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# **TITLE IX AND COVID-19: LOSING MILLIONS OF DOLLARS DURING A PANDEMIC IS NO EXCUSE FOR CUTTING WOMEN'S TEAMS**

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## **INTRODUCTION**

In response to fiscal challenges created by lost revenues, both from athletics, as well as other revenue sources such as tuition, housing and meals, and cuts to state funding for public schools, in conjunction with increased expenses brought on by the pandemic, including refunds, testing, quarantine and isolation, at least thirty-five Division I institutions cut at least one athletic team.<sup>1</sup> Both men's and women's teams were cut. In response to these cuts, athletes on many of the women's teams filed, or at least made notice of the intention to file, Title IX lawsuits. This article is going to discuss those cuts, the resulting cases, and actions taken, as well as the implications for the future.

## **I. IMPACT OF COVID-19 IN HIGHER EDUCATION**

The onset of the COVID-19 pandemic had sweeping consequences across the globe and virtually all industries, including in higher education. This

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1. *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).

section will discuss the impacts of COVID-19 on higher education overall and on intercollegiate athletics.

### A. COVID-19 Impact on Higher Education

Higher education suffered exponentially from the COVID-19 pandemic. In March 2020, schools across the United States cancelled the remainder of their in-person spring semesters and shifted all classes to online learning.<sup>2</sup> In addition, university campuses shut down and sent virtually all of their students' home.<sup>3</sup> However, with the implementation of travel restrictions and closed borders, international students in the U.S. were essentially stranded,<sup>4</sup> creating undue stress and mental anguish. Even domestic students faced barriers to completing the Spring 2020 semester, including a lack of proper technology (e.g., computers or reliable internet), changes to their living situation, financial difficulties, and difficulty concentrating, all of which affected their mental health.<sup>5</sup>

Faculty and staff were also adversely affected. Many faculty and staff shifted to working from home, and faculty had to learn new technology in a short time frame to effectively deliver their courses online.<sup>6</sup> Moreover, numerous universities implemented travel bans for faculty, meaning they could not attend conferences out of state.<sup>7</sup> In addition, research funding,<sup>8</sup> as well as general funding from state governments,<sup>9</sup> were limited or reduced. In

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2. Abigail Johnson Hess, *How Coronavirus Dramatically Changed College For Over 14 Million Students*, CNBC (Mar. 26, 2020, 2:07 PM), <https://www.cnbc.com/2020/03/26/how-coronavirus-changed-college-for-over-14-million-students.html>.

3. *Id.*; *The Impact of Coronavirus on Higher Education*, TIMES HIGHER EDUC., <https://www.timeshighereducation.com/hub/keystone-academic-solutions/p/impact-coronavirus-higher-education> (last visited Dec. 30, 2022).

4. *The Impact of Coronavirus on Higher Education*, *supra* note 3.

5. Changwon Son et al., *Effects of COVID-19 on College Students' Mental Health in the United States: Interview Survey Study*, 22 J. MED. INTERNET RSCH. e21279, e21279 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7473764/>.

6. Lisa L. Walsh et al., *Training Faculty as an Institutional Response to COVID-19 Emergency Remote Teaching Supported by Data*, 20 CBE: LIFE SCI. EDU. 1, 1-2, 5 (2021).

7. *Update on Travel Restrictions For Campus*, UNIV. OF N. COLO. (Mar. 11, 2020), <https://www.unco.edu/coronavirus/messages/update-travel-restrictions-campus.aspx>; *CU Denver Coronavirus and Travel Policies Update*, UNIV. OF COLO. DENVER (Mar. 9, 2020, 7:44 PM), <https://www.ucdenver.edu/coronavirus/updates/messages/cu-denver-coronavirus-and-travel-policies-update-march-9-2020>.

8. Emma Stoye, *How Research Funders Are Tackling Coronavirus Disruption*, NATURE (Apr. 17, 2020), <https://www.nature.com/articles/d41586-020-01120-2>.

9. Victoria Yuen, *Mounting Peril for Public Higher Education During the Coronavirus Pandemic*, CTR. FOR AM. PROGRESS (June 11, 2020), <https://www.americanprogress.org/article/mounting-peril-public-higher-education-coronavirus-pandemic/>.

fact, public universities that rely on significant state funding expected “double-digit cuts from legislatures facing huge losses in tax revenue.”<sup>10</sup> Even universities with endowments were not immune; the sharp drop in the stock market in March 2020 significantly impacted the financial health of those institutions, although the market has since recovered.<sup>11</sup>

Many colleges and universities resumed in-person classes for the Fall 2020 semester, but with additional protocols in place. For instance, nearly all colleges and universities required all students, faculty, and staff to wear face masks at all times while on campus.<sup>12</sup> Other changes included socially distanced classrooms, reduced capacity in residence halls and specific residence halls earmarked for quarantine, and enhanced cleaning protocols.<sup>13</sup> In addition, all faculty, staff, and students were required to be tested regularly for COVID-19.<sup>14</sup> To make matters worse, many universities saw enrollment numbers drop, which further exacerbated the dire financial situation of a nationwide shutdown in Spring 2020 because of reduced tuition and increased expenses, such as COVID-19 tests.<sup>15</sup> The federal government did provide three rounds of pandemic relief for higher education as part of multiple COVID-19 relief bills, including the Coronavirus Aid, Relief, and Economic Security (CARES) Act<sup>16</sup> and the American Rescue Plan (ARP),<sup>17</sup> which helped offset some, but not all, of the financial losses.

Overall, the pandemic wreaked havoc on higher education and forced some significant changes. However, higher education is resilient and “ha[d]

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10. Jeffrey Mervis, *As Pandemic Pounds U.S. Universities, Federal Support Helps Their Labs Stay Afloat*, SCI. (June 5, 2020), <https://www.science.org/content/article/pandemic-pounds-us-universities-federal-support-helps-their-labs-stay-afloat>.

11. *Id.*

12. Elinor Aspegren & Samuel Zwickel, *In Person, Online Classes or a Mix: Colleges' Fall 2020 Coronavirus Reopening Plans, Detailed*, USA TODAY (June 22, 2020, 5:36 PM), <https://www.usatoday.com/story/news/education/2020/06/22/coronavirus-reopening-college-fall-2020/3210719001/>.

13. *Id.*

14. Dennis Wagner, *Colleges Race to Create 'A New Sense of Normalcy.' Will New Rules, COVID-19 Testing be Enough?*, USA TODAY (July 7, 2020, 5:32 PM), <https://www.usatoday.com/story/news/education/2020/07/05/covid-testing-colleges-race-campus-safe-reopen-fall/3283734001/>.

