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ARTICLE

UNFINISHED BUSINESS: THE CONTINUING STRUGGLE FOR EQUAL OPPORTUNITY IN COLLEGE SPORTS ON THE EVE OF TITLE IX'S FIFTIETH ANNIVERSARY

BRIAN L. PORTO*

INTRODUCTION

After Congress's 1972 enactment of Title IX, which outlaws sex discrimination in education by recipients of federal funds, the then-Department of Health, Education, and Welfare (HEW) drafted proposed regulations to implement the new law and invited public comment on them.¹ More than ninety percent of the ten-thousand-plus comments that HEW received about Title IX addressed its application to athletics, even though fewer than ten percent of the proposed regulations applied directly to athletics, physical education, or recreation.² The sports-heavy nature of the public comments prompted Secretary Caspar Weinberger to quip, "I had not realized until the comment period that the most important issue in the U.S. today is intercollegiate athletics."³

In 1975, Congress approved the draft regulations,⁴ which took effect in

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1. Title IX is codified at 20 U.S.C. §§ 1681–1688.

2. LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, TITLE IX 6 (2005).

3. *Id.* at 12.

4. *Id.* at 6.

1978.⁵ Since 1978, Americans' cultural affinity for college sports, along with a legal nudge from Title IX, has produced a dramatic increase in athletic opportunities for girls and women. During the mid-1960s, only 15,000 women played intercollegiate sports, compared to 152,000 men.⁶ By 1972, as Title IX was being discussed and enacted, the number of women college athletes had doubled to 30,000; during the next five years, as the regulations were proposed, revised, and adopted, the number doubled again, to 63,000.⁷ By 2014–15, more than 200,000 women were playing college sports, forty-three percent of the total number of college athletes nationwide.⁸ Three years later, those numbers had risen to 216,378 and forty-four percent, respectively, representing a 291 percent increase from 1981–82.⁹

The increased number of women athletes on campus reflects the growing prominence of women in higher education generally. In the autumn of 2017, 56.4 percent of the students enrolled in all undergraduate programs in the United States were women.¹⁰ The federal Department of Education estimates that by 2026, fifty-seven percent of college students nationwide will be women.¹¹

The growing numerical dominance of women among undergraduates has shaped and will continue to shape colleges' efforts to ensure the "equal opportunity" in athletics that Title IX requires. The principal measure of equal opportunity—the "substantial proportionality" test—requires colleges to show that the percentage of women among their varsity athletes is substantially proportional to the percentage of women undergraduates on campus.¹² Unfortunately, institutional compliance with this standard has been the exception, not the rule, as the twelve-point gap noted above between the percentages of women students and women athletes shows.¹³ That gap equates

5. *Id.* at 3.

6. R. SHEP MELNICK, *THE TRANSFORMATION OF TITLE IX: REGULATING GENDER EQUALITY IN EDUCATION* 86 (2018).

7. *Id.*

8. *Id.*

9. ELLEN J. STAUROWSKY ET AL., *WOMEN'S SPORTS FOUND., CHASING EQUITY: THE TRIUMPHS, CHALLENGES, AND OPPORTUNITIES IN SPORTS FOR GIRLS AND WOMEN* 7 (2020).

10. GARY A. BERG, *THE RISE OF WOMEN IN HIGHER EDUCATION: HOW, WHY, AND WHAT'S NEXT* xiii (Rowman & Littlefield eds. 2020).

11. *Id.* at 7.

12. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 239, 71414 (Dec. 11, 1979); *see also* GERALD GURNEY ET AL., *UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT* 151 (2017).

13. According to Gerald Gurney and coauthors Donna Lopiano, and Andrew Zimbalist, precise data on the Title IX compliance status of individual institutions are not available. The federal Equity in Athletics Disclosure Act (EADA), 20 U.S.C. § 1092, requires institutions to report athletic participation

to approximately 148,030 lost participation opportunities, meaning that if women could participate in athletics in substantial proportionality to their enrollment, assuming each woman played one sport, an additional 148,030 would be playing college sports.¹⁴

Therefore, as Title IX approaches its fiftieth birthday, the achievement of equal athletic opportunities for college women remains unfinished business.¹⁵ But the continued pursuit of equal opportunity should not be just a matter of more money, more teams, and more athletic scholarships for women. More money, more teams, and more athletic scholarships has long been the unofficial mantra of the male model of college sports, resulting in large expenditures for a small number of varsity athletes and “large admissions boosts” for recruited athletes, especially at selective institutions.¹⁶ A wiser strategy would heed the words of James Shulman and William Bowen, who wrote two decades ago that “Title IX should be seen as providing an opportunity to rethink the organization and place of college sports on the campus; it should not be merely a stimulus to replicate the male model of college athletics in women’s sports (including the current patterns of coaching, recruitment, and admissions.”).¹⁷

A new strategy may be more viable now than ever before because it has an unlikely ally: the novel coronavirus, better known as COVID-19. The virus

data by gender annually, but “such data are insufficient to determine Title IX compliance” because they do not take account of permissible exceptions to the proportionality standard. GURNEY ET AL., *supra* note 12, at 147–148. Part I of this article will identify the exceptions that enable an institution to comply with Title IX without having achieved proportionality.

14. Letter from Nancy Hogshead-Makar, CEO, Champion Women and Amy Poyer, Senior Staff Att’y, Cal. Women’s Law Ctr., to Amy Huchthausen, Commissioner, America East Conf. 3 (June 26, 2020) (on file with the author).

15. Despite that unfinished business, press and scholarly attention have shifted of late to the statute’s relationship to sexual harassment and gender identity. See, e.g., Greta Anderson, *Education Department Releases Final Title IX Regulations*, STUDENTLY (May 6, 2020), <https://www.insidehighered.com/print/news/2020/05/07/educat>; Michael Levenson & Neil Vigdor, *Inclusion of Transgender Athletes Violates Title IX, Trump Administration Says*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/connecticut-transgender-student-athletes.html>; Doriane Lambelet Coleman et al., *Re-Affirming The Value of The Sports Exception To Title IX’s General Non-Discrimination Rule*, DUKE J. GENDER L. & POL’Y 69 (2020).

16. R. Shep Melnick, *The Strange Evolution of Title IX*, NATIONAL AFFAIRS (Summer 2018), <https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix>. The admissions boost for athletes is especially consequential at small, selective institutions, such as Amherst College in Massachusetts, where, in the fall of 2018, the student body of just under 1900 included 676 athletes, or almost thirty-six percent, of all undergraduates. The athletes took admissions slots that, in many cases, could have gone to more academically talented students. This issue does not arise so dramatically at large institutions, such as the University of Alabama, where athletes are only two percent of the undergraduates. See JEFFREY SELINGO, *WHO GETS IN AND WHY: A YEAR INSIDE COLLEGE ADMISSIONS* 154 (Scribner ed., 2020).

17. JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES* 305 (2001).

caused the closure of campuses nationwide in March of 2020, resulting in a significant loss of revenue and a historic purge of college athletic teams in a wide array of sports at institutions nationwide.¹⁸ These conditions, though regrettable in their origins, offer Title IX advocates and college-sports reformers a chance to not only achieve gender equity in college sports, but to also reverse the overemphasis on sports by educational institutions, particularly the admissions preference for athletes at selective institutions.¹⁹

Toward those ends, Part I will discuss the statutory and regulatory framework of Title IX. Part II will analyze the major cases that have interpreted the statute and its regulations. Part III will examine why, almost fifty years after the enactment of Title IX, most institutions still fail to satisfy its proportionality standard. Part IV will argue for enforcement of that standard in a way that reflects the current demographics of higher education. The article will conclude that present circumstances offer an unprecedented opportunity to make college sports equitable and educationally sound and will suggest ways to achieve both goals.

I. ENFORCING EQUAL OPPORTUNITY: TITLE IX'S STATUTORY LANGUAGE AND REGULATIONS

A. *The Key Words*

The heart of Title IX, which has become so iconic as to have a blog and a sports apparel company named for it,²⁰ is the thirty-seven-word sentence: “No

18. See Aishwarya Kumar, *The Heartbreaking Reality—and Staggering Numbers—of NCAA Teams Cut During the Pandemic*, ESPN (Nov. 6, 2020), espn.com/Olympics/story/-/id/30116720/the-heartbreaking-reality-staggering-numbers-ncaa-teams-cut-pandemic. But some institutions that cut teams because of the pandemic have reinstated them. For example, Dartmouth College, which cut five teams in July 2020, reinstated all five, including two women's teams, after a lawyer hired by the affected students informed College officials that even before the cuts, Dartmouth was out of compliance with Title IX, a deficiency the cuts exacerbated. Pete Nakos, *Dartmouth Reverses Course, Will Reinstate Five Varsity Sports Programs Cut in July*, VALLEY NEWS (Jan. 30, 2021), vnews.com/Dartmouth-College-to-reinstate-women-s-golf-and-swimming---diving-teams-for-full-TitleIX-compliance-38601387. In the NCAA's Division I, institutions cut 112 teams in the wake of the coronavirus epidemic but later reinstated thirty-seven, for a net loss of seventy-five teams in Division I alone. The sports that lost the most teams were men's tennis (15), women's tennis (9), men's swimming and diving (5), women's swimming and diving (4), baseball (5), and men's indoor track (4). See *Tracker: College Sports Programs Cut During COVID-19 Pandemic*, BUS. COLLEGE SPORTS (June 22, 2021), businessofcollegesports.com/tracker-college-sports-programs-cut-during-covid-19-pandemic/.

19. See SHULMAN & BOWEN *supra* note 17, at 307. See also Tom Farrey, *Why Cutting College Varsity Sports Could Be a Good Thing*, N.Y. TIMES (Oct. 13, 2020), www.nytimes.com/2020/10/13/sports/college-sports-cuts.

20. Ellen J. Staurowsky & Erianne A. Weight, *Title IX Literacy: What Coaches Don't Know and Need to Find Out*, 4 J. INTERCOLLEGIATE SPORT 190, 192 (2011). Title IX Blog is located at <http://title-ix-blogspot.com/>.

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.”²¹

To aid implementation of the statutory language, HEW drafted regulations that became final in July of 1975 and carried the force of law because Congress did not reject them during the applicable forty-five-day review period.²² One key regulation, which pertains specifically to athletics, tracks the language of the statute, prohibiting exclusion from participation, denial of benefits, and disparate treatment based on sex “in any interscholastic, intercollegiate, club or intramural athletics” programs offered by an educational institution that receives federal funds.²³ The same regulation states that institutions “may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”²⁴ In other words, in college sports, “separate but equal” teams segregated by sex are permissible—indeed, they are customary—under ordinary circumstances. Circumstances change, however, when the institution sponsors a men’s team, but no women’s team in a sport, in which case the institution must allow women to try out for the men’s team if the sport is noncontact.²⁵ In the case of a contact sport, the institution is not so obligated, even if only a men’s team exists.²⁶

The regulation also requires institutions to provide “equal opportunity for members of both sexes” in sports and identifies ten factors for regulators to consider in determining whether institutions have complied. Known as “the laundry list,” those factors include:

- (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;

21. 20 U.S.C. § 1681.

22. CARPENTER & ACOSTA, *supra* note 2, at 6.

23. 34 C.F.R. § 106.41(a) (2020).

24. 34 C.F.R. § 106.41(b).

25. CARPENTER & ACOSTA, *supra* note 2, at 10.

26. *Id.*

- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.²⁷

This regulation notes that “unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams” do not necessarily equate to “noncompliance” with Title IX, but that the regulators “may consider the failure to provide necessary funds for teams for one sex” when evaluating equality of opportunity at a particular institution.²⁸ The regulatory language reflects the aim of the Javits Amendment, which was added to Title IX in 1974; named for then-Senator Jacob Javits (R-NY), the amendment stated that regulations, when issued, must include “reasonable provisions considering the nature of particular sports.”²⁹ The Javits Amendment was a compromise that replaced the defeated Tower Amendment, named for Senator John Tower (R-TX). The latter would have removed “revenue-producing sports” from the calculations of equal opportunity under Title IX, meaning that institutions could have continued to spend lavishly on football and men’s basketball, shortchanging nonrevenue (including women’s) sports, the only sports that would have figured in the “equal opportunity” calculus.³⁰

The Javits-inspired regulatory language, then, is considerably more friendly to the equal-opportunity aims of Title IX than the Tower language. Still, the former recognizes athletic realities, such as that football uniforms are more expensive than swimsuits; hence, a discrepancy in the amounts spent on uniforms for men’s and women’s teams is not necessarily a Title IX violation. But the institution that provides men’s teams with better-quality uniforms or that gives male athletes home, away, and practice uniforms, yet only gives women’s teams one set of uniforms, violates Title IX.³¹

Another regulation, although not devoted entirely to athletics, is

27. 34 C.F.R. § 106.41(c) (2020).

