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Timeout! Getting Back to What Title IX Intended and Encouraging Courts and the Office of Civil Rights to Re-evaluate the Three-Prong Compliance Test

Rachel Schwarz

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Timeout! Getting Back to What Title IX Intended and Encouraging Courts and the Office of Civil Rights to Re-evaluate the Three-Prong Compliance Test

Rachel Schwarz*

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I. Introduction

“Equal opportunity to participate lies at the core of Title IX’s purpose.”¹

When Title IX was enacted in 1972, it was intended to combat sex discrimination in academia.² However, the decision in *Cohen v. Brown University*³ changed the course of intercollegiate athletic participation forever. It set the stage to enable and empower women to participate in what had traditionally been viewed as a male territory.⁴ Since *Cohen*, women have continued to fight for their equal place in intercollegiate athletics, and have seen much success in the courts.⁵ On the other hand, as Title IX has gained more traction at schools and in courts, men’s opportunities are slowly being removed because it is the most financially feasible way to comply with Title IX.⁶

1. *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st. Cir. 1993).

2. See JEAN O’REILLY & SUSAN K. CAHN, *Law and Equity: Title IX and Its Aftermath*, in *WOMEN AND SPORTS IN THE UNITED STATES* 319, 319 (Jean O’Reilly & Susan K. Cahn eds., 2007) (“When Congress passed Title IX, . . . few people anticipated the enormous impact it would have on all levels of sports.”).

3. See *Cohen*, 991 F.2d at 907 (holding that the trial judge did not abuse its discretion by issuing a preliminary injunction).

4. See SUSAN CAHN, *Coming on Strong: Gender and Sexuality in Twentieth-Century Sports*, in *EQUAL PLAY: TITLE IX AND SOCIAL CHANGE* 9, 9 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007) (“Sport had developed as a male preserve, a domain in which men expressed and cultivated masculinity through athletic competition.”).

5. See discussion *infra* Part III.B (discussing courts’ proclivity towards removing men’s teams but requiring that women’s teams be reinstated).

6. See discussion *infra* Part III.C.1 (addressing the issues with the first prong of the

Title IX debates often center around the lack of opportunity for women, when in reality both male and female athletic teams are suffering from the continuing emphasis on the three-prong test that the OCR defines.⁷ The current test for Title IX compliance encourages roundabout practices and fails to accomplish what it did originally: increase athletic opportunities for women.⁸

Despite Title IX's expansion efforts, the courts and the National Collegiate Athletic Association (NCAA) have routinely rejected one prominent female sport that should be included in any compliance test: competitive cheerleading.⁹ In 2008, the Office of Civil Rights (OCR) made clear in a Dear Colleague Letter that cheerleading was, at the time, presumed not to be a sport, but left open the possibility that if some factors of cheerleading changed, it could be granted Title IX protection in the future.¹⁰ Continuing to disregard competitive cheerleading as a varsity sport subject to Title IX protection ignores an existing opportunity that could help schools satisfy an equal opportunity evaluation.¹¹

Section II of this Note discusses the history of women in sports as it relates to Title IX. It focuses specifically on the National Collegiate Athletic Association and the struggles that women have dealt with to earn equal opportunities in sports. Section III evaluates how the three-prong test has

compliance test).

7. See discussion *infra* Part II.B.4 (laying out the compliance test).

8. See Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified at 20 U.S.C. §§ 1681-1688 (2012)) (using language that applies generally to programs receiving federal financial assistance as opposed to language that is specifically directed at sports).

9. See *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012) (holding that competitive cheerleading participants could not be counted as athletes under Title IX).

10. See Letter from Stephanie Monroe, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleagues (Sept. 17, 2008), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html> ("Please keep in mind that OCR's determinations based on these factors are fact-specific. Therefore, determinations may vary depending on a school district or postsecondary institution's athletics program, the nature of the particular activity, and the circumstances under which it is conducted."); see also JODY FEDER, *Title IX, Sex Discrimination, and Intercollegiate Athletics: A Legal Overview*, CONG. RESEARCH SERV. 15 (Dec. 7, 2012), available at <http://www.fas.org/sgp/crs/misc/RL31709.pdf> ("Meanwhile, ED has issued guidance clarifying that there is a presumption that cheerleading is not a sport and that cheerleaders may not be counted as athletes for purposes of fulfilling a school's Title IX requirements. ED has, however, indicated that cheerleading may be deemed a sport if the program meets certain requirements.").

11. See discussion *infra* Part IV.A (analyzing cheerleading and the ease involved in considering it a Title IX sport).

been applied in courts in a way that favors women at the expense of men, and discusses the problems with the three options that schools have for compliance. Finally, Section IV presents a two-fold solution to the Title IX problem: include competitive cheerleading in the Title IX analysis, and reformulate the test for compliance that includes a more all-encompassing approach instead of the strict three-prong options that schools must currently comply with.

II. *Women's Involvement in Sports and the History of Title IX*

A. *History of Women in Sports*

Female athletes have fought a long battle against gender discrimination in sports, and they have seen significant advances in the last forty years.¹² Initiatives like WomenSport International (WSI) work to advance athletic opportunities for women all over the world and at every competitive level.¹³ For example, WSI supports the Brighton Declaration on Women and Sport, a promise to promote the continued involvement and participation of women in sports.¹⁴ Across the world, over 300 organizations have endorsed the Brighton Declaration to show their support for the involvement and equality of women in athletics.¹⁵ At the collegiate level in the United States, the National Collegiate Athletic Association champions Title IX in its quest for

12. See Div. for the Advancement of Women, *Women, Gender Equality and Sport*, DEP'T OF ECON. AND SOC. AFFAIRS OF THE UNITED NATIONS SECRETARIAT 2 (Dec. 2007), <http://www.un.org/womenwatch/daw/public/Women%20and%20Sport.pdf> (“Women’s participation in sport has a long history. It is a history marked by division and discrimination but also one filled with major accomplishments by female athletes and important advances for gender equality and the empowerment of women and girls.”).

13. See *Brighton Declaration on Women and Sport*, WomenSport International, http://www.sportsbiz.bz/womensportinternational/conferences/brighton_declaration.htm (last visited December 29, 2013) (detailing the initiatives of the company itself and outlining the Brighton Declaration on Women and Sport which advocates equality in sport).

14. See *id.* (articulating the purpose of the Brighton Declaration as an effort to encourage equality in sports for women at all levels).

15. See *The IWG Welcomes Bodies Worldwide to Endorse the Brighton Declaration on Women and Sport*, International Working Group on Women and Sport, <http://www.iwg-gti.org/iwg/brighton-declaration-on-women-an/> (last visited Nov. 21, 2013) (“To date, more than 400 organizations worldwide have been moved to endorse the Brighton Declaration . . . The Declaration is meant to complement all sporting, local, national and international charters, laws, codes, rules and regulations relating to women or sport.”).

equality, but still struggles to implement it without problems despite a forty-year history and countless revisions and clarifications.¹⁶

B. History of Title IX

Before Title IX was enacted, women faced discrimination in athletics, academics, admissions, and hiring.¹⁷ Title IX was intended to solve the inequality problems in educational institutions receiving federal financial assistance.¹⁸ The overwhelming effect Title IX had on athletics was unforeseen and unintended, as only §106.41 of the Amendment addresses athletics.¹⁹ The passage of Title IX marked a defining moment in the development of women's rights and participation in college sports in the United States.²⁰

Title IX's original purpose was to grant women more academic opportunities, better employment options after college, and aimed to prohibit sex discrimination generally.²¹ Because its substantial influence on athletics was unintended, its implementation remains a work in progress.²² Title IX has evolved into one of the primary tools used by students and other

16. See Ross A. Jurewitz, *Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 AM. U. J. GENDER SOC. POL'Y & L. 283, 305–12 (analyzing Cohen v. Brown Univ. and the three-part test the case helped establish).

17. See EILEEN McDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS 77–112 (2008) (evaluating the history of Title IX and the buildup to enacting it).

18. See *id.* at 78–80 (recounting the problems Title IX intended to combat).

19. See *infra* note 25 and accompanying text (discussing the hasty passage of Title IX and the unintended consequences on college athletics); see also 34 C.F.R. § 106.41 (2013) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”).

20. See § 106.41 (articulating the language of Title IX relating to the combating of gender discrimination in educational institutions receiving federal funding).

21. See McDONAGH, *supra* note 17, at 79–80 (reviewing the original purpose and goal of Title IX); see also Courtney W. Howland, Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1255 (1979) (“Title IX was passed without much debate about its effect on sports and intercollegiate athletics. The statute’s general language simply prohibits sex discrimination in educational programs receiving federal aid.”).

22. See DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORTS REVOLUTION 1–15 (Richard Delgado & Jean Stefancic eds., 2010) (discussing Title IX generally and how far women have come).

organizations to fight inequality in athletics.²³ However, developing Title IX into an athletic equality statute has taken several years and many clarifications.²⁴ Today, the contest between Title IX and athletic teams at collegiate institutions continues.

1. Education Amendments of 1972 and 1974

Title IX was adopted as part of the Education Amendments of 1972.²⁵ The Education Amendments were enacted by Congress after “extensive hearings on women in higher education and . . . ample evidence of intentional discrimination that presented formidable barriers for admission to institutions of higher education.”²⁶ The law requires that educational institutions “‘be fair,’ but [does not provide] details, definitions, [or] exceptions” on accomplishing this goal.²⁷ Upon passage of the 1972 Amendments, significant unease arose from individuals and groups involved with athletics even though less than ten percent of the Title IX regulations addressed athletics.²⁸ After a notice and comment period, a version of Title IX including equal opportunities for women was passed into law on June 23, 1972.²⁹ Feeling unsettled, the NCAA attempted to prevent Title IX from

23. See *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012) (ruling that competitive cheerleading participants could not be counted under Title IX and showing that Title IX is the basis of several of the lawsuits filed alleging violation of gender equality in collegiate sports).

24. See Ephraim Glatt, *Defining “Sport” Under Title IX: Cheerleading*, *Biediger v. Quinnipiac University, and the Proper Scope of Agency Deference*, 19 SPORTS LAW. J. 297, 300 (2012) (“Because Title IX was adopted by Congress as a floor amendment and therefore lacks the standard Committee hearings or reports, its lack of legislative history often leads to vagueness surrounding its intent and scope.”).

25. See *id.* (“These Education Amendments . . . extended gender antidiscrimination laws to federally funded education programs and threatened to terminate federal assistance as a penalty for noncompliance.”); see also *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523–25 (1982) (explaining the vague language of the Education Amendments and their failure to discuss equality in sports as a specific issue being targeted).

26. See NANCY HOGSHEAD-MAKAR & ANDREW ZIMBALIST, *Introduction*, in *EQUAL PLAY: TITLE IX AND SOCIAL CHANGE* 49 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007) (discussing the Educational Amendments of 1972).

27. See LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, *TITLE IX* 5 (2005) (explaining the initial requirements of Title IX at its enactment).

28. See *id.* at 6 (“Over 90 percent of those comments related to the application of Title IX to athletics, yet less than 10 percent of the regulations deal directly with athletics, physical education, recreation, or sports.”).

29. See 20 U.S.C. §§ 1681–1688 (2012) (articulating Title IX).

applying to intercollegiate athletics.³⁰ The Tower Amendment was a first attempt at working with the NCAA's concerns.

2. Tower Amendment vs. Javits Amendment

As part of the NCAA's effort, Senator John Tower (R-TX) presented the Tower Amendment. The Tower Amendment would have amended Title IX to exempt "intercollegiate athletic activity to the extent that such activity does or may provide gross receipts or donations to the institution necessary to support that activity."³¹ Senator Birch Bayh (D-IN), a sponsor of the 1972 Education Amendments, vocally rejected the Tower Amendment and argued that Title IX's was to be "a strong and comprehensive measure [to] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women."³² In Sen. Bayh's opinion, this included all of an institution's activities, including athletics.³³ Although the Tower Amendment passed in the Senate, the House-Senate conference committee settled on a "compromise provision" that temporarily avoided answering specific questions about how Title IX applied to intercollegiate athletics.³⁴

The middle ground that Congress found was an amendment proposed by Senator Jacob Javits (R-NY).³⁵ When Congress passed the Javits Amendment³⁶ in 1974, it marked the first time Congress expressly aligned Title IX with gender equality in sports.³⁷ The Javits Amendment directly

30. See HOGSHEAD-MAKAR, *supra* note 26, at 50 (discussing the backlash of enacting Title IX in 1972).

31. See BRAKE, *supra* note 22, at 18–19 (reviewing the history of Title IX and the challenges in retaining the inclusion of sports).

