Swimming Upstream: Men's Olympic Swimming Sinks While Title IX Swims

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SWIMMING UPSTREAM: MEN’S OLYMPIC SWIMMING SINKS WHILE TITLE IX SWIMS∗

I. INTRODUCTION

At the 2000 Olympic Games in Sydney, Australia, the U.S. Men’s Olympic Swimming Team (the U.S. Team) was defeated for the first time ever in the 4x100 Freestyle Relay in international competition by the Australians. Many people thought this was a fluke and the United States would come back with a vengeance in 2004, but that was not the case. At the 2004 Olympic Games in Athens, Greece, the U.S. Team could not even manage to walk away with a silver medal, let alone a gold medal, in the 4x100 Freestyle Relay, an event it had once dominated. The U.S. Team lost to South Africa and the Netherlands, respectively, coming home with only a bronze.

As one begins to search for answers as to why the United States continues to lose its dominance on the international swimming scene, an analysis of Title IX and its unintended consequences may provide some of the necessary answers. Title IX has resulted in many opportunities for female athletes that did not exist prior to its implementation. However, men have

∗ An earlier version of this article was published in issue 6 of the 2006 American Swimming Magazine.


4. Id.

suffered throughout the whole process. Since the passing of Title IX, athletic departments across the country have cut more than seventy men’s Division I swimming programs.6 As more institutions drop programs, men in this country continue to find fewer opportunities to compete at the collegiate level. This is creating a smaller pool of swimmers from which to select the U.S. Olympic Team, which ultimately may be hurting the depth of the U.S. Team, and in turn, hurting the performance of the U.S. Team at the Olympic Games.

This Comment addresses the possibility that Title IX has hurt the U.S. men’s swimming performances at the past two Olympic Games because of its current application. While this Comment focuses on the sport of swimming, Title IX has also had a negative impact on the sports of gymnastics,7 wrestling,8 and track and field.9 Part II examines Title IX’s history and the test used to determine compliance with Title IX. Part III details the implications that Title IX has had and continues to have on men’s Division I swimming programs. Part IV describes the U.S. Team’s lack of success at the 2000 and 2004 Olympics.

II. DIVING INTO TITLE IX: ITS HISTORY & ITS TEST FOR COMPLIANCE

Title IX was passed in 1972, and after some original confusion about whether it applied to collegiate athletics, it was determined that Title IX did in fact apply to intercollegiate athletics. Federal regulations were passed that explained how Title IX applied to the participation numbers within collegiate athletic departments. However, confusion remained, and the Department of Education published clarification letters in 1996, 2003, and 2005 in order to further explain the three-part test used in determining compliance in regards to participation.

A. Title IX and College Athletics

Although Title IX applies to education in general, most of Title IX’s attention focuses on how Title IX applies to college athletics. Title IX became

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8. Id. One hundred twenty-one NCAA institutions dropped their men’s wrestling team during the past fifteen years. Id.
9. Id. One hundred twenty-six NCAA institutions dropped their men’s outdoor track teams during the past fifteen years, while during the same time period 183 NCAA institutions dropped their men’s cross country teams. Id.
law in 1972, but even after more than thirty years, it is still a controversial topic in the context of college athletics. Title IX states 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.” The federal regulations specifically apply the statute to athletics:

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

Even after thirty years of experience, college administrators are still confused. The government has taken several steps to attempt to clear up this confusion, but these steps have proven unsuccessful. Once Title IX passed, Congress allowed a three-year transition period “to give institutions time to comply with its equal athletic opportunity requirements,” but even after this transition period many institutions remained confused about how Title IX applied to college athletics.

In 1978, the Department of Education (the Department) investigated numerous complaints. The Department determined that it should provide further guidance on what constitutes compliance with the law. Therefore, the Department published a Policy Interpretation in 1979 “designed specifically for intercollegiate athletics.” The 1979 Policy Interpretation established a three-part test that the Department uses to determine if an institution’s athletic department complies with Title IX.

During the mid to late 1980s, even greater confusion occurred among institutions about the application of Title IX to their athletic departments because of the conflicting outcomes of several court cases and new legislation. In 1984, the Supreme Court concluded that Title IX did not
apply to an athletic department if the athletic department did not directly receive federal funds.\textsuperscript{19} The Court determined Title IX applied to only programs within the institution that directly received federal funds.\textsuperscript{20} However, just three years later, Congress overturned this decision.\textsuperscript{21} The Civil Rights Restoration Act of 1987 applied Title IX to all operations of any educational institutions that receive federal funding, including the athletic departments of those institutions.\textsuperscript{22}

To eradicate any remaining confusion, the Office for Civil Rights (OCR) published a letter in 1996 titled \textit{Clarification of Intercollegiate Athletics Policy Guidance: The Three-part Test} (1996 Clarification Letter).\textsuperscript{23} As the name suggests, the 1996 Clarification Letter focused on the three-part test that is used to determine if an athletic department complies with Title IX in regard to participation numbers.\textsuperscript{24} The 1996 Clarification Letter breaks down each part of the three-part test and includes examples of how an athletic department could comply with each part of the test.\textsuperscript{25}

Institutions remained confused about the ambiguities of the three-part test, even after the 1996 Clarification Letter. In response, in 2002, the Department created a commission (the Commission) to examine Title IX.\textsuperscript{26} The Commission "collect[ed] information, analyze[d] issues, and obtain[ed] broad public input directed at improving the application of current federal standards for measuring equal opportunity for men and women and boys and girls to participate in athletics under Title IX."\textsuperscript{27} The Commission worked for over eight months to gather this information from various sources,\textsuperscript{28} and it then put together a report with twenty-three recommendations to provide OCR with new ideas about improving the Title IX enforcement process.\textsuperscript{29}
As a result of the Commission's recommendations, clarifications were issued in 2003 and 2005. The 2003 Clarification Letter assured institutions that no one prong was favored over another and that nothing in Title IX required an institution to cut or reduce a team. The 2005 Clarification Letter further explains part three of the three-part test, which is used to determine if the university is effectively accommodating the interests and abilities of its student-athletes under Title IX. The burden of proving that an institution has not effectively accommodated its students is on OCR or the student, when dealing with a private right of action. Further, the 2005 Clarification Letter also includes a model survey that institutions may use to help determine if they have fully and effectively accommodated their students' interests.

B. Complying with Title IX: The Three-Part Test in Theory

The Department developed the three-part test in the 1979 Policy Interpretation, which provided institutions guidance about applying Title IX to their programs. The test allows courts and OCR to determine whether an institution complies with Title IX on a case-by-case basis in participation only and reads as follows:

Compliance will be assessed in any one of the following ways:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program


32. 1996 Clarification Letter, supra note 23.


