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COMMENTS

TITLE IX LEAVES SOME ATHLETES ASKING, “CAN WE PLAY TOO?”

Title IX (Title IX or the Act), enacted as part of the Educational Amendments of 1972,¹ prohibits discrimination in any federally funded education program or activity.² While striving toward a noble goal, Title IX has been slow to eliminate the discrimination it was designed to remedy.³ Although little legislative material accompanied the Act's passage,⁴ it soon became apparent that athletics fell within Title IX's purview.⁵

In the years following Title IX's enactment, its sparse legislative history made it unclear whether the Act applied specifically to university athletic programs.⁶ This ambiguity caused concern in the university community

1. Title IX of the Act of June 23, 1972, Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1688 (1988)).

2. 20 U.S.C. § 1681(a). The section states: "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 . . ." *Id.*

3. Alexander Wolff, *The Slow Track*, SPORTS ILLUSTRATED, Sept. 28, 1992, at 52 (stating that many universities are ignoring Title IX's requirements); Laura Duncan, *Colleges Slowly Leveling Playing Field For Women*, CHI. DAILY L. BULL., Oct. 5, 1994, at 1 (citing a recent poll that found only one of 646 colleges surveyed were even close to complying with the Act); see Diane Heckman, *Women & Athletics: A Twenty-Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 2 (1992) (calling Title IX the "cornerstone of federal statutory protection for female athletes").

4. *Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993) (noting that Congress included no committee report with the final bill, and athletics was mentioned only twice during the congressional debate); Catherine Pieronek, *A Clash of Titans: College Football v. Title IX*, 20 J.C. & U.L. 351, 353 (1994) (discussing Title IX's legislative history); see *infra* notes 34-86 and accompanying text (discussing the Act's legislative history).

5. 20 U.S.C. § 1682 (granting each federal department and agency the authority to effectuate the provisions of § 1681 by issuing rules, regulations, or orders of general applicability consistent with the objectives of the Act); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir.) (noting that the Act delegated to the Secretary of Health, Education and Welfare (HEW) the responsibility for promulgating regulations that include college athletics), *cert. denied*, 114 S. Ct. 580 (1993); *Cohen*, 991 F.2d at 893 (explaining that the Secretary of HEW followed the directive of Congress by promulgating regulations which specifically included college athletics); see *infra* notes 52-64 and accompanying text (discussing Title IX's regulations).

6. Joseph E. Krakora, Note, *The Application of Title IX to School Athletic Programs*, 68 CORNELL L. REV. 222, 223 (1983) (stating that after its enactment, considerable conflict

because college athletics had become and still are such an integral part of American society.⁷ In 1975, at the behest of Congress,⁸ the Department of Health, Education, and Welfare (HEW) issued regulations that extended Title IX's scope to include intercollegiate athletics.⁹ But it was not until 1979, when HEW published a Policy Interpretation,¹⁰ that Title IX's effect on university athletic programs became clear.¹¹ Just after

existed over the Act's applicability to college athletics); *see infra* notes 36-38 and accompanying text (elaborating on Title IX's legislative history).

7. James V. Koch, *The Economic Realities of Amateur Sports Organization*, 61 *IND. L.J.* 9, 9-10 (1985-86) (noting that sports occupy a unique and sometimes overriding position in America, and stating that athletics in the United States are "larger than life" both economically and socially); *see Cohen*, 991 F.2d at 891. The court comments that college athletics occupy a prominent role in America. *Id.* It not only offers college scholarships to athletes, but college athletics also teaches valuable lessons both on and off the field in areas of leadership and self confidence. *Id.* *See* Thomas A. Cox, *Intercollegiate Athletics and Title IX*, 46 *GEO. WASH. L. REV.* 34, 34 (quoting Caspar Weinberger, then Secretary of HEW, who stated: "I had not realized until the [Act's] comment period that athletics is the single most important thing in the United States"); Philip Anderson, *A Football School's Guide To Title IX Compliance*, 2 *SPORTS LAW. J.* 75, 76 (1995) (commenting on the importance of intercollegiate athletics to the American education system); Melissa M. Beck, Note, *Fairness on the Field: Amending Title VII to Foster Greater Female Participation in Professional Sports*, 12 *CARDOZO ARTS & ENT. L.J.* 241 (1994) (stating that in American culture, sports are synonymous with apple pie and the Fourth of July); Jill Johnson, Note, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 *B.U. L. REV.* 553 (1994) (noting that athletics are an integral part of American universities); Aside, *The Common Law Origins of the Infield Fly Rule*, 123 *U. PENN. L. REV.* 1474 (1975) (exemplifying the importance of baseball in American society by comparing the origins of a rule of the national pastime with the origins of the English and American systems of jurisprudence). *But cf.* Koch, *supra*, at 9-10 (noting that while sports do hold a prominent position in our minds, they are not as big as we might suppose). The author points out that the University of Michigan's athletic budget is only the economic equivalent of one prosperous central Indiana supermarket. *Id.* at 10.

8. *Cohen*, 991 F.2d at 893-94 (commenting on the various layers of Title IX regulations); Anderson, *supra* note 7, at 79 n.21 (noting that Congress charged HEW with promulgating Title IX regulations).

9. Department of Health, Education, and Welfare, General Administration, 40 *Fed. Reg.* 24,128 (1975) (bringing each educational program or activity which receives or benefits from federal financial assistance, including athletics, under the guise of Title IX); 45 *C.F.R.* § 86.4 (1994) (requiring "whatever remedial action is necessary . . . to eliminate existing discrimination on the basis of sex"); Krakora, *supra* note 6, at 222 (noting that HEW interpreted the statute as "extending to athletic programs in any institution receiving federal money" regardless of whether or not the money actually is used in the athletic program).

10. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 *Fed. Reg.* 71,413 (Office of Civil Rights, Office of the Secretary, HEW 1979) [hereinafter Policy Interpretation] (outlining HEW's interpretation of Title IX's regulations).

11. *See Cannon v. University of Chicago*, 441 U.S. 677, 689-709 (1979) (discussing the enactment history of Title IX). *But see Grove City College v. Bell*, 465 U.S. 555, 563-70 (1984) (finding that Title IX coverage of athletics is not triggered when students receive Federal Basic Educational Opportunity Grants to pay for their education).

HEW published the Policy Interpretation, Congress divided HEW into two agencies,¹² the Department of Health and Human Services (HHS)¹³ and the Department of Education (DED).¹⁴ The latter took over administration of Title IX.¹⁵

Following the issuance of the regulations and subsequent Policy Interpretation, it became obvious that Title IX was applicable to universities on an institution-wide basis.¹⁶ This institution-wide approach meant that if any portion of an institution received federal funding, then all of the programs within that institution were subject to Title IX.¹⁷ This broad reading of the Act, applying an institution-wide approach, was not popular with either university athletic administrators or the National Col-

12. See 20 U.S.C. § 3411-3510 (1988).

13. *Id.* § 3508 (changing the name of the Department of Health, Education, and Welfare to the Department of Health and Human Services); see Johnson, *supra* note 7, at 554-55 n.11 (explaining the confusion surrounding the split of HEW and the subsequent assignment of Title IX to DED); Anderson, *supra* note 7, at 79 n.21.

14. See 20 U.S.C. § 3441(a)(1) (transferring all of the education functions of HEW to DED).

15. See *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828 n.3 (10th Cir.) (noting that DED's Office of Civil Rights (OCR) is now in charge of administering Title IX), *cert. denied*, 114 S. Ct. 580 (1993); *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993). The First Circuit, commenting on what it called "a wonderful example of bureaucratic muddle," explained that in 1979 Congress split HEW into the Department of Health and Human Services (HHS) and the Department of Education. *Id.* At the time of the split, Title IX's regulations were left with HHS, but DED promulgated its own substantially similar set of regulations. *Id.* Because both sets of regulations are still in effect and are essentially identical, this Comment refers to both sets as interchangeable.

16. 45 C.F.R. § 86.2(h) (1994). The regulations define recipient as:

[A]ny State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

Id.; see Policy Interpretation, 44 Fed. Reg. 71,413, 71,414 (1979). The Policy Interpretation, in adopting the institution-wide approach, states that "[t]his Policy Interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department." *Id.*

17. See *infra* notes 43-44 and accompanying text (discussing the institution-wide approach to Title IX).

legiate Athletic Association (NCAA),¹⁸ who now were forced to bring college athletics into compliance with Title IX.¹⁹

Title IX, in conjunction with a number of related events, spurred the growth of women's sports in this country in the 1970s and early 1980s.²⁰ But in 1984, the Supreme Court examined and disagreed with the institution-wide approach of Title IX in *Grove City College v. Bell*.²¹ The Court reversed the institution-wide approach by ruling that Congress intended the Act to be enforced at universities in a program-specific manner.²² In light of this decision, Title IX lost nearly all of the effectiveness it previously had gained in remedying discrimination in college athletic programs.²³ Congress responded to the *Grove City College* decision, by passing the Civil Rights Restoration Act of 1987, (Restoration Act),²⁴ which re-adopted the institution-wide approach of Title IX²⁵ and brought university athletics back within the scope of Title IX.²⁶

Since the passage of the Restoration Act, Title IX has become a focal point at many universities, particularly in light of the budget restraints that many schools currently face.²⁷ Title IX has prompted both female and male members of eliminated athletic teams to file suit alleging Title

18. The NCAA, a voluntary association of over 800 colleges and universities, was formed in 1906 at the behest of President Theodore Roosevelt. PAUL C. WEILER & GARY R. ROBERTS, *CASES, MATERIALS AND PROBLEMS ON SPORTS AND THE LAW* 496-97 (1993). The NCAA was created as a forum for reshaping the rules of football, but has since evolved into a governing body for all intercollegiate athletics. *Id.* at 497.

19. See Johnson, *supra* note 7, at 561 n.51 (noting the expensive legal battle that was fought by the NCAA to keep HEW from promulgating regulations).

20. P. Michael Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 MARQ. SPORTS L.J. 149, 150 (1990) (discussing the growth of women's athletics in the 1970s and early 1980s).

21. 465 U.S. 555 (1984).

22. See *id.* at 570-71 (adopting the program-specific approach); see also *infra* notes 86-104 and accompanying text (discussing the *Grove City College* decision).

23. See Villalobos, *supra* note 20, at 151 (commenting that the Supreme Court left women's athletics with no substantive protection, and several schools immediately eliminated women's programs).

24. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1681 (1988)).

25. § 3(a), 102 Stat. at 28-29; see *infra* notes 105-14 and accompanying text (discussing the Restoration Act).

26. See *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir.) (noting that since 1988 Title IX has applied to all of the operations of a recipient of federal funding), *cert. denied*, 114 S. Ct. 580 (1993).

27. See *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332, 335 (3d Cir. 1993). The university cited budget concerns as the primary reason for its elimination of the athletic team. *Id.*; Andrew Blum, *Athletics in the Court: New Wave of Title IX School Bias Suits Hit*, NAT'L L.J., Apr. 5, 1993, at 1, 30 (stating that "belt-tightening on some college campuses has sparked a new round of Title IX litigation").

IX and other constitutional violations.²⁸ In response, courts have developed an analytic framework for Title IX cases²⁹ based on a thorough reading of both the regulations and the Policy Interpretation.³⁰ This analysis yields positive results for female teams,³¹ negative results for male teams,³² and difficult choices for university administrators.³³

This Comment focuses primarily on Title IX's applicability to, and effect on, university athletic programs. This Comment begins by analyzing Title IX's history, from its passage in 1972 through the Restoration Act of 1987. Next, this Comment focuses on plaintiffs who have brought suit against universities because the school eliminated their team from its athletic program. Through a review of these cases, this Comment analyzes the framework courts use to decide whether a university is complying with Title IX. This Comment then addresses the flaws in the present analysis and argues that the present Title IX analysis represents an impossible situation for universities and an unfortunate situation for male teams. This Comment concludes by recommending alternatives to the present Title IX analysis that allow university administrators to reach equitable decisions for both female and male athletes, while the school retains its decision making freedom.

28. See *infra* notes 118-88 (discussing at length, cases in which female teams and male teams have brought suit under Title IX). For a variety of cases claiming federal and state equal protection violations, see *Kelley v. Board of Trustees of Univ. of Ill.*, 832 F. Supp. 237, 242-43 (C.D. Ill. 1993) (rejecting the men's team's Equal Protection claim), *aff'd* 35 F.3d 265 (7th Cir. 1994), and *cert. denied*, 115 S. Ct. 938 (1995); *Haffer v. Temple Univ.*, 678 F. Supp. 517, 524-36 (E.D. Pa. 1987) (permitting the plaintiff to include an Equal Protection claim with their Title IX claim); *Blair v. Washington State Univ.*, 740 P.2d 1379, 1382-83 (Wash. 1987) (examining a claim brought under the State Equal Rights Amendment). This Comment will focus on the Title IX claims made in these cases.

29. See *Roberts*, 998 F.2d at 824, 827-33 (applying the statutory and regulatory framework for Title IX cases); *Cohen v. Brown Univ.*, 991 F.2d 888, 894-96 (1st Cir. 1993) (laying out the framework in further detail); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 584 (W.D. Pa. 1993) (showing the analysis applied in Title IX cases).

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

31. See *infra* notes 118-70 (discussing the recent cases brought by women).

32. See *Gonyo v. Drake Univ.*, 837 F. Supp. 989, 996 (S.D. Iowa 1993) (deciding that Drake University had not violated Title IX by eliminating the men's wrestling team); *Kelley*, 832 F. Supp. at 243-44 (recognizing the men's swimming team as an innocent victim of Title IX's "benevolent attempt to remedy the effects of an historical deemphasis on athletic opportunities for women").

33. Blum, *supra* note 27, at 30-31 (pointing to some of the difficulties that Title IX compliance is presenting).

I. TITLE IX'S HISTORY

A. Ambiguous Language and Legislative Interpretations

Section 1681(a) of Title IX of the Education Amendments of 1972³⁴ provides that no person shall be discriminated against or excluded from participation in any educational program or activity that receives federal financial aid.³⁵ As originally enacted, Title IX contained broad language but very little legislative history to clarify its scope.³⁶ This ambiguity concerned university administrators as they attempted to determine which school programs were subject to the Act.³⁷ Much of the initial concern centered around vague terminology used to define what programs the Act applied to, including the broad phrase "any education program or activity."³⁸ Because of this ambiguity, two schools of thought developed concerning who or what constituted a recipient under the Act — the program-specific and the institution-wide approach.³⁹

The program-specific approach to Title IX, favored by athletic administrators and initially by the NCAA,⁴⁰ defines a recipient as any university

34. Title IX of the Act of June 23, 1972, Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1688 (1988)).

35. Section 1681(a) states that "[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." 20 U.S.C. § 1681(a).

36. See Krakora, *supra* note 6, at 223 (noting that the pre-enactment history does not address Title IX's scope); 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, 1049-50 (1983) (commenting on Title IX's broad language).

37. See *Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993) (noting that most of the anxiety centered around the football team because the men's football budget far exceeded that of any other sport); Krakora, *supra* note 6, at 223 (discussing whether the Act should apply to an entire school or just particular programs within the school); Lewis, *supra* note 36, at 1050 (stating that the language of the Act should be read broadly).

38. 20 U.S.C. § 1681. The statute states that discrimination is prohibited "under any education program or activity receiving Federal financial assistance." *Id.* § 1681(a); see Krakora, *supra* note 6, at 223 n.10 (reviewing the debate between two senators as to the proper meaning of the phrase "any program or activity").

39. See Lewis, *supra* note 36, at 1050-55 (concluding that the smattering of legislative history under Title IX shows that Congress favored the adoption of the institution-wide approach). *But see* Janet Lammersen Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 62 (1976) (arguing that Title IX's language must be construed narrowly and therefore should not apply to college athletics).

