TITLE IX AND GENDER EQUITY IN INTERCOLLEGIATE
ATHLETICS: CASE ANALYSES, LEGAL IMPLICATIONS, AND
THE MOVEMENT TOWARD COMPLIANCE

Teresa M. Miguel*

Title IX of the Education Amendments of 1972 is a simple
law. Title IX states that no institution receiving federal funds shall
discriminate on the basis of sex in its administration of educational
programs or activities. In the last twenty years, however, Title IX has
undergone various changes in its application, remedial power, and
enforcement ability. Today, in light of several judicial decisions
flowing from recent litigation, it appears that Title IX is quickly
gaining momentum and causing great concern among academics and
athletic departments alike.

The purpose of this Article is to explain how Title IX is
currently affecting intercollegiate athletics. I will begin with a brief
history of Title IX’s effects on athletics. Then I will analyze several
recent judicial opinions affecting Title IX and gender equity in
intercollegiate athletics. Finally, I will discuss the mandates Title IX
imposes upon universities and colleges in their attempts to comply
with Title IX. This portion includes several alternatives universities
and colleges might consider when restructuring their athletic
departments so as to comply with Title IX and avoid risking gender-
based discriminatory litigation and monetary damages.

I. A BRIEF HISTORY OF TITLE IX

Over twenty years ago, Congress enacted Title IX of the
Education Amendments of 1972.1 Title IX prohibits federally funded
institutes from discriminating on the basis of sex in any educational

---

* B.A. 1990, University of Wisconsin; J.D. 1994, University of Richmond,
T.C. Williams School of Law.
235 (codified at 20 U.S.C.A. §§ 1681-1688 (1990)).
program or activity, including athletics. Elementary schools had a July 1976 deadline to comply with Title IX; high schools and colleges were given until July 1978. Initially, Title IX was seen as the "cornerstone of federal statutory protection for female athletes and prospective female athletes in the United States."

In 1979, the Office for Civil Rights (OCR), which was then under the direction of the Department of Health, Education, and Welfare, issued a lengthy Policy Interpretation aimed specifically at the implications of Title IX on intercollegiate athletics. The Policy Interpretation focuses on three major areas of evaluation in determining Title IX compliance: (1) Athletic financial assistance (scholarships); (2) Equivalence in other athletic benefits and opportunities; and (3) Effective accommodation of student interests and abilities. This Policy Interpretation continues to serve as the driving force behind evaluating Title IX compliance both during OCR investigations and in the courtroom.

Shortly before Title IX was enacted in 1972, the Association for Intercollegiate Athletics for Women (AIAW) was created. The number of AIAW members steadily increased in the years to follow, as did the number of female athletes participating in intercollegiate athletics; progress towards general equity in women's athletics seemed certain. However, when the National Collegiate Athletic Association (NCAA), the principal governing body of men's intercollegiate athletics, began sponsoring women's national

---

2. 20 U.S.C.A. §§ 1681(a); 34 C.F.R. § 106.41(a).
6. Id. at 71415. See also 34 C.F.R. § 106.37(c).
7. 44 Fed. Reg. at 71415. See also 34 C.F.R. § 106.41(c)(2)-(10).
8. 44 Fed. Reg. at 71417. See also 34 C.F.R. § 106.41(c)(1).
10. Id.
championships, many schools left the AIAW for the NCAA. In 1982, the AIAW folded.

Despite the elimination of the AIAW, the popularity and visibility of women's sports continued to flourish. Suddenly, Title IX took a severe blow in 1984 when the Supreme Court decided in *Grove City v. Bell* that a college's receipt of federal funds permits the federal government to oversee only the specific programs that are receiving federal support; it does not allow the government to regulate an entire institution. Thus, the Supreme Court's decision virtually excluded athletic departments from Title IX mandates because athletic departments generally do not directly receive federal assistance.

In response to *Grove City*, Congress ultimately overrode a presidential veto and enacted the Civil Rights Restoration Act of 1987. This law restored the original power to Title IX and effectively called for athletic departments to once again comply with Title IX mandates prohibiting gender discrimination in women's athletics.

II. RECENT CASES AFFECTING TITLE IX COMPLIANCE

One would think that twenty-one years is a sufficient period of time for universities and colleges to reach compliance with the mandates of Title IX. Similarly, five years from the enactment of the Civil Rights Restoration Act should be long enough to see significant progress towards compliance as well. However, recent statistics show that there are still disproportionately more men than women participating in college athletics. In addition, men’s athletic teams

---

11. *Id.* at 114.
12. In 1984, the AIAW sued the NCAA alleging antitrust violations. The D.C. Circuit Court of Appeals, however, rejected AIAW's allegations of the NCAA being a monopoly and violating the Sherman Antitrust Act. *Id., citing AIAW v. NCAA*, 735 F.2d 577, 580 (D.C. Cir. 1984).
14. *Id.* at 573.
continue to receive inordinately more money for recruiting, scholarships, and operating expenses than do their female counterparts.\(^{17}\)

As a result of the obvious gender inequality on college campuses, many female athletes have brought and continue to bring law suits against their respective institutions alleging violations of Title IX. Five recent federal cases, including one Supreme Court and two appellate court decisions, are bound to have a significant impact on intercollegiate athletics.