35. Id.
expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.36

Statistical data that shows "a disparity between female participation in intercollegiate athletics and female student enrollment"37 does not conclusively show discrimination against females; rather, it creates a rebuttable presumption that an institution may have discriminated against the underrepresented sex.38 The three-part test allows an institution three different options to rebut this presumption by showing the institution has "provide[d] individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics."39

The 1996 Clarification Letter did not provide many clear-cut answers to institutions about applying Title IX to their athletic programs, but it made one important statement. The 1996 Clarification Letter confirmed that institutions had to comply with only one part of the three-part test, rather than comply with all three parts, in order to prove they were not discriminating against one sex while providing participation opportunities to the other.40 "The Clarification does not provide strict numerical formulas or 'cookie cutter' answers to the issues that are inherently case and fact-specific."41 OCR felt "[s]uch 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 to best comply with the law."42 Ultimately, the three-part test gives institutions more deference when making decisions about how to run their athletic departments; however, the ambiguities of the test (particularly in parts two and three) also subject institutions to more lawsuits.43

36. Id.
38. See 1979 Title IX Policy Interpretation, 44 Fed Reg. at 71,418.
40. Id.
41. Id.
42. Id.
43. See Boucher v. Syracuse Univ., No. 95-CV-620 (FJS), 1998 U.S. Dist. LEXIS 5042 (N.D.N.Y. Apr. 3, 1998), vacated in part and appeal dismissed in part, 164 F.3d 113 (2d Cir. 1999);
i. Part One: Are Participation Opportunities Substantially Proportionate to Enrollment?

Part one of the three-part test deals with substantial proportionality regarding female athletic participation and female enrollment. If an institution provides varsity athletic opportunities for male and female students in proportion to their respective undergraduate enrollments, OCR will find that the institution provides nondiscriminatory participation opportunities. OCR wants the percentage of opportunities available to women in the athletic department to be comparable to the percentage of women enrolled in the undergraduate institution.

When determining whether an institution complies with part one, OCR will look at all athletes within the athletics program. This includes "those athletes who do not receive scholarships . . ., those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds, and those athletes who practice, but may not compete." The essence of Title IX is to give women more opportunities to compete in athletics than they have received in the past. OCR believes this is the most appropriate way to interpret Title IX because even though these student-athletes do not receive scholarships, they do receive other benefits. Further, women who do not currently receive scholarships have the opportunity to prove themselves worthy of being able to compete at the level necessary to earn a scholarship.

Another important aspect of the first part of the three-part test is that institutions are not required to achieve "exact proportionality." Requiring an institution to achieve exact proportionality would create an unworkable statute. Enrollment rates can change on a yearly basis. Exact proportionality would require an athletic department to make annual changes regarding the number of positions available for student-athletes in both the men’s and women’s programs so that the athletic participation numbers would

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44. Throughout this Comment, each portion of the three-part test is described as a part. Other literature discussing the three-part test will often refer to each portion as a prong. These terms are interchangeable.

45. 1996 Clarification Letter, supra note 23.

46. Id.

47. Id.

48. Id. Non-scholarship athletes receive benefits such as coaching, use of facilities, and tutoring services. Id.

49. Id.

50. Id.
always be the in the same proportion as undergraduate enrollment numbers. Some critics argue that OCR should use a statistical test to come up with a certain percentage range to determine if schools have satisfied part one. Although this may reduce the number of lawsuits, OCR refuses to provide a statistical range because it feels that analysis on a case-by-case basis is more appropriate due to the different circumstances and the different sizes of athletic departments.51

ii. Part Two: Is There a History and Continuing Practice of Program Expansion for the Underrepresented Sex?

Part two of the three-part test examines whether there is “a history and continuing practice of program expansion” for the underrepresented sex.52 In determining whether an institution has complied with part two of the three-part test, OCR will first determine “whether past actions of the institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to [the underrepresented sex’s] developing interests and abilities.”53 Similar to part one, OCR looks at part two on a case-by-case basis with no strict numbers published regarding timelines or the number of sports needed within a program.54 Not only will OCR look at actions taken in the past, it will also look at whether the institution can show that it has plans in place to continue the practice of program expansion.55 If an institution increases the amount of opportunities for women proportionately to the men's opportunities by dropping men's programs, OCR will not find a history and continuing practice of program expansion.56 Thus, applying part two, OCR refuses to reward institutions that simply drop men's sports because this does not provide women (the underrepresented sex) more opportunities to compete.

iii. Part Three: Is the Institution Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex?

Part three of the three-part test looks to see if the institution “fully and effectively accommodate[s] the interest, and abilities of the underrepresented

51. Id.
54. Id.
55. Id.
56. Id.
Rather than looking specifically at athletes, part three analyzes the interests of all students, including accepted students even though those students may not have enrolled.\textsuperscript{58}

The purpose of the third part of the three-part test is to allow institutions to satisfy Title IX by showing that the current athletic imbalance does not reflect discrimination. An institution can do this by demonstrating that "notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated."\textsuperscript{59} However, OCR will not find that an institution has fully and effectively accommodated the interests and abilities of the underrepresented sex if there is an unmet interest in a particular sport, there is an ability to sustain a team in that sport, and there is a reasonable expectation of regional competition for the team.\textsuperscript{60}

To determine if an institution has met the first factor of the third part—unmet interest in a particular sport—OCR looks at several factors.\textsuperscript{61} Some of these factors include requests by current and admitted students that a particular sport be included, including those existing club sports that could be elevated to the varsity level, interviews with current and admitted students about what interests they may have in certain sports, and participation levels in high school sports by admitted students.\textsuperscript{62} While looking at the participation levels in high school sports, OCR also looks at the level of interest in the geographic areas from which the institution draws its students.\textsuperscript{63} Even if OCR finds that there is a large interest in a sport that the institution does not provide, it does not necessarily mean that OCR will find that the institution has participated in discriminating acts. Rather, large interest in a sport that the institution does not offer to female students creates a rebuttable presumption for which the institution has an opportunity "to provide a basis for any assertion that its students and admitted students are not interested in playing that sport."\textsuperscript{64}

\begin{itemize}
  \item \textsuperscript{57} Id.
  \item \textsuperscript{58} Id.
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Id.
  \item \textsuperscript{62} Id.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} Id.
\end{itemize}

\textsuperscript{64} An
institution can use simple questionnaires or open forums for current and
admitted students to prove that there is not an unmet interest in certain
sports. However, institutions are not required to engage in expensive
activities when determining whether there is an unmet interest in certain
sports.