32. See generally 118 Cong. Rec. 5804 (1972) (suggesting this is the opinion of Sen. Bayh).

33. See *id.* (inferring from Sen. Bayh's statements that he intended Title IX to be applied liberally).

34. See BRAKE, *supra* note 22, at 19 (discussing why and how the Tower Amendment failed).

35. See generally HOGSHEAD-MAKAR, *supra* note 26, at 1–8 (discussing the history and evolution of Title IX).

36. See Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484 (1974) (codified in 20 U.S.C. §§ 1681–1688 (2012)) (requiring the Department of Health, Education, and Welfare to issue a Title IX regulation that offered "reasonable provisions considering the nature of particular sports").

37. See CARPENTER, *supra* note 27, at 4–8 (using a timeline to summarize the history of equality in sports since the enactment of Title IX in 1972).

required the Department of Health, Education, and Welfare (HEW) to amend the Education Amendments of 1972 and include “reasonable provisions considering the nature of particular sports.”³⁸ The Javits Amendment brought all sports into the discussion about equality and requires that the needs for both men’s and women’s sports are adequately met.³⁹ Despite deeming athletics a necessary part of the Title IX discussion, the Javits Amendment did little to clarify intercollegiate athletics and left the details of what “reasonable provisions” actually were. Armed with the instruction of the Javits Amendment, the Office of Civil Rights (OCR) issued the 1975 Regulation.⁴⁰

3. 1975 Regulation

Drafting the 1975 Regulation encouraged the NCAA, coaches, athletic directors, etc. to comment.⁴¹ The Regulation was finalized on July 21, 1975.⁴² Several regulations were issued, and they each addressed separate issues about collegiate athletics: §106.33 addresses comparability of facilities,⁴³ §106.37 discusses financial assistance,⁴⁴ and §106.41 focuses directly on gender issues and collegiate athletic opportunities.⁴⁵ Section 106.41 is divided into subsections (a), (b), and (c).⁴⁶ Section 106.41(a) reiterates the general language of the law behind Title IX, stating

38. See 20 U.S.C. §§ 1681–1688 (detailing the changes to be put into effect by Title IX).

39. See BRAKE, *supra* note 22, at 88 (addressing the backlash that Congress received as a result of the Javits Amendment).

40. See Glatt, *supra* note 24, at 302–04 (explaining the 1975 Regulation and the 1979 Policy Interpretation).

41. See HOGSHEAD-MAKAR, *supra* note 26, at 65–83 (discussing the importance of the 1975 OCR Regulation).

42. See *id.* at 6 (giving a history of Title IX).

43. See 34 C.F.R. § 106.33 (2013) (“A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”).

44. See 34 C.F.R. § 106.37 (2013) (stating that any school handing out financial assistance to its students must do so on a fair basis independent of the students’ gender).

45. See 34 C.F.R. § 106.41 (2013) (discussing the need for equal opportunities in athletics and providing a test to assist schools in this evaluation).

46. *Id.* (containing the text section (a), pertaining to the general application of the statute, section (b), pertaining to separate teams, and section (c), pertaining to equal opportunities for men and women).

“[n]o person shall on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funds], and no recipient shall provide any such athletics separately on such basis.”⁴⁷

Subsection (a) re-emphasizes the need for schools to avoid discrimination in intercollegiate sports as a general matter. The ways in which a school may work to accomplish this are articulated more fully in the next two sections of §106.41.

The second subsection, §106.41(b), accepts and encourages institutions to maintain co-ed athletic teams, and discusses how those teams should function as well as how the single-sex teams should be run.⁴⁸ The language states

“ . . . a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have been previously limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport [C]ontact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.”⁴⁹

§106.41(b) created an accepted “separate but equal”⁵⁰ system in intercollegiate athletics because female involvement in sport was seen not only as a threat to manhood but also a drastic change from the traditional

47. Compare *id.* (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”), with 34 C.F.R. §106.41 (1972) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”).

48. See 34 C.F.R. §106.41(b) (1972) (discussing the operation of separate teams under Title IX).

49. *Id.*

50. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overturning an earlier decision that allowed for the continuation of the doctrine of “separate but equal”).

roles of women as homemakers.⁵¹ Co-ed and single-sex teams exist at educational institutions, but the concept of separation in collegiate athletics persists today.⁵²

§106.41(c) gives the most guidance regarding what schools should consider for compliance with Title IX. This section is the core of the OCR Regulation because it gives an athletic director concrete factors to consider when evaluating whether equal opportunities exist for members of both sexes.⁵³ The non-exhaustive list of factors includes:

“(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity.”⁵⁴

After issuing the 1975 Regulation, schools, teams, and individuals had something tangible to ground their claims in, and allegations of violations came pouring in. By mid-1978, HEW had received “nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education.”⁵⁵ The complaints centered mostly on “whether a school had provided ‘enough’ sports opportunities for female student-athletes.”⁵⁶ The overwhelming number of allegations motivated the OCR to issue the 1979 Policy Interpretation and clarify further how institutions were to comply with Title IX.⁵⁷

51. See HOGSHEAD-MAKAR *supra* note 26, at 49–50 (discussing the necessity of Title IX despite women’s suffrage and the sharp outcry by the NCAA against allowing women to be treated as equals in intercollegiate athletics).

52. See Earl C. Dudley, Jr. & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & LAW 177, 220–22 (1999) (discussing dual gender sports, single gender sports, and the problems that arise with both of them).

53. See 34 C.F.R. §106.41(c) (listing factors to consider when evaluating whether a school has given equal opportunities to men and women).

54. *Id.*

55. Policy Interpretation, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

56. See *id.* at 54 (“HEW issued a policy interpretation . . . in 1979 that further clarified the meaning of Title IX’s ‘equal opportunity’ mandate.”); see also *A Policy Interpretation:*

57. See *id.* at 54 (“HEW issued a policy interpretation . . . in 1979 that further clarified the meaning of Title IX’s ‘equal opportunity’ mandate.”); see also *A Policy Interpretation:*

4. 1979 Policy Interpretation

Compliance with Title IX under the 1979 Policy Interpretation requires that (1) “athletically related financial assistance be allocated in proportion to the numbers of male and female students participating in intercollegiate athletics;”⁵⁸ (2) “all other benefits, opportunities, and treatment afforded participants of each sex be equivalent;”⁵⁹ and (3) “the interests and abilities of students be effectively accommodated to the extent necessary to provide equal athletic opportunity for members of both sexes.”⁶⁰ These three goals are focused on achieving what the OCR hoped 1975 Regulation would accomplish by further explaining how to comply with Title IX.⁶¹ The third requirement of the Policy Interpretation, evaluating whether the effective accommodation of interests and abilities for both sexes is where the majority of the conflict lies.⁶²

The Policy Interpretation’s third requirement is a three-prong test⁶³ that today is the hallmark of interpreting and deciding Title IX complaints.⁶⁴ The purpose of this three-prong test is to articulate what the OCR meant by using the words “equal opportunity” in the 1975 Regulation.⁶⁵ Generally, equal opportunity is intended to “distribute athletic opportunities among members

Title IX and Intercollegiate Athletics, OFFICE FOR CIVIL RIGHTS (Dec. 11, 1979), available at <http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html> (containing the text of the 1979 Policy Interpretation).

58. See Mark Hammond, *Substantial Proportionality Not Required: Achieving Title IX Compliance without Reducing Participation in Collegiate Athletics*, 87 KY. L.J. 793, 797 (1999) (citing POL’Y INTERPRETATION *supra* note 55, at 71,415).

59. See *id.* (citing POL’Y INTERPRETATION, *supra* note 55, at 71,415–17).

60. See *id.* (citing POL’Y INTERPRETATION, *supra* note 55, at 71,417–18).

61. See discussion, *supra* Part II.B.4 (giving instructions for financial aid, equality, etc., but failing to explain further how to accomplish this equality).

62. See Hammond, *supra* note 58, at 798 (“This effective accommodation test and its three prongs have been the focal point for federal appellate courts in Title IX litigation.”).

63. See Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, OFFICE FOR CIVIL RIGHTS (Dec. 11, 1979), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

64. See Jurewitz, *supra* note 16, at 298–99 (2000) (“[The Policy Interpretation] has nonetheless become the key regulatory provision for Title IX compliance.”).

65. See POL’Y INTERPRETATION, *supra* note 55, at 71,414 (“The final Policy Interpretation . . . explains the factors and standards set out in the law and regulation which the Department will consider in determining whether . . . any disparities . . . exist between men’s and women’s programs are justifiable and nondiscriminatory.”).

of both sexes based upon each sex's proportion within the student body."⁶⁶ Equal opportunity can be achieved in one of three ways under the three-prong test.

A school must meet only one of the three prongs to maintain Title IX compliance.⁶⁷ The first prong states "all . . . assistance should be available on a substantially proportional basis to the number of male and female participants in the institutions athletic program."⁶⁸ This does not necessitate that equal money be spent on each athletic program, it merely requires that each athletic opportunity is funded appropriately depending on the needs of the sport.⁶⁹ More specifically, this prong asserts that the ratio of men to women at a school should parallel the ratio of men to women participating in sports.⁷⁰ This is historically the easiest of the three prongs to evaluate because it requires a look at raw numbers;⁷¹ however, it is also the most litigated⁷² because most schools fail to meet the requirements of substantial proportionality and the courts have not given adequate guidelines for what level of disparity is acceptable.⁷³

The second prong addresses the whether a school has shown a continuing history of expansion for the underrepresented sex. As part of this expansion, the institution must be "demonstrably responsive to the developing interest and abilities of the members of that [underrepresented]

66. Jurewitz, *supra* note 16, at 288.

67. See Clarification of Intercollegiate Athletics Policy Guidance, *supra* note 63 ("The Clarification confirms that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes."); see also Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L. 75, 169 (2003) ("[E]ach prong of the test is a viable and separate means of compliance [and] to give practical examples of the ways in which schools can comply.").

68. See POL'Y INTERPRETATION, *supra* note 55, at 71,418 (describing the Policy Interpretation and summarizing the intended effects).

69. See 34 C.F.R. §106.41(a), (c) (noting the need for equal treatment for different sports, but not requiring equal division of money).

70. See discussion, *infra* Part II.B.5 (providing clarifications for each prong of compliance).

71. See POL'Y INTERPRETATION, *supra* note 55 (outlining each prong of compliance).

72. See Kristin Rozum, *Staying Inbounds: Reforming Title IX in Collegiate Athletics*, 18 WIS. WOMEN'S L.J. 155, 163 (2003) ("[C]ourts have deferred to the OCR's Policy Interpretation and given undue weight to the 'substantial proportionality' prong of the Three-Part Test.").

73. See *Roberts v. Col. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) (holding that a disparity of 10.5% was too large a gap to satisfy the substantial proportionality test, but failing to provide an acceptable level of disparity).

sex.”⁷⁴ This is much more difficult to comply with now than it was when Title IX was in its early stages because several schools cannot afford to continue expanding.⁷⁵

The third way a school may comply with the effective accommodation test is “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.”⁷⁶ This is the most difficult of the three prongs to comply with because the wording is exceedingly vague. There has been a considerable amount of conflict over this language, and it has even been suggested that this doesn’t present an alternative option for schools from the first prong in achieving equality.⁷⁷

Generally, the Policy Interpretation has helped frame the debate over whether schools are in compliance with Title IX, but it has also “created a battle for scarce resources between male and female athletes, and between revenue and non-revenue producing sports.”⁷⁸ As these fights for funds raged on, the OCR became aware that they had to continue clarifying ways for institutions to comply with Title IX. The OCR “has the right and perhaps the responsibility to clarify apparent ambiguity” in existing laws.⁷⁹ To this end, the OCR has issued several letters of clarification since the 1979 Policy Interpretation.⁸⁰

74. POL’Y INTERPRETATION, *supra* note 55, at 71,418.

75. See Jeffrey P. Ferrier, *Title IX Leaves Some Athletes Asking, “Can We Play Too?”*, 44 CATH. U. L. REV. 841, 864–65 (1995) (“Title IX leaves university athletic administrators with few options in responding to a budget crisis; they can either eliminate men’s teams or do nothing.”).

76. POL’Y INTERPRETATION, *supra* note 55, at 71,418.

77. See discussion, *infra* Part III.C.3 (analyzing the problems with the third prong of the Policy Interpretation).

78. See Jurewitz, *supra* note 16, at 287; see also *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254–1257 (1979) (“The final regulations still contain a general prohibition of sex discrimination in any athletic program, a provision that follows naturally from the broad language of the statute.”).

79. See CARPENTER, *supra* note 27, at 17 (acknowledging the ongoing obligation an agency has in enforcing a law).

80. See CARPENTER, *supra* note 27, at 17 (introducing the Letters of Clarification issued by the OCR).

5. Letters of Clarification

The OCR has issued four letters of clarification relating to the three-prong test,⁸¹ one letter addressing financial aid,⁸² and one letter discussing when activities constitute sports for Title IX purposes.⁸³ Each of these letters was intended to respond to the criticism and confusion that many non-compliant schools struggled with.

