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Jesse M. Rappole

Thomas A. Baker III

Kevin K. Byon

EXPOSING THE SHELL GAME: THE NEED FOR A NARROWLY-TAILORED APPROACH TO TITLE IX

Jesse M. Rappole, Thomas A. Baker III, and Kevin K. Byon*

INTRODUCTION

The University of California at Davis (UC Davis) recently cut several varsity sports including women's rowing, men's wrestling, men's swimming and diving, and men's indoor track and field.[1] Spurred by budgetary shortfalls, UC Davis made this decision after consideration of more than twenty alternative models for achieving fiscal solvency.[2] Had the decision been dictated strictly by economic factors, the process would have proven much simpler: cut the most expensive teams that generate the least amount of revenue.[3] While the elimination of the women's crew team did positively impact the University's budget, the loss of the men's indoor track and field team belies another factor at play. In reality, cutting the men's indoor track team saved very little money. A current member of the UC Davis men's track team, Jeffrey Cambell, wrote that he was told to expect "the possibility of pre-outdoor-season meets with the other track teams in the Big West Conference to be used instead of the couple indoor meets."[4] Though the indoor track program was cut for "budgetary reasons," the program's coaches replaced lost indoor competitions with new outdoor meets, the cost of which negated any savings generated by the indoor team cut.

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* Jesse Rappole earned his J.D. from the Washington & Lee University School of Law. His co-authors, Thomas A. Baker III and Kevin K. Byon, are assistant professors at the University of Georgia. With a J.D. from Loyola University School of Law, Thomas A. Baker III practiced at Middleberg, Riddle & Gianna in New Orleans, LA for 2 years. Thomas A. Baker III and Kevin K. Byon each received their Ph.D.s in Sport Management from the University of Florida.

1. *UC Davis to Drop Four Teams Due to Financial Crisis*, News & Information University of California Davis (Apr. 16, 2010), http://news.ucdavis.edu/search/news_detail.lasso?id=9432 (last visited Feb. 20, 2011).

2. *See id.*

3. *See id.*

4. E-mail from Jeffrey Cambell, Varsity Track Student-Athlete, University of California at Davis, to Jesse Rappole, PhD Student, University of Georgia (Sept. 10, 2010, 12:54 EST) (on file with author).

UC Davis will retain all of the athletes, coaches, trainers, facilities, and equipment required for a varsity indoor track team as part of the outdoor track program. Current track team members were asked: "What actual changes have you noticed so far as a result of the decision?"[5] They replied, "[n]one yet"[6] and, "[n]o changes have been seen so far."[7] Why, then, did UC Davis cut the indoor track team? This decision reflects a domino effect commonly created by Title IX. Because cutting the crew team represented a loss of women's athletic opportunities, the University chose to also reduce men's opportunities in order to satisfy Title IX compliance. The cuts levied at UC Davis serve as an example of athletic departments treating Title IX compliance as a shell game. No educational opportunities were created for women while all female crew student-athletes were cut. Two rosters worth of male student-athletes, men's wrestling and men's swimming and diving, also lost opportunities. Luckily for the track team, opportunities were lost in name only. Yet, as current Title IX guidelines are interpreted, UC Davis' actions in this instance satisfy Title IX requirements.

In recent years, the elimination of men's collegiate non-revenue athletic teams has sparked debate over Title IX and its unintended consequences. Originally enacted to create equal opportunities for women at institutions receiving federal funding, the law applies particularly in the realm of collegiate athletics.[8] Although Title IX has successfully increased opportunities for women, critics blame the law for causing reductions and cuts to non-revenue men's athletic teams. Some critics suggest that Title IX enforcement rules will eventually destroy non-revenue men's National Collegiate Athletic Association (NCAA) Division I (D-I) sports.[9] The potential for this destruction lies in the fact that Title IX, as it stands, provides university sports

5. E-mail from Jesse Rappole, PhD Student, University of Georgia, to University of California at Davis Varsity Track roster (Aug. 22, 2010 17:56 EST) (on file with author).

6. E-mail from Jeffrey Cambell, Varsity Track Student-Athlete, University of California at Davis, to Jesse Rappole, PhD Student, University of Georgia (Sept. 10, 2010, 12:54 EST) (on file with author).

7. E-mail from Michael Starr, Varsity Track Student-Athlete, University of California at Davis, to Jesse Rappole, PhD Student, University of Georgia (Sept. 11, 2010, 23:11 EST) (on file with author).

8. *See generally* LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, TITLE IX (Human Kinetics) (2005).

9. Ryan T. Smith, *"Bull's Eye": How Public Universities in West Virginia can Creatively Comply with Title IX Without the Targeted Elimination of Men's Sports Teams*, 110 W. Va. L. Rev. 1373, 1374 (2008).

programs with the incentive to cut men's teams because it is the cheapest way to comply with the law's requirements.[10]

Conversely, Title IX proponents assert that the reduction of men's non-revenue sports at many NCAA D-I universities result from an arms race to fund revenue producing football and men's basketball programs.[11] Supporters of this theory argue that universities use Title IX to justify economically motivated decisions to cut programs.[12] Title IX enforcement language does not take into account the reality of the spending by NCAA D-I universities on men's revenue sports versus non-revenue sports. This article proposes suggestions for improvement in the form of a "2011 Clarification" that strengthens Title IX enforcement.

As athletic departments struggle to simultaneously fund non-revenue sports and pour money into potential revenue-generating football programs, implementation guidelines for Title IX must evolve to continue protecting student-athlete educational experiences. Since 1993, there have been several court cases in which male student-athletes argued that their programs were cut and that equal protection rights were violated in the name of Title IX.[13] Courts have denied these claims because Title IX regulations specifically protect only the underrepresented sex.[14] These cases could be avoided and program cuts reduced under a new clarification of Title IX regulation that allows gender conscious removal of educational opportunities only for compelling reasons and when no less discriminatory means are available.

