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"Bull's Eye": How Public Universities in West Virginia Can Creatively Comply With Title IX Without the Targeted Elimination of Men's Sports Teams

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“BULL’S EYE”: HOW PUBLIC UNIVERSITIES IN WEST VIRGINIA CAN CREATIVELY COMPLY WITH TITLE IX WITHOUT THE TARGETED ELIMINATION OF MEN’S SPORTS TEAMS

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I. INTRODUCTION

Imagine you are the “O.J. Mayo” of high school men’s track in West Virginia.¹ You are a record-setting athlete that is listed near the top of every

¹ Ovinton J’Anthony Mayo, better known as O.J. Mayo, is a 6-foot-5, 200-pound starting guard for the USC Trojans basketball team. Nationally recognized since the seventh grade, Mayo is a dynamic all-around player widely regarded as the top player in his class. He helped lead Huntington High School, located in Huntington, West Virginia, to an unprecedented third con-

national high school track recruiting list. All of the major college track programs are calling, writing letters, and coming to your track meets. Schools are doing absolutely everything recruiting regulations allow to get your attention and lure you to their institution. Your only decision is to decide which school is lucky enough to have its name tied to your own while you attend college. It is inevitable that you will turn into a professional athlete and will be forever identified as a product of that university.

Now imagine that you were born and raised in West Virginia. The first article of clothing your parents ever purchased for you was a miniature West Virginia University ("WVU") t-shirt. You were raised as a WVU Mountaineers fan your entire life. Your parents both attended WVU, and ever since you could remember, you wanted to follow in their footsteps.

As you are about to commit to WVU, it is announced that the men's track team has been eliminated. Shortly thereafter, Marshall University ("Marshall") also announces that its track team will no longer exist. No men's Division I-A track teams are left in the state of West Virginia. You are forced to attend a university and represent a state that is not your own.

Even worse, what if you are halfway into your college athletic career when your team is eliminated? This could be devastating as a potential professional athlete. You would have to find another way, either by transferring to another school or by training through private programs, to maintain your abilities. More realistically, as an above-average track athlete that has been practicing day-in and day-out to earn an athletic scholarship, elimination of your sport can be equally devastating. You are left with no scholarship and no team on which to play. What if you cannot afford to attend school without the athletic scholarship?

This example has been a common occurrence throughout the United States since 1972 when President Nixon signed the Education Amendment Act that included Title IX.² In short, Title IX is a statute designed to prohibit gender discrimination in educational institutions.³ Unfortunately, the implications of this statute have hit too close to home in recent years: Many have blamed Title IX for the elimination of multiple sports teams at the two largest public universities in the state of West Virginia. Specifically, the men's indoor and outdoor track, men's tennis, and men's cross-country teams have all been eliminated at WVU.⁴ Similarly, the men's indoor and outdoor track teams have been elimi-

secutive Class AAA state championship his senior year. He also won many awards, including the National High School Boys Basketball Player of the Year by EA Sports. OJ Mayo Bio, <http://www.ojmayonnaise.com/oj-mayo-bio/> (last visited Mar. 19, 2008).

² PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS* 904 (3d ed. 2004) [hereinafter WEILER & ROBERTS].

³ 20 U.S.C. § 1681(a) (2006).

⁴ Telephone Interview with Ed Pastilong, Athletic Dir., W. Va. Univ. (Jan. 18, 2007).

nated at Marshall.⁵ Was Title IX really the catalyst for the elimination of these sports? If the eliminations were related to Title IX, was there a different way these two universities could have complied without eliminating some of the low-interest sports?

Title IX of the Education Amendments of 1972 bars gender discrimination in all educational programs or activities receiving federal financial assistance.⁶ The main purpose of Title IX is "to ensure that the gender-segregated allocation of athletic opportunities does not disadvantage either gender."⁷ Title IX is an anti-discrimination statute comprised of a three-part test that must be met to prevent a rebuttable presumption of gender discrimination.⁸ Neither a gender-based statistical disparity, nor the single fact that relief may adversely impact one gender, will mandate a finding of discrimination.⁹

Title IX was enacted 36 years ago, and is still a work-in-progress. Initially, very little tangible progress was made toward developing less discriminatory practices. In 1978, the Department of Health, Education and Welfare found that women comprised 30% of Division I intercollegiate athletes while comprising 48% of the national intercollegiate enrollment.¹⁰ In the 1990s, twenty years after enactment of Title IX, women still made up only one third of Division I intercollegiate athletes, despite the fact that female enrollment increased to above 50%.¹¹

However, enforcing and challenging Title IX is common today. As of 2004, NCAA member universities have eliminated more than 350 men's wrestling, gymnastics, track and field, tennis, and swimming teams.¹² As such, the impact of Title IX is allegedly being felt all over the country. The penalty for lack of Title IX compliance is the termination of federal funding, which would have a dramatic effect on the nation's universities.¹³ Universities seem to be giving in to the strength of Title IX by cutting sports teams instead of creatively finding ways to comply and maintain existing teams. Do universities have an option or is Title IX forcing them to cut teams and move forward?

This Note seeks to address the rule of Title IX, how Title IX has been a key element in the elimination of sports teams in West Virginia, and to examine

⁵ Telephone Interview with Jeff Small, Head Track and Cross Country Coach, Marshall Univ. (Jan. 10, 2007).

⁶ 20 U.S.C. § 1681(a) (2006).

⁷ *Cohen v. Brown Univ.*, 101 F.3d 155, 177 (1st Cir. 1996).

⁸ *Id.* at 170-71.

⁹ *Id.* at 171; *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993); 20 U.S.C. § 1681(a) (2006).

¹⁰ Title IX of the Education Amendments of 1972: A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, app. A at 71, 419 (1979) [hereinafter Policy Interpretation] (codified at 45 C.F.R. pt. 86) (stating 1977-1978 national averages).

¹¹ Alexander Wolff, *The Slow Track*, SPORTS ILLUSTRATED, Sept. 28, 1992, at 52, 54-55.

¹² WEILER & ROBERTS, *supra* note 2, at 950.

¹³ *Cohen*, 101 F.3d at 167.

how universities should be more creative in their efforts to comply with Title IX requirements to avoid team elimination. In order to fully understand how Title IX affects universities, this Note will first discuss the background and evolution of Title IX including relevant statutes and case law in Part II. Next, Part III will address where Title IX stands today and evaluates how the decision was made to eliminate sports teams at the two largest universities in West Virginia, WVU and Marshall. Finally, Part IV will initially address alternatives to elimination. Part IV will then address what actions WVU and Marshall should have taken in the past, and what should be done in the future, regarding the elimination of sports teams.

II. BACKGROUND AND EVOLUTION OF TITLE IX

A. *Who Is Affected By Title IX*

A suitable Title IX plaintiff is any person that is “excluded from participation, denied the benefits of, or subjected to discrimination under any education program . . . [receiving] federal funds.”¹⁴ A showing of “discriminatory intent” is not required, although it may have an impact on the remedies available to the plaintiff.¹⁵ The most common Title IX plaintiff is the female athlete, with other possible plaintiffs being coaches and tutors, women’s organizations and player associations, and finally men.¹⁶ While men “have technical standing to bring suit under Title IX, their suits will be subject to an immediate motion to dismiss . . . unless they can prove that they are underrepresented in the athletic department.”¹⁷ Being an “underrepresented sex” is a requirement of Title IX cases.¹⁸ Due to most universities having more male athletes than female athletes, male athletes seldom meet this requirement.¹⁹

An appropriate Title IX defendant is any educational institution that receives federal funds and also allegedly fails to provide a discrimination-free athletic department.²⁰ An “educational institution” is defined under United States Code §1681(c) as

Any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution

¹⁴ Melody Harris, *Hitting Em’ Where It Hurts: Using Title IX Litigation To Bring Gender Equity To Athletics*, 72 DENV. U. L. REV. 57, 92 (1994).

¹⁵ *Haffer v. Temple Univ.*, 678 F. Supp. 517, 539-40 (E.D. Pa. 1987); Harris, *supra* note 14, at 91-92.

¹⁶ Harris, *supra* note 14, at 66-68.

¹⁷ *Id.* at 68-69.

¹⁸ *Id.* at 69.

¹⁹ *Id.*

²⁰ *Id.*; 20 U.S.C. § 1681(a) (2006).

composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.²¹

Accordingly, by the plain language of the statute, Title IX affects almost every university in the United States.²²

B. *Rule of Title IX*

Title IX of the Education Amendments of 1972, an anti-discrimination statute modeled after Title VI of the Civil Rights Act of 1964,²³ prohibits gender discrimination in educational programs or activities receiving federal financial assistance.²⁴ The statute addresses discrimination in educational institutions as a whole. Specifically, Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"²⁵ The core of Title IX is to provide an "equal opportunity to participate."²⁶ However, most of the Title IX controversy deals with intercollegiate sports.

The United States Department of Education, acting through its Office of Civil Rights ("OCR"), has promulgated three sources of legal framework guiding the interpretation of Title IX: (1) the Regulations, (2) a Policy Interpretation, and (3) the Investigator's Manual.²⁷ All three of these sources allow a university to constantly monitor its compliance with Title XI.

1. The Regulations

The Regulations, proposed in 1974²⁸ and made effective in 1975,²⁹ were designed to "implement and clarify Title IX."³⁰ The OCR developed these

²¹ 20 U.S.C. § 1681(c) (2006).

²² For the purposes of this Note, it affects every school in the National Collegiate Athletic Association ("NCAA").

