

William & Mary Journal of Race, Gender, and Social Justice

Volume 7 (2000-2001)
Issue 3 *William & Mary Journal of Women and
the Law*

Article 6

April 2001

If You Build It, They Will Come: Establishing Title IX Compliance in Interscholastic Sports as a Foundation for Achieving Gender Equity

Amy Bauer

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Education Law Commons](#)

Repository Citation

Amy Bauer, *If You Build It, They Will Come: Establishing Title IX Compliance in Interscholastic Sports as a Foundation for Achieving Gender Equity*, 7 Wm. & Mary J. Women & L. 983 (2001), <https://scholarship.law.wm.edu/wmjowl/vol7/iss3/6>

Copyright c 2001 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmjowl>

IF YOU BUILD IT, THEY WILL COME: ESTABLISHING TITLE IX COMPLIANCE IN INTERSCHOLASTIC SPORTS AS A FOUNDATION FOR ACHIEVING GENDER EQUITY

President John F. Kennedy issued Executive Order 10,980,¹ establishing the President's Commission on the Status of Women on December 14, 1961. The Commission issued a report concluding that gender discrimination in the United States was rampant.² One of the many responses to that finding was the enactment of Title IX of the Education Amendments of 1972.³ Intended to eliminate gender discrimination in all activities supported by federally funded institutions, enforcement of the statute has focused primarily on athletic programs in American schools.⁴ Indeed, Title IX has been the impetus for a revolution that has changed the face of American sports by making room for the female athlete.

Title IX provided the starting point for unprecedented growth in women's athletics.⁵ Within a decade of Title IX's enactment, the number of girls participating in school sports increased by 500%.⁶ The number of female intercollegiate athletes exploded from a mere fifteen percent prior to 1972 to over thirty percent by the mid-1980s.⁷ Many public schools that had not previously offered female sports programs now offer as many, if not more, to females than to males.⁸ In short, Title IX has had an enormous impact on gender equity in sports and has resulted in an incredible array of new opportunities for women.⁹ Despite this encouraging and exciting progress, however, Title IX has not resulted in equality of gender participation in sports.¹⁰ The promise of equal opportunity signaled

1. Exec. Order No. 10,980, 3 C.F.R. § 500 (1959–1963), *reprinted in* 1962 U.S.C.A.N. 4252.

2. See PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, AMERICAN WOMEN 1 (1963).

3. 20 U.S.C. § 1681(a) (1994).

4. See William E. Thro & Brian A. Snow, *Cohen v. Brown University and the Future of Intercollegiate and Interscholastic Athletics*, 84 EDUC. L. REP. 611, 611 (1993).

5. See Diane Heckman, *Women & Athletics: A Twenty-Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 9 (1992).

6. See Susan Bittenwieser, *Time Flies When You're Changing the World*, MS., May-June 1997, at 46.

7. See 2 ROBERT C. BERRY & GLENN M. WONG, LAW & BUSINESS OF THE SPORTS INDUSTRIES: COMMON ISSUES IN AMATEUR AND PROFESSIONAL SPORTS 211 (1986).

8. See *id.* at 212.

9. See Trudy Saunders Bredthauer, *Twenty-Five Years Under Title IX: Have We Made Progress?*, 31 CREIGHTON L. REV. 1107, 1107 (1998); see also Robert Sullivan, *A Law That Needs New Muscle*, SPORTS ILLUSTRATED, Mar. 4, 1985, at 9 (discussing the positive impact Title IX has had on female athletes).

10. See *Title IX: 20 Years Later a New Call for Action*, USA TODAY, June 8, 1992, at 8C (noting that in terms of total participation and budgetary allocations the number of male athletes continues to be greater than that of female athletes).

by Title IX's passage remains elusive to female athletes as the road to gender equity in sports remains fraught with obstacles, both old and new.¹¹

The disproportionate application of Title IX to intercollegiate athletics,¹² and the requirement of substantial proportionality specifically,¹³ although successful in many aspects, has reached a point at which further pursuit of Title IX compliance without shifting the focus to interscholastic sports programs¹⁴ can only result in further stagnation and regression of the movement for gender equity in sports. Consequently, the ultimate goal of gender equity in life is hindered.¹⁵ Gender equity in sports is encountering several problems as a result of the preoccupation with numerical parity at the college level, including: (1) a failure to address the desire to compete of female athletes who do not possess elite or exceptional talent¹⁶ and (2) the increasingly popular and derogatory impression that Title IX, rather than being an anti-discrimination statute, is an affirmative action plan that furthers the cause of female athletes at the expense of their male counterparts.¹⁷

While both of these unfortunate outcomes are arguably inevitable and perhaps necessary, continuing to implement Title IX at the collegiate level only will exacerbate these problems. Continuing this course of action would be equivalent to relying on affirmative action in college admissions to achieve racial equity in

11. See Thro & Snow, *supra* note 4, at 612; see also Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC. PROBS. 331, 331 (1999) (discussing the need for improvement and reform in the area of Title IX compliance); William E. Thro & Brian A. Snow, *Still on the Sidelines: Developing the Non-Discrimination Paradigm Under Title IX*, 3 DUKE J. GENDER L. & POL'Y 1, 1-2 (1996) (discussing the failure of Title IX to ensure that all women are not "left on the sidelines").

12. See generally Ray Yasser & Samuel J. Schiller, *Gender Equity in Athletics: The New Battleground of Interscholastic Sports*, 15 CARDOZO ARTS & ENT. L.J. 371 (indicating that intercollegiate athletics are affected by Title IX more than any other group).

13. See discussion *infra* pp. 12-14, 24 (explaining the requirement, extracted from the statute and case law, that schools must furnish participating opportunities for male and female students in numbers substantially proportionate to respective enrollments).

14. The phrase "interscholastic sports" as used throughout refers to athletic programs offered at the primary and secondary school level.

15. See Jessica E. Jay, *Women's Participation in Sports: Four Feminist Perspectives*, 7 TEX. J. WOMEN & L. 1, 18-20 (1997) (discussing the history of discrimination against women in sports); Thro & Snow, *supra* note 4, at 626-27 (recognizing that a training ground is needed if Title IX is to succeed at the intercollegiate level); Thro & Snow, *supra* note 11, at 11-12 (suggesting that more focus should be placed on sports programs at the primary and secondary school levels).

16. See Thro & Snow, *supra* note 11, at 9 n.32.

17. See Jerry R. Parkinson, *Grappling with Gender Equity*, 5 WM. & MARY BILL RTS. J. 75, 75 (1996); Michael Straubel, *Gender Equity, College Sports, Title IX and Group Rights: A Coach's View*, 62 BROOK. L. REV. 1039, 1039-40 (1996).

education without also improving the scholastic opportunities for minorities at the primary and secondary school levels. In both situations, colleges and universities are forced to provide opportunities for a hypothetical group of students.¹⁸ It is only by shifting the focus to earlier education levels that this hypothetical group can become a reality.