Current Title IX compliance guidelines do not provide enough incentive to add women's sports. Instead, they allow athletic departments to cut men's non-revenue sports and apply "roster management" schemes as the most economical methods of Title IX compliance. This article aims to bring attention to the current shortcomings of Title IX implementation and to propose viable, practical changes that can improve regulation to increase the number of student-athlete experiences across the board. In pursuit of this goal, the

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10. *Id.*

11. SPORTING EQUALITY: TITLE IX THIRTY YEARS LATER 134 (Rita James Simon, ed., Transaction Publishers) (2005).

12. Daniel R. Marburger & Nancy Hogshead-Makar, *Is Title IX Really to Blame for the Decline in Intercollegiate Men's Nonrevenue Sports?*, 14 Marq. Sports L. Rev. 65, 91 (2003).

13. *E.g.*, Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930 (U.S. App. 2004); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608 (6th Cir. 2002); Kelly v. Board of Trustees Ill., 35 F.3d 265 (7th Cir. 1994); Harper v. Ill. State Univ., 35 F. Supp. 2d 1118 (C.D. Ill. 1999).

14. Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608 (6th Cir. 2002) (upholding the district court's dismissal of the claim observing that Title IX does not bestow rights on the over-represented gender); *accord* Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996).

article addresses the role that Title IX plays in men's non-revenue sport cuts and how to amend Title IX regulation so as to require better implementation methods. Although courts do not apply strict scrutiny to gender discrimination cases,[15] the Department of Education's Office for Civil Rights (Office for Civil Rights) could write such a standard into the compliance guidelines to encourage courts toward following that standard. The courts have historically shown deference to the guidelines.[16] Universities should be rewarded for funding additional women's sports and discouraged from cutting men's non-revenue sports. Reaching equality through subtraction should not be allowed in cases where less restrictive options are available.

The article begins with a brief history of Title IX, the Office for Civil Rights' regulations thereof, and Title IX case law. The existing shortcomings of Title IX enforcement are shown through studying consequences of current implementation methods for universities and student-athletes. Recent lawsuits filed on behalf of male athletic teams are examined. The Equal Protection Clause of the 14th Amendment analysis in these cases is compared with Equal Protection Clause application in educational affirmative action challenges. Suggestions are made for improvement in a "2011 Clarification" requiring strict scrutiny review of Title IX grievances that would promote female opportunity expansion while eliminating the temptation for schools to comply by cutting non-revenue men's teams. The conclusion addresses effects of the proposed "2011 Clarification" and the benefits that this clarification would provide for both genders.

HISTORY AND BACKGROUND OF TITLE IX APPLICATION

In 1972, Congress passed Title IX of the Education Amendments to the Civil Rights Act of 1964 which states in relevant part 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."[17] Enforced by the Office for Civil Rights, Title IX compliance is currently determined by the "Three-Part Test" con-

15. *See* University of California Regents v. Bakke, 438 U.S. 265, 303 (1978).

16. *See* Equity in Athletics v. Department of Education, 504 F. Supp. 2d 88, 105 (W.D. Va. 2007); *accord* Cohen v. Brown, 991 F.2d 888 (1st Cir. 1993); Roberts v. Colo. Agric., 998 F.2d 824, 829 (10th Cir. 1993); Kelley v. Board of Trustees Ill., 35 F.3d 265, 269-70 (7th Cir. 1994).

17. Title IX of the Education Amendments Act, 20 U.S.C. § 1681 (1972).

tained in the larger analytical framework of the 1979 Policy Interpretation.[18]

Under the Three-Part Test, a school is presumed to provide nondiscriminatory participation opportunities to its student-athletes if it satisfies any one of the following: 1) the percent of male and female athletes is substantially proportionate to the percent of male and female students enrolled at the school; 2) the school has a history and continuing practice of expanding participation opportunities for the underrepresented sex; or 3) the school is fully and effectively accommodating the interests and abilities of the underrepresented sex. This has remained constant since the 1979 Policy Interpretation. Although Title IX facilitated tremendous growth in women's athletics participation during the 1970's, the rise slowed during the 1980's.[19] In response, Congress passed the Civil Rights Restoration Act of 1988 extending Title IX's protections to indirect recipients of federal funding, including collegiate athletic departments.[20] The Supreme Court of the United States bolstered enforcement further with its 1992 ruling in *Franklin v. Gwinnett*, stating that successful Title IX plaintiffs could recover monetary damages and attorney fees for intentional discrimination.[21] In 1996, the Office for Civil Rights further explained the Three-Part Test in its Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (1996 Clarification).[22]

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18. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413 (Dec. 11, 1979) (stating "Compliance will be assessed in any one of the following 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.").

19. *See* LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, *supra* note 8, at 121 (noting the rapid rise in participation began to level off when the United States Supreme Court ruled that the law (Title Ix) applied only to those programs or activities that directly received federal funding.).

20. Civil Rights Restoration Act, 20 U.S.C. § 1687 (1988).

21. *See* Franklin v. Gwinnet, 503 U.S. 60 (1992).

22. Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, Office of Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, 2 (January 16,1996) (on file with U.S. Department of Education) ("The Clarification confirms that institutions only need to comply with any one part of the three-part test to prove nondiscriminatory participation opportunities exist. The first part of the test – substantial proportionality – focuses on the participation rates of men and women at an institution and affords an institution a "safe harbor" for establishing that it provides nondiscriminatory participation opportunities. An institution that does not provide substantially proportional participation opportunities for men and women may comply with Title IX by satisfying either part two or part three of the test. The

In the 1996 seminal Title IX case *Cohen v. Brown Univ.*, Brown University demoted four varsity athletic teams due to budgetary constraints.[23] The First Circuit Court of Appeals quickly concluded that Brown could not meet parts one and two of the three-part test. Focusing on part three, the Court held that Brown violated Title IX by taking away two sports with an obvious interest by the *under*-represented sex and required Brown to reinstate two women's programs.[24] No recourse was available to members of the two men's teams that were cut despite the District Court finding "that Brown saved $62,028 by demoting the women's teams and $15,795 by demoting the men's teams, but that the demotions 'did not appreciably affect the athletic participation gender ratio.'"[25] The female athletic participation opportunities justified protection from economically motivated cuts. However, under current Title IX enforcement, athletic departments may cut male athletic participation opportunities to save relatively small amounts of money.

