

William & Mary Bill of Rights Journal

Volume 5 (1996-1997)
Issue 1

Article 3

December 1996

Grappling with Gender Equality

Jerry R. Parkinson

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



Part of the [Law and Gender Commons](#)

Repository Citation

Jerry R. Parkinson, *Grappling with Gender Equality*, 5 Wm. & Mary Bill Rts. J. 75 (1996),
<https://scholarship.law.wm.edu/wmborj/vol5/iss1/3>

Copyright c 1996 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

GRAPPLING WITH GENDER EQUITY

Jerry R. Parkinson*

In this twenty-fifth anniversary year of the enactment of Title IX of the Education Amendments of 1972, the issue of gender equity in athletics is as divisive as ever. Lawsuits by female athletes and the demise of many men's teams have changed perceptions of Title IX in the 1990s and have provided an impetus for a thorough reexamination of the gender equity issue.

In this Article, Professor Parkinson begins with a brief overview of the regulatory framework governing Title IX's application to athletics. He then examines the legal standards by which the Department of Education's Office for Civil Rights (OCR) and the courts review athletics programs for Title IX compliance. In examining these standards, Parkinson emphasizes OCR's three-part standard by considering it in light of OCR's recent Clarification and the most recent case law. This Article also probes what may be the most divisive gender equity issue in recent years—the elimination of men's sports as a means of narrowing the opportunity gap between men and women.

* * *

These whinings [of men's team coaches] . . . make them look shallow and—above all else—guilty. . . .

....

But those who have supported women's issues, for the most part, haven't helped matters. They've taken the law and shaken it in the faces of their male peers like a Bible before a sinner¹

INTRODUCTION

In this twenty-fifth anniversary year of the enactment of Title IX of the Education Amendments of 1972,² the issue of gender equity in athletics is as divisive as ever. Many defenders of the status quo view Title IX simply as the latest pet cause of "militant" feminists³ and "gender quota extrem-

* Professor of Law, University of Oklahoma College of Law. The author acknowledges the longstanding support of an extraordinarily generous colleague, Mark R. Gillett.

¹ Bill Campbell, *Judge Must Dismiss Drivel*, NEW ORLEANS TIMES-PICAYUNE, Oct. 28, 1995, at D2, *quoted in* NCAA NEWS, Nov. 13, 1995, at 4.

² 20 U.S.C. §§ 1681-1688 (Supp. II 1972 & 1988).

³ See, e.g., Dale Anderson, Letter to the Editor, NCAA NEWS, May 24, 1995, at 4

ists."⁴ Conversely, Title IX proponents often view concerns about reduction or elimination of men's sports as "men's whining about the fact that the playing field is finally being leveled."⁵

Perhaps this polarization is to be expected. After all, female athletes have been waiting twenty-five years for school administrators to comply with the law,⁶ and twenty-five years is a long time to keep one's patience. It was inevitable that female athletes eventually would turn to litigation, the ultimate polarizer, in their efforts to secure equitable treatment. Women's gains over the last several years, however, often have come at the expense of men's teams.⁷ Although women's sports advocates may have difficulty empathizing with male athletes and coaches who lose athletic opportunities,⁸ they must remember that the athletic benefits they herald for women are equally important to men. Men who lose athletic opportunities should

(referring to "militant women's groups" engaged in a "misinformation" campaign) (Anderson is a former NCAA wrestling champion who serves as Title IX project attorney for the National Wrestling Coaches Association); Debra E. Blum, *Officials of Big-Time College Football See Threat in Moves to Cut Costs and Provide Equity for Women*, CHRON. HIGHER EDUC., June 16, 1993, at A35 (quoting Edmund P. Joyce, former University of Notre Dame executive vice-president, at the 17th annual convention of the College Football Association: "Frankly, I have been dismayed at the publicity and apparent support the militant women have received on their irrational attack of football as their bugaboo.").

⁴ Leo Kocher, *A Fair Hearing to Review Title IX*, NCAA NEWS, Apr. 19, 1995, at 4. Kocher is the University of Chicago's head wrestling coach. See also Robert C. Farrell, *Title IX or College Football?*, 32 HOUS. L. REV. 993, 996 (1995) ("In the locker room, the football stadium, and in the athletic director's office, Title IX is viewed as an annoying and extremist intrusion, driven by militant women.").

⁵ Debra E. Blum, *Men Turn to Federal Anti-Bias Laws to Protect Teams from Chopping Block*, CHRON. HIGHER EDUC., Aug. 11, 1993, at A33 (quoting Diane M. Henson, plaintiffs' attorney in University of Texas gender-equity litigation).

⁶ One commentator has suggested that it is "somewhat misleading" to accuse school administrators of recalcitrance for that period due to uncertainty in the 1970s and 1980s about whether Title IX applied to athletics programs. B. Glenn George, *Miles to Go and Promises to Keep: A Case Study in Title IX*, 64 U. COLO. L. REV. 555, 558 (1993). For a brief discussion of that issue, see *infra* note 350.

⁷ See, e.g., *Kelley v. Board of Trustees*, 35 F.3d 265, 269 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995).

⁸ Professor Stephen F. Ross served as a member of the Athletic Board of the University of Illinois, where the men's swimming team was eliminated in 1993 in an effort to cut athletics programs costs. The university retained the women's swimming team due to Title IX concerns. *Id.* Professor Ross expressed dismay at "the genuine pain a number of people . . . experienced in making these program cuts." Stephen F. Ross, et al., *Rededication Panel Discussion on Gender Equity and Intercollegiate Athletics*, 1995 U. ILL. L. REV. 133, 141. To Professor Ross, "the decision on the men's swimming team was not that difficult . . . [because] the swimmers had been getting an extremely fortuitous benefit for twenty years, by receiving scholarships at all." *Id.*

not be expected to go down without a fight.

Lawsuits by female athletes and the demise of many men's teams have changed perceptions of Title IX in the 1990s and have provided an impetus for a thorough reexamination of the gender equity issue. In late 1994, representatives of several men's coaching organizations began a concerted effort to convince Congress to hold hearings on Title IX and its impact on men's sports.⁹ Much of their concern resulted from three 1993 federal appellate court decisions that held in favor of female athletes who had sued their universities under Title IX.¹⁰ The coaches' lobbying bore fruit in May 1995 when the House Subcommittee on Postsecondary Education, Training, and Lifelong Learning heard three hours of testimony on Title IX and its enforcement by the Department of Education's Office for Civil Rights (OCR).¹¹ Despite several witnesses' pleas for Congress to "take back control" of the Title IX enforcement process,¹² the House panel expressed no interest in amending Title IX or its regulations.¹³ Thus, for the foreseeable future, the enforcement of Title IX will remain in the hands of OCR and the courts.

To date, the courts generally have deferred to OCR and its three-part Policy Interpretation that explains how schools can comply with Title IX mandates.¹⁴ One important development, however, is a January 1996 federal district court decision, *Pederson v. Louisiana State University*.¹⁵ In *Pederson*, the court questioned both OCR's Policy Interpretation and federal

⁹ Mike Zapler, *Protecting Men's Sports*, CHRON. HIGHER EDUC., Jan. 6, 1995, at A43. The coaches contended that Title IX played a major role in many schools' elimination of men's sports programs, to the extent that some sports, such as gymnastics, swimming, and wrestling, faced extinction. *Id.* The shrinkage of some sports is very real. In academic year 1974-1975, 401 of the 704 NCAA schools sponsored wrestling programs, but in 1994-1995, despite an increase to 909 NCAA member schools, only 261 wrestling programs remained. *Id.* at A44. Gymnastics programs dwindled from 133 to 32 during the same time period. *Id.*

¹⁰ *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993) (reinstating women's field hockey and gymnastics programs); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.) (reinstating women's softball program), *cert. denied*, 510 U.S. 1004 (1993); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (reinstating women's gymnastics and volleyball programs).

¹¹ Debra E. Blum, *House Panel Hears Title IX Debate but Schedules No Further Action*, CHRON. HIGHER EDUC., May 19, 1995, at A41.

¹² *Id.* (quoting Rep. J. Dennis Hastert, R-Ill., the lobbyists' principal supporter in Congress and a former college wrestler and high school wrestling coach).

¹³ *Id.* Representative Pat Williams, D-Mont., a subcommittee member, declared that Title IX compliance should be a matter for schools to resolve, without the intervention of Congress or the courts. *Id.*

¹⁴ See, e.g., *Roberts*, 998 F.2d at 828-29; *Cohen*, 991 F.2d at 896-97. For the text of OCR's three-part test, see *infra* text accompanying notes 66-67.

¹⁵ 912 F. Supp. 892 (M.D. La. 1996).

courts' previous applications of that standard.

The May 1995 congressional hearing led to another significant development. In June 1995, OCR committed to clarifying its enforcement standards to give schools more concrete guidance in their efforts to comply with Title IX.¹⁶ OCR released an initial draft of its *Clarification* in September 1995, and, following a comment and review period, issued its final *Clarification* on January 16, 1996.¹⁷

This Article begins with a brief overview of the regulatory framework governing Title IX's application to athletics.¹⁸ It then examines the legal standards by which OCR and the courts review athletics programs for Title IX compliance. In examining these standards, this Article particularly emphasizes OCR's three-part standard¹⁹ by considering it in light of OCR's recent *Clarification* and the most recent case law, including *Pederson*.²⁰ This Article also probes what may be the most divisive gender equity issue in recent years—the elimination of men's sports as a means of narrowing the opportunity gap between men and women.²¹

I. THE REGULATORY FRAMEWORK

A. Title IX

In 1972, Congress enacted Title IX to prohibit sex discrimination in schools receiving federal funds.²² Title IX mandates that "[n]o person in the United States shall, on the basis of sex, be excluded from participation

¹⁶ In July 1995, the House Appropriations Committee approved legislation that would have withheld appropriations for OCR compliance investigations if OCR had not issued new "objective criteria" for determining compliance with Title IX by the end of the year. Douglas Lederman, *House Bill Targets Enforcement of Federal Sex-Bias Law in College Sports*, CHRON. HIGHER EDUC., Aug. 4, 1995, at A26. In June, however, Norma V. Cantu, Assistant Secretary of Education and the head of OCR, had promised to clarify the policy. *Id.* Shortly thereafter, members of Congress weighed in on the matter: 96 House members sent a letter to Cantu urging that OCR's current interpretation of Title IX be upheld, and 134 House members submitted their own letter criticizing the OCR stance and recommending changes. *Id.*

¹⁷ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (1996) [hereinafter OCR CLARIFICATION].

¹⁸ See *infra* Part I.

¹⁹ See *infra* Part II. Case law and OCR's three-part test focus on men's and women's equal *opportunity* to participate, rather than on the equal treatment of existing men's and women's teams. See *infra* text accompanying notes 45-50. This Article's scope is limited to the question of equal opportunity to participate.

²⁰ 912 F. Supp. 892 (M.D. La. 1996).

²¹ See *infra* Part III.

²² 20 U.S.C. §§ 1681-1688 (Supp. II 1972 & 1988).

in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.”²³ To enforce that broad mandate, Congress directed the Secretary of the Department of Health, Education and Welfare (HEW) to prepare regulations to implement Title IX.²⁴

B. *The Regulations*

Although a dearth of legislative history left in doubt Title IX’s application to athletics,²⁵ in June 1974, HEW issued proposed regulations that included specific provisions governing intercollegiate athletics programs.²⁶ In response to the proposed regulations, HEW received nearly 10,000 comments, with the athletic provisions generating the most controversy.²⁷ The National Collegiate Athletic Association (NCAA) was one of the respondents that challenged Title IX’s applicability to intercollegiate athletics. The NCAA proposed, at a minimum, an exemption for revenue-producing sports.²⁸ The United States Senate passed such an exemption in the “Tower Amendment” to the Education Amendments of 1974.²⁹ Congress, however, ultimately rejected the exemption and replaced the Tower Amendment with the “Javits Amendment,” which simply instructed HEW to consider “the nature of particular sports” when drafting its final regulations.³⁰

In June 1975, following substantial redrafting and presidential approval, HEW submitted the final regulations to Congress for review.³¹ Congress

²³ *Id.* § 1681(a).

²⁴ *Id.* § 1682.

²⁵ See Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 9 & n.30 (1992). Congress included no committee report with the final bill, and the congressional debate only briefly mentioned athletics. See 118 CONG. REC. 5,807 (1972) (Sen. Bayh’s statement regarding football teams’ and locker rooms’ continued segregation); 117 CONG. REC. 30,407 (1971) (Sen. Bayh’s statement regarding privacy in “sports facilities”).

²⁶ 39 Fed. Reg. 22,228-40 (1974).

²⁷ Mark H. Rettig, Note, *Sex Discrimination and Intercollegiate Athletics*, 61 IOWA L. REV. 420, 471-74 (1975).

²⁸ *Id.* at 473.

²⁹ Act of Aug. 21, 1974, Pub. L. No. 93-380, 1974 U.S.C.C.A.N. (93 Stat.) 4093, 4271.

³⁰ “The Secretary shall prepare and publish . . . proposed regulations implementing the provisions of title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.” Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974). The passage of the Javits Amendment suggests a congressional intent to include intercollegiate athletics programs within the scope of Title IX.

³¹ On June 4, 1975, the final regulations were published in the *Federal Register*,

held several hearings and debates during June and July but took no action to reject the regulations, which became effective on July 21, 1975.³²

The Title IX athletics regulations are broad. The regulations govern both interscholastic and intercollegiate athletics, as well as intramural and club sports.³³ The regulations require an institution sponsoring any of these types of athletics programs to provide "equal athletic opportunity for members of both sexes."³⁴ The regulations set forth a nonexclusive list of ten factors that OCR will consider in determining whether a school has met the equal opportunity mandate:

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

with a supporting memorandum from HEW Secretary Caspar Weinberger to President Ford. 40 Fed. Reg. 24,128-45 (1975).

³² Rettig, *supra* note 27, at 470-71; *see also* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 531-32 (1982) (describing in detail the promulgation of the regulations).

³³

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

³⁴ 34 C.F.R. § 106.41(a) (1996).

Note that the citation is to Department of Education regulations. In 1979 Congress split HEW into the Department of Education and the Department of Health and Human Services. 20 U.S.C. §§ 3401-3510 (Supp. III 1979). Congress transferred all education functions, including education-related OCR functions, to the Department of Education. *Id.* § 3441(a). At the time of the split, the existing Title IX regulations, 45 C.F.R. § 86, were left with the Department of Health and Human Services. The Department of Education, however, promulgated its own, identical set of regulations. The Department of Education's regulations are cited in this Article because OCR, the agency charged with enforcing Title IX, is part of the Department of Education.

³⁴ 34 C.F.R. § 106.41(c) (1996).

es;
(10) Publicity.³⁵

The regulations also address the equitable treatment of the sexes in awarding athletic scholarships.³⁶

OCR has categorized these ten factors and two factors not specifically mentioned in the regulations—recruitment and support services—into three distinct areas of Title IX compliance: (1) “Athletic Financial Assistance (Scholarships)”; (2) “Equivalence in Other Athletic Benefits and Opportunities” (factors 2 through 10 above, plus recruitment and support services); and (3) “Effective Accommodation of Student Interests and Abilities” (factor 1 above).³⁷ OCR set forth these categories in a formal “Policy Interpretation,” which it published in 1979.³⁸

C. *The Policy Interpretation*

The final Title IX regulations allotted three years to secondary and post-secondary schools to meet Title IX compliance standards.³⁹ During that transition period, OCR received more than one hundred formal complaints alleging sex discrimination in intercollegiate athletics.⁴⁰ From schools, it also received countless pleas for clarification of the regulations.⁴¹ In 1978, in an effort to provide guidance to schools in their compliance efforts and to reduce the number of complaints filed, OCR proposed a “Policy Interpretation.”⁴² Following an extensive comment and review period,⁴³ on December 11, 1979, OCR issued a final version of the Policy Interpretation.⁴⁴ Be-

³⁵ *Id.*

³⁶ *Id.* § 106.37(c). (“To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.”).

³⁷ 44 Fed. Reg. 71,413, 71,415-17 (1979).

³⁸ *Id.* at 71,413.

³⁹ 34 C.F.R. § 106.41(d) (1996). Elementary schools were required to comply within one year, by July 21, 1976. *Id.* To those who objected to the three-year “grace period,” OCR responded that schools would be required to comply “before the end of the adjustment period wherever possible.” 40 Fed. Reg. 24,135 (1975).

⁴⁰ *Cohen v. Brown Univ.*, 991 F.2d 888, 896 (1st Cir. 1993).

⁴¹ See James P. Martin, *Title IX and Intercollegiate Athletics: Scoring Points for Women*, 8 OHIO N.L. REV. 481, 492 n.92 (1981) (noting the widespread “confusion among the university community as to what constituted compliance”).

⁴² 43 Fed. Reg. 58,070 (1978).

⁴³ OCR received more than 700 comments during this period. 44 Fed. Reg. 71,413 (1979).

⁴⁴ *Id.*

cause the Policy Interpretation provides the most specific guidance regarding OCR's view of what Title IX and its regulations require, the Policy Interpretation has become the principal focus in Title IX compliance cases.

As noted above, the Policy Interpretation divides compliance issues into three distinct categories and addresses each category separately. The first two categories are scholarships and "other benefits and opportunities." These generally are characterized as dealing with "treatment" issues,⁴⁵ which address the manner in which existing women's teams are treated relative to men's teams in areas such as coaching, facilities, and scheduling. The third category is accommodation of student interests and abilities, which addresses participation opportunities.

Treatment issues are critical in an assessment of an institution's compliance with Title IX. Treatment inequities take many familiar forms: schools provide women second-rate facilities relative to those of men; they make female athletes ride old buses to away games, while men fly; they schedule women's games "prior to men's contests as if they are some type of 'warmup'";⁴⁶ they allot women's teams the worst practice times; and they provide substantially more publicity for men's sporting events than they do for women's events. All such disparities send a message about women's second-rate "place" in the athletic cosmos.⁴⁷

As important as treatment issues are, however, they mean very little unless women have an opportunity to participate.⁴⁸ That opportunity "lies at the core of Title IX's purpose."⁴⁹ Consequently, the Policy Interpretation, most of the recent developments in Title IX law, and thus this Article, focus on OCR's third category, which is effective accommodation of student interests and abilities.⁵⁰

⁴⁵ See, e.g., *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 909 (M.D. La. 1996); *Cohen v. Brown Univ.*, 879 F. Supp. 185, 195 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, No. 96-1321, 1997 WL 81992 (U.S. Apr. 21, 1997).

⁴⁶ Julie Dunn Crawford & John L. Strobe, *Gender Equity in College Athletics: How Far Have We Really Come in Twenty Years?*, 104 EDUC. L. REP. 553, 554 (1995).

⁴⁷ See George, *supra* note 6, at 570.

⁴⁸ See Melody Harris, *Hitting 'Em Where It Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics*, 72 DENV. U. L. REV. 57, 81 (1994).

⁴⁹ *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993).

⁵⁰ Another reason for this focus is that treatment issues are considerably easier to evaluate; generally it is not that difficult to compare men's and women's scholarships, facilities, travel allowances, and recruiting budgets and to make a judgment as to whether a school is treating the sexes equally. The "effective accommodation of interests and abilities," on the other hand, is laden with ambiguity.

Other commentators have directed their attention to treatment issues. See, e.g., Anne Bloom, *Financial Disparity as Evidence of Discrimination Under Title IX*, 2 VILL. SPORTS & ENT. L.F. 5 (1995); George, *supra* note 6 (case study examining differential treatment of the University of Colorado's men's and women's basketball pro-

Prior to an analysis of OCR's effective accommodation standard, a threshold question merits discussion: In light of OCR's separate compliance categories, is noncompliance in only one category sufficient to violate Title IX? Alternatively, may a school balance its strengths in one compliance area against weaknesses in another to achieve overall Title IX compliance?

The leading gender equity case, *Cohen v. Brown University*,⁵¹ considered this issue. In *Cohen*, the defendants argued for a program-wide evaluation of their compliance efforts. The district court, however, concluded that deficiencies in the accommodations area alone could result in a Title IX violation.⁵² On appeal, the Court of Appeals for the First Circuit agreed:

Equal opportunity to participate lies at the core of Title IX's purpose. Because the third compliance area delineates this heartland, we agree with the district courts that have so ruled and hold that, with regard to the effective accommodation of students' interests and abilities, an institution can violate Title IX even if it meets the ["treatment"] standards.⁵³

Other courts that have addressed this issue are in accord with *Cohen*.⁵⁴

grams). One particularly valuable resource is Valerie M. Bonnette, *Title IX Basics*, in NATIONAL COLLEGIATE ATHLETIC ASS'N, *ACHIEVING GENDER EQUITY: A BASIC GUIDE TO TITLE IX FOR COLLEGES AND UNIVERSITIES* 5, 11-26 (1994) [hereinafter NCAA GENDER EQUITY GUIDE]. Bonnette, a former OCR senior program analyst and co-author of OCR's 1990 *Title IX Athletics Investigator's Manual*, see *infra* note 55, addresses each of the twelve treatment issues from an OCR compliance investigator's perspective.

⁵¹ 809 F. Supp. 978 (D.R.I. 1992) (preliminary injunction), *aff'd*, 991 F.2d 888 (1st Cir. 1993), *on remand*, 879 F. Supp. 185 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996). This Article focuses on the First Circuit's 1993 opinion. In 1996, that court concluded that its earlier opinion provided "the law of the case." 101 F.3d at 162, 167-69. Thus, the 1993 opinion, which sets forth the court's most complete legal analysis, is the "controlling authority." *Id.* at 162.

⁵² *Cohen*, 809 F. Supp. at 988-89.

⁵³ *Cohen*, 991 F.2d at 897.

⁵⁴ See *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 273 (6th Cir. 1994); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993); *Cook v. Colgate Univ.*, 802 F. Supp. 737, 742-43 (N.D.N.Y. 1992), *vacated on other grounds*, 992 F.2d 17 (2d Cir. 1993); *accord Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 584-85 (W.D. Pa.) (not addressing the issue directly, but basing its finding of noncompliance solely on accommodations), *aff'd*, 7 F.3d 332 (3d Cir. 1993). Even *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892 (M.D. La. 1996), which strays from the judicial party line in other respects, see *infra* text accompanying notes 189-217, appears to agree with this proposition. In *Pederson*, the court held that Louisiana State University violated Title IX based solely on an accommodations analysis. *Id.* at 917.

Thus, the judiciary has determined that a school that fails to provide sufficient participation opportunities to its female students cannot avoid liability simply because it treats its female and male athletes equally.

Interestingly, OCR has not taken quite as firm a stance. Indeed, in *Cohen*, the defendants based their argument for a program-wide review largely on OCR's *Title IX Athletics Investigator's Manual*,⁵⁵ which states that a compliance determination generally is made by "reviewing the program as a whole."⁵⁶ The *Investigator's Manual*, however, also indicates that an OCR investigation "may be limited to . . . one or two" of the three major compliance areas⁵⁷ that the courts have found persuasive.⁵⁸ Although OCR addressed the matter in its January 1996 *Clarification*,⁵⁹ that *Clarification* provides no clear answer:

It is important to note that under the Policy Interpretation the requirement to provide nondiscriminatory participation opportunities is *only one of many factors* that OCR examines to determine if an institution is in compliance with the athletics provision of Title IX. OCR also considers the quality of competition offered to members of both sexes in order to determine whether an institution effectively accommodates the interests and abilities of its students.

⁵⁵ See *Cohen*, 809 F. Supp. at 988-89. In 1990, OCR issued the *Investigator's Manual* to provide guidance to agency personnel in their investigations of intercollegiate and interscholastic athletics programs. Valerie M. Bonnette & Lamar Daniel, U.S. DEP'T OF EDUC., TITLE IX ATHLETICS INVESTIGATOR'S MANUAL [i] (1990) [hereinafter OCR INVESTIGATOR'S MANUAL]. For a discussion of the manual's adoption and women's groups' early criticism of some of its provisions, see Heckman, *supra* note 25, at 16 n.64.

OCR first published an *Interim Manual* in 1980, shortly after it published its *Policy Interpretation*. According to Lamar Daniel, co-author of the 1990 *Manual*, the 1980 draft recognized the accommodations provision as simply one of many factors with "no added status." *Discussions of Title IX and Restructuring Captivate CFA Audience*, SIDELINES, July/Aug. 1995, at 4 (reporting Daniel's remarks at the 19th annual convention of the College Football Association).

⁵⁶ OCR INVESTIGATOR'S MANUAL, *supra* note 55, at 10; see Harris, *supra* note 48, at 71 ("[T]he Investigator's Manual calls for a balancing of all compliance areas against each other to determine if there is overall compliance with Title IX."); William E. Thro & Brian A. Snow, *Cohen v. Brown University and the Future of Intercollegiate and Interscholastic Athletics*, 84 EDUC. L. REP. 611, 622 (1993) (asserting that the *Cohen* holding is "directly contradictory to OCR's approach of examining all aspects of the athletic program and allowing the strengths in one area to cancel out a weakness in one area").

