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Gender (In)equity?: An Analysis of Title IX Lawsuits in Intercollegiate Athletics

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SPORTS LAW

Gender [In]equity? An Analysis of Title IX Lawsuits in Intercollegiate Athletics

I. INTRODUCTION

Female collegiate athletes have recently enjoyed much success in bringing gender discrimination lawsuits against universities and colleges under Title IX of the Education Amendments of 1972.[1] Many colleges are now faced with the decision of whether to increase the number of female athletes at the school, or decrease the number of male athletes. Due to budgetary constraints, some schools are opting for the latter. As a result, men's teams are being eliminated from athletic programs, while their female counterparts are receiving increased opportunities for participation.

It is against this backdrop that the recent cases of *Kelley v. Board of Trustees, University of Illinois*[2] and *Gonyo v. Drake University*[3] have arisen. In both of these cases, the plaintiffs, male athletes of programs that have been eliminated, sought injunctive relief for gender discrimination under Title IX and in violation of the Equal Protection Clause of the Fourteenth Amendment[4] to the United States Constitution.

In order to fully understand the claims that have been made, and why similar claims are unlikely to succeed, an analysis of the history of Title IX with respect to intercollegiate athletics is in order. This Article will then examine Title IX's application to intercollegiate athletics, with analysis of the *Kelley* and *Gonyo* decisions. Finally, the future of Title IX lawsuits in the arena of intercollegiate athletics will be discussed with a proposal for a possible amendment to Title IX.

II. HISTORY OF TITLE IX

In 1972, Congress enacted Title IX of the Education Amendments of 1972.[5] Title IX provides in 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 Feder-

1. 20 U.S.C. §§ 1681-1688 (1995).
2. 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995).
3. 837 F. Supp. 989 (S.D. Iowa 1993).
4. U.S. CONST. amend. XIV.
5. 20 U.S.C. §§ 1681-1688 (1994).

al financial assistance ...."[6] Although Title IX did not specifically address athletics, most women's rights activists viewed this as a huge step forward for female athletes.[7] Unfortunately, equality was not as swift for female athletes as had been hoped.[8] However, in 1975 the Secretary of the Department of Health Education and Welfare (HEW) promulgated implementing regulations specifically mandating that intercollegiate athletic programs fully comply with Title IX requirements within three years.[9] In 1979, the HEW's Office of Civil Rights (OCR) published its Policy Interpretation of Title IX and Intercollegiate Athletics.[10] The Policy Interpretation was meant to provide universities and colleges "with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs."[11] Through the late 1970s and early 1980s, the popularity and visibility of women's sports flourished under Title IX.[12]

The progress made in women's sports suffered a severe setback in 1984 with the case of *Grove City College v. Bell*.[13] Here, the United States Supreme Court held that Title IX's prohibition against gender discrimination in any education program or activity receiving or benefitting from Federal financial assistance was "program-specific."[14] In other words, the fact that a college receives federal funds did not allow the federal government to regulate all of the activities of the college, rather only those specific programs receiving federal support.[15] As federal funds are generally not specifically earmarked for athletic departments, the *Grove City College* decision effectively removed intercollegiate sports from the purview of Title IX.[16]

In response to *Grove City College*, Congress enacted the Civil Rights Restoration Act of 1987,[17] reversing the Supreme Court's decision. The Restoration Act provided that, for the purposes of Title IX, "program or activity" is defined to include all operations of a college or university "*any part of which* is extended Federal financial assistance."[18] Thus, "if any arm of an educational institution received federal funds, the institution as a whole must comply with Title IX's

6. 20 U.S.C. § 1681(a).

7. Diane M. Henson and Boyce C. Cabaniss, *It's Not Whether You Win or Lose, but Whether You Get to Play: Title IX Finally Expands Participation Opportunities for Female Athletes in the '90s*, 13 REV. LITIG. 495, 496 (1994).

8. *Id.*

9. 34 C.F.R. § 106.41 (1993). Note that HEW's authority to enforce Title IX is now vested in the Department of Education (DED). *See* Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993).

10. 44 Fed. Reg. 71,413-71,423 (1979) [hereinafter *Policy Interpretation*].

11. *Id.*

12. Teresa M. Miguel, *Title IX and Gender Equity in Intercollegiate Athletics: Case Analyses, Legal Implications, and the Movement Toward Compliance*, 1 SPORTS L.J. 279, 281 (1994).

13. 465 U.S. 555 (1984).

14. *Id.* at 570, 574.

15. Miguel, *supra* note 12, at 281.

16. Loretta M. Lamar, *To Be an Equitist or Not: A View of Title IX*, 1 SPORTS L.J. 237, 256 (1994); Miguel, *supra* note 12, at 281.

17. 20 U.S.C. § 1687 (1988).

18. *Id.* (emphasis added).

provisions."[19] Athletic departments were, therefore, forced to comply with Title IX's mandates against gender discrimination.

III. Application of Title IX to Intercollegiate Athletics

In 1992, the United States Supreme Court held that a private cause of action exists under Title IX, as well as unrestricted remedies, including damages.[20] The earliest Title IX athletic cases following the Restoration Act involved women seeking injunctive relief to reinstate eliminated female athletic teams. The first substantial case in this area was *Favia v. Indiana University of Pennsylvania.*[21] Following *Favia* were the important *Cohen v. Brown University*[22] and *Roberts v. Colorado State Board of Agriculture*[23] decisions.

A. Favia v. Indiana University of Pennsylvania

In *Favia*, a class action suit was brought on behalf of the women's athletic program participants and all future or potential Indiana University of Pennsylvania (IUP) female students who seek to participate in intercollegiate athletics.[24] The named plaintiffs had been members of the women's gymnastics and field hockey programs, both of which had been eliminated. The plaintiffs sought a preliminary injunction to have the teams reinstated and to prevent IUP from eliminating other women's teams.[25]

The district court made extensive findings of fact. Faced with a budget crisis in 1991, the university administration advised the department of athletics to reduce its budget by $350,000.[26] Accordingly, an announcement was made that the women's gymnastics and field hockey teams as well as the men's soccer and tennis teams would be eliminated beginning with the 1992-93 school year.[27] The district court found that, since 1982, the number of women's teams dropped from ten to seven.[28] Additionally, women received only twenty-one percent of the athletic scholarships awarded by IUP.[29] Finally, and perhaps most telling, despite representing over fifty-five percent of the student population, women comprised less than thirty-eight percent of the athletes.[30] Furthermore, the court stat-