²³ Harris, *supra* note 14, at 91-92.

²⁴ 20 U.S.C. § 1681(a) (2006).

²⁵ *Id.*

²⁶ Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993).

²⁷ Jennifer Lynn Botelho, *The Cohen Courts' Reading of Title IX: Does It Really Promote a De Facto Quota Scheme?*, 33 NEW ENG. L. REV. 743, 783 (1999).

²⁸ Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance: Nondiscrimination on the Basis of Sex, 39 Fed. Reg. 22,228 (June 20, 1974) (codified at 45 C.F.R. pt. 86).

²⁹ Final Rule, 40 Fed. Reg. 24,128 (June 4, 1975).

³⁰ Eugene G. Bernardo, II, Note, *Unsportsmanlike Conduct: Title IX and Cohen v. Brown University*, 2 ROGER WILLIAMS U. L. REV. 305, 313 (1997).

Regulations to clearly state that any educational program benefiting from federal funds is subject to Title IX and its regulations.³¹ "The regulations address Title IX's application to an educational institution's entire operation, . . . [with] two sections specifically pertaining to athletics."³² Section, §106.37(c), entitled "Athletic scholarships," "requires university grants of athletic scholarships to be substantially equal in proportion to males and females participating in intercollegiate sports."³³ Section 106.41, entitled "Athletics," generally prohibits discrimination based on sex.³⁴ Subsection (c) of §106.41, entitled "Equal Opportunity," requires universities to provide "equal athletic opportunity for members of both sexes."³⁵ This "equal opportunity" requirement has been the subject of most of the litigation dealing with Title IX. Specifically, "equal opportunity" is the primary issue of *Cohen v. Brown University*,³⁶ the landmark United States Supreme Court case in Title IX litigation.

Universities "must provide gender-blind equality of opportunity to its student body."³⁷ Subsection (c) of §106.41 lists ten non-exclusive factors which the OCR will consider in assessing whether universities are in compliance with Title IX.³⁸ These 10 factors include the following:

1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
2. The provision of equipment and supplies;
3. Scheduling of games and practice time;
4. Travel and per diem allowance;
5. Opportunity to receive coaching and academic tutoring;
6. Assignment and compensation of coaches and tutors;
7. Provision of locker rooms, practice and competitive facilities;

³¹ Jennifer L. Henderson, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness*, 5 SETON HALL J. SPORT L. 133, 138 (1995).

³² Bernardo, *supra* note 30, at 311.

³³ *Id.* at 312.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992).

³⁷ *Cohen v. Brown Univ.*, 991 F.2d 888, 896 (1st Cir. 1993).

³⁸ *Id.*

8. Provision of medical and training facilities and services;
9. Provision of housing and dining facilities and services; and
10. Publicity.³⁹

Balancing these factors helps the OCR to determine whether schools are providing equal opportunities among both sexes. Spending unequal amounts on each gender is not *per se* non-compliance.⁴⁰ Furthermore, there is a clear distinction between providing "equal opportunity" and providing "equal expenditures" between sexes.⁴¹ Providing equal opportunity is at the crux of Title IX's existence and is the primary issue regarding Title IX compliance. Providing equal expenditures is one of the many sub-issues used in determining equal opportunity. However, when funds are necessary to assess equality of the sexes, unequal expenditures may be considered in determining compliance.⁴²

2. Policy Interpretation

Even after the OCR adopted the Regulations, universities were still unsure about how to unequivocally comply with Title IX. Therefore, four years after the emergence of the Regulations, the OCR formed the Health Education & Welfare Policy Interpretation ("Policy Interpretation"), which expands the Regulations and offers a more detailed explanation of equal athletic opportunity.⁴³ "The eleven-page Policy Interpretation solely addresses gender discrimination in intercollegiate sports."⁴⁴

The Policy Interpretation is broken into three sections: Section A—Athletic Financial Assistance,⁴⁵ Section B—Equivalence in Other Athletic Benefits and Opportunities,⁴⁶ and Section C—Effective Accommodation of Student Interests and Abilities.⁴⁷ Each section corresponds directly to an athletic provision in the Regulations and "is designed to clarify obligations under those Regulations and Title IX."⁴⁸ Generally, during an investigation, the OCR will

³⁹ 34 C.F.R. § 106.41(c)(1)-(10) (2007).

⁴⁰ Bernardo, *supra* note 30, at 313.

⁴¹ *Id.*

⁴² 34 C.F.R. § 106.41(c) (2007); Bernardo, *supra* note 30, at 313.

⁴³ *Cohen*, 991 F.2d at 893-94; Bernardo, *supra* note 30, at 314.

⁴⁴ Bernardo, *supra* note 30, at 314.

⁴⁵ Policy Interpretation, *supra* note 10, at 71,415.

⁴⁶ *Id.*

⁴⁷ *Id.* at 71,417.

⁴⁸ Bernardo, *supra* note 30, at 314.

evaluate all three sections of the Policy Interpretation.⁴⁹ However, the most important section of the Policy Interpretation is Section C (Effective Accommodation of Student Interests and Abilities). Courts have ruled that failing in this section alone will result in a finding that a university is in violation of Title IX.⁵⁰

Section A—Athletic Financial Assistance, corresponding with Section 106.37(c) of the Regulations, requires universities to “provide reasonable opportunities of (financial assistance) for members of each sex in proportion to the number of students of each sex participating in inter-collegiate athletics.”⁵¹ This standard compares the results of dividing the amount of aid available to each sex by the number of participants of each sex.⁵² This section simply requires that this comparison results in “substantially equal” expenditures.⁵³

If the comparison does not result in being “substantially equal,” universities can still be in compliance if the disparity can be explained by legitimate, nondiscriminatory factors.⁵⁴ Two possible circumstances of acceptable, uneven scholarship allocation are when “the higher costs of tuition for students from out-of-state may in some years be unevenly distributed between men’s and women’s programs,” and also when universities “make reasonable professional decisions concerning the awards most appropriate for program development.”⁵⁵ For example, sports team development may initially require giving scholarships to student athletes over a four year period.⁵⁶ Spreading full scholarships could result in fewer overall scholarships than may be necessary to create proportionality.⁵⁷

Section B—Equivalence in Other Athletic Benefits and Opportunities, corresponding with Section 106.41(c)(2)-(10) of the Regulations, requires institutions to provide equal athletic opportunities for members of both sexes.⁵⁸ Compliance is determined by comparing the availability and quality of benefits, opportunities, and treatment provided to each gender using the factors of Section 106.41(c)(2)-(10) of the Regulations.⁵⁹ Results must show that the opportu-

⁴⁹ Valerie M. Bonnette & Lamar Daniel, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., Title IX Athletics Investigator’s Manual 7 (1990) [hereinafter Investigator’s Manual].

⁵⁰ Bernardo, *supra* note 30, at 315; Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993); Roberts v. Colorado State Bd. of Agric., 814 F. Supp. 1507, 1510-11 (D. Colo. 1993); Favia v. Indiana Univ., 812 F. Supp. 578, 584-85 (W.D. Pa. 1993).

⁵¹ Policy Interpretation, *supra* note 10, at 71,415.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Bernardo, *supra* note 30, at 316. These factors are the following: Provision of equipment and supplies; Scheduling of games and practice time; Travel and per diem allowance; Opportunity to receive coaching and academic tutoring; Assignment and compensation of coaches and tutors;

nities between sexes are either "equal or equal in effect."⁶⁰ Exact equivalency is not required and there may be legitimate reasons why differences exist between men's and women's programs, "provided the inequities are attributable to non-discriminatory factors."⁶¹ An acceptable nondiscriminatory reason for inequity is when there are "unique aspects of particular sports."⁶² For example, for institutions offering a football program, more equipment is needed than most other sports, and it is more expensive to maintain a football field than other sport playing fields.⁶³ Another example deals with special operational expenses such as dealing with crowd control at large tournaments.⁶⁴ As long as "sport-specific needs are met equivalently in both men's and women's programs . . . differences . . . will be found to be justifiable."⁶⁵

Section C—Effective Accommodation of Student Interests and Abilities, corresponding with § 106.41(c)(1) of the Regulations, "has been labeled the 'heartland' of equal opportunity" and has been the centerpiece of nearly every Title IX dispute decided by the courts.⁶⁶ The United States Supreme Court in *Cohen* stated that this compliance area is the cornerstone of Title IX as it applies to athletics.⁶⁷ Specifically, this section "requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes."⁶⁸ To determine whether an educational institution affords equal opportunities, courts must apply the above-mentioned three-prong Effective Accommodation Test. This test consists of three "benchmarks," in which universities must comply in any of the following three ways:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments;⁶⁹ or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution

Provision of locker rooms, practice and competitive facilities; Provision of medical and training facilities and services; Provision of housing and dining facilities and services; and Publicity. *Id.* at 313.

⁶⁰ *Id.* at 316.

⁶¹ *Id.* at 316-17.

⁶² Policy Interpretation, *supra* note 10, at 71,415.

⁶³ *See* Bernardo, *supra* note 30, at 316.

⁶⁴ *See Id.*

⁶⁵ Policy Interpretation, *supra* note 10, at 71,416.

⁶⁶ Bernardo, *supra* note 30, at 317.

⁶⁷ *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993).

⁶⁸ Policy Interpretation, *supra* note 10, at 71,417.