A. Franklin v. Gwinnett County Public Schools

In the landmark case, Franklin v. Gwinnett County Public Schools,\(^{18}\) a high school student brought a Title IX action alleging gender-based discrimination in connection with alleged sexual harassment and abuse by a high school coach-teacher. The student sought and was awarded monetary damages under Title IX.\(^{19}\) The Supreme Court held, \textit{inter alia}, that Title IX is indeed enforceable through an implied right of action,\(^{20}\) and that Congress did not intend to limit the remedies available in an action grounded on Title IX.\(^{21}\) Franklin was the first Title IX case where the court explicitly stated that compensatory damages constitute an available remedy for victims of gender discrimination having claims grounded in Title IX.\(^{22}\)

---

17. Malcolm Moran, \textit{Title IX Is Now An Irresistible Force}, \textit{N.Y. TIMES}, June 21, 1992, at B27 (Part I of a three-part, three-day series). The \textit{N.Y. Times} reproduced figures gathered during a survey of NCAA Division I colleges and universities conducted by the Chronicle of Higher Education for the 1990-91 academic year. The survey examined the male-female ratios of undergraduate enrollment, the male-female distribution of athletes, and the distribution of athletic scholarship dollars, operating expenses, and recruiting budgets. Several schools declined to report their statistics to the Chronicle citing the sensitivity of their data. The Chronicle’s survey was based on an NCAA study.


19. \textit{Id.} at 1038. The U.S. District Court for the Northern District of Georgia dismissed plaintiff’s request for monetary damages holding that Title IX did not authorize an award of damages. The Eleventh Circuit Court of Appeals, 911 F.2d 617, affirmed.

20. \textit{Id} at 1035-36.

21. \textit{Id.} at 1036-1037.

22. In Cannon v. University of Chicago, 44 U.S. 677 (1979), rev’g 559 F.2d 1063 (7th Cir. 1976), the Supreme Court reversed the Seventh Circuit’s holding that a plaintiff does have a private right of action under Title IX. The Supreme Court did not recognize, however, that such a plaintiff is entitled to compensatory damages. Ellen F.
B. Favia v. Indiana University of Pennsylvania

Just weeks before the Supreme Court handed down the decision in Franklin, the district court in Favia v. Indiana University of Pennsylvania found for the plaintiffs in a class action suit alleging Title IX violations. The plaintiffs, female student-athletes at Indiana University of Pennsylvania (IUP), filed for a preliminary injunction alleging systemic gender discrimination. The case arose out of the athletic department’s decision in 1991 to eliminate two men’s and two women’s teams, including the plaintiffs’ sports of choice, gymnastics and field hockey. The court consolidated this trial on the merits with the plaintiff’s motion for a preliminary injunction reinstating the teams. In a motion for a preliminary injunction, a court had to consider: (1) the presence of irreparable harm to the plaintiffs and defendants; (2) the likelihood of plaintiffs’ success on the merits; and (3) the effect of the injunction on the public interest. The court determined that the plaintiffs would be irreparably harmed with the elimination of their teams, and that the defendants would not be irreparably harmed by the granting of the injunction.

Before delving into a discussion of the plaintiffs’ potential success on the merits, the court first recognized that Title IX applied.

24. Id. at 579.
25. Id.
27. Favia at 583. The court held that by cutting the women’s teams, IUP was denying the plaintiffs the benefits to women athletes who compete at the college level. The court observed that women develop skill and self-confidence, learn team cohesion, develop a sense of accomplishment, increase their physical and mental well-being, and develop a lifelong healthy attitude when they participate in college athletics. In addition, although actual competition only lasts for a short period of time, the benefits of participation last forever. Thus, the court found that the overall harm emanating from lost opportunities for the plaintiffs was indeed likely to be irreparable.
28. Id at 584. The court observed that IUP’s budget had room for the reallocation of funds and cutbacks in areas other than women’s athletic teams. Thus, IUP will not be irreparably harmed by reinstating the previously eliminated women’s teams.
to all levels of school-based athletics: intercollegiate, interscholastic, club, and intramural.29 Second, the court pointed out the rule of *Haffer v. Temple University*30 that plaintiffs do not have to prove intentional gender discrimination in order to show a violation of Title IX.31

Finally, with deference to the official Policy Interpretation, the court announced and applied OCR's three-prong test for determining whether a school has complied with Title IX.32 The three-prong test, the tool the court used to determine plaintiffs' probability of success on the merits, asks: (1) Whether the ratio of male and female varsity athletes is substantially proportionate to the ratio of male and female students enrolled at IUP; or (2) Where women have been and are underrepresented among college athletes, whether the school can show a history and continuing practice of expanding programs and opportunities for women to participate which is responsive to the developing interests and abilities of women; or (3) Where women are underrepresented and the institution cannot show a history of program expansion, whether the school can demonstrate that the interests and abilities of women have been fully and effectively accommodated by the current athletic program.33

In applying the test, the court first compared the male-female enrollment ratio with the male-female athletic population at the time IUP decided to cut several sports from varsity to club status.34 The court found that the female students enrolled at IUP outnumbered the male students 55% to 45%, but were underrepresented in the athletic department.35 In 1991-92, only 37% of the varsity athletes were women; 63% were men. This disproportionate figure increased even more with the elimination of the teams (36% women, 64% men).36 The court, therefore, held that IUP failed the first prong of the test because it did not provide female students with opportunities to

29. *Id.*
31. *Favia at 584.*
32. *Id.*
33. *Id., citing 44 Fed. Reg. at 71418.*
34. *Favia at 585.*
35. *Id. at 581.*
36. *Id.*
participate in intercollegiate athletics proportionate to the percentage of women enrolled as undergraduate students at IUP.\textsuperscript{37}

The court found that IUP failed the second prong because IUP did not show a history of expanding its women’s programs in response to the developing interests of its female students.\textsuperscript{38} Finally, the court held that IUP’s intentions did not “fully and effectively accommodate the interests and abilities” of women at IUP.\textsuperscript{39} Further, the court rejected defendant’s contentions that (1) financial problems forced the institution to cut the teams, and (2) the NCAA did not have a gymnastics national championship, thereby justifying the elimination of gymnastics from IUP.\textsuperscript{40} In sum, because of the disproportionate ratio of female students to female athletes at IUP, and because the defendants failed to prove at least one of the remaining two prongs of the OCR’s three-prong test, the court found that the plaintiffs would probably prevail in a trial on the merits.