⁵⁷ OCR INVESTIGATOR'S MANUAL, *supra* note 55, at 7.

⁵⁸ See, e.g., *Roberts*, 998 F.2d at 828; *Cohen*, 809 F. Supp. at 989.

⁵⁹ See *supra* text accompanying notes 16-17.

In addition, when an "overall determination of compliance" is made by OCR, . . . OCR examines the institution's program *as a whole*. Thus, OCR considers the effective accommodation of interests and abilities *in conjunction with* equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes to determine whether an institution provides equal athletic opportunity as required by Title IX. These other benefits include coaching, equipment, practice and competitive facilities, recruitment, scheduling of games, and publicity, among others. An institution's failure to provide nondiscriminatory participation opportunities *usually* amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.⁶⁰

This language indicates that a program-wide evaluation is essential for an "overall determination of compliance." The critical issue that remains, however, is whether a finding of *noncompliance* can be based on only one of the "many factors" in the Title IX analysis. OCR seems to have avoided that question. Stating that accommodation deficiencies "usually" will amount to a Title IX violation will not stop university defendants from pleading for program-wide reviews.⁶¹

Regardless of OCR's position on the matter, the courts seem to be firm in their conviction that effective accommodation of student interests and abilities lies at the heart of Title IX. The courts also agree that failure to meet this standard constitutes a Title IX violation.⁶² Therefore, it is likely that the primary gender equity battles will continue to be fought over the accommodations issue. Furthermore, although private enforcement of Title IX through litigation has begun to overshadow OCR's governmental enforcement,⁶³ in making their judgments, courts have deferred to OCR's Pol-

⁶⁰ OCR CLARIFICATION, *supra* note 17, at 2 (emphasis added).

⁶¹ See, e.g., Walter B. Connolly, Jr. & Jeffrey D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L. REV. 845, 864, 875, 879-80 (1994) (arguing for a balancing of all factors). Connolly served as co-counsel for Brown University in the *Cohen* litigation. *Cohen*, 879 F. Supp. at 187, 188 n.3.

⁶² See, e.g., *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 273 (6th Cir. 1994); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993); *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993); *Cook v. Colgate Univ.*, 802 F.Supp. 737, 742-43 (N.D.N.Y. 1992), *vacated on other grounds*, 992 F.2d 17 (2d Cir. 1993).

⁶³ Considerable evidence suggests that the spate of Title IX litigation in the 1990s is a direct result of female athletes' frustration with OCR's lack of meaningful Title IX

icy Interpretation.⁶⁴ Such judicial deference has reaffirmed the prominence of OCR's three-part test.

II. THE THREE-PART TEST

To determine whether a school has "effectively accommodate[d] the interests and abilities"⁶⁵ of its students, OCR set out in its Policy Interpretation the following three standards:

- (1) Whether intercollegiate level⁶⁶ participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests 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.⁶⁷

The use of the disjunctive "or" in the three-part test clearly indicates that

enforcement during the 1980s. *See, e.g.*, Harris, *supra* note 48, at 58-59; Debra E. Blum, *New Head of Civil-Rights Office Vows to Get Tough on College Sports*, CHRON. HIGHER EDUC., Sept. 15, 1993, at A39.

⁶⁴ *See, e.g.*, Horner, 43 F.3d at 273 (noting that the Policy Interpretation is "entitled to substantial deference by the courts"); Roberts, 998 F.2d at 828; Cohen, 991 F.2d at 896-97. *But cf.* Pederson v. Louisiana State Univ., 912 F. Supp. 892, 914 (M.D. La. 1996) (acknowledging the necessity of granting "great deference" to OCR but suggesting that the Policy Interpretation may be contrary to statutory language and thus need not be followed).

⁶⁵ 34 C.F.R. § 106.41(c) (1996).

⁶⁶ Although the Policy Interpretation specifically addresses intercollegiate athletics, it notes that its "general principles" apply equally to interscholastic, club, and intramural athletics programs. 44 Fed. Reg. 71,413 (1979). The leading decision on Title IX's application to interscholastic athletics explicitly adopts the Policy Interpretation's three-part test as the governing standard. Horner, 43 F.3d at 273-74.

⁶⁷ 44 Fed. Reg. 71,418 (1979) (footnote added).

compliance with any one of the three parts is sufficient to meet the effective accommodation requirement. OCR unequivocally reiterated that proposition in its recent *Clarification*:

[T]he three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.⁶⁸

Even with these three separate avenues to compliance, currently the odds are against institutions in Title IX actions. The first prong, the “proportionality” test, is particularly difficult to meet.⁶⁹ Although neither OCR nor the courts provide clear guidance on what constitutes “substantial” proportionality, few schools could meet any reasonable definition of the standard. The NCAA conducted a 1992 gender equity study that indicated that men made up nearly seventy percent of varsity college athletes although they comprised only about fifty percent of the student population.⁷⁰ A school also would have difficulty showing a “continuing practice” of expanding women’s athletic opportunities for the simple reason that most schools have not significantly expanded their athletics programs in recent years; budget shortfalls often have meant just the opposite.⁷¹ Finally, student “interest” in athletics is extremely difficult to measure.⁷² To date, courts have shown little enthusiasm for a careful analysis of the third prong of the test.⁷³

⁶⁸ OCR CLARIFICATION, *supra* note 17, at 2.

⁶⁹ See, e.g., *Roberts*, 814 F.Supp. at 1513 (7.5% differential between female enrollment and athletic participation not substantially proportionate); see also Connolly & Adelman, *supra* note 61, at 862-63, 906-07 (noting that OCR provides no statistical test and suggesting the use of the binomial test established in civil rights cases).

⁷⁰ NCAA GENDER EQUITY GUIDE, *supra* note 50, at 1. Apparently these statistics have improved somewhat, to about 37% female participation in academic year 1994-1995. *Sidelines*, CHRON. HIGHER EDUC., Mar. 1, 1996, at A39. In academic year 1994-1995, the statistics for high school athletes were only slightly more promising: males comprised 61.2% of interscholastic athletes compared with 38.8% female. *More Students Taking Part in High-School Athletics*, NCAA NEWS, Sept. 25, 1995, at 5.

⁷¹ See *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993) (“[I]n an era of fiscal austerity, few universities are prone to expand athletic opportunities.”).

⁷² One current debate centers on whether surveys of students are useful tools for measuring interest in athletic participation. The NCAA Research Committee has developed a survey instrument that has been tested at a few schools. Some women’s sports advocates, however, maintain that such instruments are inherently flawed and that a purported lack of interest should not be used to deny opportunities to women. Ronald D. Mott, *Proportionality Meets Interest*, NCAA NEWS, Feb. 15, 1995, at 1.

⁷³ See, e.g., *Cohen*, 991 F.2d at 900 (noting that thorough interest assessments

Both OCR and the courts have been attacked for what many believe to be too great a reliance on the proportionality prong of the three-part test.⁷⁴ Perhaps the appeal of that standard lies in its simplicity: one merely adds up the number of female athletes,⁷⁵ determines the percentage of athletes who are women, and compares that percentage to the percentage of women in the overall student population. A difficult issue remains, of course, as to what level of disparity is "substantial,"⁷⁶ but in many respects, this mathematical exercise still is much easier to contend with than are the ambiguities inherent in prongs two and three. Nonetheless, the same forces that prodded OCR to issue its recent *Clarification* also demand a more thorough explication of each of the standards in the three-part test in order to determine if more than an illusory alternative to strict proportionality exists.

This Article now addresses each of the three standards in light of the case law and OCR's pronouncements. Although considerable harmony exists among the court opinions, the law is not well-settled. Only a few gender equity cases have been decided, and those most often cited as the leading

"would do little more than overcomplicate an already complex equation" and would "aggravate the quantification problems that are inevitably bound up with Title IX"). The *Cohen* court opted instead for "a relatively simple assessment" under prong three by inquiring into "whether there is unmet need in the underrepresented gender." *Id.* This formulation will cut heavily against the institution if female plaintiffs seek the reinstatement of a previously viable team. The courts also have recognized that the issues under prong three will be considerably more "vexing" in a case in which female plaintiffs seek to create a new team. *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993); *Cohen*, 991 F.2d at 904.

⁷⁴ For a small but representative sample, see Ross, *supra* note 8, at 144 (quoting Fred Heinrich, counsel for University of Illinois in *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994) (rejecting a reverse discrimination claim brought by male swimmers whose team was eliminated), *cert. denied*, 115 S. Ct. 938 (1995), decrying OCR's "numbers game"); Kocher, *supra* note 4, at 4 (contending that despite "disingenuous claims to the contrary," OCR relies on "strict proportional gender quotas [as] the only valid measure of Title IX compliance"); Ronald D. Mott, *OCR Still Analyzing Responses; Hopes to Announce Guidelines Soon*, NCAA NEWS, Nov. 6, 1995, at 1 (reporting the College Football Association's and two members of Congress' objections to a perceived overemphasis on proportionality).

⁷⁵ Note that the test speaks of "participation opportunities." See *infra* text accompanying notes 82-84.

⁷⁶ The Policy Interpretation does not define "substantial," and the *OCR Clarification* does not provide much guidance. Although the *Clarification* provides examples in which the size of the athletics program appears to be significant, the bottom line is that substantial proportionality "depends on the institution's specific circumstances" and, thus, must be determined "on a case-by-case basis." OCR CLARIFICATION, *supra* note 17, at 4. To date, the definition of substantial proportionality has not been a particularly pressing issue because schools generally have had such large statistical disparities. It remains to be seen what view OCR or the courts will take of a school in which, for example, 50% of the students are female, and 45% or 48% of the athletes are female.

cases—*Cohen v. Brown University*,⁷⁷ *Roberts v. Colorado State Board of Agriculture*,⁷⁸ and *Favia v. Indiana University of Pennsylvania*⁷⁹—all involved a narrow factual scenario in which the university defendant sought either to eliminate or to downgrade an existing varsity women's team. Certainly an assessment of a school's "accommodation of interests and abilities" takes on a unique dimension when a school cuts a viable women's team. In *Pederson v. Louisiana State University*,⁸⁰ however, the court considered a request by female athletes to add new teams to the existing women's program and "most emphatically" rejected one of the principal tenets of the other courts' analyses.⁸¹

A. Part One: Proportionality

Part one of OCR's three-part test focuses strictly on numbers. It asks whether the number of female athletes at the school is "substantially proportionate" to the number of women in the student body. In other words, part one suggests that if females make up fifty percent of the overall student population, ideally fifty percent of the athletes should be female as well. As indicated previously, an assessment of a school's compliance with this test is a matter of simple mathematics. Before a school's compliance can be determined, however, two definitional hurdles must be cleared: (1) who is an "athlete"; and (2) what constitutes "substantial" proportionality?

The proportionality test speaks in terms of "participation opportunities."⁸² In its recent *Clarification*, OCR declared that it determines the number of participation opportunities by using a longstanding definition of "participants" set forth in the Policy Interpretation.⁸³ The Policy Interpretation defines "participants" as those athletes:

- a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and

⁷⁷ 991 F.2d 888 (1st Cir. 1993). The First Circuit recently issued a second opinion in *Cohen*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, No. 96-1321, 1997 WL 81992 (U.S. Apr. 21, 1997), but it relied substantially on its 1993 opinion. *See supra* note 51. Thus, this Article focuses on the 1993 opinion.

⁷⁸ 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

⁷⁹ 7 F.3d 332 (3d Cir. 1993).

⁸⁰ 912 F. Supp. 892 (M.D. La. 1996).

⁸¹ *Id.* at 913.

⁸² 44 Fed. Reg. 71,418 (1979); *see supra* text accompanying notes 66-67.

⁸³ OCR CLARIFICATION, *supra* note 17, at 3.

- b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
- c. Who are listed on the eligibility or squad lists maintained for each sport, or
- d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.⁸⁴

The *Clarification* also makes clear that walk-ons (nonscholarship athletes) and those who practice but do not compete (presumably including redshirts⁸⁵) are included as athletic participants for purposes of the three-part test.⁸⁶

One would think that because the definition of participants is so critical to determining proportionality, use of the term would generate many questions, such as the following: Is it appropriate to include athletes who cannot compete due to either redshirt status or injury? In light of the substantial gender gap in the numbers of walk-ons,⁸⁷ should male and female walk-ons be treated differently? Is it proper to focus exclusively on varsity teams, or should participation rates include club and intramural athletes?⁸⁸

Despite its seeming importance, this part of OCR's analysis has spawned little comment.⁸⁹ Perhaps this is because fine-tuning of the counting pro-

⁸⁴ 44 Fed. Reg. 71,415 (1979).

⁸⁵ A redshirt is an enrolled student athlete who practices with an intercollegiate team but does not engage in intercollegiate competition during the year, thereby saving a year of eligibility. Under NCAA rules, a student athlete is limited to four seasons of intercollegiate competition in any given sport and five years within which to complete that competition. NATIONAL COLLEGIATE ATHLETIC ASS'N, 1996-97 NCAA MANUAL art. 14.2, at 160 (1996) [hereinafter NCAA MANUAL].

⁸⁶ OCR CLARIFICATION, *supra* note 17, at 3.

⁸⁷ Male walk-ons are common, but talented female athletes "generally are not interested in walking on and sitting on somebody's bench" because they usually have scholarship and playing opportunities elsewhere. Ross, *supra* note 8, at 138 (quoting Karol Kahrs, Associate Director of Athletics, University of Illinois).

⁸⁸ See Thro & Snow, *supra* note 56, at 627 (decrying a continued focus on "elite" athletes, while "the overwhelming majority of students who may wish to participate . . . but are incapable of playing on the intercollegiate level" are ignored). Cf. Farrell, *supra* note 4, at 1051 ("Would not the interests of female students be better served by less emphasis on competitive intercollegiate athletics for a relatively few very talented athletes and more emphasis on, and funding for, aerobics and dance classes, physical education classes, and intramural sports?").

⁸⁹ One exception is the district court's second opinion in the *Cohen* litigation, in which the court defined "participation opportunities" as the "actual participants on intercollegiate teams." *Cohen v. Brown Univ.*, 879 F. Supp. 185, 202 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, No. 96-1321,

cess would have little effect on the outcome of most compliance reviews, for the simple reason that wide gender disparities have been and remain common at most institutions.⁹⁰ Moreover, many observers' attention has been diverted by a much larger counting issue: should football players be included in determining the number of athletic participants?

Those who are unfamiliar with Title IX issues probably would be perplexed that this question has been posed. Nonetheless, since Title IX's enactment, a notion has persisted that football's unique character justifies special treatment, if not an outright exemption from gender equity requirements.⁹¹ Since OCR and the courts have begun to focus on proportionality as the key to compliance, the issue has assumed even greater significance. Because of football squads' large sizes, some commentators question whether proportionality is possible at a school that maintains a football program.⁹² Conversely, many schools that do not satisfy the proportionality standard would do so if football were excluded from the equation.⁹³

Current NCAA rules allow eighty-five scholarships and a squad size of one hundred five for Division I-A football programs.⁹⁴ Because the sport has no women's counterpart, participation rates for college athletics inevitably are skewed heavily in favor of men at most schools with a sizable football program. To close that gap, schools essentially have two options: they

1997 WL 81992 (U.S. Apr. 21, 1997). The court considered and rejected the university's suggestion that participation opportunities be determined either by "filled and unfilled athletic slots" or by the sizes of NCAA travel squads. *Id.* at 203 & n.37. Representative J. Dennis Hastert, R-Ill., who led the congressional effort in 1995 to require OCR to clarify its Policy Interpretation, also submitted a recommendation to OCR that it count "opportunity slots" as participants even if students did not fill those slots. *Title IX Ticker*, NCAA NEWS, Nov. 27, 1995, at 5. Presumably, this method of counting would narrow the gender gap by increasing the number of female "participants."

⁹⁰ See *supra* text accompanying note 70.

⁹¹ Some commentators have referred derisively to this idea as the "three-sex theory" of athletics—the sexes being men, women, and football players. *E.g.*, Cynthia J. Harris, Comment, *The Reform of Women's Intercollegiate Athletics: Title IX, Equal Protection, and Supplemental Methods*, 20 CAP. U. L. REV. 691, 709 (1991); Alexander Wolff, *The Slow Track*, SPORTS ILLUSTRATED, Sept. 28, 1992, at 54; see also Loretta M. Lamar, *To Be an Equitist or Not: A View of Title IX*, 1 SPORTS L.J. 237, 263 (1994) (referring to "a three-way athletic department: the men's program, the women's program, and football").

⁹² See Farrell, *supra* note 4, at 995; Catherine Pieronek, *A Clash of Titans: College Football v. Title IX*, 20 J.C. & U.L. 351, 351 (1994).

⁹³ Connolly & Adelman, *supra* note 61, at 910; Pieronek, *supra* note 92, at 352.

⁹⁴ NCAA MANUAL, *supra* note 85, art. 15.5.5.1, at 25 (scholarships), art. 17.11.2.1.1, at 307 (squad size). Division I-AA schools may award the equivalent of 63 scholarships, *id.* art. 15.5.5.2, at 25, and have a maximum squad size of 90, *id.* art. 17.11.2.1.2, at 307.

can increase women's opportunities or make cuts in men's athletics programs.⁹⁵ In tough budget times, the latter becomes the more attractive alternative, and most schools, when deciding which men's programs to cut, adopt a hands-off posture toward "revenue-producing" sports,⁹⁶ such as football and men's basketball.⁹⁷ That leaves lower-profile sports, such as gymnastics, swimming, and wrestling, for the chopping block. Thus, both supporters of low-profile men's sports and of high-profile sports (who fear that their protection from the budget ax soon may expire) have strong incentives to champion a football exemption from the proportionality standard.

A state court case, *Blair v. Washington State University*,⁹⁸ considered the football exemption in detail. In *Blair*, female athletes and coaches brought suit under the Washington Constitution's Equal Rights Amendment and under a state anti-discrimination statute.⁹⁹ The trial court excluded football players when calculating participation opportunities on the ground that football was "unique in many respects, . . . [and] distinguishable from all other collegiate sports."¹⁰⁰ On appeal, however, the Supreme Court of Washington rejected the argument that football's distinguishing characteristics¹⁰¹ warranted an exemption from the gender equity calculations: "It is stating the obvious to observe the Equal Rights Amendment contains no exception for football The exclusion of football would prevent sex equity from ever being achieved since men would always be guaranteed many more participation opportunities than women" ¹⁰²

Likewise, Title IX contains no exception for football. Indeed, the battle for a football exemption was fought, and lost, more than twenty years ago, when Title IX's implementing regulations were promulgated. Despite intense lobbying by the NCAA and others, Congress rejected an exemption for revenue-producing sports. Congress instead opted for a mild admonition to HEW to consider "the nature of particular sports" when drafting its final

⁹⁵ This assumes the school will not eliminate athletics altogether, an alternative that one court, remarkably, offered as a viable solution to the gender equity dilemma. *Cohen v. Brown Univ.*, 809 F. Supp. 978, 993, 999 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993).

⁹⁶ Studies suggest that in light of the enormous expenses incurred in operating a football program, few such programs truly generate net revenues. *See infra* notes 426-28 and accompanying text.

⁹⁷ *See* Blum, *supra* note 5, at A34.

⁹⁸ 740 P.2d 1379 (Wash. 1987).

⁹⁹ *Id.* at 1380.

¹⁰⁰ *Id.* at 1382-83.

¹⁰¹ The trial court in *Blair* stated that football's distinguishing characteristics include "the number of participants, scholarships, and coaches, amount of equipment and facilities, income generated, media interest, spectator attendance, . . . publicity generated for the University as a whole," and its use of business principles to earn a profit. *Id.* at 1383.

¹⁰² *Id.* (citation omitted).

regulations.¹⁰³ HEW's final regulations and OCR's Policy Interpretation recognize the legitimacy of added expenditures for program components such as equipment, facilities, and crowd management.¹⁰⁴ The existence of those provisions, however, reinforces the absence of a football exemption.

It is simply too late to argue that football players should not be counted in participation calculations. Not only is an exemption wrong from an equitable perspective,¹⁰⁵ it also has no support in the law. OCR's Policy Interpretation explicitly states that football is not to be excluded,¹⁰⁶ and since the first *Blair* decision,¹⁰⁷ no court has even hinted at the possibility of an exemption. Indeed, even the College Football Association (CFA), which historically has been among the most vocal critics of OCR's enforcement efforts,¹⁰⁸ has recognized the futility of an exemption argument. In a 1995 position paper on Title IX, the CFA stated unequivocally: "We DO NOT seek exemption of football from Title IX."¹⁰⁹

Thus, continued arguments for a football exemption seem hopelessly outdated and futile. As the CFA has recognized, the courts and proponents of a more forgiving compliance posture from OCR should instead concentrate on two issues that are in greater need of analysis: (1) how strict is the proportionality standard; and (2) what role should proportionality play in achieving the overall regulatory goal of accommodating student interests and abilities?¹¹⁰

OCR's Policy Interpretation states that men's and women's participation opportunities should be "substantially proportionate to their respective en-

¹⁰³ See *supra* text accompanying notes 28-30.

¹⁰⁴ See John Gaal et al., *HEW's Final "Policy Interpretation" of Title IX and Intercollegiate Athletics*, 6 J.C. & U.L. 345, 347 (1979-1980).

¹⁰⁵ "After all, what kind of law would [Title IX] be if it permitted discrimination as long as you were making money at it?" George, *supra* note 6, at 568.

¹⁰⁶ 44 Fed. Reg. 71,421 (1979).

¹⁰⁷ *Blair v. Washington State Univ.*, No. 28816 (Super. Ct. for Whitman County Jan. 3, 1983) (choosing to exclude football in its calculations), *aff'd in part, rev'd in part*, 740 P.2d 1379 (Wash. 1987) (holding in part that the trial court abused its discretion in excluding football from its calculations).

¹⁰⁸ See, e.g., Blum, *supra* note 3, at A35; Mott, *supra* note 74, at 1 (quoting CFA's letter to OCR following the initial *Clarification*, which criticized OCR's perceived overemphasis on proportionality). The CFA will disband on June 30, 1997, following twenty years as a potent football lobbying force. The CFA's board of directors voted the organization out of existence in May 1996, in part because of lagging support from several major conferences. *College Football Association Voted Out of Existence*, NORMAN TRANSCRIPT, June 2, 1996, at 24.

¹⁰⁹ COLLEGE FOOTBALL ASS'N, POSITION ON TITLE IX (1995). The CFA contends it seeks "practical and reasonable interpretations and guidelines from OCR to eliminate colleges and universities from becoming prisoners to a strict proportionality test." *Id.*

¹¹⁰ See *id.*

rollments,"¹¹¹ but it does not define "substantiality." Therefore, what little guidance schools have had in their voluntary compliance efforts has come either from tales of OCR compliance reviews at other institutions, from OCR's recent *Clarification*, or from a handful of recent court decisions.¹¹² None of these sources are very helpful in determining the definition of substantial proportionality.

Until relatively recently, OCR was quite tolerant of disparities between student enrollment and athletic participation.¹¹³ The district court in *Cohen*, for example, conceded that in 1989 OCR found two universities, the University of Nebraska at Lincoln and the University of Arkansas, in compliance with the effective accommodation requirement despite sizable disparities.¹¹⁴ In 1989, OCR also found Colorado State University in compliance, but after the university's female athletes took their case to court in 1993,¹¹⁵ the federal district judge concluded that "[w]ith all due respect" to OCR,¹¹⁶ the school was in violation of Title IX despite a smaller disparity than that which existed in 1989.¹¹⁷ In fact, OCR's perceived laxity in enforcing Title IX mandates in the 1980s has prompted gender equity lawsuits at many schools during recent years.¹¹⁸

¹¹¹ 44 Fed. Reg. 71,418 (1979).

¹¹² See *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992) (granting a preliminary injunction), *aff'd*, 991 F.2d 888 (1st Cir. 1993), *on remand*, 879 F. Supp. 185 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, No. 96-1321, 1997 WL 81992 (U.S. Apr. 21, 1997); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993); *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993); *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892 (M.D. La. 1996); see also *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994).

¹¹³ Lamar Daniel, a former OCR investigator and co-author of the agency's *Title IX Athletics Investigator's Manual*, stated that OCR never intended strict proportionality to be determinative of Title IX compliance. Instead, OCR conceived proportionality as a threshold inquiry, with the principal focus on the third prong of OCR's three-part test, which considers accommodation of student interests and abilities. In Daniel's view, the focus shifted in the 1990s from accommodation to proportionality due to the lobbying of women's advocacy groups and the courts' adoption of proportionality as the key test of compliance. *Discussions of Title IX and Restructuring Captivate CFA Audience*, *supra* note 55, at 4.

