# GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS AS MANDATED BY TITLE IX OF THE EDUCATION AMENDMENTS ACT OF 1972: FAIR OR FOUL?

*Charles Spitz**

*Table Of Contents*



> This is the only civil rights law I know of where innocent bystanders are punished. The unintentional consequences (of Title IX) has been the cutback of men's sports and not the growth of women's sports. It's a trend across the country and we want to stop it.
>
> Dennis Hastert, R-Ill.[1]

## *I. Introduction*

Twenty-five years ago, Congress enacted Title IX of the Education Amendments Act of 1972[2] in an effort to battle the evils of

* B.A., Political Science, La Salle University; J.D., Seton Hall University School of Law, anticipated May 1997. The author would like to express his sincerest thanks to Kelley Dreyer for all her support and encouragement throughout the creation of this note.

1 Vic Feuerherd, *Title IX Sparks Gender Battle; Participation Balance Focus of Concern*, THE WISCONSIN STATE JOURNAL, May 14, 1995, at 1D.

2 Pub. L. No. 92-318, 86 Stat. 373 (1972) (as amended by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, at 20 U.S.C. §§ 1681-88 (1988)).

gender discrimination in educational programs and activities which receive federal funding.[3] Presently, Title IX requires institutions to provide varsity athletic opportunities for both male and female athletes in proportion to the ratio of male and female students enrolled at the undergraduate level.[4] However, as we rapidly approach the dawning of a new millennium, gender discrimination in intercollegiate athletics remains a pressing issue facing many college and university administrations.[5] Due to budget cuts and economic crisis, Title IX looms as an ominous storm front on the National Collegiate Athletic Association (NCAA) horizon.[6] Courts have applied Title IX as a means of promoting equal participation opportunities for both sexes in intercollegiate athletics. The Act attempts to both remedy past gender inequities and affirmatively

---

[3] See SENATE COMM. ON LABOR AND HUMAN RESOURCES, CIVIL RIGHTS RESTORATION ACT OF 1987, S. REP. NO. 64, at 64 (1988), reprinted in 1988 U.S.C.C.A.N. 3,4. Title IX was originally designed to reinforce Title VI's restriction on discrimination in a "program or activity" based upon race, color or natural origin. CANNON V. UNIVERSITY OF CHICAGO, 441 U.S. 677, 694-95 (1979). Title VI prohibits gender discrimination on the basis of race and national origin in all federally assisted programs, including education, housing, health services, and state and local governments. Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1988). Title VI provides:

> No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

*Id.* Regarding Title VI, Senator Pastore stated, "[t]he purpose of Title VI is to make sure that funds of the United States are not used to support racial discrimination." 110 CONG. REC. S7062 (1964).

Additionally, Title VI provided the foundation for Title IX's objective; Congress intended for Title IX to preclude the use of federal funds for supporting discriminatory practices. *Cannon*, 441 U.S. at 704. Senator Bayh, the author of Title IX, stated that "[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers. . ." 118 CONG. REC. S5806-07 (1972).

[4] *See supra* Part III.

[5] *See supra* notes 9,10.

[6] *See* Tom Witosky, *The Battle For Gender Equity In Intercollegiate Sports Is About To Be Re-Fought*, THE COURIER-JOURNAL, Feb. 11, 1995 at 5B. Surprisingly, many universities find themselves operating at a deficit. *Id.* A 1995 survey of 202 NCAA Division I-A colleges and universities revealed that only 62 of these athletic departments profited during the 1993 fiscal year. *Id.* Additionally, 98 of the 159 Division I-A and I-AA football programs finished the year at a deficit. *Id.* Moreover, a recent survey conducted by Daniel Fulks, a professor of accounting at the University of Kentucky, revealed that only 80 of the 202 Division I basketball programs which responded to his survey finished 1993 with a profit. *Id.*

advance the status of women in intercollegiate athletics.[7] Critics, however, view Title IX as nothing more than an affirmative action quota system which has drastically slashed opportunities for male athletes while demanding infinite opportunities for women in intercollegiate athletics.[8]

Compliance with Title IX has sparked a maelstrom of controversy in the world of intercollegiate athletics as schools scramble to comply with Title IX's mandate of gender equity.[9] Schools have been forced to either cut or completely eliminate many male varsity programs in an effort to comply with Title IX.[10] Critics of Title

---

7 *See, e.g.*, Kelley v. Board of Trustees of Illinois, 832 F. Supp. 237, 241 (C.D. Ill. 1993); discussed in depth *infra* at notes 174-187.

8 *See* Jessica Gavora, *College Women Get More Than Their Sporting Chance*, THE WASHINGTON TIMES, Jan. 22, 1996 at 25; *See also* Cohen v. Brown Univ., 101 F.3d 155, 195 (1st Cir. 1996) (Torruella, J., dissenting) In his dissent, Chief Judge Torruella stated that the three-part test, as interpreted by the district court, creates a quota system. *Id.* Judge Torruella opined that "I agree that 'Title IX is not an affirmative action statute,' but I believe that is exactly what the district court has made of it. As interpreted by the district court, the test constitutes an affirmative action, quota-based scheme." *Id.*; discussed in depth *infra* at Part IV.B.

9 *See* Debbie Becker & Tom Witosky, *Crew, Soccer Help Schools Close Gender* Gap, USA TODAY, Mar. 4, 1997 at 6C. Many schools are adding women's crew and women's soccer in an effort to comply with Title IX. *Id.* For example, in 1982 there were only 22 NCAA Division I women's soccer teams. *Id.* Today, there are 211 teams. *Id.* To illustrate, the University of Tennessee, a leader in women's intercollegiate athletics, has recently added women's softball, soccer and crew in an effort to comply with Title IX. *Id.; see also* Ragan Ingram, *AUM Studies Compliance With Title IX*, THE MONTGOMERY ADVERTISER, Jan. 25, 1996, at 1D (reporting that officials at Auburn University at Montgomery formed a gender equity committee to assist the university in complying with Title IX); Jerry Zgoda, *Gophers Will Make Women's Ice Hockey Varsity Sport in 1997*, THE STAR TRIBUNE, Oct. 28, 1995 at 7C (reporting that the University of Minnesota will promote the women's ice hockey team to varsity status in 1997 to help reach compliance with Title IX); Mike Jensen, *In Sports, Equity Still An Issue*, PHILA. INQUIRER, Oct. 28, 1994, at A1, A10 (reporting that Villanova has added a women's water polo team).

10 *See*, Kelley v. Board of Trustees of Illinois, 832 F. Supp. 237 (C.D. Ill. 1993) (upholding the elimination of the men's swimming team); Gonyo v. Drake Univ., 837 F. Supp. 989 (S.D. Iowa 1993) (affirming the elimination of the men's wrestling team); discussed in depth *infra* at notes 174-200; *see also* Jefferey M. Samoray, *MSU Dropped Men's Lacrosse and Fencing*, DETROIT NEWS, Jan. 17, 1997, at F2 (reporting that Michigan State University dropped men's lacrosse and fencing); Mark Blaudschun, *The Ax Falls On Some: BU Baseball Program Getting* Cut, BOSTON GLOBE, Apr. 12, 1995, at 37 (reporting that Boston University's baseball team is being eliminated because of Title IX); David Wickert, *Lawyers Challenge ISU Cuts*, THE PANTAGRAPH (Bloomington, Ill.), Mar. 28, 1995, at A1 (reporting that Eastern Illinois University dropped plans to eliminate men's wrestling and swimming under student and alumni pressure); John Maher, *Out of the Running*, AUSTIN-AMERICAN STATESMAN, Jan. 22, 1995, at A1 (reporting that Blinn College dropped the highly successful men's track program which has

IX contend that this trend could result in the crippling of present day college athletics.[11] Nevertheless, universities must weigh the allegedly harsh and inequitable results Title IX compliance has caused for many male athletes against the considerable repercussions of noncompliance.[12]

---

produced 11 Olympians and a gold medal winner at the 1992 Olympiad, reportedly because of gender equity and Title IX); Sean Waters, *Balancing the Books*, L.A. TIMES, June 2, 1994, at 22 (reporting that Santa Monica College dropped the men's volleyball and men's tennis teams and added women's soccer); Jamison Hensley, *Terps Cut Men's Scholarships*, BALTIMORE SUN, Dec. 19, 1993, at 5c (reporting that the University of Maryland has increased scholarships for female athletes by decreasing scholarships for male athletes); Matt Toll, *College Wrestling Is Confronting Some Troubling Statistics*, PHILA. INQUIRER, Dec. 11, 1993, at C7 (reporting that Temple, Villanova, and Princeton Universities dropped their wrestling programs, allegedly due to Title IX); Bill Jaus, *NU Adds Varsity Women's Soccer; Men's Fencing Clubbed*, CHI. TRIBUNE, Aug. 9, 1993, § 3, at 11 (reporting that Northwestern University dropped their men's fencing team from varsity status and added women's soccer); Joanne Korth, *Goetze Follows Raymond To The Pros*, ST. PETERSBURG TIMES, May 30, 1993 (reporting that University of Rhode Island reduced the size of their football team, dropped men's tennis and stopped awarding baseball scholarships in an effort to comply with Title IX).

[11] *See* Jonathan Feigen, *Gender Equity; Football Coaches Circle the Wagons*, HOUSTON CHRONICLE, June 28, 1993, at 1 (quoting 1972 statement by Darrell Royal, the former football coach at the University of Texas). Many in the intercollegiate athletic community believe that "Title IX will be the end of major college football." *Id.* Specifically, former Louisiana State University's men's basketball coach Dale Brown was quoted as saying that Title IX's mandate of gender equity, carried out to its fullest extent, could "'destroy college athletics as we know it.'" Carl Redman, *Gender Equity Causing Major Concern for LSU*, THE ADVOCATE, Oct. 10, 1994 at 1D. Brown stressed that he is not an opponent of women's athletics. *Id.* However, he believes that if revenue producing sports are cut, those cuts will eventually filter down and undercut the funds available for both women's sports and non-revenue producing sports. *Id.*

[12] *See* 20 U.S.C. § 1682 (1988). Pursuant to Title IX, Federal funding may be terminated for noncompliance. *Id.* Section 1682 states in pertinent part that:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which noncompliance has been found. . .

*Id.*

Additionally, noncompliance by an institution may result in liability to an aggrieved athlete for monetary damages. Franklin v. Gwinnett County Pub. Sch.,__ U.S. __, __, 112 S. Ct. 1028, 1038 (1992). In *Franklin*, a female high school student brought a Title IX action against her coach/teacher alleging that she had been the victim of sexual harassment. *Id.* at 1031. The District Court dismissed the complaint holding that Title IX did not authorize an award of monetary damages. *Id.* at 1031-1032. That

This note begins with an extensive look at the history of Title IX and the deluge of Title IX litigation initiated in an effort to prompt schools to comply with Title IX's mandate of gender equity.[13] Emphasis will be placed upon three United States Courts of Appeals' decisions[14] which marked a "monumental change" in the interpretation of Title IX.[15] Additionally, focus will be placed upon the effects of the interpretations of Title IX, the ramifications of these interpretations on women over the past twenty-five years and, particularly, the prominent role that Title IX played in the 1996 Summer Olympics.[16] Finally, this note will conclude that although the remedial purpose of Title IX is laudable, it has seemingly created inequitable results for male athletes who participate in small, non-revenue producing sports.[17]

## *II. Development of Title IX*

### A. *History and Statutory Framework.*

Title IX was enacted by Congress on July 1, 1972 in an effort to eliminate sex discrimination in all educational programs and activities that receive federal funding.[18] It requires educational institu-

---

decision was affirmed by the Eleventh Circuit Court of Appeals. *Franklin*, 911 F.2d 617 (11th Cir. 1990). The Supreme Court granted certiorari and reversed. *Franklin*, __ U.S. at __, 112 S. Ct. at 1032. The Court was faced with the question of what remedies were available in a suit brought under Title IX. *Id.* The Court held that under Title IX's implied right of action, monetary damages are available for an action brought to enforce it. *Id.*, __ U.S., at __, 112 S. Ct. at 1038. In reaching this conclusion, the Court articulated that "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* __ U.S. at __, 112 S. Ct. at 1033(*citing* Bell v. Hood, 327 U.S. 678, 684 (1946)).

