

Title IX: How Title IX Should Be Interpreted to Afford Women the Opportunities They Deserve in Intercollegiate Athletics

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I. INTRODUCTION

Moments after a dazzling fifty-five-yard interception return for a touchdown by New Mexico in the 2002 Las Vegas Bowl, the Lobos' kicking team rushed onto the field for the point-after attempt. However, this was no ordinary point-after attempt. This point-after attempt would go down in the record books as the first time a woman played in a Division I football game.¹ Katie Hnida gracefully jogged onto the field to kick the extra point amidst the chatter of thousands of fans amazed at what they were witnessing. After the ball was snapped and spiraled toward the holder's outreaching hands, Katie went up against more than just the eleven University of California at Los Angeles (UCLA) defensive players; she went up against every person who has ever thought that women are unequal to men and should not be given the same opportunities in athletics. With perfect poise and concentration, Katie approached the ball and kicked it toward the uprights, but the ball found the raised hand of a UCLA player who batted it down to deny Katie's extra point.²

The extra point attempt by Katie is symbolic of the two different approaches of interpreting Title IX: on the one hand, the cheers that Katie received as she entered both the game and the record books as the first woman to play in a Division I football game could be symbolic of a strict, proactive interpretation of Title IX that will allow the gender barrier to be broken in college athletics and afford women the opportunities and recognition in the college sports world they rightly deserve; or, on the other hand, the ball being blocked by the UCLA player could be symbolic of a looser interpretation of Title IX, where women will continue to travel down the long, difficult road in college sports only to find their quest for the opportunities they deserve continually blocked.

As a former college baseball player, it was hard to go through a season without hearing negative statements from various coaches, administrators, or other athletes criticizing Title IX. Their statements would almost always begin, "If it wasn't for Title IX," and end with some negative impact that Title IX has caused to their men's teams or athletic department. Some examples of these statements are: "If it wasn't for Title IX, the athletic department could be run like a business," and "If it wasn't for Title IX, the athletic department would not have a deficit," and

1. See Jere Longman, *Female Athletes Gaining Ground and Breaking It*, N.Y. TIMES, Feb. 25, 2003, at D1.

2. See *id.* at D5.

the most famous, “If it wasn’t for Title IX, our program would get more money and we would be more successful.” It is time, once and for all, for the college athletic world to stop blaming Title IX for its financial problems because of long-standing myths about enforcement of the statute. It is also time for Title IX to be enforced in the manner in which it was intended, to ensure that no person is denied the opportunity to participate in educational programs receiving federal financial assistance on the basis of their sex.

The goal of this Article is to fully explore exactly what Title IX currently requires of an intercollegiate athletic department, and to analyze the recent proposed changes to the statute to determine how Title IX should be enforced to better meet its purpose.

II. THE ACTUAL STATUTE

Title IX of the Education Amendments of 1972 is a federal statute that states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”³ The term “program or activity” has been interpreted by Congress to mean “all the operations of . . . a college, university or other postsecondary institution, or a public system of higher education.”⁴ This interpretation by Congress ensures that Title IX will be given “broad, institution-wide application,”⁵ which will apply to all programs or activities at a college or university, including athletics.⁶ A “recipient” has been defined to include any entity “to whom federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance.”⁷

In *Grove City College v. Bell*, the court held that a college qualifies as a recipient if there are students in attendance who receive federal financial assistance.⁸ The court also found that Title IX makes no distinction between an institution receiving direct assistance and an institution receiving indirect assistance through its students.⁹ Therefore, while Title IX does not directly reference intercollegiate athletics, Title

3. 20 U.S.C. § 1681(a) (2000).

4. 20 U.S.C.A. § 1687(2)(A) (1993).

5. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 2(2), 102 Stat. 28 (1988).

6. *See id.* § 908.

7. Nondiscrimination on the Basis of Sex in Education, 34 C.F.R. § 106.2(i) (2003).

8. 465 U.S. 555, 569-70 (1984).

9. *Id.* at 564.

IX governs intercollegiate athletics because athletics are operations of a college or university, and because nearly every college or university receives federal assistance either directly or indirectly through its students.¹⁰ Intercollegiate athletics have also been directly implemented under Title IX's coverage through the Code of Federal Regulations.¹¹ 34 CFR § 106.41(a) states:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.¹²

III. INTERPRETATION AND COVERAGE

Congress issued a directive to the Secretary of Health, Education and Welfare (HEW) granting the Secretary the power to set standards for athletic programs under Title IX.¹³ In response to this directive, HEW enacted regulations in 1975 that pertained directly to college athletics.¹⁴ The current HEW policy was implemented in 1979, when the HEW's Office for Civil Rights (hereinafter OCR) published its Policy Interpretation¹⁵ that went into more detail regarding how an institution is to be measured in determining whether it is in compliance with Title IX in the athletic opportunities it offers.¹⁶ With this Policy Interpretation, the OCR gave guidance pertaining to the three aspects of Title IX that are

10. See Donald Heller, *Not All Institutions Are Alike*, CHRON. HIGHER EDUC., Nov. 14, 2003, at B7.

11. See Nondiscrimination on the Basis of Sex in Education, 34 C.F.R. § 106.41(a) (2003).

12. *Id.*

13. Pub. L. No. 93-380, section 844, states in relevant part: "The secretary [of HEW] shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972." Educational Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974).

14. See *Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993).

15. The OCR stated the reason for the Policy Interpretation as follows:

By the end of July 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education. In attempting to investigate these complaints, and to answer questions from the university community, the Department determined that it should provide further guidance on what constitutes compliance with the law. Accordingly, this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.

Intercollegiate Athletics: Sex Discrimination, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

16. *Cohen*, 991 F.2d at 888.

applied to intercollegiate athletics: participation, scholarships, and other benefits.¹⁷

The OCR created a three-part test that is used to determine whether a university's athletic program is in compliance with the participation aspect of Title IX.¹⁸ Under the OCR's three-part test, an intercollegiate athletic program is in compliance with the participation aspect of Title IX if any one of the three following tests is met:

[Prong 1] Intercollegiate level participation opportunities for male and female students [must be] provided in numbers substantially proportionate to their respective enrollments;

OR

[Prong 2] Where the members of one sex have been and are underrepresented among intercollegiate athletes, . . . the institution [must] show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex;

OR

[Prong 3] Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above . . . it [must] be demonstrated that the interests and abilities of the members of that sex have been fully accommodated by the present program.¹⁹

The second aspect of intercollegiate athletics governed by Title IX is scholarships, which requires that female and male student-athletes receive athletic scholarship dollars proportional to their participation.²⁰

The third aspect of Title IX applicable to intercollegiate athletics is other benefits, which requires that male and female student-athletes receive equal treatment with regard to: "equipment and supplies, scheduling of games and practice times, travel and daily allowance/per diem, access to tutoring, coaching, locker rooms, practice and competitive facilities, medical and training facilities and services, housing and dining facilities and services, publicity and promotions, support services and recruitment of student-athletes."²¹

17. Intercollegiate Athletics & Sex Discrimination, 44 Fed. Reg. at 71,414.

18. *Neal v. Bd. of Trs. of Cal. State*, 198 F.3d 763 (9th Cir. 1999).

19. 44 Fed. Reg. at 71,418.

20. 34 C.F.R. § 106.37(c)(1) (2003).

21. *Id.* § 106.41(c)(2-10).

