

## ARTICLES

# Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance

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### I. INTRODUCTION

Title IX was enacted in order to address the issue of gender equality, and as such, a consequence of Title IX continues to be a movement towards increasing women's participation in intercollegiate athletics. Prior to the passage of Title IX in 1972, only 15% of college student-athletes were women;<sup>1</sup> as of 1999 that number had grown to approximately 41%.<sup>2</sup> This would suggest that efforts to abide by Title IX have resulted in an increase in female participation, but can this be considered a success?

Title IX and its supporters have been able to address some inequities between the sexes in participation and scholarships, but have not been able to completely level the playing field. Budgetary problems during the 1990s caused the elimination of both men's and women's teams at many colleges, further complicating universities' attempts to maintain and/or establish Title IX compliance. A result was a decrease in opportunities to participate in college athletics, not the desired increase in athletic opportunities that Title IX was enacted to achieve. As some have

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1. B. Glenn George, *Title IX and the Scholarship Dilemma*, 9 MARQ. SPORTS L. J. 273, 274 (1999) (citing Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 UNIV. OF MIAMI ENT. & SPORT L. REV. 1, 33 (1992)) & Iram Valentin, *Title IX: A Brief History*, Education Development Center, available at <http://www.edc.org/WomensEquity/resources/alldigest/index.htm> (August 1997).

2. National Collegiate Athletic Association, *1998-99 Participation Study – Women's Sports & 1998-99 Participation Study – Men's Sports*, available at [http://www.ncaa.org/participation\\_rates/1998-99\\_w\\_partrates.pdf](http://www.ncaa.org/participation_rates/1998-99_w_partrates.pdf) & [http://www.ncaa.org/participation\\_rates/1998-99\\_m\\_partrates.pdf](http://www.ncaa.org/participation_rates/1998-99_m_partrates.pdf) (March 7, 2000). During the 1970 – 1971 academic year there were 31,852 women who participated in intercollegiate athletics. In the 1998 – 1999 academic year that number had risen to 148,803.

suggested, for true compliance with Title IX to be attained, changes in the current application of substantial proportionality may be required.<sup>3</sup> Furthermore, the National Collegiate Athletic Association (NCAA) needs to re-evaluate rules regulating athletic departments in the area of scholarships and the number of athletes allowed to participate per team, in addition to potentially limiting expenditures for revenue generating teams, in order to facilitate the achievement of gender equity.

In order to address these issues, the following contains a brief history of the enactment of Title IX and a review of some of the landmark legal cases that have helped provide clarity regarding the scope of how courts have used Title IX as a mechanism to correct violations. We then describe the development of substantial proportionality and discuss the current application used by courts, while addressing the limitations of the substantial proportionality measurement. Following this, we outline the issues that the NCAA could address in order to assist athletic departments in meeting Title IX compliance. Finally, a proposal is presented as an alternative model of measuring the interest and abilities of students to achieve Title IX compliance, along with possible limitations to its successful application.

## II. A BRIEF HISTORY OF TITLE IX

Title IX of the Education Amendments was passed by Congress on June 23, 1972<sup>4</sup> and signed into law by President Richard Nixon on July 1, 1972.<sup>5</sup> Title IX states that "no person in the United States, shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal assistance."<sup>6</sup> Title IX was adopted by Congress as a floor amendment without Committee hearings or reports, so it lacks any legislative history. This created a situation in which it was unclear as to the intent and scope of Title IX.<sup>7</sup>

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3. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 FED. REG. at 71,413, 71,418 (Dec. 11, 1979). Substantial proportionality is a standard outlined in the Effective Accommodation Test and is used to measure an athletic department's compliance with Title IX. Substantial proportionality will be examined in detail in Part IV and V of this paper.

4. Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1972).

5. Public Law No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. § 1681(a) (1994)).

6. 20 U.S.C. §§ 1681-1688.

7. Claudia S. Lewis, Note, *Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language with Its Broad Remedial Purpose*, 51 FORDHAM L. REV. 1043, 1050-55 (1983).

Congress attempted to clarify the statute by calling on the Department of Health, Education and Welfare (HEW) to review Title IX. HEW took three years to interpret Title IX<sup>8</sup> and provide specific regulations, which President Gerald Ford signed into law on May 27, 1975.<sup>9</sup> Two of HEW's regulations pertained specifically to college athletics. The first regulation required schools to award athletic scholarships "in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."<sup>10</sup> The second regulation considered when a school can maintain separate athletic teams for males and females and under what circumstances a student can participate on the opposite sex team.<sup>11</sup>

In 1980, the Department of Education was established and governance of Title IX was transferred from HEW.<sup>12</sup> Under both HEW and the Department of Education, the Office for Civil Rights (OCR) has had the authority to withhold federal funding for universities found to be in violation of Title IX; however, as of 1997 this important penalty had not been used.<sup>13</sup> Therefore, many individuals who believe they have been victims of gender discrimination have used the federal court system as a forum to voice their complaints.

### III. TITLE IX: LEGAL DEVELOPMENTS

Court rulings have been instrumental in redefining the intent of Title IX and mandating enforcement in order to achieve gender equity; accordingly, it is important to review some of the landmark decisions in Title IX lawsuits.

