GENDER EQUITY IN THE 1990'S: AN ATHLETIC ADMINISTRATOR'S SURVIVAL GUIDE TO TITLE IX AND GENDER EQUITY COMPLIANCE

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> The beacon by which we must steer is Congress's unmistakably clear mandate that educational institutions not use federal monies to perpetuate gender-based discrimination. At the same time, we must remain sensitive to the fact that suits of this genre implicate the discretion of universities to pursue their missions free from governmental interference and, in the bargain, to deploy increasingly scarce resources in the most advantageous way. These considerations, each of which is in service to desirable ends, are necessarily in tension in Title IX cases. Thus, there are unlikely to be ideal solutions to all the vexing problems that might potentially arise.[4]

I. INTRODUCTION

While many athletic administrators might quibble with Judge Selya's characterization of the clarity of Title IX's Congressional mandate, few would argue with his representation that courts should be hesitant to interfere with a university's discretionary use of its declining resources. Despite this word of warning, federal courts increasingly are deciding how and where a university shall allocate its resources when it comes to intercollegiate athletics. And those universities that have stood before the federal bench in an attempt to defend their respective athletic programs in the face of Title IX challenges have learned all too late the expensive price of noncompliance.

Recently, suits brought under Title IX have resulted in judicial determinations which not only mandate compliance with the law, but also specify the method to achieve such compliance.[5] Moreover, courts have found implied private rights of action and the potential for compensatory damages to the injured plaintiffs.[6] This trend has had enormous impact on the collegiate athletic community. Title IX, once an idealistic yet ineffective vehicle for female athletes to achieve equity, has come of age. The potential for damage awards and immediate and specific injunctive relief has had the dual effect of 1.) encouraging potential plaintiffs to file suit where they once had little to gain,[7] and 2.) providing the economic impe-

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4. Cohen v. Brown University, 991 F.2d 888, 907 (1st Cir. 1993). For further discussion *see infra* part C.

5. *See* Favia v. Indiana Univ. of Pa., 812 F. Supp. 578 (W.D. Pa. 1993), in which the district court granted a preliminary injunction requiring the reinstatement of the women's gymnastics and field hockey programs. The university's subsequent attempt to modify the injunction to substitute a less expensive soccer program for the gymnastics program was denied by the district court and affirmed by the Third Circuit. Favia v. Indiana Univ. of Pa., 7 F.3d 332 (3rd Cir. 1993).

6. Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028 (1992).

7. Aside from the social stigma of being labeled a "trouble maker," women were reluctant to seek legal redress because their suits, and their attendant hope of redress, would

tus for institutions to initiate self-reviews in an attempt to put their houses in order before being ordered to do so.[8] Indeed, it is with this newfound concern that universities and their athletic administrators are searching for guidance in interpreting this law.

Title IX does not explicitly govern intercollegiate athletics. Rather it states a "broad prohibition of gender-based discrimination in all programmatic aspects of educational institutions."[9] In the more than two decades since Congress enacted Title IX, an institution's obligations have been the source of much debate and little consensus. On its face, the language of Title IX appears quite straightforward in that it forbids discrimination on the basis of sex. Determining compliance, however, has proved to be a complicated undertaking and ultimately has hinged upon congressional, administrative and judicial understandings of the term gender equity. Only one thing seems clear: despite the hopes of female athletes everywhere, gender equity does not necessarily imply gender equality.[10]

This article will explain the statutory, regulatory and legal framework governing the most litigated aspect of Title IX and provide a practical framework for a university addressing gender equity issues. It is hoped that with a clearer understanding of the requirements of Title IX, athletic departments will be able to enlist the support and resources of their institutions in addressing their respective Title IX obligations.[11]

II. THE STATUTORY AND REGULATORY FRAMEWORK

A. The Statute

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any program or activity that receives federal financial assistance. The statute is not exclusively directed at intercollegiate athletics, but rather addresses discrimination throughout educational institutions. Specifically, Title IX

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outlive their eligibility. Now, with the possibility of immediate corrective action in the form of a preliminary injunction and the possibility of receiving a damage award for their injury, female athletes are no longer disheartened by the cost and tediousness of litigation.

8. *See* Ellen J. Vargyas, *Franklin v. Gwinnett Public Schools and Its Impact on Title IX Enforcement*, 19 S.C. & U.C. 373, 380-81 (1993). In the past, universities took a wait and see position, secure in the knowledge that noncompliance would be met with little more than a slap on the wrist provided the school promised to draft a compliance plan. *Id.* Although Title IX provides for the withdrawal of federal funding in the case of noncompliance, the OCR has never pursued this course of action. *Id.*

9. *Cohen*, 991 F.2d at 894.

10. *See* Hillsdale College v. Dept. of Health, 696 F.2d 418, 425-27 (6th Cir. 1982), *vacated*, 466 U.S. 901 (1984). Inasmuch as Title IX was enacted by a floor vote, there is essentially no legislative history to draw upon. *Id.* at 426.

11. This article does not address salary or scholarship issues as they relate to Title IX.

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 . . . ."[12] Any statutory analysis begins with an assessment of the law's potential applicability. In this regard, the key terms triggering the applicability of the law are "program or activity." Before 1988, universities had argued that only the specific institutional program or activity that actually received the federal financial assistance was subject to the law's requirements.[13] In support of their position, universities relied upon the discussion in *Grove City College v. Bell*[14], which held that Title IX was "program-specific," and therefore applied only to those programs actually receiving federal funds. By taking this position, universities were able to avoid adhering to the requirements on an institution-wide basis and as a result many athletic departments escaped the law's scrutiny.[15] In 1988, however, Congress both overturned the *Grove City* decision and overrode a presidential veto when it enacted the Civil Rights Restoration Act.[16] Among other things, this Act provided that the mandate of Title IX applied to each and every subdivision of any university receiving federal financial assistance.[17]

The statute is clear that while the law prohibits discrimination, strict numerical equality among the sexes is not required.[18] In other words, a Title IX violation may not be found solely because of a disparity between the gender composition of the institution's student body and the gender composition of the institution's athletic programs.[19] The statute also states that this limitation may not be used to prevent the introduction of statistical evidence which may reveal an imbalance in violation of Title IX.[20] Congress chose not to legislate any further on the subject and instead left it to the

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12. 20 U.S.C. § 1681(a) 1994.

13. *Hillsdale College*, 696 F.2d at 418; University of Richmond v. Bell, 543 F. Supp. 321, 325 (E.D. Va. 1982).

14. 465 U.S. 555, 574 (1984).

15. Bennett v. West Texas State Univ., 799 F.2d 155, 158 (5th Cir. 1986) (holding that a Title IX violation was not applicable to a university which received no federal funding); O'Connor v. Peru State College, 781 F.2d 632, 642 (8th Cir. 1986).

16. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 120 Stat. 28 (1988) (codified at 20 U.S.C. § 1687). The Act did not specifically target athletic programs, however, "the record of the floor debate leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletics." *Cohen*, 991 F.2d at 894. *See also* Croteau v. Fair, 686 F. Supp. 552, 553, n.1 (E.D. Va. 1988).

17. *See* 20 U.S.C. § 1687 (which legislatively overturned *Grove City College v. Bell*).

18. 20 U.S.C. § 1681(b).

19. *Cohen v. Brown Univ.*, 991 F.2d at 895.

20. *Id.*

Department of Education to issue regulations and guidance on the precise requirements under Title IX.[21]

B. The Regulatory Framework

The three sources of administrative requirements and guidance involving Title IX are: (a) the regulations promulgated by the Department of Education, [hereinafter "Department"], that govern, among other things, intercollegiate athletics;[22] (b) a policy interpretation issued by the Department in 1979;[23] and (c) a manual used by investigators from the Department's Office of Civil Rights in Title IX investigations.[24]

Although the latter two sources do not impose regulatory requirements in a technical sense, they are extremely important because they contain the Department's substantive guidance on the obligations imposed by Title IX. In addition to providing some guidance for an athletic administrator to understand the requirements, the guidelines are particularly important because courts look to these sources for assistance in determining whether an institution has complied with the various requirements under the law.[25]

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21. *Id.* The Department of Health, Education and Welfare was delegated the responsibility to promulgate implementing regulations. *Id.* After a cabinet level reorganization, this responsibility was assumed by the Department of Education. *Id.* The Department's Office of Civil Rights is the agency charged with administering Title IX. *Id. See also* Roberts v. Colorado Univ., 814 F. Supp 1507, (D. Colo.) *aff'd in part and rev'd in part sub nom*; Roberts v. Colorado Bd of Agric., 998 F.2d 824 (10th Cir. 1993) *cert. denied* 114 S. Ct. 580.

22. 34 C.F.R. § 106, *et seq.* (1992). The regulations initially were promulgated in 1975 by the Department of Health and Welfare, with an effective date of July 1978. 40 Fed. Reg. 24,128 (1974). In 1979, Congress divided the Department of Health and Welfare into the Department of Health and Human Services ("HHS") and the Department of Education ("D-ED"). 20 U.S.C. §§ 3401-3510. Although the regulations were left with HHS, they were also formally adopted by the DED. Thus, there now exist two sets of virtually identical regulations. *Compare* 45 C.F.R. § 86 (1992) (HHS Regulations) *with* 34 C.F.R. § 106 (1992) (DED Regulations). Congress transferred all educational functions of HEW to DED thereby making DED, through its OCR, the primary administrative enforcement agency for Title IX. *See* 20 U.S.C. § 3441(a)(1).

23. *Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413, *et seq.* (December 11, 1979).

24. Office for Civil Rights, U.S. Department of Education, Title IX Athletics Investigator's Manual (April 2, 1990), [hereinafter Investigator's Manual]. The Investigator's Manual was prepared by Valerie M. Bonnette, OCR Policy and Enforcement Service, and Lamar Daniel, OCR Region IV.

25. *See, e.g., Cohen*, 991 F.2d at 896-97. In general, courts will defer to the interpretations given to the law's requirement by the agency or department charged with its oversight and enforcement. *See also Roberts*, 998 F.2d at 828, citing Martin v. Occupational Safety & Health Comm., 499 U.S. 144 (1991).

1. The Regulations

Like the statute, the regulations prohibit discrimination on the basis of sex. The regulations are divided into two categories: those that deal with athletic scholarships[26] and those that provide guidance regarding athletics in general.[27] The latter specifically prohibits a university from excluding an individual on the basis of sex from participation in, denying an individual the benefits of, and treating an individual differently or discriminating against someone in any interscholastic, intercollegiate, club or intramural athletics. In addition, they prohibit an institution from offering athletics separately on these bases.[28]

Notwithstanding these prohibitions, however, separate teams for members of each sex may be offered *if* (1) selection for the team is based on competitive skill *or* (2) the activity involved is a contact sport.[29] However, if the institution does not offer a separate team for the other sex and athletic opportunities for that sex have previously been limited, members of the excluded sex must be allowed to try out unless it is a contact sport.[30]

The regulations require that an institution provide equal athletic opportunity for members of both sexes.[31] An institution's failure to spend an equal amount of money on each sex, either in the aggregate or based upon a team by team comparison (where separate sex teams for the same sport are offered), will not constitute noncompliance. However, this failure may be considered in assessing equality of opportunity for members of each sex.[32] Inasmuch as the above description summarizes the substance of the regulations as they directly pertain to athletics, we must turn to a policy interpretation issued by the Department to further refine and understand an institution's obligations under Title IX.[33]

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26. 34 C.F.R. § 106.37(c).

27. 34 C.F.R. § 106.41.

28. 34 C.F.R. § 106.41(a).

29. 34 C.F.R. § 106.41(b) Contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact. *Id. See also* Williams v. School Dist. of Bethlehem, 998 F.2d 168 (3rd Cir. 1993) *cert. denied* 114 S. Ct. 689 (1994) (reversing lower court's finding that field hockey was not a contact sport); Kleczek v. Rhode Island Interscholastic League, 768 F. Supp. 951 (D.R.I. 1991) (holding that field hockey must be considered a contact sport).

30. *Id.*

31. *See Cohen*, 991 F.2d at 896. This requirement applies regardless of whether teams are segregated by sex. *Id.*

32. 34 C.F.R. § 106.41(c)

33. Regulations typically have the force of law unless a court rules them inconsistent with their implementing statute or otherwise unlawful. The Title IX regulations have thus far withstood constitutional challenge. Kelley v. Bd. of Trustees of Univ. of Illinois, 35 F.3d

2. The Policy and the Manual

In December, 1979, HEW issued a Policy Interpretation, [hereinafter "Policy"] on Title IX and intercollegiate athletics. Although the interpretation is designed for intercollegiate athletics, its general principles will often apply to club, intramural and interscholastic athletic programs.[34] As stated, the Policy sought to clarify the meaning of "equal opportunity" in intercollegiate athletics and explain the factors and standards which will be used by the Department in assessing compliance. In addition, the Policy provides guidance in determining whether any existing disparities may be justified and/or otherwise found to be nondiscriminatory. Although the theoretical underpinnings of the Policy are the concepts of equivalency and proportionality, the Policy is divided into and specifically addresses three distinct aspects of a university's athletic program: athletic financial assistance; equivalence in other athletic benefits and opportunities; and effective accommodation of student interests and abilities. Compliance within each area is assessed separately. A compliance investigation, however, may be limited to less than all three of these areas.[35] Even if an institution meets the compliance requirements in two areas (such as financial assistance and athletic equivalence), a violation of Title IX may still be found for noncompliance in the third area (such as where the institution does not effectively accommodate the interests and abilities of each sex).[36]

In April 1990, the Office of Civil Rights of the Department of Education issued an intercollegiate athletics investigators' manual.[37] The manual replaced the one that had been issued in July, 1980,[38] and contains more detailed guidance, standards and methods for assessing compliance with Title IX. Because the Manual tracks the subject area breakdown provided in the Policy, citations and additional references to the manual will be incorporated in the ensuing discussion.

