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STEPPING BACK TO PUNT: FAVORING INTERNAL AGENCY INTERPRETATIONS OVER TITLE IX AND ITS REGULATIONS

*Joshua Ryan Heller**

I. INTRODUCTION

Title IX of the Education Amendments Act of 1972[1] ("Title IX") prohibits gender based discrimination in education programs[2] receiving

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* In loving memory of my grandfather, Morrie, who, among his many lessons, taught me the value of hard work and the virtue of perseverance.

1. 20 U.S.C. §§ 1681-1688 (1999).

2. 20 U.S.C. § 1681(c) (1999) defines "educational institution" as:

> For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an

federal financial assistance.[3] Title IX is composed of two central provisions: a general prohibition[4] and an enforcement power.[5] However, enforcement of these provisions, cannot result in "preferential or disparate treatment."[6]

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

3. The United States Supreme Court has determined that the educational institution must be either a direct or indirect recipient of federal funds in order for Title IX to regulate the actions of the institution. *See* Grove City Coll. v. Bell, 465 U.S. 555, 571 (1984). Under the *Bell* Court's interpretation, which was "program specific," the entire institution was not tainted by such an action. *See id.* at 573-74; North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 514-15 (1982); Pub. L. No. 100-259, 102 Stat. 28 (1988). In the Civil Rights Restoration Act of 1987, Congress restored the "broad scope of coverage" of Title IX to encompass the entire institution if it receives any federal funds. *See Bell*, 465 U.S. at 573-74. However, federal regulatory power, including Title IX, does not extend to private organizations that do not receive Federal financial assistance but receive dues from institutions that do. *See* National Collegiate Athletic Ass'n v. Smith, 119 S. Ct. 924, 926 (1999).

4. 20 U.S.C. § 1681(a) (1999) provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...."

5. 20 U.S.C. § 1682 (1999) provides, in relevant part:

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

Id.

6. 20 U.S.C. § 1681(b) (1999) provides:

> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number of percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection *shall not be construed to prevent the consideration* in any hearing or proceeding under this chapter *of statistical evidence tending to show that such an imbalance exists* with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

Id. (emphasis added).

Athletic programs, an integral part of an institution's education program, are subject to these provisions.[7]

Congress enacted Title IX to combat pervasive discrimination against women in the educational setting.[8] Since the 1970s, the Department of Health, Education, and Welfare (HEW), succeeded by the Department of Education's (DED)[9] Office of Civil Rights (OCR), promulgated regulations interpreting the provisions of Title IX. Two such regulations speak directly to Title IX's application to athletics.[10]

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7. *See* Jayits Amendment, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974) (directing the Secretary of the Department of Health, Education, and Welfare (HEW) to issue regulations "which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.") (codified at 20 U.S.C. §1681 note); OFFICE FOR CIVIL RTS., U.S. DEP'T OF EDUC., EQUAL OPPORTUNITY IN INTERCOLLEGIATE ATHLETICS: REQUIREMENTS UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 1 (1991).

8. *See* 118 CONG. REC. 5804 (1972) (remarks of Sen. Bayh); Cohen v. Brown Univ., 101 F.3d 155, 165 (1st Cir. 1996) [hereinafter *Cohen IV*], *cert. denied*, 520 U.S. 1186 (1997); *Bell*, 456 U.S. at 523 n.13.

9. The initial agency responsible for the administration of Title IX was HEW. When HEW split into two agencies, the Department of Education (DED) and the Department of Health and Human Services (HHS), the DED became the Title IX regulatory agency. *See Cohen IV*, 101 F.3d at 165 n.5. For the remainder of this note, the two agencies will be referred to conjunctively as DED.

10. *See* 34 C.F.R. § 106.37 (2000) (financial assistance) & 34 C.F.R. § 106.41 (2000) (athletics). 34 C.F.R. § 106.41 (2000) provides:

> (a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
>
> (b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.
>
> (c) Equal Opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

In 1979, several years after the promulgation of a number of Title IX regulations, and after extensive public comment, the DED published a Policy Interpretation[11] explaining the regulations. By publishing the Policy Interpretation, the DED intended to provide an easily administered rule of compliance with the equal opportunity requirements of Title IX and the DED's interpretive regulations.[12] One portion of the Policy Interpretation sets forth a three-prong test under which an institution's compliance with Title IX and the DED's regulations can be determined.[13] In 1996, the DED

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
> (2) The provision of equipment and supplies;
> (3) Scheduling of games and practice time;
> (4) Travel and per diem allowances;
> (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.
>
> Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex. . . .

11. *See* Title IX of the Education Amendments of 1972, Policy Interpretation, 44 Fed. Reg. 71,413 (1979) [hereinafter Policy Interpretation].

12. *See id.* ("[T]his Policy Interpretation explains [34 C.F.R. § 106 *et seq.*] so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.").

13. The three-prong test provides:

> [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 . . . , whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the

published a clarification of the Policy Interpretation intending to demystify the three-prong test.[14]

In addition to the DED regulations, the Policy Interpretation, especially the three-prong test, has been extensively utilized by courts in deciding Title IX disputes.[15] However, the appropriateness of the DED's interpretations has remained relatively unchallenged. This Note recommends analyzing the propriety of DED's various regulatory and policy implementations of Title IX and determining whether DED's actions exceed its statutory mandate. The DED's three-prong test, although providing an easily applicable procedure, deviates from the principles espoused in Title IX and its properly promulgated regulations. Furthermore, alternative interpretations or enactments could provide an application that is more consistent with the intent of Title IX and with judicial precedent.

II. THE POLICY INTERPRETATION: THREE PRONGS OF COMPLIANCE

A. *Overview*

On May 27, 1975, President Ford signed the regulation implementing Title IX into law and submitted it to Congress for review.[16] After a three year transition period and in response to a number of complaints[17] of

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present program.

Id. at 71,418.

14. *See* Cover Letter from Norma V. Cantu, Assistant Secretary for Civil Rights accompanying, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC. CLARIFICATION OF INTERCOLLEGIATE ATHLETIC POLICY GUIDANCE: THE THREE-PART TEST (Jan. 16, 1996) (available at <http://www.ed.gov/offices/OCR/clarific.html> (visited Dec. 18, 2000)) [hereinafter Cover Letter to Clarification].

15. *See, e.g.*, Pederson v. Louisiana State Univ., 201 F.3d 388, 409-10 (5th Cir. 2000); Neal v. Board of Tr., 198 F.3d 763, 767 (9th Cir. 1999); Cohen v. Brown Univ. (*Cohen IV*), 101 F.3d 155, 172-73 (1st Cir. 1996); Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265, 273 (6th Cir. 1994), *reh'g denied*, Kelley v. Board of Tr., 35 F.3d 265, 268-72 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995); Cohen v. Brown Univ., 991 F.2d 888, 894-900 (1st Cir. 1993), *remanded* 879 F. Supp. 185 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) [hereinafter *Cohen II*]; Favia v. Indiana Univ. of Pa., 7 F.3d 332, 343-344 (3d Cir. 1993); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 828-832 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993); Gonyo v. Drake Univ., 879 F. Supp. 1000, 1003-06 (S.D. Iowa 1995).

