Have You Come a Long Way, Baby--A Look at Gender Equity in Intercollegiate Athletics in the 1990s

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I confess. I have betrayed my gender. Until I began doing research for this note, I had no idea of the seriousness of the problem of gender inequality in intercollegiate athletics. I knew Title IX existed, but I did not know that for the most part, its mandates have been ignored.

I rarely, if ever, paid attention to women's college sports when I was growing up. I grew up playing and watching basketball. My heroes were male college players—Johnson, Jordan and Bird. As far back as I can remember, I have been watching the men's NCAA Championship Tournament. I can remember North Carolina State coming from out of nowhere to win the 1983 Final Four, but I couldn't tell you what women's teams made the Final Four this year.

This pattern continued when I reached college. During my four years of college, I attended practically every football game and men's basketball game. I attended a handful of women's volleyball games. Why didn't I attend more? After all, this was a team that won 3 Big Ten titles and went to the Final Four twice during my college years. I also attended only one women's basketball game. I had played basketball practically all of my life and when I finally got the chance to watch fellow female players, I didn't bother attending.

Why didn't I attend more women's sports? The same invisible force that made me spend $65 on a football season ticket and that made me go to the men's basketball game against Indiana (because it was, after all, more important than homework) is part of a larger scheme which says it is O.K. to treat female college athletes as second-class citizens. It is this force that Title IX tries to combat.

Although Title IX has existed for twenty-one years, its effects have yet to be felt in many ways. In the past couple of years, however, female athletes, coaches and athletic department administrators have renewed a demand for compliance with Title IX. Collegiate athletic programs are slowly moving toward compliance, but many issues remain unresolved. Perhaps the most important is the definition of gender equity—what is “equitable” in college athletics? Even members of the National Collegiate Athletic Association (NCAA) Task Force on Gender Equity had a difficult time developing a definition. One member said, “I
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guess it's like defining love . . . I know it when I see it." The task force eventually defined gender equity as "an environment in which either the men's or women's sports program would be pleased to accept as its own the overall program of gender equity." Unfortunately, this definition is vague and does not do much toward solving the problem of noncompliance with Title IX.

This note will examine the history of Title IX and see how it has been enforced. Next, this note will examine the recent campaign for compliance with Title IX. It will look at the work of the NCAA Gender Equity Task Force, and also will look at what colleges and athletic conferences have been doing regarding Title IX compliance. It will also assess the role of football in the battle for gender equity. Finally, this note will discuss recent court cases on Title IX and evaluate ideas for reform so compliance can be achieved permanently.

HISTORY OF TITLE IX

Women had always participated in college athletics. In 1972, two events occurred which would forever change the face of women's college sports. The first event was the formation of the Association for Intercollegiate Athletics for Women (AIAW). This organization sought to be an equivalent to the NCAA for women and it provided female college athletes with a high level of training and competition. In 1972, it sponsored national championships in seven sports for its 278 member schools.

The second event was the enactment of Title IX of the Education Amendments of 1972. Title IX is designed to prohibit sex discrimination in any educational program receiving federal funds. It states: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance." Although athletics and Title IX are closely connected today, athletics was not the focus of Congressional discussion of Title IX. Little legislative history is available about Title IX; however, what history there is reveals that the topic of sports was mentioned only briefly during Congressional debate.

When it became apparent that Title IX would require no sex discrimination in athletics (especially men's revenue-producing teams), members of Congress introduced bills to restrict the reach of Title IX. For example, the Tower Amendment attempted to exempt revenue-producing sports like football from


6. Id.
Title IX computation. The NCAA also opposed Title IX applying to football and men's basketball. It supported the Tower Amendment because those sports funded women's programs and it would hurt productive men's programs to allocate money to women's programs. The Tower Amendment failed; however, it can safely be argued that Title IX has not destroyed the success of football or men's basketball as the amendment's supporters thought.

Throughout the next decade following 1972, women's athletics exploded. In 1971, women comprised 7% of all college athletes. By 1981, they comprised 35% of all college athletes. The AIAW also grew. By 1982, it had 961 member schools. Even the NCAA jumped on the women's bandwagon. Although the NCAA had lobbied vigorously against Title IX, in the 1981-82 season it began to sponsor championships in women's sports. Unfortunately, the AIAW could not compete with the power and prestige of the NCAA. Consequently, it folded in 1982.

As kind as the 1970s were to women's collegiate athletics, the 1980s proved to be the opposite. Participation by women leveled at 31% of total college athletes. The requests by women to offer more sports met with resistance. The Department of Education's Office for Civil Rights, the agency in charge of enforcing Title IX, did not take active steps to enforce Title IX because of the ideological views of the presidential administration at the time.

The biggest setback occurred in the 1984 United States Supreme Court case Grove City College v. Bell. Ironically, Grove City did not involve an allegation of sex discrimination under Title IX. The plaintiff was a church-affiliated institution who refused to fill out a form stating it was in compliance with Title IX because it felt that these government regulations interfered with its independence. As required by statute, the Department of Education cut off federal funds to the school. The school claimed it was not bound by Title IX because it did not receive federal funds for itself, although some of its students received federal financial aid. The Supreme Court looked at the language of Title IX, which prohibits sex discrimination in "any educational program or activity receiving Federal financial assistance." It held that the language of the law limited its

7. Id.
10. Christine H.B. Grant, Speech at DePaul University College of Law's Legal Issues in Intercollegiate Athletics (Oct. 5, 1993) [herein after Grant].
11. Olson, supra note 3, at 110.
15. Id. at 561; see also 20 U.S.C.A. §1682.
application to the specific program receiving federal funds.\textsuperscript{17} Thus, only the financial aid office at Grove City College was subject to Title IX, while the rest of the school was not because none of the other departments received financial assistance. Justice Brennan dissented, saying:

The absurdity of the Court’s decision is... demonstrated by examining its practical effect. According to the Court, the financial aid program at Grove City College may not discriminate on the basis of sex because it is covered by Title IX, but the college is not prohibited from discriminating in its admissions, its athletic programs or even various academic departments.\textsuperscript{8}

\textit{Grove City} was a crucial blow to women’s athletic programs. Before the decision, the common interpretation of Title IX had been that it applied to all of the activities at a school that received federal money for any purpose.\textsuperscript{19} However, because few, if any, athletic departments receive federal assistance, \textit{Grove City} effectively meant that Title IX did not apply to athletic programs.\textsuperscript{20}

Congress responded to \textit{Grove City} by amending Title IX so that it applies to an \textit{entire} institution, not just to the specific program receiving federal money. Congress had found that certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX of the Education Amendments of 1972... and legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.\textsuperscript{21}

The amendments, known as the Civil Rights Restoration Act, state 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..."\textsuperscript{22} Consequently, athletic departments around the country fell under the auspices of Title IX because the vast majority of the colleges and universities receive some type of federal funds.