The Court, however, did not specify how to measure damages for a Title IX violation. *Id.* __ U.S. at __, 112 S. Ct. at 1038. The Court did proffer that damages are not limited to back pay and prospective relief. *Id.* Therefore, the Court's opinion seems to open the door for awards of both compensatory and punitive damages. *Id.*

13 *See infra* Part II.

14 *See* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, __ U.S. __, 114 S. Ct. 580 (1993); Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996); Favia v. Indiana Univ. of Pa., 7 F.3d 332 (3d Cir. 1993); discussed in depth *infra* notes 89-151.

15 *See infra* Part III.

16 *See infra* Part IV.

17 *See infra* Part V.

18 *See* 20 U.S.C. §§ 1681-1688 (1988). Title IX was enacted in response to hearings on sexual discrimination conducted by a Special House of Representatives Subcommittee on Education. *See* Cannon, 441 U.S. at 694 n.16 (discussing Discrimination

tions to provide benefits both to men and women without discriminating against persons of either sex.[19] Title IX makes no specific reference to athletics.[20] In fact, Title IX's meager legislative history[21] contains virtually no discussion of it's potential impact on intercollegiate athletics.[22]

---

*Against Women: Hearings on H.R. 16098 Section 805 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. 2 (1970) [hereinafter cited as 1970 *House Hearings*]). Chaired by Representative Edith Green of Oregon, the hearings were held in conjunction with Congress' consideration of Section 805 of H.R. 16,098, a bill that would have amended Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1982), to prohibit discrimination on the basis of sex in all federally assisted programs. *Cannon*, 441 U.S. at 695 n.16. For a complete discussion of Title VI, see *supra* note 3. Substantial portions of the extensive testimony on Section 805, however, concerned sex discrimination in educational institutions. *Cannon*, 441 U.S. at 695 n.16 (discussing *supra* 1970 *House Hearings* at 5, 237, 584). Witnesses at the hearings proposed that a provision be promulgated that was analogous to, but more limited in scope than, Title VI. *Id.* (discussing *supra 1970 House Hearings* at 664-666, 677-78, 690-91). Thus, in 1972, Congress passed Title IX, a measure patterned verbatim after Title VI, but limited in scope to education. *Id.* (citing 117 CONG. REC. 30,407, 30,408 (1971); *see generally*, 20 U.S.C. § 1681, et. seq.

[19] *See* 20 U.S.C. § 1681(a)(1988). The statute provides, in pertinent part, that: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." *Id.*

[20] *See* The Education Amendments of 1974, Pub. L. 93-380, § 844 88 Stat. 612 (1974). Originally, Title IX made no specific reference to its application to athletics. *See generally* 20 U.S.C. § 1681 et. seq. However, the "Javits Amendment" to Title IX specifically brings athletics within the purview of Title IX. §844, 88 Stat. at 612. For a more complete discussion of the Javits Amendment see *infra* note 30 and accompanying text.

[21] *See, e.g.*, Grove City College v. Bell, 465 U.S. 555, 566 (1984); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 532-33 (1982); Iron Arrow Honor Society v. Heckler, 702 F.2d 549, 557 (5th Cir. 1983), vacated as moot, 464 U.S. 67 (1983); Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418, 426 (6th Cir. 1982); Yellow Springs Exempted Village Sch. Bd. of Educ. v. Ohio High Sch. Athletics Ass'n, 647 F.2d 651, 660 (6th Cir. 1981).

[22] *See* S. REP. NO. 798, 92nd Cong., 2d Sess. 221-22 (1972); *see also*, Jill K. Johnson, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U. L. REV. 553, 557 (1994). Title IX was adopted in conference without formal hearings or a committee report. Johnson, *supra* at 557. In fact, Senator Bayh, the sponsor of Title IX, only mentioned athletics twice in the congressional debate, with both references regarding the integration of facilities. 118 CONG. REC. S5807 (1972) (statement of Sen. Bayh). Senator Bayh stated that agencies enforcing Title IX may permit unequal treatment based on gender "only [in] very unusual cases where such treatment is absolutely necessary to the success of the program—such as . . . in sports facilities or other instances where personal privacy must be preserved." *Id.* Senator Bayh also commented that Title IX does not "mandate the desegregation of football fields. What we are trying to do is provide equal access for men and women students to the educational process and the extracurricular activities in a school,

The lack of legislative history has generated mass confusion and speculation from academic administrators concerned with which individual programs, specifically athletic programs, would fall within the scope of the legislative mandate.[23] The concern over Title IX's scope and applicability to intercollegiate athletics paved the way for the introduction of the Tower Amendment.[24] The proposed Tower Amendment attempted to grant revenue producing sports, such as football and basketball, an exemption from the breadth of Title IX.[25] Under the reasoning of the Tower Amendment, this exemption was justified because these sports produced revenue and created the largest disparity between the genders and sports.[26] For example, the men's football budget at a vast number of schools far exceeds that of any other sport.[27] Congress, however, rejected the Tower Amendment[28] and, in an act of political compromise,[29] adopted the Javits Amendment.[30] In contrast to the Tower Amendment, the Javits Amendment did not exempt rev-

---

where there is not a unique facet such as football involved." 117 CONG. REC. S5807 (1972) (statement of Sen. Bayh);

23 *See, Cohen*, 991 F.2d at 893; *See also*, Johnson, *supra* note 22 at 557; Thomas A. Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 36 & n.11 (1977) (noting that only two references were made concerning the application of Title IX to sports).

24 *See* 120 CONG. REC. S15,322 (1974) (statement of Senator Tower). Senator John Tower of Texas introduced an amendment to the Education Amendments of 1974 on the floor of the Senate. *Id.* For a more detailed discussion of the Tower Amendment, see *infra* note 26 and accompanying text.

25 *See* 120 CONG. REC. 15,322-23 (1974). After passage of Title IX, it became apparent that the statute could prohibit gender discrimination of intercollegiate athletic programs. ELLEN J. VARGYAS, BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX (1994).

26 *See* Johnson, *supra* note 22, at 586. Under the Tower Amendment, a sport qualified as a revenue producing sport if it produced gross receipts or donations. 120 CONG. REC. S15,322 (statement of Senator Tower).

27 *See Cohen* 991 F.2d at 893. Operating expenses at a typical college football program reflect the magnitude of the sport. Alexander Wolf, *The Slow Track*, SPORTS ILLUSTRATED, Sept. 28, 1992, at 52. Consider that an average Division I-A team distributes 92 scholarships to members of its 145 man team. *Id.* Also, that same program will expend approximately $500,000 on its twelve man coaching staff. *Id.*

28 *See* 120 CONG. REC. S15,323 (statement of Sen. Tower).

29 *See Cohen*, 991 F.2d at 894 n.6.

30 *See* §844, 88 Stat. at 612 (1974). The Javits Amendment, named after Senator Jacob Javits (R-N.Y.), instructed the Secretary of HEW to prepare regulations for implementing Title IX that included, "with respect to intercollegiate [athletics,] reasonable provisions considering the nature of particular sports." *Id.* The Javits Amendment became law in 1974, and remains controlling today. *Id.*

enue producing sports from the scope of Title IX.[31] Rather, the Javits Amendment required the Secretary for the Department of Health, Education, and Welfare ("HEW") to propose and prepare regulations for intercollegiate sports, taking into account the nature of the particular sport.[32]

In 1974, in a direct response to the mandate of the Javits Amendment, the HEW promulgated regulations for the enforcement of Title IX.[33] While the regulations also cover Title IX's application to an educational institution's entire operation, two sections specifically pertain to college athletics.[34] One section requires schools to award athletic scholarships in proportion to the number of males and females participating in athletics.[35] The other section specifies when a school may maintain separate male and female athletic teams and when it must permit members of one sex to participate on the other sex's team.[36] Furthermore, this section also requires schools to provide equal athletic opportunities for members of both sexes.[37] The final regulation became ef-

---

31 See id.

32 *See* Title IX of the Education Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (1979)(codified at 45 C.F.R. pt. 86).

33 *See id.*

34 See id.

35 *See* 34 C.F.R. § 106.37(c)(1)(1995). Section 106.37(c)(1) provides that "[t]o the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics." *Id.*

36 *See id.* at § 106.41(b). The regulations allow a school to maintain teams separated by sex "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* However, if a separate team is fielded for one sex but not the other, and athletic opportunities for the excluded 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." *Id.* The regulations define contact sports to include "boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact." *Id.*

37 *See id.* at § 106.41(a) (1994). Section 106.41(a) provides:

> 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.

*Id. See also id.* at § 106.41(c)(1994). The regulation lists ten factors to consider in evaluating an athletic program's compliance with Title IX. *Id.* Section 106.41(c)

fective on July 21, 1975.[38]

In the three years immediately following the publication of these regulations, HEW received more than one hundred discrimination complaints.[39] In response to complaints by universities that the regulations were ambiguous, HEW issued a Policy Interpretation regarding Title IX's application to intercollegiate athletics.[40] This Policy Interpretation was designed to provide colleges and universities with more detailed guidance on how to comply with the law.[41] The Policy Interpretation established three "safe harbors" or guideposts by which colleges and universities could avoid regulatory sanctions under Title IX.[42] In order to ensure that schools are providing nondiscriminatory participation opportunities for individuals of both sexes, the Office for Civil Rights[43]

---

states that "[i]n 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 time;
(4) Travel and per diem allowance;
(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services; and
(10) Publicity.

*Id.*

38 *See id.* at § 106.1. In addition, these regulations established a three year transition period to give secondary and postsecondary institutions sufficient time to comply with the equal opportunity requirements. *Id.* at § 106.41(d). Presumably, the regulations themselves functioned as notice to universities of the date (July 21, 1978) after which the Office for Civil Rights (OCR) would begin enforcement. *Id.*

39 *Cohen*, 991 F.2d at 896. The complaints, which were filed by aggrieved female athletes, pertained to discrimination in intercollegiate athletics. *Id.*

40 *See* 44 Fed. Reg. 71,413 (stating that the purposes of the Regulations are to explain the regulations "so as to provide a framework within which . . . complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs").

41 See id.

42 *See id.* at 71,418. For a complete discussion of the three guideposts set forth by the Policy Interpretation, see *infra* notes 46-53 and accompanying text.

43 *See Roberts*, 998 F.2d at 828 & n.3. After the enactment of Title IX, HEW split into the Department of Health and Human Services and the Department of Education. *Id.* Presently, the Office for Civil Rights (OCR), acting under the Department of Education's supervision, is now responsible for Title IX enforcement. *Id.*

(OCR) will apply a three-part test.[44]

To demonstrate compliance with Title IX, an institution must establish at least one of the following three criteria.[45] First, OCR will find compliance if an institution has demonstrated that its athletic program has intercollegiate participation opportunities for male and female students in numbers substantially proportionate to their respective undergraduate enrollments.[46] A rigid ratio, however, has not been established.[47] Rather, the regulations suggest that an institution would be in compliance with Title IX if both its enrollment and athletic participation ratio is 52% male and 48% female.[48]

Under the second criteria, OCR will find compliance if an institution can demonstrate that it has a history and continuing practice of program expansion which meets the underrepresented gender's athletic interests.[49] Essentially, part two looks at an insti-

---

[44] *See infra* notes 46-53.