The final factor in the plaintiff’s motion for a preliminary injunction was the effect of the team eliminations on the public interest. The court held that the “public has a strong interest in the prevention of any violation of constitutional rights.”\textsuperscript{41}

In the final decree, the court issued a permanent injunction ordering, \textit{inter alia}, that: (1) defendants restore the women’s gymnastics and field hockey teams at IUP to varsity status; (2) the coaching staff, uniforms, equipment, facilities, publicity, travel opportunities and all other incidentals of a varsity team be provided to the women’s gymnastics and field hockey teams on a basis equal to that of the 1991-92 academic year; and (3) funding be made available immediately to the two teams in an amount equal to that provided during the previous academic year.\textsuperscript{42}

\begin{enumerate}
\item Id. at 585.
\item Id. IUP stated that it planned to elevate its women’s club soccer team to varsity status. The court found, however, that future promises do not satisfy the need of opportunities for women today.
\item Id.
\item Id.
\item Id.
\end{enumerate}
Favia established a precedent for the entire country; it showed that gender-based discrimination would not be tolerated. Favia also provided a solid groundwork for defeating gender-based discrimination by relying solely on the three-prong test delineated in OCR’s Official Policy Interpretation.43

C. Cook v. Colgate University

Although Cook v. Colgate University44 has recently been remanded by the court of appeals with an order to dismiss the action because of mootness, the trial judge’s unique approach to evaluating the allegations of gender-based discrimination grounded in Title IX is worth a brief discussion.

In this case, the plaintiffs, all females and all former members of the Colgate women’s ice hockey team, alleged that Colgate’s decision in 1988 to maintain women’s ice hockey as a club sport violated Title IX, the Civil Rights Restoration Act, the regulations of the Department of Education, and the Fifth and Fourteenth Amendments of the U.S. Constitution.45 The issues of whether or not Title IX covered Colgate’s athletic department and protected plaintiffs were not in dispute; Title IX clearly applied in both those situations.46

Although the judge initially examined the enrollment percentages of men and women at Colgate,47 the court did not take the next step of comparing the number of male and female students to the number of male and female athletes at Colgate, as the court in Favia did.48 Instead, the court predicated its entire decision on the

43. In the past, like in Favia, plaintiffs often alleged Fourteenth Amendment Due Process and Equal Protection claims in addition to Title IX violations. See, e.g., Blair v. Washington State Univ., 108 Wash.2d 558, 740 P.2d 1379 (1987); Bennet v. West Tex. State Univ., 799 F.2d 153 (5th Cir. 1986). Arline F. Schubert, et al., Changes Influenced by Litigation in Women’s Intercollegiate Athletics, 1 SETON HALL J. SPORTS LAW 237, 241 n.28 (1991). Also, state ERA laws have proven to be a successful means of fighting gender-based discrimination in athletics in those states that have ERA laws. Schubert at 254.

44. 802 F. Supp. 737 (N.D.N.Y. 1992), vacated and remanded, with order to dismiss, 992 F. 2d. 17 (2nd Cir. 1993). Hereinafter, the district court opinion will be referred to as Cook I; the appellate court opinion will be referred to as Cook II.

45. Cook I at 739.

46. Id. at 744.

47. Id. at 739.

48. See Favia, supra note 23, at 581.
disproportionate budgetary expenditures within the athletic department, and on the blatant inequalities between the men's ice hockey team and the women's ice hockey team. This narrow approach is a crucial factor in determining whether or not the court correctly examined the Title IX violations alleged by the plaintiffs.

First, the court acknowledged that unequal expenditures between same-sport teams for men and women did not in and of itself constitute noncompliance. The court also recognized, however, that Title IX and its regulations “invite a comparison between separate teams in a particular sport” because Title IX is designed to protect individual athletes as well as women as a class.

Next, the court determined that it did indeed have proper authority to compare men's and women's ice hockey teams in evaluating whether or not Colgate was violating Title IX. The court rationalized its authority by citing OCR's Policy Interpretation, which provides for the Assistant Secretary of the OCR to consider the failure to provide necessary funds for teams of one sex in assessing equality of opportunity for members of each sex in a situation where a federally funded institution sponsors same-sport teams for each sex.

The court surprisingly applied the three-step process used in Title VII discrimination cases to determine if a Title IX violation existed at Colgate. Plaintiffs established a prima facie case by

49. *Cook I* at 742. The court, citing Blair, supra note 43, correctly included football in its evaluation of expenditures in Colgate's athletic department. In 1990-91, the men's teams received nearly three times more money than the women's teams (the men had a budget of $654,909; the women were allotted $218,970).

50. *Id.* at 751.

51. *Id.* at 742, citing 34 C.F.R. § 106.41(c); Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1130 (9th Cir. 1982), holding that even if overall athletic opportunities for men and women are equal, the equal protection clause is violated when there is inequality of opportunity in any given sport.

