

III. ELEMENTS OF TITLE IX'S PROHIBITION AGAINST SEX DISCRIMINATION IN ATHLETICS

BREAKING DOWN BARRIERS



A. SOURCES OF AUTHORITY

Because the statutory language of Title IX does not specifically address athletics – or almost any other particular substantive area – the primary sources for the specific contours of Title IX’s prohibition of sex discrimination in athletics are the Title IX regulations, 34 C.F.R. §§ 106.41 (athletics generally) and 106.37(c) (athletic scholarships); the Policy Interpretation;⁸⁷ the 1996 Clarification, as well as later Clarifications;⁸⁸ and the developing case law. A less authoritative source is the OCR’s Title IX Athletics Investigator’s Manual, last revised in 1990.⁸⁹ Parties may also seek to rely on Letters of Findings (LOFs) issued by the OCR in individual investigations as well as on other policy documents and letters publicly issued by the OCR (e.g., regarding scholarships and cheerleading).⁹⁰ Compliance with the gender equity rules of the NCAA or of any other conference, association, or governing body is not a defense to a Title IX claim.

⁸⁷ Policy Interpretation, *supra* note 11, 44 Fed. Reg. 71,413 (Dec. 11, 1979). See *Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ.*, 263 F. Supp. 2d 82, 96 (D.D.C. 2003) (noting that courts considering Title IX cases accord considerable deference to “[the Department of Education’s] interpretation of the statute, as manifested in the 1975 Regulations and 1979 Policy Interpretation”), *aff’d*, 366 F.3d 930 (D.C. Cir. 2004), *cert denied*, 545 U.S. 1104 (2005).

⁸⁸ See 1996 Clarification, *supra* note 33; see also 2003 Clarification, *supra* note 35; 2005 Clarification, *supra* note 38. The 2005 Clarification was issued without notice or input and may violate the statute, as well as the Equal Protection Clause. See *infra* pages 29-30 for further discussion regarding the 2005 Clarification.

⁸⁹ Office for Civil Rights, Department of Education, Title IX Athletics Investigator’s Manual (April 1990) (hereinafter the Investigator’s Manual), available at http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/23/24/ef.pdf; see *infra* notes 373-389 and accompanying text for a discussion of the relative weight to be given these various documents.

⁹⁰ See, e.g., Letter from Harry A. Orris, Director, Cleveland Office, Midwestern Division, Office for Civil Rights, Department of Education, to Suzanne M. Martin, Assistant Director, Mich. High Sch. Athletic Ass’n (Oct. 18, 2001) (hereinafter 2001 Cheerleading Letter); Letter from Dr. Mary Frances O’Shea, National Coordinator for Title IX Athletics, Office for Civil Rights, Department of Education, to David V. Stead, Executive Director, Minn. State High Sch. League (Apr. 11, 2000) (hereinafter 2000 Cheerleading Letter); Letter from Dr. Mary Frances O’Shea, National Coordinator for Title IX Athletics, Office for Civil Rights, Department of Education, to Nancy S. Footer, General Counsel, Bowling Green State Univ. (July 23, 1998) (hereinafter Scholarship Clarification).

⁹¹ See 34 C.F.R. § 106.6(c) (2006) (“The obligation to comply with [Title IX] is not obviated or alleviated by any rule or regulation of any . . . athletic or other . . . association.”); see also *Kelley v. Bd. of Trs.*, 832 F. Supp. 237, 240 n.5 (C.D. Ill. 1993) (Big Ten Conference “gender equity” requirement does not preempt Title IX).

Sources of Information about Title IX

Statutory Text

- Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-87 (2006).
- Civil Rights Restoration Act of 1987 (Restoration Act), 20 U.S.C. § 1687 (2006).

Implementing Regulations

- 34 C.F.R. Part 106 (2006)

Policy Interpretation, OCR Manual, and Clarifications

- U.S. Department of Education Athletic Guidelines; Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,423 (1979) (Policy Interpretation)
- Office for Civil Rights, Department of Education, Title IX Athletics Investigator's Manual (April 1990)
- Office for Civil Rights, Department of Education, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (January 16, 1996) (1996 Clarification)
- Letter from Dr. Mary Frances O'Shea, National Coordinator for Title IX Athletics, Office for Civil Rights, Department of Education, to Nancy S. Footer, General Counsel Bowling Green State University (July 23, 1998) (Scholarship Clarification)

- Office for Civil Rights, Department of Education, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (June 11, 2003) (2003 Clarification)
- Office for Civil Rights, Department of Education, Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Part Three (March 17, 2005) (2005 Clarification)

OCR Policy Letters

- Letter from Harry A. Orris, Director, Cleveland Office, Midwestern Division, Office for Civil Rights, Department of Education, to Suzanne M. Martin, Assistant Director, Michigan High School Athletic Association (October 18, 2001) (2001 Cheerleading Letter)
- Letter from Dr. Mary Frances O'Shea, National Coordinator for Title IX Athletics, Office for Civil Rights, Department of Education, to David V. Stead, Executive Director, Minnesota State High School League (April 11, 2000) (2000 Cheerleading Letter)