The success of Title IX to date is incredible given that its primary focus has been on intercollegiate athletics and that inadequate attention has been paid to building a proper foundation for gender equity in interscholastic sports. This success sends the encouraging message to interscholastic sports programs that "[i]f you build it, they will come."¹⁹ If those charged with the task of implementing and enforcing Title IX embraced this idea, we could be one giant step closer to achieving not only the statutory goals expressed in the language of Title IX,²⁰ but also to realizing the arguably more important implicit objectives underlying the adoption of the statute.²¹

The first section of this Note provides a brief historical overview of Title IX and its current legal framework. The next section identifies both the explicit and implicit goals of Title IX and explains the important role of gender equity in sports as it relates to the women's movement. This Note then offers a glimpse of the area in which Title IX has had its greatest impact—intercollegiate athletics. Specifically, this section focuses on the effect three landmark cases²² have had on gender equity in sports. The next section explains why Title IX compliance at the primary and

18. I use the terminology "hypothetical group of students" to denote that, in the female college sports programs, there may be no females to take advantage of these opportunities because of their lack of exposure to sports at the earlier education levels.

19. FIELD OF DREAMS (MCA 1989).

20. The clear statutory purpose of Title IX is to eliminate discrimination on the basis of gender in educational institutions: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" 20 U.S.C. § 1681(a) (1994).

21. See *infra* notes 57-61 and accompanying text.

22. See *Cohen v. Brown Univ.*, 809 F. Supp. 978, 979 (D.R.I. 1992), *aff'd*, 991 F.2d 888, 891 (1st Cir. 1993). On remand, the district court considered the case on its merits and found for the plaintiffs. *Cohen v. Brown Univ.*, 879 F. Supp. 185, 190-91 (D.R.I. 1995), *aff'd*, 101 F.3d 155, 162 (1st Cir. 1996); see also *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1518-19 (D. Colo. 1993), *aff'd in part, rev'd in part sub nom.*, *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 834-35 (10th Cir. 1993) (holding that Colorado State had violated Title IX and requiring reinstatement of its women's softball team); *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 585 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332, 335 (3d Cir. 1993) (ordering the reinstitution of women's gymnastics and field hockey teams at Indiana University of Pennsylvania); Thro & Snow, *supra* note 11, at 1 (identifying *Cohen*, *Roberts* and *Favia* as landmark cases).

secondary school levels is important. It will discuss mechanisms other than Title IX that have been and are being used to eradicate gender-based discrimination at the interscholastic level. Finally, this Note introduces several proposals for implementing and increasing compliance with Title IX in the arena of interscholastic sports. Specifically, this Note argues that shifting the emphasis of Title IX enforcement away from substantial proportionality at the intercollegiate level and toward improved compliance at the primary and secondary levels²³ is necessary to achieve the explicit and implicit goals of Title IX, as well as those of the women's movement in general. Changing the emphasis of Title IX enforcement would also avoid further impediments to attaining gender equality.

THE EVOLUTION OF TITLE IX: HISTORICAL OVERVIEW AND REGULATORY FRAMEWORK

Congress passed Title IX of the Education Amendments, the "cornerstone of federal statutory protection for female athletes and prospective female athletes in the United States,"²⁴ in 1972.²⁵ Title IX regulations became effective on July 21, 1975.²⁶ Congress required elementary schools to comply by July 21, 1976, whereas secondary and post-secondary schools had until July 21, 1978 to comply.²⁷

The initial legislation did not explicitly refer to athletics; therefore, some confusion arose as to whether Congress intended the statute to apply to this area.²⁸ When the Supreme Court, in *Grove City College v. Bell*,²⁹ adopted the "program-specific" approach, it alleviated the confusion and Title IX encountered its first stumbling block. The Court held that only those programs that directly received federal funding would be subject to Title IX.³⁰ Fortunately, Congress overturned this decision through the enactment of the Civil Rights Restoration Act of 1987.³¹ The Act

23. Although the argument set forth pertains to primary level schools, the majority of the focus will be on junior high and high schools, or secondary institutions.

24. Heckman, *supra* note 5, at 2.

25. 20 U.S.C. § 1681(a).

26. See Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391, 397 (1997).

27. 34 C.F.R. § 106.41 (1999).

28. See *Grove City Coll. v. Bell*, 465 U.S. 555, 570 (1984).

29. *Id.*

30. See *id.* at 575.

31. 20 U.S.C. § 1687 (1994). No court has addressed the issue of retroactivity and the Supreme Court denied certiorari for a case raising this issue in January 1991. *De Vargas v.*

adopted the "institution-wide" approach, indicating that if any one program within an institution received federal funding, then all programs or activities could be subject to Title IX claims.³² As a result, all athletic programs offered by institutions receiving any form of federal funds have been subject to Title IX since March 22, 1988.³³

As a procedural matter, the regulations were re-codified in 1980³⁴ by the newly established Department of Education (DOE). This granted the DOE the necessary authority to oversee the enforcement of Title IX regulations.³⁵ Today, the DOE enforces Title IX through the Office of Civil Rights (OCR).³⁶ The statute's broad language and limited legislative history,³⁷ however, left enforcers and academic institutions with very few guidelines as to how the statute applies to athletic programs.³⁸

In an attempt to resolve this uncertainty, Congress passed the Javits Amendments³⁹ in 1974. Unfortunately, these amendments, which directed the Department of Health, Education and Welfare (Title IX enforcers before the formation of the DOE) to disseminate regulations for intercollegiate athletics,⁴⁰ failed to adequately explain how athletic programs could comply with Title IX.⁴¹ It was not until 1979, when the OCR within the Department of Health Education and Welfare issued a Policy Interpretation of Title IX,⁴² that those charged with implementing the statute were given assistance in understanding and complying with Title IX.

The OCR's Policy Interpretation articulates for colleges and universities two areas that require specific compliance. The first,

Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1387 (10th Cir. 1990), *cert. denied*, 498 U.S. 1074 (1991) ("The standard of 'clear congressional intent' for the retroactive application of statutes requires articulated and clear statements on retroactivity, not inferences drawn from the general purpose of the legislation.").

32. See 20 U.S.C. § 1687.

33. See Thro & Snow, *supra* note 4, at 615.

34. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (1980).

35. See Establishment of Title and Chapters, 45 Fed. Reg. 30,802, 30,962-30,963 (May 9, 1980).

36. See 34 C.F.R. § 106.41.

37. See *Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993) (noting that Congress included no committee report with the final bill).

38. See Darryl C. Wilson, *Parity Bowl IX: Barrier Breakers v. Common Sense Makers: The Serpentine Struggle for Gender Diversity in Collegiate Athletics*, 27 CUMB. L. REV. 397, 417 (1997).

39. 20 U.S.C. § 1681 (1994).

40. *Id.*

41. See Wilson, *supra* note 38, at 417.

42. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.37(c) (1980).

athletic financial assistance (scholarships), is designed to ensure that funds for scholarships are allocated in proportion to the number of men and women participating in athletic programs.⁴³ The second addresses the benefits and opportunities available to athletic programs.⁴⁴ Here, the Policy Interpretation provides the following list of specific requirements concerning the administration and management of sports that will be considered in determining whether equal opportunities are available:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes [effective accommodation requirement];
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice times;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.⁴⁵

In order to comply with the effective accommodation provision, schools must be able to effectively demonstrate at least one of the following: (1) that the number of intercollegiate athletic opportunities provided for males and females proportionately represents their respective enrollments (that there is "substantial proportionality"),⁴⁶ (2) that they have a history of expanding programs to accommodate developing female interests and abilities in sports⁴⁷ or (3) that they have fully and effectively accommodated these interests and abilities.⁴⁸ Failure to establish compliance with at least one part of this three-prong effective accommodation test

43. See *id.*; Title IX of Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979).

44. 34 C.F.R. § 106.37(c).