[45] *See* 44 Fed. Reg. 71,418. In 1990, OCR published an Investigator's Manual to aid in identifying violations of Title IX. *Cohen*, 879 F. Supp. at 197 (citing OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION, TITLE IX INVESTIGATOR'S MANUAL 24 (1990)). [hereinafter "INVESTIGATOR'S MANUAL"]. The Investigator's manual advises OCR investigators that "they use an overall approach and review the total athletics program for intercollegiate athletic investigations." *Roberts*, 814 F. Supp. at 1510 (citing INVESTIGATOR'S MANUAL at 21).

[46] *See* 44 Fed. Reg. 71,418; *see also* Cohen, 991 F.2d at 901 (holding that the burden of proof in proving non-compliance with the first part of the three-part test falls upon the plaintiff)

[47] *Roberts*, 814 F. Supp. at 1512 (citing INVESTIGATOR'S MANUAL at 7).OCR states that "there is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in disparity or a violation. All factors for this program component and any justifications for differences ordered by the institution, must be considered before a finding is made." *Id.*For examples of ratios that have been found to be in violation of part one of the three part test, see Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992), aff'd, 991 F.2d 888 (1st Cir. 1993), aff'd 101 F.3d 155 (1st Cir. 1996) (finding discrepancy of 11.6% to be in violation); Favia v. Indiana Univ. of Pa., 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd* 7 F.3d 332 (3d Cir. 1993) (finding discrepancy of 19.1% to be in violation); Roberts v. Colorado State Bd. Of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, __ U.S. __, 114 S. Ct. 580 (1993) (finding discrepancy of 10.6% to be in violation).

[48] *See Roberts*, 814 F. Supp. at 1512 (citing INVESTIGATOR'S MANUAL at 24).

[49] *See* 44 Fed. Reg. 71,418. The burden of proof is placed upon the defendant to demonstrate program expansion. *Roberts*, 998 F.2d at 830 n.8; *Cohen*, 991 F.2d at 902; *Favia*, 812 F. Supp. at 584. *See also, Cohen*, 879 F. Supp. at 207 (proffering that "[a]n institution does not demonstrate 'program expansion' by reducing male teams so as to increase the relative percentage of female participation in intercollegiate athletics, although it may achieve compliance with prong one if it sufficiently reduces the program of the overrepresented gender").

tution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.[50]

Third, OCR will find compliance if it determines that an institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.[51] In making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in that sport; and (c) a reasonable expectation of competition for that team.[52] If all three conditions are present, OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.[53]

Despite the implementation of this three-part test, confusion continued to linger over Title IX's scope and application.[54] This confusion prompted the Department of Education to issue the Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test (Clarification).[55] This Clarification was issued in response to requests from a number of universities for more specific guidance concerning the enforcement of Title IX.[56] The Clarification does not provide strict-numerical formulas, but instead, it provides examples of scenarios which would and would not comply

---

50 *See id.*; *see also Cohen*, 991 F.2d at 898. The court opined that Title IX "does not require that the university leap to complete gender parity in a single bound." *Cohen*, 991 F.2d at 898. The Cohen court further proffers that "if a school has a student body in which one sex is demonstrably less interested in athletics, Title IX does not require that the school create teams for, or rain money upon, otherwise disinterested students." *Id.*

51 *See* 44 Fed. Reg. 71,418. The court of appeals in *Cohen* and *Roberts* placed the burden on the plaintiff to establish that the interests and abilities of the underrepresented sex are unmet. *Cohen*, 991 F.2d at 901-02; *Roberts*, 998 F.2d at 831. *But see, Roberts v. Colorado State Bd. Of Agric.*, 814 F. Supp. 1507, 1511 (D. Colo. 1993) (placing burden on defendant); *Favia*, 812 F. Supp. at 854 (same); *Cohen v. Brown Univ.*, 809 F. Supp. 978, 992 (D.R.I. 1992) (same).

52 *See* 44 Fed. Reg. 71,417.

53 *Cohen*, 991 F.2d at 898 (citing 44 Fed. Reg. 71,415-16). Part-three of the three part test sets a lofty standard for attainment. *Id.* It requires not merely some accommodation, but rather "full and effective" accommodation of the interests and abilities of the underrepresented sex. *Id.*

54 *See infra* note 56 and accompanying text.

55 *Cohen*, 101 F.3d at 167 (discussing Department of Education "Clarification Memorandum" dated January 16, 1996).

56 *See id.* The purpose of the Clarification was not to alter Title IX's enforcement, but merely to clarify and explain current enforcement standards. *Id.*

with Title IX.[57] Although the Clarification explains the current enforcement criteria,[58] their usefulness and utility has yet to be determined because of its recent issuance.[59]

B. *Procedures for Enforcement of Title IX.*

Consistent with Title IX's language and purpose, the procedures for enforcement of the Title IX regulations mirror those of Title VI.[60] Pursuant to HEW's initiative, OCR is authorized to begin the enforcement of Title IX's mandate in one of two ways: (1) it can initiate "compliance reviews" of randomly selected universities,[61] or (2) it can investigate specific complaints alleging gender discrimination.[62] OCR has ninety days to conduct such an investigation and another ninety days to obtain a voluntary compliance agreement from a university found not to be in compliance with the gender equity mandate of Title IX.[63] When it appears that remedial measures will take an extended period of time, OCR and the university may negotiate a plan to implement those remedies or it may develop its own plan.[64] In either scenario, OCR will peri-

---

57 *See id.* The Clarification provides a series of examples which are intended to illustrate the principles of the three-part test. *Id.* The following example is offered:

> At the inception of its women's program in the mid-1970's, Institution A established seven teams for women. In 1984 it added a women's varsity team at the request of students and coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution A is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging women's sport in the region. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. OCR would find Institution A in compliance with part two because it has a history of program expansion and is continuing to expand its program for women to meet their developing interests and abilities.

U.S. Dep't of Educ., Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test (1995).

58 *See supra* note 56.

59 *See* Charles P. Beveridge, *Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletics*, 1996 U. ILL. L. REV. 809, 819 (1996) (stating that "[b]ecause of its newness, the utility of the Clarification to schools remains untested").

60 *See* 44 Fed. Reg. 71,413, 71,418 & n.8 (articulating that the Title IX regulations incorporate the enforcement procedures of Title VI).

61 *See* 44 Fed. Reg. at 71,418.

62 *See id.*

63 *See id.*

64 *See id.*

odically monitor the university's progress.[65] If the university's voluntary compliance plan proves to be fruitless, OCR will then initiate a formal process which has the potential to ultimately result in termination of federal funding.[66] Although this penalty is always available, OCR has never terminated the federal funding of a university.[67] Consequently, it may be argued that Title IX's administrative enforcement powers have been largely ineffective.

### *III. Judicial Interpretations of Title IX.*

As an alternative to filing a complaint with OCR, an aggrieved plaintiff is left with one additional avenue for redress: the filing of a federal lawsuit.[68] Although Title IX was enacted primarily to eliminate gender discrimination in educational programs and activities which receive federal funding,[69] the confusion triggered by the sparse legislative history significantly hampered initial compliance with Title IX.[70] Courts struggled with the question of whether

---

65 *See id.* at 71,418-19.

66 *See* 44 Fed. Reg. at 71,419.

67 *See* Carol Herwig, *Gender Equity*, USA TODAY, July 2, 1993, at 12C.

68 *See* Cannon v. University of Chicago, 441 U.S. 677, 680 (1979). In *Cannon*, the petitioner brought suit against two federally funded medical schools, claiming that her application for admission was denied because she was a woman. *Id.* The United States District Court for the District of Illinois dismissed the complaint because Title IX did not expressly authorize a private right of action. Cannon v. University of Chicago, 406 F. Supp. 1257, 1259 (N.D. Ill.), aff'd 559 F.2d 1063 (7th Cir. 1976), rev'd 441 U.S. 677 (1979). The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision, concluding that Title IX did not include an express or implied private remedy. *Cannon*, 441 U.S. at 683. The Supreme Court reversed and held that Title IX contains an implied private cause of action. *Id.* at 717.

However, the extended nature of litigation and the costs associated with a prolonged court battle makes seeking a judicial remedy difficult. *See* Ellen J. Vargyas, *Franklin v. Gwinnett County Public Schools and Its Impact On Title IX Enforcement*, 19 J.C. & U.L. 373, 380 (1993) (stating that the lengthy litigation process is a constant concern for female athletes seeking injunctive relief). In Cook v. Colgate University, the women's club ice hockey team at Colgate University had sought elevation to varsity status four times over a nine year span. 802 F. Supp. 737,740 (N.D.N.Y. 1992), vacated as moot, 992 F.2d 17 (2d Cir. 1993). On each occasion, the athletic department denied the request. *Id.* After the fourth time, five disgruntled members of the team filed suit, alleging a violation of Title IX. *Cook*, 992 F.2d at 18. Despite the fact that the district court found for the plaintiffs and ordered the school to elevate the team to varsity status beginning with the 1993-94 academic year, *Cook*, 802 F. Supp. at 751, the Second Circuit vacated the decision as moot because all of the plaintiffs were scheduled to graduate before the injunction could take effect. *Cook*, 992 F.2d at 20.

69 See generally supra note 3.

70 *See, e.g., Cohen*, 991 F.2d at 893 (noting that part of the initial confusion over the

Title IX encompassed intercollegiate athletics at all.[71] Two views emerged from this confusion. The first considered Title IX to be "program specific."[72] The second proffered that Title IX was applied "institution-wide."[73]In 1984, the United States Supreme Court finally offered a definitive opinion with regard to this dichotomy.[74] In *Grove City College v. Bell*, the Court held that Title IX was

---

implementation of Title IX was the lack of secondary legislative material to define compliance and noncompliance). Initial compliance was also hampered by the fact that most athletic programs did not receive direct federal funding. Michael Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 MARQ. SPORTS L.J. 149, 151 (1990) (suggesting that "most school sports programs receive direct federal funding").

71 *See, e.g.*, University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (holding that a university athletic department was not covered by Title IX).

72 *See* 20 U.S.C. § 1681(a)(1988). The "program specific" view, derived directly from the language of Title IX, suggested that Title IX forbids gender discrimination only in those "educational programs or activities receiving federal financial assistance." *Id.* Proponents of this view read the language of Title IX to limit its application only to those specific programs or activities that directly received federal funds. *See, e.g.*, Janet L. Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49,62 (1976) (arguing that language of Title IX does not permit application to athletic programs).

Decisions applying the "program-specific" theory include, Rice v. President & Fellows of Harvard College, 663 F.2d 336, 338-39 (1st Cir. 1981) (declining to apply Title IX where sex discrimination was not alleged in a specific program that received federal funds), *cert. denied*, 456 U.S. 928 (1982); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (holding that a university athletic department was not covered by Title IX); Othen v. Ann Arbor Sch. Bd., 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983) (same); Bennett v. West Texas St. Univ., 799 F. Supp. 155 (5th Cir. 1986) (same).

