

GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS: A COMMITMENT TO FAIRNESS

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I. INTRODUCTION

The small guard drives down court, leaps from the foul line in Jordanesque fashion, then dishes off to a teammate on the baseline. The shot goes up, and it's good! The Stanford Cardinals have won another national championship in women's intercollegiate basketball.² While the television crews clamored to capture the scene for its national audience, reporters scurried for interviews with the players and coaches.

It is only recently that national attention has been drawn to collegiate women basketball players, demonstrating their talent and athleticism. Twenty years ago this scene would have been unimaginable. Women's sports were no more than an afterthought to college educators and administrators. Then, Title IX of the Education Amendments of 1972³ was enacted. Title IX became the springboard for providing amateur athletic opportunities for women in the United States.⁴ Yet, twenty years after its enactment, the purpose of Title IX remains unrealized.

This comment analyzes one of the most difficult and potentially divisive issues intercollegiate athletics administrators face today, the issue of gender equity. Historically, very few educational institutions have enforced Title IX. Although there has been a modest increase in awareness, most institutions of higher education still do not comply with Title IX. In addition, the over arching issue of gender equity and fairness has been completely ignored. Now, with sweeping reforms taking place in our federal government, the higher education system, and college athletics,⁵ the goal of gender equity is finally being addressed.⁶

2. Stanford's women's basketball team won the National Collegiate Athletic Association championship for the 1989 and 1991 seasons. They advanced to the Final Four in the 1990 season. Telephone Interview with the Sports Information Department at Stanford University (Mar. 8, 1993).

3. Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1990) [hereinafter Title IX].

4. Title IX provides in pertinent part: "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 . . ." 20 U.S.C. § 1681(a) (1990).

5. See generally, *Keeping Faith With The Student-Athlete: A New Model For Intercollegiate Athletics* (Report of the Knight Foundation Commission on Intercollegiate Athletics, March, 1991).

6. *Cooperation Sought For Gender-Equity Challenge*, NCAA NEWS, Jan. 20, 1993 at 16 (quoting James J. Whalen, president of Ithaca College and co-chair of the NCAA Gender-Equity Task Force). "[Gender equity] is not just a divisional issue, not just a monetary issue, not just a sport-specific issue . . . it is in many ways one of the most all-encompassing matters with which the NCAA may ever deal, and one that should be - and in my view is - as important to men as it is to women." *Id.*

This comment begins with a brief history of the language of Title IX and its various interpretations.⁷ Next, it examines the most recent developments involving Title IX. This is done through an analysis of recent violations in intercollegiate athletics and the responses that have resulted from the non-enforcement of the statute. These include responses from the judiciary, the National Collegiate Athletic Association ("NCAA"), athletic conferences, state governments and Congress.⁸ Finally, several recommendations are made to help institutions and athletic conferences into full compliance with Title IX and its principles of gender equity.

II. TITLE IX HISTORY

Equal opportunity has been one of the central themes of American government since our country's inception.⁹ Still, Congress has had to specifically legislate this equal opportunity for certain defined groups in our society.¹⁰ African Americans, disabled Americans and female participants in intercollegiate athletics are three groups for which Congress has chosen to enact protective legislation.

In fact, Title IX was modeled after Title VII of the Civil Rights Act of 1964.¹¹ Title IX provides protection for female athletes against discrimination on the basis of gender in educational programs and activities receiving federal funds.¹² Title IX applies to interscholastic¹³ as well as intercollegiate athletic programs.¹⁴

7. For a more extensive review of Title IX history, judicial decisions and regulatory interpretations, see Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1 (1992); Cynthia J. Harris, Comment, *The Reform of Women's Intercollegiate Athletics: Title IX, Equal Protection, and Supplemental Methods*, 20 CAP U. L. REV. 691 (1991); Paula M. Carey, Comment, *Grove City v. Bell: The Weakening of Title IX*, 20 NEW ENG. L. REV. 805 (1985); Christina Johnson, Comment, *The Evolution of Title IX: Prospects for Equality in Intercollegiate Athletics*, 11 GOLDEN GATE U. L. REV. 759 (1981).

8. See Diane Ravitch, *What Gender Bias?*, THE WASHINGTON POST, Nov. 21, 1993 at C7. Legislation has, in fact, been introduced in Congress to create an Office of Gender Equity. *Id.*

9. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). "We hold these truths to be self-evident, that all men [and women] are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." *Id.*

10. See e.g., Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-17 (1990), prohibits discrimination on the basis of race, color, and national origin. Americans with Disabilities Act, 42 U.S.C. § 12132 (1990), making it illegal to exclude a qualified individual with a disability from participation in activities and programs or to deny such individual the benefits of the services of a public entity. *Id.*

11. Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 9-10 n. 30 (1992).

12. 20 U.S.C. §§ 1681-1688 (1990).

13. See *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Ath. Ass'n*, 647 F.2d 651 (6th Cir. 1981)(holding that discrimination on the basis of sex in high

The statutory language of Title IX was open to interpretation for several years after its enactment. Title IX limits its protection against gender discrimination to any "educational program or activity receiving federal financial assistance."¹⁵ In the context of intercollegiate athletics, the "educational program or activity" language was not in dispute. In most cases, the material question arose as to what constitutes the "receipt" of federal funds.

The meaning of the term "receipt" as used in the regulations of Title IX¹⁶ was interpreted in two very different ways: (1) the "institution-wide" approach and (2) the "program-specific" approach. Under the "institution-wide" approach, federal funds need only be received by any one program of a university or college to require the entire institution to comply with Title IX. In other words, if a university's athletic department does not receive direct federal funding but its biology department receives a federal grant, the athletic department must still comply with Title IX requirements because athletics is a division of the institution's educational programs.

Conversely, the "program-specific" interpretation of the regulation's use of the word "receipt" requires that only the specific programs receiving federal funds comply with Title IX.¹⁷ Many universities receive federal grants for departmental research projects, library acquisitions, and academic scholarships, but very few athletic departments receive federal funds directly. Therefore, under the program-specific reading of the statute, athletic programs rarely need to comply with Title IX requirements. Consequently, the broader "institution-wide" interpretation of "receipt" would clearly advance the Congressional mandate of equality.

However, in the early challenges, most courts employed the "program-specific" view to determine whether Title IX applied to sex discrimination cases.¹⁸ If an athletics program did not receive federal monies directly, it was not required to comply with the equal opportunity mandates of Title IX. Intercollegiate athletic

school athletics is a violation of Title IX).

14. *Haffer v. Temple University*, 524 F. Supp. 531, 541 (E.D. Pa. 1981), *aff'd* 688 F.2d 14 (3d Cir. 1982)(holding that sex discrimination in intercollegiate athletics is a violation of Title IX).

15. 20 U.S.C. § 1681(a).

16. 34 C.F.R. § 106.2(h) (1991).

17. *See Hillsdale College v. Dep't of Health, Education and Welfare*, 696 F.2d 418 (6th Cir. 1982), for a more detailed description of these competing approaches.

18. *See e.g. Univ. of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982); *Bennett v. West Texas State Univ.*, 525 F. Supp. 77 (N.D. Tex. 1981); *Othen v. Ann Arbor Sch. Bd.*, 507 F. Supp. 1376 (E.D. Mich. 1981).

programs were allowed to continue their discriminatory practices simply because they did not receive direct federal aid. This narrow approach effectively foreclosed the opportunity for an individual to bring a legal claim for sex discrimination in a college athletic setting.

As late as 1984, the United States Supreme Court adopted the very narrow "program-specific" interpretation of Title IX in *Grove City College v. Bell*.¹⁹ Grove City, a private college, did not receive federal funding directly. However, many of its students received federal student loans.²⁰ The Court first determined that the federal assistance given to the students was actually received by the college's financial aid department, not by the institution as a whole. The Court then held that Title IX only applied to the specific program or activity, that received federal funding, within the college.²¹ The Court concluded that the receipt of federal loans for student financial aid did not require institution-wide compliance under Title IX.²² Thus, the Court reasoned, sex discrimination within the financial aid department of Grove City College was the only discrimination that was prohibited by Title IX.²³ Thus, the decision placed virtually all collegiate athletic programs beyond the reach of Title IX.

In his dissent, Justice Brennan described the majority's decision as absurd.²⁴ He reasoned that, under this decision, Grove City College may not discriminate on the basis of sex within its financial aid office, but the college may, in effect, sexually discriminate in its admissions policies, its academic departments and its athletic programs.²⁵ Accordingly, the majority's statutory interpretation created some very unsound policies.