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265 (7th Cir. 1994) (regarding a constitutional challenge to Title IX's regulatory requirements by men's swimming team members rejected by the court); Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n., 647 F.2d 651, 658 (6th Cir. 1981) (overruling the district court's finding that regulatory provision authorizing recipients of federal financial assistance the right to deny physically qualified girls the opportunity to participate with boys in contact sport was violative of the Fifth Amendment). Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753 (S.D. Oh. 1978)).

34. 44 Fed. Reg. 71,413-14.

35. *See* Investigator's Manual, *supra* note 24, at 7; *Roberts*, 998 F.2d at 828.

36. *See Cohen*, 991 F.2d at 897.

37. Investigator's Manual *supra*, note 24 at 19.

38. Office for Civil Rights, U.S. Department of Education, Title IX Intercollegiate Athletics Investigator's Manual (Interim) (July 28, 1980).

III. TITLE IX AREAS OF INQUIRY

As indicated above, universities are required to comply with Title IX in three different respects. The recent wave of litigation, however, has focused almost exclusively on only one aspect of compliance, namely, accommodation of athletic interests. As a result, we will only summarize the key aspects of financial assistance and equivalence in other athletic benefits and opportunities. However, we must bear in mind that to the extent a plaintiff desires to argue noncompliance dealing with these aspects of an athletic program, such inadequacies must be specifically alleged.

A. Financial Assistance

The regulations require that institutions provide reasonable opportunities for the award of financial assistance to members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics.[39] Athletic financial assistance is generally defined as aid awarded by the institution on the basis of athletic participation. This would include athletic scholarships, tuition waivers and aid from organizations administered by the university such as booster and alumni groups. Financial aid to an athlete that is based on need, however, generally is not included.[40]

Equality in the number or dollar value of the individual scholarships provided to each sex is not required. Rather, the total dollar amount of scholarship aid made available to each sex must be substantially proportionate to the number of students of each sex participating in intercollegiate athletics.[41] Compliance with this requirement is assessed by dividing the total dollar amount of aid awarded to male athletes by the number of male athletes and dividing the total dollar amount of aid awarded to female athletes by the number of female athletes and comparing the two results.[42]

The Investigator's Manual acknowledges, however, that certain nondiscriminatory factors may justify differing amounts of aid.

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39. 34 C.F.R. § 106.37(c).

40. *See* Investigator's Manual *supra*, note 24 at 15. If, however, there are allegations that merit or need based assistance is provided to athletes differently than to the general student body or that such assistance is provided to athletes on the basis of sex, investigation into this area may also be initiated. *Id. See also Cohen*, 991 F.2d at 987, n.12.

41. 44 Fed. Reg. at 71,415

42. Investigator's Manual *supra* note 24, at 17. Two tests, known as the "Z" test and the "T" test are used by investigators to determine if the difference in the percentage of total aid awarded to one sex and the percentage of participants is significant and whether the difference between the average financial aid award to male and female athletes is statistically significant. *Id.* If the disparities are significant, then a violation exists. *Id.*

Examples of such legitimate factors are: higher tuition rates for out of state students at public institutions and reasonable professional decisions related to program development (such as spreading out scholarships over four years of student athletes when a team is initially fielded).[43] If the comparison results in substantially equal amounts or if the disparity can be explained by legitimate nondiscriminatory factors, the institution will be found in compliance.[44]

B. Equivalence in Other Athletic Benefits and Opportunities

Institutions are required to provide equivalent athletic opportunities for members of both sexes. In a compliance review, the availability, quality, and kinds of benefits, opportunities, and treatment afforded members of both sexes will be compared. Compliance will be achieved if the compared program components are equal or at least equal in effect. Although identical treatment, benefits and opportunities are not required, the overall effect of any differences must be negligible.

As with financial assistance, compliance may be achieved if any differences are based on nondiscriminatory factors. For example, the unique aspects of particular sports or activities may cause the difference. Factors such as rules of play, nature/replacement of equipment, rates of injury resulting from participation, nature of facilities required for competition, and the maintenance/upkeep requirements of those facilities can be considered.[45] Similarly, sex neutral factors related to special circumstances of a temporary nature may justify an inequality. For example, team recruitment activities may fluctuate based upon team needs for first year athletes. Such fluctuations are permissible as long as they do not reduce overall equality of opportunity.[46]

In addition, activities directly associated with the operation of a single sex sport may create unique demands and imbalances. For example, football and men's basketball games may draw large crowds which increases the cost of managing such events. Corresponding differences in financial support for men's and women's programs for this type of event management is understandable. As a result, a Title IX violation will not be found as long as the same type of support is made available to both men's and women's programs based on sex neutral criteria (such as the size of the crowd).[47]

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43. *Id.*
44. *Id.*
45. 44 Fed. Reg. at 71,415-16.
46. 44 Fed. Reg. at 71,416.
47. *Id.* Another justification for differing programs or support levels arises where an in-

In determining whether equal opportunity exists in the athletic programs, the regulations (a) - (j) set forth advise which areas of the programs are to be reviewed.[48] A program review will entail the consideration of two additional factors: recruitment of student athletes and the provision of support services. Support services essentially involves an analysis of the amount of administrative, clerical and secretarial services provided to the men's and women's programs. If equal athletic opportunities are not present, recruitment practices will be examined to ascertain if the provision of equal opportunity will require modification of those practices. The opportunity to recruit, the financial and other resources available for recruitment and the differences in benefits, opportunities and treatment afforded to each sex will be scrutinized.[49]

The compliance determination will consider (1) whether the policies of the institution are discriminatory in language or effect; (2) whether substantial and unjustified disparities exist in benefits, treatment, services or opportunities in the program as a whole; and

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stitution undertakes a voluntary affirmative action program to overcome the effects of past discriminatory treatment of one sex. *Id.*

48. *See* 44 Fed. Reg. at 71,417. These regulations list the area of the programs to be reviewed:

> a) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.
> (b) Equipment and supplies (availability, quality, amount, suitability, maintenance, etc.);
> (c) Game and practice scheduling (time of day, number and length of games and practices, opportunity for pre and post-season competition);
> (d) Travel and allowances (per diem allowances, mode of transportation, travel housing and dining, length of stay before and after event);
> (e) Opportunity to receive coaching and academic tutoring (full-time/part-time, availability, qualifications, types of tutoring sessions - individual/group - size of group);
> (f) Coaches and tutors (availability, qualifications, experience, assignment and compensation);
> (g) Locker rooms, practice and competitive facilities (availability, quality, exclusivity of use, maintenance, preparation of facilities for practice and competition);
> (h) Medical and training facilities and services (availability, qualifications of personnel, quality of facilities, health/accident/injury insurance coverage);
> (i) Housing and dining facilities and services;
> (j) Publicity (availability, quality, quantity, sports information personnel, publications, promotions).