\textbf{ENFORCEMENT OF TITLE IX}

The Office for Civil Rights (OCR) of the Department of Education is the agency in charge of enforcing Title IX. The OCR performs two main functions regarding Title IX. First, it investigates Title IX complaints that have been filed against colleges and universities. Second, it conducts compliance reviews to make sure institutions are complying with Title IX.

When the OCR investigates an institution to decide if it is in compliance with

\textsuperscript{17} Grove City at 573.
\textsuperscript{18} \textit{Id.} at 574.
\textsuperscript{19} Craig Neff, \textit{Equality at Last, Part II}, \textit{SPORTS ILLUSTRATED}, March 21, 1988, at 70.
\textsuperscript{20} \textit{Id.}
Title IX, it looks at three areas.

**Opportunities to Participate**

First, the OCR evaluates the opportunities for women at the school to participate in intercollegiate athletics. Specifically, the OCR is to determine "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." When the OCR evaluates participation opportunities, it evaluates them in light of two factors — opportunities to compete and levels of competition.

a. **Opportunities to compete**

A school may demonstrate that it is providing equal opportunities to compete in one of three ways. First, it is able to show that it offers each gender athletic opportunities in proportion to that gender's total student body enrollment. For instance, suppose that a student body is composed of 60% men and 40% women. If that school could show that 60% of the athletic opportunities go to men and 40% go to women, then that school satisfies this first benchmark. However, the OCR is lenient when it comes to assessing a school's compliance with this benchmark. If the disparity between the athlete ratio and the student body ratio is due nondiscriminatory factors such as a lack of athletic interest among the female student body, then the OCR will likely say the school is in compliance, regardless of the disparity. Also, the degree of the disparity between the two ratios may be small enough that the OCR will say that there is compliance. Recent court cases have held that 10.5% difference between female athletes and the female student population is insufficient to warrant compliance with Title IX. Smaller disparities may be allowed; however, neither the OCR nor a court has said what could be the maximum allowable disparity.

A school can also show that it is effectively accommodating student interests through evidence of "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities" of the members of the underrepresented sex. The OCR investigators evaluate whether a school meets this benchmark by asking the following questions: 1) when did each men's and women's team begin intercollegiate competition?; 2) have any sports been eliminated?; 3) if so, why were they eliminated?; 4) how many females were affected by the elimination of that sport?; 5) have there been any requests to add more teams?; 6) if teams have been added, how did that affect...
the percentage of opportunities for each gender? For example, Colorado State University added 11 women's sports during the 1970s; however, none have been added since 1977. Since that time, it also dropped 3 women's sports and women's participation opportunities decreased by 34%. Thus, Colorado State could not show it had maintained a practice of expansion in women's athletics. It could not prove it granted women opportunities in college athletics through this benchmark.

Finally, a school can show compliance by demonstrating that "the interests and abilities of the members of (the underrepresented) sex have been fully and effectively accommodated" by the school's present program. This means that the school must take steps to satisfy the underrepresented gender's interest in either adding or upgrading a team. Schools have tried to assess interest by taking a survey to determine what sports interest the student body. However, these surveys have provided misleading results. Students usually respond that they are interested in football and basketball — sports that are already well-established in college athletic programs. Instead of conducting a campus-wide survey, the school can look at the factors that OCR considers when it determines if this benchmark has been met. First, a school should take into account national level of interest and abilities. For instance, if field hockey is becoming popular at the intercollegiate level and a group of women (enough to make up a team) ask the school to sponsor them as a club, then the school should do so. Second, a school should not disadvantage members of the underrepresented sex. An example is that a school should not hold women to a higher standard of proving interest when petitioning for a new or upgraded sport. Third, a team's performance records should be taken into account when it is being considered for a varsity position. If the women's field hockey club has had winning seasons and has always attracted plenty of quality players, then it should be upgraded to varsity status. Fourth, a school should respond to the expressed interests of the students who are capable of competing in athletics. The issue here is what constitutes an "expressed interest." The Women's Sports Foundation's Playing Fair: A Guide to Title IX tells interested female athletes that it simply is not enough for a couple of friends to tell their school that they want to form a soccer team. They need to find more interested parties, a potential coach and a place to play. The more interest that players can show in a sport, the greater the
chance that the school will sponsor their team on either the club or intercollegiate level. Thus, if a school can demonstrate it has followed one of these four factors, then it has demonstrated it has satisfied the third benchmark.

b. quality of competition

Besides determining whether an institution is offering opportunities to compete, OCR also looks at the quality of competition provided to each sex. The OCR considers two factors when evaluating this area. First, it compares the number of competitive events provided for each team at the school’s declared competitive level (i.e. Division I, Division II). For example, if the men’s basketball team consistently plays against Division I teams, while the women’s team playing against Division II or III teams, then the school would not be providing equal opportunities for its female athletes. Second, the OCR determines if the school is increasing competitive opportunities for the underrepresented gender when their abilities warrant such an increase. For instance, if the women’s field hockey club consistently crushes the other teams it plays, then the school should elevate this team to varsity status so it can compete with teams of a higher quality. Therefore, if a school can demonstrate that there are opportunities for the underrepresented sex to compete and the quality of competition is equivalent to those of the represented sex, then it has effectively accommodated the athletes’ interests and abilities.

