

*Winter 2012*

## Title IX: Creating Unequal Equality through Application of the Proportionality Standard in Collegiate Athletics

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### Recommended Citation

Brenda L. Ambrosius, *Title IX: Creating Unequal Equality through Application of the Proportionality Standard in Collegiate Athletics*, 46 Val. U. L. Rev. 557 (2012).

Available at: <https://scholar.valpo.edu/vulr/vol46/iss2/8>

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## Notes

### TITLE IX: CREATING UNEQUAL EQUALITY THROUGH APPLICATION OF THE PROPORTIONALITY STANDARD IN COLLEGIATE ATHLETICS

#### I. INTRODUCTION

Aaron Roberts is a three-sport high school senior in Smalltown, Indiana.<sup>1</sup> As he looks for a university to attend next year, he wants to find a school that not only offers his favorite sport, hockey, but one that may also be able to give him a scholarship to play. Unfortunately, many of the top schools in the area, such as Indiana University and Purdue, do not offer a men's hockey program. Finally, Aaron finds a small Division III school that offers a hockey team, and he is excited to spend the next four years of his college career playing hockey for Petite University ("PU"). PU has been competitive in its conference for many years, winning the National Collegiate Athletic Association ("NCAA") Division III tournament on several occasions. When Aaron gets to campus, he joins the team and has a great first season. The team wins its conference and makes an appearance in the NCAA tournament. However, after Aaron's freshman season, the school decides to cut the men's hockey program at PU to comply with Title IX. He must spend the next three years playing club hockey instead of enjoying the varsity experience he anticipated.<sup>2</sup>

Aaron's story is not uncommon for men's low-revenue athletic teams throughout the country. In the last twenty years, more than eight hundred men's athletic teams have been eliminated from collegiate programs.<sup>3</sup> With universities receiving fewer private donations and operating budgets being downsized, athletic programs are under more

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<sup>1</sup> The author created fictional story to illustrate the adverse effects of Title IX's current application to men's athletic teams, which is the issue of this Note.

<sup>2</sup> If Aaron decides to transfer schools once the program is cut, he will most likely have to sit out a year from participating, which can cause problems for the academic transfer of credits and eligibility. See NCAA, TRANSFER 101: BASIC INFORMATION YOU NEED TO KNOW ABOUT TRANSFERRING TO AN NCAA COLLEGE (2011), available at <http://www.ncaapublications.com/productdownloads/TGONLINE2011.pdf> (stating that eligibility after transfer may be postponed unless an exception is allowed by the new school, and exceptions are laid out based on the division of the old and new school).

<sup>3</sup> Ryan T. Smith, Note, "Bull's Eye": How Public Universities in West Virginia Can Creatively Comply with Title IX Without the Targeted Elimination of Men's Sports Teams, 110 W. VA. L. REV. 1373, 1389 (2008).

## 558 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

pressure than ever to cut costs.<sup>4</sup> Men's athletic teams often take the brunt of these cuts to allow schools to comply with the Title IX proportionality requirement, which requires schools to structure athletic programs based on the proportion of students who attend the university.<sup>5</sup> Although Title IX has made large strides in creating opportunities for women in athletics, in the forty years since its inception, the proportionality requirement of compliance has now started creating excessive adverse effects for men's teams.<sup>6</sup> Due to its dramatic effect on all aspects of education, especially athletics, scholars have analyzed Title IX's application and interpretation to determine the validity and effectiveness of the statute since its enactment in 1972.<sup>7</sup>

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<sup>4</sup> See *infra* notes 41, 56 and accompanying text (discussing the current trend of cuts in men's athletics and the cost efficiency of using cuts to save money within the department).

<sup>5</sup> See *infra* note 34 and accompanying text (discussing Title IX statutory language and the regulations set forth to assess compliance).

<sup>6</sup> See *infra* note 56 and accompanying text (discussing how the proportionality requirement has led to a trend of cutting men's athletic teams to comply with Title IX); see also Part II.C.2 (highlighting cases brought under Title IX by members of men's athletic teams due to the discrimination of the Title IX proportionality requirement).

<sup>7</sup> See generally Eric Bentley, *Title IX: The Technical Knockout for Men's Non-Revenue Sports*, 33 J.L. & EDUC. 139 (2004) (evaluating Title IX and its effect on intercollegiate athletics, specifically on men's non-revenue sports teams); Erin E. Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821 (2006) (discussing Title IX's history and the three-prong test, focusing on the model survey to assess prong three); Matthew L. Daniel, *Title IX and Gender Equity in College Athletics: How Honesty Might Avert a Crisis*, 1995 ANN. SURV. AM. L. 255 (1995) (analyzing how Title IX affects gender equity in athletics); Suzanne Eckes, *Commentary, Another Pin for Women: The National Wrestling Coaches Associations' Title IX Case is Dismissed*, 182 ED. LAW. REP. 683 (2004) (discussing the court's ruling in a lawsuit filed by the National Wrestling Coaches Association alleging Title IX violations for elimination of teams); Elisa Hatlevig, *Title IX Compliance: Looking Past the Proportionality Prong*, 12 SPORTS LAW. J. 87 (2005) (evaluating Title IX compliance and noting that the proportionality standard may not be the most equitable); Daniel R. Marburger & Nancy Hogshead-Makar, *Is Title IX Really to Blame for the Decline in Intercollegiate Men's Nonrevenue Sports?*, 14 MARQ. SPORTS L. REV. 65 (2003) (analyzing the economic effects of athletic departments and the effects on Title IX compliance); J. Brad Reich, *All the [Athletes] Are Equal, but Some Are More Equal than Others: An Objective Evaluation of Title IX's Past, Present, and Recommendations for Its Future*, 108 PENN ST. L. REV. 525 (2003) (evaluating the evolution of Title IX and presenting possibilities to clarify the compliance standards to reduce confusion and create alternative ways for institutions to comply with Title IX); Armand B. Alacbay, *Note, Are Intercollegiate Sports Programs a Buck Short? Examining the Latest Attack on Title IX*, 14 GEO. MASON U. C.R. L.J. 255 (2004) (examining the history of Title IX and discussing the effect Title IX has on athletic programs); Elizabeth A. Hueben, *Note, Revolution, Numbers, IX: The Thirtieth Anniversary of Title IX and the Proportionality Challenge*, 71 U. MO. KAN. CITY L. REV. 659 (2003) (discussing evolution of Title IX and challenges presented by the proportionality requirement of compliance standards); Ross A. Jurewitz, *Note, Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 AM. U. J. GENDER SOC. POL'Y & L. 283 (2000) (discussing the adverse effects of Title IX on men's athletic teams); David Klinker, *Comment, Why Conforming With Title IX Hurts Men's Collegiate Sports*, 13 SETON HALL J.

This Note will discuss Title IX's effect on men's athletic teams and how its proportionality requirement is no longer the best way for universities to comply with the statute. Part II will review the history of the Civil Rights Act and the inception of Title IX.<sup>8</sup> It will also discuss landmark Title IX cases and the courts' rulings and rationale of these cases.<sup>9</sup> Further, Part II will highlight a new wave of cases that are popping up all over the country – reverse discrimination actions brought by men's athletic teams that have been eliminated.<sup>10</sup> Part III of this Note will analyze Title IX's effect on institutions, and discuss how Title IX has come full-circle and now discriminates against men solely due to their gender.<sup>11</sup> Part III will also analyze the problems the proportionality prong creates and the benefits of focusing on interest when assessing equality of offerings within athletic departments.<sup>12</sup> Finally, Part IV will propose a new standard of compliance for universities that would amend the proportionality requirement to allow schools to focus on providing opportunities for all students based on genuine interest and desirability of the program.<sup>13</sup>

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SPORT L. 73 (2003) (discussing the history and interpretation of Title IX and examining whether the proportionality requirement is consistent with the purpose of Title IX); Christopher Paul Reuscher, Comment, *Giving the Bat Back to Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics*, 35 AKRON L. REV. 117 (2001) (analyzing Title IX and the adverse effects of its application in college athletics); Ronnie Wade Robertson, Comment, *Tilting at Windmills: The Relationship Between Men's Non-Revenue Sports and Women's Sports*, 76 MISS. L.J. 297 (2006) (analyzing the compliance requirements under Title IX while focusing on the problems created by the proportionality standard); Smith, *supra* note 3 (discussing the history and evolution of Title IX and focusing on options for schools in West Virginia to comply with Title IX without cutting teams); Megan K. Starace, Comment, *Reverse Discrimination Under Title IX: Do Men Have a Sporting Chance?*, 8 VILL. SPORTS & ENT. L.J. 189 (2001) (examining Title IX's history and claims under the statute).

<sup>8</sup> See *infra* Parts II.A–B (discussing the background of the Civil Rights Act, generally, and Title IX, specifically, as well as the evolution and application of Title IX).

<sup>9</sup> See *infra* Part II.C.1 (discussing influential cases under Title IX, which have shaped the law's current application).

<sup>10</sup> See *infra* Part II.C.2 (highlighting recent cases brought by men's athletic teams claiming reverse discrimination under Title IX).

<sup>11</sup> See *infra* Part III.A (analyzing the shortcomings of Title IX's current application).

<sup>12</sup> See *infra* Parts III.B–C (evaluating problems, benefits, and proposed solutions to the proportionality prong and the fully and effectively accommodated prong of the compliance requirements).

<sup>13</sup> See *infra* Part IV (proposing new compliance standards and evaluation criteria for assessing overall interest in sports to assist universities in determining which sports to offer).

## II. BACKGROUND

The purpose of Title IX is to prevent discrimination based on sex in educational institutions.<sup>14</sup> This Part discusses Title IX from its enactment to its current state.<sup>15</sup> Part II.A discusses the history of Title IX, from its enactment in 1972 to the latest policy interpretation in 2010.<sup>16</sup> The evolution of Title IX and how it has been applied to cases is discussed in Part II.B.<sup>17</sup> Finally, this Part discusses landmark cases that have been decided under Title IX in Part II.C.<sup>18</sup> The discussion starts with traditional Title IX cases brought by female student-athletes and concludes with cases brought by male student-athletes claiming reverse discrimination under Title IX.<sup>19</sup>

A. *History of Title IX*

The Civil Rights Act of 1964 was enacted to prohibit discrimination and provide “full and equal enjoyment” to “any place of public accommodation” regardless “of race, color, religion, or national origin.”<sup>20</sup> Title IX, enacted in 1972 as part of the Educational Amendments, is an extension of this Act that prohibits discrimination based on sex in educational programs receiving federal funding.<sup>21</sup> Title IX expressly applies to all “public or private preschool, elementary, or secondary school[s], or any institution of vocational, professional, or higher education.”<sup>22</sup> Although the statute applies to all aspects and levels of

<sup>14</sup> 20 U.S.C. § 1681(a) (2006); see H.R. REP. NO. 96-459, at 35 (1979), reprinted in 1979 U.S.C.C.A.N. 1612, 1614 (stating that the purpose for the Educational Amendments is to promote the general welfare of the United States, and more specifically to prohibit educational institutions from giving preferential or different treatment to members of one sex when a “historic disparity” has been shown); S. REP. NO. 96-49, at 11 (1979), reprinted in 1979 U.S.C.C.A.N. 1514, 1525 (noting that the need for equal access to educational activities is paramount, and Title IX is specifically designed to help end sex discrimination).

<sup>15</sup> See *infra* Parts II.A–C (discussing the history and evolution of Title IX, as well as current cases under the statute).

<sup>16</sup> See *infra* Part II.A (discussing the history of Title IX).

<sup>17</sup> See *infra* Part II.B (examining the evolution of Title IX).

<sup>18</sup> See *infra* Part II.C (highlighting landmark cases under Title IX).

<sup>19</sup> See *infra* Parts II.C.1–2 (discussing traditional Title IX cases brought under the statute, as well as reverse discrimination cases brought under Title IX).

<sup>20</sup> 42 U.S.C. § 2000a (2006); see *Title VI of the Civil Rights Act of 1964*, U.S. DEP’T JUST., <http://www.justice.gov/crt/about/cor/coord/titlevi.php> (last visited Feb. 18, 2012) (stating that Title VI of the Civil Rights Act of 1964 was enacted to prohibit discrimination on the basis of race, color, or national origin).

<sup>21</sup> 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 [f]ederal financial assistance . . . .” *Id.*

<sup>22</sup> *Id.* § 1681(c).

education, its effect is most recognizable in college athletics.<sup>23</sup> Title IX requires, aside from proportional opportunities, that men's and women's athletic programs be relatively equal in categories such as travel, equipment, and tutoring.<sup>24</sup>

When Title IX was first implemented, there was some confusion as to how it should apply to college athletics.<sup>25</sup> More specifically, confusion arose as to whether Title IX applied to entire institutions or only to the specific programs that received federal funding.<sup>26</sup> Congress answered this question by passing the Civil Rights Restoration Act, which expressly stated that Title IX applies to all areas of an educational institution that receive federal funding.<sup>27</sup> Due to continued confusion, however, Congress directed the Secretary of Health, Education, and Welfare ("HEW") to create regulations explaining Title IX standards and requirements.<sup>28</sup> The purpose of the regulations was to provide guidance to athletic programs and to make it clear that any kind of gender discrimination would result in a Title IX violation.<sup>29</sup> The Office of Civil Rights ("OCR"), under the Department of Education ("ED"), which is

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<sup>23</sup> See *History of Title IX*, TITLE IX.INFO (2012), <http://www.titleix.info/History/History-Overview.aspx> (stating that most people who have heard of Title IX think it only applies to athletics). See generally 20 U.S.C. § 1681 (discussing prohibition of discrimination in educational programs, but never specifically mentioning athletics).

<sup>24</sup> Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,416 (Dec. 11, 1979). Title IX requires schools to provide comparable amenities to both men's and women's sports teams in such categories as: (1) equipment and supplies; (2) scheduling of games and practice times; (3) travel and per diem allowances; (4) opportunity to receive coaching and academic tutoring; and (5) assignment and compensation of coaches and tutors. *Id.*

<sup>25</sup> See *Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993) (noting confusion as to the scope of Title IX's coverage and acceptable avenues of compliance because of an absence of legislative materials, lack of committee report, and the fact that intercollegiate athletics was only mentioned twice during the congressional debate of the matter); see also *Equity in Athletics, Inc. v. Dep't of Educ.*, 675 F. Supp. 2d 660, 664 (W.D. Va. 2009) (noting that "[a]fter Title IX was passed, there were efforts to limit the effect" on athletics (quoting *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 287 (2d Cir. 2004))).

<sup>26</sup> Compare *Univ. of Richmond v. Bell*, 543 F. Supp. 321, 329 (E.D. Va. 1982) (holding that a university's athletic department was not covered by Title IX if it did not receive direct federal funding), with *Haffer v. Temple Univ.*, 688 F.2d 14, 17 (3d Cir. 1982) (ruling that an intercollegiate athletic program was subject to Title IX if the university as a whole received federal funding).

<sup>27</sup> Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). Title IX applies to all of the operations of an educational institution, any part of which is extended federal financial assistance. *Id.*

<sup>28</sup> See *Cohen*, 991 F.2d at 895 (explaining regulatory framework of Title IX as issued by HEW).

<sup>29</sup> See Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,416 (Dec. 11, 1979) (outlining compliance criteria and policy reasons for the Title IX regulations and the Policy Interpretation, which include assessing the equivalence of general athletic program components between genders).

562 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

responsible for the implementation and enforcement of Title IX, emphasized the necessity for equal opportunities within intercollegiate athletics for all athletes, regardless of gender.<sup>30</sup>

In the three years following this initial explanation of the statute, the ED received over one hundred discrimination complaints involving more than fifty schools.<sup>31</sup> In 1979, the OCR issued a "Policy Interpretation" that offered a more detailed measure of equal athletic opportunity as well as clearer guidelines for schools to follow.<sup>32</sup> The Policy Interpretation outlined how schools could effectively accommodate the interests and abilities of male and female athletes.<sup>33</sup> The OCR provided a three-prong test for schools to utilize in evaluating Title IX compliance, which can be satisfied if any one of the following prongs is met:

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

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<sup>30</sup> 34 C.F.R. § 106.41(c) (2009). A recipient of federal funding that operates or sponsors intercollegiate, club, or intramural athletics is required to provide equal athletic opportunities for members of both sexes. *Id.* The OCR evaluates a school's compliance to equal opportunity based on ten non-exclusive factors: (1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) the provision of equipment and supplies; (3) scheduling of games and practices; (4) travel and per diem allowances; (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 (10) publicity. *Id.*; see *Cohen*, 991 F.2d at 895 (explaining the split of the HEW into the Department of Health and Human Services and the ED, and the Office of Civil Rights' duties under the ED in relation to Title IX compliance).

<sup>31</sup> See Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413 ("By the end of July 1978, the [ED] had received nearly [one hundred] complaints alleging discrimination in athletics . . ."); see also *Cohen*, 991 F.2d at 896 (noting that the initial issuance of the regulations resulted in numerous complaints against many collegiate institutions).

<sup>32</sup> Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413. "The . . . Policy Interpretation represents the Department of Health, Education, and Welfare's interpretation of the intercollegiate athletic provisions of Title IX of the Education Amendments of 1972 and its implementing regulation." *Id.*

<sup>33</sup> *Id.* at 71,418. To "effectively accommodat[e] the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities." *Id.*; see also Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Dep't of Educ. (Apr. 20, 2010) [hereinafter Letter from Russlynn Ali], available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf> (indicating that procedures should be easy to understand and should be distributed to students, coaches, and employees).

