compete.[282] Further, precedent establishes that a university must maintain a varsity team for the underrepresented sex because the mere existence of a varsity team demonstrates sufficient interest and ability to sustain the team.[283] In addition, a university may be required to add varsity teams for the underrepresented sex if club teams have expressed an interest in becoming varsity sports.[284]

B. The Future of Intercollegiate Athletic Programs

As university spending decreases, athletic programs will have difficulty complying with Title IX.[285] Title IX apparently requires universities to add women's teams and, therefore, make other program cuts if necessary.[286] Questions arise as to which athletic programs may be disbanded and how universities should structure their athletic programs in order to comply with Title IX. Clearly, a university may not eliminate women's varsity teams unless these cuts will enable the university to satisfy the three-prong Policy Interpretation test.[287] Furthermore, universities cannot restructure athletic

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Policy Interpretation to selection of sports). For a full discussion of the third prong of the Policy Interpretation test, see *supra* notes 42-43.

282. *Cohen*, 991 F.2d at 899.

283. *See* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993); *Cohen*, 991 F.2d 888; *Favia*, 812 F. Supp. 578; Kelley v. Board of Trustees, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 63 USLW 3488 (1995); *Roberts*, 814 F. Supp. 1507.

284. In Cook v. Colgate University, the Second Circuit vacated an order by the district court to promote a women's club ice hockey team to varsity status only because the judgement was mooted by the graduation of the named plaintiffs. 992 F.2d 17, 19 (2d Cir. 1993). However, the United States District Court for the Northern District of New York held that Colgate's failure to promote women's ice hockey to varsity status violated Title IX. Cook v. Colgate Univ., 802 F. Supp. 737, 751 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17 (2d Cir. 1993).

285. *See generally Cohen*, 991 F.2d at 898 n.15. Program expansion for female athletes requires significant funding. The only option available to universities will be to terminate men's programs to provide adequate funding for women's teams. *See* Johnson, *supra* note 18, at 584.

286. Johnson, *supra* note 18, at 584.

287. *Cohen*, 991 F.2d 888. For many universities, disbanding women's programs is not a viable solution because many universities are not currently in compliance with Title IX. *See* Johnson, *supra* note 18, at 584 (stating that universities should conduct own self-evaluation before making any cuts). A university could simultaneously eliminate both men's and women's teams which may lead to substantial proportionality. This solution may also be problematic because disbanding both men's and women's sports produces an effect which is entirely contrary to the purpose of Title IX. Further, the "abilities and interests" of the underrepresented sex would clearly not be satisfied. *Policy Interpretation*, *supra* note 28, at 71,418.

programs and rely on a lack of funding as a cognizable defense under Title IX.[288] Therefore, it is necessary to analyze the alternatives available to universities facing noncompliance.

Universities have several options available to achieve Title IX compliance. First, a university could abolish the entire varsity athletic program.[289] This would eliminate the gender equity problems. At the same time, however, this action may severely damage the athletic reputation and prominence of the university.[290] This action may also threaten the university's financial interests if the university derives a substantial amount of revenue from these programs. Similarly, this extreme solution harms all athletes, men and women alike.

A second alternative may be to eliminate men's varsity programs and expand women's teams until the ratio of male and female athletes is substantially proportionate.[291] This alternative is often criticized and has been labeled as inequitable,[292] but it may be a feasible solution to the problem. By eliminating some men's

288. *See* Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 585 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993); Roberts v. Colorado State Univ., 814 F. Supp. 1507, 1518 (D. Colo.), *aff'd in part and rev'd and part sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993); *Cook*, 802 F. Supp. at 750.

289. Teresa M. Miguel, *Title IX and Gender Equity in Intercollegiate Athletics: Case Analysis Legal Implication and the Movement Toward Compliance*, 1 SPORTS L. J. 279, 299 (1994).

290. A university would be affected by abolishing its athletic department in the following areas: decrease of enrollment, decrease in endowments and decrease or complete loss of booster and/or alumni funding. Despite the fact that a university's academic reputation is exclusive of its athletic reputation, the loss of an entire athletic program would impact the academic growth of the university by questioning its moral status and commitment to a full rounded education, equality and fairness. Furthermore, a trend towards eliminating varsity sports programs would reshape amateur athletics, as well as severely limiting the scholarship opportunities to a wide range of society.

