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# The Title IX Tug-of-War and Intercollegiate Athletics in the 1990's: Nonrevenue Men's Teams Join Women Athletes in the Scramble for Survival

SUSAN M. SHOOK\*

## INTRODUCTION

The advent of Title IX in 1972, with its mandate directing educational institutions to refrain from discrimination on the basis of sex, signaled Congress' attempt to correct gender inequality in federally funded schools; in addition, it prompted the end of fifty years of "dark ages" in women's athletics.<sup>1</sup> While sports programs had been popular for women in the early 1900's, a movement to deemphasize collegiate-level women's sports reached fulfillment by the 1920's.<sup>2</sup> This devaluation continued to flourish into the early 1970's, so that when Title IX was promulgated, only 200,000 women nationwide were involved in any aspect of interscholastic athletics.<sup>3</sup>

Within four years of enactment, however, the number of women athletes increased exponentially to encompass over two million participants.<sup>4</sup> In addition, universities worked diligently to meet these reborn interests by expanding women's athletic programs and by offering a diverse array of sports.<sup>5</sup> Unfortunately, this trend fails to survive into the present decade.

Specifically, as universities in the 1990's face tougher economic times, their ability to continue expanding women's programs has, in many instances, come to a virtual standstill. In some cases, women's teams have even been eliminated. At the same time, these university programs have not yet fulfilled the gender equity standards of Title IX. As a result, women athletes have entered the courts under Title IX's implied right of action,<sup>6</sup> seeking either the reinstatement of their eliminated teams or an expansion in the institution's women's program that would satisfy gender equity compliance standards.

The federal appellate courts have consistently found that universities are not complying with Title IX and have thus directed universities to reinstate women's intercollegiate teams; these same decisions have also indirectly forced universities to respond by eliminating assorted men's teams. Specifically, in order to satisfy the mandates of Title IX, institutions unable to afford athletic expansion have turned to reducing their men's programs to satisfy federal court rulings on Title IX. Consequently, many of the less

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1. GARY NYGARD & THOMAS H. BOONE, *LAW FOR PHYSICAL EDUCATORS AND COACHES* 280 (2d ed. 1989).

2. *Id.* at 280-81 (citing the reasons for the Conference of College Directors of Physical Education's disapproval of women's intercollegiate sports in the 1920's: "(1) [i]t leads to professionalism; (2) [t]raining of a few to the sacrifice of many; (3) [i]t is unsocial; (4) [n]ecessity of professional coaches; (5) [p]hysical educators, both men and women, of [the] leading colleges find results undesirable; (6) [e]xpense; and (7) [u]nnecessary travel fatigue").

3. *Id.* at 281.

4. Joan O'Brien, *The Uneven Playing Field*, *SALT LAKE TRIB.*, Sept. 4, 1994, at A1.

5. See, e.g., *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir.) (noting Colorado State University's addition of 11 intercollegiate women's sports during the 1970's), *cert. denied*, 114 S. Ct. 580 (1993).

6. See *infra* note 61 and accompanying text.

prominent, nonrevenue men's sports have indirectly felt the hidden axe of Title IX compliance.

Some men's sports teams have responded with reverse discrimination suits; to date, these have been unsuccessful as courts find that neither the Title IX statute nor its application to intercollegiate sports violates the Equal Protection Clause. Therefore, as schools deal with the strict 1990's Title IX case law and seek a quick remedy, nonrevenue men's sports become increasingly endangered or extinct. A more prudent solution may exist, especially given universities' obligations to promote intercollegiate athletics for their educational benefits rather than their revenue potential.

Part I of this Note outlines Title IX's statutory and regulatory background and also focuses on important early judicial interpretations of Title IX and enforcement mechanisms. Part II discusses the standard 1990's Title IX lawsuit and how the federal circuit courts' responses have maintained that universities are failing to meet applicable gender equity mandates in their women's athletics programs. Part III delineates the unsuccessful reverse discrimination claims emanating from those men's teams eliminated by universities looking to meet Title IX standards within the confines of limited budgets. Part IV examines why the recent Title IX decisions have correctly applied the statute, not only in a legal sense, but also from a policy perspective. This Part also contends that the "interest" tests proposed by many athletic departments fail to accord with Title IX's goals, primarily due to the lingering effects of historical gender discrimination in collegiate athletics. Moreover, Part IV analyzes why the three-prong test of compliance that is strictly applied by the appellate courts offers, realistically, only one viable method of application for universities seeking to avoid Title IX violations. Finally, Part V contends that if universities wish to maintain their status as promoters of "educational" opportunities within the realm of intercollegiate athletics, they should maintain a variety of women's and men's sports. Specifically, this Note concludes that university athletic programs should decrease the roster size of college football in order to keep nonrevenue men's sports alive. This reduction, the Author suggests, will not injure the quality of college football nor result in revenue losses for the athletic departments, but it will lead to compliance with Title IX standards and avoid the risk of federal sanctions.

## I. TWENTY YEARS OF ROCKY TERRAIN FOR TITLE IX

### *A. Title IX History: Legislative Enactment, Administrative Interpretation, and Initial Judicial Analysis*

Congress enacted a section of statutory code known as "Title IX" within the larger framework of its Education Amendments of 1972.<sup>7</sup> Simply stated, Title IX prohibits discrimination on the basis of gender in all education programs benefitting from federal funding. Section 1681 of the title states, in its relevant portion, 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."<sup>8</sup>

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7. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (1972) (codified at 20 U.S.C. §§ 1681-1688 (1994)). Sections 908 and 909 were added to the original act in 1988. Pub. L. No. 100-259, § 3(a), 102 Stat. 28 (1988).

8. 20 U.S.C. § 1681(a).

However, due to the title's vague wording and the relative scarcity of secondary legislative materials accompanying its passage in Congress, institutions of higher education were unable to assess whether and how Title IX affected their own programs, especially in the realm of intercollegiate athletics.<sup>9</sup> In essence, universities queried whether the scope of Title IX reached their sports programs as separate entities.<sup>10</sup> In the midst of this period of confusion (approximately the mid-1970's), women's and girls' sports saw an unprecedented growth in participation at all competitive levels.<sup>11</sup> Yet, despite the growth in women's athletics, any guidance to university athletic programs on how to meet the nebulous Title IX standards—both to accommodate current and future women students—remained unavailable.

Some of the collegiate programs' questions were subsequently answered when, in 1975, Congress directed the Secretary of Health, Education, and Welfare ("HEW") to promulgate regulations implementing Title IX. These regulations specifically prohibited gender discrimination in "intercollegiate . . . athletics,"<sup>12</sup> and most notably included a section entitled "equal opportunity."<sup>13</sup> Under this section, HEW related that a "recipient" of federal funding "shall provide equal athletic opportunity for members of both sexes."<sup>14</sup> In assessing whether a recipient were indeed offered equal opportunities, the regulation provided that the Director of HEW would consider, along with other factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice 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.<sup>15</sup>

9. See *Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993) (stating that "Congress included no committee report with the final bill and there were apparently only two mentions of intercollegiate athletics during the congressional debate").

10. *Id.*

11. Within four years of Title IX's passage, women's participation increased by 600%. See O'Brien, *supra* note 4, at A1. Additional statistics showed the following breakdowns:

Increase in athletic participation of high school women, 1971-1978: 294,000 to 2,083,000.

Increase in collegiate women's intramural sports, 1971-1976: 108%.

Increase in collegiate women's club sports, 1971-1976: 55%.

Increase in intercollegiate women's sports, 1971-1976: 102%.

Policy Interpretation, 44 Fed. Reg. 71,413, 71,419 (1979).

12. 34 C.F.R. §§ 106.37, 106.41 (1995). Throughout this Note, the Author refers to the Department of Education's replication of these HEW regulations in its own regulatory sector. Specifically, in 1979, Congress separated HEW into two divisions: the Department of Health and Human Services ("HHS") and the Department of Education ("DED"). See 20 U.S.C. §§ 3401-3510 (1994). HEW's Title IX regulations remained within HHS's own set of regulations, 45 C.F.R. § 86 (1994), while DED also copied them into its regulatory storehouse, 34 C.F.R. §§ 106.37, 106.41. Because DED is the "principal locus" of ongoing enforcement of educational regulations, however, post-1979 cases and commentaries have looked to the DED's placement of the regulations in the Code of Federal Regulations for citation and reference. Note that HHS's and DED's regulations are identical except for the change in language necessitated by the splitting of HEW into HHS and DED. See *Cohen*, 991 F.2d at 895, for a more comprehensive treatment of the HEW split, reorganization procedure, and placement of subsequent agency authority.

13. 34 C.F.R. § 106.41(c) (1995).

14. *Id.*

15. *Id.* § 106.41(c)(1)-(10) (1995).

Equally important, and appended to the end of this list, was a stipulation by HEW that "unequal expenditures" for men's and women's teams would not necessarily "constitute noncompliance with this section"; however, HEW could consider a failure to provide adequate funding for teams of one sex in "assessing equality of opportunity for members of each sex."<sup>16</sup> Thus, at this stage in the statutory interpretation of Title IX, the administrative agency<sup>17</sup> appeared to focus more aggressively on "equal opportunity" aspects of compliance as opposed to "equal expenditures."

Following the initial issuance of the regulations, HEW received more than one hundred discrimination complaints covering more than fifty schools.<sup>18</sup> In efforts to promote self-compliance at the university level and thereby reduce the number of complaints, HEW proposed a policy interpretation of its regulations and of Title IX itself.<sup>19</sup> After notice and comment rulemaking, HEW's Office of Civil Rights ("OCR"), its enforcement agency for Title IX, promulgated a final "Policy Interpretation"<sup>20</sup> in 1979 and stated that it was "designed specifically for intercollegiate athletics."<sup>21</sup>

The Policy Interpretation found that the 1975 regulations suggested three areas of compliance necessary to avoid a Title IX violation. It summarized these areas as (1) compliance in financial assistance (scholarships) based on athletic ability; (2) compliance in other program areas (equipment and supplies, practice times, etc.); and (3) compliance in meeting the interests and abilities of male and female students.<sup>22</sup> HEW's goals in adopting this framework were to foster compliance with Title IX by ensuring that "institutions remain obligated . . . to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available." This would entail, in most instances, "development of athletic programs that substantially expand opportunities for women to participate and compete at all levels."<sup>23</sup>

In discussing athletic scholarships—the first area of compliance—the Policy Interpretation referred back to § 106.37 of the 1975 regulations.<sup>24</sup> Likewise, in its "equivalence in other athletic benefits and opportunities" section, the Policy Interpretation made reference to the regulations for guidance on compliance standards. Specifically, it restated subsections 106.41(c)(2) through 106.41(c)(10), but left out subsection 106.41(c)(1) of the regulations: that subsection would itself serve as the third indicator of intercollegiate compliance with Title IX,<sup>25</sup> and as the impetus for the

16. *Id.* § 106.41(e) (1995).

17. *See supra* note 12 and accompanying text.

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

19. 43 Fed. Reg. 58,070 (1978).

20. 44 Fed. Reg. 71,413, 71,413-23 (1979).

21. *Id.* at 71,413. However, HEW also stated that while the Policy Interpretation was designed for college athletics, its general principles would also "often apply to club, intramural, and interscholastic athletic programs." *Id.*

This phrase embedded within the HEW Policy Interpretation could, this Author suggests, lead to many more Title IX athletics lawsuits based on secondary and grade schools not following the Title IX regulations providing for equal treatment and opportunities. Now that the collegiate level lawsuits have opened the doors with favorable holdings for women's sports, *see infra* parts II and III, parents pleading for their daughters' equal opportunities may soon bring more high school level suits.

22. 44 Fed. Reg. 71,413, 71,414 (1979).

23. *Id.*

24. 34 C.F.R. § 106.37(c) (1995). The regulation provides that a recipient, to the extent that it awards athletic scholarships, must "provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics." *Id.*

25. 44 Fed. Reg. 71,413, 71,415 (1979).

holdings of the 1990's spate of Title IX college athletics cases discussed in Parts II and III below.

This third measure of intercollegiate athletic compliance with Title IX was labelled "Effective Accommodation of Student Interests and Abilities" and was modelled specifically from the directives of the 106.41(c)(1) regulation;<sup>26</sup> that is, one measuring compliance with Title IX would look to "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities", of *both* genders.<sup>27</sup> How were institutions to discern whether or not they were "effectively accommodating" these interests and abilities? The Policy Interpretation stated that HEW (later DED) would begin by examining three factors under this compliance standard to assess whether interests and abilities were being met. First, was the school determining the athletic interests and abilities of its students accurately, ensuring that its "methods of determining interest and ability" were not "disadvantag[ing] the members of an underrepresented sex"?<sup>28</sup> Second, what selection of sports were being offered, taking into account the difference between contact and noncontact sports?<sup>29</sup> Third, and what proved to be the most important aspect of the Policy Interpretation for recent cases dealing with Title IX, was whether *adequate levels of competition* were being made available to both sexes, including the opportunity for team competition.<sup>30</sup>

To discern whether adequate levels of competition were being offered—for example, varsity as opposed to club-sport status at the university—the Policy Interpretation established yet another embedded layer of compliance, a "trinitarian model . . . which a university must meet"<sup>31</sup> to accommodate the competitive interests of both sexes. This trinitarian model has come to be known as the "Effective Accommodation" test. Specifically, the Policy Interpretation stated that Title IX regulation compliance under this branch could be met in any one of three ways:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.<sup>32</sup>

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26. See *supra* text accompanying note 15.

27. 34 C.F.R. § 106.41(c)(1) (1995).

28. 44 Fed. Reg. 71,413, 71,417 (1979).

29. *Id.* at 71,417-18. This particular aspect of accommodating interests deals with the issue of females wishing to participate on teams offered only for male athletes and vice versa, and it is thus beyond the scope of this Note. For an interesting synopsis of the legal battles fought in this arena, see Polly S. Woods, Comment, *Boys Muscling in on Girls' Sports*, 53 OHIO ST. L.J. 891 (1992); see also Diana Heckman, *Women and Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 47-59 (1992).

30. 44 Fed. Reg. 71,413, 71,418 (1979).

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

32. 44 Fed. Reg. 71,413, 71,418 (1979). The Author shall designate these three subtests as the "Significant Proportionality," "Continuing Expansion," and "Full Accommodation" tests, respectively, and more fully discuss these tests and their significance in Parts II and III of this Note.

The Policy Interpretation listed additional compliance factors;<sup>33</sup> however, appellate courts have deemphasized these factors focusing instead on the Effective Accommodation test's three prongs of possible compliance.

Despite the 1975 regulations and the fairly extensive 1979 Policy Interpretation, universities and courts still debated whether the language of Title IX itself included *their* athletic departments at all. At issue was the Title IX, § 1681(a), phrase dealing with funding: sex-based discrimination in "any education program or activity receiving Federal financial assistance violated Title IX."<sup>34</sup> Depending on whether a party was fighting for or against gender equity compliance under Title IX in the college athletics area, that party argued for, respectively, an "institution-wide" or "program-specific" view of this phrase. Supporters of the latter view argued that Title IX forbade gender discrimination only in those specific "programs or activities" receiving *direct* federal funding. Thus, if an athletic program did not receive any direct federal funding, the regulations and compliance guidelines of Title IX did not apply to it.<sup>35</sup> This argument severely limited the number of university athletic departments falling under the auspices of Title IX, as few of them received any direct financial aid.<sup>36</sup>

In contrast, those supporting the institution-wide viewpoint argued that an *entire* educational institution falls under the requirements of Title IX if any part of the institution was the recipient of federal monies. Because almost every American institution of higher education receives some type of federal aid or admits students who receive federal loans, this interpretation brought almost all collegiate athletic departments within Title IX's purview.

Advocates of both perspectives asserted that Title IX's limited legislative history supported their view.<sup>37</sup> Institution-wide proponents also argued that direct financial funding intrinsically had no bearing on whether programs were benefitting from federal

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33. *Id.* Included among these additional factors for compliance assessment were the following:

- (1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or
- (2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

*Id.* These two factors appear to reemphasize the totality of the Effective Accommodation test. Also included in the application of the Effective Accommodation test was a statement from HEW that schools would not be required to "upgrade teams to intercollegiate status . . . absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions." *Id.* However, the institution would possibly be responsible for actively encouraging such interest in the region, should none be perceived to exist beyond its own student body. *Id.*; see also *infra* text accompanying notes 220-22.

34. 20 U.S.C. § 1681(a).

35. Among those decisions finding that the program-specific model applied were *Rice v. President & Fellows of Harvard College*, 663 F.2d 336, 338-39 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982); *Othen v. Ann Arbor School Board*, 507 F. Supp. 1376 (E.D. Mich. 1981).

36. See Jill K. Johnson, Note, *Title IX and Intercollegiate Athletics: Current Judicial Interpretations of the Standard for Compliance*, 74 B.U. L. REV. 553, 561 (1994) (stating the program-specific viewpoint's "narrow interpretation excluded almost all university athletic departments from Title IX coverage because they rarely receive any direct financial assistance").