52. *Cook I* at 742. The court noted that Colgate did not cite any cases which limit the court's authority in determining whether or not a university is violating Title IX by comparing separate sex teams participating in the same sport.

53. *Id.* at 743.

54. *Id.*

55. *Id.* In a Title VII action, the first step is for the plaintiffs to establish a prima facie case. This is done by demonstrating that: (1) the Colgate athletic department is covered by Title IX; (2) the plaintiffs are entitled to protection under Title IX; and (3) the
introducing evidence of six factors under the athletic department’s control that demonstrated discriminatory treatment toward the plaintiffs.\textsuperscript{56} These six factors were analyzed solely between the men’s and women’s ice hockey teams; the plaintiffs did not introduce evidence that all female athletes at Colgate were being discriminated against in the same manner.

The court summarized plaintiffs’ evidence by identifying the double standard that existed among many athletic departments: “the men’s ice hockey players at Colgate are treated as princes. The women ice hockey players are treated as chimney sweeps.”\textsuperscript{57} Due to the unequal treatment of men and women competing in the same sport, the court held that the plaintiffs had established a prima facie case of gender discrimination.\textsuperscript{58}

On April 27, 1993, the Second Circuit remanded \textit{Cook I} with an order to dismiss because of mootness due to the graduation of the named plaintiffs.\textsuperscript{59} The appellate court implied that if the plaintiffs had filed a class action suit, then the case may not have been dismissed.\textsuperscript{60} Nevertheless, had this case been appealed based on the district court’s rationale, it is likely that the decision would have been reversed because the district court did not look at Colgate’s athletic department as a whole. Most courts have evaluated alleged Title IX violations by examining an entire athletic department, not simply by comparing separate-sex teams competing in the same sport.\textsuperscript{61}

\begin{footnotesize}
\begin{itemize}
\item plaintiffs have not been provided equal athletic opportunities compared to the male athletes at Colgate. The court cited McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252, 253, n.6 (1981) as authority for applying the burden shifting analysis of Title VII cases.
\item \textit{Cook I} at 744-45. The six factors were: (1) unequal expenditures; (2) unequal and inadequate equipment; (3) inadequate locker room; (4) unequal methods of transportation for traveling to games, and unequal rooming conditions; (5) inconvenient practice times which were often preempted by the men’s team; and (6) inadequate and understaffed coaching. The above factors are six of ten enumerated elements contained in OCR’s Official Policy Interpretation and codified in 34 C.F.R. § 106.41(c)(1)-(10).
\item \textit{Cook I} at 745.
\item Id.
\item \textit{Cook II} at 18.
\item Id. at 20.
\end{itemize}
\end{footnotesize}
Although the *Cook I* court did determine unequal expenditures, the court did not compare the percentages of men and women enrolled as undergraduates at Colgate to the percentages of men and women participating in varsity athletics. This percentage analysis is the most basic and elementary principle of gender discrimination under Title IX; proportionality is the cornerstone of gender equity.

**D. Cohen v. Brown University**

In December, 1992, the District Court of Rhode Island decided *Cohen v. Brown University*, a case that delineated and explained the impact Title IX could have upon an entire athletic department, not just on one particular sport. This was a class action suit brought by female student-athletes at Brown University seeking a preliminary order to: (1) reinstate the women’s gymnastics and volleyball teams to full varsity status (the teams had recently been reduced to club status); and (2) prohibit Brown from eliminating or reducing the status of any other female varsity athletic teams unless the percentage of varsity female athletes at Brown equaled the percentage of women enrolled as undergraduate students. Plaintiffs charged Brown with violating Title IX by discriminating against women in its intercollegiate athletic program.

The court began its lengthy opinion with an analysis of the number of male and female athletes at Brown, and the number of sports offered for each sex. The court also noted the distinct

---

62. *Cook I* at 742.
63. *Supra* note 61. On April 16, 1993, the United States Court of Appeals for the First Circuit affirmed the district court’s decision to grant a preliminary injunction reinstating the women’s teams to varsity status. The appellate court remanded the case to district court for a trial on the merits to determine if Brown University was in violation of Title IX. 991 F. 2d. 888 (1st Cir. 1993), at 907, 991 F.2d. at 907. Hereinafter, the district court decision will be referred to as *Cohen I*; the appellate court decision will be referred to as *Cohen II*.
64. *Cohen I* at 980.
65. *Id.* This portion of plaintiffs’ claim is referring to the proportionality test used by the district court in *Favia, supra* note 23, and disregarded by the Court in *Cook I*.
66. *Id.* at 979, citing 20 U.S.C. § 1681(a).
disadvantages a team incurs when demoted from varsity status to club status.68

The court next launched into an in depth analysis of the legal framework of Title IX.69 This included a brief history of Title IX and the Civil Rights Restoration Act in order to show that Brown University is covered by the mandates of Title IX.70

In addition, the court addressed the impact Title IX has on the administration of individual programs, such as athletic teams, in federally funded institutions.71 The court focused on the Department of Education’s regulations as codified in 34 C.F.R. §§ 106.37(c) and 106.41(c). These regulations are explained in OCR’s Policy Interpretation, which is divided into three main focuses: (1) athletic scholarships (§ 106.37(c)); (2) recruitment and support services (§ 106.41(c)(2)-(10)); and (3) accommodating students’ interests and abilities (§ 106.41(c)(1)), i.e., the three-prong test.72 The Policy allows separate investigations and findings for each of the three sections.73

