Marquette Sports Law Review

Volume 33
Issue 1 *Fall*

Article 6

2022

Title IX's "Substantial Proportionality" Test: Old Challenges and New Debates in Assessing Whether a School Provides Equal Opportunity to Participate In Athletics

Wyatt Honse

Jayma Meyer

TITLE IX'S "SUBSTANTIAL PROPORTIONALITY" TEST: OLD CHALLENGES AND NEW DEBATES IN ASSESSING WHETHER A SCHOOL PROVIDES EQUAL OPPORTUNITY TO PARTICIPATE IN ATHLETICS

WYATT HONSE* & JAYMA MEYER**±

TABLE OF CONTENTS

INTRODUCTION 84
I. SEISMIC CHANGES IN COLLEGIATE SPORTS REQUIRE RENEWED FOCUS ON TITLE IX'S PROMISE OF EQUAL OPPORTUNITIES 86
A. *Antitrust judgments have changed the budgetary landscape resulting in increased risks that schools will not satisfy Title IX's substantial proportionality standard* 88
B. *Pending antitrust and labor law challenges could further increase the likelihood further that schools will make decisions that do not satisfy Title IX's substantial proportionality standard* 91
II. ORIGINS AND DEVELOPMENT OF TITLE IX'S "SUBSTANTIAL PROPORTIONALITY" STANDARD 94
A. *Passage of Title IX and early debates over its scope* 95
B. *The 1975 Regulations* 96
C. *The 1979 Policy Interpretation* 98
D. *The 1996 Clarification* 100

* Law Clerk, U.S. District Court for the Western District of Wisconsin.

** Counsel, Simpson Thacher & Bartlett LLP; Visiting Clinical Professor of Sports Law and Public Policy, O'Neill SPEA, Indiana University.

± We would like to thank Elizabeth Kristen, Director of the Gender Equity & LGBT Rights Program and Fair Play for Girls in Sports project at Legal Aid at Work, and David Balme, associate at Simpson Thacher & Bartlett LLP, for their helpful assistance in viewing early drafts of this article.

III. COMPLYING WITH THE SUBSTANTIAL PROPORTIONALITY STANDARD 101
A. Step 1: Determine the number of participation opportunities provided for each sex 101
1. The legal standard—what is a "participation opportunity"? 101
2. Problems with compliance—"*hiding the ball*" and "*fudging the numbers*." 103
B. Step 2: Evaluate whether the number of participation opportunities provided for each sex is substantially proportionate to their enrollment 108
1. The legal standard—when are athletic participation opportunities "substantially proportionate"? 108
2. Two issues applying the substantial proportionality standard 114
a. Issue 1: What role do percentages play in the prong one analysis, and is there a statistical "safe harbor" within which a school categorically satisfies Prong One? 114
b. Issue 2: When deciding whether a school's participation gap is large enough to sustain a "viable team," what should courts use as their frame of reference? 120
3. A framework to address the "percentage gap" and "average team size" issues 122
CONCLUSION 129

INTRODUCTION

It is with great joy that we celebrated Title IX's fiftieth anniversary on June 23, 2022.[1] The law, which prohibits sex discrimination in educational programs and activities that receive federal funding, has transformed American society and changed the lives of millions of girls and women. Senator Birch Bayh, who authored Title IX, guided its passage through Congress and defended it from repeated attacks, observed that discrimination in education is a double whammy because it leads to discrimination in a woman's personal and professional lives.[2]

1. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2022).

2. ROBERT BLAEMIRE, BIRCH BAYH: MAKING A DIFFERENCE 209 (2019).

While Title IX has led to a revolutionary change in a wide array of educational opportunities for girls and women—from eliminating bans on women in higher education to prohibiting boys-only science and math classes in high schools—the law's application to sports has drawn the most attention in the public consciousness, courts of law, and halls of Congress. Ever since Title IX was passed as part of an omnibus education funding act and it became apparent that its non-discrimination mandate applied to sports, there have been organized efforts to undermine it. These efforts began immediately after Title IX's passage, with Congress considering an amendment to exclude sports from the law's reach and, when that failed, to exclude revenue-producing sports like football and men's basketball from any assessment of gender equity.[3] While these efforts were not successful, Title IX has remained under attack ever since. And, ever since the early attacks on Title IX,[4] schools have continued to resist accountability. Far too many schools make financial decisions that are not based on gender equity, and courts have not thoroughly analyzed those budgetary decisions.

With that contentious past as our precedent, this article looks forward, discussing problems that are likely to be Title IX battlegrounds of the future. In particular, we focus on issues relating to the law's bedrock principle that schools provide students with an equal opportunity to participate in athletics regardless of their sex. In Part I, we discuss the seismic shift in intercollegiate athletics currently underway as a result of antitrust and labor law challenges to amateurism in college sports.[5] Funding decisions caused by these changes will lead to (and indeed already are causing) a new wave of legal challenges to long-established principles for measuring equality of athletic opportunity at schools. In Part II, we review the history and development of Title IX's equal opportunity requirement, focusing specifically on the law's frequently litigated provision: the "substantial proportionality" standard known as Prong One. After reviewing that history, in Part III, we discuss issues that have arisen in recent Title IX litigation relating to the substantial proportionality standard, including in

3. *E.g.*, On May 20, 1974, Senator John Tower proposed an amendment to exempt "revenue producing" sports from Title IX. NANCY HOGSHEAD-MAKAR & ANDREW ZIMBALIST, EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 50 (2007). *See also* Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 19 (2003); *History of Title IX*, WOMEN'S SPORTS FOUND. (Aug. 13, 2019), https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/; *infra* Part II.A.

4. *See, e.g.*, NCAA v. Califano, 444 F. Supp. 425, 428-29 (D. Kan. 1978); Grove City v. Bell, 465 U.S. 555, 579 (1984); Deborah Price, The Secretary's of Education's Commission on Opportunity in Athletics, *"Open to All": Title IX at 30 (archived)*, U.S. DEP'T OF EDUC. 15-16 (2003), https://www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf.

5. *See* NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring) (stating that commercialization of intercollegiate sports presents "difficult [Title IX] policy and practical problems.").

Michigan State University v. Balow, where on December 12, 2022, the Supreme Court denied Michigan State University's (MSU) petition for a writ of certiorari on the question of whether in determining compliance with the substantial proportionality rule, the gap between male and female athletes must be measured in raw numerical terms or, instead, may be assessed as a percentage figure.[6] We then discuss a framework for analyzing substantial proportionality that addresses the issues that have arisen in litigation, is faithful to the spirit and text of Title IX and aimed at ensuring a robust legal analysis.

I. SEISMIC CHANGES IN COLLEGIATE SPORTS REQUIRE RENEWED FOCUS ON TITLE IX'S PROMISE OF EQUAL OPPORTUNITIES

Despite the extraordinary gains in women's sports in the fifty years since Title IX was enacted, schools still fail to comply with the law. Title IX's promise of gender equity remains unfulfilled. A comprehensive data analysis and report by *USA Today* found that eighty-seven percent of NCAA Division I Football Bowl Subdivision (FBS) schools were not offering athletic opportunities to women proportionate to their enrollments during the 2020-21 academic year.[7] Indeed, in 2020, Division I women athletes accounted for only forty-seven percent of athletes, despite the fact that women's share of enrollment at Division I schools was fifty-four percent, a gap of seven percent.[8] In Divisions II and III the numbers are worse, with gaps of fifteen and sixteen percent, respectively.[9]

Throughout much of Title IX's history, schools have used budget constraints as a reason to undermine women's athletics programs. Historically, when schools shape their athletic department budgets, they often marginalize women's sports programs by reducing the size of their rosters or eliminating

6. Balow v. Mich. State Univ., 24 F.4th 1051 (6th Cir.), *reh'g denied*, No. 21-1183, 2022 WL 1072866 (6th Cir.), *cert. denied*, No. 22-93, 2022 WL 17573475 (U.S. Dec. 12, 2022).

7. Rachel Axon & Lindsay Schnell, *Title IX: Falling Short at 50*, USA TODAY (June 3, 2022, 5:31 AM), https://www.usatoday.com/in-depth/news/investigations/2022/06/03/title-ix-failures-50-years-colleges-women-lack-representation/9664260002; *see generally* GERRY GURNEY ET AL., UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT 151-69 (2017).

8. Amy Wilson, Managing Dir., Off. of Inclusion, *Title IX 50th Anniversary: The State of Women in College Sports*, NCAA 9, 13 (2022), https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022_State_of_Women_in_College_Sports_Report.pdf. The gaps in high school are similarly troubling. Elizabeth Tang et al., *Title IX at 50*, NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., 33 (2022), https://nwlc.org/wp-content/uploads/2022/06/NCWGE-Title-IX-At-50-6.2.22-vF.pdf. Although high school girls represent nearly fifty percent of high school students, they are afforded only about forty-three percent of the athletic opportunities. Ellen Staurowsky et al., *50 Years of Title IX: We're Not Done Yet*, WOMEN'S SPORTS FOUND. 8 (May 2022), https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/13_Low-Res_Title-IX-50-Report.pdf. Girls of color have even less access to athletics. *Id*. at 52-55.

9. Wilson, *supra* note 8.

women's teams altogether.[10] Schools, also, as noted in the USA Today report, engage in widespread manipulation of rosters by hiding the ball and fudging the numbers in order to make it appear that they are in compliance with Title IX.[11]

As a result, it is no surprise that a frequently litigated issue in Title IX athletics is the failure by schools to provide female athletes with equal opportunities to participate. More specifically, when schools cut women's teams, Title IX's requirement that participation opportunities be substantially proportional to the schools' enrollment is tested in litigation.[12]

Most recently, the COVID-19 pandemic, which resulted in higher spending to protect athletes' health, on the one hand, and lower revenue due to lost ticket sales and reduced fees from media rights, on the other hand, highlights what schools do when faced with budgetary constraints.[13] Schools cut women's

10. *See id.* at 13. At the same time, schools were making budgetary decisions that particularly favor men's revenue producing teams such as spending much more on recruiting for those teams than for women's teams, paying excessively high, multi-million-dollar contracts to their coaches and building lavish football-only facilities that contain features such as barbershops, lazy rivers, lockers with individual televisions, and sleep pods.

11. Kenny Jacoby et al., *Title IX: Falling Short at 50, Title IX Was Intended to Close the Gender Gap in College Athletics. But Schools Are Rigging the Numbers*, USA TODAY (May 26, 2022, 4:04 AM), https://www.usatoday.com/in-depth/news/investigations/2022/05/26/college-sports-title-ix-and-dark-illusion-gender-equity/7438716001/ (documenting that schools skirt Title IX by manipulating the numbers of women that participate in their athletic programs, including padding their rosters with women who will never have a chance to meaningfully practice or compete in sports like rowing, double and triple counting female athletes who participate in indoor and outdoor track and field and cross country, and counting male practice players as female participants); *see also infra* Part II.A.2. One might consider this to be litigation risk management as opposed to gender equity management.

12. *See infra* Part III. The Title IX standards discussed here apply equally to high schools (and to middle and grade schools if they have interscholastic sports). *See* Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 855 (9th Cir. 2014); *see also* McCormick *ex rel.* McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 300 (2d Cir. 2004) (applying the three-part test to high school districts); Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 272-75 (6th Cir. 1994) (applying the three-part test to high school districts).

13. During the COVID-19 pandemic when most high schools suspended sports for their students, schools could have used that time to assess Title IX compliance and remedy inequities before restarting sports for students. *See Informational Hearing: Safe and Equitable Reopening of Sports before Cal. Assemb. Comm. on Arts, Ent., Sports, Tourism, and Internet Media* (Cal. 2021) (prepared testimony of Elizabeth Kristen and Kim Turner on behalf of Legal Aid at Work Fair Play for Girls in Sports), https://legalaidatwork.org/wp-content/uploads/2021/03/Final-Sports-Reopening-Hearing-3-17-21-Testimony.pdf. However, high school sports programs appear to have restarted maintaining the same gender inequity (or worse) that they demonstrated prior to the pandemic. *See* Staurowsky et al., *supra* note 8, at 30 ("According to a survey of North Carolina High School Athletic Association (NCSHAA) athletic directors conducted by High School OT in May of 2021 examining the impact of the COVID-19 pandemic on the dropping of varsity and junior varsity teams, girls' sports have been impacted more negatively. In 2020-21, 333 girls' teams were dropped, compared to 317 boys' teams" (citing Nick Stevens, *Despite More In-Person Learning, Loosening of Restrictions, Sports Participation Still on Decline in NC*, HIGH SCH. OT (May 21, 2021, 9:52 AM), https://www.highschoolot.com/despite-more-in-person-learning-loosening-of-restrictions-sportsparticipation-still-on-decline-in-nc/19689383/)).

sports.[14] Indeed, Division I schools cut at least forty women's teams between March 2020 and February 2021.[15] During the same time period, at least nine schools entered into settlements reinstating teams after athletes threatened to sue or filed a lawsuit.[16] Also, Title IX litigation is pending against another half dozen or so schools that dropped women's sports.[17] A common cause of action in each of these cases is that the schools failed to satisfy Title IX's standard of substantial proportionality, one of the key measurements of gender equity.[18] Thus, concern about schools using budget pressures as an excuse to cut women's sports is not speculative. And, while lack of financial resources has never been a legal defense to failing to comply with Title IX, schools continue to assert it as a reason for their failure to provide gender equity.

A. Antitrust judgments have changed the budgetary landscape resulting in increased risks that schools will not satisfy Title IX's substantial proportionality standard

Recent NCAA rule changes enacted in response to antitrust litigation increase the financial choices that athletic departments face. At the most basic level, these NCAA rule changes allow athletes to receive more benefits, leaving less money for other budget line items.

---

14. *See Tracker: College Sports Programs Cut During COVID-19 Pandemic*, BUS. OF COLL. SPORTS, https://businessofcollegesports.com/tracker-college-sports-programs-cut-during-covid-19-pandemic/ (July 14, 2021) (tracking seventy-seven Division I program cuts across thirty-five institutions). *See also* Jason Bryant, *COVID-19 Era Dropped & Suspended Sports*, MAT TALK ONLINE (Apr. 7, 2020), http://almanac.mattalkonline.com/covid-19-era-dropped-sports/.

15. *Tracker: College Sports Programs Cut During Covid-19 Pandemic*, *supra* note 14.