15. Kery Murakami, *Congressional Deal Would Give Higher Ed \$23B*, INSIDE HIGHER ED (Dec. 22, 2020), <https://www.insidehighered.com/news/2020/12/22/congressional-agreement-covid-19-would-give-higher-ed-23-billion>.

16. Kery Murakami, *\$40 Billion for Colleges*, INSIDE HIGHER ED. (Mar. 8, 2021), <https://www.insidehighered.com/news/2021/03/08/senate-approves-40-billion-colleges>.

17. *Third Round of Federal Higher Education Relief Funding*, LEGIS. ANALYST'S OFF., <https://lao.ca.gov/Publications/Report/4421> (May 12, 2021).

withstood turbulent economic times in the past.”<sup>18</sup> Thus, there is no reason to think that higher education will not rebound from this latest setback.

### *B. Impact of COVID-19 on Collegiate Athletic Departments*

#### 1. Initial Impact

Like many areas of the sport industry, college sports were hit hard by the COVID-19 pandemic. College athletic departments depend on revenue generated from ticket sales, advertising, sponsorships, and media contracts to fund much of their sports.<sup>19</sup> College athletic departments were forced to implement changes to try and limit the financial shortfall from cancelled Spring 2020 sports seasons, particularly the National Collegiate Athletic Association’s (NCAA) Men’s Basketball tournament.<sup>20</sup> Those changes came in the form of eliminating sports. Specifically, thirty-five Division I schools cut a total of 112 sports programs, both men’s and women’s, to save money.<sup>21</sup> Furthermore, the sports that were cut were often Olympic sports, such as gymnastics, soccer, swimming, wrestling, lacrosse, and golf, which are typically classified as nonrevenue.<sup>22</sup> The most popular sport cut was tennis: thirty-two men’s programs and thirty-one women’s programs were eliminated at the college level.<sup>23</sup> While the biggest cuts were at the Division I level, Division II and III schools, National Association of Intercollegiate Athletics (NAIA) schools, and community and junior colleges also made cuts.<sup>24</sup> However, football and men’s basketball programs remained intact, and some schools, such as Cincinnati, continued to “invest heavily in its football program.”<sup>25</sup> This was despite the fact that Cincinnati eliminated its men’s

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18. *The Impact of Coronavirus on Higher Education*, *supra* note 3.

19. Matthew J. Williams & Devin M. Mathis, *The COVID-19 Pandemic and the Stress it Put on College Athletics*, SPORT J. (Aug. 13, 2021), <https://thesportjournal.org/article/the-covid-19-pandemic-and-the-stress-it-put-on-college-athletics/>.

20. *Id.*

21. *Tracker: College Sports Programs Cut During COVID-19 Pandemic*, *supra* note 1.

22. *Id.*; Meredith Cash, *Cincinnati, Stanford, and 17 Other Division I Schools Are Permanently Eliminating Dozens of Sports Programs in an Unexpected Loss From the Pandemic*, INSIDER (July 8, 2020, 3:12 PM), <https://www.insider.com/college-sports-programs-cut-due-to-coronavirus-pandemic-2020-7>.

23. Aishwarya Kumar, *The Heartbreaking Reality—and Staggering Numbers—of NCAA Teams Cut During the Pandemic*, ESPN (Nov. 6, 2020), [https://www.espn.com/olympics/story/\\_/id/30116720/the-heartbreaking-reality-staggering-numbers-ncaa-teams-cut-pandemic](https://www.espn.com/olympics/story/_/id/30116720/the-heartbreaking-reality-staggering-numbers-ncaa-teams-cut-pandemic).

24. *Cutting Sports in the Context of Title IX, COVID-19*, ATHLETIC BUS. (May 6, 2021), <https://www.athleticbusiness.com/operations/legal/article/15161296/cutting-sports-in-the-context-of-title-ix-covid-19>.

25. Cash, *supra* note 22.

soccer program as a cost-saving measure.<sup>26</sup> Other schools that eliminated programs include the University of Connecticut, Stanford, Michigan State, Brown, Robert Morris, East Carolina, Old Dominion, and Appalachian State.<sup>27</sup> These massive cuts to sport programs prompted several lawsuits, which will be discussed in greater detail later in this article.

Eliminating sport programs did not just affect the college athletes. Coaches, athletic trainers, sport information directors, and other sport support staff were laid off<sup>28</sup> or took pay cuts.<sup>29</sup> For example, Stanford Athletics sent an open letter to its fanbase explaining that their current model of supporting thirty-six athletic programs had “become a serious and growing financial challenge . . . [and was] not sustainable,” which was the justification the school used for eliminating eleven sport programs and twenty support staff positions.<sup>30</sup> The University of Louisville furloughed forty-five athletic department staffers, cut salaries by four percent for anyone who made more than \$100,000 and its athletic director forfeited \$300,000 in bonuses.<sup>31</sup> These cuts were in addition to a ten percent salary reduction for head coaches and senior athletics staff.<sup>32</sup> Other schools, such as Syracuse University and the University of Kansas, announced that several of their coaches and senior athletic directors took voluntary pay cuts to help alleviate the financial pressure.<sup>33</sup>

## 2. Continuing Impact

Eliminating sports due to COVID-19 was not the only major impact for college athletic departments. Starting with the Fall 2020 sport season, the

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26. *Id.*

27. *Tracker: College Sports Programs Cut During COVID-19 Pandemic*, *supra* note 1.

28. Williams & Mathis, *supra* note 19.

29. Marc Tessier-Lavigne et al., *An Open Letter to the Stanford Community and the Stanford Athletics Family*, STAN. NEWS (July 8, 2020), <https://news.stanford.edu/2020/07/08/athletics/>.

30. *Id.*

31. *Louisville Furloughs 45 Athletic Department Staffers, While Others Take 4% Pay Cut Amid Pandemic*, ESPN (Apr. 22, 2020), [https://www.espn.com/college-football/story/\\_/id/29084218/louisville-furloughs-45-athletic-department-staffers-others-take-4-pay-cut-amid-pandemic](https://www.espn.com/college-football/story/_/id/29084218/louisville-furloughs-45-athletic-department-staffers-others-take-4-pay-cut-amid-pandemic).

32. *Id.*

33. Andrea Adelson, *Syracuse Coaches Jim Boeheim, Dino Babers Take Voluntary Pay Cuts*, ESPN (Apr. 20, 2020), [https://www.espn.com/college-sports/story/\\_/id/29071160/syracuse-coaches-jim-boeheim-dino-babers-take-voluntary-pay-cuts](https://www.espn.com/college-sports/story/_/id/29071160/syracuse-coaches-jim-boeheim-dino-babers-take-voluntary-pay-cuts); *Kansas' Les Miles, Bill Self, Jeff Long Take Salary Cuts*, ESPN (Apr. 27, 2020), [https://www.espn.com/mens-college-basketball/story/\\_/id/29103984/kansas-les-miles-bill-self-jeff-long-take-salary-cuts](https://www.espn.com/mens-college-basketball/story/_/id/29103984/kansas-les-miles-bill-self-jeff-long-take-salary-cuts).