28. *Id.*

29. CARPENTER & ACOSTA, *supra* note 2, at 194. See also ELIZABETH KAUFER BUSCH & WILLIAM E. THRO, *TITLE IX: THE TRANSFORMATION OF SEX DISCRIMINATION IN EDUCATION* 26 (Rutledge ed. 2018); James J. Hefferan, Jr., *A Sporting Chance: Biediger v. Quinnipiac University and What Constitutes a Sport for Purposes of Title IX*, 26 MARQ. SPORTS L. REV. 583, 587 (2016).

30. CARPENTER & ACOSTA, *supra* note 2, at 194.

31. LISA MAATZ ET AL., NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, *TITLE IX AT 45: ADVANCING OPPORTUNITY THROUGH EQUITY IN EDUCATION* 44 (2017).

nevertheless important because one portion of it governs athletic scholarships.³² In general, the regulation prohibits sex discrimination by educational institutions in the awarding of financial aid to students.³³ Section (c) of this regulation, concerning athletic scholarships, requires institutions to “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.”³⁴

Unfortunately, the Title IX regulations left many college athletic directors’ questions unanswered as their effective date, July 21, 1978, approached. By that date, moreover, HEW had received nearly one hundred complaints against more than fifty institutions that alleged sex discrimination in athletics. To answer athletic directors’ questions and to investigate the complaints, HEW issued a document titled: “Policy Interpretation: Title IX and Intercollegiate Athletics” in 1979.³⁵ The stated purpose of the Policy Interpretation was to explain the Title IX regulations in order to “provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.”³⁶

B. The Policy Interpretation

The Policy Interpretation is divided into three sections: (1) “Compliance in Financial Assistance (Scholarships) Based on Athletic Ability,” (2) “Compliance in Other Program Areas” (i.e. the laundry list), and (3) “Compliance in Meeting the Interests and Abilities of Male and Female Students.”³⁷ Regulators would determine compliance in financial assistance “by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results.”³⁸ They would likely find an institution to be compliant “if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors.”³⁹ One example of such a factor, which reflects the Javits Amendment’s acknowledgement of reasonable differences between sports, is the higher cost

32. 34 C.F.R. § 106.37 (2020).

33. *Id.*

34. 34 C.F.R. § 106.37(c)(1).

35. *See Policy Interpretation, supra* note 12, at 71413.

36. *Id.*

37. *Id.* at 71414.

38. *Id.* at 71415.

39. *Id.*

of nonresident tuition at state universities, which “may in some years be unevenly distributed between men’s and women’s [teams].”⁴⁰ Another example is “spreading scholarships over as much as a full generation (four years) of student athletes” when building a newly established team.⁴¹ Doing so “may result in the award of fewer scholarships in the first few years than would be necessary to create proportionality between male and female athletes.”⁴²

The financial assistance regulation “does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value.”⁴³ Instead, “the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates.”⁴⁴ Put simply, if women are forty-five percent of the athletes at a particular institution, they should receive forty-five percent of the athletic scholarship dollars or thereabouts.

The Policy Interpretation expanded “Other Athletic Benefits and Opportunities” to include not only the ten components of the laundry list, but also “recruitment of student athletes and provision of support services.”⁴⁵ Compliance would be assessed “by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes.”⁴⁶ Institutions need not provide identical benefits, opportunities, or treatment to male and female athletes, so long as “the overall effects” of any differences are “negligible.”⁴⁷

Specific comparisons would be made regarding the ten laundry-list factors plus recruiting and support services. For example, regarding factor number two—equipment and supplies—regulators would compare the quality, amount, suitability, maintenance and repair, and availability of equipment and supplies for men’s and women’s teams.⁴⁸ Similar comparisons would be made for the remaining laundry-list factors to assess compliance with Title IX.⁴⁹

To assess gender equity in the recruitment of athletes, regulators would consider whether: (1) coaches of men’s and women’s teams “are provided with

40. *Id.* But in the same section, the Policy Interpretation cautions that such differences would only be considered nondiscriminatory “if they are not the result of policies or practices which disproportionately limit the availability of out-of-state scholarships to either men or women.”

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 71416.

49. *Id.* at 71416–71417.

substantially equal opportunities to recruit,” (2) the financial and other resources available for recruiting male and female athletes “are equivalently adequate to meet the needs of each program”; and (3) the differences in benefits, opportunities, and treatment given to recruited athletes of each sex “have a disproportionately limiting effect upon the recruitment of students of either sex.”⁵⁰ An assessment of gender equity in support services would consider the equivalence in “the amount of administrative assistance provided to men’s and women’s programs” and in “the amount of secretarial and clerical assistance provided to men’s and women’s programs.”⁵¹

The Policy Interpretation then addresses the effective accommodation of student interests and abilities. It requires institutions to provide “both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.”⁵² To determine compliance, regulators will evaluate: (1) “whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) assuming one sex has been and remains underrepresented among an institution’s intercollegiate athletes, “whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex”; or (3) when the members of one sex are underrepresented among the intercollegiate athletes at an institution, whether the institution can show that “the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.”⁵³ In subsequent litigation, this “three-part test” would become the key metric by which federal courts would measure the institutional defendant’s compliance, or lack thereof, with Title IX.⁵⁴

In 1979, though, the three-part test had not yet become the key to compliance, so the more narrowly focused two-part test for assessing levels of competition for men and women that accompanied it received equal billing in the Policy Interpretation. The latter requires regulators to consider whether: (1) “the competitive schedules for men’s and women’s teams, on a program-wide

50. *Id.* at 71417.

51. *Id.*

52. *Id.* at 71418.

53. *Id.*

54. *Id.* at 71414. Parts two and three of the three-part test are the “exceptions” to the substantial-proportionality standard cited in note 13. Because they are alternative means of complying with Title IX, the data that institutions provide under the EADA are not a clear measure of Title IX compliance. The data may suggest noncompliance with part one, but the institution could still comply under part two or part three, each of which is less amenable to numerical measures than part one.

basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities” or (2) “the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by the developing abilities among the athletes of that sex.”⁵⁵

The Policy Interpretation marked a change in the process by which Title IX regulations were promulgated. One commentator has noted that “1975 was the last time that [federal regulators] sent a major Title IX regulation to the president for his signature.”⁵⁶ Beginning with the Policy Interpretation, the communications to institutions about Title IX athletics rules came via “interpretations,” “clarifications,” and “guidance” documents; in recent years, these communications have taken the form of “Dear Colleague” letters, which have announced major policy decisions on several occasions.⁵⁷ Because these documents were not the products of formal rulemaking, they lack the force of law, although, as Part II will show, courts have accorded them “substantial deference” in lawsuits challenging the legality of the proportionality standard for enforcing Title IX.⁵⁸

C. The 1980s: Lax Title IX Enforcement

The Policy Interpretation was the work of HEW, but in 1980, just a year after the Policy Interpretation’s release, Congress split HEW, and the new Department of Education’s Office for Civil Rights (OCR) assumed responsibility for Title IX enforcement, which it retains today.⁵⁹ Despite the presence of the Policy Interpretation, the federal government’s enforcement of Title IX in the late 1970s and the 1980s was lax. Most institutions ignored the July 1978 deadline for Title IX compliance and the increasing interest of women in athletic competition, establishing few or no teams for women.⁶⁰ Moreover, for the next fifteen years, Title IX went largely unenforced, and institutions

55. *Id.* at 71418.

56. MELNICK, *supra* note 6, at 43.

57. *Id.*

58. Informal agency rulings, such as the Policy Interpretation, which do not result from notice-and-comment rulemaking, are not entitled to “considerable deference,” under *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). But, like the Policy Interpretation, such rulings may receive “substantial deference” from courts when those rulings interpret the agency’s own regulations, the language of the regulations is ambiguous, and the informal ruling is “reasonable” and “sensibly conforms to the purpose and wording of the regulations.” See Hefferan, Jr., *supra* note 29, at 595.

59. Brian L. Porto, *Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. OF SPORT LAW 351, 356, n. 25 (1998). See also CARPENTER & ACOSTA, *supra* note 2, at 254.

60. Expert Report of Donna A. Lopiano, Ph.D. at 33, *Portz v. St. Cloud State Univ.* No. 16-cv-01115-JRT-LIB (Dist. Minn. Jan. 15, 2017) (on file with the author).

became increasingly aware of the lack of federal oversight of their women's sports programs.⁶¹

Institutional intransigence was not the only reason for lax enforcement. A primary cause was the Supreme Court's decision in *Grove City College v. Bell*, which held that the word "program" in the opening section of Title IX referred not to an entire institution, but instead, only to its subunit(s) that actually received federal funds.⁶² Because college athletic departments do not receive federal funds, after *Grove City*, women athletes had to rely on "institutional goodwill" to ensure that they received equitable treatment from the athletic director; Title IX no longer applied to institutional subunits that received no federal funds.⁶³

Sadly, institutional goodwill was in short supply. In the wake of the *Grove City* decision, OCR closed twenty-three investigations of athletic programs.⁶⁴ For much of the 1980s, then, "Title IX was off the table as a remedy for sex discrimination in college and high school athletics."⁶⁵ Congress itself upended the table in 1988 when it enacted The Civil Rights Restoration Act of 1987 over President Reagan's veto, codifying the word "program" to mean an entire institution (including the athletic department), not just a subunit that actually receives federal funds.⁶⁶ Still, as the 1990s began, Title IX enforcement remained less than aggressive.⁶⁷

D. The Clinton Era and the 1996 "Clarification"

The pace of enforcement quickened under President Clinton and Assistant Secretary of Education for Civil Rights Norma Cantu. In 1996, OCR released its first major Title IX enforcement document since the Policy Interpretation, titled the "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test."⁶⁸ The Clarification takes the form of a "Dear Colleague" letter from Assistant Secretary Cantu; the letter notes early on that it is "limited to an

61. *Id.*

62. 465 U.S. 555 (1984); see also CARPENTER & ACOSTA, *supra* note 2, at 119.

63. See CARPENTER & ACOSTA, *supra* note 2, at 121.

64. MELNICK, *supra* note 6, at 102.

65. Erin E. Buzuvis & Kristine E. Newhall, *Equality Beyond the Three-Part Test: Exploring and Explaining the Invisibility of Title IX's Equal Treatment Requirement*, 22 MARQ. SPORTS L.J. 427, 435 (2012).

66. CARPENTER & ACOSTA, *supra* note 2, at 126.

67. See WELCH SUGGS, A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX 128 (2005).

68. *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEPT. OF EDUC., OFF. FOR CIV. RTS., (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter *Clarification*].

elaboration of the “three-part test” first identified in the Policy Interpretation.⁶⁹ It notes further that “institutions need to comply only with any one part of the three-part test” to satisfy Title IX.⁷⁰ Institutions that comply with the first part of the test, known as “substantial proportionality,” have reached a “safe harbor” of Title IX compliance.⁷¹

But an institution that cannot achieve substantial proportionality may still comply by satisfying either part two or part three of the test. According to the Clarification, part two—the “history and continuing practice” portion of the test—examines “an institution’s good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex” on campus.⁷² Part three, which concerns “fully and effectively accommodating interests and abilities of the underrepresented sex,” asks whether “concrete and viable interests among the underrepresented sex” exist and warrant accommodation by the institution.⁷³

Having identified the alternative pathways to Title IX compliance, the Clarification proceeds to address several criticisms of the three-part test expressed in comments that OCR had solicited regarding an earlier draft of the document. One such criticism is that “the test improperly establishes arbitrary quotas.”⁷⁴ The Clarification rejects the “quota” charge because quotas only exist (and are impermissible) when “opportunities are required to be created without regard to sex.”⁷⁵ For example, a system that limited the number of Catholics, Jews, women, or Italian Americans who could be admitted to a 120-member first-year law school class would be an impermissible quota. But, the Clarification notes, “schools are permitted to create athletic participation opportunities based on sex,” and, if “they do so unequally, that is a legitimate measure of unequal opportunity under Title IX.”⁷⁶ Thus, even if achieving “substantial proportionality” were the only permissible means of complying with Title IX, the quota charge would be, to use the Clarification’s word, “misplaced.”⁷⁷

The Clarification also rejects a suggestion by some that when determining the number of participation opportunities an institution offers in sports, OCR should count “unfilled slots,” meaning positions on a team that the institution

69. *Id.* at 2.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 3.