16. 34 C.F.R. Part 106. The regulation was required to be submitted to Congress pursuant to § 431(d)(1) of the General Education Provisions Act. For the significant provisions relating to athletics, *see supra* note 10.

17. By the end of July, 1978, the OCR had received "nearly 100 complaints alleging discrimination in athletics against more than 50 [i]nstitutions of higher education." 44 Fed. Reg.

gender-based discrimination, the DED set forth the Policy Interpretation.[18] The DED intended the Policy Interpretation to provide additional guidance on what actions comply with Title IX.[19] One way the Policy Interpretation provided guidance was through a three-prong test through which an institution could demonstrate compliance with the dictates of Title IX. In 1996, the DED also created a Clarification of the Policy Interpretation to resolve ambiguities in the three-prong test and to provide further guidance on Title IX compliance.[20]

The Policy Interpretation three-prong test operates in the following way: After a party has demonstrated that its injuries would constitute gender discrimination, the burden of production shifts to the educational institution.[21] To fulfill its burden, the educational institution must satisfy at least one prong of the three-prong test set forth by the Policy Interpretation: substantial proportionality, historical expansion, or interest accommodation.[22]

The first prong, substantial proportionality, requires an analysis of the statistical proportionality of the institution's male and female athletic participation in relation to the gender ratio of the institution's population as a whole.[23] If the ratio of male to female athletes is exactly proportional to the ratio of male to female students, then an irrebuttable presumption arises that the institution is in compliance with Title IX.[24] Additionally,

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at 71,413. It is unclear whether these numbers include complaints prior to the enactment of Title IX or were only during the 3-year transition period for Title IX's enactment.

18. *Id.*

19. *See id.* The reason that the OCR created the Policy Interpretation rather than amending 34 C.F.R. § 106 remains unclear, however, some of the implications of this decision are explored *infra* Part III.C.

20. OFFICE FOR CIVIL RTS., U.S. DEP'T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETIC POLICY GUIDANCE: THE THREE-PART TEST (1996) (available at <http://www.ed.gov/offices/OCR/clarific.html> (visited Dec. 18, 2000)) [hereinafter Clarification].

21. *See also Cohen II*, 991 F.2d 888 (Plaintiff is required to "show disparity between the gender composition of the institution's student body and its athletic program, thereby proving that there is an underrepresented gender. Then, the plaintiff must show that a second element — unmet interest — is present . . . . If the plaintiff carries the devoir of persuasion on these two elements, she has proven her case unless the university shows, as an affirmative defense, 'a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members' of the underrepresented gender."). Lipsett v. University of P.R., 864 F.2d 881, 896 (1st Cir. 1988) (case law under Title VII applies to Title IX claims); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973) (establishing burden-shifting standard for Title VII disparate treatment discrimination cases). *Cf.* Cohen v. Brown Univ., 991 F.2d 888, 901-02 (1st Cir. 1993).

22. *Cf.* Clarification, *supra* note 20 ("If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement."); Policy Interpretation, *supra* note 11 at 71, 413-14.

23. *See* Policy Interpretation, *supra* note 11, at 71,418.

24. *Cf.* Kelley v. Board of Tr., 35 F.3d 265, 271 (7th Cir. 1994) ("[T]he policy interpretation

because an institution should not be expected to make minor adjustments to its number of athletic opportunities based on insignificant changes in the institution's overall population, if an institution is relatively close to the ideal ratios, or "substantially proportionate," then the same presumption of compliance arises.[25] Neither the DED nor the courts, however, have specifically defined what level of discrepancy would be considered "substantially proportionate."[26]

The second prong, historical expansion, examines whether an institution has a history of increasing opportunities for the traditionally disadvantaged gender.[27] Although the DED continues to assert that historical expansion entails a distinct and separate examination from substantial proportionality, such a position has been criticized by at least one commentator.[28] That commentator argues that although historical expansion requires a more detailed examination of the institution than simply comparing the ratio of athletic opportunities with the population of the educational institution, the intended result is the same as substantial proportionality: substantial gender proportionality between the athletic opportunities and population of the institution.[29]

The third prong, interest accommodation, requires the institution to demonstrate in a gender-neutral manner that it fully and effectively accommodates the interests of the historically disadvantaged gender, including students who are admitted, but not yet enrolled.[30] An institution can fulfill this prong by demonstrating that, despite disproportionately low participation rates by the institution's historically disadvantaged gender, the interests of the students are being fully and effectively accommodated.[31] In 1996, the Clarification set forth three criteria to make this determination: whether there is unmet interest in a particular sport, whether there is sufficient ability to sustain a team in a sport, and whether there is a

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merely creates a presumption that a school is in compliance with Title IX and the applicable regulation when it achieves such a statistical balance."); Clarification, *supra* note 20 (explaining that if the ratio is exactly proportional, "then the institution would clearly satisfy part one.").

25. *See* Clarification, *supra* note 20.

26. Although undefined, the exact percentage of discrepancy can be inferred as something less than 10%. *See* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993) (holding that a 10.5% disparity is "statistically significant" and does not clear the substantial proportionality hurdle).

27. *See* Clarification, *supra* note 20.

28. *See* Patrick Shannon, Title IX and Other Sports Law Issues (1998) (unpublished paper, University of Florida) (on file with author).

29. *See id.*

30. *See* Clarification, *supra* note 20.

31. *See* Cohen v. Brown Univ., 991 F.2d 888, 898 (1st Cir. 1993) (*Cohen II*); *see also* Clarification, *supra* note 20 (espousing the 1996 interpretation of the Policy Interpretation).

reasonable expectation of competition for the team.[32] Following the 1996 Clarification, if all three conditions are present, then the institution has not fully and effectively accommodated the interests and abilities of the historically disadvantaged gender.[33]

B. *The First Circuit:* Cohen v. Brown University

Even though neither the Policy Interpretation nor the Clarification, including the three-prong test, were ever amended into the regulations promulgated under Title IX, courts have harnessed this test in order to resolve issues of institutional compliance with Title IX. The first case to do so was *Cohen v. Brown University.*[34]

In *Cohen*, the appellant, a university, as a measure of fiscal responsibility, eliminated four intercollegiate athletic sports: women's volleyball and gymnastics and men's golf and water polo.[35] Although the cuts did not substantially affect the athletic opportunity ratios at the institution,[36] following the cutbacks, appellees, members of the women's volleyball and gymnastics teams sued under Title IX,[37] charging that appellant's athletic roster discriminated by gender.[38] The district court found for appellee and issued a preliminary injunction ordering appellant to reinstate its women's volleyball and gymnastics programs.[39] On appeal, the First Circuit Court affirmed, invoking the Policy Interpretation's three-

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32. *See* Clarification, *supra* note 20.

33. *See id.*

34. 809 F. Supp. 978 (D.R.I. 1992) [hereinafter *Cohen I*], *aff'd*, 991 F.2d 888 (1st Cir. 1993) [*Cohen II*], *remanded* 879 F. Supp. 185 (D.R.I. 1995) [hereinafter *Cohen III*], *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996) [*Cohen IV*], *cert. denied*, 520 U.S. 1186 (1997) [hereinafter collectively referred to as *Cohen*].

