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Andrew A. Ingrum

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COMMENT

Civil Rights: Title IX and College Athletics: Is There a Viable Compromise?

*I think we are fighting for our lives and we better act accordingly.*
— Rev. Edmond Joyce

Introduction

The above cited quotation represents the typical response to the threat that Title IX enforcement poses to intercollegiate athletics. The application of Title IX with respect to gender equity is the most controversial topic regarding intercollegiate athletics. Proponents of gender equity demand equality of athletic budgets and equal opportunity for female athletes according to female percentages of the student population. Opponents contend that Title IX calculations should exempt certain sports whose annual revenue fund a substantial portion of the entire athletic budget. Thus, the calculation dilemma represents the principal area of controversy regarding application of the Act. The relevant provision of Title IX provides: "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."4

Title IX originated as a provision within the Educational Amendments Act of 1972 to guarantee that no federally funded institution engaged in gender discrimination. Since its inception, Title IX has undergone several interpretations, policy revisions and judicial resolutions. There are effectively two tiers of judicial decisions that have a major influence on Title IX. In the first tier of cases, the central issue was whether a university's athletic program fell within the category of federal assistance and thus under Title IX scrutiny. In the second tier of cases,

1. Buck Turnbull, *Notre Dame's Joyce Says Future of Game on Line vs. Militant Women*, USA TODAY, June 7, 1993, at C12 (quoting Rev. Edmond Joyce, former Notre Dame Executive Vice President, one of the founders of the College Football Association). The context of Rev. Joyce's quotation was a comment about the threat that gender equity presented to the existence of college football.
3. "I wish we had all the money in the world, where we could give the ladies everything we can . . . . I'm for it for the ladies, just like the men, but we must be realistic about who can bring in the dollars to pay for all these programs." *Id.* (quoting Bobby Bowden, head football coach at Florida State University).
the central issue was the applicability of the most recent policy determination. In Title IX's present form, the judicial evaluation mandates a three-part analysis known as the Effective Accommodation Test.

The focus of this comment will center upon the legislative and judicial interpretations of Title IX and their effect on intercollegiate athletics. Part I of this commentary profiles the evolution and legislative history of Title IX since its inception, including several noteworthy court decisions and their progeny. Part II offers an extensive summary of the modern judicial treatment. Part III illustrates the current policy, or lack thereof, of the governing body of intercollegiate athletics. Parts IV and V will reveal the necessary framework and detail a comprehensive remedy to resolve gender equity disputes, as well as subject the comprehensive remedy to current judicial doctrines.

I. History of Title IX

A. Legislative Interpretation

Congress enacted Title IX as a component of the Education Amendments Act of 1972.\(^5\) There are two principal provisions to the Act. First, the Act prohibits gender-based discrimination.\(^6\) Second, the Act applies to all institutions receiving federal assistance.\(^7\) With few exceptions,\(^8\) Title IX prohibits discrimination in both interscholastic and intercollegiate programs.\(^9\)

The particular language of Title IX loosely mimics Title VII of the Civil Rights Act of 1964.\(^10\) Both statutes use similar operative language, except for the exchange of a sex for race protected classification.\(^11\) Although not readily apparent, the importance of this connection reflects itself in the availability of remedies afforded to private plaintiffs. A strict interpretation of Title IX provides the enforcing authority\(^12\) with only two investigative methods of enforcement. First, Title IX grants the enforcing authority the power to conduct random "compliance reviews" of institutions.\(^13\) Second, the enforcing agency can

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5. Pub. L. No. 92-518, §§ 910-919, 86 Stat. 235. The original Act differed slightly in its wording from the presently codified version. The original Act provided "no person in the United States shall, on the ground of sex, . . . be subject to discrimination under any program or activity conducted by a public institution of higher education . . . which is the recipient of Federal funds." 86 Stat. at 373.
6. Id.
7. Id. This specific provision became the threshold issue courts litigated and finally decided only to be overruled by statute. See infra notes 36-58 and accompanying text.
9. Id. § 1681(a)(1).
11. Id.
12. At Title IX's original inception, the Health, Education and Welfare Department originally handled enforcement. However, the Department of Education Office of Civil Rights now handles enforcement. 34 C.F.R. § 106.37 (1991).
investigate specific complaints at universities. Curiously missing from the literal Title IX language is the ability of aggrieved private plaintiffs to file suit against universities to enforce gender equity. However, the previously noted similarity between Title IX and Title VII led the courts to imply that Congress intended to bestow a private remedy in addition to governmental enforcement.

The obvious, unstated purpose of Title IX is to preclude the use of federal funds to support discriminatory practices. However, the scarce legislative history surrounding the adoption of the Act does not overtly state the intended purpose. Consequently, Congress did not initially debate many potential ramifications of the Act, specifically its application to intercollegiate athletics. In fact, the topic of athletics only surfaced twice during congressional debate. After the full ramifications of the Act became evident, there were several attempts to exempt intercollegiate athletics from the scope of Title IX. Nevertheless, these attempts to limit the scope of Title IX failed. In response to the upsurge of sentiment for a college athletics exemption, Congress directed the Secretary of Health, Education and Welfare (HEW) to prepare and publish regulations concerning the application of Title IX to intercollegiate athletic activities. Congress ratified HEW's proposed regulations in 1975. However, the regulations proved vague and ambiguous. As a result, in 1979, HEW's Office of Civil Rights (OCR) issued a lengthy "Policy Interpretation" intended to clarify the guidelines for compliance and provide a framework for dispute resolution.

In the year following the policy interpretation, HEW split into two separate entities: the Department of Health and Human Services (DHS) and the Department of Education (DED). DED became the new department endowed with the duty of enforcing Title IX. Consequently, the DED promptly adopted the 1979 HEW-OCR policy interpretation as its own. The policy interpretation represents the first successful legislative effort to clarify the vagueness of the original Act. In general, the policy interpretation focused on three major areas to evaluate Title IX

14. Id.
15. Cannon, 441 U.S. at 694-703. The drafters of Title IX explicitly assumed that it would be enforced similar to the enforcement of Title VII, which provided for private remedies.
16. Id. at 704.
17. Title IX was enacted without formal hearings or even a committee report. See Diane Heckman, Women & Athletics: A Twenty Year Retrospective on Title XI, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 9 n.30 (1992).
19. Specifically, six attempts to limit the scope were made, most notable was the Tower Amendment 1343 to S. 1539, 120 CONG. REC. 15,322 (1974) (attempting to exclude revenue producing intercollegiate activities).
20. This directive is commonly known as the Javits Amendment.
21. The final regulations were apparently "watered down" omitting any affirmative efforts by an institution to gauge student interest in athletics. See Heckman, supra note 17, at 12.
24. Id. at 895.
compliance:25 (1) Athletic Financial Assistance (scholarships),26 (2) Equivalence in Other Athletic Benefits and Opportunities,27 and (3) Effective Accommodation of Student Interests and Abilities.28 Additionally, the policy interpretation included guidelines that investigators may use to balance the three major areas of compliance.29 Moreover, it stated that unequal expenditures for male and female teams will not constitute a per se Title IX violation.30

