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NOTES

Substantial Proportionality Not Required: Achieving Title IX Compliance Without Reducing Participation in Collegiate Athletics

BY MARK HAMMOND*

INTRODUCTION

Title IX of the Education Amendments of 1972 was originally intended to prevent sex discrimination and promote equal opportunity in educational programs and activities that receive federal funding. Through the years, the focus of Title IX has shifted to intercollegiate athletics, resulting in an incredible array of new opportunities for women. Athletic expenses have increased as fast as the opportunities for women in intercollegiate athletics; however, as budgets tighten, the ability of colleges to add athletic opportunities for men and women has diminished. Thus, a conflict exists in today’s world of intercollegiate sports between income constraints and achieving complete equality of opportunity. Title IX advocates are demanding strict compliance with the components of Title IX, but developing new sports teams costs money that athletic departments do not have. Instead of adding women’s sports,

* J.D. expected 2000, University of Kentucky.
3 See infra notes 20-22 and accompanying text.
4 See Deborah L. Rhode, Despite Title IX, Double Standard Still Persists, NAT’L L.J., May 25, 1998, at A19; see also Denise K. Stellmach, Note, Title IX:
institutions are eliminating men’s sports in an attempt to offer equal opportunities for both sexes.\(^5\)

The decision by many colleges and universities to eliminate men’s sports comes after consistent rulings against universities in Title IX litigation.\(^6\) This litigation has both prevented universities from dropping women’s sports and forced the addition of women’s squads in times of economic crisis.\(^7\) Additionally, Title IX advocates have successfully fought reverse discrimination suits that alleged Title IX was being incorrectly enforced as an affirmative action statute.\(^8\)

Judicial interpretation of Title IX requirements has resulted in the nearly universal solution of meeting Title IX by dropping men’s sports.\(^9\) Courts have focused on requiring equal proportions of male and female athletes instead of focusing on whether a university has effectively met the interests of the student body.\(^10\) Title IX clearly was not intended to improve only the proportion of athletes who are female by way of dropping men’s sports.\(^11\)

In order for Title IX to succeed in the future, universities and courts must find a way to increase the overall number of opportunities for women and stop basing Title IX’s success on a comparison of women’s athletic opportunities to men’s athletic opportunities. Eliminating men’s sports at universities across the nation while women’s sports remain at status quo does not help either sex when overall participation drops. This result was surely not the goal of Title IX’s drafters.

The courts, however, are not entirely to blame for the current ineffectiveness of Title IX. A look at the budgets of athletic departments across the nation shows a systematic mismanagement of funds, resulting in many schools lacking the revenue needed to create and fund new and existing sports.\(^12\) Institutions can move toward meeting the requirements of Title IX

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\(^5\) See *infra* notes 112-20 and accompanying text.

\(^6\) See *Aronberg, supra* note 2, at 772 n.214 (discussing the major cases that apply Title IX to athletics).

\(^7\) See, e.g., *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993).

\(^8\) See, e.g., *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994).

\(^9\) See *infra* notes 112-21 and accompanying text.


\(^11\) See *Aronberg, supra* note 2, at 747.

\(^12\) See *infra* notes 141-53 and accompanying text.
if the court system enforces Title IX as originally intended and athletic departments cut unnecessary spending within their departments.

This Note examines the attempts of both the court system and universities to interpret, enforce, and comply with Title IX. Part I of the Note outlines the evolution of Title IX since its inception and the federal court decisions that have interpreted and enforced Title IX requirements. Part II examines how the courts’ frequent interpretation of Title IX, effectively as an affirmative action statute, is contrary to the actual intent of the statute. Part III details how some universities’ spending habits prevent compliance with Title IX. Lastly, Part IV analyzes how a different interpretation of Title IX and improved athletic spending habits could result in increased participation for women without the loss of men’s sports.

I. THE EVOLUTION OF TITLE IX

A. The History of Title IX and the Requirements Imposed

A brief summary of the history of Title IX and its requirements is necessary to recognize the current problems with Title IX enforcement. Title IX first came into the spotlight in 1972 when the Education Amendments to the Civil Rights Act of 1964 were passed. Title IX of those Education Amendments states in part: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or subjected to discrimination under any education program or activity receiving Federal financial assistance.” This amendment basically prohibits sex-based discrimination in any education program or activity receiving federal financial assistance. Because nearly all colleges and universities benefit from federal funding, they must comply with the requirements of Title IX.

