Complying with Title IX of the Education Amendments of 1972: The Never-Ending Race to the Finish Line

I. INTRODUCTION

For many years, women's intercollegiate sports have been relegated to an inferior position in many athletic programs.[1] Traditionally, the belief was that physical activity was too strenuous for women, thus placing them on the sidelines to applaud the success of their male counterparts.[2] Therefore, the resources of intercollegiate athletic departments have been aimed towards "revenue-producing" men's sports, while women's sports have received limited support.[3] Yet, national lawmakers triggered an athletic revolution that changed the face of intercollegiate athletics through the enactment of Title IX of the Education Amendments Act of 1972 (hereinafter "Title IX").[4]

Prior to the enactment of Title IX, women represented approximately fifteen percent of the total intercollegiate athletic population.[5] By the mid-1980's, the number of intercollegiate women ath-

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1. *See* Dr. Herb Appenzeller & Thomas Appenzeller, M.Ed., SPORTS AND THE COURTS 71 (1980) (discussing the history of litigation concerning discrimination in both interscholastic and intercollegiate athletic programming); *see also* United States Commission on Civil Rights, *More Hurdles to Clear: Women and Girls in Competitive Athletics*, No. 63, July 1980 (reflecting on the history of women and girls in sports, dating from the Victorian era to contemporary times).

2. *See* United States Commission on Civil Rights, *supra* note 1, at 1. It was generally believed that the physical composition of women rendered them incapable of performing such strenuous, athletic tasks. *Id.* Physical educators feared that competitive athletics would be injurious to the health of women, as they were concerned with damaging the reproductive system. *Id.* at 2.

3. *Id.* at 17. "Revenue-producing" sports, such as men's collegiate football and basketball, are ones that "do or may provide gross receipts" to the college athletic program. *Id.* at 7. Data collected by the Association for Intercollegiate Athletics for Women (AIAW) showed that from the average athletic budget in 1978-79 of $858,000, only 16.4% was allocated for women's programs, leaving 83.6% for the men's programs. *Id.* at 26. On a per capita basis, the average AIAW college spent $1,382 for each female athlete and $3,013 for each male athlete. *Id.*

4. Education Amendments of 1972, Pub. L. No. 92-318, ss 901-09, 86 Stat. 373-75 (1972) (codified at 20 U.S.C. ss 1681-1688 (1988)) [hereinafter "Title IX"]. Title IX states, "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." *Id.*

5. *See* Brian A. Snow, M.A., J.D. & William E. Thro, M.A., J.D., Comment, *Cohen v Brown University and the Future of Intercollegiate and Interscholastic Athletics*, 84 ED. LAW REP. 611 (1993) (noting the progression of participation by women in intercollegiate athletic programs from pre-Title IX enactment to the 1993 *Cohen* decision).

letes had risen to over thirty percent.[6] Title IX gave women athletes substantial opportunities for advancement and participation in intercollegiate athletics; however, its existence did not produce equality in gender participation.[7]

The passage of the Civil Rights Restoration Act of 1987[8] and the continuing development of women's athletics has created a new wave of litigation, as lawyers try to enforce Title IX's ultimate goal of providing equal opportunities for intercollegiate women athletes.[9] First, intercollegiate women athletes assert that they are being treated unequally, as there is a corresponding male intercollegiate team that is receiving both greater financial and overall athletic support.[10] Conversely, male teams that have been discontinued claim that their civil rights have been violated.[11] Second, there is litigation concerning cases of "substitution," where women athletes challenge a university's decision to discontinue their sport in favor of another women's sport.[12] Finally, the majority of litigation focuses on either the reinstatement or the addition of women's intercollegiate teams to a university's athletic program.[13] As one of

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6. *Id.*

7. *Id.* The number of women athletes increased 102.1% from 1972 to 1978, yet women only totalled 27.4% of the total athletic population. United States Commission on Civil Rights, *supra* note 1, at 21.

8. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. s 1687 (1988)) [hereinafter "Restoration Act"].

9. *See* Andrew Blum, *Athletics in the Courts: New Wave of Title IX School Bias Suits Hit,* 15 NAT'L L.J. 1 (discussing the recent and pending federal and state litigation concerning possible Title IX violations in several intercollegiate athletic programs).

10. *See* Snow & Thro, *supra* note 5, at 612; *see also* Cook v Colgate University, 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated as moot,* 992 F.2d 17 (2d Cir. 1993) (holding that Colgate University promote the women's ice hockey team to varsity status in order to comply with Title IX's requirement of providing equal athletic opportunities to both sexes).

11. *See* Kelly v Bd. of Trustees of Univ. of Illinois, 832 F. Supp. 237 (C.D. Ill. 1993) (holding that the elimination of the men's swimming team but not the women's swimming team did not violate Title IX); *see also* Gonyo v Drake Univ., 837 F. Supp. 989 (S.D. Iowa 1993) (denying the varsity male wrestling team's motion for a preliminary injunction to reinstate the squad due to alleged Title IX and equal protection violations).

12. Ashbaugh v Ramo, C.A. No. 92-0551 (D.N.M. July 20, 1992) (bench decision). Members of the women's gymnastics team at the University of New Mexico challenged the University's decision to drop the gymnastics team and replace it with women's soccer. *Id.* The court denied a preliminary injunction and the matter has been dropped. *Id.*

13. *See* Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992), *aff'd,* 991 F.2d 888 (1st Cir. 1993) (holding that the district court did not abuse its discretion by ordering Brown Univ. to reinstate both the women's volleyball and gymnastics teams to full varsity status); Favia v Indiana Univ. of Pennsylvania, 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd,* 7 F.3d 332 (3d Cir. 1993) (holding that the university violated Title IX by failing to provide female students with proportionate opportunities to participate in intercollegiate athletics); Roberts v. Colorado State Bd. of Agric., 814 F. Supp. 1507 (D. Colo), *aff'd in part, rev'd in part sub nom.* Colorado State Bd. of Agric. v. Roberts, 998 F.2d 824 (10th Cir. 1993) (holding that the district court did not abuse its discretion by reinstating women's varsity fast pitch softball team to varsity status, yet the district court did abuse its discretion by ordering the softball team to play a fall exhibition season).

Title IX's aims is to have participation by women athletes in substantial proportionality to the university's overall female enrollment, women athletes hope to utilize the courts to achieve this goal.[14]

This Comment will examine the evolution of Title IX since its inception in 1972. First, the history of Title IX and its early application to intercollegiate athletics will be explained. Second, the statutory and regulatory frameworks of Title IX, along with its policy interpretation, will be explored as the basis by which the courts analyze a university's athletic program for possible Title IX violations. Next, the Comment will analyze the court's interpretation of Title IX in recent decisions, focusing primarily on the federal decisions of *Cook, Roberts, Favia,* and *Cohen* along with the Washington Supreme Court's decision in *Blair.* Finally, the future of Title IX and possible avenues by which gender equity in intercollegiate athletics may be achieved will be explored.

II. The History of Title IX

Title IX of the Education Amendments Act of 1972 prohibits sex discrimination in federally-assisted educational programs.[15] Title IX simply states, "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."[16] Initially, Title IX did not appear to apply to intercollegiate athletics, as neither "program or activity" nor "Federal financial assistance" were defined in the legislation.[17] Furthermore, sports were only mentioned twice during the Congressional debate.[18]

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14. *See* Snow & Thro, *supra* note 5, at 612 (discussing the wave of litigation that reached the courts concerning compliance with Title IX). *See also,* Blair v. Washington State Univ., 740 P.2d 1379 (Wash. 1987)(focusing on the utilization of the Washington State court system and the State's Equal Rights Amendment to bring about equality in collegiate athletics).

15. *See* Title IX, *supra* note 4.