The policy interpretation's all important third category, the effective accommodation of student interests and abilities, eventually led to the DED-OCR's innovative three-prong compliance guideline commonly referred to as the Effective Accommodation Test.31 The test asks:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are under represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are under represented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.32

25. Id. at 897.
27. Id. § 106.37(c)(2)-(c)(10).
28. Id. § 106.41(c)(1).
29. The policy interpretation denoted ten considerations that an investigator could look toward to balance the three general areas of compliance. The ten considerations include:
   (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
   (2) The provision of equipment and supplies;
   (3) Scheduling of games and practice time;
   (4) Travel and per diem allowance;
   (5) Opportunity to receive coaching and academic tutoring;
   (6) Assignment and compensation of coaches and tutors;
   (7) Provision of locker rooms, practice and competitive facilities;
   (8) Provision of medical and training facilities and services;
   (9) Provision of housing and dining facilities and services;
   (10) Publicity.
30. Id. § 106.41(c)(10).
31. Cohen, 991 F.2d at 897.
32. Id. (citing 44 Fed. Reg. 71,418 (1979)). This comment will refer to several discussions of this important test and its three criteria. The three criteria will be referred to as (1) substantially proportionality; (2) history and continuing program expansion; and (3) effective accommodation of
The 1990 Title IX Athletic's Investigators Manual also promulgated the Effective Accommodation Test evaluation criteria. The three criteria provide an escape mechanism for those universities that fail to meet exact compliance. Exact compliance dictates that the proportion of female to male athletes must directly correspond to the female to male student proportion. If an institution can validly fulfill one criterion of the Effective Accommodation Test, exact compliance is not mandatory. Realistically speaking, most universities are not in exact compliance, substantially close to compliance, or able to prove a continuing history of expansionism. Absent a showing of substantial proportionality or a continuing program history, the third evaluation criterion becomes the most important.

B. Early Judicial Interpretations

The first tier of cases represents the early judicial attempt to resolve an initial Title IX application issue. Courts focused on whether receipt of federal funds by one program within an institution subjected the entire institution to Title IX scrutiny. Accordingly, early plaintiffs advocated an "institutional approach," which subjected the whole institution to investigation if one of its programs accepted federal aid. Conversely, early defendants advocated a "program specific" approach, subjecting only the collegiate program that received federal funds to Title IX scrutiny.

In Haffer v. Temple University, an action by female students to increase university funding of women's athletics, a Pennsylvania District Court accepted the plaintiff's argument and promulgated the institutional approach to Title IX interpretation. The Haffer court held that federal funds given to one program constituted indirect funding to all programs. Thus, mandating institutional wide scrutiny.

In lieu of precedent to the contrary, the Haffer court propounded that receipt of federal funding by one program benefits all component parts of an institution by an indirect reallocation of funds. However, the existence of indirect funding was not at issue in the case. The court concluded that the athletic program did

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interest and ability.

34. Id. at 7.
35. See NCAA REPORT FROM THE GENDER EQUITY TASK FORCE 3 (1993) [hereinafter NCAA REPORT]. Specifically, the report states that although general student ratios of men to women are roughly equal, men comprise 69.5% of the athletic participants and their programs receive 77% of the operating budget. Id.
37. Id. at 538-39.
40. Id.
receive direct federal funding, thus invoking Title IX scrutiny under a program specific or institutional approach. \(^41\)

In 1983, the Supreme Court addressed the indirect funding theory suggested by the Haffer court in Grove City College v. Bell. \(^42\) The Supreme Court seemingly resolved the issue by rejecting the indirect funding theory. The Court utilized a program specific interpretation of Title IX limiting its scope to "each educational program or activity . . . which receives or benefits from federal financial assistance." \(^43\)

The Grove City Court recognized that federal funding in the form of student loans, scholarships, or grants accepted by a university constituted federal funding within the context of the Act. \(^44\) However, the program specific approach adopted by the Court only brought the financial aid office of the university under Title IX scrutiny. \(^45\) Additionally, the Court discounted the theory of federal funding "freeing up" university resources to fund other programs. \(^46\)

The effect of Grove City's flat rejection of the institutional approach was of paramount importance to intercollegiate athletic programs. Provided an athletic program does not accept any direct federal financial assistance, it was insulated from Title IX scrutiny. In the wake of Grove City, the DED-OCR terminated many of its gender equity investigations of collegiate athletics. \(^47\)

Without the protection of an institutional approach to Title IX, gender equity advocates imagined that women's collegiate athletics would meet the same fate as similar women's movements such as the AIWA \(^48\) and the ERA. Amazingly, in the three years after Grove City, hundreds of new women's collegiate teams were created \(^49\) disproving the theory that universities would be unwilling to fund

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41. Id. at 541.
42. 465 U.S. 555 (1984), superseded by statute, 20 U.S.C. § 1681 (1994). The plaintiffs in Grove City brought suit to increase funding for women's athletics. Grove City University was a private university that prided itself on accepting no Federal funding. However, it did enroll students that did receive financial grants. Therefore, Federal assistance did eventually find its way into the general operating budget of the university.
43. Grove City, 465 U.S. at 573 (citing 34 C.F.R. § 106.11 (1982)).
44. Id. at 572.
45. Id.
46. The Court based this assumption on the fact that all federal funding has a "ripple effect" throughout the university. It would be impossible to decipher which program actually received Federal assistance. Id. at 572-73.
48. The Association of Intercollegiate Athletics for Women began in the early 1970s to promote competition in women's athletics. However, membership in the organization began to decline when the NCAA began to offer a wider variety of women's athletic support. Eventually, in 1982, the AIWA folded. Glenn M. Wong & Richard J. Ensor, Sex Discrimination in Athletics: A Review of Two Decades of Accomplishments and Defeats, 21 GONZ. L. REV. 345, 348 (1986).
49. P. Michael Villalobos, The Civil Rights Restoration Act of 1987: Revitalization of Title IX, 1 MARQ. SPORTS L.J. 149, 151 (1990). From 1985-88 approximately 450 new NCAA women's teams were created. Additionally, since the inception of Title IX, female athletic participation increased from 15% to 30.8% of the overall participation in 1984. Id.
women's athletics absent the threat of judicial enforcement. In addition, aggregate expenditures for female athletics increased from $24.7 million in 1977 to $116 million in 1981. Despite the great strides made toward gender equity prior to and following the Grove City decision, the legislature was displeased with the Supreme Court's interpretation of Title IX.