37. See *id.* at 561-63. In essence, parties supporting the program-specific view pointed to initial statements made about the applicability of Title IX as explicitly institution-wide that were *not* enacted by Congress and thus, they said, were implicitly refused by Congress—especially as it used institution-wide language elsewhere within the amendments. Alternatively, parties supporting the institution-wide approach argued that several congressmen had sought unsuccessfully to amend Title IX by restricting its applicability to only those programs receiving direct federal aid and that Congress' failure to enact these amendments implicitly welcomed the institution-wide approach. Moreover, institution-wide proponents "contended that the remedial nature of Title IX required that it be given the broadest interpretation necessary to carry out its remedial goals." *Id.* at 563.

money. Specifically, they proffered a "release theory," finding that when the federal government aids one program in an institution, that program is able to "release" money to other programs in the institution. In essence, this "other," indirectly funded program (such as an athletic department) was still benefitting from federal resources.<sup>38</sup>

Despite the persuasive arguments accompanying the institution-wide perspective,<sup>39</sup> in 1984, the Supreme Court in *Grove City College v. Bell*<sup>40</sup> held that Title IX was program-specific, applying therefore only to those programs specifically receiving federal funds.<sup>41</sup> As a result, because few athletic departments received federal funds directly, the number of Title IX investigations conducted by DED's OCR dropped dramatically.<sup>42</sup> In effect, *Grove City* "cabined Title IX and placed virtually all collegiate athletic programs beyond its reach."<sup>43</sup>

Congress, responding to the Supreme Court's limited interpretation of Title IX, quickly followed with the Civil Rights Restoration Act of 1987.<sup>44</sup> This provision legislatively reversed the Court's *Grove City* holding, stipulating that, for the purposes of Title IX in the context of higher education, "the term 'program or activity' and 'program' mean *all* of the operations of . . . (2)(A) a college, university, or other postsecondary institution, or a public system of higher education . . . *any part of which* is extended Federal financial assistance."<sup>45</sup> Despite the fact that the Restoration Act failed to specifically mention sports in its codification, the record of congressional debates left little room for doubt

38. *Id.* at 562. The basis of this "release" theory was framed in *Bob Jones University v. Johnson*, 396 F. Supp. 597, 602-03 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

39. The Author would also have argued the institution-wide approach, given the 1979 Policy Interpretation of HEW. Specifically, HEW stated the Policy Interpretation was written to "clarify] the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in *athletic departments*." Policy Interpretation, 44 Fed. Reg. 71,413, 71,415 (1979) (emphasis added). Because the program-specific viewpoint would have resulted in a tiny percentage of athletic programs being affected by Title IX's policy against gender bias, *see supra* text accompanying note 36, it seems illogical that HEW's OCR would have engaged in extended notice and comment rulemaking in order to carry out a statutory section applicable only to a few rare universities. However, the Author concedes this argument might have still failed because this Title IX issue arose in the era before *Chevron* was enacted, and courts were not yet clearly obligated to defer to the permissible statutory interpretations of administrative agencies. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

40. 465 U.S. 555 (1984).

41. *Id.* One commentator underlined the inconsistency of the Court's program-specific viewpoint and excerpted portions of Justice Brennan's dissent from *Grove City* which highlighted the absurdity of the majority opinion. That is, given Title IX's antidiscrimination purpose, why is it acceptable to say that because *Grove City College's* financial aid department receives direct federal funds, it cannot discriminate but that the remainder of the college is not prohibited from discriminating in its admissions policies, athletic departments, or even academic departments? *See Heckman, supra* note 29, at 8.

42. *See NYGARD & BOONE, supra* note 1, at 291 (stating the OCR dropped 64 Title IX athletics discrimination suits following the program-specific holding of *Grove City*); *see also* *Cohen v. Brown Univ.* (Cohen I), 991 F.2d 888, 894 & n.5 (1st Cir. 1993) (relating that 79 ongoing OCR Title IX cases had been dropped or curtailed).

43. *Cohen I*, 991 F.2d at 894.

44. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687 (1990)).

45. *Id.* (emphases added). Congressional findings associated with the Civil Rights Restoration Act of 1987 included the observation that

certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972 generally . . . and . . . legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

*Id.*; *see also* S. Rep. No. 64, 100th Cong., 1st Sess. 4 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3, 6 (revealing that if an institution received any federal funds, Congress wished to prohibit discrimination throughout the institution).



that among its goals was the creation of more athletic opportunities and equality for female athletes.<sup>46</sup>

An additional tool in Title IX interpretation came with the 1990 Title IX Investigator's Manual ("Manual").<sup>47</sup> The Manual—published by the OCR to aid in Title IX investigations of interscholastic and intercollegiate athletic programs—outlines the three general areas of Title IX compliance mentioned in the 1979 Policy Interpretation: scholarships, other athletic benefits and opportunities, and effective accommodation of student interests. However, the Manual makes clear that an "investigation may be limited to less than all of these major areas where unique circumstances" justify doing so.<sup>48</sup> Thus, the Manual suggests an investigator may justifiably look only to the Effective Accommodation factor to measure compliance. Under this factor, the Manual sketches three consecutive steps for the OCR investigators to follow in assessing a university's Title IX compliance—steps which echo the Effective Accommodation test of the 1979 Policy Interpretation.<sup>49</sup> In fact, the Manual directs investigators to consider subsequent steps in the three-part analysis *only* if the prior step has not been met.<sup>50</sup>

For example, first the investigator must determine if the school has met the "Substantial Proportionality" test. If not, the investigator should next evaluate whether the school follows the Continuing Expansion test. Finally, if the school meets neither of these tests, the investigator must determine if the school is complying with the Full Accommodation test.

An important factor in recent cases and Title IX controversies is the Manual's focus on the Substantial Proportionality prong of the Effective Accommodation test. Specifically, the Manual tells investigators that there exists "no set ratio that constitutes 'substantially proportional' or that, when not met, results in a disparity or a violation."<sup>51</sup> Yet, in its illustration of the Substantial Proportionality test, the Manual reveals that if, for example, a university's student body is fifty-two percent male and forty-eight percent female, "then, ideally, about [fifty-two percent] of the participants in the athletics program should be male and [forty-eight percent] female."<sup>52</sup> The use of the word "ideally" and the lack of any other statement on an acceptable range encompassing the terms "substantially proportionate" have left little guidance for both courts and universities on what percentages will satisfy this prong of the Effective Accommodation test. As Parts II and III of this Note will illustrate, courts have thus stated that ranges differing approximately ten percent from that of undergraduate student body gender ratios have not been close enough to satisfy this prong. In addition to this guidance on the Substantial Proportionality test (or, in reality, lack of guidance), the Manual gives the OCR investigators additional examples of the evidence they should gather to see if

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46. *Cohen I*, 991 F.2d at 894 (demonstrating that the Congressional Record includes statements by several senators lamenting past discrimination against female athletes and noting ample evidence of gender-based discrimination in athletics and education).

47. VALERIE M. BONNETTE & LAMAR DANIEL, U.S. DEP'T OF EDUC., TITLE IX ATHLETICS INVESTIGATOR'S MANUAL: 1990. The OCR published the 1990 Manual with the intent of having it supersede two similar packets issued in 1980 and 1982.

48. *Id.* at 7.

49. *Id.* at 21.

50. *Id.* at 23-24.

51. *Id.* at 24-25.

52. *Id.* at 24.

schools are meeting the Continuing Expansion or Full Accommodation tests of the three-part Effective Accommodation model.<sup>53</sup>

Thus, with the broad language of § 1681 of the Title IX statutory law came years of nettlesome issues and vacillating interpretations which affected and impeded some, if not all, enforcement of Title IX regulations.<sup>54</sup> In the meantime, interest levels in girls' and women's sports expanded rapidly throughout the country. As a result, after these issues were resolved, a new flurry of university gender-equity-in-athletics cases and settlements appeared on the scene.<sup>55</sup>

### B. Title IX Enforcement Mechanisms

Title IX is currently enforced administratively through the DED's office of Civil Rights as a result of HEW's handing the baton of education activities to the DED in 1979.<sup>56</sup> The 1979 Policy Interpretation provides the clearest guidelines on enforcement procedures and regulatory analysis under Title IX.<sup>57</sup> These guidelines mention two methods of initiating enforcement: "compliance reviews" and "complaints."<sup>58</sup> Compliance reviews entail the DED's periodic random selection of a number of federal aid recipients and an investigation to determine compliance.<sup>59</sup> Alternatively, complaints involve the DED's investigation of all "valid (written and timely)" complaints alleging gender-based discrimination in a recipient's program.<sup>60</sup>

However, as a result of two Supreme Court holdings, Title IX can also be enforced via court action, with the potential for monetary relief in addition to equitable or injunctive relief, if such relief is still available at the time the case is adjudicated. Specifically, in 1979, the Supreme Court held in *Cannon v. University of Chicago*<sup>61</sup> that Title IX contains an implied private right of action for aggrieved parties. In addition, in 1992, the Supreme Court made the lawsuit gamble for noncomplying institutions much higher in *Franklin v. Gwinnett County Public Schools*.<sup>62</sup> The Court held that a plaintiff could recover monetary damages for intentional violations of Title IX.<sup>63</sup> This holding indirectly sent a message to universities refusing to follow OCR compliance directives that more was at stake than a possible loss of federal funding which, even now, has never been a strong

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53. *Id.* For a more comprehensive discussion of the Investigator's Manual, see Johnson, *supra* note 36, at 567.

54. For additional sources of information on recent Title IX history and its effect on women's athletics, see Catherine Pieronek, *A Clash of Titans: College Football v. Title IX*, 20 J.C. & U.L. 351, 352-55 (1994); Johnson, *supra* note 36, at 557-70; R. Lindsay Marshall, Case Comment, Cohen v. Brown University: *The First Circuit Breaks New Ground Regarding Title IX's Application to Intercollegiate Athletics*, 28 GA. L. REV. 837, 842-47 (1994); Mary Beth Petriella, Note, *Injunctive Relief—Title IX*, 4 SETON HALL J. SPORT L. 595, 595-600 (1994).

55. See Andrew Blum, *Athletics in the Court*, NAT'L L.J., Apr. 5, 1993, at 1, 30 (illustrating that schools including the University of Oklahoma, the College of William and Mary, the University of New Hampshire, and the University of Massachusetts at Amherst have all had to reinstate women's teams in the face of Title IX court battles); O'Brien, *supra* note 4 (noting that Temple University, Colorado State University, Cornell University, Auburn University, and the California State University have all lost or settled gender equity suits in recent years).

56. See *supra* note 12.

57. Policy Interpretation, 44 Fed. Reg. 71,413, 71,413-23 (1979).

58. *Id.* at 71,418. The enforcement regulations are located at 34 C.F.R. §§ 110.30-110.39 (1995).

59. 44 Fed. Reg. 71,413, 71,418 (1979).

60. *Id.*

61. 441 U.S. 677 (1979). Some commentators have noted that this implied right of action signaled a positive step for parties suffering gender-based discrimination in athletics, as Title IX enforcement prior to this opening of the courthouse doors had been somewhat lax. See, e.g., Ellen J. Vargyas, *Franklin v. Gwinnett County Public Schools and Its Impact on Title IX Enforcement*, 19 J.C. & U.L. 373 (1993).

62. 503 U.S. 60 (1992).

63. *Id.* at 75-76.

threat as the OCR has never removed funding from a university.<sup>64</sup> Moreover, the unavailability of monetary damages caused the "paucity of litigation" under Title IX before *Gwinnett County*, a consequence arising from the "principal problem . . . that, without damages, Title IX litigation brought few benefits to plaintiffs."<sup>65</sup> Because of the prolonged litigation student athletes often underwent in Title IX lawsuits before *Gwinnett County*, "student-plaintiffs would typically have left the institution by the time their case was resolved."<sup>66</sup> Hence, a supposed "win" for the plaintiffs resulted only in injunctive or equitable relief which often arrived too late and was of "no practical value."<sup>67</sup>

Thus, the powerful combination of *Cannon* and *Gwinnett County* opened the doors for much more Title IX litigation than had been seen in the first two decades after its enactment. As a result, many institutions in the 1990's are encountering the gender-based athletic discrimination complaints that have been brewing on the litigation sidelines.<sup>68</sup> Some schools have settled rather than endure lengthy litigation with the potential for the sting of monetary damages at the end;<sup>69</sup> others, as Part II will illustrate, have taken their chances in the courtroom and, to date, have consistently lost.

## II. RECENT TITLE IX CASES: WOMEN ATHLETES AS PLAINTIFFS SEEKING VARSITY TEAM STATUS

Four recent federal court cases<sup>70</sup> have waded through the murky statutory and administrative waters of Title IX history and enforcement procedures to provide potential plaintiffs and university athletic departments with much clearer guidelines on what exactly constitutes Title IX compliance. Each of these cases found that the university in question violated Title IX. Moreover, given the guidelines provided, the courts signaled that almost all institutions were in violation of the title<sup>71</sup> and thereby sent a warning that has been resounding in athletic departments across the country.<sup>72</sup> This Part will focus on the impetus for bringing suit and the general guidelines found in these four cases. The

64. See Vargyas, *supra* note 61, at 381.

65. *Id.* at 380.

66. *Id.*

67. *Id.* Vargyas also points out that the prolonged aspect of Title IX litigation without recourse to monetary damages made mootness a constant problem. *Id.* For example, groups of student-athletes wishing to reinstate their team to varsity status would graduate and no longer have an injury redressable by injunctive means once the lawsuit had concluded. *Id.* With the advent of monetary relief provided by *Gwinnett County*, the absence of any meaningful remedy for "victorious" student plaintiffs was potentially eliminated.

In addition, Vargyas demonstrates that the OCR administrative route also left little room as a viable alternative for plaintiffs. Added to the fact that the OCR has never used the ultimate remedy of pulling federal assistance from a university, see *supra* note 65 and accompanying text, it "rarely impose[s] any strong remedies at all." Vargyas, *supra* note 61, at 381. Where the OCR finds violations, its usual actions include:

(1) to negotiate "assurances" with the institution in which the institution represent[s] that it will come into compliance; (2) on the basis of these assurances find that the institution is in compliance; and (3) to close the case with little, if any, follow-up. The complaining party . . . play[s] virtually no role in this process.

*Id.* (footnote omitted). As a result of this administrative ineffectiveness, only a few of the potential Title IX complaining parties have sought out the administrative process. *Id.*

68. Blum, *supra* note 55, at 1.

69. See O'Brien, *supra* note 4, at A1.

70. *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993); *Cook v. Colgate Univ.*, 992 F.2d 17 (2d Cir. 1993); *Cohen v. Brown Univ. (Cohen I)*, 991 F.2d 888 (1st Cir. 1993); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

71. See *infra* part IV.

72. According to attorneys representing women plaintiffs in Title IX suits, "once these cases get to court, schools generally have no valid defense." Blum, *supra* note 55, at 1, 30. As a result, many universities threatened with lawsuits decide not to litigate and settle while those who do go to court are losing. Only one university has won a Title IX gender-equity-in-sports case—the University of New Mexico—in a pre-*Cohen I* lawsuit. *Id.*

focus will be on female athletes bringing Title IX claims against their universities for the reinstatement of varsity women's athletic teams. Part III, in contrast, will center on a male athlete's lack of success in a reverse discrimination suit arising from his university's cutback of men's sports to comply with these judicial interpretations of Title IX.

The most detailed case regarding collegiate level Title IX compliance came in 1993 from the First Circuit in *Cohen v. Brown University* ("*Cohen I*").<sup>73</sup> The court received the case on appeal from the defendants, Brown University, its president, and its athletic director, who sought a reversal of the lower court's preliminary injunction requiring "Brown to reinstate its women's gymnastics and volleyball programs to full intercollegiate varsity status pending" resolution of student-plaintiffs' Title IX claim.<sup>74</sup>

The suit emanated from Brown University's announcement in the spring of 1991 that it was facing an athletic department financial bind due to budget restrictions. As a result, it planned to eliminate funding for four sports from "its intercollegiate athletic roster: woman's volleyball, women's gymnastics, men's golf, and men's water polo."<sup>75</sup> The school announced that these teams could continue to play at club level, but that it would withdraw the financial support of varsity team status.<sup>76</sup> As a result of these cuts, the school would realize a \$77,813 savings per year.<sup>77</sup>

While these cuts would affect the women's sports budget much more drastically than the men's, the ratio of female to male varsity sports participants would remain about the same: approximately thirty-seven percent female participants versus sixty-three percent male.<sup>78</sup> However, these varsity sports proportions did not reflect the student body ratio at Brown: women comprised forty-eight percent of the total student body, while men totalled fifty-two percent.<sup>79</sup>

During the 1991-92 school year, Brown offered fifteen varsity women's teams to its sixteen men's teams.<sup>80</sup> Historically, Brown had offered fourteen women's sports between the years 1970 and 1977 but had made *only one* addition to women's varsity teams since that time.<sup>81</sup>

At the district court level, members of the women's volleyball and gymnastics teams had proceeded as plaintiffs under the implied private cause of action established by *Cannon v. University of Chicago*.<sup>82</sup> Their complaint alleged that "Brown's athletic arrangements violated Title IX's ban on gender-based discrimination, a violation that was . . . exacerbated by Brown's decision to devalue the two women's programs without first making sufficient reductions in men's activities or, in the alternative, adding other women's teams to compensate for the loss."<sup>83</sup> The plaintiff team members also moved for and were granted certification as a class consisting of all present and future women students at Brown who participate or seek to participate in intercollegiate athletics funded

73. 991 F.2d 888. On remand, the district court applied the First Circuit's analysis of Title IX to find that, as of March, 1995, Brown University continued to be in violation of the statutory mandates. *Cohen v. Brown Univ.* (Cohen II), 879 F. Supp. 185 (D.R.I. 1995); see *infra* notes 131-46 and accompanying text.

74. *Cohen I*, 991 F.2d at 891; see also *Cohen II*, 809 F. Supp. 978.

75. *Cohen I*, 991 F.2d at 892.

76. *Id.*

77. *Id.* This total savings was broken down as follows: women's volleyball, \$37,127; women's gymnastics, \$24,901; men's water polo, \$9250; and men's golf, \$6545. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. 441 U.S. 677 (1979); see also *supra* note 61 and accompanying text.