35. *See Cohen II*, 991 F.2d at 893.

36. Before the termination of the four teams, "Brown athletics offered an aggregate of 328 varsity slots for female athletics and 566 varsity slots for male athletics. Thus, women had 36.7% of the athletic opportunities and men 63.3%. Abolishing the four varsity teams . . . did not materially affect the athletic opportunity ratios; women retained 36.6% . . . and men 63.4%." *Id.* at 892.

37. Although Title IX does not have an expressed private right of action, an implied private right of action has been recognized under the statute. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 65-66 (1992); Cannon v. Univ. of Chicago, 441 U.S. 677, 687 n.8, 717 (1979). (holding that exhaustion of administrative remedies is not a prerequisite to a Title IX suit). For a more detailed discussion of this issue see, Jarret Raab, Comment, *Sexual Discrimination: Peer Sexual Harassment and Its Effect Under Title IX*, 11 U. FLA. J.L. & PUB POL'Y 225 (2000) (discussing the history of Title IX's implied private right of action).

38. *See Cohen II*, 991 F.2d at 892-93.

39. *See Cohen I*, 809 F. Supp. at 1001.

prong test[40] as an evidentiary standard governing the proof of a Title IX violation.[41]

The First Circuit Court began its analysis with Title IX.[42] Finding the statutory language too broad based to provide a helpful analysis, the court turned to DED's regulatory framework interpreting Title IX.[43] Unsatisfied by the regulations, the court sought guidance from the Policy Interpretation.[44] Although the court found no record of the Policy Interpretation's formal adoption,[45] the court ceded substantial deference to the Policy Interpretation's three-prong test.[46] The *Cohen* court ceded *such* substantial deference that it began treating the Policy Interpretation as a regulation.[47]

Under the court's analysis of the three-prong test, the first prong, substantial proportionality, operates as a "safe harbor" provision.[48] Essentially, by maintaining relatively equivalent gender proportionality between the student body and athletic participation, an educational institution could "stay on the sunny side" of Title IX.[49] The court viewed the second prong, historical expansion, as allowing an institution to demonstrate compliance by exhibiting a history of progression toward

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40. *See supra* note 13.

41. *See Cohen II*, 991 F.2d at 896-900.

42. *See id.* at 893-95.

43. *See id.* at 895. Additionally, the Court referred to 34 C.F.R. Part 106. For a discussion of these regulations see *supra* note 10. *See also* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)(holding that an agency's own regulations must be accorded appreciable deference).

44. *See supra* note 13.

45. After an exhaustive search, the author could also find no record of agency adoption.

46. At least part of the reason the court turned to this framework without discussion was due to the parties' arguments, or lack thereof. *See Cohen II*, 991 F.2d at 896-97 ("Although we can find no record that DED formally adopted the Policy Interpretation, we see no point to splitting the hair, *particularly where the parties have not asked us to do so.* Because this document is a considered interpretation of the regulation, *we cede it substantial deference.*") (emphasis added).

47. *See infra* note 64.

48. *See Cohen II*, 991 F.2d at 897.

49. *See id.* at 898. Commentators have argued that the *Cohen* interpretation of "substantial proportionality" institutes a "numerical quota" on athletic participation. *See* Shannon, *supra* note 28; Donald C. Mahoney, Note and Comment, *A Critical Review of Judicial and Administrative Interpretations of Title IX as Applied to Intercollegiate Athletic Programs*, 27 CONN. L. REV. 943 (1995) (examining legislative history and application of Title IX and determining that present judicial interpretation of Policy Interpretation creates a quota scheme contravening the intent of Congress). The First Circuit opposed this view in *Cohen II*, 991 F.2d at 900-01, and the OCR continues to oppose this view today. *See* Cover Letter to Clarification, *supra* note 14.

In *Cohen*, the First Circuit eventually affirmed the district court's finding. *See Cohen II*, 991 F.2d at 892. Although the teams' elimination did not materially affect the comparative ratio of athletes (from 36.7% women and 63.3% men to 36.6% women and 63.4% men), the First Circuit determined that either ratio was not "substantially proportionate" to appellant's student body gender ratio (approximately 52% men and 48% women). *See id.*

substantial proportionality.[50] With respect to the final prong, the court found that interest accommodation requires "full and effective accommodation" of the statistically underrepresented gender.[51] If existing programs do not completely fulfill the underrepresented gender's interests with opportunities to compete, the institution necessarily fails the third prong.[52]

The court rejected appellant's argument that the Policy Interpretation exceeds its enabling legislation.[53] The error in appellant's reasoning, the court determined, was that appellant ignored the term "full" in its duty to "fully and effectively" accommodate.[54] Contributing to this conclusion, the court determined that the "essence" of the Policy Interpretation originates in Title IX.[55] Furthermore, because the court determined that the Policy

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50. *See id.* at 898. Although the *Cohen* court implies that these prongs are independent, an analysis of this determination demonstrates that it anchors on a unstable seabed. If an institution has a history of expanding opportunities for an underrepresented gender, yet does not satisfy the first-prong, there is no other goal to this expansion than reaching "substantial proportionality." The First Circuit itself stated that the purpose behind historical expansion is that "Title IX does not require that the university leap to complete gender parity in a single bound." *Id.* at 898. In *Cohen*, although the court never directly explored whether appellant had made a showing of historical expansion, the court's affirmation of the district court strongly implies that appellant never did. The third prong of the test suffers from a similar problem. *See infra* note 52.

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

52. The independence of this prong is also tenable, despite the protests of the DED. *See* Cover Letter to Clarification, *supra* note 14. Under the First Circuit's analysis, although the institution must fully accommodate the interests of the underrepresented gender, satisfying "full and effective" accommodation in the course of litigation is all but impossible. If a party is contesting the issue, it is because they have an unmet interest in intercollegiate athletics. Therefore, any time a party reaches this prong of the test, it will fail, forcing the institution to compliance with the first prong. In fact, no court analyzing this issue has found that an institution that has satisfied interest accommodation when they have not satisfied "substantial proportionality." *See, e.g.*, Pederson v. Louisiana State Univ., 201 F.3d 388, 408-10 (5th Cir. 2000); Neal v. Board of Tr., 198 F.3d 763, 768-69 (9th Cir. 1999); Kelley v. Board of Tr., 35 F.3d 265, 269-72, (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995); *Cohen II*, 991 F.2d at 897-98; Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 829-30, 832 (10th Cir. 1993).

Although appellant offered evidence that it had met some of the interest exhibited by the underrepresented gender, impliedly appellant's accommodation was not full. *See Cohen II*, 991 F.2d at 898. If so, it is unlikely that an aggrieved party would have ever contested the issue.

53. *See id.* at 899-900.