⁶⁹ *Id.* at 71,418.

can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex,⁷⁰ or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.⁷¹

Prong 1, the “Substantially Proportionate” prong, has been termed a “safe harbor” because if satisfied, the institution is deemed in compliance with Title IX and all inquiry ends.⁷² The two calculations that need to be “substantially proportionate” are the university’s student-body gender proportion and the university’s student-athlete gender proportion.⁷³ The Clinton Education Department’s 1996 Policy Interpretation document makes the student-athlete gender proportion an alleged safe harbor when the percentage is within 5% of the student-body gender proportion ratio.⁷⁴ For example, if females at a university comprise of 50% of the student-body population, and comprise of 46% of all student athletes, this 4% disparity falls within the safe harbor of Prong 1.

However, this prong has never had a rigid, bright-line rule.⁷⁵ A bright-line rule would not take into account unexpected fluctuation of either gender’s enrollment due to natural circumstances and recruiting efforts.⁷⁶ The smallest differential recognized by a court as violating the substantially proportionate prong was the 7.5% differential in *Roberts v. Colorado State Board of Agriculture*, a United States Court of Appeals case from the Tenth Circuit.⁷⁷ In *Cohen*,⁷⁸ the leading case in Title IX jurisprudence, the Court easily found that the 11.6% differential was not substantially proportionate.⁷⁹

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL’Y 191, 222 (1996).

⁷³ Bernardo, *supra* note 30, at 318.

⁷⁴ WEILER & ROBERTS, *supra* note 2, at 950. See *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993); *Chalenor v. Univ. of N.D.*, 142 F. Supp. 2d 1154 (D. N.D. 2000).

⁷⁵ Harris, *supra* note 14, at 84.

⁷⁶ *Id.*

⁷⁷ *Id.*; *Roberts*, 998 F.2d at 830.

⁷⁸ *Cohen v. Brown Univ.*, 809 F. Supp. 978, 978 (D.R.I. 1992).

⁷⁹ *Id.* at 991; Harris, *supra* note 14, at 83-84.

There is a shifting burden of proof in Title IX cases.⁸⁰ Initially, the burden rests with the plaintiff.⁸¹ A Title IX plaintiff must show the university fails the first prong by showing "a disparity between the gender composition of the institution's student body and its athletic program, therefore proving that there is an underrepresented gender."⁸² Due to the first prong being a safe harbor, it is the first priority when assessing Title IX compliance.⁸³ However, even if the institution violates the first prong, a plaintiff must also prove non-compliance of the third prong before the burden shifts to the defendant.⁸⁴

A plaintiff can prove non-compliance of the third prong, the "Full and Effective Accommodation of Interests and Abilities" prong, by showing that the underrepresented gender has not been "fully and effectively accommodated by the present program."⁸⁵ This third prong allows educational institutions to come into compliance with Title IX by demonstrating that the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated by the present program.⁸⁶ This means that a university can comply with Title IX under the third prong if it proves the underrepresented sex has no interest, or does not have the ability to participate, in a sports team not currently in the present athletic program.

To meet the threshold of "fully and effectively accommodating" the underrepresented gender, universities must ensure participatory opportunities when there is "sufficient interest and ability among the members of the excluded sex to sustain a viable team."⁸⁷ Simply put, this third prong allows institutions to provide greater athletic opportunities to one gender where the other is clearly not interested.⁸⁸ For example, some universities that have a large non-traditional student population may meet this prong by showing there are few

⁸⁰ See *Cohen v. Brown Univ.*, 991 F.2d 888, 901-02 (1st Cir. 1993).

⁸¹ *Id.*

⁸² *Id.* at 901.

⁸³ WEILER & ROBERTS, *supra* note 2, at 950.

⁸⁴ *Cohen*, 991 F.2d at 902.

⁸⁵ *Id.* (quoting Title IX of the Education Amendments of 1972: A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, at 71,418 (1979) (codified at 45 C.F.R. pt. 86)).

⁸⁶ Harris, *supra* note 14, at 90.

⁸⁷ Policy Interpretation, *supra* note 10, at 71,418.

⁸⁸ Harris, *supra* note 14, at 90. Many athletic programs today, such as West Virginia University and Marshall University, are trying to decrease their budget, so it is rare that universities try to expand athletic opportunities when confronted with Title IX problems. See *Cohen*, 991 F.2d at 898; Interview with Ed Pastilong, *supra* note 4; Interview with Jeff Small, *supra* note 5. Of course, expanding athletic opportunities is one easy way to come into compliance. However, endless expansion is difficult to promulgate, especially in light of budget cuts like WVU and Marshall have recently experienced. Therefore, universities often attempt to comply with Title IX by demonstrating that the interests and abilities have been fully and effectively accommodated by the present program, thus showing the underrepresented gender has no interest. *Cohen*, 991 F.2d at 898.

female participants due to those students having jobs or being parents.⁸⁹ Additionally, lack of interest can be shown when not enough female athletes try out for a particular sport.⁹⁰

If a plaintiff can show non-compliance with the first and third prongs, a *prima facie* violation of Title IX has occurred.⁹¹ Therefore, the burden shifts to the defendant-institution to prove the second prong's affirmative defense of demonstrating "a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members" of the underrepresented gender.⁹² This means that universities can comply with Title IX by demonstrating continuing progress toward gender equity in their athletic departments.⁹³

A history and continuing practice of program expansion can be accomplished in a variety of ways. The courts typically focus on the number of athletic teams added and the increase in the number of participation opportunities.⁹⁴ If the institution shows a continuing program expansion for the underrepresented gender, the institution is in compliance and the interests and abilities compliance area analysis ends.⁹⁵ As the United States District Court for the District of Rhode Island stated in *Cohen*, "merely reducing program opportunities to the overrepresented sex does not constitute program 'expansion.'"⁹⁶ For example, in *Roberts*, the United States District Court for the District of Colorado rejected the university's argument that participation opportunities increased due to eliminating 18 female softball players and 55 male baseball players.⁹⁷

Title IX does not require that an institution leap to complete gender equality overnight.⁹⁸ Instead, institutions are given a reasonable amount of time to achieve gender equity.⁹⁹ If a university is found in violation of Title IX, it must submit a plan that will correct these violations within a specified period of time.¹⁰⁰ The Department of Health, Education, and Welfare ("Department") then determines whether the plan is adequate.¹⁰¹ "If the institutional plan is ac-

⁸⁹ Harris, *supra* note 14, at 90. .

⁹⁰ *Id.*

⁹¹ *See Cohen*, 991 F.2d at 902.

⁹² *Id.* (quoting Title IX of the Education Amendments of 1972: A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, app. A at 71, 419 (1979) (codified at 45 C.F.R. pt. 86)).

⁹³ *See Harris*, *supra* note 14, at 87.

⁹⁴ Investigator's Manual, *supra* note 49 at 24-25.

⁹⁵ *Id.* at 25.

⁹⁶ *Cohen v. Brown Univ.*, 879 F. Supp. 185, 211 (D.R.I. 1995).

⁹⁷ *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1514 (D. Colo. 1993).

⁹⁸ *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993).

⁹⁹ Harris, *supra* note 14, at 88.

¹⁰⁰ Policy Interpretation, *supra* note 10, at 71,418.

¹⁰¹ *Id.*

ceptable, the Department will inform the institution that although the institution has violations, it is found to be in compliance because it is implementing a corrective plan."¹⁰² However, if the plan is found unacceptable to correct violations or to correct violations within a reasonable period of time, the institution will not be found in compliance with Title IX and could ultimately have its federal funding terminated.¹⁰³

3. Investigator's Manual

In 1990, to assist in compliance investigations, the OCR provided even further guidance when it published the Title IX Athletics Investigator's Manual ("Manual").¹⁰⁴ The Manual provides steps and procedures used by the OCR to determine Title IX compliance.¹⁰⁵ Specifically, it outlines the separate sections of each of the components in the Policy Interpretation.¹⁰⁶ Therefore, universities can use the Manual as a tool to monitor their own compliance.¹⁰⁷

C. *How Case Law Has Refined Title IX*

Even with these three substantial tools, (1) the Regulations, (2) a Policy Interpretation, and (3) the Investigator's Manual, there is still uncertainty about how exactly to comply with Title IX. Gender equity in athletics has been a major subject of litigation in federal courts. The following cases are "central to the evolving legal issues in determining the application of Title IX's gender equity directive to athletics."¹⁰⁸

1. *Grove City College v. Bell* and Civil Rights Restoration Act of 1987

As stated above, Title IX was enacted to eliminate gender discrimination in education programs or activities receiving federal financial assistance.¹⁰⁹ However, universities quickly found a loophole in this statute by separating these programs and activities from the institutions as a whole.

¹⁰² *Id.* at 71,419.

¹⁰³ *Id.*

¹⁰⁴ *Cohen v. Brown Univ.*, 809 F. Supp. 978, 984 (D.R.I. 1992). "This Manual was intended to supersede two similar guidance documents issued by the Office of Civil Rights in 1980 and 1982." *Id.*

¹⁰⁵ *Botelho*, *supra* note 27, at 759.

¹⁰⁶ *Cohen I*, 809 F. Supp. at 984.

¹⁰⁷ *See Botelho*, *supra* note 27, at 759.

¹⁰⁸ *Harris*, *supra* note 14, at 63.

¹⁰⁹ *See* 20 U.S.C. § 1681(a) (2006).