¹¹⁴ *Cohen v. Brown Univ.*, 809 F. Supp. 978, 993 n.12 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993); see also *Thro & Snow*, *supra* note 56, at 618 (discussing OCR's tolerance of disparities at Metropolitan State College of Denver and Mercer University).

¹¹⁵ *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507 (D. Colo.), *aff'd in part, rev'd in part sub nom.*, *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

¹¹⁶ *Id.* at 1516.

¹¹⁷ See *id.* at 1512.

¹¹⁸ See *Harris*, *supra* note 48, at 58-59; *Blum*, *supra* note 63, at A39 (quoting Ellen J. Vargyas of the National Women's Law Center: "There's little to no faith that going to

In May 1993, Norma V. Cantu was appointed the new head of OCR, and one of her first pledges was to strengthen the agency's enforcement of Title IX.¹¹⁹ Critics charge that OCR has implemented a new "get-tough" policy by demanding strict, immediate proportionality.¹²⁰ Yet OCR insists that proportionality is given no more emphasis than either of the other two prongs of the three-part test¹²¹ and that even when applying the proportionality standard, percentages are not dispositive:

The percentage is not the controlling factor. For example, you could have a particular school that is quite small with a differential perhaps of seven percent. But the disparity may not in total number get up to [a] sufficient number of students who could field a viable team. I don't believe it is wise for us to get into terms of percentages. Those will vary depending upon the kinds of schools you are talking about.¹²²

This statement epitomizes OCR's difficulty in defining "substantially proportionate" participation. On one hand, OCR has formulated its standard in terms of percentages.¹²³ On the other hand, OCR backs away from percentages and suggests that absolute numbers may be the key to compliance. That theme is repeated in OCR's recent *Clarification*, which ties proportionality to the size of the athletics program. OCR considers two hypothetical institutions, each with women comprising fifty-two percent of the student body and forty-seven percent of the athletes.¹²⁴ Although both institutions have a five percent disparity between athletic participation and enrollment,

OCR with a complaint will get anything accomplished."); Debra E. Blum, *Civil Rights Office Urged to Heed Results of 2 Recent Sex-Bias Suits*, CHRON. HIGHER EDUC., Sept. 15, 1993, at A40 (quoting plaintiff in suit against Auburn University as asserting she sued because of OCR's laxity).

¹¹⁹ Blum, *supra* note 63, at A39.

¹²⁰ See, e.g., Ross, *supra* note 8, at 143 (quoting Karol Kahrs, Associate Director of Athletics, University of Illinois, on OCR's "obstinate" attitude on the issue); Zapler, *supra* note 9, at A44 (noting Eastern Illinois University's decision to drop wrestling and men's swimming due to OCR's "inflexible" insistence on immediate proportionality).

¹²¹ According to OCR's recent *Clarification*, proportionality is simply one of "three distinct ways to provide individuals of each sex with nondiscriminatory participation opportunities," and the three-part test is designed to give institutions "flexibility and control over their athletics programs." OCR CLARIFICATION, *supra* note 17, at 12.

¹²² Mott, *supra* note 72, at 7 (quoting Mary Frances O'Shea, OCR's national coordinator for Title IX athletics).

¹²³ From a mathematical perspective, it is difficult to address "proportionate" participation without using percentages.

¹²⁴ OCR CLARIFICATION, *supra* note 17, at 5.

OCR states that a school with a large athletics program likely would not be in compliance, yet a school with relatively few athletes probably would be in compliance.¹²⁵ According to OCR, a five percent disparity at a large school represents a substantial number of women whose athletic interests are not being accommodated. A five percent disparity at a small school, however, may represent an insufficient number of unaccommodated women to field a viable team.¹²⁶

Unfortunately, OCR's attempt at clarification raises several unanswered questions: Are absolute numbers more important than percentages? If the focus is on numbers sufficient to support additional teams, is it sound to assume that all "unaccommodated" women will be interested in playing a particular sport? Is it even possible to assess proportionality without reference to the third prong of the three-part test? Indeed, hasn't OCR blurred the line between the proportionality and accommodation prongs by highlighting raw numbers? Has OCR, through its examples, effectively established standards for substantiality?

OCR's principal point in the *Clarification* regarding proportionality seems to be that no bright-line rule exists for determining substantial proportionality: "Because this determination depends on the institution's specific circumstances and the size of its athletic program, OCR makes this determination on a case-by-case basis, rather than through use of a statistical test."¹²⁷ OCR, however, may have inadvertently undermined that fundamental precept by including examples with specific figures. Because those examples appear to offer concrete guidance, schools desperate for direction may interpret them as edicts.

OCR's small-program example, with only sixty athletes in the school's entire athletics program,¹²⁸ seems atypical.¹²⁹ Therefore, many observers will focus on the large-program example, involving six hundred athletes,¹³⁰ and will assume, based on OCR's statements, that a five percent disparity will not pass muster. The only other guidance OCR provides in its *Clarification* is the advice that institutions need not "fine tune" their athletic participation rates to respond to "natural fluctuations in . . . enrollment and/or participation rates" from year to year.¹³¹ That advice is instructive and eminently sensible. Again, however, OCR's examples elucidating this basic canon send an implicit message that only strict proportionality will suffice; in both of its examples, OCR assumes that minor enrollment fluctuations

¹²⁵ *Id.*

¹²⁶ *Id.* at 4-5.

¹²⁷ *Id.* at 4.

¹²⁸ OCR CLARIFICATION, *supra* note 17, at 5.

¹²⁹ Certainly such a school would not face the difficult problems a school with a large football program faces. See *supra* text accompanying notes 89-110.

¹³⁰ OCR CLARIFICATION, *supra* note 17, at 5.

¹³¹ *Id.* at 4.

occurred after the institution had achieved perfect proportionality.¹³²

OCR seems to be sending mixed signals. Although OCR professes to minimize the significance of mathematical precision in assessing disparities between athletic participation and enrollment, OCR's actions in recent compliance reviews and its *Clarification* examples suggest that strict proportionality is its lodestar.

Despite its clumsy effort, OCR's success in resisting the temptation to establish a bright-line rule, whether it be five percent, two percent, or exact proportionality, is commendable. Admittedly, an "it depends on the case" standard¹³³ does not provide much guidance, but neither do numbers tell the whole story. Each case will rest on its facts, particularly if proportionality is viewed in the larger and more meaningful context of accommodating student interests and abilities.¹³⁴ Although a bright line is appealing, any specific standard that OCR, the courts, or commentators could invent would be arbitrary.¹³⁵

Certainly no meaningful measures exist to indicate, for example, that a two percent deviation from exact proportionality represents more of a good faith effort to provide equitable participation opportunities than a three percent or five percent deviation. Moreover, the adoption of some *de minimis* level of permissible disparity would undermine the goal of equal treatment of the sexes. If schools were allowed to deviate from strict proportionality by five percent, for example, they would strive for that arbitrary standard rather than for true equality.¹³⁶

Despite these shortcomings, the clarity of the bright line has proven enticing. In schools and athletic conferences around the country, gender equity has become a numbers game, with progress measured against an arbitrary numerical goal. The University of Texas settled a Title IX suit by agreeing to increase athletic opportunities for women until they made up at least forty-four percent of the school's varsity athletes.¹³⁷ In a sweeping

¹³² See *id.*

¹³³ See *id.*

¹³⁴ The strict separation of the prongs of OCR's three-part test is perhaps the most troubling aspect of its application. See *infra* text accompanying notes 212-17, 291-92.

¹³⁵ See, e.g., Farrell, *supra* note 4, at 1041-42 (suggesting a five percent benchmark based on court decisions, OCR pronouncements, and settlements between female plaintiffs and universities). One pair of commentators at least has suggested the use of statistics rather than the kind of "eyeballing" some courts seem to employ. Connolly & Adelman, *supra* note 61, at 894-95, 902-03 (suggesting a "two to three standard deviation" test). In the final analysis, however, even a statistical test would be arbitrary.

¹³⁶ See Harris, *supra* note 48, at 84-85. Cf. *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring) (noting, in the reapportionment context, that "a *de minimis* rule of allowable disparities tends to demean in theory and in practice the constitutional objective [that each person's vote should carry equal weight] because it suggests that it is not necessary even to aim at equality").

¹³⁷ Debra E. Blum, *U. of Texas at Austin Settles Sex-Bias Suit by Doubling Women's*

agreement, the California State University System settled a suit brought by the state chapter of the National Organization for Women by promising to narrow the gap between women's athletic participation and enrollment to five percent.¹³⁸ For Virginia Tech, the magic number was three percent.¹³⁹ The Big Ten Conference joined in with a conference-wide commitment to a sixty percent-forty percent male-female split in athletic participation.¹⁴⁰

Although these examples represent headway toward increased athletic opportunities for women, they also illustrate the capriciousness of the quest for "substantial" proportionality. In the absence of meaningful guidance from OCR, schools are left to formulate their own definitions of the term. The result is an apparent random selection of maximum disparity figures. Exacerbating this situation is a lack of direction from the courts. Schools facing the threat of litigation ultimately must predict how a court will judge their athletics programs and tailor their remedial actions accordingly. At present, however, such predictions are precarious because most applicable judicial precedent includes little thoughtful analysis.

The first court to address the proportionality prong of OCR's three-part test was the federal district court in *Cohen*.¹⁴¹ The judge in *Cohen* devoted one short paragraph of his opinion to the application of the substantial proportionality test and concluded that Brown University failed to meet the standard. The judge noted that women comprised 48.2% of the student body but only 36.6% of varsity athletes.¹⁴² "Thus," concluded the court without further comment, "Brown fails to satisfy the first question."¹⁴³ Six weeks later, the federal district court in *Favia v. Indiana University of Pennsylvania*¹⁴⁴ likewise dispatched the proportionality issue in a single paragraph,

Sports Opportunities, CHRON. HIGHER EDUC., July 28, 1993, at A33 (noting that the settlement "put Texas out in front" in embracing proportionality).

¹³⁸ Debra E. Blum, *Big Step for Sex Equity*, CHRON. HIGHER EDUC., Oct. 27, 1993, at A35. Following the settlement, a state senator withdrew his bill which would have required no more than a two percent disparity at California state universities. *Id.*

¹³⁹ Debra E. Blum, *Virginia Tech Will Add 2 Women's Sports to Settle Suit*, CHRON. HIGHER EDUC., Feb. 24, 1995, at A40. The Virginia Tech suit was brought by women seeking to elevate club sports to varsity status. At the time of the suit, a seven percent disparity existed. *Id.*

¹⁴⁰ See Jennifer L. Henderson, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness*, 5 SETON HALL J. SPORT L. 133, 151-52 (1995).

¹⁴¹ *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993). *Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17 (2d Cir. 1993), was decided three months earlier than *Cohen*, but in *Cook*, the court focused primarily on treatment disparities between the men's and women's hockey teams and did not specifically address proportionality.

¹⁴² *Cohen*, 809 F. Supp. at 991.

¹⁴³ *Id.*

¹⁴⁴ 812 F. Supp. 578 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

supporting its conclusion with only a recitation of the enrollment and athletic participation rates.¹⁴⁵ Subsequent opinions on proportionality in these cases were equally unenlightening.¹⁴⁶

*Roberts v. Colorado State University*¹⁴⁷ is the lone exception to courts' generally brief analysis of the proportionality prong of OCR's three-part test. The trial court in *Roberts* at least pondered the definition of substantiality and identified several sources to which it looked for guidance. In concluding that the university did not meet the "substantial proportionality" test, the court found four factors persuasive: (1) a hypothetical example from the *OCR Investigator's Manual* involving perfect proportionality; (2) a 1983 Statement of Findings issued to the university by OCR, indicating that disparities of 7.5%, 12.5%, and 12.7% for the three years under review (1980-1983) were too large; (3) a statistics expert's testimony that the university's 10.5% disparity was "statistically significant"; and (4) a comparison to Brown University's 11.6% disparity in *Cohen*.¹⁴⁸ The appellate court in *Roberts* accepted the district court's analysis and added only that "substantial proportionality entails a fairly close relationship between athletic participation and undergraduate enrollment."¹⁴⁹

Roberts is more illuminating than other courts' opinions,¹⁵⁰ but it is hardly a model of clarity and direction. The phrase "fairly close relationship" has no more substance than does "substantially proportionate." Nor are the sources of guidance the courts drew upon in *Roberts* particularly persua-

¹⁴⁵ See *id.* at 584-85. Admittedly, the disparity in *Favia* was relatively large, primarily because of the large percentage of women in the student population (55.61%). Prior to athletics program cuts, women made up 37.77% of the intercollegiate athletes; following the cuts, the percentage dropped to 36.51%. *Id.*

¹⁴⁶ Affirming the district court's ruling in *Cohen*, the First Circuit devoted one sentence to the issue. See *Cohen*, 991 F.2d at 903 ("[W]e adopt the lower court's record-rooted finding . . . because [the University] offered too few varsity opportunities for women."). On remand, the district court acknowledged that substantiality was "necessarily an elusive concept" and offered a new, less-than-helpful definition: a school's athletic program must "mirror[] the student enrollment as closely as possible." *Cohen*, 879 F. Supp. at 201-02. In applying that standard, the court again simply recited the numbers (38.13% female athletes, 51.14% female enrollment) and stated that the resulting 13.01% disparity was too high. *Id.* at 211. The appellate court in *Favia* did not reach the issue due to the unique procedural context (reviewing a denial of a motion to modify a preliminary injunction). See *Favia*, 7 F.3d at 334-35.

¹⁴⁷ 814 F. Supp. 1507 (D. Colo.), *aff'd in part, rev'd in part sub nom.*, *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

¹⁴⁸ *Id.* at 1512-13.

¹⁴⁹ *Roberts*, 998 F.2d at 830.

¹⁵⁰ In addition to *Cohen* and *Favia*, see *Bryant v. Colgate Univ.*, No. 93-CV-1029, 1996 WL 328446, at *20 (N.D.N.Y. June 11, 1996) (denying defendants' motion for summary judgment partly because of a 13.2% disparity).

sive. The first is a statement in the *OCR Investigator's Manual*: "If the results are substantially proportionate (for example, if the enrollment is 52% male and 48% female, then, ideally, about 52% of the participants in the athletics program should be male and 48% female), the recipient is effectively accommodating the interests and abilities of both sexes."¹⁵¹ Apart from the ambiguity inherent in the use of the word "about," this statement purports to define the ideal, which has little relevance to the vast majority of schools whose participation and enrollment rates are far from perfectly proportionate. Moreover, as the district court in *Roberts* observed, the *OCR Investigator's Manual* immediately follows this statement with a renunciation of numerical standards: "There is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a disparity or a violation. All factors for this program component, and any justifications for differences offered by the institution, must be considered before a finding is made."¹⁵²

Also curious in *Roberts* is the trial and appellate courts' reliance on a Statement of Findings OCR issued in 1983. In 1989, OCR terminated its monitoring of Colorado State's athletics program by referring to the university's "good faith efforts to increase athletic opportunities for female student athletes."¹⁵³ At the time, the disparity between athletic participation and enrollment was significantly *larger* than it was in 1983.¹⁵⁴ This fact alone reinforces OCR's longstanding view that deviation percentages are a poor measure of Title IX compliance.¹⁵⁵ It also makes one wonder why the district court in *Roberts* relied on OCR's 1983 pronouncements when, in the same case, the court forcefully repudiated later OCR actions.¹⁵⁶

The trial court in *Roberts* also cited a statistics expert's testimony that the university's disparity was statistically significant, that is, "the disparities between women's enrollment and athletic participation rates at CSU over the last decade could not have occurred merely by chance."¹⁵⁷ Although the use of statistics perhaps is better than simple "eyeballing,"¹⁵⁸ the statistician's conclusions in *Roberts* seem both self-evident and of little utility in providing a general definition of substantial proportionality. Recall also that OCR has explicitly eschewed the use of statistical tests in applying its substantiality standard.¹⁵⁹

¹⁵¹ *Roberts*, 814 F. Supp. at 1512 (quoting the OCR INVESTIGATOR'S MANUAL, *supra* note 55, at 24).

¹⁵² *Id.*

¹⁵³ *Id.* at 1516.

¹⁵⁴ *See id.* at 1512.

¹⁵⁵ *See supra* text accompanying notes 122-24.

¹⁵⁶ *See Roberts*, 814 F. Supp. at 1516.

¹⁵⁷ *Id.* at 1513.

¹⁵⁸ Connolly & Adelman, *supra* note 61, at 902-03.

¹⁵⁹ *See supra* text accompanying note 127.

Finally, the courts in *Roberts* compared Colorado State's 10.5% disparity with the 11.6% disparity found unacceptable in *Cohen*.¹⁶⁰ Both the trial court's and the appellate court's barren juxtaposition of the two disparity figures, without any further comment or explanation,¹⁶¹ leaves one with the impression that indeed the courts were "eyeballing": the courts in *Cohen* found an 11.6% disparity to be too high; 10.5% is not much lower; therefore, 10.5% is unacceptable as well. Not only is this an uninspired analysis, but it perpetuates an unhealthy fixation on pure numbers and artificially establishes a new maximum disparity benchmark.¹⁶²

Thus, *Roberts* adds little to the other cases that have attempted to interpret the meaning of "substantial proportionality." The result is that neither OCR nor the courts have given schools meaningful guidance in this area. Indeed, OCR's repeated assertion that the proportionality determination "depends on the institution's specific circumstances" and that "OCR makes this determination on a case-by-case basis"¹⁶³ highlights the fact that substantial proportionality "is necessarily an elusive concept."¹⁶⁴ In light of that elusiveness, an overemphasis on proportionality seems inappropriate.

Despite OCR's insistence that student interests and abilities may be accommodated by satisfying any one of the three-part test's prongs,¹⁶⁵ the proportionality prong has assumed a position of prominence. In fact, the structure of the test itself emphasizes proportionality. The proportionality prong is the first of the three prongs, and the test suggests that one should not consider either of the other two prongs until after examining proportionality. Prongs two and three are triggered only if "the members of one sex have been and are underrepresented among intercollegiate athletes,"¹⁶⁶ that

¹⁶⁰ See *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993); *Roberts*, 814 F. Supp. at 1513; *Cohen v. Brown Univ.*, 809 F. Supp. 978, 991 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993), *on remand*, 879 F. Supp. 185 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, No. 96-1321, 1997 WL 81992 (U.S. Apr. 21, 1997).

¹⁶¹ See *Roberts*, 814 F. Supp. at 1513; *Roberts*, 998 F.2d at 830.

¹⁶² Several commentators have embraced this comparison game as well. See, e.g., Brief for the United States as Amicus Curiae at 14-15, *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996) (No. 95-2205) (arguing that Brown's 13.01% disparity was too high because the courts in *Roberts* found 10.5% insufficient); Crawford & Strobe, *supra* note 46, at 564 (asserting that the Big Ten Conference's plan to increase women's athletic opportunities to 40%, which is a 10% disparity if one assumes there is 50% female enrollment in the conference, is inadequate in light of "recent court rulings"); Pieronek, *supra* note 92, at 369 ("*Roberts v. Colorado State University* points out that the 10% differential that would result from the [Big Ten's] 60-40 proposal does not satisfy the Substantial Proportionality Test.").

¹⁶³ OCR CLARIFICATION, *supra* note 17, at 4.

¹⁶⁴ *Cohen*, 879 F. Supp. at 201.

¹⁶⁵ See *supra* text accompanying notes 68, 121.

¹⁶⁶ 44 Fed. Reg. 71,418 (1979).

is, when proportionality does not exist. Moreover, in recent compliance reviews, OCR appears to have put the primacy of proportionality into practice.¹⁶⁷

The courts have taken this concept a step further. The most prominent gender equity decision is the First Circuit's opinion in *Cohen*, which characterized proportionality as a "safe harbor" for institutions.¹⁶⁸ Elaborating, the court asserted that "a university which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup."¹⁶⁹ Following *Cohen*'s lead, the Tenth Circuit in *Roberts* and the Sixth Circuit in *Horner v. Kentucky High School Athletic Association*¹⁷⁰ explicitly adopted the safe harbor approach.¹⁷¹

At one level, the notion of proportionality as a safe harbor is unremarkable. Assuming that the First Circuit in *Cohen* was referring only to the accommodations component of Title IX compliance and not the separate "treatment" issues,¹⁷² the safe harbor analysis really is nothing more than a reiteration of OCR's position that "[i]f an institution has met *any part* of the three-part test, OCR will determine that the institution is meeting [the effective accommodation] requirement."¹⁷³ If this is true, do prongs two and three provide equally safe harbors? They should, if OCR means what it says.

Nonetheless, some courts have conferred an exalted status on the proportionality prong by reserving to it the safe harbor label, while simultaneously relegating prongs two and three to a backup role. For example, the appellate court in *Cohen* clearly suggested that "gender balance" is the key to compliance, conceding only that under the right circumstances, the second and third prongs might serve as a "satisfactory proxy" for proportionality.¹⁷⁴

¹⁶⁷ See *supra* note 120 and accompanying text.

¹⁶⁸ *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993).

¹⁶⁹ *Id.* at 897-98.

¹⁷⁰ 43 F.3d 265 (6th Cir. 1994).

¹⁷¹ See *Horner*, 43 F.3d at 275; *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 829 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993). The Third Circuit did not reach this issue in *Favia v. Indiana University of Pa.*, 7 F.3d 332 (3d Cir. 1993), because of the case's unique procedural context (reviewing a denial of a motion to modify a preliminary injunction). In *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994), the Seventh Circuit favorably noted the safe harbor approach, *id.* at 271, but its opinion is somewhat cryptic because it also refers to proportionality as creating only a "presumption" of compliance. *Id.* at 268, 270, 271.

¹⁷² See *supra* text accompanying notes 45-50. Surely proportionality alone will not keep an institution "on the sunny side of Title IX" if it is discriminating in one of the other two compliance categories.

¹⁷³ OCR CLARIFICATION, *supra* note 17, at 2 (emphasis added).

¹⁷⁴ *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993).

The district court in *Cohen* referred to the second and third prongs as “escape routes,” to be considered only if a school does not meet the proportionality standard.¹⁷⁵ In a subsequent opinion,¹⁷⁶ the district court in *Cohen* suggested an even more limited role for prongs two and three: “[T]he [three-part] test encourages equality but recognizes that some institutions may be unable to attain this goal through no fault of their own; in these cases, the test provides alternatives to statistical parity.”¹⁷⁷

Recent developments, however, may indicate that proportionality is developing chinks in its armor. One very significant development is congressional involvement in the gender equity debate, which led to OCR’s clarification of its three-part standard. In May 1995, at the urging of a coalition of men’s coaching organizations,¹⁷⁸ a House of Representatives committee held a hearing to address the manner in which both OCR and the courts had been enforcing Title IX mandates.¹⁷⁹ Much of the debate at that hearing centered around a perceived overemphasis on proportionality.¹⁸⁰ Some witnesses urged Congress to intervene by amending Title IX, but, instead, OCR and Congress compromised; Congress agreed to remain on the sidelines if OCR agreed to clarify its enforcement policies.¹⁸¹

In September 1995, OCR issued an initial draft of its *Clarification*.¹⁸² During the thirty-day comment period that followed, the agency received 234 comments, including many that criticized OCR for failing to strengthen prongs two and three.¹⁸³ OCR’s final *Clarification*, issued in January 1996, differed little from the initial draft,¹⁸⁴ and it is unlikely to appease those who had originally pressed for congressional involvement. Because the

¹⁷⁵ *Cohen v. Brown Univ.*, 809 F. Supp. 978, 991 (D.R.I. 1992), *aff’d*, 991 F.2d 888 (1st Cir. 1993).

¹⁷⁶ In the first *Cohen* opinion, the district court issued a preliminary injunction against Brown University. The district court’s second opinion followed a trial on the merits. *Cohen*, 879 F. Supp. at 187-88.

¹⁷⁷ *Id.* at 199. The court did not explain when an institution would be unable to achieve substantial proportionality “through no fault of [its] own.” *See id.*

¹⁷⁸ The primary movers were representatives of coaching associations of nonrevenue sports, such as gymnastics, swimming, and wrestling. Ronald D. Mott, *OCR Title IX Clarification Receives Mixed Reviews*, NCAA NEWS, Oct. 9, 1995, at 1. These coaches viewed the use of a proportionality test in the enforcement of Title IX as a threat to the very existence of their sports. *See infra* text accompanying notes 397-401.

¹⁷⁹ Douglas Lederman, *Murky Clarification*, CHRON. HIGHER EDUC., Nov. 3, 1995, at A51.