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.<sup>34</sup>

Typically, schools comply by conforming with the first prong of the test because proportionality of students is the most objective standard and the easiest with which to comply.<sup>35</sup> Historically, the second prong of the test has been hard for universities to satisfy due to the short time in which the expansion of programs has been occurring.<sup>36</sup> Showing not only a history, but also a continuation of expansion in women's athletics

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<sup>34</sup> Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418. Determination of compliance will be based on:

- a. Whether the policies of an institution are discriminatory in language or effect; or
- b. Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole; or
- c. Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

*Id.*

<sup>35</sup> See H. Clay McEldowney, *As Colleges Cut Athletics, Title IX Creates an Injustice to Men*, WASH. POST, Aug. 6, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/05/AR2009080503089.html> (explaining that "compliance" for universities usually "means applying a quota standard . . . [that requires] schools [to] maintain the same ratio of men and women on the playing field as in the classroom"); see also Alyssa Benedetto, *College Athletics Affected by Title IX*, THE REV. (Nov. 19, 2007), <http://www.udreview.com/2.1979/college-athletics-affected-by-title-ix-1.138104> ("Under Title IX, there must be proportionality between men's and women's teams based on the total enrollment at the school."); Eric McErlain, *Where Title IX Went Wrong*, SAVING SPORTS (Jan. 23, 2008, 4:45 PM), [http://savingsports.blogspot.com/2008\\_01\\_01\\_archive.html](http://savingsports.blogspot.com/2008_01_01_archive.html) (discussing problems with Title IX's proportionality requirement and how it has been applied in athletic departments).

<sup>36</sup> See MICHAEL J. COZZILLO ET AL., SPORTS LAW: CASES AND MATERIALS 909 (2d ed. 2007) (noting that in light of the thirty plus years since Title IX's enactment, it is difficult for a school to show "a history and continuing practice of program expansion for women if the school still does not provide proportionally equal opportunities for both sexes").

## 564 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

has proven difficult for many universities.<sup>37</sup> Likewise, the third prong of the test has been difficult for schools to satisfy.<sup>38</sup> Even if a school is under the impression that it is providing adequate opportunities, the filing of a complaint for a Title IX violation shows that the school has not met all the interests of the underrepresented gender.<sup>39</sup> Due to the difficulties and ambiguity of the second and third prongs, more schools are electing to comply with Title IX's compliance requirements by offering athletic opportunities that are substantially proportionate to enrollment.<sup>40</sup> However, complying with the proportionality standard

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<sup>37</sup> See *Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763, 766 (9th Cir. 1999) (claiming a Title IX violation for cutting the men's wrestling team instead of creating more women's teams to comply with statute); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 635 (7th Cir. 1999) (asserting a Title IX violation for elimination of men's wrestling and soccer teams instead of meeting the proportionality requirement by expanding women's opportunities); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 267 (7th Cir. 1994) (bringing a civil rights action for elimination of a men's swimming program to cut costs and remain competitive, while allowing women's teams to remain without creating new teams); see also *McEldowney*, *supra* note 35 (stating that teams are being cut across the country to help relieve the financial burden athletic programs are facing, instead of creating new opportunities for women).

<sup>38</sup> See Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418 (explaining that Title IX compliance may be satisfied if an institution can "demonstrate[] that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated"); *COZZILLO ET AL.*, *supra* note 36, at 905 (noting that although the third prong sets a high standard, it is not absolute, as the mere fact that there are some female students interested in a sport does not ipso facto require the school to provide a team to comply with the third benchmark); Letter from Russlynn Ali, *supra* note 33 (determining compliance for the third prong depends on all of the following questions: "1. Is there [an] unmet interest in a particular sport? 2. Is there sufficient ability to sustain a team in the sport? 3. Is there a reasonable expectation of competition for the team?").

<sup>39</sup> See *COZZILLO ET AL.*, *supra* note 36, at 909 ("[A]ny time female students bring a Title IX lawsuit . . . it is difficult for a college to defend its lack of proportional opportunities by arguing that it has fully accommodated women's interests and abilities." (quoting Kimberly Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 741 (2003))).

<sup>40</sup> See *Neal*, 198 F.3d at 770 (stating that the university had to provide athletics opportunities in proportion to the gender composition of the student body); *Boulahanis*, 198 F.3d at 641 (ruling that the university's elimination of men's soccer and wrestling programs helped to achieve Title IX compliance under the proportionality standard); *Kelley*, 35 F.3d at 272-73 (holding that even after eliminating the men's swimming program, men's participation in athletics continued to be more than substantially proportionate to women's participation, such that women's teams could not be eliminated for fear of violating Title IX); *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 344 (3d Cir. 1993) (granting preliminary injunction to reinstate women's varsity field hockey and gymnastics to meet proportionality requirement of Title IX); *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993) (granting preliminary injunction restoring women's gymnastics and volleyball teams to varsity status to comply with Title IX); see also *COZZILLO ET AL.*, *supra* note 36, at 909 ("Most commentators simply assume that compliance will, at the end of the day, be measured in

has required schools to cut men's athletic teams more frequently in hard economic times because athletic departments are unable to support the large number of teams; schools must also keep proportionality in mind when making cuts.<sup>41</sup>

In 2005, the OCR issued an additional clarification regarding application of the third prong of the compliance test.<sup>42</sup> It also provided a model survey for institutions to measure student interest in participating in intercollegiate athletics and included specific guidelines for implementation.<sup>43</sup> However, the OCR has recently determined that the 2005 Additional Clarification was inconsistent with the nondiscriminatory methods set forth by the Policy Interpretation.<sup>44</sup> In

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terms of substantial proportionality . . . ." (alteration in original) (quoting Julia Lamber, *Intercollegiate Athletics: The Program Expansion Standard Under Title IX's Policy Interpretation*, 12 S. CAL. REV. L. & WOMEN'S STUD. 31, 33 (2002)) (internal quotation marks omitted)).

<sup>41</sup> See Rebecca Leung, *The Battle Over Title IX*, CBS NEWS: 60 MINUTES (Feb. 11, 2009, 8:37 PM), <http://www.cbsnews.com/stories/2003/06/27/60minutes/main560723.shtml> (noting that male athletes on college campuses are claiming they are losing out to women's athletics due to Title IX, and since there is no money to add women's teams, schools must cut men's teams to comply with the proportionality requirement); McEldowney, *supra* note 35 (indicating that men's teams often take the brunt of athletic department cuts).

<sup>42</sup> See *Office For Civil Rights: Case Resolution and Investigation Manual*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/ocrm.html> (last updated May 2005) (providing further clarification to schools for compliance with option three of the three-part test); see also Letter from Mary Frances O'Shea, Nat'l Coordinator for Title IX Athletics, Office for Civil Rights, to David V. Stead, Exec. Dir. of Minn. State High School League (Apr. 11, 2000), available at [http://66.40.5.5/Content/Articles/Issues/Title-IX/C/~media/Files/PDFs%20and%20other%20files%20by%20Topic/Issues/Title%20IX/O/Official%20OCR%20letter\\_Cheerleading.pdf](http://66.40.5.5/Content/Articles/Issues/Title-IX/C/~media/Files/PDFs%20and%20other%20files%20by%20Topic/Issues/Title%20IX/O/Official%20OCR%20letter_Cheerleading.pdf) [hereinafter Letter from Nat'l Coordinator of Title IX Athletics] (discussing assessment tools as well as factors for determining whether the OCR will consider the activity to be a "sport" for Title IX compliance evaluation).

<sup>43</sup> See Letter from Russlynn Ali, *supra* note 33 (indicating that the 2005 clarification "included a prototype survey instrument (model survey) that institutions could use to measure student interest"). The new clarification states that:

[S]chools in which females are underrepresented in athletics . . . and that have not demonstrated a history and continuing practice of expanding opportunities for [women] would be deemed in compliance with the law under [p]rong [three] of the athletic participation provision if they simply e-mailed a 'model survey' to current students to determine their interests and abilities and found interest by the underrepresented sex to be lacking.

Nancy Hogshead-Makar, *Department of Education Creates Huge Title IX Compliance Loophole: The Foundation Position*, WOMEN'S SPORTS FOUND. (June 16, 2005), <http://66.40.5.5/Content/Articles/Issues/Title-IX/D/Department-of-Education-Creates-Huge-Title-IX-Compliance-Loophole-The-Foundation-Position.aspx>.

<sup>44</sup> See Letter from Russlynn Ali, *supra* note 33 ("[T]he 2005 Additional Clarification and the User's Guide . . . do not provide the appropriate and necessary clarity regarding nondiscriminatory assessment methods, including surveys, under Part Three."); see also Hogshead-Makar, *supra* note 43 (stating that the 2005 clarification may lead to more discrimination against women in athletics by creating a loophole for universities).

## 566 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

April 2010, the ED withdrew the 2005 Additional Clarification including the Model Survey.<sup>45</sup> The assistant secretary of the ED stated that due to current resource limitations and their effects on athletic departments, there is a need to develop assessment measures that are consistent with the nondiscrimination requirements of Title IX, while still allowing institutions the flexibility to meet their unique circumstances.<sup>46</sup>

Under the 2010 "Dear Colleague Letter" from the ED, the "OCR recommend[ed] that institutions have effective ongoing procedures for collecting, maintaining, and analyzing information on the interests and abilities of students of the underrepresented sex."<sup>47</sup> Surveys may be an effective way to determine and measure the interest and abilities of the students enrolled in a university.<sup>48</sup> If an institution utilizes a survey to assess the interest of its students, the content, implementation, and response rates are considered when determining effectiveness.<sup>49</sup> This newest clarification from the ED allows schools to assess the interest of students in determining Title IX compliance; it therefore provides schools with an alternative to the substantial proportionality test.<sup>50</sup> Since its enactment, almost forty years ago, Title IX has evolved, has been officially clarified, and has been applied by courts, schools, and officials in a variety of ways resulting in its current application in which

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<sup>45</sup> See Letter from Russlynn Ali, *supra* note 33 ("All other Department policies . . . remain in effect and provide the applicable standards for evaluating Part Three.").

<sup>46</sup> *Id.* The Dear Colleague letter reaffirmed and provided additional clarification on the multiple indicators used in assessment of Title IX compliance to ensure institutions' flexibility in developing their own assessment methods. *Id.*

<sup>47</sup> See *id.* (indicating that procedures should include easy-to-understand policies "for receiving and responding to requests for additional teams, and wide dissemination of such policies . . . to existing and newly admitted students, as well as to coaches and other employees"); see also Michelle Brutlag Hosick, *OCR Rescinds 2005 Title IX Clarification*, NCAA NEWS (Apr. 20, 2010, 3:05 PM), [http://fs.ncaa.org/Docs/Misc\\_Committees\\_DB/CWA10/May/Supplement%20No.%2030.pdf](http://fs.ncaa.org/Docs/Misc_Committees_DB/CWA10/May/Supplement%20No.%2030.pdf) (stating that NCAA President, Jim Ische, was optimistic about the new clarification and its potential effect on Title IX compliance).

<sup>48</sup> Letter from Russlynn Ali, *supra* note 33. A well designed survey is one tool that may be used to assist an institution in assessing information on students' interests; the OCR evaluates a survey as one component of the institution's overall assessment under part three and will not rely on a survey alone. *Id.*

<sup>49</sup> *Id.* Although the OCR has not endorsed a specific survey that institutions must use, it will evaluate the overall weight of the survey based on the following, non-exclusive criteria: "content of the survey; target population surveyed; response rates and treatment of non-responses; confidentiality protections; and frequency of conducting the survey." *Id.*

<sup>50</sup> See *id.* (explaining that the clarification allows institutions flexibility over their athletic programs, but they must remain consistent with the nondiscriminatory Title IX requirements).

institutions rely heavily on the proportionality standard to comply with the statute.<sup>51</sup>

*B. The Evolution of Title IX*

When Title IX was enacted in 1972, women's participation in sports was minimal, at best.<sup>52</sup> In the first four years of its implementation, participation in women's athletics increased by six hundred percent to include nearly two million participants.<sup>53</sup> In 2008, 3.1 million girls participated in high school athletics with an additional 182,503 women participating in NCAA collegiate sports.<sup>54</sup> After the implementation of Title IX, colleges and universities across the country continued to expand athletic opportunities for women.<sup>55</sup> However, expanding programs is becoming increasingly difficult due to the hard economic times.<sup>56</sup> Schools are unable to continuously provide additional opportunities for women and must now find alternative ways to meet the Title IX compliance requirements.<sup>57</sup>

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<sup>51</sup> See *infra* Part II.B (explaining the evolution and application of Title IX since its inception in 1972).

<sup>52</sup> HISTORY OF WOMEN IN SPORTS TIMELINE, <http://www.northnet.org/stlawrenceaauw/timelne4.htm> (last visited Feb. 24, 2012). "When President Nixon sign[ed] the act on July 23 about 31,000 women [were] involved in college sports; spending on athletic scholarships for women [was] less than \$100,000; and the average number of women's teams at a college [was] 2.1." *Id.* "There [were] 817,073 girls participating in high school sports." *Id.*

<sup>53</sup> Starace, *supra* note 7, at 189.

<sup>54</sup> U.S. Census Bureau, *Women's History Month: March 2011*, NEWSROOM, [http://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb11-ff04.html](http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb11-ff04.html) (last modified Feb. 9, 2012).

<sup>55</sup> See *Cohen v. Brown Univ.*, 991 F.2d 888, 903 (1st Cir. 1993) (referencing the improvements within Brown University to expand the athletic opportunities for women after Title IX's passage); see also *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) (discussing growth of Colorado State University's athletic program in the 1970s); DENISE DEHASS, 2005-06 NCAA GENDER-EQUITY REPORT 9 (2008), available at <http://www.ncaapublications.com/productdownloads/GER06.pdf> (noting that by the 2005-2006 academic year, women's participation in college athletics had risen from forty-two to fifty percent of total athletes).

<sup>56</sup> See Brody Schmidt, *College Sports Try to Fend Off Economic Blitz*, USA TODAY (Nov. 15, 2008, 7:53 AM), [http://www.usatoday.com/sports/2008-11-14-college-economy\\_N.htm](http://www.usatoday.com/sports/2008-11-14-college-economy_N.htm) (noting that regardless of the size of the school, many athletic programs are getting nervous about their financial future due to boosters and other donation sources pulling out in the hurting economy); see also *Neal v. Bd. of Trs. of the Cal. State Univ.*, 198 F.3d 763, 770 (9th Cir. 1999) (noting that hard economic times make it difficult for schools to expand their women's athletic programs, and therefore, financially-strapped institutions may still comply with Title IX by cutting athletic programs to meet substantial proportionality).

<sup>57</sup> See *McEldowney*, *supra* note 35 (stating that men's teams are often eliminated disproportionately to women's teams and that even when women's teams are cut alongside men's, the men's roster spots are reduced in greater numbers); Mark Schlabach, *Programs Struggle to Balance Budget*, ESPN (July 13, 2009), <http://sports.espn.go.com/ncaa/>

## 568 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

As a result of Title IX, women have continued to benefit from the creation of new programs and new opportunities to compete at the amateur level as well as the professional level through the inception of leagues, such as the Women's National Basketball Association ("WNBA") and Women's United Soccer Association ("WUSA").<sup>58</sup> However, there is still evidence that there is more interest in men's athletics and, therefore, higher participation.<sup>59</sup> This discrepancy in the level of interest has led schools to comply with Title IX by contracting and eliminating men's sports teams.<sup>60</sup> Compliance by contraction has become a more common practice for athletic departments in recent years due to the courts' interpreting contraction as a valid form of Title IX compliance.<sup>61</sup>

Over the last forty years, Title IX has gone from providing opportunities for women to eliminating opportunities for men, which is directly contrary to Title IX's purpose of *creating* opportunities *regardless of sex*.<sup>62</sup> As men's athletic teams continue to be cut due to Title IX

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columns/story?columnist=schlabach\_mark&id=4314195 (discussing that athletic departments are struggling to balance the books after receiving less in federal funding as well as fewer donations from alumni and boosters, and as a result, schools are resorting to cutting programs to try and save money); see also Joe Drape, *Cal-Berkeley Cuts 5 Athletic Programs*, N.Y. TIMES, Sept. 28, 2010, <http://www.nytimes.com/2010/09/29/sports/29cal.html> (noting that five teams were dropped from the athletics department at the University of California, Berkeley to save nearly \$4 million per year, and two of the teams dropped, "baseball and men's rugby, had become particular points of pride over the years").

<sup>58</sup> WILLIAM H. GLOVER, JR., SPORTS LAW HANDBOOK FOR COACHES AND ADMINISTRATORS 103 (2009). Title IX has allowed women athletes to come a long way in the participation of athletics. *Id.* Also, the creation of leagues such as the WNBA and the WUSA has allowed an increase in opportunities for women to pursue professional athletics as a career. *Id.*

<sup>59</sup> See Reich, *supra* note 7, at 569 (noting that desire to participate is often higher in men, as the average men's track team will attract thirty-two members while the corresponding female team will attract only twenty-seven).

<sup>60</sup> GLOVER, JR., *supra* note 58, at 64; see also *id.* (noting that men's athletic teams have become the victim of Title IX regarding compliance with the substantial proportionality requirement because they have historically been larger and better-funded).

<sup>61</sup> COZZILLO ET AL., *supra* note 36, at 913; see also *id.* (noting that compliance by contraction is consistent with 1979 OCR interpretations of Title IX regulations, but draws battle lines between men's and women's athletic teams). The court indicates that Title IX does not require that a school continue to add money and programs into an athletic department; it may also bring itself into compliance with the first benchmark (proportionality) by subtraction and downgrading of opportunities of the overrepresented gender. *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st. Cir. 1993).