291. Non-revenue producing sports without a female counterpart will be the most vulnerable.

292. *See* Johnson, *supra* note 18, at 197 (quoting Jamison Hensley, *Terps Cut Men's Scholarships*, BALTIMORE SUN, Dec. 19, 1993, at 5C ("We don't want to enhance the women's teams by taking away from the men's programs and their competitiveness. . . . We have to find other ways to enhance the women's programs.") (quoting Sue Tyler, University of Maryland Associate Athletic Director, commenting on the university's response to an OCR Title IX investigation report)); Katheryn Reith, *NCAA Gender Equity Committee Report Is Final*, THE WOMEN'S SPORTS EXPERIENCE, Sept./Oct. 1993, at 7, 8 ("The reasons why we want to increase sports opportunities for women, the benefits you get from taking part in sports, are no less true for male athletes than female. . . . Some schools may take the easy way out and just cut opportunities for some students and give them to others." (quoting Nancy Hogshead, President of the Women's Sports Foundation, expressing concern about the practice of eliminating men's programs in order to provide opportunities for women)).

varsity teams, the university would be able to use the funding to expand women's varsity teams, thereby bringing the athletic program into compliance with Title IX.

Universities could also eliminate or reduce the size of and funding for their football teams.[293] By reducing the number of football scholarships and participation opportunities, a university could re-distribute these saved dollars to increase athletic opportunities for women.[294] Additionally, by reducing or eliminating the football program, the large disparity in substantial proportionality would be reduced because the size of the football team often accounts for these large disparities.[295] However, the feasibility of this alternative may be severely limited in situations where football produces the majority of revenue used to operate the other athletic programs.

Many athletic directors and male student athletes find these alternatives unworkable and inequitable. Currently, however, universities are given few other choices. The courts have made it clear that the university has the responsibility to provide an equal opportunity to participate. Therefore, a university may be forced to institute these inequitable alternatives or face the substantial cost of Title IX noncompliance.[296]

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293. Harris, *supra* note 44, at 709. The reduction of the football team has long been recognized by many commentators as the best possible solution because football is the largest sport on most campuses in terms of the amount of funding, number of scholarships (85 in 1994-95) and number of coaches allowed (12). *See also* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1993-94 NCAA DIVISION I OPERATING MANUAL 11.7.2, 15.5.5.1 (1994). In response to this viable solution, the College Football Association (CFA) has asked Congress to amend Title IX by excluding football from the equation used to determine compliance. Mike Zapler, *Coaches of Major Football Teams Ask Congress to Help Revamp Enforcement of Title IX*, CHRON. HIGHER ED., Jan. 6, 1995, at A44. Success of CFA's request seems unlikely. As stated by Christine Frank, Director of Women's Athletics at the University of Iowa, "[f]ootball teams tried this in the 1970's trying to get exempt. There is no way they were going to win then and there is no way they are going to win now." *Id.*

294. Two universities have recently instituted this alternative. California State University at Fullerton and California State University at Long Beach dropped their football programs, creating an additional 100 varsity slots and an additional $400,000 of scholarship money. Debra E. Blum, *Hard to Meet Goals of Gender Equity*, CHRON. HIGHER ED., Oct. 26, 1994, at A51.

295. Johnson, *supra* note 18, at 584. For example, Robert Jacoby, athletic director at Stetson University, attributes the university's success at balancing its athletic opportunities and budget to the university's lack of a football team; women student-athletes make up 53% of the athletes and 48% of the scholarships. Debra E. Blum, *Stetson University Works*, CHRON. HIGHER ED., Oct 26, 1994, at A51.

296. Jennifer L. Henderson, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness*, 5 SETON HALL J. SPORT L. 133, 158 (1995); *see also* Janet Judge, et. al., *Gender Equity in the 1990's: An Athletic Administrator's Survival Guide to Title IX*

C. The Future of Title IX Litigation

Initially, Title IX litigation focused on whether universities were providing adequate participation opportunities for female student-athletes. However, the focus of future Title IX litigation may be broader—for instance, male student-athletes may file reverse discrimination suits under Title IX.[297]

Although Title IX, on its face, prohibits discrimination and requires universities to provide equal athletic opportunities for both men and women, recent litigation suggests that Title IX prohibits only discrimination against women.[298] As *Gonyo* and *Kelley* establish, male student-athletes attending universities presently not in compliance with Title IX will be foreclosed from pursuing Title IX litiga-

and Gender Equity Compliance, 5 SETON HALL J. SPORT L. 313 (1995) (discussing alternatives for Title IX compliance).