16. Brown University, College of William & Mary, University of North Carolina at Pembroke, East Carolina University, Dartmouth College, University of St. Thomas, La Salle University, Dickinson College, Clemson University, and the University of Iowa. *Bailey Glasser Partner Arthur Bryant Named Sports Law Trailblazer*, BAILEY GLASSER LLP (Nov. 15, 2021), https://www.baileyglasser.com/news-bailey-glasser-partner-arthur-bryant-named-sports-law-trailblazer; *Dickinson College Agrees to Reinstate Women's Squash Team, Stop Discriminating Against Female Student-Athletes, and Comply With Title IX*, BAILEY GLASSER LLP (Oct. 6, 2021), https://www.baileyglasser.com/news-dickinson-college-agrees-reinstate-womens-squash-team-title-ix; Vanessa Miller, *University of Iowa Women's Wrestling Announcement Part of Title IX Lawsuit Settlement*, GAZETTE (Sept. 23, 2021, 10:14 AM), https://www.thegazette.com/higher-education/ university-of-iowa-has-reached-agreement-on-settlement-terms-in-female-athletes-title-ix-suit/. *See* Arthur Bryant & Cary Joshi, *College Sports is Headed For a Collision With Title IX*, SPORTICO (Nov. 10, 2021, 8:55 AM), https://www.sportico.com/law/analysis/2021/college-sports-nil-title-ix-1234645328/.

17. Anders v. California State Univ., Fresno, No. 1:21-cv-00179, 2021 WL 3115867, at *14 (E.D. Cal. July 22, 2021); Fisk v. Bd. of Trs. of Cal. State Univ., No. 3:22-cv-00173, 2022 WL 16577871, at *1 (S.D. Cal. Nov. 1, 2022); Balow v. Mich. State Univ., No. 1:21-cv-44, 2021 WL 4316771, at *1 (W.D. Mich. Sept. 22, 2021); Niblock v. Univ. of Ky., No. 5:19-394, 2020 WL 7028707, at *1 (E.D. Ky. Nov. 30, 2020). *See* Bryant & Joshi, *supra* note 16.

18. *Anders*, 2021 WL 3115867, at *14; *Fisk*, 2022 WL 1657787, at *1; *Balow*, 2021 WL 4316771, at *1; *Niblock*, 2020 WL 7028707, at *1.

Three rule changes in particular are at issue: (1) payments from schools to athletes in the form of cost of attendance (COA) stipends of up to $6,000 a year,[19] (2) payments from schools to athletes of up to $6,000 a year for "academic achievement" and any other benefit tethered to education such as computers, internships, or graduate school tuition,[20] and (3) payments from third parties to athletes for the monetization of their names, images, and likeness (NILs).[21] All three rules directly and indirectly intensify budgetary pressure

19. College athletes sought to enjoin NCAA rules that prevented schools from providing NIL monetization to their athletes. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 963 (N.D. Cal 2014), *aff'd in part, vacated in part*, 802 F.3d 1049, 1079 (9th Cir. 2015). While the athletes did not secure the relief they sought, the Ninth Circuit agreed that the NCAA's mantra of the necessity of unpaid amateurism in college sports was on thin ice. The case ended up not resolving the original issue relating to NIL payments and instead the court issued an injunction with a smaller step ("less restrictive alternative" in antitrust parlance). It required the NCAA to permit schools to provide athletes COA awards. Significantly, the NCAA defended in its summary judgment motion that its restrictions on providing NIL benefits were necessary, *inter alia*, because they enable athletic departments to increase their support for women's sports. The court held that Title IX's "social purpose" relating to women's sports was not a procompetitive justification under the Sherman Act in this case. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126, 1152 (N.D. Cal. 2014). But the fact that this defense failed in *O'Bannon* does not by any stretch of the imagination mean that it is not a legitimate concern—just not an antitrust concern. *See generally* Dillion J. Besser, Note, *The Forgotten Party in O'Bannon v NCAA: How Non-Revenue Sports Operate in a Changing Intercollegiate Marketplace*, 101 IOWA L. REV. 2015, 2123-24 (2016).

20. The failure by athletes to succeed fully in *O'Bannon* led to a subsequent antitrust case, *NCAA Grant-in-Aid* (coordination of *Alston v. NCAA* and five athletic conferences, and *Jenkins v. NCAA* and eleven athletic conferences), where athletes sought to eliminate the NCAA's restrictions on pay of any kind. NCAA v. Alston, 141 S. Ct. 2141, 2154 (2021). The ultimate issue of no restrictions on payments to athletes was not resolved. While the case went up to the Supreme Court, it was only on the limited issue of whether the NCAA could restrict educational benefits and academic cash awards to athletes. In a unanimous decision, the Court said that the NCAA could not limit schools from providing benefits to athletes that are legitimately tethered to education. Justice Kavanaugh, in a concurring opinion, stated that the NCAA and elite conferences cannot continue to justify not paying athletes a fair share of the billions of dollars that they generate. But he recognized that some "*difficult policy and practical questions*" included "[h]ow would any compensation regime comply with Title IX." *Id.* at 2168 (emphasis added). Further, during oral arguments, Justice Barrett raised Title IX concerns if the business model of college sports were changed. She asked the NCAA's counsel "what's the impact of the decision on Title IX and women's sports?" Argument Transcript 39: 19-20, *Alston*, No. 20-512, 39 (Sup. Ct. Mar. 31, 2021). Seth Waxman, NCAA's counsel, responded that "schools would, per force, reduce the number of 'non-revenue sports,' reducing the advantages and offerings available to student-athletes in those other sports." *Id.* at 40: 9-14. This answer is consistent with the NCAA's argument in its *O'Bannon* summary judgment motion as to why it must maintain restrictions on whether and how much schools can compensate athletes. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d at 1151-52.

21. As a result of the *O'Bannon* and *Alston* cases, the Department of Justice expressed concerns to the NCAA that imposing limits on NIL compensation from third parties may potentially violate the antitrust laws. Steve Berkowitz & Christine Brennan, *Justice Department Warns NCAA Over Transfer and Name, Image, Likeness Rules*, USA TODAY (Jan. 8, 2021, 4:00 PM), https://www.usatoday.com/story/sports/ncaaf/2021/01/08/justice-department-warns-ncaa-over-transfer-and-money-making-rules/6599747002/. In June 2021, the NCAA changed its rules to permit (subject to state laws) monetization by college athletes of their NILs as

resulting in additional stress on schools to make decisions that comply with Title IX requirements. First, and most obviously, are the direct effects: COA stipends, academic awards, graduate school tuition, internships, computers, and other tangible items are all costs to athletic departments that will directly impact their bottom lines. While schools are no doubt aware of the extent of these impacts, as far as we know, to date there has been no comprehensive analysis of the impact they have on athletic department budgets.

Second, and harder to quantify, are the indirect implications. If third parties like boosters give money directly to athletes for NIL compensation, they likely will donate less to athletic departments. Perhaps more impactful, less money may come from corporate sponsors if they apply at least part of their marketing budgets to enter into NIL deals with individual athletes directly.[22] As one gender equity advocate commented: "It doesn't take a Rhodes Scholar to say those businesses might be able to make a deal with one of those recognizable faces for a lot less money than they can a deal with the athletics department."[23] Sports economist Andrew Zimbalist explained: "[t]he roughly 25% of Power Five athletic department revenue that used to come from donors and corporate sponsors is now finding its way . . . to the athletes in a surrogate labor market."[24] College athletic department deficits, he stated, which are "already approaching a median annual deficit of $20 million in FBS, will soar upward . . . ."[25]

---

long as the payments are made by third parties and not by schools or conferences and are "not pay for play" or used to induce athletes to attend or stay at particular schools. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx.

22. Aaron Beard, *Non-Revenue Sports Fret over College Athlete Compensation*, AP NEWS (June 1, 2020), https://apnews.com/article/6e75887a2e44e6cca8bd55949504a937 (discussing lost participation opportunities as a "key" issue resulting from NIL monetization rule changes).

23. *Id*. (quoting Kathy DeBoer, executive director of the American Volleyball Association).

24. Andrew Zimbalist, *NILs, Surrogate Markets and The Future Of College Sports*, FORBES (Oct. 27, 2021, 8:00 AM), www.forbes.com/sites/andrewzinbalist/2021/10/27q/nils-surrogate-markets-and-the-future-ofcollege-sports/?sh=2c8c6d7c1f27. While intercollegiate sport is at least an $18 billion industry and growing, the money is mostly centered at a small subset of big-time schools. *See Alston*, 141 S. Ct. at 2150 (noting Division I schools, 350 out of 1,100 schools in total, "attract the most money"). Also, to note is that at Division I FBS schools, the most lucrative group, individual expenses have outpaced revenues. *Finances of Intercollegiate Athletics*, NCAA, https://www.ncaa.org/sports/2013/11/19/finances-of-intercollegiate-athletics.aspx (last visited Dec. 30, 2022).

25. Zimbalist, *supra* note 24. It is recognized that at least some of the FBS schools will be receiving additional resources from big media contracts (e.g., The Big Ten's new media rights deals). *See* Michael McCarthy & Amanda Christovich, *Big Ten Expects Even Bigger Media Rights Deal*, FRONT OFF. SPORTS (Aug. 4, 2022, 3:51 PM), https://frontofficesports.com/big-ten-conference-media-rights-1-5-billion/ and the expansion of the lucrative College Football Playoff (CFP) to twelve teams. But even if the athletic budgets at those schools are not as constrained as the budgets at the vast majority of NCAA schools, their decisions should be made to assure that their athletic departments comply with Title IX's gender equality mandate and not succumb to internal pressure that focuses only on promoting even further their revenue producing sports designed to generate even more resources.

With deficits soaring, schools may be tempted further to marginalize women's sports, such as cutting teams and reducing women's teams' rosters, while at the same time making decisions that favor their revenue producing sports. But, as always, schools must make gender equitable choices and not rely on financial constraints to do otherwise.

B. Pending antitrust and labor law challenges could further increase the likelihood that schools will make decisions that do not satisfy Title IX's substantial proportionality standard

Ongoing antitrust and labor law challenges have the potential to further disrupt athletic department budgets. Schools will face additional choices on their allocation of resources that must be made in a gender-equitable manner. A pending antitrust case, *In re College Athlete NIL Litigation*, seeks, *inter alia*, to eliminate NCAA rules that prohibit schools and conferences from sharing with athletes the revenue they receive from their broadcasting contracts, marketing contracts, and all licensing deals that involve athletes' NILs.[26] There, the plaintiffs have survived a motion to dismiss brought by the NCAA and the five largest college conferences.[27] If the plaintiffs ultimately succeed, to stay competitive many athletic departments will have little choice but to share revenue with athletes, significantly reducing the funds available for other department activities.

Pending labor law cases and legislative efforts seeking to classify student-athletes as employees also pose a threat to schools' athletic budgets.[28] While previous cases brought under the Fair Standard Labor Act (FLSA) failed,[29] a pending case, *Johnson v. National Collegiate Athletic Association*, has gained traction, with the court recently denying the defendants' motion to dismiss and finding it plausible that some athletes are employees.[30] Defendants appealed the

26. Consolidated Am. Compl. *In re* College Athlete NIL Litig., No. 4:20-cv-03919 CW, ¶¶ 35-38 (N.D. Cal. July 26, 2021) (No. 164).

27. Grant House v. NCAA, 545 F. Supp. 3d 804, 819-20 (N.D. Cal. 2021).

28. A study by the National Bureau of Economic Research found that the top two college football positions, the quarterback and wide receiver, are worth $2.4 million and $1.3 million per year, respectively, and starting men's basketball players are worth between $800,000 and $1.2 million per year. *See* Craig Garthwaite et al., *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 6 (Nat'l Bureau of Econ. Rsch. Working Paper No. 27734, 2020). Even if schools were to pay only their star athletes, the budgets of athletic departments will be impacted negatively. And, given that schools tend to view football and men's basketball as their "front porches" for receiving donations, they will be inclined to pay at least those athletes, triggering Title IX obligations that they must also pay women athletes on an equitable basis, resulting in an even bigger impact on budgets.

29. Dawson v. NCAA, 932 F.3d 905, 913 (9th Cir. 2019); Berger v. NCAA, 843 F.3d 285, 294 (7th Cir. 2016).

30. Johnson v. NCAA, 556 F. Supp. 3d 491, 495 (E.D. Pa. 2021).

decision to the Third Circuit, and several *amici* submitted briefs highlighting the impact that paying athletes will have on the ecosystem of educational sports.[31] One brief, submitted by the American Council for Education and twelve other prominent educational organizations, argued that if "colleges and universities are forced to pay their student-athletes, it is inevitable that many schools will simply eliminate athletic teams, with non-revenue sports teams the most likely to be on the chopping block. The result would be far fewer opportunities for students to experience the benefits of intercollegiate athletics."[32]

Others have sought to classify athletes as employees under the National Labor Relations Act (NLRA).[33] On September 29, 2021, the General Counsel of the National Labor Relations Board (NLRB), Jennifer Abruzzo, issued an opinion warning that FBS football players and "similarly situated" athletes at private schools are employees under the NLRA.[34] Soon after the General Counsel's opinion, two groups of athletes comprising of football players and men's basketball players filed charges with the NLRB seeking to be classified as employees.[35]

Finally, Congressional bills have been introduced that would recognize college athletes as employees or require sharing of revenues between athletic departments and revenue producing athletes.[36]

---

31. Johnson v. NCAA, No. 19-5230, 2021 WL 6125095, at *1 (E.D. Pa. Dec. 28, 2021).

32. Brief for *Amici Curiae* American Council on Education and Twelve Other Educational Organizations in Support of Appellants at 7, Johnson v. NCAA, No. 22-1223 (3d Cir. June 7, 2022) (No. 31).

33. Earlier efforts include those of football players at Northwestern University to unionize. *See, e.g.*, Robert L. Corrada, *The Northwestern University Football Case: A Dissent*, 11 HARV. J. SPORTS & ENT. L. 15, 15-16 (2020) (describing the failed Northwestern University student unionization efforts).

34. Jennifer A. Abruzzo, Gen. Couns., to all Reg'l Dirs., Officers-in-Charge, & Resident Officers of the NLRB, *Memorandum GC 21-08*, at 2 (Sept. 29, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of. Ms. Abruzzo's opinion explicitly expands her reasoning to the NCAA, conferences, and public schools under a joint employer theory of liability. *Id.* at 9 n.34. While it remains unclear who would be "similarly situated" to football players, it is most likely to be athletes producing revenues.