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

¹⁸² *See id.*

¹⁸³ *See id.*

¹⁸⁴ Ronald D. Mott, *Title IX Clarification Statement Varies Little from September Draft*, NCAA NEWS, Jan. 22, 1996, at 1.

critic's pleas have generated empathy from 134 members of Congress,¹⁸⁵ the specter of congressional intervention again looms on the horizon, particularly if OCR and the courts continue to emphasize strict proportionality.¹⁸⁶

OCR's *Clarification* is simply a clarification, not a reevaluation of the three-part test. In a letter accompanying the final *Clarification*, Norma V. Cantu, the Assistant Secretary of OCR, reaffirmed the integrity of the test itself and cautioned readers not to view the *Clarification* as second-guessing that test.¹⁸⁷ She wrote that the three-part test "has guided OCR's enforcement in the area of athletics for over 15 years, enjoying the bipartisan support of Congress . . . [and] the support of every court that has addressed issues of Title IX athletics."¹⁸⁸

Ironically, four days before OCR released its *Clarification*, a Louisiana federal district judge issued an opinion that questioned one of the three-part test's fundamental premises. In *Pederson v. Louisiana State University*,¹⁸⁹ Judge Rebecca F. Doherty asked whether proportionality was an appropriate measure of an institution's accommodation of student interests and abilities.¹⁹⁰ Judge Doherty's question lies at the heart of another significant development—the apparent unraveling of judicial solidarity on the importance of proportionality and its safe harbor status.

As mentioned above, the federal appellate courts in *Cohen*, *Roberts*, and *Horner* all adopted the safe harbor analysis.¹⁹¹ Judge Doherty, however, declined "most emphatically" to follow suit:

This Court is not unaware of the *Roberts*, *Cohen* and *Horner* holdings and, in fact, the explicit language . . . that one "may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup." The Fifth Circuit has not spoken to this issue and this Court is not bound by *Roberts*, *Cohen* and *Horner*.

Further, this Court finds those decisions erroneous in this regard. To accept the interpretation in *Roberts*, *Cohen* and

¹⁸⁵ See *supra* note 16.

¹⁸⁶ See Mott, *supra* note 74, at 7 (quoting a letter written to OCR by two members of the House subcommittee that had convened the May 1995 hearing following OCR's release of a draft of its *Clarification*: "Our reading of the policy clarification indicates a continuing overemphasis on a strictly defined concept of proportionality . . .").

¹⁸⁷ Letter from Norma V. Cantu, Assistant Secretary, Office for Civil Rights, Dep't of Educ., to Colleagues (Jan. 16, 1996); see also Mott, *supra* note 184, at 1.

¹⁸⁸ Letter from Norma V. Cantu, *supra* note 187; see also Mott, *supra* note 184 at 19.

¹⁸⁹ 912 F. Supp. 892 (M.D. La. 1996).

¹⁹⁰ See *id.* at 913-14.

¹⁹¹ See *supra* notes 168-71 and accompanying text.

Horner, . . . one *must assume* that interest and ability to participate in sports is equal as between all men and women on all campuses. For instance, if a university has 50% female students and 50% male students, the assumption, under this argument must follow that the same percentage of its male population as its female population has the ability to participate and the interest or desire to participate in sports at the same competitive level. A review of *Roberts*, *Cohen* and *Horner* finds no evidence to prove or disprove this assumption

Without some basis for such a pivotal assumption, this Court is loathe to join others in creating the "safe harbor" or dispositive assumption for which defendants and plaintiffs argue. Rather, it seems much more logical that interest in participation and levels of ability to participate as percentages of the male and female populations will vary from campus to campus and region to region and will change with time. To assume, and thereby mandate, an unsupported and static determination of interest and ability as the cornerstone of the analysis can lead to unjust results.¹⁹²

The *Pederson* opinion clearly strays from the judicial party line. Its persuasive force is tempered, however, by the fact that the court's discussion of the safe harbor concept was unnecessary to the disposition of the case. By definition, the "safe harbor" protects only those schools in *compliance* with Title IX after the school has achieved substantial proportionality. Louisiana State University was no different from the vast majority of its peer institutions; immense disparities existed between men's and women's athletic opportunities,¹⁹³ so the university could not begin to make a credible claim of substantial proportionality. Thus, the court's quarrel over proportionality as a safe harbor was dictum.¹⁹⁴

In light of the disparities common at most schools, the real issue is

¹⁹² *Pederson*, 912 F. Supp. at 913-14 (footnotes omitted).

¹⁹³ Women comprised 49% of the student population but only 29% of the school's intercollegiate athletes. *Id.* at 915.

¹⁹⁴ The safe harbor discussions in *Cohen*, *Roberts*, and *Horner* also were dicta because the courts in those cases likewise concluded that the institutions involved had not met the proportionality standard. See *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 275 (6th Cir. 1994); *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993), *on remand*, 879 F. Supp. 185, 202 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155, 178 (1st Cir. 1996), *cert. denied*, No. 96-1321, 1997 WL 81992 (U.S. Apr. 21, 1997); *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507, 1517-18 (D. Colo.), *aff'd in part, rev'd in part sub nom.*, *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 829 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

whether a *lack* of substantial proportionality alone suffices to find an institution in *non*compliance with Title IX. This is the question that has raised the hackles of those who believe that OCR and the courts have transformed Title IX analysis into a one-dimensional proportionality probe. For example, in *Pederson*, the plaintiffs argued that proportionality was dispositive on the flip side of the safe harbor; that is, "if numerical proportionality is *not* found, the [institution] should be found to be in violation of Title IX."¹⁹⁵ The court in *Pederson* rejected that reasoning, but it is remarkable that the plaintiffs chose to make that argument. Despite practices that might indicate otherwise, OCR repeatedly has insisted that an institution's failure to meet the proportionality standard is not determinative.¹⁹⁶ The same is true for those courts that have drawn fire for overemphasizing proportionality. For example, the First Circuit in *Cohen* emphasized that "a court assessing Title IX compliance may not find a violation *solely* because there is a disparity between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand."¹⁹⁷

Interestingly, that comment from *Cohen* represented the court's interpretation of a Title IX provision that explicitly addresses the concept of proportionality. Section 1681(b) of the statute reads:

Nothing contained in subsection (a) of this section [the basic anti-discrimination mandate] 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: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.¹⁹⁸

This provision can be interpreted in different ways. One commentator has suggested that the "community, State, section, or other area" language refers only to geographic areas and does not include university "communi-

¹⁹⁵ *Pederson*, 912 F. Supp. at 913 (emphasis added).

¹⁹⁶ See *supra* notes 121-22 and accompanying text.

¹⁹⁷ *Cohen*, 991 F.2d at 895.

¹⁹⁸ 20 U.S.C. § 1681(b) (1994).

ties.”¹⁹⁹ Thus, according to this interpretation, the statute would not condemn comparisons “within the same institution.”²⁰⁰ This view, however, seems exceedingly narrow in light of several ordinary definitions of the word “community.”²⁰¹

Assuming section 1681(b) reaches comparisons within academic communities, that section certainly suggests a congressional distaste for proportionality as a determinative factor in Title IX compliance. Consequently, the court in *Pederson* used section 1681(b)’s language to further support its rejection of the safe harbor concept. Noting first that “the jurisprudential emphasis on numerical ‘proportionality’ is *not found* within the statute or the regulations,”²⁰² Judge Doherty focused on what little guidance Congress did provide in the statute. She concluded that section 1681(b)’s “clear language” prohibited OCR’s use of a safe harbor: “[T]o the extent that the Policy Interpretation [OCR’s three-part test] suggests by use of the disjunctive ‘or’ that a mere reliance upon substantial numerical proportionality between the sexes suffices, it is contrary to the explicit language in 20 U.S.C. § 1681(b)”²⁰³

Unfortunately, the statutory language is not so clear. First, the proviso included in section 1681(b) specifically proclaims that statistical disparities can be relevant to the compliance determination.²⁰⁴ More important, however, is the language appearing before the proviso. A careful reading of the statute indicates that section 1681(b) prohibits only one thing: that educational institutions be *required* by statistical imbalances to treat the sexes differently.²⁰⁵ On its face, OCR’s three-part test provides options; it does not require proportionality, but simply *allows* schools to comply through that method.²⁰⁶ If prong one is not met, a school theoretically can comply

¹⁹⁹ Farrell, *supra* note 4, at 1038.

²⁰⁰ *Id.*

²⁰¹ See, e.g., Webster’s Ninth New Collegiate Dictionary 267 (1984) (defining “community” as “a body of persons of common and esp. professional interests scattered through a larger society <the academic community>”).

²⁰² *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 914 (M.D. La. 1996).

²⁰³ *Id.*

²⁰⁴ See 20 U.S.C. § 1681(b) (1994) (“*Provided*, That this subsection shall not be construed to prevent the consideration . . . of statistical evidence . . .”).

²⁰⁵ See *id.*

Nothing contained in subsection (a) . . . shall be interpreted to require any educational institution to grant preferential or disparate treatment to . . . one sex on account of an imbalance . . . with respect to the total number or percentage of persons of that sex participating in or receiving [federal] benefits . . . in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area

Id.

²⁰⁶ See *supra* text accompanying notes 67-68.

through prongs two or three.²⁰⁷ Thus, the concept of a safe harbor is not directly contrary to section 1681(b).

The rub, of course, is whether OCR or the courts will provide schools with a meaningful opportunity to comply through prongs two or three. In effect, Judge Doherty has issued a challenge to her fellow jurists to live up to their word. Their leading spokesperson, the three-judge appellate panel in *Cohen*, has insisted that Title IX "does not mandate strict numerical equality between the gender balance of a college's athletic program and the gender balance of its student body."²⁰⁸ According to *Cohen*, to prevail in an athletic discrimination suit, "a Title IX plaintiff . . . must accompany statistical evidence of disparate impact with some further evidence of discrimination, such as unmet need amongst the members of the disadvantaged gender."²⁰⁹ Such statements are consistent with the framework of the three-part test. In practice, however, when faced with a sizable statistical disparity, will the courts really give serious attention to the other parts of the test? So far, the signs are not particularly promising.²¹⁰

Despite its flaws, Judge Doherty's opinion in *Pederson* serves as a trenchant reminder that Title IX's ultimate goal is to "effectively accommodate [students'] interests and abilities"²¹¹ rather than to establish an abstract numerical benchmark. Although other courts have blindly accepted the proposition that proportionality is an appropriate surrogate for accommodation of student interests and abilities, Judge Doherty simply was not willing to accept that proposition without supporting evidence.²¹² In Judge Doherty's view, the critical inquiry was whether Louisiana State University had assessed and met student desires and abilities, regardless of disparities between enrollment and athletic participation rates.²¹³ Judge Doherty asserted that the "simplicity" of the safe harbor concept should not absolve athletic directors from their Title IX duties to analyze the needs of their students and to "fill[] those needs in a non-discriminatory fashion."²¹⁴ Judge Doherty's logic is persuasive, particularly in light of section 1681(b). Although that

²⁰⁷ *Id.*

²⁰⁸ *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993).

²⁰⁹ *Id.* at 895.

²¹⁰ See *infra* text accompanying notes 253-55, 298-321.

²¹¹ 34 C.F.R. § 106.41(c) (1996).

²¹² Judge Doherty's position in *Pederson* has lifted the spirits of proportionality critics. See, e.g., Debra E. Blum, *Measuring Equity: Federal Judge Rejects Common Test Used in Title IX Disputes over Athletics*, CHRON. HIGHER EDUC., Jan. 26, 1996, at A34 (quoting Charles M. Neinas, Executive Director of the College Football Association: "I'm encouraged that a federal judge recognizes the fallacy of using proportionality to satisfy Title IX.").

²¹³ See *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 913-14 (M.D. La. 1996).

²¹⁴ *Id.* at 914.

provision may not forbid the use of a safe harbor, its principal thrust nonetheless downplays the significance of proportionality in the overall compliance assessment.²¹⁵

To further congressional objectives, OCR should modify its three-part test to remove the disjunctive "or." The agency should consider all three factors—proportionality, program expansion, and accommodation of student interests and abilities—as integral parts of any comprehensive compliance review.²¹⁶ Otherwise, the simplicity of proportionality will continue to seduce courts, OCR compliance officials, and institutions,²¹⁷ and the other two prongs will be virtually ignored. Perverse results may follow, because the latter two prongs of the three-part test do not necessarily serve the same goals as proportionality.

B. Part Two: Program Expansion

The second part of OCR's three-part test asks "whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of [the underrepresented] sex."²¹⁸ Several factors have combined to marginalize the second prong in recent years,²¹⁹ but OCR's recent *Clarification* raises some interesting new questions and may actually breathe new life into this part of the test.

The *Clarification* indicates that "OCR will review the entire history of [an institution's] athletic program,"²²⁰ but a school's recent history clearly is the most critical. Prong two states that an institution must show a "*continuing practice* of program expansion," which means that a school is not in

²¹⁵ See 20 U.S.C. § 1681(b) (1994).

²¹⁶ See *Pederson*, 912 F. Supp. at 914 ("[T]he proper analysis under effective accommodation . . . allows for consideration of all factors listed [in the three-part test] in determining whether the university has provided equal opportunity . . . for males and females.").

²¹⁷ For example, in *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995), the court initially seemed uncomfortable with the notion of a safe harbor, referring repeatedly to a "presumption" of compliance if a school met the proportionality standard. *Id.* at 268, 270, 271. The court also recognized the need to give schools "flexibility" in meeting Title IX mandates. *Id.* at 271. Ultimately, however, the court's presumption became irrebuttable: "[I]t is only practical that schools be given *some clear way* to establish that they have satisfied the requirements of the statute. The substantial proportionality contained in Benchmark 1 merely establishes such a safe harbor." *Id.* (emphasis added).

²¹⁸ 44 Fed. Reg. 71,418 (1979).

²¹⁹ At least one commentator, who contends that prong two "was always a temporary device," views it as essentially meaningless in the contemporary gender equity debate. See Farrell, *supra* note 4, at 1043-44.

²²⁰ OCR CLARIFICATION, *supra* note 17, at 5.

compliance if it rests only on teams established "at the initiation of its program" for women.²²¹ "In other words, efforts that were made during the 1970's or early 1980's are irrelevant."²²²

Essentially, schools hoping to satisfy prong two will have to show tangible progress toward expanding women's athletic opportunities in the last decade. Due to budgetary constraints, most schools have not been in an expansion mode during that time. In fact, many schools have trimmed their athletics program, as evidenced by the spate of litigation prompted by the elimination or demotion of both men's and women's teams.²²³ Thus, because "the typical . . . school added many sports in the 1970's and early 1980's and has not added any in recent years, . . . most institutions would fail the second prong."²²⁴

This analysis has been affirmed in the courts, where a similar focus on schools' "continuing" efforts to expand opportunities has left compliance with prong two out of reach even for schools with a commendable historical commitment to women's athletics. Brown University's experience provides a good example. From 1971 through 1977, Brown established varsity programs in fourteen women's sports,²²⁵ a remarkable and "dramatic"²²⁶ feat. The school added a fifteenth women's sport, indoor track, in 1982.²²⁷ For the next ten years, however, Brown added no new teams, so when financial concerns prompted cutbacks in both women's and men's programs²²⁸ and the University subsequently became a defendant in a gender

²²¹ *Id.* (emphasis added).

²²² Thro & Snow, *supra* note 56, at 624; see also Harris, *supra* note 48, at 87-89 (arguing against consideration of efforts in the 1970s).

²²³ See Kelley v. Board of Trustees, 35 F.3d 265, 267 (7th Cir. 1994) (four varsity programs eliminated at University of Illinois), *cert. denied*, 115 S. Ct. 938 (1995); Favia v. Indiana Univ. of Pa., 7 F.3d 332, 335 (3d Cir. 1993) (four varsity programs eliminated); Cohen v. Brown Univ., 991 F.2d 888, 892 (1st Cir. 1993) (four varsity teams demoted to club status); Gonyo v. Drake Univ., 879 F. Supp. 1000, 1002 (S.D. Iowa 1995) (wrestling program eliminated); Roberts v. Colorado State Univ., 814 F. Supp. 1507, 1514 (D. Colo.) (three varsity programs eliminated since 1986), *aff'd in part, rev'd in part sub nom.*, Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

²²⁴ Thro & Snow, *supra* note 56, at 624; see also Cohen, 991 F.2d at 898 ("[I]n an era of fiscal austerity, few universities are prone to expand athletic opportunities. It is not surprising, then, that schools more often than not attempt to manage the rigors of Title IX by . . . meeting the third benchmark of the accommodation test.").

²²⁵ Cohen, 991 F.2d at 892.

²²⁶ *Id.* at 903.

²²⁷ Cohen v. Brown Univ., 879 F. Supp. 185, 211 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, No. 96-1321, 1997 WL 81992 (U.S. Apr. 21, 1997).

²²⁸ The university downgraded four sports from varsity to club status—women's gymnastics and volleyball and men's golf and water polo. *Id.* at 187.

equity suit,²²⁹ the university could not show a continuing practice of increasing women's participation opportunities. The university argued that focusing on participation numbers alone was too limiting and that "program expansion" could be measured in other ways.²³⁰ Contending that the university had "the pre-eminent women's sports program in the country,"²³¹ Brown's attorneys pointed to the school's continued improvements in the quality of its existing women's athletics program²³² and argued that the percentage of women participating in athletics had increased after the cutbacks because the cuts affected more men than women.²³³

The district court conceded that Brown University had "an impressive history of program expansion," but concluded that the university could not show "a continuing practice of intercollegiate program expansion for women."²³⁴ The court in *Cohen* confirmed that prong two's focus was solely on expansion of participation opportunities, so Brown's acknowledged improvements in the treatment of existing women's teams were irrelevant.²³⁵ The court also rejected the university's contention that a program "expansion" for women could be established through cuts in the men's athletics program.²³⁶

The appellate courts that have considered prong two have concurred with the district court's analysis in *Cohen*. In *Cohen*, the First Circuit suggested that Brown University deserved "appreciable applause" for its efforts

²²⁹ The suit was brought on behalf of "all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown." *Id.*

²³⁰ *Cohen v. Brown Univ.*, 809 F. Supp. 978, 991 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993).

²³¹ Douglas Lederman, *A Key Sports-Equity Case*, CHRON. HIGHER EDUC., Oct. 5, 1994, at A51. While this boast undoubtedly was self-serving, in light of the extensive women's sports offerings at the university, it was not far off the mark.

²³² Among other things, Brown highlighted an increase in the number and quality of women's coaches and an increase in the level of competition afforded women's teams. *Cohen*, 809 F. Supp. at 991.

²³³ See *id.* at 981. The parties disagreed on the numbers of students affected by the cutbacks, and ultimately the court concluded that since the late 1970s, the percentage of women competing in athletics at Brown had "remained fairly constant." *Id.* at 991; see also *Cohen*, 879 F. Supp. 185, 211 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, No. 96-1321, 1997 WL 81992 (U.S. Apr. 21, 1997).

²³⁴ *Cohen*, 879 F. Supp. at 211.

²³⁵ See *id.* This position is consistent with OCR's recent *Clarification*, which states: "Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex. Improvements in the quality of competition, and of other athletic benefits, provided to women athletes, [are] not considered under the three-part test" OCR CLARIFICATION, *supra* note 17, at 5 n.2 (emphasis added).

²³⁶ *Cohen*, 879 F. Supp. at 211.

in the 1970s.²³⁷ In the final analysis, however, the university's failure to add significantly to its offerings for women fell "far short of a *continuing* practice of program expansion."²³⁸ In *Roberts v. Colorado State Board of Agriculture*,²³⁹ the Tenth Circuit likewise acknowledged Colorado State University's "dramatic expansion of women's athletic opportunities during the 1970s"²⁴⁰ but concluded that to rely on those early developments would "read[] the words 'continuing practice' out of this prong of the test."²⁴¹

The court in *Roberts* also agreed with *Cohen* that a reduction in men's opportunities does not constitute an expansion of women's opportunities: "[T]he ordinary meaning of the word 'expansion' may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs."²⁴² This indisputable observation, however, underscores the inconsistency between prongs one and two. Increasing the "relative percentages of women participating in athletics" is precisely the goal of prong one.²⁴³ Indeed, as the court in *Roberts* recognized, if women's athletic participation percentages were to increase to the point that "men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population," compliance with Title IX would be achieved.²⁴⁴

The contrast between prongs one and two is stark. Cutting programs to equalize participation rates seems almost the antithesis of "program expansion"²⁴⁵ for women under prong two. Such cuts do nothing to increase opportunities for women.²⁴⁶ Yet men's program cuts often not only are ac-

²³⁷ *Cohen v. Brown Univ.*, 991 F.2d 888, 903 (1st Cir. 1993).

²³⁸ *Id.*

²³⁹ 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

²⁴⁰ *Id.* at 830. The university established 11 women's sports in the 1970s. *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ 44 Fed. Reg. 71,418 (1979).

²⁴⁶ OCR recognized that fact in its *Clarification*:

OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex. This is because part two considers an institution's good faith remedial efforts through actual program expansion.

OCR CLARIFICATION, *supra* note 17, at 7. Remarkably, one women's coach criticized OCR for this policy statement, contending that schools should be able to show program expansion solely by cutting men's teams. See Lederman, *supra* note 179, at A52 (quot-

cepted but are encouraged as a means to achieve proportionality under prong one. In *Roberts*, the Tenth Circuit recognized that "in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletic programs."²⁴⁷ The court, however, had a ready solution for "[f]inancially strapped institutions" that had little hope of complying with prong two; the court suggested that such institutions cut athletics programs until substantial proportionality is achieved.²⁴⁸ The court in *Roberts* found support in the First Circuit's *Cohen* opinion:

Title IX does not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent).²⁴⁹

One can hardly blame nonrevenue men's sports' coaches for running scared in the face of such open judicial invitations to cut athletics programs.²⁵⁰ Nor can one blame those coaches for concluding that all compliance roads eventually lead to proportionality.²⁵¹ In effect, the courts have stated, "We know institutions will not be able to meet prong two because the money for program expansion is unavailable, but who needs prong two? Proportionality under prong one is always attainable, even by the most 'financially strapped' institutions, through program cuts." Astonishingly, one court offered schools the option of achieving perfect proportionality by abolishing their athletics programs entirely.²⁵²

ing Kay Brechtelsbauer, softball coach at Southern Illinois University at Carbondale).

²⁴⁷ *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

²⁴⁸ *See id.*

²⁴⁹ *Cohen v. Brown Univ.*, 991 F.2d 888, 898-99 n.15 (1st Cir. 1993), *quoted in Roberts*, 998 F.2d at 830 n.9.

²⁵⁰ Moreover, OCR offers little comfort in its modest statement that "nothing in the three-part test *requires* an institution to eliminate participation opportunities for men." OCR CLARIFICATION, *supra* note 17, at 12 (emphasis added).

²⁵¹ *See, e.g., Lederman, supra* note 179, at A52 (quoting letter to OCR from Stephen P. Erber, associate athletic director at State University of New York at Binghamton and secretary of the National Wrestling Coaches Association: "Your 'clarification' . . . does nothing to strengthen [prongs two and three]. Which leads us back to square one: proportionality is, *de facto*, the only criterion used.").

²⁵² *Cohen v. Brown Univ.*, 809 F. Supp. 978, 993 (D.R.I. 1992), *aff'd*, 991 F.2d 888

Even if an institution had the money to expand significantly its athletic opportunities for women, prong two still operates in the shadow of prong one. After all, because prong two focuses on a "continuing" practice of program expansion, schools striving to comply with Title IX through this avenue will have to continue expanding opportunities for women in the future rather than "rest on their laurels."²⁵³ How long must those efforts continue? Arthur H. Bryant, Executive Director of the Trial Lawyers for Public Justice and a prominent gender equity plaintiff's lawyer,²⁵⁴ candidly admitted that schools will not be safe from the threat of litigation until they reach the safe harbor of proportionality: "[E]ither participation rates have to be proportionate to enrollment, or schools have to continue to add women's teams where interest and ability exist until participation reaches proportionality."²⁵⁵

At best, program expansion may be nothing more than a temporary compliance tool for schools trying to buy time in their efforts to move toward substantial proportionality. On the other hand, prong one establishes an end in itself; apparently an institution that meets the proportionality standard complies with Title IX even if women's athletic opportunities remained steady, or even declined, during the previous years. Assume, for example, that an institution like Brown University, which created a sizable women's athletics program in the 1970s and early 1980s but added no more teams for the next decade,²⁵⁶ decided in the 1990s to eliminate either its football team, several smaller men's teams, or a combination of men's teams and comparatively smaller women's teams. Clearly, none of these actions would constitute an "expansion" of the school's athletics program for women. If the cuts reduced the percentage of male athletic participants to a level comparable to men's student enrollment, however, OCR and the courts would herald the university's action as a victory for women's athletics even though women's opportunities did not increase. Similarly, if this hypothetical school were to maintain substantial proportionality in the future, it need not worry about Title IX compliance even if it never provides further opportunities for women.

Assuming, for the sake of argument, that prong two alone also stands as

(1st Cir. 1993).