In *Grove City College v. Bell*,¹¹⁰ a large number of students who received Basic Educational Opportunity Grants (“BEOG”) attended Grove City College.¹¹¹ However, Grove City was a private college that sought to maintain its autonomy by refusing federal financial assistance, thereby circumventing its responsibility to comply with Title IX.¹¹² The first issue before the United States Supreme Court was whether these grants constituted federal assistance to the institution. The Supreme Court held that Title IX coverage cannot be excluded just because federal funds are granted to students and not the institution itself.¹¹³ The Regulations make clear that grants to students constitute federal assistance.¹¹⁴

After deeming grants to be considered federal assistance, the second issue the Court analyzed was whether the institution as a whole should be subject to Title IX. The Court held that it was not the intent of Congress to hold an entire institution subject to Title IX just because students receive federal grants that eventually reach the institution’s general operating budget.¹¹⁵ The Court found that the Department’s Regulations do not follow federally-aided students from “activity to activity.”¹¹⁶ This would be inconsistent “with the program-specific nature of the statute.”¹¹⁷ Therefore, a narrow interpretation of Title IX was implemented in which “only departments that received federal money were required to comply.”¹¹⁸ This holding allowed Grove City College to escape Title IX scrutiny in all departments not composed of students receiving federal grants.

Justice Brennan dissented in this opinion; Justice Marshall joined.¹¹⁹ The dissenters stated that when “financial assistance is clearly intended to serve as federal aid for the entire institution, the institution as a whole should be covered by the statute’s prohibition on sex discrimination.”¹²⁰ Three years later, in response to *Grove City College*, Congress agreed with Justice Brennan’s dissenting opinion and enacted the Civil Rights Restoration Act of 1987.¹²¹ This act effectively overruled *Grove City College*, by requiring Title IX to “be applied to the entire institution if any program within the institution was a recipi-

¹¹⁰ *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

¹¹¹ *Id.* at 559.

¹¹² *See id.*

¹¹³ *Id.* at 569-70.

¹¹⁴ *See id.* at 568.

¹¹⁵ *See id.* at 572-73.

¹¹⁶ *Id.* at 573.

¹¹⁷ *Id.* at 572.

¹¹⁸ Lillian Thomas, *Title IX at 30*, PITTSBURGH POST-GAZETTE, Oct. 6, 2002, available at <http://www.post-gazette.com/lifestyle/20021006titleix1006fmp2.asp>.

¹¹⁹ *See Grove City Coll.*, 465 U.S. at 581-604 (Brennan, J., dissenting).

¹²⁰ *Id.* at 603-04.

¹²¹ 20 U.S.C. § 1687 (2006); *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993).

ent of federal funds."¹²² Specifically, the act stated that the terms "program or activity" and "programs" mean the operations of "a college, a university, or other postsecondary institution, or a public system of higher education."¹²³ Therefore, the program-specific/institution-wide debate was resolved in favor of making every institution that receives federal funding comply with Title IX. Although Title IX was enacted in 1972, it did not significantly apply to intercollegiate athletic programs until fifteen years later.¹²⁴

2. *Cohen v. Brown University*¹²⁵

Brown University once operated a two-tier funding system that included "university-funded" varsity teams, supported by university funds, and "donor-funded" varsity teams, supported by private donations.¹²⁶ Until 1991, Brown University had thirteen women's and twelve men's university-funded teams, as well as three women's and four men's donor-funded teams.¹²⁷ In the spring of 1991, Brown University announced that it was in a financial bind and decided to eliminate university funding for four teams to save money: men's golf, men's water polo, women's gymnastics, and women's volleyball.¹²⁸ Brown University estimated that by eliminating these four teams, the university would save \$77,813 per year.¹²⁹

Before the cuts, the Brown University athletic program offered 328 (36.7%) varsity slots to female athletes and 566 (63.3%) varsity slots to male athletes.¹³⁰ After the cuts, the percentages of women and men playing sports were unaffected.¹³¹ Meanwhile, Brown University's student body consisted of 52% men and 48% women.¹³²

Led by gymnast Amy Cohen, disappointed members of the women's volleyball and gymnastics teams brought suit against Brown University.¹³³ The plaintiffs charged that Brown University's current athletic department violated Title IX, and that the violation was worsened by the institution's decision to eliminate the two women's teams without making adequate reductions in the

¹²² B. Glenn George, *Miles To Go and Promises To Keep: A Case Study in Title IX*, 64 U. COLO. L. REV. 555, 559 (1993).

¹²³ 20 U.S.C. § 1687(2)(A) (2006).

¹²⁴ George, *supra* note 122, at 558.

¹²⁵ 991 F.2d 888 (1st Cir. 1993).

¹²⁶ *See Cohen v. Brown Univ.*, 879 F. Supp. 185, 189 (D.R.I. 1995).

¹²⁷ *See id.*

¹²⁸ *Cohen v. Brown Univ.*, 991 F.2d 888, 892 (1st Cir. 1993).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² *Id.*

¹³³ *See id.*; Bernardo, *supra* note 30, at 322.

number of men's teams or, in the alternative, adding other women's teams to balance the loss.¹³⁴

The United States District Court for the District of Rhode Island granted a preliminary injunction requiring Brown University to reinstate the women's gymnastics and the women's volleyball teams, pending the final outcome of the case.¹³⁵ The court rested its preliminary injunction on the first of the ten areas of inquiry under the Regulations: Brown's failure to effectively accommodate the interests and abilities of female students in the selection and level of sports.¹³⁶

On appeal, Brown argued that it should only have to allocate athletic opportunities to women "in accordance with the ratio of interested and able women to interested and able men."¹³⁷ Thus, Brown attempted to read "full" out of the duty to accommodate the underrepresented gender "fully and effectively."¹³⁸ A panel of the United States Court of Appeals for the First Circuit rejected this argument and affirmed the district court for several reasons. Specifically, the court reasoned that the Policy Interpretation required "full" accommodation of the underrepresented gender.¹³⁹ In addition, the court held that Brown's view was poor public policy because it would make it "more difficult for colleges to ensure that they have complied with Title IX."¹⁴⁰

On remand, the district court relied heavily on the First Circuit's opinion and the Policy Interpretation's three-prong test. Due to failing all three prongs, Brown University was found in violation of Title IX.¹⁴¹ Under Prong 1 (Substantial Proportionality), the undergraduate enrollment in 1993/94 was 2,796 men (48.86%) and 2,926 women (51.14%).¹⁴² However, Brown provided 555 (61.87%) intercollegiate athletic opportunities to men and 342 (38.13%) to women.¹⁴³ Due to the 13.01% disparity, the two gender ratios were not substantially proportionate, and therefore, the safe harbor protection of Prong 1 was not available.¹⁴⁴

Prong 2 (Continuing Expansion) was also violated. Since 1977, only two women's sports, women's indoor track and women's skiing, had been added to the athletic program.¹⁴⁵ Also, Brown had not proven that the percent-

¹³⁴ See *Cohen*, 991 F.2d at 893.

¹³⁵ See *id.*

¹³⁶ *Cohen v. Brown Univ.*, 809 F. Supp. 978, 994 (D.R.I. 1992).

¹³⁷ *Cohen*, 991 F.2d at 899.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 900.

¹⁴¹ See *Cohen v. Brown Univ.*, 879 F. Supp. 185, 214 (D.R.I. 1995).

¹⁴² *Id.* at 211.

¹⁴³ *Id.*

¹⁴⁴ See Bernardo, *supra* note 30, at 331.

¹⁴⁵ *Cohen*, 879 F. Supp. at 211.

age of women participating in their intercollegiate athletic program had increased.¹⁴⁶ Brown violated Prong 3 (Full Accommodation) on two counts. First, Brown failed to accommodate women fully and effectively by maintaining the women's water polo team at "donor-funded" status and by demoting women's gymnastics to "donor-funded" status, when both teams demonstrated the requisite interest and ability to compete as intercollegiate varsity teams.¹⁴⁷ Second, Brown failed to fully accommodate women when the university failed to have women's skiing and fencing at the "university-funded" level after the requisite amount of interest was shown.¹⁴⁸

The district court left it to Brown's discretion in deciding how to provide equal opportunities for its male and female athletes, in order to be found in compliance with Title IX.¹⁴⁹ In the spring of 1997, Brown filed a proposed solution to its Title IX problems.¹⁵⁰ The proposed remedy stated that the club teams of women's lightweight crew, equestrian, and water polo were to be upgraded to varsity status.¹⁵¹ While no entire men's sports teams were eliminated, individual positions were cut from several men's teams, as well as a cap put in place upon the number of male athletes permitted on each of the men's teams.¹⁵² By executing this proposed remedy, Brown ensured that the gap between the female-athlete and female-student ratios would be reduced from the previous 13% to a single percentage point; that ratio easily falls within the acceptable 5% range of the OCR.¹⁵³

III. WHERE TITLE IX STANDS TODAY

Today, Title IX has sparked an increase in women's athletics participation in both college and professional sports. Through this increase of women in intercollegiate athletics, professional leagues such as the WNBA (Women's National Basketball Association) and the WUSA (Women's United Soccer Association) were jumpstarted.¹⁵⁴ Although women's athletics have blossomed, over 800 men's athletic teams have been eliminated in the last two decades.¹⁵⁵ Many participation opportunities for men are being reduced to make obligations

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* at 212.

¹⁴⁸ *See id.*

¹⁴⁹ *See id.* at 214.

¹⁵⁰ *See* WEILER & ROBERTS, *supra* note 2, at 943.

¹⁵¹ *Id.* at 943-44.

¹⁵² *Id.* at 944.

¹⁵³ *Id.*

¹⁵⁴ *See* Symposium, *Panel II: Thirty Years of Title IX*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 695, 696 (2004).