C. Legislative Response to Early Court Decisions

The program specific approach promulgated by Grove City irritated members of Congress who preferred a broad reading of the Act implementing an institutional approach. As a result of Haffer, Congress statutorily overruled the Court's decision by overriding a presidential veto and enacting the Civil Rights Restoration Act of 1987. Specifically, Congress redefined the "program or activity" terminology of the original Act to subject "a college, university, or postsecondary institution . . . to which federal financial assistance is extended directly or through another entity" to Title IX scrutiny. In effect, Congress resurrected the old institutional approach promulgated by the Haffer dicta.

With this new legislative action, coverage of the Act is no longer an issue. The repercussions of the legislative action resounded in the form of sixteen complaints against universities six months after the passage of the Restoration Act. Although there was an explosion of gender equity litigation, women's groups began an active campaign to urge more female athletes to file complaints with the DED-OCR. The first round of new lawsuits was decided by the courts in the early 1990s with astonishing similarity.

D. Recent Judicial Interpretation

As previously noted, the first tier of cases disputed application of Title IX based on individual program receipt of federal assistance. The second tier of cases dispute possible exemptions from Title IX based upon satisfaction of one of the three criteria of the Effective Accommodation Test articulated in the DED-OCR policy determination.


The well-known foundation case of modern day Title IX analysis is the First
Circuit decision of *Cohen v. Brown University.* Cohen represents the first judicial interpretation of the 1987 Restoration Act's effect upon collegiate athletic equality. The practical result of the case was a broad reading of Title IX and a ringing endorsement of the institutional theory. In its broad reading of the statute, the court utilized the Effective Accommodation Test as its central analysis.

The *Cohen* plaintiffs filed suit, seeking a preliminary injunction barring Brown University (BU) from discontinuing funding for two women's sports. BU sought to discontinue funding as a result of institutional budgetary cutbacks. Before the cutbacks, women constituted 36.7% of the total athletic participants while comprising 48% of the general student population. After the budget cuts, the ratio of participation increased in favor of women's athletics by .1%.

The *Cohen* court's analysis represents a synergy of concepts between the Restoration Act and the DED-OCR policy determination. In measuring whether an athletic program accommodated the students' interests and abilities, the *Cohen* court adopted the "Trinitarian model of the Effective Accommodation Test" enunciated in the DED-OCR's policy determination. As a threshold issue, the court noted the defendant was not in exact compliance; therefore, the three criteria of the Effective Accommodation Test must be applied. Under the Trinitarian model, Title IX compliance is not mandatory if the university satisfies one of the three evaluation criteria.

The first criterion evaluates whether the percentage of athletic opportunity for women is substantially proportional to the percentage of females within the general


60. 991 F.2d 888 (1st Cir. 1993). This decision is regarded by some as the first in a line of affirmative action cases that mandate increased levels of women's participation in collegiate athletics. See Thro & Snow, supra note 59.

61. *Cohen*, 991 F.2d at 894.

62. See *infra* part II (discussion of Effective Accommodation Test).

63. *Cohen*, 991 F.2d at 894.

64. Although the newly enacted legislation did not provide for a private cause of action, the right was established in *Cannon v. University of Chicago*, 441 U.S. 677, 695 (1978). *See also* *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 65-66 (1992).

65. *Cohen*, 991 F.2d at 892. The particular sports were volleyball and gymnastics. That represented a net savings of over $60,000 per year.

66. *Id.* The funding for two men's sports was also discontinued. However, the total savings of this measure was only $15,795.

67. *Id.*

68. *Id.*

69. *Id.*

70. See * supra* note 31 and accompanying text.

71. *Cohen*, 991 F.2d at 892.

72. *Id.* at 897.
student population. In Cohen, the disparity between the opportunities for female participation and student enrollment at BU was 11.3%.73 By the court's determination, the disparity was not in substantial proportionality.74 Furthermore, the court determined that the university did not fulfill the second criterion of a historical and continuing female athletic program expansion due to the absence of continuing efforts to expand female athletic opportunities.75

As a result of the university's inability to meet either of the first two criteria, the court concentrated significant analysis toward the third criterion.76 Arguably, the third prong of the test is the most difficult to prove. Not only does the third criterion compel accommodation of all interests and abilities, it requires full and effective accommodation.77 In this respect, the court held that the university must accommodate a sport when there is "sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team."78

Finally, the court addressed the issue of who bears the burden of proof in a private gender equity lawsuit.79 Initially, the plaintiff must prove a disparity between the gender composition of the institution's student body and its athletic program.80 Next, the plaintiff must prove that the university's present program failed to accommodate the interests of the underrepresented gender.81 In response to a plaintiff's case, a university may offer an affirmative defense.82 Specifically, the university may demonstrate a history and continuing practice of female athletic program expansion.83

2. Roberts v. Colorado State University

About the same time as Cohen, a Colorado District Court decided a comparable gender equity claim with a similar line of reasoning. In Roberts v. Colorado State University,84 the court protected the varsity status of the women's softball team by issuing a permanent injunction against the university.

The background of this case is analogous to that of the cases in the second tier. Due to budgetary shortfalls, Colorado State University (CSU) discontinued funding

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73. Id. at 892.
74. Id. at 898.
75. Id.
76. Id.
77. Id.
78. Id. (citing 44 Fed. Reg. 71,418 (1979)).
79. In Cohen, burden of proof was an issue raised by the defendants on appeal.
80. Cohen, 991 F.2d at 901. The disparity shown by the plaintiff must not be substantially proportionate.
81. Id. at 902. The burden essentially requires the plaintiff to prove the third criterion of the Effective Accommodation Test.
82. Id.
83. Id. This affirmative defense represents the second criterion of the Effective Accommodation Test.
for the women's varsity softball team. Consequently, the members of the team brought suit against the university seeking a preliminary injunction for Title IX violations. In their claim, the student-athletes contended that the university failed to accommodate the interests and abilities of the student body. Specifically, the claim was itself upon the university's failure of the Effective Accommodation Test's third criterion.

Naturally, the court's analysis focused on the Effective Accommodation Test and allocated the burden of proof in the same manner as the Cohen court. The first criterion required the plaintiffs to prove that the disparity of female athletic participation to undergraduate population was not substantially proportionate. CSU's Title IX compliance review indicated women constituted 37.7% of the athletic participants while comprising 48.2% of the student body. In its defense, CSU asserted their ratio of female student athletes to the total enrollment was substantially proportionate. Unfortunately for the university, the court concluded that a disparity of 10.5% did not satisfy the substantial proportionality criteria.