The adoption of Title IX in 1972 had an immediate impact on women’s athletic participation in terms of growth. By 1998, the number of female high school student-athletes had grown from 300,000 to more than two

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13 See infra notes 17-90 and accompanying text.
14 See infra notes 91-130 and accompanying text.
15 See infra notes 131-53 and accompanying text.
16 See infra notes 154-66 and accompanying text.
18 Id. § 1681(a).
19 But see infra notes 60-63 and accompanying text.
Similarly, participation in women's college sports increased from 32,000 in 1972 to 150,000 in 1983. Additionally, the number of universities that offered scholarships for women's sports jumped from sixty in 1974 to five hundred in 1981. These increases in participation and opportunities mostly came after the Department of Health, Education and Welfare ("HEW") formulated specific regulations in 1975 intended to enforce Title IX on campuses around the nation. These regulations were a response to complaints that Title IX was too vague. Before these regulations were imposed, universities were unable to ascertain whether Title IX applied to intercollegiate athletics.

The regulations imposed by HEW in 1975 specifically stated that Title IX did apply to intercollegiate athletics. The most notable section of requirements demanded equal opportunity for both sexes. In deciding whether universities were offering equal opportunity, HEW provided a list of ten factors for consideration. At the top of this list is what is known as the "interests and abilities" factor. This factor is currently the most important area of inquiry and asks "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." HEW gave schools a maximum of three years to comply with Title IX or face being stripped of federal funding.

Despite the regulations, HEW continued to receive numerous complaints regarding how vague the requirements actually were. These complaints probably were a result of the minimal legislative history.

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22 See id.
25 See id.
26 See 34 C.F.R. §§ 106.37, 106.41.
27 See id. § 106.41(c).
28 See id. § 106.41(e)(1)-(10).
29 Id. § 106.41(e)(1).
30 Id.
available regarding Title IX’s application to athletics.\(^{32}\) In fact, sports were mentioned only twice throughout the congressional debate on Title IX.\(^{33}\)

Because of the continued confusion among university officials, the Department of Education’s Office of Civil Rights (“OCR”) issued a “Policy Interpretation” of Title IX in 1979.\(^{34}\) The Policy Interpretation was specifically aimed at intercollegiate athletics.\(^{35}\)

Based on the Policy Interpretation, compliance with Title IX requires that: (1) athletically related financial assistance be allocated in proportion to the numbers of male and female students participating in intercollegiate athletics;\(^{36}\) (2) all other benefits, opportunities, and treatment afforded participants of each sex be equivalent;\(^{37}\) and (3) the interests and abilities of students be effectively accommodated to the extent necessary to provide equal athletic opportunity for members of both sexes.\(^{38}\) The major goal of the Policy Interpretation was no different than that of the 1975 HEW regulations; both sought to “effectively accommodate the interests and abilities of . . . both sexes” by expanding the athletic opportunities available to women.\(^{39}\)

The Policy Interpretation of 1979 has become the cornerstone of a substantial portion of Title IX litigation. Specifically, the third requirement calling for effective accommodation of interests and abilities for both sexes is seen as the major step towards Title IX compliance.\(^{40}\) In deciding whether this requirement has been met, the Policy Interpretation set out yet another three-part test.\(^{41}\) This internal test has been dubbed the “effective

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\(^{32}\) See Aronberg, supra note 2, at 754.

\(^{33}\) See Courtney W. Howland, Note, Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX, 88 YALE L.J. 1254, 1255 n.11 (1979).

\(^{34}\) The Department of Education assumed responsibility for educational matters after HEW was split into two agencies by Congress. The OCR was assigned the duty of Title IX administration and is currently the enforcement agency for Title IX. See Shook, supra note 24, at n.12.


\(^{36}\) See id. at 71,415.

\(^{37}\) See id. at 71,415-17.

\(^{38}\) See id. at 71,417-18.


\(^{40}\) See id.; Policy Interpretation, 44 Fed. Reg. at 71,415.

\(^{41}\) See Bernardo, supra note 10, at 317. The author describes the requirement that universities effectively accommodate the interests and abilities of both sexes as “the ‘heartland’ of equal opportunity.”

\(^{42}\) See Policy Interpretation, 44 Fed. Reg. at 71,418.
accommodation test and requires a university to meet any one of the following 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, 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.

This effective accommodation test and its three prongs have been the focal point for federal appellate courts in Title IX litigation. The first prong of the test, requiring "substantial proportionality," provides institutions with a so-called "safe harbor" for compliance because opportunities for females are obviously accommodated if they are proportionate to the percentage of females on campus. "Substantial proportionality" has become the focus of Title IX controversy because it mandates sex quotas based on the percentage of students from each sex at the school in question. However, it is important to point out that institutions need not meet the first prong of the effective accommodation test if they can meet one of the other two prongs of the test.

