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# TITLE IX: PROBLEMS WITH LITIGATION ANALYSIS

*Bibek Das*

## INTRODUCTION

Since the inception of Title IX of the Education Amendments of 1972, [EN 1] a great deal of controversy and legal woes has arisen as a result of the amendment. Title IX was created to allow for growth in culture, skills, and ideals for both genders provided by equal opportunities in intercollegiate athletics. In addition, Title IX was also created to prevent further gender-related discrimination while providing equal opportunity for both genders in intercollegiate athletics. Although great strides have been made in creating equality in college athletics, in recent years questions have been raised as to the vitality of Title IX in creating opportunities while eradicating sexual discrimination. Issues have been raised as to the method the courts use in determining Title IX violations, as well as, whether Title IX is promoting a positive future for equality while maintaining athletic integrity. There have also been issues raised as to whether there can ever be a valid Title IX analysis that can co-exist with Men's Intercollegiate Football.

However, recently, the effectiveness of Title IX, when compared to the positive effects it had on women's sports during the 1970's, seems to have tailed off. Instead, today many will argue that Title IX only acts as a stopgap for further gender discrimination and fails to create the ideal equal opportunity.

This article will concentrate on recent Title IX litigation and the methods the court uses in evaluating a Title IX violation. Part II will focus on the history of Title IX through its creation and implementation. Part III will look at the method the current courts have been using in evaluating a Title IX violation by intercollegiate athletic programs. Part IV will take a closer look at recent benchmark cases under Title IX violations. Part V will concentrate on problems in current Title IX violation analysis. Part VI will center on remedies available to correct the problems in Title IX analysis.

## II. BACKGROUND

### *A. The Creation of Title IX*

Congress enacted Title IX of the Education Amendments of 1972 to prohibit sex discrimination in any educational program or activity that receives Federal funds. [EN 2] The underlying principle behind Title IX was that educational institutions should not use Federal funds to subsidize discrimination based on gender. [EN 3] The statute of Title IX clearly delineates 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 education program or activity receiving Federal financial assistance..."[EN 4] However, the statute itself neither clarified how Title IX would apply to intercollegiate athletics, nor did it specify the methods courts could use to evaluate, analyze, and determine Title IX violations.

In 1975, the Department of Health, Education, and Welfare ("HEW") [EN 5] published final regulations in applying the statute of Title IX to intercollegiate athletics. The first section of the regulations dealt with institutional awards for athletic scholarships. [EN 6] The published regulations provided that there needed to be reasonable opportunities for athletic scholarships for

members of both genders in proportion to the number of students of each gender participating in intercollegiate sports. [EN 7] In addition, a second section of the published regulations also dealt with "equal opportunity" provided for members of both sexes in intercollegiate athletics. [EN 8] However, these regulations were still unclear as to the application and methods of analysis for proper compliance of Title IX in litigation and the use of Title IX by the Courts.

Finally, in 1978, after issues and questions arose as to the application of Title IX to intercollegiate athletics, the HEW provided further guidelines as to what constituted proper compliance with the law under the Title IX Policy Interpretation. The purpose of the Policy Interpretation was to clarify the meaning of Equal Opportunity in college athletics. It contains the requirements prescribed by the Policy Interpretation of Title IX that are currently being used by the courts to evaluate and analyze an institution's compliance with Title IX under recent Title IX litigation.

### *B. Program-Specific v. Institution-Wide*

Despite the HEW guidelines, the courts, educational institutions, and legislatures still had a major issue to clarify about Title IX. This issue was whether Title IX had a broad institution-wide application or whether Title IX only applied to specific institutional programs. The courts had to determine whether Title IX only applied to specific programs receiving Federal funds ("program-specific"), or if it applied to all of the departments within an institution receiving some form of federal funds ("institution-wide"). [EN 9] The Policy Interpretation did not help resolve the disagreement among courts as to the scope of the statute. [EN 10] Until 1988, the judiciary remained divided on the issue of whether a "recipient" [EN 11] of funds meant a specific program or if it applied to the entire institution. [EN 12]

The courts in *Grove City College v. Bell* seriously tackled the issue of program-specific versus institution-wide application of Title IX. [EN 13] Grove City College was a private co-educational college that did not receive any direct Federal financial assistance except in the form of Basic Educational Opportunity Grants (BEOG's) that were given to enrolled students. [EN 14] The Court found that the Federal grants for the enrolled students brought Grove City College under the definition of "recipient" [EN 15] of Federal assistance. [EN 16] The Court held that the only program that received the Federal assistance was the Financial Aid Program and thus implemented a "program-specific" interpretation of Title IX. [EN 17] Therefore, no gender discrimination would be tolerated solely under the financial aid program at the college.