83. *Cohen I*, 991 F.2d at 893.

by Brown but are deterred from doing so. The district court granted the plaintiffs a preliminary injunction, requiring Brown to reinstate the volleyball and gymnastics teams until final resolution of the Title IX claim.<sup>84</sup>

The First Circuit conducted its analysis of the case under the guidelines of preliminary injunction review.<sup>85</sup> The court noted that if it affirmed the lower court's conclusion to maintain the preliminary injunction, this was only an attempt to "predict probable outcomes"—that is, the defendant may nonetheless win.<sup>86</sup>

After giving a detailed history of Title IX, from its statutory inception to its administrative interpretations, the court proceeded with its analysis. First, the court found that it must accord the DED's Title IX regulations "appreciable" deference, as called for by the *Chevron* test.<sup>87</sup> The court added that, in this particular instance, the "degree of deference is particularly high . . . because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX."<sup>88</sup>

Second, the court began its analysis of the Title IX regulations and interpretations by noting that the regulations stipulate that whether an institution's teams are segregated by sex or not, it must "provide gender-blind equality of opportunity to its student body."<sup>89</sup> The regulations provide, in § 106.41(c),<sup>90</sup> a list of factors to consider when assessing compliance with this directive.<sup>91</sup> The First Circuit noted that the district court had issued its preliminary injunction on the first of these ten areas, the so-called "Effective Accommodation" test: "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."<sup>92</sup> In turn, it found this factor the "most critical" in assessing the plaintiffs' case against Brown and mentioned that of all ten factors under § 106.41(c), factor one was the "most difficult to measure."

To assess the meaning and factors necessary for compliance with the Effective Accommodation test, in turn, the court looked to the 1979 Policy Interpretation. Similar to its handling of the Title IX regulations, the court felt obligated to accord the Policy Interpretation "substantial deference," recognizing that it was an administrative agency's "considered interpretation of § 106.41(c)."<sup>93</sup> The court examined the three major areas of regulatory compliance under the Policy Interpretation (scholarships, equivalence in other athletic benefits and opportunities, and effective accommodation of student interests and abilities) and reiterated what several district courts had already held: a

84. *Id.*

85. *Id.* The court outlined four factors in evaluating a party's motion for preliminary injunction:

(1) the movant's probability of victory on the merits; (2) the potential for irreparable harm if the injunction is refused; (3) the balance of interests as between the parties, *i.e.*, whether the harm to the movant if the injunction is withheld outweighs the harm to the nonmovant if the injunction is granted; and (4) the public interest.

*Id.* at 902. If a reviewing court felt the plaintiffs' case satisfied these factors, it would be compelled to affirm a preliminary injunction. *Id.*

86. *Id.*

87. *Id.* at 895. *Chevron* is a Supreme Court case setting out a two-prong analysis of administrative agency interpretations of congressional statutes. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron*'s first prong asks whether the agency's interpretation is a permissible reading of the statute. *Id.* at 842-45. If so, prong two of *Chevron* states that a court must accord it substantial deference in its interpretation and application of the statute. *Id.*

88. *Cohen I*, 991 F.2d at 895.

89. *Id.* at 896.

90. 34 C.F.R. § 106.41(c) (1995).

91. See *supra* text accompanying note 15.

92. 34 C.F.R. § 106.41(c)(1) (1995).

93. *Cohen I*, 991 F.2d at 896-97.

failure to accommodate effectively student interests and abilities *alone*, while meeting the other two factors, could result in an institution's violation of Title IX.<sup>94</sup> The First Circuit was compelled to agree with these lower courts, it stated, because of the ultimate basis of Title IX: "[e]qual opportunity to participate lies at the core of Title IX's purpose."<sup>95</sup>

In essence, the court explained that given Title IX's purpose, the third compliance measure, the Effective Accommodation test, reflected this "heartland" of equal opportunity so that, even if an institution met the financial (scholarship) assistance and athletic benefits equivalence standards, it could still violate Title IX.<sup>96</sup> Accordingly, a university providing women with a smaller number of athletic opportunities than Title IX requires could automatically be found in violation of the statute even if it otherwise spent more resources on those women or offered athletic benefits equal to or better than the men's benefits.<sup>97</sup>

Because the Effective Accommodation test had thus become the court's focus, it proceeded to analyze what circumstances comported with the test's compliance standards. It turned to the "trinitarian model" of the Effective Accommodation test found in the 1979 Policy Interpretation, remarking that an institution faced with a Title IX complaint must "meet *at least one* of [the] three benchmarks" to survive scrutiny.<sup>98</sup> That is, the university must meet one or more of the Substantial Proportionality *or* Continuing Expansion *or* Full Accommodation tests to meet Title IX strictures.

The Substantial Proportionality prong, the court found, represents a "safe harbor" for universities distributing athletic opportunities proportionate to their student bodies.<sup>99</sup> Thus, schools could remain on the "sunny side" of Title IX "simply by maintaining gender parity between [their] student body and [their] athletic lineup[s]."<sup>100</sup>

However, the court noted that the second and third tests of Effective Accommodation compliance allow for the fact that, in reality, some programs falling short of proportionality could still furnish a "satisfactory proxy for gender balance."<sup>101</sup> Specifically, the Continuing Expansion prong would allow a university to meet Title IX through an "ongoing effort to meet the needs of the underrepresented gender."<sup>102</sup> So long as a university "persist[ed] in this approach as interest and ability levels in its student body and secondary feeder schools [rose,]" it would satisfy Title IX and would not be required to "leap to complete gender parity in a single bound."<sup>103</sup>

Likewise, the Full Accommodation benchmark, if satisfied, could alone keep an institution from violating Title IX. The court pointed out that under this test an institution would not be required to expend resources for uninterested sports participants of either sex.<sup>104</sup> Rather, if the institution was meeting the underrepresented sex's "discernible

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94. *Id.* at 897.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (emphasis added).

99. *Id.*

100. *Id.*

101. *Id.* at 898.

102. *Id.*

103. *Id.*

104. *Id.*

interests . . . fully and effectively,"<sup>105</sup> it could meet the whole of the Effective Accommodation trinitarian model and thus satisfy this aspect of the Title IX regulations.

Following this discussion of the three-part scheme of the Effective Accommodation test, the court turned to its general application. Specifically, it initially noted that, realistically, many coeducational universities' athletics programs are not proportional to the gender balance of their student bodies (thus failing the Substantial Proportionality test).<sup>106</sup> Moreover, these programs were not presently expanding to allow for more equitable athletic opportunities; fiscal restraints were keeping athletic departments from any expansion efforts at all, thereby lacking any Continuing Expansion commitment. Thus, the court found that most schools "more often than not"<sup>107</sup> could only attempt to satisfy the Effective Accommodation test via the third prong—Full Accommodation.

The court stated that the Full Accommodation benchmark, however, represented a "high standard," demanding not only "some accommodation" of the underrepresented sex's interests and abilities, but "full and effective accommodation."<sup>108</sup> If the statistically disadvantaged gender had an interest "not slaked by existing programs" at the university, it would "necessarily fail[] this prong of the test."<sup>109</sup> Yet, this benchmark is not "absolute," the court said, because the "mere fact that there are some females interested in a sport does not *ipso facto* require the school to provide a varsity team";<sup>110</sup> instead, the school must ensure intercollegiate participation to the extent that interest and ability exist to "sustain a viable team and a reasonable expectation of intercollegiate competition for that team."<sup>111</sup> A school could not be lax in its duties under this test, the court warned, because it was obligated to upgrade the opportunities available to the historically underrepresented gender as "warranted by the developing abilities of that sex."<sup>112</sup>

Before applying the three-part Effective Accommodation test to the facts of the case, the court also settled some additional issues of Title IX interpretation and legitimacy. First, the court addressed Brown University's argument that the third prong had been read too narrowly by the First Circuit and other district courts. Specifically, Brown argued that a university should be able to satisfy the Full Accommodation test by providing athletic opportunities to women reflecting "the ratio of interested and able women to interested and able men, regardless of the number of unserved women or the percentage of the student body that they comprise."<sup>113</sup> That is, if two males per every one female expressed an interest in varsity athletic participation, Brown felt a university need only to provide varsity slots according to that gender ratio. The court refused this line of reasoning,

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105. *Id.*

106. *Id.* In fact, as of 1993, only one school had managed to satisfy the Substantial Proportionality test. Washington State University, under a court order to maintain proportional ratios, sported a 44% women varsity athletics population with a 45% female student body. See *Intercollegiate Sports: Hearing Before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the Committee on Energy and Commerce*, 103d Cong., 1st Sess. 24 (1993) [hereinafter *Hearing*] (testimony of Donna A. Lopiano, Executive Director, Women's Sports Foundation).

107. *Cohen I*, 991 F.2d at 898.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (quoting Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (1979)).

112. *Id.* For schools whose athletic budgets were unable to afford the upgrade in participatory opportunities for female athletes to meet present interests, the court suggested looking back again to the Substantial Proportionality test. If Full Accommodation was impossible, the school could comply with the Effective Accommodation model via "subtraction and downgrading" of the overrepresented gender's athletic opportunities. *Id.* at 898 & n.15. In essence, the school would meet the necessary ratios by reducing the advantaged gender's opportunities while maintaining the status quo for the disadvantaged gender.

113. *Cohen I*, 991 F.2d. at 899.

pointing out that it was legally unsound because it read the “full” out of the “full accommodation” called for by the Policy Interpretation.<sup>114</sup>

Despite the possibility that Brown’s argument might be more attractive to some institutions dealing with Title IX,<sup>115</sup> it was nonetheless irrelevant: the court was bound by *Chevron* to accord substantial deference to the Policy Interpretation’s permissible reading of Title IX.<sup>116</sup> Moreover, Brown’s perspective also led to poor policy, the court noted, because it would be difficult for institutions to monitor compliance with Title IX. Since a Brown-type “survey of interests and abilities would begin under circumstances where men’s athletic teams have a considerable head start,”<sup>117</sup> this type of analysis would contravene the Policy Interpretation’s admonition to take into consideration the *developing* interests of women athletes and to avoid disadvantaging the *historically* underrepresented gender. Finally, the court stated that Brown’s viewpoint would lead to measurement problems: universities would have to survey both their present and future male and female student bodies to ascertain interests. In contrast, the court noted the Full Accommodation test called simply for assessing “whether there is [an] unmet need in the underrepresented gender that rises to a level sufficient to warrant a new team.”<sup>118</sup>

Brown’s second argument was that if the Full Accommodation test did indeed require “full and effective accommodation of the underrepresented gender,” it necessarily violated the Fifth Amendment’s equal protection guarantees.<sup>119</sup> The court dispensed with this argument on two bases. First, it remarked that even though presently more men may exhibit an interest in sports participation, no proof existed that women would not equally engage in sports—“absent [anti-sports] socialization and disparate opportunities.”<sup>120</sup> “Secondly, the court stipulated that even if it were to perceive a gender classification in favor of women under Title IX, constitutional law would condone this classification

114. *Id.* To illustrate its reasoning and the “myopic” view of Brown’s argument, the court set out a theoretical Oooh U., whose student body consists of 1000 men and 1000 women—a one to one proportion. *Id.* If 500 of these men and 250 of these women demonstrated an interest and ability in varsity athletics, the ratio of interested men to interested women would be two to one. Under Brown’s theory, if it provided athletic slots for 100 men and 50 women, it would comply with Title IX despite the fact that the interests of 200 additional women would be unmet. *Id.* However, the court noted, the law required satisfaction of at least one of the Effective Accommodation test’s benchmarks. *Id.* So, under this illustration, compliance with Title IX would either require Oooh U. to add an additional 50 slots to its women’s programs or to “subtract and downgrade” the men’s program to 50 slots total (both options thereby meeting the Substantial Proportionality test). *Id.* Alternatively, Oooh U. could expand its athletics program in efforts to create additional opportunities until it accommodated all “interested” women (presuming at this point that women were still the underrepresented gender), thus satisfying Full Accommodation. *Id.*

Despite the fact that this illustration extends clearer meaning to the court’s interpretation of the Full Accommodation test, another example may have more adequately demonstrated the fallacy and unfairness in Brown’s argument given the purpose of Title IX (*i.e.*, eliminating gender-based discrimination) and the wording of this third benchmark (*i.e.*, “full” accommodation). See *infra* text accompanying note 200-01 for the Author’s own reworking of this numerical illustration of the Full Accommodation test.

115. Notwithstanding the *Cohen I* court’s analysis and its subsequent embrace by four other circuits, some universities still feel that they are complying with Title IX when they use the Brown method of meeting interests. See O’Brien, *supra* note 4, at A1 (noting that both Brigham Young University and Southern Utah University erroneously contend that satisfying interest ratios, not unmet interests, meets Title IX compliance standards). Commentators suggest that institutions taking this approach are seeking to use historical discrimination (*e.g.*, sports socialization) to justify current gender discrimination. *Id.*

116. *Cohen I*, 991 F.2d at 899.

117. *Id.* at 900.

118. *Id.*

119. *Id.*

120. *Id.*



through its recognition that Congress possesses "broad powers . . . to remedy past discrimination."<sup>121</sup>

The court dealt with the burden of proof standards for the three different compliance factors under the Effective Accommodation test. Correcting the district court's analysis, the First Circuit said that to meet their Title IX burden of proof, plaintiffs must first show a disparity between the gender ratios of the student body and the athletic program.<sup>122</sup> Once this disparity is established, the plaintiffs then *also* have to show that an "unmet interest" is present which is not being *fully* accommodated by a university's present program.<sup>123</sup> Plaintiffs proving both these factors could then prevail unless, as an affirmative defense, the university could show a history and *continuing* practice of program expansion.<sup>124</sup>

Finally, turning its analysis of Title IX to the facts of the case, the court compared Brown's athletic program to the three prongs of the Effective Accommodation test. First, plaintiffs had proven that Brown's proportion of varsity women athletes was approximately only thirty-seven percent, whereas its student body was comprised of forty-eight percent women.<sup>125</sup> The court, without much explanation, found that this eleven percent difference did not satisfy the Substantial Proportionality prong of the three-part test.<sup>126</sup>

Next, the court investigated Brown's commitment to continuing expansion of its women's sports opportunities. Although Brown could refer to substantial growth in its women's program during the 1970's, a more than decade-long "hiatus" in additional growth suggested to the court "something far short of a *continuing* practice of program expansion."<sup>127</sup> Thus, Brown had also failed the Continuing Expansion test.

Applying the final prong of the test, Full Accommodation, the court recognized that this standard was a bit hazier. However, given the fact that the Brown University volleyball and gymnastics teams were healthy, competitive teams with "great interest and talent" before the cuts were planned, the court found that the plaintiffs could prove an "unmet interest" would not be fully accommodated should the proposed cuts be implemented.<sup>128</sup>

Because it found, like the district court, that Brown failed each of the three prongs of the Effective Accommodation test, the appellate court held that Brown would probably, in turn, violate § 106.41(c)(1) of the Title IX regulations.<sup>129</sup> Thus, it affirmed the district court's 1992 preliminary injunction reinstating the women's teams.<sup>130</sup>

121. *Id.* at 901 (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 565-66 (1990), which held that Congress does not have to show a specific finding of discrimination to award race-based contracts, and *Califano v. Webster*, 430 U.S. 313, 317 (1977), which deemed constitutional a social security law that favored women because it was enacted as a general remedy for past gender discrimination). Brown levelled one more contention against the "full accommodation" reading of Title IX, suggesting that it constituted affirmative action without a "factual predicate" to warrant it. *Id.* The court summarily refused this stance, noting that it was just a variant of Brown's Fifth Amendment argument. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 902 (citing *Policy Interpretation*, 44 Fed. Reg. 71,413, 71,418 (1979)).

125. *Id.* at 892, 903.

126. *Id.* at 903.

127. *Id.* (emphasis in original); see also *supra* text accompanying note 81.

128. *Id.* at 904 (quoting *Cohen v. Brown Univ.*, 809 F. Supp. 978, 992 (D.R.I. 1992)). The hazier, more "problematic" aspect of the Full Accommodation test would arise, the court said, in instances where plaintiffs sought to promote new or club teams to varsity status that had never before reached that stage as opposed to the demotion of varsity status at issue. *Id.*

129. 34 C.F.R. § 106.41(c)(1) (1995).

130. *Cohen I*, 991 F.2d at 907.

On remand in March, 1995, Judge Raymond Pettine of the U.S. District Court for the District of Rhode Island held that, following the First Circuit's analysis in *Cohen I*, Brown University was indeed in violation of Title IX's equal opportunity provisions.<sup>131</sup> Pettine's opinion in *Cohen II* emphasized that the First Circuit's Title IX analysis bound the district court in its application of the statute to Brown's situation despite the defendant university's protests to the contrary.<sup>132</sup> *Cohen II* also revealed in greater detail the factual background of the Brown University athletic participation structure and provided some additional insight into the First Circuit's analysis and Title IX interpretation.

Initially, *Cohen II* reiterated the First Circuit's holding that the Title IX DED regulations deserved controlling weight, adding that this deference was "appropriate" because Congress had explicitly delegated responsibility for promulgating compliance standards to the agency.<sup>133</sup> Similarly, *Cohen II* echoed the First Circuit's admonition that courts and universities must accord "substantial weight" to the agency's Policy Interpretation.<sup>134</sup>

Factually, Pettine noted that Brown's athletic program offered thirteen university-funded intercollegiate sports for women and twelve for men. In addition, Brown recognized but did not fund several so-called "donor-funded" varsities—three for women, four for men.<sup>135</sup> Yet, although the *number* of sports teams offered to each gender were equal, the *selection* of sports offered by Brown's athletic department produced far more individual positions for male athletes than female athletes—even including donor-funded team membership in the equation.<sup>136</sup> Brown's 1993-1994 participation levels thus revealed that varsity positions consisted of thirty-eight percent women and sixty-two percent men; in contrast, undergraduate enrollment for male and female students displayed an almost even forty-nine to fifty-one percent ratio, respectively.<sup>137</sup>

131. *Cohen v. Brown Univ. (Cohen II)*, 879 F. Supp. 185, 200, 214 (D.R.I. 1995). *Cohen II*'s primary focus on remand was whether Brown University had yet satisfied any of the three prongs of compliance delineated in the DED's Policy Interpretation and mandated by the "Equal Opportunity" provision of the DED's § 106.41(c)(1) regulation. *Id.* at 193, 200. The court noted, however, that on December 16, 1994, it had entered a settlement agreement and stipulation of dismissal between the same group of plaintiffs and Brown regarding the *equivalency in financial treatment* of university-funded male and female teams. *Id.* at 192-93. The financial equivalency issue for all university-funded teams, the court noted, was therefore no longer a factor on remand: the sole issue in *Cohen II* was whether "significant disparities [continued to] exist in the *number of intercollegiate participation opportunities* available to men and . . . to women." *Id.* at 193 (emphasis added).