<sup>62</sup> See COZZILLO ET AL., *supra* note 36, at 913 (noting that compliance by contraction allows universities to take a passive solution "rather than develop creative ideas to level the playing field" for both sexes, therefore "[t]he debate [continues] as to whether this approach comports with the letter and spirit of Title IX"); GLOVER, JR., *supra* note 58, at 63 ("Since 1972, 256 colleges have dropped [men's] wrestling."); see also *supra* text

compliance, more lawsuits are being filed by athletes and teams for reverse discrimination.<sup>63</sup> Most, if not all of these cases, have been dismissed, and courts have ruled that eliminating men's athletic teams does not constitute a reverse discrimination or equal protection cause of action.<sup>64</sup> Courts have also ruled that Title IX, itself, is not violated by the elimination of men's athletic teams.<sup>65</sup> However, as more and more teams are cut to comply with Title IX, people are starting to question whether men's teams should have some recourse in the courts.<sup>66</sup>

### C. Cases Under Title IX

Since its inception, Title IX has prompted many lawsuits brought by student-athletes who feel that lack of athletic opportunities or the elimination of athletic teams violates the statute's compliance requirements.<sup>67</sup> Schools must show that they are providing

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accompanying note 14 (reiterating that the purpose of Title IX is to prevent gender discrimination in educational institutions).

<sup>63</sup> See *infra* Part II.C.2 (discussing Title IX cases brought by eliminated men's athletic teams, alleging violations of Title IX compliance requirements).

<sup>64</sup> See, e.g., *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 641 (7th Cir. 1999) (holding that the university's action did not violate equal protection, and claims against the university under § 1983 are preempted by Title IX); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272-73 (7th Cir. 1994) (ruling that the university's decision to terminate the men's swimming program while retaining women's swimming did not violate equal protection); *Equity in Athletics, Inc. v. Dep't of Educ.*, 675 F. Supp. 2d 660, 680 (W.D. Va. 2009) (ruling that regulation implementing Title IX did not violate equal protection rights of overrepresented gender members).

<sup>65</sup> See *Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 1999) ("holding that Title IX does not bar universities from taking steps to ensure that women are approximately as well represented in sports programs as they are in student bodies"); *Boulahanis*, 198 F.3d at 639 (ruling that a university's elimination of men's teams based on sex discrimination theory did not violate Title IX); *Kelley*, 35 F.3d at 271 (holding that a university's decision to terminate the men's swimming program while retaining women's swimming did not violate Title IX); *Equity in Athletics, Inc.*, 675 F. Supp. 2d at 671 (stating that a university could choose to pursue gender proportionality in its athletic programs by eliminating men's programs, and therefore Title IX was not violated); see also *Cohen*, 991 F.2d at 898 (indicating that Title IX does not require that a school continue to add money and programs into an athletic department, as it may bring itself into compliance with the first benchmark (proportionality) by subtraction and downgrading of opportunities of the overrepresented gender).

<sup>66</sup> *McEldowney*, *supra* note 35. The worsening economy makes gender equity an even more impossible hurdle; once a school determines that it must cut programs, Title IX controls which teams will be eliminated. *Id.* "[A]s legal action groups and gender activists are riding to the rescue of women's sports, there appears to be no similar savior for men's athletics. Although the law promises equal protection for both sexes, . . . [officials have] been silent on the cuts to men's [sport] teams." *Id.*

<sup>67</sup> See generally *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 961-62 (9th Cir. 2010) (presenting a putative class action suit where female wrestlers alleged that their exclusion from the wrestling team violated Title IX and equal protection rights); *Mercer v.*

## 570 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

opportunities that fully and effectively address their students' interests.<sup>68</sup> When athletes feel that the school is not providing opportunities that fully and effectively meet their needs, lawsuits are the most common response, although they can be time-consuming and very expensive for both sides.<sup>69</sup> Almost all courts have come to the same conclusion when evaluating Title IX compliance: Suits alleging discrimination against women's athletic teams have resulted in favor of the student-athletes, while suits alleging discrimination against men's athletic teams have resulted in favor of the university.<sup>70</sup> The cases outlined below, divided into "traditional cases" and "reverse discrimination cases," illustrate the courts' trend when ruling on Title IX compliance cases.<sup>71</sup>

## 1. Traditional Title IX Cases

The most influential case in Title IX's history is *Cohen v. Brown University*.<sup>72</sup> In *Cohen*, members of the women's gymnastics and

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Duke Univ., 190 F.3d 643, 644 (4th Cir. 1999) (involving a Title IX action brought by a female student-athlete against a university for refusing to allow her to be a member of the men's football team); *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 334 (3d Cir. 1993) (alleging that a university discriminated against female athletes on the basis of gender when it cut women's gymnastics and field hockey athletic programs); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 826 (10th Cir. 1993) (involving former members of a women's varsity softball team who brought a Title IX action challenging university's cancellation of the program); *Cohen*, 991 F.2d at 892 (claiming a Title IX violation when women's gymnastics and volleyball teams were demoted from full varsity status to club status); see also *Neal*, 198 F.3d at 765 (alleging a Title IX and equal protection violation by a university for eliminating a number of roster spots on the men's wrestling team); *Boulahanis*, 198 F.3d at 636 (presenting male athletes who brought claims against a university for violating Title IX and discriminating on the basis of sex when it eliminated the men's soccer and wrestling programs); *Kelley*, 35 F.3d at 267 (involving a case where athletes alleged that Title IX was violated when the men's swimming program was cut, but the women's program was retained).

<sup>68</sup> See *supra* note 34 and accompanying text (explaining Title IX compliance requirements); see also *supra* notes 38 and 39 (discussing specifically the third prong of the compliance requirements).

<sup>69</sup> See Jill Lieber Steeg, *Lawsuits, Disputes Reflect Continuing Tension Over Title IX*, USA TODAY, May 13, 2008, [http://www.usatoday.com/sports/college/2008-05-12-titleix-cover\\_N.htm](http://www.usatoday.com/sports/college/2008-05-12-titleix-cover_N.htm) (noting that two lawsuits for Title IX infractions against Fresno State University cost the school and California taxpayers more than \$14 million plus interest, which continues to accrue through the appellate process).

<sup>70</sup> See *infra* Parts II.C.1-2 (discussing the holdings of cases under Title IX, noting that lawsuits brought by women's athletic teams require reinstatement of teams, while men's actions are dismissed).

<sup>71</sup> See *infra* Parts II.C.1-2 (discussing Title IX court cases brought by women claiming Title IX violations by universities, and claims by men's teams alleging reverse discrimination in violation of the proportionality compliance requirement).

<sup>72</sup> 991 F.2d 888; see *Mansourian*, 602 F.3d at 965 (quoting *Cohen* in determining that female wrestlers had a claim under the fully and effectively accommodated prong of Title IX);

volleyball teams filed suit against the university for Title IX violations when the teams were eliminated.<sup>73</sup> The cuts were made to comply with the Title IX substantial proportionality requirement and to cut costs in the athletic department.<sup>74</sup> In assessing the school's Title IX compliance, the First Circuit stated that a plaintiff must "show disparity between the gender composition of the institution's student body and its athletic program, thereby proving that there is an underrepresented gender."<sup>75</sup> The plaintiff must then show there is unmet interest, which indicates "that the underrepresented gender has not been 'fully and effectively accommodated by the present program.'"<sup>76</sup> If the plaintiff meets this

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*Favia*, 7 F.3d at 343 (citing *Cohen* in discussion of the three prong test set forth by the OCR); *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 87 (D. Conn. 2010) (noting Title IX's history as evaluated in *Cohen*); see also GLOVER, JR., *supra* note 58, at 107 (noting that *Cohen* is often regarded as the most influential case decided under Title IX); Reuscher, *supra* note 7, at 131 (stating that *Cohen* is viewed by many as the landmark case of Title IX).

<sup>73</sup> *Cohen*, 991 F.2d at 892. "The [u]niversity permitted the teams to continue playing as 'intercollegiate clubs,' a status that allowed them to compete against varsity teams from other colleges," but they would no longer have the varsity status. *Id.* Financial support from the university would, however, be cut off. *Id.*; see also Jennifer R. Capasso, Note, *Structure Versus Effect: Revealing the Unconstitutional Operation of Title IX's Athletics Provisions*, 46 B.C. L. REV. 825, 834 (2005) (noting that plaintiffs in *Cohen* represented a class of current and future women athletes and challenged Brown University's decision to drop teams to reduce the financial burden in the athletic department).

<sup>74</sup> *Cohen*, 991 F.2d at 892. Brown's student body consisted of approximately 48% women and 52% men, while its athletic program consisted of 37% women and 63% men. *Id.* The school stated they would save approximately \$78,000 by cutting the four varsity teams (men's golf and water polo were also cut, though not reinstated through this action). *Id.* In the 1991-1992 academic year, Brown offered fifteen women's athletic teams and sixteen men's teams. *Id.*

<sup>75</sup> *Id.* at 901. The court ruled that a Title IX violation may not be found *solely* due to a disparity between gender composition of the student body and the athletic program. *Id.* at 895. Statistical evidence of disparity must be accompanied by further evidence of discrimination, such as an unmet need in the underrepresented gender. *Id.*; see also Buzuvis, *supra* note 7, at 864 (stating that even before the cuts to the women's programs, the percentage of female athletes was far less than the percentage of female students enrolled at Brown, therefore statistical evidence showed a violation of the first prong); Alacbay, *supra* note 7, at 267 (noting that the court in *Cohen* ruled that there "is no specific ratio that would automatically satisfy substantial proportionality").

<sup>76</sup> *Cohen*, 991 F.2d at 902 (quoting Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979)) (internal quotation marks omitted). The third prong of the test sets a high, but not absolute, standard. *Id.* at 898. The school must be diligent in ensuring that participatory opportunities in which "there is sufficient interest and ability among the members of the excluded sex . . . and a reasonable expectation of intercollegiate competition" are met. *Id.* (quoting Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71,418) (internal quotation marks omitted). The accommodation must be "full-and-effective," as *some* accommodation will not meet the standard under Title IX. *Id.*; see also Alacbay, *supra* note 7, at 267 (stating that the purpose of prongs two and three is to make Title IX a vehicle by which women would become more interested in sports, and therefore the standard is high, but not unattainable); Capasso, *supra* note 73, at 836 ("The court

## 572 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

burden, she has proven her case, and the university is in violation of Title IX unless it can assert an affirmative defense.<sup>77</sup> In *Cohen*, the First Circuit “ruled that a university violates Title IX if it ineffectively accommodates student interests and abilities regardless of its performance in other Title IX areas.”<sup>78</sup>

The *Cohen* court also held that a school is not required to create teams for the underrepresented gender if that sex is demonstrably less interested in athletics to comply with Title IX.<sup>79</sup> However, the university must provide gender-blind equality of athletic opportunity to its student body.<sup>80</sup> If a university prefers, it may bring itself into compliance with

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cautioned, however, that . . . if there is sufficient interest and ability among members of the underrepresented sex that existing programs do not satisfy, an institution [will] fail[] the third prong of the [compliance] test.”)

<sup>77</sup> *Cohen*, 991 F.2d at 902. A university may present a history and continuing practice of program expansion for the underrepresented gender as an affirmative defense against a Title IX action. *Id.* If they cannot show this history and continuation of expansion, the institution must remain vigilant in the upgrading of competitive opportunities available to the disadvantaged gender. *Id.* at 898. The school should continue “developing abilities among the athletes of that sex until the opportunities for, and levels of, competition are equivalent by gender.” *Id.* (citation omitted) (internal quotation marks omitted); *see also* Alacbay, *supra* note 7, at 268 (“[A]n institution must either prove that it has some program in place that anticipates compliance at some specific date in the future, or prove that there is not a sufficient unmet interest by an underrepresented gender in a specific sport.” (footnote omitted)).

<sup>78</sup> *Cohen*, 991 F.2d at 897. Even if a school meets the requirements in its allocation of “financial assistance” and “athletic equivalence,” Title IX can be violated if the interests and abilities of the underrepresented sex are not fully and effectively accommodated. *Id.* (internal quotation marks omitted).

<sup>79</sup> *Id.* at 898. Title IX does not require that a school create teams for otherwise disinterested students. *Id.* The purpose of the third prong of the three-part test is “to determine whether a student has been ‘excluded from participation in, [or] denied the benefits of’ an athletic program ‘on the basis of sex.’” *Id.* at 899-900 (alteration in original) (quoting 20 U.S.C. § 1681(a) (2006)); *see also* Capasso, *supra* note 73, at 836 (noting that although Title IX does not require institutions to provide every athletic opportunity, it does require an “institution to establish a new team or upgrade an existing club team if there is a sufficiently high unmet need in the underrepresented gender”).

<sup>80</sup> *Cohen*, 991 F.2d at 896. Brown violated Title IX by not “effectively accommodat[ing] the interests and abilities of female students in the selection and level of sports.” *Id.*; *see also* Buzuvis, *supra* note 7, at 865 (discussing Brown’s argument that the third prong of compliance should be satisfied using a relative interest test, which provides athletic opportunities to women based on the ratio of interested and able women to interested and able men, and noting that the court rejected this argument as not being gender-blind); Capasso, *supra* note 73, at 836 (noting that the court’s opinion found that the university’s interpretation of the third prong “read[s] the full out of the duty” to “fully and effectively” accommodate its students on a gender neutral basis (internal quotation marks omitted)); Reuscher, *supra* note 7, at 133 (stating that based on common sense and logic, Brown argued that the number of women enrolled at the institution was the incorrect standard since women and men often do not share an equal interest in sports, but the court

the first benchmark of the three-part test by reducing opportunities for the overrepresented sex.<sup>81</sup> Because Brown University did not meet any of the standards in the three-part test, it was in violation of Title IX, and therefore the women's teams were required to be reinstated to full varsity status.<sup>82</sup>

This case was the first of its kind to determine how Title IX applied to women in athletic situations.<sup>83</sup> By ruling that universities must provide equal opportunities for both genders and that the proportionality requirement could be met by subtraction, schools were able to comply with Title IX by cutting men's teams if they were unable to add women's teams.<sup>84</sup> The outcome has been relied on by many other courts in Title IX actions throughout the years.<sup>85</sup>

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dismissed this argument stating that "no person could continuously keep track and summarize 'students [sic] interests and abilities'").

<sup>81</sup> *Cohen*, 991 F.2d at 898-99. The fact that the overrepresented gender is not "fully and effectively" accommodated does not excuse the lack of opportunities provided for the underrepresented sex. *Id.* at 899 (internal quotation marks omitted); *see also* COZZILLO ET AL., *supra* note 36, at 913 (noting that compliance by contraction is consistent with the 1979 OCR interpretations of the Title IX regulations, but draws battle lines between men's and women's athletic teams, and also acknowledging that compliance by contraction allows universities to take a passive solution rather than "develop creative ideas to level the playing field" for both sexes).

<sup>82</sup> *Cohen*, 991 F.2d at 907. Brown did not even closely meet the "substantial proportionality" test under prong one. *Id.* at 903 (internal quotation marks omitted). Although Brown could show "impressive growth" in the 1970s, it had not added a women's team in nearly twenty years, and therefore did not meet the second prong of the Title IX requirement. *Id.* (internal quotation marks omitted). Also, there would be a waste of great interest and talent if women's volleyball and gymnastics were eliminated, therefore failing to meet the third prong of the test. *See id.* at 904 (recognizing that women's volleyball and gymnastics would have fewer players and become less competitive if given club status, rather than varsity status); Capasso, *supra* note 73, at 837 (noting that the *Cohen* court held that "Title IX [was] not an affirmative action statute, but rather an anti-discrimination statute, and that no aspect of the Title IX regime mandates gender-based preferences or quotas").

<sup>83</sup> *See Cohen*, 991 F.2d at 891 (noting that this was a "watershed case" in which there was some confusion as to Title IX's application to college athletics); Buzuvis, *supra* note 7, at 864 (noting that "by its own description and any objective measure," *Cohen* is considered the "'watershed' decision about equal athletic opportunity"); Capasso, *supra* note 73, at 834 (designating the *Cohen* decision as the "[w]atershed' [i]nterpretation" of Title IX).

<sup>84</sup> *See Cohen*, 991 F.2d at 898 (acknowledging that Title IX does not require a school to pour infinite funds into its athletic department to accommodate all needs, as a school may comply by downgrading or reducing opportunities for the overrepresented gender while keeping opportunities for the underrepresented gender stable).

<sup>85</sup> *See generally* Mansourian v. Regents of Univ. of Cal., 602 F.3d 957, 965 (9th Cir. 2010) (quoting *Cohen* in determining that female wrestlers had a claim under the fully and effectively accommodated prong of Title IX); Mercer v. Duke Univ., 190 F.3d 643, 648 (4th Cir. 1999) (prohibiting the university from discriminating against a student on the basis of her sex once it allowed her to try out for the football team); Favia v. Ind. Univ. of Pa., 7 F.3d 332, 344 (3d. Cir. 1993) (requiring the university to reinstate women's varsity field hockey

## 574 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

The same year *Cohen* was decided, the Third Circuit Court of Appeals ruled that Indiana University of Pennsylvania (“IUP”) had to reinstate its women’s field hockey and gymnastics teams to comply with Title IX in *Favia v. Indiana University of Pennsylvania*.<sup>86</sup> The court affirmed the district court’s order, which determined that IUP did not meet any of the three prongs of the Title IX compliance test, especially substantial proportionality, and therefore could not eliminate women’s teams.<sup>87</sup> IUP tried to substitute women’s soccer for women’s gymnastics after the preliminary injunction was granted, but the court ruled that although women’s soccer would increase the proportionality of the athletic department, the spending would be much less.<sup>88</sup> This case provided that unequal aggregate expenditures would be considered in assessing equality of opportunities for each sex.<sup>89</sup>

*Mercer v. Duke University*,<sup>90</sup> which was decided in 1999, determined that where a member of the excluded sex is allowed to try out for a

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and gymnastics programs to comply with Title IX); *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 87–92 (D. Conn. 2010) (discussing Title IX’s history as evaluated in *Cohen*).