45. *Id.* § 106.41(c).

46. See 44 Fed. Reg. at 71,418. There is no strict ratio to determine what is or is not "substantially proportionate." See Charles Spitz, *Gender Equity in Intercollegiate Athletics as Mandated by Title IX of the Education Amendments Act of 1972: Fair or Foul?*, 21 SETON HALL LEGIS. J. 621, 630 (1997).

47. See 44 Fed. Reg. at 71,418.

48. See *id.*

has been the focus of most of the intercollegiate athletics litigation.⁴⁹ It is this area that is most relevant to the arguments this Note advances. This Note will discuss how colleges and universities will be unable to escape defending such litigation unless or until gender equity in sports is established at the primary and secondary school levels. This shift in focus is essential to realizing the goals of Title IX.

THE GOALS OF TITLE IX AND ITS ROLE IN THE WOMEN'S MOVEMENT

It is the job of courts, federal regulators and school administrators to ensure that Title IX is applied in a manner that will realize the statute's goals. Establishing a clear understanding of the statute's objectives is, therefore, a necessary first step toward success.

Courts commonly employ two methods of statutory interpretation when determining the goals of a statute: (1) textualist and (2) intentionalist.⁵⁰ The textualist interpretation relies upon the explicit goals in the text of the statute; the intentionalist approach focuses on the implicit goals of a particular piece of legislation by examining documents such as legislative history.⁵¹ Although a majority of the current Supreme Court favors the textualist approach and, therefore, focuses on explicit objectives,⁵² this Note argues that investigating the legislative intent of Title IX is equally, if not more, important than

49. See *Cohen v. Brown Univ.*, 809 F. Supp. 978, 979 (D.R.I. 1992), *aff'd*, 991 F.2d 888, 891 (1st Cir. 1993) (granting preliminary injunction against the dissolution of any women's sports team unless the percentage of "opportunities" to participate in intercollegiate athletics equals the percentage of women enrolled in the undergraduate program and ordering the reinstatement of varsity level women's volleyball and gymnastics); *Cohen v. Brown Univ.*, 879 F. Supp. 185, 190-91 (D.R.I. 1995), *aff'd*, 101 F.3d 155, 162 (1st Cir. 1996) (granting a permanent injunction); see also *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1518-19 (D. Colo. 1993), *aff'd in part, rev'd in part sub nom.*, *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 834-35 (10th Cir. 1993) (holding that Colorado State had violated Title IX and requiring reinstatement of its women's softball team); *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 585 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332, 335 (3d Cir. 1993) (ordering the reinstatement of women's gymnastics and field hockey teams at Indiana University of Pennsylvania); *Cook v. Colgate Univ.*, 802 F. Supp. 737, 745 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17, 20 (2d Cir 1993) (vacating lower court's holding that Colgate's disparate treatment of male and female ice hockey players violated Title IX on the grounds that plaintiffs had filed as individuals and upon their graduation their claim was rendered moot); Ted Riley Cheesebrough, Case Note, *Cohen v. Brown: I Am Woman, Hear Me Score*, 5 VILL. SPORTS & ENT. L.J. 295, 298 (1998) (discussing the legislative and jurisprudential history of Title IX).

50. See Straubel, *supra* note 17, at 1055.

51. See *id.* at 1055, 1061.

52. See *id.* at 1055.

emphasizing the explicit objectives set forth by the language of the statute.

Explicit Goals

As previously stated, a statute's explicit goals are best ascertained by applying the textualist interpretation. This approach asks how an average person would perceive the purpose of a statute without reference to any source except for the statute itself.⁵³ Applying this approach to Title IX, the relevant portion of the statute states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"⁵⁴

The clear statutory purpose of Title IX, based on this approach, is to eliminate discrimination on the basis of gender in educational institutions.⁵⁵ When applied to athletics, the plain meaning of the statute is that no person, based on gender, can be denied the opportunity to participate in athletics.⁵⁶ While the explicit goals of Title IX are relatively simple to extract from the written words, the same cannot be said for the more ambiguous implicit goals.

Implicit Goals

When attempting to define the implicit goals of a statute, courts commonly apply an intentionalist interpretation approach.⁵⁷ This approach asks what concerns the legislature was attempting to address when formulating and passing the statute.⁵⁸ A review of these concerns in the case of Title IX makes it clear that the intent of the legislature went far beyond achieving gender equality in education or even athletics.⁵⁹

The rather limited legislative history of Title IX on the subject of athletics supports this conclusion. One senator involved in the

53. *See id.*

54. 20 U.S.C. § 1681(a) (1994).

55. *See Straubel, supra note 17, at 1057.*

56. *See id.*

57. *See id.* at 1061.

58. *See id.*

59. *See Note, Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1634 (1997) [hereinafter *Cheering on Women*] ("Title IX was like almost all of the other feminist reforms of the 1960s and early 1970s, in that its goals were to provide access to traditionally male structures, and to provide equality of opportunity once inside.").

statute's passage stated that the legislative history indicated that Title IX was to be "a strong and comprehensive measure [which would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women."⁶⁰ Therefore, implicit in the passage of Title IX is the legislature's desire to change the nature of the gender hierarchy.⁶¹

The intentionalist approach reveals a noble aspiration on the part of the legislature; however, advocates of Title IX must not overlook the importance of attaining the explicit goals. As previously discussed, failure to achieve equal opportunity for female athletes to participate will necessarily result in failure to achieve Congress' implicit goals.⁶² The implicit goals suggest that achieving gender equity in sports will have benefits for women both on and off the field.

The Importance of Gender Equity in Sports to the Women's Movement

Sexual violence, sexual harassment, poverty, reproductive liberty, occupational injustice and a myriad of child care dilemmas are but a sampling of the imperative issues concerning American women as we start the new millennium. In comparison to these problems, gender equity in sports is often perceived as a matter of trivial importance.⁶³ Many studies indicate, however, that there is more to be gained from women's participation in sports than may be apparent initially.⁶⁴

Studies show that women who have had the opportunity to participate in athletics acquire a greater sense of confidence, self-esteem and pride.⁶⁵ These studies have also shown that athletics

60. Yasser & Schiller, *supra* note 12, at 372-73 (citation omitted) (alteration in original); see also *Nat'l Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33, 38 (N.J. 1974) (stating that the underlying purpose of Title IX is to emancipate women and girls from stereotypes and limiting conceptions that are discordant with their needs, capabilities and aspirations).

61. See Straubel, *supra* note 17, at 1055.

62. See *Cheering on Women*, *supra* note 59, at 1640 ("As long as their interests have been shaped by a discriminatory, sexist society, these women need a proportionate number of opportunities to play, regardless of their misleadingly low interest level.").