Finally, the court examined the “Title IX Athletics Investigator’s Manual: 1990” developed for OCR personnel who investigate allegations of Title IX violations.74 The Manual follows OCR’s Policy Interpretation, but suggests that although the three

68. Id. at 981-82. When the women’s gymnastics and volleyball teams were reduced to club status, the teams’ practice times were cut, their access to medical trainers was reduced, office space, long-distance telephone and clerical support was eliminated, as were admissions preferences. The men’s teams that were reduced to club status did not lose coaches or office space.
69. Id. at 982.
70. Id. at 982-83. Defendants admitted that Brown received federal financial assistance, but did not admit or deny that Brown was covered under Title IX. The court, therefore, noted that Title IX does indeed cover an institution receiving federal funds, citing Radcliff v. Landau, 883 F.2d 1481, 1483 (1989), clarified, 892 F.2d 51 (1989), affirmed after remand, 930 F.2d 29 (9th Cir. 1991).
71. Cohen L. at 983.
72. Id. at 983-84, citing 44 Fed. Reg. at 71413. See also Favia at 584. This Policy Interpretation was designed specifically to aid in assessing a college athletic department’s compliance with the equal opportunities requirements of 34 C.F.R. §§ 106.37(c) and 106.41(a).
73. Cohen L. at 984.
74. Id. Office of Civil Rights Publication 1990.
sections enumerated in the Policy Interpretation should be investigated at the same time, "an investigation may be limited to less than all three of these major areas." 75

Relying on the language of both the Policy Interpretation and the Investigator's Manual, the court separated the three major focal points of the Policy Interpretation and determined that Title IX may be violated solely on the basis of 34 C.F.R. § 106.41(c)(1), the three-prong test examining the effective accommodation of interests and abilities of both sexes. 76 The court applied OCR's three-prong test and held that: (1) Plaintiffs had demonstrated that the percentage of male and female athletes at Brown was not substantially proportionate to the respective percentage of male and female undergraduate students; 77 (2) Brown did not establish a continuing practice of expanding women's athletic programs; 78 and (3) By denying the women's volleyball and gymnastics teams full varsity status, Brown was not accommodating the interests and abilities of the female athletes participating on these teams. 79 Thus, by sole virtue of violating § 106.41(c)(1), the court held that Brown was violating Title IX and would, therefore, probably succeed on the merits at trial.

Even though the court found explicit Title IX violations, the court continued its analysis by evaluating the competitive opportunities addressed in OCR's Policy Interpretation. 80 The court

75. Id., citing Investigator's Manual at 7.
76. Id. at 989, citing 44 Fed. Reg. at 71417-71418.
77. Cohen I. at 991.
78. Id. at 991.
79. Id. at 991-92. On appeal, the First Circuit, citing 20 U.S.C. § 1681(b), held that the burden of proof for this third prong should have been carried by the plaintiffs, not the defendants. However, the appellate court found that the district court's record was sufficiently developed so that the defendants failed this prong regardless of the district court's error in assigning the burden of proof.
80. Cohen I. at 994. 44 Fed. Reg. at 71418. The court determined the standard for competitiveness as provided for in § 106.41(c)(1) with a two-step analysis: (1) by examining such factors as the nation-wide increase in athletic interests and abilities among women, the selection of sports offered at Brown, the expressed interests of women to compete intercollegiately, the levels of intercollegiate competition available for women in a particular sport, and the competitiveness of the schedule as a reflection of the abilities of the competitors; and (2) by measuring (a) whether the team schedules of male and female athletes are considerably similar in that a substantially proportionate percentage of men and women are allowed advanced competition, or (b) whether the school can show a history and
found that male and female varsity athletes were provided with similar competitive opportunities, and that Brown had demonstrated a history of increasing the competitive opportunities for women. However, Brown’s attention to the competitive opportunities of women did not affect the reality that Brown’s failure of the three-prong test showed that Brown was still in violation of Title IX.

Further, the court evaluated evidence of potential violations of other relevant factors contained in both 34 C.F.R. § 106.41(c) and in the Policy Interpretation. The district court found relevant disparities in the allocation of funds for individual team budgets for recruiting, coaches’ salaries, and operating expenses. The court simply stated, however, that when this case is tried on the merits, the court will determine if the opportunities for women are being infringed upon in this respect. Returning the focus of the opinion to the components for determining injunctive relief, the court examined the issue of irreparable harm to the plaintiffs. The court found that should the teams be denied restoration to varsity status, then the plaintiffs will likely suffer irreparable harm due the denial of admission preferences for nonvarsity teams, the loss of recruiting and coaching funds, and overall inability to maintain the same high level of competitiveness that they had in the past. In contrast, the court, examining the effects on the defendants, held that temporarily restoring the women’s teams to varsity status until a trial on the merits of the case would not be an undue burden on Brown.