The second evaluation criterion, one of continuing program expansion, effectively shifts the burden of proof to the defendant. At CSU, the total number of women's sports ranged from zero in 1970, ballooning to a height of fourteen, but sinking to its current level of eight. Notwithstanding this activity, the court rejected the broad contention that the creation and expansion of a woman's athletic program within the last three decades were evidence of continuous expansion. Specific evidence pointing to this conclusion was a 1983 OCR review finding CSU in violation of Title IX. In response to the review, CSU submitted a corrective action plan to raise the female athletic participation to 46.6% by the 1987-88 school year. However, the measures in the corrective plan either failed or were never implemented. Accordingly, the court found that CSU did not engage in a continuing program of expansion citing evidence that the female athletic participation in the 1987-88 school year was 33.8%.

The third and final criterion, the interest and ability criterion, allowed CSU to escape Title IX exact compliance if the university documents that the interests and abilities of the female student body were effectively accommodated by the athletic program. The court accepted as proof that CSU failed in this respect based on

86. Id.
87. Id. at 1510.
88. See supra note 32.
89. Roberts, 814 F. Supp. at 1511.
90. Id. at 1512.
91. Id.
92. Id. at 1512-13.
93. Id. at 1511.
94. Id. at 1514.
95. Id.
96. Id. at 1515.
97. Id.
98. Id.
testimony by the plaintiffs of their dedication to softball and the growing popularity of the sport nationwide.\footnote{Id. at 1517.}  

Unlike other decisions in the second tier of cases, the Roberts court engaged in some hypothetical analysis of differing alternatives available to the university that could effectively satisfy the substantial proportionality criterion. In the hypothetical inquiry, CSU kept its women's softball team and added women's soccer and an alpine ski team, thereby increasing the ratio of female athletic participation to 46.6\%\footnote{Id. at 1518.}. The gap between female participation and student population would be an acceptable 1.7\%.\footnote{Id. at 1519.} This hypothetical analysis represents the judiciary's only positive interpretation of a disparity in substantial proportionality, thus exempting CSU from Title IX exact compliance. Unfortunately for CSU, it was only hypothetical.  

Finally, the Roberts court ordered a permanent injunction against CSU, thereby reinstating the women's softball team.\footnote{Id.} The court mandated that "CSU may not continue to operate an intercollegiate athletic program that provides a disproportionate amount of participation opportunities to male athletes where there is no evidence of continuing program expansion or effective accommodation of the interests and abilities of its female students."\footnote{Id. at 1520.} On appeal, the Tenth Circuit Court of Appeals upheld the permanent injunction against CSU without major modification.\footnote{Id.}  

3. Favia v. Indiana University of Pennsylvania  

In Favia v. Indiana University of Pennsylvania,\footnote{812 F.2d 824 (10th Cir.), cert. denied, 114 S. Ct. 580 (1993).} a Pennsylvania District Court unequivocally stated that Title IX does not provide any exemptions due to an institution's financial difficulties. Accordingly, the court implemented the Effective Accommodation Test to resolve the issue of Title IX compliance.\footnote{Id.}  

In 1991, due to budgetary constraints, Indiana University of Pennsylvania (IUP) initiated a program to shrink its athletic budget.\footnote{Id. at 583.} To this end, IUP discontinued funding for women's gymnastics and field hockey and men's soccer and tennis teams.\footnote{Id. at 584.} The plaintiffs were former members of the affected women's teams seeking an injunction against university action.\footnote{Id. at 579.}
With respect to the first criterion of the Effective Accommodation Test, the court concluded that the ratio of female participation was not substantially proportional to general female student population. The court acknowledged some expansion of female athletic opportunity, but condemned the budget cuts as a regression of women's sports offerings. Consequently, IUP attempted to offer a plan to elevate the women's soccer team to varsity status as evidence of continuing expansion. Sarcastically, the court replied that IUP cannot replace programs with promises.

Finally, IUP failed to meet the third criterion by failing to demonstrate its actions had fully and effectively accommodated the interests and abilities of female students at IUP. The court based its conclusion on the plaintiffs' testimony concerning their interest and commitment to the respective sports.

On appeal, IUP sought modification of the injunction requesting the replacement of women's soccer for gymnastics, thus raising the percentage of female athletic participation to 43%. The request for modification represented a good faith attempt by IUP to progress toward Title IX compliance while working within its budgetary limitations. However, the court concluded that the substitution of women's soccer would still not bring IUP into substantially proportionate compliance under the first prong of the Effective Accommodation Test. Accordingly, the Third Circuit Court of Appeals rejected IUP's request for modification and upheld the trial court's preliminary injunction.

110. Id. at 584.
111. Id. at 584-85.
112. Id. at 585. The discrepancy prior to the discontinuation of funding was 17.84%. After the budget cuts the discrepancy increased to 19%.
113. Id.
114. Id.
115. On appeal the university attempted to lift the injunction granted by the district court elevating the women's soccer program to varsity status. See Favia v. Indiana Univ. of Pa., 7 F.3d 332, 334 (3d Cir. 1993).
117. Id.
118. Id.
119. Id., 7 F.3d at 336.
120. Id. at 334. IUP reasoned that a 50-member soccer team costing $50,000 annually is a better option than a 15-member gymnastics team costing $150,000 annually. Id. at 343.
121. Id. at 343.
122. Id. at 344.
4. Blair v. Washington State University

In 1987, the Supreme Court of Washington rendered a verdict that was years ahead of its time. In Blair v. Washington State University, the court upheld the trial court's injunction based upon the discriminatory administration of its athletic program. Although the Blair plaintiffs did not base the suit upon Title IX violations, the actions precipitating the suit and claimed injuries are identical to other tier two cases.

The Blair trial court issued several findings. During the 1970s, women's athletic programs made marked improvement, but still did not parallel the men's programs in terms of funding or athletic opportunity. Unfortunately, Washington State University (WSU) was not an exception. Consequently, the trial court held that WSU "acted, or failed to act, in the operation of the University's intercollegiate athletics program in a manner that resulted in discriminatory treatment of females." To remedy the disparities, the trial court issued a detailed injunction. The court ordered 37.5% of the total scholarship financial support, excluding football, to be given to the women's athletic department. Additionally, the amount of financial support given to female athletics would increase by two percent per year. Elsewhere, the court ordered WSU to increase female athletic opportunity to a level equal commensurate with the undergraduate female population.