63. See Tracy J. Johnson, Comment, *Throwing Like a Girl: Constitutional Implications of Title IX Regarding Gender Discrimination in High School Athletic Programs*, 18 N. ILL. U. L. REV. 575, 600 (1998).

64. See generally *id.* (discussing the benefits women receive by participating in athletics).

65. See *Women's Sports Facts*, WOMEN'S SPORTS FOUND., at <http://www.womenssportsfoundation.org/templates/action/take/results.html?record=577> (last visited Sept. 29, 1999)

foster personal skills and relationships in addition to promoting physical and psychological health.⁶⁶ Further, there is a positive correlation between student participation in sports, a reduced probability of teenage pregnancy and an increase in the likelihood of high school graduation.⁶⁷ Lastly, "[w]ith every athletic achievement comes prestige [and] respect."⁶⁸ Surely, the advantages and benefits just noted are not trivial. This is especially true when one considers the reality that "[g]ender disparities in sports are not only a consequence of cultural stereotypes but also a cause of these stereotypes."⁶⁹ That female participation leads to significant psychological and physical benefits has become a widely accepted and acknowledged phenomenon, as evidenced by the following Nike advertisement:

If you let me play, if you let me play sports.
I will like myself more; I will have more self-confidence.
If you let me play sports. If you let me play,
I will be sixty percent less likely to get breast cancer;
I will suffer less depression.
If you let me play sports,
I will be more likely to leave a man who beats me.
If you let me play,
I will be less likely to get pregnant before I want to.
I will learn what it means to be strong,
If you let me play⁷⁰

Just as there are numerous benefits for women as a result of the push toward gender equity in sports, there are equal disadvantages that will impact all women should women's participation in athletics stagnate. As one judge noted, "[a] stigma may attach when qualified female athletes are not allowed to compete . . . solely because they are female."⁷¹

(noting that eighty percent of women who are leaders in Fortune 500 companies took part in sports during childhood).

66. See *id.* (indicating that women who played sports as children benefit from positive body image and as much as a sixty percent reduction in the risk of breast cancer).

67. See *id.*

68. Johnson, *supra* note 63, at 600.

69. *Id.*

70. Jay, *supra* note 15, at 1 (citing Nike, Inc. television advertisement, reprinted in Eleanor Mallet, *Everywoman: Letting Girls Have a Sporting Chance*, PLAIN DEALER (Cleveland), Oct. 3, 1995, at 1E).

71. *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 667 (6th Cir. 1981) (Jones, J., dissenting in part).

To assign gender equity in sports any status less than one of primary importance would be to tolerate, if not endorse, the idea that sports should be "[a]t least one island on the sea of life reserved for man . . . impregnable to the assault of woman."⁷² It has even been argued that "[t]o deny females equal access to athletics supported by public funds is to permit manipulation of governmental power for a masculine advantage."⁷³ Although this view may be extreme, its prediction is justified in light of the advantages participation in sports offers to women.⁷⁴

It is because of the advantages to be gained, and the disadvantages that could be avoided, through achieving gender equity in sports that this movement is a significant factor in the larger movement for gender equity in life. As one author noted, "[t]he power of Title IX lies in its ability to change both women's and girls' everyday lives and the ways men and women interact in society."⁷⁵ This tremendous power has not been realized.⁷⁶

As we move into the twenty-first century, women and girls are still being forced to "choose between being a successful girl and being a successful athlete."⁷⁷ Despite the fact that it has allowed more females to participate, Title IX has had very little success in altering the underlying sentiments responsible for keeping girls out of sports in the first place.⁷⁸ In order for Title IX to successfully transform the existing oppressive social structure, it must be refocused on promoting female participation in sports at a younger age. It is only after this happens that the gender hierarchy will change. As the following discussion will show, the focus of Title IX on intercollegiate sports, although worthwhile, has reached a point at which further pursuit in this realm will prove both inefficient and ineffectual.

72. *State v. Hunter*, 300 P.2d 455, 457 (Or. 1956) (approving the legislature's use of states' police power to "halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges").

73. *Hoover v. Meiklejohn*, 430 F. Supp. 164, 169 (D. Colo. 1977).

74. See *supra* notes 64-70 and accompanying text.

75. *Cheering on Women*, *supra* note 59, at 1627.

76. See Susan Berrill & Diana M. Richter, *Is a Diamond Forever: Feminist Transformations of Sports*, in *WOMEN, SPORT, AND CULTURE* 221, 222-23 (Susan Berrill & Cheryl L. Cole eds., 1994).

77. CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 120 (1987).

78. See *Cheering on Women*, *supra* note 59, at 1636.

TITLE IX AND INTERCOLLEGIATE ATHLETICS: AN EXAMINATION OF THE CASES

Before the late 1980s there were very few judicial decisions analyzing Title IX claims brought by intercollegiate athletes.⁷⁹ However, following the passage of the Civil Rights Restoration Act of 1987⁸⁰ and a Supreme Court decision that held that compensatory damages and legal fees may be awarded to a successful claimant,⁸¹ litigation of Title IX cases increased dramatically.⁸² The cases discussed in this Note are only a sampling, but they have provided the most guidance to courts in analyzing the dictates of Title IX and the effective accommodation requirement in intercollegiate activities.⁸³

The Cases

In *Favia v. Indiana University of Pennsylvania*,⁸⁴ the Third Circuit held that the school's athletic department violated Title IX by failing to effectively accommodate female athletes.⁸⁵ The plaintiffs filed their claim in response to the university's decision to eliminate the women's field hockey and gymnastics teams.⁸⁶ In reaching its decision, the court found that the school did not demonstrate any of the three prongs of the effective accommodation test.⁸⁷ The court first found that the 17.8% discrepancy between the percentage of female students and female athletes was too great to be considered substantially proportionate.⁸⁸ Next, the court held that choosing to reduce the number of women's sports teams from ten to seven required a finding that the university did not have a history of program expansion and, therefore, did not satisfy the second option for showing effective accommodation.⁸⁹ Lastly, the court determined, based on the plaintiffs' testimony, that both

79. See *Pederson v. La. State Univ.*, 912 F. Supp. 892, 911 (M.D. La. 1996) (noting that even as of 1996, "only a handful of cases have interpreted Title IX").

80. 20 U.S.C. § 1687 (1994).

81. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992).

82. See *Cheesebrough*, *supra* note 49, at 299.

83. See *Thro & Snow*, *supra* note 11, at 1.

84. 7 F.3d 332 (3d Cir. 1993).