75. *Id.*

76. *Id.*

77. *Id.*

claims exist but that no athletes actually fill.⁷⁸ According to the Clarification, OCR must count only actual athletes when evaluating proportionality because “participation opportunities must be real, not illusory.”⁷⁹ Finally, the Clarification responds to comments that revealed confusion about whether, to achieve substantial proportionality between male and female athletes, institutions can (or must) cap the size of or eliminate men’s teams. It explains that to comply with part one of the three-part test, “an institution can choose to eliminate or cap teams,”⁸⁰ but “nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men.”⁸¹ And “cutting or capping men’s teams will not help an institution comply with part two or part three because these tests measure an institution’s positive, ongoing response to the interests and abilities of the underrepresented sex.”⁸²

E. The Bowling Green Letter

The next major communication from OCR regarding the application of Title IX to college sports was the “Dear Colleague Letter: Bowling Green State University,” better known as the Bowling Green Letter, which was issued in 1998.⁸³ The Letter emphasizes that under the Policy Interpretation, an institution must ensure that “the total amount of scholarship aid made available to men and women [is] substantially proportionate to their [overall] participation rates” at the institution.⁸⁴

Accordingly, if the percentage of an institution’s total athletic scholarship budget that athletes of either sex receive is within one point of their sex’s share of the total number of varsity athletes on campus, then a strong presumption will exist that the disparity is reasonable and the institution complies with Title IX regarding athletic scholarships.⁸⁵ For example, “if men are 60% of the athletes, OCR would expect that the men’s athletic scholarship budget would be within 59%-61% of the total budget for athletic scholarships for all athletes, after accounting for legitimate nondiscriminatory reasons for any larger disparity.”⁸⁶ Thus, institutions have one percentage point of wiggle room in

78. *Id.*

79. *Id.*

80. *Id.* at 4.

81. *Id.*

82. *Id.*

83. See U.S. Department of Education, Office of Civil Rights, *Dear Colleague Letter: Bowling Green State University* (July 23, 1998), www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html.

84. *Id.*

85. *Id.*

86. *Id.*

either direction from their numbers of male and female athletes to achieve substantial proportionality in athletic financial aid.

F. The George W. Bush Era: A Presidential Commission and a "Further Clarification"

Guidance documents continued to flow from OCR after the George W. Bush administration took office in 2001. The Bush administration sought to make compliance with Title IX easier by enabling institutions to use the results of their student surveys to show that existing institutional athletic programs satisfied part three of the three-part test by effectively accommodating their athletic interests and abilities.⁸⁷ This intent reflected the opposition of conservative Title IX critics to the substantial proportionality standard, which the critics thought had caused the elimination of too many men's teams. Accordingly, President Bush's Secretary of Education, Roderick Paige, formed a Commission on Opportunity in Athletics in June 2002 to study the issues surrounding Title IX compliance.⁸⁸

The Commission's report, called "Open to All: Title IX at Thirty," included twenty-three recommendations, fifteen of which were unanimous.⁸⁹ Secretary Paige announced that his department would "move forward" only on the unanimous recommendations.⁹⁰ Among the nonunanimous recommendations, three are noteworthy. Recommendation 15 would have found an institution in compliance with the proportionality standard if the numbers of "available slots" for men and women on its respective teams were "proportional to the male/female ratio in enrollment."⁹¹ In other words, "[e]ven if the slots a program makes available are not filled, the school could still be in compliance with the first part of the three-part test."⁹² The Minority Report, filed by Commissioners Donna deVarona and Julie Foudy, pointed out that this recommendation plainly contradicted the guidance that OCR had issued in 1996, namely, that "participation opportunities must be real, not illusory."⁹³ If adopted, they wrote, it "would allow schools to artificially inflate the percentage of athletic opportunities they give to women by counting opportunities they

87. MELNICK, *supra* note 6, at 90.

88. CARPENTER & ACOSTA, *supra* note 2, at 189.

89. U.S. Department of Education, Secretary's Commission for Opportunity in Athletics, *Open to All: Title IX at Thirty* 1 (2003), www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf [hereinafter *Open to All*].

90. CARPENTER & ACOSTA, *supra* note 2, at 191.

91. *Open to All*, *supra* note 89, at 37.

92. *Id.*

93. Report, Donna deVarona & Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics*, 14 MARQ. SPORTS L. REV. 1, 13 (2003).

never actually fill or seek to fill.”⁹⁴

Recommendation 17 would have excluded “walk-on” (neither recruited nor scholarship recipient) athletes from the ratios of male and female athletes on which the proportionality calculation is made. In other words, when numbers of male and female athletes were compared to enrollment figures, walk-ons would not be counted, as if they did not exist.⁹⁵ The minority report charged that this recommendation “would enable schools to pretend that they are *not* giving athletics opportunities to men, and then to reduce their obligation to female athletes accordingly, even though walk-ons receive the benefits of sports participation, including coaching, training, tutoring, equipment and uniforms.”⁹⁶

Recommendation 18 would have allowed institutions to “conduct continuous interest surveys on a regular basis as a way of (1) demonstrating compliance with the three-part test, (2) allowing schools to accurately predict and reflect men’s and women’s interest in athletics over time, and (3) stimulating student interest in varsity sports.”⁹⁷ It directed the Department of Education to “develop specific guidance on interest surveys and how these surveys could establish compliance with the three-part test.”⁹⁸ The minority report responded that this recommendation “rests on the stereotyped notion that women are inherently less interested in sports than men—a notion that contradicts Title IX and fundamental principles of civil rights law.”⁹⁹

Five months after Secretary Paige released *Open to All*, Assistant Secretary for Civil Rights Gerald Reynolds issued a “Further Clarification” regarding Title IX and college sports.¹⁰⁰ Taking the form of a “Dear Colleague” letter from Mr. Reynolds, it was anticlimactic. It specifically endorsed the three-part test, noting that “[e]ach of the three prongs is . . . a valid, alternative way for schools to comply with Title IX” and that “no one prong is favored.”¹⁰¹ If these words were not a ringing endorsement of the substantial proportionality standard, they were hardly a rejection of it either, much to the relief of Title IX advocates. But as became evident with the issuance of an “Additional

94. *Id.* Readers of a certain age will remember deVarona and Foudy as Olympic gold medalists in swimming (1964) and soccer (1996), respectively. Each woman participated in the Olympic Games twice.

95. *See Open to All*, *supra* note 89, at 38.

96. deVarona & Foudy, *supra* note 93, at 13.

97. *See Open to All*, *supra* note 89, at 38.

98. *Id.*

99. *See* deVarona & Foudy, *supra* note 93, at 16.

100. Gerald Reynolds, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*, United States Department of Education, Office for Civil Rights (Jul. 11, 2003), <https://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>.

101. *Id.*

Clarification” in 2005, the Bush administration still wished to make Title IX compliance easier for colleges and universities.¹⁰²

G. The Bush Era, Act Two: An “Additional Clarification”

The new document expressed OCR’s belief that “institutions may benefit from further specific guidance on part three.”¹⁰³ It stated that an institution would comply with part three unless one or more sports existed for the underrepresented sex in which all of the following conditions were present: (1) unmet interest sufficient to sustain a varsity team, (2) sufficient athletic ability to sustain a team, and (3) a reasonable expectation of intercollegiate competition for the team(s) within the institution’s normal competitive region.¹⁰⁴ Accordingly, schools need not “accommodate the interests and abilities of all their students or fulfill every request for the addition or elevation of particular sports, unless all three conditions are present.”¹⁰⁵ The document concluded by observing that each part of the three-part test is “an equally sufficient” means of complying with Title IX.¹⁰⁶ To underscore this point, it added that, “[i]n essence, each part . . . is a safe harbor.”¹⁰⁷

Much criticism greeted the “Additional Clarification.” Critics assailed it for accepting the use of email surveys as “the sole determinant” of women’s interest in playing varsity sports, contrary to the 1996 “Clarification,” which had included such surveys among several means of assessing unmet interest.¹⁰⁸ Criticism also resulted from the document’s reference to “results that show insufficient interest to support an additional varsity team for the underrepresented sex” creating “a presumption of compliance with part three of the three-part test. . . .”¹⁰⁹ According to one critic, this arrangement assigned “the burden of proof” regarding unmet interest to the students instead of the

102. *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three*, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS (Mar. 17, 2005), www2.ed.gov/about/offices/list/ocr/letters/200503017-additional-clarification-three-part-test.pdf [hereinafter *Additional Clarification*].

103. *Id.* at iii.

104. *Id.* at iv.

105. *Id.*

106. *Id.* at v.

107. *Id.*

108. Andrew Zimbalist, *Bush Administration Uses Stealth Tactics to Subvert Title IX*, in EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 283, 284 (Nancy Hogshead-Makar & Andrew Zimbalist eds. 2007). The other determinants of unmet interest included in the 1996 Clarification are (1) requests by students and admitted students that a particular sport be added; (2) requests that an existing club sport be elevated to varsity status; (3) participation in particular club or intramural sports; (4) interviews with students, admitted students, coaches, administrators, and others regarding interest in particular sports; and (5) participation in particular high school sports by admitted students.

109. See *Additional Clarification*, *supra* note 102, at iv.

university.¹¹⁰ Another critic noted that limiting the pool of students surveyed to existing undergraduates would underestimate unmet interest. For example, “a university that does not offer women’s varsity ice hockey would be unlikely to find survey evidence of enough interest and ability to field a varsity women’s ice hockey team, since women who really wanted to play that sport likely would have selected a different school.”¹¹¹ As a result, part three has not become the “safe harbor” that the Bush administration hoped it would be; indeed, the Obama administration would rescind the Additional Clarification in 2010.¹¹²

H. The Obama Era: Aggressive Enforcement

The rescission came in a thirteen-page “Dear Colleague” letter signed by Assistant Secretary for Civil Rights Russlyn Ali.¹¹³ Secretary Ali noted that under part three of the Title IX standard, to determine unmet interest in a particular sport, instead of relying solely on interest surveys, OCR would return to evaluating the following factors identified in the 1996 Clarification:

- (1) requests by students and admitted students that a particular sport be added;
- (2) requests for the elevation of an existing club sport to intercollegiate status;
- (3) participation in club or intramural sports;
- (4) interviews with students, admitted students, coaches, administrators, and others regarding interests in particular sports;
- (5) results of surveys or questionnaires of students and admitted students regarding interests in particular sports;
- (6) participation in interscholastic sports by admitted students; and
- (7) participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students.¹¹⁴

110. Zimbalist, *supra* note 108, at 284.

111. DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORTS REVOLUTION 221 (2010).

112. MELNICK, *supra* note 6, at 90.

113. U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter* (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

114. *Clarification of the Intercollegiate Athletics Policy Guidance: The Three Part Test*, U.S. Dep’t

Besides those factors, OCR would consider “intercollegiate competition for a particular sport in the institution’s normal competitive region.”¹¹⁵

Secretary Ali then outlined a similarly comprehensive process for assessing the ability to sustain a viable team and the likelihood of finding suitable competition for that team. If the information the institution compiles during the assessment process shows sufficient interest and ability to support a new intercollegiate team and a reasonable expectation of competition against suitable rivals in the institution’s normal competitive region, the institution must “create a varsity team within a reasonable period of time” to satisfy part three.¹¹⁶ Thus, as of the spring of 2010, institutions could no longer demonstrate compliance based on the results of interest surveys alone. After 2010, the focus of OCR’s Title IX guidance documents shifted from athletics to sexual harassment and sexual violence, both in the Obama administration and the Trump administration.¹¹⁷ This trend continues in the Biden administration.¹¹⁸

That shift does not signal the achievement of gender equity in college sports, though. Indeed, college women continue to file lawsuits charging their institutions with violating Title IX by failing to establish new women’s teams or by underfunding or eliminating existing teams.¹¹⁹ The influence of lawsuits on the enforcement of Title IX in college sports is the subject of Part II, which follows.

of Educ., Office for Civil Rights (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

115. *Id.*

116. *Additional Clarification*, *supra* note 102, at 10.

117. United States Department of Education, Office for Civil Rights, *Dear Colleague Letter* (2011) refers to the Obama administration’s letter. It is available at www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html. The Trump administration rescinded that letter in 2017, subsequently promulgating new regulations governing sexual assault in May of 2020. See Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED (May 7, 2020), <https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations>.

118. In March 2021, the Biden administration issued Executive Order 14021 ordering a review of all Department of Education actions that “are or may be inconsistent with a guarantee of an educational environment free from discrimination based on sex” Included in the review were the regulations the Trump administration put in place in 2020. See Exec. Order No. 14,021, 86 C.F.R. 13803 (2021).

119. See discussion *infra* Part IID.

II. LITIGATING EQUAL OPPORTUNITY: JUDICIAL INTERPRETATIONS OF TITLE IX'S LANGUAGE AND REGULATIONS

A. Setting the Table: The Precursor Decisions

The Title IX college-sports litigation began in earnest after Congress overrode President Reagan's veto of the Civil Rights Restoration Act.¹²⁰ The litigation flowed from decisions by institutions to drop certain women's sports because of budgetary constraints.¹²¹ But those institutional decisions would likely have gone unchallenged—at least in court—had not two Supreme Court decisions facilitated legal challenges to gender inequity in college sports.¹²²

In *Cannon v. University of Chicago*,¹²³ the Supreme Court held Title IX encompasses a private right of action that entitles a victim of sex discrimination to sue an institution to enforce the statute's prohibition against such discrimination.¹²⁴ In the second case, *Franklin v. Gwinnett County Public Schools*,¹²⁵ also a Supreme Court decision, the Court concluded that lower courts may require an educational institution found liable for intentional sex discrimination “to pay a plaintiff compensatory and punitive damages besides having to reform its noncomplying program(s)” to satisfy Title IX.¹²⁶

Spurred by *Cannon*, *Franklin*, and the enactment of the Civil Rights Restoration Act, college women brought several successful Title IX sports-related lawsuits in the federal courts during the 1990s. They are the focus of Section B, below.