Norma V. Cantu, the Assistant Secretary for Civil Rights at the time, approved the 1996 Letter of Clarification, which focuses on proportionality and gives a detailed explanation of how schools may comply with each prong of the test.⁸⁴ The letter addresses the substantial proportionality prong by reiterating which students qualify as athletic participants before going on to determine whether the participation is substantially proportional.⁸⁵ Athletic participants are those athletes who are

“(a) . . . receiving institutionally-sponsored support normally provided to athletes . . . at the institution involved, (b) . . . participating in the organized practice[s] [and other team events], (c) . . . listed on the eligibility . . . lists . . . for each sport, or (d) . . . [are unable to meet the above criteria] but continue to receive financial aid on the basis of athletic ability.”⁸⁶

81. See Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, to Colleague (Jan. 16, 1996) available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> (breaking down each portion of the three-prong test for further clarification); see also Letter from Gerald Reynolds, Assistant Secretary for Civil Rights, to Colleague (Jul. 11, 2003), available at <http://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> (reiterating the three-prong test and explaining the current standards); see also Letter from James F. Manning, Assistant Secretary for the Office of Civil Rights, to Colleague (Mar. 17, 2005), available at http://www.nacua.org/documents/AdditionalClarificationThreePartTest_2005.pdf (suggesting that the use of surveys can be used to help institutions satisfy the third prong); see also Letter from Russlynn Ali, Assistant Secretary for the Office of Civil Rights, to Colleague (Apr. 20, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html> (revoking the applicability of the 2005 Clarification Letter).

82. See CARPENTER, *supra* note 27, at 239–43 (providing the text of the 1998 Clarification Letter).

83. See Letter from Stephanie Monroe, Assistant Secretary for Civil Rights, to Colleague (Sept. 17, 2008), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html> (explaining what standards a school should use to determine whether or not an activity is a sport).

84. See Cantu, *supra* note 81 (breaking down each portion of the three-prong test for further clarification).

85. See *id.* (providing criteria for evaluation).

86. *Id.*

Once the number of athletic participants has been determined, a school or court can calculate whether substantial proportionality is achieved. Problems often arise in how schools count athletes and how close to exact proportionality a school must be. The 1996 Letter of Clarification attempted to give some guidance in this area, but it is still a grey area.⁸⁷

In explaining prong two of the test, the 1996 Letter provides factors that the OCR or a court should consider when determining whether a school has a history of program expansion and whether a school has exhibited a continuing practice of program expansion.⁸⁸ When evaluating a school's history of program expansion, the OCR looks to the teams the school has added, the increasing number of participants, and the school's response to requests for new sports.⁸⁹ Most schools have a history of expanding opportunities for women because of the requirements that Title IX placed on institutions when it was first enacted.⁹⁰

The more difficult part of this test is whether an institution can show a continuing practice of program expansion. The OCR considers a school's current non-discrimination policy whether its students are aware of the procedure for requesting the addition of a new sport, and the university's plan to continue expanding programs for the underrepresented sex.⁹¹ The 1996 Clarification is notes clearly that eliminating men's teams instead of creating women's teams is not a way to properly satisfy this second or third prong even though it is accepted under the first prong.⁹²

To satisfy the third prong, the 1996 Letter offers three questions that the OCR should consider: (1) whether there is sufficient unmet interest to support

87. *See id.* (attempting to help institutions with Title IX compliance); *see also* *Roberts v. Col. State Bd. of Agric.*, 998 F.2d 824, 830 (1993) (holding that a 10.5 percent disparity between the male to female student to athlete ratio was too high to be in compliance with Title IX).

88. *See* Cantu, *supra* note 81 (explaining the second prong of Title IX compliance).

89. *See id.* (articulating the factors that the OCR looks at).

90. *See Title IX of the Education Amendments of 1972: Hearing Before the H. Subcomm. on Postsecondary Educ., Training & Life-long Learning of the H. Comm. on Econ. & Educ. Opportunities*, 104th Cong. 353 (1995) (including Mr. Williams' (Mont.) statement that participation rates for female athletes rose from two percent of college athletes to 35 percent from 1972 through 1995).

91. *See* Cantu, *supra* note 81 (outlining the process of evaluation for determining Title IX compliance).

92. Cantu, *supra* note 81 (“[C]utting or capping men's teams will not help an institution comply with part two or part three of the test because these tests measure an institution's positive, ongoing response to the interests and abilities of the underrepresented sex.”).

an intercollegiate team, (2) whether there is sufficient ability to sustain an intercollegiate team, and (3) whether there is a reasonable expectation of competition for the team.⁹³ The Letter then goes on to give considerations for each question to evaluate whether effective accommodation has been achieved.⁹⁴ “If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.”⁹⁵

To date, the 1996 Clarification Letter is the most comprehensive explanation of how each prong of the 1979 Policy Interpretation can be achieved. However, the 2003 Clarification Letter that Gerald Reynolds, the Assistant Secretary for Civil Rights at the time, issued is a response to more complaints and a desire for further clarification.⁹⁶

The 2003 Clarification Letter makes five general statements about the applicability of the three-prong test and Title IX: (1) The three-prong test has been successful to date and is a workable outlet for schools to be flexible in their compliance.⁹⁷ (2) Title IX does not require removing teams to come into compliance, and in fact removing teams is not encouraged for schools to come into compliance.⁹⁸ (3) The OCR intends to enforce Title IX standards and enforce punishments for schools who fail to comply.⁹⁹ (4) Athletic teams may be sponsored privately.¹⁰⁰ (5) A goal of the OCR is to encourage “clear and consistent” implementation of Title IX.¹⁰¹ Therefore, the 2003 Clarification did not add anything to the process of interpretation of the three-prong test or Title IX generally, but did serve to make clear what the goals of institutions as well as the OCR should be in their effort to work towards equality for men and women in sports.

93. See Cantu, *supra* note 81 (explaining the third prong of the test).

94. See Cantu, *supra* note 81 (outlining factors and ways that institutions can properly comply with Title IX).

95. Cantu, *supra* note 81.

96. See Letter from Gerald Reynolds, Assistant Secretary for Civil Rights, to Colleague (Jul. 11, 2003), available at <http://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> (continuing to clarify several aspects of confusion surrounding Title IX).

97. See *id.* (“First . . . [the] OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations.”).

98. See *id.* (“[N]othing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX . . .”).

99. See *id.* (“OCR . . . will aggressively enforce Title IX standards . . .”).

100. See *id.* (“Private sponsorship of athletic teams will continue to be allowed.”).

101. See *id.* (“OCR recognizes that schools will benefit from clear and consistent implementation of Title IX.”).

Following the 2003 Clarification Letter, the Bush Administration released a 2005 Letter of Clarification,¹⁰² which was expressly rejected as a solution in a 2010 Letter of Clarification.¹⁰³ The 2005 Letter stated that a school could comply with the third part of the test by relying solely on surveys given to current students at the institution.¹⁰⁴ The 2010 Clarification Letter was adamant that while surveys were one tool that an institution could use to gauge whether students interests and needs were being met, it could not be the sole factor that a school relied on in determining whether they were in compliance with Title IX.¹⁰⁵

III. Problems with Title IX

“While striving toward a noble goal, Title IX has been slow to eliminate the discrimination it was designed to remedy.”¹⁰⁶ Now, male and female teams are fighting the same battle: keeping their teams in existence while schools attempt to keep their athletics in compliance. In order to maintain compliance with Title IX, many schools are forced to remove some of their men’s athletic programs.¹⁰⁷ Additionally, women’s teams are not being added, and oftentimes are removed with male teams.¹⁰⁸ Several courts have

102. See Letter from James F. Manning, Assistant Secretary for the Office of Civil Rights, to Colleague (Mar. 17, 2005), available at http://www.nacua.org/documents/AdditionalClarificationThreePartTest_2005.pdf (focusing specifically on the third prong of the compliance test).

103. See Letter from Russlynn Ali, Assistant Secretary for the Office of Civil Rights, to Colleague (Apr. 20, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html> (removing the possibility that a school may rely only on surveys to comply with the third prong).

104. See Letter from James F. Manning, *supra* note 102 (allowing institutions to rely on student surveys to evaluate compliance with the third prong).

105. See Letter from Russlynn Ali, *supra* note 103 (withdrawing the 2005 Letter of Clarification as a workable solution for schools to comply without incorporating additional factors into their consideration as well).

106. Ferrier, *supra* note 75, at 841. See also 20 U.S.C. § 1681(a) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).

107. See Hammond, *supra* note 58, at 794 (citing several cases addressing litigation in which men’s sports teams were cut and alleged Title IX violations to no avail).

108. See Sue Ann Mota, *Title IX, The NCAA, and Intercollegiate Athletics*, 33 J.C. & U.L. 121, 130–31 (2006) (discussing cases involving the elimination of men’s and women’s sports teams at some schools, and just women’s sports teams at other schools).

addressed this issue, and the response remains the same: cutting teams is not the favored approach, but it is an accepted way to achieve Title IX compliance under the substantial proportionality prong.¹⁰⁹ Consequently, athletic teams of both sexes find themselves fighting to maintain and create teams, but run into roadblocks including financial issues¹¹⁰ and outdated Title IX standards that no longer achieve their purpose.¹¹¹ Because the test grows more antiquated as time goes on, the courts' and OCR's attempts to fairly evaluate Title IX arguments have led to undesirable consequences. The Policy Interpretation prevents collegiate athletics from moving forward in a way that is equitable to men or women.¹¹²

A. Applying Title IX in the Courts

In 1978, at the end of the three-year transition period granted by Congress for institutions to develop programs that complied with Title IX, almost 100 complaints against more than 50 institutions had been filed with the OCR.¹¹³ The 1979 Policy Interpretation was the OCR's response to institutions to grant them workable standards for compliance and solve some of the complaints.¹¹⁴ Although the Policy Interpretation and Letters of

109. See *Kelley v. Bd. of Tr.*, 35 F.3d 265 (7th Cir. 1994) (rejecting a challenge brought by a group of male swimmers because the team had been eliminated); see also *Chalenor v. Univ. of N.D.*, 291 F.3d 1042 (8th Cir. 2002) (upholding the decision of the district court when they determined that eliminating the men's wrestling program was alright in an effort to comply with Title IX); see also *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't. of Educ.*, 263 F.Supp.2d 82 (D.D.C. 2003) (ruling against a men's wrestling team and agreeing with eight different circuits about the ability of men's teams to challenge Title IX decisions based on money).

110. See *Mota*, *supra* note 108, at 133–36 (discussing the difficulty of adhering scholarship awards to Title IX); see also *Catherine Pieronek*, *supra* note 67, at 111–15 (proposing private funding for athletic programs to expand opportunities for men and women).

111. See *Suzanne Eckes*, *Another Pin For Women: The National Wrestling Coaches Associations' Title IX Case is Dismissed*, 182 Ed. Law Rep. 683, 702–04 (arguing that there is no longer a need to encourage women to play sports because women are interested in sports at a rate comparable to men); see also *Ferrier*, *supra* note 75, at 865–68 (discussing the glaring problems with each prong of the three-part test that the OCR currently uses to evaluate whether a sport will receive Title IX protection and whether a school is violating Title IX requirements).

112. See *Glatt*, *supra* note 24, at 311–15 (discussing the level of deference that courts must give to the OCR's regulations and clarifications that prevents them from interpreting the three-prong test in any other way).

113. See 45 C.F.R. § 26 (explaining the purpose of the Policy Interpretation after the failure of so many institutions to comply with Title IX in 1978).

114. See discussion, *supra* Part II.B.4 (giving history about the 1979 Policy Interpretation).

Clarification remain instructive for schools, courts still see plenty of angry students arguing that Title IX is failing them.¹¹⁵

Universities and institutions opposed to Title IX's application to athletics were granted a short victory in 1984. In *Grove City College v. Bell*,¹¹⁶ the court determined that because the colleges themselves were the direct recipients of financial assistance and not the athletic programs, the athletic programs could avoid compliance with Title IX.¹¹⁷ Supporters of Title IX feared that the court's decision would "allow colleges to discriminate . . . against women in their academic and athletic programs."¹¹⁸ This triggered a lengthy debate in Congress that resulted in the creation and passage of the Civil Rights Restoration Act of 1987 (1987 Act).¹¹⁹ The 1987 Act reinforced the goal of applying the Education Amendments of 1972 liberally.¹²⁰ Any program or activity operating as a part of an entity receiving federal financial assistance was required to operate under Title IX rules.¹²¹ Following the enactment of the 1987 Act, schools' athletic programs could no longer escape the reach of Title IX.