NCAA released guidelines for safely returning to in-person activities,<sup>34</sup> as well as guidelines for testing, symptom checks, and social distancing.<sup>35</sup> In addition to conducting daily health checks, the NCAA guidelines “urged a universal protocol for staff, coaches, and athletes to wear cloth face masks...while participating in non-aquatic activities.”<sup>36</sup> Furthermore, the governing body mandated that student-athletes “must be allowed to opt out of participation due to concerns about contracting COVID-19.”<sup>37</sup> Among other NCAA requirements for safeguarding student-athletes, member schools had to cover COVID-19 related medical expenses for student athletes, and any athletes in Division I and Division II who opted out of their season had to have their scholarship commitments honored by the school.<sup>38</sup> The NCAA has continued to update its COVID-19 protocols each season, including the upcoming Fall 2022 season, accounting for differences between vaccinated and unvaccinated persons,<sup>39</sup> and formally defining what it means to be fully vaccinated.<sup>40</sup>

When it came to Fall 2020 sports, including college football, many Division I Football Bowl Subdivision (FBS) conferences, such as the Mid-American Conference (MAC),<sup>41</sup> the Mountain West Conference,<sup>42</sup> and the Ivy League,<sup>43</sup> decided to cancel their season and shift it to Spring 2021. The Power Five conferences, which consist of the Big 10, Southeastern Conference (SEC), Atlantic Coast Conference (ACC), Pac-12, and Big-12, vacillated

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34. *Board Directs Each Division to Safeguard Student-Athlete Well-Being, Scholarships and Eligibility*, NCAA (Aug. 5, 2020, 11:44 AM), <https://www.ncaa.org/news/2020/8/5/board-directs-each-division-to-safeguard-student-athlete-well-being-scholarships-and-eligibility.aspx>.

35. Gillian R. Brassil, *N.C.A.A. Updates Guidelines and Says Return of Sports Depends on Spread*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/16/sports/ncaaf-football/ncaa-guidelines-fall-sports.html>.

36. *Id.*

37. *Board Directs Each Division to Safeguard Student-Athlete Well-Being, Scholarships and Eligibility*, *supra* note 34.

38. *Id.*

39. *New COVID-19 Guidance For Fall Sports Released*, NCAA (Aug. 4, 2021, 2:00 PM), <https://www.ncaa.org/news/2021/8/4/general-new-covid-19-guidance-for-fall-sports-released.aspx>.

40. *NCAA Releasees Updated COVID-19 Guidance For Winter Sports*, NCAA (Jan. 6, 2022, 12:00 PM), <https://www.ncaa.org/news/2022/1/6/media-center-ncaa-releasees-updated-covid-19-guidance-for-winter-sports.aspx>.

41. Jenna West, *MAC Cancels Fall Football Season, Will Attempt to Play This Spring*, SPORTS ILLUSTRATED (Aug. 8, 2020), <https://www.si.com/college/2020/08/08/mac-cancels-football-season-fall-sports>; Ralph Ellis et al., *College Football's 'Power Five' Leaders are Discussing Postponing Season Amid Coronavirus Concerns, Reports Say*, CNN (Aug. 10, 2020, 9:22 PM), <https://www.cnn.com/2020/08/10/us/college-sports-power-five-covid-spt/index.html>.

42. Ellis et al., *supra* note 41.

43. Brassil, *supra* note 35.

between cancelling or playing their Fall 2020 seasons.<sup>44</sup> Ultimately, all of the Power 5 conferences decided to play football (and other fall sports), but the Big-10, SEC, and Pac-12 adopted a conference-only schedule for each fall sport,<sup>45</sup> while the ACC and Big-12 permitted one non-conference game for football.<sup>46</sup>

An unexpected influence of the pandemic was how the loss of seasons and constantly changing safety protocols affected student-athlete mental health. The majority of student-athletes had at least one season of their sport cancelled or postponed, which prompted the NCAA to provide an additional year of eligibility at all levels for all athletes.<sup>47</sup> In addition, athletes at NAIA schools and schools that are part of the National Junior College Athletic Association (NJCAA) were also given an extra year of eligibility.<sup>48</sup> Moreover, the NCAA conducted several surveys to assess student-athlete well-being.<sup>49</sup> According to the NCAA's website, the surveys, disseminated in Spring 2020, Fall 2020, and Fall 2021, examined areas such as mental health concerns, barriers to training, academic experiences, COVID-19 testing, and impact on academic timeline and career planning.<sup>50</sup> Across all three surveys, the majority of student-athlete respondents reported higher-than-normal rates of mental exhaustion, anxiety, and depression.<sup>51</sup> These issues were even more prevalent among athletes of

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44. *Big Ten, Pac-12 Postpone Fall College Football: What You Need to Know*, ESPN (Aug. 11, 2020), [https://www.espn.com/college-football/story/\\_/id/29640578/big-ten-pac-12-postpone-fall-college-football-need-know](https://www.espn.com/college-football/story/_/id/29640578/big-ten-pac-12-postpone-fall-college-football-need-know); Rachel Treisman, *Big 12 is Moving Ahead With Fall Football Season*, NPR (Aug. 12, 2020, 5:48 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/08/12/901867332/big-12-is-moving-ahead-with-fall-football-season>; Alan Blinder, *Pac-12 Will Play Football in 2020, Joining Other Top Leagues During the Pandemic*, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/2020/09/24/sports/ncaaf-football/coronavirus-pac-12-restart.html>.

45. Paul Myerberg, *Pac-12 Joins Big Ten With Conference-Only Football, Other Sports For the Fall*, USA TODAY (July 10, 2020, 8:55 PM), <https://www.usatoday.com/story/sports/ncaaf/2020/07/10/pac-12-joins-big-ten-conference-only-college-football/5414246002/>; *SEC Establishes New Conference-Only Football Start Date*, SEC SPORTS (July 30, 2020), <https://www.secsports.com/article/29565989/sec-establishes-new-conference-only-football-start-date>.

46. *ACC Announces Plans For Football and Fall Olympic Sports*, ACC (July 29, 2020), <https://theacc.com/news/2020/7/29/general-acc-announces-plans-for-football-and-fall-olympic-sports.aspx>; *2020 Big 12 Football Conference Schedule Announced*, BIG 12 SPORTS (Aug. 12, 2020, 10:30 AM), <https://big12sports.com/news/2020/8/12/2020-big-12-football-conference-schedule-announced.aspx>.