19. Cohen v. Brown Univ., 991 F.2d 888, 894 (1st Cir. 1993) [hereinafter *Cohen II*].
20. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 72 (1992).
21. 812 F. Supp. 578 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993).
22. 991 F.2d 888 (1st Cir. 1993).
23. 998 F.2d 824(10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993).
24. *Favia*, 812 F. Supp. at 579.
25. *Id.*
26. *Id.* at 580.
27. *Id.*
28. *Id.* at 581.
29. *Id.* at 582.
30. *Id.* at 580. Before beginning its analysis with respect to the injunction, the court dispelled any argument that football should be excluded from Title IX's scrutiny. *Id.* at 583. IUP's vice president for student affairs testified that to achieve total equality, the university would have to cut the men's teams to four. *Id.* at 582. Presumably, the vice president was referring to the difficulty of achieving

ed that "Title IX does not provide for any exception to its requirements simply because of a school's financial difficulties."[31]

In ruling on the motion for a preliminary injunction, the court considered: (1) the existence of irreparable harm to the plaintiffs; (2) the existence of irreparable harm to the defendants; (3) the likelihood that plaintiffs would prevail on the merits; and (4) public interest.[32] Irreparable harm to the plaintiffs was found to exist. The court found that competing in undergraduate interscholastic athletics develops self-confidence, a sense of accomplishment, physical and mental well-being, and a healthy attitude that lasts a lifetime; and the loss of such would irreparably harm the plaintiffs.[33] Without discussion, the court found no threat of irreparable harm to the defendant, stating that "[t]he budget, while shrinking, has space for reallocation and cutbacks in other areas."[34]

The probability of the plaintiffs succeeding on the merits was next addressed.[35] The court first stated that the plaintiffs were not required to show the existence of an intent on the part of IUP to discriminate against women.[36] The court then looked to the OCR's Policy Interpretation for guidance, finding that the interpretation is entitled to "great deference."[37] The Policy Interpretation sets forth a three-pronged test for determining a university's compliance with Title IX:

> 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 interests 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.[38]

The court analyzed the first prong, the substantial proportionality test, by looking to the percentage of female athletes compared to female students at IUP. The burden of proof for this prong falls on the plaintiffs.[39] The court found that before the 1991 cuts, over fifty-five percent of the students were women, while

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substantial proportionality of female athletes to the female student body. While the court was sympathetic, it found this unpersuasive. *Id.* at 583.

31. *Id.* at 583.

32. *Id.* (citing Merchant & Evans, Inc. v. Roosevelt Bldg. Prod. Co., 963 F.2d 628 (3d Cir. 1992)).

33. *Id.* at 583.

34. *Id.* at 584.

35. *Id.*

36. *Id.* (citing Haffer v. Temple Univ., 678 F. Supp. 517, 539 (E.D. Pa. 1987)).

37. *Id.* (citing Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

38. *Id.* (citing *Policy Interpretation, supra* note 10, at 71,418).

39. *Id.*

less than thirty-eight percent of the intercollegiate athletes were women.[40] Not only did the cuts serve to further reduce the percentage of female athletes,[41] but the pre-1991 situation was already a Title IX violation.[42]

The court found that the defendants failed the second prong of the test as well, since IUP failed to show a history of expanding athletic opportunities[43] in response to the developing interest of its female students. The court found that although there had been some expansion of women's sports prior to 1991, after 1991 they regressed. The court took additional factors into consideration, finding that there were far fewer athletic expenditures for women than for men,[44] women received a smaller percentage of scholarship funds than their percentage of athletes,[45] and IUP failed to elevate the popular women's soccer club to varsity status.[46]

The court further found that IUP did not meet the full and effective accommodation requirement of the third prong.[47] Although the university honored its scholarship commitments to those athletes whose teams had been eliminated, and offered to assist athletes in transferring schools, that did not fully and effectively accommodate the interests and abilities of female athletes.[48] Both the women's gymnastics team and the field hockey team had plenty of competition, and the testimony of the named plaintiffs established an interest in these sports.[49] Finding that IUP failed to meet any one of the three prongs of the Policy Interpretation, the plaintiffs showed they had a reasonable probability of success on the merits.

Finally, the court held that "[t]he public has a strong interest in the prevention of any violation of constitutional rights."[50] As all factors for a preliminary injunction militated in favor of the plaintiffs, the court issued the injunction.[51]

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40. *Id.* at 584-85. The plaintiffs must demonstrate that there is no substantial proportionality.

41. *Id.* at 585 (the female percentage dropped from 37.77% to 36.51%).

42. *Id.*

43. *Id.* Note that although the court failed to specifically address the "continuing practice" requirement of the second prong, the court's analysis makes it clear that this was indeed considered.

44. *Id.* The court found that women's athletic expenditures in 1991 were $2.75 for each $8.00 spent on men's programs. *Id.*

45. *Id.* Women received only 21.46% of IUP's athletic scholarships compared to 35% of women participating. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* However, the court did not state what those constitutional rights are, as it did not reach the plaintiffs' Equal Protection claim. Title IX is not in the Constitution, so it is not clear to which Constitutional violation the court is referring.

51. *Id.* There was later a motion by IUP to modify the injunction, which was denied by the Third Circuit in *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993).

B. Cohen v. Brown University[52]

In this self-proclaimed "watershed case," the defendant, Brown University, appealed from the district court's issuance of a preliminary injunction ordering the reinstatement of Brown's women's gymnastics and volleyball programs to varsity status pending the resolution of the plaintiffs' Title IX claim.[53] The original suit was a class action brought on behalf of "all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown."[54]

The court first went into the factual background of the case.[55] In the spring of 1991, Brown announced its plan to drop women's volleyball and gymnastics, as well as men's golf and water polo, due to a "financial bind."[56] Brown's student body was comprised of 48% women, yet before the cuts only 36.7% of the varsity athletes were women.[57] By elimination of the four sports, $62,028 was taken from the women's athletic budget while the men's athletic budget lost only $15,795.[58] After finding that the plaintiffs had standing,[59] the court discussed the history of Title IX.[60]

The court discussed the statutory framework of Title IX, stating that Title IX "does not mandate strict numerical equality between the gender balance of a college's athletic program and the gender balance of its student body."[61] A court "may not find a violation *solely* because there is a disparity between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand."[62] However, evidence of a disparity is clearly relevant, because statistical evidence of disparate impact must be shown by the plaintiffs[63] as well as further evidence of discrimination.[64]

The court next conducted an in-depth analysis of Title IX's regulatory frame-

52. *Cohen II*, 991 F.2d 888 (1st Cir. 1993).

53. *Id.* at 891. *See also* Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992) [hereinafter *Cohen I*].

54. *Cohen II*, 991 F.2d at 893 (quoting *Cohen I*, 809 F. Supp. at 979).

55. *Id.* at 892.

56. *Id.*

57. *Id.* This figure dropped slightly to 36.6% after the cuts.

58. *Id.*

59. *Id.* at 892-93 (citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 65-66 (1992) (recognizing implied private right of action under Title IX)). The court found that the plaintiffs had an implied cause of action under Title IX and that the plaintiffs need not exhaust administrative remedies prior to a Title IX suit. *Id.* (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 687, n.8 (1979)).