B. The Early Title IX College Sports Cases

In *Favia v. Indiana University of Pennsylvania* (IUP), members of the women's field hockey and gymnastics teams challenged IUP's decision to disband both teams, winning a preliminary injunction that forced IUP to reinstate them.¹²⁷ *Favia* signaled future developments, notably the centrality of the Policy Interpretation to judicial interpretations of Title IX. It was “the first federal court decision to apply any provision of the Policy Interpretation to a Title IX claim in the context of college sports.”¹²⁸ It also put institutions on

120. CARPENTER & ACOSTA, *supra* note 2, at 126.

121. BRIAN L. PORTO, A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS 151 (2003).

122. *Id.*

123. 441 U.S. 677 (1979).

124. PORTO, *supra* note 121, at 151.

125. *See* 503 U.S. 60 (1992).

126. PORTO, *supra* note 121, at 151.

127. 7 F.3d 332, 344 (3d Cir. 1993).

128. *Id.*

notice that they would not be able to defend themselves successfully against a Title IX claim by pleading budgetary problems, the offering or disbanding of equal numbers of men's and women's teams, or a lack of discriminatory intent.¹²⁹

Roberts v. Colorado State Board of Agriculture followed on the heels of *Favia*.¹³⁰ In *Roberts*, members of the softball team at Colorado State University (CSU) filed suit after the institution dropped their sport; the trial court, concluding that CSU had violated Title IX, issued a permanent injunction, reinstating the team.¹³¹ CSU appealed, and the Tenth Circuit affirmed, relying on the three-part test articulated by OCR in the Policy Interpretation.¹³² *Roberts* was a milestone "because it established that the three-part test was the judicially preferred measure of compliance with Title IX, that the plaintiff bore the burdens of proof under parts one and three, and that the defendant bore the burden of proof under part two."¹³³ It further established that a 10.5 percent gap between female enrollment and female athletic participation, which would have resulted from dropping the softball team, failed to meet part one of that test: the substantial proportionality standard.¹³⁴ Last but not least, it reinforced two conclusions reached in *Favia*: (1) an institution could not use budgetary constraints to escape accountability for violating Title IX, and (2) a plaintiff did not have to prove discriminatory intent to show that the defendant institution had violated the statute.¹³⁵

Still, the most consequential of the early Title IX college sports cases was *Cohen v. Brown University*, which resulted from Brown University's 1991 decision to disband its women's volleyball and gymnastics teams.¹³⁶ In *Cohen I*, the district court granted a request by the women volleyball players and gymnasts for a preliminary injunction against Brown's decision, restoring both teams to varsity status.¹³⁷ In *Cohen II*, the First Circuit affirmed, concluding that the plaintiffs would likely win on the merits of their suit at trial.¹³⁸ It then

129. *Id.*

130. See 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993). At the time of the litigation, the Colorado State Board of Agriculture was the governing body of Colorado State University; hence, it was the defendant in *Roberts*.

131. PORTO, *supra* note 121, at 152.

132. *Id.*

133. *Id.* at 153.

134. *Id.*

135. *Id.*

136. *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997). Brown dropped its men's golf and water polo teams and its women's volleyball and gymnastics teams simultaneously.

137. *Id.*

138. *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993).

remanded the case to the district court for a trial.¹³⁹

In *Cohen III*, after a bench trial, the district court held that Brown had violated Title IX and must submit a compliance plan.¹⁴⁰ The district court later rejected the plan, after which Brown appealed again, triggering *Cohen IV*.¹⁴¹

The First Circuit rejected Brown's claim that its responsibility under Title IX was just to provide for women athletic opportunities equal to their current membership on varsity teams.¹⁴² According to the First Circuit, Brown's "relative interests" approach would "entrench and fix by law the significant gender-based disparity in athletics opportunities found by the district court to exist at Brown" ¹⁴³ That approach disregarded Title IX's purpose to overcome stereotypical conceptions of women's athletic interests and abilities. Athletic "interest and ability rarely develop in a vacuum," the appellate court noted; instead, "they evolve as a function of opportunity and experience."¹⁴⁴ Thus, the First Circuit affirmed the district court's rejection of Brown's initial plan and remanded again to the district court to give Brown another chance to submit a compliance plan.¹⁴⁵ Brown appealed to the Supreme Court, which declined to hear the case.¹⁴⁶ In 1998, the parties signed a consent decree requiring Brown to maintain a 3.5 percent gap between the percentages of women undergraduates and women athletes on campus.¹⁴⁷

139. *Id.* at 907

140. *Cohen v. Brown Univ.*, 879 F. Supp. 185, 214 (D.R.I. 1995).

141. 101 F.3d at 162.

142. *Id.* at 175.

143. *Id.* at 176.

144. *Id.* at 179.

145. *Id.* at 188.

146. 520 U.S. 1186.

147. Greta Anderson, *Compliance Headache Turned PR Problem*, INSIDE HIGHER ED (Sept. 1, 2020), <https://www.insidehighered.com/quicktakes/2020/09/01/brown-emails-show-frustration-title-ix-agreement>. More recently, Brown cut additional teams, prompting a return to court and a new agreement in the fall of 2020. Under the new settlement, Brown has agreed to reinstate its women's equestrian and fencing teams, maintain full support for those teams in the future, and not cut or reduce the status of any women's varsity team until at least 2024, during which time it must comply with the terms of the 1998 agreement. In return, the consent decree will expire on August 31, 2024, although Brown must ensure equal athletic opportunities thereafter. See *Court Approves Settlement Restoring Equal Opportunities for Women in Brown Univ. Athletics*, ACLU RHODE ISLAND (Dec. 15, 2020, 9:00 AM), www.riaclu.org/news/post/court-preliminarily-approves-settlement-in-title-ix-lawsuit-against-br own-u. In October 2021, the United States Court of Appeals for the First Circuit upheld the agreement reached a year earlier, despite a claim by twelve athletes on Brown's current women's gymnastics and ice hockey teams that the original plaintiffs, who attended Brown in the 1990s, no longer adequately represent the class. Susan A. Greenberg, *Brown U. and Female Former Athletes Resolve Title IX Dispute*, INSIDE HIGHER ED. (Oct. 29, 2021), <https://www.insidehighered.com/print/quicktakes/2021/10/29/brown-u-and-female-former-athletes-resolve-title-ix-dispute>; Katie Mulvaney, *Appeals*

Even after *Cohen*, some observers still argued that “Title IX is an affirmative action statute that requires gender-based preferences or quotas.”¹⁴⁸ But the rule of *Roberts* and *Cohen* has been the law of the land since the mid-1990s; to comply with Title IX, institutions must satisfy one part of the three-part test first articulated in the Policy Interpretation in 1979.¹⁴⁹

C. Backlash: Title IX Suits by Male College Athletes

Favia, *Roberts*, and *Cohen* spawned lawsuits by male college athletes against their respective institutions for having dropped certain men’s teams, allegedly to satisfy the substantial proportionality standard. Illustrative of these cases, which occurred between 1993 and 2002, was *Gonyo v. Drake University*. The *Gonyo* court held that the institution’s decision to discontinue its wrestling program was not sex discrimination in violation of Title IX because, even after wrestling’s elimination, men accounted for 42.8 percent of the student body, but 75.3 percent of the varsity athletes at Drake.¹⁵⁰ Therefore, Drake’s athletic offerings effectively accommodated the interests and abilities of its male students,¹⁵¹ and the court granted summary judgment for Drake.¹⁵² The lesson of *Gonyo* is that “the termination of a men’s team signals no discrimination when post termination participation ratios continue to favor males.”¹⁵³ In cases following *Gonyo*, male college athletes were similarly unsuccessful for the same reason the *Gonyo* court cited.¹⁵⁴

Court Upholds Settlement in Landmark Brown Gender-Equity Case, PROVIDENCE J. (Oct. 27, 2021), <https://www.providencejournal.com/story/news/courts/2021/10/27/appeals-court-upholds-settlement-landmark-brown-gender-equity-case/8551760002/>.

148. PORTO, *supra* note 121, at 154–55.

149. *Id.* at 154.

150. 837 F. Supp. 989, 992 (S.D. Iowa 1993).

151. *Id.* at 995–96.

152. *Id.* at 996.

153. CARPENTER & ACOSTA, *supra* note 2, at 139.

154. See *Kelley v. Bd. of Trustees of Univ. of Ill.*, 35 F.3d 265 (7th Cir. 1994) (decision to end men’s swimming program while retaining women’s swimming program did not violate Title IX because even afterwards, men’s participation in athletics was still more than substantially proportionate to their presence in student body); *Boulahanis v. Bd. of Regents*, 198 F.3d 633 (7th Cir. 1999) (elimination of men’s soccer and wrestling programs did not violate Title IX because men’s participation in athletics remained within three percentage points of their enrollment); *Neal v. Bd. of Trustees of Cal. State Univ.*, 198 F.3d 763 (9th Cir. 1999) (reduction in roster spots on wrestling team for males did not violate Title IX because institutions may cut programs to make men’s and women’s athletic participation rates substantially proportionate to their percentages in the undergraduate student body); *Mia. Univ. Wrestling Club v. Mia. Univ.*, 302 F.3d 608 (6th Cir. 2002) (equalization of athletic opportunities for men and women by eliminating three men’s team sports did not violate Title IX, which focuses on opportunities for the underrepresented gender and does not bestow rights on the historically

The case that best illustrates Title IX's jurisprudential victory over its critics, though, is *Equity in Athletics, Inc. v. Department of Education*, which was litigated between 2007 and 2011.¹⁵⁵ The plaintiff, known as Equity in Athletics, Inc. (EIA), was a nonprofit corporation comprised of coaches, fans, booster clubs, parents, save-our-sport groups, and alumni of several Virginia universities, including James Madison University (JMU).¹⁵⁶ EIA sought an injunction to prevent JMU from eliminating seven men's and three women's sports.¹⁵⁷ In *Equity I*, the trial court considered and denied that motion.¹⁵⁸

Before the athletic program downsizing, JMU fielded twenty-eight varsity teams for an undergraduate student body that was 61 percent female and 39 percent male; the athletes, though, were 50.7 percent female and 49.3 percent male.¹⁵⁹ The restructuring plan sought to rebalance athletic participation to 61 percent female and 39 percent male, reflecting the undergraduate enrollment at JMU.¹⁶⁰

In *Equity I*, EIA's amended complaint alleged, first, that the Policy Interpretation's three-part test authorized intentional discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and of Title IX itself.¹⁶¹ Second, it alleged that the three-part test and subsequent Clarifications "unlawfully amended the Title IX regulations without the required notice and comment rulemaking."¹⁶² Third, it charged that the three-part test, subsequent Clarifications, and Department of Education's (DOE) Title IX regulations were invalid because the President had not approved them.¹⁶³ Finally, it alleged that the JMU athletic cuts, in seeking to achieve proportionality, violated both Title IX and the Constitution.¹⁶⁴ The court rejected all four claims, then denied EIA's

overrepresented gender); and *Chalenor v. Univ. of N.D.*, 291 F.3d 1042 (8th Cir. 2002) (elimination of wrestling program did not violate Title IX because a university may comply with Title IX by increasing athletic opportunities for the underrepresented gender (women) or by decreasing athletic opportunities for the overrepresented gender (men)).

155. See 504 F. Supp. 2d 88 (W.D. Va. 2007); 291 Fed. Appx. 517 (4th Cir. 2008); 675 F. Supp. 2d 660 (W.D. Va. 2009); 639 F.3d 91 (4th Cir. 2011). In a previous case, *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, which similarly challenged OCR's enforcement of Title IX, both the trial court and the appellate court had held that the plaintiff associations lacked standing because they could not show that a victory in court would reestablish any discontinued teams. See 263 F. Supp. 2d 82 (D.D.C. 2003); 366 F.3d 930 (D.C. Cir. 2004).

156. 504 F. Supp. 2d 88, 90.

157. *Id.* at 91.

158. *Id.*

159. *Id.* at 92.

160. *Id.*

161. *Id.* at 98.