54. *See id.* at 899. The First Circuit did not attribute its quotation of the words "fully and effectively." The First Circuit's failure to attribute becomes problematic since the words "fully and effectively" do not appear in Title IX or the DED regulations. *See supra* notes 2, 4-6, & 13. The phrase "fully and effectively" first appears in the Policy Interpretation. *See* Policy Interpretation, *supra* note 11 at 71,418. For a discussion of the tautology resulting from the First Circuit's unattributed quotation see text accompanying *infra* notes 94-95.

55. *Cohen II*, 991 F.2d at 899.

Interpretation is a "plausible, if not inevitable," reading of the statute, the court found that it was obligated to enforce the Policy Interpretation.[56]

C. *The Seventh Circuit:* Kelley v. Board of Trustees of the University of Illinois

Most circuit courts of appeal hearing Title IX issues adopted *Cohen*'s view of the significance of the Policy Interpretation without question.[57] It was not until *Kelley v. Board of Trustees of the University of Illinois*[58] that another circuit did anything more than blindly accept *Cohen* and integrate the case into its reasoning. Although *Kelley* took the less traveled path of reexamining how the Policy Interpretation applies to Title IX and its regulatory framework, it stopped short of directly questioning whether the Policy Interpretation properly interprets Title IX's regulations.

In *Kelley*, appellants, members of a men's swimming program, brought a civil rights action against appellees, trustees of a state university, alleging that appellees' actions of terminating four varsity teams, including men's swimming, violated Title IX[59] by discriminating against male athletes.[60] After hearing testimony supporting appellants' request for a preliminary injunction and receiving affidavits supporting appellees' motion for summary judgment, the district court granted summary judgment in favor of appellees and found that the request for a preliminary injunction was therefore moot.[61] Affirming, the Seventh Circuit Court of Appeal held that appellees' decision to eliminate the men's swimming program while sparing the women's swimming program did not violate Title IX.[62]

In making its determination, the *Kelley* court turned to the three-prong test set forth by the Policy Interpretation.[63] The *Kelley* court began with the proposition that the Title IX regulations must be accorded considerable deference.[64] After determining that the DED's regulations were not

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56. *Id.* To set forth this proposition, the First Circuit improperly relied on *Chevron*, 467 U.S. 837. *See infra* notes 64 & 67.

57. *See* Favia v. Indiana Univ. of Pa., 7 F.3d 332 (3rd Cir. 1993); *Roberts*, 998 F.2d 824.

58. 35 F.3d 265 (7th Cir. 1994).

59. Appellants also alleged appellee violated the Equal Protection Clause of the Fourteenth Amendment. *See* Kelley v. Board of Tr., 35 F.3d 265, 267 (7th Cir. 1994). However, the court's holding on the Equal Protection Clause issue goes beyond the scope of this note.

60. *Id.* at 267-69.

61. *See* Kelley v. Board of Tr., 832 F. Supp. 237 (C.D. Ill. 1993).

62. *See Kelley*, 35 F.3d at 271-72.

63. *See id.* at 268.

64. *See id.* at 270. The *Kelley* court relied on Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984), which held that where Congress has expressly delegated to an agency the power to "elucidate a specific provision of the statue by regulation," the resulting regulations should be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *See Kelley*, 35 F.3d at 270. However, unlike *Cohen*, *Kelley* properly

contrary to Title IX or arbitrary in form, the *Kelley* court turned to the Policy Interpretation.[65] The *Kelley* court determined that the Policy Interpretation is a reasonable interpretation of the DED's regulations.[66] Accordingly, the court found that it was required to defer to the Policy Interpretation,[67] and concluded that the Policy Interpretation provides a presumption of when "effective accommodation" has been achieved.[68] The court then adopted the three-prong test.[69] Despite its somewhat distinguishable analysis, the *Kelley* court did not address whether the three-prong test was a proper subject matter for a DED interpretation, such as the Policy Interpretation. The *Kelley* court also did not address whether the Policy Interpretation was indeed an interpretation or a *de facto* regulation.[70]

D. *The Sixth Circuit: Horner v. Kentucky High School Athletic Association*

The Kelley court's examination of the Policy Interpretation, however brief, may have been one of the last times that a court examined the appropriateness of applying the DED's interpretation of its own regulations as a controlling authority in Title IX cases. Soon after *Kelley*, the Sixth Circuit Court of Appeals in *Horner v. Kentucky High School Athletic Ass.*[71] indicated that future examinations of the Policy Interpretation should yield to *Cohen* for guidance, rather than relying on *Kelley* or independent logic.[72]

The *Horner* appellants, female high school student athletes, sued

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applied *Chevron* to a regulation. *See supra* note 56 and *infra* note 66-67 and accompanying text.

65. *See Kelley*, 35 F.3d at 270-71.

66. *See id.* at 271.

67. *See id. See also* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150 (1991)(explaining that a court must defer to an agency's interpretation of its regulations if that interpretation is reasonable).

68. *See Kelley*, 35 F.3d at 268. Under Title IX, in determining whether equal opportunities exist in an athletic program, one factor to be considered is "[w]hether the selection of sports and levels of competition *effectively accommodate* the interests and abilities of members of both sexes. *See* 34 C.F.R. § 106.41(c)(1) (2000) (emphasis added).

69. *See Kelley*, 35 F.3d at 271.

70. The liability for the absence of such a determination cannot be solely posited with the court. The court's characterization of appellants' argument implies that if the regulation was controlling, then the Policy Interpretation was controlling. *See Kelley*, 35 F.3d at 270 ("Plaintiffs contend . . . that the applicable regulation . . . *and* policy interpretation . . . pervert Title IX.") (emphasis added). Furthermore, appellants' other argument took issue with what they believed to be a quota system resulting from the "substantial proportionality" test. *See id.* at 271 ("Plaintiffs . . . argue that the substantial proportionality test contained in the agency's policy interpretation of that regulation establishes a gender based quota system, a scheme they allege is contrary to the mandates of Title IX."). The reason for the gap in the *Kelley* court's logic could therefore be attributable to the appellants' argument. In the alternative, see discussion *infra* Part IV.A.

71. 43 F.3d 265 (6th Cir. 1994).

72. *See id.* at 275.

appellees, the local school board and high school athletic association, under Title IX[73] alleging gender discrimination in allowing fewer sports teams for girls than boys, thus affording unequal athletic opportunity.[74] The district court granted summary judgment for appellees, finding appellees' justification to be gender-neutral and to adequately reflect a lack of enough student interest to justify more teams.[75] The Sixth Circuit Court of Appeals affirmed in part and reversed in part, holding that the issue of whether appellees effectively accommodated female athletes' interests presented a genuine issue of material fact for the district court.[76]

In order to determine whether an institution has met its effective accommodation obligations, the *Horner* court determined that "reference must be made" to the Policy Interpretation.[77] Adopting both *Cohen*'s logic and lexicon, the *Horner* court found that the Policy Interpretation was entitled to "substantial deference," "dr[ew] its essence from" Title IX, and "st[ood] upon a 'plausible, if not inevitable reading of Title IX.'"[78] Although it relied on *Cohen*, the *Horner* court differed in that it recognized that the Policy Interpretation is an interpretation of a DED regulation, and not a regulation itself.[79] However, the Sixth Circuit's observation may have been in vain because by relying so strongly upon *Cohen* in its reasoning, the *Horner* court effectively imputed *Cohen*'s reasoning into its own decision.[80]

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73. Appellants also sued under the Equal Protection Clause of the Fourteenth Amendment and state law. *See Horner*, 43 F.3d at 270.