The Court's holding in *Grove City College* "effectively removed nearly every university athletic program from the purview of Title IX". [EN 18] As a result of this holding the Director of the Office of Civil Rights of the Department of Education ("OCR") [EN 19] was unable to fully investigate claims of alleged discrimination in intercollegiate athletics. [EN 20] In 1988, Congress remedied the problems created by the *Grove City College* holding by implementing the Civil Rights Restoration Act of 1987. [EN 21] Under this Act, Congress broadened the scope of Title IX, thus making it an institution-wide application of Title IX. [EN 22] The implementation of this Act opened the doors for complaints against universities for Title IX violations in their athletic programs. As a result, "the Act provided new support for Title IX litigation." [EN 23]

### III. METHOD OF EVALUATION OF TITLE IX LITIGATION

Since the passage of Title IX of the Education Amendments of 1972, [EN 24] there was little litigation in an attempt to create equal opportunities for women in intercollegiate athletics until the passage of the Civil Rights Restoration Act of 1987. However, in recent years there have been judicial decisions on women's athletics marked by three significant cases. These three cases are *Cohen v. Brown*, [EN 25] *Roberts v. Colorado State Univ.*, [EN 26] and *Favia v. Indiana Univ. of Pennsylvania*. [EN 27] All three of these cases involved gender discrimination through the elimination of women's varsity intercollegiate athletic programs. In each of these cases, the courts further determined a method of analysis for gender discrimination through the requirements established in the Policy Interpretation of Title IX. [EN 28] The three benchmarks, also known as the three-part test, for evaluation of gender discrimination under the Policy Interpretation under Title IX, as applied by the courts in Title IX litigation, are:

1. Whether intercollegiate (or interscholastic) level of participation opportunities for male and female students is provided in numbers substantially proportionate to their respective enrollments;
2. Where the members of one sex have been underrepresented among intercollegiate (or interscholastic) athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of that sex;
3. Where the members of one sex are underrepresented among intercollegiate (or interscholastic) 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. [EN 29]

These three benchmarks, (1) proportionality, (2) expansion, and (3) accommodation, of the Policy Interpretation are currently the main focus of Title IX litigation. As we will see, most of the courts dealing with Title IX litigation have become dependant on the three-part test of the Policy Interpretation.

### IV. BENCHMARK CASES IN TITLE IX LITIGATION

#### *A. Cohen v. Brown* [EN 30]

In May 1991, in an attempt to lower its budget, Brown University's athletic department demoted four varsity teams to club status. [EN 31] The University trimmed their budget, because there was less funding needed for club sports. [EN 32] These teams included women's volleyball, women's gymnastics, men's water polo, and men's golf. [EN 33] This action by the University directly affected the percentage of women that were involved in intercollegiate varsity sports. During the 1991-92 season, the percentage of women involved in varsity sports was 36.6% as opposed to the percentage of women enrolled in the undergraduate, which was 48.2%. [EN 34] In 1992, the members of both the women's volleyball and gymnastics filed a class action against

Brown to get a preliminary injunction forcing Brown to reinstate the two women's teams to varsity status. [EN 35] In addition, the members of the teams sought to prevent any further elimination of varsity women's intercollegiate athletic teams unless the percentage of women's athletic participation was equal to the percentage of women enrolled in the Brown undergraduate. [EN 36]

The District Court found for the plaintiffs and granted the preliminary injunction. [EN 37] The District Court found that Brown violated Title IX regulations by failing to comply with the effective accommodation provision of the equal opportunity regulation. [EN 38] The District Court reasoned that the Title IX violation could be evaluated by the three-part test under the Policy Interpretation of Title IX. [EN 39]

In the application of the three-part test, the court found that Brown had violated the first prong of the test, the "substantially proportionate" test. [EN 40] The court found the near 13% difference in women enrolled in the undergraduate (48.2%) versus the amount of female intercollegiate varsity athletes (36.6%) was substantially disproportionate. [EN 41] In addition, the court applied the second prong of the test, which was the "continuing practice" to expand the women's varsity program element. [EN 42] The court found that, although Brown had a history of substantial growth in the 1970's, the University failed to meet the increased rate of undergraduate women by simultaneously increasing the amount and quality of women's varsity athletics. [EN 43] Therefore, Brown had failed the second prong of the three-part test because of a lack of increased expansion and quality for women's sports. Finally, the court considered the third prong of the three-part test as to whether Brown "fully and effectively accommodated" the interests and abilities of their female athletes. [EN 44] The court found that Brown failed to meet this standard because they did not effectively accommodate the interests and abilities of women, because they demoted the women's programs from the more competitive varsity status. [EN 45]