35. David J. Garraux et al., *Student Athletes No More, NLRB Reinstates Scope of NLRA Section 7 to Include "Players at Academic Institutions"*, K&L GATES (Feb. 17, 2022), https://www.klgates.com/Student-Athletes-No-More-NLRB-Reinstates-Scope-of-NLRA-Section-7-to-Include-Players-at-Academic-Institutions-2-17-2022; *College Basketball Players Group Tips-Off Battle Over Student-Athlete Employment Status*, FISHER PHILLIPS (Nov. 16, 2021), https://www.fisherphillips.com/news-insights/college-basketball-players-student-athlete-employment-status.html. *See also* Chris Vannini, *Advocacy Group Files Unfair Labor Practice Charges Against NCAA, Pac-12, UCLA and USC*, ATHLETIC (Feb. 8, 2022), https://theathletic.com/3511373/2022/02/08/advocacy-group-files-unfair-labor-practice-charges-against-ncaa-pac-12-ucla-and-usc/.

36. *See, e.g.*, College Athlete Right to Organize Act, S. 1929, 117th Cong. § 3 (2021); College Right to Organize Act, H.R. 3895, 117th Cong. § 3 (2021). *See also* Ross Dellenger, *Five Senators to Reintroduce*

Like all of the changes discussed above, if schools pay athletes as employees or share their revenues with certain athletes, athletic departments will face more difficult budgetary choices—choices that must be made in a manner that ensures gender equity. But, if the past is any guide, women's sports, at least at some schools, will end up on the chopping block and schools will manipulate roster numbers in an attempt to appear that they are in compliance with Title IX.[37] Indeed, a recent Associated Press survey of Division I's 357 athletic directors showed that putting more money in the pockets of athletes raises Title IX concerns.[38] The survey found that "94% of respondents said it would be somewhat or much more difficult to comply with Title IX gender equity rules if their schools were to compensate athletes . . . ."[39] One athletic director put it bluntly: "'[s]haring revenue with student-athletes . . . works if universities are then absolved of their Title IX requirements. Football revenue supports women's golf, women's tennis, women's softball, women's volleyball, women's soccer, women's track and field on this campus.'"[40] More than seventy percent of the athletic directors said that sports would lose funding or be cut.[41]

Sweeping College Athlete Bill of Rights in Congress, SPORTS ILLUSTRATED (Aug. 3, 2022), https://www.si.com/college/2022/08/03/college-athlete-bill-of-rights-congress-transfers-nil.

37. Even if college athletes become classified as employees, we maintain that any cash payments to them by schools, including revenue sharing, should remain subject to Title IX's requirements of equitable financial aid and treatment/benefits. Importantly, all choices by schools on whether and how much to pay athletes should be free of sex discrimination. Neither the OCR nor the courts have addressed this issue yet. While this issue is beyond the scope of this article, it is receiving attention. For example, in California, the legislature recently addressed the concern that expanding rights of male revenue producing athletes will come at the expense of female athletes. College Race and Gender Equity Act, S.B. 1401, 2022 Leg., Reg. Sess. (Cal. 2022). The Act required schools with revenue producing sports to share revenues with the team earning them pursuant to a somewhat complex formula. The California State University educational system objected to the bill on the grounds, *inter alia*, that "the redistribution of revenues will be disproportional to male and female athletes." *See* Jon Wilner, *Incomplete Pass: California Bill That Would Have Changed College Sports Stalls in Committee*, SANTA CRUZ SENTINEL (May 19, 2022, 1:46 PM), https://www.santacruzsentinel.com/2022/05/19/incomplete-pass-california-bill-that-would-have-changed-college-sports-stalls-in-committee/.
Accordingly, the bill originally included a provision that any school that so qualified with revenue producing sports, would have to affirm that they were compliant with Title IX. Failure to do so would have subjected that school's athletic director to a three-year suspension. But the Title IX provisions were eliminated in conference and the bill is currently "on suspense" in the California legislature. *See* Daniel Libit, *How the Athlete Race and Gender Equity Act Got Segregated*, SPORTICO (June 8, 2022, 8:30 AM), https://www.sportico.com/leagues/college-sports/2022/college-athlete-race-and-gender-equity-act-1234678144/. *See also*, Ellen J. Staurowsky, "*A Radical Proposal": Title IX Has No Place in College Sport Pay-For-Play Discussio*n, 22 MARQ. SPORTS L. REV. 575 (2012).

38. *Survey: ADs Say Compensating Athletes Would Make it Harder to Comply With Title IX Rules*, ESPN (Apr. 1, 2021), https://www.espn.com/college-sports/story/_/id/31176910/survey-ads-say-compensating-athletes-make-harder-comply-title-ix-rules.

39. *Id.*

40. *Id.*

41. *Id.*

Echoing these findings, Tom McMillan, CEO of Lead 1, an organization of the athletic directors of the largest 131 FBS football programs in the NCAA, suggested that we could be at a "fork in the road," with women's sports vulnerable.

While the outcomes of these particular antitrust and labor law challenges are not clear, it is likely that many schools will be paying athletes or providing additional benefits to them in the near future, exacerbating budget constraints.[42] Some may argue that the constraints will impact men's and women's non-revenue generating sports equally. For example, schools could attempt to avoid running afoul of Title IX by eliminating both men's and women's teams or reducing roster spots for both men and women. But this argument ignores the fact that Title IX's promise of gender equity in sports has never been a reality.[43] In other words, a supposedly "even-handed" approach that eliminates men's and women's opportunities in equal measure would in many cases only maintain a status quo that already disadvantages women. Accordingly, the time is ripe to ensure that Title IX's equal participation opportunity requirement is protected and that courts examine thoroughly whether men and women receive equality of athletic opportunity.

II. ORIGINS AND DEVELOPMENT OF TITLE IX'S "SUBSTANTIAL PROPORTIONALITY" STANDARD

If a school chooses to maintain an athletics program, Title IX's implementing regulations require that the school provide its male and female students with equal athletic treatment, benefits, scholarships, and opportunities.[44] The regulations establish standards to assess whether a school is meeting Title IX's non-discrimination mandate in each of these categories.[45] One of the standards, which measures whether males and females receive equal opportunity to *participate* in athletics, is known as the "Three-Prong Test." The Three-Prong Test offers schools three independent ways to show that they provide male and female students with equal opportunities to participate in athletics. When a school cancels a women's team, absent extraordinary circumstances, two of the three prongs—showing a history of expanding

42. We do not discuss in this article the merits of providing college athletes with additional cash benefits but instead focus on the budgetary impact of such expenditures and the corresponding added pressure on schools to make choices that comply with Title IX when they face budgetary pressures.

43. *See supra* pp. 86-88. This argument also ignores that fact that schools could choose to reduce spending on men's revenue sports or otherwise manage their budget decisions to avoid cutting any sports.

44. *See* Samuels & Galles, *supra* note 3, at 13.

45. 34 C.F.R. § 106.41(c) (2022). *See also infra* note 65 and accompanying text (discussing the levels of competition standard).

women's athletics programs, or showing that the athletic interests of women have been fully accommodated—are not available.[46] Historically, this has meant that the remaining prong—showing that the school provides athletic participation opportunities to both sexes that are "substantially proportionate" to their rates of enrollment—has been a centerpiece of Title IX litigation. In part due to the budget concerns discussed above, there is good reason to believe that pattern will continue, so the need for a clearly articulated and robust "substantial proportionality" standard is apparent. To that end, we will start with a review of the history and development of that standard.

A. Passage of Title IX and early debates over its scope

Title IX of the Education Amendments of 1972 bars sex discrimination in all aspects of schools that receive federal funding.[47] The statutory text provides that: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[48] The law's prohibition against sex discrimination applies to most elementary and secondary schools, colleges, and universities.[49]

In passing Title IX, Congress authorized and directed the federal agencies responsible for dispensing financial assistance to educational institutions to issue "rules, regulations or orders of general applicability which shall be consistent with the objectives" of the law.[50] However, in the first years after Title IX's enactment, some opponents of gender equality in sports argued that the law's non-discrimination mandate did not extend to athletics—that such programs were not an "education program or activity" covered by the law.[51] Following the passage of Title IX in 1972, members of Congress introduced bills explicitly seeking to limit Title IX's coverage and exclude scholastic

46. *See infra* Part III.C.

47. 20 U.S.C. §§ 1681-1688 (2022).

48. 20 U.S.C. § 1681(a) (2022).

49. *See* 20 U.S.C. § 1681(a)(2) (2022); N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) ("There is no doubt that if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language." (citation and internal quotation marks omitted)). *See also, e.g.*, Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 855 (9th Cir. 2014) (finding that Title IX applies to interscholastic secondary sports and collecting cases).

50. 20 U.S.C. § 1682 (2022).

51. *See* Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 329-30 (2012); Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 11-12 (1992).

sports, or alternatively, to exclude revenue producing sports.[52] All of the proposed amendments were defeated.[53]

Instead, in 1974, Congress expressed its clear intent to include athletics within Title IX when it passed the Education Amendments of 1974—also known as the Javits Amendment—which directed the U.S. Department of Health, Education, and Welfare (HEW) to "prepare and publish . . . regulations implementing the provisions of [T]itle IX . . . which shall include . . . reasonable provisions considering the nature of particular sports."[54] That same year, HEW published proposed regulations prohibiting sex discrimination "in any . . . athletics program operated by a [Federal funds] recipient."[55] HEW then initiated an extended formal public notice and comment process involving public hearings in cities around the country and incorporating feedback from around ten-thousand public comments.[56]

B. The 1975 Regulations

On June 4, 1975, after being formally approved by President Ford, the final Title IX regulations were published and, pursuant to Section 431(d)(1) of the General Education Provisions Act,[57] HEW submitted the regulations to

---

52. *See* Heckman, *supra* note 51, at 11 n.38 (collecting the rejected proposed amendments); *N. Haven Bd. of Educ.*, 456 U.S. at 532-33 nn.22, 24.

53. *See* Heckman, *supra* note 51, at 11-12 n.38; *N. Haven Bd. of Educ*., 456 U.S. at 532-33 nn.22, 24.

54. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974); *see also Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. and Lab.*, 94th Cong., 438 (1975) [hereinafter *Sex Discrimination Regulations*] (remarks of HEW Sec. Weinberger) ("[T]he so-called Javits amendment . . . made very clear that athletics should be covered by the [HEW] regulation.").

55. *See* Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities, 39 Fed. Reg. 22,232, 22,236 § 86.38 (June 14, 1974).

56. *See Sex Discrimination Regulations*, *supra* note 54, at 437-38 (remarks of HEW Sec. Weinberger).

> [B]riefings were held in 12 cities across the country. More than 3,500 individuals attended the briefings, and the press briefings were covered by 150 members of the media resulting in newspaper coverage alone of 175 articles and editorials . . . . We received about 10,000 comments on the proposed regulation from virtually every major institution of higher education, hundreds of school superintendents, chief State school officers and principals, and women's groups. Each comment was reviewed and cross-indexed by a special task force, which later prepared policy option papers setting forth policy alternatives . . . . Review of the comments . . . resulted in substantial revisions in the final regulation . . . .

Id. See N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 531 (1982) (summarizing the regulatory history).

57. *See* General Education Provisions Act, Pub. L. No. 93-380, § 509, 88 Stat. 567 (1974) (amended at 20 U.S.C. § 1232(d)(1)).

> This "laying before" provision was designed to afford Congress an opportunity to examine a regulation and, if it found the regulation "inconsistent with the Act from which it derives

Congress for review.[58] Several members of Congress introduced resolutions of disapproval; however, each was rejected, and on July 21, 1975, the final regulations (the "1975 Regulations") went into effect.[59] The 1975 Regulations provide generally that:

> [n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.[60]

The 1975 Regulations mandated that any federal funding recipient sponsoring interscholastic, intercollegiate, club, or intramural athletics provide "equal athletic opportunity for members of both sexes" and provided a list of ten non-exhaustive factors to consider whether a school meets this requirement.[61]

> its authority . . . ," to disapprove it in a concurrent resolution. If no such disapproval resolution was adopted within 45 days, the regulation would become effective.

N. Haven Bd. of Educ., 456 U.S. at 531-32 (citing 20 U.S.C. § 1232 (d)(1)).

58. *N. Haven Bd. of Educ.*, 456 U.S. at 531.

59. *Id*. at 532-33.

60. 34 C.F.R. § 106.41 (2022). The 1975 Regulations originally appeared at 34 C.F.R. § 86 (1972) but were later moved to 34 C.F.R. § 105 (1980). *See N. Haven Bd. of Educ.*, 456 U.S. at 516 nn.4-5.

61. The relevant portion of the 1975 Regulations states:

> A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
>
> (2) The provision of equipment and supplies;
>
> (3) Scheduling of games and practice time;
>
> (4) Travel and per diem allowance;
>
> (5) Opportunity to receive coaching and academic tutoring;
>
> (6) Assignment and compensation of coaches and tutors;
>
> (7) Provision of locker rooms, practice and competitive facilities;
>
> (8) Provision of medical and training facilities and services;
>
> (9) Provision of housing and dining facilities and services; and
>
> (10) Publicity.

34 C.F.R. § 106.41(c) (2022). The regulations further required that recipients who offer athletic scholarships do so equitably "in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."

C. The 1979 Policy Interpretation

The 1975 Regulations led to a flurry of gender discrimination complaints from student athletes across the country, but also complaints from athletics departments claiming that their programs would be doomed if the 1975 Regulations were enforced against them.[62] In response, on December 11, 1979, after a one-year notice-and-comment period,[63] HEW published its *Policy Interpretation on Title IX and Intercollegiate Athletics* (the "Policy Interpretation") providing detail on "the meaning of 'equal opportunity' in intercollegiate athletics."[64]

Specifically, the Policy Interpretation divided the compliance inquiry into three requirements:

> (1) Compliance regarding "meeting the interests and abilities of male and female students;"
>
> (2) Compliance regarding the treatment and benefits athletes receive (including, for instance, equipment, supplies, facilities, access to coaching and medical support, etc.); and

---

62. Anderson, *supra* note 51, at 336.

63. HEW initially published a draft of the Policy Interpretation in December 1978. *See* Title IX of the Education Amendments of 1972: A Proposed Policy Interpretation, 43 Fed. Reg. 58,070, 58,070 (Dec. 11, 1978). After receiving and considering over 700 comments, the final Policy Interpretation was published in the federal register one year later. *See* Samuels & Galles, *supra* note 3, at 14 n.10.

64. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg., 71,413, 71,414 (Dec. 11, 1979) (also available at www2.ed.gov/about/offices/list/ocr/docs/t9interp.html). At least one school has recently argued that under *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Policy Interpretation is an invalid interpretation of the 1975 Regulations and so should not receive any deference from courts in assessing Title IX liability. *See* Niblock v. Univ. of Ky., No. 5:19-cv-394, 2020 WL 7028707, at *4 (E.D. Ky. Nov. 30, 2020). We are aware of no court crediting this argument, and every US circuit court of appeal to have considered the Policy Interpretation has concluded that it is a valid interpretation of the 1975 Regulations and entitled to substantial deference under *Chevron USA v. NRDC*, 467 U.S. 837 (1984) and other relevant authorities. *See, e.g.*, Chalenor v. Univ. of N.D., 291 F.3d 1042, 1046-47 (8th Cir. 2002); Mansourian v. Regents of Univ. of Calif., 602 F.3d 957, 965 n.9 (9th Cir. 2010) (citing Neal v. Bd. of Trs. of Cal. State Univ., 198 F.3d 763, 770-71 (9th Cir. 1999)); Biediger v. Quinnipiac Univ., 691 F.3d 85, 96-97 (2d Cir. 2012) (citing McCormick *ex rel*. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 290 (2d Cir. 2004)); Kelley v. Bd. of Trs., 35 F.3d 265, 269-72 (7th Cir. 1994); Cohen v. Brown Univ., 991 F.2d 888, 896-97 (1st Cir. 1993); Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 171 (3d Cir. 1993); Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 406 (5th Cir. 1996) (noting generally that agency interpretations of Title IX receive "appreciable deference" (citation omitted)); *see generally* Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL'Y 69, 84 n.67 (2020). Indeed, one post-*Kisor* circuit court decision has reaffirmed that the Policy Interpretation is valid and owed deference. *See* Bernsdsen v. N.D. Univ. Sys., 7 F.4th 782 (8th Cir. 2021); *see also id*. at 794 (Colloton, J., concurring in judgment) (explicitly noting that the Policy Interpretation's "separate teams requirement," 34 C.F.R. § 106.41(b), is valid under *Kisor*).

(3) Compliance regarding athletic scholarships.[65]

The Policy Interpretation established specific criteria to assess whether a school violates Title IX for each of these three requirements. With regard to the first requirement, that schools meet the interests and abilities of male and female students, the Policy Interpretation required that schools provide an equal opportunity to participate in athletics. It established the Three-Prong Test to show compliance with that requirement.

The Three-Prong Test offers schools three independent alternative ways to show that they satisfy Title IX's equal athletic participation opportunity requirement. Specifically, the test considers:

> *Prong One*: Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> *Prong Two*: Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> *Prong Three*: Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.[66]

If a school decides to eliminate a viable team for the under-represented sex, then Prongs Two and Three are effectively unavailable to it—cutting a team is anathema to a "continuing practice of program expansion," and directly contradicts the notion that the school is effectively accommodating the interests

65. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,414.

66. *Id.* at 71,418.

and abilities of the under-represented sex.[67] As a result, Title IX litigation often involves Prong One—the "substantial proportionality" standard.

D. The 1996 Clarification

In 1996, the U.S. Department of Education's Office for Civil Rights (OCR), responsible for enforcing Title IX,[68] issued a Dear Colleague letter (the "1996 OCR Letter") containing further guidance on the Three-Prong Test.[69] That guidance, titled the *Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test* (the "1996 Clarification"),[70] "provided schools with a broad range of specific factors and illustrative examples to help schools understand the flexibility of the three-prong test," and, as relevant here, the standards that apply to Prong One.[71]

With regard to Prong One, the 1996 Clarification established a two-step process for assessing whether a school provides "substantially proportionate" athletic participation opportunities to males and females. First, one determines the "number of participation opportunities afforded to male and female athletes" at the school.[72] Second, one considers whether "the number of participation opportunities . . . is substantially proportionate to each sex's enrollment."[73]

---

67. *See, e.g.*, Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 854, 858 (9th Cir. 2014) ("[I]f an 'institution has recently eliminated a viable team,' we presume 'that there is sufficient interested, ability, and available competition to sustain' a team in that sport absent strong evidence that conditions have changed" (citation omitted)).

68. In 1979, HEW's functions under Title IX transferred to the Department of Education under the Department of Education Organization Act, Pub. L. No. 96-88, § 301, 93 Stat. 677 (1979) (codified as amended at 20 U.S.C. § 3441(a)(3)); *see also* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 516 nn.4-5 (1982). The HEW regulations relating to Title IX were adopted "virtually unchanged" by the Department of Education. Samuels & Galles, *supra* note 3, at 13 n.7.

69. *See* Norma V. Cantú, Assistant Sec'y for Civ. Rts., *Dear Colleague Letter: Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html.

70. *Id*. The final 1996 Clarification was published following a one-year notice period during which OCR received, responded to, and incorporated comments from 4,500 interested parties. Samuels & Galles, *supra* note 3, at 16 n.15. The 1996 Clarification has repeatedly been found to be a valid agency interpretation of Title IX, owed deference. *See* Berndsen v. N.D. Univ. Sys., 7 F.4th 782, 786 (8th Cir. 2021); Biediger v. Quinnipiac Univ., 691 F.3d 85, 96-97 (2d Cir. 2012); Mansourian v. Regents of Univ. of Calif., 602 F.3d 957, 965 n.9 (9th Cir. 2010) (citing Neal v. Bd. of Trs. of Cal. State Univ., 198 F.3d 763, 770-71 (9th Cir. 1999)).

71. Samuels & Galles, *supra* note 3, at 16; *see also* Cantú, *supra* note 69.

72. Cantú, *supra* note 69; *see also Biediger* 691 F.3d at 96-97.

73. Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 856 (9th Cir. 2014); *see also* Cantú, *supra* note 69.

III. COMPLYING WITH THE SUBSTANTIAL PROPORTIONALITY STANDARD

A. Step 1: Determine the number of participation opportunities provided for each sex

1. The legal standard—what is a "participation opportunity"?

Assessing whether a school provides its students with substantially proportionate athletic participation opportunities "begins with a determination of the number of participation opportunities afforded to male and female athletes in the . . . athletic program."[74] The question naturally arises: what is a "participation opportunity" for the purposes of Title IX? The Policy Interpretation defines athletic "participants" as athletes who:

> (a) are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
>
> (b) are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
>
> (c) are listed on the eligibility squad lists maintained for each sport, or
>
> (d) because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.[75]

The 1996 OCR Letter and 1996 Clarification reaffirmed the Policy Interpretation's definition of athletic participants and provided further guidance on how to determine the number of participation opportunities offered by a school. First, the 1996 OCR Letter stated that "for an athlete to be counted, he or she must be afforded a participation opportunity that is 'real, not illusory,' in that it offers the same benefits as would be provided to other *bona fide*

74. Cantú, *supra* note 69. *See also Biediger*, 691 F.3d at 93; Balow v. Mich. State Univ. (*Balow II*), 24 F.4th 1051, 1056 (6th Cir. 2022); *Ollier*, 768 F.3d at 856.

75. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979) (also available at www2.ed.gov/about/offices/list/ocr/docs/t9interp.html).

athletes."[76] For this reason, the inquiry considers the number of "actual athletes," not "unfilled slots" that a school may "claim[] [a] team can support but which are not filled . . . ."[77] Second, the 1996 Clarification delineated four principles to guide the counting of participation opportunities:

> 1. A sport's season . . . commence[s] on the date of a team's first intercollegiate competitive event and . . . conclude[s] on the date of the team's final intercollegiate competitive event.
> 2. As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants.
> 3. An athlete who participates in more than one sport [is] counted as a participant in each sport in which he or she participates.
> 4. Each of the following are counted as "athletic participants" for the purposes of the substantial proportionality analysis:
>   a. athletes who do not receive scholarships (e.g., walk-ons),
>   b. athletes who participate on teams that are funded in whole or in part by the team's own fundraising efforts (i.e., as opposed to funds received from the institution), and
>   c. athletes who practice but do not compete.[78]

---

76. *Biediger*, 691 F.3d at 93 (quoting Cantú, *supra* note 69). *See also* Cantú, *supra* note 69; *Ollier*, 768 F.3d at 856.

77. Cantú, *supra* note 69.

78. *Id*. With respect to walk-ons, members of self-funded teams, and practice players, the 1996 Clarification explained:

> OCR's investigations reveal that these athletes receive numerous benefits and services, such as training and practice time, coaching, tutoring services, locker room facilities, and equipment, as well as important non-tangible benefits derived from being a member of an intercollegiate athletic team. Because these are significant benefits, and because receipt of these benefits does not depend on their cost to the institution or whether the athlete competes, it is necessary to count all athletes who receive such benefits when determining the number of athletic opportunities provided to men and women.

Id.

Even with these agency determinations in hand, many schools' longstanding passivity about—or even outright opposition to—sex equality in sport has led to waves of litigation under Prong One relating to which participation opportunities are "genuine" and so worthy of counting.[79]

2. Problems with compliance—*"hiding the ball"* and *"fudging the numbers."*

While counting genuine athletic participation opportunities should be straightforward, schools have employed tactics to muddy the waters and maintain the appearance that they comply with Title IX. The most common practices fit into two categories: issues involving limiting access to athletic participation data ("hiding the ball") and issues relating to manipulating athletic participation data ("fudging the numbers").[80]

Hiding the Ball—Neither the text of Title IX nor OCR determinations interpreting it obligate schools to publish data they collect to track their compliance with Title IX.[81] Practically, this means that schools have exclusive access to and control over their Title IX records, and, absent a court-sanctioned request or OCR investigation, they often do not disclose all their data and underlying information.[82] As a result, when a school announces a change to its athletics program that impacts student athletes—such as canceling a team due to budget concerns—the first and often prohibitive hurdle that concerned stakeholders face is that they cannot access the data necessary to assess Title IX compliance. The best place they could turn for answers, their school, just canceled a sport and unsurprisingly responds that there is "nothing to see here."[83]

---

79. *See, e.g.*, *Biediger*, 691 F.3d at 99-102; *Balow II*, 24 F.4th at 1056-57.

80. Here we summarize a few key examples of each practice; our list is not exhaustive.

81. From 1993 to 2011, the NCAA required schools to demonstrate that they were committed to and had progressed toward fair and equitable treatment of male and female athletes as part of a Certification process. Schools had to submit data in fifteen categories and the University President or Chancellor was required to certify the accuracy of the report. The information was available on a dashboard maintained by the NCAA and subject to peer review. *See* NCAA, SELF-STUDY INSTRUMENT, CYCLE 3, CLASS 3 (2010-11); Letter from Kathryn Olson et al., Women's Sports Found., to Mark Emmert, NCAA, *Re: NCAA Certification Process and Gender Equity* (Aug. 5, 2011) (on file with authors); Letter from Nancy Hogshead-Makar, Senior Dir. of Advocacy, to Larry Scott, Commissioner, Pac-12 Conference (June 10, 2013) (on file with authors).

82. *See, e.g.*, Ohlensehlen v. Univ. of Iowa, 509 F. Supp. 3d 1085, 1096 (S.D. Iowa 2020); Balow v. Mich. State Univ., 24 F.4th 1051, 1059 (6th Cir. 2022).

83. Even after being sued, when releasing the internally-held data would presumably benefit the school to show its purported compliance, some schools have stonewalled by, for instance, refusing to produce data altogether or by hiring an expert to review school records behind closed doors and then issue a summary report claiming the school is in compliance. *See, e.g.*, *Ohlensehlen*, 509 F. Supp. 3d at 1101 (finding a defendant university's argument that alternative sources of participation data were too speculative to be

This lack of accessibility of complete data leaves affected stakeholders with few options to evaluate their school's compliance, forcing them at great effort to cobble together sketches of the school's athletics program from public sources.[84] The best, though imperfect, source available in the intercollegiate context to fill the gap is the data schools are required to submit in connection with the Equity in Athletics Disclosure Act (EADA).[85] The EADA was enacted by Congress in 1994 to address "increasing concern among citizens, educators, and public officials regarding the athletic opportunities for young men and women at institutions of higher education."[86] Under the EADA, colleges and universities that receive federal funding must submit an annual report to the U.S. Department of Education containing information regarding, among other things, the school's:

- undergraduate enrollment, broken down by gender;
- the number and type of men's and women's varsity teams;
- the number of participants on each team;
- the number, distribution, and average salaries of head and assistant coaches;
- the amount of athletic scholarship money available to each gender;
- the total revenues, operating expenses, and total expenses for each team; and
- the amount of money distributed for recruiting purposes.[87]

The data provided in EADA reports are then published by the Department of Education and available to the public.[88] EADA data are often the best

"especially disingenuous" after the defendants "refus[ed] to disclose the official Title IX data they claim exonerates the University—data they admit is discoverable but have nonetheless declined to produce . . . ."); *Balow II*, 24 F.4th at 1059.

84. In the high school context, given that the EADA does not apply to them, the problem is particularly acute, with athletes, coaches, and families having to rely on sources like yearbook photos and school websites, or by seeking access to the data via public records requests that schools often deflect or ignore.

85. 20 U.S.C. § 1092(g) (2022). The EADA implementing regulations can be found at 34 C.F.R. § 668.47 (2022).

86. Equity in Athletics Disclosure Act, H.R. 921, 103rd Cong. § 360B (1994) (enacted).

87. 20 U.S.C. § 1092(g); *see also Ohlensehlen*, 509 F. Supp. 3d at 1090, 1090 n.3.

88. *See Equity in Athletics Data Analysis*, U.S. DEP'T OF EDUC., https://ope.ed.gov/athletics/#/ (last visited Dec. 30, 2022).

stakeholders can do to assess their school's Title IX compliance and, if necessary, assert a claim in court. But the law is not a panacea, and differences between EADA reporting requirements and Title IX's athletic participation standards consistently cause uncertainty and confusion in the courts. Two examples illustrate the problem:

Male Practice Players—At many colleges, some women's teams invite men to participate during practice sessions as "practice players."[89] In sports like basketball and volleyball, where an athlete's size can be a key to performance, enlisting men to scrimmage with women allows teams to prepare for competition against larger bodies while keeping the women on the team better rested.[90] These male practice players do not qualify as female athletic participants under Title IX, however under the EADA's implementing regulations, schools are permitted to report them as "female" athletic participants.[91] Indeed, doing so is common at many schools, leading EADA reports to regularly overstate the number of women's athletic participation opportunities the schools actually offer.[92] In litigation, practitioners have sought to account for this over-counting by comparing EADA data to other sources such as publicly-released team rosters.[93] However, courts have not uniformly accepted this sort of analysis.[94]

Different Counting Dates—A second difference between EADA and Title IX standards involves the date on which athletic participation opportunities are counted. Under the EADA, universities report "[t]he total number of participants, by team, *as of the day of the first scheduled contest for the team*."[95] By contrast, as discussed above,[96] under the Policy Interpretation a participant for Title IX must, in addition to being on an eligibility or squad list, "*on a regular basis during a sport's season*" receive institutional athletic support (coaching, training, etc.) and participate in practice sessions and team

89. *See* Jacoby, et al., *supra* note 11.