Title IX opponents, though, are quick to point out that the last two prongs of the effective accommodation test are both infeasible. These

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43 See generally Bernardo, supra note 10, at 317-18 (discussing the effective accommodation test components).
45 See, e.g., Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993) (stating that both parties cited effective accommodation as the area that the appeal contested).
46 See id. at 897-98.
47 See id. at 898.
48 See id.
49 See Aronberg, supra note 2, at 786.
opponents of Title IX argue that the court system focuses on "substantial proportionality."\(^5\) They feel that the third prong of the test basically restates the first prong's mandate for sex quotas and the second prong is not reachable for any school. This leaves the test, as a whole, a standard of affirmative action.\(^5\)

**B. Developments in Title IX Litigation**

Two United States Supreme Court cases opened the door to more frequent Title IX litigation in the 1990s. First, in the 1979 case *Cannon v. University of Chicago*,\(^5\) the Supreme Court held that although there is no express statutory provision empowering a private party to bring suit to enforce Title IX, there is an implied private right of action in the statute to bring such a suit.\(^5\) Later, in *Franklin v. Gwinnett County Public Schools*,\(^5\) the Supreme Court held that a private party could collect monetary damages where the violations of Title IX are intentional.\(^5\) These two cases allowed enforcement of Title IX through the court system (as opposed to filing a complaint with the OCR)\(^5\) and permitted awards of monetary relief in addition to any injunctive relief.\(^5\)

Many violations of Title IX have undoubtedly been enforced through out-of-court settlements.\(^5\) This allows many schools to save face rather than go through a lengthy, expensive, high-risk litigation process. Meanwhile, those schools which have challenged Title IX complaints in court have consistently lost.\(^5\)

The sole victory for Title IX opponents came in 1984 in *Grove City College v. Bell*.\(^6\) In that case, the Supreme Court held that Title IX was "program-specific" and did not apply to programs that did not actually receive federal funds.\(^6\) Thus, Title IX did not apply to most athletic

\(^{50}\) *See id.*
\(^{51}\) *See id.*
\(^{53}\) *See id.* at 677.
\(^{55}\) *See id.* at 60.
\(^{56}\) *See Cannon*, 441 U.S. at 688-89.
\(^{57}\) *See Franklin*, 503 U.S. at 60.
\(^{59}\) *See, e.g.*, *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993).
\(^{61}\) *See id.* at 574.
programs even though the university received federal funds. This ruling was contrary to some Title IX supporters' view that the amendment applied institution-wide and all programs at universities that received federal funds were to be held accountable.

However, the victory Title IX opponents realized in Grove City College v. Bell was short-lived. Congress disagreed with the Supreme Court's limited interpretation of Title IX and passed the Civil Rights Restoration Act of 1987. This act reversed the holding in Grove City College v. Bell and stated that "the term 'program or activity' and 'program' mean all of the operations of . . . a college, university, or other post-secondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance." Thus, Title IX once again applied to intercollegiate athletics. The Civil Rights Restoration Act of 1987 led to both court-imposed and voluntary actions by universities in their attempts to comply with Title IX. This movement was especially difficult for those institutions who had cut women's programs in the wake of Grove City College v. Bell.

Three federal appellate court decisions have set the judicial standard for Title IX compliance. The first and most prominent of these cases is Cohen v. Brown University. Amy Cohen brought suit in response to a Brown University decision to eliminate the women's volleyball and gymnastics teams. The appellate court, applying the effective accommodation test set out in the OCR's Policy Interpretation of 1979, determined that Brown University had failed to comply with Title IX. The primary controversy with the Cohen decision is the court's application of the third prong of the effective accommodation test. This portion of the test asks whether the university fully accommodates the interests and abilities of each sex. The court rejected Brown University's argument that this prong of the effective accommodation test is met where an institution provides

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62 See id.
63 See id.
65 Id.
66 In Craig Neff, Equality at Last, Part II, SPORTS ILLUSTRATED, Mar. 21, 1988, at 70, 71.
68 See id. at 888.
69 See id. at 896-99.
70 See supra note 38 and accompanying text.
athletic opportunities to women that reflect "the ratio of interested and able women to interested and able men, regardless of the number of unserved women or the percentage of the student body that they comprise."71 Instead, the third prong of the effective accommodation test was said to be a high standard demanding universities to provide full and effective accommodation where interest and ability exist to "‘sustain a viable team and a reasonable expectation of intercollegiate competition for that team.’"72 The controversy surrounding the third prong of the effective accommodation test is discussed in detail in Part II.