60. *Id.* at 893-94.

61. *Id.* at 894 (quoting 20 U.S.C. § 1681(a) (1988)).

62. *Id.* at 895 (construing 20 U.S.C. § 1681(b)).

63. *Id.* This requirement is so the plaintiff might pass the first prong of the *Policy Interpretation's* three-prong test. *See Policy Interpretation*, *supra* note 10, at 71,418.

64. *Cohen II*, 991 F.2d at 895.

work.[65] First, the Department of Education's (DED) implementing regulations were examined. The court reiterated the regulations' stance that gender-segregated teams are acceptable within an athletic program as long as the sport the team competes in is a contact sport or both genders are offered comparable teams in the sport.[66] Regardless of whether individual teams are segregated by gender, the institution must provide equal opportunities for both sexes.[67] The regulations provide ten factors for assessing compliance, however only the first factor was analyzed: "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes ...."[68] This first factor was the only factor relied upon by the district court in issuing its preliminary injunction.[69] In determining compliance with this factor, the three-part test spelled out in the Policy Interpretation is looked to[70] and given substantial deference.[71]

The court went through the three-prong test analyzing each prong in the abstract,[72] then later addressing each prong with case-specific analysis.[73] The first prong of the Policy Interpretation is the substantial proportionality test. If athletic opportunities are in numbers substantially proportionate to the gender composition of the student body, the institution will be on "the sunny side of Title IX" and provided a "safe harbor."[74] The court found that the burden of proof for

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65. *Id.*

66. *Id.* at 896 (citing 34 C.F.R. § 106.41(b) (1992)).

67. *Id.*

68. *Id.* (quoting 34 C.F.R. § 106.41(c)(1) (1992)). This regulation also provides that unequal expenditures for members of each sex or for male and female teams do not constitute noncompliance with this section, but the failure to provide necessary funds for teams of one sex may be considered as a factor in assessing equality of opportunity for members of each sex. The other nine factors of section 106.41(c) are as follows:

(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.

34 C.F.R. § 106.41(c) (1994).

69. *Cohen II*, 991 F.2d at 896. *See also Cohen I*, 809 F. Supp. 978, 989 (D.R.I. 1992) ("hold[ing] that a finding of violation under Title IX may solely be limited to § 106.41(c)(1)").

70. *Cohen II*, 991 F.2d at 896-97. *See Cohen I*, 809 F. Supp. at 989 (discussing *Policy Interpretation*, *supra* note 10, §§ 71,413-423). *See also supra* text accompanying note 38, for text of *Policy Interpretation*. Note that prong three of the *Policy Interpretation* is very similar to the language used in the first factor of the DED's implementing regulations.

71. *Cohen II*, 991 F.2d at 896-97.

72. *Id.* at 897-98.

73. *Id.* at 903-04 (addressing the likelihood of success on the merits with respect to the preliminary injunction).

74. *Id.* at 897-98.

this first prong rests on the plaintiff.[75] The findings of the district court were met with approval, and the First Circuit held that Brown "did not meet — or even closely approach — the 'substantial proportionality' threshold because it offered too few varsity opportunities for women."[76]

If the institution cannot meet the first prong of the Policy Interpretation's test, the second prong requires that the institution show it is "continually expanding athletic opportunities in an ongoing effort to meet the needs of the underrepresented gender, and [it] persists in this approach as interest and ability levels in its student body ... [increase]."[77] The court found the burden of proof for this prong rests with the defendant institution, as it is an affirmative defense.[78] The court recognized that Brown made great strides in the expansion of its women's athletic program over a six year period in the 1970s. However, the court also found that there was no improvement for at least twice that long and that "[t]he very length of this hiatus suggests something far short of a *continuing* practice of program expansion."[79]

Finally, if the institution does not meet either of the first two prongs of the Policy Interpretation, the third prong's full and effective accommodation standard is considered. Title IX is deemed to have been complied with if "it can be demonstrated that the interests and abilities of ... [the underrepresented] sex have been fully and effectively accommodated by the present program."[80] The court stated that if a school has a student body with one sex demonstrably less interested in athletics, teams need not be created for, nor money spent on, these disinterested students.[81] However, this prong sets a high standard, because "it demands not merely some accommodation, but full and effective accommodation."[82] This can be satisfied if the institution has ensured participatory opportunities to the extent that there is enough interest and ability to "sustain a viable team and a reasonable expectation of intercollegiate competition for that team ...."[83]

The court rejected Brown's argument that this standard can be met by allocating "athletic opportunities to women *in accordance with the ratio of interested and able women to interested and able men*,"[84] disregarding the number of unaccommodated women or their proportion of the student body.[85] The court found that such an argument effectively reads the "full" out of "full and effective" accommodation.[86] It was the court's understanding that the purpose of the

75. *Id.* at 901.
76. *Id.* at 903 (citing *Cohen I*, 809 F. Supp. 978, 991 (D.R.I. 1992).
77. *Id.* at 898.
78. *Id.* at 902.
79. *Id.*
80. *Id.* at 897 (citing *Policy Interpretation, supra* note 10, at 71,418).
81. *Cohen II*, 991 F.2d at 898.
82. *Id.*
83. *Id.* (quoting *Policy Interpretation, supra* note 10, at 71,418).
84. *Cohen II*, 991 F.2d at 899.
85. *Id.*
86. *Id.* The court gives an example of why Brown's view is incorrect. Suppose a university has

third prong is to determine if a student has been excluded from participation on the basis of sex.[87]

In contrast to the court's approach in *Favia*[88] and the lower court in *Cohen I*,[89] the First Circuit found that the burden of proof with respect to the third prong rests with the plaintiffs.[90] The court recognized that this burden may prove difficult for a plaintiff to overcome in cases where there is a lawsuit to force a university to create a team for the underrepresented plaintiffs or to upgrade the status of a club team.[91] However, where plaintiffs, as here, are seeking to prevent the elimination of already existing teams, there is little question as to the existence of interest and ability of the underrepresented plaintiffs, and the removal of their teams would not constitute full and effective accommodation.[92] Likewise, the court found that the other factors for issuing a preliminary injunction weighed in favor of the plaintiffs.[93] Therefore, the court found that the plaintiffs had a high probability of success on the merits.[94]

The court also addressed the defendants' constitutional challenge.[95] Brown asserted that the third prong of the Policy Interpretation, the full and effective accommodation requirement, violates the Fifth Amendment's Equal Protection Clause such that it disadvantages male athletes while benefitting only women.[96] The court first found that the Policy Interpretation does not create a gender classification slanted in favor of women.[97] The court went on to state that even if it did create such a classification, "[i]t is clear that Congress has broad powers under the Fifth Amendment to remedy past discrimination."[98]

Finally, the court quickly dismissed Brown's assertion that the district court's preliminary injunction was unconstitutional "affirmative action," violating the Equal Protection Clause.[99] The court found that where there is no contrary leg-

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1,000 men and 1,000 women. If 500 men and 250 women are interested and able to participate in athletics, there is a two to one ratio of interested and able men to interested and able women. Under Brown's view, if the athletic department provided 100 athletic positions for men and only 50 for women, there would be no Title IX violation. This leaves 200 women with unmet interests. *Id.*

87. *Id.* at 899-900 (construing 20 U.S.C. § 1681(a)).