On July 11, 2003, the Office for Civil Rights released the Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (2003 Clarification),[26] in which it stated that:

> (1) The Three-Part Test for assessing compliance with the participation portion of Title IX provides schools with flexibility and will continue to be the test used by the Office for Civil Rights to determine compliance; and (2) Title IX did not require the cutting or reduction of teams and that such a practice is disfavored, and generally reinforced prior Title IX regulations.[27]

In March 2005, the Office for Civil Rights issued the Additional Clarification of Intercollegiate Athletic Policy, Three-Part Test – Part Three (2005 Clarification),[28] setting forth a sample e-mail survey, apportioning burdens of proof, and otherwise setting the rules for insti-

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second part - history and continuing practice - is an examination of an institution's good-faith expansion of athletics opportunities through its response to developing interests of the underrepresented sex at that institution. The third part – fully and effectively accommodating interests and abilities of the underrepresented sex - centers on the inquiry of whether there are concrete and viable interests among the underrepresented sex that should be accommodated by an institution.").

23. 101 F.3d 155, 161(1st Cir. 1996).

24. *See id.* at 194 (emphasis added).

25. *Id.* at 163 (quoting Cohen v. Brown Univ., 879 F. Supp. 185, 214 (D.R.I. 1995)).

26. Letter from Gerald Reynolds, Assistant Secretary of Civil Rights, Office of Civil Rights, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (July 11, 2003) (on file with United States Department of Education).

27. *Id.* at 2 *(emphasis added).*

28. Office for Civil Rights, Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three (March 17, 2005) (rescinded by "Dear Colleague" letter on April 20, 2010).

tutional administrative compliance with the third method of achieving Title IX compliance.[29] The changes to the third prong of the Three-Part Test for Title XI compliance were the subject of much controversy until the 2005 Clarification was rescinded on April 20, 2010.[30] NCAA "members [we]re urged to decline use of the procedures set forth in the March 17, 2005 Additional Clarification and abide by the standards of the 1996 Clarification to evaluate women's interest in sports under the third prong of the Three-Part Test."[31]

The 2005 Clarification also placed a high burden on those seeking to increase participation opportunities. It stated that, "[t]he OCR (in an OCR investigation) or students (in an on-campus Title IX grievance investigation) bear the burden of proof with regard to part three of the test."[32] Schools that rely upon the third prong for compliance need not affirmatively demonstrate such compliance unless and until there is "actual evidence" of unmet interests and abilities among the *under*-represented sex.[33] Current Title IX regulations render it legally irrelevant if the *over*-represented sex has obvious unmet interest, ability, and availability of regional competition in a sport.

In June of 2005, the Court refused to hear, and thereby denied the National Wrestling Coaches Association's (NWCA) petition for certiorari in a case against the Department of Education seeking to invalidate the Office for Civil Rights' Title IX enforcement framework.[34] The case arose from decisions to discontinue men's wrestling at many

29. U.S. Department of Education, Office for Civil Rights, Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three (2005) ("The OCR will deem schools to be in compliance with Title IX if the school uses the OCR-provided e-mail survey and finds that there is no unmet interest and ability of the underrepresented sex.").

30. *See* letter from Russlynn Ali, Assistant Secretary of Civil Rights, Office for Civil Rights, Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three, (April 20, 2010) (rescinding 2005 Additional Clarification and setting forth current Title IX compliance guidelines) (available at http://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX-Docs).

31. NCAA Executive Committee resolution opposing the clarification signed by Chair Carol Cartwright to Secretary of Education Margaret Spellings. NCAA, Gender Equity in Intercollegiate Athletics, p.189 (2008).

32. *See* Office for Civil Rights, Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three, at 4 (2005) (remaining the standard of review as this portion of the "Additional Clarification" was not addressed in the rescinding letter of April 20, 2010).

33. U.S. Department of Education, Office for Civil Rights, Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three (2005) (emphasis added) (compliance under the third prong is assumed, "[U]nless there exists a sport(s) for the underrepresented sex for which all three of the following conditions are met: Unmet interest sufficient to sustain a varsity team in the sport(s); sufficient ability to sustain an intercollegiate team in the sport(s); and reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region.").

34. Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930 (D.C. 2004) (holding that NWCA could not show that Title IX caused or required the elimination of men's athletics teams or that changing Title IX's enforcement scheme would lead to their reinstatement).

universities. In reaching its decision, the Court stated that schools make independent decisions about which teams to field based on factors that may or may not include gender equity concerns and deferred completely to the Office for Civil Rights guidance.[35]

On April 20, 2010, the Office for Civil Rights withdrew the 2005 Clarification, User's Guide, and Sample Survey via a "Dear Colleague Letter" setting forth a new Intercollegiate Athletics Policy Clarification (2010 Clarification).[36] The Office for Civil Rights deemed the 2005 Clarification and the User's Guide inconsistent with the nondiscriminatory methods of assessment set forth in the 1979 Policy Interpretation and the 1996 Clarification and did not provide appropriate and necessary clarity regarding nondiscriminatory assessment methods.[37] The Office for Civil Rights withdrew the 2005 Clarification and User's Guide, including the model survey.[38] All "other Department policies regarding part three of the Three-Part Test remain in effect and provide the applicable standards for evaluating compliance."[39] The 2010 Clarification serves as an example where the Office for Civil Rights recognized and corrected a shortcoming in Title IX enforcement. Utilization of the same approach could increase protection for the educational student-athlete experience of males and females in non-revenue sports.