Id. Additionally, nondiscriminatory factors such as range and nature of duties, experience, number of participants, number of assistant coaches supervised and the level of competition, may affect compensation. *See* 44 Fed. Reg. at 71,416-17. Similarly, an outstanding record of achievement may justify an abnormally high salary. Factors reviewed in assessing compliance on compensation include the rate of compensation (per sport/season), duration of contract, conditions relating to contract renewal, experience, nature of duties, working conditions, and other terms and conditions of employment. *Id. See also* C.F.R. § 106.41(c) (1992).

49. 44 Fed. Reg. at 71,417.

(3) whether any such disparities in individual segments of the program are substantial enough in and of themselves to deny equality of athletic opportunity.[50]

In other words, all of the program areas are reviewed individually and as a whole to determine whether the institution is complying with the equal opportunity requirement. A difference in favor of one sex in one of these areas may be offset by a difference in favor of the other sex in another area as long as the difference is not disproportionately significant.

C. Effective Accommodation of Athletic Interests and Abilities

Universities are not required to offer identical sports, competitive opportunities, or the same number of athletic programs. Institutions are only required to accommodate the athletic interests and abilities of one sex to the same degree as they accommodate the interests and abilities of the other sex. This requirement is met by offering opportunities that equally address the interests and abilities of men and women.

Not surprisingly, the recent wave of litigation involving Title IX has focused on this aspect of compliance. The cases, which are described in detail below, arise in the context of budgetary reductions and corresponding actions by university athletic departments to eliminate or curtail programs. Depending on the manner in which the action is accomplished by the institution, members of one sex have been able to argue that by virtue of the program elimination, their athletic interests were no longer being effectively accommodated.[51]

The Policy states that when assessing compliance under this requirement, the OCR's review shall entail the following three factors: (1) the institution's determination of athletic interests and abilities of the students; (2) the selection of sports offered; and (3) the levels of competition available. The institution may determine the athletic interests and abilities by nondiscriminatory methods of its own choosing. The methods used, however, must take into account the nationally increasing levels of women's interests and abilities, must not disadvantage the underrepresented sex, must take into account team and performance records, and must be responsive

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50. *Id.*

51. Although the majority of cases have been brought by women athletes, cases are now emerging in which Title IX claims are being advanced by male athletes. *See, e.g.*, Gonyo v. Drake Univ., 837 F. Supp. 989 (S.D. Iowa 1993) (holding no Title IX violation existed where men's wrestling team was eliminated); Kelley v. Bd of Trustees of Univ. of Illinois, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd* 35 F.3d 265 (7th Cir. 1994) (determining elimination of men's swimming team permissible).

to the expressed interests of students capable of intercollegiate competition who are members of the underrepresented sex.[52] A survey of interest among current or prospective students, studies of other college sports programs, or trends identified in area high school or club programs would be appropriate efforts at identifying the interests and abilities of students.

With regard to the first factor, which is the selection of sports, it is important to note that institutions are not required to integrate teams or to provide the same choice of sports to men and women. However, an institution may be required to allow the member of one sex to try out for a sport only offered to members of the other sex or to sponsor a team for the previously excluded sex.[53]

With regard to the second factor, which is the selection of sports offered, the issue breaks down further to contact versus non-contact sports. For contact sports, effective accommodation means that if the sport is offered for one sex, it must be offered for the other sex if the opportunities for such participation have historically been limited, there is sufficient interest to sustain a viable team and there is a reasonable expectation of intercollegiate competition for that team. With regard to non-contact sports, effective accommodation includes the same two criteria set forth above as well as the additional requirement that members of the excluded sex not possess the skill to be selected for an integrated team or to actively compete if selected.[54] If those conditions are met then the athletic department must sponsor the relevant women's sport.

Within the third factor, which deals with the levels of competition available, effective accommodation requires that institutions provide both the opportunity for members of each sex to participate in intercollegiate competition and for members of each sex to have competitive teams which equally reflect their abilities. It is this third aspect of accommodation that has given rise to the relative burst of Title IX litigation over the past few years. In their respective opinions, courts have assessed compliance by relying on a three-part formula found in the regulations.[55]

The first factor is the most easily measured and as case law

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52. 44 Fed. Reg. 71,418.
53. *Id.*
54. *Id.*
55. 44 Fed. Reg. 71,418. The three provisions are:
(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

has shown, the most difficult to meet. Courts first compare the number of athletic opportunities available to men and women with the number of men and women enrolled at the institution. If the respective proportions are substantially similar, a school may relax for it has found a safe haven under Title IX. Few schools, however, find relief here for although "substantially similar" is a wonderful legalistic foothold for imaginative lawyerly arguments, the courts have steadfastly held that they will interpret this provision narrowly and have rejected even minor deviations.

The second factor, although less formalistic, has proven to offer institutions much protection. Here, the courts will conduct an exhaustive review of the historical participation opportunities for the underrepresented sex. This exhaustive review includes an analysis of net gains or losses in participation opportunities for the underrepresented sex over the years. Courts will look to the efforts made by an athletic department to determine and respond to the interests of the underrepresented sex. While many schools can show, and have argued, an increased level of participation post-1978, most school's enthusiasm reached a plateau in the mid-1980s after the *Bell* decision. Moreover, many programs have been hauled into court because of their decision to drop programs in the recent budget-cutting environment.

For these reasons, it is often the third test which will be (and in recent litigation has been) used to determine whether an institution may escape Title IX liabililty. This third test focuses on whether the students' discernible interests are being fully and effectively accommodated by the current program offerings. To satisfy this requirement, a college which has one sex underrepresented among intercollegiate athletes and does not have a history of program expansion must show that the underrepresented sex is demonstrably less interested in athletics. The burden in proving this is great, and will certainly require thorough and detailed surveys and analysis. This test has, in frequent cases, been interpreted to mean that an institution must sponsor a women's team if there is a sufficient number of interested and qualified athletes to form a team and there are reasonable competitive opportunities for the team. At a minimum, the uncertainty of consistent interpretations for this test

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practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; *or*

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of the sex have been fully and effectively accommodated by the present program.

Id.

means that the elimination of any women's team risks serious exposure to a finding of a violation of Title IX.

In summary, these regulatory sources make clear that athletic departments must give thoughtful consideration to the impact and effect of Title IX in the implementation, design, operation, reduction and elimination of intercollegiate athletic programs. Ignorance of the requirements of Title IX will only expose the institution to otherwise unnecessary liability.