IV. DEFERENCE

The OCR's Policy Interpretation regarding participation, scholarships, and other benefits must be looked to when determining whether or not a court should give deference to the OCR's interpretation of Title IX. When a court is faced with the decision of whether to give deference to an agency's interpretation, the first thing that must be analyzed is if "Congress has directly spoken to the precise question at issue."²² If Congress has directly addressed the question at issue, and the intent of Congress is clear, then "that is the end of the matter for the court," and no deference is given to the agency's interpretation if it conflicts with Congressional intent.²³ If, however, the statute is silent or ambiguous regarding the question at issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."²⁴ Title IX does not specifically mention intercollegiate athletics, and does not specify what being denied participation in a college or university program on the basis of sex means; therefore, a court must look to the OCR's interpretation of Title IX and determine whether that interpretation is "based on a permissible construction of the statute."²⁵

When an agency has been charged with administering a particular provision or statute, a high degree of deference shall be given to that agency's interpretation of that provision or statute, since the agency's expertise in the field puts them in a better position to make interpretations than the courts.²⁶ An agency is given this high degree of deference when a statute is ambiguous, because it "is presumed that Congress meant to give the agency discretion, within the limits of reasonable interpretation, as to how the ambiguity is to be resolved."²⁷ The exception to the general rule of deference is when the agency's interpretation is deemed "arbitrary, capricious, or manifestly contrary to the statute."²⁸ Because the OCR "is the administrative agency charged with administering Title IX,"²⁹ the OCR's interpretations of Title IX should be given deference, unless its interpretation is found to be "arbitrary, capricious, or manifestly contrary"³⁰ to Title IX. One way to determine if an agency's interpretation is "arbitrary and capricious," is

22. *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

23. *Id.*

24. *Id.* at 843.

25. *Id.*

26. *See id.* at 865.

27. *United States v. Mead Corp.*, 533 U.S. 218, 241-42 (2001).

28. *Chevron*, 467 U.S. at 844.

29. *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993).

30. *Chevron*, 467 U.S. at 844.

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.³¹

The OCR's interpretation of Title IX must also be consistent with congressional intent for a court to defer to the agency's interpretation.³² Senator Birch Bayh (D-IN), a Title IX proponent, gave the following statement in Congress the same day Title IX was passed:

[Title IX was enacted to] provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.³³

Senator Bayh's statements are the only authoritative demonstration of congressional intent regarding Title IX.³⁴ The United States Supreme Court stated, "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide of the statute's construction."³⁵ The OCR's three-part test for participation and the analysis for scholarships and other benefits coincides with the intent of Title IX as they both are aimed at ensuring no person is denied participation in a college program on the basis of sex. Therefore, because the OCR, the agency charged with administering Title IX,³⁶ has made an interpretation that is not "arbitrary, capricious, or manifestly contrary to statute"³⁷ and is consistent with congressional intent, the OCR's three-part test for participation and analysis for scholarships and other benefits should be given deference by a reviewing court.

V. PARTICIPATION (THREE-PART TEST)

Participation is the first of three aspects in intercollegiate athletics governed by Title IX; the other two aspects governed by Title IX are scholarships, and other benefits,³⁸ which will be described below. The

31. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

32. *See Chevron*, 467 U.S. at 842-43.

33. 118 Cong. Rec. 55808 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh).

34. *See Neal v. Bd. of Trs. of Cal. State*, 198 F.3d 763, 766 (9th Cir. 1999).

35. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982).

36. *See Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993).

37. *Chevron*, 467 U.S. at 844.

38. *See Intercollegiate Athletics: Sex Discrimination*, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979).

legal standard for each aspect will be presented; participation will be addressed first, followed by scholarships, and then other benefits.

A. Prong One (Proportionality Prong)

The first prong of the OCR's interpretation of Title IX, with regard to the participation aspect of intercollegiate athletics provides, "Intercollegiate level participation opportunities for male and female students [must be] provided in numbers substantially proportionate to their respective enrollments."³⁹ A university seeking to demonstrate compliance with Title IX through Prong One must show that the number of actual athletic participants for each sex is substantially proportionate to the enrollment at the institution for that particular sex.⁴⁰ For example, if an institution has an enrollment that includes fifty-four percent female students and forty-six percent male students, the institution would be considered perfectly proportionate if the athletic participation opportunities at the institution were fifty-four percent for female athletes and forty-six percent for male athletes. The 1979 OCR Policy Interpretation defines participants as those athletes:

- a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
- b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
- c. Who are listed on the eligibility or squad lists maintained for each sport, or
- d. Who, because of injury, cannot meet a, b, or c above but continues to receive financial aid on the basis of athletic ability.⁴¹

Any athlete who qualifies under a, b, c, or d above as a participant must be counted at the institution, separated as either male or female, and then the total number for each sex must be individually divided by the total number of athletic participants. For example, an institution that has 150 female athletic participants and 200 male athletic participants would have 43% participation opportunities for females, (female participants of 150 divided by the total participants of 350 = 43%) and 57% participation opportunities for males (male participants of 200 divided by

39. *Id.* at 71,418.

40. See O.C.R., U.S. Dep't Educ., *Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test* (Jan. 16, 1996), available at <http://www.ed.gov/about/offices/list/ docs/clarific.html> (last visited Apr. 25, 2003) [hereinafter *1996 Clarification*].

41. Intercollegiate Athletics: Sex Discrimination 44 Fed. Reg. at 71,415.

the total participants of 350 = 57%). In the scenario above of 57% participation opportunities for males and 43% opportunities for females, the enrollment at the institution would have to be 57% for males and 43% for females for perfect proportionality under the proportionality prong for participation. The statute, however, does not require a perfect proportionality between participation opportunities and enrollment, but instead requires substantial proportionality between the two.⁴² The OCR makes the determination of what qualifies as “substantially proportionate” on a case-by-case basis.⁴³

The OCR has never come forward as part of a policy interpretation or clarification for Title IX and given a range as to what exact percentage differences between athletic participation and enrollment are considered substantially proportional, and what exact percentage differences between athletic participation and enrollment are not considered substantially proportional. For example, the OCR has never stated that an institution is not in compliance with Title IX when the athletic participation rate for a particular gender is three percent less than that particular gender’s enrollment rate (i.e., women have a fifty-three percent enrollment rate at an institution, but only have a fifty percent athletic participation rate). One likely reason the OCR has not made such a statement giving an exact percentage of what is and is not in compliance is that the interpretation would be seen as a quota system, which has been highly disfavored by courts.⁴⁴ Some argue that even though the OCR has not set a quota system for Title IX, the fact that one of the prongs for participation requires an athletic participation rate substantially

42. See 1996 Clarification, *supra* note 40.

43. The OCR has noted an institution may still be found to be compliant under Title IX with the proportionality prong of participation even though the institution may not have an athletic participation rate that is exactly proportional to its enrollment rate. The OCR stated:

[The] OCR recognizes that natural fluctuations in an institution’s enrollment and/or participation rates may affect the percentages in a subsequent year. For instance, if the institution’s admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the athletic program remained constant, the institution would continue to satisfy part one (the proportionality prong) because it would be unreasonable to expect the institution to fine tune its program in response to this unexpected change in enrollment.