One of the first issues addressed by a court was who could bring a Title IX lawsuit. In 1979, in *Cannon v. University of Chicago*, the Supreme Court held that even though there was no express statutory provision empowering a private individual to bring a Title IX suit, there was an implied private right to do so.<sup>14</sup> The opportunity to file a lawsuit

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8. Valentin, *supra* note 1.

9. 34 C.F.R. Part 106, Subpart D: Discrimination On The Basis Of Sex In Educational Programs And Activities Prohibited: Financial Assistance, 34 C.F.R. § 106.37 & Athletics, 34 C.F.R. § 106.41 (1999).

10. *Id.* 34 C.F.R. § 106.37 (c).

11. *Id.* 34 C.F.R. §§ 106.41(a), 106.41(b).

12. Nondiscrimination On The Basis Of Sex In Education Programs And Activities Receiving Or Benefiting From Federal Financial Assistance, 34 C.F.R. Part 106 (1997).

13. Lynn Zinser, *Tarnish on Silver Anniversary*, PHILADELPHIA DAILY NEWS, March 28, 1997, at <http://sports.phillynews.com/special/title9/NATL28.htm>.

14. *Canon v. University of Chicago*, 441 U.S. 677 (1979).

provided individuals with the powerful option of having their claims recognized in a legal proceeding.

Title IX currently provides three options to parties that believe they have been discriminated against based on gender: filing an internal grievance with the university, filing a complaint with OCR, or filing a federal lawsuit.<sup>15</sup> The first two options may not bring about any substantive changes because filing a complaint with the university or OCR will, at most, only bring about changes on that specific campus and will have little impact on other campuses. However, the ruling in *Cannon* provided individuals with the influential option of bringing a Title IX complaint as a lawsuit and has opened the doors for many other battles regarding gender equity to be fought in the courtroom. The possibility of a lawsuit and the publicity associated with such a battle has been influential in prompting universities to regard achieving Title IX compliance as important.<sup>16</sup>

A major issue that remained in regard to the application of Title IX was the ambiguity in the wording of the statute.<sup>17</sup> A portion of the language that was open to interpretation was the phrase "receipt of federal funding," with a great deal of debate surrounding whether this definition described universities as a whole or specific departments therein.<sup>18</sup> Two emerging methods of interpretation were the program-specific and the institutional-wide approaches.<sup>19</sup> The program-specific approach viewed Title IX compliance on a narrow scope and contended that only those specific university programs that received federal funding were required to be Title IX compliant. The broader view provided by the institutional-wide approach held that if *any* university program received federal funding then *all* university programs were required to be Title IX compliant. The distinction between these two views is extremely important, as most athletic departments do not receive federal funds directly.<sup>20</sup> Therefore, determining which university departments were required to achieve gender equity through the receipt of federal funds has had a

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15. Jennifer L. Henderson, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness*, 5 SETON HALL J. OF SPORT L. 133, 139 (1995).

16. Susan M. Shook, Note, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990's: Nonrevenue Men's Teams Join Women Athletes in the Scramble for Survival*, 71 IND. L. J. 773, 781-782 (1996).

17. *Id.* at 775.

18. Henderson, *supra* note 15, at 136.

19. *Id.*

20. *Id.*

profound impact on whether or not college athletic departments are required to be Title IX compliant.

In 1980, female athletes at Temple University brought a lawsuit, *Haffer v. Temple University*,<sup>21</sup> claiming that there were not equal opportunities in intercollegiate athletics at Temple. Temple University's athletic department did not receive federal funding, so the core issue in *Haffer* was whether to apply the program-specific or institutional-wide approach to determine the athletic program's compliance with Title IX.<sup>22</sup> The district court ruled using the institutional-wide approach and held that the athletic department was required to be Title IX compliant.<sup>23</sup> The ruling was appealed and upheld by the Third Circuit Court of Appeals.<sup>24</sup> Thus, *Haffer* was extremely important as it provided clarification that universities' athletic departments were required to be in compliance with Title IX as long as some campus program at the university received federal funding.

However, the use of the institution-wide approach in *Haffer*, requiring that athletic departments achieve gender equity when the university received federal funding, was short lived. Universities continued to assert to courts that athletic departments should only be required to comply with Title IX in those incidences in which federal funding was received directly by the department. As late as 1984, in *Grove City College v. Bell*,<sup>25</sup> the Supreme Court ruled using a program-specific approach.

Grove City College, a private college, did not receive any federal funding directly as an institution; however, some students at the college did receive federally funded financial aid. The Supreme Court contended that receipt of students' federal financial aid did not designate that the institution as a whole received assistance, merely that the financial aid office received assistance by taking receipt of the students' aid.<sup>26</sup> Therefore, the Supreme Court held that the financial aid office must be complaint with Title IX, but the athletic department, and other departments on campus, were not required to be compliant.<sup>27</sup>

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21. *Haffer v. Temple Univ.*, 524 F. Supp. 531 (E.D. Pa. 1981).

22. *Id.*

23. *Id.*

24. *Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982).

25. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

26. *Grove City Coll.*, 465 U.S. at 563-570.