40. See James V. Koch, *Title IX and the NCAA*, 3 W. ST. L. REV. 250, 256 (1976) (discussing the NCAA's initial position advocating the program-specific approach); Anderson, *supra* note 7, at 97 (discussing the NCAA's position on exemptions for revenue producing sports under Title IX). *But cf.* Ivan Maisel, *Engendering Fear; Equity Issue of Sports Spending Cuts to College Football's Core*, DALLAS MORNING NEWS, May 5, 1993, at 1B, 11B (reporting that today the NCAA supports gender equity, as evidenced by the various NCAA Gender Equity Task Forces).

program that receives direct federal funding.⁴¹ Because most university athletic programs receive no direct federal funding, under this approach athletics would be exempt from Title IX scrutiny.⁴² The institution-wide approach,⁴³ in contrast, encompasses every single program or activity within an institution that receives federal funds.⁴⁴ Ultimately, Title IX and its control over university athletic programs comes down to a choice of one of these approaches.⁴⁵

Debate regarding the definition of recipient began even before Congress enacted Title IX.⁴⁶ The bill originally proposed in Congress by Senator Birch Bayh advocated the institution-wide approach,⁴⁷ but Title IX, as passed, contained no definitive language. The Act defined recipient with the ambiguous term, "under any education program or activity" to determine the breadth of the Act.⁴⁸ Therefore, the government agencies responsible for awarding federal funds, such as HEW and DED, had to clarify Title IX's applicability to athletics.⁴⁹

Section 1682 of the Act, enacted in 1972, directed HEW to promulgate regulations ensuring that recipients of federal funding complied with the

41. See *University of Richmond v. Bell*, 543 F. Supp. 321, 324-25 (E.D. Va. 1982). The University of Richmond argued that the Act should be interpreted in a program-specific manner and, therefore, the university's athletic program was not within the Act's scope. *Id.*

42. See *infra* note 101 and accompanying text (discussing how athletic departments are funded).

43. See generally Paul J. Van de Graaf, Note, *The Program-Specific Reach of Title IX*, 83 COLUM. L. REV. 1210, 1215-16 (1983) (citing two cases that interpreted Title IX in a broad, institution-wide manner).

44. See *Bell*, 543 F. Supp. at 325 (espousing that the institution-wide approach should be adopted).

45. See Krakora, *supra* note 6, at 223 (commenting that this debate is particularly important in the area of athletics).

46. See *Othen v. Ann Arbor Sch. Bd.*, 507 F. Supp. 1376, 1382 (E.D. Mich. 1981) (noting that the Senate first examined, but ultimately rejected, a proposal that clearly construed Title IX in an institution-wide manner).

47. 117 CONG. REC. 30,156 (1971). Senator Birch Bayh's original proposal prohibited discrimination "under any program or activity conducted by a public institution . . . which is a recipient of Federal financial assistance." *Id.* For an examination of the floor debate that accompanied Title IX, see Mary Beth Petriella, *An Interim Preliminary Injunction Reinstating Varsity Status to Demoted Collegiate Athletic Teams Is Available When That Team Alleges A Title IX Violation and Litigation Is Pending—Cohen v. Brown Univ.*, 4 SETON HALL J. SPORTS L. 595 (1994) (noting that Senator Bayh desired a strong measure that would eliminate gender discrimination in education).

48. 20 U.S.C. § 1681(a) (1988).

49. *Id.* § 1682; see Krakora, *supra* note 6, at 224-25 (noting the congressional debate concerning who should decide the scope of Title IX). Congress made no decisions on the issue, but instead delegated the job of promulgating appropriate regulations to HEW. *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993).

Act.⁵⁰ As of 1974, HEW had not yet promulgated regulations, and thus the confusion surrounding the definition of "program or activity" persisted.⁵¹ Congress responded to the confusion by passing § 844 of the Education Amendments of 1974. That section required the Secretary of HEW to propose and publish Title IX regulations that specifically addressed intercollegiate athletics.⁵² In 1975, HEW promulgated these regulations⁵³ and clarified Title IX's applicability to college athletic programs. In the regulations, HEW adopted the institution-wide approach, and defined "recipient" as any entity receiving or benefiting from federal funding.⁵⁴ This meant that the athletic program of any college or university that received any federal support was subject to Title IX.⁵⁵

The regulations are very similar to § 1681 of the Act except that they expressly provide that no person may be discriminated against in any athletic activity offered by a recipient.⁵⁶ The regulations allow some exceptions for contact sports and sports in which teams are chosen on the basis of competitive skill,⁵⁷ but generally, they apply to all intercollegiate ath-

50. The Act provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

20 U.S.C. § 1682.

51. See Policy Interpretation, 44 Fed. Reg. 71,413 (1979) (noting that § 844 of the Education Amendments of 1974 required the Secretary of HEW to promulgate Title IX regulations).

52. The Education Amendments of 1974, Pub. L. No. 93-380, 84 Stat. 484, 612 (1974) (codified at 20 U.S.C. § 1232(d) (1988)). Section 844 provides:

The Secretary of [HEW] shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Id.

53. See 34 C.F.R. § 106.41 (1994); see also *Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993) (noting that HEW promulgated Title IX regulations in 1975 under congressional direction).

54. See *infra* note 55 and accompanying text (discussing the regulations).

55. 45 C.F.R. § 86.2(h) (1994); see *Cohen*, 991 F.2d at 894 (noting that the Supreme Court's *Grove City College* decision "radically altered the contemporary reading of Title IX").

56. 34 C.F.R. § 106.41(a) (1994). The regulations state that no person shall be discriminated against "in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient." *Id.*

57. *Id.* § 106.41(b). The regulations provide that a recipient may provide separate teams for each sex where the selection of the teams is based on competitive skill or the

letics.⁵⁸ The most important provision of the regulations mandates that a recipient shall provide equal athletic opportunity for members of both sexes.⁵⁹ In determining equality of opportunity, the regulations offer a non-exhaustive list of ten factors a compliance investigation should consider.⁶⁰ The most important factor, and the hardest to measure, is the first: whether the athletic program is "effectively accommodat[ing] the interests and abilities of members of both sexes."⁶¹

The regulations' adoption of the institution-wide approach⁶² soon impacted college athletic programs, which were now clearly covered by the Act.⁶³ In the three years following the July 1975 promulgation of the regulations, HEW received over 100 discrimination complaints in college athletics alone.⁶⁴ In an effort to encourage self-regulation, HEW clarified the regulations by offering a Policy Interpretation that provided further guidance as to what constituted compliance.⁶⁵ The HEW Policy Interpre-

sport is a contact sport. *Id.* The regulations define contact sports to include boxing, wrestling, rugby, ice hockey, football, basketball, and any other sport where the purpose or activity involves bodily contact. *Id.* *But see* *Cook v. Colgate Univ.*, 802 F. Supp. 737, 747 (N.D.N.Y. 1992) (noting that female ice hockey is played at 15 colleges in the Northeast), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993).

58. *See* 34 C.F.R. § 106.41(b) (1994).

59. *Id.* § 106.41(c). The regulation states that "[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes." *Id.*

60. *Id.* To determine equal athletic opportunity, the following factors, among others, will be considered:

- (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;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

Id. The regulations add that unequal aggregate expenditures alone will not equate to non-compliance but will be considered in assessing equality of opportunity. *Id.*

61. *See* *Cohen v. Brown Univ.*, 991 F.2d 888, 896 (1st Cir. 1993) (noting that, in evaluating the charges against the university, effectively accommodating the interests and abilities of female students is the most critical and difficult factor to measure).

62. 45 C.F.R. § 86.2(h) (1994) (adopting a broad institution-wide definition of recipient).

63. 34 C.F.R. § 106.41(d) (1994) (requiring recipients to comply with Title IX within three years of the July 21, 1975 effective date of the regulations); *see* *Krakora*, *supra* note 6, at 225 (stating that HEW's broad interpretation of the statute is significant, particularly in relation to college athletics).

64. Policy Interpretation, 44 Fed. Reg. 71,413 (1979).

65. *Id.* The Policy Interpretation originated in a two-step process. *Id.* at 71,414. In December 1978, HEW published a proposed Policy Interpretation. Title IX of the Education Amendments of 1972, A Proposed Policy Interpretation, 43 Fed. Reg. 58,070 (Office of Civil Rights, Office of the Secretary, HEW (1978)). This proposal drew over 700 com-

tation attempted to clarify the regulations' use of the phrase "equal opportunity."⁶⁶

The Policy Interpretation, which still is used today in Title IX cases, is a complex document, but, reduced to its simplest terms, it delineates three areas that have been used by both the DED's Office of Civil Rights (OCR)⁶⁷ and the courts in rendering Title IX compliance decisions.⁶⁸ Compliance in financial assistance (scholarships) based on athletic ability is the first area addressed by the Policy Interpretation.⁶⁹ Here, compliance is assessed by examining whether men's and women's teams receive proportionally equal amounts of financial aid.⁷⁰ The second area considers whether a program is in compliance by examining the nature of the benefits afforded to members of each sex.⁷¹ While non-compliance with any of the three areas may constitute a violation of Title IX,⁷² it is the third area which has become the main focus of Title IX litigation.⁷³ The

ments, representing a broad range of opinions. See Policy Interpretation, 44 Fed. Reg. 71,413 (1979). Additionally, HEW visited eight campuses to ensure that the proposal would be practical. *Id.* Step two was the promulgation of the final Policy Interpretation, which reflects both the comments HEW received and the results of the campus visits. *Id.* This final interpretation served to clarify the phrase "equal opportunity" in college athletics, as used in the regulations. *Id.*

66. Policy Interpretation, 44 Fed. Reg. 71,413, 71,414 (1979); see *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir.) (noting that the Policy Interpretation explains how colleges may effectively accommodate students' interests and abilities), *cert. denied*, 114 S. Ct. 580 (1993).

67. See *supra* note 15 and accompanying text (discussing the agency in charge of administering Title IX).

68. See Policy Interpretation, 44 Fed. Reg. 71,413, 71,415-19 (1979) (delineating the three major compliance areas under Title IX).

69. *Id.* at 71,415.

70. *Id.* The Policy Interpretation makes it clear that in terms of financial assistance, a dollar for dollar comparison will not be undertaken, rather the total amount of scholarship aid made available to men and women must be substantially proportionate to their respective participation rates. *Id.* The Policy Interpretation also notes two nondiscriminatory factors that may be taken into account. *Id.* These two factors are the difference between in and out-of-state tuition, and reasonable decisions by the school regarding the development of new teams. *Id.*

71. *Id.* Compliance is assessed by "comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes." *Id.*

72. See ELLEN VARGYUS, NAT'L WOMEN'S L. CENTER, TITLE IX BASICS 6, 15 n.71 (1994) (noting cases that reject the proposition that a plaintiff must make out a violation in each of the three compliance areas to prevail on a Title IX claim). *But cf.* *Gonyo v. Drake Univ.*, 1995 WL 127059 (S.D. Iowa March 10, 1995). The court concluded that the male athletes, though they comprised 75.3% of the athletes and received only 47% of athletic financial assistance, did not make out a Title IX case because scholarships "remain only a part of the larger picture, logically subordinate to the overarching goal [of equal opportunity]." *Id.* at *3, *5.

73. See *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993) (noting the importance of the third compliance area).

critical third area measures compliance based on whether a university's athletic program meets the interests and abilities of its students.⁷⁴ The courts measure compliance with the interests and abilities area by referring to the Policy Interpretation's three-benchmark test.⁷⁵

The first benchmark of the three-benchmark test, assesses compliance by determining whether athletic participation opportunities are substantially proportionate to undergraduate enrollment figures.⁷⁶ The second benchmark determines whether the university can show a history and continuing practice of expansion in the program's of the traditionally under-represented gender.⁷⁷ The third benchmark determines whether the university has fully and effectively accommodated the interests and abilities of the under-represented sex.⁷⁸

Having delineated the three compliance areas and the three-benchmark test, the Policy Interpretation next speaks to the enforcement mechanisms of Title IX.⁷⁹ Title IX investigations arise in two methods: first, by periodic compliance reviews where the OCR selects a number of recipients and investigates their compliance with the Act,⁸⁰ or second, by investigating a valid complaint.⁸¹ If, after either type of investigation, the DED finds a recipient is not in compliance with Title IX, it first will attempt to negotiate a compliance plan with the recipient.⁸² If voluntary

74. Policy Interpretation, 44 Fed. Reg. 71,413, 71,417-18 (1979). The third area is referred to as either the "interests and abilities" strand or the "measuring effective compliance" strand. See *Cohen*, 991 F.2d at 897.

75. Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (1979) (noting the application of a three-part test when assessing effective accommodation).

76. *Id.* The Policy Interpretation does not define what constitutes substantial proportionality. *Id.*

77. *Id.*

78. *Id.* In sum, the Policy Interpretation uses two, three-part tests to assess Title IX compliance. *Id.* at 71,415-19. First is an examination of the three areas of compliance: athletic financial assistance (scholarships) given to male and female athletes; equivalence in other athletic benefits and opportunities; and effective accommodation of student interests and abilities. *Id.* at 71,415-18. This third area is most difficult to decipher than the first two, so the Policy Interpretation offers a second three-part test to guide decision making on whether there has been effective accommodation of students interests and abilities. *Id.* at 71,418. The courts have adopted this three-benchmark test and applied it in recent Title IX cases. *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828-29 (10th Cir.) (applying the three-benchmark test of the Policy Interpretation), *cert. denied*, 114 S. Ct. 580 (1993); *Cohen v. Brown Univ.*, 879 F. Supp. 185, 196, 200-213 (D.R.I. 1995);

79. See Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (1979) (describing the enforcement process of Title IX); *Anderson*, *supra* note 7, at 79 (discussing how the Department of Education enforces Title IX).

80. See Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (1979).

81. *Id.* (noting that a valid complaint is one that is written, timely, and alleges gender discrimination by a recipient).

82. *Id.* The Policy Interpretation notes that to be acceptable, "a plan must describe the manner in which institutional resources will be used to correct the violation." *Id.* If

compliance attempts do not work, or if the plan is not implemented, the recipient will be found in noncompliance and "the formal process leading to termination of Federal assistance will [begin]."⁸³

It was against this backdrop of regulations and the HEW Policy Interpretation that student athletes initially filed Title IX actions.⁸⁴ Between 1979 and 1984, the DED pursued over forty Title IX investigations in university athletic programs.⁸⁵ These investigations, however, came to an unexpected halt in 1984 with the Supreme Court's decision in *Grove City College v. Bell*.⁸⁶

B. Athletic Departments Breathe a Sigh of Relief

While the regulations and Policy Interpretation clearly favored the institution-wide approach over the program-specific option,⁸⁷ as of 1984 no judicial consensus existed.⁸⁸ The Supreme Court, therefore, granted certiorari in *Grove City College* to resolve whether Title IX applied only to specific programs receiving federal funds or if it applied to all of the departments within a recipient institution.⁸⁹

Two years prior to *Grove City College*, in *North Haven Board of Education v. Bell*,⁹⁰ the Court noted that Title IX's language and legislative history dictated that Title IX's administering agencies could regulate and terminate funding subject to the program-specific limitations of §§ 901 and 902.⁹¹ The *North Haven* decision restricted the government's regulatory function under Title IX and thus undermined the assumption that

the plan is acceptable, the department will notify the recipient and review the implementation of the plan periodically. *Id.*

83. *Id.* at 71,419. *But see* Carol Herwig, *Sportsviews*, USA TODAY, July 2, 1993, at 12C (noting that the remedy of pulling federal funding has never been invoked).

84. *See Haffer v. Temple Univ.*, 524 F. Supp. 531, 532 (E.D. Penn. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982).

85. Villalobos, *supra* note 20, at 159 (discussing pending Title IX cases at the time of the *Grove City College* decision).

86. 465 U.S. 555 (1984).

87. *See supra* notes 50-82 and accompanying text (discussing the regulations and Policy Interpretation).