132. *Id.* Pettine noted that while the district court was not bound by the First Circuit's "application of the law to the facts then in evidence," the district court did remain bound to follow the First Circuit's *legal* pronouncements—regardless of whether the appellate level court's analysis emanated from review of a preliminary injunction (as here) or the review of a district court's trial on the merits. *Id.* (emphasis added).

133. *Id.* at 197 (citing the Javits Amendment, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974) (codified as amended at 20 U.S.C. § 1681) and its delegation of authority to the Secretary of Education to propose regulations implementing Title IX—including its application to intercollegiate sports).

134. *Id.* at 198-99 (noting that, under the *Chevron* standard, an agency's interpretation of its own regulation(s) is, for all practical purposes, granted the "force of law" unless the interpretation appears "clearly erroneous or inconsistent" with the regulation(s) and, thus, the court is required to abide by the DED's Policy Interpretation).

135. *Id.* at 189. Brown University provides monetary resources for university-funded varsities, while donor-funded teams are required to raise their own funds through private donations. In addition, Pettine found, Brown grants university-funded varsities with privileges and services it fails to allot similarly to donor-funded teams. As a result, the donor-funded "varsity" teams had found it difficult to "maintain a level of competitiveness" comparable to the university-funded squads in several ways: (1) other institutions were reluctant to include donor-funded teams in their varsity schedules; (2) donor-funded teams were unable to obtain varsity-level coaching and recruits; and (3) scraping up the funds for travel, post-season competition, and equipment was an insuperable task. *Id.* at 189-90.

136. *Id.* at 189.

137. *Id.* at 192.

The two-tiered university-funded/donor-funded varsity system that the university maintained threw a confusing twist to the Title IX analysis. *Cohen II* determined that for the purposes of enumerating “intercollegiate athletic participation opportunities” under the Policy Interpretation and the first prong of the Effective Accommodation test (the Substantial Proportionality prong), both university and donor-funded team numbers could be counted.<sup>138</sup> Nonetheless, even with this allowance for additional participation numbers, Brown failed this prong of the test by an approximately thirteen percent margin (*i.e.*, the difference between undergraduate females and intercollegiate female athletic participation).<sup>139</sup>

Similarly, *Cohen II* added to the First Circuit’s analysis of the Continuing Expansion prong of the Effective Accommodation test, noting that a subtraction and downgrading of men’s varsity athletic opportunities did not equal an “expansion” of women’s varsity opportunities:

[M]erely reducing program offerings to the overrepresented sex [in this case, men] does not constitute program “expansion[.]” . . . [and] the fact that Brown has eliminated or demoted several men’s teams does not amount to a continuing practice of program expansion for women. In any case, Brown has not proven that the percentage of women participating in intercollegiate athletics has increased. Since the 1970s, the percentage of women participating . . . has remained remarkably steady.<sup>140</sup>

Thus, institutions like Brown would be foreclosed from asserting that they had complied with the Continuing Expansion prong merely by slashing men’s opportunities unless women’s athletic opportunities also grew in number.

Finally, *Cohen II* found that utilizing the donor-funded varsity system could not aid Brown in its efforts to satisfy the third prong of the Effective Accommodation test, the Full Accommodation factor. Pettine felt Title IX allowed the university to make use of donor-funded team membership in its accounting of “intercollegiate athletic participation” figures under the Substantial Proportionality prong. However, he refused to sanction Brown’s utilization of donor-funded varsity positions to demonstrate and meet the “full accommodation” requirements of Brown’s female athletic interests and abilities under Title IX legal policy:

Brown’s restructured athletic program cannot be used to shield it from liability when in truth and in fact it does not fully and effectively accommodate the women athletes participating on the donor-funded teams. It would circumvent the spirit and meaning of the Policy Interpretation if a university could “fully and effectively” accommodate the underrepresented sex by creating a second-class varsity status. . . . Clearly, the potential for athletic development and the level of competition of women’s donor-funded teams are much less than that of university-funded teams.<sup>141</sup>

Moreover, *Cohen II* stipulated that Brown could not excuse its inability to accommodate the interests and abilities of the females on the four women’s donor-funded teams by pointing to an absence of intercollegiate competition for these teams in the school’s competitive region. To the contrary, *Cohen II*’s findings pointed to ample opportunity for competition within Brown’s usual competitive region.<sup>142</sup>

138. *Id.* at 211 & n.53.

139. *Id.*

140. *Id.*; see also *infra* notes 229-30 and accompanying text.

141. *Cohen II*, 879 F. Supp. at 213.

142. *Id.*

Thus, in applying the Title IX regulations and, specifically, the Policy Interpretation's three prongs of compliance assessment, *Cohen II* found that, under the facts as presented on remand, Brown University failed to meet Title IX mandates.<sup>143</sup> *Cohen II*'s remedy for the plaintiff-women athletes required Brown to "provide equal opportunity to both genders," stipulating that Brown could not "operate an intercollegiate program that disproportionately provides greater participation opportunities to one sex in relation to undergraduate enrollments, where there is no evidence of continuing program expansion . . . or effective accommodation of the interests and abilities' of the underrepresented sex."<sup>144</sup> Consequently, Brown was ordered to submit a comprehensive plan for Title IX compliance within 120 days of the district court's ruling.<sup>145</sup> Unfortunately, Brown's Title IX saga continues: in August, 1995, the district court ruled that Brown's submitted plan to cut men's sports and add five women's junior varsity teams would not comply with Title IX. The court noted that Brown's "attempt[s] to pad the women's varsity participation numbers in this way indicates a regrettable lack of interest in providing an intercollegiate athletic experience for its female students."<sup>146</sup>

The court's analysis in *Cohen I*, echoed and occasionally supplemented by *Cohen II*, thus lays out the general standards of 1990's-style Title IX compliance when women's teams are denied varsity status, eliminating some of the confusion surrounding interpretation of the Effective Accommodation test. Three other early 1990's cases<sup>147</sup> follow much of the same reasoning as *Cohen I* and, in some instances, provide additional guidance regarding what federal courts find to be (un)acceptable methods of satisfying Title IX.

First, in *Favia v. Indiana University of Pennsylvania* ("IUP"), the Third Circuit upheld a district court's finding that IUP had failed the Effective Accommodation test following its elimination of the women's varsity field hockey and gymnastics teams.<sup>148</sup> Applying the three prongs of the test, the district court held that Substantial Proportionality had not been met because an eighteen percent disparity existed between the percentage of female

143. *Id.* at 199-213.

144. *Id.* at 214 (quoting *Cohen v. Brown Univ.*, 809 F. Supp. 978, 999 (D.R.I. 1992)). The district court suggested Brown could meet compliance standards through several alternative routes: (1) eliminate the athletic program entirely; (2) establish the requisite number of women intercollegiate participants; (3) downgrade some men's position; or (4) implement a mixture of the second and third remedies. *Id.* Brown apparently denounced these options as nothing more than an incentive to "cut, cap or eliminate men's teams." *Id.* (quoting defendant's brief). However, the district court noted the options merely left the next move to Brown, allowing it the opportunity to "reduce the 'standard of living' for its university-funded varsity sports in order to expand the participation opportunities for its women athletes" and come closer to equal athletic opportunity for both genders. *Id.*

145. *Id.* Quickly after the *Cohen II* decision, Brown filed briefs to the appellate court claiming the lower court's decision created athletic quotas for females. Three groups representing 1700 universities joined Brown University in its brief to the First Circuit. *Brown Appeals Ruling*, N.Y. TIMES, June 27, 1995, at B12.

146. *Brown Loses 2nd Sex-Bias Ruling*, CHI. TRIB., Aug. 18, 1995, at C6. In addition to its finding that Brown continued to violate Title IX with its new plan, the court ordered Brown to follow the solution proposed by the female plaintiff-athletes, namely to create women's university-funded varsity teams for gymnastics, water polo, skiing, and fencing. However, the order will not become effective until an appeal of the district court's finding of a Title IX violation in *Cohen II* is reviewed once again by the First Circuit. *Id.*; see also *Brown Cuts Men's Sports for Title IX*, N.Y. TIMES, July 8, 1995, § 1, at 30 (stating that Brown's submitted and ultimately rejected plan would have required women's teams to have a minimum number of participants and would limit the size of all men's teams except for football, and quoting attorney for plaintiffs that Brown "decided to be acerbic" in their plan by "mak[ing] a point that achieving substantial proportionality must always result in absurd results").

147. *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), cert. denied, 114 S. Ct. 580 (1993); *Cook v. Colgate Univ.*, 992 F.2d 17 (2d Cir. 1993); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

148. *Favia*, 812 F. Supp. 578.

students and female varsity athletes.<sup>149</sup> Continuing Expansion had also not been fulfilled, especially since the number of women's teams at IUP had actually decreased in the prior ten years.<sup>150</sup> Finally, because plaintiffs' testimony verified that much interest, competition, and player quality existed for these demoted teams, the court found the school had not served these needs under the Full Accommodation test.<sup>151</sup> Like *Cohen I*'s factual situation, the district court in *Favia* noted that, although two men's sports had also been cut to maintain equal numbers of teams, that fact did not translate into equal opportunities: equality in numbers of teams does not imply equality in number of opportunities for the underrepresented sex.<sup>152</sup>

The Tenth Circuit upheld a similar finding and utilization of the Effective Accommodation test by a federal district court in *Roberts v. Colorado State Board of Agriculture*,<sup>153</sup> and the Supreme Court subsequently allowed the decision to stand.<sup>154</sup> The appellate court found that none of the three prongs of the test had been satisfied by Colorado State University's athletics department: a ten percent disparity existed between female athletic participation and women's representation in the student body;<sup>155</sup> opportunities for women athletes had decreased in the last ten years;<sup>156</sup> and the demoted softball team had been a healthy, competitive one before the university had terminated its varsity status.<sup>157</sup>

In the remaining case in this series, *Cook v. Colgate University*,<sup>158</sup> a New York district court compared Title IX to Title VII's antidiscrimination bases (rather than looking to the Effective Accommodation test). The Second Circuit subsequently declared it moot because the plaintiff-students had graduated and were no longer injured as student-athletes. (They later cured this problem by bringing their suit as a class action and by certifying their class as all present and future female athletes at Colgate.) Although this particular method of analysis was not followed in *Cohen I*, *Favia*, or *Roberts*, the case added to their perspective on accommodating women athletes by finding that Colgate University was required to promote a former women's ice hockey club to varsity level—a status it had never before occupied.<sup>159</sup> *Cook* thereby illustrates the one recent decision in which a court still found an unmet interest not being fully accommodated by a university even though the team had not been a "robust" and "healthy" varsity team before the plaintiffs brought suit. Thus, this decision emphasizes that women plaintiffs in Title IX suits need not always be those seeking to regain varsity status they lost; a glimpse of Title IX hope also exists for those women's teams seeking to garner varsity funding for club teams that exhibit adequate interest, quality, and competitiveness to be accorded this opportunity.

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149. *Id.* at 580.

150. *Id.* at 585.

151. *Id.*

152. *Id.* at 582.

153. 998 F.2d 824 (10th Cir.), *aff'g* 814 F. Supp. 1507 (D. Colo.), *cert. denied*, 114 S. Ct. 580 (1993).

154. *Roberts*, 114 S. Ct. 580 (1993); see Laura Duncan, *Colleges Slowly Leveling Playing Field for Women*, CHL DAILY L. BULL., Oct. 5, 1994, at 1 (noting gender advocates hailing as another victory the Supreme Court's denying certiorari following the district court's ultimate decision to reinstate the Colorado State University women's softball team).

155. *Roberts*, 998 F.2d at 830 (stating a 10.5% disparity between varsity women athletes and the female undergraduate enrollment was "not substantially proportionate").

156. *Id.*

157. *Id.* at 831 (finding that the district court had made "extensive findings concerning the unmet abilities and interests of the plaintiff softball players, and the feasibility of their organizing a competitive season of play").

158. 992 F.2d 17 (2d Cir. 1993).

159. *Cook v. Colgate Univ.*, 802 F. Supp. 737, 745 (N.D.N.Y. 1992).

Thus, *Cohen I* and its sister cases firmly establish that, barring congressional or administrative changes in Title IX, women plaintiffs can obtain resounding victories in seeking equal intercollegiate athletic opportunities. So long as universities continue to fail in efforts to effectively accommodate women's athletic interests, this group of cases indicates that women plaintiffs will continue to be successful in Title IX legal battles.<sup>160</sup>

### III. RESPONSE FROM THE MEN'S TEAMS: TITLE IX CREATES REVERSE DISCRIMINATION

Despite the fact that Title IX has existed for over twenty years, most schools in the early and mid-1990's have not come close to complying with its gender equity standards in the intercollegiate sports arena.<sup>161</sup> Although many of these schools wish to rectify their situations by expanding opportunities for women's athletics, in an era of scarce higher education funding, most can hardly afford to create additional teams. Moreover, following *Cohen I* and similar cases, institutions facing budget cuts realize that while downsizing their athletic programs is an economic must, they cannot respond by lowering the participation opportunities granted to female athletes. As a result, some schools have responded by retaining most, if not all, of their women's varsity sports slots while cutting back on their men's teams.<sup>162</sup> In taking this action, schools hope to avoid Title IX violations by coming closer to substantial proportionality ratios and full accommodation of women's interests.

However, as a consequence of these steps, many nonrevenue men's sports teams have become history: universities' Title IX compliance hatchets have relegated men's swimming, wrestling, and gymnastics teams to club or nonexistent status at several schools.<sup>163</sup> For example, in 1993 the University of Illinois terminated its varsity men's swimming program while retaining its women's team. In response, the male team members unsuccessfully fought the university in *Kelley v. Board of Trustees*,<sup>164</sup> alleging the demotion of their team violated Title IX and the Equal Protection Clause—that is, the university's actions constituted reverse discrimination.

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160. See Mike Dame, *Many Lawsuits Later, Women Still Not Equal: The Push for Gender Equity Has Stirred Courts—But Not Playing Fields*, ORLANDO SENTINEL, Aug. 21, 1994, at C1 (noting that a survey on the status of Title IX at the collegiate level cites an Athletic Director at the University of Iowa stating that the "evidence is overwhelming . . . [w]hen women threaten to go to court or take [schools] to court, they're winning hands down," adding that the "silly thing" about the situation is the amount of money being spent on lawyers, when schools could use the same money to help create equal athletic opportunities).

161. *Id.* (noting that, according to the OCR and the Women's Sports Foundation, 95% of colleges still do not comply with Title IX).

162. See Blum, *supra* note 55, at 31 (relating that when schools face budget cutbacks, they look to downsizing athletics, and the lesson of Title IX litigation is that "when women are not already being given an opportunity to participate in proportion to enrollment and schools eliminate teams, it had better be mens' [sic] teams only").

163. See Ron Grossman, *Women Win Each Battle in the Gender-Equity War; When Budget Crunch Hits, Men's Teams Vanish*, CHI. TRIB., Nov. 19, 1994, § 3, at 1, 4 (noting that the University of Illinois had cut men's swimming, the University of Notre Dame had axed men's wrestling, and many universities had eliminated men's gymnastics; also citing Northwestern University's wrestling coach that "all men's nonrevenue-producing sports are at risk"); Carl Redman, *Gender Equity Causing Major Concern for LSU*, BATON ROUGE ADVOC., Oct. 10, 1994, at 1D (relating that Louisiana State University had cut men's gymnastics and wrestling, Oregon State had terminated men's track, the University of Oregon had eliminated baseball, and many schools had dropped swimming and wrestling); see also *infra* note 233.

164. 35 F.3d 265 (7th Cir. 1994), *aff'g* 832 F. Supp. 237 (C.D. Ill. 1993), *reh'g denied*, 1994 U.S. App. LEXIS 27858 (7th Cir. Sept. 1, 1994), *cert. denied*, 115 S. Ct. 938 (1995). A similar case, but which only reached the district court level, brought an equal protection claim against a university for discontinuing the men's wrestling team; the court's disposition of the case is similar to the Seventh Circuit's in *Kelley. Gonyo v. Drake Univ.*, 837 F. Supp. 989 (S.D. Iowa 1993).

The background to *Kelley* revealed that the University of Illinois historically had not been stellar in its efforts to comply with Title IX. In 1982, the DED's OCR found the school had denied equal athletic opportunities to female students; however, the OCR refrained from citing the university with a Title IX violation, relying on the school's promise that it would remedy the problem within a reasonable amount of time.<sup>165</sup> However, as the court in *Kelley* revealed, a decade later women occupied only twenty-three percent of intercollegiate participation slots in comparison to the forty-four percent female student body. Therefore, when the school was forced to make budget cuts in its athletics program, its concerns centered both on monetary savings and Title IX compliance. Following the recommendations of its athletic director and legal counsel, the school decided to cut three men's intercollegiate teams (swimming, fencing, and diving) and one women's team (diving). Left unscathed was the women's swimming team, which retained its varsity status.<sup>166</sup>

The Court of Appeals for the Seventh Circuit initially addressed plaintiffs' reverse discrimination claim by stating that the University of Illinois' decision to keep its women's swimming team had been "prudent" under Title IX compliance standards. The court noted that participation ratios at the school were substantially disproportionate to the student body and that, if the school had discontinued this women's team, it would not be fully accommodating the evident interests of women athletes at the school. Obviously, eliminating women's swimming would necessarily run the risk of a Title IX violation. Yet, the court stipulated, the school could justifiably eliminate the men's team because, despite this cut, "men's participation in athletics would continue to be more than substantially proportionate to their presence in the [u]niversity's student body."<sup>167</sup> Pointing to *Cohen I*, the court explained that Title IX case law made it clear that Illinois' termination of the men's teams was a "reasonable response" to the Title IX regulations.<sup>168</sup>

Nevertheless, the plaintiffs contended that the Effective Accommodation test had perverted the basis of Title IX and "through some alchemy of bureaucratic regulation[,] . . . transformed . . . a statute which prohibits discrimination on the basis of sex into a statute that mandates discrimination against males."<sup>169</sup> The court dismissed this argument in several steps.