The second factor used in determining whether an institution has satisfied
the third part of the three-part test is whether there is sufficient ability to
sustain an intercollegiate team. To determine this, OCR will generally look
at three factors: (1) the athletic experience and accomplishments of interested
students; (2) the opinions of coaches, athletes, and administrators about
whether there is potential to be able to sustain a varsity team; and (3) prior
experience of club or intramural teams that indicates the institution may have
the potential to sustain a varsity level team. However, “[n]either a poor
competitive record nor the inability of interested students or admitted students
to play at the same level of competition engaged in by the institution’s other
athletes is conclusive evidence of lack of ability.” Rather, OCR is simply
looking for the potential to sustain a varsity level team.

The third factor is whether there is “a reasonable expectation of
competition for the team.” One of the most important factors is whether
there is a reasonable amount of competitive opportunities in the area in which
the institution’s athletes normally compete. However, simply because no
other institutions in the institution’s geographic area or the institution’s
conference compete at the varsity level in the sport of interest does not mean
that the institution complies with Title IX. “The institution may also be
required to actively encourage the development of intercollegiate competition
for a sport for members of the underrepresented sex when overall athletic
opportunities within its competitive region have been historically limited for
members of that sex.” This creates a huge burden on institutions to lobby
other institutions in their area to begin to offer certain sports for women.

65. Id. The 2005 Clarification Letter included a sample questionnaire that universities may
use to determine if there is an unmet interest. See 2005 Clarification Letter, supra note 31.
67. Id.
68. Id.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id.
74. Id.
C. In Practice, the Three-Part Test Does Not Provide Institutions Three Reasonable Options

Due to the sheer volume of the statute and regulations, confusion continues among administrators and those in charge of deciding what athletic departments need to do in order to comply with Title IX. The 1979 Policy Interpretation and the 1996, 2003, and 2005 Clarification Letters tried to clarify some of the ambiguities about the interpretation of the regulation, but as the Secretary of Education’s Commission on Opportunity in Athletics found, many institutions remain confused about how the three-part test applies to specific situations. What is clear is that the substantial proportionality test in part one is the only test that will allow athletic departments to comply with Title IX by simply dropping men’s programs. The substantial proportionality test also includes the least amount of ambiguity. As a result of these ambiguities and financial issues, many schools and athletic departments have chosen to comply with Title IX by using the substantial proportionality test and have done so by dropping men’s programs.

i. Part One: The Only Safe Harbor

Although the substantial proportionality test includes some ambiguity, the substantial proportionality test is by far the most understandable portion of the three-part test. “[T]he substantial proportionality test of [part] one is applied under the Title IX framework, not mechanically, but case-by-case, in a fact-

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75. The 1979 Policy Interpretation "explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions . . . with additional guidance on the requirements for compliance with Title IX in intercollegiate athletics programs." 1979 Title IX Policy Interpretation, 44 Fed Reg. 71,413, 71,418 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

76. The author of the 1996 Clarification Letter, the Assistant Secretary for Civil Rights, stated in the 1996 Clarification Letter, "I have recognized the need to provide additional clarification regarding what is commonly referred to as the 'three-part test.'" 1996 Clarification Letter, supra note 23.

77. TITLE IX AT THIRTY, supra note 5, at 25. The Commission's report included fourteen findings. Id. at 21–32. One of the Commission's findings was that "[t]here is great confusion about Title IX requirements caused by a lack of clarity in guidance from the Office for Civil Rights." Id. at 25.

78. 1996 Clarification Letter, supra note 23.

OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex.

Id. Part three strictly deals with the interests and abilities of women; therefore, the fact that an institution may have dropped a men's program has no relevance in determining whether an institution has accommodated the interests and abilities of women. Id.
specific manner." As with all three parts of the three-part test, the substantial proportionality test allows courts to look at facts on a case-by-case basis. However, because the substantial proportionality test uses numbers, rather than discretionary factors as found in parts two and three, it allows institutions and athletic departments to more easily understand whether they comply with Title IX. Institutions are able to look at enrollment percentages and athletic opportunity percentages side by side to determine the disparity percentage.

While there is no regulation or case law stating exactly what disparity percentage is allowed in order for a school to comply with Title IX using the substantial proportionality test, there are some examples in case law that give universities and athletic departments a fairly good idea as to what disparity percentage is allowed. In Cohen v. Brown University, Brown University’s female undergraduate enrollment constituted 51.14% of the entire undergraduate population. However, females accounted for only 38.13% of the total amount of athletes at Brown University. The court ruled that a 13.01% disparity difference between female undergraduate enrollment and female participation in athletics is too large of a disparity.

However, a lower disparity percentage does not necessarily mean compliance in all cases. For example, the 1996 Clarification Letter provides an example of a school with 600 student-athletes and a 5% disparity. If the school allowed sixty more women to participate in its athletics program the disparity percentage would be less than 1%. Even with a 5% disparity, this institution does not comply with Title IX because it is likely that the institution could sustain a viable team, or possibly even two additional teams, with sixty student-athletes. However, if an institution’s athletic department consisted of only sixty students, the school would need to provide opportunities to six more women for the disparity percentage to drop below 1%. In this instance it is unlikely any viable team could be fielded with only six student-athletes;

80. Id.
82. Id. at 163.
83. Id.
84. Id. at 166.
85. 1996 Clarification Letter, supra note 23.
86. Id.
87. Id.
88. Id.
89. Id.
therefore, this institution has complied with Title IX by meeting the requirements of part one, while still having 5% disparity.\textsuperscript{90}