IV. TITLE IX CASE LAW

Although Title IX appeared to lie dormant for a substantial period of time, the last few years have seen an increase in the number of cases alleging some form of sex discrimination in the operation of athletic programs. In particular, while in the past Title IX enforcement was viewed as essentially an administrative matter involving compliance investigations conducted by the Department of Education, recent cases clearly suggest a trend toward its use as a private right of action.[56] In other words, cases are now, more than ever, being brought by aggrieved students against colleges and universities and their athletic departments. Instead of being simply an anti-discrimination statute, Title IX is being transformed into a judicial mandate for affirmative action.[57] It is precisely because of this increased possibility of litigation that institutions should begin to focus now on their obligations and plan their actions accordingly.

The recent cases that have been decided primarily arise out of decisions by universities to curtail or eliminate certain programs as a result of budgetary cutbacks. Because many institutions currently face similar pressures, these cases are particularly instructive. Although each case is unique there are enough factual similarities to make the decisions significant.

Generally speaking, the universities, in an apparent attempt to treat the programs equally in the reduction phase, terminated equal numbers of men's and women's programs. Although such actions may have appeared *superficially* appropriate to those involved, violations were found nonetheless, because the institution did not factor into their equation the fact that at the time of the

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56. See Franklin v. Gwinnett, 112 S. Ct. 1028 (1992) (holding that a private right of action was available under Title IX).

57. See *infra* notes 58-72 and accompanying text. *See also* William E. Thro & Brian A. Snow, Cohen v. Brown University and The Future of Intercollegiate and Interscholastic Athletics, 84 EDUC. L. REP. 611 (1993).

reduction the institution was already out of compliance with Title IX. As a result, by further reducing women's programs, the university placed itself further out of compliance vis-a-vis the number of women students at the university. In short, the university's action generated a larger discrepancy ratio between women's athletic opportunities and the total number of female students at the university.[58]

Cohen v. Brown University, the seminal decision involving Title IX, was issued by the Court of Appeals for the First Circuit in April, 1993. In the early nineties, Brown, like many other universities facing financial troubles, issued a university-wide budget cutting mandate. In an effort to comply, the athletic department announced in 1991 that it had decided to demote four sports from varsity to club status: women's volleyball and gymnastics, and men's golf and water polo. The then athletic director, John Parry, estimated that the reductions would save the department over $75,000.[59] He later remarked that in making the decision, he believed that although the demotion took substantially more dollars from the women's budget than from the men's budget,[60] it did not violate Title IX because it did not materially affect the participation opportunity ratios of the male and female athletes.[61] In fact, the decision merely reduced the percentage of female athletes' opportunities by one tenth of a percentage point, namely, from 36.7% to 36.6%.

After the department announced its decision to demote the teams, members of the women's volleyball and gymnastics teams filed a class action suit against Brown claiming that the University's athletic program was in violation of Title IX *before* it decided to demote the four teams. Therefore, its subsequent decision to devalue two of the women's programs simply exacerbated its

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58. As the court stated in Cohen v. Brown, 991 F.2d 888, 905 (1st Cir. 1993):

> In an era where the practices of higher education must adjust to stunted revenues, careening costs, and changing demographics, colleges might well be obliged to curb spending on programs, like athletics, that do not lie at the epicenter of their institutional mission. Title IX does not purport to override financial necessity. Yet the pruning of athletic budgets cannot take place solely in controllers' offices, isolated from the legislative and regulatory imperatives that Title IX imposes.

Id.

59. Many athletic programs have an assortment of classifications involving varsity, junior varsity, club and intramural. A team's classification has funding ramifications. Loss of funding and varsity status affects the program's access to admissions preferences and recruiting budgets, office space, long distance telephone funding, and clerical support.

60. *Id.* at 892. The budgetary reductions broke down as follows: women's volleyball, $37,127; women's gymnastics, $24,901; men's water polo, $ 9,250; and men's golf, $ 6,545. *Id.*

61. Presentation by John Parry, "Gender Equity in Sports: Preventive Economic & Legal Aspects of Title IX," American Bar Association Section of Business Law, 1993 Spring meeting, New Orleans, Louisiana, April 17, 1993.

previous noncompliance. The claimants initially sought a preliminary injunction ordering Brown to reinstate the women's teams' varsity status and to prohibit the elimination or demotion of any other women's university supported intercollegiate teams until the percentage of women participating in sport equaled the percentage of women enrolled in the university.[62]

After a fourteen-day hearing in which testimony was elicited from twenty witnesses, the district court granted the preliminary injunction which required Brown to reinstate the two programs pending the outcome of the litigation.[63] Brown immediately sought a temporary stay and appealed the lower court's decision to the appellate court. On appeal, the First Circuit acknowledged that due to a dearth of relevant precedent, its opinion was traversing unexplored Title IX compliance terrain. With this adventurous spirit in mind and despite the limited procedural posture of the appeal,[64] the court embarked upon an exhaustive yet instructive tour through the intricacies of achieving compliance under Title IX. After recounting the history, the court concluded that although Title IX's reach encompassed three broad categories, *i.e.*, the allocation of athletic scholarships, athletic equivalence standards, and athletic opportunity, that it was an athlete's "[e] opportunity to participate [that lay] at the core to Title IX's purpose."[65] In so limiting its universe, the court laid its groundwork for measuring effective accommodation of students' interests and abilities.

After reciting the three prong test discussed above, the court held that a university need only satisfy one of the three prongs to escape liability under the law. In fact, the court noted, should a university wish to ensure compliance, it need only "maintain gender parity between its student body and its athletic lineup."[66] The court quickly added that all is not lost for the majority of universities which fail the strict proportionality test. "The second and third parts of the accommodation test recognize that there are circumstances under which, as a practical matter, something short of this

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62. *Cohen*, 991 F.2d at 892. At the time of the reductions, the university population was comprised of approximately 52% men and 48% women. *Id.*

63. *Id.* at 893. *See also* Cohen v. Brown University, 809 F. Supp. 978, 1001 (D.R.I. 1992).

64. The court was merely reviewing the district court's decision to grant a preliminary injunction under an abuse of discretion lens.

65. *Id.* Moreover, the court found that its review was limited to the athletic opportunity arena because plaintiffs' failed to allege that Brown, which does not offer athletic scholarships, discriminated by gender in allocating its financial aid and because the district court had made only preliminary findings regarding equivalence with a promise to conduct a more thorough evaluation at trial.