162. *Id.*

163. *Id.*

164. *Id.* at 98–99.

motion for a preliminary injunction.¹⁶⁵

EIA appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in *Equity II*, noting that it was limited “to addressing only those issues relevant to the denial of the motion for a preliminary injunction, a motion addressed only against JMU.”¹⁶⁶ Therefore, the appellate court sidestepped the legitimacy of the Policy Interpretation and focused instead on EIA’s claims of intentional gender discrimination by JMU.¹⁶⁷ It noted that “nearly every circuit in the country has rejected challenges similar to EIA’s underlying complaint against JMU, i.e., that JMU violated Title IX and the Constitution when it used gender to determine which athletic programs to cut.”¹⁶⁸ Based on this reasoning and its view that JMU should chart its own athletic future, the appellate court affirmed the denial of EIA’s request for injunctive relief.¹⁶⁹

The case then returned to the trial court (*Equity III*), which considered the defendants’ motions to dismiss and EIA’s motion for summary judgment; the court granted the former and rejected the latter as moot.¹⁷⁰ It rebuffed EIA’s claim that the three-part test violates Title IX, observing that “courts have uniformly held that Title IX ‘does not bar remedial actions designed to achieve substantial proportionality between athletic rosters and student bodies.’”¹⁷¹ For that reason and because EIA could not produce a contrary case, the trial court agreed with the federal defendants that the three-part test comports with Title IX.¹⁷²

Furthermore, Title IX honors the Equal Protection Clause. The statute’s purpose is to prohibit institutions from discriminating based on sex, and the three-part test serves that end. The “limited consideration of sex” sometimes necessary in the downsizing of college athletic programs does not violate the Constitution.¹⁷³ And “[c]ourts have consistently rejected EIA’s underlying claim that equal opportunity under [§106.41] should be tied to expressed interest rather than actual participation.”¹⁷⁴

The trial court then denied EIA’s claim that the three-part test was invalid because neither the Policy Interpretation nor the Clarifications had undergone

165. *Id.* at 91.

166. *Equity in Athletics v. Dep’t of Educ.*, 291 Fed. Appx. 517, 522 (4th Cir. 2008).

167. *Id.*

168. *Id.* at 524.

169. *Id.*

170. 675 F. Supp. 2d 660, 663 (W.D. Va. 2009).

171. *Id.* at 670 (quoting *Neal*, 198 F.3d at 771).

172. *Id.* at 684.

173. *Id.* at 672 (quoting *Kelley*, 35 F.3d at 272).

174. *Id.* at 675 (quoting *Equity in Athletics, Inc. v. U.S. Dep’t of Educ.*, 291 Fed. Appx. 517, 523 (4th Cir. 2008)).

notice-and-comment rulemaking. That requirement, the court reasoned, “does not apply to ‘interpretive rules,’ which simply state what the administrative agency thinks a statute means.”¹⁷⁵ It only applies to ‘legislative rules,’ “which create new rights, impose new obligations, or effect a change in existing law.”¹⁷⁶ Because the Policy Interpretation and the Clarifications were HEW’s interpretations of Title IX’s athletic regulations, notice-and-comment rulemaking was unnecessary.

Finally, the Policy Interpretation was not invalid for lack of Presidential approval because “the [Administrative Procedure Act] does not require Presidential approval each and every time an agency issues interpretive guidelines.”¹⁷⁷ Thus, the trial court granted the federal defendants’ motions to dismiss and dismissed EIA’s motion for summary judgment.¹⁷⁸

The case ended with *Equity IV*, a return visit to the Fourth Circuit.¹⁷⁹ Persuaded by the reasoning of the district court and of “sister circuits” in previous cases,¹⁸⁰ the appellate court affirmed the district court’s grant of the defendants’ motion to dismiss.¹⁸¹ In so doing, it effectively quashed the backlash against the Policy Interpretation, the three-part test, and particularly part one of that test. Subsequent litigation would contest an institution’s application of those guidelines, but not their legitimacy.

D. The Second Wave of Title IX Lawsuits

Amidst the backlash, female athletes continued to sue their institutions after 2000 for violating Title IX because the early cases, such as *Favia*, *Roberts*, and *Cohen*, did not spur nationwide compliance with the three-part test.¹⁸² The most consequential in the second wave of Title IX equal-opportunity cases is *Biediger v. Quinnipiac University*, which began in a federal district court in Connecticut

175. *Id.* at 677 (quoting *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1340 (4th Cir. 1996)).

176. *Id.* (citing *L.A. Closeout, Inc. v. Dep’t of Homeland Sec.*, 513 F.3d 940, 941 (9th Cir. 2008)).

177. *Id.*

178. *Id.* at 684.

179. 639 F.3d 91 (4th Cir. 2011).

180. *Id.*

181. *Id.* at 111.

182. *See, e.g., Pederson v. La. State Univ.*, 213 F.3d 858, 864 (5th Cir. 2000) (holding that, considering LSU’s undergraduate enrollment was fifty-one percent male and forty-nine percent female, but varsity teams were seventy-one percent male and twenty-nine percent female, “LSU violated Title IX by failing to accommodate effectively the interests and abilities of certain female students and that its discrimination against these students was intentional”); *Barrett v. W. Chester Univ. of Pa. of the State Sys. of Higher Educ.*, No. CIV.A. 03-CV-4978 2003 WL 22803477 (E.D. Pa. Nov. 12, 2003) (granting the plaintiffs’ motion for a preliminary injunction after concluding that the University violated all parts of the three-part test).

in 2010.¹⁸³ In 2009 Quinnipiac eliminated its women's volleyball, men's golf, and men's outdoor track teams and sought to create a competitive cheerleading team for the 2009-10 school year.¹⁸⁴ Five volleyball players and their coach sued the university, alleging that their team's elimination violated Title IX.¹⁸⁵

In *Biediger I*, the court, after a bench trial, concluded that Quinnipiac indeed violated Title IX when allocating athletic participation opportunities in 2009-10.¹⁸⁶ During that year, Quinnipiac's undergraduate population was 61.87 percent female (3,518 women) and 38.13 percent male (2,168 men); because women were 62.27 percent and men were 37.73 percent of the varsity athletes, the university appeared to satisfy the substantial-proportionality standard.¹⁸⁷ But Quinnipiac inflated the number of its female athletes by conditioning participation in women's cross-country on participation in indoor and outdoor track too.¹⁸⁸ Complicating matters was Quinnipiac's decision to create the competitive cheerleading team and to assign it an initial roster target of thirty participants.¹⁸⁹ Accordingly, *Biediger I* considered two issues rarely, if ever, litigated in previous Title IX litigation: (1) whether a university-sponsored varsity activity—cheerleading in this instance—can be treated as a sport for Title IX purposes, and (2) whether a varsity team qualifies as a genuine participation opportunity.¹⁹⁰

To determine whether competitive cheerleading qualified as a sport, the court referred to a 2008 "Dear Colleague" Letter, issued by OCR, which identified several factors that OCR considers when determining whether a particular activity is a sport, including its "structure, administration, team preparation and competition."¹⁹¹ The following elements prompted the district court to conclude that the competitive cheerleading team could not qualify as a "sport" under Title IX:

- (1) Its coach was not permitted to recruit athletes off campus;
- (2) Its regular season featured different competitions governed

183. 728 F. Supp. 2d 62 (D. Conn. 2010).

184. *Id.* at 63.

185. *Id.*

186. *Id.*

187. *Id.* at 64—65.

188. *Id.* at 78.

189. *Id.* at 80-81.

190. *Id.* at 94.

191. Stephanie Monroe, *Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS (Sept. 17, 2008) [hereinafter *Athletic Activities Dear Colleague Letter*], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html>.

- by varying rules and a varying quality of opponents;
- (3) Its postseason was an open invitational without any pre-event winnowing or elimination of teams; and
- (4) Its athletes received no locker space from Quinnipiac and no insurance from the NCAA.¹⁹²

The court held that “Quinnipiac may not yet count the members of its competitive cheer team in order to prove its compliance with Title IX.”¹⁹³

Moving to the second issue—whether all athletic participation opportunities at Quinnipiac were genuine—the court reasoned that not all of the women cross country runners who also participated in indoor and outdoor track enjoyed genuine participation opportunities because they were required to compete in indoor and outdoor track as a condition of running cross-country.¹⁹⁴ Some of these athletes were injured or were “redshirts” who sit out a season, often to improve their skills or gain strength through physical maturation; their inclusion added to the roster sizes of the indoor and outdoor track teams without offering a genuine athletic experience.¹⁹⁵

Thus, the trial court removed from Quinnipiac’s cadre of female athletes thirty competitive cheerleaders and eleven cross-country runners who were unable or ineligible to compete in indoor and outdoor track in 2009-10.¹⁹⁶ The result was that Quinnipiac had 233 female athletes and 167 male athletes on the first day of competition that year, making women 61.87 percent of the undergraduates and 58.25 percent of the varsity athletes and creating a disparity of 3.62 percent.¹⁹⁷ At issue was whether the 3.62 percent disparity—which equated to a shortfall of thirty-eight women athletes—reflected an unmet demand for a new varsity team.¹⁹⁸

The court’s answer was yes because the median size of Quinnipiac’s women’s teams in 2009-10 was twenty-four, and the women’s volleyball team, which had been eliminated, required only fourteen players.¹⁹⁹ Accordingly, Quinnipiac had violated Title IX in 2009-10 by failing to offer equal athletic

192. *Biediger*, 728 F. Supp. 2d at 99-100.

193. *Id.* at 101.

194. *Id.* at 107.

195. *Id.* See also *Biediger*, 728 F. Supp. 2d at 67, n.2 (providing an excellent description of the practice of redshirting).

196. *Id.* at 111.

197. *Id.*

198. *Id.* at 112.

199. *Id.*

opportunities to its women students.²⁰⁰ Thus, the district court permanently enjoined Quinnipiac from denying its female students athletic opportunities and ordered it to submit a Title IX compliance plan within sixty days.²⁰¹

Quinnipiac appealed, challenging the trial court's exclusion of roster slots in women's indoor and outdoor track and in competitive cheerleading, plus its conclusion that a 3.62 percent disparity between female enrollment and athletic participation violated Title IX.²⁰² The appellate court noted that OCR requires athletic participation opportunities to be offered in the context of a "sport."²⁰³ Acknowledging that "with better organization and defined rules," cheerleading "might someday warrant recognition as a varsity sport," the appellate panel nevertheless concluded: "'that time has not yet arrived.'"²⁰⁴

The appellate court then observed that the number of athletes listed on the rosters of the indoor and outdoor track teams "were not reflective of genuine participation opportunities in these sports, but were inflated to support mandated year-round training for the 18 members of the women's cross-country team."²⁰⁵ Finally, the appellate panel noted that the 3.62 percent disparity between women undergraduates and women athletes was a direct result of Quinnipiac's athletic choices and could be easily remedied by creating more athletic opportunities for women.²⁰⁶ Thus, it affirmed the district court's injunction order.²⁰⁷

The parties returned to the trial court in 2013 when Quinnipiac moved to lift the injunction order.²⁰⁸ In the meantime, the institution had added women's golf and rugby teams, developed competitive cheerleading further, and ceased requiring women cross-country runners to participate in indoor and outdoor track.²⁰⁹ To obtain relief from the injunction order under Federal Rule of Civil Procedure 60(b)(5), Quinnipiac had to show that continued enforcement was inequitable because of significantly changed circumstances, meaning genuine compliance with Title IX, now and for the foreseeable future.²¹⁰ The court would apply the familiar three-part test and then the two-question "levels-of-

200. *Id.* at 113.

201. *Id.* at 114.

202. *See Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 91 (2d Cir. 2012).

203. *Id.* at 93 (citing *Clarification*, *supra* note 68, at 2-3).

204. *Id.* at 105.

205. *Id.* at 100.

206. *Id.* at 108.

207. *Id.*

208. *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 419 (2013).

209. *Id.* at 420.

210. *Id.* at 434—35.

competition” test.²¹¹

The levels-of-competition test, though “seldom used today and rarely if ever litigated,”²¹² was relevant here because to be relieved of the injunction, Quinnipiac not only had to achieve substantial proportionality, but also show that “its athletic program offers genuine varsity participation opportunities, and equivalent athletic competition, for its female population.”²¹³

But competitive cheerleading still could not qualify as a varsity sport; besides lacking NCAA recognition, competitive cheerleading had tumbled into a feud of late between the activity’s rival progeny, “Acro” and “STUNT,” making the prospects for becoming an NCAA sport even dimmer than before.²¹⁴ As a result, the district court concluded that “Quinnipiac’s acro program cannot be considered—at least not at this stage in its development—an intercollegiate-level varsity ‘sport’ under Title IX.”²¹⁵ The new women’s rugby team was problematic too. The lack of varsity rivals in Quinnipiac’s traditional competitive region meant that most of the team’s competitors were club teams; hence, Quinnipiac failed the “levels-of-competition” test.²¹⁶

Therefore, the district court removed a total of sixty-seven women, including thirty-six acro athletes, twenty-eight rugby players, and three indoor-track runners who had quit the team less than halfway through the regular season and had not competed in one indoor-track event from Quinnipiac’s tally of female athletes during 2011-12.²¹⁷ Consequently, in 2011-12, the count of female athletes at Quinnipiac was reduced to 254, which equated to 60.2 percent of the total number of athletes there, as compared to the 62.4 percent of Quinnipiac undergraduates who were women.²¹⁸ Thus, a 2.2 percent disparity existed between female undergraduates and female athletes.²¹⁹ Although that number was small, it represented a shortfall of approximately twenty-five athletes, a number that “would almost certainly be enough to sustain a new,

211. *Id.* at 437. Recall from Part I that the “levels-of-competition” test considers: (1) whether the competitive schedules for men’s and women’s teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities or (2) whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities of that sex. 44 Fed. Reg. at 71,418.