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

89. *Cohen I*, 809 F. Supp. 978 (D.R.I. 1992).

90. *Cohen II*, 991 F.2d at 900, 901-02. *Compare Favia*, 812 F. Supp. at 584; *Cohen I*, 809 F. Supp. at 997.

91. *Cohen II*, 991 F.2d at 904.

92. *Id.* Although the lower court erroneously placed this burden of proof on the defendants, its findings of fact indicated that the plaintiffs had nonetheless successfully carried the burden of proof. *See Cohen I*, 809 F. Supp. at 992.

93. *Cohen II*, 991 F.2d at 906. The other factors were the potential for irreparable harm to either party; the balance of the potential harms between the parties; and the impact on public policy. *Id.* at 902.

94. *Id.* at 904.

95. *Id.* at 900.

96. *Id.*

97. *Id.*

98. *Id.* at 901 (citing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 565-66 (1990); Califano v. Webster, 430 U.S. 313, 317 (1977)).

99. *Id.*

islative directive, "the federal judiciary possesses the power to grant *any* appropriate relief on a cause of action appropriately brought pursuant to a federal statute."[100] Therefore, the preliminary injunction was affirmed.[101]

C. *Roberts v. Colorado State Board of Agriculture*[102]

The plaintiffs in this case were Colorado State University (CSU) students and former members of the fast pitch softball intercollegiate athletic team.[103] The plaintiffs sued after CSU announced that it was discontinuing the women's softball team.[104] This case was an appeal by the Colorado State Board of Agriculture (SBA) of the district court's decision that the SBA violated Title IX and its order requiring the SBA to reinstate the women's fast pitch softball team at CSU.[105]

The Tenth Circuit began its Title IX analysis by examining the DED's implementing regulations, finding that Title IX may be violated "by failing to accommodate effectively the interests and abilities of the student athletes of both sexes" — the first of the ten factors listed in the regulations.[106] The court then reviewed the three factors of the OCR's Policy Interpretation.[107] It found that compliance with effective accommodation[108] is assessed in three general areas:

> a. The determination of athletic interests and abilities of students;
> b. The selection of sports offered; and
> c. The levels of competition available including the opportunity for team competition.[109]

The court found that the plaintiffs' claim involved their opportunity to participate in team competition.[110] The court then followed the same general analysis as used by the *Cohen II* court in determining the first prong of the three-part Policy Interpretation — substantial proportionality.[111] The disparity between en-

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100. *Id.* (citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 72 (1992)). The court also stated that because Title IX is compatible with the Equal Protection Clause, Brown could not possibly prevail on its constitutional claim. *Id.* at 901, n.19.

101. *Id.* at 907.

102. 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 589 (1993). Note that Colorado State Board of Agriculture is defendant "in its capacity as the entity charged with the general control and supervision of Colorado State University." *Id.*

103. *Id.* at 824. Note that this is not a class action suit, as were *Favia* and *Cohen II*. *See Favia*, 812 F. Supp. 578, 579 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993); *Cohen II*, 991 F.2d at 888.

104. *Roberts*, 998 F.2d at 826.

105. *Id.*

106. *Id.* at 828 (citing 34 C.F.R. § 106.41(c) (1993)); *see also Cohen II*, 991 F.2d at 897-98.

107. *Roberts*, 998 F.2d at 828-29. *See Policy Interpretation*, *supra* note 10, at 71,418.

108. Note that although the court purports to be referring to the effective accommodation section of the *Policy Interpretation*, which would be the third prong, it seems more likely that the effective accommodation requirement to which it refers is actually that of the DED's implementing regulations. *See* 34 C.F.R. § 106.41(c)(1) (1994); *supra* text accompanying note 68.

109. *Roberts*, 998 F.2d at 828 (quoting *Policy Interpretation*, *supra* note 10, at 71,417).

110. *Roberts*, 998 F.2d at 828.

111. *Id.* at 828-29.

rollment and athletic participation for women at CSU was found to be ten and a half percent.[112] The defendant argued that ten and a half percent is substantially proportionate as a matter of law.[113] The court then suggested that substantial proportionality requires a "fairly close relationship between athletic participation and undergraduate enrollment."[114] A discrepancy of ten and a half percent, therefore, is not substantially proportionate.[115]

The court then analyzed the second prong of the Policy Interpretation, requiring that the defendants make a showing of a history and continuing practice of expansion in women's athletics.[116] The court found that this prong may not be met by a showing that the relative percentages of women participating in athletics have increased through making cuts in both men's and women's programs.[117] Institutions in financial difficulty can still comply with Title IX "by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender."[118] The court reasoned that such a reduction, while not complying with the second prong, may be used to comply with the first prong if the reductions result in substantially proportionate participation rates with respect to the undergraduate population.[119] The fact that women's participation opportunities at CSU declined by thirty-four percent during the 1980s while men's opportunities declined by only twenty percent shows that there has not been a continuing practice of expansion of women's athletics at CSU, and therefore the defendants failed the second prong of the test.[120]

The court analyzed the third prong of the Policy Interpretation next, beginning with a finding that the district court improperly placed the burden of proof on the defendant.[121] The plaintiffs must show they have been "'excluded from participation in, [or] denied the benefits of' an athletic program 'on the basis of sex.'"[122] The court found this to be the "heart of the controversy."[123] Since the plaintiffs were members of a team that had played a competitive schedule as recently as the spring of the previous year, and such team had been eliminated

112. *Id.* at 829.

113. *Id.*

114. *Id.* at 830 (citing Title IX Athletics Investigator's Manual 7 (1990) of the OCR, DED at 24 [hereinafter *Investigator's Manual*]).

115. *Id.* (citing *Cohen I*, 809 F. Supp. 978, 991 (D.R.I. 1992) (finding disparity of 11.6% is not substantially proportionate)).

116. *Id.*

117. *Id.*

118. *Id.* at 830 n.9 (quoting *Cohen II*, 991 F.2d 888, 898-99 n.15 (1st Cir. 1993)).

119. *Id.* at 830.

120. *Id.* at 830.

121. *Id.* at 831.

122. *Id.* (quoting 20 U.S.C. § 1681(a)). Even if the plaintiffs prove there has been no effective accommodation, the institution may still refuse to upgrade or create an intercollegiate team if competition for that team in the institution's normal competitive region is not a reasonable expectation. *Id.* (citing *Policy Interpretation, supra* note 10, at 71,418). This exception to the effective accommodation requirement is only applicable when a university sponsors a non-contact sport for one sex and not the other. *See Policy Interpretation, supra* note 10, at 71,418.