16. *Id.* Title IX was enacted to protect women from general, widespread discrimination. *See* Walter T. Champion, Jr., Sports Law in a Nutshell, 280 (1993). The act prohibited any federally funded educational program and program which received federal funds from discriminating on the basis of sex. *Id.*

17. *Id.* at 281. The vagueness of Title IX stems from the fact that the legislation was adopted without formal hearings or a committee report. *See* S. Rep. No. 798, 92d Cong., 2d Sess. 221-222 (1972). The U.S. Supreme Court is also in accord that the legislative history of Title IX is sparse. *See* Grove City College v. Bell, 465 U.S. 555, 556 (1984)(interpreting the vague language of Title IX to be "program-specific"; only programs that directly receive Federal financial assistance must comply with the statute).

18. *See* 117 Cong. Rec. 30,407 (1971) (statement of Sen. Bayh) (commenting that his legislation would not mandate the desegregation of football fields or men's locker rooms); 118 Cong. Rec. 5,807 (1972) (statement of Sen. Bayh) (stating that sexual discrimination would

Congressional concern over the inclusion of intercollegiate athletics under Title IX coverage quickly surfaced through several Congressional amendments.[19] Senator John Tower (R-Texas) introduced an amendment to the Education Amendments Act of 1974 to exempt any intercollegiate sports that do or may provide gross receipts to the university from Title IX coverage.[20] Senator Tower hoped that the amendment would serve to "preserve the revenue base of intercollegiate athletics [so that] it will provide the resources for expanding women's activities in intercollegiate sports."[21] However, Senator Tower's amendment attempted indirectly to exclude men's football and basketball programs from having to abide by Title IX discrimination policies.[22]

The Tower Amendment was replaced by the Javits Amendment, reflecting congressional disapproval of exempting revenue-producing intercollegiate sports.[23] The Javits Amendment provided that the Secretary of Health, Education, and Welfare (hereinafter "HEW") "prepare and publish regulations . . . that . . . include with respect to intercollegiate athletic activities reasonable provisions concerning the nature of particular sports."[24] Accordingly, HEW issued a final regulation outlining Title IX compliance on May 27, 1975, which would take effect on July 21, 1975.[25] The regulation gave the intercollegiate athletic community until July 21, 1978 to comply with Title IX policies, yet the regulation was unclear as to methods of compliance.[26] Therefore, on December 11, 1979, HEW's Office of Civil Rights (hereinafter "OCR") published a "Policy Interpretation" that provided a more detailed measure of equal athletic opportunity.[27]

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not be allowed in "sports facilities or other instances where personal privacy must be preserved").

19. *See* 120 Cong. Rec. 15,322 (1974) (Tower Amendment modification); *Id.* at 24,592 (Javits Amendment). Both amendments are discussed *infra* notes 20-24 and accompanying text.

20. *See generally United States Civil Rights Commission, supra* note 1, at 7 (discussing the inception of Title IX and the subsequent attempts at its amendment).

21. *See* 120 Cong. Rec. 15,323 (1974).

22. Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 5 (1992). The interest in high school football in Texas is legendary. *Id.* at n.37. Furthermore, Texas has a number of men's collegiate football programs. *Id.*

23. 40 Fed. Reg. 24,134 (1975) (to be codified at 34 C.F.R. pt.106).

24. 120 Cong. Rec. 24,592 (1974). The language of the Javits Amendment makes clear that the conference committee found the Tower Amendment exempting revenue-producing sports from Title IX compliance unacceptable. United States Commission on Civil Rights, *supra* note 1, at 7. Congressional approval of the Javits Amendment supports the conference committee's decision, as the intent of the Congress was for Title IX to apply to all athletic programs in federally-assisted educational institutions. *Id.*

25. 45 C.F.R. §86.34 (1975).

26. 45 C.F.R. §86.41(d) (codified at 34 C.F.R. §106.41(d) (1991)).

27. 44 Fed. Reg. 71,413 (1979). The Policy Interpretation outlines three major areas of

III. Determining the Scope of Title IX: Early Application to Intercollegiate Athletic Programs

Title IX was first applied to intercollegiate athletics in 1981.[28] In applying Title IX, the threshold issue was whether the actual athletic program must directly receive federal funds for Title IX to apply, or whether receipt of the funds by either the educational institution or the students rendered the entire school and its programs subject to Title IX coverage.[29] In *Haffer v. Temple University*[30], the District Court for the Eastern District of Pennsylvania held that Title IX applied to Temple University's athletic program even though the program received no direct federal financial assistance.[31] The United States Court of Appeals for the Third Circuit affirmed the lower court's decision, explaining that although a university is not as inherently linked to the State as a secondary school, it does act in concert with the government through its use of state and federal financial aid.[32]

The United States Supreme Court radically altered the holding of the *Haffer* court through the landmark decision of *Grove City College v. Bell*.[33] Utilizing the "program-specific" approach, the

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regulatory compliance: "Athletic Financial Assistance (Scholarships)," *see* 34 C.F.R. §106.37; "Equivalence in Other Athletic Benefits and Opportunities," *see* 34 C.F.R. §106.41(c) (2) -(10); and "Effective Accommodation of Student Interests and Abilities," *see* 34 C.F.R. §106.41(c)(1). Although not law, most courts have adopted the interpretation and have ruled that a university is in violation of Title IX if it ineffectively accommodates student interests and abilities despite its satisfactory performance in other Title IX areas. *Cohen*, 991 F.2d at 897.

28. *See* Cheryl L. Schubert-Madsen, *Gender Discrimination in Athletics*, 67 N.D. L. Rev. 227, 239 (1991) (reviewing the various methods by which an alleged gender discrimination violation can be challenged in state and federal courts). It should be noted that besides the use of Title IX for discrimination litigation, 14th Amendment Equal Protection challenges have been set forth. *Id.* at 228.

29. *See* Heckman, *supra* note 22 at 15. Early case law in the area of Title IX focused on the jurisdictional issue rather than on the merits of the discrimination claim. *Id.*

30. Haffer v. Temple University, 524 F. Supp. 531 (E.D. Pa 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982).

31. *Id.* at 532. In this case, eight women undergraduates brought a class action against Temple University, claiming that disparities existed in both the resources that were distributed to the women's athletic programs and in the amount of financial aid allocated to women athletes. *Id.* Although the ratio of male and female athletes was close, the budget for the men's athletic program, excluding football, was 3.6 times higher than the women's athletic budget. *Id.* Furthermore, Temple spent twelve million dollars on scholarships for male athletes, while only spending three million dollars on scholarships for women athletes. *Id.*

32. *Haffer*, 688 F.2d at 16. Following the *Grove City* decision, the *Haffer* ruling was no longer applicable. *See* Champion, *supra* note 15, at 283. After the passage of the Restoration Act in 1987, the petitioner in *Haffer* was allowed a motion for reconsideration, in which the court held that the athletic program was within the protection of Title IX. Haffer v. Temple University, 678 F. Supp. 517 (E.D. Pa 1987). The parties then agreed on a settlement, which included proportional scholarships, increased athletic opportunities, and increased budget stipends for the female programs. *See* Champion, *supra* note 15, at 284. Thus, *Haffer* is arguably the "most important Title IX case to be reviewed after the passage of the Civil Rights Restoration Act." *Id.* at 283.