The Court of Appeals upheld the district court's holding. [EN 46] However, they found that the language of Title IX does not find a Title IX violation solely based on numerical inequality in percentages of women. [EN 47] Therefore, the court held that all three prongs of the three-part test must be met in order to find a violation of Title IX. [EN 48] The Court of Appeals found that the District Court, in its analysis, properly ruled that Brown violated all three prongs. [EN 49]

#### *B. Roberts v. Colorado State University [EN 50]*

In 1991, Colorado State University ("CSU"), in an attempt to meet budget restrictions, eliminated its fifty-five member men's varsity baseball team and eighteen member women's varsity softball team. [EN 51] The year following the elimination of these varsity teams, the percentage of women participating in varsity sports was 37.7% while the enrollment of women in the University was 48.2%. [EN 52] The members of the eliminated softball team filed a suit claiming that CSU violated Title IX by denying them equal opportunity to participate in athletics, and sought an injunction to reinstate the women's softball team. [EN 53]

The District Court used the three-part test analysis as laid out by the Policy Interpretation of Title IX in order to determine whether CSU violated Title IX by eliminating the women's varsity softball team. [EN 54] The court found that under the first prong of the three-part test, disparity between participating female athletes and female undergraduate enrollment, CSU did violate the requirement under the Title IX Policy Interpretation. [EN 55] The court found that

the 10.6% disparity between the amount of women participating in athletics and the amount of women enrolled in the undergraduate was substantially disproportionate. [EN 56]

The court then applied the second prong of the test, whether there was a history of continuing practice of expansion of athletic programs to accommodate the discriminated gender. [EN 57] The court found that CSU had not added any new teams to its varsity program in twelve years. [EN 58] In fact, the court found that the amount of women participating in varsity intercollegiate athletics at CSU had declined in those twelve years. [EN 59] In addition, the court was influenced by the fact that CSU had pledged voluntarily to increase the amount of women participating in varsity athletics when the OCR was investigating it in 1983. [EN 60] During the OCR monitoring, CSU did increase the amount of women participating in varsity athletics. However, once the OCR stopped monitoring CSU in 1989, the amount of women participation dropped back to the 1983 rate. [EN 61] The court took this into consideration and found that CSU did not demonstrate a history and continuing practice of program expansion. [EN 62]

Finally, the court applied the third prong of the test, which was whether an institutional athletic program demonstrates that the interests and abilities of the members of the discriminated gender have been fully and effectively accommodated. [EN 63] The court found that CSU failed this prong of the three-part test on two grounds: the first being that CSU completely eliminated a varsity softball program and a participation opportunity for females even though there was an overwhelming interest in the varsity softball athletic program. [EN 64] The court also found that CSU failed this prong, because there were five women's club athletic programs that had expressed interest in becoming an intercollegiate varsity team. [EN 65]

This court reaffirmed the sentiments of the Cohen court in holding that "a financial crisis could not justify gender discrimination." [EN 66] The court upheld the plaintiff's claim for a permanent injunction to reinstate the varsity softball team at CSU. [EN 67]

### *C. Favia v. Indiana University of Pennsylvania [EN 68]*

During the 1990-91 school year, Indiana University of Pennsylvania ("IUP") had 55.6% of its undergraduate student body represented by women. [EN 69] During this same year, the amount of women enrolled in varsity athletics was 37.7%. [EN 70] Only 21% of the athletic scholarships awarded during this school year were distributed to women. [EN 71] In August 1991, in order to meet budget restrictions, IUP had its athletic department eliminate the women's gymnastics and field hockey teams as well as eliminating the men's soccer and tennis teams. [EN 72] After the elimination of these athletic programs, the amount of participating women varsity athletes was reduced to 37.5% of all varsity athletes. [EN 73]

In October 1992, the members of the eliminated women's varsity athletic teams filed a class action suit against IUP seeking a preliminary injunction to reinstate the eliminated women's varsity teams and to prevent IUP from further eliminating any women's varsity athletic programs. [EN 74] The District Court, similar to the Cohen [EN 75] and Roberts [EN 76] courts, used the three-part test of the Policy Interpretation to analyze whether IUP violated the Title IX requirements. [EN 77]

The court first determined whether the first prong of the test, the substantial proportionality between the amount of women enrolled in the undergraduate and the percentage of women participating in varsity athletics, was violated. [EN 78] The court found that the disparity in the percentages of women enrolled in the undergraduate (55.6%) and the percentage

of women in varsity intercollegiate athletics (37.5%) was substantially disproportionate. [EN 79] The court declared that the elimination of the two women's teams only "exacerbated an already existing Title IX violation." [EN 80]