297. *See* Kelley v. Board of Trustees, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 63 USLW 3488 (1995); Gonyo v. Drake Univ., 837 F. Supp. 989 (S.D. Iowa 1993). Title IX is similarly being used by women to demand equal pay in the field of coaching intercollegiate athletics. Stanley v. University of S. Cal., 13 F.3d 1313 (9th Cir. 1994); Tyler v. Howard Univ., C.A. No. 91-CA11239 (D.C. Super. Ct. 1993). As demonstrated by a 1992 NCAA report, this area seems ripe for litigation. *See* Glenn M. Wong & Carol A. Barr, *Title IX Takes Some New Turns*, SPORTS LAWYER, Jan./Feb., 1994 at 3, 5 (citing NCAA report "Women in Intercollegiate Sports"). The NCAA report indicated that the average head coaching salary total for coaches at Division IA institutions was $396,791 for male coaches compared to $206,106 for female. *Id.* Though there is a clear discrepancy in salaries, the issue of equal pay is fraught with complexities.

The OCR has established a list of seven criteria to be used in assessing compensation for coaches: rate of compensation of coaches; duration of contracts; conditions relating to renewal; experience; nature of coaching duties performed; working conditions; and other terms and conditions of employment. *Id.* In addition, the OCR states that women coaches must demonstrate that lower compensation of the female coaches negatively affects the female athletes. *Id.* These OCR guidelines and recommendations have yet to be clarified or tested and the effect on future litigation is ambiguous. Further, it has long been accepted that certain men's sports coaches receive more compensation than their female counterparts because of the nature of and the revenue produced in their sport. Jacobs v. College of William & Mary, 517 F. Supp. 791 (E.D. Va. 1980), *aff'd without opinion*, 661 F.2d 922 (4th Cir.), *cert. denied*, 454 U.S. 1033 (1981). Though these requirements may seem to impede the claims of female coaches, recent litigation suggests that these claims may be successful. However, further litigation and regulation is needed to establish a clear standard for determining whether there is a disparity between men's and women's coaching compensation that violates Title IX.

298. *C.f. Cohen*, 991 F.2d at 900 n.17 (1st Cir. 1993) (characterizing Title IX as benefiting only women is "isthmian view" of world). Male student-athletes may also attempt to bring equal protection claims under the Fourteenth Amendment. *Gonyo*, 837 F. Supp. at 990; *Kelley*, 832 F. Supp. at 239. In analyzing gender based equal protection claims, courts generally attempt to determine whether the rules or actions under challenge satisfy an important state interest or whether the rule or action has a rational relationship to a legitimate organizational purpose. *Kelley*, 832 F. Supp. at 243. The argument supporting the discontinuation of male athletic programs is that an important governmental interest lies in compliance with Title IX to offset the historical discrimination against women. *Id.*

tion for two reasons. First, Title IX is designed to protect members of the underrepresented sex.[299] Because men presently constitute the majority of athletes in university athletic programs, men are not members of the underrepresented sex Title IX was designed to protect.

Second, Title IX is designed to protect members of a sex who historically have been denied opportunities to participate in intercollegiate athletics. Men have not been denied this opportunity in the past, and, therefore, male athletes cannot file a Title IX suit asserting this ground. Unfortunately, given the difficult economic times in higher education and the lack of protection provided by Title IX, male student-athletes may be without recourse.[300] However, as more male athletic programs are disbanded, Congress may be forced to reevaluate Title IX's purpose and undo judicial interpretation that permits reverse discrimination under Title IX.

In addition to male athletes filing Title IX lawsuits, female athletes will continue to seek redress under Title IX. Because the vast majority of colleges and universities are not complying with the requirements of Title IX, female athletes will continue to seek relief.[301] Recent litigation suggests that courts are receptive to the concerns of female athletes.

Courts and universities are finally recognizing the seriousness of Title IX violations. Title IX compliance is expected, and universities must make difficult choices. The success of female plaintiffs in recent litigation and the potential for continued success in the future poses significant challenges for university athletic programs attempting to comply with Title IX. Lawyers, teachers, fans and athletes will all be affected by these challenges and choices.

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299. *See Policy Interpretation, supra* note 28, at 71,418.

300. Although no legal grounds exist under Title IX, as male athletic programs are adversely affected by compliance, it is possible that reverse discrimination claims will gain acceptance in the courts. Another option may be a resurrection of the Tower Amendment. For a discussion of the Tower Amendment, see *supra* notes 20-22 and accompanying text.

301. *See* Chick Ludwig, *Gender Equity: An Idea Whose Time Has Come*, STAR TRIBUNE, Nov. 21, 1993, at 8C (quoting Arthur Bryant and Donna Lopiano).