Id. The OCR gave two other examples where the institution would be considered substantially proportional without being exactly proportional, which include “when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team.” *Id.*

44. See generally *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265 (1978) (refusing to allow a quota system in a medical school’s admissions process, which set aside a certain number of spots for minorities).

proportional to the enrollment rate, the participation prong has effectively become a quota system.⁴⁵

Courts have also declined to give an exact percentage for what constitutes compliance with the proportionality prong for participation. The court in *Cohen v. Brown University*, however, gave guidance as to what percentage would fail to comply with the proportionality prong when it held that an eleven percent gap between the participation opportunities for male and female students and their respective enrollments does not satisfy Prong One because the participation opportunity is not substantially proportional to the enrollment.⁴⁶ Unfortunately, the eleven percent figure the *Cohen* court gave for noncompliance does not help an institution wondering if they are in compliance with the proportionality prong when its athletic participation rate is in a range between exact proportionality and eleven percent of its student enrollment.⁴⁷

1. Counting Unfilled Roster Spots as Opportunities

In February of 2003, the federal commission studying gender equity in sports⁴⁸ proposed a change in the way a participation opportunity is measured.⁴⁹ The commission proposed the following change:

45. Jessica Gavora, the Senior Policy Adviser at the U.S. Department of Justice, stated, "OCR officials such as Norma Cantu were being dishonest when they insisted that because the regulations didn't 'require' sex quotas, those who administered the regulations didn't work relentlessly to make quotas happen." Jessica Gavora, *The Inequity of Gender Equity*, CHRON. HIGHER EDUC., May 3, 2002, at B11.

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

47. One such university that was in the range between exact proportionality and 11% was the University of Wisconsin at Madison. Jessica Gavora stated:

In the fall of 2000, having labored for a decade to attract women to its programs, the university had achieved near-perfect parity in the spring of that year: 429 athletes on the campus were men and 425 were women. Not good enough, wrote Algis Tamosiunas, of the OCR's Chicago office, in a letter to university officials. Because women constituted a majority of students on the Madison campus, or 53.1%, the university would have to add another 25 women.

Gavora, *supra* note 45, at B11.

48. According to the United States Department of Education:

"On February 26, 2003, the Secretary's Commission on Opportunity in Athletics issued its final report." [U.S. Department of Education] Secretary Paige announced the creation of this blue-ribbon panel of sports professionals and educators on June 27, 2002. Its purpose was to examine ways to strengthen enforcement and expand opportunities to ensure fairness for all college athletes.

U.S. Dep't Educ., *Secretary's Commission on Opportunities in Athletics*, at <http://www.ed.gov/about/bdscomm/list/athletics/index.html> (last modified Feb. 26, 2003).

49. See Welch Suggs, *Cheers and Condemnation Greet Report on Gender Equity*, CHRON. HIGHER EDUC., Mar. 7, 2003, at A40.

The Office for Civil Rights [OCR] should consider a different way of measuring participation opportunities for purposes of allowing an institution to demonstrate that it has complied with the first part of the three-part test [proportionality prong]. An institution could establish that it has complied with the first part of the test by showing that the number of available slots for men and women, as demonstrated by the predetermined number of participants for each team offered by the institution, is proportional to the male/female ratio in enrollment.⁵⁰

The OCR currently measures the number of participation opportunities by counting the total “number of actual athletes participating in the athletic program.”⁵¹ According to the OCR, the determination of how many actual athletes participating in the athletic program is made on the date of the team’s first competitive event.⁵² For example, if the women’s softball team at an institution had fifteen players on the roster on the day of its first regular season game, the total number of participation opportunities for women’s softball at that institution would be fifteen, regardless of how many players remained on the team at the end of the season.

The district court in *Cohen* provided a different guideline for when and how the determination should be made regarding the team participation opportunity numbers.⁵³ The court concluded that the opportunity should be measured by counting each team’s remaining participants at the end of the season, which would not include participants who quit or who were cut.⁵⁴ For the above example, a softball team that had fifteen players at the start of the season, but had two players quit and had two players cut during the season would only have eleven total participation opportunities. The OCR interpretation, which counts the number of actual athletes at the first of the season, is a better standard than the *Cohen* standard, which counts the number of actual athletes at the end of the season.

A potential problem with the *Cohen* standard is that it encourages the athletic director, not the women’s coaches, to determine who should stay on the team and who should not. For example, when a women’s

50. *Id.* at A41. U.S. Department of Education Secretary Rod Paige decided that the department would only include the recommendations that received unanimous approval from the commission in its final report. The recommendation to count unfilled roster spots was not included in the commission’s final report because it received a vote of ten for and three against, instead of the required consensus. *Id.*

51. *1996 Clarification*, *supra* note 40.

52. *Id.*

53. *Cohen v. Brown Univ.*, 879 F. Supp. 185, 203-04 (D.R.I. 1995).

54. *See id.*

basketball coach wants to cut a player for a legitimate reason that is related to the benefit of the team (i.e., a player is continually late for practice and misses team functions), the athletic director may want to have the coach keep the player on the roster until the end of the season in order to have one more participant count toward compliance with the proportionality prong.

The commission's suggestion above would be the best standard, where a team would simply count its total number of roster spots, and that would be the total number of participation opportunities for that sport.⁵⁵ The definition of an opportunity is "a chance for progress or advancement."⁵⁶ This definition implies that because an opportunity is a "chance for progress or advancement,"⁵⁷ the progress or advancement may or may not take place depending on the person. Just because one did not capitalize on an opportunity does not mean that one did not have the opportunity. For example, a women's softball team that has tryouts for eighteen open spots and only twelve women try out for and make the team should be considered to have eighteen participation opportunities because six more women could have capitalized on the opportunity to participate on the softball team that year, but did not. An institution should not be penalized for a year where there was an unexplainably low number of women who tried out for a particular team. If unfilled roster spots are not counted as opportunities, an institution seeking compliance under the proportionality prong may be forced into a situation where it must try to "hunt down" and convince women to play a sport they are not interested in playing in order to fill the roster spots and have them count as participation opportunities.

The OCR counts an athlete who participates in more than one sport as a participation opportunity in each sport that he or she plays.⁵⁸ This OCR rule, along with the rule that unfilled roster spots do not count as participation opportunities, invites abuse of the system by an athletic director seeking compliance with Title IX under the participation prong. For example, an athletic director could have the women's soccer coach offer a full scholarship to a soccer prospect on the condition that the athlete will participate on the women's bowling team and the women's softball team. The athlete would be told that she will only have to compete in soccer contests, but must go to all of the bowling and softball

55. See Suggs, *supra* note 49, at A40.

56. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1234 (4th ed. 2000).

57. *Id.*

58. See 1996 Clarification, *supra* note 40.

practices and games. In the above example, this one women's soccer player would count as three participation opportunities for women at that institution, even though she may only know how to play soccer. This would help an institution's participation and enrollment numbers become more proportional.⁵⁹

One argument that may be raised against counting unfilled roster spots is that coaches and administrators will distort the number of roster spots that are available for a particular sport. For example, a coach could say that there are 100 spots available for the women's bowling team (even when the bowling team has never had more than ten players) in order to boost the number of participation opportunities for women at the institution. The commission addressed this argument by stating that there could be a "predetermined number of participants for each team."⁶⁰ This predetermination could be made by the National Collegiate Athletic Association (NCAA), where the NCAA would gather data from coaches and other sources to determine how many roster spots each team should have. For example, the NCAA could determine that men's and women's basketball will have twelve roster spots, men's baseball will have twenty-five roster spots, and women's softball will have twenty roster spots; this would equate to thirty-seven participation opportunities for males and thirty-two participation opportunities for females, regardless of whether the spots were filled.⁶¹ A team should also be required to count each athlete if the team's roster is over the predetermined amount. Therefore, if men's basketball has twelve predetermined roster spots, and they have fourteen players on the team, all fourteen players should count as a participation opportunity because all fourteen of them have the opportunity for participation. Predetermining roster sizes for each sport and counting all spots as participation opportunities would be a simpler and more accurate way of measuring a participation opportunity because

59. In a personal interview with Athletic Director "A" (who will remain anonymous), he said he has seen this type of abuse where a coach gives a scholarship to a female athlete to play a particular sport, and that athlete will participate in other sports for the purpose of increasing the number of participation opportunities that are counted for women. He admitted that for his athletic department, the female track athletes are recruited on the basis that they will participate in outdoor track, indoor track, and cross-country, which counts as three participation opportunities per female athlete. At Athletic Director "A's" university, this means that while only twenty-five individual female athletes participate in outdoor track, indoor track, and cross-country, there are actually seventy-five participation opportunities because athletes who participate in more than one sport are counted in each sport in which they participate. Interview with Athletic Director "A" (Mar. 28, 2003).