The second federal case, *Favia v. Indiana University of Pennsylvania,*73 was also important in regards to the application of the OCR’s Policy Interpretation. The federal court in *Favia* held that the institution’s decision to disband the women’s field hockey and gymnastics teams violated the requirements of Title IX.74 This case was especially important in that it "was the first federal court decision to expressly apply any provision of the Policy Interpretation to a Title IX claim in the college sports context."75

The third federal case that helped mold the court system’s interpretation of Title IX was *Roberts v. Colorado State Board of Agriculture.*76 In *Roberts,* the United States Court of Appeals for the Tenth Circuit, interpreting the effective accommodation test, found that Colorado State University’s elimination of the women’s softball team violated Title IX.77 Once again, a court applied the three-prong test described in the OCR’s Policy Interpretation.78 The *Roberts* decision also maintained that an institution cannot show a history of expanding opportunities for women (prong two of the effective accommodation test) by making cuts in both the

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71 *Cohen,* 991 F.2d at 899 (emphasis omitted).
72 *Id.* at 898 (quoting Policy Interpretation, 44 Fed. Reg. 71,418 (1979)).
73 *Favia* v. Indiana Univ. of Pa., 812 F. Supp. 578 (W.D. Pa.), aff’d, 7 F.3d 332 (3d Cir. 1993).
74 *See id.* at 584.
76 *Roberts* v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993).
77 *See id.*
78 *See id.* at 828-29.
men's and women's sports programs. This particular ruling mirrored a similar decision in Favia.80

Reverse discrimination suits brought by male athletes whose teams were disbanded have been universally rejected by the courts.81 In Gonyo v. Drake University, a United States District Court held that the elimination of the men's wrestling program did not constitute sex discrimination in violation of Title IX where the current athletic opportunities for men were proportionately greater than those offered to women.82

Similarly, in Kelley v. Board of Trustees, the Seventh Circuit held that the University of Illinois did not violate Title IX.83 In that case, the university eliminated the men's swimming team while retaining the women's swimming team.84 The court held that where men's participation in athletics was more than substantially proportionate to their enrollment, Title IX cannot be violated in regard to disbandment of a men's team.85 Both of these reverse discrimination cases show the court's reliance on the effective accommodation test adopted by the OCR's Policy Interpretation.

One of the most recent federal decisions has actually given hope to Title IX opponents who disagree with the current application of the effective accommodation test. In Pederson v. Louisiana State University,86 a United States District Court rejected the conclusion of other courts that substantial proportionality alone was a "safe harbor" for Title IX compliance.87 The court in Pederson held Louisiana State University in violation of Title IX, but stated that

it seems much more logical that interest in participation and levels of ability to participate as percentages of the male and female populations will vary from campus to campus and region to region and will change with time. To assume, and thereby mandate, an unsupported and static

79 See id. at 839.
80 See Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 585 (W.D. Pa.), aff'd, 7 F.3d 332 (3d Cir. 1993).
81 See, e.g., Kelley v. Board of Trustees, 35 F.3d 265 (7th Cir. 1994); Gonyo v. Drake Univ., 837 F. Supp. 989 (S.D. Iowa 1993).
82 See Gonyo, 837 F. Supp. at 989.
83 See Kelley, 35 F.3d at 265.
84 See id.
85 See id. at 271.
87 See id.
determination of interest and ability as the cornerstone of the analysis can lead to unjust results.\textsuperscript{88}

For many Title IX opponents, this statement provided promise that interpretation of the effective accommodation test will move away from sole analysis of "substantial proportionality" and sex quotas.\textsuperscript{89} Instead, Title IX analysis should include a determination of whether an institution accommodates an equal percentage of interested athletes who have the ability to participate.\textsuperscript{90} Discussion of this case and its relevance continues in Part II of this Note.

\section*{II. The Courts' Interpretation of Title IX}

The attempts by universities across the nation to meet Title IX come in direct response to the judicial reading of the Policy Interpretation released by the OCR. For those schools who have attempted to meet Title IX, the most common reaction to litigation has been the elimination of men's sports.\textsuperscript{91} Title IX either has not yet been taken seriously by institutions or has been seen as infeasible for most of the schools that have

\textsuperscript{88} Id. at 913-14 (rejecting reliance on the substantial proportionality prong of the effective accommodation test).

\textsuperscript{89} See, e.g., Aronberg, \textit{supra} note 2, at 801 (describing how the decision in \textit{Pederson} was a "stinging rebuke of the proportionality test" that "capitalized on, and added to, the anti-quota momentum building in the courts and Congress").