The court then applied the second prong of the three-part test as to whether there was a history of continuing expansion in athletic opportunities for the discriminated gender. [EN 81] The court found that IUP failed this prong of the test, because they were unable to show a continuing practice of expanding athletic opportunities to respond to the developing interests of its women students. [EN 82]

Finally, the court applied the third prong of the three-part test, whether the institution demonstrated that the interests and abilities of the members of the discriminated gender had been fully and effectively accommodated. [EN 83] Similar to the holdings of *Cohen* [EN 84] and *Roberts*, [EN 85] this court found that ISU eliminated the varsity athletic participation opportunity even though there was evidence of interest and ability in the women's programs. [EN 86]

## V. PROBLEMS WITH CURRENT TITLE IX METHODS OF ANALYSIS

The judicial analysis for Title IX litigation, currently used by the courts based upon the three-part test of the Policy Interpretation, has caused "a myriad of problems" for athletes of both sexes and the institutions themselves. [EN 87] In this day of budget restrictions, the courts leave little room for athletic programs to meet many of these budget restrictions mandated by the educational institutions.

### *A. Numerical v. Non-Discriminatory Analysis*

Using the Policy Interpretation of Title IX as a guide, it is clear from the three-benchmark cases *Cohen*, [EN 88] *Roberts* [EN 89], and *Favia*, [EN 90] that the courts have adopted a more numerical approach to determine Title IX violations by an institution. The courts, in all three of these cases, looked at the parity in numbers based on percentages of female athletes in varsity sports and the percentages of females enrolled in the respective undergraduate. However, what the courts tended to overlook in these cases was the overall discriminatory effects of the elimination of varsity athletic programs on the individual athletes.

In all three of these cases, the Title IX violation was triggered by the elimination of a female varsity athletic program. The courts analyzed each case by focusing mainly on one aspect, the numerical parity between male and female athletes in the athletic programs of each respective institution. Although there has been great progress in women participation in varsity athletics, the judiciary fails to focus on what should be at the heart of analysis of a Title IX violation: whether there is true discrimination in the treatment of an individual student, based on gender, who wishes to participate in athletic competition. [EN 91] The courts have "ignored the issues relating to discrimination and have focused almost exclusively on raw numbers." [EN 92]

Based on Title IX analysis, the courts can use two methods of evaluation. One being numerical parity analysis, which focuses on raw numbers and determines whether each gender is proportionately represented in each educational program, [EN 93] and the other being non-discriminatory analysis, which focuses on the fact that the treatment of the individual cannot be different simply because of gender. [EN 94] Under the numerical parity analysis, the court focuses less on the individuality of a student, and concerns itself with whether the student is a

member of a particular gender and athletic program. In essence, the court's only concern, as evidenced by their analysis of *Cohen*, *Roberts*, and *Favia*, is the meeting of numerical goals and quotas. [EN 95] For example, in *Roberts*, CSU eliminated both men's baseball and women's softball to meet budget constraints. [EN 96] This elimination was not directed towards women specifically. However, the court still found this to constitute gender discrimination in violation of Title IX. As a result of the disparity in numbers, the court required CSU to reinstate the women's varsity softball program and did not allow CSU to remedy the problem in any other manner, such as limiting male varsity enrollment, cutting a male sport, or even adding another women's sport. [EN 97] However, if the court used a non-discriminatory method of analysis, it would have focused on whether the elimination of women's softball had an unfair or discriminatory treatment to the individual members of the team, rather than the participation rates of women in the athletic program generally. [EN 98] Similarly, in the decisions in *Cohen* [EN 99] and *Favia*, [EN 100] the court also focused their analysis of Title IX violations specifically on the numerical parity in participants in intercollegiate athletics. [EN 101]

Although the courts based their decisions on numerical analysis in *Cohen*, *Roberts* and *Favia*, in *Cook v. Colgate*, [EN 102] the courts took a more non-discriminatory approach in their analysis of a Title IX violation. In 1990, the former members of the women's club ice hockey team brought a complaint against Colgate University for violating Title IX. [EN 103] The complaint was based on the University's denial of the request made by the women to elevate the club hockey team into varsity status. [EN 104] The women's ice hockey applications were denied on all four attempts to attain varsity status. [EN 105] As a result of the final rejection by the University in 1988, the former members decided to bring a Title IX violation complaint against Colgate. [EN 106]