212. Biediger, 928 F. Supp. 2d at 446.

213. *Id.* at 452.

214. *Id.* at 424. Acro and STUNT each sponsored its own national championship separate from the other. *Id.* at 424, n.13.

215. *Id.* at 458.

216. *Id.* at 461.

217. *Id.* at 466.

218. *Id.*

219. *Id.*

independent varsity team.”²²⁰

Quinnipiac therefore failed both the substantial proportionality test and the levels-of-competition test, prompting the district court to deny Quinnipiac’s motion to lift the injunction.²²¹ Thereafter, the parties reached a settlement whereby Quinnipiac agreed to retain its existing women’s teams, including volleyball, allocate more athletic scholarships to women, and improve the benefits provided to women’s teams.²²²

Biediger is noteworthy for three reasons. First, the district court’s 2010 decision applied for the first time OCR’s test of whether a sponsored varsity activity qualified as a sport for Title IX purposes. Second, that court’s 2013 decision applied the rarely litigated levels-of-competition test because the authenticity of certain “athletic opportunities” was in question. Third and most importantly, the same decision admonished Quinnipiac (and colleges generally) to listen to students when contemplating new teams instead of selecting specific teams “for economic or strategic reasons,” including the large roster sizes those teams can support.²²³ The admonition was timely because, as Part III will show, the manipulation of rosters to appear compliant with Title IX is rampant in college sports.

E. The Saga Continues: Pending Litigation

Despite the caselaw discussed above, institutional failures to satisfy Title IX continue to spawn litigation by college women seeking to revive teams that their schools have eliminated or to establish new teams to address an unmet demand for athletic opportunities. At this writing, late in the autumn of 2021, five such cases are in various stages of the judicial process.²²⁴ The persistent

220. *Id.* at 467. The calculation regarding substantial proportionality was as follows: Quinnipiac had 168 male athletes. For them to represent 37.6 percent of the varsity athletes (equivalent to their percentage of the student body), the total number of athletes would have to be 447, of whom 279 were women. The difference between the exactly proportional number of 279 women athletes and the 254 then countable for Title IX purposes was twenty-five. *Id.* at 467, n. 61.

221. *Id.* at 473.

222. Hefferan, Jr., *supra* note 29, at 662.

223. *Id.* at 663.

224. *See, e.g.,* *Anders v. Ca. State Univ., Fresno*, 2021 WL 3115687 (E.D. Cal. 2021) (plaintiffs challenge University’s decision to eliminate women’s lacrosse team; trial court denied defendants’ motion to dismiss); *Balow v. Mich. State Univ.*, 2021 WL 4316771 (W.D. Mich.) (class action alleging that the University’s elimination of women’s swimming and diving team violated Title IX because the University does not satisfy any part of the three-part test; plaintiffs sought preliminary injunction prohibiting elimination of the women’s swimming and diving program, which the trial court denied; the trial court granted the defendants’ motion to dismiss the plaintiffs’ complaint regarding financial assistance to athletes and the allocation of athletic benefits but denied that motion regarding plaintiffs’ claim of unequal participation opportunities, although his claim survives against only the University

litigation of effective-accommodation issues under Title IX after nearly fifty years underscores the need to investigate why institutions still fail to meet the athletic interests and abilities of their female undergraduates. That task is the business of Part III, which follows.

III. STILL SEEKING EQUAL OPPORTUNITY: CONTINUING PROBLEMS IN ENFORCING TITLE IX

A. Failure to Enforce Substantial Proportionality

College women still have fewer athletic opportunities than they are entitled to under the substantial-proportionality standard.²²⁵ Although women are now forty-four percent of the athletes—a clear improvement over 1972-73 (fifteen percent)—they are also fifty-six percent of the undergraduates at NCAA-member institutions; hence, they are still shortchanged regarding athletic opportunities.²²⁶

Perhaps the easiest way to grasp how women are shortchanged in college athletics is to consider how “proportionality math” works at the level of the individual institution. Assume that the institution is a small liberal arts college with 1,485 students—734 men and 751 women—making the women 50.6

and its Board of Trustees, not against individual defendants); *Berndsen v. N.D. Univ. Sys.*, 7 F.4th 782 (8th Cir. 2021) (arising from defendants’ elimination of the women’s ice hockey team in 2017; the trial court granted the defendants’ motion to dismiss, 395 F. Supp. 3d 1194 (D.N.D. 2019), and the plaintiffs appealed to the Eighth Circuit, which reversed and remanded the case to the trial court); *Niblock v. Univ. of Ky.*, 2020 WL 7028707 (E.D.KY.) (a class action seeking to require the University to increase varsity athletic opportunities for women students, provide them with all corresponding benefits of varsity status, increase athletic scholarships for women, and award monetary damages to the named plaintiff, who has graduated; defendants’ motion to dismiss was granted on 11/30/20 as to two of named plaintiff’s equal-protection claims, but denied as to her Title IX claims); *Portz v. St. Cloud State University*, 16 F.4th 577 (8th Cir. 2021) (after a bench trial, the trial court ordered the University to improve athletic opportunities for women and its treatment of women athletes, 401 F. Supp. 3d 834 (D. Minn. 2019). The University appealed to the Eighth Circuit, which affirmed in part and reversed in part and remanded, agreeing with the trial court that the University did not provide equal participation opportunities, but reversing the trial court’s conclusion that the plaintiffs did not receive equal treatment and benefits). Two other recent Title IX suits against universities by women athletes, *Keasing v. Bd. of Trustees of Stanford Univ.* and *Ohlensehlen v. Univ. of Iowa*, were settled in 2021. See Chris Burt, *5 Student-Athletes, Stanford Reach Settlement Over Title IX Lawsuit*, UNIVERSITY BUSINESS (Aug. 27, 2021), <http://universitybusiness.com/5-student-athletes-stanford-reach-settlement-over-title-ix-lawsuit/>; Chloe Peterson, *University of Iowa, Women’s Swimmers Reach Settlement in Title IX Lawsuit*, DAILY IOWAN (Oct. 7, 2021), [dailyiowan.com/2021/10/07/university-of-iowa-women-s-swimmers-reach-settlement-in-title-ix-lawsuit/](https://www.dailyiowan.com/2021/10/07/university-of-iowa-women-s-swimmers-reach-settlement-in-title-ix-lawsuit/).

225. See Donna Lopiano, *Gender Equity in Sports: It’s Not What You Think—2019 Quick Primer* 13 (on file with the author).

226. *Id.*

percent of the student body and the men 49.4 percent.²²⁷ But women are only 44.4 percent of the athletes (272 total), whereas men are 55.6 percent of the athletes (340 total), meaning that a gap of 6.2 percent separates the percentages of women athletes and women undergraduates, respectively.²²⁸ To determine whether that gap signals a Title IX violation, assume that the 340 male-athlete total equals the 49.4 percent male share of the student body, in which case the number of athletes (male and female) at the institution should be 688 (340 divided by .494). Then subtract from 688 the number of athletic-participation opportunities actually provided (340+272=612); the difference between the 688 slots that Title IX requires and the 612 actually provided is seventy-six, meaning that if proportionality is to be achieved, the women are entitled to seventy-six additional participation opportunities.²²⁹ Because seventy-six participation opportunities would encompass several teams, the institution will likely be required to establish one or more new women's teams, although it may also eliminate one or more men's teams, increase the roster sizes of existing women's teams, decrease the roster sizes of existing men's teams, or some combination thereof, to achieve proportionality.²³⁰

Thus, the size of the gap between the percentage of the student body and the percentage of athletes who belong to the underrepresented sex does not determine whether an institution has achieved substantial proportionality. Instead, the determinative figure is the difference between the number of participation opportunities each sex would enjoy if proportionality were achieved and the number of such opportunities the underrepresented sex actually enjoys. If that number is smaller than the size of a new team the institution does not currently offer, Title IX is satisfied, but if it is larger than the size of a new team, the unmet need must be met by one or more of the methods described above.²³¹

Institutional failure to satisfy not just the proportionality standard, but all parts of the three-part test of Title IX compliance, also exists at the athletic-conference level, as an example will show. Consider the wealthy and

227. Donna Lopiano, *Monitoring Athletics Title IX Compliance*, 2018 Association of Title IX Administrators (ATIXA) Annual Conference, Philadelphia, PA, October 10, 2018 (on file with the author).

228. *Id.*

229. *Id.*

230. Professor Deborah Brake has noted: "[A]s long as men have a disproportionately large share of the opportunities to play sports, cuts to men's teams, whether for financial reasons or in the name of moving toward gender equity, do not discriminate against men on the basis of sex." BRAKE, *supra* note 111, at 84.

231. Nancy Hogshead-Makar and Amy Poyer, Legal Memo, Title IX Athletic Department Compliance to Amy Huchthausen, Commissioner, America East Conference 3 (June 26, 2020) (on file with the author).

prestigious Atlantic Coast Conference (ACC), whose fifteen members sponsor some of the most storied athletic programs in the United States and have produced successful and much-publicized football and men's and women's basketball teams.²³² Only one member—the University of Miami—can satisfy part one of the three-part test; the remaining members all need to provide additional athletic opportunities for women to achieve substantial proportionality.²³³ No ACC-member institution can satisfy either part two or part three of the three-part test.²³⁴

Thus, the persistence of litigation seeking equitable participation opportunities for women in college sports almost fifty years after the passage of Title IX is no surprise. Despite the tremendous growth over time in the number of those opportunities, gender equity remains the exception, not the rule, in college sports.²³⁵

B. The Use of Title IX as a Scapegoat for Financial Mismanagement

Some institutions seek to deflect criticism for their failure to comply with Title IX by blaming the statute for the deficits in their athletic budgets instead of facing their own profligate spending on football and men's basketball. A 2017 report by the NCAA notes that in 2015-16, the sixty-five institutions that belong to the Football Bowl Subdivision (FBS)—the most athletically ambitious component of college football—spent an average of eighty percent of

232. The members of the Atlantic Coast Conference are Boston College, Clemson University, Duke University, Florida State University, Georgia Tech, North Carolina State University, Syracuse University, The University of Louisville, The University of Miami, The University of North Carolina at Chapel Hill, The University of Notre Dame, The University of Pittsburgh, The University of Virginia, Virginia Tech, and Wake Forest University. *See generally* ATLANTIC COAST CONFERENCE 2019-2020 ANNUAL REPORT.

233. Memorandum from Nancy Hogshead-Makar & Amy Poyer, Title IX Athletic Department Compliance to John Swofford, Commissioner, Atlantic Coast Conference 3 (June 5, 2020).

234. *Id.* at 5.

235. STAUROWSKY ET AL., *supra* note 9, at 65; *see* Alan Blinder, Jere' Longman & Gillian R. Brassil, *Women's Basketball Is a Renewed Flashpoint for an Embattled N.C.A.A.*, N.Y. TIMES (April 4, 2021), <https://www.nytimes.com/2021/04/04/sports/ncaabasketball/womensbasketball-ncaa-tournament.html>. The 2021 NCAA Women's Basketball Tournament underscored the continuing gender inequity in college sports when a female basketball player posted online photographs of the dramatically unequal training facilities at the men's and women's venues. The pictures prompted the NCAA to apologize and hire a law firm to investigate the Association's conduct of championship events with respect to gender equity. The report concluded unequal treatment results from the NCAA's organizational structure, media contracts, and revenue-distribution model, all of which prioritize men's basketball. It recommended numerous changes, including holding the men's and women's basketball tournaments together in the same city to ensure that men and women athletes have comparable championship experiences. The investigative report the NCAA requested is available at <https://ncaagenderequityreview.com>.

their men's athletic budgets on just football and basketball.²³⁶ The FBS institutions also had the largest gap of all three NCAA divisions between expenditures for men's and women's athletics, except for scholarships.²³⁷ Not surprisingly, the NCAA report found that Division III, whose members are small private colleges and smaller state universities that do not award athletic scholarships, provides the most equitable spending on men's and women's sports.²³⁸

Overspending on men's sports—notably football—is not confined to FBS institutions, either, as the now-familiar case of James Madison University (JMU) illustrates. Recall that in 2006, JMU announced plans to disband ten athletic teams, ostensibly to comply with Title IX.²³⁹

The authors of a study of the athletic cuts at JMU specified that the scapegoating of Title IX was a major factor in their choice of subject. They explained that “JMU officials represented the decision to cut programs as motivated by Title IX while selectively failing to disclose that during the same period, greater institutional resources were being devoted to the football program in preparation for playing in a more competitive conference.”²⁴⁰ The announcement of the cuts coincided with JMU's planned move to the Colonial Athletic Association, in which “the level of competition in the sport of football was going to demand an even greater financial commitment to the football program to remain competitive.”²⁴¹

Also in the works at the time of the cuts was “a new athletics performance center with locker rooms and office space for the football team,” which required “2.8 million to be drawn from institutional reserves and other nontax sources.”²⁴² Besides these factors, several others—including expansion of the football roster from 102 to 142 players and a campaign to expand and renovate the football stadium—suggested that the actions taken by JMU administrators

236. National Collegiate Athletic Association, *45 Years of Title IX: The Status of Women in Intercollegiate Athletics* 26 (2017), <https://www.ncaapublications.com/productdownloads/TitleIX-45.pdf>

237. *Id.* at 29.