90. *Id.*; *see also* Ohlensehlen v. Univ. of Iowa, 509 F. Supp. 3d 1085, 1095-96 (S.D. Iowa 2020).

91. *See* 34 C.F.R. § 668.47 (2022); *see also Ohlensehlen* 509 F. Supp. 3d at 1095-96.

92. One investigative report found, for example, that at the University of Michigan, twenty-nine members of the forty-three-player women's basketball team were in fact men who signed up to practice with the team. Nationally, that report concluded that about one of every four women's basketball players that the subject schools reported to the Department of Education under EADA were actually men. *See* Jacoby et al., *supra* note 11; *see also, e.g., Ohlensehlen*, 509 F. Supp. 3d at 1095-96.

93. *See, e.g., Ohlensehlen*, 509 F. Supp. 3d at 1096-97.

94. *Compare, e.g.,* Balow v. Mich. State Univ., No. 1:21-cv-44, 2021 WL 650712 (W.D. Mich. Feb. 19, 2021) *with Ohlensehlen*, 509 F. Supp. 3d at 1096-97.

95. 20 U.S.C. § 1092(g)(1)(B)(i) (2022) (emphasis added).

96. *See supra* Part III.A.1.

meetings.[97] In other words, student-athletes who quit after their team's first competition will be counted for EADA purposes but not Title IX; and conversely, athletes who join a team the day after the first competition and otherwise receive all the treatment, benefits, and opportunities of the team throughout the season, would not be counted as EADA participants but should be counted for Title IX. These differing standards, as with the male practice player issue, can result in an overstatement of women's numbers.[98]

In light of this uncertainty, some courts have resisted litigants' attempts to use EADA data as the basis for unequal participation claims under Title IX.[99] However, understanding the uphill battle that Title IX plaintiffs face in accessing schools' internal data—particularly at the start of litigation prior to discovery—many courts have held that EADA reports, if properly accounting for issues like the ones mentioned above, can be relied upon at the preliminary injunction and motion to dismiss stages.[100]

Fudging the Numbers—In addition to the problems stemming from stakeholders' lack of access to reliable Title IX data, another Prong One problem involves schools manipulating their athletic participation figures. These tactics—often referred to as "roster manipulation"—have long been a subject in Title IX cases.

Roster Padding—Perhaps the most common roster manipulation tactic, roster padding, occurs when a school claims that there are more individuals receiving genuine athletic participation opportunities on a team than there are actually. While the tactic has been used to inflate participation numbers for various sports, the quintessential example is women's rowing, where schools often offer "spots" to dozens of inexperienced novice rowers who have no

97. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg., 71,413, 71,415 (Dec. 11, 1979) (emphasis added).

98. *See, e.g.*, Ohlensehlen v. Univ. of Iowa, 509 F. Supp. 3d 1085, 1096-97 (S.D. Iowa 2020)

99. *See, e.g.*, *Balow I*, 2021 WL 650712, at *6, *rev'd and remanded*, 24 F.4th 1051 (6th Cir. 2022); Anders v. Cal. State Univ. Fresno, No. 1:21-cv-179, 2021 WL 1564448, at *13-14 (E.D. Cal. Apr. 21, 2021).

100. *See, e.g.*, Balow v. Mich. State Univ., 24 F.4th 1051, 1059 (6th Cir. 2022) ("[A]t the preliminary injunction stage, it may be appropriate to rely on EADA data to calculate" participation opportunities under Title IX); *Ohlensehlen*, 509 F. Supp. 3d at 1101; Biediger v. Quinnipiac Univ., 616 F. Supp. 2d 277, 297 (D. Conn. 2009) (preliminary injunction), *inj. sustained after trial*, 728 F. Supp. 2d 62, 113-14 (D. Conn. 2010), *aff'd*, 691 F.3d 85, 108 (2d Cir. 2012); Barrett v. W. Chester Univ. of Pa., No. 03-CV-4978, 2003 WL 22803477 (E.D. Pa. Nov. 12, 2003); Choike v. Slippery Rock Univ., No. 06-622, 2006 WL 2060576, at *7 (W.D. Pa. July 21, 2006); *cf.* Robb v. Lock Haven Univ. of Pa., No. 4:17-CV-00964, 2019 WL 2005636, at *7 (M.D. Pa. May 7, 2019) (analyzing Prong One claims with EADA data on class certification motion); Mansourian v. Bd. of Regents of Univ. of Calif. at Davis, 816 F. Supp. 2d 869, 885, 913 (E.D. Cal. 2011) (discussing EADA reports and noting the parties agreed "female athletic participation opportunities were not substantially proportionate."); Brust v. Regents of Univ. of Cal., No. 2:07-cv-1488, 2007 WL 4365521, at *4 (E.D. Cal. Dec. 12, 2007) (denying the motion to dismiss Title IX lawsuit because the plaintiffs might be able to show EADA numbers were not accurate, showing an even greater disparity).

prospect of competing and may never even get out on the water.[101] By its nature, roster padding is hard to attack because assessing whether participation opportunities are "genuine" is a fact-intensive inquiry requiring substantial discovery and involving a multi-factor legal standard.[102] It is no surprise, then, that the technique can be used to exploit the grey areas of what is a "genuine" participation opportunity in an attempt to maintain the appearance of Title IX compliance.

Selective Double and Triple Counting—As discussed above, under the 1996 Clarification, athletes who participate in more than one sport should be counted as participants in each sport in which they participate.[103] This means that an athlete who participates in both cross-country and track is considered two participants for the purposes of Prong One. And, since outdoor and indoor track are also counted as separate sports, a runner who participates in cross country and indoor and outdoor track could be counted three times. Schools, however, do not always apply this rule consistently. Indeed, reports have shown that schools often double or triple count *all* of their multi-sport women athletes, while only doing so with *some* of their multi-sport men.[104] The effect is to make it appear that the participation numbers are more equal than they are for purposes of Title IX.

"Ghost" Men's Teams—Finally, some schools have flouted Prong One standards entirely by claiming not to sponsor a men's team for a sport, while

101. *See* Jacoby et al., *supra* note 11; *see also* Jasper Colt & Michelle Hanks, *Title IX: 'Revolutionary' Legislation, But Inequalities Still Exist 50 Years Later*, USA TODAY (Aug. 19, 2022, 3:22 PM), https://www.usatoday.com/videos/sports/2022/06/13/title-ix-revolutionary-legislation-but-inequalities-still-exist-50-years-later/10003389002/.

102. *See, e.g.*, *Biediger*, 691 F.3d at 99-102 (affirming district court finding that university's policy of requiring women cross-country runners to be members of the school's indoor and outdoor track teams did not permit the university to double-count women runners who, due to injury or red shirt status did not participate in track practice, "would never actually compete in the indoor and outdoor track season," and did not receive any meaningful benefits as members of the track team beyond those they received as off-season cross-country athletes); *Balow II*, 24 F.4th at 1056-57 (finding no clear error where district court concluded that "novice" members of women's rowing team could be counted as genuine participants in light of a coach's declaration stating that such rowers were "full-fledged members of the [school's] rowing team who receive the same practice gear and competition gear and participate in the same training and conditioning activities as the rest of the team," and likewise finding no clear error where district court found that women cross country and track athletes could be counted where the only countervailing evidence was that they "did not participate in any races.").

103. Cantú, *supra* note 69; *see also supra* Part III.A.1.

104. *See, e.g.*, Colt & Hanks, *supra* note 101 (explaining, for example, that in a recent year Florida State University double counted thirty-eight of its forty-five male track and field athletes, but all of its sixty-six females); Jacoby et al., *supra* note 11 (finding that nationally, schools "double-counted women nearly 50% more often than men and triple-counted women 70% more.").

nonetheless sending male athletes to competitions for that sport.[105] Like selective counting, these "ghost teams" have the effect of deflating the number of reported male athletic participation opportunities, helping to paper over the fact that a school actually provides more genuine participation opportunities to men.

Each of the tactics and issues discussed above highlights the necessity of not accepting at face value athletic participation data that a school might put forward in litigation, especially when the school has eliminated a team for the under-represented sex. Courts should closely examine whether the school's claimed athletes actually existed, regularly practiced, received benefits equal to those of genuine participants, and otherwise qualified as participants for Title IX purposes. Only when this in-depth audit has occurred, and the true number of genuine athletic participation opportunities has been determined should the court proceed to the second step of Prong One.

B. Step 2: Evaluate whether the number of participation opportunities provided for each sex is substantially proportionate to their enrollment

1. The legal standard—when are athletic participation opportunities "substantially proportionate"?

Once the accurate number of athletic participation opportunities offered to males and females at a school has been determined, the second step of Prong One considers whether those opportunities "are provided in numbers substantially proportionate to their respective enrollments."[106] Step two raises the question: what does "substantially proportionate" mean? To answer this question, the 1996 Clarification provides a legal standard and four illustrative examples. A detailed description of the Clarification is critical to understanding the legal issues regarding substantial proportionality.

Before delving into that, it is helpful to introduce a concept that, while not explicitly mentioned in the Policy Interpretation or 1996 Clarification, naturally derives from the principles laid out there and which undergirds many discussions about Prong One: the "participation gap."

---

105. *See* Jacoby et al., *supra* note 11 (noting that ten schools in a national investigation "undercounted a total of 170 male athletes by claiming to sponsor no men's indoor track and field team while continuing to send men to indoor track and field competitions.").

106. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (also available at www2.ed.gov/about/offices/list/ocr/docs/t9interp.html); *see also* Cantú, *supra* note 69; Biediger v. Quinnipiac Univ., 691 F.3d 85, 94 (2d Cir. 2012) Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 856 (9th Cir. 2014).

The concept works as follows: if a school offers athletic participation opportunities to males and females in numbers that are disproportionate to the school's male and female enrollment, the participation gap is the number of participation opportunities that would need to be added for the underrepresented sex to bring athletic participation into perfect alignment with enrollment (assuming enrollment stays the same and no participation opportunities are taken away from the over-represented sex).[107]

To illustrate, if a school enrolls 500 males and 500 and it provides 100 athletic participation opportunities for males and eighty participation opportunities for females, the female participation gap is twenty.[108] As another example, if a school's enrollment is forty-seven percent male (4,700 students) and fifty-three percent female (5,300 students) and it provides 210 athletic participation opportunities for males and 210 participation opportunities for females, then the female participation gap is 26.8 (i.e., 26.8 female participation

---

107. *See, e.g.*, Ohlensehlen v. Univ. of Iowa, 509 F. Supp. 3d 1085, 1091 n.5 (S.D. Iowa 2020).

108. Generally, the female participation gap can be calculated using a two-step formula that involves five variables:

X_E = the number of enrolled females.

Y_E = the number of enrolled males.

X_P = the number of female athletic participation opportunities.

Y_P = the number of male athletic participation opportunities.

X_{Pequal} = the number of female athletic participation opportunities there would be at the school if the percent of female athletic participation was exactly proportionate to the percent of female enrollment.

In the first step, we calculate X_{Pequal}, the number of female athletic participation opportunities there would be at the school if enrollment and athletic participation rates were exactly proportionate. To do this, we must solve the following equation for XPequal:

$$\frac{X_E}{X_E + Y_E} = \frac{X_{Pequal}}{X_{Pequal} + Y_P}$$

Applying some algebra yields:

$$X_{Pequal} = Y_P \times \left(\frac{X_E}{Y_E}\right)$$

In the second step, we calculate the participation gap by finding the difference between the number of female participation opportunities that there would be if exact proportionality were achieved, and the number of female participation opportunities there currently are at the school:

$$Female\ Participation\ Gap = X_{Pequal} - X_P$$

If the female participation gap is negative, then males are the under-represented sex, and the resulting number would be the male participation gap.

Applying the formula to the example above:

$$X_{Pequal} = 100 \times \left(\frac{500}{500}\right) = 100$$

$$Female\ Participation\ Gap = 100 - 80 = 20$$

opportunities would need to be added in order for the sex breakdown of participation opportunities to match the 47/53 sex breakdown in enrollment).[109]

The participation gap, properly defined for the purposes of Prong One, is expressed as a raw number of participation opportunities. However, a few courts have inaccurately used the term "participation gap" to describe a related but different metric—specifically, the percent difference between each sex's enrollment and its rate of athletic participation.[110] Even further confusing the Prong One landscape, one court incorrectly used the term "participation gap" to refer to yet another percent-based metric—specifically, the number of participation opportunities that are lacking for the under-represented sex expressed as a percentage of the size of the school's athletics program as a whole.[111]

With this participation gap context in view, we now discuss the substantial proportionality guidance set forth in the 1996 Clarification.

As a starting point, the 1996 Clarification explains that because the 1975 Regulations "allow[] institutions to control the respective number of participation opportunities offered to men and women . . . [,] it could be argued that to satisfy [Prong One] there should be no difference between the participation rate in an institution's intercollegiate athletic program and its full-time undergraduate student enrollment."[112] In other words, the 1975 Regulations could be read to require "exact" proportionality.[113] However, the 1996 Clarification explains that the Policy Interpretation's less-demanding "substantial" proportionality requirement derives from a recognition that:

---

109. Applying the formula set forth above, supra note 109, to this example yields the following:

$$X_{Pequal} = 210 \times \left(\frac{5{,}300}{4{,}700}\right) = 236.8$$

$$Female\ Participation\ Gap = \ 236.8 - 210 = 26.8$$

110. *See, e.g.*, Lazor v. Univ. of Conn., 560 F. Supp. 3d 674, 683 (D. Conn. 2021) (finding the defendant university's reliance on the "participation gap percentage" to be "unpersuasive" for the purposes of Prong One). To illustrate this concept using the hypotheticals above: In the first example (*supra* note 108), the school's enrollment is fifty percent female, however female participation opportunities only comprise 44.4% of the total athletic opportunities at the school (i.e., 100 x (80/180)). As a result, there is a 5.6% difference between enrollment and athletic participation (i.e., 50% – 44.4%). In the second example (*supra* note 109), females comprise fifty-three percent of the school's enrollment, but only fifty percent of its athletic participation opportunities, so there is a three percent difference between enrollment and athletic participation.