60. Suggs, *supra* note 49, at A40.

61. The examples above are not inclusive; the NCAA would make a determination for every varsity level sport for men and women.

a team would not have to decide whether to count its roster at the first or end of the season. Furthermore, predetermining roster counts would not invite abuse of the system, and it would more accurately reflect the meaning of a participation opportunity.

2. Counting Walk-On Athletes⁶² as Opportunities

Another proposed change to Title IX by the federal commission studying gender equity in sports was to change the way in which walk-on athletes are calculated.⁶³ The commission's proposed change was as follows: "For the purpose of calculating proportionality with the male/female ratio of enrollment in both scholarships and participation, these ratios will exclude walk-on athletes as defined by the NCAA. Proportionality ratios will be calculated through a comparison of full or partial scholarship recipients and recruited walk-ons."⁶⁴

The OCR interpretation of Title IX currently counts walk-on athletes as participation opportunities as long as the athlete meets the criteria of a "participant."⁶⁵ Because walk-ons are generally counted as participation opportunities, some colleges seeking compliance under the proportionality prong have tried to limit the number of male walk-ons and increase the number of female walk-ons.⁶⁶ Considering that the definition of an opportunity is "a chance for progress or advancement,"⁶⁷ it is hard to imagine how a walk-on athlete would not be considered to have an opportunity for participation in a sport when the athlete practices

62. Walk-On athletes "are usually not recruited nor have they previously received scholarships to participate in a given sport. Rather, they show up on the first day of practice hoping to gain a place on the team through a tryout." U.S. Dep't Educ., *Secretary's Commission for Opportunity in Athletics, Open to All: Title IX at Thirty*, Feb. 28, 2003, available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf> (last visited Apr. 25, 2003) [hereinafter *Title IX at Thirty*].

63. See Suggs, *supra* note 49, at A41.

64. *Id.* The proposed change regarding walk-on athletes received a vote of eight for and five against, and therefore, was not included in the final commission report because it was not unanimous. See *Title IX at Thirty*, *supra* note 62.

65. See *Intercollegiate Athletics: Sex Discrimination*, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979).

66. One author has noted:

Athletic department administrators have generally responded to the disparity [between men's and women's participation opportunities] by telling coaches of women's teams to keep as many walk-ons as they can, even encouraging them to scour campuses for more candidates to fill their rosters. The coaches of many men's teams, meanwhile, have been assigned a reduced, fixed roster limit, a number that is quickly filled by established recruits. Often, there is no room for walk-ons.

Bill Pennington, *Want to Try Out for College Sports? Forget It*, N.Y. TIMES, Sept. 22, 2002, at 1.

67. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1234 (4th ed. 2000).

with the team, participates in all of the team functions, travels with the team, and may even play in the majority of the team's games. The OCR's Policy Interpretation is the better standard with regard to walk-ons. As noted above, the OCR's Policy Interpretation counts a participant as those:

- a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
- b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
- c. Who are listed on the eligibility or squad lists maintained for each sport; or
- d. Who, because of injury, cannot meet a, b, or c above but continues to receive financial aid on the basis of athletic ability.⁶⁸

At first glance, the OCR's Policy Interpretation seems to consider all walk-ons participation opportunities because walk-ons would fulfill part "a," because walk-ons receive coaching, equipment, and medical training room services on a regular basis. Walk-ons would also fulfill part "b," because they participate in a team's practice and meetings on a regular basis. However, walk-ons may not always fulfill part "c," as a walk-on might not always be "listed on the eligibility or squad list maintained for each sport."⁶⁹ A walk-on athlete who has a low probability of playing in the games could be intentionally left off the eligibility or squad list, which would allow the institution to not count them as a participation opportunity. A smart athletic director seeking Title IX compliance under the participation prong could have the football team, which could have from fifteen to thirty walk-ons, exclude all walk-ons from the eligibility or squad list who are not likely to play, in order to make the athletic participation opportunities for men appear fewer.

The commission proposed that only recruited walk-on athletes be counted as a participation opportunity.⁷⁰ This suggested change, if enforced, would have the effect of actually providing fewer opportunities for male athletes because athletic directors will ask coaches to stop sending information and making phone calls to athletes who they know will not be offered scholarships so the athlete will not be considered a recruited walk-on. The result would be fewer male athletes trying to walk-on to athletic teams because they may feel that their chances of

68. Intercollegiate Athletics: Sex Discrimination, 44 Fed. Reg. at 71,415.

69. *Id.*

70. See Suggs, *supra* note 49, at A41.

making the team are even slimmer due to the fact they have not had contact with any of the coaches. The better rule would be to count every walk-on athlete as a participation opportunity, because after all, that is exactly what a walk-on athlete is receiving; an opportunity to participate in intercollegiate athletics.

3. Excluding Nontraditional Students from the Enrollment Calculation

Another proposed change to Title IX by the federal commission studying gender equity in sports was to alter the way in which student enrollment is calculated.⁷¹ The proposed change stated the following: "In demonstrating compliance with the proportionality requirement of the first part of the three-part test, the male/female ratio of athletic participation should be measured against the male/female ratio of an institution's undergraduate population minus nontraditional students."⁷²

The commission did not give a definition for "nontraditional students," but traditional students are generally considered to be between the ages of eighteen and twenty-two,⁷³ so it can be assumed that a "nontraditional student" is a student who is age twenty-three or older. One of the rationales behind counting only traditional students is that nontraditional students are much less likely to participate in intercollegiate athletics.⁷⁴ Chris Weinke, arguably the best quarterback in Florida State history, was twenty-eight years old when participating in football his senior year.⁷⁵ This demonstrates that it is a misconception to think that a student over the age of twenty-two is not capable of participating in intercollegiate athletics. Even if it is not as likely that a student over the age of twenty-two will participate in intercollegiate athletics, these "nontraditional" students should still be factored into the enrollment of a university, not doing so would be making an assumption that they are unlikely to participate, which may not be true at every university.⁷⁶ Instead of making assumptions regarding the ages of

71. *See id.*

72. *Id.* The proposed change regarding counting only traditional students had a vote of 9 for and 4 against, and therefore, was not included in the commission's final report because it was not unanimous. *See Title IX at Thirty, supra* note 62.

73. *See* ARTHUR LEVINE, IN DEFENSE OF AMERICAN HIGHER EDUCATION (Philip Altbach ed., Johns Hopkins University Press 2001).

74. *See Title IX at Thirty, supra* note 62.

75. *See* Florida State Football, at http://seminoles.ocsn.com/sports/m-footbl/mtt/weinke_chris00.html (last visited Apr. 23, 2003).

76. For example, the Brigham Young University football team has a history of recruiting twenty-one-year-old freshmen, who have been on a two-year Mormon mission, generally when they were nineteen to twenty-one years of age. By the time these athletes are seniors, they are

students on campus who will likely participate in intercollegiate athletics, all students should be factored into the enrollment determination at a university, regardless of whether or not they are a “traditional student.”