The 1998 Equity in Athletics Disclosure Act causes institutions and athletic departments to focus even more attention on part one of the three-part test.\textsuperscript{91} The Equity in Athletics Disclosure Act requires institutions that provide athletic scholarships to report information pertaining to gender equity and athletics.\textsuperscript{92} Some of the information this Act requires includes the number of students at the institution and the number of students who participate in athletics at the institution, both broken down by sex.\textsuperscript{93} After OCR receives this information, OCR publishes a report that contains the information submitted.\textsuperscript{94} The report is then further broken down by institution and conference.\textsuperscript{95} Institutions know that OCR publishes this report, and if the institution does not appear to fall within substantial proportionality, the institution is more susceptible to further scrutiny from OCR or to potential litigation.\textsuperscript{96}

ii. Part Two: Too Vague

Part two of the three-part test examines whether the institution has "a history and continuing practice of program expansion for the underrepresented sex."\textsuperscript{97} This part seems to illustrate the exact intent of the regulations, but because this part is too vague in practice, some institutions are hesitant to use it in an attempt to comply with Title IX. The intent of the regulations did not

\begin{itemize}
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} Equity in Athletics Disclosure Act, 20 U.S.C. § 1092(e) (2000); see \textit{TITLE IX AT THIRTY}, supra note 5, at 26.
\item \textsuperscript{92} 20 U.S.C. § 1092(e).
\item \textsuperscript{93} § 1092(e)(A)-(B).
\item \textsuperscript{94} § 1092(e)(5).
\item \textsuperscript{95} \textit{Id.}
\end{itemize}

\begin{itemize}
\item The Department of Education provides a website to access the information reported by each school. Office of Postsecondary Educ., Equity in Athletics Data Analysis Cutting Tool Website, http://ope.ed.gov/athletics/ (last visited Mar. 24, 2006). The site allows a user to search by looking at specific geographic regions, states, cities, types of institution, instructional programs, or by specific university. \textit{See id.} The information shown for each institution includes the number total of full-time undergraduates enrolled, the number of full-time women undergraduates enrolled, and the number of full-time men undergraduates enrolled. \textit{Id.} Information regarding the athletic program includes a list of teams and the number of participants on each team, the total number of male participants, and the total number of female participants in the athletic department. \textit{Id.} The website also includes the total operating budget for each male and female team, and a total operating budget for the women's teams compared to the operating budget of the men's teams. \textit{Id.}
\item \textsuperscript{96} \textit{TITLE IX AT THIRTY}, supra note 5, at 23. One of the Commission's findings stated, "Many practitioners feel that their institutions must meet the proportionality test to ensure a 'safe-harbor' and avoid expensive litigation." \textit{Id.}
\item \textsuperscript{97} \textit{1996 Clarification Letter}, supra note 23.
\end{itemize}
include requiring athletic departments to immediately allow equal opportunities for women. This would have been too much for most athletic departments to take on in one or two years because it would have required an immediate overhaul of the athletic department. Therefore, the three-part test allows institutions and athletic departments to gradually implement changes in order to provide women more opportunities.

OCR wants to give substantial deference to each institution to decide what best fits its interests while at the same time complying with Title IX, but this deference leads to a vague interpretation of part two. OCR has stated, "there are no fixed intervals of time within which an institution must have added participation opportunities." While this allows OCR and courts to look at facts on a case-by-case basis, it also leaves institutions without guidance as to how they need to proceed in order to comply with Title IX using part two.

Determining whether an institution has satisfied part two usually happens only after intense scrutiny by OCR or costly litigation in which the court ultimately decides whether the institution has complied with part two. Throughout ongoing litigation from 1993 to 1996, Brown University tried to prove that it had satisfied part two by showing it had added many women's teams over the years. Brown University was unsuccessful in its attempt to satisfy part two. Brown University added fourteen women's athletic teams between 1971 and 1977. The last varsity women's team Brown added was in 1982 when it added women's indoor track. Although the court noted Brown University had "an impressive history of program expansion," the fact that Brown University had not added any teams since 1982 showed it was not "maintain[ing] a continuing practice of intercollegiate program expansion for women, the underrepresented sex." However, the court gave no guidance as to what actions would have been acceptable practice for program expansion.

On the other hand, in 1998, Syracuse University satisfied part two of the three-part test by showing a continuing practice of program expansion.

98. Id.
99. Id.
101. Id.
104. Id.
105. Id.
Syracuse University established a women’s athletics program in 1971 with five sports.\textsuperscript{107} Syracuse University added women’s crew in 1977, women’s soccer in 1996, and women’s lacrosse in 1997.\textsuperscript{108} In addition, Syracuse University had plans to add softball during the 1999–2000 school year.\textsuperscript{109} The court concluded Syracuse University complied with Title IX by satisfying part two of the three-part test.\textsuperscript{110} Like Brown, Syracuse University went nearly twenty years without adding an additional women’s sport, but because it added two women’s sports in the two years prior to the suit and had additional plans to add softball during the following school year, it complied with Title IX.\textsuperscript{111}

Reconciling \textit{Cohen} (Brown University) and \textit{Boucher v. Syracuse University}\textsuperscript{112} is somewhat difficult for institutions looking for guidance about how to satisfy part two. Syracuse University added two women’s teams in the two years prior to litigation, but prior to adding those two teams it had not added any women’s teams for nearly twenty years.\textsuperscript{113} The good news for institutions that have not added women’s programs in at least twenty years is that they may still be able to satisfy part two simply by adding a new women’s program and creating a plan to continue building the women’s athletics program. However, the courts have not given any guidance about how often a women’s program needs to be added and how extensive plans for future program expansion must be. Does an institution need to add a program once every one to two years like Syracuse University did, or is it possible to add a program every five years?

iii. Part Three: Too Many Ambiguities

Similar to part two, part three included many ambiguities as well, until recently. Institutions did not receive enough guidance about what they had to do in order to make sure that they fully and effectively accommodated the interests and abilities of women until the 2005 Clarification Letter was published. Debbie Corum, associate commissioner of the Southeastern Conference, said administrators worry about using part three to comply with Title IX. “Administrators are fearful that test three means that if two women . . . show up and want to start a team, then the interest is there and the women

\begin{itemize}
\item \textsuperscript{107} \textit{Id.} at *2. In 1971, Syracuse offered basketball, fencing, swimming, tennis and volleyball for women. \textit{Id.}
\item \textsuperscript{108} \textit{Id.} at *2–3.
\item \textsuperscript{109} \textit{Id.} at *3.
\item \textsuperscript{110} \textit{Id.} at *10.
\item \textsuperscript{111} \textit{Id.} at *2–3.
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} \textit{Id.} at *2–3.
\end{itemize}
must be accommodated, so how do I decide whether they’re really supposed to start a team or not?” Further, there was also confusion about what an institution needed to do in order to determine exactly what kind of interest its female students may have had in certain sports. As the Commission pointed out in its findings in Title IX at Thirty, “[A]dministrators express confusion about the possibility of using interest surveys to periodically determine levels of student interest in athletics, which then must be met with matching levels of athletic opportunity.” In other words, some institutions fear that if they take steps to determine the interests of their female students, OCR will penalize the institutions simply because they took these steps, but did not add programs in the same manner that OCR believes they should go about adding programs. The Commission ultimately found that “some schools may be making decisions that may limit the athletic opportunities of their students because those schools do not understand what Title IX actually requires of them.” If this is truly the case, institutions benefit simply by remaining ignorant about the interests of their female students.