27. *Id.*

The *Grove City* ruling effectively exempted athletic departments from the provisions of Title IX.<sup>28</sup> In intercollegiate athletics there were few departments that accepted federal monies, thus, most programs were now able to ignore gender equity requirements. Furthermore, the ruling allowed other university programs, such as the admissions office or an academic department, the legal ability to be excluded from compliance with Title IX. Only those departments that directly received federal funding were now mandated to achieve gender equity. Seemingly, the intent of Title IX to increase gender equity was not being achieved.

In response to the narrow view used by the program-specific approach in *Grove City*, Congress enacted the Civil Rights Restoration Act, which became law on March 22, 1988.<sup>29</sup> The Civil Rights Restoration Act adopted the broad view and stated that Title IX should be interpreted through the institutional-wide approach. Therefore, all university departments, including intercollegiate athletics, were required to be Title IX compliant if *any* department of the university accepted federal funding. Congress passed the Civil Rights Restoration Act over a veto by President Ronald Regan.<sup>30</sup>

Another case that was important in shaping Title IX policy was *Cohen v. Brown University*.<sup>31</sup> In 1991, Brown University decreased its athletic budget and cut its men's golf and water polo teams and women's volleyball and gymnastics teams. The suit contended that the proportionate number of female athletes was well below the female undergraduate numbers, whether prior to or after the cuts. The plaintiffs received a preliminary injunction that reinstated the volleyball and gymnastics teams. The case continued through two appeals to the First Circuit<sup>32</sup> and the Supreme Court denied certiorari.<sup>33</sup> The result of *Cohen* was that the substantial proportionality test was established as the primary measure of Title IX compliance. The importance of the substantial proportionality test will be discussed further in the next section.

Another important issue addressed by the courts was the restitution that an individual could receive if an institution was found to be in violation of Title IX. In early Title IX decisions, an individual could receive a

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28. P. Michael Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 MARQ. SPORTS L. J. 149, 151 (1990).

29. Civil Rights Restoration Act, 20 U.S.C. § 1687 (1988).

30. Villalobos, *supra* note 28, at 149.

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

32. *Id.* & *Cohen v. Brown Univ.*, 101 F.3d. 155 (1st Cir. 1996).

33. *Brown Univ. v. Cohen*, 520 U.S. 1186 (1997).

declaratory judgement or an injunction.<sup>34</sup> A declaratory judgement would declare the rights of the plaintiff and the institutional defendant with no consequential relief. However, an injunction could be issued that would force the institution found in violation of Title IX to stop discriminatory practices, with monetary awards only to cover attorney fees.

In 1992, in *Franklin v. Gwinnett County Public Schools*, the Supreme Court held that plaintiffs could receive monetary awards.<sup>35</sup> A female student attending a public high school alleged sexual harassment by a male teacher and filed suit under Title IX. The court ruled that Title IX does not provide for compensatory damages.<sup>36</sup> However, the Supreme Court reversed the ruling in a unanimous decision and held that compensatory damages can be awarded when intentional discrimination is established.<sup>37</sup> Therefore, *Franklin* established that an athletic department found to intentionally discriminate on the basis of gender could be forced not only to stop their discriminatory practices, but also to pay compensatory and punitive damages. The possibility of substantial monetary damages may encourage some athletic departments to more actively address Title IX compliance.<sup>38</sup>

#### IV. SUBSTANTIAL PROPORTIONALITY

To understand the impact of the *Cohen* ruling it is necessary to review the concept of substantial proportionality and its emergence as an accepted means of determining gender equity. Currently, compliance with Title IX in intercollegiate athletics does not require that participation on teams be equitable between the sexes at a 50-50, male-female ratio. As mentioned earlier, Title IX was considered by many to be unclear and vague as to its intent and scope, even after HEW's regulations were enacted in 1975.<sup>39</sup> By 1979, OCR had received over 100 complaints claiming discrimination in more than 50 separate college athletic departments and believed it was necessary to reduce the number of complaints filed and stimulate self-compliance at the university level.<sup>40</sup> To provide clarification to the regulations that were still viewed as vague, OCR is-

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34. Henderson, *supra* note 15, at 139.

35. *Franklin v. Gwinnett County Pub. Sch's*, 112 S. Ct. 1028, 1032 (1992).

36. *Id.*

37. *Id.* at 1038.

38. Henderson, *supra* note 15, at 140-141.

39. Charles P. Beveridge, *Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletic Teams*, 1996 UNIV. OF ILL. L. R. 809, 817 (1996).

40. *Id.*; Shook, *supra* note 16, at 776.

sued a Policy Interpretation of Title IX in 1979, which was specifically aimed at college athletics.<sup>41</sup>

The Policy Interpretation established that Title IX compliance requires:

- (1) athletically related financial assistance be allocated in proportion to the numbers of male and female students participating in intercollegiate athletics;<sup>42</sup>
- (2) all other benefits, opportunities, and treatment afforded participants of each sex be equivalent; and<sup>43</sup>
- (3) the interests and abilities of students be effectively accommodated to the extent necessary to provide equal athletic opportunity for members of both sexes.<sup>44</sup>

The third requirement of the Policy Interpretation has become the foundation for determining gender equity.<sup>45</sup> The Policy Interpretation developed another three-prong test in order to ascertain if an athletic program had effectively accommodated the interests and ability of students.<sup>46</sup> This test, called the Effective Accommodation Test (EA Test),<sup>47</sup> outlined three possible means, or safe harbors, for an athletic department to demonstrate compliance with Title IX.