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

by CSU, the requirement of full and effective accommodation of interests had not been met.[124] Therefore, the defendants failed on all three prongs of the Policy Interpretation, and thus the plaintiffs prevailed on their Title IX claim.

The court next addressed the relief granted by the lower court.[125] It concluded that the lower court's equitable injunctive remedy was appropriate, because "monetary relief alone [wa]s inadequate"[126] to remedy CSU's continuing violation of Title IX which deprived the plaintiffs of the opportunity to participate in varsity softball.[127] As a Title IX violation was found by the court, the district court's decision was affirmed, with the injunction reversed only to the extent that it required a Fall 1993 exhibition schedule.[128]

D. Summary

The application and interpretation of Title IX is fairly straightforward in lawsuits brought by female plaintiffs. The court will first determine whether one of three general areas is applicable to an effective accommodation analysis. The court will look at the determination of athletic interests and abilities of students, the selection of sports offered, and the levels of competition available.[129] If one of these areas is applicable, the court then looks to see if there has been effective accommodation pursuant to the DED's implementing regulations.[130] In determining this, courts have looked to the three-prong analysis of the Policy Interpretation.[131] The plaintiff must prove there is no substantial proportionality[132] and no full and effective accommodation to establish a Title IX violation.[133] The

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124. *Id.* at 832.

125. *Id.* at 833.

126. *Id.*

127. *Id.* However, the court agreed with the defendant's contention that the lower court overstepped its authority in demanding that the softball team play a Fall 1993 exhibition season, which had never been a regular practice at CSU. *Id.* at 835. The defendant also argued that specifically requiring CSU to maintain a softball team went beyond that which is necessary to correct a Title IX violation, and resulted in a requirement that CSU maintain a softball team in perpetuity. *Id.* at 833. The court rejected this argument, as this was not a class action. *Id.*

If this had been a class action, the order requiring CSU to maintain a women's softball team would be for the benefit of the plaintiffs. This would include all future female CSU students who seek to participate in intercollegiate softball. In this case, the requirement to reinstate the women's softball team was individual relief granted to the plaintiffs and is appropriate only for them. *Id.* at 833, 834. Once all the plaintiffs in this case have left the school, the defendant is free to return to court and seek to have the injunction dissolved. *Id.* at 834.

Note that the court made a disturbing suggestion in *dictum* that had this indeed been a class action, an appropriate remedy might have been to enjoin all men's varsity competition at CSU until defendant proposed a plan that would bring CSU into compliance with Title IX. *Id.* at 833.

128. *Id.* at 835.

129. *Id.* at 828. *See supra* text accompanying note 109.

130. *Id.* (citing 34 C.F.R. § 106.41(c) (1993)); *see also Cohen II*, 991 F.2d 888, 897-98 (1st Cir. 1993).

131. *Roberts*, 998 F.2d at 828.

132. *Id.* at 829 n.5. *See also Cohen II*, 991 F.2d 888, 901 (1st Cir. 1993); Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 584 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

133. *Roberts*, 998 F.2d at 831. *See also Cohen II*, 991 F.2d at 902. *Contra Favia*, 812 F. Supp. at

defendant university may use the second prong of the Policy Interpretation as an affirmative defense if it demonstrates a history and continuing practice of program expansion for women.[134]

IV. THE GONYO AND KELLEY DECISIONS

Both the *Gonyo*[135] and *Kelley*[136] decisions depart from the standard Title IX cases in that male student athletes, rather than female student athletes, alleged gender discrimination.[137] In both cases, the male plaintiffs attempted to use Title IX. However, the courts have not followed the in-depth analysis involving the Policy Interpretation on which the prior case law relied. The alternate analyses used by the two courts follows, with an analysis of the decisions.

A. Gonyo v. Drake University[138]

This case was a class action lawsuit, in which the named plaintiffs were full-time students and collegiate wrestlers at Drake University.[139] The plaintiffs asserted a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, breach of contract, and violation of Title IX.[140] In March of 1993, Drake University made a public announcement that it would discontinue its wrestling program due to financial concerns, discontinuation of wrestling programs by other colleges, the fact that its athletic conference did not sponsor wrestling as a sport, and lack of support by students and the community.[141]

The District Court of the Southern District of Iowa began its analysis by noting the number of other schools that had dropped wrestling from their athletic programs.[142] The court then noted that only 24.7% of the athletes at Drake were women, whereas women comprised 57.2% of the student population.[143] It then noted that fifty-six percent of the athletic budget was spent on men's sports compared to only forty-four percent for women's sports.[144]

An analysis for preliminary injunctions followed. The first factor analyzed was the threat of irreparable harm. The court found that Title IX "does not establish a right to participate in any particular sport at one's college, and there is no constitutional right to participate in intercollegiate or high school athletics."[145]

584.

134. *Roberts*, 998 F.2d at 830. *See also Cohen II*, 991 F.2d at 902; *Favia*, 812 F. Supp. at 584.

135. Gonyo v. Drake Univ., 837 F. Supp. 989 (S.D. Iowa 1993).

136. Kelley v. Board of Trustees, Univ. of Ill., 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995).

137. *Gonyo*, 837 F. Supp. at 990; *Kelley*, 35 F.3d at 267.

138. 837 F. Supp. 989 (S.D. Iowa 1993).

139. *Id.* at 990.

140. *Id.*

141. *Id.* at 992.

142. *Id.*

143. *Id.*

144. *Id.* at 993.

145. *Id.* at 994 (citing *In re* United States *ex rel.* Missouri St. High Sch. Activities Ass'n, 682 F.2d

Therefore, the harm to the plaintiffs resulting from the district court's refusal to issue the preliminary injunction was not a harm to their legal rights.[146]

The court then found that the harm the defendants might suffer as a result of an injunction outweighed any harm the plaintiffs might suffer from the lack of an injunction. This was based on its finding that putting together a wrestling program for the 1993-94 season could only be accomplished at a considerable budgetary and administrative expense.[147]

The probability of success on the merits was the next issue addressed. The court quickly dismissed the Equal Protection claim by stating that the defendants were not acting under the color of state law.[148] The breach of contract claim was dismissed because Drake had continued to honor the financial portion of its scholarship commitments to the named plaintiffs.[149] The court then turned to the Title IX claim. It found that although more scholarship dollars went to women's athletics than men's athletics, "injunctive relief might well undermine the underlying purpose of Title IX, which is to protect the class for whose benefit the statute was enacted."[150] The court did not undergo an analysis involving the Policy Interpretation as did the previous Title IX cases, yet it concluded that the plaintiffs were unlikely to succeed on the merits.[151]

Finally, the court held, without analysis, that the public interest "weighs in favor of permitting colleges and universities to chart their own course in providing athletic opportunities without judicial interference or oversight, absent a clear showing that they are in violation of the law."[152] Therefore, since there was no threat of irreparable harm to the plaintiffs, there was a threat of harm to the defendants if the injunction was issued, the plaintiffs were unlikely to succeed on the merits, and public policy weighed in favor of the defendants, the court denied the motion for a preliminary injunction.[153]

B. Kelley v. Board of Trustees, University of Illinois[154]

The plaintiffs were members of the University of Illinois men's swimming team.[155] They sought damages as well as an injunction,[156] asserting that the defendants, the Board of Trustees of the University of Illinois, violated Title IX

147, 153 n.8 (8th Cir. 1982)).