47. *What Does the NCAA Extra Year of Eligibility Mean for Recruiting?*, NCSA COLL. RECRUITING, <https://www.ncsasports.org/coronavirus-sports/ncaa-eligibility-coronavirus> (last visited Dec. 30, 2022).

48. *Id.*

49. *NCAA Student-Athlete Well-Being Study*, NCAA, <https://www.ncaa.org/sports/2020/5/22/ncaa-student-athlete-well-being-study.aspx> (last visited Dec. 30, 2022).

50. *Id.*

51. *Survey Shows Student-Athletes Grappling With Mental Health Issues*, NCAA (May 22, 2020, 10:00 AM), <https://www.ncaa.org/news/2020/5/22/survey-shows-student-athletes-grappling-with-mental-health>.



color, those living alone or away from campus, LGBTQ+ athletes, and those who report economic hardship.<sup>52</sup>

Overall, the COVID-19 pandemic took a large toll on the monetary health of college athletic programs, and many universities cut sports programs to protect the athletic department from major financial shortfall. However, perhaps the more important concern within college athletics was the mental health decline among college athletes and the anxiety about whether their programs would be reinstated once COVID-19 started to recede.

## II. TITLE IX

### A. Background

Before discussing the Title IX lawsuits that arose from the cutting of these teams, it is important to provide necessary background on Title IX. Over a half century ago, Representative Edith Green (D-Ore.) “introduced the first iteration of Title IX during the 1969 – 1970 congressional session with no co-sponsors, as one small part (Section 805) of the large Omnibus Postsecondary Education Act of 1970.”<sup>53</sup> Unfortunately, the bill never made it out of committee. The following year, “Green resubmitted her omnibus education bill . . . including what would become Title IX . . . with seven men co-sponsors.”<sup>54</sup> The bill progressed to the House Committee on Education and Labor where Representatives Patsy T. Mink (D-HI) and Shirley Chisholm (D-NY) joined Green to pass the landmark legislation.<sup>55</sup> While Green, Mink, and Chisholm worked in the House, Senator Birch Bayh (D-IN) came aboard in the Senate.

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issues.aspx [hereinafter *Survey Shows Student-Athletes*]; Greg Johnson, *Pandemic Continues to Impact Student-Athlete Mental Health*, NCAA (Feb. 16, 2021, 12:00 PM), <https://www.ncaa.org/news/2021/2/16/pandemic-continues-to-impact-student-athlete-mental-health.aspx> [hereinafter *Pandemic Continues*]; Greg Johnson, *Mental Health Issues Remain on Minds of Student-Athletes*, NCAA (May 24, 2022, 12:00 PM), <https://www.ncaa.org/news/2022/5/24/media-center-mental-health-issues-remain-on-minds-of-student-athletes.aspx> [hereinafter *Mental Health Issues Remain*].

52. *Survey Shows Student-Athletes*, *supra* note 51; *Pandemic Continues*, *supra* note 51; *Mental Health Issues Remain*, *supra* note 51.

53. Sherry Boschert, *The True Mother of Title IX. And Why it Matters Now More Than Ever*, WASH. POST (June 22, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2022/06/22/true-mother-title-ix-why-it-matters-now-more-than-ever/>.

54. *Id.*

55. *Id.*

The legislation would later stall; however, “Sen. Bayh reintroduced the bill in 1972 with a few provisions.”<sup>56</sup> Those provisions would become what is known as the thirty-seven words that “ushered in an era of gender equity in schools that aimed to level the playing field for women, be it in academics or athletics.”<sup>57</sup> The law, co-written by Sen. Bayh and Rep. Green and signed by President Richard Nixon on June 23, 1972, states, “[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.”<sup>58</sup> Any educational organization that receives federal funding (e.g., public and private primary and secondary schools, two- and four-year colleges and universities, and vocational programs, etc.) cannot discriminate based on sex.<sup>59</sup>

Title IX is synonymous with advancing women’s sports.<sup>60</sup> However, the application of Title IX is much broader as it covers cases of sexual assault, sexual harassment, gender identity, and sexual orientation.<sup>61</sup> “The U.S. Department of Education’s Office of Civil Rights (OCR) is in charge of enforcement.”<sup>62</sup> If an organization is in violation of Title IX, federal funding could be revoked. However, the OCR has never taken that step; “non-compliant schools sign resolution agreements outlining the changes needed to reach compliance by a certain date and allowing the OCR to monitor them during that time.”<sup>63</sup> To maintain compliance, many schools and organizations have hired a Title IX coordinator.

### *B. Athletics Enforcement*

In athletics, Title IX provides equal access to programs and equal treatment that is equitable to male athletes. Equal access is assessed through

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56. Greg Johnson, *The Origins of Title IX: How the Landmark Legislation Got its Start 50 Years Ago*, NCAA (June 23, 2022), <https://www.ncaa.com/news/ncaa/article/2022-06-23/origins-title-ix-how-landmark-legislation-got-its-start-50-years-ago>.

57. Rachel Axon, *USA Today Answers Your Questions About Title IX and its Role in College Sports*, USA TODAY (May 26, 2022, 5:00 AM), <https://www.usatoday.com/story/news/investigations/2022/05/26/title-ix-college-sports-questions-answered/9837129002/>.

58. Johnson, *supra* note 56.

59. Axon, *supra* note 57.

60. Madeline Marino, *Celebrating the 50<sup>th</sup> Anniversary of the Passage of Title IX for Women’s History Month*, NEV. TODAY (Mar. 31, 2022), <https://www.unr.edu/nevada-today/news/2022/title-ix-50th-anniversary>.

61. *Id.*

62. Axon, *supra* note 57.

63. *Id.*

“how well an institution is accommodating the interests and abilities of athletes of the underrepresented sex, most often females.”<sup>64</sup> To show compliance, schools must demonstrate one of the following three-prongs:

- (1) Participation opportunities for men and women is substantially proportionate to their respective enrollments; or
- (2) The institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex; or
- (3) The institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.<sup>65</sup>

Prong one “requires numerical proof that a school’s ratio of female athletic participation is close to the ratio of female enrollment at the institution.”<sup>66</sup> Title IX does not state a numerical number that shows compliance, but the “OCR and courts generally accept a difference of less than five percent.”<sup>67</sup> Schools use head counts from rosters starting on the first date of competition of the number of athletes competing. For example, if the data showed a total of 500 athletes, including 300 males and 200 females, the female rate would be forty percent and with a differential of ten percent, thus not supporting proportionality.<sup>68</sup> However, some athletes are two or even three sport participants. It is important to take this into consideration when calculating the data.

Under prong two a school must show a pattern of expansion, adding opportunities or improving already existing opportunities.<sup>69</sup> The school should ask itself, was the expansion responsive to the developing interests and

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64. Ellen J. Staurowsky & Erianne A. Weight, *Title IX Literacy: What Coaches Don’t Know and Need to Find Out*, 4 J. INTERCOLLEGIATE SPORT 190, 194 (2011).