<sup>86</sup> See *Favia*, 7 F.3d at 344 (affirming a preliminary injunction granted by the district court, which required IUP to reinstate women’s varsity field hockey and gymnastics programs); see also Reuscher, *supra* note 7, at 135–36 (noting that the court entered judgment for the plaintiff “and ordered the restoration of the women’s teams back to varsity status”).

<sup>87</sup> *Favia*, 7 F.3d at 335–36. The student body of IUP was 56% women and 44% men, while athletic participation was 38% women and 62% men. *Id.* at 335. The court ruled that IUP had failed to provide equal athletic opportunities to female students and therefore was in violation of Title IX. *Id.* at 336. Prior to this action, IUP offered nine men’s and women’s varsity athletic teams; however the men’s teams were much larger. *Id.* at 335. Due to the disproportionate number of participants, IUP was in violation of Title IX. *Id.* at 336.

<sup>88</sup> *Id.* at 336. The school already had plans to elevate its women’s club soccer team to varsity status, which would increase the percentage of women participating in sports to forty-three percent. *Id.* The athletic director also noted that soccer would follow the national trend toward women’s participation in soccer and away from gymnastics, and would increase recruiting of future athletes. *Id.* The court also noted that replacing gymnastics, which requires a \$150,000 investment with soccer, which requires only \$50,000, would decrease the overall expenditures for women’s athletics. *Id.* at 343; see also Jill K. Johnson, Note, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U. L. REV. 553, 579 (1994) (“Two months after the preliminary injunction [was] issued, IUP sought to modify the order by substituting a women’s soccer team for the women’s gymnastics team.”); Jurewitz, *supra* note 7, at 311 (discussing IUP’s argument for modification of the injunction, stating that it would allow the school to make progress in achieving proportionality while increasing recruitment options for the future).

<sup>89</sup> *Favia*, 7 F.3d at 343. “[U]nequal aggregate expenditures for members of male and female teams will not necessarily establish noncompliance” with Title IX. *Id.* However, the “failure to provide funds . . . [to] one sex may be considered in assessing [the] equality of opportunit[ies].” *Id.*; see also Johnson, *supra* note 88, at 579–80 (noting that a fifty-member soccer team, costing \$50,000, would bring the university closer to proportionality compliance than a fifteen-member gymnastics team costing \$150,000; however, the court denied the motion to amend because expenditures would be less for women’s athletics).

<sup>90</sup> 190 F.3d 643 (4th Cir. 1999).

historically one-gendered sport, the university could not discriminate on the basis of sex in allowing the athlete to play on the team.<sup>91</sup> Title IX provides that a university may provide gender-segregated teams if the sport is a contact sport or if selection for the team is based upon competitive skill.<sup>92</sup> However, where there is no comparable team, “members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport.”<sup>93</sup> The court ruled that members of the excluded sex need not be allowed to try out for a contact sport, but if the institution and team allows them to try-out, the athlete may not be discriminated against based on sex.<sup>94</sup>

Although these traditional Title IX cases have shaped the interpretation of the statute by courts, they are not the only cases involving discrimination claims under Title IX.<sup>95</sup> Men’s athletic teams that have been cut to allow universities to comply with the substantial

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<sup>91</sup> *Id.* at 648. Because Duke allowed Mercer to try out for its football team, and made her a member of the team for a period of time, the team was not allowed to discriminate against her solely on the basis of sex. *Id.*; see also Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 551, 563 (2003) (“Title IX regulations permit the operation of separate sex teams . . . when participation is based on competitive skill or when the team competes in a ‘contact’ sport.”).

<sup>92</sup> 34 C.F.R. § 106.41(b) (2009). “[An institution] 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.” *Id.*; see also *Mercer*, 190 F.3d at 646 (noting that institutions are allowed “to operate separate teams for men and women in many sports, including contact sports such as football, rather than integrating those teams”); *Cohen v. Brown Univ.*, 991 F.2d 888, 896 (1st Cir. 1993) (stating that “athletic program[s] may consist of gender-segregated teams as long as” the sport is either a contact sport or there is a comparable team for each gender).

<sup>93</sup> 34 C.F.R. § 106.41(b).

<sup>94</sup> *Mercer*, 190 F.3d at 647–48. The court stated that the text of the clause is incomplete in that it states that a member of the excluded sex must be allowed to try out as long as the sport is not a contact sport, but it gives no indication of what the requirement is for a contact sport. *Id.* at 647. The court read the rule to say “members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport, *in which case members of the excluded sex need not be allowed to try out.*” *Id.* (internal quotation marks omitted). The court concluded by saying that since Duke University allowed Mercer to try out for a historically gender-segregated sport, it could not discriminate against her after the fact. *Id.* at 648; see also Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 *CONN. L. REV.* 381, 395 (2000) (noting that the Fourth Circuit held “that while Title IX’s contact sports exception would have allowed Duke to exclude Mercer from the team despite her abilities, once she was allowed on the team, she could not be discriminated against on the basis of her sex”).

<sup>95</sup> See *infra* Part II.C.2 (presenting other cases involving discrimination claims under Title IX); *supra* Part II.C.1 (highlighting the holdings in traditional Title IX cases).

## 576 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

proportionality test have started bringing actions based on Title IX infringement and equal protection violations.<sup>96</sup>

## 2. Reverse Discrimination Under Title IX

Suits brought under Title IX have traditionally involved a challenge to a university for violating compliance requirements when the university eliminated women's athletic teams.<sup>97</sup> However, the trend is changing and more men are alleging violations under Title IX and the Equal Protection Clause for cuts to men's athletic teams.<sup>98</sup> The first significant reverse discrimination suit was decided in 1994 in *Kelley v. Board of Trustees*.<sup>99</sup> In *Kelley*, members of the men's swimming program at the University of Illinois brought a Title IX and reverse discrimination action when the team was eliminated from the athletic department.<sup>100</sup> In determining the regulations for Title IX, Congress did not require schools to have parallel teams for each gender; therefore, cuts to the athletic department could be gender-based to meet substantial proportionality.<sup>101</sup> Congress has the broad power to remedy past

<sup>96</sup> See *infra* Part II.C.2 (discussing cases brought by men's athletic teams who assert that cutting men's teams to comply with Title IX's proportionality requirement is essentially gender discrimination and a Title IX violation).

<sup>97</sup> See *supra* Part II.C.1 (discussing Title IX cases brought by women's athletic teams claiming Title IX violations).

<sup>98</sup> See generally *Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763, 765 (9th Cir. 1999) (presenting a men's athletic team that claimed that a university's reducing the number of roster spots on its men's wrestling team violated the Equal Protection Clause and Title IX); *Boulahean v. Bd. of Regents*, 198 F.3d 633, 636 (7th Cir. 1999) (asserting that elimination of the men's soccer and wrestling teams at Illinois State University programs violated Title IX and sex discrimination under § 1983); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 267 (7th Cir. 1994) (alleging violation of Title IX and the Equal Protection Clause when the men's swimming program was terminated at the University of Illinois); *Equity in Athletics, Inc. v. Dep't of Educ.*, 675 F. Supp. 2d 660, 663 (W.D. Va. 2009) (claiming that Title IX regulations, which imposed gender equality in federally financed programs and resulted in the elimination of athletic teams, were unconstitutional).

<sup>99</sup> 35 F.3d 265 (7th Cir. 1994).

<sup>100</sup> *Id.* at 267. The University of Illinois determined it would only field teams that were capable of competing for Big Ten Titles and NCAA championships. *Id.* at 269. The school selected the swimming program for elimination because of its history of weak performance and lack of spectator following. *Id.* The university did not, however, eliminate the women's swimming program for fear of violating Title IX. *Id.* At the time of the lawsuit, the University of Illinois's student body consisted of 44% women and 56% men, while its athletic program consisted of 23% women and 67% men. *Id.*; see also *Capasso*, *supra* note 73, at 838 (noting that male swimmers "sought a preliminary injunction to prevent the university from cutting their program while leaving the female swimming program intact"); *Jurewitz*, *supra* note 7, at 314 (noting that the court "was sympathetic to the unfortunate loss of men's opportunities from the implementation of Title IX").

<sup>101</sup> *Kelley*, 35 F.3d at 271. The OCR "could have required schools to sponsor a women's program for every men's program offered and vice versa." *Id.* This method of ensuring

discrimination, thus men cannot claim a Title IX violation for lack of full and effective accommodation if the proportionality requirement is still in their favor.<sup>102</sup> Therefore, the *Kelley* court ruled that the men's team did not have a valid cause of action under Title IX or the Equal Protection Clause.<sup>103</sup>

Five years after *Kelley* was decided, the Seventh Circuit again decided a case involving alleged reverse discrimination and a Title IX violation when men's teams were cut from an athletic department in *Boulahanis v. Board of Regents*.<sup>104</sup> In *Boulahanis*, former members of the men's soccer and wrestling teams claimed that the elimination of men's teams denied them "equal athletic opportunity" under Title IX.<sup>105</sup> The cuts were a response to a Title IX compliance investigation done by the

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equality among teams would undoubtedly have been the easiest to comply with, but requiring such a rigid approach would deny schools the flexibility to respond to men's and women's differing interests in athletics. *Id.* The substantial proportionality benchmark provides schools with a clear way to establish compliance, and men's teams may be cut based on gender to meet the requirements. *Id.*; see also Heckman, *supra* note 91, at 563 (noting that Title IX regulations did not require separate, parallel teams for each gender and "the operation of separate sex teams . . . when participation is based on competitive skill or when the team competes in a 'contact' sport" was acceptable).

<sup>102</sup> *Kelley*, 35 F.3d at 272. Removing the legacy of sexual discrimination, including discrimination in athletics, is an important government objective; therefore, the court must give deference to Congress in remedying this discrimination. *Id.* Men's participation in athletics at the university, even after the elimination of the swimming program, was proportionately higher than that of their female counterparts. *Id.* at 270. "[I]f the percentage of student-athletes of a particular sex is substantially proportionate to the percentage of students of that sex in the general student population, the athletic interests of that sex are presumed to have been accommodated." *Id.*; see also Jurewitz, *supra* note 7, at 314 (stating that the court held that "the law permits discriminatory remedial measures provided that they are substantially related to prohibiting gender discrimination"); Reuscher, *supra* note 7, at 137 (noting that "even though the elimination of the program excluded [plaintiffs] from varsity participation as individuals, the percentage of all men participating in the varsity program [was] more than substantially proportionate to the percentage of men represented by the undergraduate population" and, therefore, Title IX was not violated (internal quotation marks omitted)).

<sup>103</sup> *Kelley*, 35 F.3d at 272-73. The court granted summary judgment in favor of the university. *Id.* at 267. The district court correctly ruled that the University of Illinois did not violate Title IX or the Equal Protection Clause in its decision to terminate the men's swimming team. *Id.* at 272-73.

<sup>104</sup> 198 F.3d 633 (7th Cir. 1999). The court stated that the plaintiff-appellants' argument was substantially similar to that already considered in *Kelley*. *Id.* at 637.

<sup>105</sup> *Id.* at 635. The court stated that unless the judicial system is willing to mandate spending by universities to increase opportunities for the underrepresented sex, the OCR's proportionality rule must be read to allow the elimination of men's athletic teams to achieve Title IX compliance. *Id.* at 638; see also Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L. 75, 103 (2003) (noting that because of the difficulty in distinguishing decisions made solely due to financial reasons from those made to comply with Title IX, the Seventh Circuit refused to distinguish *Boulahanis* from *Kelley*).

## 578 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

Gender Equity Committee, which found the school to be in violation of the statute.<sup>106</sup> The court ruled that “the elimination of men’s athletic programs [was] not a violation of Title IX as long as men’s participation in athletics continues to be ‘substantially proportionate’ to their enrollment.”<sup>107</sup>

The men’s teams argued that if Title IX is interpreted to permit the elimination of men’s teams solely on the basis of sex, the Equal Protection Clause would be violated.<sup>108</sup> However, the court, following *Kelley*, ruled that Title IX’s objective to prohibit discrimination in the historically underrepresented gender is accomplished by pursuing substantial proportionality.<sup>109</sup> Neither Title IX nor the Equal Protection Clause is violated by the elimination of men’s teams to comply with the Title IX proportionality requirement.<sup>110</sup>

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<sup>106</sup> *Boulahanis*, 198 F.3d at 635. In the fall of 1993, the Gender Equity Committee of Illinois State University began a year-long investigation into Title IX compliance at the school. *Id.* The committee found that the university’s student body consisted of 45% males and 55% females, while the athletic participation was 66% men and 34% women. *Id.* The school had not added a women’s athletic team in over ten years and did not believe that it could fully and effectively accommodate the interests and abilities of the female student-body; therefore, the school decided to focus on the substantial proportionality requirement. *Id.* The university began finding ways to comply with Title IX and eventually decided to eliminate men’s wrestling and soccer, add women’s soccer, and reduce men’s roster spots on other teams. *Id.* at 636. This adjustment changed the athletic participation ratio to 52% women and 48% men. *Id.*; see also Pieronek, *supra* note 105, at 103 (“Because [ISU] has achieved substantial proportionality between men’s enrollment and men’s participation in athletics, it is presumed to have accommodated [men’s] athletic interests.” (alterations in original)).

<sup>107</sup> *Boulahanis*, 198 F.3d at 638. The court also noted, as it did in *Kelley*, that if a university has achieved substantial proportionality between men’s enrollment and athletics, it is presumed to have accommodated the athletic interests of that sex. *Id.*

<sup>108</sup> *Id.* at 639; see also Pieronek, *supra* note 105, at 103 (quoting *Boulahanis*, 198 F.3d at 639) (noting that the students “argu[ed] that they [had] a protected property interest in participating in athletics” and cutting the team would violate the Equal Protection Clause, and the court dismissed the action after recognizing that Title IX preempted equal protection claims (internal quotation marks omitted)).

<sup>109</sup> *Boulahanis*, 198 F.3d at 639. The purpose of Title IX “is not to ensure that the athletic opportunities available to women increase. Rather its avowed purpose is to prohibit educational institutions from discriminating on the basis of sex.” *Id.* (quoting *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994)) (internal quotation marks omitted). The elimination of the men’s soccer and wrestling teams by the university “were substantially related” to achieving this objective and complying with Title IX’s proportionality requirement. *Id.*; see also Pieronek, *supra* note 105, at 104 (noting that in providing remedies under Title IX, Congress created a regime of redress of sex discrimination in athletics).

<sup>110</sup> *Boulahanis*, 198 F.3d at 639. The court reflected its holding in *Kelley* and stated that “[w]hile the effect of Title IX and the relevant regulation and policy interpretation is that institutions will sometimes consider gender when decreasing their athletic offerings, this limited consideration of sex does not violate the Constitution” or Title IX. *Id.* (alteration in original) (quoting *Kelley*, 35 F.3d at 272) (internal quotation marks omitted).

In *Neal v. Board of Trustees*,<sup>111</sup> decided the same year as *Boulahanis*, the Ninth Circuit Court held that the university's decision to reduce roster spots available to male athletes, to remedy imbalance between genders, did not violate Title IX.<sup>112</sup> The cuts to the men's wrestling program were made in compliance with a previous lawsuit in which the California State University system was found to be violating Title IX's proportionality requirement.<sup>113</sup> The district court granted a preliminary injunction preventing the reductions, stating that capping men's teams to comply with Title IX violated the statute as a matter of law.<sup>114</sup> On appeal, the Ninth Circuit reversed and vacated the injunction, stating that Title IX was not violated when the university cut opportunities for the overrepresented gender.<sup>115</sup>

The men argued that equal opportunity is best achieved when each gender's athletic participation roughly matches its *interest* in participating.<sup>116</sup> However, the court ruled that basing compliance on

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<sup>111</sup> 198 F.3d 763 (9th Cir. 1999).

<sup>112</sup> *Id.* at 770. A university may "comply with Title IX by leveling down programs instead of ratcheting them up" to ensure substantial proportionality. *Id.* The court stated that "Title IX does not bar universities from taking steps to ensure that women are approximately as well represented in sports programs as they are in student bodies," and therefore cuts to men's athletic teams were not prohibited. *Id.* at 773; see also Danielle M. Ganzi, Note, *After the Commission: The Government's Inadequate Responses to Title IX's Negative Effect on Men's Intercollegiate Athletics*, 84 B.U. L. REV. 543, 553 (2004) (noting that the court acknowledged that "the Policy Interpretation [of Title IX compliance] simply creates a *presumption* . . . that a school has violated Title IX if there is a statistical disparity between the sexes in their athletic program").

<sup>113</sup> *Neal*, 198 F.3d at 765. Female students made up 64% of the student body at California State University, Bakersfield ("CSUB"), but only represented 39% of the athletic population. *Id.* In response to a lawsuit filed by the National Organization for Women, CSUB agreed to adjust athletic participation to within five percentage points of the student enrollment. *Id.* At the time, "California was slowly emerging from a recession, and state funding . . . was declining," creating a problem for schools that wished to expand opportunities. *Id.* CSUB adopted "squad size targets" to comply with Title IX by reducing the size of men's teams across the board, instead of eliminating entire men's teams. *Id.*

<sup>114</sup> *Id.* at 766. "The district court concluded as a matter of fact that CSUB's primary motivation for capping the size of the men's teams was to meet the gender proportionality requirements in the consent decree." *Id.* It ruled that, as a matter of law, capping men's teams violated Title IX. *Id.*; see also Capasso, *supra* note 73, at 839 (noting that the district court granted the preliminary injunction in favor of the male athletes by ruling that the gender-based distinction in implementing cuts created a quota system, which was a violation of Title IX).