73 *See* Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982)(concluding that "where the federal government furnishes indirect or non-earmarked aid to an institution. . . the institution itself must be the 'program'"). Therefore, the institution-wide approach maintained that an entire educational institution is subject to the requirements of Title IX if any part of the institution receives federal financial assistance. *Id.* Decisions applying the institution-wide approach include *Grove City*, 687 F.2d at 700 (holding that students' receipt of federal grants brought entire college under Title IX's requirements), *rev'd in part*, 465 U.S. 555, 570-574 (1984), and Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982) (per curiam) (holding that because the university as a whole received federal funds, its intercollegiate athletic department was subject to Title IX). For a more thorough treatment of this dichotomy, see Kevin A. Nelson, Note, *Title IX: Women's Collegiate Athletics in Limbo*, 40 WASH. & LEE L. REV. 297 (1983).

74 Grove City College v. Bell, 465 U.S. 555 (1984). Grove City College, a private, coeducational, liberal arts college in Pennsylvania did not receive any direct financial assistance. *Id.* at 559. It did enroll students who received Basic Educational Opportunity Grants (BEOG's) from the federal government. *Id.* The Supreme Court agreed with the Department of Education's determination that the students' receipt of the BEOG's brought the college within the regulatory definition of a "recipient" of fed-

"program specific" and thus applicable only to those programs that actually received federal funds.[75] As a result, *Grove City* effectively removed every university's athletic program from the purview of Title IX because very few athletic departments actually receive direct federal funding.[76]

Congress was apparently dissatisfied with the *Grove City* decision[77] and attempted to abrogate the Court's ruling by enacting the Civil Rights Restoration Act of 1987 (Restoration Act).[78] The Restoration Act mandated that if any institution's program received federal funds, the institution as a whole must comply with Title IX's provisions.[79] The Restoration Act clearly manifested Congress' intent to reestablish the sweeping scope of coverage of Title IX, and thus to counter the "program-specific" approach of the *Grove City* decision.[80]

---

eral financial assistance. *Id.* at 560. The Court then determined that the only "program or activity" that received this federal assistance was the college's financial aid program. *Id.* at 572. Therefore, the court concluded that Title IX was only applicable to the financial aid program and not to the university as a whole. *Id.* at 573.

75 *See id.* at 574; *see also supra* note 72 and accompanying text.

76 *See Cohen*, 991 F.2d at 894. For example, a large percentage of federal funding is granted directly to an institution's research funds or indirectly routed through it financial aid office. *Id.*

77 *See* Craig Neff, *Equality at Last, Part II*, SPORTS ILLUSTRATED, Mar. 21, 1988, at 70. *Grove City* did not completely destroy the progressive steps made by female athletes. *Id.* Even with the decision in *Grove City*, many athletic departments displayed an inclination to continue funding and expanding women's athletics. *Id.* Between 1985 and 1988, approximately 450 new NCAA women's teams were formed. *Id.*

78 20 U.S.C. § 1687 (1988). Senator Edward Kennedy of Massachusetts introduced the bill in the Senate and Representative Paul Simon introduced the bill in the House. Civil Rights Restoration Act of 1984, S. 2568, 98th Cong., 2d Sess. (1984); H.R. 5490, 98th Cong., 2d Sess. (1984). The bill mandated an "institution-wide" approach to Title IX by replacing the words "program or activity" with "recipient." *Id.*

In 1988, President Ronald Reagan vetoed the Restoration Act, stating that the Act would "vastly and unjustifiably expand" federal power. Ruth Marcus & Helen Dewar, *Reagan Vetoes Civil Rights Restoration Act; Bill Would 'Unjustifiably Expand' Federal Power, President Says*, THE WASHINGTON POST, Mar. 17, 1988, at A1. Congress, however, finally passed the Restoration Act over President Reagan's veto. Status of S. Bills, CONG. INDEX, S. Bill No. 557, 100th Cong. at 21,009 (CCH)(1987-88). The strength of Congress' intention to reinvigorate the protection of Title IX was demonstrated by the ease with which Congress overrode President Reagan's veto of the Restoration Bill. *Id.* The Senate overrode the veto by a vote of 73 to 24 and the House of Representatives overrode by a vote of 292 to 133. *Id.*

79 *See id.*; *see also* S. REP. No. 64, 100th Cong. 2d Sess. 4 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 6 (clarifying that Congress wanted to prohibit discrimination throughout an institution if the institution received any federal funds).

80 *See* Pub. L. No. 100-259, 102 Stat. 28 (1988). Congress made specific findings in

Through passage of the Restoration Act, Congress not only broadened Title IX's scope, but it also ensured Title IX's application to intercollegiate athletics.[81] Not surprisingly, the Restoration Act served as a catalyst for change because it provided women with the much needed ammunition to force institutions to comply with the mandates of Title IX.[82] In fact, within six months of its enactment, sixteen complaints were brought alleging discrimination in athletic departments at twelve colleges and universities, some with successful results.[83] These developments significantly breathed life into Title IX litigation.[84]

Recently, three different United States Circuit Court of Appeals' decisions have thrust Title IX into the spotlight, significantly altering the landscape of intercollegiate athletics.[85] Each case shares a common theme: female collegiate athletes whose teams have been either eliminated or demoted from varsity status.[86] Collectively, these cases signify the courts' willingness to strictly en-

---

the Act that "certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX," and that "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.* at §2, 102 Stat. at 28.

81 See id.

82 *See infra* note 83 and accompanying text.

83 *See, e.g.*, Haffer v. Temple Univ., 524 F. Supp. 531,532 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982) (per curiam), modified 678 F. Supp. 517 ( E.D. Pa. 1987) (holding that Temple University violated Title IX by discriminating against women in the operation of its athletic department).

84 *See* Christine Brennan & Gabby Richards, *Women Taking to the Courts; Title IX Inaction Now Costing Schools*, WASH. POST, Aug. 7, 1993, at F1. In addition to Title IX gender discrimination suits filed by female intercollegiate athletes, a second wave of suits have been filed by female athletic coaches. *Id.* These female coaches are using Title IX in claiming that their compensation is illegally lower than that of their male counterparts. *Id.* A six person D.C. Superior Court jury awarded Howard University's women's basketball coach, Sanya Tyler, $2.4 million (later reduced to $1.1 million) for violations of Title IX and the D.C. Human Rights Act. *Id.* In addition to being paid a salary approximately half of the men's coach, Tyler complained of inadequate office space, locker room facilities, and staffing. *See* Stanley v. University of S. Cal., 13 F.3d 1313, 1318 (9th Cir. 1994) (involving Marianne Stanley, the women's basketball coach at the University of Southern California, who brought suit against the University seeking eight million dollars).

85 *See* Roberts v. Colorado State Univ., 814 F. Supp. 1507 (D.C. Colo.), *aff'd in part and rev'd in part sub nom.* Roberts v. Colorado State Bd. Of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, __ U.S. __, 114 S. Ct. 580 (1993); Favia v. Indiana Univ. of Pa., 812 F. Supp. 578 (W.D. Pa.), *aff'd* 7 F.3d 332 (3d Cir. 1993); Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992), *aff'd* 991 F.2d 888 (1st Cir. 1993), *aff'd* 101 F.3d 155 (1996).

86 *See infra* notes 88-149.

force the mandates of Title IX by remedying discriminatory situations that adversely effect female intercollegiate athletes.[87]

### A. *Cohen v. Brown University*

The first case to demonstrate the courts' willingness to strictly enforce the mandates of Title IX was *Cohen v. Brown University*.[88] Throughout the 1990-91 academic year, Brown University sponsored a total of thirty-one varsity athletic teams, sixteen male and fifteen female.[89] These teams consisted of 894 undergraduate student athletes.[90] In the spring of 1991, as a direct result of budgetary concerns, Brown announced that it planned to demote four sports from varsity status.[91] The demotion eliminated funding for men's golf, men's water polo, women's gymnastics, and women's volleyball.[92] These cuts, however, did not materially alter the athletic participation ratios at the University.[93]

---

87 *See infra* notes 88-149.

88 *See* 809 F. Supp. 978 (D.R.I. 1992), *aff'd* 991 F.2d 888 (1st Cir. 1993), *aff'd*, 101 F.3d 155 (1996).

89 *See Cohen*, 809 F. Supp. at 980. The following sports were offered to both men and women: basketball, crew, cross-country, ice-hockey, lacrosse, soccer, squash, swimming, tennis, fall track and spring track. *Id.* Baseball, football, golf, water polo, and wrestling were offered exclusively to men, while field hockey, gymnastics, softball, and volleyball were offered solely to women. *Id.*

90 *See id.* at 981. Women were offered an aggregate of 328 varsity slots (36.7%), while men were offered 566 varsity slots (63.3%). *Id.* At that time, Brown's undergraduate population consisted of roughly 52% men and 48% women. *Cohen*, 991 F.2d at 892.

91 *See* Cohen, 809 F. Supp. at 981. The decision to cut these programs was made in response to a university wide mandate to cut 5-8% from the budget over the next several years. *Id.* The demotions saved the athletic department $77,813 per annum: $37,127 from women's volleyball, $24,901 from women's gymnastics, $9,250 from men's water polo, and $6,545 from men's golf. *Id.*

Additionally, the teams were also deprived of significant privileges that they enjoyed before the demotion. *Id.* at 981-82. For instance, varsity teams began to receive priority over intercollegiate club teams with regard to practice time and access to trainers. *Id.* at 982. The coaches of the women's teams were also denied office space, access to long distance telephone service and support staff. *Id.*

92 *See id.* at 981. Brown University initially classified the four demoted teams as "club varsity." *Id.* However, the teams were later characterized as "intercollegiate clubs." *Id.* Unfortunately, many schools with varsity athletic programs are reluctant to compete against club teams. *Id.* at 993. For instance, once Brown demoted its women's volleyball team from varsity to club status, some schools dropped them from their future game schedules. *Id.*

93 *See Cohen*, 991 F.2d at 892. After the cuts, men retained 63.4% of the varsity athletic opportunities, while women retained 36.6%, as compared to 63.3% and 36.7% respectively. *Id. But see supra* note 91 and accompanying text.

In April 1992, members of the women's gymnastics and volleyball teams filed a class action suit against Brown.[94] The plaintiffs alleged that Brown's actions in demoting women's gymnastics and volleyball violated Title IX's ban on gender based discrimination in intercollegiate athletics.[95] The plaintiffs sought a preliminary injunction ordering Brown to reinstate the two women's teams to full varsity status.[96] The plaintiffs also sought prohibition against the elimination or reduction in status of any other university funded women's teams unless the percentage of athletic participation opportunities equaled the percentage of female undergraduate students.[97]

The United States District Court for the District of Rhode Island granted the injunction ordering Brown to restore the women's gymnastics and volleyball teams to their former varsity status.[98] In so doing, the court recognized that Brown violated Title IX by failing to provide women athletes with an equal opportunity to participate in intercollegiate athletics.[99]

---

94 *See Cohen*, 991 F.2d at 892. Suit was filed on behalf of themselves and "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." *Id.* at 893.

95 *See id.* The plaintiffs contended that Brown's violation of Title IX was allegedly exacerbated by Brown's decree to demote the two women's teams without first making adequate reductions in men's programs or, alternatively, adding other women's teams to mitigate the loss. *Id.*

96 *See Cohen*, 809 F. Supp. at 980.