The Office for Civil Rights withdrew the 2005 Clarification in part due to perceived misuse of surveys.[40] The Office for Civil Rights believes survey use can benefit universities trying to meet the interest of all able students who hope to participate in a sport for which regional competition is available. However, due to its expense, very few schools take this third prong approach to Title IX compliance. Though costly, an honest third prong approach would avoid constitutional challenges under the Equal Protection Clause. Cutting men's teams contradicts efforts to meet all viable athletic participation interests. Schools choosing to comply through more economical means under the first prong open themselves up to Equal Protection Clause challenges by male student-athletes.

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35. *See id.*
36. *Supra* note 30.
37. *See id.*
38. *See id.*
39. *Id.* at 2.
40. *Id.* at 8.

THE EQUAL PROTECTION CLAUSE IN GENDER AND EDUCATIONAL DISCRIMINATION

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution reads in relevant part that,

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[41]

Courts review substantive challenges under this Clause with varying levels of scrutiny based on the classification in question. Precedent holds that gender classifications warrant "intermediate scrutiny" requiring that "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification."[42] Title IX requires gender consideration in the provision of educational opportunities and therefore may be subject to intermediate scrutiny under the Equal Protection Clause.[43]

The current language of Title IX enforcement protects only the underrepresented sex, however, the Court has held that a statutory policy which "discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review."[44] In *Virginia v. United States*, the most recent gender discrimination case in education to reach the Court, the Court emphasized the importance of protecting educational opportunities for both genders.[45]

> Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-Reed decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the

41. U.S. Const. amend. XIV § 1.

42. Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982), (*see also* Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981) and Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979)).

43. *Id.* at 723.

44. *Id.* at 723 (citing Reed v. Reed, 404 U.S. 71, 75 (1971).

45. Virginia v. United States, 518 U.S. 515, 532-33 (1996).

> achievement of those objectives.'" The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[46]

To date, the Office for Civil Rights has ignored the heavy burden of proof placed on state actors in gender discrimination claims. Student-athletes that have been negatively affected by gender-conscious Title IX decisions lack the time necessary to justify following an Equal Protection Clause challenge through the appeals process.

The objective of Title IX, to increase educational opportunities for women, provides an exceedingly persuasive justification for differential treatment based on gender classification. This moves an Equal Protection Clause analysis quickly to the discriminatory means employed, which raises the following question. What is the substantial relationship between the removal of educational opportunities provided by male non-revenue sports and the creation of educational opportunities for women? Such a nexus should be required to warrant the justification for gender classification under the Equal Protection Clause. If the money saved by cutting a male team was redirected to fund new female opportunities, it would relate to this objective. However, that policy is not a requirement under current Title IX guidance. No effected male student-athlete with proper standing has filed a complaint in timely fashion and pursued a decision beyond motions for preliminary injunction. As it is currently enforced, Title IX may be susceptible to such a challenge if decided on the merits.

Equal Protection Clause challenges have successfully overturned affirmative action programs limiting access to educational opportunities. Review of these affirmative action challenges reveals a "strict scrutiny" standard of review employed by courts in race and ethnicity classification cases. In *Regents of University of California v. Bakke* (*Bakke*), the Court held that "a government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available."[47] The Court also stated that, "there are serious problems of justice connected with the idea of preference itself" in justification of strict scrutiny application.[48] Thus, even

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46. 518 U.S. 515, 532-33 (1996) (quoting Mississippi Univ. for Women, 458 U.S. at 724 (1982); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980) (*See also* Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975); Califano v. Goldfarb, 430 U.S. 199, 223-24 (1977) (Stevens, J., concurring) (internal citations omitted).

47. Regents of Univ. of California v. Bakke, 438 U.S. 265, 357 (1978).

48. *Id.* at 298.

though affirmative action's aim of increasing diversity is compelling, especially in an educational setting, its means will only be allowed if they are the least restrictive. "The Court applies strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that government is pursuing a goal important enough to warrant use of a highly suspect tool."[49] Title IX enforcement should use strict scrutiny to "smoke out" athletic departments cutting men's non-revenue sports in the name of Title IX compliance without increasing female funding.

In *Bakke*, the Court elaborated on the importance of strict scrutiny application to preferential classifications made at the expense of individuals belonging to other groups. If the law fails to treat individuals equally, those whose societal injury is thought to exceed a level of tolerability would receive preferential treatment.[50] The "kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence – even if they otherwise were politically feasible and socially desirable."[51] Strict scrutiny protects proper implementation of programs designed to correct prior discrimination related to educational opportunities.

Two recent cases arising at the University of Michigan (U of M) provided an excellent opportunity for the Court to clarify the difference between means that pass strict scrutiny and those that are unconstitutional classifications determining access to educational opportunities. In *Grutter v. Bollinger*, the Court reaffirmed its position that, "to assure within its student body some specified percentage of a particular group merely because of its race or ethnicity" is not a compelling interest.[52] "That would amount to outright racial balancing, which is patently unconstitutional."[53] However, The University of Michigan Law School stated a goal of enrolling a "'critical mass' of minority students."[54] After agreeing that this constituted a compelling interest, the Court turned its analysis to the means used for this purpose.