<sup>115</sup> *Neal*, 198 F.3d at 765; see also Ganzi, *supra* note 112, at 553 (stating that "the Ninth Circuit found that the district court had not deferred sufficiently to the Policy Interpretation" issued by the OCR regarding Title IX compliance).

<sup>116</sup> *Neal*, 198 F.3d at 767. "Appellees therefore suggest that gender-conscious remedies are appropriate only when necessary to ensure that schools provide opportunities to males and females in proportion to their relative levels of interest in sports participation." *Id.* The court stated that male athletes have been given an enormous head start in athletics,

## 580 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

interest instead of composition of enrollment would ignore the fact that Title IX was enacted to remedy discrimination that results from gender stereotyped notions about women's interests and abilities.<sup>117</sup> Every court that has ruled on Title IX violations "has held that a university may bring itself into Title IX compliance by [either] increasing athletic opportunities for the underrepresented gender . . . or . . . decreasing athletic opportunities for the overrepresented gender."<sup>118</sup> Therefore, Title IX was not violated by the reduction in men's roster spots to achieve substantial proportionality.<sup>119</sup>

Finally, *Equity in Athletics, Inc. v. Department of Education* is the most recent case involving Title IX violations and reverse discrimination in the elimination of men's teams.<sup>120</sup> In *Equity in Athletics*, an association of sports participants, coaches, and fans sued the ED claiming a Title IX violation.<sup>121</sup> The lawsuit focused on James Madison University's ("JMU") decision to cut ten athletic teams from the athletic department to comply with Title IX.<sup>122</sup> The court held that Title IX should not be

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and therefore Title IX "prompt[s] universities to level the proverbial playing field." *Id.*; see also Buzuvis, *supra* note 7, at 865 (noting that the court in *Cohen* ruled that the third prong of compliance "may require a university 'to give the underrepresented gender . . . a larger slice of a shrinking athletic-opportunity pie'" (quoting *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993))).

<sup>117</sup> *Neal*, 198 F.3d at 768. The central aspect of Title IX's purpose was to encourage women to participate in sports, but basing compliance on stereotypes of women's interests does not allow that purpose to grow. *Id.* Title IX must be viewed as a dynamic statute that adjusts with the "continuing progress toward the goal of equal opportunity for all athletes." *Id.* at 769.

<sup>118</sup> *Id.* at 769-70; see *id.* at 770 (citing cases that recognize that institutions experiencing financial difficulties may have to resort to reducing the number of opportunities where it is impractical to increase opportunities).

<sup>119</sup> *Id.* at 773. A university must provide athletic opportunities in proportion to the gender composition of the student body and this can be achieved "by increasing . . . opportunities for the underrepresented gender . . . or by decreasing opportunities . . . for the overrepresented gender." *Id.* at 770; see also COZZILLO ET AL., *supra* note 36, at 913 (noting that compliance by contraction is consistent with 1979 OCR interpretations of the Title IX regulations); Benedetto, *supra* note 35 ("Under Title IX, there must be proportionality between men's and women's teams based on the total enrollment at the school.").

<sup>120</sup> 675 F. Supp. 2d 660 (W.D. Va. 2009).

<sup>121</sup> *Id.* at 667. The primary purpose for James Madison University's ("JMU") decision to cut teams was to bring the school into compliance with Title IX. *Id.* The Equity in Athletics Association ("EIA") challenged the Title IX interpretive guidelines that permit colleges to engage in the kind of gender-based decision making that Title IX was intended to prevent. *Id.*

<sup>122</sup> *Id.* at 666. In 2006, JMU decided to cut ten varsity athletic teams to bring itself into Title IX compliance. *Id.* The teams that were cut included men's archery, cross-country, gymnastics, indoor track, outdoor track, swimming, and wrestling, as well as women's archery, fencing, and gymnastics. *Id.* At the time of the cuts, JMU consisted of 61% women and 39% men within the student body and 51% women and 49% men in the athletic

interpreted to *require* proportionality between athletics and general enrollment, but the statute authorizes institutions to comply in such a manner.<sup>123</sup> Therefore, Title IX is not violated when opportunities for the overrepresented sex are decreased based on gender.<sup>124</sup>

“To state an equal protection claim, a plaintiff must [show] sufficient facts to ‘demonstrate that he has been treated differently from others’” in a similar situation and the treatment must be “the result of intentional or purposeful discrimination.”<sup>125</sup> The court ruled that JMU made gender-based cuts to ensure compliance with a federal law and not with the intention of discriminating against one sex.<sup>126</sup> Therefore, JMU’s

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department. *Id.* After the cuts, the ratio of women participating in athletics would mimic that of enrollment (61% women and 39% men). *Id.* at 667.

<sup>123</sup> *Id.* at 670. The first prong of the three-part compliance test authorizes, rather than requires, schools to engage in gender balancing to comply with Title IX. *Id.* Although the statute does not require proportionality, it does not forbid it either. *Id.*; *see also* Capasso, *supra* note 73, at 836 (noting that although Title IX does not require institutions to provide every athletic opportunity, it does “require[] an academic institution to establish a new team or upgrade an existing club team if there is a sufficiently high unmet need in the underrepresented gender”).

<sup>124</sup> *Equity in Athletics*, 675 F. Supp. 2d at 672. In determining how an institution will comply with Title IX, it may sometimes consider gender when decreasing its athletic program, but such limited consideration does not violate Title IX or the Equal Protection Clause of the Constitution. *Id.*

<sup>125</sup> *Id.* at 679–80 (emphasis omitted) (quoting *Williams v. Hansen*, 326 F.3d 569, 576 (4th Cir. 2003)). A plaintiff must present proof in the form of “sufficient facts to demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination.” *Id.* (emphasis omitted) (quoting *Williams*, 326 F.3d at 576) (internal quotation marks omitted); *see also* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 730 (2007) (stating that equal protection requires “that the [g]overnment must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class” (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995))); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979) (noting that disparate impact and foreseeable consequences are relevant to prove an equal protection claim); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954) (discussing equal protection claims in a school desegregation case and noting that equal protection of law is guaranteed by the Fourteenth Amendment); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 514 (2003) (noting that motive is often a factor when determining whether there is a valid equal protection claim); *A Brief History of School Desegregation*, AUSTIN CHRON. (June 10, 2005), <http://www.austinchronicle.com/news/2005-06-10/274239/> (discussing equal protection as it applies to school desegregation).

<sup>126</sup> *Equity in Athletics*, 675 F. Supp. 2d at 680. The university’s actions were taken in an attempt to comply with the requirements of Title IX and therefore were not considered “intentional or purposeful discrimination.” *Id.* (emphasis omitted) (quoting *Williams*, 326 F.3d at 576); *see also* Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 840 (2011) (noting that in *Ricci v. DeStefano*, decided in 2009, the government’s “ultimate aim . . . was to comply with [a] federal law” even though the actions were “race dependant in the sense that its actions likely would have been different but for the race of

## 582 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

decision to cut athletic teams to comply with Title IX proportionality requirements did not violate Title IX or the Equal Protection Clause.<sup>127</sup>

The differences in the outcome of traditional Title IX cases and the new reverse discrimination cases show that the courts are focused on remedying past discrimination against women, rather than the equality principle of Title IX.<sup>128</sup> An in-depth look at the downfalls of Title IX's current application—as well as an analysis of the proportionality and fully and effectively accommodated prongs of the compliance test—shows that a change is necessary if Title IX's goal of protecting all athletic participants, regardless of gender, is to be achieved.<sup>129</sup>

## III. ANALYSIS

This Part analyzes the Title IX statute, focusing primarily on the “proportionality” and “fully and effectively accommodated” compliance requirements under the three-prong test.<sup>130</sup> Part III.A discusses problems with the evolution and application of Title IX's three-prong compliance requirement test.<sup>131</sup> Part III.B examines the proportionality requirement of Title IX compliance by analyzing the statute itself along with the courts' interpretations of the requirement.<sup>132</sup> Finally, Part III.C discusses the fully and effectively accommodated prong of the compliance requirements by analyzing the statutory language and the courts' interpretations of this compliance prong.<sup>133</sup>

## A. Shortcomings in Title IX's Evolution and Application

When Title IX was enacted forty years ago, the purpose was to prohibit discrimination in educational institutions on the basis of

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those benefited or disadvantaged by it,” and the court invalidated such an action, ruling it unconstitutional under strict scrutiny review (internal quotation marks omitted)).

<sup>127</sup> *Equity in Athletics*, 675 F. Supp. 2d at 672. Due to previous decisions regarding reverse discrimination and equal protection, the court chose to follow the trend and held that the plaintiff did not state a cause of action; therefore, the university was not prohibited from eliminating teams based on gender. *Id.*

<sup>128</sup> See *supra* Parts II.C.1-2 (discussing Title IX cases and the courts' trends to rule in favor of female athletic teams and against men's teams).

<sup>129</sup> See *infra* Part III (analyzing Title IX's language and compliance requirements, as well as the problems caused by the current application of Title IX).

<sup>130</sup> See *infra* Parts III.A-C (analyzing Title IX and its compliance requirements while discussing the positive and negative effects resulting from the statute's enactment).

<sup>131</sup> See *infra* Part III.A (examining Title IX's negative effect on athletic departments due to its current application).

<sup>132</sup> See *infra* Part III.B (discussing the proportionality requirement under Title IX).

<sup>133</sup> See *infra* Part III.C (analyzing the fully and effectively accommodated prong of the Title IX compliance standards).

gender.<sup>134</sup> This was interpreted to mean creating opportunities for women where there previously were very few opportunities, such as in athletics.<sup>135</sup> The statute has accomplished that goal, as there are more opportunities for women now than ever before.<sup>136</sup> This may be one reason why institutions have a hard time complying with the second prong of the Title IX compliance standards, which requires showing a history and continuation of creating opportunities for the underrepresented gender.<sup>137</sup> In today's society, women have arguably the same opportunities as men throughout their development, especially when it comes to athletics.<sup>138</sup> At some point, athletic programs may have no additional opportunities to offer; therefore, *continued* expansion is nearly impossible.<sup>139</sup>

As currently applied, Title IX has come full circle and now creates discrimination solely on the basis of sex due to the application of the compliance requirements, which have many schools cutting men's sports teams to meet the proportionality standard.<sup>140</sup> Where Title IX was once a statute that focused on *creating* opportunities, it has now become a statute that is *reducing* opportunities for men based solely on their

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<sup>134</sup> See *supra* notes 14, 21 and accompanying text (discussing Title IX's enactment and purpose).

<sup>135</sup> 20 U.S.C. § 1681(a) (2006); see H.R. REP. NO. 96-459, at 35 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1612, 1614 (stating that the purpose for the Educational Amendments is to promote the general welfare of the United States); S. REP. NO. 96-49, at 10-11 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1514, 1524-25 (noting that the need for equal access to educational activities is paramount; Title IX is specifically designed to help end sex discrimination); see also *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994) (noting that removing the legacy of sexual discrimination, including discrimination in athletics, is an important government objective, and therefore the court must give deference to Congress in remedying this discrimination).

<sup>136</sup> See *supra* notes 52-55 and accompanying text (noting the increase in women's participation in sports, also showing that more women are participating in sports now than ever before).

<sup>137</sup> See *COZZILLO ET AL.*, *supra* note 36, at 909 ("[I]n light of the thirty [plus] years since Title IX's passage, it is difficult for [a school] to boast a history and continuing practice of program expansion for women if the school still does not provide proportionally equal opportunities for both sexes.").

<sup>138</sup> See *GLOVER, JR.*, *supra* note 58, at 103 (noting that Title IX has allowed women athletes to come a long way in the participation of athletics as adolescents, as well as in colleges and in the creation of professional leagues); see also *DEHASS*, *supra* note 55, at 9 (stating that female athletes account for fifty percent of student-athletes in Division I, non-football schools, forty-one percent of student-athletes in Division II, and forty-two percent of Division III).

<sup>139</sup> See *supra* notes 55-57 and accompanying text (discussing the difficulties with continued expansion of athletic programs to provide additional opportunities for women).

<sup>140</sup> See *supra* Part II.C.2 (discussing reverse discrimination cases in which men's teams bring claims against universities for Title IX violations when teams are cut).

## 584 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

gender.<sup>141</sup> The spirit in which Title IX was enacted would be better achieved if opportunities were offered on the basis of competitiveness, interest, and feasibility, instead of the ratio of student-athletes by gender.<sup>142</sup> The purpose of Title IX has been discarded in lieu of a quota system that requires universities to provide opportunities to student-athletes, which are determined by gender instead of interest or competitiveness.<sup>143</sup>

The current system of Title IX compliance has some positive effects as well as some drawbacks.<sup>144</sup> The three-prong test that is used to determine compliance gives institutions multiple options, which they can use to determine how they will comply with the statute.<sup>145</sup> Allowing schools to have more than one means of adhering to Title IX gives institutions flexibility, and therefore provides the opportunity for higher compliance rates.<sup>146</sup> Also, the current system has been around for forty

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<sup>141</sup> See Robertson, *supra* note 7, at 307 (noting that from 1981–2001, men lost between 57,100–57,700 participation opportunities, while in the same time period, women gained roughly 52,000 opportunities); compare H.R. REP. NO. 96-459, at 35 (1979), reprinted in 1979 U.S.C.C.A.N. 1612, 1614 (stating that the purpose of Title IX is to prohibit educational institutions from giving preferential or different treatment to members based on sex), with Neal v. Bd. of Trs. of the Cal. Univs., 198 F.3d 763, 769–70 (9th Cir. 1999) (ruling that cutting a men’s wrestling team does not violate Title IX because compliance is presumed in overrepresented gender even when teams are cut), Boulahanis v. Bd. of Regents, 198 F.3d 633, 637 (7th Cir. 1999) (noting that as long as proportionality of athletic opportunities shows an overrepresented gender, that gender is presumed to be fully and effectively accommodated), and Kelley v. Bd. of Trs., 35 F.3d 265, 270 (7th Cir. 1994) (ruling that the elimination of the swimming team did not violate Title IX because men’s participation in athletics remained substantially proportionate).

<sup>142</sup> See Alacbay, *supra* note 7, at 269 (discussing how capping and cuts hurt the overall competitive nature of athletic teams and the school as a whole, and that there is a double standard when schools make a gender-conscious decision toward a men’s team); see also McErlain, *supra* note 35 (discussing the practice of “roster management” and the problems it causes for coaches, teams, and the competitive nature of the sport in general (internal quotation marks omitted)).

<sup>143</sup> See Reich, *supra* note 7, at 569 (noting that even though men’s interest in athletics outweighs that of their female counterparts, men’s teams are still cut to comply with proportionality); Robertson, *supra* note 7, at 306 (noting that the proportionality standard gives universities little choice for compliance and therefore imposes a quota system); see also McErlain, *supra* note 35 (discussing the problems roster management causes for coaches, teams, and the competitive nature of the sport in general).

<sup>144</sup> See *infra* notes 145–54 and accompanying text (discussing the positives and negatives of the current Title IX three-prong compliance test).

<sup>145</sup> See *supra* notes 34–40 and accompanying text (examining the OCR regulations, which set out the three prong test, and how each of the prongs can be utilized to comply with Title IX).

<sup>146</sup> See COZZILIO ET AL., *supra* note 36, at 905 (discussing Title IX compliance and how each of the different prongs may be satisfied, and also noting that universities choose to use different methods when determining compliance).

years; thus, institutions understand what is required under Title IX.<sup>147</sup> Courts have continuously applied the standards in similar ways and the interpretations have given universities direction in how to remain compliant.<sup>148</sup>

The OCR Clarifications—which have been issued to try to remedy reverse discrimination claims and allow institutions to comply with Title IX by evaluating and accommodating the interest of the university—have been unsuccessful and created more problems.<sup>149</sup> There are no clear standards for evaluating the level of interest within the school, the surrounding community, and the athletic department, making assessment of interest a near impossibility for universities.<sup>150</sup> Even worse, if a school is able to adequately assess interest, there is no direction for applying its findings to an athletic department to comply with Title IX and save itself from costly litigation in the future.<sup>151</sup> Finally, the OCR has never set a standard for how often interest must be assessed, and therefore, how long an institution would be in compliance if it could meet this difficult standard.<sup>152</sup> The clarifications have created more problems for institutions and courts who must decide if a school has fully and effectively accommodated the underrepresented gender in its athletic offerings.<sup>153</sup> Therefore, reliance on the proportionality standards has become a way to ensure Title IX compliance.<sup>154</sup>

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<sup>147</sup> See Buzuvis, *supra* note 7, at 828–29 (discussing the history of Title IX and the compliance regulations set forth by the OCR); Hatlevig, *supra* note 7, at 90–97 (outlining the three prongs set forth by the OCR and how they can be applied by institutions to achieve compliance); Jurewitz, *supra* note 7, at 290–91 (discussing the framework of Title IX compliance and its application to athletics); Reuscher, *supra* note 7, at 119–29 (discussing the three prong test and its application and interpretation regarding Title IX compliance).

<sup>148</sup> See *supra* text accompanying note 70 (highlighting that courts traditionally rule in favor of women’s sports teams in Title IX claims, applying the proportionality standard consistently to actions).