\textsuperscript{90} See Maureen E. Mahoney, \textit{The Numbers Don't Add Up So Says a Lawyer for Brown, Which Is Fighting to Ensure Title IX Benefits for All Students}, \textit{Sports Illustrated}, May 5, 1997, at 78, 78 [hereinafter Maureen E. Mahoney, \textit{The Numbers Don't Add Up}]. The writer, an attorney for Brown University, fully explains the university's disagreement with the court's emphasis on substantial proportionality.

not disbanded men’s teams. This is clearly based on the low proportion of female athletes at most institutions.92

A. Interpretation of Title IX in Cohen v. Brown University

The basic interpretation of Title IX was rendered in Cohen v. Brown University.93 As previously discussed, the first prong of the effective accommodation test requires that “participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.”94 This part of the test clearly requires quotas for each sex, but is only a “safe harbor” for institutions.95 If opportunities are proportionate, then there is obviously no discrimination of opportunity and “extensive compliance analysis” is not necessary.96 However, “substantive proportionality” need not be attained by an institution if either prong two or three of the effective accommodation is met.97

Prong two of the effective accommodation test allows those universities that are “continually expanding athletic opportunities in an ongoing effort to meet the needs of the underrepresented gender” to meet Title IX even though proportionality is not attained.98 This prong of the test cannot be met, however, by dropping men’s teams.99 This requirement makes prong two of the test futile for institutions that are looking to lower athletic expenditures.

Prong three of the effective accommodation test requires an assessment as to whether there has been need or expressed interest to form a new team by the underrepresented sex.100 At first glance, this looks to be the most

92 Women account for 52% of enrollment at Division I colleges but make up only 37% of the athletes. See Karen Dillon, NCAA Certification Program Does Little to Improve Gender Equity (visited Apr. 7, 1999) <http://www.kcstar.com/ncaa/part5.html>.

93 Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993) (“[A]n institution that offers women a smaller number of athletic opportunities than the statute requires may not rectify that violation simply by lavishing more resources on those women or achieving equivalence in other respects.”).


95 See Cohen, 991 F.2d at 897.

96 See id. at 897-98.

97 See id. at 898.

98 Id.

99 See supra notes 79-80 and accompanying text.

100 See Cohen, 991 F.2d at 898.
attractive prong of the test for an institution attempting to meet Title IX requirements. Considering the popular belief by many that females are less interested in sports than males, a university likely would not have to develop a new team unless sufficient interest existed. However, the court in Cohen acknowledged that the "third benchmark of the accommodation test . . . sets a high standard." The standard is high because this prong of the test does not allow compliance based on satisfying equal proportions of interested and able athletes from each sex, as argued by Brown. The Cohen court made this clear when it stated that:

Brown reads the "full" out of the duty to accommodate "fully and effectively." It argues instead that an institution satisfactorily accommodates female athletes if it allocates athletic opportunities to women in accordance with the ratio of interested and able women to interested and able men, regardless of the number of unserved women or the percentage of the student body that they comprise.

Meeting prong three of the test is impossible for schools that do not meet substantial proportionality, considering the Cohen court refused to distinguish between prongs one and three of the effective accommodation test. The interests and abilities of the underrepresented sex cannot be "fully and effectively accommodated" because of the existence of a lawsuit filed in response to cutting a women's sport. Additionally, the example presented by the court in Cohen makes it clear that an equal number of opportunities for both sexes must be available for a school to meet the third prong of the test. This interpretation of the "full and effective accommodation" requirement makes it identical to the "substantial proportionality"

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101 See Maureen E. Mahoney, The Numbers Don't Add Up, supra note 90, at 78 (pointing out that men outnumber women eight to one in Brown's intramural program and approximately 60% of students who want to play varsity sports are men).

102 Cohen, 991 F.2d at 898.

103 See id. at 899.

104 Id. (emphasis omitted).

105 See Aronberg, supra note 2, at 786-88 (analyzing how the third prong of the effective accommodation test is "nearly invisible").

106 Id. at 787 (citing Policy Interpretation, 44 Fed. Reg. 71,418 (1979)).

107 See Cohen, 991 F.2d at 899. The example the court analyzed involved the hypothetical "Oooh U." where 500 men and 250 women are able and interested athletes. See id.
requirement. Thus, the *Cohen* court has effectively read prong three out of the effective accommodation test. Considering that prong two of the test is not likely to be met, as the *Cohen* court readily admitted, this interpretation of the effective accommodation test makes Title IX a de facto affirmative action statute. The court in *Cohen* virtually admitted as much by supporting its argument with the statement: "It is clear that Congress has broad powers under the Fifth Amendment to remedy past discrimination."

**B. The Cohen Interpretation Has Failed**

The court in *Cohen v. Brown University* rationalized its call to accommodate women at a higher rate by arguing that schools cannot accurately survey the interests of women on campus because of the continuing increase in the interest women have in intercollegiate athletics. Additionally, the court argued that the interpretation sought by Brown University would make the test complicated and difficult to enforce.