¹⁵⁵ *Id.* at 709.

to corresponding women's participation lower.¹⁵⁶ Every university is forced to take Title IX compliance into consideration, as the possibility of Title IX non-compliance is one of the main concerns of athletic directors in today's society.¹⁵⁷

A. *Athletic Director Conundrum*

Title IX is a significant threat to universities around the nation that do not focus on gender equity. Although athletic directors have to make sure their athletic department complies with all Regulations, they rely heavily on the institution's general counsel to make sure each individual rule is analyzed and complied with, including Title IX.¹⁵⁸

Athletic directors' main concern is that they do not want their university to be sued and wind up in court.¹⁵⁹ Defending a Title IX lawsuit not only causes the institution a financial burden, but it also creates a negative image associated with the university. Due to this concern, athletic directors routinely defer to their general counsel to study the fine details of Title IX. Athletic directors usually want to take "the path of least resistance."¹⁶⁰ Their attitude is often as simplistic as: "[J]ust give me a flat number, tell me how to do this, don't bother me."¹⁶¹ This, coupled with the general counsel's knowledge that compliance with Prong 1 (Substantial Compliance) is likely a safe harbor, leads most attorneys to recommend that the institution strive for compliance with Prong 1.¹⁶²

It is argued that if a university uses one of the other two prongs, History and Continuing Practice of Program Expansion or Full and Effective Accommodation of Interests and Abilities, the university is only "buying time."¹⁶³ Adding women's sports teams will not be legally sufficient to ensure Title IX compliance until the proportionality standard (Prong 1) is met.¹⁶⁴ Therefore, by using the other two prongs, institutions are just temporarily solving the gender equity problem until they meet proportionality.¹⁶⁵ Additionally, by prolonging the process, there is a greater chance that Title IX litigation could occur.¹⁶⁶ This

¹⁵⁶ See *id.* at 730.

¹⁵⁷ Interview with Ed Pastilong, *supra* note 4.

¹⁵⁸ See Symposium, *Panel II: Thirty Years of Title IX*, *supra* note 154, at 733.

¹⁵⁹ See *id.*

¹⁶⁰ *Id.* at 734.

¹⁶¹ *Id.*

¹⁶² See *id.* at 733.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

possibility frightens athletic programs and makes the decision to eliminate teams much easier.¹⁶⁷

However, this rigid approach is the wrong way to analyze Title IX. The additional time that a university uses when complying with Prongs 2 and 3 could permit other conditions of the institution to change, including the male/female enrollment ratio and the male/female athlete ratio. If these two factors change and move more towards proportionality, the university could move closer to compliance without cutting men's teams. Further, women's teams could still be added when interest/ability/desire/finances permit.

Schools should not be afraid to prove compliance with Title IX, especially in moving beyond "substantial proportionality." There are three prongs for a reason. Prong 1 is the easiest to measure, but when schools solely defer to the substantial proportionality test, certain men's sports teams are cut and athletes lose their opportunity to continue to compete.

B. *Why Do Universities Eliminate?*

One of the problems with eliminating sports teams is that sometimes these teams are well-known and have a strong historical tie to the institution. For example, the University of Miami's men's swimming team produced possibly the greatest men's diver in history, Greg Louganis, an Olympic gold medalist.¹⁶⁸ Unfortunately, the men's swimming team was eliminated from Miami's athletics program in 2004.¹⁶⁹

The WVU Rifle Team faced a similar situation. The team was a national powerhouse for many years. The team won three NRA National Championships and thirteen NCAA national titles during its existence, the last NCAA title being in 1998.¹⁷⁰ The team also produced twelve Olympians.¹⁷¹ To demonstrate how accomplished the WVU Rifle Team had become, it was once stated that "[w]hen you're a football player you dream of going to a school like Nebraska . . . [w]hen you're in rifle, your goal is to shoot for West Virginia."¹⁷² However, in April 2003, the team was demoted to club-status due to budgetary

¹⁶⁷ *Id.*

¹⁶⁸ *See id.* at 711.

¹⁶⁹ *See id.* at 712.

¹⁷⁰ Bob Hertz, *Beasley Quits as Rifle Coach: Her WVU Teams Won Eight National Championships*, DOMINION POST, Mar. 30, 2006, at 5B, available at 2006 WLNR 5309114; *WVU Rifle Team May Be Reinstated*, CHARLESTON DAILY MAIL, Mar. 25, 2004, at 2A, available at 2004 WLNR 1196575.

¹⁷¹ Civilian Marksmanship Program, *West Virginia University Reinstates Rifle Program*, The First Shot: CMP On-Line Magazine, Apr. 2004, <http://www.odcmp.org/0504/default.asp?page=WVU> (last visited Feb. 22, 2008).

¹⁷² Shelly Anderson, *"We Feel Lost," This Week's Program Cuts at WVU Just Part of a Bitter Trend Nationwide*, PITTSBURGH POST-GAZETTE, Apr. 20, 2003, at D-1.

concerns.¹⁷³ This demotion was a huge blow not only to WVU, but to the state of West Virginia as a whole. West Virginia took pride in its national championship rifle team, and on July 1, 2004, the rifle team was reinstated as a varsity sport at WVU due to donations and fundraisers.¹⁷⁴

Institutions around the nation have given many reasons for eliminating sports teams. The two most frequently cited reasons are budget constraints and Title IX compliance.¹⁷⁵

1. West Virginia University

Ed Pastilong, WVU's Athletic Director, is very proud of the efforts of the WVU Athletic Department.¹⁷⁶ He feels that the athletic department is run in a "competitive and doable manner."¹⁷⁷ As to female athletics at WVU, Pastilong states "we want to maintain opportunities for women and we want to provide resources to be competitive and enjoy their intercollegiate athletic experience."¹⁷⁸ WVU takes Title IX compliance very seriously.¹⁷⁹ Over the years, the WVU athletic department has increased opportunities for women by funding women's full-tuition scholarships and increasing women's athletic teams.¹⁸⁰

However, in 2003, the WVU athletic department was notified by WVU's Board of Directors that it must reduce expenditures and increase revenues.¹⁸¹ WVU was forced to make changes to remedy the budget problem, and it became apparent that certain sports teams needed to be eliminated. The reason given for specific team elimination was that resources "were stretched too thin to make across-the-board cuts and expect teams to remain competitive."¹⁸²

Many factors were analyzed when determining which sports to eliminate. Because of their elite status, certain sports were "untouchable," such as football, men's and women's basketball, gymnastics, and women's soccer.¹⁸³

¹⁷³ Andrew J. Beckner, *Lack of Funding Places Future of WVU Rifle Team in Doubt*, CHARLESTON DAILY MAIL, Apr. 28, 2005, at 2B; *Fund-Raiser Fails Rifle Team's Revival*, WHEELING NEWS-REGISTER, Oct. 31, 2004, at A14, available at http://www.oweb.com/state/story/1031202004_sta02.asp.

¹⁷⁴ *Fund-Raiser Fails Rifle Team's Revival*, *supra* note 173, at A14.

¹⁷⁵ Interview with Jeff Small, *supra* note 5; Interview with Ed Pastilong, *supra* note 4.

¹⁷⁶ Interview with Ed Pastilong, *supra* note 4. Ed Pastilong has been the Athletic Director at West Virginia University since July 1989. West Virginia University Mountaineers Official Athletic Site, Director of Athletics, <http://www.msnsportsnet.com/page.cfm?section=9612> (last visited Feb. 20, 2008).

¹⁷⁷ Interview with Ed Pastilong, *supra* note 4.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Anderson, *supra* note 172, at D-1.

¹⁸³ *Id.*

The rest of the sports were rated by evaluating five categories: "cost; competitiveness; in-state vs. out-of-state athletes; popularity locally, nationally and among young athletes; and gender equity."¹⁸⁴ In April of 2003, WVU cut five sports teams: rifle, men's indoor track, men's outdoor track, men's tennis, and men's cross-country.¹⁸⁵

The crucial inquiry at WVU was whether the elimination of teams was fueled by pure budget concerns or also equally by Title IX concerns. The budget was certainly a concern. The WVU Athletic Department is self-supporting.¹⁸⁶ It spends monies received through the Mountaineer Athletic Club ("MAC"), which receives its funds through contributions by corporations and individuals, and also ticket sales.¹⁸⁷ WVU stated that the rifle team itself cost \$162,000 per year to run while producing revenues of only \$129,000.¹⁸⁸ The cuts in 2003 were estimated to save the athletic department \$600,000 per year from a budget that requires approximately \$27 million.¹⁸⁹ It takes approximately \$5.5 million per year just to fund athletic scholarships.¹⁹⁰ WVU Athletic Director Ed Pastilong explained that the athletic department is like any other business: "you have to balance the books and you can only maintain what you can pay for."¹⁹¹ Therefore, the budget was a clear problem due to some teams' revenues being lower than their costs.

However, the decision to eliminate teams was also scrutinized under the lens of Title IX compliance. WVU stated that the elimination of the specific five sports teams was due to Title IX compliance.¹⁹² Terri Howes, the West Virginia Associate Athletic Director, stated that the eliminations "were necessary to keep the athletic department solvent, regardless of gender issues . . ."¹⁹³ However, she also mentioned that "[g]ender equity was not a deciding factor, but it was part of it."¹⁹⁴

Before the cuts, the WVU athletic program offered 260 (40%) slots to female athletes and 388 (60%) slots to male athletes.¹⁹⁵ Since the cuts, the percentages of women and men playing sports have dramatically changed to 274

¹⁸⁴ *Id.*

¹⁸⁵ Hertzell, *supra* note 170, at 5B.