The Cohen case shows that any institution that currently has a club sport, which is not also a varsity sport at the institution, may not satisfy part three. The court found that Brown University did not fully and effectively accommodate the interests and abilities of its female students. At the time of the suit, Brown University had two donor-funded sports and two club sports that the court felt had the ability to compete at the varsity level. Most universities throughout the country support club athletic programs to provide their students with opportunities to participate in extracurricular activities. Those universities most likely could not satisfy part three if any of those sports were sports that the institution did not offer at the varsity level and were able to be competitive at the varsity level.

The 2005 Clarification Letter has provided universities with more guidance about exactly what is needed to satisfy part three of the three-part test. The 2005 Clarification Letter makes two important points: (1) universities are not required to fulfill every request for an additional team for the underrepresented sex (in most cases women) and (2) the burden is on OCR or the student(s) based on preponderance of the evidence to prove that the

114. Title IX at Thirty, supra note 5, at 9 (quoting Debbie Corum, Associate Commissioner, Southeastern Conference).
115. Id. at 26.
116. Id.
117. Id. at 27.
119. Id.
university has not fully and effectively accommodated the underrepresented sex.\(^{120}\) The 2005 Clarification Letter also provided an example of a survey that may be used to help determine if there is an unmet interest at the university.\(^{121}\) As universities become more educated about part three, part three will hopefully become more useful in proving compliance with the participation portion of Title IX.

As long as confusion about parts two and three continues, institutions are most likely going to comply with Title IX by using the safe harbor of part one. At a time when education costs are rising, institutions are attempting to find ways to cut their budgets. One way to save a substantial amount of money is to avoid litigation at all costs. Unfortunately, many people believe the only way to assure an institution will avoid litigation in the realm of Title IX is to advise institutions to comply with Title IX using the substantial proportionality test. As noted earlier, this is the only test that allows universities to comply with Title IX simply by dropping men’s programs. It costs a lot less to drop a men’s program than it does to add a women’s program; thus, the institution saves money. However, this approach helps only the institution’s bottom line; it does nothing to help women or men.

III. Sink or Swim: Institutions Cut Men’s Programs to Comply

Throughout the last thirty years, many men’s programs, especially swimming programs, have been dropped. Institutions have cited both Title IX and budget reasons as the reasons why the programs have been dropped.\(^{122}\) As a result, the amount of opportunities for males to continue their swimming careers at the collegiate level has dropped significantly.

A. Lawyers and Consultants Often Advise Institutions to Satisfy the Three-Part Test by Using Part One Because There Is Less Risk of Costly Litigation.

Athletic departments and institutions across the country have decided to drop men’s programs in an effort to save money and comply with Title IX. Attorneys and consultants often advise institutions about making decisions to avoid litigation, including decisions about avoiding Title IX litigation. The Commission found “attorneys and consultants have told [the Commission] that

\(^{120}\) 2005 Clarification Letter, supra note 31.

\(^{121}\) Id.

\(^{122}\) U.S. GEN. ACCOUNTING OFFICE, INTERCOLLEGIATE ATHLETICS FOUR-YEAR COLLEGES’ EXPERIENCES ADDING AND DISCONTINUING TEAMS, GAO-01-297 (Mar. 2001). “At NCAA Division I-A schools . . . 54% of the respondents discontinuing a men’s team cited gender equity considerations as a great or very great influence.” Id. at 20.
the only safe way to demonstrate compliance with Title IX's participation requirement is to show that [institutions] meet the proportionality requirement of the three-part test.123 At a time when education costs are soaring and athletic departments are continually operating in the red rather than the black,124 institutions want to avoid the risk of potential litigation and the costs associated with litigation. Therefore, when consultants and attorneys advise institutions to comply with Title IX using the substantial proportionality test, institutions are likely to listen.

An institution using part one is not immune to litigation, but the 1996, 2003, and 2005 Clarification Letters and case law give institutions a much better idea about what decisions they need to make in order to avoid litigation. If an institution has a 50% female undergraduate student enrollment and 50% of the athletes are female, clearly it has satisfied part one and complies with Title IX.125 At times there will be close cases that may require litigation to determine whether or not an institution has complied with Title IX, but in most instances a university will know whether or not it has satisfied part one by comparing the percentage of female undergraduates to the percentage of female athletes.126

Part two, on the other hand, lends itself to more confusion because of the nature of the test and the ambiguities that lie within the language of part two. While the 1996 Clarification Letter published by OCR offers some examples of what would and what would not satisfy part two,127 these examples have

123. Title IX at Thirty, supra note 5, at 23.
125. 1996 Clarification Letter, supra note 23.
126. Id.
127. Id. The following examples were given in the 1996 Clarification Letter:
[Example 1:] At the inception of its women's program in the mid-1970s, Institution C established seven teams for women. In 1984 it added a women's varsity team at the request of students and coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution C is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging women's sport in the region. The addition of these teams resulted in an increased percentage of women participating in varsity athletics at the institution. Based on these facts, OCR would find Institution C in compliance with part two because it has a history of program expansion and is continuing to expand its program for women to meet their developing interests and abilities.

[Example 2:] By 1980, Institution D established seven teams for women. Institution D added a women's varsity team in 1983 based in the requests of students and coaches. In 1991 it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport. In 1993 Institution D eliminated a viable women's team and a viable men's team in an effort to reduce its
been of little help to institutions and athletic departments because often the institution's facts and circumstances are different than those given in the examples.\textsuperscript{128} The 1996 Clarification Letter made it clear that if an institution continually takes steps to add women's programs, to add scholarships, or to upgrade club programs to varsity status, it will have a better chance of proving that it has satisfied part two.\textsuperscript{129} However, there are no specific standards set forth regarding how many programs need to be added and within what period of time these programs should be added.\textsuperscript{130} The only way to determine whether an institution has satisfied part two is through an investigation by OCR or a determination by a court (if a private right of action is brought against the university).

In 1998, Syracuse University successfully proved that it satisfied part two, but this required extensive litigation.\textsuperscript{131} Syracuse University most likely spent

\begin{quote}
athletic budget. It has taken no action relating to the underrepresented sex since 1993. Based on these facts, OCR would not find Institution D in compliance with part two. Institution D cannot show a continuing practice of program expansion that is responsive to the developing interests and abilities of the underrepresented sex where its only action since 1991 with regard to the underrepresented sex was to eliminate a team for which there was interest, ability and available competition.