74. *See id.*

75. *See id.* Summary judgment was only granted on the Equal Protection Clause and Title IX claims. *See id.* at 270-71.

76. *See id.* at 275. Judge Batchelder disagreed, pointing out that the "burden of proving statistical disparity and unmet interest squarely [rests] on the shoulders of the plaintiffs." *Id.* at 277 (Batchelder, J., dissenting).

77. *Id.* at 273. Although initially principally intended as guidance for intercollegiate athletic programs the "general principles will often apply to . . . interscholastic athletic programs which are also covered by [the] regulation." Policy Interpretation, *supra* note 11, at 71, 413. At least one case prior to *Horner* had so applied the Policy Interpretation. *See* Williams v. School Dist., 998 F.2d 168, 171 (3d Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994).

78. *Horner*, 43 F.3d at 273, 274-75 (quoting Cohen v. Brown Univ. (*Cohen II*), 991 F.2d 888, 899 (1st Cir. 1993)). *See infra* note 127.

79. *Compare Horner*, 43 F.3d at 273 ("The Policy Interpretation is a 'considered interpretation' of the applicable regulations . . . .") *with Cohen II*, 991 F.2d at 899 ("[W]e are obligated to enforce *the regulation* [referring to the Policy Interpretation] according to its tenor.") (emphasis added).

80. This raises a question whether imputing the reasoning of another court carries the baggage of the original opinion with it. This question remains unanswered in the context of Title IX.

III. ATTENUATING INTENT

A. *The Policy Interpretation's Place in the Puzzle*

Categorizing the Policy Interpretation requires an examination of Title IX and the legislative and DED enactments both preceding and proceeding it. Most clearly, Title IX functions as an enabling act for the DED to promulgate regulations to inhibit gender-based discrimination in educational institutions.[81] Acting pursuant to the enabling capabilities of Title IX, the DED codified regulations aimed at curbing gender-based discrimination in many areas, including the realm of athletics.[82] The Policy Interpretation was created to explain the OCR's "approach to determining compliance" with the DED regulations.[83] Despite its purpose, the Policy Interpretation is not a regulation.[84]

Whether viewed as an interpretive rule or a general statement of policy, the DED was not required to circulate the Policy Interpretation for public comment or to make it publicly available prior to its use.[85] That these steps are unnecessary becomes especially unsettling when it becomes clear that portions of the Policy Interpretation are less interpretive and more regulatory in nature.

For example, one of Title IX's regulations, 34 C.F.R. § 106.41, sets forth a non-exclusive list of ten factors to be considered when determining whether equal opportunity is available in an athletic program.[86] Harnessing the non-exclusive nature of the regulation, in the Policy Interpretation, the DED added two factors to this list: recruitment of student athletes and provision of support services.[87] However, the added factors are tenuously, if at all, related to the original factors in the regulation.[88] Indeed, one would

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81. *See supra* note 5.

82. *See supra* note 10.

83. Policy Interpretation, *supra* note 11, at 71,413.

84. Although one might point out that the Policy Interpretation was enacted pursuant to the APA requirement for notice and comment rulemaking, this misses the point. *See* 5 U.S.C. § 553. One of the objectives of rulemaking is to provide adequate notice to parties of policy changes and the Policy Interpretation may have set forth such notice, however it created a situation where later enactments do not. *See* Clarification, *supra* note 20.

85. Although the DED took these steps with the Policy Interpretation, expressions of agency intent create no obligation to do so. *See* 5 U.S.C. § 553(a)(3)(A) (1999).

86. *See supra* note 10 (34 C.F.R. § 106.41(c) outlines the ten factors).

87. *See* Policy Interpretation, *supra* note 11, at 71,415.

88. With the exception of "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes" the factors in the regulation set forth narrowly drawn factors for the DED to consider. *See supra* note 10. The factors "recruitment of student athletes" and "provision of support services" are painted with a broader stroke, leaving much of their interpretation to be carved with the individual inclinations of an

question why the DED, which was responsible for promulgating the original regulation, would set forth an amendment in its Policy Interpretation rather than amending the regulation.[89] Furthermore, since the DED has taken the steps of notice and comment in the past, it may be required to do so with the Clarification and any future revision of the Policy Interpretation.[90]

While the DED's arbitrary addition of factors to 34 C.F.R. § 106.41 is unsettling, the DED's construction of the three-prong test for Title IX compliance is disconcerting. Within an interpretation of a regulation, the DED sets forth a test to determine whether a person has been "subjected . . . to discrimination under [an] education program or activity."[91] Effectively, to determine an educational institution's compliance with Title IX, the DED turns, not to a promulgated regulation, but to a document two steps removed from Title IX.[92] Furthermore, any educational institution receiving federal assistance is obligated to keep abreast of any changes or clarifications to the Policy Interpretation, forcing educational institutions to abide by interpretations of interpretations four to five times removed from the original statute which may or may not be published in the Federal Register and offer the opportunity for public comment before their promulgation.[93]

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inspector.

89. *See* discussion *infra* Part III C. The DED's original rationale could be any of a number of possibilities including a desire to be able to avoid future notice and comment procedures to simple oversight to a hope that later hostile administrations would believe that the policy interpretation was not easily amended or revoked.

90. *See* Abbs v. Sullivan, 756 F. Supp. 1172, 1188 (W.D. Wis. 1990) (finding that "[a]s a result of this voluntary election by the Secretary to abide by the rulemaking provisions of the [APA], courts have held [HHS] to strict compliance with the notice and comment requirements when promulgating regulations."), *vacated*, 963 F.2d 918 (7th Cir. 1992); *see also* Gardner v. FCC, 530 F.2d 1086, 1090 (D.C. Cir. 1976) (holding that "[o]nce having stated that it will give such notice, the [FCC] has created a reasonable expectation in the parties to the proceeding that such notice will be received.").

91. 20 U.S.C. § 1681(a) (1999).

92. . *See* discussion *supra* Part II.A. If Title IX is the enabling act and the regulations used to enforce Title IX, 20 U.S.C. § 1681 *et seq.*, are one step removed, then the Policy Interpretation of those regulations are two steps removed from the original statute. Furthermore, under the same logic, the Clarification of the Policy Interpretation of the regulations of Title IX are three steps removed from any Congressional authorization.