111. Balow v. Mich. State Univ., No. 1:21-cv-44, 2021 WL 650712, at *11 (W.D. Mich. Feb. 19, 2021), *rev'd*, 24 F.4th 1051, 1051 (6th Cir. 2022). While the two percentage-based metrics just discussed may appear to be the same, they are not. To illustrate the difference, in the first example above (*supra* notes 108, 110), the percent difference between enrollment and athletic participation was 5.6%. By contrast, the participation gap expressed as a percentage of the school's athletics program would be 11.1% (i.e., 100 x (20/180)).

112. Cantú, *supra* note 69.

113. *Id.*; *see* 34 C.F.R. § 86 (1975).

> [I]n some circumstances it may be unreasonable to expect an institution to achieve exact proportionality—for instance, because of natural fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality . . . .[114]

Whether a school meets Prong One, the 1996 Clarification explains, "depends on an institution's specific circumstances and the size of its athletics program."[115] As a result, the determination must be made "on a case-by-case basis, rather than through use of a statistical test."[116] To illustrate this case-by-case, non-formulaic approach, the 1996 Clarification provides two examples that are reproduced here in full:

> *Example 1:* If an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the participants in the athletic program are male and 48 percent female, then the institution would clearly satisfy [Prong One]. However, OCR recognizes that natural fluctuations in an institution's enrollment and/or participation rates may affect the percentages in a subsequent year. For instance, if the institution's admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the athletic program remained constant, the institution would continue to satisfy [Prong One] because it would be unreasonable to expect the institution to fine tune its program in response to this change in enrollment.[117]
>
> *Example 2:* [O]ver the past five years an institution has had a consistent enrollment rate for women of 50 percent. During this

114. Cantú, *supra* note 69.

115. *Id.*

116. *Id.* (explaining that "the [1996] Clarification does not provide strict numerical formulas or 'cookie cutter' answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.").

117. *Id.*

> time period, it has been expanding its program for women in order to reach proportionality. In the year that the institution reaches its goal—i.e., 50 percent of the participants in its athletic program are female—its enrollment rate for women increases to 52 percent. Under these circumstances, the institution would satisfy [Prong One].[118]

So, the first two examples contemplate scenarios in which a gender disparity between a school's enrollment and its athletics program (both expressed in percent terms) arises due to natural fluctuations in the school's enrollment.[119] In both examples, the schools remain in compliance despite there being a small percent disparity between each sex's enrollment and its athletic participation rate (i.e., one percent in *Example 1* and two percent in *Example 2*).[120]

After *Examples 1* and *2*, the 1996 Clarification establishes a standard for assessing substantial proportionality that is based on the number of participation opportunities needed to field a new team. The guidance states:

> OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.[121]

In other words, a school satisfies Prong One if its participation gap is too small "to sustain a viable team," that is, a team for which there is "a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team."[122] The guidance then offers two examples illustrating this "viable team" standard:

---

118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

> *Example 3:* Institution A is a university with a total of 600 athletes. While women make up 52 percent of the university's enrollment, they only represent 47 percent of its athletes. If the university provided women with 52 percent of athletic opportunities, approximately 62 additional women would be able to participate. Because this is a significant number of unaccommodated women, it is likely that a viable sport could be added. If so, Institution A has not met [Prong One].[123]
>
> *Example 4:* [A]t Institution B women also make up 52 percent of the university's enrollment and represent 47 percent of Institution B's athletes. Institution B's athletic program consists of only 60 participants. If the University provided women with 52 percent of athletic opportunities, approximately 6 additional women would be able to participate. Since 6 participants are unlikely to support a viable team, Institution B would meet part one.[124]

The viable team standard and *Examples 3* and *4* establish that Prong One compliance is assessed by looking at the participation gap in raw numerical terms—i.e., the actual number of athletes needed to field a viable team.[125] The 1996 Clarification provides that the "average size of teams offered the underrepresented sex" can be used as a "frame of reference," and *Examples 3* and *4* present hard numbers that likely would meet the standard (*Example 3's* gap of sixty-two) and likely would not (*Examples 4's* gap of six).[126]

Thus, the 1996 Clarification gives stakeholders and courts a flexible, practical method to determine whether a school meets Prong One.[127]

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *See, e.g.*, Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 855 (9th Cir. 2014); Biediger v. Quinnipiac Univ., 691 F.3d 85, 93 (2d Cir. 2012); Ohlensehlen v. Univ. of Iowa, 509 F. Supp. 3d 1085, 1089 (S.D. Iowa 2020); Lazor v. Univ. of Conn., 560 F. Supp. 3d 674, 680 (D. Conn. 2021).

2. Two issues applying the substantial proportionality standard

a. Issue 1: What role do percentages play in the prong one analysis, and is there a statistical "safe harbor" within which a school categorically satisfies Prong One?

Under the Policy Interpretation and 1996 Clarification, a school satisfies Prong One when the gender breakdowns of its enrollment and its athletic participation are substantially proportionate.[128] However, in recent cases some schools have argued that courts do not analyze the participation gap consistently. Specifically, they contend that there is a dispute over whether the participation gap should be considered in raw numerical terms (as required for the viable team standard) or instead in terms of percentage-based metrics. Going even further, some have argued that there exists a *de facto* "statistical safe harbor" within which an institution meets Prong One regardless of what caused the participation gap or how big it is in numerical terms. Indeed, those questions were at issue in a petition for a writ of certiorari filed by Michigan State University challenging the Sixth Circuit's opinion in *Balow v. Michigan State University*.[129] On December 12, 2022, the Supreme Court denied MSU's petition.[130] This left intact the Sixth Circuit's holding that in determining compliance with the substantial proportionality rule, the gap between male and female athletes must be measured in raw numerical terms, not as a percentage figure, and that there is no safe harbor. A survey of relevant cases shows why MSU's position was wrong and sets the groundwork for an approach to Prong One that avoids the pitfalls endorsed by some schools.

First up are cases where some schools, including MSU in *Balow*, have argued erroneously that courts used an exclusively percentage-based approach.[131] In *Boulahanis v. Board of Regents*, members of the Illinois State University men's soccer and wrestling teams sued the university after it canceled the teams as part of a Title IX compliance plan.[132] An internal investigation had found that men were severely overrepresented in the school's athletics program—they comprised forty-five percent of the school's

128. *See, e.g.*, *Ollier*, 768 F.3d at 855-56; Balow v. Mich. State Univ., 24 F.4th 1051, 1054-55 (6th Cir. 2022); Boulahanis v. Bd. of Regents, 198 F.3d 633, 635 (7th Cir. 1999), *abrogated by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009); Equity in Athletics v. Dep't of Educ., 639 F.3d 91, 101-02 (4th Cir. 2011).

129. Petition for a Writ of Certiorari at i, Mich. State Univ. v. Balow, (July 29, 2022) (No. 22-93).

130. *See* Balow v. Mich. State Univ., 24 F.4th 1051 (6th Cir.), *reh'g denied*, No. 21-1183, 2022 WL 1072866 (6th Cir.), *cert. denied*, No. 22-93, 2022 WL 17573475 (U.S. Dec. 12, 2022).

131. *See* Petition for a Writ of Certiorari, *supra* note 129, at 18-19.

132. *Boulahanis*, 198 F.3d at 634-35.

undergraduate enrollment but sixty-six percent of its student-athletes.[133] After implementing the compliance plan, men still remained the over-represented sex with their athletic participation gap down to "within three percentage points of [their] enrollment."[134] The plaintiffs did not contend that the resulting disparity fell outside the bounds of substantial proportionality (instead they argued that Title IX did not permit a school to cancel men's teams to begin with).[135] Faced with these facts, the court stated that the school did not violate Title IX when it cancelled a men's team where the men were still overrepresented.[136]

In *Equity in Athletics, Inc. v. Department of Education*—another case recently cited by MSU and other schools as using a percent-based approach[137]—an organization representing male athletes at James Madison University (JMU) challenged JMU's decision to cancel seven men's teams (in addition to three women's teams).[138] The male athletes, who had long been over-represented in JMU's athletics program, brought a Title IX claim in part on the ground that the school's plan "overdid [the] elimination of male athletes" because it would potentially cause men to become the under-represented sex by a small margin.[139] The athletes argued that after the cancellations there would be a participation gap of seventeen male opportunities, amounting to a two percent difference between participation and enrollment.[140] The Fourth Circuit, after examining the fact-specific details for the school's plan which erased a 10% female participation gap while creating a 1.15% male gap, affirmed the district court's dismissal of the Title IX claim.[141] And finally, in *Pederson v. Louisiana State University*, another case cited as evidencing a percent-only approach, the Fifth Circuit affirmed the trial court's finding that the defendant school violated Title IX based on a very large twenty percent gap between female enrollment and athletic participation.[142]

In other cases, some argue that courts have taken a mixed approach, analyzing the difference between enrollment and athletic participation both in

133. *Id.* at 635.

134. *Id.* at 638-39.

135. *Id.* at 636-38.

136. *Id.* at 635, 637-39 (citing Kelley v. Bd. of Trs., 35 F.3d 265, 270 (7th Cir. 1994); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 829 (10th Cir. 1993); Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993)).

137. *See* Petition for a Writ of Certiorari, *supra* note 129, at 19-21.

138. Equity in Athletics v. Dep't of Educ., 639 F.3d 91, 97-98, 109-10 (4th Cir. 2011).

139. *Id.* at 109-10.

140. *Id.*

141. *Id.* at 110 ("EIA provides no support for its contention that a disparity as low as 2% . . . is substantially disproportionate as a matter of law.").

142. Pederson v. La. State Univ., 213 F.3d 858, 878-79 (5th Cir. 2000).

percent terms and in terms of the numerical participation gap. In *Biediger v. Quinnipiac University*, for instance, the Second Circuit considered both the percent by which females were underrepresented—3.62%—and the number of opportunities needed for them to reach parity—thirty-eight.[143] The court relied upon the percentage gap as a starting point for its analysis, approving the district court's conclusion that "a 3.62% disparity presents a borderline case of disproportionate athletic opportunities."[144] However, after noting that the 1996 Clarification prohibits a "bright-line statistical test," the court also considered "the causes of the disparity and the reasonableness of requiring the school to add additional athletic opportunities to eliminate the disparity."[145] To that end, it analyzed whether the disparity was due to natural fluctuations in enrollment or the school's own actions (the court concluded that it was the latter),[146] and whether it was reasonable to add women's opportunities to close the gap (since the school had recently eliminated a viable women's volleyball squad, it was).[147] These "specific circumstances," the *Biediger* court held, "supported the conclusion that a 3.62% disparity" failed Prong One.[148]

In another example, *Ollier v. Sweetwater Union High School District*, the court noted that the difference between enrollment and athletic participation was 6.7%, but focused its attention on the fact that the gap "was equivalent to 47 girls," a number that could "sustain at least one viable competitive team."[149] Because the school failed the viable team standard, and there were no "specific circumstances" that otherwise explained the gap, the court held that Prong One was not met.[150]

Finally, in *Balow*, the Sixth Circuit disapproved using percent-based metrics to analyze Prong One.[151] There, the plaintiffs are former members of

143. Biediger v. Quinnipiac Univ., 691 F.3d 85, 105-08 (2d Cir. 2012).

144. *Id.* at 106 (citation omitted).

145. *Id.* at 106-07 (citation omitted).

146. *Id.* at 95 (arguing that during the relevant period, female enrollment had increased by 0.27% for reasons beyond the school's control, meaning that the effective difference between enrollment and athletic participation was only 3.35%.); *Id.* at 107 (finding the 0.27% change to be insignificant, stating that "the difference is not one that undermines the district court's conclusion that Quinnipiac's voluntary actions caused the disparity.").

147. *Id.* at 95.

148. *Id.* at 107-08.

149. Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 856–57 (9th Cir. 2014) (citing 1996 Clarification *Examples 3* and *4*, discussed *supra*, pp. 110-11). In *Ollier*, the defendant school district had argued that for the purposes of Prong One, "the idea of substantial proportionality relies on percentages, rather than numbers." *Id.* at 855. The United States, as *amici curiae*, argued in support of plaintiffs that a percent-based approach had no precedential authority and was "flatly incorrect," and the court agreed. *Id.* at 855-57.

150. *Id.* at 856-57.

151. *See* Petition for a Writ of Certiorari, *supra* note 129, at 22-24.

MSU's women's swimming and diving team who sued the school after it announced a plan to eliminate the women's and men's swimming and diving programs for the 2021-22 school year.[152] In denying the plaintiffs' motion for preliminary injunction, the district court analyzed the school's participation gap in percent terms—comparing the size of the participation gap to the size of the athletics program as a whole.[153] On appeal, the Sixth Circuit explicitly rejected this unprecedented program-size percentage approach, and resisted the use of percentages to analyze Prong One.[154] While stating that "the percentage gap may be relevant" to substantial proportionality, the court reasoned that relying on percentages "ignores the clear text of the [Policy Interpretation]," which "never refers to percentages and discusses only the number of participation opportunities provided."[155] Likewise, the court stated that while the 1996 Clarification "refers to percentages in other contexts, it uses only numbers to refer to the participation gap."[156] In, particular, the court explained that *Examples 1* and *2* from the 1996 Clarification, which discuss enrollment and athletics participation in percent terms,[157] "do not support the claim that the participation gap is measured as a percentage" but rather "stand only for the principle that fluctuations in enrollment will not force a school out of compliance."[158] As a result, the *Balow* court held that substantial proportionality should be determined by considering whether the number of opportunities needed to reach exact proportionality is sufficient to support a viable team.[159] As noted earlier, the Supreme Court denied the petition.

Judge Guy dissented, arguing that Title IX's statutory text authorizes courts to use "'statistical evidence of an imbalance' in terms of a 'number or percentage,'" and that contrary to the majority's view, the 1996 Clarification's examples do contemplate analyzing the participation gap in percent terms.[160] Following remand to the district court, on July 22, 2022, the *Balow* defendants submitted a petition for writ of certiorari to the Supreme Court arguing that the

152. Balow v. Mich. State Univ. (*Balow II*), 24 F.4th 1051, 1051 (6th Cir. 2022).

153. *Id.* at 1057.

154. *Id.*

155. *Id.* at 1057-59 (citing Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (internal quotation marks omitted).

156. *Id.* at 1057.

157. *See supra* pp. 111-12.

158. Balow v. Mich. State Univ., 24 F.4th 1051, 1057-58 (6th Cir. 2022).

159. *Id.* at 1057-61.

160. *Id.* at 1062-69 (Guy, J., dissenting). As discussed below *infra* note 163, on the latter point Judge Guy was incorrect.