In *Gratz v. Bollinger*, the Court held that the U of M undergraduate admission policy considered race in a manner not narrowly tailored to achieve their interest in diversity and therefore violated the Equal Protection Clause.[55] Since *Bakke*, it has been well established that

49. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).
50. 438 U.S. at 296 (1978).
51. *Id.*
52. Grutter, 539 U.S. at 329-30 (quoting Bakke, 438 U.S. at 307).
53. *Id.* at 330.
54. *Id.* at 329.
55. Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

quota systems are not narrowly tailored. The Court stated that "a race-conscious admissions program cannot use a quota system – it cannot 'insulate each category of applicants with certain desired qualifications from competition with all other applicants'"[56] This precedent applies to race-based cases where diversity is the objective. Although the Court also made it clear that they do not apply a strict scrutiny standard in gender discrimination challenges, the anti-quota reasoning translates to the preservation of student-athlete educational opportunities when applied to prong-one of the Title IX Three-Part Test.

Title IX is a legislated form of affirmative action. Yet compliance under the first prong proportionality test equates to a quota system where male opportunities cannot exceed their percentage representation in the student body population. Implementing a strict scrutiny standard of review would prevent institutions from choosing to comply by eliminating teams from blaming Title IX for the cuts. The Court has stated that, "there is a measure of inequity in forcing innocent persons. . .to bear the burdens of redressing grievances not of their making."[57] Existing guidelines discourage compliance through the elimination of men's opportunities.[58] New guidelines should go further and prevent elimination of men's non-revenue teams while strengthening Title IX against criticism and potential judicial challenges.

EVIDENCE OF TITLE IX ENFORCEMENT SHORTCOMINGS

The following discussion illustrates the harm caused by the Office for Civil Rights' passive approach to Title IX enforcement. Football and men's basketball take priority at most universities because of the revenue and exposure they generate for schools with the most successful programs. Until the Office for Civil Rights publishes a Title IX clarification accepting this reality, athletic departments will continue to treat Title IX as a minor obstacle to funding these two sports. Under the current enforcement regulations, discrimination against male student-athletes competing in non-revenue sports continues in the name of Title IX because athletic departments refuse to make cuts to revenue producing sports. Male and female student-athletes alike are cheated when schools use "roster management" schemes that count females in sports they never played or even male practice squad

56. *Id.* at 334 (quoting Bakke at 315).

57. Bakke, 438 U.S. 265, 298 (1978).

58. *See* letter from Gerald Reynolds, Assistant Secretary of Civil Rights, Office of Civil Rights, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (July 11, 2003) (on file with United States Department of Education).

members as females.[59] Athletics participation opportunities are a protected right for females thanks to Title IX.[60] Further protection of these athletic opportunities for young men and women is necessary in the face of intense commercialization of NCAA D-I football and basketball competition. The Office for Civil Rights has the power to implement this protection through stricter enforcement of Title IX.

The purpose of Title IX is to make discrimination in education based on gender unlawful.[61] Some are quick to point out that, "Title IX does not prevent schools from abandoning the educational mission of athletics, and it cannot prevent schools from deciding to drop a men's team or indeed, its entire athletic department. The law is limited to providing both men and women with educational experiences equitably."[62] Why must the law be limited in this way? It does prevent schools from dropping women's educational experiences, but does not afford the same protection for men.[63] The educational mission of athletics justified Congress legislating that Title IX specifically applies to athletic departments as indirect recipients of government funding.[64] So why would we now accept that Title IX is *not* meant to protect student-athletes from gender conscious opportunity elimination? At one time males did not require this protection, but that has since changed for the educational experience of men's non-revenue sport participation.

MEN'S NON-REVENUE CUTS

Several male student-athletes, and organizations representing their interests, have filed lawsuits challenging Title IX compliance regulations. In response to the elimination of Illinois State University's men's wrestling and soccer programs, members of those teams filed suit against the University. They argued the cuts violated Title IX because the underlying decision rested solely on the basis of sex.[65] The school justified the cuts as a means of increasing the proportionality ratio of women in athletics.[66] The court rejected their argument and

59. Katie Thomas, *College Teams, Relying on Deception, Undermine Gender Equity*, N.Y. TIMES, Apr. 25, 2011, at A1.

60. *See* Cohen v. Brown, 101 F.3d 155 (1996); *cert. denied* 520 U.S. 1186 (1997) (confirming that women's teams must be reinstated while men's teams can be cut).

61. 20 U.S.C. § 1681 (1972).

62. Daniel R. Marburger & Nancy Hogshead-Makar, *Is Title IX Really to Blame for the Decline in Intercollegiate Men's Nonrevenue Sports?*, 14 Marq. Sports L. Rev. 65 (2003).

63. *See* Cohen v. Brown, 101 F.3d 155.

64. Civil Rights Restoration Act, 20 U.S.C. § 1687 (1988).

65. Harper v. Ill. State Univ., 35 F. Supp. 2d 1118 (C.D. Ill. 1999).

66. *Id.*

cited *Cohen v. Brown* for the proposition that elimination of men's programs represents an acceptable means of complying with Title IX.[67] The court also rejected an additional argument that institutions are required to use the least discriminatory method to achieve compliance because the law does not contain such a requirement.[68] The court justified this holding stating that, "nothing in Title IX requires the institution to choose the method or benchmark for achieving gender parity that has the least negative impact on the overrepresented gender."[69] Courts in other jurisdictions continue to follow this guidance as persuasive authority in similar cases.[70] The Office for Civil Rights should recognize the counter productive nature of this ruling, prevent further non-revenue male sport casualties that in no way further female participation, and implement a strict scrutiny standard within Title IX enforcement.

At the University of Illinois, four varsity sports, including men's swimming, were eliminated and former members of the swim team filed suit against the University, alleging that its decision to drop the men's program while retaining women's swimming violated Title IX.[71] The court held the University was well within its rights because, even after elimination of the program, the men's participation levels in athletics would remain more than substantially proportionate.[72] The University of Illinois' failure to comply with the first prong blocked the male team's opportunity of participation because it moved the university closer to compliance despite the fact that it did *not* create a single female educational opportunity.