4. The Proportionality Prong Myth

One of the major myths regarding the application of Title IX is the notion that an athletic department must meet the proportionality prong in order to comply with the participation aspect of Title IX.⁷⁷ This notion is simply inaccurate because there are two other prongs that a university may choose to demonstrate compliance with the participation aspect of Title IX.⁷⁸ In fact, only one third of the colleges and universities reviewed by the OCR between 1994 and 1998 used the proportionality prong to prove compliance with Title IX.⁷⁹ In 1996, the OCR sent information to all institutions to clarify its interpretation of Title IX and combat the myth that schools must comply with the proportionality prong. The OCR stated that the clarification is consistent with OCR and federal court decisions: “[I]t confirms that institutions need to comply only with any part of the three-part test to provide nondiscriminatory participation opportunities for individuals of both sexes.”⁸⁰ With the OCR’s Policy Interpretation that clearly provides an “or” between each of the participation prongs,⁸¹ and the 1996 Clarification that was sent to each institution to emphasize this point,⁸² it is hard to believe there could still be a belief in the myth that an institution must adhere to the proportionality prong in order to show compliance.

well over the age of a traditional student. See R. Leuma Schwemke, *Called to Serve on Football and Mission Fields*, at http://www.totalbluesports.com/news/public_story/165.html (last visited Apr. 23, 2003).

77. Billy Jean King, former tennis great and current founder of the Women’s Sports Foundation recognized this myth with the application of Title IX by stating:

Title IX does not require “proportionality” or any other mathematical test, as some are alleging. There are many schools that are conducting athletic programs that are in compliance with Title IX with athletic program male/female participation numbers that are not proportional to the percentages of men and women in their general student bodies.

Billy J. King, *For All the Good Things It Has Done, Title IX Is Still Plagued by Myths*, N.Y. TIMES, June 23, 2002, § 8 (Back Talk), at 7.

78. See *Intercollegiate Athletics: Sex Discrimination*, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

79. See Nancy Hogshead-Maker, *60 Minutes Flunks the Latest Title IX Exam*, NCAA NEWS, at <http://www.ncaa.org/news/2003/20030106/editorial/4001n31.html> (last visited Jan. 6, 2003).

80. 1996 Clarification, *supra* note 40.

81. *Intercollegiate Athletics: Sex Discrimination*, 44 Fed. Reg. at 71,418.

82. See 1996 Clarification, *supra* note 40.

The federal commission studying gender equity in sports voiced its concern that too much emphasis was being placed on the proportionality prong through what has been referred to as a “safe harbor.”⁸³ This “safe harbor” has been interpreted to mean that if a school can prove it satisfies the proportionality prong, then “there will be no further scrutiny by the Office for Civil Rights.”⁸⁴ In its report, the commission suggested:

The designation of one part of the three-part test as a “safe harbor” should be abandoned in favor of a way of demonstrating compliance with Title IX’s participation requirement that treats each part of the test equally. In addition, the evaluation of compliance should include looking at all three parts of the test, in aggregate or in balance, as well as individually.⁸⁵

The commission’s final report went on to state, “This recommendation aims to allow schools to demonstrate compliance using the other three parts of the test without having to be concerned about later complaints for noncompliance with the first part.”⁸⁶ The commission’s recommendation is evidence that the myth of an institution being required to prove proportionality is still prevalent, even though the OCR’s interpretation clearly provides an “or” between each prong,⁸⁷ and even though the OCR has sent a clarification letter to each institution stating that compliance with the participation aspect of Title IX can be shown through *any* of the three prongs.⁸⁸ The current standard is that an institution seeking compliance under the participation aspect of Title IX may rightfully decline to show under Prong One that its athletic participation opportunities are proportional to its enrollment, and can instead show either under Prong Two that they have a “history and continuing practice of program expansion,” or show under Prong Three that “the interests and abilities of the members of [the underrepresented] sex have been fully accommodated by the present program.”⁸⁹ For example, a university with an enrollment rate of sixty percent female and forty percent male may have a difficult time showing that its athletic participation opportunities are substantially close to sixty percent female and forty percent male, leading the university to not demonstrate

83. See *Title IX at Thirty*, *supra* note 62, at 26.

84. *Id.* at 23.

85. Suggs, *supra* note 49, at A41. This recommendation was unanimously approved and was included in the commission’s final report. See generally *Title IX at Thirty*, *supra* note 62.

86. *Title IX at Thirty*, *supra* note 62, at 39.

87. Intercollegiate Athletics: Sex Discrimination, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

88. See *1996 Clarification*, *supra* note 40.

89. Intercollegiate Athletics: Sex Discrimination, 44 Fed. Reg. at 71,418.

compliance under Prong One, but instead look at Prongs Two or Three to show compliance.

B. Prong Two (History and Continuing Practice Prong)

1. Interpretation

Prong Two of the OCR's interpretation of Title IX provides, "Where the members of one sex have been and are underrepresented among intercollegiate athletes . . . the institution [must] show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex."⁹⁰ There are two separate aspects of Prong Two that must be demonstrated by an institution seeking compliance under this prong: First, the institution must show a *history* of program expansion that is "demonstrably responsive to the developing interests and abilities of the [underrepresented] sex" and second, the institution must also show a *continuing practice* of program expansion that is "demonstrably responsive to the developing interests and abilities of the [underrepresented] sex."⁹¹

For the first part, a history of program expansion that is "demonstrably responsive to the developing interests and abilities of the underrepresented sex,"⁹² the OCR will consider the following factors to make the determination:

- An institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- An institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- An institution's affirmative responses to requests by students or others for addition or elevation of sports.⁹³

Based on the OCR factors above, an institution seeking compliance for the participation aspect of Title IX under Prong Two must show that for the underrepresented sex, it has either added teams, upgraded club teams to varsity status, or increased the numbers of participants. If an institution cannot fulfill any of these factors, the inquiry ends regardless of whether there is a plan for *continuing* the practice of program expansion.⁹⁴ One foreseeable problem with requiring a history of

90. *Id.*

91. *Id.*

92. *1996 Clarification, supra* note 40.

93. *Id.*

94. *See id.*

program expansion is that an institution could actually fail Prong Two even though it has made a dedicated and committed effort to start expanding programs for the underrepresented sex. For example, consider the following: an institution has not added, upgraded, or increased the participation opportunities for a women's sport in the last thirty years. This institution has always demonstrated compliance under the proportionality prong, but has recently added four men's sports, which would force the institution to demonstrate compliance under Prong Two or Three because the participation rate for women at the institution would no longer be substantially proportional to the enrollment rate of women.

Now consider that the institution has recently hired a new athletic director who decides to add four women's sports over the next four years that are responsive to the interests and abilities of women in the area. This institution would not be able to show compliance under Prong Two because it has no history of program expansion for women, even though it has a plan for continued expansion. In such a situation, an institution should be found compliant with Prong Two when it can show that it had a good faith reason for not adding, upgrading, or expanding participation opportunities in the past, and can prove there is a commitment to expanding programs in the future.

Not only must an institution prove that it has a history of program expansion, the program expansion must be in response to the interests and abilities of the underrepresented sex.⁹⁵ The requirement that the program expansion is in response to the interests and abilities of the underrepresented sex ensures that an institution will not be found to be in compliance with Prong Two when it has a history of adding sports such as women's archery and women's badminton, where there was no interest in those sports, but the sports were added only because they are low cost sports.⁹⁶

The OCR has provided examples of how an institution can ensure that its program expansion is "demonstrably responsive to the developing interests and abilities of members of the [underrepresented] sex."⁹⁷ These examples include, "An NCAA survey that show[s] a significant increase

95. See *Intercollegiate Athletics: Sex Discrimination*, 44 Fed. Reg. at 71,418.

96. The estimated start-up cost for women's archery is approximately \$1500, and its annual cost including approximate coaches' salaries is \$12,000. Badminton is also an inexpensive sport to add to an athletic department's programs with an estimated start-up cost of less than \$1000, and its annual cost including approximate coaches' salaries is \$10,000 to \$15,000. See NCAA, *Emerging Sports*, at http://www.ncaa.org/library/general/achieving_gender_equity/emerging_sports.pdf (last visited Nov. 10, 2003).