The most substantial change in athletic equality came for Title IX proponents just a few years later in 1993. Brown University demoted its women's gymnastics and volleyball teams as well as its men's golf and water polo programs to intercollegiate club status instead of varsity status.¹²² The justification for lowering the status of these teams was that the school could

115. See discussion, *infra* Part III.B (discussing cases students filed against universities in violation of Title IX and the favorable outcomes for women).

116. See *Grove City Coll. v. Bell*, 465 U.S. 555 (holding that if a college is the recipient of federal financial assistance, it is subject to comply with Title IX in all of its areas and not just on a general scale).

117. See *id.* at 555–56 (finding that Title IX protections are triggered when an institution receives federal financial assistance).

118. See Hugh Davis Graham, *The Storm Over Grove City College: Civil Rights Regulation, Higher Education, & The Reagan Administration*, 38 *History of Education Quarterly* 407, 408 (1998) (explaining the concerns of equality groups over the *Grove City* ruling).

119. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28.

120. See *id.* ("An Act to restore the broad scope of coverage and to clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.").

121. See *id.* at § 3, 102 Stat. 28, 28–29 (1988) (providing the findings of Congress and explaining how the 1987 Act is to apply to the Education Amendments of 1972).

122. See *Cohen v. Brown Univ.*, 991 F.2d 888, 892 (1st. Cir. 1993) (giving background on Brown University and discussing its financial difficulties).

no longer manage the financial burden of so many athletic teams.¹²³ The court found that Brown failed each part of the three-prong test, and the school was ordered to reinstate both of the female teams, but not the male teams.¹²⁴ Because Brown was not in compliance with any of the prongs of Title IX, the court effectively assigned the substantial proportionality prong as the compliance goal for which the school should aim. Reinstating the women's teams and not the men's teams embraced the idea that in a financial struggle, it was justifiable to eliminate men's teams in order to work towards Title IX compliance.¹²⁵ Since *Cohen v. Brown University*, courts are prone to ruling in favor of women's Title IX challenges and reject men's.¹²⁶

B. Men vs. Women in Title IX Actions

The majority of Title IX challenges by male athletic teams are a due to varsity teams either being demoted to club status or removed altogether for budgetary reasons.¹²⁷ As stated above, courts have repeatedly held that schools may comply with Title IX by cutting teams if they do not want to or cannot spend infinite amounts of money on their athletic programs in pursuit of satisfying another prong of the test.¹²⁸ As long as the purpose for cutting a male team is not to discriminate against men, schools are free to comply

123. *See id.* (“Brown estimated that eliminating these four varsity teams would save \$77,813 per annum. . .”).

124. *See id.* at 896–900, 907 (refusing to accept Brown's argument of compliance and forcing the University to reinstate the female teams to get them closer to equality between its student athletes).

125. *See generally id.* at 888 (deciding that Brown University failed all three prongs of the Title IX compliance test, and giving specific orders for reinstating the female teams).

126. *See* Andrew J. Boyd, *Righting the Canoe: Title IX and the Decline of Men's Intercollegiate Athletics*, 37 J. Marshall L. Rev. 257, 262 (2003) (“Male athletes have sued universities under Title IX in attempts to reinstate their sports teams; these cases have been uniformly unsuccessful.”).

127. *See* *Kelley v. Bd. of Tr.*, 35 F.3d 265 (7th Cir. 1994) (citing several cases in which men's teams brought cases because their teams were demoted or cut for financial reasons).

128. *See* *Cohen v. Brown Univ.*, 991 F.2d 888, 898 n.15 (1st. Cir. 1993) (“[T]itle IX does not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender . . .”).

with Title IX in any of the three ways provided in the 1979 Policy Interpretation, even if the result is less male athletics.¹²⁹

In 2007, James Madison University chose to eliminate seven men's teams and three women's teams "in order to comply with Title IX through the proportionality prong."¹³⁰ Dissatisfaction among the athletes, coaches, and fans involved with the teams getting cut filed a Title IX action.¹³¹ The court agreed with James Madison University and upheld the constitutionality of the first prong of the test despite its negative effect on male athletic teams.¹³²

On the contrary, women's sports have received extremely favorable outcomes when challenging actions taken by schools under Title IX.¹³³ When female athletic teams are cut or demoted from varsity status, the institution nearly always fails all three prongs of the test.¹³⁴ Perhaps one of the most evident instances of bias towards maintaining and/or reinstating female programs at the expense of male programs is in *Gonyo v. Drake University*.¹³⁵ The court determined in *Gonyo* that because the proportionality prong most closely accomplished the goals of Title IX, cutting the men's wrestling team was allowed even though the scholarship awards were extremely uneven in

129. See *Boulahanis v. Ill. State Univ.*, 198 F.3d 633 (7th Cir. 1999) (finding that because cutting the men's teams was not an act of discrimination against men, the action was acceptable); see also *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1047 (8th Cir. 2002) (upholding the three-prong test by allowing schools to cut teams to come into compliance with Title IX).

130. Victoria Langton, *Stop the Bleeding: Title IX and the Disappearance of Men's Collegiate Athletic Teams*, 12 VAND. J. ENT. & TECH. L. 183, 199–200 (2009) (analyzing the case initiated in 2006 by James Madison University students, faculty, etc. who were upset with the decision to remove so many sports teams from the university).

131. See *Equity in Athletics, Inc. v. Dep't. of Educ.*, 675 F. Supp. 2d 660, 666–68 (providing history for how the instant action arose).

132. See *id.* at 670 (reiterating that the first prong of the three-prong test is consistent with Title IX).

133. See Rozum, *supra* note 72, at 163–68 (providing an overview of cases in which females have prevailed in Title IX actions).

134. See *Favia v. Ind. Univ. of Penn.*, 7 F.3d 332 (3d Cir. 1993) (determining that the Indiana University of Pennsylvania was in violation of all three parts of the three-prong test after cutting the women's gymnastics and field hockey teams); see also *Roberts v. Col. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993) (finding that Colorado State University failed all three prongs of the Three-Part test after discontinuing the women's softball team).

135. See *Gonyo v. Drake Univ.*, 879 F.Supp. 1000 (1995) (ruling that the university's decision to eliminate the intercollegiate wrestling program did not violate Title IX or the Equal Protection Clause).

favor of the female teams.¹³⁶ Had the scholarship division been reversed, it's difficult to believe that the court would have allowed it to remain that way.

In modern cases, courts rely almost exclusively on the substantial proportionality prong when evaluating whether an institution is in compliance despite the opportunity to apply any of the three prongs.¹³⁷ Since *Cohen*, substantial proportionality has become the “safe harbor” of compliance and rendered the second and third prong tests relatively unavailable to institutions.¹³⁸ Although some female-favoritism may have been unavoidable in the effort to promote equality in athletics in the past, the three-prong test now fails as an effective way to accomplish equality.

C. Issues With The Three-Prong Test

The court is committed to respecting to the OCR's authority when interpreting the issued regulations and clarifications.¹³⁹ While this deference to the OCR is warranted,¹⁴⁰ it places schools and courts at the mercy of the OCR, who remain convinced that the three-part test is effective.¹⁴¹ The clarifications have been issued under the working assumption that the three-prong test is still the best way to evaluate athletic equality at an institution.¹⁴² Requiring a school to comply with one of the three prongs of the test allows the liberal application and flexibility that the OCR desires in a school's

136. *See id.* at 1002 (acknowledging that 75 percent of the athletes at Drake were men, but 53 percent of the scholarship dollars were being awarded to women); *see also* Rozum, *supra* note 72, at 167 (stating that the participation test “more comprehensively served the remedial purposes of Title IX than did the scholarship test”).

137. *See* Rozum, *supra* note 72, at 167–68 (outlining why substantial proportionality is the controlling prong that courts and schools use for compliance because of the nature of the alternative tests).

138. *See* Rozum, *supra* note 72, at 167–68 (explaining why the substantial proportionality prong has overtaken the second and third prongs).

139. *See* Glatt, *supra* note 24, at 311–17 (analyzing the proper amount of deference to give to the OCR interpretations).

140. *See* Glatt, *supra* note 24, at 311–17 (discussing the proper level of deference to apply to the clarification letters and OCR regulations); *see also* CARPENTER, *supra* note 27, at 19 (providing a table with the Title IX documents and how much authority to give to each one).

141. *See* Letter from Gerald Reynolds, *supra* note 8196 (stating matter-of-factly that the three-prong test continues to be successful).

142. *See* POL'Y INTERPRETATION, *supra* note 55 (explaining the changes to the Education Amendments of 1974 and identifying what is now known as the three-prong test for Title IX compliance); *see also* Pieronek, *supra* note 81 (attempting to clarify the 1979 Policy Interpretation by laying out each prong of the test).

ability to comply, but fails to regulate equality in any meaningful way.¹⁴³ As a result, each of these opportunities for schools to comply fails provide what Title IX was originally intended to provide.¹⁴⁴

1. Prong One: Substantial Proportionality

Substantial proportionality is arguably the easiest for schools to comply with because it is theoretically simpler for courts to review and more difficult to challenge when it exists.¹⁴⁵ Determining whether a school is in compliance with Title IX often comes down to an evaluation of the first prong's requirements.¹⁴⁶ However, in implementing the first prong, institutions face financial issues,¹⁴⁷ interest issues,¹⁴⁸ team size issues¹⁴⁹ and a lack of varsity sports available for participation opportunities.¹⁵⁰ Schools are often left with no option other than to eliminate male athletic teams instead of adding opportunities for females in order to comply with substantial proportionality.¹⁵¹

143. See Pieronek, *supra* note 63 (“The Clarification confirms that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes.”) (modified Mar. 3, 2005).

144. See Ferrier, *supra* note 75, at 865–69 (analyzing why each part of the three-prong test fails to be effective under current university systems).

145. See *Boulahanis v. Ill. State Univ.*, 198 F.3d 633, 638 (7th Cir. 1999) (stating that Title IX compliance exists when substantial proportionality exists).

146. See Kimberly A. Yuracko, *Title IX and the Problem of Gender Equality in Athletics*, in *SPORTING EQUALITY: TITLE IX THIRTY YEARS LATER* 83, 83 (Rita J. Simon, ed., 2005) (providing history on Title IX).

147. See discussion *infra* Part III.C.1.a (discussing financial issues that schools face in their goals to comply with Title IX).

148. See Allie Grasgreen, *Equal Opportunity, Unequal Interest?*, *INSIDE HIGHER ED* (Nov. 15, 2012, 3:00 AM), <http://www.insidehighered.com/news/2012/11/15/lower-female-interest-sports-calls-title-ix-application-question-study-says> (discussing a recent study that showed a lower general interest by women to participate in sports than men).

149. See Ferrier, *supra* note 75, at 877 (noting the substantial difference in size between a college football team and a professional football team, the former carrying a roster of over 100 players while professional teams only permit forty-seven players).

150. See NCAA: OFFICIAL WEBSITE OF NCAA CHAMPIONSHIPS, www.ncaa.com (listing all men's and women's sports by hovering over the “Men's Sports” and “Women's Sports” tabs on the home page); see also *supra*, note 106, at 868–71 (discussing the men's and women's sports that have been cut due to financial issues and to better achieve substantial proportionality in an effort to comply with Title IX).

151. See Ferrier, *supra* note 75, at 868–71 (discussing compliance with Title IX by eliminating men's teams as opposed to adding women's teams to move towards gender equity).

a. Financial Issues

The financial problems in athletic programs that schools contend with result almost entirely from uneven distribution of school profits and NCAA grants. Most schools' athletic programs lose money regardless of which sports they offer.¹⁵² Only 14 of the 120 schools that offer football programs made a profit in the 2009 fiscal year.¹⁵³ Football and basketball are not only the two largest grossing sports, but they are the only ways a school can make money for its athletic program.¹⁵⁴ Those profits – which are non-existent in many cases – are joined with the distributions from the NCAA and are then divided between all of the sports at the school.¹⁵⁵ The NCAA contributions are comparatively miniscule when placed against a football or basketball program's profits.

Schools that are consistently profitable in football and/or basketball are forced to support other teams.¹⁵⁶ Consequently, schools that want to retain more money for their profitable sports will cut non-revenue producing teams to remain in compliance with Title IX.¹⁵⁷ Eliminating teams in order to maintain substantial proportionality is not what the drafters of Title IX

152. See *A Report Shows Many College Programs in the Red*, NBC SPORTS (Aug. 25, 2010, 10:00 PM), <http://collegefootbaltalk.nbcsports.com/2010/08/25/ncaa-report-shows-many-college-programs-in-the-red/> (“[S]ixty-eight universities reported a profit in football. An even more telling statistic was that all 97 non-football schools reported an average loss of nearly \$3 million.”) (emphasis in original).

153. See *NCAA Report: Economy Cuts Into Sports*, ESPN COLLEGE FOOTBALL (Aug. 23, 2010, 7:28 PM), <http://sports.espn.go.com/nca/news/story?id=5490686> (citing Dan Fulks' study that the large majority of NCAA athletic programs are losing money and substantially overspending what they have).