<sup>149</sup> See Buzuvis, *supra* note 7, at 840–46 (highlighting problems created by the Model Survey, which was issued in the 2005 Clarification by the OCR to further assess interest under the third prong of the compliance test).

<sup>150</sup> See *id.* (evaluating the subjective nature of the third prong and how a lack of standards creates uncertainty for schools); see also Robertson, *supra* note 7, at 306 (noting that the proportionality standard gives universities little choice for compliance and therefore imposes a quota system).

<sup>151</sup> See Buzuvis, *supra* note 7, at 840–46 (describing the uncertainty caused by the third prong); Robertson, *supra* note 7, at 309 (noting that an alternative approach may be necessary due to a lack of objective direction and the result of women’s and men’s sports being pitted against each other).

<sup>152</sup> See Buzuvis, *supra* note 7, at 840–41 (noting that problems created from the Model Survey have gone unanswered by the OCR, including response rates and frequency of administering the survey).

<sup>153</sup> See *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993) (ruling that when there is sufficient interest and ability among the members of the underrepresented sex and a team

## 586 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

The application of the current Title IX compliance requirements can be compared to other areas of social change where remedying past discrimination has caused other forms of equal protection claims.<sup>155</sup> The current problems in Title IX's application parallel school desegregation cases, in which laws were passed to remedy past racial discrimination by forcing schools to desegregate and prohibit "separate but equal" educational institutions.<sup>156</sup> However, it has recently been argued that forcing racial integration is equally as unconstitutional as racial segregation.<sup>157</sup> Laws that require racial or gender based actions may be invalid even if they are designed to avoid disparate impact liability or remedy past discrimination.<sup>158</sup> The current Title IX compliance system causes a disparate impact on men's athletics—similar to the disparate impact laws involving racial classifications—and therefore should trigger an equal protection cause of action.<sup>159</sup> Since courts do not

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is being eliminated, it is assumed that the institution is not fully and effectively accommodating that sex); see also COZZILLO ET AL., *supra* note 36, at 909 (noting that "it is difficult for a college to defend its lack of proportional opportunities by arguing that it has fully accommodated women's interests and abilities" when there are Title IX compliance complaints).

<sup>154</sup> See *infra* note 166 and accompanying text (discussing proportionality as the "safe harbor" of compliance).

<sup>155</sup> See *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994) (noting that remedying past discrimination is an important government interest; therefore, if the proportionality of athletes favors the overrepresented gender, they will be presumed to be accommodated); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 730 (2007) (stating that equal protection requires "that the [g]overnment must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class"); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954) (discussing equal protection claims in a school desegregation case and noting that equal protection of law is guaranteed by the Fourteenth Amendment).

<sup>156</sup> See *A Brief History of School Desegregation*, *supra* note 125 (noting that "separate but equal" laws were passed in 1896, but were then repealed in 1954 in *Brown v. Board of Education*); see also *Kelley*, 35 F.3d at 271 (noting that the OCR did not require parallel teams for men's and women's sports, but that solution would have been an easy way to ensure Title IX compliance).

<sup>157</sup> See *Adams*, *supra* note 126, at 883 (noting that recently the Supreme Court has adopted an "equivalence doctrine," which states "that there is a moral [and] constitutional equivalence between laws designed to" segregate and those designed to integrate (alteration in original) (internal quotation marks omitted)).

<sup>158</sup> See *id.* at 840 (discussing the Court's ruling in *Ricci* and noting that even if the actions were intended to avoid disparate impact, the action may still qualify as "race-based," and therefore would be invalid (internal quotation marks omitted)); see also *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979) (noting that disparate impact and foreseeable consequences are relevant evidence to prove an equal protection claim).

<sup>159</sup> See *Primus*, *supra* note 125, at 538 (noting that disparate impact standards trigger heightened scrutiny in equal protection claims); *id.* at 515 (discussing Title VII disparate impact law as applied to racial classifications); see also *supra* Part II.C.2 (discussing Title IX

recognize such a claim in men's athletic teams, changes to the current regulations should be used to remedy this problem.<sup>160</sup>

The question then arises, what is the best standard to achieve equality in college athletics? The answer is not as simple as picking one of the standards set forth in the three-prong test.<sup>161</sup> To assess true equality of opportunities, a combination of these standards may be necessary.<sup>162</sup> Both the proportionality and the fully and effectively accommodated standards have drawbacks in their language and application, but a combination of the two prongs may be the best way to satisfy all parties.<sup>163</sup> Adequately assessing the interest in the athletics department and applying a standard that allows schools to offer opportunities that are proportionate to this level of interest would create a win-win situation.<sup>164</sup>

#### *B. Title IX's Proportionality Requirement*

Schools most often choose to comply with Title IX by adhering to the proportionality standard of the three-prong compliance test.<sup>165</sup> This is because it is the most objective and is considered the "safe harbor" by the courts.<sup>166</sup> However, this prong is not necessarily the most "fair"

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cases brought by men's athletic teams claiming equal protection claims and reverse discrimination).

<sup>160</sup> See *infra* Part IV (proposing a new compliance standard, which would remedy the courts' refusal to recognize a cause of action in men's Title IX claims).

<sup>161</sup> See *infra* Parts III.B-C (discussing the downfalls of both the first and third prongs of the Title IX compliance requirements).

<sup>162</sup> See *infra* notes 220-22 and accompanying text (suggesting that a combination of two of the compliance prongs may achieve a more equitable environment within athletic departments); *infra* Part IV (suggesting a new standard, which focuses on interest in athletic opportunities instead of focusing solely on gender).

<sup>163</sup> See *infra* Parts III.B-C (discussing the downfalls of both the first and third prongs of the Title IX compliance requirements).

<sup>164</sup> See *infra* Part IV (discussing the benefits of providing schools with a more objective and attainable standard for complying with Title IX).

<sup>165</sup> See *supra* notes 35, 41 and accompanying text (discussing schools' reliance on the proportionality prong for Title IX compliance); see also Robertson, *supra* note 7, at 301 ("[P]ractical considerations make it likely that schools will choose to satisfy the proportionality prong in order to comply with Title IX.").

<sup>166</sup> See GLOVER, JR., *supra* note 58, at 105 (emphasis omitted) (stating that the proportionality standard is considered the "safe harbor" under the statute); Hatlevig, *supra* note 7, at 96 (noting that compliance under the "safe harbor" prong is the most widely pursued compliance requirement due to its objective nature); Jurewitz, *supra* note 7, at 319 (highlighting that cutting men's sports teams appears to be the easiest and most clearly defined method of Title IX compliance); Robertson, *supra* note 7, at 301 (noting that compliance to the most objective of the tests—proportionality—helps prevent costly litigation by institutions, and that the OCR has designated the proportionality test the "safe harbor," making it the most reliable standard).

## 588 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

measure of equality.<sup>167</sup> There have been strong reactions to the proportionality standard and its application to college athletics.<sup>168</sup> Title IX applies to all aspects of federally funded education, including extracurricular activities and classroom curriculum, as well as athletics.<sup>169</sup> However, the application of equal opportunities in areas outside of sports is very different.<sup>170</sup> In other programs, Title IX's focus is to allow all interested parties to participate, where in athletics the focus is on the proportionality of participation.<sup>171</sup> To ensure that men are not given the majority of athletic opportunities, Title IX prohibits sex discrimination and, in practice, if not in theory, imposes a quota system.<sup>172</sup>

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<sup>167</sup> See GLOVER, JR., *supra* note 58, at 106–07 (noting that the third prong, while difficult, is more equitable than the other prongs); Robertson, *supra* note 7, at 301–02 (stating that the third prong of Title IX compliance standards—fully and effectively accommodated—is probably the most fair and equitable measure of compliance).

<sup>168</sup> See Hatlevig, *supra* note 7, at 99–100 (explaining that reliance on the proportionality requirement creates hostility within institutions when teams are cut to save money, and also noting that proportionality under Title IX creates an atmosphere for reverse discrimination claims); Klinker, *supra* note 7, at 88 (giving a brief overview of how Title IX proportionality affects collegiate teams, especially men's low-revenue-producing programs); Robertson, *supra* note 7, at 306–07 (discussing the negative effects resulting from the proportionality requirement, such as quota systems, discrimination against men based solely on gender, and divergence from the original goal of the enactment).

<sup>169</sup> See Daniel, *supra* note 7, at 293 (noting that the Title IX statute doesn't mention athletics specifically and that it refers to *all* educational activities); Robertson, *supra* note 7, at 304–05 (explaining Title IX compliance as it relates to other areas of education, such as classroom settings).

<sup>170</sup> See Robertson, *supra* note 7, at 305 (noting that schools do not have separate male and female engineering majors within an institution, and therefore Title IX does not require that an equal number of engineering spots be filled by men and women, but rather that no one will be denied the opportunity to join the engineering program based on his or her sex); *see also id.* (explaining that the proportionality standard is applied differently to athletics where opportunities are designated based on gender).

<sup>171</sup> See Daniel, *supra* note 7, at 261–62 n.25 (quoting B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 Wis. L. REV. 647, 648 (1995)) (contemplating whether equality is determined by equal opportunity or equal participation, and that the debate is further complicated by the segregation of genders); Robertson, *supra* note 7, at 305 (noting that removing gender designations in athletics would allow focus to return to interest in participating and therefore create a less discriminatory method for enforcing Title IX, but the practical effect would be a decline in women's participation in sports); *see also supra* note 170 and accompanying text (discussing Title IX's focus when considering areas outside of athletics).

<sup>172</sup> See Reuscher, *supra* note 7, at 157 (recognizing that despite the original intent and legislative history of Title IX, it currently operates as a quota system rather than an anti-discrimination statute); Robertson, *supra* note 7, at 306 (stating that by managing the number of roster spots on teams to fit within proportionality, Title IX essentially enforces a quota system on participation); McElDowney, *supra* note 35 (explaining that "compliance" for universities usually "means applying a quota standard").

The current use of the proportionality prong provides institutions with a quantitative method to determine compliance under Title IX.<sup>173</sup> Also, since the proportionality prong is so commonly used by institutions and applied by courts, schools understand how to use the current standard for compliance via the athletic department.<sup>174</sup> Members of the university, the administration, and the judicial branch can easily apply the current standard without fear of confusion.<sup>175</sup> This benefit allows schools to know exactly what is expected of them to comply with the statute.<sup>176</sup> However, this ease of use doesn't necessarily make the proportionality standard the most equitable way of complying with Title IX.<sup>177</sup>

Universities are left little practical choice when determining how to comply with Title IX proportionality.<sup>178</sup> The schools' choices are creating teams for the underrepresented gender or cutting teams for the overrepresented gender until the ratio of student-athletes to general enrollment is acceptable.<sup>179</sup> Universities often feel compelled to cut

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<sup>173</sup> See Benedetto, *supra* note 35 (“[U]nder Title IX, there must be proportionality between men’s and women’s teams based on the total enrollment at the school.”); McEldowney, *supra* note 35 (explaining that compliance for universities usually means applying a quota standard that requires schools to maintain the “same ratio of men and women on the playing field as in the classroom”).

<sup>174</sup> See *Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 1999) (stating that the university had to provide athletic opportunities proportionate to the gender composition of the student body); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 641 (7th Cir. 1999) (ruling that the university’s elimination of men’s soccer and wrestling programs helped to achieve Title IX compliance under the proportionality standard); see also COZZILLO ET AL., *supra* note 36, at 909 (noting that it is simply assumed that compliance will be measured in terms of substantial proportionality).

<sup>175</sup> See *supra* notes 74, 87, 100, 106, 113 and 122 (discussing courts’ interpretations of how to apply proportionality by evaluating the number of students in the institution’s general enrollment compared to the number of student-athletes of each gender, thereby setting the standard for application of proportionality).

<sup>176</sup> See Hatlevig, *supra* note 7, at 92-93 (discussing the first prong of the Title IX compliance test and noting that universities can rely on the objective nature of proportionality when complying with Title IX).

<sup>177</sup> See *infra* text accompanying notes 200-02 (noting that compliance is not best achieved by using the proportionality standard within athletics); see also *infra* Part IV (proposing a new standard that will allow schools to more equitably comply with Title IX).

<sup>178</sup> See Eckes, *supra* note 7, at 697 (noting that the practical result of Title IX is that many schools feel that the best way to comply is to cut men’s programs); Robertson, *supra* note 7, at 306 (pointing out that Title IX does not require schools to cut teams, but in lieu of creating opportunities for women in hard economic times, it seems to be the only practical possibility).

<sup>179</sup> See *supra* notes 60-61 and accompanying text (discussing that compliance by contraction is acceptable in lieu of creating more opportunities for women); see also *supra* notes 34, 77 and accompanying text (noting that schools may comply with Title IX by showing a history and continuation of program expansion).

## 590 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

men's non-revenue sports to meet the requirements due to: (1) the lack of economic resources in college athletic departments; (2) the drain on resources by revenue sports; and (3) the uncertainty in satisfying Title IX using any method other than proportionality.<sup>180</sup>

There are also practicality problems with the proportionality standard when institutions and courts try to determine how to define substantial proportionality.<sup>181</sup> Problems such as differences in roster-size requirements between men's and women's sports, revenue production, and levels of interest are among the major practicality concerns when applying the proportionality standard.<sup>182</sup> Many suggestions have been proposed to remedy this impracticality; for instance, some argue that revenue-producing sports and non-revenue sports should be distinguished for Title IX purposes.<sup>183</sup> Defining "sport" is an issue that

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<sup>180</sup> See COZZILLO ET AL., *supra* note 36, at 913 (noting that compliance by contraction is consistent with 1979 OCR interpretations of the Title IX regulations, but draws battle lines between men's and women's athletic teams); Marburger & Hogshead-Makar, *supra* note 7, at 81-82 (recognizing that the marginal benefit of each dollar spent on football and basketball tends to exceed the marginal benefit of each dollar spent on non-revenue sports); Reich, *supra* note 7, at 553-56 (presenting problems with applying the proportionality standard and offering a solution to these application problems); Robertson, *supra* note 7, at 306 (explaining that resources are needed to assist any sports team, especially high cost revenue-producing programs, and that with a drain on these resources, institutions view the elimination of men's teams as the only viable solution to Title IX violations); see also Cohen v. Brown Univ., 991 F.2d 888, 898-99 n.15 (1st Cir. 1993) (indicating that Title IX does not require a school to continue to add money and programs into an athletic department, as "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").

<sup>181</sup> See Neal v. Bd. of Trs. of the Cal. State Univ., 198 F.3d 763, 765 (9th Cir. 1999) (implying that institutions striving to be within five percentage points when evaluating the student-athlete to general enrollment ratio will be considered in compliance with the proportionality requirement); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993) (noting that the ratio of student-athletes to general enrollment does not have to be exactly the same when determining proportionality, because if the two numbers are substantially similar, they will be accepted); see also GLOVER, JR., *supra* note 58, at 64 (noting that men's athletic teams have become the victim of Title IX regarding compliance with the substantial proportionality requirement because they have historically been larger and better-funded).

<sup>182</sup> See *infra* notes 183-89 and accompanying text (discussing arguments that would help solve problems presented when applying the proportionality standard to athletic departments).

<sup>183</sup> See Reich, *supra* note 7, at 553 (discussing that in most schools, the major revenue-producing sports, such as football and basketball, allow non-revenue sports to exist). In 2000, the average profit (revenue minus costs) generated from football and basketball alone was roughly \$1.8 million, while all of women's sports produced a \$1.7 million deficit; therefore, revenue-producing sports should be exempt from the proportionality requirement because they make it possible for all other sports to operate. *Id.*; see also Robertson, *supra* note 7, at 308 (noting large differences between revenue-producing sports

has also incurred much debate.<sup>184</sup> Finally, the most prevalent argument has been that proportionality would be more fairly assessed by eliminating football from the proportionality equation.<sup>185</sup> All of these proposed solutions would dramatically enhance the practicality of the proportionality standard for Title IX compliance by making application more equitable.<sup>186</sup> However, these arguments have either been expressly rejected by courts or not accepted in Title IX interpretations.<sup>187</sup> Applying

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and non-revenue sports of any gender, and that men's non-revenue sports are suffering the consequences of the proportionality requirement's interpretation solely because of their gender, which is a result that seems to attack the core purpose of Title IX).

<sup>184</sup> See Letter From Nat'l Coordinator of Title IX Athletics, *supra* note 42 (explaining that the OCR makes various inquiries when determining whether an activity is a "sport"). To determine whether the activity is a sport, the OCR will consider the following on a case-by-case basis:

[W]hether selection for the team is based upon objective factors related primarily to athletic ability;

[W]hether the activity is limited to a defined season;

[W]hether the team prepares for and engages in competition in the same way as other teams in the athletic program with respect to coaching, recruitment, budget, try-outs and eligibility, and length and number of practice sessions and competitive opportunities;

[W]hether the activity is administered by the athletic department; and,

[W]hether the primary purpose of the activity is athletic competition and not the support or promotion of other athletes.

*Id.* (footnote omitted); see also *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 94 (D. Conn. 2010) (ruling that cheerleading could not be used in the proportionality equation because it was not a sport according to the NCAA and therefore not governed by Title IX); Reich, *supra* note 7, at 556-57 (noting that the OCR is currently responsible for defining what is considered an "athletic opportunity" under the statute, and the definition that is currently used removes many possible student-athletes, such as competitive cheerleaders, from the equation).