In its analysis, the court in *Colgate* used a more non-discrimination approach. The court looked at how the female hockey players were treated in comparison to the male hockey players. The court analyzed several aspects of the difference in the method the ice hockey teams were run by the University. These aspects that came under the scrutiny of the court were (1) the financial support, (2) the equipment, (3) the locker room facilities, (4) the travel, (5) the practice times, and (6) the coaching of the two teams. [EN 107] The court found that (1) the men's hockey team received 50 times the financial support of the women's teams, [EN 108] (2) the men were provided their own equipment while the women were forced to purchase their own equipment, [EN 109] (3) the men's locker room was 2,500 square feet, while the women's was only 225 square feet, [EN 110] (4) the men's team traveled in chartered buses, while the women drove themselves to their games, [EN 111] (5) the men's team had access to the best times for practice and had the ability to bump the women out of their practice time slots; [EN 112] and (6) the coaches for the men's team were highly paid while the coaches for the women's team were only given a minimal stipend because they were volunteers. [EN 113] In analyzing the discriminatory method that Colgate ran the men and women's ice hockey program, the court found Colgate to be in violation of Title IX. Interestingly, though, the court in *Colgate* never mentioned the three-part test of the Policy Interpretation that was used by the courts in determining Title IX violations in *Cohen*, *Roberts*, and *Favia*. This court looked strictly at the treatment of the individual women, rather than looking at the raw numbers of the University's athletic program on the whole.

## *B. Inclusion of College Football in Title IX Analysis*

The courts have laid the groundwork for Title IX litigation by determining that a proper analysis requires the use of the three-part test of the Policy Interpretation. However, it has been shown through the three landmark cases that meeting the criteria of the three-part test can be nearly impossible for many institutions. The problem for institutions to meet the requirements set forth in the three-part test stems from the inclusion of men's intercollegiate football teams into a Title IX analysis. "Almost no university that offers a full array of sports for both men and women, including a men's football team, can fulfill the substantial proportionality test of the first benchmark because the size of the football teams yields disproportional percentages in the athletic program." [EN 114] A men's football team, on average, includes 120 male athletes and requires nearly four million dollars in expenses by the institution. [EN 115] In a typical Division I-A school, the cost to run a football program nearly doubles the amount of money needed to run the entire female varsity athletic program. [EN 116] In addition, no women's sport requires as many individuals to participate, as does a men's football program. [EN 117] Thus, it is nearly impossible for an institution to meet the substantial proportionality requirement of the Policy Interpretation. Therefore, all universities with an intercollegiate football team will be found in violation of Title IX.

A consequence of including men's football into Title IX analysis is the elimination of smaller and lower revenue athletic programs. [EN 118] An institution, in an effort to prevent Title IX litigation will eliminate smaller male athletic programs, such as golf, wrestling, or tennis. [EN 119] An institution will avoid eliminating a women's athletic program as to avoid any further Title IX litigation, which has proven to be successful as evidenced by *Cohen, Roberts* and *Favia*. Another reason an institution will avoid eliminating a football team is the revenues the program brings to the university. [EN 120] In addition to providing the school with a more marketable name and a history that breeds funding from many sources, the revenue of college football helps maintain a strong funding base for the other athletic programs. [EN 121] Supporters of large football programs argue that the popularity of college football enables a university to do more for women's sports. [EN 122]

Thus, for these reasons, most Division I-A institutions will avoid eliminating a football program and will always have an athletic program that has a substantially disproportional number of women participating in varsity athletics as opposed to men. This large disparity in numbers, due to college football, causes a flawed analysis of athletic programs under Title IX. The courts and OCR must find a way to correct the numerical disparity caused by college football before more gender discrimination against individual athletes is caused by the disparity.

## VI. REMEDIES TO TITLE IX ANALYSIS PROBLEMS

### *A. Options to Remedy Problems Created by Current Analysis Methods*

The first option of correcting the problems created by a numerical analysis approach is for the legislature to determine. The courts should have little to do with determining the method of analysis, but rather should be focused on implementing the method. [EN 123] Therefore, the legislature should place a focus on amending the current Title IX and maintaining an analysis focused more on discrimination than on meeting a numerical goal or quota. [EN 124]

Another method to avoid gender discrimination is to focus on all students as a whole. This would include individuals that are not involved in intercollegiate athletics in an analysis to determine sexual discrimination. Currently, Title IX focuses on varsity athletes and does not pay much attention to club and intramural sports, which are under the regulations of Title IX. [EN 125] Title IX should be centered towards all athletes, whether they have superior athletic ability or not. Title IX was meant as a method of preventing discrimination towards an individual based on gender, not on athletic ability.