Two controversial facets to the trial court's injunction provided the basis for an appeal to the Washington Supreme Court. First, the court determined that gender equity calculations would not incorporate football participation or amount

123. 740 P.2d 1379, 1389 (Wash. 1987).
124. The Blair plaintiffs chose to base their action upon a state Equal Rights Statute and a state Law Against Discrimination. The relevant portion of the laws most similar to Title IX provides in part: "The right to be free from discrimination because of . . . sex . . . includ[ing], but not limited to: . . . (b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement . . . ." WASH. REV. CODE ANN. § 49.60.030(1) (West 1993).
125. Specifically, the actions precipitating the tier two cases include university budget constraints and discontinuation of funding for assorted women's sports. Consequently, the women of the affected sports filed lawsuits to enjoin their universities from making the economic cuts.
126. Blair, 740 P.2d at 1381. The court found, during the 1980-81 school year, the men's athletic budget amounted to $3,017,692 and the women's budget amounted to $689,757. The funding for the female athletic budget consisted of approximately $450,000 in legislative appropriations, $10,000 in gate receipts and $150,000 transferred from the football program. In addition, the opportunities for men increased by 115 positions from 1973-81 while only nine positions for the women during the same time period.
127. Id.
128. Id.
129. Id.
130. Id. At the time of the injunction, 44% of the undergraduate population at WSU was female. Although not explicitly mentioned in the analysis, this appears to be a derivative of Effective Accommodation Test of Title IX analysis, specifically, the substantial proportionality criteria.
131. Id.
132. The plaintiffs appealed on four issues. However, only two of the issues are relevant to Title IX analysis and consequently discussed herein.
of funding.\textsuperscript{133} Second, the injunction required the university to achieve parity in funding male and female athletics only by "University Financial Support."\textsuperscript{134} The controversial aspect to this second provision surfaced in a revenue retention exemption.\textsuperscript{135} The injunction excluded the revenue attributable to any specific sport or program from the category of University Financial Support.\textsuperscript{136} Accordingly, the university need only achieve parity between the amount of University Financial Support given to male and female athletics. The result of this revenue retention provision safeguarded the revenue generated by a particular sport from calculation of gender parity.\textsuperscript{137}

The Supreme Court of Washington began its analysis with an examination of the trial court's football exemption. The trial court justified its exemption by classifying football as a sport "unique in many respects, the combination of which distinguished it from all other collegiate sports."\textsuperscript{138} Specifically, the trial court cited distinguishing characteristics such as the number of participants, coaches, amount of equipment and facilities, amount of income generated, spectator attendance, and publicity generated for the university.\textsuperscript{139} Nevertheless, the Blair court found the distinguishing characteristics unpersuasive in relation to the relevant law.\textsuperscript{140} As a result, the court ruled that the trial court abused its discretion and reversed the injunction with respect to the football exclusion issue.\textsuperscript{141}

Revenue retention became the next issue discussed by the Washington Supreme Court. The specific provision within the injunction allowed each sport to subsidize its own budget by retaining the revenue it generated.\textsuperscript{142} The Washington Supreme Court held that the trial court did not abuse its discretion in this respect.\textsuperscript{143} Central in the court's determination was the plaintiff's inability to cite any law or authority in opposition to the revenue retention provision.\textsuperscript{144} Additionally, the court noted several policy considerations in support of a revenue retention program, including encouraging sports to fund their expenses through their own

\begin{itemize}
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Id.
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} Id. This revenue retention provision has a dramatic effect upon the gender equity calculations. For example, the football program brought in $1,430,554 while the women's program only accumulated $10,535 during the 1980-81 school year. Therefore, under the trial court's injunction, the portion of the men's athletic budget funded by revenue from the men's program would not be used in the calculation of gender equity.
  \item \textsuperscript{137} Specifically, the injunction excluded sources of revenue including gate receipts, conference revenues, guarantees, sale of media rights, concession and novelty sales at games, coach and athlete work projects, and donations attributable to a sport or program.
  \item \textsuperscript{138} Blair, 740 P.2d at 1383.
  \item \textsuperscript{139} Id.
  \item \textsuperscript{140} Id.
  \item \textsuperscript{141} Id. at 1382.
  \item \textsuperscript{142} Id. at 1383.
  \item \textsuperscript{143} Id.
  \item \textsuperscript{144} Id.
efforts. Most important, the court determined the revenue retention plan's inherent gender neutrality did not violate the applicable law.

Decided six years prior to most of the tier two cases, Blair decides the main issue in each of the tier two cases, that of equality of athletic opportunity, with little or no discussion. Furthermore, the Blair decision discussed the next big question after the issue of opportunity has been settled, namely that of equal funding for men's and women's collegiate athletics.

II. Summary of Recent Judicial Analysis

The recent court decisions in favor of female athletics represent an increased awareness for gender equity and a lower tolerance for noncompliance. The second tier Title IX cases illustrate a basic framework of the methodical effective accommodation analysis a court will implement to resolve collegiate gender equity disputes. If the plaintiff demonstrates a disparity between the percentage of female opportunities to the percentage of female student population, the defendant-university must satisfy one of the three criteria articulated in the Effective Accommodation Test to escape judicially mandated gender equity.

As discussed previously, the first prong of the test represents the substantial proportionality criterion. In this phase, the court will inquire about one ostensively simple fact: Is the percentage of female athletic opportunity substantially proportional to the percentage of females in the general student population? Satisfaction of this criterion provides a "safe harbor" for institutions that do not wish to engage in continuous program analysis to stay within exact compliance. In reality, the substantial proportionality criterion is an enforcement measure for the future. Evidence of this assertion is found in the recent National Collegiate Athletics Association (NCAA) gender equity study, indicating most schools' gender disparities are not within substantial proportionality. Thus, potential plaintiffs can easily demonstrate a defendant university does not offer substantially proportional athletic opportunities according to its enrollment.

Unfortunately, no one knows, or has adequately articulated, precise parameters for substantial proportionality. The OCR's investigator's manual states "there is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a violation. All factors for this program component, and any justifications for difference offered by the incitement, must be considered before a finding is made." Likewise, the courts declined to offer a definitive range that the

145. Id. at 1384. The injunction additionally required a sex equity committee to recommend ways to encourage and promote women's sports to increase their revenues. Id.

146. Id.

147. The Blair case cannot be included as a true tier two case due to its absence of a Title IX claim and its resolution prior to the Civil Rights Restoration Act of 1987.


149. See NCAA REPORT, supra note 35, at 2.

disparity ratio must fall within to be considered substantially proportional. Case law does suggest that disparities of 11.3%,151 10.5%,152 and 17.8%153 do not rise to the level of substantial proportionality. Interestingly, the Roberts court engaged in a hypothetical example that resulted in a disparity of only 1.7%, which it termed "acceptable."154 Thus, a failure of the substantial proportionality test shifts the burden of proof to the university to defend its disparity by offering evidence to prove the second or third criteria of the Effective Accommodation Test.