154. See *id.* (quoting Jim Isch, NCAA interim president, that the only ways to make money in the collegiate world are through football and basketball).

155. See *NCAA Report*, *supra* note 153 (“Fulks pointed out that many schools funnel profits from football and men's basketball . . . into lower-profile sports that can't rely on season ticket plans, TV packages, and well-heeled donors.”).

156. See David Welch Suggs, Jr., *Myth: College Sports Are a Cash Cow*, THE PRESIDENCY, Spring 2010, available at <http://www.acenet.edu/news-room/Pages/Myth-College-Sports-Are-a-Cash-Cow2.aspx> (explaining that the money generated by the University of Georgia's football program “enables the association to send its golf teams to Puerto Rico, track teams to Washington State, and Gym Dogs to Utah. Here and there, the Athletic Association also endows professorships and funds a few campus-wide projects”).

157. See *Cohen v. Brown Univ.*, 991 F.2d 888, 891–93 (hearing a lawsuit brought on because Brown attempted to eliminate men's golf and water polo and women's gymnastics and volleyball).

intended in combating sex discrimination.¹⁵⁸ Because schools want to retain as much money as possible for their football or basketball teams since those teams will continue to earn the institution money, other teams do not receive adequate consideration when a school is making decisions about the sports it will offer. Courts generally reject challenges by men's sports teams when they have been cut instead of increasing the number of women's teams for financial purposes.¹⁵⁹ Not only does this result in fewer opportunities for men in sports, it fails to increase opportunities for women (and sometimes reduces opportunities further), which is contrary to the equality Title IX should help achieve.¹⁶⁰

b. Unequal Interest

Substantial proportionality requires that the percentages of men and women athletes at any institution parallels the percentages of male and female students at the school. The reality is that women are not as interested in participating in sports as much as their male counterparts.¹⁶¹ Female desire to participate in sports is an ongoing debate that centers on whether the lack of interest is due to lack of female interest or a lack of opportunities for females.¹⁶² This does not assume, however, that women have no interest

158. See Letter from Gerald Reynolds, *supra* note 96 (stating that cutting teams is not the goal of Title IX for schools in complying, and that reducing teams is actually contrary to the goals of Title IX).

159. See Andrew J. Boyd, *Righting the Canoe: Title IX and the Decline of Men's Intercollegiate Athletics*, 37 J. Marshall L. Rev 257, 263 (2003) ("Male athletes have sued universities under Title IX in attempts to reinstate their sports teams; these cases have been uniformly unsuccessful."); see also Hammond, *supra* note 58, at 813 ("[C]olleges have chosen to meet the requirements of Title IX by cutting nonrevenue men's sports and leaving the number of women who participate at the status quo.").

160. See William H. Glover, Jr., *THE SPORTS LAW HANDBOOK: FOR COACHES AND ADMINISTRATORS* (2009) (explaining the substantial proportionality test).

161. See Grasgreen, *supra* note 148 (reviewing a study indicating that women have less interest in playing sports than men do); see also Michelle Mitchell, *Title IX Flawed Because Females are Less Interested in Sports?*, mydesert.com (Nov. 15, 2012), <http://isun.blogs.mydesert.com/2012/11/15/title-ix-flawed-because-females-are-less-interested-in-sports/> ("Women are inherently less interested in sports than men are and therefore the basic assumptions of Title IX are false, a new study found.").

162. Compare Suzanne Eckes, *Another Pin for Women: The National Wrestling Coaches Associations' Title IX Case is Dismissed*, 182 Ed. Law Rep. 683, 702-04 (arguing that "the increase in participation [since Title IX was enacted] suggests that it has been a lack of athletic opportunity, instead of a lack in interest."), with Rozum *supra* note 72, at 170 ("Studies show males are more interested in athletics than females at all levels of competition.").

whatsoever in playing sports or being active in high school, college, and beyond.¹⁶³ Women's interest in playing sports is evidenced by the substantial growth in female athletics since Title IX was enacted.¹⁶⁴ However, that growth is not infinite.

A study evaluating female participation in sports since Title IX determined that currently women are engaged in athletic activities other than organized sports or participate in sports that are not offered as varsity sports by the NCAA.¹⁶⁵ Many women stay active by attending group fitness classes or going to the gym regularly, but have less interest in organized sports.¹⁶⁶ Other studies have shown that men are more inclined towards organized athletics than women at any age or level.¹⁶⁷ The other activities that women participate in do not get counted in a substantial proportionality evaluation.¹⁶⁸

Another possibility for lower female participation is a lack of school-sponsored athletic opportunities. The NCAA's list of current emerging women's sports includes only equestrian, rugby, and sand volleyball.¹⁶⁹ Potential NCAA sports that are absent from the emerging list and the current active list of women's NCAA sports¹⁷⁰ are cheerleading, competitive

163. See B. Glenn George, *Forfeit: Opportunity, Choice, and Discrimination Theory Under Title IX*, 22 YALE J.L. & FEMINISM 1, 25–29 (2010) (analogizing an unrelated case to help establish that Title IX advocates agree with the courts that the lack of interest is due to a lack of opportunity); see also Mota, *supra* note 108, at 121 (“The number of women on varsity teams has risen, as have women's teams' budgets.”).

164. See Hammond, *supra* note 58, at 793 (“[T]he focus of Title IX has shifted to intercollegiate athletics, resulting in an incredible array of new opportunities for women.”).

165. See Robert O. Deaner, et al, *A Sex Difference in the Predisposition for Physical Competition: Males Play Sports Much More than Females Even in the Contemporary U.S.*, available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0049168#s2> (detailing the results of a study about men's and women's participation in sports).

166. See *Males Play Sports Much More Than Females*, GVNOW (Nov. 28, 2012), available at <http://www.gvsu.edu/gvnow/index.htm?articleId=CBD47A65-AAA0-43F3-B7A087BA6635DF4F> (discussing the results of Robert Deaner's study that shows a much lower participation rate in sports for females and includes what activities they choose to engage in alternatively).

167. See Rozum, *supra* note 72, at 170 (citing examples from intramural sports as well as more regulated sports to show that women are less interested in athletics than men).

168. See 34 C.F.R. §106.41(c) (discussing factors that contribute to sports that women participate in, and not including individual activities, group exercise classes, etc.).

169. See *Emerging Sports for Women*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Emerging+Sports+for+Women> (listing the women's sports currently classified as “emerging” and vying for Title IX protection).

170. See NCAA: OFFICIAL WEBSITE OF NCAA CHAMPIONSHIPS, www.ncaa.com (listing all current women's sports by hovering over the “Women's Sports” tab on the home page).

cheerleading, figure skating, and dance.¹⁷¹ This is not an exhaustive list, but it does help explain that part of the reason more women choose not to participate in collegiate athletics might be because several primarily female sports are not currently classified as sports under Title IX. A first prong evaluation fails to include these other sports that women are interested in, and the test does not adequately account for the other athletic activities that women may be participating in or wished they could participate in. Furthermore, schools do not have the money to add all of them under the second or third prongs of compliance.¹⁷²

c. The Football Problem

One of the biggest problems in complying with the substantial proportionality test is that football, a male-only sport, comprises a huge portion of male athletes.¹⁷³ The enormous size of a football team makes it nearly impossible for women's athletic teams to afford and field the number of teams needed to meet the substantial proportionality prong.¹⁷⁴ This becomes even more difficult when the numbers of women attending a particular institution outnumber that of men.¹⁷⁵ This is one main reason why the number of men's teams has declined as opposed to the number of women's teams expanding.¹⁷⁶ Although NCAA schools ultimately come closer to complying with substantial proportionality, the consequence of

171. See "Emerging Sports," *supra* note 169 (listing the current sports on the "emerging sports" list and missing several listed here).

172. See discussion *infra* Part III.2-3 (discussing the flaws in the second and third prongs of Title IX compliance).

173. See Ferrier, *supra* note 75, at 875 ("One major problem for universities attempting to comply with Title IX is that a college football team consists of eighty-five scholarship athletes and numerous non-scholarship players. No female team requires an equivalent number of athletes.").

174. See B. Glenn George, *Forfeit: Opportunity, Choice, and Discrimination Theory Under Title IX*, 22 YALE J.L. & FEMINISM 1, 28 (2010) ("If we reject women's football as a realistic solution for achieving proportionality, then a school would be required to add three, four, or even more sports for women to balance the large number of male student-athletes participating in football and reflect a student body that is fifty-five to sixty percent female.").

175. See Katie Thomas, *College Teams, Relying on Deception, Undermine Gender Equity*, N.Y. TIMES, Apr. 25, 2011, available at http://www.nytimes.com/2011/04/26/sports/26titleix.html?pagewanted=all&_r=0 (citing a study claiming that women now represent fifty-seven percent of American college enrollment).

176. See Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L. 75, 96 (2003) (discussing the decline in men's sports that fail to produce a profit for the school).

hurting men's intercollegiate athletics and failing to improve opportunities for women's athletics contradicts the ultimate intentions of Title IX.¹⁷⁷

d. Roster Management and Resulting Lower Opportunities

Men and women that hope to become student-athletes focus their attention on schools that offer the programs in which they have a desire to participate.¹⁷⁸ Because of a combination of financial issues and a desire to remain in compliance,¹⁷⁹ schools develop ways to avoid truthful reporting of the numbers of their participants and ultimately limit the number of athletic teams they offer.¹⁸⁰ Athletic directors and school presidents acknowledge that this practice of “roster management” is widespread among NCAA schools to avoid potential compliance investigations by the NCAA, and that the continued use of this faux-compliance perpetuates reverse discrimination in an effort to comply with Title IX.¹⁸¹ Outwardly, these schools appear to be complying with Title IX, but on closer examination, these roster management techniques are rampant around NCAA institutions.¹⁸²

177. See Susan M. Shook, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990's: Nonrevenue Men's Teams Join Women Athletes in the Scramble for Survival*, 71 IND. L.J. 773, 793–95 (1996) (discussing the unintended consequences of enacting and implementing Title IX that has resulted in reverse discrimination against male athletes).

178. See *Ask the Experts: Sports and College*, PETERSON'S, <http://www.petersons.com/college-search/ask-experts-sports-college.aspx> (allowing experts to respond to questions that high school teenagers have about playing sports in classes, revealing that students focus on schools where they can get recruited to play as opposed to schools where they would have to fight to create a specific team).

179. See discussion *supra* Part III.C.1.a (addressing financial issues).

180. See Dan Fogarty, *College Teams Are Pretending Boys Are Girls to Get Around Title IX*, SPORTS GRID: SPORTS NEWS & VIDEOS FOR MEDIA JUNKIES (Apr. 27, 2011, 10:41 AM), <http://www.sportsgrid.com/uncategorized/ny-times-report-college-teams-are-pretending-boys-are-girls-to-get-around-title-ix/> (citing Duke, Texas A&M, and Cornell as small sampling of the schools that place women on team rosters who do not compete, count men as women when they participate on the women's practice squad, and list athletes who are students at the school but have no knowledge that their names are on athlete rosters).

181. See Pieronek, *supra* note 175 (“In 2002, 21 South Florida women competed in cross-country. By 2008, the number had grown to 75 – more than quadruple the size of an average Division I cross-country team In 2009-10, South Florida reported 71 women on its cross-country team, but race results show only 28 competed in at least one race.”).

182. See Pieronek, *supra* note 175 (giving an example of roster management techniques); see *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012) (holding that the university's women's running teams represented 67, rather than 78, genuine athletic participation opportunities).

The extensive use of this practice was further revealed when the Second Circuit Court ruled in *Biediger v. Quinnipiac*¹⁸³ that the university's women's running teams represented 67, rather than 78, genuine athletic participation opportunities.¹⁸⁴ Athletes participating in both track & field and cross-country were determined to be one student-athlete.¹⁸⁵ Another approach schools take is adding names to team rosters that don't actually participate to teams. This is an easy way to appear to be in compliance with Title IX while avoiding costs of developing a new team.¹⁸⁶ Roster management results in fewer opportunities for men and women, and is the most widespread and detrimental problem with the substantial proportionality.

At first, the substantial proportionality test appears to be an easy way for schools to comply with Title IX, but in reality it causes the largest number of problems because of the financial issues and ways around the rules.

2. Prong Two: Expansion for the Underrepresented Sex

The second way to comply with Title IX is to be able to show a history of continuing expansion of athletic opportunities for the underrepresented sex.¹⁸⁷ The OCR or a court evaluates several factors addressing whether there is a history of expansion as well as continuing expansion of athletic opportunities.¹⁸⁸ Schools can point to a history of expansion relatively easily because of the rapid expansion that occurred after Title IX's enactment.¹⁸⁹ Schools had to offer more athletic opportunities for women or face sanctions.¹⁹⁰ The increase in popularity and participation of females in

183. See *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012) (holding that the university failed to afford female students varsity athletic opportunities substantially proportionate to their enrollment).