As a result of *Grove City*, most collegiate athletic departments were immune to the mandates of Title IX. However, four years later, the Supreme Court's decision in *Grove City* was undermined by Congress when it enacted the Civil Rights Restoration Act of 1987 (1988 Amendments).²⁶ The Restoration Act adopted a very broad reading of Title IX's language.²⁷ By restoring the interpre-

19. 465 U.S. 555 (1984).

20. *Id.* at 559.

21. *Id.* at 571-72.

22. *Id.* at 573.

23. *Id.* at 574.

24. *Grove City College*, 465 U.S. at 601.

25. *Id.*

26. 20 U.S.C. § 1687 (1990).

27. *Id.* The Act required that if any arm of an educational institution received federal funds, the institution as a whole must comply with the Title IX provisions. With this Act, Congress re-established the initial purposes of Title IX. Congress originally enacted Title IX to avoid the use of federal funds to support discriminatory practices and to provide effective

tation of Title IX to the institution-wide approach through the Civil Rights Restoration Act, Congress re-focused the judiciary toward the true purpose of the statute, gender fairness.²⁸

In addition to clarifying Title IX's purpose, Congress also directed the Office for Civil Rights²⁹ ("OCR") to promulgate and enforce regulations to ensure compliance with Title IX. The OCR developed regulations which clearly state that any educational program benefiting from federal funds, however indirectly, is subject to Title IX and its regulations.³⁰ Thus, Congress and the OCR have clearly indicated that the receipt of indirect federal funds by an educational institution causes its athletic department to fall under the directives of Title IX.

One of the most notable athletic discrimination cases to be heard since the passage of Title IX was *Haffer v. Temple University*.³¹ At issue in *Haffer* was whether Title IX applied to an intercollegiate athletics program that did not directly receive federal funds. Female athletes at Temple University originally filed suit in 1980.³² They claimed that the university failed to provide women equal opportunity to participate in intercollegiate athletics. The district court held that Title IX applied to Temple's intercollegiate athletic program even though the program received no direct financial assistance.³³ On appeal, the United States Court of Appeals for the Third Circuit upheld the lower court's decision and adhered to the institution-wide interpretation of Title IX. Although the parties subsequently entered into a settlement agreement, *Haffer* is

protection against these practices. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

28. Section 2 of Pub. L. 100-259 of the Education Amendments of 1972 states:

The Congress finds that (1) certain aspects of recent decisions and opinions of the Supreme Court cast doubt upon the broad application of Title IX of the Education Amendments of 1972; and (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

Id.

29. 34 C.F.R. § 106.4 (1991). The Department of Education through the Office for Civil Rights is the administrative agency charged with enforcing Title IX. *Id.*

30. 34 C.F.R. § 106.2(h) (1991). The OCR defines a recipient as,

[A]ny State or political subdivision thereof, or any . . . public or private agency, institution, or organization . . . to whom Federal financial assistance is extended directly or through another recipient and which operates an educational program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

Id.

31. 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982).

32. *Id.*

33. *Id.* at 532. Temple University as a whole received approximately nineteen million dollars from federal sources, constituting more than ten percent of the university's budget. *Id.*

considered by many as a ground breaking case because it required mandatory compliance with Title IX and other federal discrimination laws by institutional programs and intercollegiate athletics departments.³⁴

Congress designed the statute so that an entire institution and all of its programs would be subject to Title IX if any part of the institution or any one of its programs received federal financial assistance.³⁵ Thus, *Haffer* reinforced the original intent Congress contemplated when it enacted Title IX.

A. Relief Under Title IX

An allegation of a Title IX violation may be pursued via three avenues: (1) filing an internal grievance with the individual educational institution, (2) filing a complaint with the Office of Civil Rights (OCR), or (3) commencing a federal lawsuit.³⁶ In the interests of saving time and lowering legal costs, the filing of an internal grievance with the university or the filing of a complaint with the OCR may be preferred options. Due to the recent Supreme Court decision of *Franklin v. Gwinnett*,³⁷ which allows compensatory damages if intentional discrimination is established, it is predicted that there will be an increase in the number of private federal actions filed under Title IX.³⁸

Although Title IX does not expressly state that a prospective plaintiff has the right to commence a federal lawsuit, the Supreme Court in *Cannon v. University of Chicago*³⁹ held that an individual has an implied right to initiate a Title IX action.⁴⁰ Initially, the Title IX plaintiff was only entitled to declaratory or injunctive relief⁴¹ if she prevailed in her suit. A declaratory judgment in favor of the plaintiff declares the rights and status of the female plaintiff and the institutional defendant, even though no consequential relief is awarded. On the other hand, an injunction forces the institution found to be in violation of Title IX to stop its discriminatory practices. The only monetary relief previously awarded to prevailing Title

34. Christina A. Longo & Elizabeth F. Thoman, Comment, *Haffer v. Temple: A Reawakening of Gender Discrimination in Intercollegiate Athletics*, 16 J.C. & U.L. 137, 138 (1989). The plaintiffs in *Haffer* also asserted violations of the equal protection clause of the 14th Amendment and Pennsylvania's Equal Rights Amendment (ERA). *Id.*

35. See *supra* note 28.

36. Diane M. Henson, *Gender Equity in Sport: What is She Entitled to?*, at 2-3 (March, 1992) (unpublished paper, on file with the author).

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

38. Tony Mauro, *Sex Bias Law Applied to Schools*, USA TODAY, Feb. 27, 1992, at 1A.

39. 441 U.S. 677 (1979).

40. *Id.* at 709.

41. See, e.g., *Univ. of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982).

IX plaintiffs were attorney's fees which were available under the Civil Rights Attorney's Fees Awards Act of 1976.⁴²

The more substantial relief of compensatory damages, those damages that remunerate an injured party for the injury sustained, were not directly addressed by the Title IX statute⁴³ or its regulations.⁴⁴ The awarding of compensatory damages, however, was considered in the most recent Title IX Supreme Court decision of *Franklin v. Gwinnett County Public Schools*.⁴⁵ In *Franklin*, a female student attending a public high school alleged sexual harassment by her male teacher and filed suit under Title IX. The United States Court of Appeals for the Eleventh Circuit concluded that Title IX does not allow compensatory damages.⁴⁶

In a unanimous decision, the Supreme Court reversed the Eleventh Circuit. The Court held that compensatory damages may be awarded in a Title IX action where intentional discrimination is established.⁴⁷ Justice White, writing for the Court, noted that a federal court may order any appropriate remedy if a right of action exists to enforce a federal right and Congress is silent on the question of relief.⁴⁸

With its decision in *Franklin*, the Court empowers Title IX plaintiffs with a forceful remedy against educational institutions. Previously, a university in violation of Title IX could only lose its federal funding.⁴⁹ Upon compliance with the directives of Title IX, the institution's federal funding would resume.⁵⁰ Now, after *Franklin*, an institution that intentionally discriminates on the basis of gender may be forced to pay the plaintiff compensatory and punitive damages in addition to reorganizing its non-complying pro-

42. 42 U.S.C. § 1988 (1991). In *Cannon*, the Supreme Court stated that this Act authorizes an award of fees to prevailing parties in Title IX actions. 441 U.S. at 685 (1979).

43. 20 U.S.C. § 1681 (1991).

44. 34 C.F.R. Part 106. Title IX regulations are silent on the issue of compensatory damages. *Id.*

45. 112 S. Ct. 1028, 1032 (1992).

46. *Id.* at 1032.

47. *Id.* at 1038.

48. *Id.* at 1035. The respondents in *Franklin* contended they were not adequately notified that monetary damages were a potential form of relief in a Title IX action. They referred to *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), and asserted the argument that remedies were limited under the Spending Clause when an unintentional violation was alleged. *Id.* The respondents therefore maintained that this presumption should also apply to intentional violations. *Id.* The Court strongly disagreed with this line of reasoning stating that a notice problem could not exist in an action in which intentional discrimination is alleged. *Id.* Congress, the Court said, surely did not intend for federal monies to be spent to support intentional actions such as sexual harassment. *Id.* These actions were precisely the kind of conduct Congress sought to prohibit through the Title IX legislation. *Id.*

49. 20 U.S.C. § 1682 (1990).

50. *Id.*

gram(s) to meet the standards of Title IX. The potential for compensatory damages may be a deterring factor which will influence an institution's actions and attitude regarding Title IX violations. In these types of actions, where a plaintiff alleges intentional discrimination, Title IX carries more force than ever.⁵¹ In addition, students were reluctant to pursue violations because they knew they would graduate before a suit would be decided and, therefore, would not personally benefit from a decision.⁵² *Franklin* gives Title IX plaintiffs an alternative form of relief. This monetary form of relief should encourage plaintiffs to pursue their federal rights.