²⁵³ See *Cohen*, 991 F.2d at 903 (applauding Brown University for "supercharging" its women's athletics program in the 1970s but criticizing it for "rest[ing] on its laurels" throughout the 1980s).

²⁵⁴ Bryant served as co-counsel for the plaintiffs in *Cohen*. See *id.* at 891. Trial Lawyers for Public Justice has provided counsel or acted as amicus curiae in several gender equity lawsuits and has been credited with helping to reinstate women's athletics programs at several institutions through the threat of litigation. *Title IX and Athletics: The Plaintiff's View*, 6 SYNTHESIS: LAW & POL'Y IN HIGHER EDUC. 435 (1994).

²⁵⁵ *Title IX and Athletics*, *supra* note 254, at 435.

²⁵⁶ *Cohen*, 991 F.2d at 892, 903.

a viable compliance standard, how does a school establish a "continuing practice of program expansion?" Unfortunately, case law provides little guidance in answering that question. This is understandable, however, if one considers the context in which courts have decided the gender equity cases. In all of the major cases, the courts reviewed schools' elimination or demotion of existing, vital women's teams.²⁵⁷ Even *Pederson v. Louisiana State University*²⁵⁸ fits this pattern. In *Pederson*, the plaintiffs sued to compel the university to add a varsity women's softball team.²⁵⁹ Critical to the court's prong two analysis was the fact that in 1983 the university had disbanded a successful women's softball team, apparently without good reason.²⁶⁰ Thus, none of these cases provides a fitting test of what an institution must do to establish an "expansion" of its women's athletics program.

School officials, then, probably will have to obtain guidance from OCR's recent *Clarification*. Consistent with the case law, OCR's examples in the *Clarification* make clear one lesson: schools that eliminate existing women's teams will be hard-pressed to show program expansion. In OCR's first example, "Institution C" established seven women's teams in the mid-1970s, added another team in 1984, upgraded a club team to varsity status in 1990, and was implementing a plan to add yet another team in 1996.²⁶¹ OCR would find that institution in compliance with prong two.²⁶² "Institu-

²⁵⁷ See *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332, 335 (3d Cir. 1993) (concerning elimination of field hockey and gymnastics teams); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 826 (10th Cir.) (concerning elimination of fast-pitch softball team), *cert. denied*, 510 U.S. 1004 (1993); *Cohen v. Brown Univ.*, 991 F.2d 888, 892 (1st Cir. 1993) (concerning demotion of gymnastics and volleyball teams from varsity to club status).

Three other often-cited gender equity cases did not involve cuts of existing varsity teams, but all three arose in unique contexts, and the program expansion prong of OCR's three-part test was barely addressed, if at all. *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994), was brought by high school athletes seeking to compel the state high school athletic association to add fast-pitch softball to its sanctioned sports. The court cited the three-part test but, in light of the summary judgment context, offered minimal analysis. See *id.* at 274-75. In *Cook v. Colgate University*, 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993), members of a women's club ice hockey team sought an upgrade to varsity status, but the court focused on disparate treatment between the women's and men's hockey teams and did not address the three-part test. In *Blair v. Washington State University*, 740 P.2d 1379 (Wash. 1987), a suit generally challenging the university's treatment of female athletes, the court did not consider Title IX because the plaintiffs brought the suit under state law.

²⁵⁸ 912 F. Supp. 892 (M.D. La. 1996).

²⁵⁹ *Id.* at 897. The court dismissed for lack of standing an accompanying claim for a varsity women's soccer team. *Id.* at 907-08.

²⁶⁰ See *id.* at 915-16.

²⁶¹ OCR CLARIFICATION, *supra* note 17, at 7.

²⁶² *Id.*

tion D" has a history similar to "Institution C," having established seven women's teams in the 1970s and adding new teams in 1983 and 1991.²⁶³ "In 1993 [, however,] Institution D eliminated a viable women's team and a viable men's team in an effort to reduce its athletic budget."²⁶⁴ Cutting the men's team is immaterial because prong two addresses only program expansion for the "underrepresented sex." Eliminating the women's team, however, proved decisive: Institution D does not comply with prong two because "its only action since 1991 with regard to the underrepresented sex was to eliminate a team for which there was interest, ability and available competition."²⁶⁵

Institution C's plan to add a women's team in the near future also distinguishes the two hypothetical schools, but it seems unlikely that this was pivotal in OCR's analysis. The *Clarification* explicitly discounts the significance of institutional "promises" to improve.²⁶⁶ The agency, however, appears to have taken care in its wording; it noted in two examples that schools were "implementing a plan" to add a women's team.²⁶⁷ This language suggests more than a mere promise and is consistent with an earlier comment in the *Clarification* that an institution's "current implementation of a plan of program expansion" is a significant factor.²⁶⁸

Thus, Institution C's expansion plan undoubtedly weighs in its favor, but

²⁶³ *Id.* at 7-8.

²⁶⁴ *Id.* at 8.

²⁶⁵ *Id.*

²⁶⁶ "OCR will not find that an institution satisfies part two . . . where it merely promises to expand its program for the underrepresented sex at some time in the future." *Id.* at 7. This position may represent a departure from OCR's past, in which it was criticized for too often accepting as compliance a school's "plans to make a plan." Harris, *supra* note 91, at 711 (quoting Ann M. Seha, *The Administrative Enforcement of Title IX in Intercollegiate Athletics*, 2 LAW & INEQ. J. 121, 168 (1984)); see also Ross, *supra* note 8, at 140 (quoting Fred Heinrich, counsel for the University of Illinois, as saying that OCR found the university in compliance with Title IX in 1981 based on promises to expand its program in the future); Debra E. Blum, *Civil-Rights Office Urged to Heed Results of 2 Recent Sex-Bias Suits*, CHRON. HIGHER EDUC., Sept. 15, 1993, at A40 (noting May 1993 letter from OCR to Auburn University finding the university in compliance with Title IX based on promise to add women's soccer the following year).

²⁶⁷ OCR CLARIFICATION, *supra* note 17, at 7, 8 (discussing Institutions C and F).

²⁶⁸ *Id.* at 6. Institutions do not always follow through on their plans, however. In *Pederson*, Louisiana State University argued that its verbal commitment to add varsity women's teams in softball and soccer demonstrated a continuing practice of program expansion. *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 916 (M.D. La. 1996). The district court rejected the argument on the ground that the university had "not yet lived up to its verbal commitment. Softball is not yet in competition, nor is this Court convinced it will be in full and effective competition in 1996, as LSU claims; soccer is operating under considerable handicaps which . . . demonstrate LSU's inadequate commitment to the team." *Id.*

the difference in outcomes between Institutions C and D still appears to be grounded on the latter's elimination of a viable women's team. A school with any history of reduction in its women's athletics program, even if motivated by nondiscriminatory budget considerations, will have to make a strong showing of overall program expansion to overcome such an action.²⁶⁹ OCR's "Institution E" example indicates that such a showing can be made, but the example does not offer hope to many schools. Institution E established five women's teams in the mid-1970s, added another in 1979, and in 1984, it upgraded a twenty-five-member club team to varsity status while simultaneously eliminating another eight-member varsity women's team.²⁷⁰ The institution then added new women's teams in 1987, 1989, and 1995, and in the late 1980s it increased the size of an existing team.²⁷¹ Excepting a minor aberration in 1984 (that still resulted in a net gain of seventeen varsity women's opportunities), this institution has an exceptionally strong record of program expansion. OCR recognized that record and concluded that the school would comply with prong two.²⁷²

OCR wisely attempted to avoid bright line rules in its elucidation of prong two. Because circumstances will vary at each school, the *Clarification* disavows any reliance on "fixed intervals of time" between program expansions or "particular number[s] of sports."²⁷³ Nonetheless, OCR ran the same risk by including specific examples for prong two as it did for prong one. Observers who are hungry for concrete guidance may interpret the examples as broadly applicable standards.²⁷⁴ Some women's sports advocates, for example, have criticized OCR's Institution C example for condoning six-year intervals between the addition of sports.²⁷⁵ Other observers have criticized the *Clarification* for permitting "haphazard" program expan-

²⁶⁹ Although prong two refers to program expansion that is responsive to the "developing" interests of women, the *Clarification* makes clear that "[d]eveloping interests include interests that already exist at the institution." OCR CLARIFICATION, *supra* note 17, at 5-6.

²⁷⁰ *Id.* at 8.

²⁷¹ *Id.*

²⁷² *See id.* ("[T]he elimination of the team in 1984 took place within the context of continuing program expansion.").

²⁷³ *Id.* at 6.

²⁷⁴ *See supra* text accompanying notes 130-36.

²⁷⁵ Cary Groth, athletic director at Northern Illinois University and former president of the National Association of Collegiate Women Athletic Administrators, stated that "a six-year gap is too long. There are almost six generations (of women) that have been cheated out of opportunities." Mott, *supra* note 74, at 9. Christine H.B. Grant, women's athletic director at the University of Iowa, defined "generation" differently, but expressed similar disappointment in the Institution C example: "That is not fair to young women. Every four years we turn over a new generation. I'm not one for a specific number, but I would have a problem with six years." *Id.*

sion.²⁷⁶

The examples do raise some interesting questions regarding the fairness of OCR's emphasis on a continuing practice of program expansion. "Institution F" is said to be in compliance because its "history *since 1987* shows that it is committed to program expansion."²⁷⁷ A close look at the school's overall history, however, demonstrates a rather tepid commitment. Institution F established four women's teams in "the early 1970's" and made no further improvements until 1987, when it upgraded a club team to varsity status and "expanded the size of several existing women's teams."²⁷⁸ The school's only other action since 1987 was its implementation, based on a survey of its current and incoming female students in 1990, of a "plan to add a women's team by the spring of 1997."²⁷⁹

Remarkably, Institution C's critics failed to criticize Institution F. If the critics thought six-year intervals were bad, it is surprising that they did not react to intervals of at least ten years.²⁸⁰ OCR lauds Institution F's efforts "since 1987," but arguably they are not really that exemplary. Admittedly, the school made significant strides in 1987 after an exceptionally long hiatus, but since 1987 it merely has formulated a plan to add one team *seven years* after surveys indicated a need for expansion.

Even if OCR's characterization of Institution F's recent activities indicates a strong commitment to program expansion, one might question the wisdom of focusing almost exclusively on the last decade. OCR's analysis could lead to interesting results for schools that did "little or nothing until the late 1980s."²⁸¹ Currently, for example, Institution F has five varsity sports for women; Brown University, which demoted two women's teams to club status in 1991, has thirteen.²⁸² Although Institution F is in compliance, Brown University, which has an "impressive *history* of program expansion,"²⁸³ is not in compliance because it has not recently expanded its program.

Brown University nevertheless stands in contrast to the University of

²⁷⁶ Lederman, *supra* note 179, at A52.

²⁷⁷ OCR CLARIFICATION, *supra* note 17, at 8 (emphasis added).

²⁷⁸ *Id.* Apparently "several" means four, since that is all the school had prior to 1987. *Id.*

²⁷⁹ *Id.*

²⁸⁰ One must assume more than a decade passed between the "early" 1970s and 1987, and the school's "plan" to add a team in 1997 may not be on schedule.

²⁸¹ See Thro & Snow, *supra* note 56, at 624 n.102 (suggesting that this is one of the lessons of *Cohen v. Brown University*).

²⁸² See *Cohen v. Brown Univ.*, 879 F. Supp. 185, 195 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, No. 96-1321, 1997 WL 81992 (U.S. Apr. 21, 1997). The school downgraded volleyball in 1991, but reinstated its varsity status during the 1994-1995 season. *Id.* at 192 n.17.

²⁸³ *Id.* at 211.

Arkansas, which had only six women's teams "[t]hroughout the 80's and into the 90's."²⁸⁴ Arkansas added three women's sports following a 1993 decision by the Southeastern Conference that its member schools, including Arkansas, should have two more women's teams than men's teams.²⁸⁵ This action, according to the university's chancellor, left Arkansas "in good shape" with respect to OCR's three-part test.²⁸⁶ If OCR's examples are adequate indicators, based on the university's recent program enhancements, the chancellor is correct. One wonders, however, whether Arkansas deserves more legal protection than Brown, which for two decades provided far more athletic opportunities to women.

Another irony illustrated by contrasting Arkansas and Brown is that despite Arkansas's progress in the last few years, it is much further from substantial proportionality than Brown. When Arkansas's chancellor offered his opinion regarding his school's Title IX compliance, he fully "realize[d]" that women make up 26 percent of the athletic participants while they comprise 53 percent of the enrollment."²⁸⁷ Apparently, such an enormous disparity is irrelevant because the three prongs of OCR's test stand as independent avenues of compliance.

Perhaps the most important question to arise from OCR's analysis of prong two is whether schools can insulate themselves from Title IX difficulties simply by periodically adding or upgrading a women's team. For example, will the schools of the Southeastern Conference be able to avoid liability by complying with the conference's 1993 directive?²⁸⁸ Interestingly, the district court in *Pederson v. Louisiana State University* did not find persuasive LSU's addition of two teams. In fact, the court sharply rebuffed the university's argument that its actions constituted a continuing practice of program expansion:

LSU's decision to add two intercollegiate varsity women's sports was neither for the purpose of encouraging women's athletics, nor for responding to an increasing interest and ability in women's athletics on campus. In adding the two teams, LSU chose merely to follow the decisions made

²⁸⁴ *Discussions of Title IX*, *supra* note 55, at 5 (quoting Daniel Ferritor, Chancellor, University of Arkansas).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* Apparently, when Arkansas's three new women's teams are fully operational, the women's participation rate will increase to 35%. *Id.* Assuming a continued 53% female enrollment rate, the resulting 18% disparity still will remain considerably higher than the 13.01% disparity at Brown. *See Cohen*, 879 F. Supp. at 211.

²⁸⁸ *See Pieronek*, *supra* note 92, at 369-70 (suggesting that both the Southeastern Conference's approach and the Big Ten Conference's requirement of 40% female athletic participation by 1997 might satisfy the program expansion prong).

by the Southeastern Conference concerning whether to add additional women's teams

. . . .

LSU led a minority move to resist proposed changes toward gender equity in athletics within the NCAA. Despite the efforts of the minority group, the NCAA and the Southeastern Conference recognized the need for expansion of women's athletics, thus dragging LSU along with the tide of change.²⁸⁹

The court's language suggests that both an institution's motives for expansion and its entire history of dealing with women's athletics are at issue when evaluating the school's commitment to program expansion. That analysis may be difficult to reconcile with OCR's *Clarification* examples, however, because the examples seem to subordinate institutional motives and early history to recent, tangible results.

OCR's examples seem to suggest that program expansion is a viable compliance alternative to proportionality. Astute administrators will be eager to take advantage of that potential opportunity. Arkansas's chancellor, for example, concluded that his institution's recent program expansion will probably protect it "for five years," at which point "the institution is potentially back to square one."²⁹⁰ If that is correct, twenty-five more years may not be enough to settle the gender equity debate.

This dilemma again raises a question concerning whether any of the three prongs should stand alone as a compliance standard.²⁹¹ Program expansion, like proportionality, may be a poor substitute for genuine accommodation of student interests and abilities. Thus, all three prongs of OCR's test should be considered in compliance assessment in order to avoid deficiencies inherent in any single prong.²⁹²

In fact, the *Clarification* recognizes that one really cannot assess program expansion in isolation. OCR's commentary on prong two is replete with language suggesting that prong two is inextricably intertwined with prong three. The heart of the commentary, for example, states that "the focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex."²⁹³ Moreover, OCR's principal lessons under prong two apply equally to prong three: existing,

²⁸⁹ *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 916-17 (M.D. La. 1996).

²⁹⁰ *Discussions of Title IX*, *supra* note 55, at 5-6.

²⁹¹ See *Pederson*, 912 F. Supp. at 916 (questioning "the wisdom of allowing a university to avoid a finding of non-compliance" through satisfaction of only the second prong).

²⁹² See *supra* text accompanying notes 223-24.

²⁹³ OCR CLARIFICATION, *supra* note 17, at 6.

viable teams should not be cut because to do so would be antithetical to accommodating present interests. Rather, schools should respond to student requests for new or upgraded women's teams²⁹⁴ and conduct periodic surveys to determine whether program expansion is warranted.²⁹⁵ The commentary suggests prong two means little without a simultaneous assessment under prong three.²⁹⁶

C. Part Three: Full and Effective Accommodation of Student Interests and Abilities

If an institution does not meet substantial proportionality and cannot show a continuing practice of program expansion, it can still comply with Title IX if "it can be demonstrated that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program."²⁹⁷ On its face, this third prong of OCR's test may appear to be many schools' best hope for compliance.²⁹⁸ To date, however, the courts have been as inhospitable with respect to prong three as they have been with respect to prong two.

OCR promulgated the three-part test to explain a specific regulation requiring institutions to "effectively accommodate the interests and abilities" of its students.²⁹⁹ The third prong of that test now asks whether an institution has "fully and effectively accommodated" the "interests and abilities" of its female students.³⁰⁰ This draftsmanship is remarkably incongruous. OCR's nearly verbatim incorporation of the regulatory language into its

²⁹⁴ "[A]n institution's affirmative responses to requests by students or others for addition or elevation of sports" is a significant factor to consider. *Id.* The courts also have recognized the importance of this consideration. See *Cohen v. Brown Univ.*, 809 F. Supp. 978, 993-94 n.12 (D.R.I. 1992) (distinguishing Brown University from the University of Nebraska at Lincoln and the University of Arkansas in part because at the latter two schools female students had not requested additional teams), *aff'd*, 991 F.2d 888 (1st Cir. 1993).

²⁹⁵ "OCR would also find persuasive an institution's efforts to monitor developing interests and abilities of the underrepresented sex . . . by conducting periodic nondiscriminatory assessments of developing interests and abilities . . ." OCR CLARIFICATION, *supra* note 17, at 6-7. Two of the *Clarification* examples, those of Institutions E and F, refer to institutional surveys of enrolled and incoming students. *Id.* at 8.

²⁹⁶ The *Clarification* notes, however, that under prong two, "*an institution is not required, as it is under part three, to accommodate all interests and abilities of the underrepresented sex.*" *Id.* at 6 n.3 (emphasis added).

²⁹⁷ 44 Fed. Reg. 71,418 (1979).

²⁹⁸ See *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993) (suggesting that in light of difficulty meeting first two prongs, schools will look to satisfy prong three); Henderson, *supra* note 140, at 142 (same).

²⁹⁹ See *supra* text accompanying notes 33-35, 65-67.

³⁰⁰ 44 Fed. Reg. 71,418 (1979).

policy interpretation leaves one wondering why prong three is not *the* test of compliance, let alone why it has been relegated to third place.³⁰¹

Nonetheless, in an attempt to give some independent meaning to prong three, in *Cohen v. Brown University*,³⁰² the court discussed the single linguistic difference between the two standards. The court noted that the policy interpretation “demands not merely some accommodation, but *full* and effective accommodation.”³⁰³ In other words, *all* female students with the requisite interest and ability must be accommodated.³⁰⁴ Obviously, that is a tall order; it is impossible to accommodate every able student who would be interested in participating in intercollegiate athletics.³⁰⁵ An institution’s obligation ends under prong three, then, at the same point a program expansion obligation ends under prong two: when the school reaches substantial proportionality.³⁰⁶

In *Cohen*, Brown University argued that this analysis rendered prong three useless because it effectively became nothing more than a proportionality requirement.³⁰⁷ The court disagreed, contending that other institutions could use prong three by “point[ing] to the *absence* of [unaccommodated female] athletes to justify an athletic program that does not offer substantial proportionality.”³⁰⁸ Although that may sound plausible, an institution rarely will have no “unaccommodated” female students. Moreover, an institution could not readily make such a showing. The courts have yet to be receptive to institutional efforts to assess student interests.³⁰⁹

³⁰¹ In *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 914-16 (M.D. La. 1996), the court questioned the use of either of the first two prongs as an independent compliance standard. “Clearly,” the court said, “the pivotal element of the analysis in this case is the question of effective accommodation of interests and abilities.” *Id.* at 915. In effect, the court concluded that the only “safe harbor” in the three-part test was prong three.

³⁰² 991 F.2d 888 (1st Cir. 1993).

³⁰³ *Id.* at 898 (emphasis added).

³⁰⁴ The court acknowledged one limitation on that principle. Noting that “the full-and-effective-accommodation standard is . . . not absolute,” the court recognized OCR’s qualifications that the level of interest and ability must be sufficient “to sustain a viable team” and that there must be “a reasonable expectation of intercollegiate competition for that team.” *Id.* (quoting 44 Fed. Reg. 71,418 (1979)).

³⁰⁵ This is especially true if one includes the demand for scholarships.

³⁰⁶ The district court in *Cohen* candidly assessed that its “interpretation of prong three does require that the unmet interests and abilities of the underrepresented sex be accommodated to the fullest extent until the substantial proportionality of prong one is achieved.” *Cohen v. Brown Univ.*, 879 F. Supp. 185, 210 (D.R.I. 1995), *aff’d in part, rev’d in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, No. 96-1321, 1997 WL 81992 (U.S. Apr. 21, 1997); *see also infra* text accompanying notes 329-31.

³⁰⁷ *See Cohen*, 879 F. Supp. at 210.

³⁰⁸ *Id.* (emphasis added).

³⁰⁹ *See infra* text accompanying notes 335-47.

The most interesting aspect of *Cohen's* "full accommodation" theory may be its apparent departure from the focus of both Title IX and prong one on equal treatment of the sexes. Is it fair and consistent with Title IX to accommodate fully women's interests and abilities if men's interests and abilities are only partially accommodated? Brown University contended in *Cohen* that full accommodation of only one sex's interests and abilities ran counter to Title IX, and remarkably, the First Circuit seemed to agree:

[Brown's objection] overlooks the accommodation test's general purpose: to determine whether a student has been "excluded from participation in, [or] denied the benefits of" an athletic program "on the basis of sex . . ." 20 U.S.C. § 1681(a) (1994). *While any single element of this tripartite test, in isolation, might not achieve the goal set by the statute, the test as a whole is reasonably constructed to implement the statute.*³¹⁰

If that is true, then it is unclear why each "single element" of the three-part test is isolated and considered as a separate and independent benchmark for determining compliance with the accommodation requirement.³¹¹ In *Cohen*, the court seemed to recognize that consideration of the three-part test "as a whole" would best advance Title IX's purposes,³¹² yet it reinforced the separation of the three prongs through its safe harbor concept.

Brown University urged the court to adopt a comparative accommodation standard that would compare the percentage of unaccommodated women who had the requisite interest and ability to participate in intercollegiate athletics with the percentage of similarly unaccommodated men.³¹³ Instead, the First Circuit crafted an example to illustrate the distinction between comparative accommodation and full accommodation:

Suppose a university (Oooh U.) has a student body consisting of 1,000 men and 1,000 women, a one to one ratio. If 500 men and 250 women are able and interested athletes, the ratio of interested men to interested women is two to one. Brown takes the position that both the actual gender composition of the student body and whether there is unmet interest among the underrepresented gender are irrelevant; in order to satisfy the third benchmark, Oooh U. must only provide

³¹⁰ *Cohen v. Brown Univ.*, 991 F.2d 888, 899-900 (1st Cir. 1993) (emphasis added).

³¹¹ *Id.*

³¹² See *supra* text accompanying notes 223-24, 303-04 (agreeing with the view that the three prongs should be evaluated together).

³¹³ *Cohen*, 991 F.2d at 899.

athletic opportunities in line with the two to one interested athlete ratio, say, 100 slots for men and 50 slots for women. Under this view, the interest of 200 women would be unmet—but there would be no Title IX violation.

We think that Brown's perception of the Title IX universe is myopic. The fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender. Rather, the law requires that, in the absence of continuing program expansion (benchmark two), schools either meet benchmark one by providing athletic opportunities in proportion to the gender composition of the student body (in Oooh U.'s case, a roughly equal number of slots for men and women, as the student body is equally divided), or meet benchmark three by fully accommodating interested athletes among the underrepresented sex (providing, at Oooh U., 250 slots for women).³¹⁴

This example demonstrates the futility most schools would encounter in attempting to comply with prong three as the First Circuit has interpreted it. As suggested by the court, assume that this relatively small university was in a position, financially and otherwise, to provide intercollegiate athletic opportunities to 150 of its students. Further assume that it is currently providing such opportunities to one hundred men and fifty women, a ratio that generally reflects participation rates around the country.³¹⁵ Oooh U. could comply with prong one by adding fifty more opportunities for women, an unlikely scenario considering the resource commitment that a thirty-three percent program expansion would entail. To comply with prong three, however, *Cohen* suggests that the university would have to add 200 more opportunities for women, which would more than double the size of its overall athletics program.³¹⁶

The court's example is fundamentally flawed. The three-part test is structured so that prong three is triggered only when "the members of one sex are underrepresented among intercollegiate athletes."³¹⁷ On its face,

³¹⁴ *Id.*

³¹⁵ See *supra* text accompanying note 70.