85. See *id.* at 334.

86. See *id.* at 343-44.

87. See *supra* notes 46-48 and accompanying text.

88. See *Favia*, 7 F.3d at 335.

89. See *id.* at 336.

interest and ability were present for field hockey and gymnastics.⁹⁰ The result was a court ordered reinstatement of the teams.⁹¹

The defendant school in *Roberts v. Colorado State University*⁹² discontinued both the men's baseball and women's fast-pitch softball programs, claiming budget constraints.⁹³ As in *Favia*, the plaintiffs prevailed by showing the school's failure to provide effective accommodation.⁹⁴ Analyzing the actions of the school, the court held that Colorado State University (CSU) did not demonstrate compliance with any of the effective accommodation provisions.⁹⁵ The 10.5% discrepancy between female students and female athletes did not indicate substantial proportionality, the decision to eliminate four women's sports over the previous four years discredited any previous showing of expansion of women's athletic programs⁹⁶ and the desire and talent demonstrated by the plaintiffs led the court to conclude that the school unsuccessfully responded to female students' interests and abilities.⁹⁷ As in *Favia*, CSU was ordered to reinstate the women's team.⁹⁸

*Cohen v. Brown University*⁹⁹ is the most recent landmark case concerning effective accommodation. This case, which provided female athletes with yet another victory,¹⁰⁰ is viewed by many as having "saddled sports administrations with a debilitating defeat."¹⁰¹ *Cohen* is the most recent case; therefore, its potential significance is great.

In 1991, Brown University responded to a reduction in the school's budget by eliminating four varsity level sports.¹⁰² The sports included men's water polo, men's golf, women's gymnastics and women's volleyball.¹⁰³ Each team was given the option of becoming a "club" sport that could participate in intercollegiate

90. *See id.* at 344.

91. *See id.*

92. *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993).

93. *See id.* at 830.

94. *See id.* at 834.

95. *See supra* notes 46-48 and accompanying text.

96. The university had added eleven women's teams in the 1970s. *See Roberts*, 998 F.2d at 830.

97. *See id.* at 829.

98. *See id.* at 834.

99. 991 F.2d 888 (1st Cir. 1993). On remand, the district court considered the case on its merits and found for the plaintiffs. *Cohen v. Brown Univ.*, 879 F. Supp. 185 (D.R.I. 1995), *aff'd*, 101 F.3d 155 (1st Cir. 1996).

100. It was a victory in that the court ultimately found for the plaintiffs. Whether decisions such as this are in the best interest of gender equity in sports is discussed *infra* pp. 15-17.

101. Cheesebrough, *supra* note 49, at 296.

102. *Cohen*, 991 F.2d at 892.

103. *See id.*

competition if enough funds could be raised from private sources; each team exercised this option.¹⁰⁴ One year later, however, members of the women's teams brought a class action lawsuit claiming a Title IX violation.¹⁰⁵

The trial court granted the requested preliminary injunction and reinstatement of the women's teams as varsity teams.¹⁰⁶ In addition, the court forbade the university from eliminating or reducing financial support of any varsity women's teams until the case was resolved on its merits.¹⁰⁷ On appeal, the First Circuit granted a temporary stay of the district court's decision.¹⁰⁸ Considering the case on the merits, the district court applied the three-prong effective accommodation test¹⁰⁹ and held that Brown University failed to show substantial proportionality,¹¹⁰ program expansion or accommodation of abilities and interests of female athletes.¹¹¹ In 1997, the Supreme Court declined to hear the case, thereby allowing this strict application of the three-prong test to stand.¹¹²

The Effect of These Decisions on the Quest for Gender Equity in Sports

Cases such as *Favia*, *Roberts* and *Cohen*, through strict adherence to the OCR regulations,¹¹³ have positively impacted gender equity in sports by "securing the imposition of an affirmative obligation upon educational institutions to find places for [female athletes] in much larger numbers in their intercollegiate athletics programs."¹¹⁴ In addition, they have "achieved a symbolic conquest of the male athletic establishment and the 'old boy' network which have [sic] controlled such programs from their inception."¹¹⁵ That said, it must be noted that adherence to the statutory interpretation

104. *See id.*

105. *See id.*

106. *See Cohen v. Brown Univ.*, 809 F. Supp. 978, 1001 (D.R.I. 1992).

107. *Id.*

108. *Cohen*, 991 F.2d at 907.

109. *See supra* notes 46-48 and accompanying text.

110. The discrepancy between the percentage of females participating in sports and the percentage of females in the student body was thirteen percent. *See Bredthauer, supra* note 9, at 1114.

111. *Cohen v. Brown Univ.*, 879 F. Supp. 185, 214 (D.R.I. 1995).

112. *Cohen v. Brown Univ.*, 879 F. Supp. 185 (D.R.I. 1995), *aff'd*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

113. *See supra* notes 84-112 and accompanying text.

114. *Thro & Snow, supra* note 11, at 8.

115. *Id.*

promulgated by these three cases has given rise to at least two new hurdles on the already difficult path to full realization of the explicit and implicit goals of Title IX.¹¹⁶ These new obstacles arise from the courts' consistent focus on the goal of numerical parity.¹¹⁷

The first damaging effect resulting from the courts' preoccupation with achieving substantial proportionality at the intercollegiate level is judicial failure to recognize and attend to the enduring oppression of female athletes who are not "elite" or "exceptional."¹¹⁸ The class of superior athletes (male and female) comprises less than 6.4% of all enrolled students;¹¹⁹ therefore, these "landmark" cases leave many women stranded on the sidelines.¹²⁰ By focusing on the number of women participating in varsity sports, rather than on the underlying issues of discrimination,¹²¹ current jurisprudence does not address the atmosphere of discrimination surrounding those women who seek the benefits of athletic competition at a lower than varsity level, such as the club or intramural sports level.¹²²

Some level of emphasis on numerical parity, however, is important. Without female representation at the highest levels of athletic competition, young women aspiring to become athletes will have few, if any, role models.¹²³ Should courts continue to base decisions on the raw numbers, however, "the role models will never be more than token symbols."¹²⁴ The consequence would be judicial reinforcement of the "stereotype that only a few super women . . . are capable of being great athletes."¹²⁵ With no shift in focus, discrimination will continue to run rampant in athletic programs and the goals of Title IX will be unattainable.

The second problem stems from the categorization of *Favia*, *Roberts* and *Brown* as "affirmative action" cases. This classification

116. See *supra* notes 50-62 and accompanying text.

117. See Thro & Snow, *supra* note 11, at 9.

118. *Id.*

119. Memorandum from Todd Peter, Assistant Director of Research of the NCAA, to Christine Susemihl, Director of Compliance, Athletic Department, Colorado State University 1 (Jan. 30, 1955) (on file with author).

120. See Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, 3 YALE J.L. & FEMINISM 105, 150 (1990) (noting that little has been done to "develop a vision of sports that would encourage more women to participate").

121. A focus on discrimination would look beyond numerical parity to equality of experiences and treatment of female athletes beyond inclusion. See Thro & Snow, *supra* note 11, at 14.

122. See *id.* at 9.

123. See *id.* at 48.

124. *Id.* at 49.