88. *Compare* Bennett v. West Texas State Univ., 525 F. Supp. 77, 79-80 (N.D. Tex. 1981) (adopting the programmatic approach), *rev'd*, 698 F.2d 1215 (5th Cir. 1983), *and cert. denied*, 466 U.S. 903 (1984) *and* Othen v. Ann Arbor School Bd., 507 F. Supp. 1376, 1381 (E.D. Mich. 1981) (relying on the language in section 1681 of the Act to opt for the program-specific approach), *aff'd*, 699 F.2d 309 (6th Cir. 1983) *with Haffer*, 524 F. Supp. at 540-41 (adopting the institution-wide approach).

89. 465 U.S. at 555.

90. 456 U.S. 512 (1982).

91. *Grove City College*, 465 U.S. at 570 (quoting *North Haven*, 456 U.S. at 538).

Title IX was to be construed broadly.⁹² The Court relied in part on *North Haven* when it decided *Grove City College v. Bell*.⁹³

In *Grove City College*, the Court examined whether Title IX applied to a private, coeducational college that accepted no federal or state funding and did not accept federal financial aid.⁹⁴ The only connection Grove City College had to federal assistance was that a number of its students received Basic Educational Opportunity Grants (BEOGs) from the DED.⁹⁵ In fact, Justice White, writing for the majority in *Grove City College*, stated that only by ignoring the program-specific language of Title IX could the Court conclude that the receipt of BEOGs by some students represented federal aid to the entire institution.⁹⁶ The Court further reasoned that under the institution-wide approach, if only one student at Grove City College received federal aid, the entire school would be subject to the rigors of Title IX compliance.⁹⁷ The Court acknowledged that such an extreme result could not have been Congress' intent when it passed the Act.⁹⁸ As a result, the Court concluded that the institution-wide approach was inappropriate.⁹⁹

The *Grove City College* decision perplexed both the DED, which was conducting Title IX compliance investigations, and university administrators, who were defending those investigations.¹⁰⁰ As a result of *Grove City College*, the DED subsequently discontinued or narrowed forty pending investigations because the athletic program in question received no direct federal aid,¹⁰¹ including an investigation at the University of

92. Karen Czapanskiy, *Grove City College v. Bell: Touchdown or Touchback?*, 43 MD. L. REV. 379, 380-81 (1984) (explaining that according to *North Haven*, the government's regulatory function was only program-specific).

93. 465 U.S. 555 (1984).

94. *Id.* at 559.

95. *Id.* (discussing BEOG's in more detail).

96. *See id.* at 571. The Court concluded that the receipt of Basic Educational Opportunity Grants "does not trigger institution-wide coverage under Title IX." *Id.* at 573. The Court added that the only program or activity receiving federal funds in this case is the financial aid program, not the entire college. *Id.* at 571.

97. *Id.* at 572-73.

98. *Id.* at 573.

99. *See id.*

100. *See Villalobos, supra* note 20, at 163-64 (stating that OCR refrained from investigating complaints unless the athletic department received direct federal funding).

101. B. Glenn George, *Miles To Go and Promises To Keep: A Case Study In Title IX*, 64 U. COLO. L. REV. 555, 558 (1993) (noting that athletic departments do not usually receive direct federal funding); *see Krakora, supra* note 6, at 223 n.9 (according to one athletic director, at most of the nation's colleges federal financial aid does not go directly to athletic programs); *see also* Glenn M. Wong & Richard J. Ensor, *Sex Discrimination in Athletics: A Review of Two Decades of Accomplishments and Defeats*, 21 GONZ. L. REV. 345, 351-52 (1986) (noting that 23 Title IX investigations were ended as a direct result of the *Grove City College* decision).

Maryland where discrimination had already been discovered.¹⁰² Additionally, the *Grove City College* decision caused the OCR to stop monitoring three schools that were in the process of implementing Title IX compliance programs.¹⁰³ As a result of *Grove City College*, female coaches, athletes, and teams were left with little or no protection from the discrimination Title IX was designed to remedy.¹⁰⁴

C. Congress Revitalizes Title IX

In an effort to reverse *Grove City College*, Congress re-adopted the institution-wide approach¹⁰⁵ in the Civil Rights Restoration Act of 1987 (Restoration Act).¹⁰⁶ This Act forbids discrimination in the programs or activities of a recipient of federal money.¹⁰⁷ To ensure that Title IX was applied in an institution-wide manner, Congress defined "programs or activities" as any institute of higher education that receives federal funds.¹⁰⁸ Further, Congress defined "recipient" as any state, public, or private agency, institution, or organization that either directly or indirectly receives federal funds.¹⁰⁹ While the Restoration Act did not specifically mention athletics, Senate floor debates indicate that the Act was intended to "creat[e] a more level playing field for female athletes."¹¹⁰ This legislation clarified Congressional intent to reverse the impact of the *Grove City College* decision and to ensure the continued development of female athletic programs.¹¹¹

102. Villalobos, *supra* note 20, at 160 (discussing the discontinued Title IX investigation at the University of Maryland).

103. *Id.* at 162 (noting the three schools: Western Michigan, Ohio, and Ball State Universities).

104. *Id.* at 160 (commenting that the decision to drop discrimination charges against the University of Maryland left female coaches and athletes without federal protection).

105. *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993); see Villalobos, *supra* note 20, at 149 n.4 (explaining the initial controversy the Act aroused, and that it eventually passed over President Reagan's veto).

106. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687 (1988)).

107. 20 U.S.C. § 1687. The Act requires "that if any arm of an educational institution received federal funds, the institution as a whole must comply with Title IX's provisions." *Cohen*, 991 F.2d at 894.

108. Villalobos, *supra* note 20, at 162. The Act states that "program or activity" means a college, university, or post-secondary institution, or public system of higher education, any part of which is extended federal financial assistance. 20 U.S.C. § 1687(2)(A).

109. See 20 U.S.C. § 1687 (2)(A).

110. *Cohen*, 991 F.2d at 894 (noting the comments of three senators involved in the debate surrounding the Act concerning discrimination in athletics). Congress, in passing § 1687, stated that it was necessary to broaden Title IX in light of the undue narrowing of the Act by the Supreme Court. § 2, 102 Stat. at 28.

111. See *Cohen*, 991 F.2d at 894 (noting the remarks of Senator Hatch regarding the importance of Title IX in the development of women athletes).

The supporters of the Restoration Act hoped its passage would sustain the growth that women's sports had achieved between the passing of Title IX in 1972 and *Grove City College*.¹¹² In fact, the Restoration Act had an immediate impact on Title IX, in the first six months following passage, the OCR received sixteen new gender discrimination complaints.¹¹³ Recent federal circuit and district court decisions on Title IX claims demonstrate that the impact of the Restoration Act on Title IX is still prevalent today.¹¹⁴

II. THE COURTS SPEAK: PRESENT JUDICIAL ANALYSIS OF TITLE IX CASES

A. Present Title IX Litigation Issues

In 1993, federal courts rendered decisions in several Title IX actions involving university athletic programs.¹¹⁵ The traditional Title IX litigation involves cases in which a group of female athletes claim a university may not legally eliminate their team because doing so would violate Title IX.¹¹⁶ A newer type of Title IX litigation focuses on cases in which an eliminated male team brings suit asking for reinstatement alleging gender discrimination in violation of Title IX.¹¹⁷ To discern the modern judicial

112. Villalobos, *supra* note 20, at 163 (noting that between 1972 and 1985, the number of women's athletic scholarships went from virtually zero to over 10,000); Wong & Ensor, *supra* note 101, at 347 (noting a 15% growth in female college athletes between 1972 and 1984).

113. Villalobos, *supra* note 20, at 163 n.127; see *Cohen*, 991 F.2d at 898 (commenting on "the recent boom in Title IX suits"); Christina A. Longo and Elizabeth F. Thoman, Comment, Haffer v. Temple University: A Reawakening of Gender Discrimination in Intercollegiate Athletics, 16 J.C. & U.L. 137, 147 n.64 (1989) (listing the schools that had complaints filed against them in the immediate aftermath of the Restoration Act).

114. See *Kelley v. Board of Trustees of the Univ. of Ill.*, 35 F.3d 265, 272-73 (7th Cir. 1994) (ruling that the elimination of men's teams did not violate Title IX), *cert. denied*, 115 S. Ct. 938 (1995); *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332, 334-35 (3d Cir. 1993) (requiring the university to reinstate two previously eliminated female athletic teams); *Roberts v. Colorado State Bd. of Educ.*, 998 F.2d 824, 834-35 (10th Cir.) (upholding the reinstatement of the women's softball team), *cert. denied*, 114 S. Ct. 580 (1993); *Cohen*, 991 F.2d at 907 (affirming the injunction that forced Brown University to reinstate two female teams); *Gonyo v. Drake Univ.*, 837 F. Supp. 989, 995-96 (S.D. Iowa 1993) (stating that the elimination of the men's wrestling team did not violate Title IX).

115. See *supra* note 114 (explaining the decision in each of these cases).

116. *Roberts*, 998 F.2d at 826; *Cohen*, 991 F.2d at 891 (requesting an injunction to reinstate the women's volleyball and gymnastics programs to varsity status); *Cook v. Colgate*, 802 F. Supp. 737, 751 (N.D.N.Y. 1992) (deciding in favor of a women's ice hockey team that consistently had been denied varsity status), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993); *Haffer v. Temple Univ.*, 678 F. Supp. 517, 521-22 (E.D. Pa. 1987) (deciding an unlawful gender discrimination claim brought by female students at Temple University).

117. *Kelley v. Board of Trustees of Univ. of Ill.*, 832 F. Supp. 237, 239 (C.D. Ill. 1993) (hearing, and subsequently denying, the men's swim team's claim that by eliminating their

analysis, the cases brought by both women and men must be examined separately. Once a framework has been established, the similarities and differences between these cases can be examined to provide a comprehensive judicial analysis of Title IX actions.

1. Title IX Actions Brought by Female Athletes

In 1993, three United States courts of appeals decided cases brought by members of women's athletic teams. In *Cohen v. Brown University*,¹¹⁸ members of two eliminated women's teams challenged a decision by the university to rectify budget problems by eliminating four varsity sports teams.¹¹⁹ Brown University discontinued the men's golf and water polo teams and the women's volleyball and gymnastics teams.¹²⁰ At the time of the cuts, the undergraduate population at Brown consisted of 52% men and 48% women,¹²¹ yet men represented 63.3 % and women only 36.7% of the athletes.¹²² Following their elimination, members of the two women's teams brought suit under Title IX's implied cause of action.¹²³ The female athletes alleged that by eliminating these women's teams, Brown had violated Title IX's prohibition on gender-based discrimination.¹²⁴

The First Circuit, after a lengthy discussion of Title IX's legislative history, regulations, and the Policy Interpretation, determined that because Congress explicitly had delegated the task of promulgating regulations,¹²⁵ those regulations, including the Policy Interpretation, deserved "control-

team, the university had unlawfully discriminated against them), *aff'd*, 35 F.3d 265 (7th Cir 1994), *and cert. denied*, 115 S. Ct. 938 (1995); *Gonyo*, 837 F. Supp. at 990 (contending that elimination of the men's wrestling team constituted gender discrimination in violation of Title IX).

118. 991 F.2d 888 (1st Cir. 1993).

119. *See id.* at 892 n.3 (noting that demotion from varsity to club status is equivalent to elimination because other colleges' varsity squads are reluctant to compete against club teams).

120. *Id.* at 892. These cuts were designed to save the university \$77,813 per year. *Id.* The savings broke down as follows: women's volleyball, \$37,127; women's gymnastics, \$24,901; men's water polo, \$9,250; men's golf, \$6,545. *Id.*

121. *Id.*

122. *Id.* (explaining that elimination of these four teams did not change the percentage of participation opportunities for male or female athletes at Brown University).

123. *See Cannon v. University of Chicago*, 441 U.S. 677, 699, 717 (1979) (recognizing an implied right of action under Title IX); *see also Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 63-66 (1992) (allowing monetary damages in Title IX suits). The damage remedy has made Title IX suits more important for universities because such a remedy is likely to be very costly. *See Johnson, supra* note 7, at 556 (elaborating on the importance of monetary damages).

124. *Cohen*, 991 F.2d at 893. The plaintiffs charged that Brown's athletic arrangements violated Title IX's ban on gender-based discrimination. *Id.*

125. *See supra* notes 50-60 and accompanying text (discussing Title IX's regulations).

ling weight.”¹²⁶ Thus, the court accorded the regulations appreciable deference in upholding the district court’s issuance of a preliminary injunction.¹²⁷ Accordingly, the First Circuit affirmed the district court in holding that the two, three-part tests set out in the Policy Interpretation are appropriate to apply in Title IX cases.¹²⁸

In *Cohen*, of the three major areas of regulatory compliance only the third area, effective accommodation of interests and abilities, was at issue. The other two areas, financial assistance and other athletic benefits, were not issues because Brown University offered no athletic scholarships and the plaintiff made no allegations of discrimination in other athletic benefits.¹²⁹ The First Circuit held that equal opportunity lies at the core of Title IX’s purpose,¹³⁰ and that an institution can violate Title IX by not meeting the effective accommodation standard, even if it meets the other two standards.¹³¹ Measuring the effective accommodation of students’ interests and abilities, therefore, was the pivotal issue in *Cohen*.¹³² The First Circuit, in deciding how to assess effective accommodation, looked to the Policy Interpretation’s three-benchmark test.¹³³

Under the three-benchmark test, Brown University could not satisfy benchmark number one because its undergraduate and athletic populations were not substantially proportionate.¹³⁴ The court rejected Brown’s

126. *Cohen*, 991 F.2d at 895 (noting that DED’s interpretation of Title IX must be given appreciable deference).

127. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); see also WILLIAM F. FOX JR., UNDERSTANDING ADMINISTRATIVE LAW, 304-05 (2d ed. 1992). *Chevron* is the seminal case explaining the deference courts pay to an agency’s position where Congress has not spoken on the issue. *Id.* at 304. In *Chevron*, the Supreme Court adopted the “*Chevron* two-step,” in which a court first determines whether the specific issue has been spoken to by Congress. *Id.* If Congress has spoken, both courts and agencies must defer to the congressional position. *Id.* If Congress is either silent or ambiguous, a court examines the agency’s position and must defer to that position if the agency’s action is reasonable. *Id.*

128. *Cohen*, 991 F.2d at 897-98 (noting that the parties agreed that the only portion of the Policy Interpretation at issue was the effective accommodation area); see *supra* notes 67-78 and accompanying text (describing the three-benchmark test).

129. *Cohen*, 991 F.2d at 897 n.12 (explaining that while the plaintiffs did not allege discrimination in other athletic benefits, the district court reserved the right to make findings on that issue).

130. *Id.* at 897.

131. *Id.* (meeting both the financial assistance and athletic equivalency standards is not enough to bring a recipient into compliance with Title IX).

132. *Id.*

133. *Id.*

134. *Id.* at 903. The court noted that Brown clearly failed the substantial proportionality test. *Id.* See *Cohen v. Brown Univ.*, 879 F. Supp. 185, 191 n.16, 211 (D.R.I. 1995) (detailing the proportion of students to athletes at Brown). Brown did not challenge this finding in the preliminary injunction hearing because the percentage of female undergraduates was much higher than the percentage of female athletes. See also *Cohen v. Brown*

argument that it met benchmark number two through a large expansion of women's programs in the 1970s.¹³⁵ The court found no continuing expansion of women's sports because Brown failed to foster the growth of women's teams after the initial expansion in the 1970s.¹³⁶ Finally, in concluding that the plaintiffs satisfied the third benchmark,¹³⁷ the court noted that when a school eliminates a team and those athletes are the plaintiffs, there is little question that they have met the interests and abilities benchmark.¹³⁸

The court concluded that because the plaintiffs had met their burden of proving benchmarks one and three, and Brown had not effectively shown a continued practice of growth, the plaintiffs had established a strong likelihood of success at trial and the balancing of the harms favored the plaintiffs.¹³⁹ Concluding this, the First Circuit affirmed the preliminary injunction reinstating the women's teams, and remanded the case to the district court for a trial on the merits.¹⁴⁰

At trial, the United States District Court for the District of Rhode Island ruled on Brown's compliance with the three-benchmark test.¹⁴¹ The court ruled that because the gender ratio in Brown's intercollegiate athletic program did not substantially mirror the gender ratio of the student body, the plaintiffs had proven that Brown's athletic program violated the

Univ, 809 F. Supp. 978, 991 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993). In attempting to discern the meaning of substantial proportionality, courts look to the language of the Title IX Athletic Investigator's Manual. VALERIE M. BONNETTE & LAMAR DANIEL, DEPARTMENT OF EDUCATION, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL (1990); see *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 829-30 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993). The *Roberts* court rationalized that while the manual offers no set ratio as to what constitutes substantial proportionality, it does indicate that the concept entails a fairly close relationship between undergraduate enrollment and athletic participation. *Id.* But see *Cohen*, 879 F. Supp. at 197 n.27 (declining to rely on the Investigator's Manual in disposition of the case).