³¹⁶ The court actually contemplated a much larger program expansion. Recognizing that men ultimately would become the "underrepresented" sex, the court stated, "Of course, if Oooh U. takes the benchmark three route, it will also have to provide at least the same number of slots for men" *Cohen*, 991 F.2d at 899 n.16. Presumably, the court means that 150 slots for men would have to be added to reach the 250 slots allotted to women.

³¹⁷ 44 Fed. Reg. 71,418 (1979).

prong three applies only to the “underrepresented” sex.³¹⁸ In the Oooh U. example, once fifty participation opportunities for women are added and proportionality is achieved, women are no longer underrepresented among intercollegiate athletes. Thus, logically, the road to compliance once again stops at proportionality.³¹⁹

The Oooh U. example certainly provides ammunition to those who believe that the full accommodation analysis “strip[s prong three] of independent significance and vitality.”³²⁰ Schools like the fictional Oooh U. are left with one practical avenue of compliance: proportionality. If proportionality is the key, schools operating under budget constraints understandably will look to the most practical vehicle for traversing that path to compliance: program cuts. In *Cohen*, the court recognized this when it invited schools to consider that alternative:

If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent).³²¹

One reasonably could question whether cutting men’s opportunities, or paring both men’s and women’s opportunities, purely for the sake of symmetry does anything to “effectively accommodate” student interests and abilities. One might rationally conclude that such a “perception of the Title IX universe is myopic.”³²²

Brown University’s comparative accommodation theory appears to reflect better the regulatory language—“effectively accommodate the interests and abilities of members of *both* sexes”³²³—than does *Cohen*’s theory of full accommodation for one sex. Why then is it wrong? First, said the court, a comparative assessment is simply inconsistent with the plain language of OCR’s policy interpretation: “Put bluntly, Brown reads the ‘full’ out of the duty to accommodate ‘fully and effectively.’”³²⁴ Moreover, according to

³¹⁸ See *supra* text accompanying notes 66-68.

³¹⁹ One could argue that this analysis makes prong three an easier, and thus more meaningful, compliance standard. In fact, in most cases prong three is nothing more than proportionality masquerading as full and effective accommodation.

³²⁰ Connolly & Adelman, *supra* note 61, at 885. As noted previously, see *supra* note 61, Connolly served as co-counsel for Brown University in the *Cohen* litigation.

³²¹ *Cohen*, 991 F.2d at 899 n.15.

³²² *Id.* at 899.

³²³ 34 C.F.R. § 106.41(c) (1996) (emphasis added).

³²⁴ *Cohen*, 991 F.2d at 899.

the court, "Brown's view is . . . poor policy" because it would complicate the accommodation assessment.³²⁵

In light of the courts' traditional deference to administrative agencies' interpretations of the laws that they enforce,³²⁶ one can appreciate the court's first rationale, although it is questionable.³²⁷ The court's policy rationale, however, is more puzzling. The court went to great lengths to emphasize that the comparative approach "would likely make it more difficult for colleges to ensure that they have complied with Title IX," would "aggravate the quantification problems that are inevitably bound up with Title IX," would "invite[] thorny questions as to the appropriate survey population," and "would do little more than overcomplicate an already complex equation."³²⁸ Even if one believes that methods of analysis should be avoided simply because they are difficult, the court's rationale has a more rudimentary defect: the assessment difficulties that the court fears in the comparative context are identical to those encountered in gauging the interests and abilities of the underrepresented sex.

Consider *Cohen's* Oooh U. example, which proceeds from the premise that "500 men and 250 women are able and interested athletes."³²⁹ If a comparative accommodation theory is the basis for that premise, some assessment tools must be employed to determine the number of both female and male students who have the interest and ability to participate in intercollegiate athletics. Once those numbers have been determined, one easily can make comparisons between women and men based on student enrollment figures and on the percentages of both sexes either currently participating in athletics or "able and interested" but unaccommodated. Under *Cohen's* full accommodation theory, of course, the number of able and interested men is irrelevant because the theory focuses solely on accommodating the interests of the underrepresented sex. One still must determine the number of able and interested women, however, so that their interests can be "fully" accommodated.³³⁰

³²⁵ *Id.* at 900.

³²⁶ *See id.* at 895 (noting that deference to agency interpretations is "particularly high" when Congress has specifically directed an agency to set standards, as with Title IX). Amusingly, one of Brown University's attorneys suggested that parts of OCR's policy interpretation are not entitled to deference "because the agency drafted them having little or no experience, background, or involvement in athletics." Connolly & Adelman, *supra* note 61, at 852.

³²⁷ The question is whether OCR's three-part test is consistent with the statute and regulations it purports to interpret. Arguably, the notion of "full" accommodation of one sex goes well beyond Title IX's mandate and its implementing regulations. If so, it would be entitled to little deference.

³²⁸ *Cohen*, 991 F.2d at 900.

³²⁹ *Id.* at 899.

³³⁰ "Full" accommodation really means accommodation until proportionality is

Under either theory, the only difficulty is measuring student interests and abilities, and presumably the same assessment tools would be used for both sexes. Once that task has been completed, comparisons between the sexes may be made easily. Thus, in *Cohen*, the court's suggestion that a comparative analysis would be exceedingly difficult and that the "far more serviceable" full accommodation approach would require only "a relatively simple assessment of whether there is unmet need in the underrepresented gender"³³¹ is disingenuous.

It would be interesting to know how the court envisioned schools making the "relatively simple" assessment of "unmet need" among women. The most evident assessment tool is a survey of students that would ask them about their athletic interests and experience. The court, however, suggested that interest surveys are suspect and noted that "thorny questions" surrounded even the issue of which survey population to use.³³² On remand, the district court was more direct, contending that any interest assessment would be "meaningless since it is an impossible task to quantify latent and changing interests."³³³ The court continued:

Given the difficulty of measuring the relative interests of men and women, it would be almost impossible for an institution to remain in compliance with Title IX by staying abreast of the everchanging relative "interests" of its male and female students and adjusting its program accordingly. . . . [C]onstant rebalancing would be necessary to maintain compliance, thereby eliminating the ability of an institution to verify easily that it falls within the "safe harbor" that prong one provides.³³⁴

This language suggests that courts consider prong three to be unmanageable. Effort should be directed, therefore, toward achieving proportionality.³³⁵ Although the courts' fears are understandable, the interest assessment lies at the heart of prong three. If that standard is to have substance, some means

achieved. See *supra* text accompanying notes 323-25.

³³¹ *Cohen*, 991 F.2d at 900.

³³² See *id.*

³³³ *Cohen v. Brown Univ.*, 879 F. Supp. 185, 205 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, No. 96-1321, 1997 WL 81992 (U.S. Apr. 21, 1997).

³³⁴ *Id.* at 206 n.44.

³³⁵ See *Discussions of Title IX*, *supra* note 55, at 5 (quoting Beverly Ledbetter, Vice President and Legal Counsel, Brown University, who stated that Brown's attempt to comply with prong three "was determined by the court to be too complicated, so it decided to fall back on the proportionality of the student body enrollment as the determining factor").

must be available to assess student interests and abilities.

OCR has distanced itself from the *Cohen* analysis in its recent *Clarification*, which clearly contemplates the use of simple assessment techniques. Norma Cantu, the head of OCR, has stated that "[t]he policy interpretation is intended to give institutions flexibility to determine interests and abilities,"³³⁶ and that the language of the *Clarification* is consistent with that attitude. The *Clarification* states that institutions have "flexibility" to use "methods of [their] choosing" in assessing student interests and abilities, provided those methods are nondiscriminatory.³³⁷ More importantly, the *Clarification* suggests that OCR is more concerned with an institution's good faith in the assessment process than it is with precision: "These assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities. . . . OCR does not require elaborate scientific validation of assessments."³³⁸

The use of student interest surveys has generated controversy on both sides of the gender equity debate. Several prominent women's sports advocates, for example, have contended that such instruments are inherently flawed and should not be used to deny opportunities for female athletes based on a purported "lack of interest."³³⁹ In response, the executive director of the College Football Association has charged that women's groups are opposed to surveys because they confirm that women's athletic interests are being accommodated.³⁴⁰ Probably there are elements of truth in both positions. In 1994, an NCAA research committee developed a survey instrument for use in a pilot study at four institutions.³⁴¹ Women's athletic directors from at least two of those universities have reported that they derived sub-

³³⁶ Mott, *supra* note 74, at 19.

³³⁷ OCR CLARIFICATION, *supra* note 17, at 10.

³³⁸ *Id.* at 10-11. These comments clearly contradict the stance taken by the district court in *Cohen*. Remarkably, that court concluded that OCR countenanced the use of interest surveys only *following* a finding of noncompliance under prong three, rather than as a means of identifying student interests in an effort to comply with prong three. *Cohen*, 879 F. Supp. at 210 n.51.

³³⁹ See Mott, *supra* note 72, at 28 (noting concerns of Christine H.B. Grant, women's athletic director at University of Iowa, Charlotte West, associate athletic director at Southern Illinois University at Carbondale, and Valerie M. Bonnette, founder of Good Sports, Inc. and former OCR senior program analyst); Ronald D. Mott, *Title IX Discussion Intensifies on Several Fronts*, NCAA NEWS, Jan. 25, 1995, at 6 (noting concerns of Cary Groth, president of National Association of Collegiate Women Athletic Administrators and athletic director at Northern Illinois University).

³⁴⁰ See Memorandum from Charles M. Neinas, Executive Director, College Football Association (CFA), to CFA Membership 3 (Apr. 13, 1995) (on file with author).

³⁴¹ Mott, *supra* note 72, at 13. The participating institutions were Long Beach State University, North Dakota State University, Washburn University, and the University of Wisconsin, La Crosse. *Id.*

stantial benefits from the use of the survey.³⁴² One reported that the survey "validated what the institution believed all along: It effectively was accommodating the athletics interests and abilities of its female athletes."³⁴³

Even the latter administrator, however, cautioned that surveys may be misused and misinterpreted.³⁴⁴ Many people are eager to advocate the use of surveys because they are convinced that women simply have a lesser interest in athletics than do men.³⁴⁵ One must be wary of making such assumptions, however, because interest and opportunity go hand in hand. As one commentator pithily stated, "It is hard to have a high level of interest in playing in a sports program that does not exist."³⁴⁶ After decades of a socialization process in which "boys became the heroes of the football field while the girls stood on the sidelines and cheered,"³⁴⁷ women's athletics in many ways is still in its infancy. Moreover, even in schools with substantial women's programs, female athletes often fare poorly in comparison with their male counterparts in such areas as practice times, facilities, equipment, coaching staffs and salaries, recruiting budgets, game schedules, publicity, and transportation.³⁴⁸ Common sense suggests that interest will be higher in programs that are better supported and promoted.

The phenomenal growth of women's athletics following the passage of Title IX indicates that if athletic opportunities are provided, women will seize them. In the 1970s, athletic participation by female students at Ameri-

³⁴² *Id.* at 28 (citing Lynn L. Dorn, women's athletic director at North Dakota State University, where 70% of more than 1100 questionnaires were returned); Bridget Belgiovine, *A Helpful Tool, If Used Correctly*, NCAA NEWS, Oct. 16, 1995, at 4. Belgiovine is director of athletics at the University of Wisconsin, La Crosse, where 62% of 1500 student questionnaires were returned. *Id.*

³⁴³ Mott, *supra* note 72, at 28 (reporting conclusions of Lynn L. Dorn, women's athletic director at North Dakota State University).

³⁴⁴ *See id.*

³⁴⁵ *See, e.g.,* Connolly & Adelman, *supra* note 61, at 881 (basing this "simple conclusion" on participation rates in high school and in club and intramural sports at college); COLLEGE FOOTBALL ASS'N, *supra* note 109 ("Academic institutions and research centers as well as government agencies consistently reveal a higher athletic interest among male[s] than female[s]."). *Cf.* Editorial, CHI. TRIB., *quoted in* NCAA NEWS, May 24, 1995, at 4 ("Anyone who has ever been to a Super Bowl party knows what's wrong with [a proportionality test]. While many women are interested in sports and while women participate in increasing numbers, far more men than women make sports part of their lives.").

³⁴⁶ Farrell, *supra* note 4, at 1049.

³⁴⁷ Martin, *supra* note 41, at 481. For a review of some of the myths and stereotypes that have inhibited women's athletic development over the last several decades, see *id.* at 482-84. Athletic participation by women flourished in the late 19th century and early 20th century but declined precipitously in the 1920s and did not begin to reemerge until the late 1960s. *See* Farrell, *supra* note 4, at 1002-04.

³⁴⁸ *See* Lamar, *supra* note 91, at 260-61.

can high schools increased from approximately 300,000 to over two million, while women's intercollegiate participation more than doubled.³⁴⁹ "By 1980, however, the rapid rise in participation began to level off, then diminish a few years later when Title IX protections weakened,"³⁵⁰ another strong indication that interest follows opportunity.

Women's interest in athletics undoubtedly will grow, as new generations of girls grow up watching and attempting to emulate new athletic heroines. In 1996, for example, play began in professional women's basketball leagues, and United States women's teams won Olympic gold medals in basketball, gymnastics, soccer, softball, and synchronized swimming. Soccer and softball were medal sports for the first time in the Olympics, and many viewed the Summer Games in Atlanta as a momentous breakthrough for women's athletics generally.³⁵¹

At the intercollegiate level, the numbers alone are telling. In the 1994-1995 school year, approximately 2.24 million girls participated in high school athletics,³⁵² but only about 110,000 women participated in varsity sports at the NCAA's 903 member institutions.³⁵³ Although these figures do not include athletic participants at non-NCAA institutions, they suggest a pool of over two million "high school girls whose choices have already indicated an interest in sports but for whom colleges have not provided [an] opportunity."³⁵⁴

³⁴⁹ NCAA GENDER EQUITY GUIDE, *supra* note 50, at 2.

³⁵⁰ *Id.* The most serious blow to Title IX came in 1984 with the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984). *Grove City College* interpreted Title IX to apply only to specific educational programs that received direct federal financial assistance, rather than to institutions as a whole. As a result, if a school's athletics program itself did not receive direct federal aid, it fell outside Title IX's purview. The law changed dramatically in 1988, however, when Congress legislatively overruled *Grove City College* by enacting the Civil Rights Restoration Act, 20 U.S.C. § 1687 (1994). That legislation imposed an institution-wide standard rather than a program-specific standard and requires schools to ensure equal opportunities in all of their programs, regardless of whether the programs directly received federal funds. The Civil Rights Restoration Act, together with *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), which held that successful plaintiffs in Title IX cases could recover monetary damages and attorney fees, put strong teeth back into Title IX.

³⁵¹ See, e.g., *Women's Games*, SPORTS ILLUSTRATED, Aug. 12, 1996, at 17 (recounting the dramatic achievements of U.S. female athletes and declaring: "Call the Games of the XXVI Olympiad, from a U.S. perspective, the Gender Equity Olympics."); Michael Farber, *Score One for Women*, SPORTS ILLUSTRATED, Aug. 12, 1996, at 70 (opining that the women's soccer triumph was a victory not only for the 1996 team but also for the next generation of female athletes).

³⁵² *More Students Taking Part in High-School Athletics*, *supra* note 70, at 5 (reporting results of survey conducted by National Federation of State High School Associations).

³⁵³ See *Sidelines*, *supra* note 70, at A39.

³⁵⁴ Farrell, *supra* note 4, at 1050. A similar argument could be made for male ath-

Another indication of interest at the intercollegiate level is the abundance of women's club sports in colleges and universities.³⁵⁵ OCR's *Clarification* lists participation in club and intramural sports as a significant factor to consider in assessing student interests and abilities.³⁵⁶ The *Clarification* also recognizes that one of the most direct indications of student interest is a request by students either to add a new intercollegiate team or to upgrade a club sport to varsity status.³⁵⁷ The seriousness with which an institution responds to such a request may be critical in assessing its compliance efforts.³⁵⁸

Surveys and other assessment tools perhaps are not as useful in evaluating student *ability* to participate in intercollegiate athletics, but OCR properly has downplayed that component of prong three. Some observers smugly declare that universities are required to accommodate only those "qualified" women students who possess the "requisite skill" to participate in varsity athletics.³⁵⁹ Assuming lack of ability, however, is even more problematic than assuming lack of interest. It is both contradictory and unseemly to extol the educational benefits of athletic participation and then to argue that women lack the abilities necessary to receive these benefits.³⁶⁰ Just as interest follows opportunity, so will ability, provided that an institution supports its women's program with proper coaching, facilities, equipment, scheduling, and publicity.³⁶¹

In its *Clarification*, OCR recognized that it may take time before a fledgling team rises to a specific ability level. It concluded that "the inability of interested students . . . to play at the same level of competition engaged in by the institution's other athletes" does not necessarily demonstrate a lack of ability.³⁶² The appropriate measure, said the agency, is whether

letes. During the same academic year, more than 3.5 million boys participated in high school athletics, *More Students Taking Part in High-School Athletics*, *supra* note 70, at 5, but fewer than 200,000 varsity slots were available at NCAA schools, *Sidelines*, *supra* note 70, at A39.

³⁵⁵ See Wolff, *supra* note 91, at 59 (noting the "hundreds of women's club teams around the country just begging for varsity status").

³⁵⁶ OCR CLARIFICATION, *supra* note 17, at 10.

³⁵⁷ See *id.*

³⁵⁸ See *Cohen v. Brown Univ.*, 809 F. Supp. 978, 993-94 n.12 (D.R.I. 1992) (distinguishing Brown University from two other schools, which OCR found in compliance, in part because students at the other institutions had not requested the addition of new women's sports), *aff'd*, 991 F.2d 888 (1st Cir. 1993).

³⁵⁹ See Connolly & Adelman, *supra* note 61, at 862.

³⁶⁰ See Martin, *supra* note 41, at 495.

³⁶¹ Alexander Wolff, a writer for *Sports Illustrated*, noted colorfully, "[T]he interest is there, and ability will follow if you're willing to pay enough to hire a coach who won't have to moonlight as an Amway distributor to make ends meet." Wolff, *supra* note 91, at 59.

³⁶² OCR CLARIFICATION, *supra* note 17, at 11.

those students "have the *potential* to sustain an intercollegiate team."³⁶³ Nor should an existing team's past performance be determinative,³⁶⁴ particularly if there is evidence of a lack of past institutional support for the team.³⁶⁵

In short, issues regarding student interests and abilities are at the core of prong three, and to resolve those issues, courts must permit schools to use "straightforward and inexpensive techniques"³⁶⁶ to determine student needs. In turn, school administrators must act in good faith and with open minds. They must conduct their assessments without preconceptions regarding women's interest and ability to compete. Schools should also continue their efforts to respond regularly to developing student interests.³⁶⁷ Although such assessments will not be perfect and may even "complicate" compliance under Title IX, without them, prong three has little meaning.

Prong three also will be eviscerated if the courts do not retreat from the full accommodation theory. Both the Sixth Circuit and the Tenth Circuit have followed *Cohen's* lead.³⁶⁸ Ironically, this theory inevitably compels schools to comply with proportionality and the most feasible way to achieve that goal is to cut athletics programs,³⁶⁹ which unquestionably is the antithesis of "full accommodation."

The case law presents another irony as well: The confusion the courts have generated on prong three was totally unnecessary because these were

³⁶³ *Id.* (emphasis added).

³⁶⁴ See *id.* (discounting "poor competitive record" as indicative of lack of ability).

³⁶⁵ See *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 585 (W.D. Pa.) ("Although the field hockey team had a poor won/loss record, this probably stems from a tough conference, but even more likely is the negative effect of lack of funding, scholarships, and staff."), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

³⁶⁶ OCR CLARIFICATION, *supra* note 17, at 10.

³⁶⁷ See *id.* at 11 (recommending periodic evaluations of student interest).

³⁶⁸ See *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 275 & n.9 (6th Cir. 1994); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 831-32 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993). The Second Circuit did not reach the full-versus-comparative accommodation issue in *Cook v. Colgate University*, 992 F.2d 17 (2d Cir. 1993), because it found the action moot. Nor did the Third Circuit address the issue in *Favia* in light of the case's procedural context. Neither the district court in *Cook* nor the district court in *Favia* mentioned the issue, perhaps because they rendered their decisions prior to *Cohen*, and the issue had not been presented. See *Favia*, 812 F. Supp. at 585; *Cook*, 802 F. Supp. at 747-48. In *Pederson v. Louisiana State University*, 912 F. Supp. 892, 915-16 (M.D. La. 1996), the court avoided entirely the use of the word "full" in its application of the three-part test, suggesting that it was not following the *Cohen* approach. The court did not consider the comparative accommodation theory, however, probably because it was unnecessary due to the university's clear failure to accommodate the interests of the student plaintiffs.

³⁶⁹ See *supra* text accompanying notes 320-22. Indeed, the easiest way to comply with proportionality is to eliminate all athletics programs.

easy cases. Viable, competitive women's teams were being cut or downgraded in each of the major cases.³⁷⁰ The simplest assessment would have demonstrated that women's interests and abilities were not being effectively accommodated. The courts acknowledged that the application of prong three is considerably "less vexing when plaintiffs seek the reinstatement of an established team rather than the creation of a new one."³⁷¹ Thus, answers to the difficult questions surrounding the interpretation of "full and effective accommodation" could have waited.

Two final issues arise under prong three. The first concerns the prospect of intercollegiate competition for newly created women's teams. One pair of commentators has read *Cohen's* full accommodation test to mean that "if . . . there are students who want to play a sport and who have ability to play that sport, the institution must offer the sport regardless of the institution's ability to sustain a team in that sport or the availability of competition."³⁷² This comment is more than an exaggeration; it seems deliberately misleading. Immediately following *Cohen's* exposition of its full accommodation standard, the appellate court noted two important limitations:

Although the full-and-effective-accommodation standard is high, it is not absolute. . . . [T]he mere fact that there are some female students interested in a sport does not *ipso facto* require the school to provide a varsity team in order to comply with the third benchmark. Rather, the institution can satisfy the third benchmark by ensuring participatory opportunities at the intercollegiate level when, and to the extent that, there is "sufficient interest and ability among the members of the excluded sex *to sustain a viable team and a reasonable expectation of intercollegiate competition* for that team"³⁷³

OCR's *Clarification* explicitly reaffirmed those limitations.³⁷⁴ In some respects, requiring a reasonable expectation of competition may inhibit an

³⁷⁰ See *supra* notes 268-71 and accompanying text.

³⁷¹ *Roberts*, 998 F.2d at 832 (citing *Cohen v. Brown Univ.*, 991 F.2d 888, 904 (1st Cir. 1993)).

³⁷² Thro & Snow, *supra* note 56, at 624; see also Connolly & Adelman, *supra* note 61, at 866 (noting that courts require institutions to accommodate "any and all expressed interest" by female students).

³⁷³ *Cohen*, 991 F.2d at 898 (quoting OCR's policy interpretation, 44 Fed. Reg. 71,418 (1979)) (second emphasis added).

³⁷⁴ See OCR CLARIFICATION, *supra* note 17, at 9-12 (noting that in analyzing prong three, "OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team.").

institution's program development because it is contingent on exogenous circumstances,³⁷⁵ but that seems the only feasible way for prong three to work. Certainly, the alternative—requiring schools to add varsity teams even when a competitive schedule could not be secured—appears impracticable.³⁷⁶

The second, potentially critical issue concerns who bears the burden of proof on prong three. Must female plaintiffs prove that their institution is *not* fully and effectively accommodating their interests and abilities, or will the institution be required to prove that it is accommodating those interests and abilities? This issue remains unresolved, despite the court's attempt at resolution in *Cohen*.

In each of the three leading gender equity cases—*Cohen*, *Favia*, and *Roberts*—the district courts placed on the university defendants the burden to show that they were fully and effectively accommodating the athletic interests and abilities of their female students.³⁷⁷ In a fourth case, *Cook v. Colgate University*,³⁷⁸ which was decided a few months before the other three cases, the district court did not specifically address OCR's three-part standard. Moreover, it employed a Title VII burden-shifting analysis that strays from all of the other gender equity decisions.³⁷⁹ *Cook* provides no further guidance because the appellate court in that case vacated the district court judgment as moot.³⁸⁰

The burden-of-proof issue did not arise on appeal in *Favia* because of its unique procedural context.³⁸¹ Thus, the district court's holding that defendants bear the burden on prong three stands. Of the other two cases, *Cohen* was the first to be resolved on appeal, and thereby became the leading case. In *Cohen*, Brown University urged the First Circuit to adopt the

³⁷⁵ See Harris, *supra* note 91, at 711-12 (referring to schools' "catch-22").