125. Olson, *supra* note 120, at 150.

is based upon the ultimate effect of assigning great weight to numerical parity in examining effective accommodation.¹²⁶ The effect, however, is to harm men's teams rather than help women's teams.¹²⁷ In an attempt to avoid costly litigation, schools are paying close attention to these recent court decisions and are striving for substantial proportionality.¹²⁸ Because so many of the nation's educational institutions are suffering from rigid budgetary constraints,¹²⁹ they are achieving effective accommodation by eliminating men's teams instead of incurring the costs of funding additional women's teams.¹³⁰

The judicial interpretation of Title IX, and its accompanying regulations, in the "affirmative action" cases is contrary to the express intent of Title IX's drafters. To be sure, the statute contains the following language:

Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance. Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, state, section, or other area.¹³¹

The misinterpretation and misapplication of Title IX are largely responsible for the negative public perception of the statute,¹³² another obstacle threatening to impede the achievement of gender equity in sports. The administrative preoccupation with Title IX is not only creating new problems, but also failing to bring society closer to realizing the goals of the statute. A shift in administrative focus from intercollegiate to interscholastic programs is essential if Title IX is to avoid running into a dead end.

126. See Cheesebrough, *supra* note 49, at 303-04.

127. See *id.* at 324; Thro & Snow, *supra* note 11, at 17; Mark Hammond, Note, *Substantial Proportionality Not Required: Achieving Title IX Compliance Without Reducing Participation in Collegiate Athletics*, 87 Ky. L.J. 793, 807 (1999).

128. See sources cited *supra* note 127.

129. See Setty, *supra* note 11, at 349; Thro & Snow, *supra* note 11, at 23.

130. See Setty, *supra* note 11, at 349; Thro & Snow, *supra* note 11, at 17; Cheesebrough, *supra* note 49, at 324; Hammond, *supra* note 127, at 807.

131. 20 U.S.C. § 1681(b) (1994).

132. See *supra* note 17 and accompanying text.

THE IMPORTANCE OF AND CURRENT EFFORTS IN INTERSCHOLASTIC SPORTS

The Importance of Gender Equity in Sports at the Primary and Secondary Levels

"The stated purpose of interscholastic athletics is to provide students with an opportunity to cultivate good habits and to develop mental and physical abilities, equally beneficial to both girls and boys."¹³³ In addition to the obvious value of promoting this purpose of interscholastic athletics, gender equity at this level is a key component of the foundation for gender equity in sports and women's equality in general.

More men than women are choosing to participate in athletics at the college level.¹³⁴ This phenomenon results from the faster rate at which girls between the ages twelve to fourteen withdraw from athletics as compared to their male counterparts.¹³⁵ An interplay of both nature and nurture is responsible for driving girls from sports.¹³⁶

Some scholars believe that the current focus on intercollegiate sports programs will adequately foster athletic interest and participation at the interscholastic level.¹³⁷ Although there is some support for this position, simple logic leads to the conclusion that encouraging athletic involvement among younger girls will result in increased levels of interest at the college level. Advocates of this position point out that this approach will have the added beneficial effect of creating a fan base for women's sports—something that, although growing, is among the most distinguishing characteristics between men's and women's amateur and professional sports.¹³⁸

Having established why gender equity in interscholastic sports is important, it is necessary to clarify why Title IX is so vital to achieving this equity given the broad scope of constitutional protections available to student athletes.

133. Johnson, *supra* note 63, at 580.

134. See Straubel, *supra* note 17, at 1042.

135. See *id.* at 1043.

136. See *id.* This Note does not address the role played by nature, instead it proposes that continued participation among young female athletes could be nurtured by a change in the current implementation of Title IX, which would sustain interest levels.

137. See Thro & Snow, *supra* note 11, at 45.

138. See *id.*

Constitutional Protections

The Fourteenth Amendment to the Constitution and, more specifically, the Equal Protection Clause, can help female students gain access to sports programs by providing remedies for gender bias in state-operated institutions.¹³⁹ There is, however, no constitutional right to participate in interscholastic athletics.¹⁴⁰ Therefore, courts limit their inquiry to whether the interscholastic program in question, as administered, denies female students an equal right to participate.¹⁴¹

There are four requirements to successfully litigate gender discrimination claims under the Fourteenth Amendment. First, there must be a showing that state action is present. Second, acknowledgement of mixed teams where potential physical contact is the basis for denial of the right to compete. Third, it is necessary to discuss separate but equal opportunities to participate in the athletic activity. Lastly, the plaintiff must demonstrate a valid property interest.¹⁴² Some of these elements are easier for student athletes to satisfy than others.

As to the requirement that state action exists it has been observed that "[p]ublic high school sports teams are uniformly members of voluntary state athletic associations. The associations set forth the governing rules and regulations for high school sports programs. Courts that considered the question of whether there was state action when these athletic associations were involved uniformly answered in the affirmative."¹⁴³

Concerning the issue of mixed teams, in which possible physical contact is grounds for exclusion of women, courts have found that gender-based classifications can withstand a constitutional challenge under the Fourteenth Amendment if it is shown that the true purpose is to rectify past discrimination.¹⁴⁴ In other words, a male athlete can be denied a place on a female team because the equalization of athletic opportunities is considered an important

139. See Bredthauer, *supra* note 9, at 1109.

140. See *Brenden v. Indep. Sch. Dist.* 742, 477 F.2d 1292, 1297 (8th Cir. 1973).

141. See Cheryl L. Schubert-Madsen et al., *Gender Discrimination in Athletics*, 67 N.D.L. REV. 227, 232 (1991).

142. See *id.* at 228.

143. Heckman, *supra* note 5, at 35.

144. See *B.C. v. Cumberland Reg. Sch. Dist.*, 531 A.2d 1059, 1063-64 (1987); see also Schubert-Madsen et al., *supra* note 141, at 233 ("In this area, the Supreme Court has held that gender-based classifications can withstand a constitutional challenge under the fourteenth amendment where the actual purpose of the gender-based regulation or rule was to compensate for past discrimination.").

governmental objective¹⁴⁵ to which such denial bears a substantial relationship.¹⁴⁶ Additionally, the exclusion of females will be upheld as constitutional where there is potential physical contact. In such cases, protecting the safety and well-being of the female athlete is the important governmental objective justifying denial of participation. "[W]omen rarely ask to compete with men in a particular endeavor," therefore, a more relevant concern for the purposes of this Note is the third issue of separate but equal teams.¹⁴⁷

Courts have consistently found that separate athletic programs for males and females are permissible, provided that they are equal.¹⁴⁸ Equality, it seems, is measured objectively in terms of budget allocations for each team¹⁴⁹ or, more subjectively, by reference to the quality of social and physical benefits derived by male and female participants.¹⁵⁰ Inequality exists when "separation of the sexes in school athletics discourages female participation or perpetuates stereotypical conceptions of a woman's role in society."¹⁵¹ A finding of such inequality requires that the courts provide a remedy for the victims.¹⁵² However, the courts cannot make this inquiry into equality until the complaining party has demonstrated loss of a valid property interest.¹⁵³ It is this prong of the Fourteenth Amendment analysis that most frequently results in a finding of no constitutional protection for athletes—particularly those at the interscholastic level.¹⁵⁴

Due process protections offered by the Fourteenth Amendment cannot be invoked until a petitioner has established a valid property right.¹⁵⁵ Although scholarships vest recipients at the college level with property rights,¹⁵⁶ the absence of scholarships in interscholastic sports means that there is no property interest and, therefore, no right to participate vested in interscholastic athletes.¹⁵⁷ Although

145. See Schubert-Madsen et al., *supra* note 141, at 232.

146. See *id.* at 228.

147. Wilson, *supra* note 38, at 409.

148. See Schubert-Madsen et al., *supra* note 141, at 234.

149. See *id.* at 235.

150. See Virginia P. Croudace & Steven A. Desmarais, Note, *Where the Boys Are: Can Separate Be Equal in School Sports?*, 58 S. CAL. L. REV. 1425, 1427 (1985).