FINANCIAL ASSISTANCE TO ATHLETES

The second major area that OCR investigates concerns financial assistance to athletes. The OCR regulations state that “[T]o the extent that a recipient (of federal funds) awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.” The regulations also provide that “[s]eparate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex.” OCR determines the ratio of male athletes to female athletes and it compares this ratio to the amount of financial aid that goes to male athletes and female athletes. If the comparison is substantially equal, or if a legitimate non-discriminatory factor can explain the disparity, the institution will likely be in compliance with Title IX on this point. The OCR has determined that some factors cannot be used to justify disparities in financial aid, including: the revenue-producing capabilities of par-

39. Id. at 12; see also Williams, supra note 28.
40. Williams, supra note 28; see also Reith, supra note 25, at 12.
41. Id.
42. 34 C.F.R. §106.37 (c)(1).
43. 34 C.F.R. §106.41 (c)(2).
44. Reith, supra note 25, at 12.
45. Id. The OCR allows for a disparity of up to 5%. Id. at 13.
ticular teams; sources of funds; athletic association rules; differences in interest or ability between male and female students; and, differing levels of spectator interest and support.46

ATHLETIC BENEFITS AND OPPORTUNITIES

The third and final area that OCR investigates concerns athletic benefits and opportunities. The OCR looks for equal opportunities in eleven (11) non-financial program areas: provision of equipment and supplies; scheduling of games and practice times; travel and daily allowance; access to tutoring; coaching; locker rooms, practice facilities and services; housing and dining facilities and services; publicity; recruitment of student athletes; and provision of support services.47 Title IX requires that the men's program and women's program receive the same level of services, facilities and supplies.48 However, a disparity in one of these factors does not necessarily mean that the school is violating Title IX.49 The OCR has not stated how many of the factors can contain disparities and still be in compliance with Title IX. However, if the disparity is due to a non-discriminatory factor, then the benefits and opportunities need not be equivalent. Such non-discriminatory factors include the "unique aspect of the sport" or "activities which are directly associated with a competitive event in a single sex sport."50 Features which are considered "directly associated with a competitive event" include rules of play, nature of facilities required for competition, maintenance of those facilities and nature/replacement of equipment.51 This provision exempts schools from having to provide equal opportunities in sports traditionally played by men, such as football.52 Because men's sports are more popular, schools can, under Title IX, use these provisions to justify spending more for upkeep and maintenance on men's facilities and equipment. Women's sports, on the other hand, do not attract as much support, so schools can afford to provide them with less money.

THE TROUBLE WITH THE OCR

Advocates of women's sports, as well as Congress, have not been pleased with OCR's enforcement of Title IX and its accompanying regulations. The House Committee on Education and Labor stated that OCR has not vigorously enforced laws protecting the rights of women . . . in education.53 A 1988 Congressional report on civil rights enforcement stated, "To the extent that any en-

46. Id. at 12.
47. Id. at 14; see also 34 C.F.R §106.41 (c)(2)-(10).
49. Williams, supra note 28.
51. Id.
enforcement has occurred, it has occurred in spite of OCR’s leadership, by a re-
gional staff that remained loyal to the objectives implicit in the civil rights stat-
utes which the staff were mandated to protect.54 Recently, the number of com-
plaints filed with the OCR has dropped into single digits because complainants feel that OCR is neither swift nor consistent in enforcing Title IX.55 The same standards are not always applied to each school.56 OCR has not been effective in remedying the disparity between men’s and women’s programs.57 OCR also accepts compliance plans from schools that remedy only part of the violations they have.58 As a result, Title IX complainants are filing lawsuits in federal court rather than going through the OCR.

Some recommendations have been made as to how OCR can better enforce Title IX. First OCR needs a leadership team that is sensitive to the OCR mission of effective enforcement of laws like Title IX.59 Second, OCR needs to develop a process for reviewing its procedures and organization so it can shift its focus on achieving gender equity.60 This would make enforcement more efficient. Third, the Title IX Investigator’s Manual that is used by the OCR should be revised to reflect OCR’s priorities and the mission of Title IX enforcement through its rules.61 Finally, OCR should seek the cooperation of colleges and universities to maintain records on participation rates and other gender-related information so OCR can easily tell who is in compliance.62

It remains to be seen whether any of these suggestions will actually become reality for Title IX enforcement. Some had hoped that the new administration in Washington would spur more effective enforcement. At the present time, however, it appears that budget constraints will prevent OCR from accomplishing such a task.

TWENTY-ONE YEARS LATER: THE RENEWED DEMAND FOR COMPLIANCE

If the 1970s could be characterized as the Golden Age of women’s college athletics and the 1980s could be characterized as the Dark Ages of women’s college athletics, then the 1990s could be considered a renaissance period. Gender equity has erupted into a major debate between women’s sports advocates, athletic directors, coaches and athletes.

54. Id. at 26.
55. Harris, supra note 8, at 711.
56. Id.
57. Id.
58. Id.
60. Id.
61. Id. at 28.
62. Id. This suggestion may be implemented because presently there are bills pending before the House of Representatives and the Senate which would require schools to disclose their participation rates. See H.R. 921, 103d Cong., 1st Sess. (1993); S. 1468, 103d Cong., 1st Sess. (1993); see also, infra notes 151-154 and accompanying text.
The impetus for debate is the NCAA's 1991 survey on gender equity. The purpose of the survey was not to measure Title IX compliance, but to provide the NCAA with a basis for analysis of the gender equity problem. The results of the survey revealed that although enrollment at colleges and universities is equally divided between men and women, almost 70% of all college athletes are men.63 Men also dominated athletics from a financial standpoint. Their programs received 70% of all scholarship funds, 77% of operating funds and 83% of recruiting money.64 Thus, the statistics indicated that twenty years of Title IX had not achieved equity for women in college athletics.

NCAA INVOLVEMENT IN TITLE IX ENFORCEMENT

Although Title IX has been around for over twenty years, the NCAA had never taken affirmative steps to assure that its members comply with it.65 However, since the results of its gender equity survey, it has taken the issue more seriously.