65. Axon, *supra* note 57.

66. Lee Green, *Title IX Compliance – Part I: The Three-Prong Test*, NFHS (Feb. 8, 2022), <https://nfhs.org/articles/title-ix-compliance-part-i-the-three-prong-test/>.

67. *Id.*

68. *Id.*

69. *Id.*

abilities of the underrepresented sex?<sup>70</sup> Courts and the OCR tend to look at the last three to five years.<sup>71</sup>

Lastly, in order to comply with prong three, a school must show it is fully and effectively accommodating the athletic interest and abilities of the underrepresented sex enrolled in the institution; offering enough sports that cover the interests of the underrepresented sex.<sup>72</sup> Surveys often help schools determine this; to help with validity, the OCR will evaluate the content of the survey, targeted population, response rate, treatment of non-responses, confidentiality protections, and frequency of such surveys.<sup>73</sup>

Elements that affect the quality of the experience and are subject to Title IX analysis include training facilities, services, equipment, supplies, housing, dining, locker rooms, coaching, academic assistance, publicity, scheduling of games and practices, travel, and per diem expenses.<sup>74</sup> It is important to note that Title IX does not necessarily mean everything needs to be equal. For example, equipment might cost more for the hockey team than the track team. The OCR will look at the quality of the equipment and if it is similar, the school should be in compliance.<sup>75</sup> Ultimately, the OCR will “determine whether discrimination is the cause for disparity.”<sup>76</sup>

### III. CHALLENGES TO THE CUTTING OF WOMEN’S TEAMS DUE TO COVID-19

In response to the cutting of teams, several Title IX lawsuits were filed or threatened. Although both men’s and women’s teams were cut, Title IX provided a unique pathway for the eliminated women’s teams to attempt reinstatement.

As discussed previously, the three prongs provide guidance as to how schools may comply with Title IX. Prongs two and three have been found by numerous courts and the OCR to “only apply to the ‘underrepresented sex.’”<sup>77</sup> Cutting existing women’s teams is the antithesis of “a ‘history and continuing

70. Diane Marshall-Freeman, *Title IX’s Three-Prong Test in Athletics*, NAT’L SCH. BDS. ASS’N 11 (March 2017), <https://cdn-files.nsba.org/s3fs-public/09.%20MarshallFreeman%20Title%20IX%20ThreeProng%20Test.pdf>.

71. Green, *supra* note 66.

72. Marshall-Freeman, *supra* note 70.

73. *Intercollegiate Athletics Policy: Three-Part Test - Part Three*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS., <https://www2.ed.gov/about/offices/list/ocr/docs/title9-qa-20100420.html> (June 29, 2020).

74. Ellen J. Staurowsky et al., *Travelers on the Title IX Compliance Highway: How Are Ohio’s Colleges and Universities Faring?*, 15 WOMEN IN SPORT & PHYSICAL ACTIVITY J. 46, 50 (2007).

75. *Id.*

76. Axon, *supra* note 57.

77. *Cutting Sports in the Context of Title IX, COVID-19*, *supra* note 24.

practice of program expansion” and does not effectively accommodate the interests and abilities of athletes.<sup>78</sup> This means schools potentially faced lawsuits under the first prong, substantial proportionality, making both athletes and schools focused on whether the cuts would put the campus out of prong one compliance. Prong one was both the primary claim the athletes had and the only potential defense for the schools.<sup>79</sup> Additionally, unlike prongs two and three, prong one applies to men and women and thus eliminated men’s teams may file a lawsuit under prong one in addition to the cut women’s teams,<sup>80</sup> increasing the number of potential, or actual, plaintiffs and requiring campuses be cognizant of the number of athletes on men’s team, not just women’s. Several of these Title IX claims, both filed and threatened, and their outcomes are discussed next.

### *A. Unfiled Claims*

#### *1. Dartmouth College*

One of the first schools to cut teams was Dartmouth College. On July 9, 2020, Dartmouth College announced the elimination, effective immediately of five intercollegiate teams: men’s and women’s swimming and diving, men’s and women’s golf, and men’s lightweight rowing.<sup>81</sup> The rationale for these cuts was “[t]o better balance the makeup of incoming undergraduate classes and help ease a budget deficit made worse by the pandemic.”<sup>82</sup> The college claimed it was facing a \$150 million deficit for the 2020-21 fiscal year and that these team cuts, along with some staff cuts and closing of the Hanover Country Club, would save \$2 million a year.<sup>83</sup> The college specifically noted in its announcement that the cuts would not impact Title IX compliance, as the remaining “percentage of women who are varsity athletes [would] be identical to the percentage of women in the undergraduate student body.”<sup>84</sup>

A group of women student-athletes hired attorney Arthur H. Bryant to represent them in a possible Title IX lawsuit against the college, who had previously been lead counsel on the first ever athletic Title IX lawsuit against

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Dartmouth Announces Changes to Varsity Athletics Program*, DARTMOUTH UNIV. (July 9, 2020), <https://home.dartmouth.edu/news/2020/07/dartmouth-announces-changes-varsity-athletics-program>.

82. *Id.*

83. *Id.*

84. *Id.*

Dartmouth.<sup>85</sup> On December 18, 2020, Bryant sent a letter to Dartmouth president Philip Hanlon outlining how the college was in violation of Title IX and requesting reinstatement of the two women's teams that were cut.<sup>86</sup> Ultimately no lawsuit was ever filed, as six weeks after receiving the letter, on January 29, 2021, Dartmouth College reinstate all five of the eliminated teams through at least the 2024-25 academic year, stating "that elements of the data that the athletics department used to confirm compliance 'may not have been complete.'"<sup>87</sup>

Coincidentally, a preliminary injunction issued in the University of Iowa case (as discussed later in this article) came the week after Bryant's letter to Dartmouth. Although never explicitly addressed by Dartmouth, it seems reasonable that the outcome of the Iowa case influenced Dartmouth's decision to reinstate its teams.

## 2. William & Mary College

William & Mary College cut seven athletic teams, "[m]en's and women's gymnastics, men's and women's swimming, men's indoor and outdoor track and field, and [women's] volleyball[.]" on September 3, 2020, effective at the end of the 2020-2021 academic year.<sup>88</sup> The cost saving for these cuts was estimated to be \$5.84 million per year.<sup>89</sup> The announcement did not indicate what the total expected financial losses for the college would be, however the school stated that it had "conducted multiple reviews over the last two decades, all of which concluded sponsoring 23 sports was not sustainable without a significant increase in funding . . . [and that] the 'financial realities' of COVID-19 only accelerated the need to reduce its sports inventory."<sup>90</sup>

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85. Pete Nakos, *Dartmouth Athletes Consider Title IX Complaint About Program Cuts*, VALLEY NEWS (Dec. 18, 2020, 10:36 PM), <https://www.vnews.com/Dartmouth-College-sent-letter-from-law-firm-outlining-possible-Title-IX-class-action-lawsuit-37873959>.