Sixth Circuit's approach violates standards established in the Policy Interpretation and 1996 Clarification.[161]

In *Balow*, the school argued that the cases discussed above raise a question about whether percentage differences or numerical participation gaps should be used in the Prong One analysis to begin with. Two separate but related questions involve, if percentages *are* fair game, how they should be used.

The first question is what would be the appropriate metric—the percentage difference between enrollment and athletic participation, or the participation gap expressed as a percentage of the size of the school's athletics program? In the *Balow* certiorari petition the school conflated these two metrics, and then simply argued that it is common practice for courts to consider the "participation gap as a percentage."[162] That is false. In fact, we are aware of no case other than the *Balow* district court decision that was reversed by the Sixth Circuit in which a court considered the participation gap as a percentage of the size of a school's athletics program. Rather, in line with the 1996 Clarification's *Examples 1* and *2*, when courts have looked at percentages in the Prong One context, they have considered the percentage difference between enrollment and athletic participation.[163]

The second question is, regardless of which percentage metric is used, is there some percentage threshold that operates as a Prong One "safe harbor"? On this point, the school in *Balow* argued in its certiorari petition that courts nationwide have "coalesced" around a "statistical safe harbor" somewhere between 1% and 3.5%, and that the Sixth Circuit's rejection of that approach makes it an outlier.[164] That is wrong, and the picture is not so simple.

First, the term "safe harbor" has been given two different meanings in the Prong One context, and again MSU conflated them. The 1996 Clarification and various cases have referred to Prong One *itself* as a "safe harbor" within the Three-Prong Test.[165] The idea, courts have explained, is that a school wishing to avoid a more "extensive compliance analysis" under Prongs Two and Three can do so by satisfying Prong One—that is, by simply offering substantially

161. *See* Petition for a Writ of Certiorari, *supra* note 129, at 3.

162. *Id.* at 26-27 (citing *Balow II*, 24 F.4th 1051 (6th Cir. 2022) dissent).

163. *See supra* pp. 112-13. This distinction appears to have escaped Judge Guy in his *Balow* dissent, but the *Balow* majority rightly pointed it out. *See Balow II*, 24 F.4th at 1058 (noting that "the relevant ratio comes from comparing the athletic opportunities to the gender breakdown of the undergraduate student body. *This* is the relevant ratio, not the percentage of the athletic opportunities relative to the size of the athletic program.").

164. *See* Petition for a Writ of Certiorari, *supra* note 129, at 21-22.

165. Cantú, *supra* note 69. *See also, e.g.*, Cohen v. Brown Univ., 991 F.2d 888, 897-98 (1st Cir. 1993).

proportionate athletic participation opportunities.[166] Plainly, this meaning of "safe harbor" is distinct from the one advanced by the Balow defendants, that a school satisfies Prong One so long as its participation gap, expressed as a percentage, is below a certain number.

Second, with that distinction in mind, we are aware of no circuit court that has held there to be a "bright-line" percentage at which a school necessarily meets Prong One. Quite the opposite, relevant decisions and other authority explicitly reject such a categorical rule as inconsistent with the text of the 1996 Clarification.[167] They emphasize that Prong One is analyzed "on a case-by-case basis, rather than through use of a statistical test."[168] Despite the overwhelming authority to the contrary, though, some district courts have wrongly stated—or at least implied—that a *de facto* statistical safe harbor exists in Prong One.[169]

---

166. *See Cohen*, 991 F.2d at 897-98.

> The first [prong] furnishes a safe harbor for those institutions that have distributed athletic opportunities in numbers "substantially proportionate" to the gender composition of their student bodies. Thus, a university which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup.

Id.

167. *See, e.g.*, Balow v. Mich. State Univ. (*Balow II*), 24 F.4th 1051, 1058 (6th Cir. 2022) (rejecting a statistical safe harbor as "inconsistent with the [1996 Clarification]"); Biediger v. Quinnipiac Univ., 691 F.3d 85, 106-07 (2d Cir. 2012) ("[W]e do not . . . understand the 1996 Clarification to create a statistical safe harbor at [2%] or any other percentage. Instead, the Clarification instructs that substantial proportionality is properly determined on a 'case-by-case' basis after careful assessment of the school's 'specific circumstances.'" (citing 1996 Clarification)); Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 856 (9th Cir. 2014) ("[T]here is no magic number at which substantial proportionality is achieved . . . ."); Biediger v. Quinnipiac Univ., 728 F. Supp. 2d 62, 111 (D. Conn. 2010) ("OCR has not established a threshold statistical figure for determining whether a school offers participation opportunities substantially proportional to its enrollment, but instead examines each school on a case-by-case basis."); Lazor v. Univ. of Conn., 560 F. Supp. 3d 674, 683 (D. Conn. 2021) (rejecting statistical safe harbor approach); Samuels & Galles, *supra* note 3, at 37. Similarly, the NCAA has repeatedly stated that a participation gap that is small in percent terms does not automatically render a school in compliance with Prong One. *See, e.g.*, NCAA, ACHIEVING GENDER EQUITY: A BASIC GUIDE TO TITLE IX AND GENDER EQUITY IN ATHLETICS FOR COLLEGES AND UNIVERSITIES 11 (2002) (citing as an example of non-compliance under Prong One a hypothetical institution with 600 athletes and a participation gap of twenty-five, and noting that "despite a difference of only two percentage points" the institution "would not be offering opportunities substantially proportionate to enrollment," and further noting that "[s]maller differences than two percentage points, depending on participation rates at a specific institution, may also be found as not substantially proportionate"); *Gender Equity in Intercollegiate Athletics: A Practical Guide for Colleges and Universities*, NCAA 22 (2008), https://www.ncaapublications.com/productdownloads/GEIA07.pdf (advising that "[a]t least one regional [OCR] office stated informally that anything greater than 1 percent would raise red flags").

168. Equity in Athletics v. Dep't of Educ., 639 F.3d 91, 110 (4th Cir. 2011) (recognizing that there is no "magic number at which substantial proportionality is achieved").

169. *See* Anders v. Calif. State Univ., Fresno, No. 1:21-cv-179, 2021 WL 3115135, at *2 (E.D. Cal. July 22, 2021); Anders v. Calif. State Univ., Fresno, No. 1:21-cv-179, 2021 WL 1564448, at *4-5, 16 (E.D. Cal.

b. Issue 2: When deciding whether a school's participation gap is large enough to sustain a "viable team," what should courts use as their frame of reference?

As we discussed above,[170] under the 1996 Clarification, a school satisfies Prong One if its participation gap, in numerical terms, is too small to field a "viable team."[171] The guidance defines a viable team as "a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team."[172] Further, the guidance states that "[a]s a frame of reference in assessing this situation [i.e., a team's 'viability'], OCR may consider the *average size of teams offered for the underrepresented sex*, a number which would vary by institution."[173]

The second issue relating to step two of Prong One involves how to apply the "viable team" standard, and specifically, which "teams" should be used as the frame of reference. On this point, some courts have assumed that the "teams" referred to in the guidance are teams across *all sports at the same school*, whereas other courts have looked at teams for a *single sport at other schools*.[174] The first approach—the "intra-school" comparison—is wrong.

As we saw above, the 1996 Clarification contemplates considering the "average size" of a team in the context of assessing if a *new sport* could be added to fill a school's participation gap.[175] The inquiry turns on the hypothetical new team's ability to compete with *other schools*.[176] Viewed in this light, an intra-school comparison makes no sense: there is no rational connection between the

Apr. 21, 2021) (holding that a 1.57% disparity fell within a safe harbor); Portz v. St. Cloud Univ., 196 F. Supp. 3d 963, 975 (D. Minn. 2016) (finding that "a deviation of less than 3.5 percentage points typically keeps the ratios substantially proportionate").

170. *See supra* pp. 111-12.

171. Cantú, *supra* note 69.

172. *Id.*

173. *Id.* (emphasis added).

174. For example, under the first approach, if School A has a participation gap of thirty-five women's opportunities, a court would consider the average size of School A's women's teams as a frame of reference for determining whether a "viable team" could be added to fill the thirty-five-participant gap. *See, e.g.*, *Anders*, 2021 WL 1564448, at *13; Lazor v. Univ. of Conn., 560 F. Supp. 3d 674, 681-83 (D. Conn. 2021) (taking for granted that the 1996 Clarification contemplates an in-school comparison but declining to consider that average because it is only a "frame of reference," and then later considering the size of teams at other schools). Under the second approach, the court would consider the average size of teams for various, candidate sports at other comparable schools or within the school's league as a reference for the number of athletes needed to field a team in each of those sports. *See, e.g.*, Balow v. Mich. State Univ., No. 1:21-cv-44, 2022 WL 3152232, at *10 (W.D. Mich. Aug. 8, 2022).

175. *See* supra pp. 112-13; Cantú, *supra* note 69.

176. *See* supra pp. 112-13; Cantú, *supra* note 69.

average size of all women's sports teams *within* a school and the number of athletes required to field an intercollegiate team for *a particular sport*.

To illustrate, imagine a school that offers three women's sports—soccer, softball, and track—with an average team size of thirty athletes. If a court finds that the school has a participation gap of twenty athletes, the size of the school's currently-sponsored teams is irrelevant to whether another team requiring fewer than thirty athletes—e.g., tennis or volleyball—could be added. Rather, the average team size *in the sport to be added* is what is relevant. To answer that question, it is only logical that a court would consider the average size of teams for that sport at other, competitor schools (a number that, per the 1996 Clarification, "would vary by institution").[177]

The intra-school approach is also wrong because it creates perverse incentives for schools, arbitrarily encouraging them to increase the average size of their women's teams to avoid Title IX liability and allowing a school with a sizable participation gap to cut women's teams with impunity. To illustrate, imagine a school with equal enrollment of men and women with the following sports and true team sizes:

Women's Athletic Participation Opportunities		Men's Athletic Participation Opportunities	
Sport	No. of Participants	Sport	No. of Participants
Softball	22	Baseball	35
Track & Field	58	Track & Field	50
Soccer	35	Soccer	30
Rugby	40	Rugby	65
Lacrosse	45	Lacrosse	40
Rowing	115	Football	115
Tennis	8	Tennis	8
Total Participants	323	Total Participants	343
Average Team Size	46.1	Average Team Size	49.0
Participation Gap = 20			

177. Cantú, *supra* note 69; To be sure, the average size of a team for a given sport will likely be *larger* than the minimum size needed to field a viable team. *See, e.g.*, Balow v. Mich. State Univ., 24 F.4th 1051, 1061 (6th Cir. 2022) ("[A] viable team is not an average one . . . .").

Even before canceling any team, the school offers twenty fewer participation opportunities to women than men. Nonetheless, under the intra-school approach, not only would the school comply with Title IX to begin with (twenty being smaller than the average women's team size, 46.1), it could even cancel its women's tennis and softball teams and remain in compliance, since the resulting participation gap would remain smaller than the average women's team size. This absurd result occurs because, while canceling both women's teams would clearly increase the participation gap (from twenty to fifty), it would also remove the two smallest teams from the average team size calculation, meaning that the school's average team size would increase substantially (from 46.1 to 58.6).

3. A framework to address the "percentage gap" and "average team size" issues

With the issues discussed above as background, we now discuss a framework for the second step of Prong One. The approach rests upon the 1996 Clarification's key principles, namely:

- The substantial proportionality inquiry is not a statistical test; it is a case-by-case determination that depends on a school's specific circumstances and the size of its athletics program.
- Satisfying Prong One does not require a school to "fine tune" its athletics program to account for natural fluctuations in enrollment or participation opportunities. Reflecting this, *Examples 1* and *2* in the 1996 Clarification show that it can be appropriate to consider a school's historical enrollment and athletic participation rates in percent terms to assess whether a participation gap, or portion thereof, is attributable to natural fluctuations outside the school's control.
- The viable team standard requires a court to look at the participation gap in raw numerical terms, and to consider whether a viable team could be added to close the gap.
- A viable team is one for which there is a sufficient number of interested and able students and enough available competition to sustain a competitive team. In assessing how many students are needed to meet this standard, a court may consider the

> average size of teams offered the underrepresented sex, which are teams for the sport in question at other schools.[178]

From these principles a few conclusions about the case law are apparent. First, as discussed above, there is no "statistical safe harbor" under Prong One. Regardless of how small the difference is between enrollment and athletic participation rates in percent terms, a court analyzing substantial proportionality must consider further factors, including the cause of the participation gap, the size of the school's athletics program, and whether the gap satisfies the viable team standard. Second, the participation gap expressed as a percentage of the size of a school's athletics program is not an appropriate metric for analyzing Prong One. A court may consider the percentage difference between enrollment and athletic participation in assessing substantial proportionality, but that figure is at most a guidepost—it does not control the analysis. Finally, while not dispositive, courts can consider the average team size of comparable teams as a frame of reference in determining the number of athletes needed for a team to be viable.[179]

The framework we discuss consists of two parts that mirror the overall structure of the 1996 Clarification and synthesizes cases that have avoided the pitfalls just mentioned, including the district court's post-remand decision in *Balow*,[180] the recent district court decision in *Lazor v. University of Connecticut*,[181] and the *Biediger*, *Ollier*, and *Balow* circuit decisions mentioned above.[182]

In the first part of the framework, a court identifies what portion of a school's participation gap can be attributed to the school's actions (e.g., cutting sports) and what portion of the gap is due to causes beyond the school's control (i.e., natural fluctuations in enrollment or athletic participation).[183] To do this, a court would consider evidence regarding the school's enrollment and athletic

178. *See* Cantú, *supra* note 69.

179. *See, e.g.*, Lazor v. Univ. of Conn., 560 F. Supp. 3d 674, 682 (D. Conn. 2021) (considering the average size women's Division I golf, bowling, rifle, and gymnastics teams in determining whether a viable team could be added); *cf. Balow III*, 2022 WL 3152232, at *10 (considering the smallest (not the average) sized swimming and diving team in the school's competitive conference when assessing viability).

180. Balow v. Mich. State Univ., No. 1:21-cv-44, 2022 WL 3152232 (W.D. Mich. Aug. 8, 2022).

181. 560 F. Supp. 3d 674.

182. Biediger v. Quinnipiac Univ., 691 F.3d 85 (2d Cir. 2012); Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843 (9th Cir. 2014); *Balow II*, 24 F.4th 1051.