The university must satisfy only one of the following three standards:

- (1) Whether intercollegiate level 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 interest and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above,

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41. 44 Fed. Reg. 71,413 (1979).

42. *Id.* at 71,415.

43. *Id.* at 71,415-17.

44. *Id.* at 71,417-18.

45. Mark Hammond, *Substantial Proportionality Not Required: Achieving Title IX Compliance Without Reducing Participation in Collegiate Athletics*, 87 KENTUCKY L. J. 793, 797 (1998-1999).

46. 44 Fed. Reg. at 71,418.

47. Hammond, *supra* note 45, at 798.



whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.<sup>48</sup>

The use of substantial proportionality as the determining factor in deciding Title IX compliance has developed mainly because the other two options for safe harbor have not been available to universities or used by courts.<sup>49</sup>

During the 1990s, many athletic departments faced difficult financial situations and reduced budgets, resulting in the elimination of both men's and women's teams. As teams were being cut, athletic departments would have a difficult, if not impossible time arguing that there was a "continued history of expanding athletic opportunities."<sup>50</sup> The result was that the second prong of the EA Test was not available to most athletic departments to demonstrate compliance with Title IX.

The third prong of the EA Test requires that the "interests and abilities . . . have been fully and effectively accommodated"<sup>51</sup> by an athletic program in order to provide evidence of Title IX compliance. However, there are no specific provisions regarding the definition or measurement of students' interests and abilities, thus creating an ambiguous situation that courts generally have avoided ruling on.<sup>52</sup> Therefore, as if by default, the measurement of substantial proportionality has become the standard that courts use to determine if an athletic department is compliant with Title IX.

Substantial proportionality is measured by comparing the percentage of undergraduates enrolled to the percentage of student-athletes by sex.<sup>53</sup> Clearly, these calculations are simple to compute, which has been another reason courts have relied on substantial proportionality as the primary measurement used in determining Title IX compliance. Furthermore, it is easy to contend that the interests and abilities of each sex are being met if athletic participation matches enrollment numbers. However, some limitations with the use of substantial proportionality as the primary means to determine gender equity need to be examined.

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48. 44 Fed. Reg. at 71,418.

49. Beveridge, *supra* note 39, at 824.

50. 44 Fed. Reg. at 71,418.

51. *Id.*

52. George, *supra* note 1, at 277.

53. 44 Fed. Reg. at 71,418.

## V. LIMITATIONS OF SUBSTANTIAL PROPORTIONALITY

The main limitations with the use of substantial proportionality as the means to determine gender equity is that OCR's Policy Interpretation and the EA Test do not lay out a specific ratio that athletic departments must adhere to and courts have struggled with what ratio constitutes substantial proportionality.<sup>54</sup> In *Roberts v. Colorado State Board of Agriculture*<sup>55</sup> the university was found in violation of Title IX because the court stated that "the disparity between enrollment and athletic participation for women at Colorado State University was 10.5%" and did not satisfy the substantial proportionality prong of the EA Test.<sup>56</sup> Additionally, the court in *Cohen* stated that "substantial proportionality is properly found only where the institution's intercollegiate athletic program mirrors the student enrollment as closely as possible."<sup>57</sup> Therefore, institutions know that an approximately equivalent percentage of undergraduates and student-athletes is needed, but are still unclear as to the exact measurement necessary to meet Title IX compliance.

Another limitation leveled against the use of substantial proportionality is the belief that it actually establishes a gender-based quota system<sup>58</sup> and promotes discrimination.<sup>59</sup> In some situations where men's teams have been cut in order to become compliant with Title IX a reverse discrimination suit has been brought alleging that the use of substantial proportionality is actually in violation of Title IX's intent of gender equity.<sup>60</sup>

For example, in *Kelley v. Board of Trustees*,<sup>61</sup> the plaintiff claimed that substantial proportionality demanded statistical balancing when the men's—but not the women's—swimming team was cut at the University of Illinois.<sup>62</sup> However, the court determined that the use of substantial proportionality "merely creates a presumption that a school is in compli-

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54. Beveridge, *supra* note 39, at 824.

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

56. *Id.* at 829.

57. *Cohen v. Brown Univ.*, 879 F. Supp. 185, 202 (D.R.I. 1995).

58. *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994).

59. John Weistart, *Title IX and Intercollegiate Sports: Equal Opportunity?*, 16 BROOKINGS REV. 39, 41 (Fall 1998).

60. Joseph Filippone, *Title IX in the Nineties*, 15 N. Y. L. SCH. J. HUMAN RIGHTS 561, 576 (1999).

61. *Kelley*, 35 F.3d 265.

62. *Id.* at 271.

ance with Title IX regulation when it achieves such a statistical balance.”<sup>63</sup>

Thus, while courts have upheld the use of substantial proportionality, it still faces limitations because universities’ administrators do not know the specific measurements required in order to achieve gender equity. The EA Test provides a safe harbor for athletic programs that effectively accommodate students’ interests and abilities and may provide an alternative method for athletic departments to achieve Title IX compliance.