86. *Id.*

87. Daniela Allee, *Dartmouth College Reinstates Five Previously Cut Sports Teams, After Threat of Lawsuit*, NHPR (Jan. 29, 2021, 5:13 PM), <https://www.nhpr.org/nh-news/2021-01-29/dartmouth-college-reinstates-five-previously-cut-sports-teams-after-threat-of-lawsuit>.

88. Dave Johnson, *Amid Financial Concerns, W&M to Discontinue Seven Sports Following the 2020-21 Academic Year*, WM & MARY (Sept. 3, 2020), <https://www.wm.edu/news/stories/2020/amid-financial-concerns,-wm-to-discontinue-seven-sports-following-the-2020-21-academic-year.php>.

89. *Id.*

90. *Id.*

Approximately six-weeks later, William & Mary reinstated the three cut women's teams after receiving notification of an intent to sue under Title IX.<sup>91</sup> The college acknowledged that after a review of its athletic rosters, it could not be certain that it would meet participation requirements once the teams were cut and so settled the suit by reinstating the women's teams.<sup>92</sup> At the time the college stated there was "no clear or easy pathway to reinstate the four suspended men's programs," but the campus was committed to continuing to explore options.<sup>93</sup>

Surprisingly, just a few weeks later William & Mary announced the reinstatement of the four cut men's teams as well, saying "that despite the very real and pressing financial challenges, the university should take more time to consider the best path for W&M Athletics going forward, in order to rebuild confidence, explore potential financial support and develop broader understanding of the challenges faced."<sup>94</sup>

### *B. Filed Lawsuits*

#### 1. University of Iowa

The University of Iowa (UI) cut four teams in August of 2020, effective at the end of the 2020-21 season: men's tennis and gymnastics and men's and women's swimming and diving.<sup>95</sup> In an open letter to the UI campus, Bruce Harreld, the university president, and Gary Barta, the athletics director, cited expenses and "impact on gender equity and Title IX compliance," among other factors, in their decision.<sup>96</sup> Three days later, Barta held a news conference where he stated "100 percent determined and driven by COVID-19. The financial fallout that COVID-19 caused led to the postponement,

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91. *William & Mary Athletics: The Path Forward*, WM. & MARY ATHLETICS (Oct. 19, 2020, 2:35 PM), <https://tribeathletics.com/news/2020/10/19/general-william-mary-athletics-the-path-forward.aspx>.

92. *Id.*

93. *Id.*

94. *University Resets Process to Determine Long-term Sustainability for W&M Athletics*, WM. & MARY ATHLETICS (Nov. 5, 2020, 11:50 AM), <https://tribeathletics.com/news/2020/11/5/general-university-resets-process-to-determine-long-term-sustainability-for-w-m-athletics.aspx>.

95. Izabela Zaluska, *Left to 'Completely Rebuild' Their Team After COVID Cuts, UI Women Swimmers Are Taking the University to Task Over Title IX*, LITTLE VILL. (Mar. 3, 2021), <https://littlevillagemag.com/university-of-iowa-women-swimmers-divers-title-ix-lawsuit/>; Pat Forde, *Iowa's Elimination of Four Sports Shows the Cruel Side of College Athletics*, SPORTS ILLUSTRATED (Aug. 25, 2020), <https://www.si.com/college/2020/08/25/iowa-cuts-sports-swimming-gymnastics-tennis>.

96. Bruce Harreld & Gary Barta, *Open Letter to the University of Iowa and Hawkeye Athletics Community*, HAWKEYE SPORTS (Aug. 21, 2020), <https://hawkeyesports.com/news/2020/08/21/open-letter-to-the-university-of-iowa-and-hawkeye-athletics-community/>.

cancellation, of fall football . . . . Were it not for that, we would not have been dropping those four sports.”<sup>97</sup>

At the time of the cuts, the Big Ten Conference fall 2020 football season was still cancelled, and the UI was anticipating \$100 million in lost revenue and a \$60-75 million budget shortfall in 2020-21.<sup>98</sup> The savings from cutting these four sports totaled just over \$4.25 million per year.<sup>99</sup> Less than a month later, on September 16, 2020, the Big Ten Conference reinstated a partial fall football season; however, UI did not reverse the elimination of those four teams, since the university would still face a \$50-60 million shortfall.<sup>100</sup> On September 25, 2020, four member of the women’s swimming and diving team (joined later by two additional students) filed a Title IX claim.<sup>101</sup> The lawsuit claimed violations under all three prongs of Title IX and requested a preliminary injunction to prevent the team from being cut while the lawsuit was pending.<sup>102</sup>

On December 24, 2020, Judge Stephanie Rose of the U.S. District Court for the Southern District of Iowa granted the preliminary injunction, ordering the reinstatement of the women’s swimming and diving team.<sup>103</sup> The court analyzed the claim under the first prong, substantial proportionality, and concluded that the plaintiffs “demonstrated a fair chance that the University of Iowa does not presently provide its female student with intercollegiate athletic opportunities in substantial proportion to their enrollment, and is unlikely to do so after eliminating the women’s swimming and diving team for the 2021–22 academic year.”<sup>104</sup> The court directly addressed the claims of financial hardship put forth by the University of Iowa, ultimately concluding:

[t]he Court acknowledges the financial harm suffered by the University at the hands of Covid-19. It is important to note, though, that Defendants originally premised their decision on budget shortfalls that projected losses and no income from

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97. Zaluska, *supra* note 95.

98. Chad Leistikow, *University of Iowa Cuts Four Sports in Wake of COVID-19 Pandemic, Loss of Fall Football*, HAWK CENT. (Aug. 21, 2020, 1:54 PM), <https://www.hawkencentral.com/story/sports/college/columnists/chad-leistikow/2020/08/21/iowa-cut-4-sports-coronavirus-swimming-gymnastics-tennis-gary-barta-bruce-harrelld/3409666001/>.

99. *Id.*

100. Zaluska, *supra* note 95.

101. *Id.*

102. *Id.*

103. *Ohlensehlen v. Univ. of Iowa*, 509 F. Supp. 3d 1085, 1106 (S.D. Iowa 2020).