The NCAA formed the Gender Equity Task Force, which was in charge of defining "gender equity," examining NCAA policies in order to evaluate their impact on gender equity, and recommending a path toward measuring and realizing gender equity in college athletics.66 In July, the task force presented its report to the public. It began by defining gender equity in the following way:

An athletics program can be considered gender equitable when the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender. No individual should be discriminated against on the basis of gender, institutionally or nationally, in intercollegiate athletics.67

63. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, FINAL REPORT OF THE NCAA GENDER EQUITY TASK FORCE 1 (1993)[hereinafter NCAA]. Exactly 69.5% of all college athletes are male. Id.
64. Id. For example, in a survey of 253 Division I schools, an average of $849,130 per school went toward men's scholarships, while an average of $372,800 per school went toward women's scholarships. Ed Sherman, Men vs. Women: It's A Brand New Ballgame, CHI. TRIB., Apr. 28, 1993, §1, p.1.

Professor B. Glenn George of the University of Colorado Law School conducted a study comparing that school's men's and women's basketball teams. She found that the two teams received equal treatment in the areas of travel, road accommodations and athletic scholarships. However, George found financial discrepancies in the areas of recruiting budgets, coaches' salaries, equipment and training table. George could not understand why the discrepancies were so large — especially in the areas of equipment and training table. Both teams use the same equipment, so any discrepancy there is indefensible. Also, the discrepancy in training table amounts was so large that it could not be justified by saying that men consume more food than women.

She tried to explain these differences by saying that the men's team makes more money for the school, so it deserves a larger budget. However, while the men's basketball team earned more revenue than the women's team, it also lost more money than it earned. B. Glenn George, Miles to Go And Promises to Keep: A Case Study in Title IX, 64 U. COLO. L. REV. 555 (1993).

65. Harris, supra note 8, at 706-07 (referring to the President's Commission and the Knight Commission dealing with women in authoritative positions).
66. NCAA, supra note 62, at 1.
67. Id. at 2.
This definition is vague and ambiguous. It does not provide institutions with any specific guidance as to what is equitable. It is more of a statement of general principles than any definition that can assist institutions in their quest for compliance.

The task force then developed guidelines for use in promoting gender equity. The task force stated that the “ultimate goal” for each institution is that the number of male and female athletes is in proportion to the number of male and female undergraduate students. While proportionality does not require fixed quotas and “(s)ports offered for one sex do not have to be identical to sports for the other,” the task force said that “participation in all sports must be included in determining the appropriate participation levels for men and women.”

The task force also addressed the issue of financing opportunities for gender equity: “Maintaining current revenue-producing programs as one aspect of long-range planning for increasing women’s opportunities is preferable to decreasing the opportunities for men — especially when such maintenance may result in revenues available for both women’s and men’s programs.” This statement does not present any new ideas. Of course athletic departments do not want to eliminate men’s sports because they want to keep as many athletes playing as possible. Also, athletic departments are going to maintain revenue-producing programs to fund the non-revenue programs. Once again, the NCAA is not providing schools with practical guidance as to how they can comply with Title IX and keep everyone playing. As will be seen, this policy statement has been violated because colleges have had to eliminate some men’s non-revenue sports in order to meet Title IX compliance.

The task force concluded its report by saying that the NCAA would play only a supporting role in helping schools achieve gender equity. It is the responsibility of the schools to develop ways to comply with Title IX, while using the NCAA as a resource. It then issued a warning to institutions that if they and the NCAA fail to remedy the problem of gender equity, then third parties, specifically the courts and Congress, would do so.

Joseph Crowley, president of the NCAA, believes that the position that the task force took concerning the roles of schools and the NCAA is appropriate. Because of the large and diverse membership of the NCAA, he feels that the NCAA would best serve as a resource for schools in their quest for compliance. If the NCAA set out standards for each school to follow, either

68. Id. at 3.
69. Id. at 4.
70. Id. at 3.
71. See Kelley v. Board of Trustees of the University of Illinois, 832 F. Supp. 237 (C.D. Ill. 1993). See also infra notes 140-150 and accompanying text.
72. NCAA, supra note 62, at 9.
73. Id. at 10.
74. Dr. Joseph N. Crowley, Speech at DePaul University College of Law’s Issues in Intercollegiate Athletics (Oct. 5, 1993).
75. Id.
many of the schools would not be able to follow them or there would be so many exceptions to the standards that they would be useless.

Some may feel that the task force did not do enough to help institutions achieve compliance with Title IX. The idea that the NCAA will act as a resource in helping schools comply with Title IX is ironic. The fact that the NCAA was opposed to Title IX from the outset and now is only willing to act as a resource indicates that it may not be as interested in Title IX as perhaps it should be. It appears that from the role that the NCAA wants to play, it is avoiding dealing with the tougher issues involved in the debate, such as the amount of interest women have in participating in athletics and the role of football in gender equity. 76

The NCAA’s Cost-Cutting Committee has also been working with the Gender Equity Task Force to develop rules and guidelines for schools so they may be able to finance the cost of achieving gender equity. The committee has recommended cutbacks in administration, travel, recruiting and walk-on programs. 77 Specific suggestions for cost-cutting include limiting Division I-A football teams to 105 players and limiting Division I-AA teams to 90 players. 78 Another suggestion is eliminating the off-season training table that is used by men’s teams (especially football). 79 The Cost-Cutting Committee estimates that cuts in these areas will save schools between $250,000 and $500,000 a year — money which would be used to add or upgrade women’s programs. 80 These recommendations have been submitted to the President’s Commission, and if they are approved, they will be voted on at the January convention. Due to the budget constraints athletic departments face today and the cost of adding or upgrading programs, agreement may never be reached on how much it will cost to achieve gender equity. Perhaps the biggest concern is that at the January convention, schools will only approve cuts in “safe” areas such as the year-around training table and not tackle a tougher issue like the fate of football walk-on programs.

In the meantime, schools and athletic conferences are devising ways to achieve gender equity without going broke in the process. The easy way to pay for gender equity is for the athletic department to receive money outright from the administration. This is what the University of Iowa did — it asked the school’s general fund to contribute $1 million to help fund a women’s soccer team. 81 However, this approach is not always practical because most schools simply do not have extra funds to pay for athletics. Thus, athletic departments

76. Regardless of how one feels about the task force report, the report and the issue of gender equity will be before the entire NCAA at its annual meeting in January. Legislation affecting gender equity may come out of this meeting.
77. Mark Asher, Big Schools Balk at Likely Cuts; NCAA Savings Irks Football Powers, WASH. POST, June 24, 1993 at B3; see also, Sherman, supra note 64, at 1.
78. Dame, supra note 9, at C1.
79. Id.
80. Sherman, supra note 64, at 1. However, women’s groups like the Women’s Sports Foundation maintain that $1 million per school is needed to bring them into compliance with Title IX. Id.
81. Id. at 19.
have to reallocate their own resources to add or upgrade women’s programs.