97 *See id.*

98 *See id.* After listening to fourteen days of testimony from twenty witnesses, *id.* at 980, the district court also ordered Brown to "[p]rovide coaching staff, uniforms, equipment, facilities, publicity, travel opportunities and all other incidentals of an intercollegiate varsity team at Brown to women's gymnastics and women's volleyball. . . ." *Id.* at 1001. Further, the court ordered that Brown "[p]rovide University funding to the two women's teams. . . ." *Id.* The court also ordered Brown to reinstate the privileges which were stripped from the coaches of the two women's teams, such as clerical support and long distance telephone service. *Id.* Finally, the court ordered Brown to "[p]rohibit the elimination or reduction in status, or the reduction in the current level of University funding, of any existing women's intercollegiate varsity team until this case is resolved on the merits." *Id.*

99 *See id.* at 999.After an extensive review of the Title IX statute, regulations, Policy Interpretation, Investigator's Manual, and the arguments of the parties, the district court concluded that a violation of Title IX may be based solely upon a university's failure to comply with the effective accommodation provision of the equal opportunity regulation. *Id.* at 989. The court then posited that the Policy Interpretation's three-part test is "clearly at the heart of evaluating this factor." *Id.* at 990. Further, the court articulated that because female athletes at Brown were not receiving the same

Applying the Policy Interpretation test, the district court concluded that Brown failed to satisfy any of the prerequisites for satisfaction of Title IX's mandate.[100] Those requirements are: (1) substantial proportionality;[101] (2) continuing practice of program expansion;[102] and (3) full and effective accommodation.[103]

The First Circuit Court of Appeals affirmed the preliminary injunction and remanded the case to the district court for further proceedings.[104] In reaching its conclusion, the court conducted an

---

opportunities as male athletes, Brown was not effectively accommodating the interests and abilities of the female athletes on the gymnastics or volleyball teams. *Id.* at 991.

100 *See infra* notes 101-102 and accompanying text.

101 *See Cohen*, 809 F. Supp. at 991. Brown failed to satisfy part-one of the test because the percentage of female varsity athletes was not "substantially proportionate" to the percentage of women enrolled at the University. *Id.* The court found that the demotion of the four teams left 529 men (63.4%) and 305 women (36.6%) participating in varsity sports, while during the same year 2917 men (51.8%) and 2716 women (48.2%) were enrolled at the undergraduate level. *Id.* Therefore, the percentages for 1991-92 reveal that the disparity between females enrolled at the University and females participating in intercollegiate athletics was 10.9% before the demotion and 11.6% afterward. *Id.*

102 *See id.* Despite demonstrating substantial growth in its women's athletic program in the 1970's, Brown also failed part-two of the test because it had neglected to expand the women's program since that time. *Id.* Since the late 1970's, Brown's undergraduate enrollment has consisted of approximately 51-52% men and 48-49% women. *Id.* Throughout this period, the percentage of intercollegiate athletes participating in varsity sports has remained at approximately 61% men and 39% women. *Id.* Since 1977, the only women's program added was winter track in 1982. *Id.* The district court rejected Brown's argument that associating "expansion" with increased numerical participation was excessively restrictive and that expansion should be linked to creating a higher quality program. *Id.*

103 *See id.* The district court also determined that by demoting the women's teams from varsity status, Brown had not "fully and effectively" accommodated the interests and abilities of its female athletes, and thus failed to comply with part-three of the three part test. *Id.* The district court opined that keeping the women's gymnastics and volleyball teams at an "intercollegiate club" level was not sufficient to satisfy the third part of the three-part test. *Id.* at 991-92. The court proffered that Brown may have had a cogent defense if it could have shown that "despite the statistical disparity between the number of men and women participating on varsity teams, there are no other women who want to compete at this level." *Id.* at 992.

104 *Cohen*, 991 F.2d at 907. On appeal, Brown challenged the district court's interpretation of the third part ("full and effective accommodation") of the three-part test. *Id.* at 899. Brown contended that the Policy interpretation "countervails the enabling legislation [suggesting that] to the extent students' interests in athletics are disproportionate by gender, colleges should be allowed to meet those interests incompletely as long as the school's response is in direct proportion to the comparative levels of interest." *Id.*

Brown argued that female athletes are fully and effectively accommodated if a university provides athletic participation opportunities in proportion to the ratio of

extensive analysis of the legal framework of Title IX as applied to intercollegiate athletics.[105] The court stressed that the language of Title IX does not require a finding of noncompliance based strictly upon numerical inequality between the gender balance of a university's athletic program.[106] Likewise, the gender balance of an undergraduate population is also not required.[107] Simply put, noncompliance with Title IX will not be found merely because a university fails the first part — the substantially proportionate requirement — of the three-part test.[108] Rather, a university is re-

---

interested and able women to that of interested and able men. *Id.* The Court of Appeals rejected this approach, stating that "[w]e think that Brown's perception of the Title IX universe is myopic." *Id.* The court also stated that "the fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender." *Id.*

The First Circuit noted that the language of the three-part test places the burden of proof upon the defendant as to part-two of the test. *Id.* at 898. Thus, an institution must demonstrate a commitment to program expansion. *Id.* As a result, the court opined that equal opportunity to participate is an integral part of Title IX's purpose and confirmed the district court's focus on the three-part test as the appropriate measure of the provision of equal opportunity. *Id.* However, the court altered the district court's distribution of the burden of proof with regard to the three-parts of the test. *Id.* at 901. The district court had stated that the University bore the burden of proof as to only part-three of the test. *Cohen*, 809 F. Supp. at 997. In contrast, the First Circuit espoused that plaintiffs bore the burden of proof with regard to parts one and three of the test. *Cohen*, 991 F.2d at 901. The First Circuit determined, however, that the district court's misapplication of the burden of proof was not lethal to the plaintiffs' case since the record contained sufficient credible evidence which demonstrated that the plaintiffs had met their burden with regard to part-three of the test. *Id.* at 904. Therefore, the First Circuit affirmed the injunction and remanded the cause to the district court for further proceedings. *Id.* at 907.

105 *See id.* at 894-95.

106 See id.

107 *See id.* The court relied on 20 U.S.C. Section 1681(a) which provided that Section 1681(a) shall not:

> interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number of percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

*Id.* (citing 20 U.S.C. § 1681(b)(1988)).

108 See id.

quired to meet only one of the parts of the three-part test.[109]

On remand, the district court again concluded that Brown's intercollegiate athletics program violated Title IX.[110] Applying the three-part test, the court first concluded that Brown failed to satisfy part-one of the test because it maintained a 13.01% disparity between female intercollegiate athletes and females enrolled at the undergraduate level.[111] Second, the court found that Brown had failed to demonstrate that it has maintained a continuing practice of intercollegiate program expansion for members of the underrepresented sex, despite the fact that Brown had an impressive history of program expansion.[112] Thus, Brown failed to satisfy part-two of the test.[113] As to the third part of the three-part test, the court found that Brown had not "fully and effectively accommodated the interest and ability of the underrepresented sex. . . ."[114] This decision was affirmed on its second appeal to the First Circuit Court of Appeals.[115]

---

109 *See id.* at 898. *See also supra* note 48 and accompanying text.

110 Cohen v. Brown Univ., 879 F. Supp. 185, 214 (D.R.I. 1995). At the trial on the merits, Brown could not demonstrate that it had either substantially equivalent participation opportunities for men and women or a continuing history of program expansion for women. *Id.* at 211. Further, Brown could not demonstrate that the athletic interests and abilities of its female students had been met. *Id.* Consequently, Brown was in violation of the law. *Id.* at 214.

111 *See id.* at 211. In the course of the trial on the merits, the district court learned that in the academic year 1993-94, Brown's intercollegiate athletics program consisted of 32 teams, 16 men's teams and 16 women's teams. *Id.* at 191. Also, Brown had a total of 897 undergraduate students participating in intercollegiate athletics, of which 555 (61.87%) were men and 342 (38.13%) were women. *Id.* at 192. Moreover, during the same period, Brown's undergraduate enrollment consisted of 5,722 students, of which 2,796 (48.86%) were men and 2,926 (51.14%) were women. *Id.*

Consequently, the district court concluded that Brown maintained a 13.01% disparity ratio between female athletes participating in intercollegiate athletics and females enrolled as undergraduates, *id.* at 211, and that "[a]lthough the number of varsity sports offered to men and women are equal, the selection of sports offered to each gender generates far more individual positions for male athletes than for female athletes." *Id.* at 189.

112 *See id.* at 211.

113 *See id.*

114 *See id.* (citing 44 Fed. Reg. at 71,417).

115 *See* Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996). As in their previous appeal, Brown challenged the validity of the three-part test employed by the district court in ascertaining whether Brown's intercollegiate athletic program is in compliance with the mandates of Title IX. *Id.* at 162. The court did, however, find error in the district court's award of specific relief. *Id.* The court remanded the case to the district court so that Brown may be given another opportunity to submit a further

B. *Roberts v. Colorado State University*

Following *Cohen,* the Tenth Circuit was confronted with a similar situation in *Roberts v. Colorado State University.*[116] Throughout the 1991-92 academic year, Colorado State University (CSU) sponsored a total of seventeen varsity athletic teams for both men and women.[117] On June 1, 1992, CSU announced the elimination of its women's varsity softball team and its men's varsity baseball team because of financial problems due to state cutbacks in aid.[118] Members of the women's varsity softball team filed suit against CSU in the United States District Court for the District of Colorado alleging that CSU violated Title IX by denying them an equal opportunity to participate in intercollegiate athletics.[119] Plaintiffs sought the reinstatement of the women's varsity softball team and additional relief in the form of monetary damages.[120]The district court, after scrutinizing the language of Title IX, applied the Policy Interpretation's three-part test.[121] In so doing, the court concluded that CSU's athletic program did not satisfy any of the prerequisites of Title IX's mandate.[122] The district court found that CSU did not satisfy the first part of the three-part test because the rate of female participation in intercollegiate athletics at CSU was not substantially proportionate to the female undergraduate enrollment at the university.[123] The district court also stated that CSU was unable to

---

plan for its consideration. *Id.* However, the court affirmed the judgment of the district court in all other aspects. *Id.*

116 814 F. Supp. 1507, 1512 (D. Colo.), *aff'd in part and rev'd in part sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied,* __ U.S. __, 114 S. Ct. 580 (1993).

117 *See id.* at 1512. Women comprised 35.2% of the members of those teams. *Id.* By comparison, the total undergraduate enrollment of women at CSU was 47.9%. *Id.*

118 *See id.* at 1509. Women's softball and men's baseball provided varsity participation opportunities for eighteen women and fifty-five men. *Id.* at 1514. Following the 1992 cuts, however, the enrollment versus participation disparity rate for females at CSU remained at 10.5%. *Id.* at 1512. The court noted that in the year following the cuts, women comprised 37.7% of the varsity athletes at CSU and 48.2% of the total undergraduate enrollment. *Id.*

119 *See Roberts,* 814 F. Supp. at 1509.

120 *See id.* at 1509-10. *See also* Franklin v. Gwinnett County Public Schools, __ U.S. __, 112 S. Ct. 1028 (1992) (holding that monetary damages were available in a Title IX action); *see also supra* note 12 and accompanying text.

121 *See Roberts,* 814 F. Supp. at 1511.

122 *See id.* at 1518.