[Example 3:] In the mid-1970s, Institution E established five teams for women. In 1979 it added a women's varsity team. In 1984 it upgraded a women's club sport with twenty-five participants to varsity team status. At that time it eliminated a women's varsity team that had eight members. In 1987 and 1989 Institution E added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women's team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women's varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. Based on these facts, OCR would find Institution E in compliance with part two because it has a history of program expansion and the elimination of the team in 1984 took place within the context of continuing program expansion for the underrepresented sex that is responsive to their developing interests.

[Example 4:] Institution F started its women's program in the early 1970s with four teams. It did not add to its women's program until 1987 when, based on requests of students and coaches, it upgraded a women's club sport to varsity team status and expanded the size of several existing women's teams to accommodate significant expressed interest by students. In 1990 it surveyed its enrolled and incoming female students; based on that survey and a survey of the most popular sports played by women in the region, Institution F agreed to add three new women's teams by 1997. It added a women's team in 1991 and 1994. Institution F is implementing a plan to add a women's team by the spring of 1997. Based on these facts, OCR would find Institution F in compliance with part two. Institution F's program history since 1987 shows that it is committed to program expansion for the underrepresented sex and it is continuing to expand its women's program in light of women's developing interests and abilities.

\textit{Id.}

\textsuperscript{128} \textit{See Title IX at Thirty, supra} note 5.

\textsuperscript{129} \textit{1996 Clarification Letter, supra} note 23.

\textsuperscript{130} \textit{Id.}

hundreds of thousands of dollars on legal expenses while trying to defend this case. Part two does not allow a "quick look" analysis like part one and therefore has the potential to lead to litigation, which can be extremely costly for universities. When institutions have an opportunity to comply with Title IX by using part one or part two, institutions will often choose part one simply because of cost reasons.

Part three also lends itself to being subject to litigation for many of the same reasons as part two. Part three is more vague than part two. The 1979 Policy Interpretation states that it "does not require an institution to accommodate the interests and abilities of potential students." However, the Policy Interpretation does not explain exactly which interests do require accommodation. While there are some indicators listed as to what OCR will look at to determine whether there is unmet interest in a particular sport, the Policy Interpretation does not indicate how many of these indicators need to be looked at, how sophisticated the questionnaires need to be, or how many questionnaires need to be distributed in order for an institution to satisfy part three. The Policy Interpretation did affirmatively note that if an institution had recently dropped a "viable team" from the athletics program, this provides "strong evidence that interest, ability, or available competition no longer exists."

Fortunately, the 2005 Clarification Letter has provided a much needed explanation and further details how institutions can satisfy part three. As more institutions continue to educate themselves about how part three can be satisfied, part three will most likely continue to be used more and more.

B. The Rising Costs of Education and Athletics Provide an Additional Incentive to Drop Men's Programs.

Some institutions end up in the position of needing to drop programs because of the rising costs of education and athletics. In some instances, institutions may want to drop a combination of men's and women's teams.

133. Id.
134. See id.
135. Id.
137. Slear, supra note 6. One of the Commission's finding stated, "Escalating operating costs in intercollegiate athletics threatens the effort to end discrimination in athletics and preserve opportunities." TITLE IX AT THIRTY, supra note 5, at 25. Although beyond the Commission's scope,
However, groups like Trial Lawyers for Public Justice often prevent institutions from dropping both men’s and women’s programs, and the institution will usually drop more than one men’s team and no women’s teams. When an institution announces plans to drop women’s teams, Trial Lawyers for Public Justice often sends a letter to the institution about a potential proportionality problem. The letter will often also include information about what happened when Brown University tried to comply with Title IX using part two and three of the three-part test.

Recent decisions by the administration at the University of Northern Iowa show the effect a letter from an organization such as Trial Lawyers for Public Justice can have on an institution’s decisions about college athletics. In 2002, the University of Northern Iowa announced plans to drop men’s and women’s swimming and tennis due to budget reasons. Shortly after this announcement, the University of Northern Iowa received a letter from Trial Lawyers for Public Justice. Thereafter, the University of Northern Iowa reinstated both women’s tennis and women’s swimming; however, “[t]he men had no viable recourse” for reinstatement.

C. The Number of Men’s Division I Swimming Programs Has Dropped Significantly Since the Passing of Title IX.

Because many institutions choose to comply with Title IX by satisfying the substantial proportionality test, athletic departments across the country continue to drop men’s programs. While the number of women’s teams increased by nearly 1000 during the period between 1986 and 1997, the number of men’s teams dropped by nearly 200 during the same time period.

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138. TITLE IX AT THIRTY, supra note 5, at 25.
139. Id.
140. Id.
141. Slear, supra note 6. Women’s Law Project was able to help prevent Slippery Rock University from cutting the women’s program, but the men’s program was still dropped in 2006. See Slippery Rock Women Score Title IX Win, WOMEN’S LAW PROJECT, July 24, 2006, http://www.womenslawproject.org/pages/issue_athletics.htm (last visited Jan. 15, 2007).
142. Id.
143. Id.
144. Id. The mere violation of a federal statute does not always allow a private right of action. Cannon v. Univ. of Chi., 441 U.S. 677, 688 (1979). However, in 1979, the United States Supreme Court determined that plaintiffs “have a statutory right to pursue [their] claim[s]” in regards to Title IX suits. Id. at 689.
145. Title IX at Thirty, supra note 5, at 18.
Men's swimming is one sport that has been devastated in recent years by the impact of Title IX. Since the 1980–1981 season, over seventy institutions dropped their men’s swimming programs at the Division I level. The original result of some of these cuts was simply for other programs to grow slightly as the swimmers from dropped programs moved to other programs. However, as more and more institutions and athletic programs drop teams and cap the remaining teams, men find fewer and fewer opportunities to swim at the college level. Therefore, a boy’s incentive to take up swimming as a sport diminishes. USA Swimming has long range studies that show the number of boys participating has dropped drastically since 1980. Prior to 1980, the percentage of boys that belonged to USA Swimming was 54%. However, recently the percentages have reversed as girls account for 54% of the membership, while boys have dropped to 46%. While some people may say that boys have simply lost interest, others have said “boys haven’t lost interest – they have lost a place to go.”

The devastation to men’s swimming comes not only from the decision to drop men’s swimming programs, but also from the fact that many programs


148. Id.

149. USA Swimming is the National Governing Body for the sport of swimming in the United States. USA Swimming "provide[s] programs and services for [its] members, supporters, affiliates and the interested public . . . . [USA Swimming] is committed to excellence and the improvement of [swimming]." USA Swimming Website, http://www.usaswimming.org/usasweb/ DesktopDefault.aspx?TabId=21&Alias=Rainbow&Lang=en (last visited Mar. 25, 2006).