The other problem with the numerical parity approach of Title IX analysis is that it fails to include programs other than the traditional varsity sports. Title IX does not label cheerleading, aerobics, and dancing as sports or activities that require the same athletic ability as a sport like football or volleyball. However, many programs like cheerleading require great skill that is similar to many varsity sports. If cheerleading were included under Title IX, then the numerical disparity in the percentage of women involved in sports would definitely be reduced and the strain on an institution to meet Title IX requirements would be greatly reduced. In addition, the interests and abilities of individuals of both genders would be met. Again, the main focus of Title IX should be the discriminatory effect of a sport on one gender as compared to another, rather than a numerical disparity.

Another possible solution to the numerical disparity approach is to create a cap on expenditures by certain intercollegiate athletic programs. Therefore, all institutions would be required to fall under a certain cap of expenditures, like scholarships, that they would be allowed to allot to their entire athletic programs, as well as each individual varsity sport. The cap would force schools to spend similarly on sports of different genders, rather than a school making greater expenditures on a high revenue sport, like college football.

### *B. Options to Remedy Problems Between College Football and Title IX Analysis*

One option raised by members of Congress and critics of Title IX is the total exclusion of football from a Title IX analysis. [EN 126] This approach would allow a university to meet the substantial proportionality requirement of the three-part test with very few implications on entire athletic programs. By eliminating college football, which has great history and revenue implications, from Title IX analysis, an institution would likely have very little disparity in the percentage of female athletes as compared to the percentage of women enrolled in the undergraduate. Many supporters feel that football should be excluded because of its ability to bring in revenue that could be redistributed to other athletic programs, mainly women's varsity athletic programs. One court did attempt to remove football from Title IX analysis, which was in *Blair v. Washington State University*. [EN 127] However, the Appellate Court found that the exclusion of football would only perpetuate discrimination that Title IX was created to prevent. [EN 128] The fallacy of the removal of football approach is that the exclusion would perpetuate gender inequality in athletic participation, because courts would not be comparing all of the women's intercollegiate varsity programs with the men's intercollegiate varsity programs. [EN 129]

Some of the other solutions to the numerical disparity caused by football include reducing the team sizes, available scholarships, and size of coaching staff. Currently, most Division I-A football teams have over a hundred male members. In comparison, professional football teams have only forty-seven members on the team. [EN 130] Cutting the team rosters in half would decrease the numerical disparity, thus making it more feasible for an institution with a

football team to meet the substantially proportional requirement of the three-part test. In addition, the NCAA allows football teams to allocate eighty-five scholarships to its member athletes. [EN 131] As mentioned above, a cap provided in the regulations of Title IX would remedy this issue, thus correcting the disparity issue. Finally, football coaching staffs currently include twelve coaches for their programs. [EN 132] The numerical disparity in funding towards varsity athletics could be corrected if the amount of coaches were reduced in half so that the expenditures would be less for male athletic programs.

Most institutions are wary of changing the status quo now maintained by the sport of intercollegiate football. Unfortunately, as a result, many of these options will likely not be changed as to prevent a decline in competitiveness and overall interest in the high revenue sport of college football.

## VII. CONCLUSION

Although Title IX has clearly achieved much success in creating equality amongst student athletes of both genders, it has clearly not come without its problems. The progress institutions have made in trying to create equal varsity athletic programs since the early 1970's has tailed off in recent years. Much of this can be attributed to the differences in levels of interests in athletics between the two genders. The courts, the legislatures, and the institutions must realize that total equality amongst the genders may never be possible. Therefore, they should act accordingly and maintain the current status quo and tailor Title IX as a tool that prevents further gender discrimination rather than one that sacrifices the positives of intercollegiate athletics present today.

[EN 1] 20 U.S.C.A. §1681 (2001).

[EN 2] *Id.*

[EN 3] *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).

[EN 4] 20 U.S.C.A. §1681 (2001).

[EN 5] Robert C. Farrell, *Title IX or College Football?*, 32 HOUS. L. REV. 993, 1011(1995). In 1974, Congress granted the Secretary of the Department of Health, Education, and Welfare (HEW) with the authority to publish regulations relating to the prohibition of sex discrimination in federally assisted education programs that also included intercollegiate athletic activities.

[EN 6] 45 C.F.R. § 86.37(c)(1) (1994).

[EN 7] *Id.*

[EN 8] 45 C.F.R. § 86.41. This section lists a number of factors relevant to equal opportunity. One of the most significant factors is whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes. Some of the other factors included in this section are provisions dealing with equipment, supplies, scheduling, travel expenditures, coaching and tutoring, athletic facilities, medical facilities, housing and dining facilities, and publicity. However, this section of the regulation did not require equal expenditures for men's and women's athletic programs, but did state that a failure to provide necessary funds for teams of one sex would be a factor of determining equality of opportunity.