184. See *id.* at 99–102 (agreeing with the district court that Quinnipiac University had incorrectly reported the number of female athletes on their women's cross country team).

185. See *id.* (analyzing Quinnipiac University's system for counting female athletes).

186. See Thomas, *supra* note 175 (quoting a former athletic director that it's much simpler to add names to a roster than begin an entirely new sport).

187. See Cantu, *supra* note 81 (“An institution can show that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex.”).

188. See discussion *supra* Part III.C.2 (discussing the second prong for compliance).

189. See Shook, *supra* note 177, at 163–68 (“Within four years of enactment [of Title IX], however, the number of women athletes increased exponentially to encompass over two million participants.”).

190. See Reynolds, *supra* note 96 (reaffirming the OCR's commitment to take action against schools that do not comply with Title IX).

athletics since Title IX went into effect cannot be denied, so the history of expansion exists for almost any institution.¹⁹¹ The challenge for schools arises when they are challenged for failing to provide *continuing* opportunities for females. Schools have used creativity in their arguments for showing continuing expansion opportunities for women, but have not been successful.¹⁹²

Colleges have pointed to the emerging sports list¹⁹³ to indicate their inclination to support women's athletic teams only when there is sufficient interest and the NCAA believes it is a good investment.¹⁹⁴ The reality is that most schools are dealing with budget limitations that directly effects their ability to comply with this second prong of the test in a continually meaningful way.¹⁹⁵ Budget considerations are not part of the evaluation in the second prong of the test, and could potentially be used as an explanation as to why an institution was in the process of expanding female sports, but wanted to wait until their financial situation was more promising. Ultimately, claiming to adhere to the emerging sports list could prevent an NCAA investigation or sanction from a court long enough for the school to find a different way to come into compliance with Title IX. Finally, at a certain point, expansion necessarily reaches its limit; so requiring schools to continue expanding indefinitely is unrealistic.¹⁹⁶ The second prong for compliance was more workable forty years ago, when schools had the means and the significant interest of women to help schools implement female athletics at their institutions.

191. See Pieronek, *supra* note 176, at 75 (stating that in 2003, athletic opportunities for female athletes had increased 400% since Title IX).

192. See *infra* notes 193–96 and accompanying text (articulating arguments that schools have used in court to meet the second prong of compliance).

193. See *Emerging Sports for Women* (July 16, 2012), available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Emerging+Sports+for+Women> (containing a list of women's emerging sports).

194. See *Recruiting Resources: NCAA Emerging Sports*, PRIMESCOUT: YOUR GOALS. OUR SUPPORT, <http://www.primescout.com/recruiting/resource/ncaa-emerging-sports> (“Once a sport has 40 NCAA programs a sport is eligible to compete for an NCAA Championship. Emerging sports must meet these criteria within ten years.”).

195. See Shook, *supra* note 177, at 806–08 (discussing why the second and third prongs of the compliance test are no longer feasible).

196. See Ferrier, *supra* note 75, at 866–67 (explaining why the second prong is impossible to comply with, even in periods where women's athletics can show a pattern of expansion).

3. Prong Three: Full and Effective Accommodation

Under the third prong, the OCR evaluates whether the institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.¹⁹⁷ The OCR will consider “whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team.”¹⁹⁸ If a team or group of people establishes that all three prongs are met, the institution is in violation of the third prong.¹⁹⁹ Courts are usually only confronted with the third prong of the test when a group of athletes brings an action for the creation of a new team.²⁰⁰ Schools are unmotivated to use this prong as the standard for their compliance because it forces them to offer opportunities that they cannot afford or provide “fully and effectively.”²⁰¹

One inventive way that institutions have considered for compliance with this prong successfully is through the use of surveys or questionnaires to determine what the institution’s students want generally and whether or not those desires are being met.²⁰² Using surveys as a consideration for whether needs are being fully and effectively accommodated “ignores the reality that . . . athletes are typically recruited, not drawn from the student body.”²⁰³ The response that administrators and athletic directors will receive from surveys do not accurately represent what the students want, what the school is

197. See Cantu, *supra* note 81 (generalizing the requirement for a university to comply with the third prong of the test).

198. Cantu, *supra* note 81.

199. See *id.* (noting that all three conditions, not just one or two, must be met in order for a team or group to justify their action under the third prong of the test).

200. See Ferrier, *supra* note 75, at 867 (“The only time courts will have to grapple with benchmark number three will be when a small group of athletes sues for the creation of a new team.”).

201. See Ferrier, *supra* note 75, at 867–68 (“[I]t is difficult to imagine a court denying that women who have fought lengthy battles for their team’s existence . . . have had their interest fully and effectively accommodated. . . . In reality, . . . [a]s soon as a court begins discussing [the Policy Interpretation] in the context of an eliminated female team, there is little doubt which side will prevail.”).

202. See Erik Brady, *Women’s Groups, OCR Spar Over Title IX Surveys*, USA TODAY (May 16, 2005 11:17 AM), http://usatoday30.usatoday.com/sports/2005-05-16-title-ix_x.htm (quoting OCR attorney David Black that the best way to fulfill prong three is to ask the students to “express their interest” in what sports they would like to see offered).

203. See *id.* (respecting National Women’s Law Center attorney Neena Chaudhry’s opinion that the third prong effectively ignores what the future students attending the school will want).

capable of providing, or what future students might be interested in. Relying on surveys creates an unstable system with constant need for the reinvention of the athletic system. That kind of inconsistency will drive men and women to schools taking different approaches to compliance, where they can feel more confident in the existence of their sport for the entirety of their time at the institution.

When the Bush administration distributed a “model survey” in 2005 for schools to test the third prong of compliance, it was quickly challenged by the majority of institutions and collegiate athletic organizations as an easy way for schools to avoid Title IX compliance.²⁰⁴ The survey suggestion came in the form of a 2005 Clarification Letter²⁰⁵ that was widely rejected by those involved with collegiate athletics.²⁰⁶ Critics of the Clarification Letter feared it might detract from the purpose of the third prong, which was to encourage participation of men and women in a fully rounded-out way instead of providing a loophole for schools to get around legitimate Title IX compliance.²⁰⁷

Additionally, students’ interests in sports change so often that less popular athletic teams may develop into interchangeable entities to a university because they do not generate the revenues of football or basketball.²⁰⁸ For example, when the Olympics occur, sports that garner attention normally see a spike in child enrollment.²⁰⁹ In 2012, the public was

204. See *Admin. Survey to Gauge Women’s Draw to Sports*, ASSOCIATED PRESS, (Mar. 22, 2005), <http://www.foxnews.com/story/0,2933,151147,00.html> (articulating the extraordinarily negative response that the new proposal of online surveys for gauging interest in sports received).

205. See Letter from James F. Manning, Assistant Secretary for the Office of Civil Rights, to Colleague (Mar. 17, 2005), available at http://www.nacua.org/documents/AdditionalClarificationThreePartTest_2005.pdf (attempting to clarify the third prong of the test).

206. See *Admin. Survey*, *supra* note 204 (containing objections to the Additional Clarification from collegiate athletics in general as well as representatives of women’s organizations).

207. See Erin E. Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 839–41 (2006) (critiquing the student survey as a way to comply with the third prong and suggesting several ways in which it fails).

208. See NCAA Report, *supra* note 153 (acknowledging that football and basketball are the only revenue producing sports in college).

209. See Andy Rogers, *Olympics Emboldens Athletes of All Kinds*, SUN THISWEEK (Aug. 8, 2012, 5:05 PM), <http://sunthisweek.com/2012/08/08/olympics-emboldens-athletes-of-all-kinds/> (“Area athletic clubs generally see a rise in interest this time of year in gymnastics and swimming along with less mainstream activities like tennis and rowing.”).

focused on swimmers Michael Phelps and Ryan Lochte and the Women's Gymnastics team.²¹⁰ When these inspired children go to college in a few years, swimming and gymnastics might be the popular activities at colleges. However, in years where the major sport is figure skating or ski jumping, the numbers for what those children are interested in will be greatly different from children that get involved with sports based on the Summer Olympics.²¹¹ The sports that students want to see on campus are too transient and unpredictable for decisions like these to be left up to the students.

The university's obligation to constantly change the sports they offer students to remain in compliance would be detrimental male and female athletics because only the widely popular sports would have assured teams from year to year. The survey-only system was never implemented at universities. Eventually, the 2005 Additional Clarification letter was absorbed into a more all-encompassing factor test for the third prong, and universities are no longer allowed to rely on solely student surveys to claim Title IX compliance.²¹²

IV. Current Status of the Three-Prong Test

Despite the extensive legislation and subsequent clarifications, universities still face problems with Title IX compliance.²¹³ Although the threatened sanction for non-compliance with Title IX is revocation of federal funding, no institution has ever been forced to suffer this consequence.²¹⁴

210. See *id.* (“Michael Phelps alone has likely inspired the sale of thousands of swimming goggles in Minnesota. . . . Elite Gymnastics Academy in Burnsville also noticed new families coming aboard, so they added more classes and additional class times.”).

211. See *SGMA Says the Olympics Do Impact Sports Participation*, SPORTS & FITNESS INDUSTRY ASSOCIATION (Mar. 12, 2012), http://www.sfia.org/press/431_SGMA-Says-The-Olympics-Do-Impact-Sports-Participation (“People tend to show an increased interest in playing sports and being active after watching the Olympic Games. . . .”).

212. See Katie Thomas, *Rule Change Takes Aim at Loophole in Title IX*, N.Y. TIMES (Apr. 20, 2010), http://www.nytimes.com/2010/04/20/sports/20titleix.html?_r=0 (explaining that in order to make Title IX fair, using surveys is more loophole than solution, and therefore cannot be utilized by universities anymore).

213. See *30 Colleges and Universities Fail to Give Female Athletes Fair Share*, TITLEIX, <http://www.titleix.info/resources/Legal-Cases/30-colleges-and-universities-fail-to-give-female-a.aspx> (“In June 2002, a sampling of 30 colleges and universities in 24 states were cited for failing to give their female athletes a fair share of athletic scholarship dollars as required by law.”).

214. See Greg Garber, *Three-pronged Test Makes True Compliance Vague*, ESPN (Jun. 19, 2012, 1:13 PM) <http://espn.go.com/gen/womenandsports/020619enforce.html> (addressing

After forty years and substantial clarifications, problems of athletic inequality should not be at issue, especially given the willingness by universities to comply when Title IX was enacted. “Current estimates are that 80 percent or more of all colleges and universities are not in compliance” with Title IX.²¹⁵ The idea of the three-prong test is sound, but the evaluation should revolve around more than proving one of three factors. Equality is more than the numerical evaluation that it has been reduced to in the substantial proportionality prong.

A. Incorporating Cheerleading

1. Collegiate Cheerleading

The distinction between competitive cheerleading and sideline cheerleading provides a good starting point for schools and courts to begin incorporating cheerleading into equality evaluations.

The biggest difference between sideline cheerleading and competitive cheerleading is the addition of national competitions and year-round camps in competitive cheerleading.²¹⁶ Sideline cheerleading squads evolved from traditional Yell Leaders in the 1920s.²¹⁷ These cheerleaders typify the common stereotype of cheerleading: “an activity that involves [primarily] supporting both athletic and academic events alike.”²¹⁸ On the other hand, the requirements and stresses for a competitive cheerleading team are more athletically demanding and intensive.²¹⁹ Competitive cheerleading involves “high-risk and complicated routines and stunts,” and teams are evaluated based on their “stunts, pyramids, tosses, tumbling, jumps, and motions.”²²⁰

the drawbacks of the current system of Title IX compliance).

215. WOMEN’S SPORTS FOUNDATION, *Title IX Media Helper*, in WOMEN AND SPORTS IN THE UNITED STATES 327, 329 (Jean O’Reilly and Susan K. Cahn, eds., 2007).

216. *See id.* (comparing competitive cheerleading and sideline cheerleading).

217. *See* NATALIE GUICE ADAMS & PAMELA J. BETTIS, CHEERLEADER! 4 (2003) (reviewing the history of cheerleaders).

218. *See Competitive Cheerleader vs. Sideline Cheerleader*, CHEERLEADER: ATHLETE (Mar. 10, 2011), <http://analisefagan123.edublogs.org/2011/03/10/competitive-cheerleader-vs-sideline-cheerleader/> (comparing sideline cheerleading with competitive cheerleading).

219. *See* Carl T. Hall, *Cheerleaders are no Pushovers*, *Study Says*, SPARTANBURG-HERALD JOURNAL (May 25, 2003), available at <http://news.google.com/newspapers?nid=1876&dat=20030525&id=Y4IgAAAAIIBAJ&sjid=UNAEAAAAIIBAJ&pg=3215,5238124> (discussing observations from a study of athletic ability of sideline cheerleaders as well as competitive cheerleaders).