146. *Id.*

147. *Id.*

148. *Id.* at 994. Note that Drake University is a private educational institution organized and existing as a non-profit corporation. *Id.* at 991.

149. *Id.* at 994.

150. *Id.* at 996. In addition, the court's refusal to issue an injunction was bolstered by the fact that nearly three-fourths of the athletes were males, despite their comprising a minority of the student body. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995).

155. *Id.* at 267.

156. *Id.*

and the Equal Protection Clause of the Fourteenth Amendment.[157] In 1982, the Office of Civil Rights (OCR) determined that University of Illinois (U. of I.) had denied its female students equal athletic opportunities.[158] A decade later, female participation was still disproportionate to the percentage of females in the student body. Women comprised 44% of the student body, but only 23.4% of the school's intercollegiate athletes in 1993. Faced with this knowledge, as well as an athletic budget deficit, the men's swimming program was dropped. Three other teams were also eliminated: men's fencing, men's diving, and women's diving.[159]

The court began its Title IX analysis by mentioning the effective accommodation requirement of the implementing regulations.[160] The court then listed the three prongs of the Policy Interpretation. It stated that there is a presumption that effective accommodation is satisfied if the first prong, substantial proportionality, has been satisfied.[161] The court went on to find that U. of I. could "eliminate the men's swimming program without violating Title IX since, even after eliminating the program, men's participation in athletics would continue to be more than substantially proportionate to their presence in the University's student body."[162] Thus, the court appears to be stating that U. of I. is in compliance with the first prong of the Policy Interpretation with respect to male athletes and, therefore, not subject to a Title IX attack by the plaintiffs.

The plaintiffs contended that the applicable rules allow U. of I. to improve its statistics without improving the opportunities for women, which plaintiffs suggest is unconstitutional.[163] However, the court found that the purpose of Title IX is not that athletic opportunities available to women increase, but to prohibit educational institutions from discriminating on the basis of sex.[164]

C. Analysis

The *Gonyo* and *Kelley* cases present a dilemma. As a result of Title IX, many male athletes will lose opportunities to participate in intercollegiate athletics.[165] However, without Title IX, many female athletes would continue to be denied

157. *Id.*
158. *Id.* at 269.
159. *Id.*
160. *Id.* at 268.
161. *Id.*
162. *Id.* at 270.
163. *Id.* at 272.
164. *Id. See also Cohen II*, 991 F.2d 888, 898-99 (1st Cir. 1993).
165. *See Gender Equity in Intercollegiate Athletics: Hearing on Title IX Before the Subcomm. on Postsecondary Education, Training and Lifelong Learning of the House Comm. on Economic and Educational Opportunities*, 104th Cong., 1st Sess. 1995 WL 269768 (F.D.C.H.) (testimony of T.J. Kerr, California State University of Bakersfield Wrestling Coach, on behalf of the National Wrestling Coaches Association). "All male sports programs are vulnerable in that approximately half of the nearly 200,000 of the male college athletes must be eliminated to reach the gender quota .... Male gymnastics is almost extinct at the college level. Wrestling has relatively recently lost over 100 programs and may lose as many as 20 programs this year." *Id.*

similar opportunities. The lower court in *Kelley* stated it aptly:

> Plaintiffs' case has emotional appeal because it graphically demonstrates the inherent unfairness of decisions which classify and isolate one gender for burdens that the other gender is not required to bear. Certainly it must be acknowledged that the members of the men's swimming team are innocent victims of Title IX's benevolent attempt to remedy the effects of an historical deemphasis on athletic opportunities for women. The [c]ourt sincerely sympathizes with the personal loss felt by members of the men's swimming team while recognizing the salutary effects of Title IX for women athletes. Women have paid and continue to pay for discriminatory actions and attitudes which have historically excluded them from the athletic opportunities given to men, as represented by current statistical disparities among athletes in universities and colleges across the country. These are the disparities Title IX, and this decision, seek to remedy.[166]

Nevertheless, there are apparent flaws in the analyses of the *Gonyo* and *Kelley* decisions. The *Gonyo* decision is the more flawed of the two cases, assuming the validity of prior Title IX decisions. In the court's analysis regarding the preliminary injunction, it found no threat of irreparable harm to the plaintiffs, stating that their legal rights had not been harmed.[167] However, in *Favia*, the court found that by cutting women's teams, female athletes were threatened with irreparable harm, because participating in intercollegiate athletics develops "skill, self-confidence, . . . a sense of accomplishment, increase[s] their physical and mental well-being, and develop[s] a lifelong healthy attitude."[168] Surely these benefits extend to male athletes as well. Therefore, the elimination of the men's wrestling team at Drake University does produce a threat of irreparable harm to the plaintiffs.

Secondly, the court found that the harm to Drake University if the injunction was issued outweighed the harm to the plaintiffs if the injunction was denied.[169] As a basis for this conclusion, the court stated that requiring Drake to maintain the wrestling program would result in "considerable budgetary and administrative cost[s] to Drake."[170] This same argument was used without success by the plaintiffs in *Favia*.[171] To allow the reinstatement of women's sports, the court recognized that cutbacks in other areas may be necessary.[172] The fact that the *Gonyo* case involved the elimination of men's sports does not invalidate the holding that budgetary constraints are not enough to find that the harm to the university outweighs the harm to the plaintiffs.[173]

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166. Kelley v. Board of Trustees, Univ. of Ill., 832 F. Supp. 237, 244 (C.D. Ill. 1993).

167. Gonyo v. Drake Univ., 837 F. Supp. 989, 994 (S.D. Iowa 1993).

168. Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 583 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

169. *Gonyo*, 837 F. Supp. at 994.

170. *Id.*

171. *Favia*, 812 F. Supp. at 584. *See also Cohen II*, 991 F.2d 888, 905 (1st Cir. 1993).