151. *Id.*

152. See *id.*

153. See *id.*

154. See generally Schubert-Madsen et al., *supra* note 141 (using the Fourteenth Amendment to analyze gender-based discrimination theories).

155. See *id.* at 236.

156. See *id.*

157. See *id.* at 236-37.

some courts have found a property interest when the student athlete establishes a connection between participation and a tangible property interest, such as participation at the college level, this is the exception rather than the rule.¹⁵⁸ Therefore, constitutional protections often provide no protection at all to athletes at the interscholastic level and, hence, the crucial need for Title IX protection at this level.

The Importance of Title IX at the Interscholastic Level

Title IX is needed to promote gender equity in situations where the Constitution is impotent. The Fourteenth Amendment guarantees that no one may be treated unfairly in an activity provided by the state—not the right to participate in such activities.¹⁵⁹ Title IX provides a more accessible remedy than attempting to prove Fourteenth Amendment Due Process violations.¹⁶⁰

Title IX carries with it the threat of administrative enforcement against noncompliance programs;¹⁶¹ therefore, its impact is stronger and more immediate than constitutional claims that offer injunctive relief and occasional damages.¹⁶² Successful Title IX claimants also receive damages and injunctive relief.¹⁶³ In addition, an individual seeking redress pursuant to Title IX does not necessarily need to retain private counsel whereas those who bring claims under the Fourteenth Amendment are required to hire their own attorneys.¹⁶⁴

In addition to offering more flexible and efficient protections than the Constitution, Title IX application at the interscholastic level would provide benefits beyond those relating to litigation. For example, enforcing Title IX at the interscholastic level would actively promote participation in sports at a younger age.¹⁶⁵ This in turn would increase female interest in college sports. The ultimate result of applying Title IX at the interscholastic level would be increased compliance with the statute at the college level and

158. *See id.* at 237.

159. *See id.* at 229.

160. *See Bredthauer, supra* note 9, at 1111.

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.* (discussing the fact that individuals have the right to bring a private suit pursuant to Title IX, but they need not incur the expense of hiring an attorney to gain access to the program or activity, whereas one must retain private counsel to bring a Fourteenth Amendment claim).

165. *See Wilson, supra* note 38, at 407.

furtherance of the implicit goals of Title IX. Furthermore, more young girls would have the opportunity to gain all of the advantages that participation in athletics brings, thereby promoting increased gender equality in society.

PROPOSALS

The advantages of pushing for increased Title IX compliance in interscholastic programs while simultaneously relaxing demands for substantial proportionality at the intercollegiate level are clear. The theory of "if you build it, they will come,"¹⁶⁶ seems to have substantial support. The only remaining question is how to build this foundation for gender equity in sports.

Shift the Focus of Implementation at the College Level

The recent push for effective accommodation, as measured by the substantial proportionality test, has effectively increased the number of opportunities available to female student-athletes at the inter-collegiate level. However, this approach fails to address part of the original intent of Title IX: to increase participation of female athletes in accordance with their interests and abilities.¹⁶⁷ Therefore, an alternative interpretation of the statute should be adopted by those individuals, agencies and courts charged with implementing Title IX at the college level. Such an interpretation would lead to the conclusion that fashioning athletic programs that reflect the interests and abilities of both men and women best achieves equality of opportunity.¹⁶⁸

The primary problem with focusing on substantial proportionality at the collegiate level¹⁶⁹ is that it rests on the faulty assumption that female college students are interested in athletics to the same degree as their male counterparts.¹⁷⁰ As a result, the current approach to implementing and enforcing Title IX does not provide equal opportunity, but instead offers preferential treatment to female athletes regardless of whether a program satisfies the interests and abilities of both sexes.¹⁷¹ At least one court has

166. See *FIELD OF DREAMS*, *supra* note 20.

167. See *Hammond*, *supra* note 127, at 813-14.

168. See *id.* at 812.

169. For a list of problems resulting from the focus on substantial proportionality see *Straubel*, *supra* note 17, at 1065-69.

170. See *id.*

171. See *Hammond*, *supra* note 127, at 809.

recognized this flaw in the reasoning expressed in the trilogy of cases discussed above.

In *Pederson v. Louisiana State University*,¹⁷² the court rejected the *Cohen* court's reliance on substantial proportionality.¹⁷³ The court stated that "[c]easing the [Title IX] inquiry at the point of numerical proportionality does not comport with the mandate of the statute."¹⁷⁴ It concluded that an analysis of Title IX compliance focusing on the relative interests of students would lead to more opportunities for currently unaccommodated student athletes who express the requisite interest and ability to participate.¹⁷⁵ This interpretation of Title IX, although perhaps more difficult to analyze, is more consistent with the explicit goals of the statute.¹⁷⁶

Reliance on substantial proportionality is an easy way for enforcers of Title IX to avoid directly addressing gender inequality, because it is based on a review of objective statistics.¹⁷⁷ The proposed alternative interpretation requires officials and judges to review the more obscure, subjective factors of interest and ability. Although this task is admittedly more cumbersome, it is not unreasonably difficult or time consuming.¹⁷⁸

Several resources are available to college and university officials to help determine the athletic interests and abilities of the student body.¹⁷⁹ Perhaps the most useful of these indicators is current participation in interscholastic sports.¹⁸⁰ Although discrimination exists at the elementary, middle and high school levels, these schools are better positioned to respond to interest in athletics.¹⁸¹ The decision of whether to participate in athletics and specifically in which sport to participate is usually made by the time an individual enters college.¹⁸² For this reason, it makes little sense to offer a team at the intercollegiate level that is not supported by high schools.¹⁸³ The test for Title IX compliance at the college level should, therefore, use high school sports participation statistics as

172. 912 F. Supp. 892, 913-14 (M.D. La. 1996).

173. *See id.*; *see also* Hammond, *supra* note 127, at 808 (discussing the *Pederson* court's rejection of the "substantial proportionality" test).

174. *Pederson*, 912 F. Supp. at 914.

175. *Id.*

176. *See* Hammond, *supra* note 127, at 808.

177. *See id.* at 794.

178. *See id.*

179. *See id.*

180. *See id.*

181. *See* Straubel, *supra* note 17, at 1072-73.