238. *Id.* at 31.

239. *See* *Equity in Athletics v. U.S. Dep't of Educ.*, 504 F. Supp. 2d 88 (W.D. Va. 2007), discussed in Part II, *supra*.

240. Ellen J. Staurowsky et al., *Revisiting James Madison University: A Case Analysis of Program Restructuring Following So-Called Title IX Cuts*, 6 J. INTERCOLLEGIATE SPORT 96, 97 (2013).

241. *Id.* at 102. The authors identified JMU's conference as the Colonial Athletic Conference, but the group's official website identifies it as the Colonial Athletic Association, so this article uses the latter term. Besides JMU, the football-playing members of the Colonial Athletic Association include Albany, Delaware, Elon, Maine, New Hampshire, Rhode Island, Richmond, Stony Brook, Villanova, and William & Mary. *See* COLONIAL ATHLETIC ASSOCIATION, <http://www.caasports.com> (last visited Nov. 21, 2021).

242. Staurowsky et al., *supra* note 240, at 102.

“at the time of the cuts and in the years that followed had little to do with Title IX and far more to do with an institutional desire to compete at a very high level in a number of sports, most particularly football.”²⁴³

C. The Manipulation of Roster Sizes

The *Biediger* case discussed in Part II highlights another unsavory practice related to Title IX: the manipulation of rosters to suggest that an institution has more female varsity athletes than it does.²⁴⁴ The *New York Times* observed in 2011 that “as women have surged into a majority on campus in recent years, many institutions have resorted to subterfuge to make it look as if they are offering more spots to women.”²⁴⁵ To achieve substantial proportionality while maintaining a football team of one hundred or more men means adding between two and four sports for women, a considerable expense.²⁴⁶ To avoid that expense, in the late 1990s, many colleges instituted “roster management,” reducing the number of male participants allowed on existing men’s teams, except, usually, football and men’s basketball. Roster management increased the percentage, if not the number, of women varsity athletes in an institution’s annual EADA report and it improved institutional prospects for achieving proportionality.²⁴⁷

But roster management is susceptible to manipulation and deception. OCR’s 1996 “Clarification” states that “participation opportunities must be real, not illusory.”²⁴⁸ At Quinnipiac, though, men were cut from official rosters shortly before the first competition of the season, which is when roster sizes are set for EADA reporting purposes, then added later, when the reporting deadline had passed.²⁴⁹ Conversely, target numbers for women’s rosters were inflated, sometimes above what the budget and the coaching staff could support. Some coaches added women who would have been cut ordinarily, counted them as participants on the date of the first competition, then cut them thereafter or allowed them to stay, but denied them an “authentic athletic experience” because they were not skilled enough to compete.²⁵⁰

The manipulation of roster numbers is particularly prevalent in women’s

243. *Id.* at 111.

244. *See Biediger*, 728 F. Supp. 2d at 108.

245. Katie Thomas, *College Teams, Relying on Deception, Undermine Gender Equity*, N.Y. TIMES (Apr. 25, 2011), nytimes.com/2011/04/26/sports/26titleix.html.

246. Lopiano, *supra* note 225, Exhibit 5.

247. *Id.*

248. *See Clarification*, *supra* note 68, at 3.

249. BRAKE, *supra* note 111, at 125.

250. *Id.*

rowing, a sport Quinnipiac did not sponsor. Rosters of “between 60 and 100 participants [with] half the team rowing in novice boats (first-year rowers, the equivalent of a freshman team)” are commonplace.²⁵¹ The other half of the team—experienced rowers—competes in four- and eight-person boats in varsity competition. The novices, and sometimes the lightweight crews too, only row on an exhibition basis, not in regular competition that counts for team standings.²⁵² But the sponsoring institutions can report ostensibly high female participation numbers for EADA purposes.

To make matters worse, EADA promotes roster manipulation in two ways. First, it counts team members for reporting purposes “as of the day of the first scheduled contest for the team,” which encourages coaches to begin the season with an inflated roster, then reduce its size dramatically after the reporting deadline passes or to retain athletes who will not have a chance to compete.²⁵³ Second, the instructions for EADA data collection published by the Department of Education permit institutions to count as women athletes for reporting purposes “male practice players” who practice regularly with women’s teams, most often in basketball and soccer.²⁵⁴ Besides violating the letter and the spirit of Title IX, roster manipulation—enabled by EADA rules—sends a cynical message to college students that phony posturing—not good-faith compliance—is the proper response to a federal civil-rights law.

D. Coaches’ Ignorance About Title IX

Closely related to institutional noncompliance with Title IX is coaches’ ignorance about its requirements. Using data gathered in 2009 and 2010, a social-science study of “Title IX literacy” asked nearly 1,100 college and university coaches five questions designed to measure their basic knowledge of Title IX.²⁵⁵ The questions concerned: the three-part test, whether Title IX is a quota system, whether Title IX governs money generated by sports boosters, how substantial proportionality is calculated, and whether—to satisfy Title IX—“the percent of scholarship assistance offered to female athletes should be

251. GURNEY ET AL., *supra* note 12, at 161.

252. *Id.*

253. 20 U.S.C. § 1092(g)(1)(B)(i).

254. Department of Education, Office of Postsecondary Education, *User’s Guide for the Equity in Athletics Act Web-Based Data Collection* 28 (2020) (on file with the author). For example, in the pending Title IX suit against the University of Iowa, the trial court noted that in 2018-19, the University reported 409 female athletes for EADA purposes, fifteen of whom were male practice players, “ten in women’s basketball, four in women’s soccer, and one in women’s volleyball.” *Ohlensehlen v. Univ. of Iowa*, 509 F.Supp. 3d 1085 (S.D.Iowa 2020).

255. Ellen J. Staurowsky & Erianne A. Weight, *Title IX Literacy: What Coaches Don’t Know and Need to Find Out*, 4 J. INTERCOLLEGIATE SPORT 190 (2011).

within one percent of their representation within the athlete population.”²⁵⁶ The majority of the respondents answered fewer than fifty percent of the questions correctly, leading the authors to conclude that had they been graded using a traditional scale, “most coaches would receive an F on basic Title IX literacy.”²⁵⁷ A subsequent question asked: “Does your institution have a designated Title IX coordinator?” Just over a third of the respondents (31.4 percent) answered “Yes,” but 42.8 percent indicated that they were “not sure.”²⁵⁸

Despite such evident ignorance of Title IX and its implications for their work, nearly seventy-nine percent of the coaches surveyed responded affirmatively to the question whether they believed their respective institutions complied with Title IX.²⁵⁹ This incongruity prompted the study’s authors to ask: On what basis would they be able to make such a determination? Perhaps the absence of a lawsuit? The word of an administrator? And given this information vacuum, how are athletes being educated about Title IX?”²⁶⁰

E. Admissions Preferences for Athletes at Selective Colleges and Universities

Although men and women are still often treated differently in college sports, in admissions to selective institutions, athletes of both genders enjoy a significant advantage over other applicants. William Bowen and Sarah Levin observed in 2003: “[T]here are so many talented young people who want to attend the leading colleges and universities, including many who present exceptional qualifications outside of athletics that don’t translate into anything like the same advantage in the admissions process.”²⁶¹

Title IX contributes to this advantage because, as Bowen and Levin noted, “a school that formerly had, say, 300 (male) athletes playing intercollegiate sports now needs 600 (male and female) athletes, assuming that the proportions of men and women in the student body are roughly equal.”²⁶² But the increasing intensity of college athletics and athletic recruiting are also responsible, along with the increased specialization of athletes that now starts at an early age.²⁶³ Increased specialization means fewer multi-sport athletes, which, in turn, means

256. *Id.* at 198—99.

257. *Id.* at 198.

258. *Id.* at 198, 200.

259. *Id.* at 198.

260. *Id.* at 203.

261. WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND AMERICAN VALUES 11 (2003).

262. *Id.* at 215.

263. *Id.* at 200.

institutions must recruit more athletes than they otherwise would, augmenting the admissions preference for athletes.²⁶⁴

The preference continues today, according to a recent examination of the college-admissions process.²⁶⁵ Author Jeffrey Selingo writes: “When it comes to getting into a selective school, you’re much better off taking up water polo, fencing, rowing, or some other niche sport than playing the tuba in the band or the lead in the school musical.”²⁶⁶ That is because, in Selingo’s words, “[m]ost schools have many more athletic teams than orchestras or debate teams.”²⁶⁷ Rick Singer, who engineered the “Operation Varsity Blues” scam in 2019, whereby wealthy parents paid him to find their children a “side door” into a prestigious college, found that entrance in coaches’ need to fill their rosters in less visible sports, such as fencing, field hockey, and water polo. He paid several coaches to designate those children as recruited athletes, knowing that designation would ease their paths to admission.²⁶⁸ The parents of one Yale applicant “paid \$1.2 million to have her designated as a star soccer recruit” even though she did not play soccer.²⁶⁹ And the parents of an applicant to the University of Southern California “paid \$200,000 and photoshopped their daughter rowing” to improve her chances of admission.²⁷⁰

Besides a vulnerability to fraud, this admission preference for athletes has two major implications. First, Jeffrey Selingo notes that “[o]n campuses where the competition to get in is stiff and seats fairly limited, admissions *is* often turned into a zero-sum game because of athletics.”²⁷¹ [emphasis in original]. The athlete gets in and the poet, artist, or budding inventor does not. Second, because rowers, skiers, and golfers are overwhelmingly white, the athletic preference at selective colleges makes the task of attracting a diverse student body more challenging than it would otherwise be.²⁷² A prime challenge for the future, then, will be to ensure equal opportunity for male and female athletes while improving the admissions chances of talented nonathlete applicants. Part IV, which follows, will suggest remedies for this problem and for the others

264. *Id.* at 105. Political Scientist R. Shep Melnick argues that because of the substantial-proportionality standard and institutional reluctance to cut men’s teams to achieve proportionality, institutions have had to increase the number of women’s teams, with the result that “intercollegiate sports are very expensive both in terms of dollars and, at selective schools, in terms of admissions slots.” Melnick, *supra* note 16, at 12.

265. *See generally* SELINGO, *supra* note 16.

266. *Id.* at 149.

267. *Id.*

268. *Id.* at 146—147.

269. *Id.* at 187.

270. *Id.*

271. *Id.* at 199.

272. *Id.* at 190.

discussed previously.

IV. ACHIEVING EQUITY: PROPOSALS FOR REFORM

If colleges and universities are to achieve gender equity in sports under Title IX, four sets of actors will need to make changes: the institutions themselves; the NCAA; the federal Department of Education (including OCR and the Office of Postsecondary Education); and the United States Congress. The suggested changes are as follows:

A. Institutions

Institutions should accept, and attempt to comply with, the three-part test announced in the 1979 Policy Interpretation instead of trying to change it or evade it through roster manipulation. Specifically, they should seek to comply with part one, which is the most viable choice for Title IX compliance because it is clear, measurable, and attainable.²⁷³ Journalist Welch Suggs has observed, regarding gender equity in college sports, that thus far, “nobody has come up with a better means of allowing colleges to define ‘equitable’ for themselves than the three-part test.”²⁷⁴ And “equitable” likely has a different meaning when in 2010 women are fifty-seven percent of American undergraduates, than it had in 1972, when fifty-seven percent of undergraduates were male.²⁷⁵

Justice lies in a recognition that when women are most of the undergraduates in American colleges and universities, they should be most of the athletes too. After all, when men were most of the undergraduates, they were most of the athletes; just as athletic programs reflected the demographics of the student body in 1972, they should do so in 2021. For that reason, recent proposals to exclude “walk-on” athletes and the top revenue-producing team at each institution, respectively, from the proportionality calculation miss the mark.²⁷⁶

The former would revive a proposal of Secretary Paige’s Commission on

273. In contrast, part two is problematic because, after fifty years, few, if any, institutions can show a *continuing* practice of expanding athletic opportunities for women, without any backsliding. [Emphasis added]. Similarly, few, if any, institutions can satisfy part three by showing that no unmet athletic interest among women students exists on campus, the women who might be interested in a new sport lack the ability to sustain a viable team, and they lack reasonable competition against whom they could play. Thus, part one is the most viable option for Title IX compliance. GURNEY ET AL., *supra* note 12, at 151–52.