104. *Id.* at 1101.



football in fiscal year 2021 when little to no athletics income was expected due to event cancellations. Since then, the University of Iowa football team has played a number of televised games, and the basketball season has begun as well. The University faces budgetary setbacks, to be sure; but those setbacks do not outweigh the harm to Plaintiffs have shown after demonstrating a fair chance their rights under Title IX have been infringed. Ultimately, “financial hardship is not a defense to a [probable] Title IX violation.” Public universities “may not simply plead limited resources to excuse the fact that there are fewer opportunities for girls than for boys.”<sup>105</sup>

On February 15, 2021, the women’s swimming and diving teams were reinstated; however, the lawsuit was not immediately dropped.<sup>106</sup> The university initially appealed the decision to the Eighth Circuit Court, but eventually dropped it and on October 6, 2021, Judge Rose approved the settlement between the plaintiff and the university and dismissed the claim with prejudice.<sup>107</sup> As part of the settlement, the university also added a women’s wrestling team.<sup>108</sup> As of the writing of this article, the cut men’s teams have not been reinstated.

## 2. Stanford University

A day before Dartmouth cut their teams, Stanford University announced the elimination of eleven of its thirty-six intercollegiate athletic teams at the end of the 2020-21 academic year.<sup>109</sup> These included: “men’s and women’s fencing, field hockey [women], lightweight rowing [women], men’s rowing, co-ed and women’s sailing, squash [women], synchronized swimming [women], men’s volleyball and wrestling [men].”<sup>110</sup> Six of the eleven teams

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105. *Id.* at 1104 (first quoting *Mayerova v. E. Mich. Univ.*, 346 F. Supp. 3d 983, 998 (E.D. Mich. 2018; then quoting *Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265 (6th Cir. 1994)).

106. Zaluska, *supra* note 95.

107. *Ohlenschlen v. Univ. of Iowa*, No. 3:20-cv-00080, 2021 WL 6689534, at \*1-2 (S.D. Iowa Oct. 6, 2021).

108. *University of Iowa Reaches Settlement Terms With Female Athletes in Title IX Suit*, IOWA NEWS NOW (Sept. 23, 2021), <https://cbs2iowa.com/news/local/university-of-iowa-reaches-settlement-terms-with-female-athletes-in-title-ix-suit?fbclid=IwAR178xueuhidVoTILVlewADVXeABKJawa13ztzoVa0M9VcFLTZM2kC64Zt8>.

109. Tessier-Lavigne et al., *supra* note 29.

110. *Id.*

cut were women's teams and a seventh had both men and women athletes.<sup>111</sup> According to the *Business of College Sports Tracker: College Sports Programs Cut During COVID-19 Pandemic*, Stanford cut more teams than any other campus (Brown University was a close second, cutting ten teams) and was the only campus to cut more women's teams than men's.<sup>112</sup>

Like other campuses which cut athletic teams, Stanford identified financial shortfall caused by the pandemic as the cause. The university stated it anticipated a deficit between \$12 and \$25 million for the 2021 fiscal year<sup>113</sup> and that these cuts would save \$8 million a year.<sup>114</sup> The university also addressed why those particular teams were selected, including NCAA sponsorship, fewer high school athletes to recruit from, and the "[i]mpact on gender equity and Title IX compliance," among others.<sup>115</sup>

The student-athletes at Stanford took longer to file a lawsuit than their counterparts on other campuses, filing two lawsuits in May 2021. One was a Title IX claim from five women representing five of the cut teams, as well as a second lawsuit regarding fraudulent inducement.<sup>116</sup> A week after the lawsuits were filed Stanford announced that all eleven teams were being reinstated.<sup>117</sup> The university claimed that the lawsuits had nothing to do with the reinstatements, and instead "changed circumstances including newly galvanized philanthropic interest . . . provided a new path to support the 11 sports."<sup>118</sup> The "newly galvanized philanthropic interest" was a group called "36 Sports Strong," which, as of May 19, 2021, had raised over \$50 million in pledged money to support the eleven cut teams.<sup>119</sup> In its reinstatement announcement, Stanford acknowledged the lawsuits but said that negotiations to reinstate the teams were already underway when they were filed.<sup>120</sup>

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111. *Id.*

112. *Tracker: College Sports Programs Cut During COVID-19 Pandemic*, *supra* note 1.

113. Tessier-Lavigne et al., *supra* note 29.

114. Chris Burt, *Stanford Athletes Sue Over Program Cuts, Claim Title IX Violation*, UNIV. BUS. (May 13, 2021), <https://universitybusiness.com/stanford-athletes-sue-over-program-cuts-claim-title-ix-violation/>.

115. Tessier-Lavigne et al., *supra* note 29.

116. Chris Burt, *5 Student-Athletes, Stanford Reach Settlement Over Title IX Lawsuit*, UNIV. BUS. (Aug. 27, 2021), <https://universitybusiness.com/5-student-athletes-stanford-reach-settlement-over-title-ix-lawsuit/>.

117. *Stanford Announces the Continuation of 11 Varsity Athletics Teams*, STAN. ATHLETICS (May 18, 2021), <https://gostanford.com/news/2021/5/18/stanford-announces-the-continuation-of-11-varsity-athletics-teams.aspx>.

118. *Id.*

119. Kristi Dosh, *Stanford Joins 8 Other Division I Programs in Reversing Sports Cut*, FORBES (May 19, 2021, 12:26 PM), <https://www.forbes.com/sites/kristidosh/2021/05/19/stanford-joins-8-other-division-i-programs-in-reversing-sports-cut/?sh=70128d034661>.

120. *Stanford Announces the Continuation of 11 Varsity Athletics Teams*, *supra* note 117.

Even with the reinstatement of all the teams, the Title IX lawsuit was not dropped (although the fraudulent inducement one was withdrawn), as the plaintiffs were still concerned about future Title IX compliance.<sup>121</sup> In August 2021, Stanford University reached a settlement with the plaintiffs requiring the university to complete a comprehensive Title IX review, to be completed no later than the end of the 2023-24 academic year.<sup>122</sup>

### 3. Michigan State

Michigan State University cut fewer teams than many schools, eliminating only the men's and women's swimming and diving team.<sup>123</sup> The university made this announcement on October 22, 2020, and gave similar financial reasons as other colleges and universities did.<sup>124</sup> Michigan State provided anticipated losses of between \$30 and \$60 million and that cutting the teams set the athletic department up "for long-term financial stability," but did not provide the exact amount cutting the teams would save.<sup>125</sup> Shortly after the announcement, athletes from the women's swimming and diving team filed a Title IX lawsuit.<sup>126</sup> This lawsuit has gone differently than others and, as of the writing of this article, is still being litigated.

In February 2021, Judge Hala Jarbou of the U.S. District Court for the Western District of Michigan ruled that the plaintiffs were not entitled to a preliminary injunction reinstating the women's swimming and diving team.<sup>127</sup> Upon examining the participation numbers of men and women athletes, the court concluded that there was insufficient evidence that the university had inflated the number of women athletes and that the university was lower than a two percent disparity.<sup>128</sup> Citing *Biediger*, the court concluded "that a disparity within two percentage points is proof that an educational institution falls within the substantial proportionality safe harbor" and thus there was not a likelihood of success on the merits, hence the denial of the preliminary

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121. Burt, *supra* note 116.