182. *See id.*

183. *See id.*

its guideline, thereby recognizing the decision of some students not to participate.¹⁸⁴

In addition to providing a more accurate measuring stick by which to judge athletic interests and abilities, a focus on interscholastic participation will have the additional beneficial effect of making administrators aware of discrimination at the interscholastic level. The current implementation of Title IX relies on a trickle down effect for promoting participation in athletics.¹⁸⁵ This leads to the creation of teams at the college level that are destined to deteriorate because they do not have corresponding high school teams.¹⁸⁶ "[S]ponsorship at the high school level is vital to generating the critical mass of interest and participation necessary to sustain college teams."¹⁸⁷ Accordingly, Title IX enforcement efforts at the interscholastic level are the most effective means of increasing interest and participation in athletics. Adoption of this interpretation of Title IX will have several additional benefits beyond aiding the pursuit of gender equity in sports.¹⁸⁸

Although this Note proposes a shift in emphasis from the substantial proportionality test to satisfying interests and abilities at the college level, it is not a recommendation to ignore or abandon numerical parity. Substantial proportionality is important for several reasons, not the least of which is its role in establishing role models for young athletes.¹⁸⁹ This Note proposes that administrators and the judiciary recognize that strict and exclusive adherence to substantial proportionality at the college level will not fully achieve the implicit and explicit goals of Title IX. If Title IX is going to continue to have a positive impact on the movement for gender equity, there must be increased emphasis on this alternative interpretation and an implementation of the statute that calls for a focus on participation at the interscholastic level.

184. *See id.*

185. *See id.* at 1072.

186. *See id.*

187. *Id.*

188. *See* Hammond, *supra* note 127, at 812; *see also* Straubel, *supra* note 18, at 1048 (explaining the benefits, which include a burden shifting scheme, and their effect in decreasing litigation).

189. *See* Thro & Snow, *supra* note 11, at 48-49.

*Increase Gender Equity in Interscholastic Sports**Pursue Substantial Proportionality in Interscholastic Programs*

At the college level, the appropriate Title IX approach is to guarantee that each gender will be able to participate at a rate proportional to ability and interest. Although substantial proportionality is not an appropriate pursuit in intercollegiate athletics, it should be enforced at the interscholastic level where encouragement and the opportunity to participate have the greatest potential impact.¹⁹⁰ The perceived lack of interest in athletics among female college students is, most likely, not genuine disinterest, but a lack of awareness of the option to participate.¹⁹¹

Although the DOE Policy Interpretation outlines the substantial proportionality approach that was promulgated specifically for intercollegiate sports, it states that its principles may often apply to secondary sports.¹⁹² Therefore, application of this test to primary¹⁹³ and secondary school policies is permissible as a matter of law.¹⁹⁴ There is no point, however, in adopting an effective accommodation approach based on substantial proportionality until effective enforcement of this approach can be a realistic occurrence.

Reform OCR

Under Title IX there are three primary avenues for grievances available to victims of gender discrimination: internal procedures within the school or university, filing an administrative complaint with the OCR and litigation.¹⁹⁵ Although litigation is a viable method of increasing Title IX compliance, it is not easily accessible and rarely resolved in a manner timely enough to benefit the individual alleging discrimination.¹⁹⁶ On the other hand, "OCR was designed to be an inexpensive, efficient, and effective method of

190. See Cheesebrough, *supra* note 49, at 325; see also *Cheering on Women*, *supra* note 59, at 1642 (discussing how establishing substantial proportionality at the high school level will be an effective method of increasing female participation in sports).

191. See Wilson, *supra* note 38, at 402.

192. See 34 C.F.R. § 106.37(c) (1999).

193. See *Cheering on Women*, *supra* note 59, at 1642 (discussing the importance of including primary education schools in the substantially proportionate approach).

194. See *id.*

195. See Setty, *supra* note 11, at 332.

196. See *id.*

correcting Title IX violations."¹⁹⁷ Unfortunately, OCR has not fulfilled its potential and should, therefore, be reformed.

Research shows that the OCR regularly applies different standards in determining Title IX violations.¹⁹⁸ In addition, OCR enforcement officers rarely demand full compliance with Title IX among schools.¹⁹⁹ In fact, "[a] comprehensive study of Letters of Findings conducted by the Women's Sports Foundation revealed that since 1988 OCR has never initiated an administrative enforcement proceeding, referred a case to the Department of Justice for enforcement, or decided to withhold federal funding for a school not in compliance with Title IX."²⁰⁰ Lastly, in several instances, OCR has taken years to resolve cases brought before it,²⁰¹ resulting in decreased incentives to file complaints.²⁰²

OCR should request increased funding from Congress to expedite investigations. Other reform recommendations include the following: implementation of uniform standards to be applied in evaluating potential violations, increased monitoring of educational institutions and consistent imposition of penalties on those programs not in compliance.

Increase Public Awareness of Title IX

Increasing public awareness of Title IX would have the dual effects of creating another monitoring body (the public) and increasing self-evaluation on the part of schools. For these reasons, institutions affected by Title IX should make a concerted effort to educate students, coaches, administrators and community members about the requirements of Title IX.

Another way to facilitate increased awareness and consequent compliance with Title IX in high schools is to establish a version of the Equity in Athletics Disclosure Act of 1994,²⁰³ which is in place at universities, primary and secondary schools. At the intercollegiate level, this Act:

[M]andates that all institutions . . . report each year on athletic participation figures, scholarships, program budgets and expenditures, and coaching salaries by gender . . . [to] not only

197. *See id.*

198. *See id.* at 340.

199. *See id.* at 341, 345.

200. *Id.* at 344 (footnotes omitted).

201. *See id.* at 346.

202. *See id.*

203. Pub. L. No. 103-382, tit. III, pt. E, § 360B, 108 Stat. 3969 (1994).

assist OCR in determining Title IX violations and in pinpointing the best avenues for reform, but also establish the basis for an honest dialogue between an institution and its students, increasing trust and cooperation toward reform.²⁰⁴

The value of creating such a reporting device at the high school level is an obvious way to promote public awareness of Title IX.

Short-Term Reform Measures

The alterations to Title IX application advocated by this Note are admittedly costly and time consuming. Full implementation of these proposed changes and the subsequent realization of increased gender equity in sports, will take place over time; however, several small changes would work toward achieving the goals of Title IX in the short run.

Among the primary obstacles to any Title IX compliance agenda, including the one this Note proposes, is budgetary constraints.²⁰⁵ Short-term reforms that could alleviate some of the financial burdens facing schools include "rotating superior playing fields, locker rooms, and, when possible, equipment between women's and men's teams."²⁰⁶ Additionally, a temporary reduction of team rosters would allow allocation of additional funds to women's sports. These short-term devices provide a temporary solution to "the problem of noncompliance with Title IX without significantly constraining men's athletic programs or engendering ill-will towards women's athletic programs and Title IX's mission."²⁰⁷

CONCLUSION

The proposals set forth in this Note will take a significant amount of time to implement. This slow transition at the primary level, however, will eventually result in increased female participation in sports and, therefore, increased equity among men and women. Until the focus of Title IX shifts away from intercollegiate sports and toward interscholastic programs, non-compliance with the *Cohen* substantial proportionality test should not necessarily be seen as a failure of colleges, but as a failure on the part of policy-makers and those charged with the awesome task

204. Setty, *supra* note 11, at 348-49.

205. *See id.* at 349.

206. *Id.*

207. *Id.*

2001]

IF YOU BUILD IT THEY WILL COME

1009

of implementing this ambitious and overwhelmingly important piece of legislation.

AMY BAUER