135. *Cohen*, 991 F.2d at 903.

136. *Id.* The First Circuit noted that while Brown University exhibited "impressive growth" in the 1970s the school failed to show growth in women's athletics in the next two decades. *Id.* The district court added, and the First Circuit agreed, that Brown spent six years, 1971 through 1977, introducing women's sports, but since, the school has "rested on its laurels for at least twice that long." *Id.* See also *Cohen*, 879 F. Supp. at 190; *Cohen*, 809 F. Supp. at 981 (describing in greater depth the history of Brown's athletic programs).

137. *Cohen*, 991 F.2d at 904.

138. See *id.* (noting that the third benchmark is not a difficult standard to meet if an existing team is seeking reinstatement).

139. *Id.* at 905-06. The First Circuit affirmed the district court's ruling that the likelihood of success at trial weighed heavily in favor of the plaintiffs and that, on balance, the potential harm to the plaintiffs in having their sports eliminated outweighed Brown's financial difficulties. *Id.* Therefore, an injunction should be issued. *Id.* at 906.

140. *Id.* at 907.

141. See *Cohen v. Brown University*, 879 F. Supp. 185, 199-200, 211 (D.R.I. 1995) (applying the three prong test).

substantial proportionality benchmark.¹⁴² The court further decided that Brown did not satisfy its burden of proving a history and continued practice of program expansion by its action of adding two women's teams since 1977.¹⁴³ Finally, the court determined that Brown had not "fully and effectively accommodated the interest and ability of the underrepresented sex," and, therefore, failed the third benchmark.¹⁴⁴ In sum; by not satisfying any of the three benchmarks, the court held that Brown was in violation of Title IX.¹⁴⁵

The Tenth Circuit employed a similar analysis in *Roberts v. Colorado State Board of Agriculture*.¹⁴⁶ Female members of the Colorado State University (CSU) varsity softball team sought injunctive relief to prevent the school from discontinuing their team.¹⁴⁷ CSU claimed that the elimination did not violate Title IX and, therefore, the court should not grant an injunction.¹⁴⁸ The Tenth Circuit, in deciding to issue the injunction, began its analysis by determining that the main issue in *Roberts* was effective accommodation.¹⁴⁹ To measure effective accommodation, the Tenth Circuit, like the First Circuit in *Cohen*, turned to the Policy Interpretation.¹⁵⁰ The Tenth Circuit first examined the three broad areas in which the DED's OCR assesses compliance in effective accommodation

142. *See id.* at 199-211. The court noted that substantial proportionality "must be a standard stringent enough to effectuate the purposes of the statute . . . [yet still] account[] for the possibility of minor fluctuations in the undergraduate population . . . from one year to the next." *Id.* at 202. The Court then ruled that Brown's disparity of 13.01% "is far from substantially proportionate." *Id.* at 211.

143. *Id.* The court noted that since 1977, Brown added women's indoor track and women's skiing in 1982 and 1994, respectively. *Id.*

144. *Id.* at 211-12. The Court found that Brown had violated the third benchmark on two levels. *Id.* at 212. First, by demoting a viable gymnastics team the school had not fully accommodated the interests of those athletes, and secondly, by not upgrading the women's skiing and fencing teams from donor-funded to university-funded status, the school failed to accommodate those athletes. *Id.* The court recognized that by requiring the school to upgrade viable teams they were breaking new ground in the area of the third benchmark, but felt that the Policy Interpretation demanded such a reading. *Id.*

145. Jeffrey Michaelson, co-counsel for Brown University commented that Brown plans to appeal the decision to the First Circuit Court of Appeals. Athelia Knight & Mark Asher, *Title IX Advocates Hail Ruling Against Brown*, WASH. POST, Mar. 30, 1995, at D1, D8. Michaelson asserted that "[a]t every step of the way, he [Judge Pettine] made substantial errors in the law to reach that conclusion." *Id.* Michaelson said that if upheld, this decision reduces Title IX to a quota bill. *Id.*

146. 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993).

147. *Id.* at 826.

148. *See id.*

149. *Id.* at 828-29. The court deduced that the plaintiffs' claims centered around their opportunity to participate in team competition and therefore, "[t]he heart of the controversy is the meaning of the phrase 'full and effective accommodation of interests and abilities.'" *Id.* at 828, 831.

150. *Id.* at 828.

cases:¹⁵¹ the determination of athletic interests and abilities; the selection of sports offered; and the levels of competition available.¹⁵² After determining that the plaintiffs' claim centered on the participation opportunities at CSU, the Tenth Circuit applied the three-benchmark test.¹⁵³

Applying the first benchmark, the *Roberts* court found that a 10.5% disparity between women's enrollment and their athletic participation did not constitute substantial proportionality and that, accordingly, CSU failed the first benchmark.¹⁵⁴ The Tenth Circuit also affirmed the district court's decision that CSU had not proven a history and continuing practice of expansion in women's athletics¹⁵⁵ because no women's teams had been created since 1977.¹⁵⁶ Regarding the third benchmark, the Tenth Circuit noted that the district court erred in placing the burden of proving the third benchmark on the university, but held that the flaw did not constitute reversible error.¹⁵⁷

The *Roberts* court stated that plaintiffs carry the burden of proving both the first and third benchmarks.¹⁵⁸ If these burdens are satisfied, the university uses the second benchmark as an affirmative defense.¹⁵⁹ The *Roberts* court maintained that the district court's misplaced burden was not fatal because testimony had established that the plaintiffs were members of a successful varsity softball team in 1992,¹⁶⁰ and first year females

151. *Id.*

152. *Id.*; see Policy Interpretation, 44 Fed. Reg. 71,413, 71,413-17 (1979) (noting the three factors that OCR uses in assessing compliance with the interests and abilities section of the regulation).

153. See *Roberts*, 998 F.2d at 828-29. The court, after a close reading of the Policy Interpretation, assessed the plaintiffs' claim under the effective accommodation three-benchmark test. *Id.*

154. *Id.* at 829-30. The appellate court relied on expert testimony received by the district court in agreeing that a 10.5% disparity is not substantially proportionate. *Id.*

155. *Id.* at 830.

156. *Id.* The Policy Interpretation places the burden on the institution to show this continuing practice. See Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (1979). As was the case in *Cohen*, the Tenth Circuit applauded CSU's efforts in the 1970s to create a women's athletic program. *Roberts*, 998 F.2d at 830. However, while CSU created 11 women's teams in that decade, the district court found that during the 1980s women's sports at CSU declined. *Id.* The last women's sport CSU added was the women's golf team in 1977, yet since that time three women's teams had been eliminated. *Id.*

157. *Roberts*, 998 F.2d at 831. In analyzing the third benchmark, the Tenth Circuit ruled that the district court improperly had placed the burden of proof on the defendant. *Id.*

158. *Id.*

159. See *id.* Because lack of substantial proportionality alone, will not result in a Title IX violation, plaintiffs also must show that the university does not fully and effectively accommodate their interests and abilities. *Id.*

160. *Id.* at 832.

were interested in playing varsity softball.¹⁶¹ This evidence convinced the Tenth Circuit that the plaintiffs would have carried the burden of proving that their interests and abilities had not been fully and effectively accommodated.¹⁶² The Tenth Circuit remanded and ordered reinstatement of the team.¹⁶³

In *Favia v. Indiana University of Pennsylvania*,¹⁶⁴ the Third Circuit heard the university's appeal of an earlier Title IX decision. In 1991, Indiana University of Pennsylvania (IUP), citing budgetary concerns, eliminated two male and two female varsity teams.¹⁶⁵ Members of the women's gymnastics and field hockey teams brought a Title IX class action suit,¹⁶⁶ seeking a decree, to force the university to comply with Title IX, and an injunction reinstating their teams.¹⁶⁷ The district court, applying the three-benchmark test, determined that IUP was not in compliance with Title IX and consequently issued an injunction reinstating the teams.¹⁶⁸ IUP filed a motion to modify the preliminary injunction en-

161. *Id.*

162. *See id.*; *see also* *Roberts v. Colorado State Bd. of Agric.*, 814 F. Supp. 1507, 1517 (D. Colo.) (noting the lack of effective accommodation), *aff'd in part and rev'd in part*, 998 F.2d 824 (10th Cir.), *and cert. denied*, 114 S. Ct. 580 (1993). The district court discussed the growing popularity of women's fast-pitch softball in Colorado. *Id.* Testimony showed that participation in fast-pitch softball in Colorado had more than doubled in the last 10 years. *Id.* The district court recognized the significance of this growth in noting that 75% of CSU's undergraduates come from Colorado high schools. *Id.* Ultimately, the court concluded that CSU failed to meet the interests and abilities of female softball players. *Id.* Acknowledging the sport's growing popularity, the court also noted that women's fast-pitch softball will be a medal sport at the 1996 Summer Olympics. *Id.*

163. *Roberts*, 998 F.2d at 834-35. The case was remanded because the district court exceeded its authority in demanding that CSU field a team to play a fall 1993 exhibition schedule. *Id.* The Tenth Circuit added that Title IX does not require "an institution to create a 'top flight' varsity team," nor can the courts try to insure that the reinstated team has a winning season. *Id.* at 835.

164. 7 F.3d 332 (3d Cir. 1993).

165. *Id.* at 335; *see Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 581 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993). The school eliminated four sports: men's soccer and tennis, and women's gymnastics and field hockey. *Id.* at 578. University officials, citing a decline in the popularity of women's gymnastics and field hockey, determined that these two sports were no longer viable. *Id.* at 580. They decided that implementing a women's soccer program would better serve student interest. *Id.*

166. *See Favia*, 7 F.3d at 335; *see also* *Cook v. Colgate*, 992 F.2d 17 (2d Cir. 1993) (showing the importance of class action suits in the Title IX context). In *Cook*, the Second Circuit declared the case moot because all of the plaintiffs would have graduated by the time Colgate made the requested changes. *Id.* at 19.

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

168. *See Favia*, 812 F. Supp. at 585-86. The district court found that IUP did not meet the substantial proportionality benchmark because only 37.77% of the athletes were female while 55.61% of the students were female. *Id.* at 584-85. The eliminations in question enlarged this gap. *Id.* IUP failed to show a continuing practice of expansion and, therefore, failed the second benchmark. *Id.* As for the third benchmark, the university did

abling them to add a women's soccer team instead of reinstating the two teams they had eliminated.¹⁶⁹ The district court refused to permit IUP to modify the injunction, a decision the Third Circuit affirmed.¹⁷⁰

2. *Eliminated Male Teams and the Judicial Analysis*

While courts that have analyzed cases brought by female athletes consistently adhere to the Policy Interpretation's three-benchmark test,¹⁷¹ courts have taken different approaches when men's teams have challenged elimination.¹⁷² In *Kelley v. Board of Trustees of the University of Illinois*, the United States District Court for the Central District of Illinois faced an issue of first impression—a men's team suing under Title IX to have their team reinstated.¹⁷³ In 1993, the University of Illinois, citing budget concerns, announced that it was eliminating the men's swimming and fencing teams, and the men's and women's diving teams.¹⁷⁴ The members of the men's swim team argued that because the university did not eliminate the women's swim team, the school had violated Title IX.¹⁷⁵ Rejecting this argument, the district court examined the

not fully and effectively accommodate the interests and abilities of the women whose teams were eliminated simply by honoring their scholarships. *Id.*

169. *Favia*, 7 F.3d at 336. IUP showed that this change would save the university money and bring the athletic program much closer to compliance. *Id.* at 336, 343.

170. *See id.* at 343-44. The court, in rejecting this request, stated that by allowing IUP to create a women's soccer team instead of reinstating the eliminated teams, the plaintiffs would become losers when in fact they had won their case. *Id.* at 344.

171. The cases discussed in the prior section have decided whether a temporary injunction should be issued to reinstate the eliminated teams. *See, e.g.*, *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507, 1519 (D. Colo.) (ordering the university to reinstate the softball team), *aff'd in part and rev'd in part*, 998 F.2d 824 (10th Cir.), *and cert. denied*, 114 S. Ct. 580 (1993); *Favia*, 812 F. Supp. at 585 (ordering reinstatement of the eliminated teams); *Cohen v. Brown Univ.*, 809 F. Supp. 978, 980 (D.R.I. 1992) (issuing an injunction), *aff'd* 991 F.2d 888 (1st Cir. 1993). The circuit courts then heard the appeals from the district courts' rulings. *See, e.g.*, *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (affirming and remanding for trial); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993); *Favia*, 7 F.3d at 332. After deciding whether the district court was correct, the circuit courts have generally remanded the cases to district courts for trial.

172. *Kelley v. Board of Trustees of Univ. of Ill.*, 832 F. Supp. 237, 241-42 (C.D. Ill. 1993) (touching briefly on the three benchmark test), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *and cert. denied*, 115 S. Ct. 938 (1995); *Gonyo v. Drake Univ.*, 837 F. Supp. 989 (S.D. Iowa 1993). The *Gonyo* court did not rely on the three benchmark test as a basis for its decision. *Id.* *But see Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994) (applying the three-benchmark test), *cert. denied*, 115 S. Ct. 938 (1995).

173. *Kelley*, 832 F. Supp. at 240-41. The district court stated, "plaintiffs present a legal question which has not been directly decided by any court in this country to date," and resolution of it was difficult. *Id.*

174. *Id.* at 240. Even though it was eliminating the teams, the university intended to honor its financial commitments (scholarships) to the athletes. *Id.*

175. *Id.* at 239.

status of athletics at the University of Illinois under the first benchmark.¹⁷⁶ In doing so, the district court found that as long as the reductions moved the university closer to substantial proportionality, they did not violate Title IX.¹⁷⁷ The court added that the university could not cut women's teams because this action would expose the university to Title IX liability.¹⁷⁸ While sympathetic to the plight of the plaintiffs, the court found no violation of Title IX and refused to reinstate the men's swimming team.¹⁷⁹ The Seventh Circuit, in affirming the district court's decision, rejected the plaintiffs' contention that Title IX mandated discrimination against males.¹⁸⁰

In *Gonyo v. Drake University*,¹⁸¹ the university's men's wrestling team sought injunctive relief and reinstatement.¹⁸² Drake University's undergraduate population in 1992-93 was 57.2% female and 42.8% male.¹⁸³ Yet, 60.6% of Division I athletes at Drake were male and only 39.4% were female.¹⁸⁴ Unlike previous cases, the *Drake* court did not discuss the regulations or the Policy Interpretation extensively, but simply held that the university acted in accordance with the purposes of Title IX by encouraging female athletes to participate, even if this was done at the expense of male teams.¹⁸⁵ Additionally, the district court found no merit in the plaintiffs' contention that, due to the elimination, Drake's athletic

176. *Id.* at 241-42. The court noted that the university may cut men's teams to move closer to meeting the substantial proportionality requirement of the first benchmark. *Id.* Furthermore, the court added that a university may comply "by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender." *Id.* at 242.

177. *Id.* at 241-42. The court reasoned that, "even if the University's decision were not based on financial or budgetary reasons, but made solely to move closer to substantial proportionality . . . the failure to cut women's programs would still be countenanced by Title IX." *Id.* at 241.