220. *See* Ashlee A. Cassman, *Bring It On! Cheerleading vs. Title IX: Could Cheerleading*

Court decisions about sideline cheerleading give insight into a deserved higher standard to which competitive cheerleading should be held.²²¹ Courts have determined that sideline cheerleading is a sport.²²² As sideline cheerleading is the less athletically demanding of the two types of cheerleading, competitive cheerleading should undoubtedly be considered a sport by comparison. Courts, federal regulations, and various clarifications by the OCR have attempted to create a manageable standard for determining what should be a protected sport under Title IX.²²³ It is this definition that prevents competitive cheerleading from being considered under a Title IX evaluation.²²⁴

Because of these differing views of competitive cheerleading and sideline cheerleading, controversy surrounds the sport in general and how it fits into Title IX. Since the 1930s and 1940s when selecting cheerleaders was based on popularity, cheerleading tryouts are more competitive and demanding on the girls involved.²²⁵ In August 2012, the 2nd Circuit Court of Appeals held that cheerleading cannot be considered a sport for Title IX purposes.²²⁶ However, at the college level, several schools either consider their competitive cheerleading squads to be varsity athletes or have created separate competitive cheerleading squads as the sport has grown in popularity.²²⁷ As competitive cheerleading expands, its influence is

Ever Be Considered an Athletic Opportunity Under Title IX, and if so, What Implications Would That Have on University Compliance?, 17 SPORTS LAW J. 245, 254 (2010) (discussing the rise of competitive cheerleading and how it differs from traditional sideline cheerleading).

221. See *Noffke v. Bakke*, 315 Wis. 2d 350, 367 (2009) (concluding that cheerleaders on a high school team are involved in “a recreational activity that includes physical contact between persons in a sport”); see also *Fisher v. Syosset Cent. School Dist.*, 264 A. D. 2d 438, 439 (1999) (classifying high school sideline cheerleading a sport).

222. See *id.* (analyzing cheerleading and concluding that it qualifies as a sport).

223. See *Noffke*, 315 Wis. 2d at 350 (2009) (giving a positive nod to sideline cheerleading as a contact sport); see also 34 C.F.R. 106.41 (explaining the ways that a school can remain in line with NCAA Title IX compliance); see *Monroe*, *supra* note 83 (detailing the factors to consider when determining if an activity falls under 34 C.F.R. 106.41(c)).

224. See *Monroe*, *supra* note 83 (reviewing the definition for considering an activity a sport).

225. See MARY ELLEN HANSON, *GO! FIGHT! WIN!* 32 (1995) (reviewing the history of cheerleading).

226. See *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012) (holding that competitive cheerleading participants could not be counted under Title IX).

227. See Erin E. Buzuvis, *The Feminist Case for the NCAA’s Recognition of Competitive Cheer as an Emerging Sport for Women*, 52 B.C. L. REV. 439, 444–45 (2011) (“Since the University of Maryland, five universities—Baylor University, the University of Oregon, Fairmont State University, Quinnipiac University, and Azusa Pacific University—have added

permeating traditional sideline cheerleading in the form of “lifts, tumbling, catches, pyramids, and formation changes done at a rapid pace” that sideline cheerleaders now perform.²²⁸ These skills can also be seen extensively in cheerleading competitions, which have been ongoing since the 1970s and have been televised for over thirty years.²²⁹

Competitive cheerleading is set apart from sideline cheerleading, and therefore should be treated differently.²³⁰ Incorporating competitive cheerleading into the Title IX discussion would help offer opportunities for women without removing any teams because cheerleading is a dominantly female sport.²³¹ Including competitive cheerleading would cut down on the gender disparity at many schools and add some much-needed female numbers to schools’ rosters.²³² Competitive cheerleading is a logical step towards providing opportunities for men and women under Title IX without cutting men’s athletic teams.

2. *Changing the Standard: Reformulating the Test*

The 1979 Policy Interpretation and clarifications evolved out of necessity because Title IX did not originally intend to have such a substantial impact on collegiate athletics.²³³ Two of the three tests are demonstrably outdated and difficult to conform with, while the substantial proportionality places unrealistic expectations on institutions to comply.²³⁴ The standards for whether or not a school is offering equal opportunities to men and women cannot be measured adequately by the number of male and female players

varsity competitive cheer teams.”).

228. See HANSON, *supra* note 225, at 91 (tracking the history of cheerleading and concluding that today, almost 95 percent of cheerleaders are female).

229. See HANSON, *supra* note 225, at 91 (“Cheer associations sponsored national competitions for college squads in the 1970s. These contests have been televised annually since 1978....”).

230. See Glatt, *supra* note 24, at 321–23 (distinguishing competitive cheerleading from sideline cheerleading).

231. See HANSON, *supra* note 225, at 1 (“Although cheerleading began as a masculine activity, it is now perceived almost exclusively as a feminized role.”); see also ADAMS & BETTIS, *supra* note 217, at 2 (“[A]n important difference from the past is that today, cheerleading is seen as an almost exclusively female activity.”).

232. See ADAMS & BETTIS, at 9–27 (tracking the history of cheerleading).

233. See MCDONAGH, *supra* note 17, at 1255–56 (discussing the original intentions of Title IX and the fact that results on collegiate athletics were not really considered).

234. See Shook, *supra* note 177, at 806–08 (explaining that substantial proportionality is the only test of the three that schools can realistically adhere to).

that participate,²³⁵ expanding athletic programs infinitely²³⁶ or gauging student interest when several students cannot and do not wish to play a sport.²³⁷

Title IX compliance evaluations should be a ‘totality of the circumstances’ test with the other considerations listed in §106.4(c).²³⁸ Each school has a different character and personality, and the availability and offering of sports should reflect those varying interests. For example, a student that chooses to attend Oklahoma State University may be interested in playing or watching golf,²³⁹ while a student that wants to attend the University of Alabama may do so partially because they are attracted to the success of the school’s football program.²⁴⁰ Adding sports should be a more individualized process; expansion for the sake of expansion alone should be discouraged, if for no other reason than budgetary restraints many institutions face.²⁴¹ The varying interests that exist at a particular school should be taken into account. A test that assesses the make-up of the school as opposed to the current across-the-board test will more effectively accommodate students in the sports that they are interested in as well as allow for a more equal athletic experience for men’s and women’s teams.

3. *New Considerations for Title IX Compliance*

A new standard of evaluation should consider all three prongs at once and incorporate other factors as well. This new test is an effective way to make the development of athletic teams at schools more representative of

235. See discussion *supra* Part III.C.1 (discussing prong one of the test).

236. See discussion *supra* Part III.C.2 (discussing prong two of the test).

237. See discussion *supra* Part III.C.3 (discussing prong three of the test).

238. See 34 C.F.R. §106.41(c) (explaining the factors that should be considered under §106.41(c)).

239. See Scott Wraight, *The Front Nine: Best College Golf Programs Over the Last 20 Years* (Mar. 1, 2005, 9:50 PM), http://sportsillustrated.cnn.com/2005/writers/scott_wraight/02/21/front9.022305/ (ranking the top nine golf programs in the country over the last twenty years).

240. See Ralph D. Russo, *Alabama Wins 2013 BCS National Championship, Routs Notre Dame, 42-14*, HUFFINGTON POST (Jan. 7, 2013, 11:53 PM) (reviewing the Alabama Crimson Tide’s third National Championship win in the last four years).

241. See Shook, *supra* note 177, at 806–08 (naming money as the principal reason why the second and third prongs of Title IX are not viable options for schools).

what students and student-athletes at individual schools want and schools can reasonably afford.²⁴²

a. Meeting the Requirements of a Sport

For the NCAA to be meaningful, certain standards of athleticism, teamwork, and competition must be maintained.²⁴³ The changes for compliance should not change the requirements of a sport, but the definition should be interpreted more liberally. The NCAA defines a sport as “an institutionalized activity involving physical exertion with the primary purpose being competition versus other teams or individuals within a collegiate competition structure.”²⁴⁴ The OCR has also developed its own definition for determining when an activity is a sport that compares the activity in question to other sports, review the selection process, and makes choices for participation based on athletic ability.²⁴⁵ Although these definitions overlap, courts must remember that some acceptable athletic opportunities will be unusual. For example, swimming is an NCAA sport, but does not involve any person-to-person contact.²⁴⁶ Activities that do not exactly fit the definition of a sport should be considered more holistically.²⁴⁷

Under this more opportunistic standard, the prevalence of competitive cheerleading across the United States makes it a logical choice to include in

242. See *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1273 (1979) (“There are several changes that should be made in the regulations These proposals would not only comport with social needs, but also with the statute’s “reasonableness” standard.”).

243. See *id.* at 1273–74 (discussing the importance of competition and the requirements of sport in general).

244. Kristina Sowder, April Hennefer, Dr. Cynthia Lee Pemberton, et. al, *Defining “Sport”*, ATHLETIC MANAGEMENT, Feb./Mar. 2004, available at <http://www.momentummedia.com/articles/am/am1602/cheerdefine.htm>.

245. See *id.* (“[S]election for the team is based upon objective factors related primarily to athletic ability; the activity is limited to a defined season; the team prepares for or engages in competition in the same way as other teams in the athletic program with respect to coaching, recruitment, budget, tryouts and eligibility, and length and number of practice sessions and competitive opportunities; the activity is administered by the athletic department; and the primary purpose of the activity is athletic competition and not the support or promotion of other events.”).

246. See *Swimming & Diving*, NCAA, www.ncaa.org, (click on the Men’s Sports or Women’s Sports drop-down menu at the top of the screen; then click on “Swimming & Diving” on either link to get more information about the swimming program in the NCAA).

247. See Sowder, *supra* note 244 (noting competition in both definitions of a sport, but arguing that the current definition of sports is too limited and should be expanded).

the list of NCAA sports, and it would be easy to implement immediately since most colleges already have dance teams, cheerleading squads, or competitive cheerleading teams.²⁴⁸ This change would immediately incorporate more women into the school-sponsored athletic activity while avoiding the added financial burden that often exists when developing a new sport at a school. Overall, sports that can be reasonably added to a school's offering of sports should be seriously considered, even those that are not on the emerging sports list²⁴⁹ – especially when incorporation could easily increase equality among men and women.

b. Teams and Players

Courts should also consider the number of players as well as the number of teams at a given school.²⁵⁰ Under 106.41(c), “interscholastic, intercollegiate, club, [and] intramural athletics” be considered in evaluating compliance.²⁵¹ This consideration has been ignored in courts, and only a school's varsity offerings have been considered for compliance.²⁵² A school that has a larger gender disparity in varsity athletic participation should not automatically be in violation of Title IX if they can establish that they are attempting to create opportunities for the women and men who want them.²⁵³ If that equality cannot, because of financial reasons, be offered through NCAA sports, then it should be available through club teams, intramurals, and other outlets that cost less money than running an NCAA team.²⁵⁴ The

248. *See id.* (“Logistically, there are many good reasons to consider making cheerleading [a sport].”); *see also* *College*, CHEERLEADING.NET: YOUR ONLINE SPIRIT SOURCE, available at <http://www.cheerleading.net/cheerweb-coll.html> (listing hundreds of schools that already have cheerleading teams, dance teams, and spirit squads).

249. *See* Erin E. Buzuvis, *The Feminist Case for the NCAA's Recognition of Competitive Cheer as an Emerging Sport for Women*, 52 B. C. L. REV. 439, 454–59 (2011) (discussing emerging sports and specifically acknowledging competitive cheerleading as the next sport that should be considered).

250. *See* discussion *supra* Part III.C.1 (reviewing the first prong of the compliance test).

251. *See* 34 C.F.R. §106.41(c) (“A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes.”).

252. *See* discussion *supra* Part III.B (reviewing the outcomes for men and women in Title IX actions).

253. *See also* *Roberts v. Col. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) (holding that a disparity of 10.5 percent was too large a gap to satisfy the substantial proportionality test).

254. *See* Edward Martindale, Ann Sloan Devlin, & Stuart A. Vyse, *Participation in*

focus on all things being equal simply by looking at the numbers ignores a reality that men grow up with their lives more focused on sports, and that influences them as they shift into college.²⁵⁵

This does not counteract the fact that women's participation in sports has increased greatly since the implementation of Title IX,²⁵⁶ but schools would have a decidedly less difficult time fielding teams for females if the level of interest claimed by Title IX proponents was an accurate representation.²⁵⁷ This factor opens the door for more ambiguity regarding what an acceptable level of disparity is before one gender's interests are simply being ignored. However, in evaluating several other factors, the level of disparity should make clear whether it is acceptable or discriminatory.

c. Monetary and Football

College football and basketball are the only profitable sports for NCAA schools.²⁵⁸ This creates an ongoing problem for schools in redistributing their earnings amongst all of their sports, and becomes particularly messy when the money is comingled with the funds the NCAA grants to college

College Sports: Motivational Differences, 71 PERCEPTUAL & MOTOR SKILLS 1139, 1139 (1990) (“[Some] participate to stay fit while still others participate to join a social network or to learn a new skill. Just as a variety of motives exists for participation, so too do the opportunities for sport, ranging from the informal commitment of the recreator through the increasingly structured activities of intramural and club, and ultimately varsity athletics.”).