[EN 9] Jeffrey P. Ferrier, *Title IX Leaves Some Athletes Asking, "Can We Play Too?"*, 44 CATH. U. L. REV. 841, 852 (1995).

[EN 10] Jill K. Johnson, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U. L. REV. 553, 563 (1994).

[EN 11] 34 C.F.R. § 106.2(h) (1993). The regulations published by the HEW defined a "recipient" of federal financial assistance as "any public or private...institution... which operates an education program or activity which receives or benefits from such assistance.

[EN 12] Johnson, *supra* note 10, at 563.

[EN 13] *Grove City College v. Bell*, 465 U.S. 555 (1984).

[EN 14] *Id.* at 559.

[EN 15] Johnson, *supra* note 10.

[EN 16] *Grove City*, 465 U.S. at 572-73.

[EN 17] *Id.*

[EN 18] Johnson, *supra* note 10, at 564.

[EN 19] 34 C.F.R. § 106.41(c)(1). The Director of the Office of Civil Rights of the Department of Education (OCR) is responsible for monitoring institutions in determining whether there are equal opportunities available and "whether the selection of sports and levels of competition effectively accommodate the interest and abilities of members of both sexes."

[EN 20] Johnson, *supra* note 10, at 564.

[EN 21] Pub. L. No. 100 - 259, 102 Stat. 28 (1988).

[EN 22] Johnson, *supra* note 10, at 564.

[EN 23] *Id.* at 565.

[EN 24] 20 U.S.C.A. § 1681 (2001).

[EN 25] *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992) ("Brown I"), *aff'd*, 991 F.2d 888 (1st Cir. 1993) ("Brown II") (collectively referred to as "Brown").

[EN 26] *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507 (D. Colo. 1993) ("Roberts I"), *aff'd in part, rev'd in part sub nom, Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993) ("Roberts II") (collectively referred to as "Roberts").

[EN 27] *Favia v. Ind. Univ. of Pa.*, 812 F. Supp 578 (W.D. Pa. 1993) ("Favia I"), *aff'd*, 7 F.3d 332 (3d Cir. 1993) ("Favia II") (collectively referred to as "Favia").

[EN 28] *Intercollegiate Athletics Policy Interpretation*, 44 Fed. Reg. 71, 413 (1979) (hereinafter referred to as "Policy Interpretation"). The express purpose of the Policy Interpretation was to further develop the meaning of "equal opportunity" in intercollegiate athletics and was issued in 1979. The Policy Interpretation was meant to explain the factors and standards by which the Department of Education would consider when determining whether an institution's intercollegiate athletics program complied with the law and governing regulations.

[EN 29] *Id.* at 71, 413, 418 (1979).

[EN 30] *Cohen*, 805 F. Supp. 978 (D.R.I. 1992).

[EN 31] *Id.* at 980.

[EN 32] *Id.*

[EN 33] *Id.* at 981.

[EN 34] *Id.*

[EN 35] *Id.* at 979.

[EN 36] *Cohen*, 805 F. Supp. at 980.

[EN 37] *Id.* at 990.

[EN 38] *Id.*

[EN 39] *Id.*

[EN 40] *Id.* at 991.

[EN 41] *Id.*

[EN 42] *Cohen*, 805 F. Supp. at 980.

[EN 43] *Id.*

[EN 44] *Id.*

[EN 45] *Id.* at 992.

[EN 46] *Id.* 898.

[EN 47] *Id.*

[EN 48] *Cohen*, 805 F. Supp. at 980.

[EN 49] *Id.*

[EN 50] *Roberts*, 814 F. Supp. 1507 (D. Colo. 1993).

[EN 51] *Id.* at 1512.

[EN 52] *Id.*

[EN 53] *Id.* at 1510.

[EN 54] *Id.* at 1511.

[EN 55] *Id.* at 1513. The Court was not persuaded by CSU's argument that it was no worse than other institutions.

[EN 56] *Roberts*, 814 F. Supp. at 1513.

[EN 57] *Id.* at 1514.

[EN 58] *Id.* at 1515.

[EN 59] *Id.*

[EN 60] *Id.*

[EN 61] *Id.* at 1516.

[EN 62] *Roberts*, 814 F. Supp. at 1516.

[EN 63] *Id.* at 1517.

[EN 64] *Id.*

[EN 65] *Id.* Neither the Title IX regulations nor the Policy Interpretation treat club athletics and varsity athletics equivalently. *See* also 34 C.F.R. § 106.41 (1993).

[EN 66] *Id.* at 1518.

[EN 67] *Id.* at 1519.

[EN 68] *Favia*, 812 F. Supp 578 (W.D. Pa. 1993).