<sup>185</sup> Reich, *supra* note 7, at 550-53 (providing statistics regarding female and male participation in sports, and specifically discussing the possibility of exempting football and basketball programs for Title IX purposes). According to the NCAA, in 1999-2000, male athletic participants at Division I schools averaged 233.3, compared to 162.6 female athletes; however, 116.8 of the male athletes at these schools participated in football. *Id.* at 553. Because there is no equivalent women's sport in terms of roster spots, football skews the results of equal participation in sports. *Id.* If football is removed from the above calculation, female athletes actually outnumber male athletes 162.6 to 116.5. *Id.*

<sup>186</sup> See Buzuvis, *supra* note 7, at 875 (discussing the impracticality of the three-prong test); Robertson, *supra* note 7, at 322 (noting that the purpose of Title IX is to create opportunities, and if the proportionality prong continues to be applied as it has been, opportunities for all athletes will decrease, therefore causing a drop in interest in non-revenue men's sports as well as women's sports).

<sup>187</sup> See Reich, *supra* note 7, at 569-70 (recognizing that the suggestions to adjust the proportionality standard to make it more reasonable have fallen on deaf ears in the OCR and the courts); see also *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 342 (3d Cir. 1993) (ruling that even though IUP offered more men's teams than women's teams, the focus should be on the total number of athletes when determining proportionality); *Cohen v. Brown Univ.*, 991 F.2d 888, 900 (1st Cir. 1993) (giving deference to the interpretation of the OCR and,

## 592 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

any of these proposed remedies would account for the realistic discrepancies between sports teams and would create a more equitable standard for Title IX compliance under the proportionality prong.<sup>188</sup>

The final argument for improving the practicality of Title IX compliance has been to use a *relative-interest* proportionality standard.<sup>189</sup> Under this standard, the ratio of participating student-athletes would need to be proportionate to the level of comparative interest in participating in athletics.<sup>190</sup> This argument is supported by evidence suggesting that the general student body is often not comparable to the pool from which athletes are drawn.<sup>191</sup> In many cases, more women attend institutions of higher education for the sole purpose of obtaining a degree, rather than participating in athletics.<sup>192</sup> The opposite is often true in the case of men; athletics play a much more important role in their decision to attend a college.<sup>193</sup> Additionally, some argue that extracurricular activities should be evaluated as a whole instead of individually by program since the relative interest in other areas of

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therefore, evaluating compliance based on student-athletes, not total teams provided, while also rejecting Brown's claim that proportionality should be based on relative interest instead of general student enrollment).

<sup>188</sup> See *supra* notes 183–87 and accompanying text (providing various proposed remedies to resolve the issues resulting from the proportionality requirement under Title IX).

<sup>189</sup> See *Cohen*, 991 F.2d at 899 (arguing that the institution should be allowed to satisfactorily accommodate female interest by offering "athletic opportunities to women *in accordance with the ratio of interested and able women* . . . regardless of the number of unserved women or the percentage of the student body that they comprise").

<sup>190</sup> See *id.* ("[T]o the extent students' interests in athletics are disproportionate by gender, colleges should be allowed to meet those interests incompletely as long as the school's response is in direct proportion to the comparative levels of interest.").

<sup>191</sup> See Jurewitz, *supra* note 7, at 288 (discussing the difference in the recruitment of athletes and students when compiling a student body); Robertson, *supra* note 7, at 307 (noting that "college athletes are drawn from the pool of eligible people with the talent and interest in college athletics, which includes people from all over the globe," while often times the general enrollment of a school is limited to a more centralized geographic area).

<sup>192</sup> See Robertson, *supra* note 7, at 308 (discussing that women's athletics are often viewed as extracurricular activities that complement the primary purpose of obtaining a quality education). See generally *Favia*, 7 F.3d at 335 (noting that 56% of the university's population consisted of female students, but only 38% competed in athletics); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) ("During the three years that were the subject of . . . review, the differences between women enrolled and women athletes were 7.5%, 12.5%, and 12.7%."); *Cohen*, 991 F.2d at 892 (acknowledging the disproportionate ratio of female student-athletes to women as general members of an institution's enrollment).

<sup>193</sup> See Reich, *supra* note 7, at 569 (noting that the desire to participate is often higher in men, and providing that the average men's track team will attract thirty-two members, while the corresponding female team will attract only twenty-seven); Robertson, *supra* note 7, at 308 (noting that men's athletics, especially revenue-producing sports, tend to take the priority in a student's life over his academics, thereby causing the apparent discrepancy in interest). See generally *Cohen*, 991 F.2d at 892 (noting the swing in enrollment numbers from the 1970s to the present day and accounting for part of the proportionality problem).

education—such as music and theatre—tends to be higher in women; and, therefore, the overall ratio of extracurricular participants is relatively equal.<sup>194</sup> Looking at relative interest when determining proportionality of participation is a more fair assessment of equality of opportunities than the general enrollment standard.<sup>195</sup>

The relative-interest standard has been rejected by courts, however, in favor of the standard proportionality equation.<sup>196</sup> As mentioned earlier, it has been noted that opportunity breeds interest in athletics.<sup>197</sup> Therefore, limiting opportunities to the amount of interest currently assumed would suppress the advancement of any sport, but specifically women's sports.<sup>198</sup> Also, by relying on relative interest, the school detracts from the legislature's desire to remedy past discrimination against women in educational settings and promotes stereotypes about women in athletics.<sup>199</sup> Finally, it is argued that the relative-interest standard causes problems in assessing the interest level due to its subjective nature.<sup>200</sup>

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<sup>194</sup> See Hueben, *supra* note 7, at 673–74 (stating that the proportionality challenge, under Title IX, is that athletics tend to get separated from all other collegiate activities); Robertson, *supra* note 7, at 308 (noting that other extracurricular activities apply a different standard than athletic departments are required to apply when assessing Title IX compliance).

<sup>195</sup> See *Cohen*, 991 F.2d at 899 (discussing Brown's argument that comparative interest better assesses the satisfaction of the program based on those that are actually willing and able to participate).

<sup>196</sup> See *id.* at 899–900 (ruling that Brown's argument that the proportionality standard should be a relative interest was wrong as a matter of law and policy, stating that the policy would stifle advancement of women in athletics and promote common stereotypes); see also *Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763, 767–68 (9th Cir. 1999) (noting that other jurisdictions had rejected the "relative interests" argument, and that a school can comply with Title IX by providing opportunities proportionate to the general enrollment of the university, and therefore, followed suit).

<sup>197</sup> See *Cohen*, 991 F.2d at 900 (stating that opportunity breeds interest and women would benefit from expansion of opportunities).

<sup>198</sup> See *id.* (stating that evaluating interest and ability under situations where women are provided less opportunities would not be an effective assessment of true interest); see also Buzuvis, *supra* note 7, at 846 (discussing that the Model Survey, a tool to judge interest, creates a standard that institutions rely on, and possibly creates a system where the status quo is continued and new opportunities no longer seem to be necessary); Reich, *supra* note 7, at 556–57 (noting that the OCR's interpretation of "athletic opportunities" may be partially to blame for limitations on female participation under Title IX, rather than unfounded stereotypes).

<sup>199</sup> See *supra* note 102 and accompanying text (discussing Congress' desire to remedy past discrimination under Title IX).

<sup>200</sup> See Buzuvis, *supra* note 7, at 841–46 (discussing ambiguities under the Model Survey of judging interest, and noting that problems include response rates, passive responses, and the subjective nature of questions).

## 594 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

Even though most schools choose to comply with the proportionality standard, there are many problems with its practicality.<sup>201</sup> Aside from creating a quota system that institutions must follow, it often creates a reverse discrimination effect against men's teams.<sup>202</sup> Title IX's proportionality standard is not the most effective method of achieving equality, though it is often the easiest.<sup>203</sup>

C. *The Fully and Effectively Accommodated Standard*

The third prong of the Title IX compliance test is a more equitable method of providing equal opportunities for members of both genders.<sup>204</sup> Determining whether there is full and effective accommodation depends on many factors such as satisfaction in the current program, whether there is unmet interest, and whether there is a waste of adequate talent by not providing a given athletic team.<sup>205</sup> Evaluating interest in athletic opportunities would allow athletic departments to offer programs that equally accommodate all parties, which is what the third prong attempts to achieve.<sup>206</sup> However, there are drawbacks to this compliance requirement as well.<sup>207</sup>

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<sup>201</sup> See *supra* notes 181-85 and accompanying text (discussing the practicality problems with Title IX's proportionality standard as it is currently applied to institutions).

<sup>202</sup> See Reuscher, *supra* note 7, at 157 (recognizing that despite the original intent and legislative history of Title IX, it currently operates as a quota system and not an anti-discrimination statute); Robertson, *supra* note 7, at 306 (stating that by managing the number of roster spots on teams to fit within proportionality, Title IX essentially enforces a quota system on participation).

<sup>203</sup> See Robertson, *supra* note 7, at 302 (noting that the third prong of the compliance test is probably the most fair and equitable measure of compliance, but is hard to satisfy).

<sup>204</sup> See Buzuvis, *supra* note 7, at 836 (stating that allowing schools to use surveys to assess interest in athletics provides a more accurate representation of students' needs and therefore is a better option for Title IX compliance); Robertson, *supra* note 7, at 304 (noting that focusing on interest instead of hard numbers to determine Title IX compliance is a more equitable way of assessing accommodation).

<sup>205</sup> See Letter from Russlynn Ali, *supra* note 33 (noting that unmet interest and satisfaction in the current program should be factors used to determine Title IX compliance under the third prong of the test); see also *Cohen v. Brown Univ.*, 991 F.2d 888, 904 (1st Cir. 1993) (stating that there would be a waste of talent and interest if Brown University was allowed to cut the women's gymnastics and volleyball teams, and therefore they had not "fully and effectively" accommodated the female athletes).

<sup>206</sup> See Letter from Russlynn Ali, *supra* note 33 (setting out guidelines for institutions to use when evaluating interest and ability and, therefore, creating a more practical alternative to the proportionality standard); see also Buzuvis, *supra* note 7, at 836 (stating that allowing schools to use surveys to assess interest in athletics provides a more accurate representation of students' needs and therefore is a better option for Title IX compliance).

<sup>207</sup> See *infra* notes 208-17 and accompanying text (discussing problems with the current Title IX standards under the third prong of the compliance requirements).

The first, and largest, problem with the third prong of the compliance test is the subjectivity of the regulation's language and the interpretation by the OCR and courts.<sup>208</sup> Whether there is unmet interest and ability is assessed first when determining Title IX compliance under this prong.<sup>209</sup> Unmet interest and ability, along with a reasonable expectation for a competitive team, are the only guidelines that are given under the fully and effectively accommodated test.<sup>210</sup> Questions arise as to how to define "interest," "ability," and "competitive" in this context.<sup>211</sup> It is presumed that there is a necessary level of interest and ability when a team is being cut from an athletic program, regardless of the reason given for the cuts.<sup>212</sup> Finally, there may also be difficulty in determining the level of interest in other areas, such as community support, financing, and coaching, which add to the confusion in applying the standard.<sup>213</sup> This subjective approach to measuring interest and ability creates a problem for institutions looking to comply under this prong of the compliance test.<sup>214</sup>

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<sup>208</sup> See Buzuvis, *supra* note 7, at 833 (noting that part of the problem with the Model Survey was the lack of a clear standard to assess interest and ability, and also stating that the third prong of the compliance test is often skipped when determining compliance because schools are nervous about litigation and proving accommodation).

<sup>209</sup> See Letter from Russlynn Ali, *supra* note 33 (stating that unmet interest is measured by the following criteria: "whether an institution uses nondiscriminatory methods of assessment when determining the athletic interests and abilities of its students; whether a viable team for the underrepresented sex recently was eliminated; multiple indicators of interest; multiple indicators of ability; and frequency of conducting assessments").

<sup>210</sup> See *id.* (noting that when determining compliance for the third prong, the OCR will consider whether there is unmet interest, sufficient ability to sustain a team in the sport, and whether there is a reasonable expectation of competition for the team).

<sup>211</sup> See *id.* (setting out criteria for assessment of the three factors, as the purpose is to provide a clearer standard of assessment under the third prong); see also Buzuvis, *supra* note 7, at 836 (discussing how the lack of concrete definitions creates confusion for institutions looking to show that interest and ability have been accommodated).

<sup>212</sup> See *Mercer v. Duke Univ.*, 190 F.3d 643, 648 (4th Cir. 1999) (holding that once Duke allowed Mercer to try out for the team, revoking her ability to play showed that her interest and ability was unmet, and this was the starting point for Title IX analysis); *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 343 (3d Cir. 1993) (noting that the elimination of women's sports teams showed interest and ability sufficient to invoke analysis under the third prong of the compliance test); *Cohen v. Brown Univ.*, 991 F.2d 888, 902 (1st Cir. 1993) (noting that since the team brought an action under Title IX, the school was presumed not to be "fully and effectively" accommodating student-athletes).

<sup>213</sup> See Buzuvis, *supra* note 7, at 851-56 (discussing the role of coaches, educators, and the community in shaping and determining interest and ability in athletics).

<sup>214</sup> See COZZILLO ET AL., *supra* note 36, at 905-06 (stating that the third prong of Title IX compliance creates a difficult, but not impossible standard); GLOVER, JR., *supra* note 58, at 106-07 (noting that the first prong is often used in Title IX due to its ease, but that the third prong, while difficult, is more equitable).

## 596 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

The courts have also had trouble articulating how institutions should apply the third-prong of the Title IX compliance requirements. Most courts have noted that the standard of full and effective accommodation is high, yet not unattainable, but have never given any concrete methods that would satisfy this prong.<sup>215</sup> With the lack of direction in applying this prong and the fear of costly lawsuits, universities are often afraid to attempt to comply with Title IX through this prong and, consequently, must rely on other compliance standards.<sup>216</sup> This creates problems in the true equality of college athletic programs.<sup>217</sup>

In spite of these ambiguities, interest is a better way of assessing the satisfaction in opportunities provided in an athletic department than proportionality; therefore, the third prong of the compliance test is still a viable option for schools to consider.<sup>218</sup> As previously noted, the standard is high, but it is not impossible to meet; if done correctly, gender equity in athletics may finally hit a point where all members are

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<sup>215</sup> See *Kelley v. Bd. of Trs.*, 35 F.3d 265, 271 (7th Cir. 1994) (stating that an institution may assess interest as it sees fit to comply with Title IX's third prong); *Cohen*, 991 F.2d at 900 (noting that the third prong of the compliance test is often difficult to assess due to the subjective nature of evaluating interest); see also *COZZILLO ET AL.*, *supra* note 36, at 905 (noting that although the third prong sets a high standard, it is not absolute); Hueben, *supra* note 7, at 669 (discussing the "effective accommodation test" and how it applies in limited circumstances).

<sup>216</sup> See *Buzuvis*, *supra* note 7, at 833 (stating that because the OCR's multifactor approach to prong three is based on qualitative, subjective factors, institutions are uncertain of whether their athletic programs satisfy the standard or whether they can successfully defend the program in court); Hueben, *supra* note 7, at 681 ("[M]easuring women's interest in sports . . . [is] much more difficult than simply matching up numbers.").

<sup>217</sup> See generally *Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763, 765 (9th Cir. 1999) (alleging a Title IX and equal protection violation by a university for eliminating a number of roster spots on the men's wrestling team to comply with Title IX proportionality); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 636 (7th Cir. 1999) (presenting a lawsuit involving male athletes who brought claims against a university for violating Title IX and discriminating based on sex when it eliminated the men's soccer and wrestling programs to comply with Title IX's proportionality requirement); *Kelley*, 35 F.3d at 267 (involving a case where athletes alleged that Title IX was violated when the men's swimming program was cut, but the women's program was retained); *Equity in Athletics, Inc. v. Dep't of Educ.*, 675 F. Supp. 2d 660, 663 (W.D. Va. 2009) (claiming that Title IX regulations that imposed gender equality in federally financed programs and resulted in the elimination of athletic teams were unconstitutional).

<sup>218</sup> See Letter from Russlynn Ali, *supra* note 33 (setting out criteria for assessment of the three factors and noting that the purpose is to provide a clearer standard of assessment under the third prong); see also *COZZILLO ET AL.*, *supra* note 36, at 905-06 (stating that the third prong of Title IX compliance creates a difficult, but not impossible standard); *GLOVER, JR.*, *supra* note 58, at 106-07 (noting that the first prong is often used in Title IX due to its ease, but that the third prong, while difficult, is more equitable); *Buzuvis*, *supra* note 7, at 875 (noting that with some changes to the interpretation, the third prong of the test and even the Model Survey could be a good assessment of Title IX compliance).

satisfied with the system.<sup>219</sup> With the recent OCR clarification, the ambiguities in how to assess interest and abilities should lessen and therefore make this particular prong even stronger.<sup>220</sup>

Although no single compliance standard under Title IX is a perfect solution to offering truly equal opportunities in athletics, equality may be reached by combining the current requirements in a more practical way.<sup>221</sup> The negative effects of the proportionality standard may be balanced by the positive effects of the fully and effectively accommodated requirement, and vice versa.<sup>222</sup> Ultimately, if an institution is given a more concrete way of adequately assessing the level of interest in athletic programs and is able to offer opportunities that correspond to that level of interest, Title IX may finally produce a system that offers true equality.<sup>223</sup>

#### IV. CONTRIBUTION

Title IX has lost its focus on equality and providing equal opportunities, regardless of sex, due to the current application of the OCR's three prong test.<sup>224</sup> When assessing Title IX complaints, courts have repeatedly shown deference to the agency's methods of determining compliance.<sup>225</sup> This usually falls on the proportionality

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<sup>219</sup> See *supra* notes 38–39 and accompanying text (explaining the standards for meeting the third prong of the Title IX compliance requirement and the difficulty in reaching *full and effective* accommodation).