First, the court found that neither the congressionally mandated Title IX regulations nor the Policy Interpretation were arbitrary or contrary to the purposes of the statute. Like the *Cohen I* court, the Seventh Circuit noted that the *Chevron* substantial deference standard bound it to follow the administrative agency's regulations, while additional constitutional law mandated that it also defer to the Policy Interpretation.<sup>170</sup>

In addition, although the plaintiffs argued that the Policy Interpretation's Substantial Proportionality test set up an indefensible gender-based quota system, the court pointed

165. *Kelley*, 35 F.3d at 269. Note that this relaxed stance on the part of the OCR has been, unfortunately, a mainstay of Title IX enforcement since the statute's inception. See *supra* notes 62-67 and accompanying text.

166. *Kelley*, 35 F.3d at 269 (noting that the university was facing a \$600,000 reduction in its athletic budget and decided to field only teams that could compete for Big Ten and National Collegiate Athletic Association ("NCAA") championships).

167. *Id.* at 270.

168. *Id.*

169. *Id.* (quoting appellants' brief). The plaintiffs embellished their argument with an additional example: Title IX's regulations should also mandate eliminating men and women from academic departments "where they are overrepresented" if courts continue to uphold its validity. The Seventh Circuit rejected this argument, stating that Congress itself noted that intercollegiate athletics presented a different set of problems than those existent in employment and academics. *Id.*

170. *Id.*

out that this prong of the Effective Accommodation test did not "mandate statistical balancing" but "merely create[d] a presumption that a school is in compliance with Title IX . . . when it achieves such a statistical balance."<sup>171</sup> In fact, a school has equal access to the two other prongs of the Effective Accommodation test to meet Title IX standards, thus a "mandate" and quota system for statistical equality was not evident.<sup>172</sup>

Second, the court addressed plaintiffs' Fourteenth Amendment Equal Protection claim against the Title IX statute and regulations. Recognizing that the effect of Title IX's regulations often forced schools to consider gender when making athletic team decisions, the Seventh Circuit echoed the *Cohen I* court in delineating that Congress maintains broad power to remedy past discrimination under the Due Process Clause.<sup>173</sup>

Considering the plaintiffs' argument in the light of constitutional law's intermediate scrutiny standard for gender classifications,<sup>174</sup> the court found that all parties agreed that Congress' wish to eliminate the vestiges of sexual discrimination from educational institutions was an "important governmental objective."<sup>175</sup> The plaintiffs' attack on Title IX lay instead with the remedial measures mandated by the Title IX regulations and Policy Interpretation. To the plaintiffs, the court noted, these measures were not "substantially related" to the goal of eliminating sexual discrimination because they "allow [the University to . . . improve] its statistics without adding any opportunities for women."<sup>176</sup> In response, the court emphasized that Title IX's explicit purpose was not to continually expand nor *increase* athletic opportunities for the underrepresented sex, but to eliminate the continuation of gender discrimination against that sex. That is, once institutions decide to offer educational athletic opportunities, they are barred from discriminating on the basis of gender in doling out these opportunities—both sexes should have the same relative opportunities to compete. The court therefore concluded that schools striving to meet Title IX mandates could justifiably consider gender to ensure that "where overall athletic opportunities decreas[ed], the *actual* opportunities available to the *underrepresented* gender [did] not."<sup>177</sup>

The court therefore affirmed the district court's holding that the University of Illinois' actions neither violated Title IX nor constitutional law.<sup>178</sup> Commentators pushing for gender equity rejoiced in this holding,<sup>179</sup> while nonrevenue men's sports teams lamented. They claimed that unless the intercollegiate sports world takes other steps, their programs shall rapidly become extinct.<sup>180</sup>

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171. *Id.* at 271.

172. *Id.* The court refused to analyze whether Title IX would be unconstitutional should the Substantial Proportionality test be a requirement, as opposed to an option, of Title IX compliance. *Id.* at 271 & n.6.

173. *Id.* at 272 (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 565-66 (1990)); see *supra* note 121 and accompanying text.

174. Equal Protection's intermediate scrutiny is applied whenever a governmental entity makes classifications based on gender. To withstand intermediate scrutiny, the classifications must "serve important governmental objectives" and be "substantially related to the achievement of those ends." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982).

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

176. *Id.* (quoting appellants' brief).

177. *Id.* (emphases added).

178. *Id.* at 272-73.

179. See, e.g., Carol Herwig, *Illinois Not Guilty of Reverse Discrimination*, USA TODAY, Sept. 9, 1994, at 5C (noting that one gender-equity advocate responded to *Kelley* by rejoicing that it was the "first reverse-discrimination claim to reach the Court of Appeals, and they just blew them out of the water . . . and it is out of a conservative district").

180. See Grossman, *supra* note 163, § 3, at 1; Redman, *supra* note 163, at 1D.



IV. VINDICATING THE APPELLATE COURTS' INTEREST  
ANALYSES AND THE MESSAGE THESE INTERPRETATIONS  
SEND TO INTERCOLLEGIATE ATHLETIC DEPARTMENTS

Some university administrators and athletics coordinators complain that the appellate courts' focus on the Effective Accommodation test is either misplaced or applied incorrectly. They argue that, realistically, female students lack the interest that male students possess in the world of athletic competition. The Effective Accommodation test, they assert, is being twisted to assure that female students can claim spots on varsity teams that should rightfully go to male athletes. In addition, these administrators feel that the three prongs of the test (Substantial Proportionality, Continuing Expansion, and Full Accommodation) fail to address Title IX's core meaning or at least do so unfairly in their effects on men's sports teams.

While this argument would justify these administrators' displeasure with the recent Title IX cases, it fails when analyzed under the legal and policy considerations surrounding Title IX's enactment—considerations which the appellate courts have seemingly accepted. This Part shall examine why the courts' analyses are correct in light of the legal foundations of Title IX and, additionally, why these analyses hold up when policy considerations are investigated.

*A. Why Each of the Effective Accommodation Prongs, As  
Applied, Reflect Title IX's Purpose*

An analysis of why the three areas of the Effective Accommodation test have been correctly applied by the federal courts initially entails an examination of the Effective Accommodation test's importance in the scheme of Title IX compliance. For example, the district court in *Cohen I* claimed that each of the other district courts dealing with Title IX had determined that a violation of the Effective Accommodation test *alone* would mandate a finding of noncompliance with Title IX as a *whole*.<sup>181</sup> The *Cohen I* and *Kelley* appellate courts agreed to this interpretation of the Title IX regulations/Policy Interpretation and therefore followed suit. In essence, these courts understood that the core of Title IX deals with equal opportunity for female athletes, especially with respect to their interests and abilities. Implicitly, the courts' focus on "equal opportunity"—and, therefore, "effective accommodation"—suggests that without equality in the availability of opportunities, the remainder of the Title IX compliance standards would be empty benefits.<sup>182</sup> That is, if universities provided expensive equipment, plush locker rooms, and top-notch dining facilities for the relatively small number of female athletes already within the intercollegiate athletics scene, they would be of little value if vast numbers of women who wished to participate at the intercollegiate level were left without those opportunities.

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181. See *supra* notes 94-96 and accompanying text.

182. See *Cohen v. Brown Univ.* (*Cohen I*), 991 F.2d 888, 897 (1st Cir. 1993) (noting that a university could "lavish" its women's teams with benefits surpassing even those of the male team members, but that this would not necessitate a compliance finding under Title IX).

The appellate courts' reasoning is justified considering the emphasis and explication given to the Effective Accommodation test by the 1979 Policy Interpretation.<sup>183</sup> Specifically, although the Title IX regulations<sup>184</sup> listed ten factors that would be assessed to determine compliance (in addition to equal opportunity of scholarships, a topic beyond the scope of this Note), five years later the Policy Interpretation emphasized that of these ten, Effective Accommodation would represent a complete compliance section on its own.<sup>185</sup> "Breaking off" the § 106.41(c)(1) Effective Accommodation factor from the remaining factors highlights that responses to Title IX's simple mandate to refrain from discriminating on the basis of sex could be determined easily by assessing whether university programs considered both genders' "interests" equally. Moreover, the Policy Interpretation relates that overall compliance determinations by the Office of Civil Rights of existing university programs would look for discriminatory language or effect or "[w]hether disparities of a substantial and unjustified nature in the benefits, treatment services, or opportunities afforded male and female athletes exist in the institution's program as a whole."<sup>186</sup> The Policy Interpretation's use of the disjunctive language "or opportunities" emphasizes that Title IX compliance centers not only on the "benefits" of varsity status, but also on whether the university accords equal "opportunities" to enjoy those benefits. Thus, the appellate courts' focus on the Effective Accommodation test accurately reflects the Policy Interpretation's own mandate seeking assurance that each gender's interests are being accommodated in a fashion relatively equal to that of the other gender.<sup>187</sup>

Nevertheless, opponents of the present interpretation of the Effective Accommodation test argue that its three prongs have been misinterpreted or applied too narrowly by the appellate courts. However, an analysis of each of these prongs reveals that the courts' applications find support in both agency directives and policy considerations underlying Title IX's purpose.

For instance, the first step of Effective Accommodation compliance assessment looks to the Substantial Proportionality test, stipulating that if a university's "participation opportunities . . . are provided in numbers substantially proportionate to their respective enrollments,"<sup>188</sup> that university will be presumed to be in compliance. Of the four appellate courts considering this factor,<sup>189</sup> the university closest to "substantial proportionality," Colorado State University ("CSU"), had a 10.5% disparity between the representation of females in intercollegiate athletics and the undergraduate female

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183. Policy Interpretation, 44 Fed. Reg. 71,413, 71,413-23 (1979).

184. 34 C.F.R. § 106.41(e)(1)-(10) (1995).

185. 44 Fed. Reg. 71,413, 71,415-18 & n.3 (1979).

186. *Id.* at 71,418 (emphasis added).

187. As mentioned in Parts II and III above, the Policy Interpretation and the Title IX regulations constrain courts in their analysis of Title IX: the *Chevron* test calls for courts to accord "substantial deference" to these agency interpretations, especially when Congress has explicitly delegated the interpretation of a federal statute to a particular agency. *See supra* text accompanying notes 87-88 & 170.

188. 44 Fed. Reg. 71,413, 71,418 (1979).

189. *See Kelley v. Board of Trustees*, 35 F.3d 265, 269 (7th Cir. 1994) (finding the University of Illinois' decision to cut more men's teams than women's teams "prudent" in light of the greater than 20% difference between female athletic opportunities and the proportion of female undergraduate students); *Cohen v. Brown Univ.* (Cohen I), 991 F.2d 888, 892-93 (1st Cir. 1993) (finding an unacceptable 11.3% disparity between varsity female athletes and the female undergraduate population); *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993) (affirming the district court's determination of a lack of substantial proportionality where there existed an almost 20% difference between women's athletic slots and the number of undergraduate women); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir.) (finding an absence of substantial proportionality given the 10.5% variation between female athletic population and female student body composition), *cert. denied*, 114 S. Ct. 580 (1993).

population.<sup>190</sup> Nevertheless, the court found this was *not* substantially proportionate, thus the university necessarily failed this portion of the test. Some commentators and advocates for CSU's athletics policy criticize this finding, asserting that many other "institutions have a greater imbalance than CSU."<sup>191</sup> The court found this argument irrelevant for purposes of the Substantial Proportionality test, and this determination makes sense in light of Title IX's purpose.

In essence, the presumption of compliance given under the Substantial Proportionality test reflects Title IX's wording that "no person . . . shall, on the basis of sex, be excluded from participation in . . . any education program or activity receiving federal aid."<sup>192</sup> Nowhere in this language does the statute refer to the fact that programs will be *compared* to determine compliance; in fact, the wording of this passage emphasizes the personal nature of Title IX compliance. The statute seeks to ensure that *individuals* ("no person shall") have the chance to participate in educational programs at *each* institution, not to relegate compliance to relative participation statistics at other institutions. Thus, the court's denial of the relative compliance model under the Substantial Proportionality test simply reflects the statute's goal of accommodating interests on an institution-by-institution basis.

One may argue, then, that the individual nature of Title IX's language should not presume compliance under a raw percentage comparison of a gender's athletic participation to its student body composition—that is, the test under Substantial Proportionality. Although, this Effective Accommodation prong involves less individualized scrutiny under Title IX, it represents a constitutional point of departure for Title IX analysis. Specifically, because the Substantial Proportionality test looks to a comparison of participation to student body numbers by gender, it implicitly embraces the constitutional ideal of equality in that once the government—through its university programs—extends some benefit to its citizens, it must not discriminate on the basis of sex in allocating that benefit unless the discrimination serves an important governmental objective.<sup>193</sup> Allowing the Substantial Proportionality test to stand as a presumption of Title IX compliance reflects that mandate: if an institution's method of funding athletic opportunities for one sex seems to mirror the percentage of that gender's membership in the student body, one supposes that even if the university is not capable of meeting *all* interests, it has evenly—in terms of gender—dispersed those athletic participation benefits it can afford to allot. While discrimination in the *choice* of sports funded by the institution may exist, discrimination *on the basis of gender* does not.

Even so, some argue, the Substantial Proportionality prong does not necessarily reflect the true interests at a particular university; one gender's athletic interests may lag far behind its percentage of representation in the student body. This line of reasoning falls under the *Kelley* court's emphasis that Substantial Proportionality is not the only method available to meet the Effective Accommodation mandate. True, there are those instances where ratio comparisons do not accurately reflect the athletic interests—or lack thereof—of students at an institution; steps two and three (the Continuing Expansion and

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190. *Roberts*, 998 F.2d at 830.

191. *Id.*; see also Carol Herwig, *Brown Decision Puzzling, University to Defend Cutting Women's Sports, USA TODAY*, Sept. 20, 1994, at 14C (illustrating that the University of Texas athletic department originally planned to fight a Title IX suit brought by female athletes because it did "a comparison of [itself] to other schools [and] . . . knew [it was] doing more").

192. 20 U.S.C. § 1681(a).

193. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982).

Full Accommodation tests) of the Effective Accommodation model deal with that situation and seek only to provide that the underrepresented gender (statistically) has found its interests satiated. If a university's proportions, therefore, do not reflect the true interests of its students, a university program can escape Title IX worries if it can show that the statistically *underrepresented* gender under the first prong nevertheless feels that the university meets its needs. Thus, the Substantial Proportionality test is no more than a *starting place* for Title IX compliance, and it mirrors the Title IX statute and regulations in its initial efforts to "provide equal athletic opportunit[ies] for members of both sexes."<sup>194</sup>

The basis of the second prong of the Effective Accommodation test, Continuing Expansion, has met with much less criticism from those unhappy with the 1990's Title IX case law. The Policy Interpretation's inclusion of this factor into the assessment of whether the statistically underrepresented gender's interests were being met sought to alleviate the universities' burdens in trying to comply with Title IX "right off the bat." That is, so long as the OCR or a federal court could identify that an institution was at least trying to comply with the spirit of Title IX on a *continuing* basis (*i.e.*, providing the underrepresented gender with expanding or equal participation opportunities), the OCR and courts would not find a Title IX violation that would otherwise arise under prongs one or three of the Effective Accommodation test. The clear policy justification for this test (and the reason it has met with little opposition from university athletic departments) lies in the final Policy Interpretation rule. The agency did not seek to outline the exact parameters of "institutions' future responsibilities" but did want to ensure that "institutions remain obligated . . . to accommodate effectively the interests . . . of . . . students with regard to the selection of sports and levels of competition available."<sup>195</sup> The OCR would not necessarily search for strict compliance immediately, but would instead seek a "continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex."<sup>196</sup> Thus, the policy justifications behind this prong of the Effective Accommodation test recognize that although discrimination against the underrepresented gender may still exist, a demonstrated willingness on the part of universities to continue battling will eventually achieve Title IX's goal.

Undoubtedly the most contested aspect of the Effective Accommodation test—through both its description in the Policy Interpretation and its implementation by the appellate courts—is the Full Accommodation prong, which stipulates that if a university's athletics program cannot satisfy the Substantial Proportionality or Continuing Expansion tests, then the school must "demonstrate[] that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program."<sup>197</sup> What leads to the greatest debate about this passage is the interpretation of the words "interest" and "fully . . . accommodated." Several athletics administrators and at least one commentator have levelled two arguments against the agency's and appellate courts' analysis of this test: (1) When a court assesses an institution's compliance with "full accommodation" of the underrepresented gender's "interests," the proper focus should be on surveys establishing the ratio of male to female athletic interests, not on

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194. 34 C.F.R. § 106.41(c) (1995).

195. Policy Interpretation, 44 Fed. Reg. 71,413, 71,414 (1979).

196. *Id.* at 71,418.

197. *Id.*

whether *all* underrepresented females interested in sports participation have been accorded opportunities equivalent to their male counterparts; and (2) the Policy Interpretation and the appellate courts have failed to establish a workable “interests” analysis test in the first place, making compliance assessment a fruitless and futile endeavor. The weaknesses in each of these arguments can be demonstrated both through an examination of specific examples underlying the mandates of Title IX and through simple policy analysis.