178. *Id.* at 242 n.6 (stating that the university may have violated Title IX by dropping the women's diving team). The defendants acknowledged the difficulty they would have encountered in defending the case if a female diver was also a plaintiff in this case. *Id.*

179. *Id.* at 243-44. The court stated that "Congress, in enacting Title IX, probably never anticipated that it would yield such draconian results." *Id.* at 243.

180. *Kelley v. Board of Trustees*, 35 F.3d 265, 270 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995). The plaintiffs argued that if Title IX requires the elimination of men from athletic competition, it should require the elimination of women from university departments where they are over represented. *Id.* The Seventh Circuit, in rejecting this contention, said that "such a result would be ridiculous." *Id.*

181. 837 F. Supp. 989 (S.D. Iowa 1993).

182. *Id.* at 990.

183. *Id.* at 992.

184. *Id.*

185. *Id.* at 996. The court discussed and rejected the plaintiffs' equal protection and breach of contract claims before they addressed the Title IX issue. *Id.* at 994-95. In discussing the Title IX claim, the court only briefly addressed the regulations and Policy Interpretation. *Id.* at 995-96.

program did not accommodate their interests and abilities.¹⁸⁶ Further, the district court found that the plaintiffs failed to show they were excluded from participation in, denied the benefits of, or subject to discrimination in Drake's athletic program.¹⁸⁷ The court, in weighing the threat of irreparable harm¹⁸⁸ against the probability of success,¹⁸⁹ denied the plaintiffs' motion for a preliminary injunction.¹⁹⁰

B. Problems with Current Title IX Decision Making

The current judicial analysis of Title IX cases raises a myriad of problems for both athletes and universities.¹⁹¹ As exemplified by *Cohen*, *Roberts*, and *Favia*, a university generally cannot eliminate women's athletic teams without exposing itself to Title IX litigation.¹⁹² Title IX leaves

186. *Id.* at 996. The crux of the plaintiffs' argument was that because an obvious interest in wrestling existed at Drake, evidenced by the lawsuit, the wrestler's interests and abilities were no longer effectively accommodated when their team was eliminated. *Id.* The *Kelley* court also rejected this argument when raised by the male Illinois swimmers. See *Kelley v. Board of Trustees of Univ. of Ill.*, 832 F. Supp. 237, 243 n.7 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), and *cert. denied*, 115 S. Ct. 938 (1995).

187. *Gonyo*, 837 F. Supp. at 996. *But cf. infra* note 211 and accompanying text (accepting this argument when proffered by the women's team in *Favia*).

188. *Id.* at 993-94 (noting that the athletes would not lose their scholarships and that they remained free to transfer).

189. See *id.* at 994-96 (discussing the plaintiffs' minimal likelihood of success).

190. *Id.* at 996.

191. See Charles Bennett, *NCAA at the Crossroads*, TIMES-PICAYUNE, June 25, 1993, at D1. Athletic directors have two options in dealing with gender equity, either add women's teams and scholarships or cut the football team. Joe Dean, the athletic director at Louisiana State University stated: "the first option is financially impractical. The second is downright heresy." *Id.* See also Jonathan Feigen, *Football Coaches Circle the Wagons*, HOUSTON CHRONICLE, June 28, 1993, at 2C (noting that if the NCAA adopts proportionality, some administrators would have only three men's sports and eleven women's sports); Mike Dame, *To Close the Gender Gap: A Difficult Balancing Act*, ORLANDO SENTINEL, Aug. 1, 1993, at C-1, C-11 (noting that due in large part to gender equity, many large college football programs are considering leaving division I-A); Bill Sullivan, *Gender Equity Troubles CFA*, HOUSTON CHRONICLE, June 5, 1993, at 8C. One athletic director explained that his school has a \$9 million athletic budget and a \$1.5 million annual deficit. *Id.* If he "went to equity," it would cost an additional \$3 million, with little prospect of increased revenue. *Id.*

192. See Bennett, *supra* note 191, at D1 (noting that two options exist, add women's teams or eliminate football, and that both options are impracticable).

university athletic administrators with few options in responding to a budget crisis,¹⁹³ they can either eliminate men's teams or do nothing.¹⁹⁴

1. *The Infeasibility of the Three Benchmarks*

The courts have stated that to successfully defend a Title IX case a university must satisfy one of the Policy Interpretation's three benchmarks.¹⁹⁵ The problem with this requirement, however, is that universities find it nearly impossible to meet any of the three benchmarks.¹⁹⁶ Almost no university that offers a full array of sports for both men and women, including a men's football team, can fulfill the substantial proportionality test of the first benchmark because the size of the football team yields disproportional percentages in the athletic program.¹⁹⁷ While there have been a variety of proposals, such as excluding football from Title IX calculations, aimed at addressing the substantial proportionality problem,¹⁹⁸ courts have not adopted any of them. The first benchmark is,

193. See Dave Dorr, *Battle For Bucks; Gender Equity Triggers Restructuring of College Sports*, ST. LOUIS POST-DISPATCH, Mar. 30, 1994, at 4D (describing the race for additional revenue to fund gender equity). Frank Windegger athletic director at Texas Christian University said that the present landscape in college sports should be called "[s]crambling for dollars." *Id.*

194. Bennett, *supra* note 191, at D1. As an illustration, suppose a budget crisis forces a university to cut money from its athletic department budget. To accomplish this, university administrators seemingly have three options: (1) eliminate male teams; (2) eliminate female teams; or (3) eliminate some of both. While the third option appears to be the most equitable, under the current judicial analysis of the Policy Interpretation it is not permissible. See *Kelley v. Board of Trustees of Univ. of Ill.*, 832 F. Supp. 237, 242 n.6. (C.D. Ill. 1993) (noting that the University of Illinois likely would violate Title IX if it eliminated women's teams), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *and cert. denied*, 115 S. Ct. 938 (1995); see also Ed Sherman, *Men vs. Women: It's a Brand New Ballgame*, CHI. TRIB., Apr. 28, 1993, at C1 (noting that many critics feel the only way to achieve gender equity is by eliminating men's teams).

195. See *Cohen v. Brown Univ.* 991 F.2d 888, 897 (1st Cir. 1993) (stating that the university must meet one of the Policy Interpretation's three benchmarks).

196. See Wolff, *supra* note 3, at 58-59 (quoting Chris Humm, Brown University sports information director as stating, "[i]f Brown University is not in compliance, then no school in the country is"). *But see id.* at 60 (noting that after being prodded by the courts, Washington State University seemingly has maintained substantial proportionality).

197. See Athelia Knight, *Football Coaches Put Title IX on Defensive; 'New Congress' is Asked to Hold Hearings*, WASH. POST, Feb. 1, 1995, at C4 (discussing concerns raised by football coaches regarding substantial proportionality); Anderson, *supra* note 7, at 77 (noting that the football team is problematic when it comes to Title IX); see also Chuck Neinas, *Purpose of Statute Lost When Focus Put on Proportionality*, USA TODAY, May 9, 1995, at 2C (commenting that more attention should be given to the number of sports offered and program development, rather than simply counting heads).

198. See *infra* notes 261-86 and accompanying text (noting the football exclusion and reduction proposals).

therefore, not an issue in most cases.¹⁹⁹ Under the present interpretation of substantial proportionality, which includes counting members of the football team, most plaintiffs can easily establish that the university athletic program is not in line with the undergraduate population.²⁰⁰

Just as most universities will fail benchmark number one because of the difficulty of having equal numbers of athletes and undergraduates, most will fail benchmark number two simply because college athletics cannot grow infinitely.²⁰¹ The problem in meeting the second benchmark is one of finance. In this time of budget constraints, it is difficult for a university to justify setting up any new sport, mens or women's, especially when there is uncertainty about whether the new team will find ample intercollegiate competition.²⁰² Yet, in both *Cohen* and *Roberts*, the courts rejected the university's contention that the rapid growth of women's teams in the 1970s satisfied benchmark number two.²⁰³ The courts stated that

199. See Sherman, *supra* note 194, at C1 (discussing how football throws off athletic department numbers); see also *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir.) (recognizing that various schools are unable to approach substantial proportionality), *cert. denied*, 114 S. Ct. 580 (1993).

200. See Knight, *supra* note 197, at C4. A 1994 survey of 257 Division I colleges indicated that in 1993-94 women comprised 50.8% of undergraduates but only 33.6% of varsity athletes. *Id.* Jonathan Feigen and David Barron, *SWC Faces Threat of Non-compliance*, HOUS. CHRON., June 29, 1993, at 1B. The article displays a chart that shows just how far most universities are from achieving proportionality. *Id.* The chart indicates that at Texas Tech, 73.7% of the scholarship athletes are male while only 53.5% of the student body is male. *Id.*

201. Notwithstanding the phenomenal growth of women's athletics in the 1970s, observers indicate that women's athletics plateaued in the 1980s. See Blum, *supra* note 27, at 30 (noting that one advocate of female athletics is concerned that the growth in women's sports seems to be leveling off); see also *Cook v. Colgate Univ.*, 802 F. Supp. 737, 746 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d. Cir. 1993) (vacating the case because the plaintiffs had, or were, preparing to graduate). The *Cook* case exemplifies the problems that may arise when a new sport emerges. *Id.* Women's ice hockey is a fairly new phenomenon and is played at only 16 universities. *Id.* A difficult question arises here: When has a sport become popular enough to justify creating a varsity team? *Id.* at 747.

202. In *Cook*, the university argued that if they spent money to set up a women's hockey team, they might not have anyone to compete against. *Cook*, 802 F. Supp. at 747. The court refuted this assertion by showing the presence of other women's intercollegiate hockey teams in the area. *Id.*; Ed Sherman, *Women's Profit is Men's Loss*, CHI. TRIB., Apr. 30, 1993, at D3. The University of Michigan, in response to criticism over the elimination of its men's gymnastics team, stated that a contributing factor in the decision was that "a dwindling number of Michigan high schools sponsor the sport." *Id.*; Anderson, *supra* note 7, at 94-95. The article discusses the need for cost containment at many schools. *Id.* at 94. The author notes that schools must attempt to comply with gender equity while cutting rather than expanding their athletic programs. *Id.*

203. See *supra* notes 135-36, 155-57 and accompanying text (discussing the court's rejection of the argument that rapid expansion in the 1970s should be considered in assessing the second benchmark); see also Anderson, *supra* note 7, at 85 (noting that no school involved in litigation has carried its burden of proof on the second benchmark).

the Policy Interpretation demands a continuing practice of expansion, not simply one rapid expansion that is satisfactory for the next twenty years.²⁰⁴ As the First Circuit noted in *Cohen*, the recent increase in Title IX suits indicates that universities are not likely to expand their athletic programs.²⁰⁵

Additionally, courts deciding these cases often mention that Title IX does not demand that schools pour ever-increasing sums of money into their athletic programs.²⁰⁶ To date, however, no court has explained how a school can show a history of expansion without huge expenditures.²⁰⁷ It is logically inconsistent for courts to require universities to satisfy benchmark number two, by showing a continuing practice of expansion, but then claim that Title IX does not require a university to continually increase athletic department funding.²⁰⁸ In light of this reading of the Policy Interpretation, most universities will fail the second benchmark.²⁰⁹

Similarly, critics, and even some courts, contend that benchmark number three is no test at all—at least not when a university has eliminated an active team.²¹⁰ For instance, it is difficult to imagine a court denying that women who have fought lengthy legal battles for their team's existence, continue to practice out of the trunk of the coach's car, and continue to play an active club schedule, have had their interests fully and effectively accommodated.²¹¹ The only time courts will have to grapple with benchmark number three will be when a small group of athletes sues for the creation of a new team.²¹² In reality, the Policy Interpreta-

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

205. *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993) (stating that “the recent boom in Title IX suits suggests that, in an era of fiscal austerity, few universities are prone to expand athletic opportunities”).

206. *Id.* at 898-99 n.15.

207. *See Roberts*, 998 F.2d at 830 (exemplifying the court's irresponsiveness to the question of how a university can show a continuing practice of expansion without pouring ever-increasing sums of money into their athletic program).

208. *Id.* The only alternative to expenditures that the court offers to comply with benchmark one is a cut in programs. *Id.* Common sense indicates that cutting programs is not a way to meet the second benchmark which requires a continued practice of expansion. *Id.* Therefore, the three benchmarks appear to work against one another at times. *See id.*

209. *Cohen*, 991 F.2d at 898.

210. *See Roberts*, 998 F.2d at 832 (commenting that the third benchmark is not an issue when plaintiffs seek only to halt the elimination of their team).

211. *See Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 581 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993). The court pointed out that Kofie Montgomery, an instructor and ex-coach of the women's field hockey team, now keeps the field hockey uniforms in the trunk of her car because the university eliminated storage space. *Id.*

212. *Roberts*, 998 F.2d at 832. The court stated that full and effective accommodation of interests may become a complicated issue when a group of people ask the university to create a “neoteric team or upgrade the status of a club team.” *Id.* n.11 (quoting *Cohen*,

tion's three-benchmark test has proven to be almost outcome determinative. As soon as a court begins discussing it in the context of an eliminated female team, there is little doubt which side will prevail.²¹³

2. *The Effects of Compliance by Subtraction*

While female teams consistently win Title IX challenges in court, male athletes have not been successful in their litigation.²¹⁴ Both the *Kelley* and *Gonyo* courts refused to circumvent Title IX even though they expressed a sense of compassion for the eliminated men's teams.²¹⁵ The courts have decided not to reinstate male teams because male athletes have not been denied the benefits of athletic programs.²¹⁶ This result is problematic because, as the *Gonyo* court noted, many of these men chose to attend their university because of a promise of a four year commitment to their respective team.²¹⁷ Thus, these men lost the opportunity to participate in intercollegiate athletics²¹⁸ simply because the university's ath-

991 F.2d at 904). Such complications are unlikely where the plaintiffs only seek reinstatement of an existing team. *Id.* at 832. *See also Cohen*, 991 F.2d at 904 (stating that "there is unlikely to be any comparably turbid question as to interest and ability where, as here, plaintiffs are seeking merely to forestall the interment of healthy varsity teams"); Carl Redman, *Gender Equity Causing Major Concern For LSU*, THE ADVOCATE, Oct. 10, 1994, at 1D. In early 1994, three female LSU students sued the university to start a women's varsity soccer program in the Fall of 1994. *Id.* Cf. *Cook v. Colgate*, 802 F. Supp. 737, 747-48 (N.D.N.Y. 1992) (noting that Colgate argued that it should not have to create a women's hockey team because there was insufficient student interest), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993).

213. *See Duncan*, *supra* note 3, at 1 (stating that all but one of 646 colleges surveyed fall far short of meeting substantial proportionality, therefore, benchmark one is no test at all); *Cohen*, 991 F.2d at 898 (admitting that few universities in this era can show a history or continuing practice of expansion); *see also Roberts*, 998 F.2d at 832 (supporting the proposition that benchmark three rarely matters).

214. *See generally Kelley v. Board of Trustees of Univ. of Ill.*, 832 F. Supp. 237, 243-44 (C.D. Ill. 1993) (granting no relief to the eliminated men's swim team), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *and cert. denied*, 115 S. Ct. 938 (1995); *Gonyo v. Drake Univ.*, 837 F. Supp. 989, 995-96 (S.D. Iowa 1993) (holding that schools may eliminate male teams without violating Title IX if doing so moves the athletic program closer to compliance).

215. *See Kelley*, 832 F. Supp. at 244. The court stated that the "[p]laintiffs' case has emotional appeal because it graphically demonstrates the inherent unfairness of decisions which classify and isolate one gender for burdens that the other gender is not required to bear." *Id.*

216. *See Gonyo*, 837 F. Supp. at 996 (recognizing that male athletes at Drake University have no meritorious claim that their interests and abilities are not being effectively accommodated).