33. 465 U.S. 555 (1984)(holding that Title IX does not apply to the collegiate institution

Court held that Title IX protection extended only to those programs within an institution that directly receive federal financial assistance.[34] Therefore, the federal financial assistance received by the students would only subject the financial aid department to Title IX scrutiny.[35] The Court stated, "The fact that federal funds eventually reach the college's general operating budget cannot subject Grove City (College) to institution-wide coverage."[36] Yet, Justice Brennan noted the absurdity of the Court's decision in his dissent by focusing on its practical effect.[37] Justice Brennan declared, "According to the Court, the financial aid program at Grove City College may not discriminate on the basis of sex because it is covered by Title IX, but the college is not prohibited from discriminating in its admissions, athletic programs, or even its various academic departments."[38]

Following the *Grove City* decision, approximately forty pending Title IX investigations were suspended or narrowed by the Department of Education.[39] Furthermore, the Office of Civil Rights refrained from investigating approximately 674 complaints against college and university athletic departments unless the departments received direct federal financial assistance.[40] More importantly, due to Title IX's narrow interpretation by the United States Supreme Court, discrimination charges and cases awaiting appeal would likely be decided differently.[41]

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as a whole but to the program that directly receives Federal financial assistance (the "program-specific" approach)). *Id.*

34. *Id.* Petitioner Grove City is a private, coeducational, liberal arts college. *Id.* at 559. Grove City did not receive direct federal financial assistance, nor did it participate in the Regular Disbursement System (RDS) of the Department of Education (Education), whereby amounts for federal grants to students were advanced to the institution. *Id.* Grove City has, however, a large number of students who receive Basic Educational Opportunity Grants (BEOG's) under the Education's Alternate Disbursement System (ADS). *Id.*

35. *Id.* In determining the scope of Title IX, the Court interpreted the law's "program or activity" phrase narrowly. *See* P. Michael Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 MARQ. SPORTS L.J. 149, n.86 (1990)(discussing the *Grove City* decision and its inapplicability after the passage of the Civil Rights Restoration Act of 1987). The Court stressed that Title IX protection would only be afforded those programs which directly received federal financial assistance. *Id.* Obviously, *Grove City* has been criticized for limiting the affect that Title IX would have both generally and specifically towards any progress in female athletic participation. Champion, *supra* note 15, at 282.

36. *Grove City*, 465 U.S. at 572. The Court reasoned that since the financial aid itself was not discriminatory, and the financial aid could not be logically and naturally tied to the athletic program, the institution could not be held liable for a Title IX violation. *Id.* at 573.

37. *Id.* at 601.

38. *Id.*

39. *See* Villalobos, *supra* note 35, at 159.

40. *Id.* at 161; *see also* Sullivan, *The Law That Needs New Muscle*, SPORTS ILLUSTRATED, March 4, 1985, at 9 (noting the number of possible Title IX violations that would remain due to the Court's interpretation of Title IX as "program-specific").

41. *See Haffer*, *supra* note 32 and accompanying text. One week after the *Grove City*

One case that felt the aftermath of the *Grove City* decision was *Bennett v. West Texas State University*.[42] The *Bennett* court rejected an attempt to extend the *Grove City* rationale by holding that federal funds received by student athletes in the form of athletic scholarships did not subject the West Texas State University's athletic program to Title IX scrutiny.[43] The court rejected plaintiff's "infection" theory, stressing that the connection between the financial aid office and the athletic department was merely ministerial.[44] Consequently, because there was minimal direct funding of intercollegiate athletic departments, most athletic programs were eliminated from Title IX coverage.[45]

IV. Civil Rights Restoration Act of 1987: Congressional Restoration of Title IX After *Grove City*

The United States Congress answered the Supreme Court's *Grove City* decision with the Civil Rights Restoration Act of 1987.[46] Because a great majority of intercollegiate athletic programs did not receive federal financial assistance directly, Congress was concerned that legal claims of discrimination or unequal opportunity would not alone suffice to achieve gender equity.[47] Therefore, the

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decision, for example, the Department of Education dropped gender discrimination charges against the University of Maryland's athletic program due to the fact that the program did not receive federal funding directly. Villalobos, *supra* note 35, at 160. Discrimination had been uncovered at the University of Maryland in several areas, including travel, per diem allowances, and support services. *Id.*

42. 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd*, 698 F.2d 1215 (5th Cir. 1983), *cert. denied*, 466 U.S. 903 (1984), *appeal after remand*, 799 F.2d 155 (5th Cir. 1986) (affirming district court's granting of summary judgment in favor of defendant).

43. 799 F.2d at 159. In this case, female students athletes alleged that West Texas State University denied them equal opportunities to participate in intercollegiate athletics. *Id.* at 156. The female athletes contended that the discrimination was due to unequal expenditures between the men's athletic and the women's athletic programs. *Id.* at 156-57.

44. *Id.* at 158. The Fifth Circuit rejected plaintiffs' "infection" theory. *Id.* The theory advanced the proposition that even using the programmatic approach of Grove City, a program should not be considered in isolation, as it may be so affected by discriminatory practices elsewhere in the institution that it too becomes a discriminatory program. *Id.* Nevertheless, the court found the discriminatory connection ministerial, holding only the financial aid office (and not the athletic department) subject to Title IX scrutiny. *Id.* at 159.

45. *See* Heckman *supra* note 22, at n.142.

46. Pub. L. 100-259, 102 Stat. 28 (codified at §908, 20 U.S.C. §1687 (1990)) [hereinafter "Restoration Act"]. The Restoration Act was passed on March 22, 1988 after overriding a veto by President Ronald Reagan. *Id.*

47. Mark H. Rettig, Note, *Sex Discrimination and Intercollegiate Athletics*, 61 Iowa L. Rev. 420, 469 (1975-76). "Few, if any, intercollegiate athletic departments receive direct federal financial assistance or directly benefit when such assistance is received by an individual college or university." *Id.* Without Title IX protection, female athletes would have limited protection in a court of law. Villalobos *supra* note 35, at 160. While the remedies for equal protection violations would allow the female athlete an opportunity to try out for a particular sport, a Title IX violation would cause the educational institution to lose all federal funds.

Restoration Act amended Title IX to allow protection from discrimination in all programs and activities that received federal funds.[48]

The Restoration Act's institution-wide approach to Title IX was achieved by redefining its original wording.[49] The Restoration Act redefined the term "program or activity" with respect to higher education institutions as a "college, university, or postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance."[50] The Restoration Act further redefined "recipient" as "any state or political subdivision thereof, . . . or any public or private agency, institution or organization, or other entity . . . to which federal financial assistance is extended (directly or through another entity or a person)."[51] As a result, the Restoration Act enveloped all institutions and agencies under Title IX protection so long as any program or activity within the institution received Federal financial aid.[52]

After the passage of the Restoration Act, sixteen complaints of gender discrimination were filed against twelve colleges and universities' athletic departments within six months.[53] However, the Restoration Act was not given a retroactive effect by the Supreme Court, who denied the petition for a writ of certiorari to decide the issue in January 1991.[54]

See JOHN C. WEISTART AND CYM H. LOWELL, THE LAW OF SPORTS 84 (1979).

48. Pub. L. 100-259, 102 Stat. 28 (codified at §908, 20 U.S.C. §1687 (1990)). Section 2 of Pub. L. 100-259 specifically provided that: "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.*

49. *See* Villalobos, *supra* note 35, at 162 (noting how the redefining and clarifying of Title IX through the Restoration Act instigated the filing of several gender discrimination complaints). The new legislation also changed the wording of Title IV, the Rehabilitation Act, and the Age Discrimination Act. *Id.* at n.120.

50. Pub. L. No. 100-259, s3(a), 102 Stat. 28 (1988) (codified at 20 U.S.C. §1687(2)(A)(1989)).

51. *Id.*

52. *Id.*

53. Villalobos, *supra* note 35, at n.127. Title IX complaints were filed against the following universities: Santa Clara, Louisiana State, Towson State, California at Santa Barbara, Maryland at College Park, and Nebraska. Athens State, Bossier Parish Community, Loyola, Mendocino, Metropolitan State, and Salem (West Virginia) also had complaints filed against them.

54. *See* Heckman, *supra* note 22, at 32. Although the Supreme Court denied the petition for writ of certiorari to decide the issue in January 1991, several other courts ruled on the issue as it pertained to other federal civil rights statutes that were affected by the Restoration Act. *Id.* For example, the district court in Leake v. Long Island Jewish Medical Center, 695 F. Supp. 1414 (E.D.N.Y. 1988), *aff'd*, 869 F.2d 130 (2d Cir. 1989), held that the Restoration Act had a retroactive effect, "given the remedial intent of Congress in enacting [the] Act to correct what it believed was an incorrect judicial interpretation." *Id.* at 1417.