In a more concrete illustration, proponents of the first contention argue that if a university distributes some kind of survey of “interests” in athletics<sup>198</sup> and finds that two males for every one female exhibit an interest in sports participation, then they can claim the university is obligated only to provide opportunities in line with that ratio despite the fact that these ratios may differ markedly with the student body composition of males to females.<sup>199</sup> That is, the argument follows that if there exists a two-to-one interest, a university should provide two thousand of its varsity positions to male athletes and one thousand to females even if another two hundred females possess participation interests that are not being fully satisfied. As mentioned in Part II, the *Cohen I* court dealt with this contention by proposing a hypothetical “Oooh U.” that allotted positions according to this method.<sup>200</sup> While the *Cohen I* court’s Oooh U. example illustrated why this contention failed to meet the statutory requirements of “full accommodation” (*e.g.*, in the hypothetical situation described above, two hundred women were not having their interests “fully” accommodated as the underrepresented gender), it could have shown in more detail why this version of “interests” analysis does not match the goals and policies behind Title IX.

Thus, suppose in contrast to Oooh U. one posits another hypothetical university, Aaah U., which maintains a student body of 1000 men and 1000 women. Suppose M is a male student at that school, and F is a female student; both are interested and able to compete with others of their gender on a sustainable, intercollegiate-level team. Next, assume Aaah U. has funds available only for 450 *total* varsity slots. Suppose, like Oooh U., Aaah U. has a two to one interest ratio, but that the numbers differ: 500 men and 250 women exhibit interests in viable varsity participation. Using the argument offered by some universities, Aaah U. should apportion the 450 slots to 300 men and 150 women. Now, suppose M and F are angry because they respectively represent the 301st male and 151st female in line for the varsity slots. Here is where the “interest ratio” proponents’ reasoning fails. Why does M not get a varsity slot at Aaah U.? Because the school lacks funds to accommodate him. Yet, why does F not obtain a varsity slot? Solely because F is a female, and her slot has been apportioned according to interest ratios and not according to the fact that she has a 151st interest just as strong as the interest of the 151st male. That is, her interest has not been satiated according to the Policy Interpretation’s “full accommodation” standard. In contrast, if Aaah U. had apportioned its 450 slots to 225 men and 225 women, and M and F had represented the 226th person in their gender

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198. Proponents of this perspective have failed to describe how they measure these “interests.” Are surveys taken only among the school’s student body? Or in the community, including future university students? Or, in short-sighted fashion, only those members of existing teams at the university? This issue has bearing on the discussion *infra* notes 207-23 and accompanying text.

199. *See supra* note 114 and accompanying text.

200. *Cohen v. Brown Univ.* (Cohen I), 991 F.2d 888, 899 (1st Cir. 1993).

line for participation, they would both lack a spot because of budget constraints, *not because of their gender*.<sup>201</sup>

This example underlines the error in “interest ratio” reasoning: it makes the generalization that, because surveys and historical interest assessments show that F’s sex *supposedly* exhibits only half as much interest in athletics participation as M’s sex, F’s interest as the 151st female is not as valid as the 151st interest of a male participant. This reasoning is clearly wrong, as it does exactly that which § 1681 of Title IX<sup>202</sup> forbids: it discriminates *on the basis of sex*—more clearly on the basis of a gender stereotype—allowing institutions to allocate resources on the basis of questionable survey ratios as opposed to looking at the actual interests of *individual* members of each gender. One must constantly keep in mind Title IX’s language that “no *person* . . . shall, on the basis of sex, be excluded” from participation in an institution’s program.

Comments appearing in the 1979 Policy Interpretation also underscore the fallacy in “interest ratio” analysis, given the context of Title IX. For example, HEW dealt with the related issue of whether it should look to “sport-specific comparison” in assessing Title IX compliance.<sup>203</sup> Under this theory, some commentators proposed that institutions offering the same sports to men and women (*e.g.*, basketball) would be obligated to provide equal opportunity within these sports, without looking at equal accommodation of interests across an entire athletic program. The Policy Interpretation rejected this analysis, stating that application of such a theory could “actually create unequal opportunity.” Athletic departments could maintain “equal” similar sports but then also filter more participatory opportunities into traditionally male-only sports such as football and ice hockey. The Policy Interpretation noted that developing women’s sports on the basis of similar men’s sports could “conflict with the [Title IX] regulation where the interests and abilities of male and female students diverge.”<sup>204</sup> Instead, as the Policy Interpretation pointed out, Title IX exists to “protect[] the *individual* as a *student-athlete*, not as a basketball player, or swimmer.”<sup>205</sup> Thus, the Policy Interpretation’s response to this particular theory emphasizes the agency’s viewpoint that Title IX seeks to accommodate, as “fully” as possible, the opportunities of individuals within the underrepresented gender so that, over time, this underrepresentation will no longer exist. In essence, so long as “interested” members of the statistically underrepresented gender call for opportunities to participate, the institution must allot the available intercollegiate spots on an equal basis until each of these interests is satisfied. That is, before accommodating the 101st male athlete’s interest, the university must assure that the 100th interest of the female athlete is met, assuming that interest exists. This practice is the only one which prevents discrimination *on the basis of sex*. Thus, the *Cohen I* court’s analysis and finding that “full accommodation” of interests of the underrepresented sex is a “high” standard, requiring just what it states (“full” access to athletic opportunities<sup>206</sup>),

201. See B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 Wis. L. REV. 647, 656 (“[G]iven limited resources, the question should be whether the satisfaction and/or frustration levels of men and women are equitable.”).

202. 20 U.S.C. § 1681(a).

203. Policy Interpretation, 44 Fed. Reg. 71,413, 71,422 (1979).

204. *Id.*

205. *Id.* (emphases added).

206. *Cohen I*, 991 F.2d at 898. Because the *Kelley* court additionally found that the Effective Accommodation test in its entirety satisfied constitutional law’s “substantially related” means inquiry, *Kelley v. Board of Trustees*, 35 F.3d 265, 272 (7th Cir. 1994), the appellate courts apparently find no constitutional infirmities with the methods the Title IX regulations and Policy Interpretation called for in implementing Title IX. Therefore, the benign gender classification that

accurately interprets both the emphasis of the Policy Interpretation and the explicit goal of Title IX.

The second issue contested under the “full accommodation” prong of the Effective Accommodation test is *how* interests will be measured in order to ensure full accommodation. At least one commentator has remarked that the First Circuit in *Cohen I*, and the other appellate courts in following *Cohen I*, failed to delineate an interest-measuring system that allows for “mechanical” application.<sup>207</sup> How, this commentator queries, can one measure “full accommodation” of interests if one is unsure of how interests will be determined?<sup>208</sup> While this question has some practical merit, its answer can be found in the 1990’s Title IX case law, the 1979 Policy Interpretation, and general issues of policy.

All but one of the early 1990’s cases deal with plaintiffs representing teams that had just been demoted from varsity status.<sup>209</sup> In each of these lawsuits, the teams had been competing for at least several years, and the willingness of the team members to continue playing had not diminished before the team cuts. These plaintiffs represent the easy case for assessing interests: when a university relegates a viable, competitive varsity team to club status, as these cases implicitly suggest, the team members have identifiable interests and abilities that would no longer be fully met by the universities’ sports programs.

A more difficult case, which the *Cohen I* court acknowledged, is how to measure the interests of teams wishing to claim intercollegiate status for the first time. While there is no precise mechanical test for measuring these interests and thus determining whether or not they should be fully accommodated, the Policy Interpretation and prevailing societal standards suggest that, in essence, a mechanical test is unnecessary.

For example, some universities argue that they should measure interests based on surveys handed out to their college population.<sup>210</sup> Others say that interests should be

the Full Accommodation test demands, though it may seem unfair to “interest ratio” advocates, passes both statutory and constitutional muster.

207. Marshall, *supra* note 54, at 855-58.

208. *Id.* at 856.

209. See *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993) (considering Title IX compliance when members of demoted gymnastics and field hockey teams sought reinstatement of varsity-level sports); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir.) (assessing whether the university violated Title IX when it removed a women’s softball team’s varsity status and funding), *cert. denied*, 114 S. Ct. 580 (1993); *Cohen I*, 991 F.2d at 893 (measuring Title IX compliance after the university relegated its highly successful volleyball and gymnastics teams to club status).

210. See, e.g., O’Brien, *supra* note 4, at A1 (noting Brigham Young University and Southern Utah University administrators conducted interest-and-abilities surveys of their students and feel that they “show [these schools] are on track to compliance”).

However, at least one gender equity proponent argues that it is also unfair for universities to measure women’s sports “interests” based on surveys only distributed on campus, when those same universities sense no injustice in going outside the university to recruit “interested and able” athletes for their men’s sports teams. Under that reasoning, the proponent argues, if a school is unable to find enough interested and able women on its campus to compete successfully, it should “go out and recruit them,” just as it does for the men’s teams. O’Brien, *supra* note 4, at A1; see also 141 CONG. REC. E972 (daily ed. May 9, 1995) (statement of Rep. Maloney) (“By offering women opportunities in a variety of sports, more women choose to become involved in sports.”); George, *supra* note 201, at 659 (relating that perhaps fewer women express interest in collegiate sports because they are already cognizant that the available slots for female athletes are scarce or nonexistent).

The *Cohen II* district court agreed with these latter assessments of “interest” surveys. 879 F. Supp. at 202. Specifically, the plaintiffs’ expert, the athletic director for women’s sports at the University of Iowa, “testified persuasively that a university ‘predetermines’ the approximate number of athletic participants and the male to female ratio.” This testimony convinced the court that Brown University also “predetermined the gender balance of its athletic program” (and thus the gender “interests”) “through the selection of sports it offer[ed], the size of the teams it maintain[ed], the coaches it hired[,] and the recruiting and admissions practices it implement[ed].” *Id.* (emphasis added). In refusing an interest test based on a survey of matriculated students at Brown University, the court also noted that “[w]hat students are present on campus to participate in a survey of interests has already been predetermined through the recruiting practices of the coaches.” *Id.*

based on the trends seen in national sports followings—both by participants and spectators.<sup>211</sup> However, what these types of interest tests fail to take into account is that female athletes are still in the process of overcoming historical sports discrimination and that most of today's populace has been socialized to value only men's sports—especially on the spectator level. Those arguing for mechanical tests miss the fact that interests are fluid over time and that as the socialization process begins to show *and allow* (through full accommodation of interests) more support for women's athletics, more women athletes will continue to display an increased interest and ability to participate in intercollegiate sports.

For instance, according to at least one state high school athletics administrator, what happens at the collegiate sports level heavily influences the participation rates at high schools and vice versa.<sup>212</sup> So, when athletic departments pondering whether to add more women's teams look to present high school participation rates to see if female interests exist or will continue, this analysis might lead to an erroneous conclusion. In some cases, the high schools may not have a large number of participants presently, but as high school females see the doors open for new sports at the college level, they might respond with an increased participatory interest in these sports. Setting up a mechanical test based solely on high school participation may thus lead to the false assumption that "interests" do not or will not exist in the future to sustain viable intercollegiate teams.

Similarly, if universities look only to public opinion polls based on society's interests in various sports, these institutions may be blinded by a historically discriminatory process that is only now beginning to change.<sup>213</sup> For example, one gender equity advocate believes that because ninety-five percent of the sports media is composed of male

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at 206. Finally, the district court found that "even a successful survey of all academically able potential Brown applicants could not . . . account for the extent to which *opportunities drive interest*": even Brown University's own defense expert agreed that if Brown provided far more athletic opportunities for women, the percentage of athletically interested women would also rise to reflect those increased opportunities. *Id.* at 207 (emphasis added). This *defense expert's* testimony (ironically) illustrates most pointedly the historical gender discrimination and cyclical socialization of athletic interests that Title IX seeks to combat. As aptly put by one commentator, "[T]here is a 'quota' involved here, but it is Brown's. The school's policies effectively ensure that 62% of its varsity athletes are men, even though more than half of its students are women." *Lawyer Makes Argument Title IX Fair, Successful*, PLAIN DEALER (Cleveland), May 21, 1995, at 8D; *see also infra* notes 216-18 and accompanying text.

211. O'Brien, *supra* note 4, at A1 (reporting that one administrator points to the "national trends" as well).

212. *See, e.g., Lee Feinswog, LSU's Athletic Program Faces Big Bout in Lawsuit*, BATON ROUGE ADVOC., Oct. 9, 1994, at 16C. The commissioner of the Louisiana High School Athletic Association states that what colleges do strongly affects what sports become popular at the high school level. The commissioner added that what "a lot of people don't realize is . . . the college sports came first. High schools like what they saw and the chance to get scholarships, so they started programs. . . . College sports really help high school sports in this state." As an example, the commissioner pointed to the drop-off in high school wrestling participation following Louisiana State University's termination of the sport at the intercollegiate level. Mark Trumbull, *US Men's Gymnastics Teeters on the Brink*, CHRISTIAN SCI. MONITOR, Mar. 3, 1995, at 13 (illustrating that a decline in men's intercollegiate gymnastics teams—along with a media devoted only to football and basketball—has spelled a "phasing out" of the sport in grade schools and high schools). Although these examples both relate to men's sports, their analogy to women's sports experiences is strong: knowing that a space exists at the next level up often provides the only incentive to continue participation for grade school and high school athletes—male or female.

213. *See, e.g., Joanne Korth, Judge Rejects Brown's Junior Varsity Proposal*, ST. PETERSBURG TIMES, Aug. 20, 1995, at 2C (noting that at the age of 14, females drop out of sports at a ratio of six to one compared to males and reporting that results of one Vanderbilt University researcher that this attrition rate is due to a regrettable socialization process that sends hidden messages to young girls which imply they will not be able to date boys if they participate in athletics); *cf. Nancy Lieberman-Cline, Bloated Athletic Budgets, Not Title IX, Hurt Colleges*, DALLAS MORNING NEWS, July 13, 1995, at 2B (stating that because Title IX has ultimately allowed more females to pursue sports and fitness, it has in turn "spurred sales" in athletic products designed for women, thereby signaling a marketing change in the perception of women's sports).



journalists, the media devalues women's sports.<sup>214</sup> (One could look in almost any newspaper's sports section if one questions this claim.) However, the few women's sports programs that have garnered press coverage have seen remarkable success in attracting the interests not only of participants but also of spectators.<sup>215</sup> However, until women's sports programs receive more media coverage, assessing collegiate interests for a given team seeking varsity status on the basis of random spectator surveys will only provide misleading results and perpetuate the discriminatory cycle in women's athletics.<sup>216</sup>

Moreover, in light of the prevailing social attitude to value men's sports more than women's, the Policy Interpretation appears to call less for a mechanical test and more for an assessment of the interests among female athletes at the university itself.<sup>217</sup> This passage stipulates that institutions may "determine the athletic interests . . . of students by *nondiscriminatory* methods of their choosing provided," among two other factors, that their "methods of determining interest . . . *do not disadvantage* the members of an underrepresented sex" and "[t]he methods are responsive to the *expressed* interests of students capable of intercollegiate competition who are members of an underrepresented sex."<sup>218</sup> In essence, this mandate echoes Title IX's purpose and seeks to prevent individual female athletes and teams from suffering the loss of athletic opportunities solely because their university looks to measurements of gender-based sports interests everywhere but, to put it colloquially, in its own backyard.<sup>219</sup>

In addition, the Policy Interpretation also notes that although Title IX will not require a university "to upgrade teams to intercollegiate status . . . absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions," it may obligate universities "to actively encourage the development of such competition . . . when overall athletic opportunities within that region have been historically limited for the members of one sex."<sup>220</sup> What this

214. Karin Winegar, *Can Less Be More For Those Who Head Women's Teams?*, STAR TRIB. (Minneapolis), Oct. 21, 1994, at 18A (quoting Donna A. Lopiano, Executive Director of the Women's Sports Foundation, who states that "[t]here's a 95 percent basically white male sports journalist population, one that has been taught to devalue women's sports or not value it as much as men's sports" and "[r]esearch shows that what gets in our sport pages is not based on how many people go to a game . . . but simply the interest of the sports editor").

215. *See, e.g.*, Suzanne Halliburton, *Hawaii Women's Volleyball Program Finds Pot of Gold*, AUSTIN AM.-STATESMAN, Sept. 1, 1995, at C1 (reporting that the University of Hawaii's women's volleyball team rivals men's basketball and baseball in popularity and may become the first volleyball program, male or female, to pay its own way); Lieberman-Cline, *supra* note 213, at 2B (citing a 1990 NCAA study which found that at least 26 Division I women's programs brought in at least \$450,000 annually, while 13 amassed over \$1.3 million per year in gate-receipt revenues and fundraising); O'Brien, *supra* note 4, at A1 (noting that the University of Utah's gymnastics team sets an example of what a women's team can achieve when given enough recruiting and area support, attracting an average of more than 10,000 fans at its meets).

216. In addition, some commentators note that a lack of professional sports outlets for female athletes may fuel a greater interest in some male athletes than in their female counterparts to participate in collegiate athletics. George, *supra* note 201, at 659. Nevertheless, Title IX has fostered growth and better quality players in at least one professional women's sport—golf. Jerry Potter, *First-time LPGA Winners on Record Pace*, USA TODAY, Aug. 1, 1995, at 12C.

217. Policy Interpretation, 44 Fed. Reg. 71,413, 71,417 (1979). Curiously, none of the 1990's appellate court Title IX cases mention this portion of the Policy Interpretation, even though it is included in the policy discussion of the Effective Accommodation test.

218. *Id.* (emphases added).