¹⁸⁶ Telephone Interview with Ed Pastilong, Athletic Dir., W. Va. Univ. (Feb. 9, 2007).

¹⁸⁷ *Id.*

¹⁸⁸ *WVU Rifle Team May Be Reinstated*, *supra* note 170, at 2A.

¹⁸⁹ Anderson, *supra* note 172, at D-1.

¹⁹⁰ Interview with Ed Pastilong, *supra* note 186.

¹⁹¹ Interview with Ed Pastilong, *supra* note 4.

¹⁹² Hertzell, *supra* note 170, at 5B.

¹⁹³ Anderson, *supra* note 172, at D-1.

¹⁹⁴ *Id.*

¹⁹⁵ See *infra* Appendix B; Monica Corbo, Title IX Compliance: Non-Appalachian Versus Appalachian in Colleges and Universities, App. A (Apr. 22, 2003) (unpublished M.S. thesis, Marshall University), available at <http://www.marshall.edu/etd/masters/corbo-monica-2003-ms.pdf>.

(47%) slots for female athletes and 306 (53%) slots for male athletes.¹⁹⁶ Meanwhile, the WVU student body has stayed consistent at 54% men and 46% women from 2003 to the present.¹⁹⁷

Male athletes were substantially affected by the elimination of teams in 2003: fifty-four of the fifty-six athletes on these eliminated teams were male.¹⁹⁸ Overall, since the eliminations in 2003, the number of female athletes has increased by fourteen, but the number of male athletes has decreased by eighty-two.¹⁹⁹ Title IX was not designed to promulgate such a devastating decrease in the number of male student athletes.

2. Marshall University

Shortly after WVU eliminated five sports teams, Marshall followed the same unfortunate course. In April 2003, Marshall announced the elimination of its men's indoor and outdoor track and field program.²⁰⁰ Due to this elimination, the state of West Virginia currently has no Division I men's track teams, and Marshall has the only Division I cross country team, which consists of both men and women.

Bob Marcum, Marshall University's Athletic Director, stated that "due to the fiscal conditions the university and the state of West Virginia are facing, we must make cuts in an attempt to balance our overall budget."²⁰¹ Eliminating men's indoor and outdoor track and field programs was projected to save the athletic department \$150,000 per year, 1.3% of a budget that is approximately \$11.5 million.²⁰² However, even with this cut, the athletic department was still operating at a \$500,000 deficit.²⁰³

Jeff Small, Marshall University's Head Track and Cross-Country coach, explained that the elimination was made to comply with Title IX as well as to save money.²⁰⁴ Small stated that he understood that the athletic department would be in compliance with Title IX as long as it showed continuing progress towards gender equity.²⁰⁵ Small continued by saying Marshall tried to be "more

¹⁹⁶ See *infra* Appendix B; U.S. DEP'T OF EDUC., OFFICE OF POSTSECONDARY EDUC., <http://ope.ed.gov/athletics/InstDetail.asp> (reporting year July 1, 2006 to June 30, 2007) (last visited Feb. 22, 2008).

¹⁹⁷ See *id.*; Corbo, *supra* note 195, at App. A.

¹⁹⁸ Anderson, *supra* note 172, at D-1.

¹⁹⁹ See *infra* Appendix B; U.S. DEP'T OF EDUC., *supra* note 196.

²⁰⁰ *Men's Track Axed at MU, 18 Athletes—10 From State—Affected by Cuts*, CHARLESTON GAZETTE, Apr. 26, 2003, at 1B.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Interview with Jeff Small, *supra* note 5. Jeff Small has been with Marshall University since 1995. *Id.*

²⁰⁵ *Id.*

proactive" by adding women's golf and women's soccer around the time when men's track was eliminated.²⁰⁶

Before the cuts, the Marshall athletic program offered 168 (35%) slots to female athletes and 315 (65%) slots to male athletes.²⁰⁷ Since the cuts, the percentages of women and men playing sports have been dramatically changed to having 158 (42%) slots to female athletes and 214 (58%) slots to male athletes.²⁰⁸ Meanwhile, the Marshall student body has stayed consistent at 54% men and 46% women.²⁰⁹ Overall, since the team elimination in 2003, the number of female athletes has decreased by ten, and the number of male athletes has substantially decreased by 101.²¹⁰ Again, Title IX was not designed to promulgate such a devastating decrease in the number of student athletes.

3. Universities in Ohio

West Virginia universities are not alone. Schools in Ohio have succumbed to team eliminations for similar reasons. In 1999, Miami University eliminated men's tennis, soccer, and wrestling.²¹¹ In 2002, Bowling Green University eliminated four men's sports so it could comply with Title IX: tennis, swimming, indoor track, and outdoor track.²¹² This elimination removed sixteen scholarships and was aimed to save the athletic department \$360,000 annually.²¹³ This was after Bowling Green University had already dropped wrestling and men's lacrosse.²¹⁴ In 2003, the University of Toledo eliminated men's swimming and men's indoor and outdoor track.²¹⁵ This move affected fifty-nine athletes and was aimed to save the athletic department \$478,000 annually.²¹⁶

The most recent act of eliminating sports occurred at Ohio University. In January 2007, Ohio University eliminated men's swimming and diving, men's indoor track and field, men's outdoor track and field, and women's la-

²⁰⁶ *Id.*

²⁰⁷ *See infra* App. B; Corbo, *supra* note 195.

²⁰⁸ *See infra* App. B; U.S. DEP'T OF EDUC., *supra* note 196.

²⁰⁹ *See infra* App. B; Corbo, *supra* note 195.

²¹⁰ *Id.*

²¹¹ Press Release, The Center of Individual Rights, Court Upholds Elimination of Men's Teams at Miami of Ohio, (Jan. 30, 2001), *available at* www.cir-usa.org/releases/45.html.

²¹² *Men's Track Axed at MU, 18 Athletes—10 From State—Affected by Cuts*, CHARLESTON GAZETTE, Apr. 26, 2003, at 1B.

²¹³ *Id.*

²¹⁴ *Ohio University to Drop Four Varsity Sports*, Jan. 29, 2007, <http://careercenter.universitybusiness.com/newssummary.aspx?news=yes&postid=1964>.

²¹⁵ *Men's Track Axed at MU, 18 Athletes—10 From State—Affected by Cuts*, CHARLESTON GAZETTE, Apr. 26, 2003, at 1B.

²¹⁶ *Id.*

crosse.²¹⁷ The reason stated for the elimination was to save money and to comply with Title IX.²¹⁸ The elimination affecting eighty-seven students is projected to save Ohio University \$685,000 in an effort to reduce the current four million dollar deficit.²¹⁹ The male to female student ratio at Ohio University is 48% male and 52% female.²²⁰ The male to female student athlete ratio is 59% male and 41% female.²²¹ Kirby Hocutt, Athletic Director, said these eliminations were the only way to comply with Title IX due to the university's current financial position.²²² Ohio University has competed in track and field since the early 1900s and competed in swimming and diving since 1935.²²³ This elimination has placed Ohio University at the Division I-A minimum of sixteen varsity programs.²²⁴

IV. LEGISLATIVE TRENDS: WHAT WVU AND MARSHALL COULD HAVE DONE TO BETTER DEAL WITH TITLE IX

Given all of the attention Title IX has received due to the elimination of sports teams around the country, the statute may be misunderstood. "Nothing in Title IX prevents schools from fostering certain athletic teams; Title IX merely prevents them from providing unequal treatment between the sexes."²²⁵ Schools do not have to downgrade successful men's teams to upgrade successful women's teams simply because there is a male counterpart team at the institution.²²⁶ Disparities between a single women's athletic team and its male counterpart should not violate compliance as long as the institution is providing benefits to women that are equal to the men's athletic program as a whole.²²⁷

What should universities do when they are confronted with a possible Title IX violation? Do universities have to automatically start eliminating men's sports? The answers to these questions may be determined by how creative universities are in finding alternatives to elimination and how much the universities care about the particular sports being eliminated.

²¹⁷ Ohio University to Drop Four Varsity Sports, Jan. 29, 2007, <http://careercenter.universitybusiness.com/newssummary.aspx?news=yes&postid=1964>.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ U.S. DEP'T OF EDUC., *supra* note 196.

²²¹ *Id.*

²²² Ohio University to Drop Four Varsity Sports, Jan. 29, 2007, <http://careercenter.universitybusiness.com/newssummary.aspx?news=yes&postid=1964>.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Harris, *supra* note 14, at 79.

²²⁶ *Id.*

²²⁷ *Id.*

A. *Alternatives to Elimination*

Many universities claim that the only option available to comply with Title IX is to eliminate certain sports teams. In *Cohen*, the Court made certain recommendations, including the following:

Brown may achieve compliance with Title IX in a number of ways. [1] It may eliminate its athletic program altogether, [2] it may elevate or create the requisite number of women's positions, [3] it may demote or eliminate the requisite number of men's positions, or [4] it may implement a combination of these remedies.²²⁸

The Court recognized that financial constraints may be a large factor in determining which avenues are to be taken in compliance.²²⁹ The Court noted that elimination was not the only option.²³⁰ The Court suggested that by reducing the standard of living for its current varsity sports, participation opportunities for its women athletes could be expanded.²³¹ The University was given full discretion on which route to take in complying with Title IX.