183. *See Ollier*, 768 F.3d at 856 n.7 (noting "[a]n institution that sought to explain a disparity . . . should show how its specific circumstances justifiably explain the reasons for the disparity as being *beyond its control*.") (emphasis added); *Biediger*, 691 F.3d at 106 (noting that courts must look to the "causes of the disparity.").

participation in the years preceding the action, and evidence regarding school initiatives that directly impacted or will impact enrollment or athletic participation.[184] The court would analyze how the school's participation gap has changed year-to-year, and consider the causes of any changes.[185] How far back in time a court looks (and the evidence it relies upon) would depend on the specific facts of the case and be at the court's discretion, however, using the relevant state's statute of limitations[186] as a frame of reference might be considered a possibility.[187]

Here, the percentage difference between enrollment and athletic participation could be useful in uncovering whether gaps (and changes in gaps) are attributable to natural fluctuations or instead are persistent year-over-year—larger athletics programs and schools will have larger natural swings in numerical terms, and looking at gaps as percentages normalizes the comparison between programs.[188] And regardless, performing a percent-based comparison is true to the 1996 Clarification's guidance to consider the size of a school's athletics program, and it aligns with the analytical approach used in *Examples 1* and *2*.[189]

Several patterns might emerge from a court's historical participation gap analysis. For instance, a school may have a participation gap that consistently

---

184. *See, e.g.*, Cantú, *supra* note 69, at *Examples 1* and *2* (*see supra* pp. 111-12); *Balow III*, 2022 WL 3152232, at *8-10 ("[B]ecause enrollment and participation numbers fluctuate every year, the Court must look at data from multiple years to determine whether MSU is complying with Title IX."); *Lazor*, 560 F. Supp. 3d at 683.

185. *See, e.g.*, Cantú, *supra* note 69, at *Examples 1* and *2* (*see supra* pp. 111-12); Lazor v. Univ. of Conn., 560 F. Supp. 3d 674, 683 (D. Conn. 2021); *Balow III*, 2022 WL 3152232, at *8-10.

186. *See, e.g.*, Purcell v. N.Y. Inst. Of Tech. – Coll. of Osteopathic Med., 931 F.3d 59, 65 (2d Cir. 2019) (finding that a three-year statute of limitation applies to Title IX claims under New York law).

187. *See Ollier*, 768 F.3d at 856 (focusing on the three years preceding suit, but also considering data going back ten years); *see also Lazor*, 560 F. Supp. 3d at 683-84 (looking back thirteen years); Balow v. Mich. State Univ., No. 1:21-cv-44, 2022 WL 3152232, at *9-10 (W.D. Mich. Aug. 8, 2022) (looking back eight years). A court employing this sort of historical analysis should be sensitive to the challenges plaintiffs face, especially at the early stages of litigation, in accessing reliable Title IX compliance data. *See supra* Part III.A.2; *Lazor*, 560 F. Supp. 3d at 683 n.5 (acknowledging the difficulties faced by plaintiffs in accessing data at the early stage of litigation). A single year's enrollment and athletic participation data might not suffice to state a Prong One claim under the framework discussed, but a burden-shifting approach could solve the problem: Upon a *prima facie* showing by the plaintiff(s) that an impermissibly large participation gap exists for any given year, the burden of proof shifts to the defendant(s) to show as a defense that the gap, or a portion thereof, is attributable to natural fluctuations over time.

188. *See* Cantú, *supra* note 69; Balow v. Mich. State Univ., 24 F.4th 1051, 1066-67 (6th Cir. 2022) (Guy, J., dissenting) (arguing that it is "sound logic" to rely on percentages to account for the fact that "[s]chools with larger athletic programs are likely to see larger fluctuations in participation numbers from year to year.").

189. *See* Cantú, *supra* note 69, at *Examples 1* and *2* (*see supra* pp. 111-12); *Ollier*, 768 F.3d at 856 (noting that under Prong One a court must "look beyond the raw numbers to . . . the size of [the school's] athletics program"); *see also Balow II*, 24 F.4th at 1066-67 (Guy, J., dissenting).

disfavors one sex but fluctuates up or down one year to the next.[190] Likewise, a school may have a participation gap that oscillates around zero—favoring males in some years and females in others. In both cases, an average could be used to estimate the size of gap that persists year-over-year, that is, the portion of the gap that is *not* due to natural fluctuations in enrollment or athletic participation.[191] Most obviously though, a court would consider the effect that a school's own actions had on the participation gap.[192] Plainly, if a school eliminated a team or cut roster spots for the underrepresented sex, then the effect that has on the participation gap is not due to natural fluctuations.

After completing its historical review, the court would then compute an "effective participation gap" in raw numbers of participation opportunities for the relevant point in time. The effective participation gap equals the sum of any year-over-year participation gap found in the historical review plus any change in the participation gap caused by the school's actions (such as canceling a team).

In the second part of the framework, the court would apply the 1996 Clarification's viable team standard to the effective participation gap it just computed. In other words, the court would determine whether the effective participation gap is large enough to support a viable team.[193] If it is, then the school does not meet Prong One.

In many cases, the definition provided in the 1996 Clarification for "viable team"—i.e., "a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team"—is all that is needed to resolve whether an effective participation gap violates Prong One. This is because as a practical matter, much Title IX litigation involving unequal athletic participation opportunities arises after a

190. *See, e.g.*, *Lazor*, 560 F. Supp. 3d at 683 (noting, after historical review, that "UConn experienced participation gaps disfavoring females every year for the past 13 years.").

191. *See, e.g.*, *Balow III*, 2022 WL 3152232, at *8-10 (finding eight-year average participation gap of thirty-one). In the extremely unlikely case that a school's average participation gap is zero, then that school would comply with Prong One. A school might also have a participation gap that grows or shrinks consistently over several years, while still fluctuating around the trend each year. In this case, a simple average may not fairly capture the trend. As an alternative to an average, the court could use a least-squares or other trendline method to estimate the effective size of the school's year-over-year participation gap at the relevant time.

192. *See, e.g.*, Biediger v. Quinnipiac Univ., 691 F.3d 85, 107 (2nd Cir. 2012) (noting that the school failed Prong One where its participation gap was "largely caused" by the school's "voluntary actions"); *Balow III*, 2022 WL 3152232, at *10 (considering elimination of women's swimming and diving team in Prong One analysis, and noting that "[a] participation gap is not necessarily the result of any one decision. It may be the result of many decisions over the course of several years."); Ohlensehlen v. Univ. of Iowa, 509 F. Supp. 3d 1085, 1094 (S.D. Iowa 2020) (considering the effect of eliminating women's swimming and diving teams on the schools' participation gaps).

193. *See, e.g.*, *Balow II*, 24 F.4th at 1058-60; *Ollier*, 768 F.3d at 856; *Ohlensehlen*, 509 F. Supp. 3d at 1094-95; Balow v. Mich. State Univ., No. 1:21-cv-44, 2022 WL 3152232, at *10 (W.D. Mich. Aug. 8, 2022).

school chooses to eliminate a team that already exists.[194] When this happens, if the school's effective participation gap is as large or larger than the team that was canceled, the Prong One inquiry is over because there is obviously a viable team at hand—the one that was just eliminated.[195]

In uncommon cases where that is not true—where the effective participation gap is smaller than a team that was canceled[196] or where there is no history of team cancellation at a school—the court would assess whether a new, viable team could be added to close the gap. In this case, the court would consider evidence regarding sports not currently sponsored by the school, and whether there is sufficient student interest and available competition to sustain a team in any of those sports.[197] As a frame of reference at this stage, the court could consider the average size of teams for the candidate sports at other schools to estimate the number of athletes needed to field a viable team.[198] If the court concluded that a viable team could be sustained with as many or fewer athletes than the size of the participation gap, then the school would fail Prong One, and, assuming neither Prongs Two or Three were met (which would not be available if the school had cut a team), the school would violate Title IX.

Finally, Title IX liability having been established, the court would then need to fashion a remedy. In his *Balow* dissent, Judge Guy argued that strictly applying the viability standard would "mean[] that if the participation gap is greater than *any* team for which there is interest, ability, and available competition (i.e., a 4-person tennis team), a school must *always* add that team to comply with Title IX."[199] That, Judge Guy argued, would be "tantamount to requiring perfection, not substantial proportionality."[200] This argument is wrong

194. *See, e.g.*, *Biediger*, 691 F.3d at 107 (elimination of women's volleyball); Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (demotion to club status of women's gymnastics and volleyball teams); *Ohlensehlen*, 509 F. Supp. 3d at 1085 (elimination of women's swimming and diving).

195. *See, e.g.*, *Biediger*, 691 F.3d at 107-08 (finding that school could "afford the additional participation opportunities of an independent sports team . . ." by re-instating its recently eliminated women's volleyball squad that "require[d] a mere 14 players to compete."); *Cohen*, 101 F.3d at 180 ("[W]hile the question of full and effective accommodation of athletics interests and abilities is potentially a complicated issue where plaintiffs seek to create a new team . . . no such difficulty is presented here, where plaintiffs seek to reinstate what were successful university-funded teams right up until the moment the teams were demoted"); *Ohlensehlen*, 509 F. Supp. 3d at 1095 ("The 35 members of the University of Iowa women's swimming and diving team easily fits within [the school's participation gap] as a viable team . . . .").

196. For instance, if a school eliminates both men's and women's teams at the same time, the resulting participation gap may be smaller than the size of the under-represented sex's canceled team.

197. *See, e.g.*, Lazor v. Univ. of Conn., 560 F. Supp. 3d 674, 682 (2021).

198. *See, e.g., id.* (considering average size of Division I teams in golf, bowling, rifle, and gymnastics teams in determining whether a viable team could be added).

199. Balow v. Mich. State Univ. (*Balow II*), 24 F.4th 1051, 1068 (6th Cir. 2022) (Guy, J., dissenting).

200. *Id.*

for several reasons. First, as discussed above, if a school can show that minute disparities in participation opportunities are attributable to natural fluctuations in enrollment or athletic participation over time, then the school meets Prong One.[201] Indeed, under the framework we discuss, the viable team inquiry only ever contemplates new teams when a school cannot make such a showing *and* the effective participation gap is smaller than any canceled team.[202] In those rare cases involving very small participation gaps, while the favored remedy is reinstating the cancelled team (or second best, adding an entirely new team), the school could expand the rosters of already existing teams by the few spots needed to close the gap.[203] Of course, any compliance plan that involves roster expansion of existing teams should include rigorous standards to ensure that the opportunities added are genuine, and not the result of roster padding.[204]

To illustrate the framework, consider the following example: In March 2024 an NCAA Division II school announces a plan to cancel its men's and women's soccer programs in the 2025-26 school year. The women's soccer team has thirty-two members and the men's team has twenty-eight members.[205] Further, in discovery, the following enrollment and athletic participation figures are established:

201. *See supra* pp. 122-24.

202. *Id.*

203. *See, e.g.*, Balow v. Mich. State Univ., No. 1:21-cv-44, 2022 WL 3152232, at *12 (W.D. Mich. Aug. 8, 2022) (denying plaintiffs' request to that their team be re-instated, and instead ordering defendant school to submit a compliance that, "for instance, 'choose[s] to eliminate or cap [men's] teams as a way of complying with [Prong One] . . . .").

204. *See supra* Part III.A.2.

205. For this hypothetical we assume the court has already made findings with regard to step one of Prong One.

	Enrollment		Athletic Participation Opportunities		Prong One Metrics	
Year	Males	Females	Males	Females	% difference between enrollment & participation	Female participation gap (# opportunities)
2015-16	5,752	5,297	187	166	3.72	26.7
2016-17	5,792	6,016	188	172	3.17	23.3
2018-19	5,748	6,012	180	158	4.37	30.2
2019-20	5,771	5,978	173	173	0.88	6.2
2020-21	5,810	6,104	172	171	1.38	9.7
2021-22	5,843	6,064	177	167	2.38	16.7
2022-23	5,546	5,983	176	161	4.12	28.9
2023-24	5,588	6,100	166	164	2.48	17.2
					Average:	19.9

In part one of the framework, a court reviewing these facts might conclude that enrollment and athletic participation naturally fluctuated every year, and that the effect on the gender disparity between enrollment and athletic participation was most pronounced during the 2019-20 and 2020-21 school years. Still, the takeaway is that throughout the eight-year look-back period, the school maintained a participation gap that disfavored women.

The court would then calculate the effective participation gap, which would be the sum of the average gap over the look-back period (19.9)[206] and the net

206. As discussed above (*supra* note 187 and accompanying text), the specific facts of each case will dictate what an appropriate length of the look-back period is and under the framework the deciding court would have discretion to make that decision. For instance, here if the court used a three-year look-back there would be an average participation gap of 20.9.

effect on participation opportunities that canceling the soccer programs will have (i.e., reducing the number of women's opportunities by four in comparison to men, thereby causing the effective participation gap to increase). The effective participation gap would then be 19.9 + 4 = 23.9, or, after rounding, 24.

In the second part of the framework, the court would consider whether an effective participation gap of twenty-four is large enough to sustain a viable team. The first place to look, the canceled women's soccer team, is a potential candidate. While the team, at thirty-two players, is larger than the effective participation gap, the court could consider evidence on the average size of women's Division II soccer teams—or other comparable competitor teams—to get a sense of whether a twenty-four player soccer team is viable (in a recent school year, the average women's Division II soccer team was 28.6 players).[207] Other evidence going to whether a twenty-four person team could viably compete, including the *smallest* women's soccer team in the competitive region/league, could also be considered. But ultimately for the purposes of analyzing Prong One liability, it may not matter because the court would also consider whether a different sport could be added to fill the gap. Indeed, the average squad size of numerous sports at the Division II level is smaller than twenty-four,[208] indicating that if there is sufficient interest at the school and prospect of competition, then the school does not meet Prong One. In that case, whether the preferred remedy would be to install a new team at the school (assuming the soccer team could not be re-instated) or adjust the roster sizes of pre-existing sports,[209] is a question outside the scope of this article.

CONCLUSION

In the fifty years since its enactment, Title IX has revolutionized the role that sports play for women and girls in American society. But despite that progress, after half a century, Title IX's promise of gender equality is still unkept. Far too many schools fail to comply with the law's core principles. With ongoing seismic changes to college sports and athletic department budgets, it is now even more critical that the promise of equal opportunity be protected. To that end, courts should hold schools accountable and analyze equal athletic opportunity in a way that is thorough and faithful to the law and its regulations. We believe that the framework we discuss does just that.

---

207. *See NCAA Sports Sponsorship and Participation Rates and Report*, NCAA 84, https://ncaaorg.s3.amazonaws.com/research/sportpart/2021RES_SportsSponsorshipParticipationRatesReport.pdf (Jan. 6, 2022).

208. For instance, volleyball (17.1), tennis (8.8), cross country (12.7), or golf (8.0). *See id.*

209. *See supra* note 203 and accompanying text.