217. *Id.* at 992. The *Gonyo* plaintiffs responded to the coach's recruitment efforts and enrolled at Drake University both to get an education and to participate in intercollegiate wrestling. *Id.*

218. For commentary on the importance of playing on a collegiate team, see Greg Garber, *Female Athletes Sue UB; Gymnastics Canceled at Bridgeport*, HARTFORD COURANT, Sept. 1, 1994, at A1 (explaining the dismay one female athlete felt when her team

letic program was not substantially proportionate to the school's undergraduate population.²¹⁹ While courts do not admit that cutting male programs is the only manner in which a university can comply with Title IX,²²⁰ they have accepted the possibility of compliance by subtraction and downgrading.²²¹ The theory of compliance by subtraction raises concerns, despite many commentator's support for the theory.²²² While it is true that elimination of men's teams moves an institution closer to gender equity,²²³ such cuts have major effects on both athletes and inter-collegiate sports.²²⁴

The rash of eliminations of men's teams²²⁵ makes it difficult for male athletes in sports other than football and basketball to choose a university at which to play.²²⁶ In the past, a swimmer or gymnast from Michigan likely would attend college in his home state, however, he must now be wary if schools in the same athletic conference are eliminating their teams

was eliminated); *see also* *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 581 (W.D. Pa.) (noting a statement made by one of the plaintiffs that she "would not have gone to IUP if she had known that the gymnastics team was to be cut"), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

219. *See Gonyo*, 837 F. Supp. at 992-93, 996 (discussing Drake University's athletic and undergraduate populations).

220. *See Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993) (reiterating that a university may stay in compliance by meeting any one of the three benchmarks).

221. *See Kelley v Board of Trustees of Univ. of Ill.*, 832 F. Supp. 237, 244 (C.D. Ill. 1993) (ruling that a university may meet the first benchmark by eliminating men's teams), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *and cert. denied*, 115 S. Ct. 938 (1995); *Cohen v. Brown Univ.*, 991 F.2d 888, 898 n.11 (1st Cir. 1993) (stating that a university may bring itself into Title IX compliance by subtraction and downgrading the over represented gender); *see also Knight, supra* note 197, at C4 (commenting that coaches of men's teams are concerned about the concept of substantial proportionality).

222. Garber, *supra* note 218, at A10 (expressing the consensus opinion about compliance by subtraction by indicating that universities can only eliminate men's teams and cannot touch the women's teams).

223. *See Kelley*, 832 F. Supp. at 242 (finding that the elimination of the men's swimming team did not violate Title IX because it brought the university closer to compliance); *see also Sherman, supra* note 194, at C1 (commenting that to accommodate gender equity, many non-revenue men's sports will disappear).

224. *See Redman, supra* note 212, at 7D (showing the problems some people have with gender equity). One critic is concerned that gender equity, pushed to its extreme, could "destroy college athletics as we know it." *Id.* (quoting Dale Brown, LSU's head men's basketball coach); Anderson, *supra* note 7, at 77 n.12 (discussing some people's view that Title IX's impact could change college athletics); *see also*, Jill Sterkel, *At 60-40, 'Equity' Split is Nothing to Applaud*, USA TODAY, June 12, 1992, at 10C. Jill Sterkel, head coach of the Indiana University women's swimming team, argued that without college athletics she never would have received her education or four Olympic gold medals. *Id.* However, the elimination of men's teams deprives the male athletes of the same basic educational opportunity about which Ms. Sterkel speaks so highly. *Id.*

225. *See infra* notes 227-32 and accompanying text (discussing recently eliminated men's teams).

226. *See Redman, supra* note 212, at 7D (noting that football and basketball are important because these two sports enable a university further assist women's athletics).

because that may signal an impending elimination at the athlete's home university.²²⁷ A lack of competition in secondary sports such as golf, tennis, and gymnastics may result within a few years.²²⁸ The athletes who participate in these sports may choose to attend the schools with the most prominent golf, tennis, and gymnastics programs, creating a dearth of talent and opportunity at other schools.²²⁹ Taken to its extreme, two possible results may occur. First, the effort to achieve gender equity could cause regionalization of men's sports within the NCAA,²³⁰ which would

227. *Kelley*, 832 F. Supp. at 240 (showing that the University of Illinois eliminated its men's swimming and diving teams); see *Redman*, *supra* note 212, at 7D (commenting on further elimination); Ed Sherman, *Women's Profit is Men's Loss*, CHI. TRIB., Apr. 30, 1993, at C3 (noting that Michigan, Wisconsin, and Arizona State have, or within the next year will have, eliminated their men's gymnastics teams). Swimmers will forego the University of Illinois and other Big Ten universities, where swimming teams have been eliminated, and enroll at Stanford University, where the swim team is very successful and has less chance of being cut. See also David Barron, *Alvin CC Decision has Mixed Reviews*, HOUS. CHRON., June 29, 1993, at 2B (quoting one athlete on the eliminated men's basketball team that if he had known the school would eliminate the team, he would have gone to college elsewhere). *But cf.* Bonnie DeSimone, *Show of Hands Saves NCAA Men's Gymnastics*, PLAIN DEALER (CLEVELAND), Jan. 11, 1995, at 1-D, 9-D (noting that even perennial gymnastics powerhouse UCLA has dropped its gymnastics program from varsity to club status).

228. See Bill Briggs, *No Fair Play in College Sports: Ban on Sex Bias Ignored*, DENV. POST, Jan. 9, 1994, at 1A, 12A (explaining that some coaches believe equity will force colleges to drop all men's varsity sports except football and basketball, which will lead to a great decline in competition in other sports); *Redman*, *supra* note 212, at 7D (commenting that Joe Dean, Louisiana State University athletic director, would, if pushed to the limit, retain men's football, basketball, baseball, and track and eleven women's sports to comply with gender equity); Anderson, *supra* note 7, at 95 (noting that if LSU did limit its men's programs to those sports, the school would fall below the NCAA's minimum requirement for Division I membership); see also DeSimone, *supra* note 227, at 1-D, 9-D. The article refers to men's gymnastics as the "spotted owl of collegiate sports" in that it is almost extinct. *Id.* at 9-D. Only 33 schools nationwide offer the sport, seven below the NCAA limit for sanctioned national championships. *Id.* The article also acknowledges that other dwindling men's sports such as swimming and wrestling, have asked the DED for help in saving their sports by altering Title IX. *Id.*

229. See *Redman*, *supra* note 212, at 7D (commenting that LSU no longer participates in men's gymnastics or wrestling). In addition, Oregon State has dropped men's track and the University of Oregon has eliminated baseball. *Id.* Other casualties in the push to fund women's sports include swimming, gymnastics, and wrestling. *Id.*

230. Sherman, *supra* note 227, at C3 (commenting on University of Michigan President James Duderstadt's proposal that regionalization, which saves money in travel and other costs, is one way to achieve gender equity without taking financial resources away from the men's teams). The University of Maryland has adopted a tiered system for its athletic program. Anderson, *supra* note 7, at 100. In 1991, Maryland's 23 sports were divided into four tiers. *Id.* Each tier competes on a different level and receives different assistance; for example, tier one, which includes men's football and men's and women's basketball, competes on the national level, and receive 80% of the school's scholarships, while tier four, which includes golf, tennis, and gymnastics compete, locally and receive no scholarship aid. *Id.* See Maisel, *supra* note 40, at 11B (commenting that cost-cutting measures will hurt men's teams). In light of these cost-cutting measures, schools are deciding to sponsor only

destroy the competitive balance that the NCAA seeks to achieve.²³¹ Second, universities may choose to eliminate all but three or four male sports to comply with Title IX.²³²

C. Proposed Solutions to Title IX Issues

I. Congressional Action

In 1974, Senator John Tower made a proposal which, if adopted, would have avoided many of the problems universities currently face in attempting to comply with Title IX. Senator Tower proposed that Title IX not apply to athletics at all.²³³ While Senator Tower later modified this proposal to exclude only revenue-producing sports,²³⁴ he was not the only person in Congress to propose athletic exclusions.²³⁵ Between 1972 and 1976, at least six proposed amendments to Title IX either totally excluded athletics from the scope of Title IX or provided an exception for revenue-producing sports.²³⁶ None of these amendments gained great support in Congress, and now, twenty years later, Title IX is causing difficulty for colleges and universities across the country.²³⁷ Recently, Congress has

the male sports that reflect the interest of athletes in that university's state. See Sherman, *supra* note 227, at C3.

231. See WEILER & ROBERTS, *supra* note 18, at 496-97 (commenting on the NCAA's stated purposes); see also Sherman, *supra* note 227, at C3. Regionalization is an alternative method of cost-cutting. *Id.* Under this plan each school would follow the example of Maryland, and determine the level at which they wanted to compete in each sport; the national level or the less-expensive, regional level. *Id.* Regionalization is not likely to succeed, however, because non-revenue coaches fear that their sports would be relegated to "secondary status." *Id.*

232. Redman, *supra* note 212, at 7D. Even if LSU reduces its men's program to four teams, the school still might not be in compliance with Title IX. *Id.*

233. See 120 CONG. REC. 15,322-23 (1974) (noting Senator Tower's proposal).

234. *Id.* (exempting any "intercollegiate athletic [activity] to the extent that such activity does or may provide gross receipts or donations to the institution necessary to support that activity"); see Knight, *supra* note 197, at C4 (noting that Congress and federal authorities previously had discussed and rejected arguments for excluding sports).

235. See Krakora, *supra* note 6, at 224 n.14 (discussing a variety of congressional proposals concerning Title IX); see Policy Interpretation, 44 Fed. Reg. 71,413 (1979) (noting a proposal to exclude the revenues a particular sport produced to the extent the revenues are used to fund that sport).

236. Krakora, *supra* note 6, at 224 n.14.

237. See Ed Sherman, *Equity May Deflate Football*, CHI. TRIB., Feb. 21, 1993, at Sports 15. This article makes it clear that many experts in athletics do not understand gender equity, let alone know how to deal with it. See *id.* One coach, when asked what occurred in a 90 minute meeting said, "[w]ell, I know they talked about gender equity, but I still have no idea what it is." *Id.* See Blum, *supra* note 27, at 30 (noting that massive violations of Title IX are taking place); Duncan, *supra* note 3, at 1 (quoting one commentator as stating, "These kind of changes are not easy to effect").

received requests to hold hearings on Title IX.²³⁸ This call for hearings has been met with opposition from many people who think that Title IX has just begun to serve its purpose of eliminating gender discrimination in college athletics and should be left untouched.²³⁹ On May 9, 1995, a subcommittee of Congress' Economic and Educational Opportunities Committee conducted a one-day hearing on Title IX.²⁴⁰ Although debate surrounding the hearing was heated, one representative noted that she was "very confident the Congress is not going to mess with Title IX after twenty-some years."²⁴¹

2. Adopt Title VII's Burden-Shifting Approach

Another alternative to help solve the Title IX dilemma is for courts to apply Title VII's burden-shifting analysis to Title IX actions.²⁴² Title VII of the Civil Rights Act of 1964 was designed to eliminate discrimination in employment.²⁴³ Under the *McDonnell Douglas-Burdine* burden-shifting approach,²⁴⁴ courts evaluate Title VII disparate treatment claims under a three-step analysis.²⁴⁵ First, the plaintiff must establish a prima

238. Knight, *supra* note 197, at C1. The 7,000 member American Football Coaches Association (AFCA) has requested the new Republican controlled Congress to hold hearings on Title IX. *Id.* AFCA claims that courts have not interpreted the Act the way Congress originally intended. *Id.*

239. *Id.* at C4. Groups such as the Trial Lawyers for Public Justice and the Women's Sports Foundation oppose holding congressional hearings on Title IX. *Id.* at C1, C4. These groups feel that Congress should not alter the law. *Id.*

240. See Harry Blauvelt, *Title IX Levels Playing Field For Women*, USA TODAY, May 9, 1995, at 1A, 2A.

241. Harry Blauvelt, *Football Says it's Special*, USA TODAY, May 9, 1995, at 2A (quoting Representative Patsy Mink, a Democrat from Hawaii).

242. For arguments in favor of applying a Title VII analysis in Title IX cases other than athletics, see Elizabeth J. Gant, Comment, *Applying Title VII "Hostile Work Environment" Analysis to Title IX of the Education Amendments of 1972—An Avenue of Relief for Victims of Student-to-Student Sexual Harassment in the Schools*, 98 DICK. L. REV. 489 (1994); Kimberly A. Mango, Comment, *Students Versus Professors: Combating Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 CONN. L. REV. 355 (1991). For discussion of Title VII in an athletic context, see Beck, *supra* note 7, at 241. Title VII served as a basis for one Title IX decision rendered by the United States District Court for the Northern District of New York, but on appeal the case was dismissed as moot, and the concept has not been revisited. See *Cook v. Colgate Univ.*, 802 F. Supp. 737, 743-51 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993).

243. See Gant, *supra* note 242, at 499 (describing cases decided under Title VII).

244. See *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 & n.6 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); see also *Cook*, 802 F. Supp. at 743 (summarizing Title VII's three-step burden-shifting approach).

245. See *Burdine*, 450 U.S. at 252, 253 & n.6 (explaining the three-step burden-shifting method employed in Title VII cases); *McDonnell Douglas*, 411 U.S. at 802 (explaining the same).

facie case of discrimination.²⁴⁶ If successful, the burden shifts to the defendant to show some legitimate, nondiscriminatory reason for its behavior.²⁴⁷ Once the defendant satisfies this step, the burden shifts back to the plaintiff, who, to prevail, must show that the defendant's reasons are merely pretextual.²⁴⁸

A court in applying Title VII's burden-shifting analysis to Title IX claims, would be required to modify the current Title VII approach slightly.²⁴⁹ To make out a prima facie case, the plaintiff first would establish that the athletic department in question is subject to Title IX, that they are a member of the class that Title IX seeks to protect, and finally, that the university has not satisfied the three-benchmark test.²⁵⁰ If the plaintiff establishes the prima facie case, the burden would shift to the university to assert a legitimate, nondiscriminatory reason for the elimination of the team.²⁵¹ If the university offers such a reason, the plaintiff, to prevail, would have to demonstrate that the defendant's proffered reasons are merely pretextual.²⁵²

In *Cook v. Colgate*,²⁵³ after the plaintiffs established their prima facie case,²⁵⁴ Colgate University introduced evidence of a lack of players, lack of local competition, and budgetary concerns as a few of its legitimate, nondiscriminatory reasons for not promoting the women's hockey team

246. *McDonnell Douglas* 411 U.S. at 802. To make out a prima facie case of discrimination under Title VII, plaintiffs must show they are members of a protected class, that they applied and were qualified for a job for which the employer was seeking applicants, that they were rejected, and finally, that the employer continued to seek applicants for the job. *Id.* The Court added that the standard is flexible and the proof required may vary depending on the facts of the case. *Id.* at 802 n.13.

247. *Burdine*, 450 U.S. at 252-53.

248. *Id.* (elaborating further on the burden-shifting process).

249. *See Cook*, 802 F. Supp. at 743 (demonstrating how a Title IX claim would be analyzed under Title VII). The Title VII burden-shifting approach has been adopted and slightly modified in other situations as well. For example, in deciding claims of employment retaliation, most courts utilize the Title VII approach. *See Love v. RE/MAX of Amer. Inc.*, 738 F.2d 383, 387 (10th Cir. 1984) (utilizing the Title VII approach in a claim of retaliation under the Fair Labor Standards Act); *Mesnick v. General Elec.*, 950 F.2d 816 (1st Cir. 1991) (using the burden shifting method in an Age Discrimination retaliation case).

250. *See Cook*, 802 F. Supp. at 743. It is important to note that when using the modified Title VII analysis, the establishment of a prima facie case amounts to the same analysis presently used in Title IX cases. *See id.*

251. *See id.* (applying the *Burdine* burden-shifting method).

252. *See id.* at 743-44.

253. 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993).