66. 991 F.2d at 898.

proportionality is a satisfactory proxy for gender balance."[67] Thus, a school could achieve compliance under the law by demonstrating either that it is continually expanding athletic opportunities and "persists in this approach as interest and ability levels in its student body and secondary feeder schools rise," or by demonstrating that the plaintiffs have failed to show that the university is not meeting the interests of the underrepresented gender.[68] The court noted that Brown had failed both the first and second prongs and that the heart of the controversy lay in the third.[69]

The third prong requires a showing that the interests and abilities of the underrepresented sex have been fully and effectively accommodated by the present program.[70] Some accommodation is insufficient: full and effective accommodation is required. The Court described this standard as high, but not absolute. As noted previously, the mere fact that some female athletes are interested in competing in a sport does not automatically require the university to institute the sport. Such opportunities need only be offered if there is sufficient interest and ability among the students of that sex to sustain a viable team and there exists a reasonable expectation of intercollegiate competition for the team. The Court acknowledged that staying abreast of the problem is not easy and that institutions must constantly be on guard to upgrade the competitive opportunities for the disadvantaged sex.[71] Interestingly, Brown argued that where interests in athletics are disproportionate by gender, colleges should only be required to accommodate the students' athletic interests in direct proportion to the comparative level of interest. Under Brown's analysis, compliance would be achieved if athletic opportunities were afforded to women in accordance with the ratio of interested and able women to interested and able men. The court, however, rejected the argument, characterizing it as an attempt to read the word "full" out of the Title IX requirement. In

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67. *Id.*

68. *Id.*

69. *Id.* at 903. Brown argued that it should have been found in compliance under the second prong, based upon the impressive growth of women's sports in the 1970's. *Id.* The court observed that while a university deserves applause for "supercharging a low-voltage athletic program in one burst rather than powering it up over a longer period, such energization, once undertaken, does not forever hold the institution harmless." *Id.* Brown's initial invigoration of the women's programs took place over six years and then the university did relatively nothing for at least twice that long. *Id.* Moreover, the length of the hiatus undermined any claim of "continuing" practice of program expansion. *Id.*

70. *Id.* The district court expressly found that there was great interest and talent among the female undergraduates which would go unserved following the cuts and in particular there was interest in the two programs. *Id.* at 904. Interestingly, the teams had won Ivy League championships in 1988 and 1990. *Id.* at 892, n. 2.

71. *Id.*

addition, the court observed that such a system would aggravate the quantification problems that are intertwined with any Title IX analysis. As it currently stands, effective accommodation "requires a relatively simple assessment of whether there is unmet need in the underrepresented gender that rises to a level sufficient to warrant a new team or the upgrading of an existing team."[72] Brown's proposal, on the other hand, would require an assessment of the level of interest among the male and female students and a determination of how completely the university was serving the interests of each sex on a comparative basis. In addition, questions as to the appropriate survey population would also arise.[73] Applying the plain meaning of the statute, the Court concluded that Brown had violated Title IX and affirmed the entry of the injunction requiring Brown to reinstate the two women's programs.

The second major case, *Roberts v. Colorado State University*, was decided by the Tenth Circuit Court of Appeals in July, 1993.[74] Members of Colorado State's women's softball team sued the University after the athletic department had announced that due to budgetary cuts, it was discontinuing the women's softball and men's baseball programs. As in *Cohen*, the Tenth Circuit opinion traces Title IX's requirements and ultimately focuses on whether the university effectively accommodated the interests and abilities of the female student population. CSU argued that under the three-part test found in the Policy Interpretation, the university's actions were not violative of Title IX because the department's percentage of intercollegiate athletic opportunities available to CSU women (37.7%), was substantially proportionate to the percentage of matriculating women (48.2%).[75] While agreeing that compliance with the first prong of the three-part test provides a "safe harbor" for a university, the court focused on CSU's argument that the 10.5% disparity that existed between men's and women's opportunities constituted substantial proportionality.[76]

In its analysis, the court observed that the Manual used by the Investigators for the Office of Civil Rights states that there is no set ratio for determining substantial proportionality.[77] However, based upon an example in the Manual which provides that if under-

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72. *Id.* at 900.

73. *Id.*

74. 814 F. Supp. 1507 (D.Colo.) *aff'd in part* and *rev'd in part sub nom* Roberts v. Colorado Board of Agriculture, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 580 (1993).

75. *Roberts*, 814 F. Supp. at 1512. Prior to the cuts, the percentage of opportunities available to women were 35.2% versus an enrollment percentage of 47.9%. *Id.*

76. *Roberts*, 998 F.2d at 829-30.

77. *Id.* at 830, (citing Investigator's Manual *supra* note 24, at 24).

graduate enrollment is 52% male and 48% female, ideally the same proportions should exist in athletic opportunities, the court concluded that substantial proportionality involves a close relationship between athletic participation and undergraduate enrollment.[78] The court then concluded that a 10.5% disparity was not substantially proportionate.[79] It did note, however, that had CSU retained its softball program and added a twenty-three member women's soccer team and a fifteen-member women's ski team, the women's athletic participation rate would have risen to 46.6% resulting in "an acceptable 1.7% gap between female athletic participation and female undergraduate enrollment."[80]

Like Brown University, CSU next argued that in finding that CSU did not satisfy the second prong of the test, regarding the "continuing expansion" criteria, the district court erred in that it should have attributed greater weight to the fact that CSU had created a women's program out of nothing in the 1970's by adding 11 programs. The district court had also observed, however, that women's participation opportunities declined steadily in the 1980's and more significantly, had declined in spite of CSU's voluntary development of a Title IX compliance plan in 1983 after OCR conducted a compliance review.[81] Although cognizant of the harsh reality of educational economics in the 1990's, the court of appeals refused to reread or relax Title IX's requirement that schools demonstrate both a history and continuing practice of program expansion.[82]

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78. *Id.* Notwithstanding this example and conclusion and the First Circuit's treatment (in *Cohen*) of the relevant survey population as being a thorny issue, a substantive argument can be made that the comparative population should be NCAA eligible students and not the student body as a whole.

79. *Id.* at 830. The court referenced the district court in *Cohen*, 809 F. Supp. at 991, finding that an 11.6% disparity was not substantially proportionate. *Id.* In addition, the court noted that a 1983 review by the Office of Civil Rights found that CSU's opportunities were not substantially proportionate (the years at issue disclosed disparities of 7.5%, 12.5% and 12.7%) and that expert testimony opined that 10.5% disparity was statistically significant. *Id.*

80. *See Roberts*, 814 F. Supp. at 1507, 1518.

81. *Id.* at 830. Budget cuts in the last 12 years resulted in a 34% decline in women's participation opportunities whereas there was only a 20% decline in men's opportunities. *Id.*

82. *Id.* The court opined:

> We recognize that in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletics programs. Nonetheless, the ordinary meaning of the word "expansion" may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs. Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population.

Id.