## VI. THE NCAA AND TITLE IX

Before developing an alternative model for athletic departments to use to become Title IX compliant, it is necessary to examine the role the NCAA and its member institutions have played in pursuing gender equity in intercollegiate athletics. According to Weistart, the NCAA’s members have been slow to support the intent of providing gender equity in athletic programs that schools provide.<sup>64</sup> The NCAA as an organization does recognize the need to achieve gender equity, yet as of 1997, the NCAA has not required its members to be compliant with Title IX.<sup>65</sup> A brief review of the stance taken on gender equity by the NCAA member institutions over the years is provided and is followed by some recommendations for the NCAA in order to facilitate athletic departments’ compliance with Title IX.

The NCAA is a voluntary association made up of approximately 1,200 institutions and is the governing body of its members.<sup>66</sup> The NCAA is charged with enforcing guidelines voted on by member institutions. Initially, the NCAA did not support full implementation of Title IX and lobbied against it. The NCAA membership also supported the Tower Amendment, which proposed an exemption for revenue producing college sports, typically men’s football and basketball, from the reach of Title IX.<sup>67</sup> The Tower Amendment would have excluded men’s football and basketball teams from the calculation of substantial proportionality. The Tower Amendment passed in the Senate, but died in a House-

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63. *Id.*

64. Weistart, *supra* note 59, at 40.

65. B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 WISC. L. REV. 647, 661 (1995); Zinser, *supra* note 13.

66. National Collegiate Athletic Association, *About the NCAA: What is the NCAA?*, available at <http://www.ncaa.org>.

67. Heckman, *supra* note 1, at 11-12.

Senate conference committee.<sup>68</sup> The NCAA membership then brought a lawsuit, *NCAA v. Califano*, against OCR claiming that OCR had exceeded its regulatory authority by issuing the Title IX regulations.<sup>69</sup> The district court dismissed the case based on the standing requirements and the case was not pursued.<sup>70</sup>

In 1992, the results of a survey completed by NCAA institutions on gender equity were released. The results found that women made up approximately one-half of the student body of Division I schools, yet approximately only one-third of intercollegiate athletes.<sup>71</sup>

Gender equity finally became a priority for the NCAA and its members in 1993.<sup>72</sup> A 16-member task force was formed with one of its goals being the establishment of guidelines to assist member institutions in providing athletic programs that were gender equitable.<sup>73</sup> The task force adopted the substantial proportionality rule to determine Title IX compliance for athletic departments. However, in the task force's final report issued in July, 1993, specific details are not provided to universities attempting to achieve gender equity; instead, OCR and the courts are still relied upon to enforce Title IX.<sup>74</sup>

At the 1993 NCAA Convention, a certification program was adopted requiring each member institution to establish a gender equity plan, including periodic self-assessments.<sup>75</sup> While this illustrates that NCAA members recognize the need for gender equitable athletic programs, the NCAA as a governing body has done little to require Title IX compliance. As of 1997, the NCAA had not denied any universities' certification because of gender inequities, it merely had attached conditions on several schools mandating that they improve.<sup>76</sup> Clearly, because of the views held by its member institutions, the NCAA has not used its enforcement capabilities to require Title IX compliance.<sup>77</sup>

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68. Brian L. Porto, *Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. OF SPORTS L. 351, 361(1998).

69. *NCAA v. Califano*, 444 F. Supp. 425 (D. Kan. 1978), *rev'd & remanded*, 622 F. 2d 1362 (10th Cir. 1980).

70. Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. OF SPORT L. 391, 400 (1997).

71. George, *supra* note 65, at 660-661. The survey also found that women received an even smaller percentage of scholarship and recruiting expenditures.

72. Henderson, *supra* note 15, at 149.

73. *Id.* at 150.

74. George, *supra* note 65, at 661.

75. *Id.*

76. Zinser, *supra* note 13.

77. George, *supra* note 1, at 281-282.

Some have suggested that the NCAA should enact and enforce regulations in order to mandate that its members become compliant with Title IX. One change that could be made to NCAA regulations would be to decrease the number of football scholarship from 85 to 75<sup>78</sup> and to also limit total team size to 75. It is difficult for women's participation to be equitable to men's participation when the football team is so large. In fact, the *Chronicle of Higher Education* conducted a survey of Division I-A schools in 1995-96 and found that only four schools out of the twenty-seven that achieved substantial proportionality of undergraduate enrollment were successful in having a football program and achieving the proportionality standard in both participation and scholarships.<sup>79</sup> Reducing team size and the number of scholarships allocated to the football team would reduce expenditures, as scholarships, equipment, travel and meals for those ten positions would be removed. For example, if a player's scholarship was \$10,000.00 and 10 scholarships were eliminated, then the athletic department would save \$100,000.00 alone in scholarship monies.<sup>80</sup> Furthermore, a reduction in the size of the football team would assist colleges in achieving gender equity in participation. These player reductions should not hurt the quality of the football program, if all programs were required to comply with this new rule. Therefore, colleges would still be able to maintain competitive football programs, reduce scholarships and additional expenditures and assist in achieving gender equity, especially if the substantial proportionality method of determining Title IX compliance is used.