Similarly, the court held that the public interest, the final consideration in the determination of a preliminary injunction, would be served by Brown’s compliance with Title IX. The court observed

---

82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 994. *The men’s teams at Brown have an overall budget of $766,228; the women are allotted $333,468.*
86. *Id.* at *59.*
87. *Id.* at *62.*
88. *Id.* at **62-65.*
89. *Id.* at *73.*
that it could best insure steps toward compliance with the temporary restoration of the women's teams to varsity status.90

In a nutshell, the court found that "Brown may not operate an intercollegiate program that disproportionately provides greater participation opportunities to one sex in relation to undergraduate enrollments, where there is no evidence of continuing program expansion or effective accommodation of the interests and abilities of its students."91 Therefore, in its final decree, the court ordered Brown to restore the women's gymnastics and volleyball teams to varsity status, and to include all the incidentals and benefits that naturally go along with being a varsity team at Brown University.92 The court also prohibited Brown from demoting or eliminating other varsity women's teams.93 Finally, the judge reiterated that this order was a temporary one until the case was tried on the merits. However, even if a Title IX violation was found at trial, the court would still give Brown sufficient discretion to determine how to restructure the athletic department in order to comply with Title IX.94

E. Roberts v. Colorado State University

Within two months of Cohen, the district court in Colorado decided Roberts v. Colorado State University.95 The plaintiffs in Roberts, all former members of the Colorado State University (CSU) women's softball team sought a preliminary injunction reinstating the team, which was terminated in June, 1992, and damages.96 The district court, relying on OCR's Policy Interpretation, OCR's Investigator's Manual, Favia, and Cohen, limited its findings to

90. Id.
91. Id. at 999.
92. Id. at 1001.
93. Id.
94. Id. The judge made several suggestions on how Brown might restructure to comply with Title IX. For example, Brown could reduce the total number of varsity teams, or it could eliminate its varsity program altogether. Id. at 999.
95. Supra note 61. Since the initial writing of this paper, Roberts has been affirmed by the Tenth Circuit. 1993 WL 248228 (10th Cir. (Colo.).) The Tenth Circuit held that CSU violated Title IX, and that the District Court correctly ordered an equitable remedy. However, the appellate court also found that the district court "did exceed its authority in demanding that the softball team play a fall 1993 exhibition season." Roberts II at *9.
96. Roberts at 1509.
§ 106.41(c)(1)—the three-prong test. The court briefly explained that: (1) the plaintiffs first had the burden of proving that the percentage of male and female athletes at CSU was not similarly proportionate to their respective undergraduate enrollment percentages; (2) if the first prong was proven, the burden shifted, to the defendants to show that CSU had a history and continuing practice of expanding women’s athletic programs in response to the growing abilities and interests of women; and (3) if the defendants were not able to succeed with the second prong, then the defendants had to show that the interests and abilities of women at CSU were being fully and effectively accommodated by the current program opportunities.

The court found that although women accounted for 48.2% of the undergraduate enrollment, only 37.7% of the varsity athletes were women. The defendants argued, however, that Title IX did not define nor provide guidance in determining what were “substantially proportionate” numbers. The district court, therefore, introduced OCR’s Investigator’s Manual which states that “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 court found this language useful in determining that the number of female athletes at CSU was not substantially proportionate to the number of female undergraduate students at CSU.

The court was also influenced by Cohen I. In Cohen I, the disparity between the percentage of female undergraduates and the percentage of female athletes after the four varsity teams were demoted was 11.6%—too high of a disparity to qualify as “substantially proportionate.” Thus, following Cohen I, the Roberts court held that a 10.5% disparity between female enrollment and female student-athletes at CSU was not acceptable under Title IX.

97. Id. at 1510-1511. The court refers to the three-prong test as the Effective Accommodations test.
98. Id. at 1511. Again, according to the First Circuit’s opinion in Cohen II, the burden of proof for the third prong should be on the plaintiffs. Cohen II at 901, citing 20 U.S.C. § 1681(b).
99. Roberts at 1511.
100. Id.
102. Roberts at 1513.
either. The plaintiffs, therefore, prevailed on the first prong of the Effective Accommodations Test.

The burden then shifted to the defendants to show that CSU had a history and continuing practice of expanding its women’s program to accompany the developing interests and abilities of women. The court found that: (1) no new women’s teams had been added for twelve years; and (2) CSU must either demonstrate (a) an actual expansion of the women’s program, or (b) an increase in the percentage of female athletes when reductions were made in women’s athletics in the past. The court found that CSU had not expanded its women’s program under any of the provisions, and, therefore, did not prove that CSU had a history and continuing practice of program expansion for women.

After failing to establish the second prong, defendants were required to demonstrate that the current programs at CSU effectively accommodated the interests and abilities of female students at CSU. The expressed interest of the plaintiffs/athletes, the national increase in the popularity of softball, and the reasonable expectation of intercollegiate competition, led the court to contend that, by eliminating a varsity sport where there was significant interest and ability, CSU was not accommodating the interests and abilities of its female student-athletes.

CSU’s disproportionate athletic participation rates for women, and CSU’s failure to demonstrate effective accommodations of the interests and abilities of its female students, were both decisive factors in the court’s conclusion that CSU violated Title IX when it eliminated women’s softball. Thus, with virtually the same reasoning and language as the court used in Cohen I, this court held

103. Id. at 1514.
104. Id.
105. Id. at 1516.
106. Id.
107. Id. at 1517-1518. In other findings, the court held that financial considerations are not valid reasons for noncompliance with Title IX. Id. at 1518, citing Cook v. Colgate Univ., supra n. 43. The court also found that gender-based discrimination does not have to be intentional to violate Title IX. Id., citing Haffer v. Temple Univ., supra note 30, at 540.
108. Roberts at 1518-1519.
that CSU had to restructure its athletic department in order to comply with Title IX, and that "CSU [could] not continue to operate an intercollegiate athletic program that provide[d] a disproportionate amount of participation opportunities to male athletes where there [was] no evidence of continuing program expansion of effective accommodation of the interests and abilities of its female students."109 Thus, the court granted a permanent injunction against CSU ordering them to reinstate the CSU women’s softball team.110