If budget constraints were not an issue, universities could simply add women's sports teams to create equality. However, universities find themselves in a tough position when they are forced to increase opportunities while having limited funds to do so. Budget deficits pose a problem, but there are ways to remedy that situation. Universities could start by asking for money from the state legislature. Universities could also try to raise money through various types of fund-raisers.²³²

Many drastic changes to the current status of nationwide athletic departments have also been suggested. The Women's Sports Foundation ("WSF") has agreed that the most appropriate action is to add women's teams, not subtract men's teams.²³³ The WSF's suggestion for funding additional sports is to cut the "bloated" budgets of men's football and basketball teams.²³⁴ For example, WSF suggests placing a sixty-player ceiling on the total roster of a college football team.²³⁵ This would not only free up some funding, but would also purportedly level the college football playing field by not allowing universities

²²⁸ *Cohen v. Brown Univ.*, 879 F. Supp. 185, 214 (D.R.I. 1995).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² The author suggests fundraisers such as raffles, dinners, auctions, and competitive sports.

²³³ WEILER & ROBERTS, *supra* note 2, at 950.

²³⁴ *Id.*

²³⁵ *Id.* at 951.

to stock-pile premium players.²³⁶ This plan supposedly gives other universities access to more talent.²³⁷ On a similar note, the prominent sports magazine, *Sports Illustrated*, has recommended that football rosters and scholarships be reduced from eighty-five to seventy-five.²³⁸ Such cuts are very debatable as some people feel that football and basketball budgets are too large, and others like WVU's Athletic Director Ed Pastilong, think every scholarship is necessary to run a Division I football and basketball program.²³⁹

Other more drastic changes could consist of the NCAA putting a cap on the amount each university can spend on a certain sport, having athletic scholarships paid for by revenues of the individual sport, or even eliminating athletic scholarships all together.²⁴⁰ Eliminating athletic scholarships and having aid being awarded based solely on need is how the Ivy League is currently operated.²⁴¹

Another possibility would be to propose legislation in the United States Congress to amend Title IX. One suggestion is to exclude non-scholarship players from Title IX calculations.²⁴² Non-scholarship players incur the *de minimis* cost of transportation, equipment, and other expenses that sports team players incur on a daily basis.²⁴³ Having non-scholarship players excluded will decrease the attention to these players and will focus the attention on the players that are actually using a substantial amount of the university's funds to finance their education.²⁴⁴

Finally, Title IX allows universities to operate single-sex teams in contact sports.²⁴⁵ Another possibility is to exclude contact sports²⁴⁶ from Title IX calculations.²⁴⁷ Popular contact sports include football and basketball. A contact sport such as football requires a large number of participants; thus, distribution of athletes between sexes is disproportionately skewed and the disparity

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 949.

²³⁹ Interview with Ed Pastilong, *supra* note 4.

²⁴⁰ WEILER & ROBERTS, *supra* note 2, at 976.

²⁴¹ *Id.*

²⁴² *Id.* at 951.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*; 34 C.F.R. § 106.41(b) (2007).

²⁴⁶ A contact sport is a sport which includes significant physical contact between the athletes involved. The Free Dictionary, *Contact Sport*, <http://encyclopedia.thefreedictionary.com/contact+sport> (last visited Mar. 6, 2007).

²⁴⁷ *Cohen v. Brown Univ.*, 101 F.3d 155, 192 (1st Cir. 1996).

makes it nearly impossible for universities to provide both men's and women's teams in other sports.²⁴⁸

As stated previously, the best option to obtain gender equity under Title IX would be to simply add more teams. If it's not possible to raise sufficient funds via alternative funding sources, then the universities have numerous other creative options, as listed above. The important thing is to shift the current mindset about Title IX compliance. Title IX compliance should not be interpreted as a mandate to eliminate sports teams, but instead as a challenge in terms of creative thinking.

B. *What WVU and Marshall Should Have Done*

The spirit of Title IX is not to eliminate men's programs in order to achieve gender equity.²⁴⁹ Jeff Small stated that it is terrible that there is no Division I-A men's indoor or outdoor track team in West Virginia.²⁵⁰ Track and Field is really "the" gender equity sport in college athletics.²⁵¹ The men's and women's teams used the same equipment, traveled together, and stayed at the same hotels.²⁵² The Cross Country team at Marshall, consisting of men and women, is the only Division I-A team left in West Virginia to have these qualities.²⁵³

A year and a half before WVU and Marshall eliminated their sports teams, the NCAA changed the rule so that universities only need to have six men's teams and ten female teams to obtain Division I-A status.²⁵⁴ According to Jeff Small, it "sounded like a rule to get rid of men's sports."²⁵⁵ While the rule was not explicit in stating that men's teams needed to be eliminated, there was implicit encouragement to consider the cutting of male athletic teams.

As stated previously, the WVU Athletic Department is self-funding.²⁵⁶ Problems arose at WVU when changes were required to be made and there were limited funds to meet the most desirable outcome. The Mountaineer Athletic Club ("MAC"), which funds the WVU athletic department, receives money neither from the university nor from the state of West Virginia.²⁵⁷ Though some

²⁴⁸ *Id.* at 192-93. *But see* Blair v. Wash. St. Univ., 740 P.2d 1379 (Wash. 1987) (holding football cannot be excluded from calculations of participation opportunities).

²⁴⁹ Interview with Jeff Small, *supra* note 5.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Interview with Ed Pastilong, *supra* note 186.

²⁵⁷ *Id.* Some athletic departments in the NCAA do receive money through their own university, their own state, or both.

people claim that MAC would have welcomed any money prior to the elimination of the teams in 2003, the fact remains that MAC didn't actually request any money from the university or the state of West Virginia.²⁵⁸ The question remains: Why did the MAC refuse to request funds from WVU or the state of West Virginia when there was clearly an opportunity to save teams from being eliminated? Pastilong assured that "when teams were being dropped, everyone knew about it."²⁵⁹ Teams were "not dropped out of nowhere."²⁶⁰

If the eliminated men's programs were to receive the same budget as the women's teams, tennis would cost \$76,333 per year, indoor track and field, \$54,429, outdoor track and field, \$51,955, and cross country, \$17,319.²⁶¹ In order to reinstate these men's teams, only \$200,036 in revenue would have been needed. Finding money to fund sports may seem like an option far from reality, but fundraising of this precise type has happened in the past: For example, the WVU elimination of 2003 included the rifle team.²⁶² However, on July 1, 2004, the rifle team was reinstated.²⁶³ Where did the money come from? The rifle team only has an operating expense of \$22,353 per year.²⁶⁴ The rifle team was "paid for by a \$100,000 legislative allocation and money promised through various fund-raisers."²⁶⁵ A "gun bash" rally was held where over \$100,000 was raised.²⁶⁶ Promoters were used to attract people to the event.²⁶⁷ Additionally, the National Rifle Association offered to sponsor the rifle team.²⁶⁸ Jeff Small stated it best when saying "WVU loves their guns."²⁶⁹ This makes one think: Does West Virginia love men's track, tennis, cross country, etc.?

Another option is to give sufficient notice to sports teams before eliminating them. This option will get the coaches and players involved in the decisions that may lead to the elimination of their particular sport. Having players and coaches at the brink of extinction would ignite the fire necessary to promote fundraisers. At Marshall, there was nothing the coaches could do.²⁷⁰ Players remember coming to practice one day and being shocked at the news that the

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ U.S. DEP'T OF EDUC., *supra* note 196.

²⁶² *Fund-Raiser Fails Rifle Team's Revival*, THE INTELLIGENCER/WHEELING NEWS-REGISTER, available at http://www.oweb.com/state/story/1031202004_sta02.asp.

²⁶³ *Id.*

²⁶⁴ U.S. DEP'T OF EDUC., *supra* note 196.

²⁶⁵ *Fund-Raiser Fails Rifle Team's Revival*, *supra* note 262.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ Interview with Jeff Small, *supra* note 5.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

men's track team was being discontinued at the end of the season.²⁷¹ The coaches were just as surprised as the players.²⁷² The men's track team at WVU was notified that the team was being discontinued in April, one month before the school year was over.²⁷³ Notification at the end of the school year made it difficult to transfer to another school's track program.²⁷⁴

When, in the worst-case scenario, teams are forced into elimination, two services should be allocated. First, athletic scholarships being eliminated due to budgetary and Title IX concerns should be continued until four years are fulfilled, even though the respective team is no longer in existence. By immediately dropping scholarships, some athletes are forced to transfer or even drop out of school. It is a tremendous disservice to students to set them up for their college careers and then place them in financial jeopardy due to factors out of their own control. WVU honored this service after the 2003 team eliminations.²⁷⁵ However, Marshall was unable to offer this same gratuity and only accommodated the seniors on scholarships, while letting everyone else go.²⁷⁶

Second, eliminated sports should be offered as club sports if there is still adequate interest. Being a club sport means the athletes can still use the facilities, but they would have no athletic association with the university.²⁷⁷ For instance, track athletes can use the track and athletic weight room, although they would have to individually pay for travel expenses and entry fees to competitions.²⁷⁸

Sports at WVU, such as the rifle team and track team, were offered as club sports after their elimination in 2003.²⁷⁹ After Marshall's elimination, club sports were not offered and men's indoor and outdoor track was totally eliminated.²⁸⁰ Offering eliminated sports teams as club teams will not only put these student-athletes in a better position than with total team elimination, but it will make the university look better in the eyes of society.

²⁷¹ Telephone Interview with William Scott Carson, former cross-country athlete, Marshall Univ. (Jan. 28, 2007).

²⁷² *Id.*

²⁷³ Telephone Interview with Alvin Hathaway, former track athlete, W. Va. Univ. (Jan. 28, 2007).