219. *See* O'Brien, *supra* note 4, at A1. O'Brien notes one gender equity advocate's stance that universities must stop using historical discrimination to justify current discrimination in their programs. The advocate points out that shortly after Title IX was enacted, institutions also argued that women did not want to participate in sports, yet female participation ballooned over 600% in the following four years. She emphasizes, therefore, that it is not that female athletes "didn't want to [participate], [they] just weren't being allowed to." *Id.*

220. 44 Fed. Reg. 71,413, 71,418 (1979); *see also* Cohen v. Brown Univ. (Cohen II), 879 F. Supp. 185, 208 n.47 (D.R.I. 1995) (noting institutions may be compelled by Title IX regulations to "actively encourage" the development of intercollegiate competition in a given geographic area).

passage suggests, more than any other in the Policy Interpretation, is that universities may have an *affirmative duty* under Title IX regulations to foster interests of the underrepresented gender within their geographic regions if it appears those interests are not currently expressing themselves because of historical limitations and devaluation.<sup>221</sup> In sum, this passage, coupled with the Policy Interpretation's directive to refrain from determining interests by methods that disadvantage the underrepresented sex, implicitly suggests that mechanical interests tests applied by universities are inappropriate; instead, a university should look to the interests expressed by its present female athletes and attempt to accommodate them, when possible, with an eye toward fostering worthwhile competitive opportunities in the neighboring areas.<sup>222</sup>

Thus, while this measurement of interests and abilities still remains somewhat nebulous, it retains the one sure thing that Title IX compliance mandates: full accommodation of the interests of the underrepresented sex without reference to surveys potentially based on historical discrimination or a valuation on the basis of gender stereotypes. Therefore, in those instances where women's teams seek varsity status where none has been accorded before, and the university fails the first two prongs of the Effective Accommodation test, the university should assess its full accommodation mandate with an eye toward the policy goals of Title IX. If potential exists for meaningful collegiate competition within the geographic region, the university should have no choice but to allot the team intercollegiate status and benefits.<sup>223</sup>

While each of the three prongs of the Effective Accommodation test appears firmly rooted and justifiable in the context of Title IX's regulations, Policy Interpretation, and goals, the realities of its implementation have left many male sports participants in dire straits as the variety of men's intercollegiate sports offerings at many universities has dwindled while women's programs appear to remain relatively unscathed under the shield of Title IX. The next Section shall discuss how this predicament arose, while Part V will consider a solution to this dilemma.

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221. The wisdom of this section lies in the fact that it prevents neighboring universities from constantly shutting the door on interested women athletes with excuses that the surrounding schools do not have varsity teams against whom to compete. Were this practice allowed, no new women's sports teams would be accommodated, despite noticeable interests at the university itself, because the neighboring universities would circularly point to the absence of interests at other schools.

222. Several athletic departments have protested that until substantial proportionality is met, all athletic departments are required to impose "affirmative action" or "quota systems" in order to prove Full Accommodation. However, as *Cohen II* points out, while a number of universities may be unable to justify their programs under both the first and third prongs of the Effective Accommodation test, other universities who fail to meet prong one's proportionality measure could still comply with Title IX by demonstrating that all women athletes at their institution already have their athletic interests and abilities fully accommodated. In these latter situations, no additional "quota" regime would be necessary. *Cohen II*, 879 F. Supp. at 210. Because Title IX suits have not been brought against every university offering intercollegiate sports, one would presume that at least some female athletes feel their schools are fully accommodating their interests, even though substantial proportionality figures may not simultaneously be evident.

223. One additional problem posed by the Full Accommodation prong, some universities feel, is that it consistently makes Title IX beneficial only to women. *Cohen v. Brown Univ.* (Cohen I), 991 F.2d 888, 900 n.17 (1st Cir. 1993). The First Circuit dismissed this complaint, relating that it "takes a rather isthmian view of the world at large" and fails to note that there are institutions (e.g., formerly all-women universities) where the men's athletics programs may be "underdeveloped . . . while fiscal retrenchment offers no reprieve. Under these circumstances, Title IX would protect the athletic interests of men as the underrepresented sex." *Id.* (emphasis added).

*B. The Practical Results of the Effective Accommodation Test: Substantial Proportionality Becomes the Only Cure for a Title IX § 106.41(c)(1) Violation*

Although the Effective Accommodation test offers three alternatives to universities seeking to meet their Title IX § 106.41(c)(1) obligations, in reality only one of the alternatives has become a viable option: the Substantial Proportionality prong.<sup>224</sup> Specifically, two generalizations can presently be made about the status of intercollegiate athletics and university budgets in the mid-1990's: (1) almost all universities and their athletic departments are dealing with budget restrictions or cuts,<sup>225</sup> and (2) an overwhelming majority of universities do not comply with Title IX in their accommodation of women's sports interests.<sup>226</sup> Compounding this state of affairs are the recent appellate level Title IX cases—which appear unwilling to provide universities with other ways to maneuver around the Effective Accommodation test—and the increasing vigilance of the OCR in assessing institutions' compliance.<sup>227</sup>

An explanation for why these facts each point to the Substantial Proportionality prong as the only option for most universities under the Effective Accommodation test lies in the logistics of meeting the other two prongs. Realistically, the only way to meet the third prong, Full Accommodation, is for the university to increase its women's athletics program to satiate the unmet interests of female athletes. Such program expansions do not come cheaply, and in an era in which budget cuts are becoming the norm rather than the exception, schools cannot afford compliance under this prong.

Similarly, maintaining an atmosphere of expanding opportunities under the Continuing Expansion prong necessitates, in most instances, spending more money on the women's programs. As the Title IX cases illustrate, a flurry of program expansion in the 1970's followed by a ten-year dry spell of limited (if any) expansion in women's sports will not suffice to meet this compliance standard.<sup>228</sup> However, one question the appellate level cases did not address is whether an institution's efforts to comply with the Substantial Proportionality ratios will protect it under the Continuing Expansion test should substantial proportionality not be fully met. That is, assume a hypothetical university attempts to lower its current thirty percent disparity between women athletes and its female undergraduate population and manages to reduce this disparity by only twenty percent; this leaves an unacceptable ten percent difference under the Substantial Proportionality test as applied in Title IX case law. Would the OCR find these efforts to be a manifestation of "continuing program expansion"? If these numbers are changed solely by cutting men's teams to approach the more proportional numbers, the Author

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224. See George, *supra* note 201, at 654 (“[P]roportionality has become the only realistic means of satisfying [the] OCR’s definition of equitable accommodation.”).

225. *Hearing*, *supra* note 106, at 8 (statement of Thomas K. Hearn, President of Wake Forest University: “The lesson here is radically at odds with the public perception of athletic departments awash in money. [Schools] built, in an environment of expanding resources, an athletic gorilla [they] cannot feed.”); Blum, *supra* note 55, at 1, 31 (citing an attorney for St. Louis University that schools are facing budget crunches and looking to “downsiz[e] athletics”).

226. See Blum, *supra* note 55, at 1, 31 (noting that the NCAA Gender Equity Committee found more than half of the national undergraduate composition is female, but that women represent fewer than a third of the available opportunities to play varsity sports); Dame, *supra* note 160, at C1 (stating that 95% of universities do not comply with Title IX standards).

227. See O’Brien, *supra* note 4, at A1 (relating that the previously unaggressive OCR is, according to athletic officials, “lumbering to life”).

228. See *supra* note 11.

asserts that the answer is no. Given the language of the Policy Interpretation that a "continuing practice of program *expansion*" entails action "which is demonstrably responsive to the *developing interest*" of the underrepresented gender,<sup>229</sup> reducing the number of male opportunities does nothing to "expand" a program or to respond to "developing" female athletic interests.<sup>230</sup> Thus, because meeting the Continuing Expansion prong of the Title IX regulations, like that of the Full Accommodation prong, seems implicitly to require additional expenditures by athletic departments that have little to spend, this factor of the Effective Accommodation test is also a nonviable alternative for most universities.

As the majority of institutions realize that their only *affordable* option in meeting the § 106.41(c)(1) regulation is the Substantial Proportionality prong, the nonrevenue men's sports find themselves with fewer opportunities. In essence, to meet substantially proportional ratios,<sup>231</sup> schools incapable of funding additional women's varsity slots have resorted to the "subtraction and downgrading" method illustrated by the *Cohen I* court: women's teams are maintained at their present status, while men's teams are eliminated to meet the targeted ratios.<sup>232</sup> As a result, university administrators predict that many men's athletic programs will feature only the "big three" male sports—football, basketball, and baseball—while the rest, at most, maintain self-supporting club status.<sup>233</sup> While some may point an accusatory finger at Title IX and women athletes in general, the final Part of this Note argues that this ire is misdirected. A solution which recognizes the

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229. Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (1979) (emphases added).

230. To date, the only federal court to deal directly with this issue ruled at the district court level. In *Cohen v. Brown Univ.* (Cohen II), 879 F. Supp. 185, 207 (D.R.I. 1995), the district court supplemented the First Circuit's analysis in *Cohen I* by admonishing institutions to proceed with caution before decreasing men's varsity slots: while eliminating men's teams might legally allow an athletic department to reach Substantial Proportionality, should this proportionality not be reached, mere downsizing of men's athletic opportunities would not translate into an expansion or accommodation of women's opportunities under the Continuing Expansion prong of analysis.

As a result of this analysis, the Author questions whether the Big Ten and Southeastern Conferences' stated goals to establish male/female participation ratios at 60/40 will shield a conference school in a Title IX lawsuit brought under § 106.41(c)(1). See Scott Rabelais, *Southeastern Conference Seeks Gender-Equity Balance*, BATON ROUGE ADVOC., Oct. 11, 1994, at 2D (illustrating the Big Ten and SEC gender-equity plans); *Women in IU Athletics: A Survey of the Last 20 Years*, MAJORITY REPORT NEWSLETTER (Ind. Univ. Office of Women's Affairs, Bloomington, Ind.), Dec. 1994, at 1 (on file with *Indiana Law Journal*) (noting Big Ten Conference's adoption of Gender Equity Action Policy requiring all member universities to reach a male/female participation ratio of 60/40 by June 30, 1997). These schools will be approaching, but missing by approximately 10%, the substantial proportionality mark—thus failing the Substantial Proportionality test. Moreover, in most instances, these schools will probably not be able to accomplish this ratio through an expansion of women's opportunities; they will subtract and downgrade their men's teams instead and thereby presumably fail the Continuing Expansion test. Nevertheless, the goal is a start.

231. These substantially proportionate ratios, according to Title IX case law and the 1990 Investigator's Manual, must truly approach "substantial proportionality." See *supra* notes 51-53 and accompanying text (illustrating the Manual's example that if 52% of the student body is female, a university should have 52% of its intercollegiate spots allotted to women athletes).

232. See *supra* note 113 and accompanying text; see also Blum, *supra* note 55, at 1 (citing Trial Lawyers for Public Justice's Executive Director Arthur Bryant that "[t]he lesson of [Title IX] litigation is that when women are not already being given an opportunity to participate in proportion to enrollment and schools eliminate teams, it had better be mens' [sic] teams only").

233. Redman, *supra* note 163, at 1D (quoting the Louisiana State University athletic director's observation that "if the proportionality issue was the only test, [we] would have to have about three male sports and about 12 female sports"); see also Karen Goldberg, *Title IX Factions Turn up the Heat; Gender Equity Threatens Football*, WASH. TIMES, Aug. 27, 1995, at C1 (stating that in past 20 years, 140 college wrestling teams have been eliminated, along with 101 men's gymnastics teams and 64 men's swimming teams); Thomas Stinson, *Dying: Men's College Gymnastics Title IX Victims: In Future, U.S. Olympic Teams May Pay for the NCAA's Gender Equity Policies*, ATLANTA J. & CONST., Jan. 8, 1995, at F2 (noting that because of "shifting budgetary philosophies and the gender equity movement, men's gymnastics has become an endangered species" and that the April, 1995 NCAA men's gymnastics championships was almost the sport's last).

validity of all types of sports and refrains from sacrificing one sport to maintain the others does exist.

V. REDUCING THE “MONSTER SQUAD”: CUTTING FOOTBALL  
TEAMS DOWN TO SIZE IN ORDER TO MAINTAIN A WIDE  
VARIETY OF MEN’S AND WOMEN’S SPORTS

As athletic departments downsize their programs to meet Title IX compliance standards under the Effective Accommodation test, eliminating the more minor men’s teams has become the standard. In contrast, the more prominent men’s sports—baseball, basketball, and football—remain untouched. The upshot of this trend is that many sports fans and participants are beginning to question the intercollegiate sports system. Some wonder if Title IX has done more harm than good. Others recognize that Title IX has merely accorded female athletes an equal opportunity to participate in intercollegiate sports, and that the prevalent loss of “lesser” men’s sports may be the result of athletic departments who are out of control in promoting their “big” team sports.<sup>234</sup>

Specifically, as gender equity lawsuits arise in the context of the Effective Accommodation test, proponents for women’s sports and for men’s minor and/or nonrevenue sports have increasingly pointed out that schools could comply with the test if football, with its much larger team, could cut its roster so that substantial proportionality is reached.<sup>235</sup> To many football coaches and fans, this idea seems unfair and unsupportable.<sup>236</sup> As one commentator has said, those promoting gender equity and the minor men’s sports have “misplaced their focus on football as a villain they must destroy . . . [and] nowhere does federal law require raiding football’s coffers to pay for women’s sports.”<sup>237</sup> However, through examination of the true purpose of intercollegiate athletics and the myths surrounding college football, one invariably arrives at the conclusion that this contention itself has “misplaced its focus.”

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234. In fact, one gender equity proponent feels that the next round of intercollegiate lawsuits will not feature women athletes against male athletes, but will instead pit male athletes against football teams. Grossman, *supra* note 163, § 3, at 1, 4.

235. “Advocates of gender equity do not like to see efforts to increase women’s opportunities presented as an attack on football or any men’s sports. . . . Football makes Title IX compliance difficult, not so much because of its expense as its number of players. . . . Because no female sport is nearly that large, women at football schools usually are underrepresented. It would take seven women’s volleyball teams to equal football’s participation rate.” O’Brien, *supra* note 4, at A1; Ken Stephens, *Coaches Fear Title IX Lawsuits May Prove Damaging for Football*, DALLAS MORNING NEWS, Jan. 10, 1995, at 9B (noting some attorneys’ observations that colleges will most easily and cheaply meet strict proportionality “by simply reducing the number of opportunities for men . . . [and] that football will be the primary target because it has far more participants—up to 85 scholarship players in Division-I-A—than any other sport”).

236. Stephens, *supra* note 235, at 9B (quoting Grant Teaff, Executive Director of the American Football Coaches Association: “I have seen the enemy eyeball to eyeball, and I can tell you they’re out to get the game of football”). Obviously, the rhetoric behind the Title IX dispute has taken on athletic (if not, at times, warlike) metaphors as strong as collegiate competition itself. Compare Teaff’s statement, for example, with a quotation from Donna A. Lopiano of the Women’s Sports Foundation: “It is so easy to cut men’s nonrevenue sports and blame it on gender equity. That is the equivalent of taking your ball and going home. Football coaches have got to play like a team on this. It is the right thing to do.” Goldberg, *supra* note 233, at C1.

237. Pieronek, *supra* note 54, at 353.

*A. The Basis for Intercollegiate Athletics:  
Education or Money?*

The First Circuit in *Cohen I* opened its opinion by noting that “[f]or college students, athletics offers an opportunity to exacuate leadership skills, learn teamwork, build self-confidence, and perfect self-discipline” and thus leads to learning that becomes “invaluable in attaining career and life success[.]”<sup>238</sup> One assumes that, should students walk into any university athletic department and similarly question the purpose of that program, they would hear some variation of the *Cohen I* court’s passage—that college athletics exist to enhance the educational, teamwork, and leadership experiences of the athletes<sup>239</sup> and to foster a cohesive school spirit. The next question students might ask, therefore, is whether a university program should be “[f]ocusing on revenue generation potential” of sports such as football that “divert[] [it] from the bigger picture . . . [of] an educational institution” because “surely no one is suggesting [it] got into the athletic business just to make money.”<sup>240</sup> If so, some argue, football should not benefit from tax-exempt programs.<sup>241</sup> Revenue questions aside (which shall be examined in Part V.B.), if the true focus of intercollegiate athletics is to derive educational benefits for its participants, should not athletic departments seek to offer these benefits as equally and fairly as possible, realizing that female athletes and male athletes representing the less prominent sports have worked for many years to attain the same benefits as football players?<sup>242</sup>

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

239. One source notes that the benefits of female students’ involvement in athletics is well documented: female athletes in high school are three times more likely to graduate; women athletes are 80% less likely to incur unwanted pregnancies; 92% less likely to use drugs; and female athletes in general have lower risks for breast cancer, higher levels of self-esteem, and lower rates of depression. *Football Not Threatened by Success of Title IX*, SEATTLE TIMES, May 12, 1995, at B6. The article suggests that immeasurable benefits also stem from women’s intercollegiate athletic participation:

What Congress—and college administrators—should not lose sight of is that college athletic departments have a larger mission than fielding a winning football team. The values of athletic competition, long-touted for young men, serve women equally well: teamwork, leadership, discipline, work ethic, self-sacrifice, pride in accomplishment, [and] strength of character.

*Id.*; see also 141 CONG. REC. E972 (daily ed. May 9, 1995) (statement of Rep. Maloney) (arguing Title IX has done more than expand women’s opportunities to participate in sports at the collegiate level; it has also expanded women’s chances to attend universities through sports scholarships and advanced their teamwork, responsibility, and self-confidence skills).

240. B. Glenn George, *Miles to Go and Promises to Keep: A Case Study in Title IX*, 64 U. COLO. L. REV. 555, 568 (1993); cf. Grossman, *supra* note 163, § 3, at 1, 4 (quoting the Director of the College Football Association relating that football needs plenty of scholarships to produce a product that brings in spectators and leads to media contracts—“[w]e’re in competition for the entertainment dollar”).

241. *Hearing, supra* note 106, at 25 (testimony of Donna A. Lopiano, Executive Director of the Women’s Sports Foundation, that “Congress needs to keep sending the clear message that we are dealing with educational sport and athletic programs that are clearly a part of the educational process. If this is not the case, they should not be receiving the benefits of tax-exempt status.”).