The second prong of the test takes the form of another simple inquiry: Can the institution show a history, and continuing practice, of female athletic program expansion? Satisfaction of this criterion recognizes the institution is making ongoing efforts toward expanding the opportunities for the underrepresented gender.155 Realistically, most universities will not satisfy the second criterion of a continuing program of expansion. As evidenced by the actions that precipitated each of the recent second tier court actions,156 universities are currently encountering widespread budget shortfalls resulting in the trimming of overall athletic expenditures. In response to the budget shortfalls, most universities, with a token effort at gender equity, will trim men's and women's programs equally. However, when women's programs are smaller than men's programs, equal cuts will effect the women's program to a greater extent than that of the men's.

Finally, the third prong of the test takes the initial form of another presumably simple inquiry: Is the university fully and effectively accommodating the interests and abilities of the members of the underrepresented sex? The policy behind this criterion dictates that in the case of a school having a student body in which one gender has a significantly smaller interest in athletics than the other gender, the university is not forced to lavish money on the uninterested gender.157

Satisfaction of the third criterion is inherently ambiguous. As evidenced by the recent court decisions, the courts accept shallow representations that the female students' interests and abilities were not accommodated by the present athletic program. Mere filing of a lawsuit and testimony of dedication to the sport by a baker's dozen of plaintiffs appears to be an illustrative factor.158 However, courts will also include a determination that the interests and abilities of future female

151. Cohen, 991 F.2d at 892.
155. Cohen, 991 F.2d at 898.
156. See Cohen, 991 F.2d at 892; Roberts, 814 F. Supp. at 1509; Favia, 812 F. Supp. at 585.
158. Roberts, 814 F. Supp. at 1517. In Roberts, there were only thirteen named plaintiffs. CSU currently has an enrollment of over 21,000 students including over 10,000 female students. Id. Applying the courts analysis to the definite numbers of female's involved, the court concluded that the University failed to accommodate the interests and abilities of .001% of the female student population. Id. However, the court justified this determination by stating that the University failed to accommodate the interests and abilities of future female students under the current program. Id.

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students were not accommodated by a university to avoid a question of mootness.\textsuperscript{159} Additionally, designation of a sport as "emerging" may assist in the determination of a lack of accommodation of interests and abilities.\textsuperscript{160} The NCAA provides adequate fuel for this argument by recommending the addition of women's sports in everything from badminton to synchronized swimming.\textsuperscript{161}

The judicial message sent by the federal courts through the second tier cases is ambiguous. Although the substantially proportionate principle is vague and subjective, it is the key to Title IX compliance.\textsuperscript{162} Since the issue of Title IX applicability is not in conflict, the relevant issue remains as to how the calculations of gender equity should be compiled. The ramifications of the present day court analysis are unmistakable. Gender equity will be court mandated at the expense of other collegiate athletics unless another alternative becomes viable.

### III. NCAA Policy Regarding Gender Equity

Since Title IX's enactment, the NCAA has made various attempts to advise its members of the changing aspects of Title IX compliance. In 1991, the NCAA issued its Guide to Title IX & Intercollegiate Athletics (the Guide).\textsuperscript{163} The Guide supplied a general overview of Title IX and attempted to clarify ambiguous compliance areas.\textsuperscript{164}

The Guide proclaims Congress' intention that virtually any receipt of federal assistance brought the university under institutional wide Title IX scrutiny.\textsuperscript{165} The Guide regurgitates the court mandated theory that an institution is within Title IX compliance if its aggregate athletic expenditures are substantially proportionate to the numbers of students of each gender participating in intercollegiate athletics.\textsuperscript{166}

Additionally, the Guide devotes significant text to one of the more controversial questions regarding gender equity: whether gender equity calculations should encompass football. Emphatically, the Guide states that football does not qualify

\textsuperscript{159} See Cook v. Colgate Univ., 992 F.2d 17, 19 (2d Cir. 1993) (vacating Title IX decision for mootness due to graduation of the remaining student-plaintiffs to the action).

\textsuperscript{160} Roberts, 814 F. Supp. at 1517. The court concluded that the popularity of women's softball at CSU is a reflection of the sport's growing popularity nationwide.

\textsuperscript{161} NCAA REPORT, supra note 35, at attachment A.

\textsuperscript{162} See generally Teresa M. Miguel, Title IX and Gender Equity in Intercollegiate Athletics: Case Analyses, Legal Implications and the Movement Toward Compliance, 1 SPORTS L.J. 279 (1994).

\textsuperscript{163} WILLIAM D. KRAMER, GUIDE TO TITLE IX & INTERCOLLEGIATE ATHLETICS 1 (2d ed. 1991).

\textsuperscript{164} It is important to note that the Guide was prepared prior to the resolution of the second tier of cases. Therefore the focus of the Guide centers on the preliminary issue predominant in the first tier of cases, that of an institutional versus program specific approach to the application of the Act.

\textsuperscript{165} KRAMER, supra note 163, at 1. The Guide stated that the intention of Congress in the original Act was one of institutional wide application. This statement of intention is different from the Supreme Courts interpretation of the Act.

\textsuperscript{166} Id. at 9. The example listed in the Guide states that an aggregate expenditure of $600,000 for a school with 200 male athletes and 100 female athletes can award $400,000 to the male athletes and $200,000 to the female athletes. $400,000/200 = $2,000 (average award to male athlete); $200,000/100 = $2,000 (average award to female athlete).
for special treatment. However, the Guide cites several special requirements such as equipment, facilities for competition, and special event management needs that could justify increased expenditures in a nondiscriminatory manner.

In 1993, possibly as a response to the recent string of second tier court decisions, the NCAA released a long awaited report from its own gender equity task force. The report cited a 1991 NCAA survey documenting undergraduate enrollment roughly evenly divided between men and women. However, athletically, men constituted 69.5% of the participants, while women comprised 30.5%. In addition, men received 70% of the scholarship funds, 77% of the operating budgets, and 83% of the recruiting resources.

The substance of the report defined gender equity as the "fair and equitable distribution of overall athletics opportunities, benefits and resources available to women and men and in which student athletes, coaches and athletics administrators are not subject to gender-based discrimination." To further the ultimate goal of gender equity, the report denoted several "guidelines" to advance gender equity within member institutions.

First, the ultimate goal of a university should be substantially proportionate athletic opportunities for male and female participants in relation to the general student population. Second, the report acknowledged evidence supporting the theory that, at some institutions, football and men's basketball routinely funded most of the athletic opportunities for women. However, the report repeated the NCAA position of inclusion of revenue producing programs for purposes of calculating gender equity. Third, the report maintained that proportionally offered opportunities may not yield identically proportionate participation, and the report does not require fixed quotas.

The nature of the NCAA proposed recommendations as mere guidelines are worthy of discussion. The potential impact of the recommendations is lost by their "guideline" designation. The guidelines do not carry any risk of penalty for noncompliance. Therefore, there is no increased incentive to comply with Title IX.