Another recommendation for the NCAA involved creating a spending cap for revenue generating sports.<sup>81</sup> Many athletic departments spend extravagantly on some items, such as hotel rooms for the football team the night before for home games. Often the justification made for the spending habits of the football and men's basketball teams is that these revenue-generating sports are the means by which other non-revenue generating sports are able to exist. However, one study found that only five cents of every dollar generated by a revenue sport was spent on

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78. *Id.* at 282.

79. Jim Naughton, *Advocacy Group Charges 25 Colleges with Violating Title IX*, CHRONICLE OF HIGHER EDUC., June 13, 1997, at A39. For the survey, a university had to have female student athletic participation within 5% of the female undergraduate enrollment to be viewed as achieving substantial proportionality. Two of the four schools, the University of Utah and the Georgia Institute of Technology, had substantially lower than normal female undergraduate enrollment, which allowed them to meet the proportionality standard.

80. Henderson, *supra* note 15, at 160.

81. Hammond, *supra* note 45, at 812 & Weistart, *supra* note 59, at 43.

a non-revenue sport.<sup>82</sup> Thus, it does not appear that the revenue-generating sports currently support the other men's and women's teams, as is sometimes claimed. However, eliminating unnecessary expenditures could allow athletic departments to free up monies for non-revenue sports. By reducing expenditures, athletic departments would be more financially efficient, able to support the teams already in existence, and, hopefully, able to plan for the expansion of athletic opportunities.<sup>83</sup> Additionally, artificial limits, such as spending caps, might increase competitive parity as the possibility of powerhouse athletic departments outspending other colleges (in order to enhance their programs) would be reduced.<sup>84</sup> The goal of achieving gender equity would be easier to meet if athletic departments were not struggling financially and were not faced with the need to eliminate teams when gender equity requires that athletic opportunities increase.

A final change that the NCAA members need to agree to is the adoption of specific guidelines for athletic departments to determine the attainment of gender equity. It is important that member institutions develop a firm stance on gender equity and empower the NCAA to enforce and impose sanctions for violations of guidelines. The most powerful sanction that the NCAA as a governing body can impose is to not allow a school to compete.<sup>85</sup> Such a penalty brings negative publicity and the possibilities of lost revenue, and could be a deterrent to maintaining athletic programs that are not gender equitable. However, individual schools may continue to lag behind in achieving the goal of Title IX until they are compelled to do so by the NCAA. Each university must recognize the importance of gender equity, and as NCAA members, vote to require that the organization's membership be Title IX compliant. Guidelines adopted by the NCAA should outline strict and specific measurements to be used by athletic departments to determine compliance with Title IX. Moreover, because it remains unclear what is the exact percentage courts will require in order to determine that a program achieved gender equity, the ambiguity of this measure must be removed.<sup>86</sup>

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82. *Id.* at 811 (citing Arthur Padilla & David Baumer, *Big-Time College Sports: Management and Economic Issues*, 18 J. OF SPORT & Soc. Iss. 128, 139 (1994)).

83. Weistart, *supra* note 59, at 43.

84. *Id.*

85. George, *supra* note 1, at 282.

86. The regulations could involve a phase-in period in order to allow schools that are not currently in compliance with Title IX a specified time period to become compliant before facing the penalty of losing the opportunity to compete. The regulations could also impose less severe penalties for universities that are making improvements in gender equity, such that

Another possible method for a university to use to establish that the athletic program is gender equitable would be to satisfy the third prong of the EA Test.<sup>87</sup> Again, Title IX compliance can be shown by fully and effectively accommodating the interests and abilities of the under-represented sex.<sup>88</sup> This alternative has not generally been used because substantial proportionality became the accepted measure. However, the measurement of interests and abilities of students would provide athletic departments with a different method to use to satisfy Title IX. The next section will develop this alternative model and will address possible limitations to its application.

## VII. AN ALTERNATIVE MODEL TO ACHIEVE GENDER EQUITY

As the enrollment of women in college increases there should be a corresponding increase in the number of female athletes through the use of substantial proportionality as the determining test of establishing Title IX.<sup>89</sup> Athletic departments have been slow to react to the requirements of Title IX<sup>90</sup> and the financial difficulties many schools faced in the 1990s made the goal of achieving gender equity even more difficult.<sup>91</sup> Therefore, an alternative means of meeting Title IX compliance should be developed in an attempt to make athletic departments proactive in achieving gender equity. We suggest that a mechanism to measure the students' interests and abilities can be developed, and thus, satisfy prong three of the EA Test. It is possible that by developing a method of measuring the interests and abilities of students gender equity can be achieved more quickly. Before considering a plan to measure students' interests and abilities, we examine a recent case that highlights current problems associated with using this option to determine Title IX compliance.

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these institutions do not face penalties as harsh as other universities that are making limited efforts to achieve gender equity.

87. Again, the Effective Accommodation Test (EA Test) ascertains if an athletic program has effectively accommodated the interests and ability of students and provides three possible methods of achieving safe harbors in order to demonstrate compliance with Title IX.

88. 44 Fed. Reg. at 71,418.

89. Valentin, *supra* note 1. In 1973, 43% of female high school graduates aged 16-24 were enrolled in college; by 1994 that percentage had increased to 63%. As females become a large percentage of students in college, the use of substantial proportionality should reflect an increase in the number of female athletes.