97. *Intercollegiate Athletics: Sex Discrimination*, 44 Fed. Reg. at 71,418.

in girl's high school participation in that sport,"⁹⁸ a survey of incoming female students regarding their "athletic interests and abilities,"⁹⁹ "a nationwide survey of the most popular girl's high school teams,"¹⁰⁰ and "a survey of the most popular sports played by women in the region."¹⁰¹

For the second part of the second prong, a continuing practice of program expansion that is "demonstrably responsive to the developing interests and abilities of the underrepresented sex,"¹⁰² the OCR will consider the following factors to make the determination:

- An institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- An institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.¹⁰³

Even if an institution has an incredible history of program expansion for the underrepresented sex, that institution cannot demonstrate compliance unless it can prove it is continuing that practice of program expansion.¹⁰⁴ *Bryant v. Colgate University*¹⁰⁵ is such an example, where an action was brought by ten women's hockey players to be certified as a class on behalf of all present and future women students who participated or wished to participate in Colgate's intercollegiate athletic programs.¹⁰⁶ The court ruled that neither side was entitled to a summary judgment with regard to Prong Two because there still remained a factual dispute as to whether Colgate University had a continuing practice of program expansion that is responsive to the interests and abilities of the women.¹⁰⁷ Even though Colgate added eleven women's varsity sports in the 1970s and 1980s, it was denied summary judgment because it had not added any women's sports from 1989 to 1993, when the action was filed.¹⁰⁸ The final result of the *Bryant*

98. 1996 Clarification, *supra* note 40.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. See Intercollegiate Athletics: Sex Discrimination, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

105. No. 93-CV-1029, 1996 WL 328446 (N.D.N.Y. June 11, 1996).

106. *Id.* at *1.

107. See *id.* at *10.

108. See *id.* at *11.

case is unknown, however, because the case was settled,¹⁰⁹ but it signifies that there is a notion of “what have you done for me lately?” and “what are you going to do for me now?” for an institution seeking compliance with the participation aspect of Title IX under Prong Two.

Just as an institution cannot show a *history* of program expansion when the institution has not properly added sports based on the demonstrated interests and abilities of the underrepresented sex; an institution cannot demonstrate a *continuing practice* of program expansion unless the program expansion is also in response to the interests and abilities of the underrepresented sex.¹¹⁰ In *Pederson v. Louisiana State University*¹¹¹ (LSU), the district court ruled that LSU’s commitment to add women’s softball and soccer was a choice that was not in response to an “increasing interest and ability of women’s athletics on campus,”¹¹² but rather, the choice was made “merely to follow the decisions made by the Southeastern Conference concerning whether to add additional women’s teams.”¹¹³ The *Pederson* decision signifies that an institution cannot simply choose to add women’s sports based on its own reasons or for the reasons of the conference, but instead, must choose to add the particular women’s sports based on a response to the interests and abilities of the underrepresented sex.¹¹⁴

2. Timeline for Continuing Practice of Program Expansion

Neither the 1979 Policy Interpretation,¹¹⁵ nor the 1996 Clarification¹¹⁶ of Title IX provides a timeline as to when an institution that is promising a continuing practice of program expansion must actually follow through with that promise. For example, an institution may have a history of program expansion, and may have a continuing plan based on interest shown through national, regional, and institutional surveys to add women’s soccer to its athletic department. However, because there is no timeline or guidance for when this institution must actually add women’s soccer, the institution could move at a “snail’s

109. See *Bryant v. Colgate Univ.*, No. 93-CV-1029, 1997 WL 222539 (N.D.N.Y. Apr. 14, 1997).

110. See *Intercollegiate Athletics: Sex Discrimination*, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

111. 912 F. Supp. 892 (La. 1996) (affirming violation of Prong Two and reversing finding of intentional discrimination, 213 F.3d 858 (5th Cir. 2000)).

112. *Id.* at 916.

113. *Id.* at 916-17.

114. See *Intercollegiate Athletics: Sex Discrimination*, 44 Fed. Reg. at 71,418.

115. See *id.*

116. See *1996 Clarification*, *supra* note 40.

pace” toward adding this sport, and all the while it would be found to be in compliance with Prong Two.

The federal commission studying gender equity in sports addressed this very problem by recommending, “The Office for Civil Rights should be urged to consider reshaping the second part of the three-part test, including by [sic] designating a point at which a school can no longer establish compliance through this part.”¹¹⁷ A timeline should be added to this prong, such as specifying that an institution seeking compliance under Prong Two, and promising that it will add women’s sports in the future must fulfill that promise within three years.¹¹⁸

While neither the 1979 Policy Interpretation, nor the 1996 Clarification for Title IX by the OCR have specified a timeline for the continuing practice of program expansion, the district court in *Pederson* ruled that LSU’s promises for program expansion were not enough because although LSU had made a commitment to add women’s softball and soccer, it “ha[d] not lived up to its verbal commitment after three years.”¹¹⁹ A reasonable timeline should limit the time an institution may take to add programs that it has specified it will add to prevent the institution from making an empty promise it does not intend to fulfill in the near future. A timeline that is enforced against an institution seeking compliance under Prong Two would greatly increase the opportunities for women and the rate at which those opportunities take place.

Even if an institution cannot demonstrate compliance with the participation aspect of Title IX by proving under Prong One that its athletic participation opportunities are substantially proportional to its student enrollment, and cannot fulfill Prong Two by demonstrating that it has a “history and continuing practice of program expansion” that is in response to the interests and abilities of the underrepresented sex, an institution can still show compliance by proving compliance with Prong Three.¹²⁰

117. Suggs, *supra* note 49, at A41. The recommendation was unanimous and, therefore, was included in the final report. See generally *Title IX at Thirty*, *supra* note 62.

118. In a personal interview, Athletic Director “A” (who will remain anonymous) stated that Title IX is not a tough hurdle because it does not tell an institution how fast it must move toward program expansion. He said that because his athletic department has added women’s sports over the last ten years, and because he continues to make a good faith effort to add women’s sports in the future, he feels comfortable that his athletic department will be found to be in compliance with Title IX. Because of the history of program expansion for his athletic department and his commitment toward making a good faith effort to add women’s sports in the future, he said that he will continue to demonstrate his compliance with Title IX through Prong Two. See Interview with Athletic Director “A” (Mar. 28, 2003).

119. *Pederson v. La. State Univ.*, 912 F. Supp. 892, 916 (La. 1996).

120. *Intercollegiate Athletics: Sex Discrimination*, 44 Fed. Reg. at 71,418.

C. Prong Three (Interests Have Been Fully Accommodated Prong)

Prong Three under the participation aspect of Title IX provides, “Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion . . . it [must] be demonstrated that the interests and abilities of the members of that sex have been fully accommodated by the present program.”¹²¹

Prong Three allows an institution that has an athletic participation rate that is not substantially proportional to its student enrollment to prove that the reason for the discrepancy is not discriminatory, and the institution is fully accommodating the interests and abilities of the underrepresented sex.¹²² In determining whether an institution is fully accommodating the interests and abilities of the underrepresented sex, the OCR will consider three factors: “Whether there is (a) unmet interest in a particular sport, (b) sufficient ability to sustain a team in the sport, and (c) a reasonable expectation of competition for the team.”¹²³ If the OCR finds that all three of the above factors are present, it will conclude that the “institution has not fully accommodated the interests and abilities of the underrepresented sex.”¹²⁴

1. Unmet Interest in a Particular Sport

The OCR has composed a list of factors to determine if there is unmet interest of the underrepresented sex in a particular sport, including the following:

- Requests by students and admitted students that a particular sport be added;
- Requests that an existing club sport be elevated to intercollegiate team status;
- Participation levels in club or intramural sports;
- Interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- Results of questionnaires of students and admitted students regarding interests in particular sports, and
- Participation levels in interscholastic sports by admitted students.¹²⁵

Each institution is allowed to determine the athletic interest of its students from the underrepresented sex using its own method, so long as

121. *Id.*

122. *See 1996 Clarification, supra* note 40.