The first prong or "Safe Harbor" provision of the three-part test for Title IX compliance shielded the University of North Dakota when it cut the men's wrestling team.[73] In response to elimination of the program for "gender equity concerns," a group of wrestlers initiated a lawsuit.[74] The court rejected the claim because an institution seeking compliance under part one of the three-part test has discretion to

67. 991 F.2d 888 (1st Cir. 1993), *cited with approval in* Roberts v. Colo. Agric., 998 F.2d 824 (10th Cir. 1993) and Kelley v. Board of Trustees Ill., 35 F.3d 265 (7th cir. 1994).

68. 35 F. Supp. 2d at 1123 (citing 991 F.2d at 899).

69. *Id.*

70. 991 F.2d 888 (1st Cir. 1993), *cited with approval in* Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608 (6th Cir. 2002), Chalenor v. Univ. of N.D., 291 F.3d 1042 (8th Cir. 2000), Kelly v. Board of Trustees Ill., 35 F.3d 265 (7th Cir. 1994), Roberts v. Colo. Agric., 998 F.2d 824 (10th Cir. 1993), and Gonyo v. Drake Univ., 879 F. Supp. 1000 (S.D. Iowa 1995).

71. Kelly v. Board of Trustees Ill., 35 F.3d 265, 267 (7th Cir. 1994) *aff'd*, 115 S. Ct. 938 (1995).

72. *Id.* at 270.

73. Chalenor v. Univ. of N.D., 291 F.3d 1042, 1157-58 (8th Cir. 2002).

74. *Id.*

eliminate a male program in order to achieve proportionality.[75] The fact that the institution could have pursued compliance under another prong of the three-part test was not considered because it preferred to pursue compliance under part one.[76] As currently implemented, the first prong explicitly allows and protects a university's right to ignore the interests of non-revenue men's sports student-athletes. While the Title IX clarifications do not carry the force of law, "it is still true that interpretations contained in formats such as opinion letters are 'entitled to respect' . . . to the extent that these interpretations have the 'power to persuade.'"[77] Despite this recognition that the Office for Civil Rights guidelines are not controlling precedent, the courts always show deference in Title IX challenges to the persuasive power possessed by the guidelines.

In *Miami University Wrestling Club v. Miami University*, the plaintiffs claimed that the elimination of the men's wrestling, tennis and soccer programs constituted discrimination on the basis of gender in violation of Title IX.[78] The University cut the teams as part of a plan to address a statistical imbalance in participation opportunities and to further develop the women's program.[79] Though not clear how cutting men's teams helped develop the women's program, the court of appeals upheld the district court's dismissal of the claim observing that, "Title IX does not bestow rights on the overrepresented gender."[80] The first prong of current Title IX enforcement guidelines specifically allows gender conscious cutting of non-revenue male student-athlete opportunities even when female participation does not increase.[81] Introduction of a strict scrutiny standard of review would eliminate this loophole in the Title IX enforcement guidelines to which courts continually show deference.

At Drake University, a decision to eliminate the wrestling program triggered a lawsuit by four members of the team. In their motion for preliminary injunction, they claimed the action violated Title IX and

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75. *Id.* at 1046.

76. *Id.*

77. *Id.* (quoting Christensen v. Harris County, 529 U.S. at 587 (2000); (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)); *cf.* Christensen, 529 U.S. at 590-91 (Scalia, J., concurring) (listing cases in which Court accorded deference to agency interpretations issued in formats other than formal regulations and adjudications).

78. Miami Univ. Wrestling Club v. Miami Univ., 195 F. Supp. 2d 1010, 1011 (S.D. Ohio 2001); *aff'd* 302 F.3d 608 (6th Cir. 2002).

79. *Id.*

80. *Id.* at 615.

81. Norma V. Cantu, The Office of Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, 2 (January 16, 1996).

the Equal Protection Clause.[82] The court disagreed and held that because Drake fell within the safe harbor provision; thus the University was compliant under Title IX.[83] The court also rejected the constitutional challenge and concluded that while consideration of gender in the application of Title IX may work to the immediate disadvantage of males under the facts of the case, that fact alone did not support a challenge under the Equal Protection Clause.[84] The court chose to ignore that Title IX regulations, as currently enforced, threaten non-revenue student-athletes' educational experiences across the country. Gender-conscious decisions in education require intermediate scrutiny review, but the District Court did not conduct a complete Equal Protection Clause analysis. It instead chose to look only at precedent concerning the validity of gender classification and not the burden of proof for justifying or constitutionality of methods implementing gender consideration.[85] The student-athletes affected by the decision lacked the time for a remedy and the resources necessary to appeal the decision.

Another case involving non-revenue men's sports discrimination arose at James Madison University when it downsized the athletic department to "attain gender proportionality between its athletic programs and its undergraduate enrollment."[86] Equity in Athletics, a student-athlete organization, responded by filing a motion for preliminary injunction alleging that the Office for Civil Rights' interpretive guidelines violated Title IX because they permitted institutions to engage in gender conscious cutting of male athletic programs.[87] The court denied the preliminary injunction, holding: (a) that the balance of hardships did not tip decidedly in their favor, (b) none of plaintiffs' claims had a strong likelihood of success, and (c) absent a clear showing of legal violations, the public interest weighed in favor of permitting institutions to chart their own course in providing athletic opportunities without judicial interference.[88] The court's reasoning ignores the fact that Title IX legislation intended to correct the course schools were taking by denying educational opportunities based on gender.[89] The Western District of Virginia sympathized with the student-athletes affected by the cuts, characterizing them as "innocent

82. Gonyo v. Drake Univ., 879 F. Supp. 1000, 1001 (S.D. Iowa 1995).
83. *See id.*
84. *See* 879 F. Supp. 1000 (S.D. Iowa 1995).
85. *Id.* at 1006.
86. Equity in Athletics v. Department of Education, 504 F.Supp. 2d 88, 90 (W.D. Va. 2007).
87. *See id.*
88. *Id.* at 112.
89. 20 U.S.C. § 1681 (1972).

victims" of Title IX's remedial effects.[90] Unfortunately, the current state of Title IX required the court to dismiss the motion for an injunction. In doing so, the court demonstrated substantial deference to the Office for Civil Rights' guidance.