90. Weistart, *supra* note 59, at 40.

91. Beveridge, *supra* note 39, at 810.

As previously stated, courts have generally shied away from using the third prong of the EA Test in determining if an institution is Title IX compliant because of its vague and ambiguous wording.<sup>92</sup> Still, generally claims made by universities that athletic programs have fully accommodated students' interests and abilities have been closely scrutinized by the courts. This is because courts have found that fully meeting the interests and abilities of the underrepresented sex is a "high" standard requiring full access to athletic opportunities.<sup>93</sup> Courts have ruled that if a women's team has recently been eliminated from an athletic program, such as in *Cohen v. Brown University*,<sup>94</sup> and a lawsuit is brought claiming discrimination, the university will not be able to satisfy the effective accommodation of interests and abilities measure.<sup>95</sup> This standard requires that the interests and abilities of the under represented sex be met fully and anything less will not provide evidence of Title IX compliance.

Thus, developing a method to accurately measure the interests and abilities of students may allow the goal of gender equity to be achieved more quickly than by relying on an increase in female enrollment at universities to force a reciprocal increase in participation numbers through the use of substantial proportionality. Additionally, the use of the third prong of the EA Test could provide actual evidence to some universities that claim women are not as interested in competing in intercollegiate athletics as men are. OCR clearly states that as long as athletic programs satisfy the interest and abilities of female students, universities can provide more opportunities to males and, furthermore, in this situation OCR will not require athletic departments to meet the substantial proportionality measure.<sup>96</sup>

To determine if an athletic program satisfies Title IX, OCR will examine 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.<sup>97</sup>

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92. George, *supra* note 1, at 277.

93. *Cohen*, 991 F.2d at 898.

94. *Id.* at 888.

95. Shook, *supra* note 16, at 801.

96. Norma V. Cant, Assistant Secretary, letter accompanying the United States Department of Education: Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, available at <http://www.ed.gov/offices/OCR/clarific.html> (January 16, 1996) (hereinafter "Clarification").

97. *Id.*



A university cannot achieve compliance with Title IX merely by assuming that its athletic program meets the interests and abilities of female students, but must develop a method to determine student interest and abilities and then create an appropriate program. Title IX allows a university to use any method to measure students' interests provided that the method selected is nondiscriminatory,<sup>98</sup> and OCR often recommends that surveys be used because they are a simple method of assessing interest.<sup>99</sup> OCR requires that the measurement tool reach a wide audience of students in order to truly assess interest and abilities and that an open-ended assessment method be used by students to list sports they are interested in.<sup>100</sup> Additionally, OCR does not require elaborate scientific validation of assessments provided by students.<sup>101</sup>

Given OCR's recommendation, the alternative model would use a questionnaire as the measurement tool to gauge interests and abilities of students in order to determine if the current athletic program is effective in meeting their needs. The questionnaire would need to address prior athletic team participation and the competition level of prior participation as a way of assessing female students' athletic abilities. The measurement of abilities is a required component of the third prong of the EA Test and will also assist athletic departments in identifying potential intercollegiate athletes. The other measurement that is required in order to provide evidence of Title IX compliance is to assess women's interest in participating in college athletics. The survey could measure the desire to continue to participate in intercollegiate athletics and the sports students would be interested in participating in. Following OCR's guidelines, students would be able to fill-in sports they are interested in and not merely select from a prepared list.

The questionnaire would be completed by undergraduate female students and include women who are admitted to the institution although not yet enrolled.<sup>102</sup> In order to reach the admitted, but not currently enrolled female students, a survey would be included as part of the broader admissions process. Potential female students would be required to complete the survey measuring athletic interests and abilities when declaring intent to enroll in the university and paying a deposit. To evaluate currently enrolled female students' interests and abilities the survey could be administered each fall as a requirement that must be

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98. 44 Fed. Reg. at 71,417.

99. Clarification, *supra* note 96.

100. *Id.*

101. *Id.*

102. *Id.*

completed before being allowed to register for classes. OCR uses fall enrollment numbers when calculating proportionality,<sup>103</sup> therefore, the survey for current students would be administered in the fall to be consistent. Requiring the questionnaire to be completed by all (or a random sample of) female undergraduate students each year would ensure that a representative sample of students' interests and abilities were being measured and, thus, satisfy OCR's requirement of reaching a wide audience of students.<sup>104</sup>

An athletic department could not merely administer the survey and then ignore the results, nor guarantee certain findings by only measuring a portion of the sample. The final step for the alternative model would be to develop or adapt the existing athletic program, to match the interests and abilities of students or, at minimum, reflect efforts to address discrepancies between student interests and the programs provided. The measurement of female students' interests and abilities must be combined with an environment within universities that supports achieving gender equity and is progressive and flexible enough to bring about a change from status quo. By measuring the interests of students a feeling will be generated that the athletic program is being provided *for* them, not merely *to* them, and that the university as a whole is interested in its students. It is likely that many women are currently interested in participating in intercollegiate athletics, but do not feel that their participation is desired because they were not recruited out of high school. As female participation in competitive sports increases in high school<sup>105</sup> there should be an increase in the number of females who are interested in continuing to play at the collegiate level. However, if a feeling of apathy exists about increasing female participation in intercollegiate athletics by athletic departments, and the wider university communities, then possible student-athletes may chose to not participate. Conversely, if an institution actively addresses gender equity and publicizes its goal of accommodating the interests and abilities of students there may be an increase in female participation due to the supportive environment that has been created. However, if the results of the survey find limited in-

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103. *How to Win at the Numbers Game in College Athletics*, 8 WOMEN IN HIGHER EDUC. 34 (1999).