The students of Brown University did just that. In 1991, members of the women's volleyball and gymnastics teams sued the university alleging a violation of Title IX.⁵³ Brown demoted these teams from varsity to club level status⁵⁴ and cut off coaching assistance and financial subsidies to the teams. The university contended that the move was not discrimination but rather a belt-tightening measure that included demoting two men's sports as well.⁵⁵ The district court granted a preliminary injunction requiring Brown to reinstate the two women's teams pending the outcome of a trial.⁵⁶ The Court rested its decision on Brown's failure to accommodate the interests and abilities of female students in the selection and level of sports.⁵⁷

The Department of Education adopted the Policy Interpretations⁵⁸ of Title IX's regulations proposed by its fore-father, Health Education & Welfare (HEW). These interpretations were issued to encourage self-policing.⁵⁹ The Policy Interpretations include three major areas of compliance: Athletic Financial Assistance (Scholarships); Equivalence in Other Athletic Benefits and Opportunities;

51. Carol Herwig, *Decision Sends Clear Message To Violators*, USA TODAY, February 28, 1992 at 2C. The pursuit of monetary damages by a Title IX plaintiff is limited to those individuals who have been intentionally discriminated against. The burden of showing intentional discrimination is on the plaintiff. She must prove that an institution deliberately developed an athletic program designed to discriminate against female athletes. However, potential plaintiffs should not be discouraged by this burden. In the past, attorneys have been reluctant to take Title IX cases because they afforded no monetary remuneration, even to cover basic costs. *Id.*

52. *Id.*

53. *Cohen v. Brown*, 809 F. Supp. 978 (D.R.I. 1991); *aff'd*, *Cohen v. Brown*, 991 F.2d 888 (1st Cir. 1993).

54. *See Cohen*, 991 F.2d at 891. Intercollegiate clubs compete against club teams and varsity teams from other colleges, however, many schools with varsity squads are reluctant to compete against club teams. *Id.*

55. *Id.* at 891.

56. *See Cohen v. Brown*, 809 F. Supp. 978, 1001 (D.R.I. 1991).

57. *See Cohen*, 809 F. Supp. at 994.

58. 44 Fed. Reg. 71,413 (1979).

59. *See Cohen* 991 F.2d at 896.

and Effective Accommodation of Student Interests and Abilities.⁶⁰ The parties agreed that the third compliance area was the issue on which the appeal must be fought.⁶¹

The issue of this case, whether an athletic program effectively accommodates students' interests and abilities, is the first to reach the 1st Circuit Court of Appeals.⁶² The Policy Interpretation charts a three-part model for the accommodation test. A university need only meet one of three standards. The first benchmark is whether the athletic opportunities are substantially proportionate to the gender composition of the university student body. The second standard asks whether an institution can show a history and continuing practice of athletic program expansion which is responsive to the developing interests and abilities of members of the under represented sex. The third benchmark concerns whether the discernible interests of the under represented sex have been fully and effectively accommodated.⁶³

Most institutions may seek to meet the third benchmark as it may be the least difficult to attain. The first standard of substantially proportionate numbers respective enrollments is an unlikely balance to achieve.⁶⁴ The second benchmark of continuing program expansion is likewise unreasonable as universities proceed to cut and contain costs. Thus, the third benchmark is the most likely standard institutions will attempt to meet to comply with Title IX.

At the time *Cohen* was filed, the women enrolled at Brown University comprised approximately 48% of the student population. The women had only 36.7% of the athletic opportunities on campus.⁶⁵ The female plaintiffs argued that they were, in fact, the under represented sex with respect to Brown's undergraduate enrollment and that their interests and abilities were not being fully and effectively accommodated by the university's athletic program.

Brown contended that it met the third benchmark by allocating athletic opportunities to women in accordance with the ratio of interested and able women to interested and able men. In other words, the university read the policy interpretation as requiring an assessment of the level of athletic interest of both the male and female student population and determining comparatively how

60. See 34 C.F.R. §§ 106.37(c); 106.41(c)(2)-(10); and 106.41(c)(1).

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

62. *Id.* at 892.

63. *Id.* at 898-99.

64. See *infra* notes 142-156 for Washington State University's considerable success in meeting a court-ordered goal.

65. *Cohen*, 991 F.2d at 892.

completely Brown was serving the interests of each sex.

The First Circuit fervently disagreed with this reading of the policy interpretations.⁶⁶ The court in *Cohen*, however, ruled that the threshold question is whether there is an unmet need in the under represented gender that warrants the formation of a new team or the upgrading of an existing team.⁶⁷ The theory would "invite thorny questions" and aggravate the quantification problems that are always involved in Title IX cases.⁶⁸

Based on this reasoning, the court affirmed the preliminary injunction requiring Brown University to reinstate its women's volleyball and gymnastics teams.⁶⁹

The decisions in *Cohen*, *Franklin* and *Haffer* provide athletic departments and educational institutions with more incentive to reform their programs. The Court has sent its message—violate Title IX and be prepared to pay. A few big damage awards by the courts "would grab everybody's attention."⁷⁰ These recent rulings put tremendous pressure on an institution to reform its programs. Institutions know that the cost to litigate a Title IX case can be enormous. Some administrators would rather eradicate discriminatory practices than spend money on legal fees.⁷¹ These institutions believe that it is more beneficial to direct their attention to the issue of Title IX compliance, than to risk becoming a defendant in a Title IX lawsuit.

III. RECENT DEVELOPMENTS

A. *Gender Equity and the Response by The National Association of Collegiate Women Athletic Administrators*

Gender equity has become the buzzword phrase of the 1990's in intercollegiate athletics administration. Athletic administrators know what Title IX is, it's "the law of the land."⁷² Yet, many peo-

66. *Id.* at 899. The university was reading the word "full" out of the duty to accommodate "fully and effectively." *Id.*

67. *Id.* at 900. The court went on to denounce Brown's theory which focused on the existing interests and abilities of the student body labeling it "myopic" and saying that this type of analysis would over complicate an already complex equation. *Id.*

68. *Id.*

69. *Id.* at 907. The court reasserted the guiding principal behind Title IX's mandates—that federal monies not be used by educational institutions to perpetuate gender-based discrimination. *Id.*

70. *Cohen*, 991 F.2d at 907 (quoting Susan Ross of Georgetown University Law School).

71. *Id.* In fact, The University of Massachusetts, The University of Oklahoma, The College of William and Mary and The University of New Hampshire are among several institutions that have agreed to reinstate women's sports after being threatened with legal action. *Governmental Affairs Report*, THE NCAA NEWS, Jan. 27, 1993 at 11.

72. Richard D. Schultz, *State of the Association Address*, THE NCAA NEWS, Jan. 20,

ple do not believe gender equity can be adequately defined. If gender equity cannot be defined, how can we comply with its principles?

Gender equity is interpreted in many different ways by different individuals and groups.⁷³ The different definitions of so many individuals and groups only adds to the confusion and may potentially polarize the issue between groups and between genders.⁷⁴ The National Association of Collegiate Women Athletic Administrators ("NACWAA") took the lead in generating awareness and understanding of the gender equity issue in intercollegiate athletics. The NACWAA first created and endorsed a definition of gender equity that emphasized fairness of opportunity and resource distribution within athletic departments.⁷⁵

The definition declares that a women's athletic program at a gender equitable university is one that men would be proud to call their own.⁷⁶ But, would men's teams actually accept the smaller participation opportunities and the meager budgetary resources that are currently allocated to women's teams? Coaches of male collegiate athletes have historically been able to take advantage of more scholarships, newer equipment, larger recruiting budgets and

1993 at 20. Schultz is a former Executive Director of the National Collegiate Athletic Association (NCAA).

73. *Id.* Gender equity has been described by Donna Lopiano, Executive Director of the Women's Sports Foundation, as a larger moral principle that places a higher standard on colleges and universities than does Title IX. Doug Tucker, *First Order of Business is Defining Gender Equity*, MORNING CALL, Jan. 16, 1993 at A46.

As a group, the National Association of Collegiate Women Athletic Administrators ("NACWAA") has proposed an articulate, descriptive definition of gender equity. See *infra* note 80 and accompanying text. Former NCAA Executive Director, Dick Schultz, has stated that gender equity is a step beyond Title IX, but he does not have a strict definition of gender equity. Dave Dorr, *Before Legislating Gender Equity, NCAA Searches for a Definition*, ST. LOUIS POST DISPATCH, Feb. 17, 1993 at 5D. In 1992, Schultz appointed an NCAA Gender-Equity Task Force and directed it to define gender equity. *Id.*

74. *Id.* Merrily Dean Baker, Director of Athletics at Michigan State University, agrees that Title IX is a moral imperative that intercollegiate athletics must address. However, she believes that a language definition of gender equity is simple, "FAIRNESS." Telephone interview with Merrily Dean Baker, Director of Athletics, Michigan State University, (Mar. 26, 1993) [hereinafter Baker Interview].