255. See *Factors Influencing Girls' Participation in Sports: Do You Know the Factors Influencing Participation in Sports?*, WOMEN'S SPORTS FOUND., <http://www.womenssportsfoundation.org/en/sitecore/content/home/support-us/do-you-know-the-factors-influencing-girls-participation-in-sports.aspx> (“By age 14, girls are dropping out of sports at two times the rate of boys.”); see also ANDREI S. MARKOVITS & DAVID T. SMITH, SPORTS CULTURE AMONG UNDERGRADUATES: A STUDY OF STUDENT ATHLETES AND STUDENTS AT THE UNIVERSITY OF MICHIGAN, 11, available at <http://quod.lib.umich.edu/s/spobooks/5099288.0001.001/1:3?rgn=div1;view=fulltext> (“The life cycle explanation suggests that as girls grow older, they decrease their interest in all aspects of sports, while as boys age, their interest in sports increases.”).

256. See *Empowering Women in Sports: What is Title IX?*, FEMINIST MAJORITY FOUND., <http://www.feminist.org/research/sports/sports12.html> (“Women who were under 10 when Title IX passed have much higher sports participation rates than women who grew up before Title IX. Fifty-five percent of the ‘post-Title IX’ generation participated in high school sports, compared to 36 percent of the ‘pre-Title IX’ generation.”).

257. See *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st. Cir. 1993) (hearing a case in which both men's and women's teams were going to be cut because of funding and not interest).

258. See HAMMOND, *supra* note 58, at 810 (“[T]he average Division I-A college makes more than \$4 million annually on men's basketball and football.”).

conferences each year.²⁵⁹ Despite the NCAA's ability to dictate where their money goes, say for financial aid, facility maintenance, and travel, the truth is that only a small portion of school's athletic budgets come from the NCAA.²⁶⁰ For example, in the Big Ten Conference,²⁶¹ each school received about \$3.3 million once NCAA allotments were divided, but the athletic budgets exceeded \$100 million during the 2009-2010 school year.²⁶² As a result, the NCAA's wishes become a secondary consideration as the overwhelming majority of funds are divided as the school sees fit as opposed to what may be best for Title IX compliance.²⁶³ Schools continue to spend money on their programs that turn a profit and neglect the other sports; however, if the football and basketball programs don't make money, the other sports will suffer even more because of the lack of funds coming in.²⁶⁴

As collegiate athletics begin to look more like professional sports, the need to model spending after professional sports becomes more important.²⁶⁵ When spending becomes excessive and a handful of teams continually hold the power and opportunity because they are consistently the best, the system must be reorganized. Spending caps have gone into effect for professional basketball, football, and hockey agreements between the players and owners

259. See *Where Does the Money Go?*, Nat'l Collegiate Athletic Assoc., http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Nine+points+to+consider_one (reporting a distribution of revenue for 2009-2010 of over \$443 million).

260. See *id.* (discussing generally how the NCAA awards money and what schools are obligated to do with it).

261. See BIG, <http://www.bigten.org> (encompassing the University of Wisconsin, University of Minnesota, University of Nebraska, Northwestern, University of Iowa, Indiana University, Penn State University, University of Illinois, University of Michigan, Michigan State University, and Ohio State University and as a conference, continuing to turn out productive football and basketball schools).

262. See *Where Does the Money Go?*, *supra* note 259 (discussing the relatively small effect that NCAA money makes, especially to the perennial money making schools).

263. See Ferrier, *supra* note 75, at 878 (stating that schools are unwilling to decrease spending on football because it is too influential in donor money, popularity of the school, and revenue in general).

264. See HAMMOND, *supra*, note 58, at 811 (analyzing the conundrum of spending on the big sports to earn for all, but ultimately ending up in a merry-go-round of continuing to benefit only the revenue-producing sports).

265. See HAMMOND, *supra*, note 58, at 809-10 (evaluating the ever-expanding revenues and expenses for the NCAA, and concluding that "collegiate sports have turned into big business").

of these sports.²⁶⁶ This levels the playing field across each respective league and encourages competitive parity.²⁶⁷

The OCR should issue a requirement that profits and NCAA-delegated money spent on football and basketball has a maximum, regardless of the success of the program. This should include payment of coaches, recruitment expenses, practice and game day operations, etc. Under this system, schools maintain the ability to find sponsors for their teams to supplement the loss of income.²⁶⁸ This would create more opportunities for money to be dedicated to less profitable sports, and successful programs could ask alumni or athletic companies to take a financial interest in the program.²⁶⁹ With the assistance of sponsors, football spending would not have to suffer, and other athletic programs would get a much-needed financial boost.²⁷⁰ This change would help even out the competition among conferences and also provide additional athletic opportunities at colleges where financial issues are currently holding them back.

266. See *NBA Salary Cap*, THEBESTSPORTSBLOG.COM: IF YOU AREN'T THE BEST, WHY BOTHER?, <http://www.thebestsportsblog.com/nba-salary-cap.html> (explaining the NBA salary cap that imposes a substantial financial penalty on teams that spend more than a certain amount on player contracts); see also SteelCityRoller, *2013 NFL Salary Cap Estimated at \$121 Million*, BEHIND THE STEEL CURTAIN (Dec. 27, 2012, 5:36 AM), <http://www.behindthesteelcurtain.com/2012/12/27/3805450/2013-nfl-salary-cap-amount-steelers-space> (analyzing the salary cap changes for the NFL and how the league will accommodate the transition to lower salaries and come into compliance with the cap); see also Rick Weiner, *NHL Salary Cap 2013: Players on Chopping Block under New Buyout Rules*, BLEACHER REPORT (Jan. 6, 2013), <http://bleacherreport.com/articles/1472987-nhl-salary-cap-2013-players-on-chopping-block-under-new-buyout-rules> (reviewing the new salary cap for the NHL agreement between the players and owners).

267. See Helmut Dietl, Markus Lang & Alexander Rathke, *The Effects of Salary Caps in Professional Team Sports on Social Welfare*, 13–14 (2008), available at www.isu.uzh.ch/static/ISU_WPS/72_ISU_full.pdf (concluding that salary caps “increase competitive balance”).

268. See *supra* note 100 (allowing private sponsorship for athletics).

269. See *Who's in Charge? UO Administrators or Nike Officials?*, UNIV. OF OREGON & UNIV. OF NIKE (June 4, 2010), <http://uocorporatesponsorship.wordpress.com/2010/06/04/whos-in-charge-uo-administrators-or-nike-officials/> (discussing the rebranding of Oregon's football program because of their marketing agreement with Nike).

270. See Jason Kirk, *College Football Recruiting: Which Schools Spend the Most, And Why?*, SB NATION (June 20, 2012, 9:11 AM), <http://www.sbnation.com/college-football-recruiting/2012/6/20/3095257/college-football-recruiting-money-2013-tennessee> (explaining how much money is spent on recruiting alone, and why some schools are better than others).

d. Emerging Sports, Intramurals, and §106.41(c)

The most glaring problem with the current compliance system is that schools face very little regulation until a team or group of students challenges a decision that its athletic directors make.²⁷¹ It is important to have a system of self-evaluation that holds the schools accountable for their year-to-year actions. This should consist of a periodic – perhaps every other year – assessment standard in which the above considerations are re-evaluated.²⁷² This incorporates the third prong without placing too much stock in a student body that may or may not be accurately representing the desires of the students that desire to become athletes.²⁷³ Forcing to schools to evaluate their programs more often will ensure that the athletic programs are doing what they can to maintain fair opportunities, even if those opportunities aren't necessarily proportional to the percentages of men and women at the institution.

Part of this assessment should include sports that the school offers that are not considered Title IX sports. A good place for schools to start is with emerging sports that are counted for Title IX purposes, but are still closely monitored as they can help with fairness in athletics.²⁷⁴ Further, courts should look to the opportunities they offer for intramural sports and club teams.²⁷⁵ Club sports and intramurals provide athletic opportunities for men and women at college without the flare and expense of sponsored team.²⁷⁶

271. See Jennifer A. Harper, *What Athletic Directors Need to Know: A Title IX & Title VII Primer*, WINTHROP (Oct. 29, 2012), <http://winthropintelligence.com/2012/10/29/what-athletic-directors-need-to-know-a-title-vii-title-ix-primer/> (acknowledging that while historically, the lawsuits filed under Title IX do not deal with athletics, a growing number of lawsuits relate specifically to discriminatory actions in athletics).

272. See discussion *supra* Part IV.B.1.d (suggesting an every-other-year evaluation).

273. See discussion *supra* Part III.C.3 (discussing the third prong of the test).

274. See *Girls Play Sports Too: College Sports for Women*, NCAA Emerging Sports and Title IX, <http://www.athleticscholarships.net/emerging-sports-women.htm> (“Colleges are allowed to use emerging sports to help meet the NCAA minimum sports sponsorship requirements and also to meet the NCAA’s minimum financial aid awards.”).

275. See 34 C.F.R. § 106.41 (2013) (providing that all types of athletic opportunities should be evaluated in determining Title IX compliance); see also Bill Pennington, *Rise of College Club Teams Creates a Whole New Level of Success*, NEW YORK TIMES (Dec. 1, 2008), http://www.nytimes.com/2008/12/02/sports/02club.html?pagewanted=all&_r=0 (discussing the rise of intercollegiate club sports and their independent efforts to raise money, put together games and other competitions, and carry on without traditional help from a university).

276. See Bill Pennington, *Rise of College Club Teams Creates a Whole New Level of Success*, N.Y. TIMES (Dec. 1, 2008), http://www.nytimes.com/2008/12/02/sports/02club.html?pagewanted=all&_r=0 (“It’s college athletics without the pageantry or prerogative,

This provides a way for students to play non-traditional sports, stay active, and maintain the benefits of athletic camaraderie. Plus, intramurals and club sports provide opportunities for men and women to play soccer, basketball, and other sports that the school traditionally supports.²⁷⁷ A large number of students can continue to play the sport they love even though financial constraints, roster restrictions, or official NCAA regulations would otherwise prohibit them.²⁷⁸ Even if not strictly regulated by NCAA, the athletic opportunities that club and intramural sports provide cannot be ignored from a perspective of providing men and women with equal outlets for participation.²⁷⁹ This more complete evaluation of the men and women participating in sports will allow schools and courts to see participation in a different way. Including popular but less traditional opportunities that students embrace in athletic participation provides a more accurate picture of how many students are actually participating in organized athletics.

V. Conclusion

After an initial surge of female participation in sports sanctioned by the NCAA and Title IX, the majority of the forty-year existence of Title IX has proved that the current system of evaluation is not working.²⁸⁰ Schools and courts must take a step back and review what the purpose of combatting discrimination really looks like when interest in sports and financial restrictions are different across many different schools and conferences.²⁸¹ Viewing only NCAA sports eliminates the consideration of a plethora of other options that men and women have available to them at the college level.²⁸²

and that's the way athletes in club sports like it.”).

277. *See id.* (discussing the general rise in popularity of club teams for a variety of many different sports).

278. *See id.* (“An estimated two million college students play competitive club sports compared with about 430,000 involved in athletics governed by the National Collegiate Athletic Association and the National Association of Intercollegiate Athletics.”).

279. *See id.* (comparing club sports with regulated NCAA sports).

280. *See* Jurewitz, *supra* note 64, at 284 (“[W]omen have made significant progress towards gender equity in traditionally male dominated fields.”).

281. *See USA Today Sports' College Athletics Finances*, USA TODAY, <http://usatoday30.usatoday.com/sports/college/story/2012-05-14/ncaa-college-athletics-finances-database/54955804/1> (listing NCAA schools and their conference, revenue, and expenses and showcasing the substantial differences in reliance on NCAA subsidy money from 2006-2011).

282. *See* Pennington, *supra* note 276 (analyzing and praising the increase in club sports on

The world of collegiate athletics has changed so much since the inception of Title IX, that the process by which compliance is evaluated must be reconsidered. Students find outlets for athletic participation and involve themselves in activities outside the varsity world of the NCAA. Incorporating competitive cheerleading is only one way that schools can combat inequalities and refrain from removing men's teams to fall in line with an outdated compliance standard. Title IX gave female athletes a chance to change their future, and now it's time for the OCR to give Title IX a chance to change its own standards to fit into a world where opportunities for competition are everywhere and strict tests are ineffective.