Although the appeals court failed to find error with the lower court's ultimate holding, it did rule that the district court had improperly placed the burden of proof on the university with respect to the third prong of the test - whether the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated by the present program. Essentially, the district court had required that the university prove that its program fully and effectively accommodated the interests and abilities of female athletes. Instead, the court held that the proper burden of proof is that the plaintiff must establish that the university does not offer substantially proportional programs and that it is not fully and effectively accommodating the interests and abilities of women.[83]

With regard to the full and effective accommodation argument, CSU also contended that if there is interest and ability on the part of women, the university is only obligated to accommodate to the extent that it accommodates men. Because both the women's softball and men's baseball teams were cut, CSU argued that there were more disappointed male athletes. The court, citing *Cohen*, quickly rejected this argument and emphasized Title IX's high standard: full and effective accommodation - not just some accommodation. If there is interest and ability in the underrepresented sex, and the institution fails to satisfy it, the university will fail this prong of the test.

The appeals court upheld the injunction requiring CSU to reinstate the softball program until all the individual plaintiffs have transferred or graduated. The court observed, however, that if CSU otherwise came into compliance with Title IX that this injunctive relief could be eliminated.[84]

In another case, after Colgate University declined the women's club hockey team's fourth request for elevation to varsity status, several female members of the team brought suit against the university under Title IX.[85] In finding a Title IX violation, the district court analyzed the twelve men's varsity sports and eleven women's varsity sports. Excluding football, the respective budgets for the 1991-92 academic year for the men's sports was $380,861.00 and for women's sports was $218,970.00. With football included,

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83. *Id.* at 831. *See also Cohen*, 991 F.2d at 897.

84. In addition, the appeals court, citing Title VII (employment discrimination) case law, held that the district court's failure to require the plaintiffs to prove intentional discrimination was not effective. The court found that the plaintiff's use of a disparate impact discrimination analysis was permissible. *Id.* at 832-33.

85. Cook v. Colgate Univ., 992 F.2d 17 (2d Cir. 1993); 802 F. Supp. 737 (N.D.N.Y. 1992).

the total men's budget was $654,909.00. Although some of the same sports received comparable funding, the court found it ironic —in view of these statistics— that Colgate attempted to argue that its program as a whole was not discriminatory.[86] Notwithstanding this point and the fact that the men's team was a varsity team and the women's team was a club team, the court engaged in a comparative analysis of the respective hockey teams through the use of several of the factors set forth at 34 C.F.R. §106.41(c)(1)-(10).[87]

Concluding that the women had established a prima facie violation of Title IX, the court analyzed Colgate's purported justification for its actions.[88] The court rejected Colgate's claim that women's ice hockey is rarely played on the secondary level. The evidence showed that while public high schools are not feeder programs for college hockey, the private schools and Canadian school programs provide an ample pool of women hockey players.[89] The court also rejected Colgate's claim that it was justified in its action because the NCAA did not sponsor a women's ice hockey championship. Among other things the court noted that the ECAC, a conference to which Colgate belongs, does offer such a championship.[90] The court also rejected the justification that the sport was only played at sixteen other colleges in the northeast, noting that all of the locations were within one day or overnight travel of Colgate.[91] The court similarly rejected claims that there was a lack of student interest and ability among the players.[92] While the court acknowledged Colgate's argument that funding of the program would be expensive, it did not allow the finances to be a justification for refusing to allow the program to move forward.[93] The court aptly

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86. *Cook*, 802 F. Supp. at 742.

87. With regard to "expenditures", the court noted that the men's hockey team received $238,561.00 in funding while the women's team received only $4,600.00. With regard to "equipment", the men's team was supplied with skates, sticks, uniforms, gloves, pads, helmets and unlimited skate sharpening. The women's team had to supply their own skates ($160.00) and pay someone to sharpen them. They were given old and inadequate equipment and were limited to two hockey sticks per year. The men's locker room was large (50' by 50'); the women's was small (15' by 15') and shared with other teams. The men's team travelled by bus with a commercial driver and stayed in comfortable accommodations. The women's team had to pay the university for the use of a van which was driven by one of the players. On most overnight trips they stayed at homes of parents and friends. The men's team practiced on weekdays from 3:00 to 6:00 p.m. and the women's team practiced at 7:30 to 9:00 p.m. on Monday, Wednesday and Friday and 4:00 to 6:00 p.m. on Sunday. After reviewing these factors, the court observed that the male hockey players were treated as "princes" and the female players are treated as "chimney sweeps". *Cook*, 802 F. Supp. at 744-45.

88. *Id.* at 745.

89. *Id.*

90. *Id.* at 746.

91. *Id.* at 747.

92. *Cook*, 802 F. Supp. at 747-49.

93. *Id.* at 749-50.

observed that if financial concerns could justify disparate treatment, Title IX would become meaningless.[94] Like the other courts, the district court recognized that in this era of limited resources, it may come down to eliminating men's programs and increasing women's programs.[95]

Colgate appealed the decision to the Second Circuit Court of Appeals. Interestingly, however, their argument on appeal was that the case had been rendered moot.[96] By the time the Court of Appeals heard the case, three of the plaintiffs had graduated, the current hockey season had ended and the remaining two plaintiffs were scheduled to graduate in a few months.[97] Because none of the plaintiffs could benefit from an order requiring equal athletic opportunities for women ice hockey players at Colgate, the action was moot. As a result, the district court's decision was vacated and the action was ordered dismissed.[98]

This case and others[99] illustrate the importance of prompt action both by those aggrieved by an institution's practices as well as the courts adjudicating those claims. The identification and inclusion of proper plaintiffs may be the most critical aspect of a Title IX case. If the case is pursued not on a class basis, but purely on behalf of specific individuals such as in this matter, the likelihood that the matter will be rendered moot is obviously much greater.

Instead of engaging in a long, costly litigious process many universities confronted with Title IX compliance suits look for a way to resolve the matter. In such case which now has the tremendous potential of increasing the opportunities for women to participate in college athletics, the California State University System and the California National Organization for Women announced in late October 1993 a settlement of a gender equity in athletics lawsuit.[100]

The lawsuit was brought by California NOW based upon a belief that CSU institutions which included 19 separate campus intercollegiate athletic programs were not providing equity in participation, funding or scholarships.[101]

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94. *Id.* at 750.

95. *Id.*

96. *Cook*, 992 F.2d at 18-19.

97. *Id.*

98. *Id.* at 19-20.

99. *See, e.g.*, Gomes v. Rhode Island Interscholastic League, 604 F.2d 733 (1st Cir. 1979).

100. California Nat'l Org. for Women v. Board of Trustees of the California State Univ. No. 949207 (Cal.App. Dep't Super. Ct., Oct. 20, 1993)(Consent device).