150. Letter from Bob Groseth, Swimming Coach – Northwestern University and member of The Board of Directors of the College Sports Council to Sec'y's Comm'n on Athletic Opportunity, supra note 147.

151. Id.

152. Id.
The number of male swimmers allowed on their teams, a topic many athletic directors prefer not to discuss. Capping men's teams does not provide more opportunities for women, but it does allow an institution to change its proportionality numbers, which will often allow it to comply with Title IX using part one. Even though there is enough pool space, equipment, and lockers for additional swimmers to train and compete with the team, institutions remain concerned with satisfying part one, and in effect, trying to meet a quota. These actions are costing the men in our country substantial opportunities to compete at the collegiate level in swimming. Moreover, this is denying the men of our country the opportunity to develop the "habits of mind and competitive drive... that will remain with them when they enter the professional ranks." Although dropping men's programs and capping men's programs does not allow women more opportunities (the original intent of Title IX), it may allow an athletic department to comply simply by adjusting numbers.

IV. U.S. OLYMPIC SWIMMING TAKES A DIVE

One of the most significant results of having fewer Division I men's swimming programs is the impact it has on the United States' performance at the Olympic Games. The United States has dominated the international swimming scene for as long as anyone can remember, but that trend appears to be changing. In 2000 and 2004 the United States men lost the 4x100 Freestyle Relay. Prior to 2000, the United States had won the 4x100 Freestyle Relay in every international competition. In 2000, many swimming fans thought the loss to the Australians was a fluke and thought the United States would begin to dominate again. However, in 2004 the results were even worse than in

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153. TITLE IX AT THIRTY, supra note 5, at 30. Capping teams is a form of roster management. At many schools, the number of walk-on positions on the men's teams are limited, while the number of walk-on positions for the same women's teams are not limited. While this does not allow women more opportunities, it does allow an institution an opportunity to help meet the quota necessary to satisfy part one.

154. Letter from Bob Groseth, Swimming Coach – Northwestern University and member of The Board of Directors of the College Sports Council to Sec'y's Comm'n on Athletic Opportunity, supra note 147. Coach Groseth attended a golf outing with other college swimming coaches from the state of Illinois. During this golf outing, the coaches discussed capping. Every school had a different policy, but each school had its own policy. Every coach told Coach Groseth the same thing: "Don't reveal where you got the information or I might be in trouble." Id. Groseth believes, "Administrators know, in their gut, that it is wrong and don't want to have to explain it to the public. The result of these policies is that guys that want to swim in college can't because the numbers don't match." Id.

155. Id.

156. TITLE IX AT THIRTY, supra note 5, at 22.

157. Anderson, supra note 2, at 58.
2000, as the United States could only manage a bronze medal.158 While many countries in the world walk away with a medal feeling ecstatic, a bronze medal for the United States in a relay is not something the U.S. Team can walk away with feeling satisfied; the country places high expectations on these men.

A. The Majority of U.S. Men Olympic Swimmers Swim at Division I Universities Prior to Competing at the Olympic Games.

An overwhelming majority of the past U.S. Team members have come from Division I swimming programs.159 Occasionally, a male high school swimmer will compete at the Olympic Games, but this is a rarity rather than a frequent occurrence.160 For example, in 2004 there were twenty-one men on the U.S. Team and only one of these athletes did not swim at a Division I program at some point in his career.161 As the number of men’s swimming programs drop, the pool of swimmers that compete for spots on the U.S. Team becomes smaller and smaller. As there is less competition in the United States, the performances of our male swimmers could continue to diminish and impact the results of the U.S. team at international competitions in the future.

Some may argue that the elimination of programs only happens to sub-par programs that are incapable of producing Olympians. However, this argument contains two major flaws. First, it is a myth that institutions drop only non-competitive programs. For example, two institutions dropped two very significant men’s swimming programs.162 Both UCLA and the University of

158. Id.
159. The 2004 Men’s Olympic Swimming Team included the following swimmers, who competed at the university noted while in college: Ian Crocker-The University of Texas; Nate Dusing-The University of Texas; Mark Gangloff-Auburn University; Scott Goldblatt-The University of Texas; Gary Hall, Jr.-The University of Texas; Brendan Hanson-The University of Texas; Bryce Hunt-Auburn University; Larsen Jensen-The University of Southern California; Klete Keller-The University of Southern California; Dan Ketchum-The University of Michigan; Lenny Krayzelburg-The University of Southern California; Jason Lezak-The University of California-Santa Barbara; Ryan Lochte-The University of Florida; Tom Malchow-The University of Michigan; Aaron Piersol-The University of Texas; Scott Usher-The University of Wyoming; Peter Vanderkaay-The University of Michigan; Erik Vendt-The University of Southern California; and Neil Walker-The University of Texas. See USA Swimming 2004 Olympic Team Roster, http://www.swim2000.org/olympic_qualifiers.htm (last visited Mar. 20, 2006).
160. In 2000 and 2004, Michael Phelps became the only member of the Men’s USA Swimming Olympic Team that had not competed for a Division I University. Id. Phelps was the first male high school swimmer to turn professional when he signed an endorsement agreement with Speedo in 2001, when he was only sixteen. Paul McMullen, Phelps Signs Speedo Deal: Suit Manufacturer to Pay for His College Education, BALT. SUN, Oct. 4, 2001, at 7D.
161. USA Swimming 2004 Olympic Team Roster, supra note 159.
162. Letter from Bob Groseth, Swimming Coach – Northwestern University and member of
Miami had very storied swimming programs, but the athletic departments made the decision to drop the program at each institution. The University of Miami had twenty-two NCAA champions and UCLA had twenty-two Olympians, but both athletic departments made the decision to drop the men’s programs while allowing the women’s programs to continue. Second, while most Olympians come from major programs, this is not the case with every Olympian. Scott Usher provides a great example. Unlike many future Olympic swimmers, Usher did not receive a lot of attention throughout the high school recruiting process. Ultimately, Usher made the decision to compete at the University of Wyoming, hardly known as a top notch swimming program. However, Usher improved vastly while attending the University of Wyoming and made the 2004 U.S. Team in the 100 meter breaststroke. As institutions continue to drop men’s swimming programs, there will be fewer opportunities for swimmers like Scott Usher, who use their college swim program as an opportunity to improve and continue pursuing an Olympic dream, to make an Olympic Team, which will in turn continue to hurt the United States’ performance at the Olympic Games.

B. The Decline in Men’s Division I Swimming Programs Has Caused a Decline in the Pool of Swimmers That Aim to Qualify for the Olympic Games.