122. *Id.*

123. *Michigan State Announces Plans to Discontinue Swimming & Diving After 2021*, MICH. STATE UNIV. (Oct. 22, 2020, 3:46 PM), <https://msuspartans.com/news/2020/10/22/general-michigan-state-announces-plans-to-discontinue-swimming-diving-after-2021.aspx>.

124. *Id.*

125. *Id.*

126. Riley Overend, *Michigan State Asks Supreme Court to Hear Title IX Case Caused by Swimming Cuts*, SWIMSWAM (July 30, 2022), <https://swimswam.com/michigan-state-asks-supreme-court-to-hear-title-ix-case-caused-by-swimming-cuts/>.

127. *Balow v. Mich. State Univ.*, No. 1:21-cv-44, 2021 WL 650712, at \*1 (W.D. Mich. Feb. 9, 2021).

128. *Id.* at \*10-11.

injunction.<sup>129</sup> Michigan State University then filed a motion to dismiss the entire lawsuit, using the court's reasoning and affidavits from the preliminary injunction case to support the dismissal.<sup>130</sup> However, in September 2021, Judge Jarbou declined to dismiss the Title IX claim, stating "[r]eliance on affidavits is more appropriate for a summary judgment motion than for a motion to dismiss the complaint" and that the plaintiffs had not yet been able to test the defendant's evidence via discovery.<sup>131</sup>

The plaintiffs appealed to the Sixth Circuit Court, which vacated and remanded the district court's denial of the preliminary injunction by a vote of 2-1.<sup>132</sup> The Sixth Circuit agreed with the district court that there was insufficient evidence to support the allegation that Michigan State University inflated the reported numbers of women athletes.<sup>133</sup> However, the Sixth Circuit differed from the district court by contending that the participation gap need only be determined as a percentage:

[w]hile the percentage gap may be relevant, substantial proportionality should be determined by looking at the gap in numerical terms, not as a percentage. A school may fail to achieve substantial proportionality even if its participation gap is only a small percentage of the size of its athletic program.<sup>134</sup>

Since the district court did not issue a finding as to the numerical participation gap, the Sixth Circuit remanded the case to that court for reconsideration in light of the Sixth Circuit's opinion.<sup>135</sup>

Judge Ralph Guy dissented from the majority for several reasons, including that he found the district court did make a finding regarding the numerical participation gap and that the university was in compliance with Title IX.<sup>136</sup> Moreover, Judge Guy disagreed with the majority's conclusion that the participation gap should be measured exclusively numerically, stating that numerous courts, as well as Congress, have determined that either a percentage or a number may be used to determine whether there is an

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129. *Id.* at \*11 (citing *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 110 (D. Conn. 2010)).

130. *Id.* at \*1, 6.

131. *Id.* at \*6.

132. *Balow v. Mich. State Univ.*, 24 F.4th 1051, 1053 (6th Cir. 2022).

133. *Id.* at 1056-57.

134. *Id.* at 1059.

135. *Id.*

136. *Id.* at 1064-65.

imbalance under Title IX.<sup>137</sup> He further pointed out that all but one court have viewed this gap as a percentage.<sup>138</sup> Ultimately, Judge Guy concluded that “the majority announce[d] legal standards that no other federal circuit court has adopted—and for good reason—because the standards blatantly contradict Title IX and agency guidance.”<sup>139</sup>

In July 2022, the plaintiffs again requested a preliminary injunction from the district court while Michigan State University appealed to the United States Supreme Court.<sup>140</sup> In August of 2022 Judge Jarbou of the district court reheard the case, looking at the participation gap as a raw number instead of a percentage.<sup>141</sup> The district court concluded that over the most recent eight years, MSU averaged a participation gap of thirty-one student-athletes, each year in favor of male athletes.<sup>142</sup> The court further determined that the plaintiffs had demonstrated that there was sufficient interest and ability to field a women’s swimming and diving team of twenty-one.<sup>143</sup> In contrast to the first decision, this time the district court concluded that MSU was not in compliance with Title IX and a preliminary injunction was warranted; however, the court did not order immediate reinstatement of the women’s swimming and diving team.<sup>144</sup> Instead, Judge Jarbou gave MSU ninety days to present a compliance plan for addressing the participation gap, which may or may not include swimming and diving.<sup>145</sup> The court also refused to stay the proceedings due to MSU’s appeal to the Supreme Court, stating the case can proceed while the appeal is pending.<sup>146</sup> A full trial before the district court is currently scheduled for January 2023.<sup>147</sup>

## CONCLUSION

While the outcomes in these cases mostly bolster the long-standing application of Title IX, particularly prong one, the Michigan State University

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137. *Id.* at 1065.

138. *Balow v. Mich. State Univ.*, 24 F.4th 1051, 1066 (6th Cir. 2022).

139. *Id.* at 1062.

140. Overend, *supra* note 126.

141. *Balow v. Mich. State Univ.*, No. 1:21-cv-44, 2021 WL 650712, at \*1 (W.D. Mich. Feb. 9, 2021).

142. *Id.* at \*9.

143. *Id.* at \*10.

144. *Id.* at \*12.

145. *Id.* at \*12-14.

146. *Id.* at \*14.

147. *Balow v. Mich. State Univ.*, No. 1:21-cv-44, 2021 WL 650712, at \*13 (W.D. Mich. Feb. 19, 2021).

case raises questions about future enforcement of prong one. If the Supreme Court takes up the case, then the resulting decision could have a profound effect on how schools comply with prong one. The Supreme Court could support the common practice of looking at the percentage disparity, give schools the option of choosing between a percentage or numerical approach, or decide that a numerical approach is the one that should be used. The last option would represent a significant alteration to how schools and courts determine whether a school complies with prong one. If the Supreme Court denies certiorari, then there will be inconsistency between circuits, creating subsequent inconsistency as to how schools in different parts of the country, yet often in the same conference, will have to comply with prong one of Title IX. In this case, the OCR would need to put out updated guidance to schools to re-establish consistent criteria.

Overall, the Title IX lawsuits, or threat thereof, were successful in getting women's teams reinstated, and in some cases the men's teams were as well. Several courts reaffirmed that financial difficulties do not constitute a sufficient reason to cut teams if it brings the university out of Title IX compliance and it is clear colleges and universities take the potential of Title IX litigation seriously. Many schools attempted to be Title IX compliant when making their initial cuts, however unsuccessful those attempts were, which shows that the schools were aware the financial reasons alone would not prevail in a lawsuit.