75. NACWAA *Talks Center on Gender Equity*, THE NCAA NEWS, Sept. 21, 1992 at 16. NACWAA's proposed definition of gender equity is:

[a]n atmosphere and a reality where fair distribution of overall athletic opportunity and resources, proportionate to enrollment, are available to women and men and where no student-athlete, coach or athletic administrator is discriminated against in any way in the athletic program on the basis of gender.

That is to say, an athletic program is gender equitable when the men's sports program would be pleased to accept as its own the overall participation, opportunities and resources currently allocated to the women's program and vice versa.

Id.

76. *Id.*

better training and competition facilities than those available to coaches of female collegiate athletes. In addition, many male coaches of a men's team receive better employment contracts than those received by female coaches of the analogous women's team. The male coach's contract typically covers a longer term and far higher compensation (usually including a bonus package) compared to the contract for a female coach of the women's team participating in the same sport.

How many male coaches would trade places with their female counterpart in the university athletic department? Would the men's basketball coach be able to improve his program year after year using the same resources that are distributed to the women's basketball coach?⁷⁷ Perhaps he could, but would he actually be willing to try? Usually, the more money a sport receives, the more power its coach wields within the organizational structure of college athletics. "People who have power do not want to give it up."⁷⁸ Thus, the lines are drawn. A male coach of a men's team may support gender equity morally but not monetarily. He will not voluntarily transfer any of "his" money to support "her" budget.

B. Gender-Equity in Athletic Leadership Roles

Gender equity and the principles of fairness apply to athletic administrators and coaches as well as to the student-athletes. Yet, recent studies show that the number of female administrators and coaches has actually decreased over the last twenty years. Before 1972, most universities had a dual system athletic department in which the men's athletic teams were directed by a male administrator and the women's teams were managed by a female administrator. After the enactment of Title IX, male administrators were appointed to manage the newly integrated athletic departments established by most institutions.⁷⁹

An on-going longitudinal study by Vivian Acosta and Linda Carpenter poignantly shows the loss of female representation in athletic leadership positions.⁸⁰ Their study includes all four-year

77. Doug Tucker, *First Order of Business is Defining Gender Equity*, MORNING CALL, Jan. 16, 1993, at A46. Most Division I schools allocate about 70% of their athletic budget to men's sports. This leaves, on average, only 30% of the budget to spend on the women's sports program. *Id.*

78. *Id.* (quoting Nora Lynn Finch, Associate Athletic Director, North Carolina State University).

79. MARIAH BURTON NELSON, ARE WE WINNING YET?: HOW WOMEN ARE CHANGING SPORTS AND SPORTS ARE CHANGING WOMEN 159 (1991).

80. R. Vivian Acosta & Linda J. Carpenter, *Women in Intercollegiate Sport. A Longitudinal Study — Fifteen Year Update 1977-1992*. Unpublished paper, Brooklyn College, New

college and university NCAA members that offer intercollegiate athletic programs for women. Results of the study reveal that in 1972, women coached more than 90 percent of the women's collegiate teams. Yet by 1992, female representation in the coaching ranks had dropped to 48.3 percent.⁸¹ More male coaches were lured into coaching women's teams because the status of coaching women's athletics rose to more closely mirror the status of men's varsity athletics versus club level or intramural sports.

This decrease in the number of women coaching women's teams may be attributed to a combination of factors. For instance, Title IX forced institutions receiving federal funds to provide uniforms and adequate facilities for its women's athletic teams.⁸² Also, these institutions now must pay a salary to the coaches of the women's teams. Something never before required.

These factors along with the increased interest in women's sports made the idea of coaching female athletes much more appealing to male coaches. With the "good old boy" network still firmly in place, the male administrators in charge of the newly combined athletics programs hired male coaches to direct the women's teams. As a result, women have been steadily and effectively squeezed out of the key responsibilities of coaching and directing athletic programs.⁸³

C. *The Concern of University Presidents*

The Commission on Intercollegiate Athletics, funded by the Knight Foundation is an organization formed to study intercollegiate athletics and to propose needed reform measures.⁸⁴ In March of 1991, the Knight Commission issued its first report identifying certain problems in intercollegiate athletics.⁸⁵ The report focused on the restoration of integrity to institutions of higher education. Athletics was specifically targeted by the Commission in this reconstructive effort.⁸⁶

The Knight Commission advocates the involvement and commitment of university presidents in the promotion of gender equity in

York (1992) [hereinafter Acosta & Carpenter].

81. *Id.*

82. Nelson, *supra* note 87 at 69.

83. See Acosta & Carpenter, *supra* note 88.

84. This organization is commonly referred to as the Knight Commission.

85. Knight Foundation Commission On Intercollegiate Athletics, Keeping The Faith With The Student-Athlete: A New Model For Intercollegiate Athletics 4-6 (1991) [hereinafter, Knight Commission Report 1].

86. *Id.* at 21-22.

all aspects of intercollegiate athletics.⁸⁷ The Commission maintains that the non-enforcement of Title IX on university campuses "represents a major stain on institutional integrity."⁸⁸

Since the issuance of the Knight Commission's first report, university presidents of NCAA institutions have exerted tremendous control over the Association's legislative agenda.⁸⁹ The NCAA Presidents Commission has driven through legislation pertaining to cost reduction measures and a new institutional certification program.⁹⁰

In its third and final report, the Knight Commission recognized the inoperability of gender equity and university cost control concerns.⁹¹ The re-organization of operations within athletic departments must include financial restructuring. Athletic departments must re-evaluate priorities and focus on cost reduction. For example, the perks of free apparel and extra tickets regularly given to athletic department staff and clerical personnel must be curbed. Secretaries whose salaries are higher than that of the ticket director and other athletic administrators must be re-evaluated. In general, more efficient use of employee time must be effectuated. These examples of organizational excesses exist in nearly every athletic department in this country and they can easily be cut to trim the budgetary fat.

Intercollegiate athletics is part of the educational mission of a university, but it is also big business. Collegiate athletic conferences adopted a businesslike mentality when they signed long-term network television contracts and the post-season bowl agreements. The revenue generated from these ventures has benefited most Division I college athletic programs. The benefit came at a heavy price paid. Intercollegiate athletics has moved from the pristine world of amateur athletics to the big business world of sports and entertainment. We traded youth and idealism for money and materialism. In this new environment, universities must reorganize and become more flexible in their approaches to program operations and collegiate athletics marketing.

Although the Knight Commission's recommendations for gender equity achievement are sensible in theory, the broad policies outlined do not give adequate guidance to university presidents.⁹² The

87. *Id.* at 14.

88. *Id.*

89. Knight Foundation Commission on Intercollegiate Athletics, *A New Beginning for a New Century, Intercollegiate Athletics in the United States*, 4 (1993) [hereinafter Knight Commission Report 2].

90. *Id.* The certification program includes a self-examination and an outside peer review of an institution's actual commitment to equity. *Id.* at 5.

91. *Id.* at 6-7.

92. See *supra* note 101, at 14. The Knight Commission suggested: (1) Annual review of

Commission emphasizes that the presidents must lead in the area of gender equity but it does not give concrete direction to help them in their quest to re-establish integrity in intercollegiate athletics.

D. The NCAA Reform Attempts

Managing athletics with integrity includes addressing gender equity issues for players, coaches and administrators. The National Collegiate Athletic Association ("NCAA") is the governing body for intercollegiate athletic programs. As such, the NCAA should be integrally involved in the gender equity reforms of collegiate athletics. The Association's basic purpose is to maintain athletics as a central component of the educational program at member institutions.⁹³ As a central part of an educational institution, the athletic departments should treat its student-athletes as other academic departments treat its students—on an equal basis. For instance, male and female students have an equal opportunity to take chemistry, philosophy and women's studies courses. In addition, male and female students in academic departments receive equal financial and administrative assistance. Yet, in athletics, a tremendous discrepancy exists between the expenditures for a female athlete versus a male athlete participating in similar sports.⁹⁴

participation opportunities in intercollegiate programs by gender, (2) Development of procedures to insure more opportunities for women's participation and promote equity for women's teams in terms of schedules, facilities, travel arrangements and coaching. *Id.*

93. NCAA CONST. art. 1.3.1, reprinted in National Collegiate Athletic Association, 1992-93 NCAA MANUAL. The NCAA Constitution expressly defines the organization's basic purpose:

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sport.

Id.