V. TITLE IX'S MODERN INTERPRETATION: THE USE OF REGULATIONS AND POLICY INTERPRETATIONS

With the scope of Title IX determined, the statutory, regulatory, and policy interpretations set forth would be utilized to determine Title IX compliance of intercollegiate athletic programs. [55]The statute sets forth a broad prohibition of gender-based discrimination concerning all programs conducted by an educational institution.[56] Courts must look to the Department of Health, Education, and Welfare's regulations, with specific provisions concerning intercollegiate athletics, in order to assess compliance.[57] Furthermore,

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55. *See Cohen*, 991 F.2d at 894-898 (utilizing HEW's Policy Interpretation to determine if Brown University was in compliance with Title IX).

56. 20 U.S.C. §§ 1681-88 (1988). The statute does allow a limited number of exemptions from Title IX coverage. 20 U.S.C. § 1681(a) (2)-(9) (1988); *See also* Weistart and Lowell, *supra* note 47, at 83 (noting the broad and ambiguous construction of Title IX).

57. 34 C.F.R. § 106. Section 106 states, in pertinent part:

§ 106.1 Purpose and Effective Date

> The purpose of this part is to effectuate Title IX of the Education Amendments of 1972 . . which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. .

§ 106.11 Application

> Except as provided in this subpart, this Part 106 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance. . . .

§106.41 Athletics

> (a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
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> (b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.
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> (c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
>
> (2) The provision of equipment and supplies;
>
> (3) Scheduling of games and practice times;
>
> (4) Travel and per diem allowances;
>
> (5) Opportunity to receive coaching and academic tutoring;

courts are given a detailed measure of equal athletic opportunity through OCR's 1979 Policy Interpretation of HEW's regulation (hereinafter "Interpretation").[58] Although the Interpretation does not have the force and effect of law, several courts have utilized the proposed standard for analyzing and determining effective accommodation in assessing Title IX compliance.[59] The National Collegiate Athletic Association has also recently supported the use of this standard and has mandated compliance with both Federal and state laws regarding gender equity.[60]

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(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance, 34 C.F.R. §§ 106.1, 106.11, 106.41(a-c)(1-10) (1992).

58. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413-23 (1979) (codified at 20 U.S.C. § 1681-88 (1990)). The Policy Interpretation is divided into three areas which correspond with the regulatory provision:

(i) Compliance in athletic financial assistance (scholarships) (34 C.F.R. §106.37(c));
(ii) Compliance in other program areas (34 C.F.R. § 106.41 (c) (2-10); and
(iii) Compliance in effectively accommodating the students' interests and abilities (34 C.F.R. § 106.41 (c) (1)).

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413-23 (1979) (codified at 20 U.S.C. § 1681-88 (1990)).

59. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,418 (1979) (codified at 20 U.S.C. § 1681-88 (1990)). In determining whether a university's athletic program has effectively accommodated the underrepresented gender, compliance may be assessed by:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,418 (1979) (codified at 20 U.S.C. § 1681-88 (1990)).

60. *National Collegiate Athletic Association Const.*, art. II, § 2.3 (adopted 1994). Section 2.3.1, entitled Compliance with Federal and State Legislation, states that "it is the responsibility of each member institution to comply with Federal and state laws regarding

VI. THE FEDERAL COURTS AND TITLE IX COMPLIANCE : *COHEN V. BROWN UNIVERSITY*

The United States Court of Appeals for the First Circuit utilized OCR's Policy Interpretation to hold that Brown University was not in compliance with Title IX provisions. [61]In *Cohen v. Brown University*, Amy Cohen and other affected women athletes brought a class action suit against Brown University, its president, and its athletic director alleging Title IX violations.[62] Although Title IX does not directly authorize a private right of action to be brought against a university, the United States Supreme Court has identified an implied right.[63] Therefore, Judge Selya was given the opportunity to address the possibility of awarding an interim injunction as a temporary sanction for Title IX violations.[64]

In 1971, Brown University subsumed the all-women's Pembroke College.[65] By 1977, Brown had provided women with 14 varsity sports.[66] After 1977, only winter track had been added for the varsity women athletes.[67] Therefore, in 1991, Brown hosted fifteen

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gender equity." *Id.* at § 2.3.1. Section 2.3.2, entitled NCAA Legislation, states that "the Association should not adopt legislation that would prevent member institutions from complying with applicable gender-equity laws, and should adopt legislation to enhance member institutions' compliance with applicable gender equity laws. *Id.* at § 2.3.2.

61. 809 F. Supp. 978 (D.R.I. 1991), *aff'd*, 991 F.2d 888 (1st Cir. 1993). For a detailed analysis of Cohen v. Brown Univ., *see* Note, *Injunctive Relief - Title IX - An interim preliminary injunction reinstating varsity status to demoted collegiate athletic teams is available when that team alleges a Title IX violation and litigation is pending - Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993), 4 SETON HALL J. SPORT L. 595 (1994).

62. Cohen v. Brown University, 991 F.2d 888, 891 (1st Cir. 1993). Throughout the analysis of *Cohen*, defendants will be referred to collectively as Brown University, as seen in the United States Court of Appeals for the First Circuit's analysis. *Id.*

63. Cannon v. University of Chicago, 441 U.S. 677 (1979). In *Cannon*, a female sued two private medical schools who denied her admission for gender discrimination under Title IX. *Id.* at 680. Although both the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit dismissed the case stating that Title IX provided no private right of action, the United States Supreme Court reversed and held that an implied private right of action existed in Title IX cases. *Id.* at 683. The Court reasoned that Title IX was created to protect persons discriminated against on the basis of their gender, an element that petitioner easily satisfied. *Id.* at 694. Furthermore, the Court noted that Title IX was constructed after Title VI, which clearly allowed for a private remedy in the federal courts. *Id.* at 696-98.

64. *Cohen*, 991 F.2d at 890. In order for an interim injunction to be awarded, four factors must be evaluated: (1) whether the movant will likely succeed on the merits, (2) whether the movant will be irreparably harmed if the injunction is refused, (3) whether the harm to the movant outweighs the harm to the nonmovant if the injunction is granted, and (4) the effect on the public interest. *Id.* at 902, *see also* Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 5 (1st Cir. 1991) (setting forth the factors to be analyzed when determining whether an interim injunction should be awarded).

65. *Cohen*, at 892. Before Brown subsumed Pembroke, Pembroke had only three women's varsity sports: field hockey, tennis, and basketball. *Cohen*, 809 F. Supp. at 981.

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

67. Cohen v. Brown Univ., 809 F. Supp. 978, 981 (D.R.I. 1992).

women's varsity teams and sixteen men's varsity teams.[68]

In the spring of 1991, Brown University eliminated men's water polo and golf and women's volleyball and gymnastics due to severe financial constraints.[69] Although not funded by the University as a varsity sport, the teams were allowed to continue at "club" status and participate in intercollegiate competition through utilization of private funds.[70] This status continued for two seasons; however, the teams' club status and inability to compete on a competitive level prompted Cohen and other women athletes to file a Title IX suit.[71]

Cohen filed in the United States District Court for the District of Rhode Island for a preliminary injunction to restore both women's volleyball and gymnastics to varsity status.[72] To determine plaintiff's likelihood of success on the merits, the district court looked only to the factor of full and effective accommodation and utilized the Policy Interpretation's three part test for full and effective accommodation to reach its decision.[73] In analyzing the possi-

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

69. *Id.* at 892. Brown estimated that the demotion of the varsity sports to club status would save the athletic department approximately $77,813 per year. *Id.* While the demotion took more money from the women's than the men's budget, ($15,795.00 from the men's budget and $62,028.00 from the women's budget), it did not considerably alter the total athletic opportunities ratio. *Id.* However, it should be noted that a university's justification of noncompliance with Title IX by proving severe financial constraints is one that does not grant an exemption from the statute's requirements. *Id.*

70. *Id.* The four teams lost several privileges aside from the elimination of university funds, such as preferential practice time, limited access to medical trainers, loss of office space, and loss of "admission preferences" in recruiting freshman. *Cohen*, 809 F. Supp. at 981.

71. Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992). The United States District Court for the District of Rhode Island certified a class of "all present and future Brown University women students and potential students who participate, seek to participate and/or are deterred from participating in intercollegiate athletics funded by Brown." *Cohen*, 991 F.2d at 892-93.