Based on many of the statistics regarding Title IX, it would seem that women need all of the Title IX protection courts can give them. It is estimated that "women account for more than half of the undergraduate student body but only about a quarter of athletic operating expenses and recruiting dollars." However, judicial interpretation of Title IX has not resulted in increased opportunities for women but merely a continued elimination of men's sports. This elimination allows schools to meet the "substantial proportionality" prong of the effective accommodation test. Schools see this prong of the test as their only chance to comply with Title IX. The latest instance came at Providence College in October 1998. In order to comply with Title IX, Providence decided to drop its men's

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108 *See id.* at 898.
109 *Id.* at 901.
110 *See id.* at 900; *see also* Roy Whitehead, Jr. et al., *Gender Equity in College Athletics After Brown and Louisiana State: Why the Big Boys Are Crying*, ARK. LAW., Winter 1997, at 10, 15.
112 *See* Rhode, *supra* note 4, at A19.
113 *Id.*
114 *See* Shook, *supra* note 24, at 793-95.
baseball, golf, and tennis teams. The action taken by Providence College followed similar occurrences at the University of Cincinnati, the University of Louisville, New Mexico State University, and hundreds of other schools across the nation. As previously mentioned, elimination of men's teams allows universities to become "substantially proportionate" but does not result in increased opportunities for women.

In addition to not improving the number of opportunities for women, the current judicial interpretation of Title IX is contrary to the intent of Title IX's framers. In fact, Title IX contains a subsection that reads:

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

This provision of Title IX clarifies that the original intent of the amendment was not affirmative action or sex quotas. Additionally, comments made by Senator Birch Bayh, who originally sponsored the amendment in 1971, make it obvious that Title IX contains no ambiguity in regard to the issue of quotas. Senator Bayh stated that "[t]he amendment is not

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116 See id.
117 The University of Cincinnati decided to disband its men's tennis, indoor track, and coed rifle teams in May 1998. See id.
118 The University of Louisville announced that it would drop men's indoor track. See id.
119 New Mexico State University announced that it would disband its men's track and swimming teams. See id.
120 See supra note 91 and accompanying text.
121 See supra note 114 and accompanying text.
122 See, e.g., Donald C. Mahoney, Note and Comment, Taking a Shot at the Title: A Critical Review of Judicial and Administrative Interpretations of Title IX as Applied to Intercollegiate Athletic Programs, 27 CONN. L. REV. 943, 954 (1995) [hereinafter Donald C. Mahoney, Taking a Shot at the Title].
124 See Donald C. Mahoney, Taking a Shot at the Title, supra note 122, at 945-46.
designed to require specific quotas . . . What we are saying is that we are striking down quotas. The thrust of the amendment is to do away with every quota.”125 Clearly, Title IX was not intended to be applied as it is today.

C. Moving Away from “Substantial Proportionality”

The decision in Pederson v. Louisiana State University126 shows that at least one court has rejected the Cohen reliance on substantial proportionality. In Pederson, the court dismissed previous decisions that relied upon proportionality and stated that “[c]easing the [Title IX] inquiry at the point of numerical proportionality does not comport with the mandate of the statute.”127 The Cohen court’s analysis of Title IX compliance does not consider that the interest level of male and female students on a single campus may not be equal.128 By requiring statistical equality of opportunity, courts are dismissing the chance an institution has to offer those opportunities to interested students. Allowing Title IX compliance through analysis of campus interests would translate into more opportunities for a sex if the interested and able athletes of that sex are not equally accommodated. As women’s interests in sports continue to increase, this could mean more opportunities for women than men on some campuses or vice versa if female interest in sports is low on a certain campus. The current Title IX analysis, however, is an easy way out for the court system and does not consider the clear intent of the original amendment.

Officials at all universities have the resources to determine the athletic interests and abilities of their student bodies. This determination can be accomplished through questionnaires and interviews of students, coaches, and administrators; analysis of current participation in intramural, club, or interscholastic sports; and through requests by students to add a particular sport. By determining the interests and abilities on their own campuses, schools can then shape their athletic programs based on their particular needs. The court in Pederson said it best: “[T]his Court will not join in assuming that athletic directors in this country are incapable of meeting the burden of Title IX and its regulations which incorporates a knowledge regarding their student body, effective analysis of and meeting students’

125 Id. (quoting 117 CONG. REC. 30,409 (1971) (emphasis omitted)).
127 Id. at 914.
128 See id. at 913; see, e.g., Whitehead, Jr. et al., supra note 110, at 40.
needs, and filling those needs in a non-discriminatory fashion.”129 The current interpretation of Title IX does not provide equal opportunity; it provides preferential treatment for one sex in situations where an institution may already effectively meet the interests and abilities of both sexes. “Women don’t have to have 50% of the varsity positions to succeed as athletes. They need equal opportunity, and you don’t get that from a numerical formula.”130