94. NCAA Gender-Equity Study, Summary of Results, March 1992. In 1991, the NCAA began to tackle the gender equity issues in intercollegiate athletics by ordering the development and implementation of a comprehensive study. *Id.* This survey was conducted in response to a request made by the NACWAA to review and analyze the expenditures for women's and men's athletic programs. *Id.* at 1. The study showed that at 646 Division I member institutions in 1990-91, the enrollment figures were almost equal for male and female students. *Id.* at 4, 8, 12, 16. In addition, more female students were enrolled in Division II colleges and universities. Yet, the study revealed that the male student-athlete receives more scholarship dollars and more opportunity to play sports in all three NCAA intercollegiate divisions. In Division I schools: men participate in athletic programs at a rate of 2.24 men for every female participant; men receive 2.28 athletic scholarships for every 1 scholarship received by a woman; men's sports spend over 3.4 times the amount women's sports spend; and the recruiting expenses for a male student-athlete exceed those for a female athlete by a ratio of 4.82 to 1. NCAA Gender-Equity Study, Summary of Results, March 1992.

The statistics do not reveal whether the men's team uniforms are replaced every year, while the women's team receives new uniforms only every three years; or whether teams have comparable lodging and travel arrangements when they journey to away games;⁹⁵ or whether athletes of the same sports have access to the same playing and practice equipment; or whether teams have comparable training facilities.⁹⁶ Nor do the numbers suggest whether a team receives numerous sets of practice uniforms and is provided with several new pairs of athletic shoes, or if only one practice uniform and one pair of shoes is given to each athlete on a team.

To assess this quantitative and qualitative data each institution must conduct an internal review of its athletic program. An annual review that included an evaluation of the training facilities, player equipment and athletic apparel would be more comprehensive and qualitative than a mere comparison of program budgets. A few collegiate athletic programs are close to achieving gender equity.⁹⁷ Some programs are making steady progress toward this goal,⁹⁸ and still many other athletic departments are lagging far behind. A mandatory annual departmental review would reinforce the accountability function so desperately needed in collegiate athletics today.

In the spring of 1993, the NCAA elevated gender equity to priority status⁹⁹ with the appointment of a sixteen member task force.¹⁰⁰ Former Executive Director of the NCAA, Dick Schultz,

95. *Area Coaches Say It's Time to Look Beyond the Court*, WASH. POST, Oct. 1993 at D4 (discussing the fiscal abuses of men's athletic teams). Women's basketball teams must take a bus or drive a van to an out-of-state competition while their counterparts in the men's program travel by charter flights to the same school. *Id.*

96. *Id.* at 2.

97. See *infra* notes 142-156 and accompanying text. It is evident that the athletic administrators at Washington State University ("WSU") have placed gender equity on the top of their priority list. WSU female athletes receive almost half of the available athletic scholarships and all teams receive equitable funding. *Id.*

98. SIDELINES, THE CHRONICLE OF HIGHER EDUCATION, Jan. 20, 1993, at A45. In 1993, the University of Virginia increased the salary of its women's basketball coach, Debbie Ryan, to \$106,000. Her salary now matches that of the men's basketball coach. The university administration based its decision on Ms. Ryan's contribution to the sports program. *Id.*

99. See Mark Asher, *NCAA Selects Dempsey As Executive Director: Arizona Athletic Director Succeeds Schultz*, WASH. POST, Nov. 6, 1993 at G10. Current NCAA Executive Director, Cedric Dempsey, has maintained gender equity as one of his top priorities. *Id.*

100. Members of the Gender-Equity Task Force include: Judith E. N. Albino (Pres., University of Colorado), Elizabeth L. Albright (student-athlete), Joe Dean (Dir. of Athletics, Louisiana State University), Vivian L. Fuller (Dir. of Athletics, Northeastern Illinois University), Milton A. Gordon (Pres., California State University-Fullerton), Thomas C. Hansen (Commissioner, Pacific-10 Conference), Carla H. Hay (Assoc. Professor, Marquette University), Phyllis L. Howlett (Ass't. Commissioner, Big Ten Conference), Jeffrey H. Orleans (Exec. Dir., Ivy Group), Richard A. Rosenthal (Dir. of Athletics, University of Notre Dame), Grant G. Teaff (Dir. of Athletics & Head Football Coach, Baylor University), Chris Voelz (Dir. of Women's Athletics, University of Minnesota, Twin Cities), Diane T. Wendt (Assoc. Dir. of Athletics,

gave the gender equity task force three objectives on which to focus: (1) to define gender equity, (2) to review NCAA legislation and look for possible barriers to gender equity, and (3) to establish a set of guidelines that can be followed by member institutions that will help athletic programs provide gender equity.¹⁰¹ Recommendations promulgated by the task force were then voted upon by the membership at the 1994 NCAA Convention. The definition of gender equity adopted by the NCAA is very similar to NACWAA's proposed definition.¹⁰² Both definitions speak of the acceptance of the other gender's sports program by male and female athletes and coaches as a measuring gauge for gender equity compliance.¹⁰³

Along with the new definition, the NCAA Gender Equity Task Force established several guidelines to promote gender equity in intercollegiate athletics. The first guideline calls for an ultimate institutional goal of athletics participation rates "substantially proportionate" to the number of men and women in the undergraduate student body.¹⁰⁴ This proportionality test is a simple way to measure compliance with gender equity. Enrollment figures are generated annually by institutions and then compared to the athletic department participation figures. These numbers must be substantially similar. Numerical precision, however, is not required. The task force recognizes that yearly changes in enrollment patterns may yield different ratios.¹⁰⁵ Therefore, the proportionality test does not demand fixed quotas.

The achievement of such equity in collegiate athletics is an attainable goal, but institutions must be creative in their efforts to achieve gender equity. Most institutions cannot simply increase the athletic department's budget and funnel more money into women's sports. Cost containment is the top priority for university administrators. A department's budget will not be increased without an intense examination of the university's long-term goals and

University of Denver), Charlotte West (Assoc. Dir. of Athletics, Southern Illinois University), James J. Whalen (Pres., Ithaca College) and Kay Yow (Women's Basketball Coach, North Carolina State University).

101. Richard D. Schultz, State of the Association Address, *THE NCAA NEWS*, Jan. 20, 1993 at 20.

102. See *supra* note 83 and accompanying text.

103. NCAA Gender-Equity Task Force, Final Report of the NCAA Gender-Equity Task Force at 2. According to the NCAA, an athletic program adheres to the principles of gender equity "when the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender. No individual should be discriminated against on the basis of gender, institutionally or nationally, in intercollegiate athletics." *Id.*

104. *Id.* at 3.

105. *Id.*

the needs of each individual department.

To achieve gender equity, most universities and athletic departments will have to reallocate their existing resources and revenues. Perhaps the biggest obstacle blocking the achievement of gender equity is fear. The fear that big-time college football, as we know it, will be destroyed to provide for more opportunities for female athletes. Yet, the NCAA task force clearly stated that its purpose in establishing guidelines was not to eliminate opportunities for men, but to enhance and increase opportunities for women.¹⁰⁶ In its final report, the task force strongly suggests that universities provide equitable encouragement and equal benefits to female and male student-athletes alike.¹⁰⁷

Money, power, and football seem to be the focus of gender equity reform when, in actuality, fairness is at the heart of the issue. Many male coaches and administrators have been involved in athletics for years are fighting hard to decrease the impact of gender equity on college football programs. They do not want football to be included in the proportionality calculations used to measure gender equity compliance. They contend that cutbacks in football would destroy the product and result in less revenue. When the NCAA Gender Equity Task Force published its report resolving that all sports, including football, must be included when determining the appropriate participation levels for men and women, many of these men were initially in disbelief and denial.¹⁰⁸

E. The Big Ten Makes a Power Move

The Big Ten Conference is the first major athletic conference to endorse and promote the fairness concept of gender equity through its conference guidelines. The presidents of the Big Ten universities approved a "Sixty-Forty" plan. This plan requires that participation and access to scholarships be at a sixty-forty ratio (men to women) within five years.¹⁰⁹ Within ten years, each Big Ten uni-

106. *Id.*

107. *See supra* note 120, at 3.

108. *Id.* at 4. Young football players, however, realize that women want to play sports and that women should be able to fully benefit from participation in athletics. A Washington State University tailback recently reflected, "[H]ow can anybody say [gender equity] isn't the fair thing to do?" Mary Jordan, *Only One School Meets Gender Equity Goal*, WASH. POST, June 21, 1992, at D1, (quoting WSU tailback, Shaumbe Wright-Fair). This sentiment is noble, but would the same player feel the same way if he lost his scholarship because Division I football teams now have fewer scholarships to offer its players? This author hopes that the proper implementation of the task force's guidelines will ensure that fairness and reason triumph over stubbornness and the status quo.