93. Although presently there is only one Clarification of the Policy Interpretation the Clarification was adopted by the DED without a notice and comment procedure. *See* Clarification, *supra* note 20. There is no legislative bar from a future administration setting forth Clarfications of the Clarification, or Clarifications of the Clarification of the Clarification, further attenuating the DED's actions from the original intent of Congress. *But see supra* note 90. Additionally, no matter how far removed any future interpretations may be, they still command "substantial deference" from the judiciary. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150 (1991) (explaining that a court must defer to an agency's interpretation of its

B. *Judicial Classification of the Policy Interpretation*

Judicial categorizations of the Policy Interpretation within Title IX's statutory and regulatory scheme have been ambiguous at best. Although the *Cohen* court clearly outlined the history of the Policy Interpretation, including its failure to be formally promulgated, it conferred regulatory status upon the Policy Interpretation and the three-prong test.[94] However, in doing so, the *Cohen* court set forth a tautology. To reject appellant's argument that the DED was acting outside of its authority when it promulgated the Policy Interpretation, rather than reference the enabling legislation or the regulatory framework, the court turned to the Policy Interpretation itself.[95] Effectively, the *Cohen* court held that the Policy Interpretation falls within the enabling legislation because the Policy Interpretation says it does.

The *Kelley* court was somewhat more logical in its approach. In *Kelley*, the court began by recognizing that the Policy Interpretation was an extrapolation of the DED regulation, which in turn was an extrapolation of Title IX.[96] However, the *Kelley* court stopped short of delving into whether the nature of the three-prong test commands that it be placed within a properly promulgated DED regulation rather than the Policy Interpretation.

C. *The Dangers of Giving Interpretations Regulatory Power*

Attenuating the interpretation of a statute so far from the actual statute raises a number of problems. One problem is that turning to an interpretation subverts the need to amend regulations.[97] By using

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regulations if that interpretation is reasonable).

94. *See supra* notes 45-47 and accompanying text.

95. *See* Cohen v. Brown Univ. (*Cohen II*), 991 F.2d 888, 899 (1st Cir. 1993) ("Brown argues that DED's Policy Interpretation, construed as we have just outlined, goes so far afield that it countervails the enabling legislation . . . Brown reads the 'full' out of the duty to accommodate 'fully and effectively.'"); *see also* 20 U.S.C. §§ 1681-1688 (1999). (making no mention of "fully and effectively"); 34 C.F.R. §§ 106.37, .41 (2000) (same), *cf.* Policy Interpretation, *supra* note 11, at 71,418 ("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 interest and abilities of the members of the sex have been *fully and effectively* accommodated by the present program.") (emphasis added).

96. *See* Kelley v. Board of Tr., 35 F.3d 265, 270-71 (7th Cir. 1994).

97. *See Martin*, 499 U.S. at 151 (concluding that "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulation is a component of the agency's delegated lawmaking powers."). *But see* National Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan, 979 F.2d 227, 240 (D.C. Cir. 1992) (holding that an agency could not "amend" a rule through interpretation); Pettibone Corp. v. United States, 34 F.3d 536, 541-42 (7th Cir. 1994) (rejecting the IRS's claim that it could update an outdated regulation

interpretations as controlling authority, an agency may change regulations without following amendment procedures.[98] Furthermore, an agency's interpretation may change over time, causing the initial intent of the regulation to fall to the wayside in favor of a more subjective interpretation.[99]

Additionally, accepting interpretations as controlling authorities could lead agencies to avoid promulgating regulations any more than necessary. As an agency prepares for changes in the social and political culture, the agency may decide to react with broad regulations modified by more specific, informal methods than to have its options restricted by specific, pre-determined regulations.[100] Courts' strong deference to agency interpretations discourages agencies from promulgating specific regulations that set forth clear principles in favor of vague regulations supplemented by malleable interpretations.[101] Indeed, in the case of the DED, rather than

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by reinterpreting it).

98. *See supra* text accompanying notes 23 & 86-88 (addition of three-prong test and "recruitment of student athletes" and "provision of support services" factors); *see also* Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997)(Under *Chevron* "there is no barrier to an agency altering its initial interpretation to adopt another reasonable interpretation — even one that represents a new policy response generated by a different administration."); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 585-86 (1985) (same).

99. *See* Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 857-58 (1984). A purely theoretical understanding of this conflict would lead to the conclusion that this would be impossible, as the theory behind this principle rests upon the premise that an "agency typically is in a superior position to determine what it intended when it issued a rule, how and when it intended the rule to apply, and the interpretation of the rule that makes the most sense given the agency's purposes in issuing the rule." 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.10, at 282 (3d ed. 1994).

100. *See Paralyzed Veterans*, 117 F.3d at 584 (concluding that, "A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise of agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only though subsequent less formal 'interpretations.'"). *Cf.* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (explaining that "[i]t is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process").

101. *See Chevron*, 467 U.S. at 844 (holding that an agency's regulations must be accorded appreciable deference); *Martin*, 499 U.S. at 150 (finding that a court must defer to an agency's interpretation of its regulations if that interpretation is reasonable); *see also* Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 257, 290, 294 (2000) (noting that judicial deference "creates incentives for agencies to promulgate excessively vague legislative rules that leave the more difficult task of specification to the more flexible and unaccountable process of later 'interpreting' these open-ended regulations" as well as noting that vesting such deference with an agency "may conflict with separation-of-powers principles by lodging primary and largely conclusive interpretive power in the same entity that exercises the lawmaking function."). *See, e.g.*, Freeman Eng'g Assoc., Inc. v. FCC, 103 F.3d 169,

amend the regulation or even the Policy Interpretation, the DED, in order to alter policy priorities during the Clinton administration, adopted the Clarification of the Policy Interpretation.[102] In the Clarification, the DED delves more deeply into the Policy Interpretation's three-prong test, reassessing the priorities of enforcement for future conflicts with educational institutions.[103]

Rather than depending on capricious agency interpretations, courts should turn to more stable methods to determine the meaning of ambiguities in regulations. One such method would be to turn to regulatory preambles in order to fill in regulatory gaps.[104] Rather than the uncertainty of informal processes, regulatory preambles offer the consistency when determining the intent of the agency when it adopted a specific regulation.[105] The preamble of the Title IX regulation, 34 C.F.R. § 106.41,[106] for example, demonstrates that its contemplated scope includes both secondary schools and colleges,[107] that regulation of athletics should be codified through the regulatory process,[108] and that institutions should be required to consider the interests of both male and female students in determining what sports to offer.[109] A court adopting this method of

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178 (D.C. Cir. 1997); Adams v. EPA, 38 F.3d 43, 49 (1st Cir. 1994).

102. *See* Clarification, *supra* note 20.

103. *See id. But see* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 110-11 (1995) (O'Connor, J., dissenting) (noting that "[a]n agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through substantive changes recorded in an informal policy manual that are unsupported by the language of the regulation.").

104. *See* Noah, *supra* note 101, at III.C.4. (advocating the use of preambles to determine administrative intent).

105. *See id.* at 304 n.190 (explaining that "[e]ven if made available to most of the directly interested parties, persons subject to (or benefitting from) the regulation will have no simple way of determining whether they have before them the latest interpretation, in contrast to the greater ease of checking the currency of a regulation appearing in the *C.F.R.* and tracing its preamble.") (parenthesis in original). *See also* Mullins Coal Co. v. Director, OWCP, 484 U.S. 135, 165 (1987) (Marshall, J., dissenting) (The preamble of a final rule is "strong evidence of regulatory intent.").