123 *Id.* at 1513. Specifically, the district court found that the 10.6% disparity between the female athletic participation rate and the female undergraduate enrollment was not acceptable under Title IX. *Id.* Additionally, the court found that female

satisfy the second part of the three-part test because CSU did not have a continuing practice of program expansion for women.[124] Finally, the district court found that CSU had eliminated varsity athletic opportunities for women in a sport where there had been significant interest and talent.[125] As a result, the court ordered reinstatement of the women's varsity softball team.[126]

The United States Court of Appeals for the Tenth Circuit affirmed the order, reversing only the district court's requirement that CSU organize a fall season for the women's softball team.[127]

---

participation rates at CSU have not been substantially proportionate for at least the last decade. *Id.* The plaintiffs submitted an affidavit (Plaintiffs' exhibit 54) of Dr. Mary Gray, a professor of mathematics and statistics at American University, which stated that the difference between the proportion of the total women student population and the total women student athlete population at CSU is statistically significant and that the pattern had developed over the last ten years and not merely by chance. *Id.* The court found Dr. Gray's conclusion persuasive and agreed that the participation disparities at CSU could not have occurred simply by chance. *Id.*

124 *See id.* at 1516. Similar to Brown, CSU had demonstrated substantial growth of its women's athletic program in the 1970's. *Id.* at 1514. However, CSU had not added any women's teams since the 1980-81 academic year. *Id.* at 1514-15. Specifically, since 1980-81, women's participation opportunities in intercollegiate athletics at CSU have declined approximately 34%. *Id.*

In arriving at its conclusion, the district court was particularly influenced by CSU's failure to respond to a 1983 compliance review of CSU's athletic department by the OCR. *Id.* at 1515. That investigation revealed that "benefits, opportunities, and treatment are not equivalent in the areas of equipment and supplies, locker rooms, coaching, recruitment, publicity, support services and the effective accommodation of student interests and abilities." *Id.* (citing Plaintiff's Exhibit Z at 3-4). The district court found that CSU had failed to take the remedial actions set forth in their voluntary compliance plan. *Id.* Pursuant to this plan, CSU vowed to increase the athletic participation rate of women to 46.5% by the academic year 1987-88. *Id.* Also, CSU committed to the development of junior varsity teams for both the women's volleyball and women's basketball teams. *Id.* Further, CSU committed itself to minor increases in the participation rates of several women's teams. *Id.* However, CSU never attained these goals. Therefore, the court held that CSU could not demonstrate both a history and continuing practice of program expansion. *Id* at 1516.

125 *See Roberts*, 814 F. Supp. at 1517-18. At trial, plaintiffs Jenifer Roberts and Aimee Rice Ainsworth persuasively testified about their dedication to softball and the amount of time they had invested in training for their participation. *Id.* The women also noted that CSU's women's softball team had finished third in the Western Athletic Conference in 1992. *Id.* Thus, the court concluded that CSU had failed to satisfy the third part of the three-part test because CSU had failed to accommodate effectively and fully the interests and abilities of its female athletes. *Id.*

126 *See id.* at 1519. The district court issued a permanent injunction requiring CSU to reinstate the women's intercollegiate softball team and to furnish the team with all of the benefits given to other varsity teams at CSU. *Id.*

127 *Roberts*, 998 F.2d at 835. Three weeks following the issuance of the original injunction, the district court held a status conference. *Id.* at 826. At this conference, the

The Tenth Circuit articulated that in times of financial crisis, institutions will face difficulty in continuing a practice of expansion.[128] As the district court had stated, however, "a financial crisis cannot justify gender discrimination."[129] Therefore, the Tenth Circuit agreed with the district court's conclusion that the language of the statute itself requires a continuing practice of program expansion.[130] Moreover, like the First Circuit in *Cohen*, the Tenth Circuit corrected the district court's allocation of the burden of proof as to part three of the test.[131]

### C. *Favia v. Indiana University of Pennsylvania*

The last of the trilogy of cases to address Title IX in this context was *Favia v. Indiana University of Pennsylvania*.[132] During the 1990-91 academic year, Indiana University of Pennsylvania (IUP) enrolled 10,793 undergraduate students, 4,790 men and 6,003 women.[133] During that period, IUP sponsored eighteen varsity teams with a total of 503 athletes, 313 men and 190 women.[134] Of the $314,178 available in athletic scholarships that year, women only received only 21%.[135] In August 1991, in a direct response to a university-wide mandate to trim the budget,[136] the athletic department announced the elimination of the women's gymnastics and field hockey teams, and the men's soccer and tennis teams.[137] Following

---

court "in the face of apparent foot dragging by CSU," expanded the scope of the injunction by ordering CSU to "promptly" hire a coach, recruit team members, and organize a fall season for the softball team. *Id.* The Tenth Circuit upheld the additional orders with the exception of the fall season requirement. *Id.* at 834-35.

128 *See id.*

129 *Roberts*, 814 F. Supp. at 1518.

130 *Roberts*, 998 F.2d at 830.

131 *See id.* The Tenth Circuit commented, however, that the misallocation proved to be harmless error. *Id.*

132 812 F. Supp. 578 (W.D. Pa. 1992), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

133 *See id.* at 580. The 4,790 men comprised 44.4% of the undergraduate population at IUP. *Id.* Comparatively, the 6,003 women comprised 55.6% of the undergraduate enrollment. *Id.*

134 *See id.* at 580. The 313 men comprised 62.2% of the athletic community at IUP. *Id.* The 190 women comprised 37.8% of the athletes at the university. *Id.*

135 *See id.* at 582. Of the $314,178 available in athletic scholarships, the women's percentage amounted to only $67,423. *Id.* Moreover, for every $8.00 IUP spent on men's athletics it only spent $2.75 on women's athletics. *Favia*, 7 F.3d at 335.

136 *Favia*, 812 F. Supp. at 580. In 1991, IUP, like Brown University, was faced with severe financial problems. *Id.* In response to the bleak financial situation, the Department of Athletics was forced to reduce its budget by $350,000. *Id.*

137 *See id.* at 580. The defendants argued, among other things, that the cuts were

these cuts, IUP's varsity athletics program consisted of 397 athletes, 248 males and 149 females.[138]

In 1992, members of the women's gymnastics and field hockey teams filed a class action lawsuit in the United States District Court for the Western District of Pennsylvania.[139] The plaintiffs, alleging IUP's failure to provide intercollegiate athletic opportunities for women violated Title IX's mandate of gender equity, sought a preliminary injunction ordering IUP to reinstate the women's teams and prohibiting IUP from further eliminating any other women's teams.[140] Finding that IUP failed each part of the three-part test, the district court granted the plaintiff's motion for a preliminary injunction and ordered reinstatement of the women's gymnastics and field hockey teams.[141]

Applying the Policy Interpretation test to the facts of *Favia*, the court concluded that IUP's athletic program did not satisfy any of the prerequisites for satisfaction of Title IX's mandate.[142] As to the first part of the test, the district court determined that IUP failed to provide women with participation opportunities in intercollegiate

---

necessitated by budgetary shortcomings. *Id.* The court, however, rejected that argument. *Id.* at 583. The court articulated that "[t]itle IX does not provide for any exception to its requirements simply because of a school's financial difficulties. In other words, a cash crunch is no excuse." *Id.* Ultimately, elimination of the women's teams saved IUP $110,000, while cutting the men's teams saved $35,000. *Favia*, 7 F.3d at 335.

138 *Favia*, 812 F. Supp. at 580. After the cuts, the 248 male athletes comprised 63.49% of the total number of athletes at IUP, while the 149 females comprised 36.51% of the student athletes. *Id.* Also, plaintiffs submitted evidence which established program-wide inequality favoring men's athletics. *Id.* at 582. Plaintiffs demonstrated that the men's football and basketball teams were given more scholarships than other sports. *Id.* For example, certain men's facilities were better maintained than the women's facilities. *Id.* Also, incentives were offered for students to attend men's games. *Id.* Moreover, the University provided country club memberships and complimentary use of cars for coaches of male teams. *Id.*

139 *See id.* at 579. Suit was filed on behalf of themselves and "all present and future IUP women students or potential students who participate, seek to participate or are deterred from participating in intercollegiate athletics sponsored by IUP." *Id.*

140 *See id.* at 579.

141 *See id.* at 584-85. As a consequence of the Title IX violations, the court ordered IUP: (1) to restore the women's gymnastics and field hockey teams to their former status in the intercollegiate athletic program; (2) to provide the coaching staff, uniforms, equipment, facilities, publicity, travel opportunities and all other incidentals of an intercollegiate athletic team to the women's gymnastics and field hockey teams on a basis equal to that provided during the 1991-92 academic year; and (3) to fund the two teams in an amount equal to that provided during the previous school year. *Id.* at 584-85.

142 *See id.* at 584.

athletics proportionate to the percentage of women athletes and undergraduates.[143] The court found that IUP also failed to satisfy the second part of the test because it was unable to demonstrate a continuing practice of expanding athletic opportunities.[144] Finally, the court found that IUP did not satisfy the third part of the test, in large part because IUP, like Brown and CSU, eliminated participation opportunities for female intercollegiate athletes in the face of demonstrated interest and ability.[145]

Two months after the preliminary injunction was issued, IUP filed a motion to modify the injunction by substituting a women's soccer team for a women's gymnastics team.[146] Specifically, IUP argued that the substitution of a fifty-member women's soccer team would further its compliance efforts more so than reinstating the fifteen member women's gymnastics team.[147] The district court denied IUP's motion.[148] On appeal, the United States Court of Ap-

---

143 *See Favia*, 812 F. Supp. at 589. Before the 1991 cuts, although women comprised 37.77% of the intercollegiate athletes at IUP, 55.61% of the undergraduate student body was women. *Id.* at 584-85. After the cuts, that number dropped to 36.51%. *Id.* at 585. Therefore, based on the percentages cited in the opinion, the gap between enrollment and varsity athletic participation rates in 1991 was approximately 18%. *Id.* This disparity prompted the court to articulate that the 1991 cuts "exacerbated an already existing Title IX violation." *Id.*

144 *See id.* at 585. Although IUP had exhibited a history of program expansion for women's athletics, it regressed after the 1991 cuts. *Id.* The court stated that "[since 1991 the] opportunities for women to compete went from low to lower, and the 1991 cuts were not responsive to the needs, interests, and abilities of women students." *Id.*

145 *See id.* at 585. The court found persuasive the testimony of the named plaintiffs which evidenced a strong interest and commitment to their respective sports. *Id.* Further, the court noted that although IUP continued to honor the scholarships of those women whose teams had been eliminated and assist those athletes in transferring to other schools, those actions were insufficient to fully and effectively accommodate the interests and abilities of the female athletes at IUP. *Id.*

146 *See Favia*, 7 F.3d at 336. IUP did not appeal the issuance of the preliminary injunction or file a timely motion for reconsideration; rather, the university sought to modify the injunction by substituting a women's soccer team for the women's gymnastics team. *Id.* at 336-37.

147 *See id.* IUP contended that the modification would increase the number of varsity participation opportunities for females from the current 39% to 43% and reduce the imbalance between male and female athletic opportunities to a greater extent than by adding field hockey and gymnastics teams. *Id.* Furthermore, IUP asserted that the modification would mirror a national trend toward women's participation in soccer. *Id.* Finally, IUP argued that the modification would save the athletic department money and that these savings could be used to finance the recruitment of more female athletes. *Id.* at 343 & n.21.

148 *See id.* at 335-36. The court proffered that if it were to allow the modification, it

peals for the Third Circuit affirmed the district court's holding.[149]

The decisions in *Cohen*, *Roberts*, and *Favia* will surely impact intercollegiate athletics well into the twenty-first century. Following these decisions, it became clear that Title IX may not require a university to create women's teams where there may be no interest or expectation of competition.[150] If there is interest and ability among female intercollegiate athletes, however, these decisions may suggest that a university must provide these athletes with varsity intercollegiate athletic participation opportunities.[151]

### *IV. Ramifications of Title IX*

Title IX has altered both male and female intercollegiate athletic programs.[152] Unfortunately, although absolute gender equity for women in intercollegiate athletics has not yet been achieved,[153] the legislation has given many females athletic participation opportunities that were not available to them prior to 1972.[154] Conversely, it has been argued that Title IX's goal of gender equity in intercollegiate athletics has only served to discriminate against male athletes who participate in small, non-revenue producing sports.[155] The next two sections will discuss the impact Title IX has had on each gender, respectively.