109. *Iowa to Accelerate Sports Gender Equity*, CAPITAL TIMES, April 22, 1992 at 1C.

versity will strive to match its athletics participation ratio with its undergraduate institutional enrollment ratio of men to women.¹¹⁰

Although the plan is hyped as the most aggressive and progressive gender equity proposal created by a major athletic conference, this "sixty-forty" plan still does not meet the existing federal guidelines under Title IX. The statute requires federally funded institutions to provide equal opportunity to students who wish to participate in college athletics (i.e., a fifty-fifty ratio). The Big Ten proposal was adopted as a compromise position to promote advancement and continued progress in the area of gender equity in intercollegiate athletics.¹¹¹ The plan's proponents believe a compromise is better than no forward movement toward equity.

In 1992, seventy percent (70%) of all athletes competing in Big Ten conference sports were men.¹¹² There were 128 men's teams and 108 women's teams in the conference.¹¹³ To increase female participation in the Big Ten by ten percent within the next five years the Big Ten has four strategies: (1) encourage more walk-on participation by females; (2) add more competitive women's sports; (3) reduce the size of men's teams; or (4) eliminate some men's teams.¹¹⁴

The third strategy, reducing the size of men's athletic teams, is what many coaches of men's intercollegiate basketball and football squads fear the most. These coaches contend that the reduction in the size of team squads and team operating costs will not only harm their own teams but all of the teams within an athletic department, including "minor" men's teams and the women's programs. The revenue that Division I football programs generate does not always finance most of the other athletic teams competing for a university. In fact, nearly 70% of all NCAA Division I football programs operate at a deficit.¹¹⁵ The figures from all three NCAA division schools show that football loses money at 454 out of 524 institutions.¹¹⁶ In 1989, the most recent year for which athletic

110. *Id.*

111. Baker interview, *see supra* note 85.

112. John Sonderegger, *Gender Equity A Cutting Issue in Big Ten*, ST. LOUIS POST DISPATCH, July 31, 1992 at 9D.

113. *Id.*

114. *Id.*

115. Proposed Bill, Equity in Athletics Disclosure Act: Hearings before the Subcomm. on Commerce, Consumer Protection and Competitiveness, 103d Cong., 1st Sess. (1993) [hereinafter Hearings] (testimony of Donna A. Lopiano, citing report by Mitchell H. Raiborn, Revenues and Expenses of Intercollegiate Athletic Programs: Analysis of Financial Trends and Relationships (1990)).

116. Alexander Wolf, *Trickle-Down Economics*, SPORTS ILLUSTRATED, Oct. 10, 1993 at 84. Thus, fielding a football team is a losing proposition for 86% of all NCAA schools. *Id.*

department costs could be determined, the average surplus for a Division I-A program was only \$39,000.¹¹⁷ Less than 100 schools generate revenue from athletics.¹¹⁸

In actuality, major college football programs spend too much money, too frivolously. Lavish sports facilities are built on campuses across the country, all in the name of recruiting blue-chip male athletes who have the promise of leading a team to a national championship. The belief is that if an institution's practice facilities, conditioning rooms and competition arenas are state-of-the-art, then the nation's most talented athletes will attend that institution. "If you build them, they will come," is the sentiment embraced by many athletic departments. Every major "football school" is constantly upgrading its facilities to compete with one another in the recruiting wars. These powerhouse programs compete off the field by overspending on facility construction and recruiting activities thinking this somehow levels the competition on the field. This overspending is in direct conflict with the university's objective to contain costs and streamline departmental budgets.

One area in which football programs can trim their budget is in the construction of new "athletics-only" facilities.¹¹⁹ Athletics-only facilities on college campuses are typically practice and competition facilities built for the exclusive use by the football team or men's basketball team. Participants in the recreational sports programs and intramural competitions are usually banned from using these facilities and the upgraded equipment in them. Many campuses have state-of-the-art conditioning rooms and indoor practice fields that are only used for a few hours a day by less than twenty percent of the student body. Other costs that may be trimmed or eliminated altogether include: plush locker rooms, expensively furnished conference rooms and coaches offices; inlaid team logos on wooden chairs and conference tables; overnight hotel accommodations and prime time cinema movies on the eve of a home game;¹²⁰ team travel over short distances by airplane; and exorbitant recruiting budgets.¹²¹ In addition, some administrators advocate reducing the number of walk-ons allowed in football. It is estimated that

117. *Most Division I Athletics Programs are in debt, Study Shows*, THE NCAA NEWS, Dec. 22, 1993 at 7 (figures drawn from a study conducted by the accounting firm of Coopers & Lybrand for the National Association of College and University Business Officers.)

118. *Id.*

119. *Id.*

120. *See*, John Feinstein, *Power Play Penalizes Both Sides*, WASH. POST, Jan. 15, 1994 at D7. In fact, university presidents voted down a proposal at the 1994 NCAA Convention to forbid football teams from staying in a hotel the night before a home game. The cost of this unnecessary expense ranges anywhere from \$4,000 to \$7,000 per night. *Id.*

121. *Id.*

football costs, on average, \$900 per player per year in equipment alone.¹²² All of this "saved money" created by reducing the "standard of living" of men's football and basketball programs could be re-allocated to fund women's sports and the non-revenue men's sports.

Despite the tremendous pressure to eliminate football from the gender equity equation, the University of Iowa has chosen to accelerate its movement toward gender equity. Iowa's athletic control board voted to match the male-female ratio of its varsity athletes to the male-female ratio of its student body by 1997.¹²³ It is this type of commitment from institutions such as the University of Iowa that will more quickly transfer the gender equity principles into actual practice in intercollegiate athletics.

IV. GOVERNMENT LEGISLATION

A. *Washington State Statutes*

In addition to capturing the attention of university administrators across the country, gender equity in collegiate athletics has become a primary interest for many state legislatures.¹²⁴ Although participation in intercollegiate athletics as is not a constitutionally protected civil right,¹²⁵ some states have deemed the issue of equal opportunity to participate in athletics an important governmental concern. In 1989, the Washington state legislature codified particular requirements for athletic programs offered by four-year public universities and colleges. It enacted three distinct laws that address gender equity in intercollegiate sports: (1) Gender Equity in Athletics Conference;¹²⁶ (2) Gender Equity in Intercollegiate Athletics;¹²⁷ and (3) Gender Equality in Higher Education.¹²⁸

The first of these laws, Gender Equity in Athletics Conference, directed the higher education coordinating board of Washington to

122. *The Changing Face of Athletics*, PLAIN DEALER, July, 19, 1992 at 6D.

123. *Big Ten Moves Toward Gender Equity in Sports*, THE WASHINGTON POST, May 13, 1992 at C2.

124. Most noteworthy are the statutes passed by the state of Washington, (Wash. Rev. Code Ann § 28B.100 (West), (Gender Equality in Higher Education, Gender Equity in Intercollegiate Athletics, Gender Equity in Athletics Conference) and Minnesota, (Minn. Stat. Ann §§ 126.21, 363.01 (West).

125. *Regents of the Univ. of Minnesota v. NCAA*, 560 F.2d 352 (8th Cir.) (declining to find a property interest in intercollegiate basketball participation despite the fact that the lower court had found such a property interest).

126. WASH. REV. CODE ANN. § 28B.100 (West 1989). Chapter 339, H.B. No. 2016.

127. *Id.*, Chapter 339, H.B. No. 2016.

128. *Id.*, Chapter 341, S.H.B. No. 1430.

sponsor a state-wide meeting for athletic administrators, coaches and others involved in intercollegiate athletic programs.¹²⁹ The purpose of the conference included; identifying ways to achieve equal opportunities for males and females in intercollegiate athletics, identifying barriers to achieving equitable participation for female athletes, helping women take leadership roles in athletics and encouraging the media to publicize women's sports.¹³⁰

Another Washington state statute relates specifically to the responsibilities of each institution's athletic department. Section 3 of The Gender Equity in Intercollegiate Athletics statute directs institutions of higher education to provide equitable benefits and services to male and female athletes participating in intercollegiate athletic programs.¹³¹ These equitable benefits and services include equipment and supplies, medical services, conditioning programs, coaching and instruction, game and practice facilities, practice times, publicity, and awards.¹³² An additional goal of this act is to provide athletes with female and male coaches and administrators to act as role models.¹³³

Finally, the Gender Equality in Higher Education statute encourages gender equity in all aspects of university life, including intercollegiate athletics.¹³⁴ The act strongly advocates the concept of proportionality that participation of males and females in university athletic programs must be proportionate to the percentages of male and female undergraduate enrollment.¹³⁵

The impetus for the passage of this legislation was provided by *Blair v. Washington State University*.¹³⁶ In *Blair*, female coaches and athletes at Washington State University ("WSU") brought a sex discrimination action against the university under the state Equal Rights Amendment and the Law Against Discrimination. The trial court found that WSU's women's athletic programs received inferior treatment in funding, facilities, scholarships, equipment, coaching, administrative staff and other areas.¹³⁷ The court viewed the operation of the athletic department as discriminatory treatment toward females.