106. *See* NonDiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance, 40 Fed. Reg. 24,128 (1975) [hereinafter NonDiscrimination Rule]. The preamble of 34 C.F.R. § 106.41 (2000) actually appears with 45 C.F.R. § 86.41 (2000). As descendants of the Department of Health, Education and Welfare, the Departments of Education and Health and Human Services have codified the same regulations at separate locations in the United States Code. The Department of Health and Human Services, however, has retained custody of the preamble.

107. *See* NonDiscrimination Rule, *supra* note 106, at 24,134 ("The Department continues to take the position that athletics constitute an integral part of the educational processes of schools and colleges and, as such, are fully subject to the requirement of title IX. . . .").

108. *See id.* ("[T]he Department believes that coverage of athletics is mandated by [T]itle IX *and that such coverage must be reflected in the regulation.*") (emphasis added).

109. *See id.* ("The Department's intent . . . is to require institutions to take the interests of both sexes into account in determining what sports to offer.").

interpretation should encourage agencies that wish to change the manner of implementation to take the sensible measure of amending the suitable regulations, complete with their own amendment preambles, and providing notice and comment procedures to interested parties.

IV. THE THREE-PRONG TEST REVISITED

A. *Interpreting "Substantial Proportionality"*

Such procedural concerns raise a number of substantive issues regarding the DED's interpretation of Title IX. One such issue is the interpretation of the phrase "substantial proportionality" in the first prong of three-prong test espoused in the Policy Interpretation.[110] The predominant view of "substantial proportionality" is that the term refers to athletic involvement roughly relative to the proportion of the institution's gender ratio as a whole.[111] Title IX case law almost uniformly follows *Cohen* in interpreting that "substantial proportionality" requires that the athletic gender ratio be measured in relation to the institution-wide gender ratio.[112] In the Clarification, published after *Cohen*,[113] the OCR adopted this interpretation as its own.[114]

However, this was not the first opportunity that the OCR took to elaborate on the interpretation of "substantial proportionality." Internally, the DED had previously interpreted the policy to mean that institutions were required to meet the interests and abilities of men and women to the same degree.[115] In doing so, the DED rejected the proportionality interpretation espoused in the case law and the Clarification.[116] Subsequent

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110. *See* Policy Interpretation, *supra* note 11, at 71,418.

111. *See supra* notes 24 & 49 and text accompanying *supra* note 49.

112. *See* Neal v. Board of Tr., 198 F.3d 763, 767-68 (9th Cir. 1999); Cohen v. Brown Univ. (*Cohen IV*), 101 F.3d 155, 172-73 (1st Cir. 1996); Horner v. Kentucky High Sch. Athletic Ass'n., 43 F.3d 265, 275 (6th Cir. 1994); Cohen v. Brown Univ. (*Cohen II*), 991 F.2d 888, 894 (1st Cir. 1993); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 829-30 (10th Cir. 1993); Gonyo v. Drake Univ., 879 F.Supp. 1000, 1004-05 (S.D. Iowa 1995).

113. The Clarification post-dated *Cohen I*, *Cohen II*, and *Cohen III*, but not *Cohen IV*. *See* Clarification, *supra* note 20.

114. *See id.* ("[W]here an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.").

115. OFFICE FOR CIVIL RTS., U.S. DEPT. OF EDUC, TITLE IX INTERCOLLEGIATE ATHLETIC INVESTIGATOR'S MANUAL [hereinafter OCR MANUAL] 122 (1980) (Institutions are required to "meet the interests and abilities of women *to the same degree* as they meet the interests and abilities of men.") (emphasis added).

116. *See id.* at 122 (Institutions are "not requir[ed] . . . to offer, intercollegiate participation opportunities" that are "proportional" to the gender ratio of the student body.).

case law often reflected an unawareness of this prior interpretation or dismissed it entirely.[117]

The DED's initial proportionality interpretation directly conflicts with the *Cohen* interpretation. Under the DED's initial interpretation, an institution would comply with Title IX if the interests of men and women were met to the same degree.[118] Effectively, an institution would be considered in compliance if there was the same percentage of male and female students who were unable to compete or, correspondingly, able to compete.[119] Thus, under the initial DED interpretation, the determining factor for "substantial proportionality" constituted an equal likelihood of participation between male and female students.

The *Cohen* interpretation of "substantial proportionality" dismisses the initial DED interpretation for a stricter approach. Rather than examining whether the interests of men and woman are being proportionally met, the *Cohen* approach began with the assumption that, absent a history of discrimination, there would be exactly the same amount of interest in athletics for both males and females.[120] Grounded on that foundation, the *Cohen* approach reasons that the number of students interested in competing is proportional to the gender ratio of the institution population as a whole. Accordingly, if an institution has a gender athletic ratio "substantially proportionate" to the overall gender population ratio, then an irrebuttable presumption of compliance arises.[121]

Unlike the initial DED interpretation, the *Cohen* interpretation sets forth situations requiring preferential treatment. This is best illustrated by a hypothetical.[122] Assume that institution X has a perfectly even gender ratio in the student body (50%/50%). Additionally, assume that there are 160 varsity positions to be allocated among 200 interested and able athletes. Further assume that 120 of the athletes (60%) are men and 80 (40%) are

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117. *See, e.g.*, Pederson v. Louisiana State Univ., 201 F.3d 388, 409-10 (5th Cir. 2000); *Neal*, 198 F.3d at 767; *Horner*, 43 F.3d at 273; Kelley v. Board of Tr., 35 F.3d 265, 268-72 (7th Cir. 1994); Favia v. Indiana Univ. of Pa., 7 F.3d 332, 343-44 (3rd Cir. 1993). *See also, e.g.*, *Cohen IV*, 101 F.3d at 179 n.15 (considering a 1990 OCR MANUAL, then deciding on other grounds); *Cohen II*, 991 F.2d at 896-97 & n.11 (same); *Roberts*, 998 F.2d at 828-29 & n.7 & 10 (same).

118. *See supra* note 115.

119. *See supra* notes 115 & 116.

120. *See Cohen IV*, 101 F.3d at 179 (noting that "[i]nterest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience.") (no support in original). The author takes no position on whether this premise is faulty. Rather, the author seeks to point out that the court has set forth no proof in either support or opposition of this premise.

121. *See id.* Although no court has explicitly defined the exact percentage that would constitute "substantially proportionate," in *Roberts*, the Tenth Circuit found that a 10.5% difference did not fit substantial proportionality, implying that it lies somewhere under 10%. Roberts v. Colorado State Univ., 814 F. Supp. 1507 (D. Col.), *aff'd in part, rev'd in part*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

122. Shannon, *supra* note 28.

women.[123] Under the initial DED interpretation, the likelihood of participation is equal among both genders. However, under the *Cohen* interpretation, these facts set forth a situation where a large number of male athletes are turned away while a disproportionate percentage of female athletes participate.