³⁷⁶ OCR apparently recognized the potential dilemma when it included an intriguing provision to its *Clarification*, suggesting that an institution "may . . . be required to actively encourage the development of intercollegiate competition for a sport . . . when overall athletic opportunities within its competitive region have been historically limited for members of [the underrepresented] sex." OCR CLARIFICATION, *supra* note 17, at 12. As one might expect, however, OCR did not elaborate.

³⁷⁷ *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507, 1511 (D. Colo.) (citing *Cohen* and *Favia*), *aff'd in part, rev'd in part sub nom.* *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 584 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993); *Cohen v. Brown Univ.*, 809 F. Supp. 978, 992 (D.R.I. 1992) (citing the slip opinion in *Favia*), *aff'd*, 991 F.2d 888 (1st Cir. 1993).

³⁷⁸ 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993).

³⁷⁹ See *id.* at 743.

³⁸⁰ *Cook*, 992 F.2d at 20.

³⁸¹ The Third Circuit reviewed a denial of a motion to modify a preliminary injunction and thus did not reach the merits of the university's Title IX violation. *Favia*, 7 F.3d at 334, 340, 342 n.18.

Title VII burden-shifting analysis employed by the district court in *Cook*. The First Circuit rejected that idea, concluding that the Title VII approach was inappropriate in Title IX cases, "excepting perhaps in the employment discrimination context."³⁸² The court then overruled the district court's burden-of-proof analysis and held that student plaintiffs are required to show a lack of full and effective accommodation by their institutions.³⁸³ Three months later, the Tenth Circuit, relying on *Cohen*, followed suit in *Roberts*:

[W]e hold that the district court improperly placed the burden of proof on defendant. Because a Title IX violation may not be predicated solely on a disparity between the gender composition of an institution's athletic program and the gender composition of its undergraduate enrollment, see 20 U.S.C. § 1681(b) (1994), plaintiff must not only show that the institution fails on the first benchmark of substantial proportionality but also that it does not fully and effectively accommodate the interests and abilities of its women athletes. See *Cohen*, 991 F.2d at 897. Further, an institution would be hard-pressed to establish the full and effective accommodation of the interests and abilities of its women athletes in the abstract.³⁸⁴

Interestingly, both the First Circuit in *Cohen* and the Tenth Circuit in *Roberts* purported to base their burden-of-proof allocation on section 1681(b) of Title IX.³⁸⁵ That provision, however, states only that institutions shall not be required to grant preferential treatment to women based solely on participation disparities. The provision does permit the consideration of statistical evidence of such disparities in Title IX proceedings.³⁸⁶ This hardly seems determinative of the burden-of-proof issue.

Conversely, the language of OCR's three-part test suggests that *defendants* bear the burden on prong three. If neither of the first two prongs is satisfied, OCR considers "whether it can be *demonstrated* that the interests and abilities of [the underrepresented] sex *have been* fully and effectively accommodated."³⁸⁷ Only the defendants have the incentive to "demon-

³⁸² *Cohen*, 991 F.2d at 902 (citing *Lipsett v. University of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988), which employed Title VII burden-shifting rules to a Title IX employment case).

³⁸³ *Id.* at 901-02.

³⁸⁴ *Roberts v. Colorado State Univ. Bd. of Agric.*, 998 F.2d 824, 831 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

³⁸⁵ See *id.* at 831; *Cohen*, 991 F.2d at 903-04.

³⁸⁶ See *supra* text accompanying note 205.

³⁸⁷ 44 Fed. Reg. 71,418 (1979) (emphasis added).

strate" that the underrepresented sex *has* been accommodated.³⁸⁸ OCR studiously avoided the burden-of-proof issue in its *Clarification*.³⁸⁹

More recent case law also fails to settle the issue. Although the Sixth Circuit followed *Cohen* and *Roberts* in a decision involving high school athletics,³⁹⁰ the Seventh Circuit suggested that the burden falls on the institutional defendants.³⁹¹ In *Pederson v. Louisiana State University*,³⁹² the district court effectively collapsed prong three into a broader "effective accommodation" inquiry³⁹³ and therefore did not reach the burden issue.

Thus, the burden-of-proof issue is in doubt. As a practical matter, however, the allocation of the burden is irrelevant if *Cohen's* full accommodation theory applies. It would be futile for defendants to try to show that they have "fully" accommodated all female students with an interest and an ability to participate in athletics.³⁹⁴ Alternatively, if the burden shifts to the plaintiffs, *Cohen* suggests that it is "a relatively simple" showing that "there is unmet need" in the female student population.³⁹⁵ Indeed, in both *Cohen* and *Roberts*, the appellate courts found the district courts' misallocation of the burden to be "harmless error" because the record easily demonstrated

³⁸⁸ If OCR intended plaintiffs to bear the burden of proof on this issue, inclusion of the word "not," as in "interests and abilities . . . have *not* been . . . accommodated," would have been logical.

³⁸⁹ The *Clarification* tracks the language of the three-part test, declaring that the key to compliance under prong three is whether "it can be *demonstrated* that . . . the interests and abilities of [the underrepresented sex] *are, in fact*, being fully and effectively accommodated." OCR CLARIFICATION, *supra* note 17, at 9 (emphasis added). Again, this language suggests that defendants bear the burden of proof.

³⁹⁰ *Horne v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 275 (6th Cir. 1994) (citing *Cohen* and *Roberts*).

³⁹¹ See *Kelley v. Board of Trustees*, 35 F.3d 265, 271 (7th Cir. 1994) ("Even if substantial proportionality has not been achieved, a school may establish that it is in compliance by demonstrating either that it has a continuing practice of increasing the athletic opportunities of the underrepresented sex or that its existing programs effectively accommodate the interests of that sex."). The Department of Justice apparently concurs, as the language in its amicus curiae brief in the *Cohen* litigation indicates. See Brief for the United States as Amicus Curiae at 16, *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996) ("The district court correctly ruled that *Brown failed to show* that women were fully and effectively accommodated . . .") (emphasis added).

³⁹² 912 F. Supp. 892 (M.D. La. 1996).

³⁹³ See *id.* at 914-17.

³⁹⁴ Moreover, proportionality invariably would be reached prior to full accommodation, see *supra* text accompanying notes 329-31, so prong three and the burden-of-proof issue would become moot.

³⁹⁵ See *Cohen v. Brown Univ.*, 991 F.2d 888, 900 (1st Cir. 1993); Thro & Snow, *supra* note 56, at 626 n.113 (criticizing "the relaxed standard applied in *Brown*" and suggesting that plaintiffs' burden would be "far more difficult if [they] were required to prove interest, ability, sustainability, and a reasonable expectation of competition as the regulations and policy interpretation clearly contemplated").

that the universities had not fully accommodated their female students.³⁹⁶ At first glance, then, *Cohen* apparently threw a bone to universities in its burden-of-proof analysis, but the bone was flavorless.

Cohen's full accommodation theory renders prong three virtually useless. If applied as the court contemplated, it leads directly to proportionality. Ironically, prong three ought to be the principal test of compliance because its language is nearly identical to the regulation purportedly served by the policy interpretation. Instead, proportionality is favored, although it often encourages a result opposite to effective accommodation of student interests and abilities.

The easiest method by which most institutions can progress toward proportionality is to cut athletics programs, particularly nonrevenue men's sports. That manifestation of institutional homage to proportionality is the focus of the next section of this Article.

III. THE ELIMINATION OF MEN'S NONREVENUE SPORTS

OCR's and the courts' emphasis on proportionality as the principal means of Title IX compliance has left men's sports vulnerable.³⁹⁷ School officials' understandable response to gender equity pressures is reflected in the following comment:

The big issue today is the lack of funding. If there is a certain pie that the university has to run its athletic program, the only question at this point is how do you divvy up that pie to bring about gender equity? If you cannot expand programs for the underrepresented gender because of the lack of funding, you are going to have to make cuts on the overrepresented gender's program³⁹⁸

³⁹⁶ See *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 831-32 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993); *Cohen*, 991 F.2d at 904.

³⁹⁷ See, e.g., *Kelley v. Board of Trustees*, 35 F.3d 265, 269 (7th Cir. 1994) (concerning the elimination of men's swimming at University of Illinois although women's swimming was retained due to Title IX concerns); *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1002-03 (S.D. Iowa 1995) (concerning the elimination of Drake's wrestling program and finding that the extent to which gender equity influenced decision is "a matter of dispute"); Denise K. Stellmach, Note, *Title IX: The Mandate for Equality in Collegiate Athletics*, 41 WAYNE L. REV. 203, 212 (1994) (noting that women's soccer at University of Michigan was upgraded to varsity status with funds secured from the elimination of men's gymnastics).

³⁹⁸ Ross, *supra* note 8, at 141 (quoting Fred Heinrich, attorney for University of Illinois, which defended a reverse discrimination suit initiated subsequent to elimination of men's swim team).

Athletic administrators looking for areas in which to make program cuts inevitably focus on nonrevenue sports, such as gymnastics, swimming, and wrestling, which typically do not generate revenue for the athletic department. Over the last two decades, some nonrevenue sports have experienced dramatic declines. For example, in the academic year 1974-1975, 401 of the 704 NCAA institutions sponsored wrestling programs, but in 1994-1995, despite an increase to 909 NCAA member schools, only 261 wrestling programs remained.³⁹⁹ Men's gymnastics programs dwindled from 133 to thirty-two during that same period,⁴⁰⁰ and extinction is a possibility.⁴⁰¹

To publicize their plight, representatives of men's nonrevenue sports conducted a vigorous lobbying campaign in Congress in 1994 and 1995.⁴⁰² Some representatives sought a statement from Congress or OCR that eliminating men's teams was an unacceptable means of complying with Title IX, while others went further, arguing for a "protected status" clause prohibiting schools from eliminating certain sports.⁴⁰³ Those lobbying efforts led to a congressional hearing on Title IX in May 1995 and ultimately to OCR's January 1996 *Clarification* of its three-part compliance standard.⁴⁰⁴

When OCR released its *Clarification*, Norma V. Cantu, the head of OCR, stated that "cutting or capping men's teams will not help an institution comply with part two or part three of the test because these tests measure an institution's positive, ongoing response to the interests and abilities

³⁹⁹ Zapler, *supra* note 9, at A44.

⁴⁰⁰ *Id.*

⁴⁰¹ NCAA rules generally allow national championships only for sports in which at least 40 institutions compete, NCAA Manual, *supra* note 85, art. 18.2.3, at 396, and it is likely that the number of gymnastics programs would decline even more precipitously without a national championship. The NCAA membership granted the sport a two-year reprieve in 1995 by approving a moratorium on the discontinuation of national championships through the 1996-1997 academic year. *Legislation*, NCAA NEWS, Jan. 25, 1995, at I-5. On January 14, 1997, the NCAA agreed to protect indefinitely national championships in all Olympic sports. *Olympic-Sport Championships Preserved*, NCAA NEWS, Jan. 27, 1997, at 1. Thus, gymnastics championships will continue until the NCAA membership takes specific action to discontinue them. *Id.* at 24. For the time being, then, the sport will survive, but its future seems very uncertain.

⁴⁰² One of the leaders of the lobbying effort was T.J. Kerr, wrestling coach at California State University at Bakersfield and president of the National Wrestling Coaches Association, who wrote to each member of Congress, "Soon there will be little opportunity for males to compete in athletics other than football and basketball." Zapler, *supra* note 9, at A43.

⁴⁰³ See *id.*; Mott, *supra* note 184, at 8-9 (reporting on "protected status" argument made by Roy Johnson, men's gymnastics coach at University of Massachusetts at Amherst and president of the National Association of Collegiate Gymnastics Coaches (Men)).

⁴⁰⁴ See *supra* text accompanying notes 9-17.

of the underrepresented sex."⁴⁰⁵ As long as proportionality stands as an independent means of compliance under prong one, however, cutting men's teams will remain an attractive option for administrators operating under tight budgets.

To date, nonrevenue sports have taken the brunt of the cuts, and institutions have adopted a "hands off" approach toward football and men's basketball, which traditionally generate more revenue for athletic departments.⁴⁰⁶ Nonetheless, college football representatives fervently have joined the battle against proportionality, undoubtedly because they see football as a likely target for future budget cuts. Charles M. Neinas, executive director of the College Football Association, stated that "the prevailing opinion among the women's advocacy groups" is that men who lose athletic opportunities due to program cuts deserve "no sympathy."⁴⁰⁷ Women's sports advocates have denied the charge and have accused Neinas and others of "engaging in scare tactics" by claiming that Title IX compliance requires the elimination of men's teams.⁴⁰⁸ Indeed, gender equity proponents have argued that the elimination of men's sports actually impedes women's progress because it results in a backlash against women.⁴⁰⁹

The real message from women's sports advocates is reasonable: if a lack of financial resources truly underlies an institution's difficulty in meeting gender equity goals, that school may have to reduce expenditures in its men's athletics program to generate money for women's sports' expansion. That does not mean, however, that teams must be eliminated. Schools should examine their entire athletics program for potential cost-savings before eliminating teams.⁴¹⁰ If schools conduct an honest appraisal of their programs, one of the most obvious candidates for cutbacks is football: although it is the largest revenue-producer, it is also the largest "consumer."⁴¹¹

⁴⁰⁵ Mott, *supra* note 184, at 19 (quoting the letter accompanying final *Clarification*).

⁴⁰⁶ Blum, *supra* note 5, at A34; *see also* Farrell, *supra* note 4, at 995 ("Despite federal mandate, Title IX has had surprisingly little effect on college football.").

⁴⁰⁷ Memorandum from Charles M. Neinas, Executive Director of College Football Association (CFA) to CFA Board of Directors (Mar. 9, 1995) (on file with author).

⁴⁰⁸ P. David Pickle, *Ruling Not Surprising, Most Administrators Agree*, NCAA NEWS, Apr. 5, 1995, at 1, 14 (quoting Wendy Hillard, president of Women's Sports Foundation).

⁴⁰⁹ Ross, *supra* note 8, at 142 (reporting comments of Karol Kahrs, associate athletic director at University of Illinois); *see also* Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the "Equal Opportunity" Standard*, 1994 DET. C.L. REV. 953, 997 (noting that eliminating men's teams "alienat[es] and polariz[es] the men against the women").

⁴¹⁰ *See* Heckman, *supra* note 409, at 997 & n.251 (observing that the Department of Justice's amicus curiae brief in *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994), recognized that "spreading the cuts across [the] men's athletic program" may be preferable to "abruptly terminating teams").

⁴¹¹ Lamar, *supra* note 91, at 274; *see also* Wolff, *supra* note 91, at 61 ("[O]perating

The mere mention of cutbacks in football, however, elicits indignation from the sport's more strident backers,⁴¹² who contend that cutbacks will lower the quality of the game, perhaps to the point of destruction.⁴¹³ Such arguments ring hollow, however, to observers who see frivolous expenditures as the norm in many football programs. Schools wishing to save money can begin with the frills and excesses that have negligible effects on the quality of performance.⁴¹⁴

Fat-trimming, however, has met resistance. Simply eliminating a home game hotel, for example, could save thousands of dollars and probably fund a new women's team,⁴¹⁵ but in 1994, university presidents abandoned sound fiscal judgment and rejected an NCAA finance committee recommendation to prohibit such expenditures.⁴¹⁶

expenses . . . at a typical football school are more than those of all other men's and women's sports combined.").

⁴¹² See, e.g., Blum, *supra* note 3, at A35 (reporting on the 1993 College Football Association convention and quoting Ken Hatfield, Clemson University's football coach, as saying that "[e]verybody is taking pot shots at football" and quoting Rev. Edmund P. Joyce, former executive vice-president at University of Notre Dame, as referring to "militant women" who have engaged in an "irrational attack of football as their bugaboo"); Mike Jensen, *Male Coaches Blame Women for More Cuts*, NORMAN TRANSCRIPT, May 9, 1995, at 11 (quoting Bob Frederick, athletic director at the University of Kansas, who said that "the new 'F' word is 'football'"); Memorandum from Charles M. Neinas, Executive Director, College Football Association, to CFA Membership, *supra* note 340, at 2 ("Women's advocacy groups have cast football as the villain . . .").

⁴¹³ See Henderson, *supra* note 140, at 151 (noting the argument that cutbacks will "destroy the product"); Richard E. Lapchick, *Introduction: Gender Equity in Sports*, 2 VILL. SPORTS & ENT. L.F. 1, 2 (1995) (noting the argument that Title IX will "ruin college football"); Elizabeth Lee, *Does a Real Solution Exist?*, U. MAGAZINE, Oct. 1993, at 11, 15 (quoting Bo Schembechler, former football coach at the University of Michigan: "You can't continually chip away at football . . . There becomes a concern of being able to maintain the same level of performance you had before.").

⁴¹⁴ Henderson, *supra* note 140, at 153 (footnote omitted) (noting that football programs enjoy "plush locker rooms[;] expensively furnished conference rooms and coaches offices; . . . overnight hotel accommodations and prime time cinema movies on the eve of a home game; team travel over short distances by airplane; and exorbitant recruiting budgets.").

⁴¹⁵ See *id.* at 153 n.120 (estimating the cost of a home game hotel at \$4000 to \$7000 per night); see also *Cohen v. Brown Univ.*, 809 F. Supp. 978, 1000 (D.R.I. 1992) (noting that ending university funding of women's gymnastics and volleyball saved Brown approximately \$62,000 per year), *aff'd*, 991 F.2d 888 (1st Cir. 1993); Kelli Anderson, *The Unkindest Cut*, SPORTS ILLUSTRATED, Sept. 28, 1992, at 58 (noting that the yearly cost of operating the women's tennis team cut at the University of Massachusetts was \$14,000).

⁴¹⁶ Douglas Lederman, *NCAA Presidents Won't Push for Limit on Football Teams*, CHRON. HIGHER EDUC., July 7, 1993, at A45. The presidents also rejected measures to cap the size of football teams at 105 and to reduce the number of on-campus recruiting visits by 20%. *Id.*

Admittedly, "trimm[ing] around the edges"⁴¹⁷ may not be sufficient for some schools to make meaningful progress toward Title IX compliance. These schools, therefore, should reexamine seriously the number of their football scholarships and the size of their coaching staffs. Apologists for big-time football contend that eighty-five scholarships is "far short of the need,"⁴¹⁸ but they have a difficult time explaining why college teams need many more players than professional football teams, which operate successfully with rosters of forty-seven.⁴¹⁹ "[F]ootball is buying bench warmers,"⁴²⁰ and it is difficult to justify scholarships for nonplayers when opportunities for exceptional female athletes are severely limited.⁴²¹

Modest reductions in scholarships and coaching staffs not only would yield significant savings that could be reallocated to the development of women's sports but also would permit schools to remain competitive.⁴²² In fact, across-the-board reductions in scholarships would increase competitive parity among schools. Traditional football powerhouses would have fewer opportunities "to stockpile recruits,"⁴²³ and after talented recruits enrolled as scholarship athletes at schools with less prominent football programs, competitive gaps would narrow.⁴²⁴

Another common theme among football advocates is that cutbacks in football would endanger all other sports because they are financially dependent on the revenues football brings into the athletic department.⁴²⁵ That

⁴¹⁷ Ross, *supra* note 8, at 143 (quoting Fred Heinrich, attorney for University of Illinois).

⁴¹⁸ Mott, *supra* note 339, at 6 (quoting Grant Teaff, executive director of the American Football Coaches Association); *see also* Connolly & Adelman, *supra* note 61, at 912 (stating that "football teams require at least eighty-five members").

⁴¹⁹ *See, e.g.,* Henderson, *supra* note 140, at 159-60; Wolff, *supra* note 91, at 61.

⁴²⁰ Wolff, *supra* note 91, at 63.

⁴²¹ As one commentator noted, "You can't tell me it's more valuable educationally to have a fifth tier on the football depth chart than to have a women's softball team." *Id.* at 61.

⁴²² Other commentators have offered specific downsizing proposals that may serve as useful models. *See, e.g.,* Henderson, *supra* note 140, at 159-60 (recommending a cap of 85 on squad size and a reduction of scholarships from 85 to 72); Wolff, *supra* note 91, at 61 (noting that the elimination of 15 scholarships and two assistant coaches would generate about \$300,000 for women's program expansion).

⁴²³ Wolff, *supra* note 91, at 61.

⁴²⁴ Recent history suggests that scholarship reductions already have had such an effect. During the last 20 years, the NCAA has reduced the maximum number of football scholarships at Division I-A schools from 120 to 85. Lee, *supra* note 413, at 15. Top-ten rankings at the end of the 1995-1996 season for former also-rans such as Northwestern University and Kansas State University provide persuasive evidence of increased parity. *See id.*

⁴²⁵ *See, e.g.,* Susan Hiller, *Football Fiscally Everybody's Friend*, *SIDELINES*, Sept. 1995, at 6 ("College football may be the target of some women's advocacy groups, but

argument is meritorious, of course, only if football programs spend less than they bring in and then divert excess revenues to other athletics teams. Studies consistently have shown that relatively few college football programs actually make money, at least at smaller schools.⁴²⁶ NCAA Division I-A schools fare much better, with over half reporting a profit.⁴²⁷ At these schools, substantial revenues would be available to help fund other sports, although statistics suggest that only a small percentage of football profits actually go to women's athletics programs.⁴²⁸

Even if football did help to finance the rest of the athletics program, it is a stretch to conclude that cutbacks in football would result in significant revenue losses. A moderate reduction in football's "standard of living,"⁴²⁹ such as the elimination of home game hotel stays, reductions in the number of assistant coaches, less expensive modes of team travel, or fewer amenities in the coach's office, locker room, or athletic dormitory, would not pose a serious threat to revenues. Defenders of the status quo believe that cutbacks will damage the "quality of the game," but it is unlikely that even substantial cutbacks, such as reducing the number of football scholarships by fifteen or twenty percent, would affect significantly the quality of play. These measures probably would not affect revenues by deterring fans from attending games⁴³⁰ or by deterring donors from contributing to their alma maters. Indeed, if the NCAA mandated scholarship cuts at all schools, parity among schools probably would increase, which in turn might "generate more fan interest and, ultimately, more money."⁴³¹

without its financial contribution, every other sport except men's basketball would flounder in economic instability.") (Hiller is the editor of *Sidelines*, which is published by the College Football Association.); Christopher Raymond, Comment, *Title IX Litigation in the 1990's: The Courts Need a Game Plan*, 18 SEATTLE U. L. REV. 665, 665 n.2 (1995) (quoting Bobby Bowden, football coach at Florida State University: "[The] only thing gender equity needs to be very careful of—don't destroy the goose that lays the golden egg.").

⁴²⁶ See Farrell, *supra* note 4, at 1029-30 (noting that only 75 of 492 schools (15%) responding to a 1993 NCAA survey reported profit from their football programs, including 4.5% of responding schools in the NCAA's three smallest divisions and 67% of responding Division I-A schools); Martin, *supra* note 41, at 493 (reporting in 1981 that "about eighty percent of collegiate football programs lose money"); Wolff, *supra* note 91, at 55 (noting that 13% of NCAA football programs made a profit in 1989).

⁴²⁷ Farrell, *supra* note 4, at 1030 (noting that 57 of 106 Division I-A schools reported profit, 28 reported loss, and 21 did not respond).

⁴²⁸ See *id.* at 1030-32.

⁴²⁹ Cohen v. Brown University, 879 F. Supp. 185, 214 (D.R.I. 1995) (quoting Donna Lopiano, executive director of Women's Sports Foundation), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, No. 96-1321, 1997 WL 81992 (U.S. Apr. 21, 1997).

⁴³⁰ See Wolff, *supra* note 91, at 61.

⁴³¹ *Id.*

Reductions in football scholarships or team sizes should not be undertaken simply to achieve proportionality. Proportionality is often a poor substitute for effective accommodation of student interests and abilities. Cutbacks in football expenditures, however, represent a viable means of procuring funds to expand women's athletic opportunities. If football's advocates support gender equity as they have insisted that they do,⁴³² they should be prepared to accept cuts in their own programs, not just in men's nonrevenue sports.⁴³³ Until schools are willing to reexamine their priorities, women's sports advocates will be justified in concluding that much of the gender equity debate concerns "sacred cows."⁴³⁴

Indeed, men's sports advocates should be equally concerned about the prevailing institutional attitude that "revenue" sports are untouchable. Overlooked in gender equity discussions is the fact that nonrevenue sports are those most likely to be eliminated by administrators who feel pressure to move toward proportionality. These sports provide the vast majority of male students with their only opportunity to compete in intercollegiate athletics.⁴³⁵ Increasingly, football and basketball are sports in which only exceptionally large or tall men can expect to compete. Most of the other men's sports can accommodate good athletes of more normal stature.⁴³⁶

⁴³² See, e.g., Billy Joe, *Title IX Application Needs Further Review*, NCAA NEWS, May 24, 1995, at 4 (Joe, then-president of the American Football Coaches Association (AFCA), asserting that the AFCA "supports full and fair access to intercollegiate sports for women and is committed to the principles that prompted Title IX"); Pickle, *supra* note 408, at 14 (quoting Grant Teaff, AFCA executive director: "Remember that our association totally supports the principles of Title IX. There is no question about that.").