274. SUGGS, *supra* note 67, at 191.

275. Melnick, *supra* note 16, at 2.

276. Abigail H. Mabry, Note, *Title IX, Proportionality, and Walk-Ons*, 44 U. MEM. L. REV. 497, 499 (2013); Courtney Tibbetts, Note, *The FEMALE Act: Bringing Title IX into the Twenty-First Century*, 22 VAND. J. ENT. & TECH. L. 697, 709 (2020).

Opportunity in Athletics, which died on the vine. It would exclude walk-on athletes from the count of male and female athletes for determining substantial proportionality. According to one proponent, “[n]ot only would this [exclusion] eliminate artificial caps on the number of walk-ons allowed on a team, but it would alter the male-to-female-athlete ratio in a way that allows athletic programs to achieve Title IX compliance.”²⁷⁷ The latter proposal would exhumate the Tower Amendment, which Congress rejected in 1974.²⁷⁸ The proposal would remove the top revenue-producing sport at each institution from the proportionality calculation.²⁷⁹ A proponent suggests that its adoption would reduce the tendency to inflate women’s rosters and to cut men’s nonrevenue teams.²⁸⁰ Because both proposals depend on disregarding current campus demographics, though, the ideas they seek to resurrect should remain interred.

A recent suggestion that the 1979 Policy Interpretation and subsequent “Clarifications” issued by OCR “have transformed Title IX from a mandate of equal opportunity into a mandate for equal outcomes in the context of interscholastic and intercollegiate athletics” also discounts demographics.²⁸¹ Because athletics are segregated by sex, assessing the equality of opportunity by comparing the numbers of male and female athletes to the numbers of male and female undergraduates is appropriate. A less precise measure would permit institutions to view “equal opportunity” as merely providing teams for men and women, regardless of vast differences between them in funding and other support. Title IX demands fairness, and such differences would be fundamentally unfair.

Ironically, the coronavirus may aid the cause of Title IX compliance in the years ahead if institutions that eliminated teams in 2020 carefully consider gender equity when deciding whether to revive those teams. Between March and October of 2020, seventy-eight colleges and universities, across all three NCAA divisions and including nonmembers of the NCAA too, eliminated three hundred teams in the wake of the virus.²⁸² Despite the frustration and disappointment involved, these cuts could have a silver lining if any reinstatement favors women’s teams at institutions where women are currently underrepresented in sports. One result could be that substantial proportionality

277. Mabry, *supra* note 276, at 521.

278. Tibbetts, *supra* note 276 at 701.

279. *Id.* at 699-700.

280. *Id.* at 721.

281. BUSCH & THRO, *supra* note 29, at 39.

282. Molly Ott & Janet Lawrence, *Colleges are Eliminating Sports Teams – and Runners and Golfers are Paying More of a Price Than Football or Basketball Players*, THE CONVERSATION (Mar. 3, 2021), the [conversation.com/colleges-are-eliminating-sports-teams-and-runners-and-golfers-are-paying-more-of-a-price-than-football-or-basketball-players](https://www.conversation.com/colleges-are-eliminating-sports-teams-and-runners-and-golfers-are-paying-more-of-a-price-than-football-or-basketball-players).

is easier to achieve. Another could be that some varsity teams will transition to club teams, keeping athletic opportunities available but enabling selective institutions to reduce the number of recruited athletes and, along with it, their admissions preference. Granting the athletic admissions preference to fewer applicants or eliminating it would also signal to parents that the poet and the percussionist will have the same chance at admission to a selective institution as the placekicker and the point guard.

B. The NCAA

The NCAA could aid the cause of gender equity, particularly in Division I, by reinstituting the Certification Program that it established in 1993 but suspended in 2011. The Certification Program required Division I members to complete a self-study on gender and racial equity every ten years, identifying measurable goals and timetables for meeting them.²⁸³ When this program was in effect, “the gender-equity assessment that was part of the program was a full Title IX assessment.”²⁸⁴ Its resumption would likely motivate recalcitrant institutions to improve athletic opportunities for women.

Another motivator would be an NCAA rule stating that any member institution not compliant with Title IX would be ineligible for postseason play in all sports until compliance was achieved.²⁸⁵ Finally, the NCAA could reduce the allowable number of scholarships in FBS football from eighty-five to sixty and could limit overall squad sizes (including walk-ons) to seventy-five or eighty, thereby freeing both financial resources and participation opportunities for women’s sports.²⁸⁶ A recent study projects that “[i]f football scholarships were cut to sixty, the average college would probably save close to \$1.5 million annually—easily enough to finance an average-size FBS soccer team plus an average-size FBS golf team, or an FBS tennis team plus [a] gymnastics team, and have several hundred thousand dollars left over.”²⁸⁷ No institution would be disadvantaged because everyone would have to abide by the same limits.

C. Department of Education

Within the DOE, OCR should do more to promote gender equity in sports,

283. GURNEY ET AL., *supra* note 12, at 43-44.

284. *Id.* at 148.

285. *Id.* at 41.

286. Andrew Zimbalist, *What to Do About Title IX*, in *EQUAL PLAY: TITLE IX AND SOCIAL CHANGE* 239 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007).

287. GURNEY ET AL., *supra* note 12, at 219. After all, National Football League (NFL) teams play a regular season that is several games longer than the FBS college season with maximum active rosters of forty-five players, plus a maximum of sixteen reserve and practice players.

specifically, more aggressive enforcement of the three-part test. Such increased enforcement is likely now that the Democratic Biden administration has replaced the Republican Trump administration. Historically, a notable difference exists between Democratic and Republican leadership at OCR: Republicans view the resolution of individual complaints as the agency's main purpose, whereas Democrats view the investigation of such complaints as a starting point for more comprehensive reforms.²⁸⁸

For the Biden administration, a part of being more comprehensive would be to improve OCR's monitoring of institutions to make sure they each designate an employee to serve as Title IX coordinator, identify that person to the campus community, and make the coordinator's contact information easy to find.²⁸⁹ The coordinators are the "ground troops" of Title IX enforcement; they are responsible for making sure that their coworkers at individual institutions follow Title IX, and the regulations require that at least one coordinator work in every institution that receives federal funds for educational programs.²⁹⁰

A rejuvenated OCR should require coordinators to develop reporting systems at their institutions whereby the following information is publicly disclosed in literature and on the institution's website: (1) which part of the three-part test it is using to comply; (2) information about the institution's history and continuing practice of program expansion in athletics; and (3) the methods it is using to meet the needs of qualified female athletes.²⁹¹ Regarding number three, OCR should establish a rebuttable presumption that if a certain percentage of institutions within a conference offer a particular sport, then every institution in that conference can sustain a viable team in that sport. OCR should also establish a companion presumption that if a certain percentage of the high schools from which a particular institution draws most of its students offer a certain sport, then the subject institution can sustain a viable team in that sport.²⁹² These presumptions could nudge institutions to become proactive in adding women's teams.

Coordinators should establish and implement policies designed to protect student whistleblowers from reprisal.²⁹³ They should also conduct annual

288. MELNICK, *supra* note 6, at 100.

289. STAUROWSKY ET AL., *Chasing Equity*, *supra* note 9, at 68.

290. Sandra Guy, *Title IX at 45*, SOCIETY FOR WOMEN ENGINEERS (SWE) MAGAZINE (Mar. 20, 2017), <https://alltogether.swe.org/2017/03/title-ix-45/>. The regulatory requirement of a Title IX coordinator at every institution that receives federal funds is located at 34 C.F.R. § 106.8(a).

291. STAUROWSKY ET AL., *Chasing Equity*, *supra* note 9, at 68. The latter could include identifying conference members that offer a sport not offered by one's own institution and determining the most popular sports in high schools from which one's institution customarily draws students.

292. I am indebted to Professor Erin Buzuvis for suggesting these presumptions. Letter from Erin Buzuvis, Assoc. Dean for Acad. Aff., W.N.E. Sch. of L. (Jan. 17, 2021).

293. *See id.*

informational sessions for coaches and athletes regarding Title IX's application to athletics. OCR should support the coordinators' work by joining with the NCAA and the Association of Title IX Administrators (ATIXA) to offer periodic, mandatory training sessions for the coordinators themselves and separate sessions for coaches and athletic administrators.²⁹⁴ No excuse exists for a lack of "Title IX literacy" in either group.²⁹⁵ Those changes, along with a return to the assertive enforcement of years past, would nudge institutions to comply voluntarily instead of continuing past practices until a complaint is filed.²⁹⁶

Another DOE component, the Office for Postsecondary Education, should change its method of counting participants for EADA purposes; instead of tallying the athletes present on the first competition date, it should substitute the Title IX counting rules included in the Policy Interpretation. Those rules define "participants" as athletes who are (a) receiving institutional support (e.g., coaching, equipment, medical and training room services) regularly during the competitive season; (b) participating regularly in practice sessions and other team meetings and activities during the season; (c) listed on the eligibility or squad lists the institution maintains for each sport; *or* (d) because of injury, cannot meet a, b, or c but still receive athletic scholarships.²⁹⁷ The same office should cease counting male practice players as "women athletes" for EADA reporting purposes. Instead, male practice players should count as men as long as they receive the institutional support normally provided to varsity athletes, such as coaching, equipment, and medical and training-room services, regularly during the competitive season. Otherwise, they should not be counted for EADA purposes.

D. Congress

Congress could aid Title IX enforcement by funding OCR adequately and by granting the NCAA a limited antitrust exemption. During the Obama administration, although OCR's workload expanded dramatically, to more than 16,000 complaints in 2016, compared to less than half that number in 2009, staffing remained at 1980s levels because Congress withheld the funds necessary to hire additional staff. The invigorated enforcement and monitoring advocated here—including proactive compliance reviews of institutions and

294. Charlotte Franklin, *Title IX Administers a Booster Shot: The Effect of Private Donations on Title IX*, 16 NW. J. L. & SOC. POL'Y 145, 162 (2021).

295. Staurowsky & Weight, *supra* note 255, at 198.

296. Regarding the latter tendency by institutions, see Erin E. Buzuvis, *Title IX in U.S. College Sports*, in OXFORD HANDBOOK OF AM. SPORTS L. 404 (Michael A. McCann ed., 2018).

297. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 239, 71415 (Jan. 16, 1996). See also *Clarification*, *supra* note 68, at 6.

technical assistance and guidance to Title IX coordinators—will require that Congress provide OCR with the funds necessary to do its job.²⁹⁸

Congress should also grant the NCAA an exemption from the antitrust laws, in exchange for which, according to Professor Erin Buzuvis, “Congress could require the NCAA to limit athletic spending, reducing the pressure to win at any cost and making fair spending on women’s sports more likely.”²⁹⁹ The exemption would enable the NCAA to avoid or at least to defend itself successfully in lawsuits challenging [potential] rules that pursue educational ends but have commercial consequences, such as capping coaches’ salaries or reducing the lengths of competitive seasons. Such rules could free up additional funds for women’s sports.³⁰⁰ Only Congress can spur the NCAA to make these changes because only Congress can protect the NCAA from the antitrust consequences of doing so.

CONCLUSION

Title IX is both a colossal achievement and a missed opportunity. The achievement is the access to athletic competition that two generations of America’s daughters have enjoyed. Regarding the missed opportunity, William Bowen and Sarah Levin have observed, “Since [Title IX] mandated that colleges and universities offer to women whatever athletic opportunities they provided to men, it could have served as a signal to colleges and universities (and to the NCAA) that it was time to recalibrate the entire athletics enterprise so that it would be more congruent with educational goals.”³⁰¹ The coronavirus pandemic may necessitate the recalibration.³⁰² It has triggered a massive purge of college teams, and resurrecting them could be financially prohibitive. Thus, institutions should favor restoring women’s teams to achieve substantial proportionality. Small, selective schools should use the reduced need for athletes to limit, if not eliminate, admissions preferences for recruits.³⁰³ If institutions, the NCAA,

298. MAATZ ET AL., *supra* note 31, at 10.

299. Buzuvis, *supra* note 296, at 406.

300. BRIAN L. PORTO, THE SUPREME COURT AND THE NCAA: THE CASE FOR LESS COMMERCIALISM AND MORE DUE PROCESS IN COLLEGE SPORTS 190 (2012).

301. BOWEN & LEVIN, *supra* note 261, at 214.

302. Bowen and Levin were not alone in arguing that Title IX could be a valuable device for reforming college sports. See, e.g., BRIAN L. PORTO, A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS (2003) and Brian L. Porto, *Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. SPORT L. 351 (1998).

303. Not all small institutions are selective, and less selective ones are unlikely to cut men’s sports, even to achieve substantial proportionality, because they often rely on athletes—especially male athletes—to reach their enrollment targets and ensure a reasonable number of male undergraduates. At these institutions, though, the admission of an athlete is less likely to foreclose the admission of a more

DOE, and Congress do their parts for gender equity, as suggested here, Title IX's supporters will have much to celebrate in 2022, the statute's fiftieth-anniversary year.

academically talented nonathlete than it would be at a small, selective institution. *See* SELINGO, *supra* note 16, at 158.