72. *Cohen*, 991 F.2d at 891. The class sought an injunction reinstating both women's volleyball and gymnastics teams to varsity status and prohibiting the reduction or elimination of any other women's varsity teams. *Cohen*, 809 F. Supp. at 980.

73. *See supra* note 59 and accompanying text (outlining the Policy Interpretation and the three-part test for full and effective accommodation). The district court noted that a violation of 34 C.F.R. § 106.41 (c)(1) alone is enough to constitute non-compliance with Title IX. *Cohen*, 809 F. Supp. at 989. *But see* Comment, *Cohen v. Brown University*:73.1296 *The First Circuit Breaks New Ground Regarding Title IX's Application to Intercollegiate Athletics*, 28 GA. L. REV. 837 (1994) (arguing that although the interests and abilities test has been consistently employed, the court has failed to provide any guidance on its interpretation). As Brown University did not confer athletic scholarships among its students, 34 C.F.R. § 106.37's requirement of equal financial assistance would not be applicable, leaving only effective accommodation and equal opportunities available for analysis. *Cohen*, 809 F. Supp. at 983. The court noted the disparate ratio of male and female athletes, the fact that a women's varsity sport had not been created since 1977, and the recent demotion of two women's varsity teams to club status due to financial constraints to hold that the plaintiffs' would likely be successful on the merits. *Cohen*, 809 F. Supp. at 980-81.

bility of irreparable harm, the court reasoned that the shortfalls in recruitment, competition, and coaching would suffice to satisfy the element.[74] Although Brown claimed that they would be financially harmed if required to reinstate the women's varsity teams, the court found that Brown's overall budget could sustain their reinstatement.[75] Finally, the court noted that the public interest would be served by fostering Title IX's goal of gender equity.[76]

On appeal, the United States Court of Appeals for the First Circuit affirmed the ruling of the district court.[77] The court's affirmance was grounded upon its agreement with the district court's focus upon effective accommodation to determine Title IX compliance.[78] The court emphasized the importance of the effective accommodation prong, yet noted that its unclear nature led to utilization of the Policy Interpretation's three-pronged test of substantial proportionality, continued expansion, and full and effective accommodation.[79] The court noted that because Cohen would likely meet the effective accommodation prong, other issues set forth by the district court were not examined.[80]

VII. *FAVIA V. INDIANA UNIVERSITY OF PENNSYLVANIA*

In *Favia v. Indiana University of Pennsylvania*,[81] plaintiff brought a class action suit against the university claiming that its athletic program discriminated on the basis of gender by cutting both the women's gymnastics and field hockey programs.[82] Favia sought the remedy of a preliminary injunction against Indiana University of Pennsylvania to both reinstate the gymnastics and

74. *Id.* at 997.

75. *Id.* at 1000.

76. *Id.* at 1000. The court looked to the legislative intent of Title IX, providing equal opportunities for members of the disadvantaged sex, to ascertain that the public interest would be best served by reinstating the women's varsity teams. *Id.*

77. Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993).

78. *Id.* at 897; *see supra* note 58 (outlining the three areas of intercollegiate athletics that are analyzed to determine Title IX compliance). The court described the element of equal opportunity to participate as the "core of Title IX's purpose." *Cohen*, 991 F.2d at 897; *see supra* note 5, at 611 (discussing the implications of the *Cohen* decision).

79. *Cohen*, 991 F.2d at 895-96. More importantly, the United States Court of Appeals for the First Circuit affirmed that a sole violation of the full and effective accommodation element constitutes a Title IX violation. *Id.* at 897.

80. *Id.* The Court did not address, among other issues, the concern with the levels of competition available for Brown's female athletes. *Id.*

81. 812 F. Supp. 578 (W.D. Pa 1993).

82. *Id.* Favia brought a class action suit on behalf of all women athletes at the university, present and future, or potential students who participate, seek to participate, or are deterred from participating in intercollegiate athletics at the university. *Id.* at 579. As Indiana University of Pennsylvania (IUP) is a public institution that receives Federal financial assistance, Favia filed suit pursuant to Title IX. *Id.* at 580.

field hockey teams and prevent further elimination of other women's varsity sports.[83] The United States District Court for the Western District of Pennsylvania, pursuant to Judge Cohill's opinion, ordered the university to reinstate the two teams.[84]

In its assessment of Indiana University of Pennsylvania's athletic program, the court looked only to 34 C.F.R. §106.41(c)(1)'s requirement of full and effective accommodation of the interests and abilities of women athletes at the university.[85] First, Judge Cohill noted that the university could not meet the "safe harbor" of providing athletic opportunities for male and female athletes in substantial proportionality to the university's overall population.[86] Next, Judge Cohill observed that the university's practice of demoting teams for financial reasons would likely hinder compliance with the continued expansion prong of the Policy Interpretation.[87] Finally, as the women's gymnastics and field hockey teams were in existence at the varsity level prior to elimination, Judge Cohill concluded that the women athletes would likely prove successful on the merits of their claim.[88] Rejecting the three defenses set forth by Indiana University of Pennsylvania, Judge Cohill ordered the reinstatement of the women's gymnastics and field hockey teams, granting plaintiff's preliminary injunction.[89]

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83. *Id.* at 579. For discussion of the four elements to be considered when determining whether to issue a preliminary injunction, *see supra* note 64.

84. *Favia*, 812 F. Supp. at 585. In addition to the women's gymnastics and field hockey teams being dropped from the athletic program (yet reinstated here), men's tennis and soccer were also dropped from the university's athletic agenda. *Id.* at 580.

85. *Id.* at 585. In assessing full and effective accommodation of the interests and abilities of Indiana University of Pennsylvania's female athletes, the court looked to the three-part test set forth in the Policy Interpretation. *Id.* at 584. For a review of the Policy Interpretation's test, *see supra* note 58.

86. Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 580 (W.D. Pa 1993). The university has a full-time undergraduate population of 6,003 students, composed of 55.6% males and 44.4% females. *Id.* Although the number of athletic teams provided for male and female athletes were equal, the male teams were significantly larger. *Id.* Male athletes comprised 62% of the entire athletic population, with women totalling only 38%. *Id.* However, it seems unlikely that the athletic establishments of many coeducational universities reflect the gender balance of their student bodies. *Cohen*, 991 F.2d at 898. Yet, equivalency in this area has been achieved. *Blair*, 740 P.2d at 1379.

87. *Favia*, 812 F. Supp. at 580. Even though the women's gymnastics and field hockey teams had recently been demoted, the total number of women's teams at the university had been decreasing over a ten year period. *Id.*

88. *Id.* at 585. In order for the female athletes to prove that their interests and abilities are not being fully and effectively accommodated, the athletes must be able to sustain a viable team and substantiate a reasonable expectation of intercollegiate competition. *Cohen*, 991 F.2d at 888. Because the testimony showed that there was ample competition available and that interested and qualified members for these teams existed, the present program did not fully and effectively accommodate the interests and abilities of Indiana University of Pennsylvania's female athletes. *Favia*, 812 F. Supp. at 585.

89. *Id.* at 585. First, the university argued that it had eliminated an equal amount of male and female varsity teams, eliminating women's gymnastics and field hockey and men's

The university appealed the district court's decision to the United States Court of Appeals for the Third Circuit.[90] On appeal, the university attempted to modify the original injunction of reinstating the women's varsity field hockey and gymnastics teams by replacing the gymnastics team with a women's varsity soccer team.[91] The university insisted that significant changes had occurred to render the current injunction inequitable, such as the recent graduation of the class representatives, who were the originally named plaintiffs.[92] Nevertheless, the United States Court of Appeals for the Third Circuit denied the arguments set forth by the university and affirmed the court below.[93]

VIII. *ROBERTS V. COLORADO STATE UNIVERSITY*

In *Roberts v. Colorado State University*,[94] the United States District Court for the District of Colorado held that the demotion of the women's varsity softball team placed Colorado State University in violation of Title IX.[95] In *Roberts*, the plaintiffs were members of the women's softball team who filed for a preliminary injunction

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soccer and tennis. *Id.* at 582. However, the court rejected the university's argument due to the fact that an elimination of an equal number of teams does not necessarily mean that an equal number of opportunities still exist. *Id.* Secondly, the university contended that women's field hockey and gymnastics were selected for elimination due to a national trend showing declining participation and intercollegiate participation in those sports. *Id.* at 580. The court did not accept the university's argument as a reason to discontinue the two sports. *Id.* at 585. Finally, the university cited financial turmoil as a justification for eliminating the teams. *Id.* at 583. The elimination of the four varsity teams saved the university $110,000.00. Favia v. Indiana Univ. of Pa., 7 F.3d 332, 335 (3rd Cir. 1993). However, the court concluded that financial constraints are not an acceptable justification for violating Title IX. *Favia*, 812 F. Supp. at 583.