As a preliminary step, some schools and conferences have set a ratio between male and female athletes that the schools must achieve by a deadline. For instance, in 1992, the Big Ten Conference enacted the Gender Equity Action Policy, which mandates each member school to achieve a 60%-40% male-female participation ratio by June 30, 1997.\(^{82}\) The conference also stated that the following actions may be appropriate in achieving compliance with the policy: 1) increased funding of female student-athlete programs; 2) increased availability of programs to women; 3) encouragement of increased participation by women; 4) reallocation of resources within the intercollegiate athletics program; and 5) a cap on squad sizes of men’s sports.\(^{83}\) Unlike the NCAA Gender Equity Task Force, the Big Ten has provided its schools with some guidance on achieving gender equity. It is interesting to note that the Big Ten’s policy takes a practical look at the schools’ current financial situations. It suggests to schools that they may have to reallocate resources or cut the size of men’s squads. Indeed, some Big Ten schools have eliminated men’s programs. For example, last spring the University of Illinois eliminated its men’s swimming and diving teams, while the University of Michigan eliminated its men’s gymnastics team.\(^{84}\) The Big Ten’s policy makes the NCAA’s position on financing look like a fantasy. Thus, the NCAA may not provide the schools with an adequate resource when they are forming Title IX compliance plans.

Not surprisingly, men are upset that their sports are being cut back or eliminated altogether in the name of gender equity. As will be discussed later, the men’s swimming team at Illinois filed a lawsuit claiming reverse discrimination under Title IX.\(^{85}\) Athletic administrators are unhappy as well. Don Canham, former athletic director at the University of Michigan, says that the policy of “drop a men’s sport, add a women’s sport” has to stop because there appears to be no stopping point.\(^{86}\) Echoing the sentiment is Chuck Neinas, the executive director of the College Football Association: “Here we are leaning over backward trying to increase women’s participation, and we’re trying to cut men’s. That’s not what Title IX was intended to do . . . [i]t wasn’t meant to cut men.”\(^{87}\)

Women sympathize with the male athletes whose sports are being eliminated, but the sympathy does not run very far. Schools have had twenty years to achieve gender equity and, now, women’s sports are being cast in the role of the villain when men’s non-revenue sports are cut.\(^{88}\) Athletic departments have other options besides cutting men’s non-revenue sports. They could trim fat from

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83. 3 Id. at 72.
86. Ed Sherman, *Women’s Profits is Men’s Loss*, CHI. TRIB, April 30, 1993 at §4, p. 3.
bloated football budgets or perhaps market women’s sports so that they will generate revenue.89

Women also question the Big Ten’s mandate of 60% male athletes and 40% female athletes by 1997. They claim that this is not a good faith effort toward gender equity on the conference’s part, especially considering that the University of Iowa has committed itself to a 50-50 ratio over the same period of time.90 This argument is plausible when one looks at the percentages of male and female athletes at all of the Big Ten universities. At 10 of the 11 Big Ten schools, the ratio of male athletes to female athletes is roughly 70% to 30%.91 For example, suppose, that the average Big Ten university has a total of 500 athletes participating on the intercollegiate level. Due to the 70-30 split, 350 of these athletes would be men and 150 would be women. If this school (like most of them) cannot procure extra funds to add women’s sports teams, it must reallocate funds, which, as of late, means cutting men’s sports. Since most athletic departments like to have as many athletes playing as possible, the university will likely reallocate the eliminated positions to the women. Thus, since the school is keeping the same number of total athletes and is reallocating opportunities, then the 60-40 ratio will require the university to have 300 men and 200 women. This is a shift in only 50 slots, which may be the equivalent of two men’s teams. Eliminating 50 slots (or two men’s teams) from the men’s side and reallocating them to the women’s side should not take five years to accomplish. Achieving a 50-50 split, however, may take five years because there are more spots to eliminate and reallocate. Therefore, perhaps either the Big Ten should have shortened the period for achieving the 60-40 ratio or mandated a 50-50 ratio over the five year period.

**FOOTBALL: THE SACRED CASH COW**

Perhaps the most passionate issue that is being discussed concerns the role of football in the gender equity picture. Football is unique among college sports because of the size of the teams, the tradition surrounding the sport, its ability to bring in money for athletic departments and its ability to spend large amounts of money. This debate has become so heated that the two sides (women’s advocates versus athletic directors and football coaches) are becoming personal in their exchange of words. Coaches and athletic directors claim that all that these “militant women” want to do is “whack football.”92 Meanwhile, the women’s advocates claim that the coaches and athletic directors are “paranoid” about cuts in football.93

89. *Id.*
91. Sherman, *supra* note 86, at 19. Penn State is the only Big Ten school that is close to the conference mandated ratio. Men comprise 62% of the athletes, while women comprise 38%. *Id.*
93. Dame, *supra* note 9, at C1.
This battle over football is being fought on two fronts. The first front concerns whether football should be included on a team basis or on a participation basis in measuring gender equity. Although Title IX requires that football be included for gender equity computation, athletic directors and football coaches claim that counting football on a participation basis would make achieving equity much tougher. They believe that participation opportunities should be determined by the number of sports offered — not by the number of athletes. In effect, they divide college athletics into three groups — men's sports, women's sports and football. Athletic directors claim that if football is counted based on the number of players, then all of the men's non-revenue sports would have to be cut so women would have equal opportunities to participate. Consequently, the typical athletic program would consist of football, men's basketball and seven women's sports.

Women counter that the law requires that football count on a participation basis. In addition, if football is not included on a participation basis, then the goal of Title IX will be circumvented because athletic departments could continue to spend large amounts of money on football without any concern for women's programs.