The Office for Civil Rights won yet another vote of support for their guidelines in *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.* The three-part test enunciated in the 1979 Policy Interpretation and the 1996 Clarification were challenged on grounds they violated the Constitution (Equal Protection Clause), Title IX, the 1975 regulations, and the Administrative Procedure Act (APA).[91] The district court granted a motion by the Office for Civil Rights to dismiss for lack of subject matter jurisdiction, on the grounds that appellants lacked standing under Article III of the Constitution because a decision on the merits in their favor would not redress the injury.[92] The appellate court affirmed all parts of the district court's decision stating that, "the appellants' alleged injury resulted from the independent decisions of federally funded educational institutions that chose to eliminate or reduce the size of men's wrestling teams in order to comply with Title IX."[93] The court never decided the case on the merits because the student-athletes, already stripped of their educational opportunity due to gender-conscious cutting, would not benefit directly from a decision in their favor. Thus, wrestling teams continue to disappear from college campuses across the country.

ROSTER MANAGEMENT

In 2000, Paul Steinbach wrote an article encouraging roster management as an alternative to slashing entire men's teams. Steinbach and other supporters of "roster management" believed universities could achieve prong-one proportionality compliance by cutting a few men's slots on each team and expanding existing female rosters slightly. Athletic directors from the University of Wisconsin and Dayton University defended the practice as the least restrictive method of compliance within the spirit of Title IX.[94] For roster management to work, women's team coaches have to convince more girls than are actually interested in participation to come out for the team while men's coaches trim rosters to the minimum required for the sport.

90. 504 F.Supp. 2d 88, 112 (W.D. Va. 2007).

91. Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930 (D.C. Cir. 2004).

92. *Id.* at 933.

93. *Id.*

94. Paul Steinbach, *Roster Management Takes Pain Out of Title IX Compliance*, ATHLETIC BUSINESS, *available at* http://athleticbusiness.com/articles/article.aspx?articleid=55&zoneid=3.

While one could question the merits of roster management in this fashion, it appears an honest attempt at compliance. However, some versions of roster management that have evolved since 2000 are indefensible.

According to Katie Thomas of the *NY Times*, many of the most prestigious NCAA universities now count men as females for purposes of roster management.[95] At Cornell, almost half of the 34 student-athletes on the 2011 fencing roster were male students reported as female athletes.[96] At Duke, Texas A&M, and others, when a man is cut from the men's basketball team he can just join the women's basketball team.[97] At these schools, women's rosters include several male practice players counted as females on their report to the Office for Civil Rights.[98] In this scenario, a man could lose his spot through roster management and then take it right back away from a female so long as he is willing to play with women and be counted as a female.

The University of South Florida stretched "roster management" to extremes in 2010. When three female long jumpers from South Florida were asked about their cross-country season, they responded, unwittingly, that they were not on the team.[99] Only 28 girls from South Florida ever competed in cross-country during 2010. However, each of the 71 females on the cross-country, indoor and outdoor track rosters was counted three times for Title IX reporting. The Office for Civil Rights does not require competition participation for athletes to be counted on a roster. Members of the men's track team at South Florida do not show up on the cross-country team roster unless they compete. Roster management means counting men and women differently because of their gender. Under Equal Protection Clause scrutiny, this gender conscious disparate treatment should require a showing of substantial relation to the compelling objective of increasing female educational opportunities.

In addition to the egregious counting methods employed for women's cross-country, one female student's participation consisted of accepting early registration for classes and free running shoes. After quitting the track team and returning her scholarship during her sophomore year, Sarah Till was counted in the school's participation

95. Katie Thomas, *College Teams, Relying on Deception, Undermine Gender Equity*, N.Y. TIMES, Apr. 25, 2011, at A1.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

report three times during her junior year.[100] A former Office for Civil Rights employee commented that this behavior would raise a red flag if discovered; however, he acknowledged that many NCAA institutions count male practice players as females and the Office for Civil Rights does not see it as a Title IX violation.

Roster manipulation in the name of Title IX compliance is not a remedial measure. The approach does not provide women with additional sport-related educational opportunities. However, the practice will likely continue until the Office for Civil Rights does something about it. Athletic departments rely on this approach to offset the ever-increasing expenses associated with men's football and basketball. Unfortunately, it serves as an example of how schools remove educational opportunities from men's non-revenue sports in a way that does not provide additional opportunities to women. There is little to no nexus, much less a substantial relationship, between the manipulation of rosters and the compelling objective of promoting educational opportunities for women. Yet, as long as the Office for Civil Rights allows it, schools will continue to play number games with Title IX while female opportunity expansion slows and male non-revenue sports suffer. The Office for Civil Rights can improve the regulations so that methods failing to further female opportunity expansion do not constitute compliance.

DISCUSSION

Title IX has had well-established success in promoting and protecting educational opportunities for women in athletics. However, current enforcement policies need revamping. Specifically, the first-prong of the Three-Part Test allows athletic departments to maintain spending on revenue sports by cutting men's non-revenue teams rather than budget any additional funds for the women's sports.[101] Title IX enforcement encourages revenue-focused athletic departments to allocate spending away from non-revenue generating male teams, but does not require departments to redirect what is saved to females. Under the current NCAA model, the majority of athletic department expenses are tied up in football and men's basketball.[102] Schools are

100. Katie Thomas, *College Teams, Relying on Deception, Undermine Gender Equity*, N.Y. TIMES, Apr. 25, 2011, at A1.

101. *See* Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, Office of Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (January 16,1996) (on file with United States Department of Education).