104. Clarification, *supra* note 96.

105. United States Department of Education: Office for Civil Rights, *Impact of the Civil Rights Law*, available at <http://www.ed.gov/offices/OCR/impact.html> (January 1999) & Education Development Center, *Report Card on Title IX at 25: Athletic*, available at <http://www.edc.org/WomensEquity/title9/athletics.html> (1997). In 1971, less than 300,000 girls participated in high school varsity athletics; however, in 1996 approximately 2.4 million girls competed in high school athletics.

terest by female students, then the athletic department would have justification to eliminate certain women's teams and should be able to satisfy both OCR and the courts' scrutiny.

Clearly, a plan for the athletic department to measure the interests and abilities of students in order to achieve gender equity is radical and will face criticism and opposition. Addressing some of the possible weaknesses or perceived limitations with such a program can help demonstrate the actual workability of the plan. A possible limitation to using the third prong of the EA Test to achieve gender equity would be how to maintain a competitive athletic program while at the same time addressing the changing interests and abilities of a transitory female population. It would be impossible, and ill advised, for athletic departments to add or drop teams immediately after conducting the yearly survey to measure students' interests and abilities. Some Title IX supporters feel that if teams, men's or women's, need to be eliminated the cuts should be done over a four-year period because the existing athletes have expectations and have made a decision to attend a specific university at least partially based on the participating in the athletic program.<sup>106</sup> Therefore, a similar "phase-in" plan could be developed to introduce new teams to the varsity level which could possibly use the club or intramural program that currently exists on most college campuses as a "developmental" system; the prominence or support to each club would act as another gauge as to the popularity of certain sports. This would also provide an opportunity to develop the athletes and coaches and establish viable competitors in order to begin the process of building a team.

The importance of students' interests and abilities and available competition is clear and will be reviewed by OCR when determining if an athletic department is providing a program that is gender equitable.<sup>107</sup> In order to have the alternative model accepted by OCR or the courts as fulfilling Title IX, it would be necessary to develop a scheduled timeline that outlines the maximum length of time a team could remain at the developmental level before becoming a varsity team. Teams would be allowed to begin participating in intercollegiate competition prior to the end of the scheduled timeline, but no team could continue to compete at the developmental level beyond the scheduled timeline. This would be a safeguard to prevent schools from appearing to be making gains in gender equity, while merely relegating female athletics to a club program. In fact, by using the interests and abilities measurement, colleges would

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106. *How to Win at the Numbers Game in College Athletics*, *supra* note 103, at 34.

107. Clarification, *supra* note 96.

have little choice but to allow teams that have the potential for "meaningful" intercollegiate competition to become a recognized varsity sport.<sup>108</sup> Again, courts have viewed the effective accommodation of students' interests and abilities to be a high standard and would not find an athletic program in compliance with Title IX if interests of the under-represented sex were going unfulfilled.<sup>109</sup>

Therefore, changes in athletic programs based on students' interests and abilities do not have to occur immediately, but instead could be developed over time in order to help ensure a high level of competition and success at the intercollegiate level. This progressive plan must be coupled with a flexible athletic program in an environment that encourages gender equity. The athletic program will provide a developmental level to nurture newly created teams and then promote the teams to the varsity level within a required timeframe. For this to occur athletic departments must become more financially sound. Obviously, if a university must increase the number of women's teams due to the interests and abilities of its students, money will be needed to achieve this goal. Plans, such as reducing the football team size and scholarship awards to 75 and instituting a spending cap for football and men's basketball, would help free-up existing money to be used for other athletic expenditures such as the creation of new women's teams. For plans limiting expenditures to become a reality it will take some changes being made not only by individual universities, but also by NCAA members. By actively addressing the issue of gender equity through the measurement of students' interests and abilities the university is taking a proactive step to achieving Title IX compliance. Through the implementation of the alternative model, universities could move toward gender equity by measuring the interests and abilities of female students and becoming compliant with Title IX.

## VIII. CONCLUSION

Nearly three decades ago the need for gender equity was recognized and Title IX was passed, however, the goal of achieving gender equity still remains. Great strides have been made to provide women with the same opportunities allowed to men, however, intercollegiate athletic participation lags behind. Universities must recognize the importance of achieving gender equity and work to become Title IX compliant. The NCAA must require that all member institutions meet a stringent level

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108. Shook, *supra* note 13, at 804.

109. *Cohen*, 991 F.2d at 898.

of gender equity and adopt cost reducing plans to create financially stable athletic departments. A progressive alternative model for satisfying Title IX compliance can be established to measure the interests and abilities of female students. The results could be that gender equity is achieved more quickly than relying on the increase in substantial proportionality caused by increases in female attendance at college. Conversely, on campuses with limited female interest in participating in collegiate athletics, universities would be justified in reducing the opportunities for women. Regardless of the outcome, by adopting these changes the goal of achieving gender equity established by Title IX can finally be fulfilled.

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