⁴³³ The reaction of Ray Goff, former football coach at the University of Georgia, is typical: "Gender equity is a two-edged sword. You don't want to eliminate opportunities for anybody, but on the other hand, if you add sports [for women] you're going to have to cut men's non-revenue teams." Lee, *supra* note 413, at 11, 14. Apparently, it did not occur to Goff that football might be able to share the pain with other men's sports. It is that kind of attitude that led one insider, a "respected Division I-A official" who requested anonymity, to conclude that the football powers "are 50 years late in their thinking. They're damned lucky the hammer hasn't fallen before now . . ." Douglas Lederman, *Angry Football Powers Talk of Leaving NCAA Over Its Sex-Equity Proposal*, CHRON. HIGHER EDUC., June 30, 1993, at A29.

⁴³⁴ Zapler, *supra* note 9, at A44 (quoting Donna Lopiano, executive director of Women's Sports Foundation). Another commentator has referred to football as "a bloated bovine treated like a sacred cow." Wolff, *supra* note 91, at 61.

⁴³⁵ College football teams often start offensive lines that average about 300 pounds per man. In professional basketball, the Charlotte Hornets recently acquired seven-foot, one-inch Vlade Divac, enabling coach Dave Cowens to shift several of Divac's new teammates "back to . . . their natural positions": seven-foot Matt Geiger to power forward; six-foot, seven-inch, 250-pound Larry Johnson to *small* forward; and six-foot, eight-inch Glen Rice to guard. *Change of Heart Clears Way for Bigtime Trade*, NORMAN TRANSCRIPT, July 2, 1996, at 11.

⁴³⁶ Even baseball, however, apparently has evolved into a big man's sport. See

If nonrevenue sports are to survive, their representatives must reevaluate any alliances they may have with football, remind those in positions of influence that the regulatory goal of Title IX is effective accommodation of "both sexes,"⁴³⁷ and sell their programs to their own athletic departments. Nonrevenue men's sports are unlikely to receive significant judicial assistance. The courts have been unsympathetic to reverse discrimination claims brought by male athletes whose teams were eliminated.

Federal courts have considered two reverse discrimination suits.⁴³⁸ The first, *Gonyo v. Drake University*,⁴³⁹ involved wrestling, a sport that is particularly vulnerable to cuts because it has no women's counterpart, and therefore schools can eliminate the sport without the need to justify retaining a parallel women's program.⁴⁴⁰ The plaintiffs in *Gonyo* were varsity wrestlers who brought Title IX and equal protection claims against their university after it eliminated its intercollegiate wrestling program.⁴⁴¹ In ruling on a preliminary injunction motion, the court recognized that one of "[t]he special values of wrestling" was that "it is open to all sizes and shapes of people—many of whom, because of their small stature, would be unable to compete safely and effectively in most other sports."⁴⁴² Nonetheless, the court found little merit to the plaintiffs' legal claims and later granted summary judgment to the university.⁴⁴³

George F. Will, *The Pitch . . . It's Outahere*, NEWSWEEK, June 10, 1996, at 96 (attributing the increase in home runs and scoring in major league baseball in part to bigger batters who "are increasingly built like linebackers").

⁴³⁷ 34 C.F.R. § 106.41(c) (1996) (emphasis added).

⁴³⁸ A third suit, brought by a member of the men's swimming team which the University of Arkansas had targeted for elimination, was dropped after the university agreed to consider continuing a limited swimming program until all current swimmers graduated. *Sidelines*, CHRON. HIGHER EDUC., June 16, 1993, at A35.

⁴³⁹ 837 F. Supp. 989 (S.D. Iowa 1993) (denying plaintiffs' motion for preliminary injunction); 879 F. Supp. 1000 (S.D. Iowa 1995) (granting defendants' motion for summary judgment).

⁴⁴⁰ Anderson, *supra* note 3, at 4 ("[T]he problem was, and is, OCR and [OCR head] Norma Cantu. . . . Fortunately, Ms. Cantu and the OCR soon will be only a bad memory for all of us. Americans and now (finally) Congress and college administrators are tired of these bureaucracies, bureaucrats and all of their stupid bureaucratic rules."); Blum, *supra* note 5, at A34 (reporting comments of Lawrence Marcucci, the plaintiffs' attorney in *Gonyo*); Kocher, *supra* note 4, at 4-5 (referring to OCR's "incompetence and abusiveness," the actions of "gender quota extremists" and "social engineering from government bureaucrats").

⁴⁴¹ *Gonyo*, 879 F. Supp. at 1001. The plaintiffs also asserted breach of contract and fraudulent misrepresentation claims, but those state claims were dismissed after the court granted summary judgment on the federal claims. *See id.* at 1001, 1007.

⁴⁴² *Gonyo*, 837 F. Supp. at 991.

⁴⁴³ The court easily disposed of the plaintiffs' equal protection claim on the ground that Drake University, a private institution, was not acting under color of state law. *Gonyo*, 879 F. Supp. at 1006. Its analysis of the Title IX claim, however, is rather odd.

Male swimmers fared no better in *Kelley v. Board of Trustees*,⁴⁴⁴ in which the Seventh Circuit also upheld summary judgment for the defendants. In *Kelley*, the University of Illinois eliminated four varsity sports, including men's swimming, but retained women's swimming due to concerns about Title IX.⁴⁴⁵ Thus, the principal thrust of the plaintiffs' complaint was that the disparate treatment of men's and women's swimming constituted unlawful sex discrimination under both Title IX and the Equal Protection Clause of the Fourteenth Amendment.⁴⁴⁶

The Seventh Circuit disposed of the Title IX claim with little analysis. The court simply spelled out OCR's three-part test and concluded both that the test "maps out a reasonable approach to measuring compliance with Title IX"⁴⁴⁷ and that the university's actions "were consistent" with the test.⁴⁴⁸ The court's analysis of the equal protection claim, although similarly brief, is more intriguing.

The plaintiffs argued that the elimination of men's swimming was not "substantially related" to the goals of Title IX because even though it would improve the university's proportionality statistics, it would not increase athletic opportunities for women.⁴⁴⁹ The court rejected that argument, reasoning that "*Title IX's stated objective 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.*"⁴⁵⁰

The court's rationale represents a distillation of the dilemma not only posed by the elimination of men's sports but more broadly by the very application of OCR's three-part test, with its emphasis on proportionality. If Title IX's purpose is simply to equalize opportunities for men and women by providing symmetry in participation slots, proportionality would serve that goal admirably, and the elimination of men's sports would be an effi-

The court adopted the proportionality test as the governing standard and concluded that the university fell within *Cohen's* "safe harbor" because men were substantially overrepresented among intercollegiate athletes. *See id.* at 1004-06. The safe harbor approach, however, applies only when an institution has reached substantial proportionality. Drake clearly had not reached that status, and the court probably erred in embracing the safe harbor concept in a reverse discrimination context. The plaintiffs' focus on the university's disparate allocation of scholarships further complicates the opinion. *See id.* at 1003-05.

⁴⁴⁴ 35 F.3d 265 (7th Cir. 1994).

⁴⁴⁵ *Id.* at 269.

⁴⁴⁶ *See id.* at 267, 269-72.

⁴⁴⁷ *Id.* at 271.

⁴⁴⁸ *Id.* at 272. Once again, the court's adoption of the three-part test, and particularly *Cohen's* "safe harbor" approach, *see id.* at 271, seems questionable in this reverse discrimination context. *See supra* note 443.

⁴⁴⁹ *Kelley*, 35 F.3d at 272.

⁴⁵⁰ *Id.* (emphasis added).

cient, cost-effective means of compliance. If, however, Title IX really concerns increasing and enhancing women's athletic opportunities, elimination of men's sports, without further action, does not bear a substantial relation to that goal.

Valerie M. Bonnette, formerly a senior program analyst for OCR and currently president of Good Sports, Inc., a Title IX consulting firm, has noted, "The law really doesn't care if you're offering a tremendous athletics program for men and women or an awful one, so long as you're offering equitably awful or successful programs for men and women."⁴⁵¹ She may be correct; *Kelley*, for example, suggests that strict equality may comport with the letter of the law.⁴⁵² "Equitably awful" programs, however, surely would be inconsistent with the spirit of Title IX.

Several prominent women's sports advocates, as well as the author of this Article, have found Bonnette's attitude shortsighted.⁴⁵³ Avoiding compliance through elimination of men's programs would help to preserve exceptional traditions in men's sports, and, more importantly, equitably successful programs would solidify women's rightful place in the athletic world.⁴⁵⁴

Institutions and states with the requisite commitment can accommodate women's athletic interests and abilities without endangering men's sports. The University of Texas, for example, settled a gender equity suit by agree-

⁴⁵¹ Ronald D. Mott, *Sweet: Focus Should Be on All Parts of Title IX*, NCAA NEWS, Apr. 22, 1996, at 1, 24.

⁴⁵² *Kelly*, 35 F.3d at 272; see also *Cohen v. Brown Univ.*, 809 F. Supp. 978, 993, 999 (D.R.I. 1992) (suggesting the complete elimination of athletics programs as a viable Title IX conformance option for universities), *aff'd*, 991 F.2d 888 (1st Cir. 1993).

⁴⁵³ See, e.g., *Cohen v. Brown Univ.*, 879 F. Supp. 185, 214 (D.R.I. 1995) (quoting Donna Lopiano, executive director of Women's Sports Foundation, who noted that "the whole idea [of Title IX] is to add participation opportunities for women. And it's unfortunate that across the country . . . men's sports are being cut and women's gender equity under Title IX [is] being blamed for that."), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, No. 96-1321, 1997 WL 81992 (U.S. Apr. 21, 1997); Heckman, *supra* note 25, at 25-26 ("[Elimination of men's teams] is somewhat draconian: Although it renders the opportunity equal for both sexes, the underlying goal of Title IX is to foster female participation, not to deny athletic opportunity altogether."); *Title IX and Athletics*, *supra* note 254, at 436 (quoting Arthur H. Bryant, executive director of Trial Lawyers for Public Justice, who asserted that "Title IX's goal . . . is to ensure equality . . . [but w]hat we all would prefer is enhanced opportunities for both genders—not to cut men's teams but to increase women's opportunities by adding women's teams").

⁴⁵⁴ Wrestling, for example, has been judicially noticed as "the most ancient of all sports," contested in "the Olympian games in ancient Greece" and literally a sport of kings, as evidenced by the wrestling match between King Henry VIII of England and King Francis I of France. *Gonyo v. Drake Univ.*, 837 F. Supp. 989, 991 (S.D. Iowa 1993).

ing to add two women's teams, increase the number of female "walk-ons" (nonscholarship athletes), and more than double women's participation opportunities.⁴⁵⁵ University officials estimated the cost of this program development at more than one million dollars, but they committed not to weaken or eliminate any existing men's teams. Instead, the necessary additional funds would come from a joint fundraising campaign by the men's and women's athletics programs, budget-trimming throughout the athletic department, and possible student fee increases.⁴⁵⁶ The University of Iowa announced a plan in 1992 to reach proportionality within five years through several steps, including the addition of two women's sports, an increase in women's scholarships, a ten percent reduction in men's scholarships, and a cap on squad sizes for men's sports.⁴⁵⁷ Men's teams undoubtedly will have to make adjustments to accommodate the latter two steps, but no teams will be eliminated and team competitiveness should not be affected by these modest cuts.

One interesting aspect of the Iowa plan is the institution's proposal to seek out-of-state tuition waivers for student athletes.⁴⁵⁸ A similar tuition waiver program has existed in the state of Washington for several years, which allows that state's universities to make dramatic progress toward gender equity.⁴⁵⁹ Florida passed legislation that requires its state-supported institutions to devise gender equity plans by 1997, subject to a loss of state funds for failure to comply.⁴⁶⁰ Schools in Florida have raised student fees and expanded efforts to market and promote women's sports to generate additional revenues.⁴⁶¹

These examples indicate that creative thinking and a fresh attitude can help institutions boost women's athletics without resorting to the elimination of men's sports.⁴⁶² In the long run, cooperative efforts by men and women

⁴⁵⁵ Blum, *supra* note 139, at A40.

⁴⁵⁶ *Id.*

⁴⁵⁷ Lamar, *supra* note 91, at 267-68. Another plank of the Iowa plan is to "[p]ush for national legislation to eliminate expensive and non-essential practices, and use the savings for equity." *Id.* at 267.

⁴⁵⁸ *See id.* at 267.

⁴⁵⁹ *See id.* at 271-72; Kelly Whiteside, *A State of Enlightenment*, SPORTS ILLUSTRATED, Sep. 28, 1992, at 56 (noting that state tuition-waiver legislation freed up over \$1 million in the academic year 1991-1992 for the development of women's athletics programs at Washington's two largest state universities).

⁴⁶⁰ Crawford & Strobe, *supra* note 46, at 565-66.

⁴⁶¹ *Id.*

⁴⁶² Even seemingly small changes can increase revenues and send the message that "women's teams are valued." *Id.* at 565. Northern Kentucky University, for example, elevated the visibility of its women's basketball program by scheduling half of its games in prime time, following the men's game. *Id.* Schools also can support their women's athletics programs by "capitaliz[ing] on the marketing appeal of direct fan involvement." Harris, *supra* note 91, at 716. Due to their smaller size, most women's

to enhance opportunities for both sexes will better serve institutions' educational goals.

CONCLUSION

As female athletes have turned to litigation in an effort to enforce Title IX, the battles over gender equity have intensified. Debates on the issue increasingly have become heated, and polarization on the issue is at an all-time high. Women's sports advocates draw strength from early judicial decisions, while male athletes fear losing their sports, and school officials wonder how their institutions can ever comply with a strict proportionality standard.⁴⁶³

In deciding Title IX cases, courts generally have deferred to OCR's longstanding three-part test, leading a newly recharged OCR to proclaim solidarity with the judiciary.⁴⁶⁴ The law, however, is unsettled. First, the leading cases—*Cohen*, *Roberts*, and *Favia*—are exceedingly poor tests of Title IX's requirements. All three cases involved institutions that were sued for eliminating or demoting existing, vital women's teams. Considering this context, it would have been astonishing if any of the courts concluded that the defendants had "effectively accommodated" the athletic interests and abilities of their female students. Indeed, much of the courts' opinions could be characterized as dicta. Second, *Pederson*, which was decided in 1996, questions both the three-part standard itself and other courts' application of that standard.

OCR's three-part test could be the basis of a meaningful standard, but as written, it can lead to perverse results. As applied by OCR and the courts, proportionality under prong one reigns, while prongs two and three have been relegated to supporting roles. The court in *Cohen*, for example, stated that prong two or prong three could, under the right circumstances, serve as a "proxy" for prong one.⁴⁶⁵ This analysis, however, is difficult to defend.

programs can readily offer fans such attractions as choice seats, participation in guest coaching programs, and travel excursions with the team. *Id.* Such actions would build both fan loyalty and financial support.

⁴⁶³ One study suggests that the only schools that currently could meet a five percent disparity standard—a five percent differential between women's athletic participation rate and their enrollment rate—either had no football program or had a disproportionately male student body (e.g., engineering or military schools). Farrell, *supra* note 4, at 1043. The only exception was Washington State University, which reported commendable statistics. The study's author, however, concluded that even its proportionality status was "illusory." See *id.* at 1043, 1053-55.

⁴⁶⁴ See Mott, *supra* note 184, at 19 (quoting Norma V. Cantu, head of OCR: "The policy interpretation has . . . enjoyed the support of every court that has addressed issues of Title IX athletics.").

⁴⁶⁵ *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993).

Prong one can be met simply by reducing men's opportunities, thereby achieving a better statistical balance without adding any opportunities for women. This type of institutional action hardly squares with the goals of prongs two and three—program expansion for women and full and effective accommodation of their interests and abilities. Nor does it square with the regulation OCR's test purports to interpret, which also is couched in terms of *accommodating* student interests and abilities. Under these circumstances, the court in *Pederson* correctly questioned the suitability of proportionality as an institutional "safe harbor."

Pederson also correctly suggested that the three-part test should be considered as a whole.⁴⁶⁶ If OCR were to remove the disjunctive "or" from its standard, so that all three prongs had to be considered in a compliance review, the test would be far more meaningful. Admittedly, application of such a standard would be more difficult than the simple mathematics involved in assessing proportionality, but the broad remedial goals of Title IX are not particularly susceptible to bright-line rules.

Title IX's mandate is the expansion of opportunities for women, not mathematical symmetry. Expansion, of course, requires money, and the most obvious revenue source for underfunded schools is internal cutbacks. Institutions should consider all alternatives, however, before eliminating men's athletic teams. That type of action polarizes men and women, and as one commentator has observed, "The gender equity reform cannot succeed if it is only seen as some kind of crusade for women. Everyone, men and women, coaches and administrators, must work together to ensure that equitable opportunities are made available to women in athletics."⁴⁶⁷

Football program administrators must cooperate in the effort. Many football programs have become accustomed to a standard of living that cannot be justified when budgets are limited and participation opportunities are scarce. Cost-cutting measures and a redistribution of funds could be instrumental in enhancing women's athletics. The fact that some football programs make money should be irrelevant. Trimming expenses is unlikely to impact significantly revenues. Moreover, "college athletics has higher purposes than merely making money."⁴⁶⁸

⁴⁶⁶ See *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 914 (M.D. La. 1996) (stating that "the proper analysis . . . allows for consideration of all factors listed" in OCR's policy interpretation).

⁴⁶⁷ Henderson, *supra* note 140, at 163.

⁴⁶⁸ Lapchick, *supra* note 413, at 3; see also Harris, *supra* note 48, at 77-78 (arguing that the focus should be on "educational benefits" of athletic competition). One commentator has reached the core of the revenue issue:

Focusing on revenue generation potential . . . diverts us from the bigger picture. This is, after all, an *educational* institution. Surely no one is suggesting that we got into the athletic business just to make money. Financially, the University would be far better off shutting down the [athletic] program entirely

Few schools, of course, are likely to cut back significantly on their football operations unless they are convinced that their programs will be able to retain their competitive edge. "[D]isarm unilaterally and you get whupped."⁴⁶⁹ In some respects, then, progress toward gender equity is dependent on the NCAA, which has the might to induce broad change on a national scale. Many commentators have argued that it is long past time for the NCAA to assume a more aggressive role in requiring its member institutions to comply with Title IX.⁴⁷⁰

For twenty years following passage of the Act, the NCAA hindered meaningful reform, and at one point, sued to enjoin application of Title IX to intercollegiate athletics.⁴⁷¹ Only recently has the NCAA taken steps to address inequities. In 1992, it created the NCAA Gender-Equity Task Force to study the issue and to recommend avenues for improving the climate for women's intercollegiate athletics.⁴⁷² Following the task force's final report in 1993, the NCAA created a Title IX guidebook for use by its member institutions.⁴⁷³

In light of the NCAA's history in the gender equity area, its recent actions represent progress.⁴⁷⁴ Nonetheless, neither the task force report nor the guidebook is satisfactory. In essence, the NCAA has made three recommendations to its institutions: (1) comply with the law; (2) consider promotional ideas for enhancing the visibility and support of athletics programs;⁴⁷⁵ and (3) consider adding one or more of nine "emerging" women's sports.⁴⁷⁶ What is still missing from the NCAA is a true enforce-

We could not imagine permitting a science lab to provide the male students with twice the amount of equipment offered to the female students in the class.

George, *supra* note 6, at 568-69.

⁴⁶⁹ Wolff, *supra* note 91, at 61.

⁴⁷⁰ See, e.g., Harris, *supra* note 91, at 718-19; Henderson, *supra* note 140, at 157; Debra E. Blum, *NCAA Urged to Find Stronger Incentives for Compliance with Gender-Equity Plan*, CHRON. HIGHER EDUC., June 2, 1993, at A27. But see Lamar, *supra* note 91, at 276 (suggesting that the NCAA "should not become involved," and that gender equity action should be left to the state legislatures).

⁴⁷¹ For accounts of some of the NCAA's history of hostility toward Title IX, see Farrell, *supra* note 4, at 1004-06, Harris, *supra* note 91, at 694-95, and Martin, *supra* note 41, at 487-89.

⁴⁷² NCAA GENDER EQUITY GUIDE, *supra* note 50, at 1.

⁴⁷³ *Id.*

⁴⁷⁴ See Douglas Lederman, *Abide by U.S. Sex-Bias Laws, NCAA Panel Urges Colleges*, CHRON. HIGHER EDUC., May 26, 1993, at A31 (noting that women's sports advocates saw promise in the "mere existence" of task force report).

⁴⁷⁵ The NCAA included in its guidebook a compilation of promotional ideas submitted by institutions around the country. See NCAA GENDER EQUITY GUIDE, *supra* note 50, at 43-50.

⁴⁷⁶ The task force identified the following as "emerging" sports: ice hockey, rowing (crew), synchronized swimming, team handball, water polo, archery, badminton, bowl-

ment mechanism, with sanctions for schools that do not comply with Title IX.⁴⁷⁷

Absent NCAA leadership, individual schools and athletic conferences must set the example. Perhaps successful role models and peer pressure⁴⁷⁸ will convince other institutions that gender equity is indeed achievable. The underlying problem is not financial, as many school administrators argue.⁴⁷⁹ Rather, it is a matter of attitude and commitment. Although some administrators insist that schools would like to comply with Title IX but do not know how,⁴⁸⁰ the truth is that "[i]t's fairly easy to treat men and women the same, if that's what a school really wants to do. The problem for most institutions is not that they don't know what to do, but [that] they don't have the will to do it."⁴⁸¹ In the end, creation of an athletics program of which both sexes can be proud⁴⁸² requires a few common sense rules:

ing, and squash. *Id.* at 51. Spokespersons for the task force indicated that "nothing scientific" dictated which sports made the list, although the panel did take into account whether they were corresponding Olympic sports for female athletes. Debra E. Blum, *'Emerging' Sports for Women*, CHRON. HIGHER EDUC., Feb. 16, 1994, at A43. The panel "wanted people to think creatively," but did not expect all of the emerging sports "to take off." *Id.* (quoting Chris Voelz, women's athletic director at University of Minnesota-Twin Cities, and Phyllis L. Howlett, assistant commissioner of Big Ten Conference). One wonders how wrestlers, gymnasts, and swimmers, whose sports are Olympic traditions, view this "creative" effort to stimulate interest in new women's sports while their sports struggle to survive. Similarly, consider the comments of a columnist in Madison, Wisconsin, regarding plans to add a new women's sport at the University of Wisconsin, which earlier had eliminated men's baseball: "Lacrosse? Do you know anybody who plays lacrosse? . . . [T]o comply with Federal rules, UW could wind up with a lacrosse team,

but no baseball. It doesn't make any sense." *Opinions*, NCAA NEWS, June 21, 1995, at 4 (quoting Judie Kleinmaier, Madison, Wisconsin CAPITAL TIMES).

⁴⁷⁷ Farrell, *supra* note 4, at 1005-06; Pieronek, *supra* note 92, at 367-68. U.S. Representative Cardiss Collins, D-Ill., who chaired a House subcommittee that held hearings on Title IX in the early 1990s, expressed in the committee's gender equity report exasperation with the NCAA's failure to aggressively enforce Title IX: "It is odd that the NCAA would place a school on probation for driving an athlete to class, or providing a loan, but would have no penalty for a school that violates Title IX, a federal law." Lederman, *supra* note 433, at A31.

⁴⁷⁸ See Henderson, *supra* note 140, at 158-59 (contending that peer pressure among institutions can be "a very powerful force").

⁴⁷⁹ See *supra* text accompanying note 410.

⁴⁸⁰ See Henderson, *supra* note 140, at 162.

⁴⁸¹ *Title IX and Athletics*, *supra* note 254, at 436 (quoting Arthur H. Bryant, executive director of Trial Lawyers for Public Justice).

⁴⁸² The report of the NCAA Gender-Equity Task Force defined gender equity as follows: "An athletics program can be considered gender equitable when the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender." NCAA GENDER EQUITY GUIDE, *supra* note 50, at

listen to female student athletes; respond appropriately to their requests for specific program enhancements; learn, through surveys or otherwise, about their athletic interests and abilities; promote and publicize women's athletics; be creative in seeking and developing new athletic opportunities;⁴⁸³ and above all else, treat women and their athletic abilities with respect.

1.

⁴⁸³ One of the most interesting new ideas is the development of women's intercollegiate wrestling programs. See Peter Monaghan, *Women on the Mat*, CHRON. HIGHER EDUC., Apr. 5, 1996, at A37 (profiling women's wrestling program at California State University at Bakersfield).