123. *Id.*

124. *Id.*

125. *Id.*

that method is nondiscriminatory.¹²⁶ For example, an institution may decide that it wants to send surveys to the student population and the high schools and communities where attendance at the institution is high, and ask them what their interests are in particular sports. An institution may also want to follow up with interviews, which combined with the surveys, would likely be a nondiscriminatory method for determining student interest in a particular sport.

The OCR clarification, as mentioned above, specifies that an institution will not be in compliance with Prong Three when all three of the following are present: “(a) unmet interest in a particular sport, (b) sufficient ability to sustain a team in the sport, and (c) a reasonable expectation of competition for the team.”¹²⁷ This means that if the institution can prove either through nondiscriminatory methods of its own or through the OCR’s factors described above that it is fully meeting the interests and abilities of the current students, then the inquiry is over and the institution will be found to be compliant with Prong Three. If, however, the OCR finds that there is unmet interest at the institution, the inquiry continues to determine if there is sufficient ability to sustain an intercollegiate team.¹²⁸

2. Sufficient Ability to Sustain an Intercollegiate Team

To determine whether there is sufficient ability to sustain an intercollegiate team, the OCR will look to the following:

- The athletic experience and accomplishments in interscholastic, club or intramural competition of students and admitted students interested in playing the sport;
- Opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and
- If the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.¹²⁹

The OCR realizes that the ability of interested students who wish to participate in athletics may not be at the same level as students who are already participating on current athletic teams, so it emphasizes the potential to sustain an intercollegiate team.¹³⁰ If an institution can prove

126. *See id.*

127. *Id.*

128. *See id.*

129. *Id.*

130. *See id.*

that there is not sufficient ability to sustain an intercollegiate team, then the institution will be found to be in compliance with Prong Three, and will thus be in compliance with the participation aspect of Title IX.¹³¹ An institution that already offers the major women's sports such as basketball, softball, volleyball, track, soccer, tennis, and swimming, might easily prove that there is not sufficient ability to sustain an intercollegiate team based on the OCR's criteria above.

The first criterion, which looks at the athletic experience and accomplishments of the students and admitted students interested in playing the sport¹³² is a nonsensical standard. It would only make sense that a woman who has strong athletic experience and accomplishments in a particular sport would attend a school that offers her particular sport. Likewise, if a woman has athletic experience and accomplishments in a particular sport, an institution that offers that sport would likely recruit that woman. The result is that an institution will rarely have students who have strong athletic experience and accomplishments in a sport it does not offer.

The second factor that the OCR uses to determine the ability of interested students to sustain an athletic team is subjective and contains too many opportunities for manipulation. The second factor looks to the "opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team."¹³³ Since the sport may not have been formed yet, there would likely be no coaches at the school who can comment on that particular sport. This would pose an interesting problem, such as looking to the opinions of the women's softball, basketball, and swimming coaches, to find out whether they felt the current students have the potential to sustain a varsity bowling team. It would be easy for the school's coaches and administration to declare that there is no potential to sustain a varsity program they may know nothing about.

The only rational factor used by the OCR in determining if there is sufficient ability to sustain an intercollegiate team is if a team has previously competed on the club level and has the ability to sustain a varsity team. However, an institution that already offers the major women's sports may not have club teams for the new sports in question, which might allow it to evade this factor and prove compliance under the first two loose factors. Even if the OCR finds there is unmet interest at

131. *See id.*

132. *See id.*

133. *Id.*

the institution, and also finds there is sufficient ability to sustain an intercollegiate team, the institution can still show compliance with Prong Three if it can prove there is no reasonable expectation of competition for the team.¹³⁴

3. A Reasonable Expectation of Competition for the Team

To determine the reasonable expectation of competition for the team, the OCR looks to competition for the particular sport in the institution's region.¹³⁵ The OCR will also look to the following factors:

- Competitive opportunities offered by other schools against which the institution competes; and
- Competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.¹³⁶

Because the other schools in an institution's conference may differ drastically, the controlling weight should be given to the institution's geographic area. For example, the University of Hawaii is thousands of miles away from the nearest team in its Western Athletic Conference (WAC).¹³⁷ Not surprisingly, the University of Hawaii is the only institution in the WAC that offers women's sailing.¹³⁸ The University of Hawaii should not have been able to hide behind the fact that no other institution that it competes against in its conference offers sailing if there was clearly an unmet local interest in sailing, and sufficient ability to sustain a sailing team.

The OCR should consider changing the three factors under Prong Three for determining fully and effective accommodation of the interests and abilities of the underrepresented sex, including, "Whether there is (a) unmet interest in a particular sport, (b) sufficient ability to sustain a team in the sport, and (c) a reasonable expectation of competition for the team."¹³⁹ The second factor, "sufficient ability to sustain a team in the sport,"¹⁴⁰ should not be given any weight whatsoever because it leads to subjective determinations by coaches and administrators not familiar with a sport the institution does not currently offer, and it is unfair to

134. *See id.*

135. *See id.*

136. *Id.*

137. *See Schools*, at <http://www.wac.org/schools.asp> (last visited Oct. 11, 2003).

138. *See Women's Sailing*, at <http://uhathletics.hawaii.edu/Sport/sport.html?p=20> (last visited Oct. 16, 2003).

139. *1996 Clarification*, *supra* note 40.

140. *Id.*

analyze the athletic ability of women at the institution based on their experience and accomplishments in a sport that is not even offered. The loose factors used to measure compliance under the third prong may explain why most institutions use Prong Three to demonstrate compliance with the participation aspect of Title IX.¹⁴¹ The OCR should find that an institution is not in compliance with the participation aspect of Title IX under Prong Three when the OCR can prove that there is (a) unmet interest in a particular sport, and (b) a reasonable expectation of competition for the team. An institution, therefore, would only be able to demonstrate compliance with Prong Three when it can either prove that all interests in a particular sport have been met, or if the institution can prove that there is no reasonable expectation of competition for the team.

VI. SCHOLARSHIPS

Scholarships are the second of three areas in intercollegiate athletics governed by Title IX. The other two areas governed by Title IX are participation, as described above, and other benefits.¹⁴² To be in full compliance with the scholarships aspect of Title IX, the institution “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.”¹⁴³ Compliance with the scholarships aspect of Title IX is based on “the total amount of scholarship aid made available to men and women, [and this number] must be substantially proportional¹⁴⁴ to their participation rates.”¹⁴⁵ The

141. The *Cohen* court stated, “It is not surprising, then, that schools more often than not attempt to manage the rigors of Title IX by satisfying the interests and abilities of the underrepresented gender, that is, by meeting the third benchmark.” *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993).

142. See *Intercollegiate Athletics: Sex Discrimination*, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

143. 34 C.F.R. § 106.37(c)(1) (2002).