90. Favia v. Indiana Univ. of Pa., 7 F.3d 332 (3rd Cir. 1993).

91. *Id.* at 332. The addition of a soccer program, however, would bring Indiana University of Pennsylvania closer to Title IX compliance. *Id.* at 342. By creating a soccer team, women's participation in athletics would increase from 159 to 188 female athletes, therefore comprising 43.02% of the athletic population. *Id.*

92. *Id.* at 339. The United States Court of Appeals for the Third Circuit looked to the *Rufo* decision to determine if the injunction should be modified. *Id.* at 332. The requirements that must be met for an injunction to warrant modification are: changes in the operative facts, changes in the relevant decisional law, and changes in the applicable statutory law. *Id.* The court noted that the named representatives were no longer a part of the case, as they had since graduated, yet the court reasoned that the certified class still had a valid interest in maintaining an available athletic opportunity through the presence of the gymnastic team. *Id.* However, the university put forth the argument that the class certification by the United States District Court for the Western District of Pennsylvania brought about a change in circumstances requiring modification. *Id.* However, this argument was denied. *Id.* at 339.

93. Favia v. Indiana Univ. of Pa., 7 F.3d 322 (3rd Cir. 1993). *See* Blum, *supra* note 9, at 31 (discussing the implications of Title IX litigation and the *Favia* decision).

94. 814 F. Supp. 1507 (D. Colo. 1993).

95. *Id.* The court utilized the three-part test set forth in the Policy Interpretation, labeling the test the "effective accommodation" test. *Id.* at 1511.

to reinstate the team.[96] The plaintiffs claimed that the university did not fully and effectively accommodate the interests and abilities of its women athletes, utilizing the Policy Interpretation's effective accommodation test to set forth their analysis of Title IX compliance.[97]

Similar to the courts' analysis in both *Cohen* and *Favia*, the *Roberts* court looked only to the effective accommodation factor, 34 C.F.R. § 106.41(c)(1), to determine whether Colorado State University complied with Title IX.[98] The court first determined that a 10.5% disparity existed between enrollment and athletic participation for women athletes at Colorado State University.[99] Although the court pointed out that there is no clear standard to determine what constitutes substantial proportionality, the court concluded that Colorado State University had not met the appropriate standard.[100]

The court in *Roberts*, moreover, held that Colorado State University was in violation of Title IX by recognizing its failure to fulfill the continued expansion requirement of the effective accommodation test.[101] Although Colorado State University created eleven varsity sports for women in the 1970's, women's participation opportunities declined by 34% in the 1980's due to economic hardship.[102] As the court found neither actual expansion of the women's athletic program nor increased slots for women in the program, Colorado State University failed to satisfy the continued expansion prong of the effective accommodation test.[103]

Colorado State University was also held to be in violation of the third and final prong, full and effective accommodation of the interests and abilities of its women athletes.[104] Plaintiffs were mem-

96. *Id.* at 1509-10.

97. *Id.* at 1518-19. To review the effective accommodation test set forth in the Policy Interpretation, *see supra* note 58.

98. Roberts v. Colorado State Univ., 814 F. Supp. 1507, 1511 (D.Colo. 1993).

99. *Id.* at 1512. At the time the varsity softball team was demoted, women comprised 48.2% of the total student body yet only participated in varsity sports at a 37.7% rate. *Id.*

100. *Id.* Colorado State University attempted to utilize the disparities present in other universities to prove its own compliance in this area. Id. The university looked to the *Cohen* decision, where a 11.6% disparity was not substantially proportionate, to sway the court into holding that a smaller percentage constituted compliance. *Id. See also Cohen*, 809 F. Supp. at 991.

101. *Roberts*, 814 F. Supp. at 1514.

102. *Id.* Since 1977, when women's golf was added, there have been no further additions to the women's varsity athletic program. *Id.* In fact, when financial turmoil hit Colorado State University, four women's sports were terminated. *Id.* at 1515-16. Although men's sports were terminated as well, the ordinary meaning of "expansion" can not be twisted to find compliance when schools have increased the relative percentage of women in the varsity program by making cuts in both men's and women's programs. Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993).

103. *Roberts*, 814 F. Supp. at 1514.

104. *Id.* at 1517. Although clear in its determination that Colorado State University vio-

bers of a varsity softball team that had been successful in intercollegiate competition as recently as the spring of 1992.[105] The continued viability of the team was evidenced through both the substantial presence of freshmen participating on the club team and the growing popularity of the sport among high school students in Colorado, the majority of which attend in-state colleges.[106] With the evidence set forth, the court concluded that the women athletes were not fully and effectively accommodated, and the university therefore failed to meet any of the three prongs of the effective accommodation test.[107]

The United States Court of Appeals for the Tenth Circuit affirmed in part and reversed in part the decision of the lower court.[108] Most importantly, the United States Court of Appeals for the Tenth Circuit agreed with the court below that Colorado State University was in violation of Title IX.[109] The court furthermore affirmed the issuance of an equitable remedy reinstating the varsity softball team.[110] However, the district court's decision to order the varsity softball team to play a fall exhibition season was found to be an abuse of discretion.[111]

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lated the effective accommodation prong of the Policy Interpretation, the court incorrectly placed the burden of proof on Colorado State University to show compliance rather than on the plaintiff to prove non-compliance, which is required under 20 U.S.C. § 1681(a). *Roberts*, 998 F.2d at 831.

105. *Roberts*, 814 F. Supp. at 1517.

106. *Id.* at 1517-18. The evidence revealed that 75% of Colorado State University's student body came from in-state high schools. *Id.* at 1517.

107. *Id.* at 1507.

108. Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993). The appeal was raised by the Colorado State Board of Agriculture, a named defendant to the lower court case. *Id.* Colorado State University did not take part in the appeal. *Id.*

109. *Id.* The court did note the difficulty of interpreting the requirement of full and effective accommodation. *Id.* at 831. The court stated that a university is only required to provide opportunities if there is a reasonable expectation of competition for that team within the university's normal competitive region. *Id.* at 834. Creation of these opportunities is only warranted when there is an expressed interest by a sufficient number of athletes to form such a team. *Id.* In interpreting the effective accommodation element, the court did note the difficulty of assessing the element when plaintiffs do not seek the reinstatement of an old team but the creation of a new one. *Id.* at 841.

110. *Id.* at 833. The court reasoned that since the plaintiffs brought suit in their individual capacities and not certified as a class action, an injunction would be the only appropriate redress for their harm. *Id.*

111. *Id.* at 824. The district court's rationale for ordering a fall season was to ensure that Colorado State University have a competitive team. *Id.* at 835. However, Title IX does not require a stellar varsity squad, nor is it in the court's discretion to ensure that a varsity athletic squad have a successful season. *Id.*

IX. *COOK V. COLGATE UNIVERSITY*

In *Cook v. Colgate University*,[112] the United States District Court for the Northern District of New York employed a "program-specific" approach to determine Title IX compliance.[113] In *Cook*, former members of the women's ice hockey club team brought a Title IX action against Colgate University for alleged gender discrimination, with the hope of having that team elevated to varsity status.[114] Using the analogous *McDonnell-Burdine* test normally used in Title VII discrimination cases, Judge Hurd found a Title IX violation and ordered the elevation to varsity status.[115]

To determine whether Cook had presented a prima facie case of discrimination, Judge Hurd compared the athletic opportunities available to the men's varsity ice hockey team to those available to the women's club ice hockey team.[116] The court noted equipment and expenditure inequities as evidence of discriminatory practice.[117] Colgate University set forth several nondiscriminatory reasons for not elevating the women's club hockey team to varsity status, including the lack of student interest, the lack of competitiveness at the varsity level, and the financial burden of the sport on the athletic budget.[118] Judge Hurd noted that financial concerns alone could not justify discrimination and, disregarding Colgate University's other reasons for not elevating the club team, held

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112. 802 F. Supp. 737 (N.D.N.Y. 1992).