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

173. Note that an argument could be made that cutting back other programs in *Favia* may have included cutting back men's programs. Here, there could not be any cutbacks of female programs without violating Title IX. However, surely there are other areas within the university where cuts can

When the *Gonyo* court analyzed the probability of success on the merits, it failed to use the traditional Title IX analysis.[174] If it had, it would have looked to see if there was an effective accommodation of the interests and abilities of both sexes of student athletes.[175] Then, the court would have addressed the three-pronged Policy Interpretation.[176]

The plaintiffs would have the burden of proving a lack of substantial proportionality under the first prong.[177] A literal reading of the Policy Interpretation indicates that Drake would fail this portion of the test, because the level of participation opportunities for males and females was not substantially proportional to their campus enrollments.[178] However, it is appropriate at this point to look to the underlying purpose of Title IX. The *Gonyo* court stated that the underlying purpose of Title IX is to "protect the class for whose benefit the statute was enacted."[179] It follows that a court should not allow male athletes to assert that a university has failed the first prong of the Policy Interpretation when the male athletes are not the underrepresented gender. However, if the court were to ignore the purpose of Title IX, reading the first prong literally, it would find that the university had not satisfied substantial proportionality.[180] The analysis would then continue, looking to the second and third prongs of the Policy Interpretation.[181]

The defendants have the burden of proving the second prong[182] — showing a history and continuing practice of program expansion which is responsive to the developing interests and abilities of the underrepresented gender.[183] The plaintiffs would argue that they are the underrepresented gender. In this case, there is no evidence of program expansion, only the elimination of the wrestling program. A literal reading of the second prong would result in Drake's failure to show a history and continuing practice of program expansion. However, there is some question as to whether plaintiffs may characterize themselves as the "underrepresented gender" when all statistics indicate they are overrepresented.[184] If this is the case, the second and third prongs, which provide standards for the underrepresented gender, would not apply as remedies to

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be made.

174. Gonyo v. Drake Univ., 837 F. Supp. 989, 994-96 (S.D. Iowa 1993).

175. *See* 34 C.F.R. § 106.41(c)(1) (1994); *supra* text accompanying note 68.

176. *See supra* text accompanying note 38.

177. *Cohen II*, 991 F.2d 888, 901 (1st Cir. 1993). *See also* Roberts v. Colorado St. Bd. of Agric., 998 F.2d 824, 829 n.5 (10th Cir.), *cert. denied*, 114 S. Ct. 589 (1993); Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 584 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

178. *See supra* text accompanying notes 143-44.

179. *Gonyo*, 837 F. Supp. at 994.

180. Women comprised 57.2% of the overall student population compared to 24.7% of the athletes at Drake. *Gonyo*, 837 F. Supp. at 992.

181. *Policy Interpretation*, *supra* note 10, at 71,418. *See also supra* text accompanying note 38.

182. *Cohen II*, 991 F.2d 888, 902 (1st Cir. 1993). *See also* Roberts v. Colorado Bd. of Agric., 998 F.2d 824, 830 (10th Cir.), *cert. denied*, 114 S. Ct. 589 (1993); Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 584 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

183. *Policy Interpretation*, *supra* note 10, at 71,418. *See also supra* text accompanying note 38.

184. *See supra* text accompanying notes 143-44.

the plaintiffs.[185] Any other reading of the Policy Interpretation would run counter to the purposes of Title IX. Therefore, they would be unable to prove a violation of Title IX.[186]

For the sake of argument, the third prong will be analyzed. If there is no substantial proportionality or history and continuing practice of program expansion, and the underrepresented sex can show that its interests and abilities have not been fully and effectively accommodated, the university is in violation of Title IX.[187] Since male athletes are not the underrepresented sex, they cannot prove this prong. If the plaintiffs' only evidence of a Title IX violation is a statistical disparity, without some further evidence of discrimination as evidenced by the standards set forth in the Policy Interpretation, the plaintiffs' case will fail.[188] Therefore, ultimately, the court in *Gonyo* reached the correct decision in denying the plaintiffs' motion for a preliminary injunction.

The *Kelley* decision failed to specifically address each prong of the Policy Interpretation, however it appears to have held that U. of I. was in compliance with the first prong's substantial proportionality requirement, indicating that the court did not employ a literal reading of the requirement. It found that men's participation in athletics was "more than substantially proportionate" to their percentage of the student body,[189] although the Policy Interpretation discusses the requirement of substantial proportionality of both sexes. The court did not need to address the other two prongs of the Policy Interpretation, since there is a presumption of compliance with Title IX when there has been substantial proportionality.[190] Therefore, it appears that the court found the second and third prongs inapplicable, although there was no statement to this effect.

The *Kelley* court emphasized that Title IX does not exist "to ensure that the athletic opportunities available to women increase" but to prohibit universities from discriminating on the basis of sex.[191] Therefore, where it is necessary that overall athletic opportunities decrease for financial or other reasons, "the actual opportunities available to the underrepresented gender" may not.[192] It does not

185. *Policy Interpretation*, *supra* note 10, at 71,418. The issue of standing could become relevant at this time. May male athletes be heard to complain for the underrepresentation of female athletes?

186. This assumes that the *Policy Interpretation* is the correct standard for a court to apply. Some argue that the *Policy Interpretation* should not be used by courts in Title IX cases by student athletes against universities. *See* Walter B. Connolly, Jr. & Jeffrey D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L.R. 845 (1994).

187. *Policy Interpretation*, *supra* note 10, at 71,418. *See also supra* text accompanying note 38. Again, this assumes that the *Policy Interpretation* is the correct standard for a court to apply. *See supra* note 186.

188. *See generally Cohen II*, 991 F.2d 888, 895-900 (1st Cir. 1993).

189. Kelley v. Board of Trustees, Univ. of Ill., 35 F.3d 265, 270 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995).

190. *Cohen II*, 991 F.2d at 898.

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

192. *Id.* (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982) ("[A] gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.")).

seem logical that a university can improve the opportunities available for women by keeping the number of opportunities the same, while decreasing opportunities for men. However, Title IX decisions have allowed this — "a university ... can also bring itself into compliance ... by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender ...."[193] One reason the courts and Congress may find this acceptable is that by eliminating men's sports, more money may be spent on women's sports. While this may not increase the number of opportunities for women, it could increase the quality of their opportunities.

The OCR has recently issued its Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test.[194] This Clarification states that the

> OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex.[195]

However, this has always been the OCR's position, and the courts have continued to find that elimination of men's sports is one way to bring a university into compliance with Title IX.

Perhaps the problem comes from a flawed analysis by the courts of the substantial proportionality test in traditional Title IX cases with female plaintiffs. It has been suggested that rather than requiring a showing that the gender percentages of the student athletes are substantially proportionate to the student body's gender percentages, a comparison based on the "population of skilled and interested students" would be more proper.[196]

Additionally, the third prong of the OCR's three-pronged Policy Interpretation has been improperly applied. The third prong enables a school to bring itself into compliance with Title IX if it can demonstrate the full and effective accommodation of the interests and abilities of the underrepresented sex. Rather than looking to the population of the student body, the population of interested college-bound high-school athletes as well as intramural and club sports participants should be considered, because "[t]he best evidence we have of the relative interests of men and women in sports are participation rates in high school athletics and university club and intramural athletics."[197]

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193. *Cohen II*, 991 F.2d at 898-99, n.15.