101. *Id.* In 1991/92, the latest year for which figures are available, 6,475 students

Settlement of the suit provided that not later than the 1998/99 year, each CSU campus with an NCAA intercollegiate athletic program must meet several obligations.[102] First, they must assure that the number of women athletes at the institution are within five percentage points of the percentage of NCAA eligible women undergraduates enrolled at the campus.[103] Second, they must allocate to women funding, including General Fund resources, in a percentage within ten percentage points of the percentage of NCAA eligible women under-graduates enrolled at that campus.[104] Third, they must provide grants-in-aid for women as a portion of the total grants-in-aid within 5 percentage points of the percentage of NCAA-eligible women undergraduates at that campus.[105] In addition, as part of the settlement, CSU will also conduct a biennial survey, beginning with the 1994/95 year, of student interest, particularly women, in participating in intercollegiate sports. The 19-campus system also will devise a procedure for recording current or prospective students' requests for athletic opportunities.

Monitoring campus compliance with the settlement will be a seven-member committee of CSU presidents. Beginning with the 1994/95 academic year, this committee will present biennial reports to the CSU Board of Trustees, CSU chancellor and California NOW's attorneys.

This type of settlement avoided the apparently inevitable finding of noncompliance and the resultant judicially imposed program and funding obligations on a financially drained educational sys-

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participated in intercollegiate athletics at the 19 campuses. Of those students, 65 percent were men and 30 percent were women (an additional 5 percent took part in coeducational athletic activities). If football were excluded, the percentages changed to 57 percent men, 37 percent women and 6 percent coed. The system-wide male-female breakdown in 1991/92 was 55 percent women and 45 percent men. *Id.*

Athletic funding in 1991/92 from all sources (general fund, gate receipts, private funds, etc.) totaled $34.7 million for men and $11.8 million for women; coed activities received $1.7 million. Funding per male athlete was $8,222; excluding football it was $6,690. For females, the per student figure was $6,061; the coed figure was $5,708. If football were excluded, male and female funds, $6,690 vs. $6,061, would have been much closer in expenditure level. *Id.*

If only general fund money is reviewed, men's teams have received twice the state funding of women's teams. However, the per participant figure was higher for women, $3,392, than the $3,036 allocated per male athlete. In other words, for every $100 of state funds spent on a male athlete, $111 was spent on a female athlete. *Id.*

102. *Id.* at 2-3. (Consent Decree).

103. *Id.* For example, if women make up 50 percent of a campus, then no fewer than 45 percent of the athletes can be women. *Id.*

104. *Id.* In general, this means that men's sports could claim 60 percent of the funds if women were 50 percent of the student body. The agreement also permits allowances for more costly sports such as football. *Id.*

105. *Id.* Again, men could receive a maximum of 55 percent of the scholarships if women were 50 percent of the campus. *Id.*

tem. Instead, a staggered timeframe for compliance was successfully negotiated during which time, incremental steps toward compliance may be achieved.

V. COMPLIANCE TIPS

There are obviously many specific tasks that need to be undertaken to place the university in a defensible position for a potential Title IX claim. While the following is not an exhaustive list, it will provide a starting point for universities.

1. Designate one person within the Athletic Department to oversee compliance with Title IX. Insure that the person knows and coordinates with the University's Title IX compliance official.

2. Periodically review the athletic department's compliance with Title IX; scrutinize the policies and practices of the department and their effect on student-athletes.

3. Modify programs, policies and practices where necessary to comply with Title IX.

4. Develop and publicize a statement and/or program on the nondiscriminatory nature of college athletics by the university.

5. Consider implementing an internal grievance procedure to address Title IX complaints. Obviously, it is better to become aware of and address the complaint internally rather than to hear of the problem for the first time from an investigator from the Department of Education or an aggrieved student in court.

6. Designate one employee to receive and investigate gender equity complaints. Insure that students know who the responsible person is and how to contact that person. Implement a process that addresses gender equity concerns on an expedited basis. Insure that all complaints, even if they are withdrawn or informally resolved, are ultimately brought to the attention of the athletic director.

7. Educate the individual entities within the athletic department, the department as a whole and the entire University administration and academic senate of the obligations and requirements under Title IX.

8. Periodically conduct an internal audit, using the Department of Education's criteria, to assess the athletic department's overall compliance. Consider framing the audit so as to allow the university to avail itself of the attorney-client privilege or the work-product doctrine.

9. Consider the future litigation context of a Title IX case. It is important to understand that because a program may have been eliminated, these cases generally arise in the context of the aggrieved student(s) or team(s) seeking a preliminary injunction to

prevent the team's demise or to reinstate it to its prior level. Because requests for temporary restraining orders and hearings on requests for preliminary injunctive relief tend to move quickly, a university should consider being prepared to defend a Title IX claim even before it makes the budgetary/program reduction decision in the first place. Otherwise, there may not be time to gather the necessary information before you are in court.

10. Prior to eliminating or reducing any programs (and prior to adding any programs) statistically assess the institution's compliance status with Title IX under the existing framework and as proposed by the planned changes. This planning will help the athletic department plan its future defense as well as structure the program reductions in as defensible a manner as possible.

11. Review procedures for acting on requests to add sports and be sure there is a fair and reasonable review process.

12. If program changes are required, be sure to give adequate advance notice of the change(s) and an opportunity for students to voice their opinion on the effect of the changes. This notice period will also serve to mitigate in some manner the impact of the change(s) on the affected student-athletes and coaches.

13. Remember, at all times, that an institution's budget problems and the differences in revenue production in the individual sports do not offset Title IX obligations.

VI. CONCLUSION

There is no doubt that Title IX is both complex in nature and severe in its consequences. Whether the issue is failing to create varsity teams for interested athletes, inappropriately eliminating varsity teams, failing to provide opportunities to participate on specific teams for the opposite sex, or failing to provide equitable resources or support services for teams. The legal challenges appear endless and the financial consequences are significant.

Title IX lawsuits can result in judgments involving monetary and punitive damages, attorneys' fees, court-imposed program funding and court control of athletic programs. None of these results are pleasant; and, yet to avoid them will require athletic department and institutional cooperation and commitment.

Moreover, remember that an effective defense that will include programmatic changes must be initiated now. Delaying change until the start of a Title IX case may prove to be too little too late as Indiana University discovered in *Favia*.

Indeed times are difficult. Budgets are being reduced, opportunities for outside support are decreasing, and yet internal demands are growing. No demand is more oppressing, more costly or more

problematic than trying to meet Title IX and gender equity concerns and obligations. Simply put, this balancing act is unable to be met without additional support.

Prudence dictates that athletic departments aggressively move to survey the athletic interests and abilities of the underrepresented sex and respond to those surveys with a detailed plan to meet Title IX obligations in a conscientious manner. As you go through this process, bear in mind that while Title IX does not require equality, it does require that the sexes be treated equitably. Providing equity will absolutely require programmatic changes and, inevitably, more resources or a reallocation of existing resources.

For that reason, be always aware that compliance with Title IX is a university-wide obligation and not just the duty of the athletic department. The ultimate penalty for failure to comply with Title IX is the withdrawal of federal assistance to the university. As a result, the university must be made aware of Title IX and its implications; and, most importantly, in a time of diminishing resources, the university must be part of the solution, finding resources to address Title IX concerns.