The report did offer specific NCAA recommendations for "legislation" to promote gender equity. First, the task force formulated a list of emerging

167. Id. at 7.
168. Id.
169. NCAA REPORT, supra note 35, at 3. The task force consists of various notable intercollegiate figures as well as several consultants. The task force was formed as a reaction to an 1991 NCAA study. NCAA Executive Director Dick Schultz defined the objective of the task force to be (1) defining gender equity; (2) examining NCAA policies to evaluate impact on gender equity; and (3) recommending a path toward measuring and realizing gender equity in intercollegiate athletics. Id.
170. Id. at 1.
171. Id.
172. Id. at 2.
173. Id. at 3.
174. Id.
175. Id.
176. The use of the word promote is interesting because the committee still refused terminology such as "enforce" or "regulate" from which one could infer the possibility of sanctions for violations.
women's sports institutions which may be included for purposes of equality calculations.\textsuperscript{177} Second, the NCAA should increase the maximum financial aid limitations for some women's sports.\textsuperscript{178} Finally, the report recommended repetition of the 1991 gender-equity survey of member institutions conducted upon five year intervals.\textsuperscript{179}

Concluding the report, the task force set forth the predominant problem hindering gender equity: how to fund the necessary changes in athletic budgets.\textsuperscript{180} The report accepted the unfortunate reality of a widespread budget crunch among universities, but nonetheless placed the responsibility of compliance squarely on each university's shoulders.\textsuperscript{181}

Consequently, the NCAA report proved anticlimactic for member institutions wanting concrete guidance for the resolution of Title IX disputes.\textsuperscript{182} It simply acknowledged a gender equity problem and reprinted the analysis of recent second tier court decisions as "guidelines" and not proposed legislation. Moreover, the proposed legislation does little to encourage gender equity. The task force simply labeled "emerging sports" such as badminton and synchronized swimming as countable sports for purposes of revenue distribution calculations.

The NCAA is effectively one step behind the Title IX issue. The NCAA formulated a task force two decades after the original legislation. Accordingly, the task force articulated guidelines that were taken from recent federal court decisions. More importantly, the task force failed to formulate a concrete policy for achieving gender equality.

\textbf{IV. Foundation for Innovation}

Title IX has been a motivating force behind a tremendous growth of female athletic participation.\textsuperscript{183} Unfortunately, recent budget shortfalls experienced by many universities slowed the expansion.\textsuperscript{184} Consequently, many universities find themselves searching for alternatives to comply with Title IX while operating within budgetary constraints.

Alternatives to the presently mandated enforcement of Title IX are hard to rationalize. One plan will not satisfy both sides. Gender equity is the ultimate goal of Title IX. However, all proposed resolutions should conform to the spirit of Title IX. The spirit of Title IX is simply to foster an independent expansion of intercollegiate female athletics, not to augment female athletics to the detriment of other programs.

\textsuperscript{177} NCAA REPORT, \textit{supra} note 35, at 6. The list of emerging sports includes crew, ice hockey, team handball, water polo, synchronized swimming, archery, badminton, bowling and squash. \textit{Id}.
\textsuperscript{178} \textit{Id}.
\textsuperscript{179} \textit{Id}.
\textsuperscript{180} \textit{Id}. at 9.
\textsuperscript{181} \textit{Id}. at 10.
\textsuperscript{183} Johnson, \textit{supra} note 47, at 554.
\textsuperscript{184} \textit{Id}.
One entity has the power to bring widespread compliance of Title IX: the NCAA. To date, Congress and the courts have slowly fashioned modern day Title IX prerequisites for compliance. However, the NCAA, the governing body that controls almost every other aspect of intercollegiate sports, has failed to issue a definitive policy.

The NCAA should promulgate its own comprehensive strategy to achieve gender equity compliance and keep this issue out of the court system. The NCAA embarked on the first step by acknowledging a gender equity problem within intercollegiate athletics. Next, the NCAA should pass legislation, rather than mere guidelines, to expedite realistic gender equity enforcement. Finally, and most important, the proposed legislation should survive judicial scrutiny under current legal precedent.

V. Alternative Plan to Achieve Gender Equity

A. Specific Sport Exemptions

The most divisive proposal within potential gender equity legislation is the exemption of revenue producing sports, specifically, the collegiate football exemption. Militant gender equity proponents will never endorse a wholesale football exemption. Likewise, it is unlikely that any governing body or tribunal will sanction such an exemption. Nonetheless, football remains the most popular of all intercollegiate sports and generates a significant amount of revenue.

On the other hand, proponents of the college football exemption argue that the large squad size and enormous expenditures are necessary to promote the competitive aspect of the game. Consequently, inclusion of football within Title IX calculations would compel large scale changes in football programs that would destroy the competitive atmosphere and revenue potential. Unquestionably, football is different from any other collegiate sport. However, a wholesale college football exemption would perpetuate opportunity disparities by protecting such a large amount of male athletic scholarships. In the end, no proposed legislation can include a total college football exemption.

Since Title IX enactment, the NCAA promulgated specific legislation with respect to collegiate football. Due to increasing pressure for parity and gender

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185. See supra note 169.
186. Actual legislation, not mere guidelines, is the key to enforcement within the NCAA. For a critical analysis of guidelines, see supra part III.
187. For the purposes of this comment, the evaluation will use precedent derived from tier two cases without regard to jurisdiction.
189. Women's groups have offered empirical data that seemingly illustrate some football programs run a deficit and therefore generate no positive revenue for the institution.
190. Due to its unique demands of squad sizes and equipment needs, several courts have noted distinguishing characteristics, but not enough to validate an exemption. See Blair v. Washington State Univ., 740 P.2d 1379, 1381 (Wash. 1987).
equity concerns, the NCAA has taken measures to reduce the size and expense of collegiate football.\textsuperscript{191} The present limitation of scholarships represents the minimum level necessary to adequately compete on a collegiate level. In addition, the NCAA recently mandated several cuts in football budgets to reduce the expenditures of athletic departments.\textsuperscript{192} However, there is still room for reallocation of funds by the elimination of unnecessary football expenses.

Gender equity proponents justifiably suggest one obvious unnecessary expense. It is customary the night before a home game to require the home team to stay in a hotel. This practice costs the institution an average of $60,000 annually. Elimination of this exercise is a prime example of a reasonable budget cutback that will not impact the competitive aspect of the program.

The contracting measures enacted by the NCAA realistically promote efficiency and parity in collegiate football programs. However, militant gender equity proponents clamor for deeper cuts to subsidize women's athletics.\textsuperscript{193} The view that collegiate football is the scapegoat for all gender inequities is misguided.\textsuperscript{194} Although football programs are able to absorb some additional financial cutbacks, their competitive nature must be safeguarded by maintaining present scholarship limitations.