The trial court entered a detailed injunction that required the university to increase its support of women's athletics by two per-

129. See *supra* note 142, at § 1.

130. *Id.*

131. *Id.* at § 3(1).

132. *Id.*

133. WASH. REV. CODE ANN. § 28b.100 (West). Chapter 339, H.B. No. 2016.

134. *Id.* at § 8(3).

135. *Id.*

136. 740 P.2d 1379 (Wash. 1987).

137. *Id.* at 1380-81.

cent each year until it corresponded to the percentage of women undergraduates at the university.¹³⁸ This ruling seemed to promote the principle of gender equity. The trial court, however, excluded the football program from the calculations of participation opportunities, scholarships, and distribution of non-revenue funds. Therefore, the participation opportunities in athletics for men remained the same.

The Supreme Court of Washington affirmed the decision of the trial court but reversed its ruling on the football exclusion. The Court asserted that the exclusion of football in the participation calculations would prevent the achievement of gender equity since men would always be guaranteed more participation opportunities than women.¹³⁹ There is no corresponding women's sport that provides the number of participation opportunities as are available in collegiate football. A Division I football program may maintain 120 players on its roster. With this jump start of 120 player opportunities, gender equity in terms of participation opportunity could never be achieved. Therefore, the court was correct to include football in the calculations of participation opportunities.

Many people believed the court's proportionality requirement that the WSU athletic department have similar percentages of female athletes as the university had female undergraduate students would decrease the success of the entire athletic program. This decreased has not happened. In fact, all of the WSU athletic programs, including football, are presently more successful.¹⁴⁰

The Blair decision not only provided more opportunity for female athletes to participate in athletics at WSU, but it also created an increase in the number of athletic scholarships available to women. In 1992, women accounted for 47% of WSU's student-athletes and they received a similar proportion of the university's athletic scholarships.¹⁴¹ Washington State University added soccer and rowing as new sports in which female athletes may now participate. These additional sports raised the athletic department's team totals to nine women's sports and seven men's sports.¹⁴² Through the efforts of WSU and the Washington legislature, the state of

138. In 1987, Washington State University's undergraduate female enrollment was 44 percent.

139. *Blair*, 740 P.2d at 1383.

140. Bob Cohn, *Gender Equity, Altering Sports Money at Issue in Major Colleges*, THE ARIZONA REPUBLIC, May 31, 1992, at A1., (quoting Jim Livengood, WSU athletic director).

141. Kelly Whiteside, *A State of Enlightenment*, SPORTS ILLUSTRATED, Sept. 28, 1992, at 56.

142. Mary Jordan, *Only One School Meets Gender Equity Goal*, THE WASHINGTON POST, June 21, 1992, Final Edition, at D1.

Washington has demonstrated a statewide commitment to gender equity that may serve as a model for other states.

B. Federal Intervention

The NCAA's attempts to contend with Title IX compliance and gender equity are long overdue. As the governing body for intercollegiate athletic programs, the NCAA must lead the way toward the achievement of gender equity. The Association's efforts of late have been primarily prompted by Congress which has made it clear that if the NCAA cannot achieve gender equity through its own structure, Congress will legislate equal opportunity for the NCAA.¹⁴³ Since 1990, several bills have been introduced in the United States House of Representatives concerning intercollegiate athletics.¹⁴⁴ Only one, The Student Athlete Right-to-Know Act¹⁴⁵ is now law. The Student Right-to-Know Act requires institutions of higher education to disclose graduation rates of student athletes as well as the type of crimes committed on campuses.¹⁴⁶

Due to the important and far-reaching effects of gender equity enforcement, the federal government has again entered the arena of intercollegiate athletics. Representative Cardiss Collins introduced the Equity in Athletics Disclosure Act on February 17, 1993. The bill amends Section 485 of the Higher Education Act of 1965 by requiring institutions that receive federal funds to disclose athletic-related gender equity information.¹⁴⁷ The bill requires institutions that offer intercollegiate athletic programs to disclose the following data: the total number of participants and their gender;¹⁴⁸ the total scholarship expenditures;¹⁴⁹ the total operating expenses;¹⁵⁰ the total recruiting expenses;¹⁵¹ the gender of the head coach and whether the coach is employed full or part time;¹⁵² the full compensation of the head coach;¹⁵³ the ratio of male participants to female participants in the university's entire athletic program;¹⁵⁴ and the ratio of male scholarship expenses to

143. Dave Dorr, *Before Legislating Gender Equity, NCAA Searches For a Definition*, ST. LOUIS POST DISPATCH, Feb. 17, 1993 at 5D.

144. For a detailed analysis of these proposed bills, see David Williams, II, *Is The Federal Government Suiting Up to Play in the Reform Game?*, 20 CAP. U. L. REV. 621 (1991).

145. Pub. L. No. 101-542, Title I, § 104, 104 Stat. 2383 (1990).

146. *Id.*

147. H.R. 921, 103d Cong., 1st Sess. § 3 (1993).

148. *Id.* at § 3(g)(1)(A)(i).

149. *Id.* at § 3(g)(1)(A)(ii).

150. *Id.* at § 3(g)(1)(A)(v).

151. *Id.* at § 3(g)(1)(A)(vi).

152. H.R. 921, 103d Cong., 1st Sess. § 3(g)(1)(A)(viii) (1993).

153. H.R. 921 at § 3.

154. *Id.* at § 3(g)(1)(B)(i).

female scholarship expenses in the university's entire athletic program.¹⁵⁵ This is the most comprehensive athletics-related bill ever addressed by Congress.

Representative Collins proposed this legislation after the NCAA Gender Equity Study results were announced. In addition to the statistics already discussed,¹⁵⁶ the survey revealed that, on average, female athletes make up thirty percent of the total number of athletes in intercollegiate athletics. Yet, female athletes receive less than eighteen percent of the recruiting dollars and less than twenty-four percent of the operating budget expenditures.¹⁵⁷ The pending legislation would require institutions to disclose this type of information so that students may discern the depth of an institution's commitment to providing equitable athletic opportunities for its student athletes.¹⁵⁸ This information will aid the student in making an informed decision regarding her educational and athletic future.

If the Equity in Athletics Disclosure Act is passed, it would force institutions to gather gender equity related data and prepare the results for publication. This accumulation of data requirement compels the institution to conduct periodic reviews of its athletic department and it creates an automatic internal evaluation procedure. It would force each institution to be accountable for its actions and its policies, and perhaps inspire some institutional soul-searching. In addition, the yearly compilation of gender equity data would serve as excellent evidence in Title IX lawsuits. The possibility of a public trial in which these statistics are used against an institution in a Title IX action is a negative incentive that will surely press universities into compliance with gender equity mandates.

However, other athletic administrators are not in favor of federal legislation to ensure gender equity in intercollegiate athletics. These administrators prefer to use the "in-house" approach of institutional and conference-level mandates for gender equity.¹⁵⁹ A de-centralized approach to the enforcement of gender equity would be more effective, according to Merrily Dean Baker, Director of Athletics at Michigan State University.¹⁶⁰ The "peer pressure"

155. *Id.* at § 3(g)(1)(B)(ii).

156. *See supra* notes 107-112 and accompanying text.

157. NCAA Gender-Equity Study, Summary of Results, March 1992.

158. H.R. 921, § 2(7), 103d Cong., 1st Sess. (1993).

159. *Id.* (testimony of Grant G. Teaff, Director of Athletics, Baylor University and member of the NCAA Task Force on Gender Equity).

160. Baker interview, *supra* note 65.

created by each individual institution's efforts toward gender equity can be a very powerful force. For example, one Big Ten Conference school meets the gender equity proportionality requirement for female athletes and female undergraduates, then, Baker contends, other Big Ten institutions will increase their efforts to meet the proportionality standard to "keep up with the Jones'."¹⁶¹ The energy of this intra-conference peer pressure may transfer to impact other conferences, too. For instance, the Pacific 10 Conference and the South Eastern Conference will feel the peer pressure from the Big Ten schools and promptly increase their gender equity compliance efforts. This de-centralized peer pressure approach underscores the idea that gender equity is a social and moral imperative that every educational institution should strive to meet.