F. Summary of Cases

These cases have each demonstrated a heightened awareness of Title IX, as well as a general understanding of gender equity. Simply defined, gender equity is achieved when the percentages of men and women enrolled as undergraduate students are substantially equal to the percentage of men and women participating in varsity athletics. Although there has been minimal discussion regarding the language of "substantially proportionate," the example given in OCR's Investigator's Manual provides a sufficient and easily understood explanation.111

Each of the cases discussed in this Article dealing with intercollegiate athletics, except for the Cook cases, focus on the three-prong Effective Accommodations Test to determine Title IX compliance in a preliminary injunction hearing. Each of these cases demonstrates that proportionality is the key to Title IX compliance. Nevertheless, each court theoretically provides that an institution may comply with Title IX even if it does not pass the proportionality test. To do so, a school must demonstrate either a history of program expansion, or show that the current programs effectively accommodate the interests and abilities of its female student-athletes. The burden of proof regarding the third prong may have been incorrectly applied in the past and, according to the First Circuit, should lie with the plaintiffs.112

109. Id at 1519.
110. Id.
111. Investigator’s Manual at 24. See also Roberts at 1512.
112. See supra note 79. Since the initial writing of this paper, the NCAA Gender-Equity Task Force issued its final report. The final report provides a definition and the principles of gender equity, guidelines to promote gender equity in academic institutions, recommendations for legislation to promote gender equity, and other recommendations to
In today's world it is difficult to accomplish the effective accommodation of women without first achieving gender equity. To date, no school has successfully shown effective accommodations where gender equity does not exist. In other words, if an institution does not comply with the proportionality aspect of the three-prong test, then the institution is likely violating Title IX.

_Cook I_ did not utilize the Effective Accommodations Test, but instead focused on a more narrow comparison between the men's and women's ice hockey teams. The appellate court in _Cook II_ is the only recent court that has vacated a Title IX action due to mootness. Had it not been vacated, it probably would have been reversed due to a neglected analysis of Colgate University's overall compliance with Title IX.

III. **TITLE IX IMPLICATIONS FOR UNIVERSITIES AND COLLEGES**

Ever since _Gwinnett_, schools and courts have become aware of the seriousness of Title IX, including the possible financial implications of noncompliance. As a result, many institutions, including the NCAA, have made Title IX one of its top priorities. In fact, the NCAA recently formed a Gender-Equity Task Force which, on April 27, 1993, agreed on a tentative proposal for Title IX compliance and, possibly, enforcement. The proposal was made public August 1993.  

Recent cases, such as _Favia_, _Cohen_, _Cook I_ and _Roberts_, are illustrative of the way that Title IX has been addressed, analyzed and applied to various actions that have actually reached the courtroom. The court in _Favia_ did not examine Title IX much beyond the issues of proportionality and effective accommodations. Although the _Cohen_ and _Roberts_ courts additionally examined the disparity in treatment between male and female athletes at their respective schools, the most important consideration was the proportionality

---


factor of the Effective Accommodations Test. The court in \textit{Cook I}, on
the other hand, focused almost solely on the disparity in treatment
between the men’s and women’s ice hockey teams. Although the
narrow approach of \textit{Cook I} may have been detrimental to the final
outcome of the case, it was dismissed for mootness. Thus, but for
\textit{Cook I}, the above cases provide a strong indication of what factors
institutions need to examine and improve upon in order to reach
gender equity and comply with Title IX.

In order for a college athletic department to move towards
achieving gender equity, the proportion of male and female athletes
must be substantially equal to the proportion of male and female
athletes enrolled as full-time undergraduate students. This is the first
prong of the Effective Accommodations Test as explained in the
above cases and in OCR’s Policy Interpretation. If a school is not in
compliance proportionally, the institution must then present
documented evidence of a historically progressive movement towards
program expansion (the second prong). Realistically, if an institution
has not been able to succeed under the first two prongs, the institution
will not be able to succeed in its defense of a case. It seems virtually
impossible to prove that a school with disparate treatment of its male
and female athletes is providing sufficient opportunities for its female
students to compete intercollegiately according to their interests and
abilities (the third prong), when the national and international
popularity and growth in women’s sports is taken into serious
consideration. Nevertheless, as long as a school can show that it is
indeed expanding the opportunities for women to compete
intercollegiately, then the institution will probably not be sued nor
found in violation of Title IX, even if proportionality is not yet
achieved.

In response to the proportionality requirement, the Big Ten
Conference has instituted a movement for all of its schools to achieve
a 60\% male-40\% female ratio for athletes by 1997; the University of
Iowa has individually committed to a 50\%-50\% split in the same time
period.\footnote{Moran, June 21, 1993, at B27.} To date, this is the only conference-wide movement
towards meeting the proportionality factor of Title IX. Some people
have criticized the Big Ten’s decision of achieving a 60-40 split by
1997 as allowing too much time for too little change, especially in
light of Iowa's more generous promise.\textsuperscript{115} In addition, the Big Ten, though probably acting in good faith, is overtly admitting that they will not comply with Title IX because of the numerical disparity of male athletes created by football, a revenue-generating sport.\textsuperscript{116} However, OCR's Official Policy Interpretation does not exempt football from Title IX consideration.\textsuperscript{117} In addition, the courts consistently have ruled that financial implications are not valid reasons for failing to comply with Title IX.\textsuperscript{118}

Washington State University (WSU) is in the forefront of demonstrating that gender equity can and will be achieved in a federally funded institution. A Title IX and state constitution based lawsuit against Washington State University in 1979 sparked the state legislature to pass a strong state Title IX-type law requiring gender equity.\textsuperscript{119} WSU is living proof that gender equity can be achieved rather painlessly; WSU's football program even produced a Heisman Trophy candidate and top National Football League draft choice in 1992.