<sup>220</sup> See Letter from Russlynn Ali, *supra* note 33 (setting out criteria for assessment of the three factors and noting that the purpose is to provide a clearer standard of assessment under the third prong); see also Hosick, *supra* note 47 (stating that NCAA President, Jim Ische, was optimistic about the new clarification and its potential effect on Title IX compliance).

<sup>221</sup> See *supra* Parts III.B–C (discussing the shortcomings of both the proportionality and fully and effectively accommodated standards under Title IX compliance); see also *infra* Part IV (discussing the benefits of combining these two prongs into a more objective standard).

<sup>222</sup> See Buzuvis, *supra* note 7, at 875 (noting that the OCR may rescind the Model Survey under prong three, but it must also provide additional clarification if it expects institutions to understand its requirements because subjective standards send mixed messages); Reich, *supra* note 7, at 549–50 (discussing recommendations for future interpretation of Title IX, including redefining some of the language and interpreting the prongs in a manner consistent with the intent of Title IX).

<sup>223</sup> See *infra* Part IV (discussing the benefits of providing schools with a more objective and attainable standard for complying with Title IX).

<sup>224</sup> See *supra* Part III (evaluating the shortcomings of the Title IX compliance requirements and their current application).

<sup>225</sup> See *Neal v. Bd. of Trs. of the Cal. St. Univs.*, 198 F.3d 763, 771 (9th Cir. 1999) (stating that the clarifications issued by the OCR deserved substantial deference); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994) (noting that “where Congress has specifically delegated” regulation to an agency, the court “must accord the ensuing regulation considerable deference”); *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (“The

598 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

standard of the three prong test, which has caused new forms of sex discrimination.<sup>226</sup> To provide opportunities that are truly fair and not based solely on gender, the OCR should amend its compliance test to focus on interest and providing opportunities that coincide with the assessed level of interest, so all students are equally accommodated. The compliance test should also be amended to provide schools with a practical and objective standard that can easily be applied to athletic departments.

The OCR, which is in charge of ensuring that educational institutions are in compliance with Title IX, should amend its Policy Interpretation to outline the three-part test as follows:

*Proposed Amendment to Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71,418*<sup>227</sup>

a. Compliance will be assessed in ~~any one~~ either of the following ways:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their ~~respective enrollments~~ *determined level of interest as provided in parts b and c of this regulation*; or

(2) ~~Where the members of one sex have been and are underrepresented among intercollegiate athletes,~~ [W]hether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the ~~members of that sex~~ *student body*.

~~(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing~~

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degree of deference [given] is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs.”); *Equity in Athletics, Inc. v. Dep’t of Educ.*, 675 F. Supp. 2d 660, 676 (W.D. Va. 2009) (concluding that the OCR’s 1979 Policy Interpretation constitutes a reasonable interpretation of the Title IX regulations and therefore is entitled to deference).

<sup>226</sup> See *supra* Parts II.C.1-2 (discussing cases under Title IX and the courts’ reliance on the proportionality standard as a “safe harbor” for Title IX compliance, which allows schools to comply by cutting men’s teams).

<sup>227</sup> Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71,418 (Dec. 11, 1979). The proposals are the contributions of the author. Specifically, proposed additions are italicized and proposed deletions are struck. The language in regular font is taken from the original regulation.

~~practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.~~

*b. Interest shall be determined by assessing all of the following criteria:*

*(1) Number of interested participants in an athletic opportunity;*

*(2) Number of available and interested support staff for an athletic opportunity, including but not limited to, coaches, trainers, tutors, and other management;*

*(3) Amount of available resources within the athletic department that may be provided to an athletic opportunity;*

*(4) Amount of potential outside donations that the institution will incur from an athletic opportunity;*

*(5) Level of interest in television, radio, and other broadcast mediums within the area for an athletic opportunity;*

*(6) Level of expected community interest and involvement in an athletic opportunity;*

*(7) Level of expected competition within the institution's normal competitive region for an athletic opportunity.*

~~c. Institutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions shall evaluate the above factors to determine the quantitative level of interest in current and potential athletic opportunities. Institutions shall determine this level of interest yearly by evaluating current and potential athletic offerings.~~

#### Commentary

The amended regulation makes the necessary changes to allow institutions to provide athletic opportunities that reflect the interest of the student body, the surrounding community, and any other followers of the athletic department. It shifts the focus of the compliance requirements from proportionality of gender to interest, allowing

600 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

institutions to provide opportunities that equally accommodate all interested parties.

First, in section a, the proposed amendment changes the compliance test from a three-prong test to a two-prong test.<sup>228</sup> Institutions can comply with the amended regulations by either offering opportunities based on proportionality of interest in athletic opportunities, or by showing a history and continuance of providing opportunities responsive to the interests and abilities of the student body. By adding the element of interest to the first prong, the subjective fully and effectively accommodated prong is no longer necessary since accommodation is factored into the first prong of the new test. This eliminates some of the confusion for institutions who wish to use interest as a Title IX standard.<sup>229</sup>

Since it is impossible for an institution to provide all the opportunities that may be desired, the proposed amendment still allows the use of proportionality; but, instead of focusing on general enrollment numbers—which do not consider personal preferences in educational experience—it focuses on the interest in the athletic department.<sup>230</sup> Courts have often noted that opportunity breeds interest and that by allowing schools to use relative interest as a standard for compliance, institutions will be adding to the status quo and stereotype that women are generally less interested in athletics.<sup>231</sup> However, by using a quantitative evaluation of interest, this problem will resolve itself because interest levels won't be based on stereotypes or assumptions, but on numbers collected by the athletic department. The objective standard that is created by the proposed amendments removes bias, stereotypes, and skewed thinking when determining what athletic opportunities to offer, and replaces these mentalities with quantitative numbers that assess actual interest and ability of the program.<sup>232</sup> By

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<sup>228</sup> See *supra* notes 33–34 and accompanying text (discussing the original regulations for Title IX compliance set forth by the OCR in the 1979 Policy Interpretation).

<sup>229</sup> See *supra* notes 208–11 (discussing the subjective nature of the third prong of the Title IX compliance requirements—fully and effectively accommodated—and the problems associated with this subjective standard).

<sup>230</sup> See *supra* note 191 (discussing that college athletes are drawn from the pool of eligible people with the talent and interest in college athletics, which includes people from all over the globe, while often times the general enrollment of a school is limited to a more centralized geographic area).

<sup>231</sup> See *supra* notes 189–200 and accompanying text (discussing the relative-interest argument as viewed by courts and other academics).

<sup>232</sup> See *supra* notes 196–200 and accompanying text (discussing the relative interest argument of Title IX compliance and the stereotyped mindsets that often occur when using the subjective interest standard).

using the new proposed system of assessment, interest will breed opportunities that are well supported and competitive.

The second prong of the amended compliance test, under section a, again takes the focus away from gender and puts it on interest and ability. If an institution can show a history and continuation of providing athletic opportunities, which reflects the interests and abilities of *all members* of the student body who wish to participate, Title IX would be presumed satisfied. This prong would act as a “safeguard” for universities that do not want to worry about assessing interest, but can show program expansion that accommodates the general student body.<sup>233</sup> Essentially, this prong would create an option and give institutions an alternative to the standard assessment under the new Title IX interest regulation outlined in subsection (1).

As stated above, the third prong of the original compliance requirements has been removed under section a, due to its application difficulty and subjective nature, and has been added to the proportionality standard in subsection (1).<sup>234</sup> By allowing schools to comply with Title IX through evaluating and focusing on an objective standard of interest instead of the athletes’ gender, institutions will be able to provide opportunities based on interest and estimated competitiveness that accommodate all parties equally. It is likely that even under the new standard, some athletes will still feel they are not completely accommodated by the offerings of an athletic department. However, under the amended regulation, it can be presumed that this is the result of a lack of interest and competitiveness in a particular opportunity, and not because of the athletes’ gender.<sup>235</sup>

This revision also provides institutions with objective, practical, and measurable standards to evaluate interest in athletic opportunities under section b of the amended regulations.<sup>236</sup> Criteria (1) and (2), under

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<sup>233</sup> The second prong of the compliance test would allow institutions to be presumed compliant under Title IX as long as there are no recorded complaints alleging discrimination or lack of opportunities in the athletic department. If a university can show that the athletic department has satisfied its students by offering programs that accommodate its student body, the school will be viewed as compliant under Title IX.

<sup>234</sup> *See supra* notes 208–11 (discussing the subjective nature of the third prong of the Title IX compliance requirements—fully and effectively accommodated—and the problems associated with this subjective standard). By adding assessment of accommodation based on interest and ability to the first prong of the compliance test, institutions are able to provide athletic opportunities that meet an objective standard and therefore are more equitable.

<sup>235</sup> *See infra* notes 237–45 and accompanying text (discussing the quantitative standards of the new proposed regulations and the benefits of the objective standard).

<sup>236</sup> Section b of the above revised regulation is the original idea of the author and not an amendment or revision of any current standard. Each of the subsections under this

602 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

section b, will provide an institution with a quantitative number of interested participants in a given sport.<sup>237</sup> If this number is large enough to sustain a competitive team, the institution should move on to evaluating criteria (3) and (4), which focus on the amount of resources available to an athletic opportunity.<sup>238</sup> Institutional resources are often limited, which further evidences the importance of this criteria when determining what teams should be offered by an athletic department.<sup>239</sup> During hard economic times, institutions find it more difficult to provide adequate athletic opportunities.<sup>240</sup> These factors will give the athletic department a clear view of whether there are adequate funds to support a particular team.<sup>241</sup>

Next, institutions will evaluate the level of support the team will receive from outside sources, such as broadcast media and the surrounding community. Institutions should use evaluation tools such as Likert scales, which are designed to measure interest using a standard five-point scale, to assess the level of interest in the sources listed in

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provision are designed to measure interest, abilities, and resources available for proposed athletic opportunities in an objective and measurable manner. The criteria under section b should be used to assess the level of interest in a program under section a(1) above. To better understand how this criteria should be assessed, a hypothetical scenario will be used. PU is evaluating interest in the men's hockey team under section a(1) of the new Title IX compliance standard by using the criteria set out in section b of this regulation.

<sup>237</sup> Under subsection (1), PU assesses that there are twenty-two willing and able students who are interested in participating on the men's hockey team. Under subsection (2) of the criteria, PU determines that four well-known and qualified individuals would be interested in coaching the men's hockey team, two members of the university's training staff would be interested in working with the team, and three members of the university's faculty would be willing to serve as tutors, as needed, for the members of the team during the hockey season. There would also be four graduate assistants interested in serving as managers, statisticians, and student coaches for the team.

<sup>238</sup> After assessing the financial position of the athletic department, PU determines that it can devote approximately \$80,000 of its operating budget to support a men's hockey team each season. PU also concludes, under subsection (4), that outside donations of alumni, sponsors, and fundraising will provide an additional \$30,000 per year to the hockey program.

<sup>239</sup> See *supra* notes 56-57 and accompanying text (discussing the limited resources currently available to most athletic departments and the resulting cuts in sports teams).

<sup>240</sup> See *supra* notes 41, 56, 180 and accompanying text (discussing the virtual impossibility of choices that institutions have to make in hard economic times when providing more opportunities).

<sup>241</sup> While the objective criteria set out in section b is helpful for institutions determining whether an athletic opportunity is viable in hard economic times, the same standard can also be used during times of economic stability or prosperity to assess whether an athletic opportunity has the desired level of interest and support. The proposed assessment criteria will be relevant and useful in all economic states.

interest criteria (5) and (6).<sup>242</sup> After collecting the data, institutions would have a clear picture of whether the athletic opportunity would have support from these outside parties in an objective, measurable form. Finally, the institution should determine whether the proposed athletic opportunity would be competitive within its normal region under subsection (7).<sup>243</sup> Once all seven factors of the above criteria have been assessed, the institution should provide opportunities that meet all the factors and refrain from providing opportunities that do not meet the interest standards.<sup>244</sup> As stated previously, it is not necessary for schools to provide every athletic opportunity and pour money into sports to the detriment of the athletic department and school, but an institution would be required to offer proportionate athletic opportunities based on quantitative interest.

Lastly, the proposed amended regulation removes the note that a school is not required to provide opportunities in which it would not be competitive, under section c, because this is covered by criterion (7) of

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<sup>242</sup> Under subsection (5), PU sends out a number of Likert scale surveys to assess the level of interest in broadcast media among the local and regional areas. The questions require broadcast stations, newspapers, and other media sources to rank, on a scale of one to five— one being “completely uninterested” and five being “extremely interested”—their interest in covering news about the men’s hockey program. Areas of inquisition include game scores and highlights, roster or coaching changes, recruitment, community involvement by the members of the team, and other newsworthy information. After retrieving the responses and averaging the results, PU determines that the media industry would be “very interested” (a 4 on the Likert scale) in covering news about the men’s hockey team. PU then sends out similar surveys to assess the level of interest to members of the surrounding community, including residents of the area, students and employees of PU, members of opposing schools in PU’s athletic conference, and alumni of the university per subsection (6). After this assessment, PU concludes that members of the community would be “interested” (a 3 on the Likert scale) in supporting a men’s hockey team at PU.

<sup>243</sup> PU assesses the level of competitiveness of the potential members of its own hockey team compared to other teams that would compete against PU. A quantitative standard, such as statistical data or another developed method of competitive evaluation, is used to determine whether the team is a viable option for the school. This can be determined by looking at past history, if the school is evaluating whether a current team should continue to compete at the varsity level, or by using statistics or other objective surveys created by the school to assess a team that has not been offered in the past. After evaluating the past performance of the men’s hockey team, PU determines that the team would continue to be competitive within its conference and at the national level.

<sup>244</sup> After collecting all the data, PU should continue to offer men’s hockey as a team in its athletic department. It has assessed that there is substantial interest within the athletic community, as well as the outside community, to support the team. It has also determined that financial resources support offering men’s hockey at the university, and that the team will most likely continue to be competitive and bring exposure to the school. Based on the numbers provided by the seven outlined criteria, men’s hockey is a feasible option that PU should provide.

## 604 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

the interest evaluation factors listed in section b.<sup>245</sup> The new language of this section explains that institutions shall use the above criteria to acquire a quantitative assessment of interest in athletic opportunities, and that this evaluation should be conducted on a yearly basis. When researching the level of interest and sustainability of athletic opportunities, institutions should focus on current programs as well as programs that may be added in the future. This will allow schools to offer athletic opportunities that are well supported, competitive, and sustainable, thereby accommodating students, the athletic department, the institution, and the community alike.

The proposed changes to the OCR's regulation of Title IX compliance will allow institutions to provide athletic opportunities that will bring value to the school, all parties involved in the athletic department, and the surrounding community without focusing on the gender of the athletes. The changes create an objective standard that universities can use in Title IX compliance assessment instead of the subjective, unclear test currently used to assess interest under the third prong of the compliance requirements. Under this system, equality can be achieved by evaluating interest and ability of participants and ensuring that no person is prohibited from participating in athletics based solely on his or her gender, which was Title IX's original intent.

Critics of this proposal may argue that focus on interest instead of proportionality will hurt women's athletics and benefit only male athletes.<sup>246</sup> The argument may be that this proposal could send women back forty years to a situation similar to the 1970s, when Title IX was considered a necessity.<sup>247</sup> However, the proposed amendment will not hurt women's athletics in such a way that they will become obsolete. Shifting the focus of compliance to a system that allows schools to use an objective standard of viability for each team will allow women's teams to thrive once they show that they are willing and able to support a competitive team.<sup>248</sup> The objective system created by the proposed amendments will benefit both men's and women's teams by allowing

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<sup>245</sup> See *supra* note 244 and accompanying text (explaining criterion (7) of the interest assessment in determining whether a team will be competitive and allowing schools to provide only opportunities in which it is reasonably assessed that teams will be successful).

<sup>246</sup> See Hogshead-Makar, *supra* note 43 (noting that using interest for Title IX compliance may have negative effects on women's teams and may lead to more discrimination by creating a loophole for universities).

<sup>247</sup> See *supra* notes 52–55 and accompanying text (discussing women's participation in sports before Title IX was passed and the rise in numbers of female athletes after its enactment).

<sup>248</sup> See *supra* notes 237–45 and accompanying text (discussing the quantitative standards of the new proposal and explaining how each criterion should be applied to athletic opportunities, and also discussing the benefits of using the objective standard).

them to be assessed individually. Men's and women's teams will no longer have to compete against each other to satisfy a quota; they will only need to show that they can be supported on their own, thereby creating more equitable opportunities for all athletes, regardless of gender.

#### V. CONCLUSION

Title IX's current application is causing men's athletic teams to be cut at an alarming rate to comply with the substantial proportionality prong of the OCR regulations. This is contrary to the initial purpose of Title IX, which was to prohibit discrimination in participation of activities based solely on the individual's sex. Women have been discriminated against in the past, but by continuing the current application of the statute, the discrimination has come full circle and is reducing men's athletic opportunities. By amending the compliance requirement to allow institutions to focus on their students' interests and abilities and other outside supporters, Title IX can once again provide opportunities for all individuals, regardless of gender, thereby creating true equality in college athletics. Both genders will be equally represented based on interest, ability, and competitiveness, rather than attempting to satisfy a quota system that focuses on remedying past discrimination instead of true equality.

After Title IX's compliance amendment, schools will be able to offer programs that are well supported and competitive without focusing on the athletes' gender. This allows students like Aaron to choose a school that offers athletic opportunities he is interested in without worrying that his sport will be cut based solely on the gender of the athletes.<sup>249</sup> He can be confident that PU will continue to provide a competitive hockey team that allows him to enjoy his experience, the support of the institution, and surrounding community.

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<sup>249</sup> See *supra* Part I (using a hypothetical situation to introduce the subject of this Note).

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