242. See Grossman, *supra* note 163, § 3, at 1, 4 (noting that, “[o]ff the record,” coaches of some of the less prominent men’s sports feel that football could stand to downsize in order to maintain fairness and a diversity of men’s sports in an athletics program and quoting a gender equity advocate that “[i]t’s only a matter of time before parents of [men playing the less prominent sports] start telling the colleges, ‘I don’t want my son sacrificed to the great god of football!’”); see also George, *supra* note 201, at 663 (“Although some students may perceive [collegiate sports] as a training camp for professional sports, statistics prove most of those students wrong.”).

*B. Dispelling the Myths Surrounding  
Intercollegiate Football*

Despite the fact that most university athletic departments claim that intercollegiate sports exist to supplement the educational environment of *all* student-athletes, the reality of many athletic departments' actions seem to indicate that football is the primary team of importance to the university. As a result, these universities support very large football teams with correspondingly large budgets: most "big-time" football programs have eighty-five athletes on scholarship and a score or more walk-ons.<sup>243</sup> Some football fans and participants support this viewpoint and justify their perspective with several contentions: (1) football, as a revenue-producing sport, supports the other athletic teams in a university program; (2) alumni and other contributors will not donate as much money to a university if it fails to field a large, successful football squad; and (3) large football teams are needed to ensure the game is played at its highest level. While these propositions might appear true because of the media attention given to college football, statistical evidence shows that, for *most* football programs, each of these assertions is factually incorrect.

First, most NCAA football teams do not make a profit; hence, football programs fail to support the other teams. The experts cite varying statistics, but all reach the conclusion that the majority of intercollegiate football teams are not making money; in fact, most are running on deficits. "Contrary to popular myth," one source states, "football is either not offered as a sport or does not pay for itself at [ninety-one] percent of all NCAA member institutions."<sup>244</sup> Another source states that 454 out of 524 schools' NCAA football programs lost money in 1993.<sup>245</sup> As far as subsidizing other athletic teams, experts point out that football underwrites other sports only at powerhouse football universities such as the University of Notre Dame.<sup>246</sup> In fact, there are "only [fifty] schools in the over 800 member institutions of the NCAA where football is contributing beyond its own support. . . . [Look at Division I-A] and [forty-five] percent of those schools are running average annual deficits of \$628,000 a year in football."<sup>247</sup> Furthermore, according to more than one commentator, student fees, university subsidies, and other funding sources have paid for practically all of women's sports opportunities since Title IX's enactment and about half of the total sports budget.<sup>248</sup> Thus, the argument that athletic departments

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243. Redman, *supra* note 163, at 1D.

244. *Hearing, supra* note 106, at 23; Lieberman-Cline, *supra* note 213, at 2B (relating that at 93% of NCAA member institutions, football does not make a profit, "much less pay for women's athletics" and adding that among Division I-A football programs, 45% of the football teams lose over \$600,000 annually).

245. Alexander Wolff, *Trickle-Down Economics; Cuts in College Football Would Help Fund Women's and Other Nonrevenue Programs*, SPORTS ILLUSTRATED, Oct. 25, 1993, at 84.

246. O'Brien, *supra* note 4, at A1 (stating that "contrary to popular perception, . . . [football] generates revenue, but usually not enough to cover its own considerable expenses").

247. *Hearing, supra* note 106, at 41.

248. *Id.* Evidence presented at the congressional hearing also revealed that deficits in college football programs between 1981 and 1989 had undergone a three-fold increase, yet profits for the powerhouse teams had risen from \$1.3 to \$2.7 million. The big teams were getting richer and fewer in number, while the smaller ones faced ever-increasing budget problems. *Id.* at 52; George, *supra* note 240, at 568. George's article also notes that when the "University of Colorado football team achieved the pinnacle of success in 1990 by winning the national championship, the program lost over \$800,000." In the meantime, almost half the budget for the athletic program emanated from "unearned income": student fees, institutional grants, etc. *Id.* at 567-68. George argues that if athletic departments are unable to justify sports as part of a "broad educational program" then they have "no business allocating \$4.2 million" of university money and student fees to the program. *Id.* at 570.

should not decrease football team roster sizes because they would be “biting the hand that feeds them” withers when one actually looks to the budget deficits most NCAA football teams incur. Crowds may be packing the stadium and television networks might be offering large contract deals, but the sheer expense of supporting such large teams devours much of the revenue, leaving little money for football teams to support themselves—let alone other teams.

The second college football myth is that universities will suffer diminished alumni contributions and other donations if their teams are not large and highly successful. Some experts believe this is also an ill-conceived notion, and that football teams and athletic programs in general will continue to receive the loyal support of alumni despite football team size and, in many instances, success. According to one speaker at a congressional subcommittee hearing on Title IX, research demonstrates that the success of a football team does not influence the university’s ability to garner general donations.<sup>249</sup>

The final misconception about college football is that teams must maintain somewhere between 100 to 120 players in order to succeed (eighty-five of these players being on scholarship at Division I schools). While no statistics exist on the success of smaller teams, several other factors point to the conclusion that this contention is probably untrue. First, the National Football League (“NFL”) teams maintain rosters of only forty-seven team members; yet, most agree, the league maintains the highest competitive level of football in the country. College football coaches claim that because these men are professionals, they have more time to train and avoid physical injuries. In contrast, they argue, college players may compromise their safety if their team is reduced in size. However, this argument appears specious when one notes that many universities play their “good players” *as much as possible* because they realize they might lose them to the NFL draft before the standard four years of eligibility have elapsed.<sup>250</sup> Second, most intercollegiate football teams take “travel squads” of approximately sixty to sixty-five players to away games, and usually no more than forty to forty-five players actually get to participate during the game.<sup>251</sup> If the coaches of these teams feel that sixty-five men are enough to handle any injuries or tactical schemes in the course of a game, one would suppose that this number would constitute all the players necessary for a team roster. No other collegiate sports appear to carry a contingency of “extras” on their rosters almost double their core size. College coaches adamantly contend that safety remains the reason for these large squads, but a lack of consensus exists among many sports administrators and commentators.<sup>252</sup>

Finally, although not a myth but nevertheless a contention of some college football participants and fans is that college football and other revenue sports should be exempt

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249. *Hearing, supra* note 106, at 42 (adding that one should also realize “that those donations are tax-deductible” and parents of “daughters and sons are paying also when [government] give[s] that tax deduction, so [it] shouldn’t discriminate on the basis of their children”).

250. Wolff, *supra* note 245, at 84.

251. *Hearing, supra* note 106, at 44 (quoting one gender equity advocate who laments that despite these facts, there are “teams that have 150, 191 players” and “those are choices that are made over providing opportunities” for women athletes under Title IX) (testimony of Donna A. Lopiano, Executive Director, Women’s Sports Foundation).

252. *Id.* at 43 (Thomas K. Hearn, President of Wake Forest University, notes that “[w]hether or not we can continue to reduce football grants in aid without fundamentally altering the game [and safety issues] is something” that still remains an issue, but Hearn senses “that [university programs] can continue to reduce grants in aid” and thus their squad sizes).



from the Title IX equation.<sup>253</sup> They suggest that once revenue sports are removed, most universities would meet the Substantial Proportionality prong of the Effective Accommodation test in addition to the other Title IX regulations covering such items as similar team budgets and per diem team allowances. While this may be true, both Congress and the DED have clearly stated that revenue sports are not exempt, especially given the antidiscrimination purpose of Title IX.<sup>254</sup> Thus, in addition to the three myths above, another reason to consider reducing men's football team sizes is simply to comply with Title IX mandates, realizing that no one team should generally be accorded special status whether it generates revenue or not.

*C. Complying with Title IX Can Enhance Football Programs at Most Universities and Still Leave the Nonrevenue Men's Teams Unscathed*

When one couples the original premise that collegiate sports exist for educational reasons with the fact that most football teams are not supporting the remainder of their universities' sports programs, it becomes apparent that much of the blame levied against women's sports for men's team reductions has been misplaced. If universities wish to continue offering a diverse array of women's and men's sports, perhaps football teams in the educational setting should be more closely inspected. As women with unmet athletic needs continue to seek Title IX remedies through federal courts under the Effective Accommodation test,<sup>255</sup> universities appear to have two choices: (1) they can proceed without collegiate football,<sup>256</sup> or (2) they can insist that their athletic departments decrease football teams to sizes that allow for Title IX compliance.<sup>257</sup>

Most college sports fans would not want an institution to take the first option, and many argue that the second option would not be necessary if football teams just lowered their expenses so that women's sports teams could be initiated.<sup>258</sup> Reducing football budgets could help achieve a solution. However, realistically, in the time it takes athletic departments to pare down football budgets, lawsuits and settlements will have come and

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253. See Grossman, *supra* note 163, § 3, at 1, 4 (stating that the College Football Association is lobbying Congress—so far unsuccessfully—for a Title IX exemption of revenue sports); cf. *Hearing, supra* note 106, at 40 (statement of Donna A. Lopiano, Executive Director of the Women's Sports Foundation) (arguing that football is not "a third sex" to be excluded from universities' sports participation ratios).

254. Policy Interpretation, 44 Fed. Reg. 71,413, 71,421 (1979). The Policy Interpretation rejected the argument that football and other revenue sports "should be totally exempted" or "receive special treatment" under Title IX. The agency realized that legitimate differences in sports such as equipment costs might result in some disparity on the budget side of Title IX compliance, and these were taken into account in the final Policy Interpretation. However, other aspects of Title IX compliance must still be met in order to "comply with the prohibition against sex discrimination." *Id.* at 71,419.

255. Those lawsuits based on the other subsections of § 106.41(c) of the Title IX regulations—such as equivalent opportunities in the provision of equipment and facilities and the compensation of coaches—are beyond the scope of this Note. The Author wishes to address here only potential solutions to those suits based on the 34 C.F.R. § 106.41(c)(1) "effective accommodation" factor.

256. See Don Beck, *Gender Equity Demands Threaten Big-Time Athletics*, DALLAS MORNING NEWS, Dec. 15, 1994, at 4B (pondering whether "big-time programs have become too alien to be at home in academic environments").

257. It appears as if the NCAA has left this decision to the schools, offering little in the way of guidance for its members beyond conferences recommending—but not mandating—that certain actions be taken by member universities. Presently, the NCAA's most significant signal to its members is that an institution's commitment to gender equity will be among four criteria the NCAA considers in certification review processes. Gabby Richards, *Schools to Monitor Equity* — NCAA Eschews Police Role on Gender Issue, WASH. POST, Aug. 7, 1993, at F3.

258. See Johnson, *supra* note 36, at 588 (noting that if universities were to redistribute athletic department funds, they could best accomplish equal athletic opportunity).

gone at several institutions resulting in the elimination of even more men's teams.<sup>259</sup> Thus, the only real solution which now exists if universities wish to retain a variety of sports for the educational benefit of many different types of athletes appears to be lowering football's roster size—that is, to “subtract and downgrade” football programs while leaving other men's sports intact. This will not hurt the game, as some contend, but it will actually make football more exciting and lead to greater strides in other areas of Title IX compliance.

For instance, lowering the size of a football squad will allow for more parity among the college teams and, one supposes, more exciting games. The average level of player ability at each university will rise as some of the “bench-sitters” at the powerhouse schools become starting players at others. Possibly the only athletic departments against such a scheme would come from the powerhouse schools themselves. But if true competition and the educational benefits athletic participation fosters in team members are really the goal, then even these athletic departments could not argue with the notion that greater team parity would be a positive factor in college football. While the cuts in roster sizes will inevitably lead to some of the less skilled players losing spots on collegiate football teams altogether, this detriment would be justified by meeting Title IX mandates and permitting the most highly skilled athletes in other men's and women's sports to compete. As one sports journalist has commented, the thrills of watching football would not be affected tremendously because one “wouldn't miss a handful of young men who weren't going to play anyway.”<sup>260</sup>

Another Title IX benefit beyond that of achieving acceptable numbers under the Substantial Proportionality test would also occur if football teams were decreased in size. If athletic departments decreased teams to the present NCAA Division I standard of eighty-five scholarship players, approximately twenty positions would be eliminated at most universities. The expenses saved from that initial cut could immediately be shifted toward meeting the Continuing Expansion prong of the Effective Accommodation test and other Title IX gender equity mandates. Second, if schools further reduced their teams to the sixty-five-person mark normally used for travel games, twenty additional scholarship-funded slots would open and could shift even more money toward other athletic programs and Title IX compliance.<sup>261</sup>

Thus, a viable solution to Title IX worries at many universities simply entails decreasing the number of participatory slots for football teams. This option allows for a diverse range of men's sports to remain alive while meeting Title IX “Substantial Proportionality” standards and retaining the competitive and successful atmosphere of

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259. For example, as football teams dispute whether certain expenditures are “legitimate” additional expenses under the Policy Interpretation, 44 Fed. Reg. 71,413, 71,415-16 (1979), any reallocation of funds for Title IX purposes may take up precious time for minor men's sports. Second, football teams may be slow to comply with budget cuts, especially if they take the prevailing attitude of some revenue-sports coaches that it would be difficult for them to maintain quality teams or recruit top-notch players if they had to take steps such as busing the team or not staying at first-rate hotels. See Lieberman-Cline, *supra* note 213, at 2B (relating one university athletic director's assessment of the “football coach versus Title IX” battles: “[Y]ou're dealing with a bunch of men who just don't want to give up what they have, . . . [who have] gotten more than they deserved, and they've gotten used to it”); Carl Redman, *LSU Athletic Spending Favors Men's Programs*, BATON ROUGE ADVOC., Oct. 11, 1994, at 1D (quoting men's basketball coach Dale Brown of Louisiana State University: “Do you think I'm going to get players (who can compete at that level) if I'm busing to four places (a year for games)? . . . I'm not trying to hurt anybody, but I'm not getting on a bus four times—I'll resign before I do something like that”).

260. Wolff, *supra* note 245, at 84.

261. 34 C.F.R. § 106.41(c)(2)-(10) (1994); see William C. Rhoden, *Sports of the Times: A Partisan Spin on Title IX*, N.Y. TIMES, Apr. 22, 1995, § 1, at 31 (noting that one athletic director attending an NCAA symposium on Title IX compliance said that if he eliminated 20 football scholarships, he would save \$250,000 in scholarship money alone).

college football. Unless Title IX is changed<sup>262</sup> or university funding picks up speed, many areas of a university's athletic program will inevitably face cuts of some sort. If offering a panoply of educational benefits fairly and equally among student athletes remains the goal, then perhaps this solution is the optimal one.

### CONCLUSION

Title IX's broad mandate that educational institutions avoid discrimination on the basis of sex has resulted in a twenty-year history of change for women's athletics. Despite the statute's vague language in 1972, federal appellate courts in the early 1990's—led by *Cohen v. Brown University* and the aid of intervening agency interpretations—have called for strict adherence to the statute's purpose especially at the university level. Consequently, growing numbers of talented women who seek to play intercollegiate athletics are seeing their interests met.

Unfortunately, as universities' budgets have dwindled in recent years, schools seeking to meet Title IX standards have been forced to eliminate more minor men's sports in order to support female participation ratios acceptable to the federal courts. Reverse discrimination claims have followed, but federal courts have refused to find Equal Protection violations in either the applications of Title IX or the statute itself. Presently, therefore, many universities' men's nonrevenue sports face the risk of termination.

However, a workable solution to this dilemma exists, especially if university sports are evaluated solely through an "educational opportunities" perspective. If college athletic departments decrease the size of their football squads, Title IX compliance and the continued maintenance of nonrevenue men's sports will result. Universities must oblige themselves to this or a similar solution, realizing that if educational enhancement is the true impetus behind collegiate sports, then as many *diverse* women's and men's teams as possible should be sustained. While some of the beneficiaries of college football's high-style mode of operation will take issue with this solution, the roster-reduced game itself would nonetheless continue to offer a high level of competition and support many skilled players. In essence, that is all the remaining intercollegiate men's and women's teams ask as well.

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262. Such a possibility unfortunately looms in the upcoming year. The Republican majority and conservative Democrats in the U.S. House of Representatives in early August, 1995 adopted, by voice vote, an amendment that would order review of Title IX. Jerry Gray, *House Spending-Bill Votes Reveal Faults in Party Unity*, N.Y. TIMES, Aug. 4, 1995, at A1. The voice vote came on the heels of a campaign by House Representative Dennis Hastert (R-Ill.) to change the way the OCR regulates gender equity in collegiate athletics. In his June, 1995 letter to the OCR, Hastert called for "common sense changes" to the enforcement of Title IX, including: (1) crediting universities for women's sports teams added many years ago (e.g., adding a women's team, on average since the passage of Title IX, every three years), and (2) allowing universities to demonstrate that male students might possess a greater interest in athletics than female students. Andrew Gottsman, *Title IX Clarity Sought*, CHI. TRIB., June 21, 1995, § 4, at 4. However, opponents were quick to point out the unfairness in Rep. Hastert's approach, noting that the first change would "reward[] inaction for the last 20 years" on the part of some universities. Similarly, "interest" surveys would not reflect the cyclical nature of athletic interests following athletic opportunities, which have been denied to women by these same universities for so long. *Id.* Obviously, Title IX remains a hotbed of controversy, flaring significantly after the *Cohen II* district court announced its decision. Within two months of that decision, experts and witnesses from both sides of the controversy convened on May 8, 1995, to testify before the House Subcommittee on Post-Secondary Education, Training, and Lifelong Learning. Members of the subcommittee noted that efforts to weaken Title IX could anger women and that any changes could have political ramifications—"[m]any of your voters have daughters." Andrew Gottsman, *Hastert Bandstands for Revisions in Title IX; Illinois Pol Thinks Men's Sports Are Hit Too Hard*, CHI. TRIB., May 10, 1995, § 4, at 1 (quoting Rep. Pat Williams). In contrast, many university presidents and representatives of men's sports argued during the hearings that Title IX has become a quota, rather than a fair way to increase athletic opportunities for female students. *Id.*