Opponents of federal intervention as a means to achieve gender equity state the fact that the government has been ineffective in enforcing Title IX and its regulations.¹⁶² Title IX is a federal law and there has been virtually no enforcement of its mandates in over twenty years. The Office for Civil Rights may punish an institution for noncompliance with Title IX by withdrawing its federal funds. The agency, however, has never imposed any penalties in a Title IX college sports case.¹⁶³ If the government has not yet effectively enforced Title IX, it is difficult to believe that Congress will enact additional gender equity legislation and enforce it.

V. RECOMMENDATIONS

From a practical standpoint, the achievement of gender equity for women's intercollegiate sports and men's non-revenue sports may only be realized by allocating more funds to those programs and marketing such sports creatively. The fiscal pressures on colleges and universities is great, but the duty of these institutions to comply with Title IX and its gender equity principles is even greater.

To attain gender equity, Division I football must be reformed. Expenditures and the excess of nonessential departmental items must be controlled. Reducing the size of the football squad is a logical start. Professional football teams are limited to only forty-seven players on each roster. College football should be able to field a marketable product with eighty-five roster positions. This roster size would allow a coach to suit-up and practice with three full

161. *Id.*

162. *Id.*

163. Debra E. Blum, *Civil Rights Office Urged to Heed Results of 2 Recent Sex-Bias Suits*, THE CHRONICLE OF HIGHER EDUCATION, Sept. 15, 1993 at A40.

offensive units and three full defensive units plus one place kicker and one punter while still leaving thirteen additional players available for special teams duty. Dressing less players for practice and game situations will reduce costs by limiting overall equipment costs and uniform cleaning expenses, reducing team travel and recruiting budgets, decreasing the number of medical trainers and medical supplies needed, and eliminating the necessity of at least one staff coaching position.

Opponents of decreasing the roster size of varsity football teams argue that football is a physical sport that often causes serious injuries.¹⁶⁴ Therefore, the opponents reason, the number of starting positions combined with the potential severity of injuries in the sport of football creates the need for dozens of male athletes on the roster. However, proper conditioning and maintenance of the players physical health will prevent and reduce many injuries and make this a viable cost-reducing element in the reallocation of athletic department resources.

In conjunction with decreasing the roster size of football, institutions can limit the number of scholarships available. Football currently has eighty five scholarships to provide to male athletes, an average of 3.5 per position.¹⁶⁵ By decreasing the number of scholarships to seventy two, football may still average a respectable three scholarships per position. Computing scholarships at approximately \$10,000 each, this slight reduction in football scholarships would make available \$130,000 for athletic departments to reallocate to women's sports and nonrevenue men's sports. Under this proposal, the benefits received by the students that have been historically discriminated against far outweigh the cost to the few that may sacrifice a scholarship to enter college.

Athletic conferences can also contribute to the gender equity compliance efforts. The Southeastern Conference successfully completed its first conference football playoff in 1994. The possibility of additional conference championships and a national playoff scheme is intriguing because of the potential for revenue generation. Income from cable and network television contracts, sponsorships, and advertising may all contribute to the "championship coffer."

The revenues from the championship game would be distributed to all conference member institutions. The top two teams in a conference would compete in the conference championship game. These teams would receive one-quarter of the net revenues, includ-

164. *See Numbers Game*, SPORTS ILLUSTRATED, Jan. 24, 1994, at 11.

165. *Id.* at 11.

ing ticket gate receipts. The remaining one-half of the championship revenues would be split evenly among the remaining conference team members. This allocation of revenue benefits all the conference teams and further rewards those teams that play in the championship game.

Opponents of a conference playoff system fear an extended season that would interfere excessively with student-athlete's class attendance, study time and exam schedules. This is a legitimate concern if universities maintain the current football season schedule. However, the traditional pre-season games could very easily be eliminated. The first two or three games are "fluff" games for many football programs. The current preseason schedule serves two functions; (1) to give the larger schools a few easy practice games; and (2) to give the smaller schools a chance to play an away game before a sold-out stadium. The smaller schools, trade a loss on their record for a one-half share of the gate receipts. This may make fiscal sense for the smaller schools but it does not make athletic sportsmanship sense. By eliminating these meaningless non-conference pre-season games, each team's season would consist of a regular conference schedule only, thereby leaving room at the end of the season for conference championship playoffs. Therefore, the football season would not be extended. The players would not miss anymore classes than they presently miss under the current schedule.

Under the conference championship scheme, the smaller schools will still receive needed revenues without sacrificing a loss on their schedules. In addition, the players and coaches of the more powerful football programs are not placed in a "must-win" situation every week. Because the two winningest teams compete for the conference championship, a team with one or two conference losses still has an opportunity to win the conference and compete in a bowl game.

In addition to the establishment of conference championships, the continuation of post-season bowl games is crucial. College football bowl games have become a tradition in this country. Many family vacations and social gatherings are planned around the bowl schedule. The current name sponsors and presenters of the bowl games have shown their continued loyalty to college football by pumping millions of dollars into the industry. These corporate sponsors must not be neglected. In fact, sponsorships may be expanded to increase exposure through associations with a particular conference. A sponsor may provide product "give-aways", advertising and signage at the championship venue as part of its contractual agreement with a conference. The well-planned marketing of both the championship games and the bowl finales can translate

into huge benefits for collegiate athletic programs and corporate sponsors alike.

In addition to spreading the wealth of college football's success to other sports programs, athletic departments must be more aggressive in marketing to the public women's athletics and non-revenue men's sporting events. Athletic departments must focus as much attention on promoting these sports as they focus on the men's football and basketball programs. Many football and men's basketball programs sell themselves. Many athletic departments do not need to spend much money on advertising and promoting major football and basketball programs. Therefore, further marketing emphasis on women's sports would not take away from the promotional efforts of football and basketball, nor would it diminish the public demand for these revenue producing sports.

At the governance level, a compromise can be reached between total federal intervention in collegiate athletics and institutional self-monitoring. Most universities want to do the right thing and enforce effective gender equity policies on their campuses. They want to comply with Title IX, but don't know how. The effective implementation and enforcement of national gender equity legislation for every federally funded institution is a monumental task. The government has not yet fully enforced Title IX with the fiscal and administrative resources it now possesses. Therefore it is speculative that the government can enforce new legislation for a moral imperative.

The concept of accumulating and publishing gender equity statistics creates the accountability function that is a part of the peer pressure strategy asserted by Merrily Dean Baker.¹⁶⁶ If the NCAA enacted its own legislation similar to the Equity in Athletics Disclosure Act, its member institutions would have to comply or be served with NCAA sanctions which, for some schools, are more feared than government fines. By implementing NCAA legislation and increasing its enforcement efforts, the federal government would not be saddled with the administrative burden and cost of federal legislative enforcement.

In addition to fueling the peer-pressure strategy, the disclosure of gender equity data by NCAA member institutions would promulgate fresh data every year, which data would lead to the accountability functions emphasized by the Act. Mandatory data disclosure would create an internal review system of intercollegiate athletics while at the same time prevent intense federal intervention in

166. See *supra* note 179 and accompanying text.

university athletics. This course of action would accomplish the goals of those who promote federal intervention in intercollegiate athletics by adding some bite to Title IX. In addition, the publication of gender equity statistics would provide an accountability function that may be used by the proponents of the institutional peer pressure strategy.

VI. CONCLUSION

Gender equity in intercollegiate athletics cannot be achieved in a vacuum. Many people from different sectors of our society must work together to meet this challenge. A commitment to fairness is necessary. The judiciary and some state legislatures have already made this commitment. University presidents, and athletic administrators and the NCAA have realized that a discrepancy exists along gender lines in the distribution of athletic department funds. Even the federal government is poised to intervene and address this very divisive issue.

Now, we must establish a position for the corporate businesses who benefit from their alignment with intercollegiate athletics. They can help by sponsoring local university teams in their community. It may be as simple as advertising the women's basketball games to increase attendance which, in turn would increase revenues. The NCAA recognizes that the visibility of intercollegiate athletics can be a great burden to a university.¹⁶⁷ It also can be a great opportunity. The leadership provided by the NCAA in the area of intercollegiate athletics and gender equity will affect the rest of the American society's view of gender equity in the classroom and the board room.

Title IX is a federal law; compliance with this law is not discretionary. A commitment to fairness must be seized and maintained by student-athletes, coaches, university administrators, the fans, and the media. Educational institutions and intercollegiate athletics cannot wait another twenty years for the enforcement of Title IX and the fulfillment of the spirit of gender equity. The gender equity reform cannot succeed if it is only seen as some kind of crusade for women. Everyone, men and women, coaches and administrators, must work together to ensure that equitable opportunities are made available to women in athletics. The time to commit is now.

167. Dick Schultz, State of the Association Address for the 1993 NCAA Convention, *THE NCAA NEWS*, Jan. 20, 1993, at 20.