---

would essentially make "'the original plaintiffs [who prevailed] in this case losers.'" *Id.* at 336-37 (quoting Appellant's Appendix at 167).

149 *See id.* at 335. The Third Circuit did not conduct its own analysis of the three-part test as applied to IUP. *Id.* at 337. Rather, the court confined its analysis to whether the district court had abused its discretion in denying IUP's motion to modify the preliminary injunction. *Id.* The Third Circuit found that the proposed substitution of women's soccer for the gymnastics team would not "substantially ameliorate what the district court decided was likely to be a violation of Title IX." *Id.* at 343. The court noted that the proposed substitution would increase the percentage of female intercollegiate athletes from 38.97% to 43.02%. *Id.* However, the court observed that the proposed substitution would decrease the overall percentage of athletic expenditures for women, thereby, moving IUP farther from Title IX's mandate of gender equity. *Id.*

150 *See supra* notes 88-149 and accompanying text.

151 *See, e.g.*, *Roberts*, 998 F.2d at 831-32 (quoting *Cohen*, 991 F.2d at 898) (commenting that "'[i]f there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this [the third] prong of the test'").

152 *See infra* notes 88-149.

153 *See infra* note 166 and accompanying text.

154 *See infra* notes 88-149.

155 *See infra* notes 175-188.

A. *Impact on Female Athletes*

Enforcement of Title IX's mandate of gender equity in intercollegiate athletics has altered the landscape of women's sports.[156] Since the enactment of Title IX, not only have varsity participation opportunities for women increased, but the performance level of women athletes has also risen dramatically.[157] As participation opportunities have grown, more women have been able to successfully compete internationally in Olympic sports.[158] There is no better illustration of the strides that women have made in athletics than the 1996 Summer Olympic Games.[159]

It is remarkable to consider that 100 years ago, the phrase "Women Olympians" would have been considered an oxymoron.[160] While women were first permitted to participate in the Olympics in 1900, their participation was relegated to golf, tennis and yachting.[161] Today, female participation rates of women in the Olympics has risen dramatically.[162] In 1996, 3,779 women participated in the Summer Games, as compared to only nineteen women in the earlier part of this century.[163] In fact, women made up

---

156 *See e.g.* Robert Kuttner, *Vicious Circle of Exclusion*, WASHINGTON POST, Sept. 4, 1996, at A15; Frank DeFord, *The Women of Atlanta*, NEWSWEEK, June 10, 1996, at 62-71.

157 *See infra* note 159 and accompanying text.

158 *See infra* note 163 and accompanying text.

159 *See* Kevin O'Keeffe, *Women's Hero Is Really Their Old Uncle Sam*, SAN ANTONIO EXPRESS, Aug. 7, 1996, 1996 WL 11492679, at *1; *see also, Cohen*, 101 F.3d 155, 188 (commenting upon the correlation between enforcement of Title IX and the impressive performance of American women Olympians at the 1996 Summer Games).

160 *See* ATLANTA JOURNAL, *Editorial: Women and Athletics*, Aug. 3, 1996, at 12A [hereinafter *Women and Athletics*] (noting that one hundred years ago, there were no women Olympians); *see also* Kevin Paul Dupont, BOSTON GLOBE, *Women were Equal to Task: Atlanta '96/Summer Olympics*, Aug. 6, 1996, at C1 (noting that Pierre de Coubertin, founder of the first modern Olympics in 1896 and a staunch opponent of female participation in the Olympics once stated: "I personally am against the participation of women in public competition, which does not mean they should not participate in sports, yet not in public").

161 *See Women and Athletics, supra* note 160, at 12A.

162 *See Women and Athletics, supra* note 160, at 12A.

163 *See Women and Athletics, supra* note 160, at 12A. Women competed in 26 sports, ranging from judo to mountain biking. *Id.* The following are the participation rates of women in the Olympics over the last century:

1896 ..... 0 women
1900 ..... 19 women
1912 ..... 57 women
1920 ..... 77 women
1928 ..... 290 women
1936 ..... 328 women

42.9% of the 1996 U.S. Olympic team, the highest percentage in American history.[164]

As Title IX of the Education Amendments Act of 1972[165] embarks upon its twenty-fifth anniversary, absolute gender equity in intercollegiate athletics still remains an elusive concept for a number of female athletes.[166] Although female participation in intercollegiate athletics appears to be on the rise,[167] participation ratios between male and female intercollegiate athletes remain unequal.[168] Nonetheless, Title IX seems to be on its way to becoming the powerful weapon for female athletes that it was originally intended to be.[169] The success enjoyed by American women athletes at the 1996 Summer Games serves as a testament to the fact that although gender equity in intercollegiate athletics has been slow in coming, generations of women are already starting to see

---

| | |
|---|---|
| 1948 | 385 women |
| 1960 | 610 women |
| 1968 | 768 women |
| 1972 | 1,058 women |
| 1984 | 1.567 women |
| 1992 | 2,705 women |
| 1996 | 3,779 women |

*Id.*

164 *See* Women and Athletics, *supra* note 160, at 12A; *see also* Warren P. Strobel, *Clinton Fetes Olympians at White House, Credits Title IX For Women's Finish*, THE WASHINGTON TIMES, Aug. 8, 1996, at A4 (quoting President Clinton as stating that "[o]ver 20 years ago, in a complete, bipartisan commitment here in Washington, the United States Congress passed something called Title IX, which made it possible for a lot of the women athletes to be here today." *Id.*

165 *See supra* note 2.

166 *See Lawyer Makes Argument Title IX Fair, Successful*, THE PLAIN DEALER, May 21, 1995 at 8d (noting that women currently make up approximately one half of all undergraduate students, yet constitute only one third of all varsity athletes). *See also* Flip Bondy, *Women's Sports Have Arrived. . .So Deal With It*, THE N.Y. DAILY NEWS, Mar. 23, 1997, at C28 (noting that in a survey of four large daily newspaper publications, women-only sports constituted less than four percent of all sports covered).

167 *See* Christine Brennan, *At Olympics, Women Show Strength; Female Athletes Grow In Size, Stature*, THE WASHINGTON POST, July 18, 1996, at A1. In 1972, the number of women in the NCAA student-athlete population was a mere nine percent. *Id.* In 1992, that number soared to 34 percent. *Id.*

168 See id.

169 *See* 118 CONG. REC. S5804 (1972) (remarks of Sen. Bayh). Senator Bayh declared that Title IX was intended to be "a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." *Id.*

results.[170]

B. *Impact on Male Athletes.*

In this era of financial uncertainty, schools across the country have been caught between the conflicting mandates of balancing their budgets and complying with Title IX.[171] As a result, many universities have been forced to cut men's teams, while keeping, or even continuing to expand women's teams.[172] Critics contend that this interpretation of Title IX appears to transform the legislation from a statute that prohibits discrimination to a statute that encourages it.[173] As the next two cases demonstrate, some male athletes have been denied athletic opportunities and they have not been successful in asserting their rights under Title IX.[174]

The first case brought by male athletes attempting to assert their rights under Title IX was *Kelley v. Board of Trustees of the University of Illinois.*[175] During the 1992-93 academic year, the University of Illinois (Illinois) enrolled 25,846 students at the undergraduate level, 14,427 men and 11,419 women.[176] At that time, 474 athletes participated in Illinois varsity athletics, 363 men and 111 women.[177] On May 7, 1993, Illinois announced that as a result of the fiscal strain caused by budget constraints,[178] it would be eliminating men's varsity swimming, men's varsity fencing, and the men and women's varsity diving teams, for the 1993-94 school year.[179] In

---

170 *Cohen*, 101 F.3d 155 at 188. The court observed that "[t]hese Olympians represent the first full generation of women to grow up under the aegis of Title IX." *Id.*

171 *See supra* note 10.

172 *See supra* note 10.

173 *See* George A. Davidson & Carla A. Kerr, *Title IX: What Is Gender Equity?*, 2 VILL. SPORTS & ENT. L.F. 25, 26 (1995).

174 *See infra* notes 175-188.

175 832 F. Supp. 237 (C.D. Ill. 1993), aff'd, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 938 (1995).

176 *See id.* at 240. The 14,427 men comprised 56% of the undergraduate population, while the 11,419 women comprised 44% of the intercollegiate athletic population. *Id.*

177 *See id.* The 363 male athletes represented 76.58% of the athletes participating in intercollegiate athletics at Illinois while the 111 women comprised 23.42%. *Id.*

178 *See id.* The district court found that budgetary constraints were the primary, but not the sole, motivation for the cuts. Other considerations, such as adherence to Title IX and the Big Ten Conference's policy of gender equity also played a role. *Id.*

179 *See id.* The teams were selected for termination after athletic department officials evaluated the teams relative opportunities for success in the future. *Kelley*, 35 F.3d. at 269. The court noted that men's swimming was selected because it was histori-

1993, members of the men's swimming team brought suit against Illinois in the United States District Court for the Central District of Illinois.[180] In the first reverse discrimination suit of its kind, plaintiffs alleged that Illinois violated Title IX by discriminating against them on the basis of sex by disbanding the men's swimming team, but sparing the women's swimming team.[181]

The district court granted summary judgment in favor of Illinois, finding that Illinois' termination of the men's swimming team did not violate Title IX.[182] The court observed that although the termination of the men's swimming team excluded the members from varsity participation, the overall percentage of male athletes at the university was more than "substantially proportionate" to the percentage of men enrolled at the undergraduate level.[183] Although the court acknowledged that the male swimmers were innocent parties caught up in Illinois' efforts to comply with Title IX,[184] it found that innocent parties must often shoulder the burden in an attempt to remedy past discrimination.[185]

---

cally unsuccessful; it was not a widely offered high school sport and it had a small spectator following. *Id.* Although Illinois intended to disband the teams, it would continue to honor the scholarships awarded to the athletes affected by the cuts. *Kelley*, 832 F. Supp. at 240. At the time of the cuts, Illinois offered eleven scholarships to the twenty eight members of the men's swimming team. *Id.* at 239. The women's swimming team received 14 scholarships for disbursement among 18 members. *Id.*

180 *Kelley*, 832 F. Supp. at 239.

181 *See id.* Plaintiffs also alleged that Illinois violated the Equal Protection Clause of the Fourteenth Amendment by terminating programs using gender as the sole criteria. *Id.* However, the plaintiffs' Equal Protection challenge failed on the basis that Illinois' termination of the men's swimming team served "a remedial purpose which qualifies as an important state interest which is substantially related to eradicating historical gender discrimination against women in athletics at the University of Illinois." *Id.* at 243. Thus, even though the district court found that male swimmers at Illinois were treated differently than female swimmers on the basis of gender, the treatment passed midlevel scrutiny and did not violate the Equal Protection Clause. *Id.* In so holding, the court articulated that: "[i]n limited circumstances, a gender based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Id.* (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982)).

182 *See id.* at 244.

183 *See id.* at 242. The court found that Illinois "could cut men's programs without violating the statute because men's interests are presumptively met when substantial proportionality exists." *Id.* Additionally, the court commented that the sole woman diver, whose team was eliminated, had a more viable Title IX claim than the named plaintiffs. *Id.* at 242, n.6.

184 *See id.* at 244.