III. ATHLETIC DEPARTMENT SPENDING HABITS

Judicial interpretation of Title IX is not the sole cause of the continued elimination of men’s sports by universities or their failure to comply with the requirements of Title IX. Even if courts interpreted Title IX according to the original intent of the legislature, a mismanagement of funds by many athletic departments would prevent improvement in these two problematic areas. By continually overspending on certain sports, institutions have made maintaining the current number of teams and meeting Title IX requirements virtually impossible.131

The revenue earned at Division I institutions around the nation is, without a doubt, substantial. “In the last twenty-three years, the NCAA’s total revenues have increased by over 8,000 percent.”132 The latest tally showed the NCAA giving back $165.6 million to member schools.133 Much of the current rise in revenues is due to the record-high television contract that the NCAA negotiated for men’s basketball games. Currently, CBS is under contract to broadcast men’s basketball games through the year 2002 for an astounding $1.725 billion.134 This contract is larger than any other single professional sports league deal with any network.135 Television contracts certainly are not the only reason for a rise in NCAA revenue. “This decade alone corporate sponsorships are on a pace to increase

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129 Pederson, 912 F. Supp. at 914 (emphasis omitted).
130 Maureen E. Mahoney, The Numbers Don’t Add Up, supra note 90, at 78.
131 See Mike McGraw et al., Money Games Inside the NCAA: Revenues Dominate College Sports World, KAN. CITY STAR, Oct. 5, 1997, at A1; see also Porto, supra note 75, at 385-88 (describing how colleges return most proceeds to the sports that produce the revenue).
134 See id.
sevenfold . . . “136 Thanks in part to corporate sponsors, college sports generate almost $2 billion in annual revenue for Division I institutions.137 This number has been estimated to be twice the amount given by the Department of Defense to colleges for research.138 Additionally, ticket sales and licensing are major sources of income for many schools. At the University of Nebraska, the athletic program earned $11.3 million from football ticket sales and $2 million from licensing in 1997.139 These numbers are only one indicator of how collegiate sports have turned into big business. The most important statistic may be that the average Division I-A college makes more than $4 million annually on men’s basketball and football.140

“Despite rising revenues, most athletic programs in Division I and Division II continue to lose money . . . “141 Only twenty athletic programs in Division I currently make a profit, and this is up from eleven in 1995.142 The obvious reason is that revenues are not rising as quickly as expenses.143 The University of Michigan leads the way in total athletic expenses at $36,302,000.144 The University of Florida, Ohio State University, the University of Tennessee, and the University of Nebraska are not far behind.145 In total, athletic costs have soared ninety percent in the last five years.146 Even the huge revenue increase is not enough to offset such lavish spending. In 1995-96, Division I schools had athletic deficits totaling $245 million.147

Analysis of expenditures at many schools reveals that athletic departments simply are spending too much on unneeded expenses. At the University of Nebraska, the athletic department “paid $1.7 million to send 730 coaches, athletic administrators, the board of regents, spouses, children, the marching band and 160 players–97 of whom didn’t play–to

136 Id.
137 See id.
138 See id.
139 See id.
140 See id.
142 See id.
143 See id.
145 See id.
146 See McGraw et al., supra note 131, at A1.
147 See id.
Florida [for a men's football bowl game]. More than 300 Huskers stayed for at least ten days. Travel expenses are similar for the University of Kansas football team. The athletic department there spent $47,000 in 1996 to put the team up in a hotel for home football games. Similarly, the University of Clemson athletic department spent $1.6 million from 1990 to 1995 to buy out the contracts of two former head football coaches.

The examples presented here characterize the mismanagement of funds found in athletic departments across the country. The incredible revenue earned is spent on hotel accommodations, locker rooms, indoor training facilities for one sport, video equipment, and meeting facilities. These expenditures often serve only the sport that produces revenue. In fact, one study showed that for every dollar in revenue earned by sports like football and basketball, only five cents is spent on nonrevenue sports. This proves that nonrevenue sports are not supported by those that make money. Instead, revenue is spent excessively on the same sport that earns the revenue. This practice prevents institutions from funding new women’s teams and maintaining the nonrevenue men’s teams that already exist. Instead, athletic officials have decided that they cannot be outspent in the on-going pursuit and preservation of recruits, current players, and coaches. As other schools spend more, a recruiting competition is created where there is no winner, only a spending farce that never ends. This spending is aimed at pleasing alumni and maintaining or developing a winner on the playing field at literally all costs. These spending habits prevent institutions from providing new opportunities for both sexes while also maintaining their current teams.