102. U.S. Department of Education, Office of Postsecondary Education, Equity in Athletics Data Analysis Cutting Tool Website, http://ope.ed.gov/athletics/GetAggregatedData.aspx (last visited Feb. 21, 2011) (spread sheets on file with author).

using current guidelines to justify gender-conscious cutting of men's non-revenue programs without improving female opportunities.[103] The Office for Civil Rights must acknowledge the status of revenue producing student-athletes in a fan-based athletics model as a different experience from the education-focused, non-revenue student-athlete experience. This reality must be taken into account to better guide revenue-focused programs in the development of new educational athletic opportunities for women without depriving men of those same opportunities.

Football and men's basketball at most D-I schools are communal, fan-based experiences. The vast majority of students at these D-I schools would prefer to have a football team they can cheer for over one they could play on.[104] In this fan-based, revenue-producing athletics model, football and basketball expenses are a priority and providing more opportunities for participation in non-revenue generating sports is a luxury. However, this model flies in the face of the objectives supporting Title IX's enactment. As a result, the athletic departments at these schools do not focus on creating participation opportunities.

In participation-based athletic models, the student-athlete experiences of a football player, a male cross-country runner, and a female volleyball player should all be the same. This may be the case at many D-III schools where athletic scholarships and television contracts are non-existent. However, a realistic look at NCAA D-I athletics reveals that millions of people tune in and pay to watch football games with few caring to watch cross-country or wrestling meets. If athletic departments focus on the financial bottom line, all non-revenue sports would be cut.[105] However, Congress felt strongly enough about the value of participation-based educational opportunities for student-athletes to pass Title IX and specifically extend protection for females in intercollegiate athletics. Updating the regulations to further improve female opportunities and also protect educational opportunities for male non-revenue student-athletes is necessary. Measures aimed at removing opportunities for men in the name of Title IX while providing none for women work counter to the intent that prompted the legislation. Accordingly, Title IX enforcement should change to require narrowly-tailored remedial measures so as to protect educa-

103. Daniel R. Marburger & Nancy Hogshead-Makar, *Is Title IX Really to Blame for the Decline in Intercollegiate Men's Nonrevenue Sports?*, 14 Marq. Sports L. Rev. 65 (2003).

104. *Id.* at 84.

105. Richard Epstein, *Law and Economics: Just Scrap Title IX*, Nat'l L.J., 23 (Oct. 14, 2002).

tional participation opportunities for both genders while they still exist.

Marburger and Makar lay the blame for cuts to men's non-revenue generating sports and the loss of over 170 wrestling teams between 1981 and 1999 on profit-motivated athletic departments and not Title IX.[106] They argue that, "[w]eakening gender equity laws will only make shifting resources from the minor sports to men's football and basketball easier."[107] So why not strengthen Title IX enforcement to protect both genders by requiring strict scrutiny review of compliance proposals? This is a viable option that would protect all non-revenue-producing sports in a gender-neutral manner. It would force programs to craft Title IX compliance measures in the least discriminatory way possible. Further, it would require programs to prove their remedial measures actually remedy past discrimination and that cuts to men's programs actually create more educational opportunities for women.

PROPOSAL FOR OFFICE FOR CIVIL RIGHTS 2011 CLARIFICATION

The Office for Civil Rights should publish a new Clarification creating a strict scrutiny standard for review of Title IX compliance methods. The first prong of the Title IX compliance test is currently abused and should not serve as a safe harbor for institutions unwilling to fund additional female participation opportunities. Strict scrutiny review of all Title IX compliance grievances would better protect educational student-athlete experiences. A "2011 Clarification" implementing this standard would hold financially capable schools responsible for meeting the viable athletics interests of all students rather than cutting educational opportunities to divert funds for football and basketball. The option of reaching Title IX compliance through reduction of men's non-revenue generating athletic programs should be used only as a last resort by athletic departments that truly cannot afford them. Under this standard, if male student-athletes' opportunities are cut, they can file a Title IX grievance requiring the university to prove the action furthers the compelling interest of increasing female opportunities and that no less restrictive means exist. The use of strict scrutiny in a Title IX setting would not always prove fatal to compliance measures because legitimate cuts would survive the standard. Instead, the use of a strict scrutiny standard for Title IX would provide much

106. Marburger & Makar, *supra* note 103, at 93.
107. *Id.* at 93.

needed protection against the use of illegitimate and unnecessary means under the guise of remedying past discrimination.[108]

CONCLUSION

Title IX continues to create and protect educational equality for women. Unfortunately, the current enforcement guidelines for application of Title IX to intercollegiate athletics allow non-revenue male student-athletes to lose their educational experiences at universities preferring to fund revenue-earning sports. At some schools, the status quo remains without Title IX compliance pressure. Rather than meeting this challenge by implementing positive change and increasing female opportunities, athletic departments often choose to cut non-revenue male sports or use dishonest "roster management" practices. This type of insincere compliance undermines the intent of Title IX, but courts allow it and cite to the persuasive authority provided by the Office for Civil Rights guidelines. Accordingly, the Office for Civil Rights has the apparent power to prevent insincere Title IX practices and should exercise that authority through the implementation of a strict scrutiny standard of review for Title IX compliance.

The suggested amendment of Title IX compliance implementation would benefit both men and women by protecting the opportunity to compete in sports where sufficient interest, ability, and availability of regional competition to sustain a varsity team exist. Under the suggested 2011 Clarification, budgetary shortfalls should be applied equally across the entire athletic department in a gender-neutral manner with football and basketball taking their share of the loss. This system, which focuses on treating both genders equally, would prevent denial of student-athletes' participation opportunities in the name of Title IX compliance. This would truly meet the intent of Title IX by promoting female opportunity expansion and would significantly slow the trend of cutting non-revenue generating men's teams.

108. Bakke, 438 U.S. at 298.