194. OFFICE OF CIVIL RIGHTS, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (1995) (preliminary draft subject to change after comment period).

195. *Id.* at 6.

196. Walter B. Connolly, Jr. & Jeffrey D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L.R. 845 (1994). *Contra Cohen II*, 991 F.2d 888, 899 (1st Cir. 1993).

197. Connolly, *supra* note 196, at 881. *But see Cohen II*, 991 F.2d at 900 (finding that this type of inquiry "invites thorny questions").

V. CONCLUSION

It may be time for a legislative amendment to Title IX, or a change in its interpretation. Title IX *should* exist to ensure that the athletic opportunities available to women increase.[198] Certainly, if an institution has the financial strength, the best way to currently comply with Title IX is to continue adding women's sports until female participation is proportional to the student body. If a school does not have this financial strength, it may currently eliminate men's programs while keeping women's programs at status quo to bring itself into compliance with Title IX.[199] Although this is allowed despite the OCR's stance that it should not be, it does not benefit anyone, other than by possibly making more money available for women's sports. If a school wishes to eliminate men's programs to statistically comply with Title IX, the best program to eliminate is its football program, because football has such a large number of male participants.[200] However, football is responsible for funding many other non-revenue sports.[201] Therefore, if, due to a lack of financial strength, an institution is to eliminate men's programs to bring itself into compliance with Title IX, it is unlikely to eliminate its football program. Yet, the number of male participants in the football program are taken into consideration in a Title IX substantial proportionality analysis.

The retention of the football program, due to funding considerations, may be wise in order to continue non-revenue sports. However, the retention of this revenue producing sport helps prevent a school from meeting the substantial proportionality test. Some have suggested an amendment to Title IX, whereby football would be excluded.[202] Proponents of Title IX will argue that an institution may bring itself into compliance with Title IX through the second prong of the Policy Interpretation — by showing of a history and continuing practice of expansion in women's athletics.[203] Thus, the argument is that a financially strapped institution could use football's revenue to expand women's sports, while decreasing other men's sports. Should this be the goal of gender equity, to gradually eliminate many men's sports with the exception of football? It is unfortunate that men intending to participate in sports other than football, basketball, or baseball may find their collegiate opportunities decreasing rapidly as a result of Title IX or other considerations.[204]

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198. *Contra* Kelley v. Board of Trustees, Univ. of Ill., 35 F.3d 165, 272 (7th Cir. 1994), *cert denied*, 115 S. Ct. 938 (1995).

199. *See Cohen II*, 991 F.2d at 898-99 n.15.

200. Some football programs provide as many as 85 male athletic scholarships. *See* Toni Ginnetti, *Fed. Ruling Likely to Spur Debate Over Sex Equity: Case at Brown Calls for More Chances for Female Athletes*, CHICAGO SUN TIMES, March 30, 1995, at 95.

201. *Id.* (quoting Rick Taylor, Northwestern University Athletic Director).

202. *Id.*

203. *See Roberts*, 998 F.2d 824, 830 (10th Cir.) *cert. denied*, 114 S. Ct. 589 (1993).

204. *See generally* Christine H.B. Grant & Mary Curtis, *Judicial Action Regarding Gender Equity, Draft* (July 12, 1994), *in* 6 LEGAL ISSUES IN INTERCOLLEGIATE ATHLETICS (DePaul Univ. 1994).

Men's programs that have or will be eliminated without the elimination of female counterpart,

The real question, it seems, is whether the existence of a football program helps or hinders the expansion of female athletic opportunities? Perhaps an amendment to Title IX that should be considered would involve an analysis of the football program's contribution to non-revenue sports. To the extent it provides athletic scholarships to female non-revenues sports, it should not be taken into consideration in a Title IX analysis.[205]

The benefits a football program provides for all non-revenue sports, men's and women's alike, should somehow be taken into account in Title IX analyses.[206] While recognizing that the overall opportunities for males in intercollegiate athletics are still far ahead of those for female athletes, it must also be recognized that there must be some compromise involving football, in order to save men's non-revenue sports from extinction. Yet, this does not solve the problem facing schools with football programs that lose money. The courts must change their interpretations of the OCR's Policy Interpretation, or more non-revenue men's sports are sure to become history.

David Hancock Moon

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including those whose female counterpart had been eliminated but has since been reinstated by court order or otherwise: Albany-New York - tennis and wrestling; Arizona State - gymnastics; Brown University - water polo, golf; Cleveland State - cross country, tennis; Colorado State - baseball; Dayton - wrestling; Drake - wrestling; Fresno State - swimming; Grand Valley State - wrestling; Hobart - baseball; Indiana University - Pennsylvania - soccer, tennis; Iowa State - gymnastics, tennis; Lock Haven - golf; Miami (FL) - golf; Northeast Missouri State - swimming, wrestling; Notre Dame - wrestling; Old Dominion - cross country; Princeton - wrestling; Ramapo - football; Santa Clara - football; Southeast Missouri State - tennis; Southwest Missouri State - wrestling; U. of Arkansas - swimming, water polo; U. of California - Davis - Recommended cuts: swimming, water polo, golf, wrestling, JV football; U. of California - Los Angeles - swimming, gymnastics; U. of Illinois - swimming, fencing; U. of Michigan - gymnastics; U. of New Hampshire - wrestling; U. of Wisconsin - baseball; Wisconsin - Oshkosh - gymnastics. *Id.*

205. An example follows. Assume there are 25 scholarships to males in non-revenue sports, 75 to females in non-revenue sports, and football has 75 scholarships. Assuming a student body evenly divided among males and females, this would not meet the substantial proportionality test, because there would be 100 male athletes to 75 female athletes. Of any additional scholarships football profits can be shown to provide for non-revenue sports, 25% (25/100), would be allocated to the men's non-revenue sports scholarships, and 75% (75/100) would be allocated to the women's non-revenue sports scholarships. If, for example, the institution could show that the football revenue provides 40 scholarships to non-revenue sports, 10 (25%) would be allocated to the men and 30 (75%) to the women. The number of male athletes would thus be reduced by 30 for Title IX purposes. Therefore, the number of male athletes would be 75 (football) plus 25 (non-revenue) minus 30 = 70. The number of female athletes remains 75, thus the institution would be in compliance with Title IX. This is only an example, and certainly other more equitable formulae could be devised. The major problem with this method is its complexity in application. The numbers would vary from year to year, depending upon the amount of revenue generated by the football program in a given year. However, any solution to the current problem is bound to be complex.

206. A football program that provides no revenue should receive no benefit in a Title IX analysis, because it does nothing to add to female athletic programs.