113. *Id.* at 743. Although the court looked to 34 C.F.R. § 106.41(c)(1), it found little guidance on how to interpret the regulation. *Id.* Therefore, the court looked to the three step process for determining gender discrimination found in Title VII. *Id.*

114. *Id.* at 739. The women's club ice hockey team had applied for elevation to varsity status four times before in 1979, 1983, 1986, and 1988. *Id.*

115. *Id.* at 743. The *McDonnell-Burdine* test for determining gender discrimination in Title VII cases is a three-part burden shifting test that states:

> 1. Plaintiff has the burden of establishing a prima facie case of discrimination. If he/she succeeds .
>
> 2. Burden shifts to the defendant who must give legitimate, non-discriminatory reasons for its conduct.
>
> 3. Plaintiff must then show that defendant's reasons are pretextual.

Id.

116. *Id.* at 743. Colgate University argued that Title IX required an evaluation of the entire athletic program, not a specific program. *Id.* at 742. Furthermore, Colgate objected to the comparison of a women's club team to a men's varsity team. *Id.* at 742-43.

117. Cook v. Colgate Univ., 802 F. Supp. 737, 744-45 (N.D.N.Y. 1992). The court also looked at several other areas of inequality, focusing on locker room facilities, travel, practice time, and coaching. *Id.*

118. *Id.* at 744-49. Colgate University put forth several reasons for not elevating the team to varsity status: women's ice hockey is rarely played on the secondary level, a women's championship is not sponsored by the NCAA at any intercollegiate level, the game is only played at approximately fifteen colleges in the east, there is a lack of student interest in the sport, and there is a lack of ability present at the university to play the sport at a varsity level. *Id.* The court focused specifically on the sixth reason put forth by Colgate University: hockey is expensive to fund. *Id.* at 749.

that Colgate did not overcome the *McDonnell-Burdine* test of discrimination.[119] Therefore, Judge Hurd ordered Colgate University to promote the women's club ice hockey team to varsity status and to provide the team with all of the amenities that accompany a varsity squad.[120]

X. State Courts Take Action to Curb Gender Discrimination: *Blair v. Washington State University*

In *Blair v. Washington State University*,[121] women coaches and athletes brought a sex discrimination action under the state's Equal Rights Amendment and Law Against Discrimination.[122] The trial court found that despite marked improvements in the women's athletic program, male athletes continued to receive superior treatment in funding, publicity and promotions, scholarships, facilities, equipment, coaching, uniforms, awards, and administrative staff and support.[123] Recognizing the inequality in Washington State's athletic program, the trial court ordered Washington State to allocate 37.5% of its athletic budget to women's programs.[124]

The student-athletes appealed the trial court's decision to the Washington Supreme Court.[125] Specifically, they argued that the

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119. *Id.* The court noted that if financial reasons were sufficient to justify gender discrimination in athletics, Title IX would be meaningless. *Id.* If financial reasoning was permitted, a school could always use lack of funding to justify inequality. *Id.*

120. *Id.* at 751. The case was appealed to the United States Court of Appeals for the Second Circuit. Cook v. Colgate Univ., 992 F.2d 17 (2d Cir. 1993). The injunction instituted by Judge Hurd was overturned due to the fact that the suit was declared moot. *Id.* As the original plaintiffs in the case would have graduated from Colgate University by the time the changes pursuant to the injunction were made, the United States Court of Appeals for the Second Circuit overturned the injunction and dismissed the case. *Id.*

121. 740 P.2d 1379 (Wash. 1987).

122. *Id.* For a discussion of the state statutes at issue, *see* Jennifer L. Henderson, Comment, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness*, 5 SETON HALL J. SPORT L. 155 (1995). Although the case was not brought under the federal Title IX statute, the similarity of the Washington statutes to Title IX's requirements warrants discussion and review.

123. *Id.* at 1380. The court found that in 1980-81, the total funding available to the men's athletic program was $3,017,692.00 as compared to $689,757.00 for the women's program. *Id.* Furthermore, the number of opportunities for men increased by 115 positions from 1973-74 to 1980-81, while the opportunities for women decreased by 9. *Id.* For a discussion of *Blair* as a significant victory towards achieving gender equality, *see* Loretta M. Lamar, Comment, *To Be An Equitist Or Not: A View of Title IX*, 1 SPORTS LAW J. 237, 257 (1994).

124. *Blair*, 740 P.2d at 1381. The percentage of financial support given to the women's program was to increase yearly by two percent until it corresponded to the percentage of women undergraduates at Washington State University, which at the time of trial, was 44%. *Id.* Washington State University complied with the court's order and allocated an additional two percent each year, eventually reaching gender equality in financial and athletic opportunities. *See* Mary Jordan, *Only One School Meets Gender Equity Goal*, WASH. POST, June 21, 1992 at D1, D12.

125. Blair v. Washington State Univ., 740 P.2d 1379 (Wash. 1987).

trial court erred in not requiring football to be included in the entire athletic budget for purposes of determining whether equal opportunities existed for both male and female athletes.[126] The Supreme Court of Washington agreed with the student-athletes and ordered the inclusion of football in the calculation of participation opportunities.[127] The court observed that excluding football from participation calculations would prevent the achievement of gender equality, as men would always be guaranteed a substantially higher number of athletic opportunities.[128]

However, the Supreme Court of Washington affirmed the trial court's decision that nothing in the state's gender equity laws required Washington State University to use funds generated by football to support other sports programs.[129] Therefore, revenue-producing sports, such as football, were allowed to retain generated revenues to spend at their own discretion.[130] However, the court noted that each sport is not required to exclusively use its own generated revenue.[131] The court pointed to the fact that several universities, including Washington State University, had regularly transferred generated revenue to other athletic teams.[132]

XI. FROM PRELIMINARY INJUNCTION TO A DECISION ON THE MERITS: *COHEN V. BROWN UNIVERSITY*

On March 29, 1995, the United States District Court for the District of Rhode Island held that Brown University was in violation of Title IX.[133] After a thirty-day trial on the merits, Judge Pettine determined that Brown University failed to fully and effectively accommodate the unmet interests and abilities of its women athletes.[134] Judge Pettine gave Brown University 120 days to cre-

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126. *Id.* at 1383. The NCAA Division I football program allows 120 players to be present on each team's roster. *See* Henderson *supra* note 122, at 156. As there is no corresponding sport that provides women with an equal number of opportunities, male athletes clearly have an early advantage concerning athletic participation. *Id.*

127. *Id.* at 1383.