Many in the swimming and Olympic community share the concern that Title IX is negatively impacting Olympic performances. On June 10, 2002, Chuck Wielgus, Executive Director of USA Swimming, sent a letter to the Chief Executive Officer of the United States Olympic Committee (USOC) titled The Decline of Olympic Sports Programs in College Athletics. Wielgus stated,

The Board of Directors of the College Sports Council to Secy's Comm'n on Athletic Opportunity, supra note 147.

163. Id.
164. Id.
167. Id.
This issue is relevant to the USOC because the American system of intercollegiate athletic programs is a vital pipeline in the development of athletes in many Olympic sports, and the decline of Olympic sports programs at the college level will negatively impact many Olympic sport programs and ultimately the future performance of the U.S. Olympic team. When colleges drop Olympic sports programs, this not only eliminates opportunities for American athletes, but it also provides a disincentive for younger athletes who will lose interest in a sport because of lack of viable opportunities to continue competing at the college level.\(^{170}\)

Even former swimmers are convincing their sons to participate in other sports because they realize that it is a very real possibility that the sport of swimming will continue to diminish and that there will be too few opportunities for their sons to compete in swimming at the collegiate level.\(^{171}\) Larry Barbiere is a former Olympic swimmer as well as a college swimmer at Indiana University and has two daughters and one son.\(^{172}\) While both daughters swim, Barbiere encouraged his son to pursue another sport because Barbiere feared that there would be a lack of opportunities for his son to swim in college.\(^{173}\) In a conversation with Bob Groseth, Northwestern University Head Men’s Swimming Coach, Barbiere said, “College athletics was one of the most exciting and dramatic experiences of my life. I want my son to be part of a college team and I am afraid that when it comes time for him to go to college[,] swimming won’t be a sport.”\(^{174}\)

As more institutions drop men’s swimming programs, more people throughout the country will share Barbiere’s thoughts. These thoughts could lead to fewer boys swimming at younger ages, which will hurt swimming at the grassroots level. “When colleges drop Olympic sports programs, this not only eliminates opportunities for American athletes, but it also provides a disincentive for younger athletes who will lose interest in a sport because of lack of viable opportunities to continue competing at the college level.”\(^{175}\)

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170. Id.
171. Letter from Bob Groseth, Swimming Coach – Northwestern University and member of The Board of Directors of the College Sports Council to Secy’s Comm’n on Athletic Opportunity, supra note 147.
172. Id.
173. Id.
174. Id.
175. 2002 Wielgus Letter, supra note 169.
V. THE LASTING EFFECTS AND WHAT CAN BE DONE

Many still consider the United States the most dominant country in swimming, but if organizations in this country do not take steps to help remedy the effects of Title IX, performances will continue to suffer. The U.S. Team won the overall medal count at the past three Olympic Games, but Australia and other countries continue to win more and more medals. The results of the 4x100 Freestyle Relay could be telling signs that the depth of the men’s swimming in the United States is decreasing. A continued lack of depth could result in a decrease in the amount of medals the U.S. Team wins at future Olympic Games.

At the college level, many consider swimming, gymnastics, and wrestling non-revenue sports, but these sports often drive many of the advertising dollars generated during the Olympics. Chuck Wielgus, executive director of USA Swimming, uses this to his advantage when talking to potential sponsors. “[W]e have at times used the analogy that what Duke Basketball is to college basketball, USA Swimming is to the Olympics.” The continued loss of college swimming programs could hurt the performance of U.S. athletes as well as the amount of money that the USOC is able to generate, which helps American athletes perform at the highest levels.

The possibility of the USOC raising less revenue from broadcasting rights of the Olympic Games because of a decline in the performance of the U.S. Team would lead one to believe the USOC might be interested in helping prevent the decrease in men’s Division I swimming programs, but this does not appear to be the case. A less than dominating performance by the U.S. Team could lead to fewer Americans watching the Olympic Games and in turn lead to the USOC raising less revenue from the Olympic Games.

Many coaches and supporters of swimming and other Olympic sports such as wrestling and gymnastics hoped that the USOC Board of Directors would decide to participate in a feasibility study relating to the creation of a new charitable foundation, independent from the USOC. The purpose of the

176. Letter from Chuck Wielgus, Executive Director, USA Swimming, to Interested Members of the U.S. Olympic Sports Family (July 15, 2003) (on file with author). Football and basketball are considered the major revenue sports in college because of the attendance and the amount of advertising revenue the bowl games and NCAA Men's Basketball Tournament produce. However, swimming, gymnastics, and wrestling do not produce this type of revenue at the college level.

177. Id.

178. Id.

179. Id.

charitable foundation was to foster the sponsorship of Olympic sports by America’s colleges and universities. Many people hoped the USOC, while working with the NCAA, could create “the opportunity . . . to provide funds that would [retain Olympic Sports] such as swimming . . . at NCAA institutions.” However, the USOC declined to spend less than $250,000 for the feasibility study even though the USOC recently reported a $37 million dollar surplus. Marty Mankamyer, former president of the USOC, stated, “If the current trend of program elimination continues, we will suffer the consequences, as will be evidenced by the absence of American athletes on the medals’ podium at future Olympic games.” Although the USOC’s former director appeared to be concerned about the impact of Title IX, the new director appears as though he is not as concerned with the future of certain Olympic sports as he is with the amount of money in the USOC’s bank account. However, by not acting he could eventually hurt the USOC’s bank account even more.

If the USOC continues to turn away from the potential problem facing American Olympic sports, other organizations must get involved to try to save the sport of swimming. The NCAA, USA Swimming, and the American Swim Coaches Association need to work together to help save the sport of swimming in the United States so that USA Swimming can continue to remain the most dominant swimming nation in the world. If the trend of dropping men’s swimming programs continues, Olympic performances on the men’s side are most likely going to continue to decline.

VI. CONCLUSION

Although the Department of Education has made strides in trying to clarify how Title IX applies to college athletics through regulations and the 1996, 2003, and 2005 Clarification Letters, confusion remains among administrators. Unfortunately, this has created a “numbers” game and has led to the demise of many men’s programs. Although a decline in Olympic performance might be the most dramatic result of a poorly interpreted Title IX, a more profound result could be fewer boys benefiting from the participation in sports. Sports provide additional educational lessons such as the value of setting long-term goals and personal discipline. The loss of these lessons to

Mar. 20, 2006).

181. Id.
182. Id.
183. Id.
184. TITLE IX AT THIRTY, supra note 5, at 9.
185. Leonard, supra note 180.
our boys and men could create a large and needless societal loss. After all, the purpose of Title IX was to help our daughters, not harm our sons.

Megan Ryther