The second front in the football battle concerns trimming football budgets. Many assume that because football earns enough revenue to help support other sports, it is a profitable sport. However, only 13% of the schools with football programs make a profit. Football has the largest expenditures of any college sport. For example, Florida State University spent approximately $4 million on its football program during the 1992-93 school year. On the other hand, its entire women's program spent $900,000 during the same period.

Budget cuts have been proposed in two major areas. The first area can be defined as miscellaneous "frivolous" expenses. These include: 1) putting up players in a local hotel the night before a home game; 2) chartering an airplane for a 200-mile trip when traveling by bus would have been much cheaper; 3) allowing 7 coaches 110 days each to recruit 25 players; and 4) staying at hotels such as Hilton or Marriot. Thus far, these proposed cuts have not created much con-
The second area for proposed cuts concerns the size of the squads themselves. Currently, Division I-A programs can award 85 football scholarships for the 1994-95 season. Thus, a Division I-A school pays to have more players on its team than an NFL team. If the average football scholarship is worth $10,000, then eliminating 10 of them could pay for a women’s program.

Of course coaches and athletic directors are opposed to any scholarship reduction. They have become accustomed to players specializing in certain positions and do not like to have a player occupy two positions on the depth chart. However, scholarships could be limited to 50 per team and a coach still would have enough players that each of them could play only one position. Coaches also argue that scholarship reductions would benefit the smaller schools and, thus, more parity would be brought to the game. However, this should be an argument for cutting scholarships, not against it. Parity means that there will be better competition and close, hard-fought games, which is what football fans like to see. Therefore, the better the competition, the more that fan attendance and television revenues will increase.

Another proposed idea to reduce squad size is to either reduce or eliminate the walk-on program. Although Division I-A schools have a cap on the number of scholarships players they may have, there is no such limit for the number of walk-ons. Consequently, a team may have 150 members on its team, the majority of whom seldom, if ever, get to play. Coaches and athletic directors argue that walk-ons are a tradition in the sport and that a person who wants to play a sport simply because he loves it should be able to do so. The sentiment for walk-ons cannot be denied; however, it seems irrational to spend hundreds of dollars feeding, clothing and transporting dozens of players who never play. Therefore, at least reducing the number of walk-ons in football does not seem harsh or unfair.

Contrary to the popular opinion among coaches and athletic directors, women do not want to “whack” football. Women understand how important it is to those who play it. The proposed cuts are not excessive and will not damage the game in any way. As a matter of fact, the game may improve because more schools would get better players. All that women ask is to eliminate the unnecessary expenditures from football and keep all of the teams in the athletic programs competitive.

103. Bennett, supra note 92, at D4; see also Alexander Wolff, Trickle-Down Economics, SPORTS ILLUSTRATED, Oct. 25, 1993, at 84.
104. NFL teams carry only 47 players on their rosters. Wolff, supra note 103, at 84.
105. If a college team carried only two sets of offensive and defensive teams at 11 players per team, then it would need only 44 players.
106. Wolff, supra note 103, at 84.
107. For example, in 1992, the University of Nebraska brought 191 players to the Orange Bowl. Many of them sat in the stands. Moran, supra note 1, at 1.
If You Build It, Will They Come?

Part of meeting Title IX requirements is measuring the amount of interest each gender has in a particular sport. The amount of interest that women have in intercollegiate athletics has become a concern to many athletic directors. They realize that in order to comply with gender equity requirements, they have to add more sports. When these teams are first developed, they will have to rely on walk-ons for most of their players because tight budgets will allow for only a few scholarships. The concern is whether women are willing to participate in intercollegiate athletics because they want to or whether the school is manufacturing interest in order to demonstrate that it is complying with Title IX.

The question of women's interest is highlighted by the comparison of male walk-ons to female walk-ons. NCAA statistics show that male walk-ons outnumber female walk-ons by a 3 to 1 ratio. This disparity could exist for a couple of reasons. First, women may indeed not be interested in participating in intercollegiate athletics. Also, women may not participate in athletics unless they receive scholarship money. A coach of a women's non-revenue team believes that the latter is the case: "If you ask a man, do you want to play, he says, 'Where do I show up?' But from a woman, you hear, 'What are you going to give me?'"

On the other hand, women argue that there is an interest in participating in athletics, but that the opportunities for participation do not exist. They claim that the disparity between the number of male and female walk-ons exists for three reasons. First, they say that men have more walk-ons because men's teams receive more recruiting money and are able to "sell" their programs to more people. Second, they say that men's teams have bigger coaching staffs. This allows players to receive more individual attention — a bonus in any athletic program. Finally, women say that societal factors play a role. Unlike men, women want more out of athletics than just being on the team — they are interested in contributing to the team's success. Women believe that schools need to make a concerted effort to recruit walk-ons for women's programs. This may create a trickle down effect through encouraging high school girls to participate in athletics.
This issue has created a chicken-and-the-egg type of argument. Which must come first — opportunities or interest? Both sides present valid arguments. It appears that the only way this debate will ever be solved is for schools to provide the opportunities initially. Women are not asking for schools to add teams when there is definitely no interest in them. If the opportunities are there, but there is not interest to match them, then schools can rightfully argue that there is not interest and they are in compliance with Title IX. It also seems that women are subjected to a higher standard and have to prove their interest before a sport can be added. Perhaps this is because society either expects them to not be interested in participating in college athletics or expects them to be interested only in men’s sports. Thus, it appears that women’s interests in a sport will be more closely scrutinized than men’s interests. Effectively (and somewhat unfairly) women are going to have to have a strong showing of interest the first time that they request a sport or the first time an athletic department supports a new women’s sport.

RECENT TITLE IX LITIGATION

Title IX enforcement has increased as of late; however, the catalyst has not been the Office for Civil Rights but the federal court system. During this year, three major Title IX cases were decided. All of these cases involved schools that had eliminated women’s programs and were subsequently ordered to reinstate them under Title IX. The first case was Favia v. Indiana University of Pennsylvania. In Favia, Indiana University of Pennsylvania (IUP) eliminated its women’s gymnastics and field hockey teams as well as men’s soccer and tennis. Women made up 56% of the student body and, before the cutbacks, they made up 37% of the athletic population. The court evaluated IUP’s situation in light of the three pronged test for determining participation opportunities. IUP failed all three prongs. Especially damaging was the disparity between female student body population and the female athlete population and the fact that the level of opportunities dropped with the elimination of the two women’s sports. In addition, the court held that neither financial concerns nor the fact that the NCAA does not sponsor a championship in the particular sport (here, women’s gymnastics) can justify discrimination.