\textbf{B. Individual Athlete Exemptions}

Entire sports may not escape calculations regarding gender equity. However, proposed legislation should include provisions to accommodate the differences of individual sports. Positive interactivity between gender equity and proposed legislation is an important aspect of any viable resolution. In the instance of individual athlete exemptions, the positive interactivity is clear. Gender equity calculations will provide a gage of Title IX compliance, while individual athlete exemptions will safeguard the competitive level of sports by accommodating distinctive individual sport characteristics. Proposed legislation should compute the total amount of athletic participation using only the amount of scholarship competitive athletes. Therefore, nonscholarship walk-on participants,\textsuperscript{195} redshirted athletes,\textsuperscript{196} and injured athletes should not count toward gender equity comparisons.

\textsuperscript{191} Besides the NCAA's actions, various university athletic departments have limited the number of "walk on" participants in football to reduce the cost and comply with Title IX.

\textsuperscript{192} In 1994, the NCAA mandated several budgetary cutbacks including the dissolution of the recruiting coordinators position.

\textsuperscript{193} See generally Johnson, \textit{supra} note 47.

\textsuperscript{194} See generally Pieronek, \textit{supra} note 188.

\textsuperscript{195} A walk-on is defined as an athlete who participates in an intercollegiate sport, but does not receive any sort of financial assistance from the university. NCAA rules prohibit walk-ons from receiving academic scholarships.

\textsuperscript{196} The NCAA permits athletes who do not participate in athletic competitions to be "redshirted" and thus retain an extra year of eligibility. The NCAA permits only four years of eligibility, which can be extended to five with a maximum one year of redshirt.
Several policy considerations authorize the existence of such legislation. First, nonscholarship athletes should not constitute any ingredient of gender equity disparity figures. The spirit of Title IX is opportunity. The inclusion of nonscholarship athletes in disparity figures will label the nonscholarship athlete as expendable and decrease valuable participation. Thus, a nonscholarship athlete exemption will shift the emphasis where the real gender disparities exist— the amount of participation opportunities between male and female scholarship athletes.

Second, as all sports enthusiasts will agree, intercollegiate athletics forms the basis for the development of young athletes. Redshirt athletes should not count toward gender equity calculations. The practice of redshirting an athlete is a necessary measure of preparation to compete at the collegiate level. Without the benefit of a redshirt season, the young athlete could possibly never flourish to his or her full potential and never receive the benefits of the athletic opportunity. Redshirting allows the student-athlete to make the most of the athletic opportunity. Excluding redshirted athletes from gender equity calculations constitutes an essential proposition to protect the competitive aspect of collegiate sports and allow the student-athlete to maximize the athletic opportunity.

Third, all sports are not equal. Contact sports inherently carry a greater risk of serious injury, hence the necessity for larger squad sizes and extra equipment to preserve the competitive atmosphere. Gender equity should not penalize contact sports for their inherent risks. Consequently, there is a need for the injured athlete exception.

Finally, and most important, all individual athlete exemptions are intrinsically gender neutral. The same advantages are available for each gender, thereby not favoring one gender over another.

C. Revenue Retention

The theory of revenue retention first surfaced in Blair,197 but remains untested in a Title IX context. A proposed provision of revenue retention should resemble the one set forth in the Blair injunction.198 The thrust of a revenue retention program is definitely one of equality within university financial support. Under a revenue retention provision, income generated by one sport subsidizes its own budget and thus decreases the amount of university financial support needed.

Revenue producing sports historically contribute significantly toward their necessary budget. The revenue derived from individual sports should not count toward equity financial calculations between men's and women's athletics. Thus, gender equity should only exist within direct financial aid from the university.

197. See supra discussion in part I.
198. For the determination of the level of university financial support of intercollegiate athletics for the purposes of gender equity calculations, the term "University financial support" shall not include revenue generated by or attributable to any specific sport of program. Such excluded sources of revenue shall specifically include gate receipts, conference revenues, guarantees, sale of media rights, concession and novelty sales at games, coach and athlete work projects, and donations attributable to a sport or program. See Blair v. Washington State Univ., 740 P.2d 1379, 1381 (Wash. 1987).
Several policy considerations warrant the validation of a revenue retention provision. First, the policy promotes efficiency and business oriented decisions within particular programs. In addition, this will discourage unnecessary expenditures that are prevalent among some collegiate programs. Second, the policy is inherently gender neutral in that it does not favor one gender over another. Any sport, male or female, can subsidize itself through revenue production.

D. Development of Female Athletics

Important strides were made during the early seventies with the explosion of female athletic expansion.\textsuperscript{199} However, no comprehensive gender equity legislation can be complete without a provision to create a committee to help further advance the participation and revenue potential of female athletics. The cost of the committee would be minimal; however, the potential benefits could be enormous.

An innovative, concerted effort made toward the advancement of female athletics is an effective counterpart to the revenue retention provision of the proposed legislation. Any increase in the revenue of women’s athletics would help to subsidize only women’s athletics. Therefore, increased revenue generated by women’s athletics could have a multiplier effect.

E. Analysis Under Current Judicial Doctrine

The current judicial analysis exclusively focuses upon the Effective Accommodation Test. Judicial analysis of the current test will only focus upon one provision of the theoretical legislation proposed by this comment. The test concerns itself with only one facet of gender equity, equal athletic opportunity. The individual athlete exceptions will naturally impact gender equity opportunity calculations according to the individual decisions within the university. However, the policy considerations of the individual athletic exemptions should outweigh any mild threat to gender equity. The revenue retention provision remains untested within the federal courts. It is likely that a judicial challenge will result in its validation. The provision is inherently neutral and promotes efficiency within athletic programs.

Conclusion

The proposed legislation promulgated by this comment represents a competent resolution to the problem of gender equity within collegiate athletics. The provisions of the legislation promote fairness and equality. Most importantly, the proposed legislation promotes the positive interactivity necessary between gender equality and the competitive aspect of other sports. Therefore, the proposed legislation embodies the spirit of Title IX — to increase female participation in collegiate athletics, but not at the expense of collegiate athletics as a whole.

The NCAA is in a unique position with respect to the gender equity issue. At this time, the NCAA is poised to enact comprehensive legislation and remove the

\textsuperscript{199} See supra notes 48-51.
issue from the judicial arena, where lawsuits can be slow to resolve and may bring negative publicity to the university. The NCAA presents itself as the governing body with respect to all intercollegiate matters. It is time the NCAA takes decisive action enacting comprehensive legislation, such as that proposed in this comment.

Andrew A. Ingrum