128. *Id.*

129. *Id.* at 1383-85. Rather than construing "equality of opportunity" to include equal access to another sport's profits, the court construed it to mean equal opportunity to raise revenues. *Id.* Therefore, the court emphasized the portion of the injunction which required additional promotion of women's sports and development of their revenue-generating capabilities. *Id.*

130. *Blair*, 740 P.2d at 1383-85. Revenue-producing sports may utilize their profits, yet within NCAA discretion. *See* Comment, *A Clash of Titans: College Football v. Title IX*, 20 J.C. & U.L. 351 (1994). Although there is no requirement, the athletic department may also retain the revenue generated and allocate it over the entire athletic department. *Id.*

131. Blair v. Washington State Univ., 740 P.2d 1379, 1384 (Wash. 1987).

132. *Id.* Washington State University's football program was transferring $150,000 or more per year to the women's program before the injunction was entered. *Id.*

133. Cohen v. Brown Univ., No. CIV.A.92-0197, 1995 W.L. 139359 (D.R.I. Mar. 29, 1995).

134. *Id.* at *1. A partial settlement had been reached on October 16, 1994, during the

ate a comprehensive plan to alleviate the discrimination in its athletic program.[135] Until the plan was created, the interim injunction elevating the women's volleyball and gymnastics teams to varsity status remained.[136]

Due to Brown University's unique "dual-tiered" athletic program, the *Cohen* decision rendered by Judge Pettine was one of first impression on the court.[137] Judge Pettine first outlined Title IX, the regulations, and the Policy Interpretation, noting that the Interpretation would be afforded great deference in determining Title IX compliance.[138] However, Judge Pettine observed that "intercollegiate level athletics" and "participation opportunities" had not been defined either by the courts or by the Office of Civil Rights in its regulations, and thus took the liberty in doing so before beginning his legal argument.[139]

Judge Pettine succinctly noted that Brown University did not

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course of the trial on the merits. *Id.* at *4. The agreement settled the disparities that existed in the relative financial support of and benefits to men's and women's university-funded teams. *Id.* Therefore, the issue before the court focused primarily on plaintiffs' claim that disparities existed in the number of intercollegiate participation opportunities available to both men and women. *Id.*

135. *Id.* at *25. Judge Pettine left the manner in which Brown University must comply with Title IX completely within Brown's discretion. *Id.* Judge Pettine noted the financial constraints that faced Brown University, yet rejected the notion that eliminating, cutting, or capping men's teams was the only means of compliance. *Id.* In response to such claims, Judge Pettine suggested that Brown simply redistribute its resources in a way that may slightly reduce the university-funded teams' "standard of living." *Id.*

136. *Id.* at *25.

137. *Id.* at *23. Brown University has a two-tiered athletic program, consisting of university-funded varsity teams and donor-funded varsity teams. *Id.* at *2. While Brown provides the financial resources to sustain the "university-funded" varsity teams, Brown requires the donor-funded teams to raise their own funds through such means as private donations. *Id.* As a consequence, donor-funded teams have difficulty maintaining competitive status. *Id.* This disadvantage has led to several schools removing the teams from their varsity schedule, along with diminished recruiting and coaching capabilities. *Id.*

138. Cohen v. Brown University, No. CIV.A.92-0197, 1995 WL 139359, at *6,*12. (D.R.I. Mar. 29, 1995). Judge Pettine stated that although the Policy Interpretation had not been approved by the President, it was still effective and would be afforded substantial deference by the court. *Id.* at *9.

139. *Id.* at *13. As Brown University has a two-tiered varsity athletic program, university-funded varsity teams and donor-funded varsity teams, Judge Pettine had to determine whether the two tiers should be consolidated for Title IX purposes as an "intercollegiate athletic program." *Id.* The donor-funded varsity teams resemble both university-funded varsity teams, (as the teams could continue to participate on the NCAA level with the proper amount of donations), and club teams, (as the teams are not guaranteed coaching or equipment and supplies); nevertheless, Judge Pettine treated them as "intercollegiate teams", while recognizing them as distinct within the athletic hierarchy. *Id.* As for "participation opportunities", Judge Pettine noted that neither the United States Court of Appeals for the First Circuit nor the Code of Federal Regulations had formulated a definition for its use. *Id.* at *14. Thus, Judge Pettine held that "participation opportunities" offered by a university's varsity athletic program are measured by counting the actual participants on intercollegiate teams. *Id.*

meet either the Policy Interpretation's "substantial proportionality" test or the "continued expansion" test.[140] As to the "full and effective accommodation" test, Judge Pettine concluded that Brown University failed to comply in two respects.[141] First, Brown University failed to fully and effectively accommodate the women athletes by both demoting women's gymnastics from university-funded varsity status and maintaining women's water polo at club status.[142] Second, Brown University failed to maintain and support their donor-funded women's teams at the highest possible level, particularly the women's fencing and skiing teams, preventing the women athletes from developing their competitive abilities and athletic skills.[143] Finally, Judge Pettine concluded that the evidence presented disclosed adequate intercollegiate competition within Brown's normal competitive region for all four women's teams.[144] Thus, Judge Pettine ordered Brown University to comply with Title IX, leaving the method of compliance to Brown's discretion.[145]

XII. CONCLUSION

The road to achieving gender equity in intercollegiate sports is a long one. Although Title IX may set forth statutory requirements for a federally funded university to comply with, financial constraints and inadequate resources have proven counterintuitive to promoting progress. However, as evidenced by the success of Wash-

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140. *Id.* at *21-2. Brown did not satisfy the "substantial proportionality" test, as a 13.01% disparity existed between female participation in intercollegiate athletics and female student enrollment, as determined by figures from the 1993-4 season. *Id.* at *21. Brown did not satisfy the "continued expansion" test, as the university has only added women's track and women's skiing to the varsity program since 1977. *Id.* at *22. For a review of the Policy Interpretation's three-pronged test, *see supra* note 59.

141. *Id.* at *22.

142. *Id.* at *22. The women's gymnastics team had been demoted from university-funded varsity status solely due to financial difficulties. *Id.* at *2. The team had won the Ivy League Championship in its 1989-90 season and had already proven itself as a stable and thriving varsity squad; therefore, their interests and abilities were not being currently met. *Id.* Although only demoted to donor-funded varsity status, Judge Pettine stated that the team would cease to exist without university funding. *Id.* at *22. The women's water polo team, although currently at club status, put forth evidence at trial which proved that the team contained the interests and abilities to compete at the highest varsity level. *Id.* at *3.

143. Cohen v. Brown Univ., No. CIV.A.92-0197, 1995 WL 139359, at *23 (D.R.I. Mar. 29, 1995). Although maintained at a donor-funded level, Judge Pettine held that both women's skiing and fencing had demonstrated interests and abilities sufficient to warrant elevation to university-funded varsity status. *Id.* Judge Pettine cautioned the use of a two-tiered athletic program as a means of circumventing the spirit and meaning of Title IX, declaring that a university could not accommodate the underrepresented sex by creating a "second-class varsity status." *Id.* at *23.

144. *Id.* at *24.

145. *Id.* at *25.

ington State University, gender equality can be achieved.

Although several commentators have proposed that a school substantially cut the number of athletes and scholarships from their football program,[146] this action will not further Title IX compliance and will be detrimental to the intercollegiate athletic program. Football generates an enormous amount of revenue to an athletic program and to the university as a whole. Depleting this source of income will only lead to a substantial decrease in possible revenue that may be utilized throughout the entire athletic program. Although it is not required that varsity football teams share their hard-earned revenue with other athletic teams, curtailing this source of revenue will clearly deter a team from allocating its earnings at all. Washington State University currently allocates a portion of the football program's revenue to the women's varsity teams; by substantially cutting the size and budget of the football program, it is likely that this allocation will decrease or entirely diminish.

In the recent case of *Cohen v. Brown University,*[147] Judge Pettine suggests that schools merely redistribute their resources in a way that may slightly reduce their "standard of living" in order to expand the participation opportunities available for women athletes.[148] Without measurably altering a university's athletic program, one less assistant football coach, a few decreased football scholarships, or a cheaper hotel on away football games, could easily lead to expansion in participation opportunities for women athletes. As expansion continues and women's teams begin to increase in size and ability, their reputation and marketability will slowly begin to bring in revenue. And with revenue being generated from both men's and women's varsity sports, Title IX's goal of gender equity will be easier to achieve.

Title IX compliance should come from within the university, through cooperation between the university and its student-athletes. The increased revenue from ticket sales and championships should be allocated to women's and men's varsity teams, not to expensive litigation costs. The road to Title IX compliance is not an endless one, but a tedious one that must be taken in stride.

Jodi Hudson

146. *See, e.g.,* Henderson, *supra* note 122.
147. Cohen v. Brown Univ., No. CIV.A.92-0197, 1995 WL 139359 (D.R.I. Mar. 29, 1995).