254. *Id.* at 744. The court noted that there was no question that Colgate's athletic program was subject to Title IX, and that the female plaintiffs were in the class that Title IX seeks to protect. *Id.* Additionally, the plaintiffs showed that their interests and abilities were not being met through the club ice hockey team. *Id.* The plaintiffs therefore demonstrated a prima facie case. *Id.* at 745

to varsity status.²⁵⁵ The district court accepted the plaintiff's rebuttal of five of Colgate's six nondiscriminatory reasons,²⁵⁶ and held that because budgetary concerns alone are not a legitimate reason, Colgate's legitimate nondiscriminatory reasons for its failure to promote the team to varsity status were pretextual.²⁵⁷ Thus, the court held that the school violated Title IX.²⁵⁸ If the plaintiffs had failed to rebut Colgate's proffered nondiscriminatory reasons, the court may have determined that Colgate did not violate Title IX.²⁵⁹ For instance, if the plaintiffs had not shown that sixteen other women's intercollegiate ice hockey teams existed in the same geographic region, the court may not have forced Colgate to upgrade the team to varsity status. This is so because a lack of competition likely would constitute a legitimate nondiscriminatory reason for not upgrading.²⁶⁰

255. See *id.* at 746-51. Colgate introduced six nondiscriminatory reasons for not elevating the women's ice hockey team from club to varsity status. The reasons were: (1) women's ice hockey rarely is played on the secondary level; (2) the NCAA does not sponsor a women's championship in ice hockey; (3) women's ice hockey is played at only 15 colleges in the East; (4) lack of student interest; (5) lack of ability; and (6) hockey is too expensive to fund. *Id.*

256. See *id.* at 746-49. The one reason that was not rebutted by the plaintiff was Colgate's budget argument. *Id.* at 749-50. But see *infra* note 288 and accompanying text (discussing the fact that budget concerns alone are not a sufficient non-discriminatory reason).

257. *Cook*, 802 F. Supp. at 750; see also Vargyus, *supra* note 72, at 33 (noting that funding constraints are not a defense to Title IX suits).

258. *Cook*, 802 F. Supp. at 751 (directing Colgate to grant varsity status to the women's hockey team).

259. *Id.* at 746-51. The rebuttal of the proffered nondiscriminatory reasons proceeded in the following manner. An expert witness rebutted the contention that women's ice hockey rarely is played on the secondary level by testifying that there are between 175 and 200 women's hockey teams nationally. *Id.* at 746. The idea that the NCAA does not sponsor a national championship was rebutted by the fact that the East Coast Athletic Conference, of which Colgate is a member, offers a championship. *Id.* The court also noted that 16 of the most prestigious universities in the world maintain women's ice hockey teams, thus allowing the Colgate women to play a 32-game schedule. *Id.* at 747. The court dismissed Colgate's argument that there was a lack of student interest by stating that the players persistence in applying for varsity status four times and finally commencing legal action shows sufficient student interest. *Id.* at 748. Rejecting Colgate's argument regarding a lack of ability, the court asked how the university expected an underfunded, underprivileged team, that had to pay twenty-five cents per mile to use a school van, to be as successful as a varsity squad. *Id.* Finally, Colgate claimed that budget problems kept it from elevating the team to varsity status. *Id.* at 749. The court accepted this as a legitimate nondiscriminatory reason, but noted that "financial concerns alone cannot justify gender discrimination." *Id.* at 750 (quoting *Haffer v. Temple Univ.*, 678 F. Supp. 517, 530 (E.D. Pa. 1987)). The court held that the plaintiffs had effectively rebutted Colgate's nondiscriminatory reasons and ordered the school to grant varsity status to the hockey team. *Id.* at 751.

260. See *id.* The court did not speak to this issue because the plaintiffs rebutted all of Colgate's proffered reasons. *Id.*

3. *The Exclusion of Football*

Most universities are dependent on the men's football and basketball teams to produce revenue for their sports programs.²⁶¹ One major problem for universities attempting to comply with Title IX is that a college football team consists of eighty-five scholarship athletes and numerous non-scholarship players.²⁶² No female team requires an equivalent number of athletes,²⁶³ making football unique in both the number of players participating and the amount of revenue it generates.²⁶⁴ In light of this, when a university is faced with difficult budget decisions, and must eliminate athletic teams, the school will not eliminate the only two sports that generate a significant amount of money; yet, it cannot eliminate female teams without subjecting itself to a Title IX suit.²⁶⁵ In essence, uni-

261. For a factual basis supporting the proposition that men's football and basketball are the only revenue generating sports at most schools, see Redman, *supra* note 212, at 7D. The article notes that LSU's athletic program accumulated costs of \$15.4 million for the 1993-94 fiscal year and generated \$15.9 million in revenues. *Id.* Of the \$15.9 million, the football program generated \$7.9 million and the men's basketball program generated \$2.6 million. *Id.* The other 16 varsity sports accounted for the remaining \$4.9 million. *Id.* But see Claire Smith, *Concerns are Voiced on Effects of Title IX*, NEW YORK TIMES, Feb. 3, 1995, at B19 (noting that only 65 college football programs are profitable).

262. Johnson, *supra* note 7, at 586 n.201 (commenting that the average size of a Division I-A football team is 118 players); see *id.* at 586 n.203 (showing that for the 1994-95 school year, the number of football scholarships will be reduced to 85 per team). In response to the difficulty of meeting the first benchmark, some commentators have proposed examining Title IX compliance cases on a sport-specific basis. See Policy Interpretation, 44 Fed. Reg. 71,413, 71,422 (1979). Under this approach, the law would obligate universities to provide equal opportunity within each sport that is offered to both genders. *Id.* A men's basketball team and a women's basketball team at the same school would receive equal opportunities and benefits. *Id.* HEW refuted this idea in the Policy Interpretation. *Id.* HEW feared that the absence of a requirement for identical teams would create unequal opportunities by allowing universities to focus funding on male sports, such as football, that have no female counterpart. *Id.*

263. Ken Stephens, *Coaches Fear Title IX Lawsuits May Prove Damaging for Football*, DALLAS MORNING NEWS, Jan. 10, 1995, at 9B (noting that football will be the primary target in the search for gender equity because it has far more participants than any other sport); see Anderson, *supra* note 7, at 76-77 (noting that on average football consumes over 50% of a school's athletic budget); Johnson, *supra* note 7, at 586 n.201 (noting that the largest women's sport is crew, which carries 29 members per team); see also Feigen, *supra* note 191, at 2C (stating that the large number of football players "virtually preclude[s] universities from having a ratio of male to female athletes proportionate to the general student body"); Redman, *supra* note 212, at 7D (quoting one commentator as saying that "[a]s long as you have 85 football players (on scholarship) plus the walk-ons, . . . football is going to throw the numbers out of proportion"). LSU Chancellor William "Bud" Davis, added that 15 females per women's team requires six or seven women's sports simply to offset the football numbers. *Id.*

264. See Stephens, *supra* note 263, at 9B (noting that football should be given deference because there are places where it generates 90% of the budget).

265. *E.g.*, Kelley v. Board of Trustees of Univ. of Ill., 832 F. Supp. 237, 243-45 (C.D. Ill. 1993) (showing that the university did not eliminate the men's football or basketball

versities are left with only one option, to eliminate smaller male sports such as wrestling, gymnastics, or golf.²⁶⁶

To remedy this problem, one solution, referred to as the three-sex approach, has surfaced, in which football would be considered a separate entity for Title IX purposes.²⁶⁷ Under this approach, courts would exclude football from consideration under the three-benchmark test, thereby eliminating the problem caused by the size of a football team.²⁶⁸ Critics assert that this approach would solve many of the problems universities face under Title IX.²⁶⁹ Because the football team is often the cause of gender disparity,²⁷⁰ critics contend that by excluding it, most universities would come into compliance with the substantial proportionality benchmark, and thus, into compliance with Title IX.²⁷¹

teams), *aff'd*, 35 F.3d 265 (7th Cir. 1994), and *cert. denied*, 115 S. Ct. 938 (1995); Anderson, *supra* note 7, at 93 (noting that Cal State-Fullerton, citing budget and gender equity concerns, discontinued its football program for at least the 1994-95 season). *But cf.* Barron, *supra* note 227, at B1 (noting that Alvin Community College eliminated its successful men's basketball team to make room for women's softball).

266. See *Kelley*, 832 F. Supp. at 240 (showing that the University of Illinois eliminated men's swimming and men's and women's diving); see also *Gonyo v. Drake Univ.*, 837 F. Supp. 989 (S.D. Iowa 1993) (eliminating men's wrestling); *supra* notes 227-32 and accompanying text (noting the variety of small sports that have been dropped at various universities in order to expand women's sports).

267. See Anderson, *supra* note 7, at 96-97 (discussing that excluding football would take that sport outside of gender calculations for Title IX purposes). The article notes that at various times, Congressmen and legal commentators have viewed Title IX's regulations as exempting revenue producing sports. *Id.* at 96. The Policy Interpretation deals with the exemption proposal by recognizing that "the unique size and cost of football programs have been taken into account in developing this Policy Interpretation." *Id.* at 96 n.160 (quoting 44 Fed. Reg. 71, 419 (1979)).

268. For an example of this, see *Blair v. Washington State University*, 740 P.2d 1379, 1381-84 (Wash. 1987). The trial court in *Blair* excluded football before examining Title IX compliance at Washington State University. *Id.* This exclusion of football was reversed at the appellate level. *Id.*

269. See Redman, *supra* note 212, at 7D (noting LSU Chancellor Davis' comments on the gender equity problems caused by football). *But cf.* Briggs, *supra* note 228, at 12A (pointing out that the University of Denver has no football team, but still is struggling to comply with Title IX).

270. See Sherman, *supra* note 194, at C19 (explaining that "[football] throws off all the numbers. . . . It's like tossing an elephant on the scale"); see also Blauvelt, *supra* note 241, at 2A (noting that college football is trying to persuade Congress that it should be given special relief from Title IX); see Anderson, *supra* note 7, at 96-97 (discussing the exclusion of football and other revenue producing sports). *But cf.* Maisel, *supra* note 40, at 11B (reiterating that in a compliance determination at a federally funded institution, federal law mandates the inclusion of football, even though there is no comparable female sport).

271. See *Cohen v. Brown Univ.* 991 F.2d 888, 897 (1st Cir. 1993). The First Circuit stated that the substantial proportionality benchmark provides universities with a "safe harbor." *Id.* The court added that by meeting the first benchmark, institutions can remain on the "sunny side" of Title IX. *Id.* at 898.

One trial court adopted the concept of football exclusion when initially faced with a Title IX case.²⁷² In *Blair v. Washington State University*,²⁷³ the trial court held that because football is unique from other college sports,²⁷⁴ it should be excluded from the Title IX calculations.²⁷⁵ The court explained that football is more like a business than a sport and, therefore, it should not be included in a gender equity analysis.²⁷⁶ The appellate court in *Blair* reversed, ruling that the trial court had abused its discretion in excluding football, and holding that excluding football would only perpetuate the discrimination Title IX seeks to remedy.²⁷⁷

4. Reduce the Size and Cost of the Football Team

Another proposed solution to Title IX is to reduce both the number of football players participating, and the cost of operating a college football team.²⁷⁸ Many Division I-A schools carry 100 or more football players; a number criticized as too large.²⁷⁹ The argument in favor of cutting the number of football players seemingly is strengthened by the fact that the National Football League, which plays six to eight more games per season than a college team, allows only forty-seven players per team.²⁸⁰ This

272. *Blair*, 740 P.2d at 1379.

273. *Id.*

274. Knight, *supra* note 197, at C4 (noting the ways in which football is unique from any other college sport).

275. See *Blair*, 740 P.2d at 1383. The court pointed to factors such as the number of participants, scholarships, and coaches; and the amount of equipment, facilities, special publicity, staffing, and security needed to handle the large number of participants. *Id.* The Policy Interpretation does make exceptions for football, but they do not apply to the effective accommodation assessment. Anderson, *supra* note 7, at 97.

276. *Id.*; see also Koch, *supra* note 7, at 10-11 (discussing intercollegiate athletics as an industry and noting the large effect that economic conditions have on amateur athletics).

277. See *Blair*, 740 P.2d at 1382-83; cf. Sherman, *supra* note 194, at C1 (commenting that excluding football is not a simple answer to Title IX because even if you took away 90 scholarships for football at every Big 10 school, the men still receive, on average, 20 more athletic opportunities).

278. See Johnson, *supra* note 7, at 586-87 (suggesting some possible cost cutting measures within the football program); see also Feigen, *supra* note 191, at 2C. Donna Lopiano, director of the Women's Sports Foundation and former women's athletic director at the University of Texas alleges waste in every Division I football budget. *Id.* Some of the excesses that she says "border[] on ludicrous" include country club memberships for the coaches, excessive middle management, and having the team stay in hotels the night before home football games. *Id.* Lopiano concluded by saying: "Football is not the golden goose. It's a fat goose eating food that could nourish more opportunities for women." *Id.*

279. See Redman, *supra* note 212, at 7D (noting that the size of a Division I-A football team in 1994 was 85 scholarship players, plus a number of walk-ons, which often brought the total number of players above 100); Sherman, *supra* note 194, at C19 (noting that some schools like Nebraska and Michigan State currently carry more than 140 players);

280. See Wolff, *supra* note 3, at 61. Critics argue, however, that college football needs that many scholarships to remain competitive and to maintain its public appeal. *Id.* The

argument has particular merit if one considers what could become of the twenty or so extra athletic slots produced by the reduction of the football team.²⁸¹ Unfortunately, because football coaches often are influential at their respective universities,²⁸² it is unlikely that any large reduction in football scholarships will come soon.²⁸³

Further, supporters of large football programs argue that the popularity of college football, enables universities to do more for women's sports.²⁸⁴ At many universities, football is the sport that earns the most money and gives the school the greatest publicity.²⁸⁵ Therefore, administrators often are not receptive to the idea of reducing the size of the football program for fear that its popularity will diminish.²⁸⁶

comparisons to the NFL appear weaker when one considers that if an NFL player is hurt during the season, the team can place that player on injured reserve and replace him on the roster. See Rick Telander, *A Week With the Dallas Cowboys: Moments of Low Humor and High Purpose, Ending, as Usual, With a Win*, SPORTS ILLUSTRATED, Dec. 12, 1994, at 28 (illustrating the number of players who get hurt and are out on injured reserve in a given week in the National Football League).

281. See Wolff, *supra* note 3, at 61 (asserting that cuts in college football would help fund women's and non-revenue sports that presently get lost in the shuffle).

282. Maisel, *supra* note 40, at 11B (noting that while football coaches constitute only one part of the athletic program, it is a very large part); see Sherman, *supra* note 227, at C1 (comparing the benefits received by the head football coach, as opposed to the men's gymnastics coach at the University of Michigan).

283. Sherman, *supra* note 194, at C19 (pointing out that football and other men's revenue producing sports are not currently in danger of elimination, although a cap may be put on the number of players per team). *But cf.* Knight, *supra* note 197, at C4. The article describes concerns expressed by some college football coaches that football programs will be adversely affected by Title IX and should, therefore, be exempt from its requirements. *Id.* For example, at Shippensburg University, the football coach cut the size of his team from 110 to 80 because of Title IX. *Id.*

284. See Redman, *supra* note 212, at 7D (detailing LSU athletic director Joe Dean's opinion that the revenue generated by the football program, allows women's sports to compete at current levels).

285. See Bennett, *supra* note 191, at D1. Joe Dean summarized his school this way: "I've got 80,000 seats in my stadium. I'm going to play football at LSU, and I'm going to play it big." *Id.* See also Maisel, *supra* note 40, at 11B. Paul "Bear" Bryant, one of the most respected football coaches of all time, stated in his autobiography: "The mystery to me is why they always want to cut the football budget. . . . Football pays the freight at most schools. . . . Why would you try to shut down the counter that's keeping you in business?" *Id.* *But cf.* Ray Yasser, *A Comprehensive Blueprint for the Reform Of Intercollegiate Athletics*, 3 MARQ. SPORTS L.J. 123, 154 (1993) (pointing out one commentator who shows convincingly that the bulk of athletic programs at large universities are not profitable).