The *Cohen* interpretation does have benefits. Unlike the interest assessment necessary with the initial DED interpretation, the *Cohen* interpretation allows an institution to simply accumulate figures for its total population and total athlete population and compare the two.[124] If the percentage difference between the two exceeds the "substantially proportionate" ratio, then the institution must either take an affirmative action to return to the baseline or prove compliance with the second or third prong of the test.[125]

Although the *Cohen* interpretation sets forth an effortless system of administration, sacrificing effectiveness for simplicity is not always proper. Additionally, although the Policy Interpretation was initially intended for

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123. Under these facts, the two interpretations set forth the following numbers:

Basis for allocation	Gender	Athletes Offered a Varsity Position	Athletes *not* Offered a Varsity Position	Likelihood to Play (%)
Student Body Ratio (*Cohen*)	Male	80	40	67%
	Female	80	0	100%
Interest and Ability (initial OCR)	Male	96	24	80%
	Female	64	16	80%

Shannon, *supra* note 29.

124. *See Cohen II*, 991 F.2d at 897 (stating that "[t]he first benchmark furnishes a safe harbor for those institutions that have distributed athletic opportunities in numbers 'substantially proportionate' to the gender composition of their student bodies").

125. *See id.* at 898 (stating that "[t]he second and third parts of the accommodation test recognize that there are circumstances under which, as a practical matter, something short of this proportionality is a satisfactory proxy for gender balance."). However, an institution is highly unlikely to fulfill the second or third prong of the test. *See supra* note 50-52 and accompanying text.

intercollegiate athletic use, its precepts have been extended to other scholastic athletic areas, including secondary education.[126] However, the differing interpretations of "substantial proportionality" may both effectively serve an educational institution and its students if they are being used in different contexts.[127]

B. *Interest Analysis*

Title IX's regulatory scheme clearly establishes that a determination of equal opportunity requires an analysis of the interests and abilities of members of both sexes.[128] What is less apparent is how that interest analysis should be applied.

Under the Title IX's regulatory scheme, interest was a forefront consideration.[129] Although some institutions initially believed that the regulation required them to take an annual poll of the student body in order to determine interest, the preamble relieved this concern.[130] The regulation's preamble indicates that the original intent of the DED at the time of promulgation was to consider interest.[131] The regulation itself reflects the original intent by listing interest accommodation first among the factors that must be considered in determining the availability of equal opportunities.[132]

The *Cohen* interpretation, however, diminishes the importance of interest analysis. Under *Cohen*, interest analysis is unnecessary unless an institution has failed to demonstrate that its athletic program is not "substantially proportionate" to the student body and does not have a history and continuing practice of accommodating program expansion.[133]

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126. *See* Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265, 271 (6th Cir. 1994); Williams v. School Dist., 998 F.2d 168, 171 n.3 (3d Cir. 1993).

127. For example, a strict proportionality test may be better in a secondary education context, where the principles of physical fitness are being inculcated into the child. However, an interest based proportionality may be more appropriate in a collegiate environment, where the interests of the individual are generally set and the institution is attempting to meet that interest. Such an analysis is not without support in case law. *Cf.* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (secondary education serves vital national interest of preparing youth for life in a democratic Republic); Ambach v. Norwick, 441 U.S. 68, 77 (1979) (secondary school inculcates youth with "fundamental values necessary to the maintenance of" society); Board of Educ. v. Pico, 457 U.S. 853, 864 (1982)(plurality opinion) (the secondary school educator nurtures students' social and moral development by teaching them "community values").

128. *See supra* note 10 and *infra* note 132.

129. *See* NonDiscrimination Rule, *supra* note 106 at 24,134 ("The Department's intent . . . is to require institutions to take *the interest* of both sexes into account in determining what sports to offer.") (emphasis added).

130. *See id.*

131. *See id.*

132. *See supra* note 10 ("(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes[.]").

133. *See supra* note 125.

Effectively, interest analysis becomes a fallback provision that is rarely, if ever, considered. If it is considered, it almost never exculpates an institution from wrongdoing.[134] By diminishing the importance of interest analysis, *Cohen* dramatically deviates from the priorities implicitly established in the regulatory framework and its preamble.

C. *Procedural Impact*

The substantive concerns of Title IX cannot be considered in a vacuum. Rather, the controversy surrounding such concerns requires an analysis of their impact on the DED's procedures. Judicial interpretation has altered the emphasis of both the substantial proportionality test and the interest analysis test.[135] However, the *Cohen* court made such alterations while purporting to yield "substantial deference" to the DED's interpretation of its own regulations.[136] In a sense, the preeminent interpretation of Title IX extends deference to agency interpretation with one hand, but relinquishes any utility of that deference with the other.

Conversely, the *Cohen* court's resolution, although bewildering, may not have been without merit. If the Policy Interpretation goes beyond advising the public of the agency's construction of Title IX and provides the DED with a Title IX enforcement mechanism, then the Policy Interpretation should be a substantive rule, not an interpretive rule.[137] However, the *Cohen* court did not consider the Policy Interpretation a substantive rule because in determining the authority of the Policy Interpretation the *Cohen* court applied a "substantial deference" standard, the standard reserved only for an interpretive rule.[138] Despite the DED's labeling of the Policy Interpretation as an interpretive rule, had the *Cohen* court determinated that the Policy Interpretation was a substantive rule once the court determined that the Policy Interpretation was a reasonable construction of Title IX, the court would have determined it to be *controlling* ending its analysis.[139]

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134. *See supra* note 52.

135. *See* discussion *supra* Parts IV. A.-B.

136. *See supra* note 46 and accompanying text.

137. *See* American Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) (quoting *Attorney General's Manual on the Administrative Procedure Act*, at 30 n.3 (1947)). There are also indications that DED deviated from Congress' intent not to institute a quota scheme to establish gender equality. *See* Mahoney, *supra* note 49. A thorough examination of this issue raises the question of an agency's responsibility to defer to legislative history in promulgating regulations. That question lies beyond the bounds of this Note.

138. *See supra* note 64 and accompanying text.

139. *See supra* note 64.

V. CONCLUSION

Title IX is often recognized as the most important legislative tool to provide women with athletic opportunity. However, if the foundation upon which that policy is laid falters, the substantive goals of Title IX will crumble with it. The DED's present method to achieve gender equality turns administrative law on its head. Rather than attain Title IX's goals through properly enacted regulations, the DED has taken the path of least resistance: Public policy through internal agency interpretations and policy statements.

The principle of judicial deference to administrative internal interpretations is not devoid of logic. Agencies are often more knowledgeable in their particular field than a federal judge would be. However, in their efforts to provide deference to agency action, federal courts have turned a blind eye to the unique circumstances of Title IX cases and the distinguishable regulatory scheme surrounding them. Furthermore, federal courts continue to pass on stable methods of interpretation, such as statutory and regulatory preambles, settling for the often fluctuating political interpretations of agencies, such as the DED. Courts should return to consistent methods of Title IX interpretation, relying on logic, not beginning and ending an inquiry with an internal agency determination or a sister circuits' prior interpretation.

As courts continue to strive for gender equality in athletics, they should consider a different path. Courts should not only consider Title IX's substantive policies and concerns, but also should insure the procedural stability of Title IX in order to provide equality for all of America's students.