Assuming that a substantially proportionate percentage of women at a particular school are in fact competing intercollegiately, the institution must also provide that the athletes are afforded a competitive schedule relative to their abilities as athletes.\textsuperscript{120} This analysis is exemplified in Cohen I, when the court, after applying the "Effective Accommodations Test," compared the competitive opportunities afforded to male and female athletes at Brown University.\textsuperscript{121}

\begin{itemize}
\item \textsuperscript{115} Id., citing Donna Lopiano, Director, Women's Sports Foundation.
\item \textsuperscript{116} Id. Note the difference between revenue-generating and income-generating sports. Most, if not all, athletic departments in this country are operating in the red (i.e., they are not generating income for their institutions). The revenue generated from football and men's basketball, however, may help to pay for that team's operating, recruiting, equipment, and other costs.
\item \textsuperscript{117} 44 Fed. Reg. at 71421.
\item \textsuperscript{118} See, e.g., Cohen I, supra note 61, at 990; Haffer, supra note 30, at 530.
\item \textsuperscript{119} Kathryn Reith, Leveling the Field, Women's Sports & Fitness, April 1992, at 90.
\item \textsuperscript{120} Reith, supra note 3, at 8.
\item \textsuperscript{121} Cohen I at 994.
\end{itemize}
Another major area of compliance for Title IX is the availability of financial aid and athletic scholarships for male and female athletes. Accordingly, athletic scholarships must be awarded in proportion to the number of students of each sex participating on varsity teams; OCR allows a deviation of plus or minus 5%.

Even if a school complies with the "Effective Accommodations Test" and provides its students with appropriately competitive schedules, there are other factors that a court or an OCR investigator will consider when determining whether an institution is in compliance with Title IX. These factors include: (1) provisions for equipment and supplies; (2) scheduling of games and practice times; (3) travel allowance; (4) provisions for coaching and academic tutoring; (5) arrangements for the compensation of coaches and tutors; (6) provisions for locker rooms and practice and game facilities; (7) provisions for medical and training facilities and services; (8) provisions for housing and dining facilities and services; and (9) publicity. Although unequal expenditures, both overall and between same-sport teams, are not per se violative of Title IX, the OCR Assistant Secretary may consider the unequal treatment in assessing gender equity.

A university or college attempting to comply with Title IX by achieving gender equity has several options. First, it could virtually eliminate its athletic department, as Brooklyn College did in 1992. However, this drastic solution hurts all athletes, men and women alike.

One clear option, which may be inevitable to a certain extent considering the budgetary limitations of most institutions, is to preserve the same number of women's teams and eliminate men's

122. 34 C.F.R. § 106.37(c).
124. 34 C.F.R. § 106.41(c)(2)-(10). See also Cohen I, at 994-997.
125. 34 C.F.R. § 106.41(c). See also Cohen I, at 983.
126. Moran, June 23, 1992, at B12. Faced with a lawsuit alleging sex discrimination within the athletic department, the institution decided to simply drop its entire athletic program rather than attempt to comply with Title IX.
teams until the ratio of male and female athletes is substantially proportionate. Again, this method of achieving gender equity is discouraged because the purpose of Title IX is not being served. Such a plan does not truly increase the athletic opportunities for women; it simply decreases opportunities for men.

A better way to achieve gender equity is to increase the number of women’s varsity teams and female varsity athletes within its athletic department by creating new teams or upgrading club programs. As an alternative, a women’s varsity team could create a junior varsity team in an attempt to increase participation. However, with the economic situation most institutions are facing, many schools are eliminating athletic programs. Yet, this plan is easily feasible if a portion of the money allocated to men’s basketball and football is reallocated to increase the number of women’s teams.

Along the same lines, in an effort to reallocate funds to new and existing women’s teams, it might be necessary to reduce the number of players on, for example, the men’s football team. The NCAA has already made an effort at this by reducing the number of scholarship football players from 95 to 85 by 1995.127

IV. CONCLUSION

While the courts are finally recognizing that Title IX violations are serious infringements of women’s rights to compete intercollegiately and to be afforded the same basic opportunities as their male counterparts, the institutions that are supposed to be providing these opportunities are slowly, if at all, moving toward compliance. When the Big Ten is the only conference that is budging, and when the universities of Iowa and Washington State are the only schools in the country publicly committed to gender equity, then the message that Title IX is THE LAW is simply not strong enough.

In order for most schools to stand up and take notice of Title IX, it appears that a fellow institution is going to have to be slapped with an outrageous damage award for Title IX violations. Then, out

of fear, maybe athletic departments will truly make an effort to provide female athletes the same opportunities as male athletes.

If institutions are expected to faithfully comply with Title IX, enforcement is going to have to come full force from the governing body of collegiate athletics—the NCAA. In the past, the NCAA has sufficiently penalized individual institutions for illegal recruiting procedures, illegal payments to players, and other violations of NCAA bylaws. Since all institutions participating in the NCAA must submit gender equity information annually, it should not be difficult to determine which schools are not complying with Title IX and punish those schools for noncompliance.

If the NCAA truly wants to see gender equity in collegiate athletics, it needs to, at least, penalize those schools not moving toward Title IX compliance. Eventually, the NCAA may have to punish institutions simply for not complying with Title IX. The courts cannot handle the volume of litigation that will soon arise from women who are tired of the discrimination and who see potential relief only in the courtroom.