²⁷⁴ *Id.*

²⁷⁵ Interview with Ed Pastilong, *supra* note 4.

²⁷⁶ Interview with Jeff Small, *supra* note 5.

²⁷⁷ Interview with William Scott Carson, *supra* note 271.

²⁷⁸ *Id.*

²⁷⁹ Interview with Alvin Hathaway, *supra* note 273.

²⁸⁰ Interview with Jeff Small, *supra* note 5.

V. CONCLUSION

The heart of Title IX, “gender equity,” is an admirable concept.²⁸¹ “After twenty years of virtual paralysis in its application to athletics, Title IX is becoming the vehicle for gender equity that Congress intended it to be.”²⁸²

Title IX has “changed the face of women’s sports,” as well as society’s interest and attitude toward female student-athletes.²⁸³ The percentage of college athletes who are women rose from 15% in 1972 to 37% in 1998.²⁸⁴ This is certainly a positive trend and much of this trend has to do with Title IX.

Nevertheless, advocates for men’s sports feel deeply wronged.²⁸⁵ Eliminating sports was never the intent of Title IX; however, in fear of noncompliance, schools have seen no other solution.²⁸⁶ After numerous instances of schools dropping men’s sports and explaining their actions on the basis of the need to shift money to women’s sports, questions have risen about the fairness of an interpretation of Title IX that advances the interest of one group by denying opportunities for another.²⁸⁷ Some of these school sports, especially the recently reinstated WVU rifle team, have enjoyed a long history of success. Title IX is a complex rule that allows a finding of compliance via numerous methods. Schools should find ways to comply with Title IX without resorting to a solution that will destroy the dreams of male athletes.

President George W. Bush framed the issue well when declaring his support for Title IX during his 2000 election campaign: “We should support a reasonable approach to Title IX that seeks to expand opportunities for women rather than destroying existing men’s teams.”²⁸⁸ As appropriately stated:

Men in nonrevenue-producing sports will continue to feel vulnerable, and cries of “reverse discrimination” will be heard. But the values of athletic competition, long extolled for men—teamwork, leadership, discipline, work ethic, self-sacrifice, pride in accomplishment, strength of character—serve women equally well. Gender equity in athletics is about sharing and opportunity, and it is the mission of athletic departments not to

²⁸¹ Botelho, *supra* note 27, at 795.

²⁸² Harris, *supra* note 14, at 110.

²⁸³ Cohen v. Brown Univ., 101 F.3d 155, 188 (1st Cir. 1996).

²⁸⁴ Neal v. Bd. of Trustees of Cal. State Univ., 198 F.3d 763, 769 (9th Cir. 1999).

²⁸⁵ Weistart, *supra* note 72, at 263.

²⁸⁶ Botelho, *supra* note 27, at 795.

²⁸⁷ Weistart, *supra* note 72, at 263.

²⁸⁸ WEILER & ROBERTS, *supra* note 2, at 975.

lose sight of that as they continue to try to offer them on an equal basis.²⁸⁹

Many elite athletes are raised in West Virginia and it would be beneficial for the state if we can find the means to keep these athletes in our state universities. However, this can not happen if the sports are not available in the state. West Virginia is proud of its current intercollegiate sports teams and should make a better effort to keep existing sports teams, as well as find creative ways to reinstate teams that have been eliminated due to budget concerns and Title IX.

Title IX is the law. Universities must provide close to 50-50 gender equity. Congress and the OCR surely expected universities to add female teams in order to come into compliance. Instead, due to alleged budget concerns, universities are choosing to eliminate teams, the majority being men's teams, and much of the blame is being directed towards Title IX. The main purpose of Title IX is "to ensure that the gender-segregated allocation of athletics opportunities does not disadvantage either gender."²⁹⁰ The best of both worlds is available through creativity: increasing female opportunities while refraining from eliminating male opportunities.

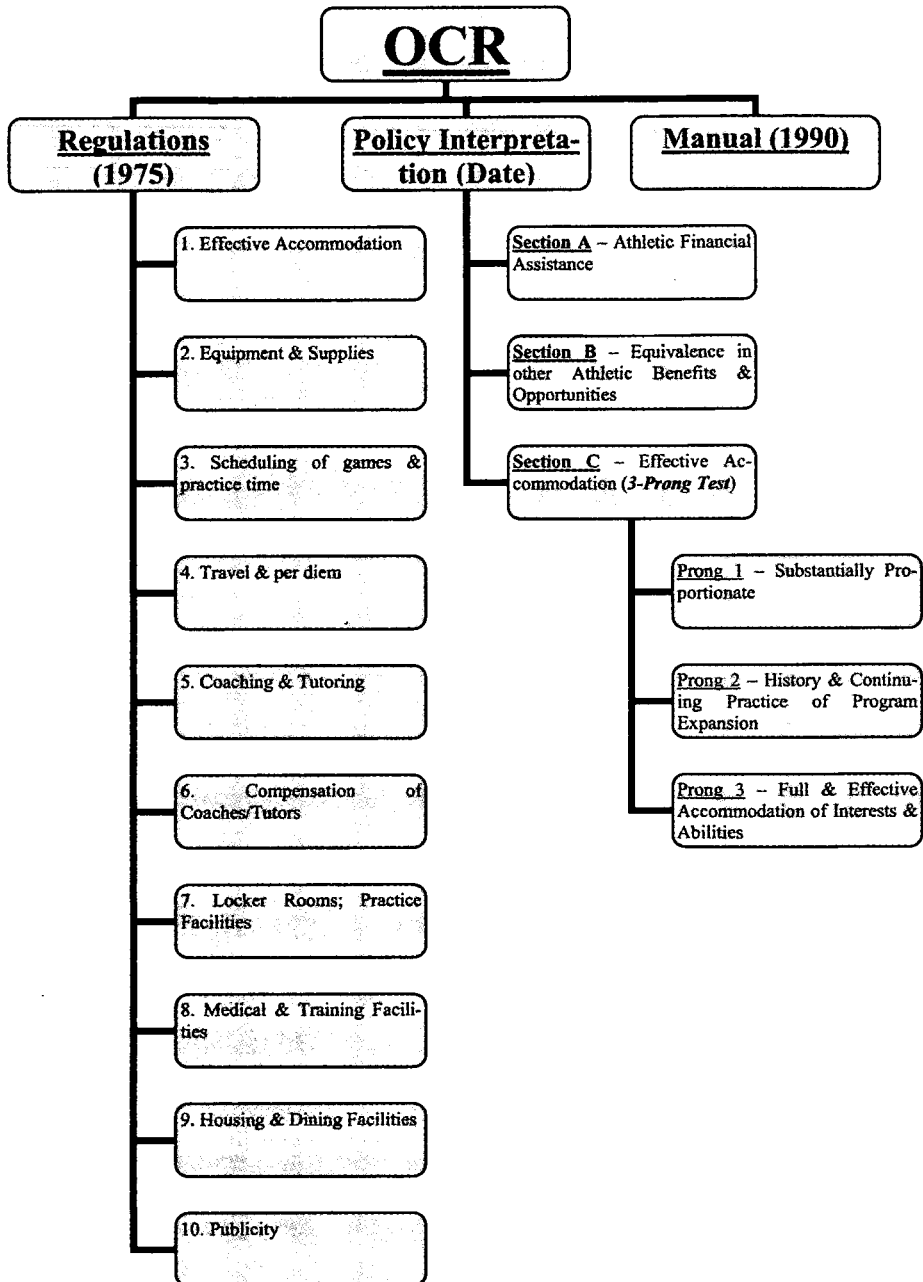
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²⁸⁹ Botelho, *supra* note 27, at 795-96; *Sports, Female Athletics and the Law*, TAMPA TRIB., Mar. 12, 1997, at 12, available at <http://w3.lexis.com/lawschoolreg/researchlogin08.asp?t=y&fac=no>.

²⁹⁰ *Cohen v. Brown Univ.*, 101 F.3d 155, 177 (1st Cir. 1996).

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APPENDIX A: TOOLS TO MEASURE COMPLIANCE WITH TITLE IX



APPENDIX B: COMPARING UNDERGRADUATE ENROLLMENT TO ATHLETES

- West Virginia University (Before 2003 Elimination)²⁹¹
 - Female Undergraduate Student Total = 7,119 (46%)
 - Male Undergraduate Student Total = 8,344 (54%)
 - Female Athletes = 260 (40%)
 - Male Athletes = 388 (60%)
- West Virginia University (7/1/05 – 6/30/06)²⁹²
 - Female Undergraduate Student Total = 8,464 (46%)
 - Male Undergraduate Student Total = 9,985 (54%)
 - Female Athletes = 280 (48%)
 - Male Athletes = 310 (52%)
- Marshall University (Before 2003 Elimination)²⁹³
 - Female Undergraduate Student Total = 4,430 (55%)
 - Male Undergraduate Student Total = 3,685 (45%)
 - Female Athletes = 168 (35%)
 - Male Athletes = 315 (65%)
- Marshall University (7/1/05 – 6/30/06)²⁹⁴
 - Female Undergraduate Student Total = 4,431 (55%)
 - Male Undergraduate Student Total = 3,581 (45%)
 - Female Athletes = 158 (42%)
 - Male Athletes = 214 (48%)

²⁹¹ Corbo, *supra* note 195.

²⁹² U.S. DEP'T OF EDUC., *supra* note 196.

²⁹³ Corbo, *supra* note 195.

²⁹⁴ U.S. DEP'T OF EDUC., *supra* note 196.