In the next case, Cohen v. Brown University, the school cut women’s volleyball and gymnastics and men’s golf and water polo. The proportion between men’s and women’s opportunities remained the same after the cuts (63% men and 37% women); however, more money was taken away from the women’s budget. Brown argued that the three benchmarks used to measure opportunity are overbroad. It argued that to the extent that student interests are disproportionate due to gender, colleges should be allowed to meet these interest in-
completely as long as the school’s response to these interests is in direct proportion to the comparative levels of interest. Brown said that a school accommodates female athletes if it allocates opportunities to women in accordance with the ratio of interested and able women to interested and able men, regardless of the number of unserved men and women and the percentage of the student body they comprise.

The court disagreed with Brown’s interpretation of the regulations. The fact that the overrepresented gender is not fully accommodated does not excuse a shortfall in providing opportunities for the underrepresented gender. Thus, the Brown court emphasized that Brown’s interpretation of the regulations was incorrect because it failed to “fully” and effectively accommodate the interests of the underrepresented gender. A school must fulfill all of the unmet interests of either gender in order to comply with Title IX. The court also thought that Brown’s reading of the statute would cause quantification problems concerning the level of interest of men and women. According to Brown’s interpretation, student plaintiffs as well as the university would have to assess the level of interest of both sexes and determine how completely that interest was being served. The court felt this was too complicated, saying that the question is simply whether there is an unmet need among the underrepresented sex that is so significant that it warrants the creation of a new team or the upgrading of an existing one.

Recently, the Tenth Circuit decided the case of Roberts v. Colorado State University. Colorado State (CSU) eliminated the women’s varsity softball team and the players sought an injunction to force the school to reinstate the program. The court’s opinion relied on Cohen to defuse the school’s arguments concerning the third benchmark of “fully and effectively accommodating interests and abilities of women.” CSU interpreted this benchmark to mean that even if there is interest and ability on the part of female athletes, the university is obliged to accommodate them only to the extent that men are accommodated, too. Thus, claimed CSU, women have no cause to complain because men’s baseball was eliminated along with softball and there were more disappointed

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126. Id. at 899.
127. Id. The Cohen court used the following example to illustrate Brown’s argument:

Suppose a university has a student body consisting of 1,000 men and 1,000 women, a one to one ratio. If 500 men and 250 women are able and interested athletes, the ratio of interested men to interested women is two to one. Brown takes the position that both the actual gender composition of the student body and whether there is unmet interest among the underrepresented gender are irrelevant; in order to satisfy the third benchmark, the university must only provide athletic opportunities in line with the two to one interested athlete ratio, say 100 slots for men and 50 slots for women. Under this view, the interest of 200 women would be unmet — but there would be no Title IX violation. Id.
128. Id.
129. Id.
130. Id.
131. Id. at 900.
132. 998 F.2d 824 (10th Cir. 1993).
133. Id. at 831.
male athletes than female athletes. The Tenth Circuit, relying on Cohen, rejected this argument. It said, "If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test." The court looked at several facts, including the plaintiff's commitment to the sport, the team's playing schedule and the interest in softball throughout the state of Colorado to determine that these players' interests were not fully and effectively accommodated by the athletic department.

In addition, the court held that CSU failed the first benchmark of whether athletic opportunities for women are substantially proportional to the population of the female student body. At CSU the disparity between enrollment and athletic participation for women was 10.5%. The Tenth Circuit held that a 10.5% disparity is not substantially proportionate and, thus, CSU did not pass the first benchmark.

These three cases illustrate a few points. First, it indicates that schools are way out of compliance as far as offering participation opportunities. The three schools here are of different sizes, from different conferences and participate at different NCAA levels. They are somewhat representative of colleges and universities across the United States. Plus, none of these schools is a major athletic mecca like the University of Michigan or UCLA. Thus, if places like Indiana University in Pennsylvania or Brown University are not complying with Title IX, then chances are that neither are the bigger athletic powerhouses.

Second, Cohen and Roberts illustrate that courts are not willing to broadly interpret the third benchmark of "fully and effectively accommodating the interests and abilities of the underrepresented gender." Stated simply, if athletes can demonstrate an interest in adding a new sport, then the school must provide them with that sport. It does not matter who is interested or that the other gender is not interested. It appears that "fully and effectively" knows no limits.

Third, from these cases it can be inferred that any disparity between the female student population and the female athletic population must be insignificant. This would not appear to bode well for the schools in the Big Ten Conference. Most of the schools in the Big Ten have a student enrollment ratio of 50-50. If each school meets the conference requirement of a 60-40 ratio in athletics, there will still be a ten percent disparity between the female student population and the female athlete population. The courts in both Cohen and Roberts would say that this disparity is too large, considering they held that 11% and 10.5% disparities are too large. Thus, although the Big Ten school would be in compliance under

134. *Id.*

135. *Id.* at 832 (citing Cohen, at 898).

136. *Id.*

137. *Id.* at 830.

138. *Id.*

139. *Id.*; see also Cohen, 809 F. Supp. at 978 (an 11% disparity between male and female athletes was also not substantially proportionate); CSU also failed the second benchmark. It had not added a women's sport since 1977. In addition, it dropped three women's programs. Roberts at 830.
conference standards, they may not be under standards as interpreted by the federal courts. This demonstrates that someone, perhaps the courts, the OCR or the NCAA, should develop a rule for what "substantially proportional" means.

Since some schools have begun to eliminate programs in order to comply with Title IX, the male athletes whose sports were cut are beginning to cry reverse discrimination. A recent example of this occurred in Kelley v. Board of Trustees of the University of Illinois. The University of Illinois (Illinois) eliminated men's varsity sports for swimming and fencing and for men's and women's diving. In an unprecedented move, the members of the men's swimming team alleged gender discrimination under Title IX. The school cited budget constraints as the reason for the cuts, but the court also found that the school was trying to comply with the Big Ten Conference's gender equity policy.