IV. MAKING TITLE IX AN EFFICIENT AMENDMENT

The current judicial interpretation of Title IX and the common university reaction to this interpretation make it clear that Title IX is not
being enforced effectively today. In effect, courts have interpreted Title IX as an affirmative action amendment, and many colleges have decided to meet Title IX requirements by disbanding men’s teams. This was not the result that Title IX’s framers intended. In order to convert Title IX into an efficient amendment, our court system must cease its affirmative action interpretation of Title IX. In addition, our nation’s universities must learn to manage athletic revenues more efficiently and shift more funds to nonrevenue teams. These changes could very well result in higher participation rates among female athletes, and yet not come at the expense of male athletes.

The interpretation of Title IX that is favorable to all parties was described best by the attorneys for Brown University in *Cohen v. Brown University*. This interpretation stands for the belief that “equal opportunity can be afforded [by colleges and universities] through a broad array of teams that reflect the relative interests and abilities of both sexes.” It is important to emphasize that this interpretation of Title IX will aid nonrevenue men’s teams that would otherwise be dropped because of the “substantial proportionality” requirement.

This alternate interpretation of Title IX will not be effective unless universities make a commitment to spending money on nonrevenue teams. The most effective method for shifting revenue towards nonrevenue sports is enforcing a spending cap on revenue sports, which will be a very tough task for supporters of nonrevenue teams. A spending cap plan could be initiated by either the NCAA or an individual institution. Undoubtedly, the revenue earned by most schools will continue to increase as the nation’s infatuation with collegiate sports grows. By capping the amount of expenses allowed for an individual sport, an institution will be forced to spend carefully and shift funds to nonrevenue sports. This result will force colleges to recognize the inefficiency in disbanding men’s teams and providing facilities that can be utilized by only one sport. As women continue to show more interest in sports (and the myth regarding women’s lack of interest in sports is dispelled), funds must be spent on providing more opportunities for women. Otherwise, Title IX cannot be satisfied under any interpretation.

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154 *See supra* notes 9-11, 112-21 and accompanying text.  
155 *See supra* notes 122-25 and accompanying text.  
157 Maureen E. Mahoney, *The Numbers Don’t Add Up*, *supra* note 90, at 78. For further discussion, see *supra* Part II.  
158 One commentator has noted that before Title IX was enacted “fewer than one in 20 high school girls participated in sports . . . . Now the ratio is one in three.”
One university has already initiated plans enabling it to comply with the requirements of Title IX. At the University of Kansas, school officials decided four years ago to begin efforts to comply with Title IX. In 1996, "women made up 49 percent of all students and 47 percent of [the] athletes" at the University. The answer to the Title IX dilemma at Kansas was increased spending on nonrevenue sports. Instead of shifting money away from revenue sports, the university found donors willing to aid women's sports. Athletic director Bob Frederick stated that the university was not going to sacrifice its existing athletic programs but was "going to find a way to come up with the extra revenue to meet the challenge." He added that many people were interested in helping women's sports, but a lot of people had not been asked. Kansas used the donated funds to build both an $8 million athletic sports complex (with male and female facilities) and a women's soccer field and to renovate the women's basketball locker room. Other schools have made similar leaps toward achieving sex equity, but these gains have come at the expense of male athletes.

CONCLUSION

Over the last three decades, Title IX has enabled more women to participate in collegiate athletics than ever before. Recently, as budgets have tightened, colleges have chosen to meet the requirements of Title IX by cutting nonrevenue men's sports and leaving the number of women who participate at the status quo. This result does not satisfy the intentions of Title IX's framers. The original intent of Title IX was to increase female

Rhode, supra note 4, at A19. Another source reports that "58 percent of Americans believe female college students have as much as or more interest in sports than male students. Another study says nine out of 10 girls expect to play sports as adults." Karen Dillon, Women Coaches Finish Second, KAN. CITY STAR, Oct. 9, 1997, at A21, available in 1997 WL 3026912.


160 See id.

161 See id.

162 See id.

163 See id.

164 See id.

165 See id.

166 See id. This author describes the attempts made by Washington State University and Michigan State University to comply with Title IX by disbanding nonrevenue men's teams.
participation in sports, among other activities, based on the interests and abilities that exist on an individual campus. Unfortunately, our court system has chosen to enforce Title IX as an affirmative action amendment. Collegiate institutions have compounded this judicial problem by spending funds recklessly. This careless spending comes at a time when sports revenues are at an all-time high. By interpreting Title IX as originally intended and spending money more efficiently, Title IX can require colleges to satisfy the interests and abilities of their students.