[EN 69] *Id.* at 580.

[EN 70] *Id.*

[EN 71] *Id.* at 582.

[EN 72] *Id.* at 580.

[EN 73] *Id.*

[EN 74] *Favia*, 812 F. Supp. at 580.

[EN 75] *Cohen*, 805 F. Supp. 978 (D.R.I. 1992).

[EN 76] *Roberts*, 814 F. Supp. 1507 (D. Colo. 1993).

[EN 77] *Favia*, 812 F. Supp. at 580-83.

[EN 78] *Id.* at 584.

[EN 79] *Id.* at 584-85.

[EN 80] *Id.*

[EN 81] *Id.*

[EN 82] *Id.* at 585. The court used the evidence that starting in 1970, when the school developed its first varsity women's athletic team, it continued to grow until 1982 when it fielded ten women's varsity teams. Beginning in 1991, the elimination of the varsity programs reduced the number of women's varsity teams down to seven.

[EN 83] *Favia*, 812 F. Supp. at 585.

[EN 84] *Cohen*, 805 F. Supp. 978 (D.R.I. 1992).

[EN 85] *Roberts*, 814 F. Supp. 1507 (D. Colo. 1993).

[EN 86] *Favia*, 812 F. Supp. at 585.

[EN 87] *Ferrier*, *supra* note 9, at 864-65.

[EN 88] *Cohen*, 805 F. Supp. 978 (D.R.I. 1992).

[EN 89] *Roberts*, 814 F. Supp. 1507 (D. Colo. 1993).

[EN 90] *Favia*, 812 F. Supp 578 (W.D. Pa. 1993).

[EN 91] Brian A. Snow and William E. Thro, *Gender & Sports: Setting a Course for College Athletics: Still on the Developing the Non-Discrimination Paradigm under Title IX*, 3 DUKE J. GENDER L. & POL'Y. 1, 9 (1996).

[EN 92] *Id.*

[EN 93] *Id.* at 11.

[EN 94] *Id.* at 14.

[EN 95] *Id.* at 13.

[EN 96] *Roberts*, 814 F. Supp. at 1507. Although CSU eliminated women's softball, there were still more varsity women's teams (eight) than men's varsity teams (seven). In addition, there were nearly three times as many members on the varsity men's baseball team than there were on the women's varsity softball team. The net result of the cut increased the percentage of women participating in varsity sports from 35% to 38%.

[EN 97] *Id.*

[EN 98] Snow and Thro, *supra* note 91, at 17.

[EN 99] *Cohen*, 805 F. Supp. 978 (D.R.I. 1992).

[EN 100] *Roberts*, 814 F. Supp. 1507 (D. Colo. 1993).

[EN 101] Snow and Thro, *supra* note 91, at 18.

[EN 102] *Cook v. Colgate Univ.*, 802 F. Supp 737 (N.D.N.Y. 1992).

[EN 103] *Id.* at 739.

[EN 104] *Id.* at 740.

[EN 105] *Id.*

[EN 106] *Id.* at 739.

[EN 107] *Id.* at 744-46.

[EN 108] *Cook*, 802 F. Supp. at 744.

[EN 109] *Id.*

[EN 110] *Id.* 745.

[EN 111] *Id.*

[EN 112] *Id.*

[EN 113] *Id.*

[EN 114] Ferrier, *supra* note 9, at 865.

[EN 115] Farrell, *supra* note 5, at 1052.

[EN 116] *Id.*

[EN 117] Ferrier, *supra* note 9, at 875.

[EN 118] Farrel, *supra* note 115, at 1052.

[EN 119] *Id.*

[EN 120] Ferrier, *supra* note 9, at 877.

[EN 121] *Id.*

[EN 122] *Id.*

[EN 123] Snow and Thro, *supra* note 91, at 44.

[EN 124] *Id.*

[EN 125] *Id.* See also *Cook*, 802 F. Supp at 740-42 (focusing on the club sports in its determination of gender discrimination of athletes when compared to varsity athletic programs).

[EN 126] Ferrier, *supra* note 9, at 876.

[EN 127] *Blair v. Wash. State Univ.*, 740 P.2d 1379 (1987) (attempting to justify the exclusion of football by stating that it was unique) (holding at the trial court level that football was more like a business than a sport and therefore should not be included under gender equity analysis).

[EN 128] Ferrier, *supra* note 9, at 877 (citing *Blair*, 740 P.2d 1379).

[EN 129] Johnson, *supra* note 10, at 586.

[EN 130] Farrel, *supra* note 115, at 1056.

[EN 131] *Id.*

[EN 132] *Id.*