The court first stated that Title IX has evolved from being a prohibition on gender discrimination to providing equal athletic opportunities for both sexes. It also held that even if the school's decision to cut men's sports was not based on financial or budgetary reasons but made solely to move closer to the substantial proportionality requirement, the failure to cut women's programs was allowed under Title IX. Under Title IX, the school could cut men's programs without violating the law because the men's needs were met due to the fact that substantial proportionality exists between male students and male athletes. Women's programs could not be cut because the level of participation is not in proportion to the percentage of female students. This would make the school vulnerable to a finding of noncompliance if the school did not fully and effectively accommodate the women's interests and abilities. The court held that the male athletes involved had not been discriminated against under Title IX. The percentage of men participating on varsity teams at Illinois is more than substantially proportionate to the percentage of men in the undergraduate population. This fact did not change even after the men's swimming and fencing teams were eliminated. Although the court sympathized with the plaintiffs because they were innocent victims in this case, it stated that it is not unfair for them (and others so situated) to have to bear the loss of a sport while women do not. Title IX requires equal opportunity and when one considers the scope of the total men's program at Illinois and the disproportionate participation in athletics, then it is permissible for Illinois to sacrifice the men's teams for the sake

141. Id. at 241.
142. Id.
143. Id. at 242. Although the ratio of the male student body to the female student body at Illinois is 50-50, male athletes make up 69% of the total number of athletes. Sherman, supra note 64, at 19.
144. 832 F. Supp. at 242.
145. Id.
146. Id.
147. Id.
148. Id.
149. Id. at 244.
of the women's program. As a result of this case, male athletes whose teams have been eliminated are without a legal or equitable remedy unless the school has achieved compliance with Title IX. Considering the fact that most schools are not in compliance, men's teams will have to live with the threat of elimination for some time.

**Ideas for Reform**

The renewed debate over Title IX has instigated some proposals to make compliance more effective and permanent. One of these proposals, currently pending in the U.S. House of Representatives' Committee on Education and Labor, is known as the "Equity in Athletics Disclosure Act." This bill requires that each school that participates in intercollegiate athletics submit an annual report to the Secretary of Education that includes the following information on each team: 1) total participants and their gender; 2) total scholarship expenditures; 3) total operating expenses; 4) total recruiting expenses, etc.

This report would be available to the public and the school must provide a copy of the report to each student to whom the school offers admission. The purpose of this bill is so that Congress and the Department of Education can monitor Title IX compliance. This bill has a few problems. The bill does not describe what will happen if a school fails to submit a report or if it lies in its report. Also, it does not say how these reports will fit in with the OCR enforcement of Title IX. However, its biggest problem is that it will likely not pass the Committee on Education and Labor. It has a 16% chance of passing in the committee and only a 7% chance of passing on the House floor.

In the absence of further legislation, people are developing ideas so that gender equity can be achieved and all athletes have opportunities to participate. One suggestion is to increase the championship fields for women's sports. For example, the women's basketball championship would go from 48 teams to 64 teams. Such expansion could lead to more exposure of women's sports and could create more interest in athletic departments because the chance of that school's women's team making the championship tournament would increase. The problem with this suggestion is whether anyone will be interested in watching expanded women's championships. Currently, men and women watch men's sports more often than women's sports. Expanding championships will give more

150. *Id.*
151. H.R. 921, 103d Cong., 1st Sess. (1993). There is also a Senate version which is virtually identical to the House version. It is currently pending in the Senate Committee on Labor and Human Resources. For full text, see S. 1468, 103d Cong., 1st Sess. (1993) [all references hereinafter will be to the House bill].
153. *Id.*
154. These statistics are available on LEXIS in the Billcast file. The Senate bill has an 8% chance of passing in committee and a 5% chance of passing on the floor. *Id.*
schools the chance to compete for a title, but it may not attract more television or live fan support.

Another suggestion is to replace athletic scholarships with ones that are need-based. 156 This would cut back on the amount of scholarship money that is awarded. However, this suggestion is not likely to become reality because athletic departments will fear losing talented athletes who would play if they received an athletic scholarship but will be unable to do so because they do not need the financial support.

It has also been suggested that the NCAA use its certification or accreditation processes to monitor Title IX compliance. 157 Both of these processes would require an internal interview and external comparison with other schools. Both programs would require compliance with Title IX as well as an examination of a school’s philosophy on its women’s athletic program. 158 If a school does not comply with Title IX or has a discriminatory philosophy toward women, it would be denied NCAA accreditation. These programs would also monitor disbursements to assure that women’s programs receive equivalent funds. 159 This seems to be a novel and forceful idea. By making the threat of losing NCAA accreditation real, schools will make a concerted effort to see that they are in compliance. Once a school loses accreditation, it can basically stop waiting for athletic money to come in. The only question is whether the NCAA is willing to impose such a harsh penalty for non-compliance. Given the NCAA’s current position toward effective Title IX enforcement, it seems unlikely.

CONCLUSION

After 21 years of being subject to Title IX, colleges and universities have finally decided that they must comply with it. What measures are taken and how long it will take to effectuate them remains to be seen, but a question still remains. Why has it taken so long for schools to take steps toward compliance? Lack of effective enforcement by the OCR is a reason, but there is another force at work — tolerance. Sex discrimination is not tolerated in other contexts such as employment. Colleges and universities do not tolerate sex discrimination in academics. Since they do not tolerate it in academics, they should not tolerate it in athletics either because athletics is only a small part of a school’s educational mission. 160

Women are taking steps to show their displeasure at such tolerance through pushing for Title IX compliance. Perhaps the best way to combat this tolerance is through publicity — televised contests, promotional nights at home games, etc. Through publicity, women can show that the quality of their athletic programs is just as good as (or perhaps even better) than men’s programs. This would make

156. Id.
157. Harris, supra note 8, at 718.
158. Id.
159. Id.
160. George, supra note 63, at 568.
Title IX compliance easier in the long run.

I have learned a lot from writing this paper. I have discovered that I tolerate this behavior in college athletics. I have decided that I am going to do something to fix that. Now if you’ll excuse me, I’m going to watch the Long Beach State-UCLA women’s volleyball game on ESPN. Those of you who also tolerate this behavior are welcome to tune in as well.

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