185 *See Kelley*, 832 F. Supp. at 244.

On appeal, the Unites States Court of Appeals for the Seventh Circuit unanimously affirmed the district court's grant of summary judgment in favor of Illinois.[186] The Seventh Circuit found that Illinois did not violate Title IX because Title IX was intended to benefit the underrepresented sex, which at Illinois, was female intercollegiate athletes.[187] The court articulated that Illinois' decision to terminate men's swimming and to retain women's swimming was "prudent" because eliminating women's swimming would have left the school vulnerable to a finding of noncompliance with Title IX.[188]

Following *Kelley,* the Seventh Circuit was confronted with a similar dilemma in *Gonyo v. Drake University.*[189] In the 1992-93 academic year, Drake University (Drake) had an undergraduate population that was 42.8% male and 57.2% female.[190] During this period, Drake sponsored seven men's varsity athletic teams and five women's varsity athletic teams.[191] These twelve teams had a male to female ratio of 60.6% male to 39.4% female.[192] On March 11, 1993,

---

186 *Kelley,* 35 F.3d at 272-73. On appeal, the plaintiffs' had argued that Title IX had been converted into ". . . a statute that mandates discrimination against males. . . ." *Id.* (citing Plaintiff's Brief at 9). The Seventh Circuit, however, rejected that argument by noting that prohibiting educational institutions from discriminating on the basis of sex was such an "important" government objective that it justified the gender classification. *Id.* at 271-72. The court also noted that Title IX, its regulations, and the Policy Interpretation are substantially related to achieving this objective. *Id.*

187 *See id.* at 270. The court posited that "[t]he University could, however, eliminate the men's swimming program without violating Title IX since even after eliminating the program, men's participation in athletics would continue to be more than substantially proportionate to their presence in the University's student body." *Id.*

188 *See id.* at 269.

189 837 F. Supp. 989 (S.D. Iowa 1993).

190 *See id.* at 992.

191 *See id.* at 993.

192 *See id.* at 992. The court found that Drake spent roughly 53% of its athletic scholarship budget on women athletes and 47% on male athletes in 1992-93. *Id.* at 992-93. Excluding football, Drake expended 71% of its overall non-scholarship budget on men's Division I and Division III level sports while only spending 29% on women in Division I sports. *Id.* at 993. In comparing the various Division I sports offered at Drake (excluding football), the court ascertained that Drake spent 65% of its total non-scholarship athletic budget on men's athletic programs and 35% on women's athletics. *Id.* Overall, Drake spent 52.9% of its athletic budget (excluding football) on male athletic programs and 47.1% on women's athletic programs. *Id.* With regard to the total expenditures of the athletic budget, the court found that Drake spent 56% on men's athletic programs at Division I or Division III levels and spent 44% on women's athletic programs. *Id.* The court also found that in Division I and Division III sports, women comprised 24.7% of the participants while men comprised

Drake publicly announced its decision to discontinue men's varsity wrestling because of financial concerns and the fact that other schools in Drake's athletic conference disbanded their wrestling programs.[193] Members of the men's wrestling team filed suit in the United States District Court for the Southern District of Iowa, alleging that Drake's action violated Title IX.[194] The plaintiffs sought a preliminary injunction ordering Drake to reinstate the men's wrestling program.[195]

After considering all the factors related to the issuance of a preliminary injunction,[196] the district court denied the plaintiffs' motion.[197] The district court did not address the merits of the Title IX claim.[198] Instead, the court considered only whether a prelimi-

---

75.3%. *Id.* at 992. In only Division I sports, 39.4% were women and 60.6% were men. *Id.* These figures are greatly disproportionate to the undergraduate enrollment figures at Drake: 52.7% female and 42.8% male. *Id.*

193 *See Gonyo*, 837 F. Supp. at 992. Drake explained that "lack of support from the students and community for the Drake wrestling program, "prompted the decision. *Id.* Moreover, the court observed that "[w]restling is not a revenue producing sport, such as football and basketball. In recent years, many other colleges and universities, due to budget constraints, have discontinued their wrestling programs at the Division I level. . . ." *Id.*

194 *See id.* at 990. Plaintiffs also alleged that Drake breached its contract with the plaintiffs. *Id.* However, the district court summarily disposed of that claim for two reasons: (1) Drake continued to honor its outstanding scholarships, and (2) there was no evidence of any other existing contracts between Drake and the plaintiffs. *Id.* at 994-95. Thus, the court concluded that no contracts were breached. *Id.* The plaintiffs also alleged that the termination of the men's wrestling team violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 990. However, a cause of action based on the Equal Protection Clause must be brought against someone who acted under the color of state law by depriving a person of rights, privileges or immunities secured by the Constitution. *Id.* at 994 (citing 42 U.S.C. § 1983 (1988)). The court noted that there was no evidence presented at the preliminary injunction hearing to suggest that Drake was acting under the color of state law when they decided to disband the men's wrestling team. *Id.* Therefore, Drake was not subject to the Equal Protection Clause. *Gonyo*, 837 F. Supp. at 994 (citing Imperiale v. Hahnemann Univ., 966 F.2d 125 (3d Cir. 1992) (per curiam), and Imperiale v. Hahnemann Univ., 776 F. Supp. 189 (E.D. Pa. 1991).

195 *See id.* at 990.

196 *See id.* at 993. In order for a preliminary injunction to be granted, the plaintiffs must demonstrate: (1) a threat of irreparable harm; (2) a balance of that harm and the possible injury inflicted on others if the injunction is granted; (3) the probability of succeeding on the merits of the case; and (4) the public interest involved. *Id.* (citing Dataphase Systems, Inc. v. CL Systems Inc., 640 F.2d 109, 113 (8th Cir. 1981)).

197 *See id.* at 996. The court proffered that a preliminary injunction "might well undermine the underlying purpose of Title IX." *Id.*

198 *See id.* at 993.

nary injunction should be issued.[199] After assessing the potential harm to both Drake and the plaintiffs, the court concluded that the factors weighed in favor of Drake, and therefore it did not issue the injunction.[200]

## *V. Conclusion*

Both *Kelley* and *Gonyo* demonstrate the courts' adoption of team elimination, rather than expansion of programs with additional opportunities for women, as a necessary and acceptable method of compliance with Title IX. For male athletes in small, non-revenue producing sports such as wrestling, swimming and gymnastics, these decisions reflect an ominous trend in college athletics. Unfortunately, these male athletes are apparently without recourse, particularly in light of the *Kelley* and *Gonyo* decisions.[201]

---

199 *See* Gonyo, 837 F. Supp. at 993. Plaintiffs argued that if the preliminary injunction was not issued, they would be unable to complete their intercollegiate wrestling careers at Drake. *Id.* Although the court acknowledged that the plaintiff's desire to complete their wrestling careers at Drake was "understandable," the court found that no irreparable harm would occur because the affected wrestlers were free to transfer to other schools to continue wrestling. *Id.* at 994.

200 *See id.* at 994. In their analysis, the district court recognized two injuries that an injunction could inflict upon Drake. *Id.* at 993. First, although it would be feasible for Drake to assemble an intercollegiate wrestling program for the 1993-94, it could only be accomplished by imposing a significant financial burden upon Drake. *Id.* Second, Drake enjoys the prerogative of allocating their resources as they see fit. The court articulated that "[a]cademic freedom, of course, does not immunize defendants from civil liability, including injunctive relief, for any violations of the law. . . but courts should be very cautious about overriding, even temporarily, a school's decision in these areas, especially absent a showing that plaintiffs are likely to ultimately prevail." *Id.* at 994. Thus, the court concluded "that the harm to Drake in issuing a preliminary injunction is far greater than the harm to plaintiffs in not doing so." *Id.*

The court also examined the possibility that the plaintiffs would succeed on the merits. *Id.* at 994. The plaintiffs alleged that Drake's decision to terminate the men's wrestling program constituted gender discrimination in violation of Title IX. *Id.* at 995. However, the court concluded that the plaintiffs would probably not prevail on such a claim. *Id.* The court expressed serious apprehension concerning the plaintiffs' standing to bring the claim because the plaintiffs had not lost their scholarships. *Id.* at 995. Moreover, the district court questioned the appropriateness of the remedy requested. *Id.* Specifically, the court expressed skepticism concerning whether reinstatement of the wrestling team would effectively eradicate a Title IX violation. *Id.* The court pronounced that "injunctive relief might well undermine the underlying purpose of Title IX, which is to protect the class for whose benefit the statute was enacted." *Id.* at 996.

201 Jessica Gavora, *Quota System Hurts Team*, THE USA TODAY, July 23, 1996, at 14A. Consider that since 1982, men's wrestling has been terminated at 99 universities. *Id.* Also, 64 universities have disbanded men's swimming. *Id.* Further, men's gymnastics is

The primary purpose of Title IX was to provide equality for women in intercollegiate athletics. However, the question is at what cost? Compliance with Title IX has essentially signaled the death knell for many male athletic programs. As demonstrated by the *Kelley* and *Gonyo* decisions, the law has been transmutated from an effort to increase varsity participation opportunities for women into a crusade to mandate outcomes. Unfortunately, these outcomes have apparently created what some may characterize as a type of reverse-discrimination quota system.

Today, financially challenged universities across the country are waging a constant battle to comply with the gender equity mandate of Title IX. To reach compliance, these schools have few choices. They can increase the number of women's sports offered at the school, or they can downsize or eliminate their men's programs. Admittedly, increasing the number of women's sports at a particular university would increase the number of female intercollegiate athletic participants without decreasing the number of available athletic opportunities for men. Although this alternative may seem sensible and viable, it is highly unrealistic in light of the modern day economic climate. The truth is, many universities simply cannot afford to add the costs of additional women's programs to their budgets. Therefore, recent judicial interpretation of Title IX has forced many universities into eliminating participation opportunities for male athletes. Although this troublesome trend has been highly criticized by many in the athletic community,[202] it has been unanimously endorsed by the courts.

A feasible alternative to this seemingly inequitable result may exist. Conceivably, for example, schools could reduce the size of, and the funding for, their football programs. Reducing the size of a football team would shrink the disparity in the male to female proportion of student athletes because the immense size of the football team often accounts for these large disparities.[203] Also,

---

virtually extinct at the college level, going from 133 teams in 1975 to 32 today. *Id.* These statistics demonstrate a dangerous side effect of Title IX compliance.

202 *See* Blaudschun, *supra* note 10 at 37. Commenting on this troublesome trend, Boston University baseball coach Bill Mahoney stated after Boston University's men's baseball program was eliminated in an effort to comply with Title IX: "I thought Title IX was about opportunity. Where is the opportunity here? How fair is this? Our kids are devastated." *Id.* Further, Mahoney commented that "Title IX is a runaway train going out of control down a mountain, and we've just seen the start of it." *Id.*

203 *See supra* note 27 and accompanying text.

such a reduction may, in theory, increase the proportion of female athletes to the school. By reducing a football program's budget for expenses such as coaches' salaries, scholarships and travel, a school could use these additional funds for redistribution towards the expansion of women's teams. Such a measure would enable a school to further its Title IX compliance efforts without unnecessarily eliminating men's teams.

The discontinuation of men's athletic programs produces an inequitable result. Although it undoubtedly assists schools in increasing the ratio of male and female athletes, the underlying goal of Title IX was to foster female participation in intercollegiate athletics, not to deny athletic opportunity. Initially, Title IX was intended to be a shield to safeguard women from the evils of gender discrimination in intercollegiate athletics. However, it has turned into a sword which has left male athletes who participate in small, non-revenue producing sports, as casualties in the gender equity war.