144. Substantial proportionality has been applied by the OCR to mean that an institution must be within a one percent disparity between the amounts of scholarships allotted to both sexes. For example, if the student body consists of 50% males, the percentage of the total athletic scholarships awarded to all men's teams cannot exceed 51%, because that would be a “strong presumption [that the institution] is in violation of the ‘substantially proportionate’ requirement.” The OCR Clarification of Athletic Financial Aid and Policy Interpretation further explains, “If any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors.” Mary F. O’Shea, *Clarification of Athletic Financial Aid Policy Interpretation*, at http://www.ncaa.org/gender_equity/resource_materials/Financialaid&Scholarship/July_23_98LtrToBowlGreen.pdf (last visited July 23, 2003).

145. *Intercollegiate Athletics: Sex Discrimination*, 44 Fed. Reg. at 71,418.

OCR will determine compliance with the scholarship standard “by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results.”¹⁴⁶ For example, an institution that has an athletic participation rate of 60% male, and 40% female, must allot 60% of its total athletic scholarship money to males, and 40% of its total athletic scholarship money to females. If the total scholarship dollars available for the above institution is \$2.4 million,¹⁴⁷ the institution must allocate \$1.44 million to male scholarships (60% of \$2.4 million) and \$960,000 to women’s scholarships (40% of \$2.4 million). Institutions are not required under the scholarships aspect of Title IX to grant an equal number of scholarships to men and women. Further, individual scholarships are not required to be of the same value, but rather, the overall concentration will be whether the total scholarship amount offered in dollars for each sex is proportional to the athletic participation rate of each sex.¹⁴⁸

Unlike the participation aspect of Title IX, the scholarships aspect of Title IX does not offer three separate prongs where an institution can choose the prong under which it wishes to demonstrate compliance. However, if an institution does not award a proportional amount of scholarships to men and women based on the participation rate of each sex, the institution can still be in compliance with the scholarships aspect of Title IX if it can prove that its disparity¹⁴⁹ is based on legitimate nondiscriminatory factors.¹⁵⁰ Two legitimate nondiscriminatory factors that will allow an institution to be in compliance despite a disparity between the scholarships and the participation rate are as follows:

- (a) At public institutions, the higher costs of tuition for students from out-of-state may, in some years, be unevenly distributed between men’s and women’s programs. These differences will be considered

146. *Id.*

147. \$2.4 million was the average total dollar amount of scholarships available to an individual institution in the 1999-2000 academic year. Denise Dehass, *1999-2000 Gender Equity Report*, Apr. 2002, available at http://www.ncaa.org/library/research/gender_equity_study/1999-00/1999-00_gender_equity_report.pdf (last visited Apr. 25, 2003).

148. *See* O’Shea, *supra* note 144.

149. In the 1998 Clarification of Athletic Financial Aid Policy Interpretation, May O’Shea stated:

A “disparity” in awarding athletic financial assistance refers to the difference between the aggregate amount of money athletes of one sex received in one year, and the amount they would have received if their share of the entire annual budget for athletic scholarships had been awarded in proportion to their participation rates.

Id.

150. *See* Intercollegiate Athletics: Sex Discrimination, 44 Fed. Reg. at 71,418.

nondiscriminatory if they are not the result of policies or practices, which disproportionately limit the availability of out-of-state scholarships to either men or women.

- (b) An institution may make reasonable professional decisions concerning the awards most appropriate for program development. For example, team development initially may require spreading scholarships over as much as a full generation (four years) of student-athletes. This may be necessary in the award of fewer scholarships in the first few years than would be necessary to create proportionality between male and female athletes.¹⁵¹

While an institution may use the two listed legitimate nondiscriminatory factors above, there are other factors,¹⁵² and the OCR will make a case-by-case determination of whether the stated reason for disparity between the scholarships offered and the participation rate among both sexes is, in fact, nondiscriminatory.¹⁵³ Since the only way an institution can rightly offer scholarships that are not substantially proportionate to each sex is through providing a legitimate nondiscriminatory justification,¹⁵⁴ and because there is only one clear standard for compliance under the scholarships aspect of Title IX, there is little room for an institution to rebut a disproportional allocation of scholarships claim. Therefore, litigation in this area has been limited.¹⁵⁵

VII. CONCLUSION

The proper interpretation of Title IX should center around increasing opportunities in intercollegiate athletics for women. In order to increase opportunities in intercollegiate athletics for women, a more strict interpretation of Title IX should be applied, which would change Prongs Two and Three of the participation aspect of Title IX. A stricter interpretation of Title IX should be applied to Prong Two, the "history and continuing practice of program expansion" prong, because neither the 1979 Policy Interpretation,¹⁵⁶ nor the 1996 Clarification¹⁵⁷ provide a timeline as to when an institution that is promising a continuing practice

151. *Id.*

152. Other factors may include the "legitimate efforts undertaken to comply with [other] Title IX requirements, such as participation requirements . . . [and another factor could be the] unexpected fluctuations in the participation rates of males and females." O'Shea, *supra* note 144.

153. *See id.*

154. *See* Intercollegiate Athletics: Sex Discrimination, 44 Fed. Reg. at 71,418.

155. *See* Judith Semo & John Bartos Jr., *A Guide to Recent Developments in Title IX Litigation*, Feb. 15, 2000, available at http://www.ncaa.org/library/general/achieving_gender_equity/current_case_law.pdf (last visited Apr. 25, 2003).

156. Intercollegiate Athletics: Sex Discrimination, 44 Fed. Reg. at 71,418.

157. *See 1996 Clarification*, *supra* note 40.

of program expansion must actually follow through with that promise. The stricter standard would set a deadline for when an institution must actually follow through with its promise of future program expansion in order to be found compliant with Prong Two of the participation aspect of Title IX. Enforcing a deadline by which an institution must fulfill its promise for program expansion would create more opportunities for women by requiring that the institution work at a reasonable pace in implementing new programs for women.

Another goal that must be accomplished in order to increase opportunities for women in intercollegiate athletics is to apply a stricter interpretation of Title IX for Prong Three, the “interests have been fully accommodated” prong. A change should be made to the three factors used to determine whether the institution is fully accommodating the interests and abilities of the underrepresented sex,¹⁵⁸ which include, “Whether there is (a) unmet interest in a particular sport, (b) sufficient ability to sustain a team in the sport, and (c) a reasonable expectation of competition for the team.”¹⁵⁹ The second factor, “sufficient ability to sustain a team in the sport,”¹⁶⁰ should be eliminated from the analysis because it leads to subjective determinations by coaches and administrators not familiar with a sport the institution does not currently offer at a varsity level, and it is unfair to analyze the athletic ability of women at the institution based on their experience and accomplishments in a sport that is not offered at the varsity level.

This strict interpretation would apply only the two remaining standards: whether there is (a) unmet interest in a particular sport, and (b) where there is a reasonable expectation of competition for the team. This would force an institution to make an objective determination as to whether a women’s sport should be added to the institution’s athletic department. This new interpretation of Title IX will ensure that women’s opportunities would be expanded when there is a proven unmet interest.

If Prongs Two and Three of the participation aspect of Title IX remain unchanged, Katie Hnida’s extra point attempt that was blocked by a UCLA player will continue to be symbolic of a looser interpretation of Title IX where women will continue to travel down the long, difficult road in college sports only to find their quest for the opportunities they deserve continually blocked. If, however, Prongs Two and Three of the participation aspect of Title IX are changed as proposed, the cheers that Katie received as she entered the game and the record books as the first

158. See *Intercollegiate Athletics: Sex Discrimination*, 44 Fed. Reg. at 71,418.

159. *1996 Clarification*, *supra* note 40.

160. *Id.*

woman to play in a Division I football game will be symbolic of a strict, proactive interpretation of Title IX that will allow the barrier to be broken in college athletics, and afford women the opportunities and recognition in the college sports world they rightly deserve.