286. Feigen, *supra* note 191, at 2C. The sentiment toward gender equity among supporters of college football is evidenced by a statement a former Notre Dame athletic administrator made that he was "dismayed at the publicity and apparent support that militant women have received by their irrational attack on football as their bugaboo." *Id.* Maisel, *supra* note 40, at 1B (quoting Georgia football coach Ray Goff's feelings on gender equity as: "You don't want to know what I really think"). *But see* Rachel Shuster, *Football, Equality Can Coexist*, USA TODAY, Feb. 4, 1993, at 2C (commenting that insecure administrators feel that football is at the "cross hairs of female fanatics gunning for equal every-

III. SOLVING TITLE IX'S PROBLEMS

A. Apply Title VII

Adaptation of the Title VII burden-shifting approach is a reasonable solution to Title IX's shortcomings.²⁸⁷ By incorporating *Haffer's* command that financial concerns alone are insufficient to justify discrimination, Title VII provides female athletes with the same protection that Title IX presently affords.²⁸⁸ While remaining a strong vehicle to remedy discrimination, the Title VII approach would, in extraordinary circumstances, allow a court to uphold the elimination of a women's team without finding a Title IX violation.²⁸⁹ The argument for using Title VII is furthered by analogizing between students and athletes who fall under the guise of Title IX and employees who are protected by Title VII.²⁹⁰ Employees must arrive for work daily and perform their respective jobs.²⁹¹ Similarly, students and athletes must arrive for school and practice daily and do the assignments their coaches and professors give them.²⁹² In light of the additional equity the Title VII approach affords, and the fact that there is very little difference between the elimination of an employee and the elimination of an athletic team, courts should apply similar tests in both scenarios.²⁹³

thing," when in fact, the idea of football being destroyed is wholly irrational); *see supra* note 265 (discussing Cal State-Fullerton's elimination of football).

287. *See supra* notes 253-60 and accompanying text (discussing how the United States District Court for the Northern District of New York applied Title VII to a Title IX case). For a demonstration of other situations where Title VII has been applied to Title IX cases *see Gant, supra* note 242, at 506 (commenting that courts have expressed a willingness to apply Title VII to sexual harassment cases brought under Title IX).

288. *See Cook v. Colgate*, 802 F. Supp. 737, 750 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993). The university had to show more than budget concerns to prevail. *Id.* This is important because if budget concerns alone satisfied the legitimate, nondiscriminatory reason portion of Title VII, Title VII would be an ineffective tool on which to base Title IX decisions. *Id.*

289. *See Cook*, 802 F. Supp. at 750 (implying that if the university did have a legitimate nondiscriminatory reason, it might not have been found in violation). This would potentially allow a university to eliminate three less-popular women's teams and replace them with two more-popular teams. This would allow more women to participate in intercollegiate sports at that university, but would not expose the school to Title IX liability.

290. *Gant, supra* note 242, at 506. In *Doe v. Taylor Independent School District*, 975 F.2d 137, 149 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1066 (1993), the Fifth Circuit stated, "[t]here is no meaningful distinction between the work environment and school environment." *Id. See Gant, supra* note 242, at 506 (recognizing that a student's position in the hierarchy of a school is structurally similar to an employee's business position).

291. *See Gant, supra* note 242, at 507-09 (commenting on the necessity of attending both work and school).

292. *See id.* This is particularly true in grade school, but it also applies to college because there is "substantial compulsion associated with schooling." *Id.* at 509.

293. *Id.* at 517.

B. Eliminate the Flaw in the Second Benchmark

Another possible way to resolve compliance problems would be for the judiciary to reevaluate the demands of the second benchmark.²⁹⁴ This benchmark requires a university to demonstrate a history and continuing practice of expansion for the under-represented gender.²⁹⁵ By adhering to the Policy Interpretation's requirement of a continued practice of growth, courts essentially are advocating a slow, deliberate pace in the growth of women's athletics within a university.²⁹⁶ If, in the 1970s, universities had anticipated that they would be required to comply with this benchmark, logic dictates that they would have engaged in a slower, more calculated expansion of female sports, instead of the rapid expansion that occurred.²⁹⁷ In the 1970's, if they had begun to expand by adding a women's team every two years, today those universities would be able to demonstrate a history and continuing practice of expansion.²⁹⁸ Under the current reading of Title IX, if universities plan to add women's sports to their athletic program, it behooves them to add new teams slowly, thereby avoiding potential Title IX liability by satisfying the second benchmark.²⁹⁹

294. See Policy Interpretation, 44 Fed. Reg. 71, 413, 71,418 (1979); see also *Cohen v. Brown Univ.*, 991 F.2d 888, 903 (1st Cir. 1993) (discussing the second benchmark of the effectively accommodating portion of the Title IX analysis).

295. Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (1979).

296. See *Cohen*, 991 F.2d at 903 (stating that the university must adhere only to a pace that is dictated by student interest).

297. See *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507, 1514 (D. Colo.) (noting that Colorado State University had no women's sports at the beginning of the 1970s, but by the end of that decade, the school sponsored eleven sports for women), *aff'd in part and rev'd in part*, 998 F.2d 824 (10th Cir.), and *cert. denied*, 114 S. Ct. 580 (1993).

298. To illustrate this loophole, suppose a new university were to open its doors in 1995. Like the First Circuit did in *Cohen*, the illustration will refer to the new university as Oooh U. *Cohen*, 991 F.2d at 899. Suppose Oooh U. begins its athletic program with five men's teams and five women's teams. Every other year, Oooh U. adds one men's and one women's team to the program, until the program contains 15 men's teams, one of which is football, and 15 women's teams. Now, 20 years later in the year 2015, Oooh U. eliminates five of the women's teams and the athletes file a Title IX suit. It is likely that the school, because of the men's football team, will not meet the substantial proportionality benchmark, nor will the school prevail on the third benchmark, effectively accommodating the interests and abilities of the students, because the women presumably would fight to keep their team. See *id.* at 904 (asserting that by suing to keep their successful gymnastic and volleyball teams, the women have demonstrated the necessary interest and ability). But, in light of the second benchmark, Oooh U. does not violate Title IX, because they can show a history and continued practice of expansion of women's sports.

299. See *id.* at 898-900 (showing that by meeting the second benchmark a university can avoid a Title IX violation).

C. *New Sources for Solutions*

Because courts have been reluctant to adopt any proposals, new ideas must be posited to respond to problems stemming from Title IX compliance.³⁰⁰ One potential solution may come from Congress.³⁰¹ In December, 1994, twenty-two Senators sent a letter to the Education Secretary stating their concern that Title IX is threatening the economic well-being of universities with football programs.³⁰² In response to the Senators' letter, OCR replied that it is reviewing the way it enforces the law.³⁰³ As part of this review, DED is revising the Title IX compliance manual.³⁰⁴ In light of the pressure DED is facing from both Congress and eliminated men's teams, it remains to be seen if there will be significant changes in the law.

1. *Title IX: The Reason for the Rule*

Assuming that courts will remain disenchanted with the idea of excluding football from the Title IX calculations, another potential solution utilizes the reason for the rule approach.³⁰⁵ Under this method, one begins with an analysis of Title IX's purpose, asking why the law was enacted and what it seeks to achieve.³⁰⁶ Title IX was enacted to prevent the discriminatory use of federal funds in educational institutions.³⁰⁷ If one accepts the supposition that the entire cost of sponsoring an athletic program is equivalent to the use of federal funds, then the following argument should apply to Title IX.

Every university athletic department should total each team's operating budget and subtract from that amount any revenue earned by the individual team that year; this number would represent the team's net

300. For a commentary on what could happen if nothing is done to resolve Title IX issues, see Bennett, *supra* note 191, at D-1 (suggesting that defection from the NCAA is one possible remedy football schools may be willing to try). One athletic director commented that "football schools don't need the NCAA. . . . If they start cutting beyond what schools think is reasonable, they could be in trouble." *Id.* See Dame, *supra* note 191, at C11 (noting the possible pullout of football programs from Division I-A).

301. See Knight, *supra* note 197, at C1 (noting that the new Republican Congress is seen by some football coaches as a "miracle").

302. *Id.*

303. *Id.*

304. DeSimone, *supra* note 227, at 9-D. The compliance manual is the guide used by Title IX investigators to determine whether a recipient is in compliance with the law. *Id.*

305. Portions of this section are from conversations and ideas that emerged during conversations with Professor Roger Hartley of The Columbus School of Law at The Catholic University of America.

306. See Petriella, *supra* note 47, at 596-97 n.8 (discussing the purpose of Title IX).

307. Policy Interpretation, 44 Fed. Reg. 71,413 (1979).

profit or loss for the year.³⁰⁸ If a particular team earns a profit, then it has not “used” any federal money, but if it has lost money, then it has “used” the amount lost.³⁰⁹ At the end of each year the net profits and losses for all the men’s and women’s teams should be totaled. There should be a total gross established for the men’s teams, and a total gross established for the women’s teams. The totals for the men’s program and the total for the women’s program should then be compared and should be equal, because the bottom line reflects the amount of money “used” by the university for the men’s and women’s athletic programs respectively.³¹⁰

This analysis indirectly encourages many of the ideas that have been advocated elsewhere, such as reducing the budget of a university’s football team.³¹¹ For instance, if a school chose to reduce the football budget, other sports would be spared because the athletic department would be better able to deal with budget cuts, thus making a more equitable situation for all athletes. This theory would continue to help female athletics, and would afford university administrators greater freedom in their decision making.

308. See C. David Strupeck et al., *Financial Management at Georgia Tech*, MGMT. ACCT., Feb. 1993, at 58, 61-62. From a financial management point of view, Strupeck advocates such an accounting method. *Id.* A two-step approach first decides what each team earns and then decides what they spend. *Id.* at 59-61. Those numbers then are subtracted to determine a bottom line and demonstrate how the funds are used. *Id.* Strupeck gives an example of this type of analysis as done by the athletic department at Georgia Tech. *Id.* at 60.

309. *Id.* at 61-62.

310. A numerical example can help illuminate this idea. Suppose an athletic department at a given university contains 10 male and 10 female varsity sports. Each of the 10 women’s sports and nine of the 10 men’s sports have an operating budget of \$100,000. The football team is the exception; its budget is \$500,000 per year. Now suppose every women’s team brings in \$10,000 in revenue for the given year. Assuming such, the university would have spent \$900,000 to operate the women’s sports program. Similarly, suppose all of the men’s teams raise \$10,000 in revenue, but the football team earns \$500,000 in revenue. Under this model, the university has spent \$810,000 to fund the men’s programs. In light of these numbers, the university would not be using the federal money in a discriminatory manner because the women and men each spend federal funds to roughly the same extent. Raw numbers make the system seem unfair, but when one considers that most football programs do not break even, the numbers become much more equitable. Suppose in the above example, the football team loses \$200,000 per year. The university then would have spent \$1.1 million on men’s sports and only \$900,000 on women’s. This would constitute disparate treatment and might, after other factors are considered, violate Title IX. See 34 C.F.R. § 106.41(c) (1994) (listing 10 factors that the regulations consider in assessing equality of opportunity under the Title IX analysis).

311. See Johnson, *supra* note 7, at 587 n.204 (pointing out such perks in the football budget as chartered aircraft and hotel stays on the night before a game).

2. Creative Ways to Increase Revenue

Another approach to solving some of the Title IX issues is to be creative and look for new sources of revenue for athletic programs. For instance, one alternative is to design a bonus system for schools that attempt to come into compliance with Title IX.³¹² This bonus does not have to be direct federal money, but instead could consist of government grants, additional research grants, or additional financial aid for students at complying institutions.³¹³ Another option is for schools to contract with large corporations, such as General Motors, Ford, Nike, and Reebok, to begin a Title IX program.³¹⁴ These entities would donate money to schools' athletic programs to help fund women's athletics.³¹⁵ For example, at the end of most televised college football games, a corporation presently donates one thousand dollars to each participating university's general scholarship fund.³¹⁶ The university could ask the corporation to match the donation to the general scholarship fund with

312. For instance, the University of Iowa is experimenting with a program that they believe will bring them into compliance with the Act. Why not reward this effort, thereby encouraging other schools to follow suit. See Sherman, *supra* note 194, at C1, C19 (discussing different alternatives tried by universities to comply with Title IX). The Iowa program relies heavily on state funding and assistance. Anderson, *supra* note 7, at 93. The state has agreed to charge only in-state tuition for out-of-state athletes, and has contributed \$200,000 in direct aid to the athletic programs. *Id.* A problem with Iowa's program, however, is that state funding is both unreliable and not available to private institutions. *Id.* (noting the unreliability of state funding by explaining that after the California State University system undertook a stringent gender equity scheme the state cut funding for the school).

313. See Mark Bradley, *Gender Equity is Forcing the Sexes to Take Sides*, THE ATLANTA J. & CONST., May 22, 1993, at C1. (detailing options available to schools to help them comply). Deborah Yow, the athletic director at the University of Maryland, who has been involved in almost every aspect of college sports, offers some possible ideas to aid in compliance. *Id.* She proposes the concept of tuition waivers or private endowment funds for female athletics. *Id.* Another commentator, who happens to be Deborah Yow's sister and the basketball coach at North Carolina, disagrees with her sister's perspective on gender equity. *Id.*

314. See B.G. Brooks, *CU Trying on New Way of Getting Uniforms*, ROCKY MTN. NEWS, Dec. 31, 1994, at 8B. Nike and the University of Michigan instituted a plan whereby Nike not only agreed to outfit the athletic teams, but also helped fund a new women's team. *Id.*

315. *Id.* Nike receives national attention when the University of Michigan wears their clothing; it replaces the necessity of purchasing advertising. *Id.*; see also Koch, *supra* note 40, at 27-29 (explaining the importance of the mutual relationship between college football and network television, and how the networks often are receptive to new ideas); see Dorr, *supra* note 193, at 4D (noting that schools view television as the most likely source for revenue to fund gender equity).

316. NCAA Football: Miami v. Syracuse (NBC television broadcast, Nov. 5, 1994) (videotape on file with the Catholic University Law Review).

an additional one thousand dollar donation to the schools "Title IX fund," to be used in furtherance of gender equity.³¹⁷

Another viable option would be to raise student fees nominally each semester.³¹⁸ This could amount to hundreds of thousands of dollars each year, all of which could be funneled into female athletics.³¹⁹ Universities also could investigate a small increase in ticket prices for admission to men's football and basketball games, and earmark that money directly for women's athletics. At the University of Michigan, which plays six home football games per season and sells over 100,000 tickets to each game,³²⁰ this could mean an additional \$300,000 - \$600,000 per year for women's athletics. Universities should attempt to utilize creative programs to solve Title IX issues. By developing such systems, the NCAA and the schools could encourage compliance with Title IX without eliminating male teams.³²¹

IV. CONCLUSION

Title IX strives for equality and fairness for women who traditionally have been discriminated against in education and college athletics. Title IX has had an arduous history, and only in the past ten years has it finally begun to eliminate gender discrimination in athletics. But the crux of Title IX has remained unchanged since the 1979 Policy Interpretation, while society has changed dramatically during those fifteen years. The time has come to revisit the Act, to see if it can be made more equitable; to see if men, women and universities can all co-exist without any athletes being deprived of the chance to participate in the wonderful experience that college athletics affords. Though Title IX is an admirable law, and has advanced women's athletics, there is room for improvement, room enough to allow everyone to participate.

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317. This idea is similar to the private endowment fund proposed by one commentator. See *supra* note 313 and accompanying text (noting the idea of a private endowment fund).

318. Joan O'Brien, *The Unlevel Playing Field*, THE SALT LAKE TRIB., Sept. 4, 1994, at A1. Utah State University, faced with compliance problems, raised \$200,000 earmarked for women's athletics, through a small increase in student fees. *Id.*

319. *Id.*

320. See Wolff, *supra* note 3, at 61 (noting that 100,000 people attend Michigan football games on Saturdays in Ann Arbor).

321. Tom Witosky, *Iowa Coach Gable Wrestles With Impact*, USA TODAY, May 9, 1995, at 2C. Grant Teaff, the executive director of the American College Football Coaches Association advocated this type of creativity when he stated "[i]ntelligent men and women can find a way to increase female participation opportunities without eliminating male opportunities if they will look at this from a reality standpoint." *Id.*