B. THE TITLE IX ATHLETICS FRAMEWORK

The Title IX regulations provide that “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 discriminated against in any interscholastic, intercollegiate, club or intramural program”⁹² Implementation of this regulation is prescribed by the Policy Interpretation, which considers three basic areas in analyzing whether students have been subjected to prohibited discrimination in athletics:⁹³

- the allocation of participation opportunities,⁹⁴
- athletic financial aid, and
- all other athletic benefits and opportunities.⁹⁵

A violation in any one of these areas will give rise to a violation of the statute,⁹⁶ and a strong record of compliance in one area cannot be used to offset a violation in another.⁹⁷ Title IX also prohibits employment discrimination and covers coaches, athletics personnel, and other employees.⁹⁸

⁹² 34 C.F.R. § 106.41(a) and (c) (2006).

⁹³ Although the discussion in this chapter refers predominantly to intercollegiate varsity athletics, the general principles related to participation and equal treatment claims also apply at the elementary and secondary education levels, as well as to club and intramural sports.

⁹⁴ Participation opportunities refer to the number of individual participation slots that are available to students and not the number of teams that may be offered. See *infra* notes 120-28 and accompanying text regarding conventions for counting participants.

⁹⁵ See *infra* notes 191-248 and accompanying text regarding the analysis of discrimination for this third category which includes, *inter alia*, scheduling, travel, facilities, coaching and all other benefits that are typically provided to varsity athletes.

⁹⁶ Courts have consistently rejected defendants' arguments that a plaintiff must make out a violation in *each category* in order to prevail on a Title IX claim. See, e.g., *Roberts v. Colo. State Univ.*, 998 F.2d 824, 828 (10th Cir. 1993) (hereinafter *Roberts II*) (holding that violation of § 106.41(c)'s participation requirements alone states a violation of Title IX); *Cohen II*, 991 F.2d at 897 (“[A]n institution can violate Title IX even if it meets the ‘financial assistance’ and ‘athletic equivalence’ standards.”); *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1511 (D. Colo. 1993) (hereinafter *Roberts I*) (“[A] violation of Title IX may be shown by proof of a substantial violation in any one of the three major areas of investigation set out in the Policy Interpretation.”); *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 584 (W.D. Pa. 1992) (predicting plaintiffs' success on Title IX claims under § 106.41(c)(1) alone), *mot. to modify order denied*, 7 F.3d 332 (3d Cir. 1993); *Cohen I* 809 F. Supp. at 989 (stating that “a finding of violation under Title IX may solely be limited to § 106.41(c)(1)”).

⁹⁷ See, e.g., *Cohen II*, 991 F.2d at 897 (“[A]n institution that offers women a smaller number of athletic opportunities than the statute requires may not rectify that violation simply by lavishing more resources on those women or achieving equivalence in other respects.”).

⁹⁸ See *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982). *Breaking Down Barriers* will not address issues of employment discrimination in any detail. As a general matter, however, the Title IX prohibition of employment discrimination tracks the prohibition established under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988). See, e.g., *Blundell v. Wake Forest Univ. Baptist Med. Ctr.*, 2006 U.S. Dist. LEXIS 11713, *31 (M.D.N.C. Mar. 15, 2006) (stating that “because there are fewer cases concerning Title IX, courts have applied the judicial interpretations of Title VII as to Title IX claims”); see also *Lipssett v. Univ. of P.R.*, 864 F.2d 881, 896 (1st Cir. 1988) (applying “the substantial body of case law developed under Title VII to assess the plaintiff’s [employment discrimination] claims under . . . Title IX”); *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987) (“Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX’s substantive standards. . . .”); *O’Connor v. Peru State Coll.*, 781 F.2d 632, 642 n.8 (8th Cir. 1986) (finding teacher’s Title IX complaints regarding work conditions, insofar as duplicating Title VII claims, to be redundant); *Nagel v. Avon Bd. of Educ.*, 575 F. Supp. 105, 106 (D. Conn. 1983) (implying that standards governing Title IX and Title VII are the same). But see *Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997) (holding no private right of action for employment discrimination under Title IX). Note that there is a circuit split on the issue of whether employment discrimination claims that are covered under both laws must be brought under Title VII so as to require exhaustion of administrative remedies. See *supra* note 49.

The Department of Education and the courts have developed a clear and analytic framework to evaluate claims of discrimination under Title IX. This framework is described in the following sections.⁹⁹

C. PARTICIPATION OPPORTUNITIES

1. THE BASIC TITLE IX PRINCIPLE

The law's requirement that participation opportunities be allocated in a nondiscriminatory manner is set forth in 34 C.F.R. § 106.41(c)(1), which requires that “the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.” The Policy Interpretation¹⁰⁰ and 1996 Clarification¹⁰¹ expand on the regulatory language to provide more details on the analytical approach.¹⁰²

The introductory language of the Policy Interpretation requires institutions to “take into account the nationally increasing levels of women’s interests and abilities” and prohibits “disadvantag[ing] the members of an underrepresented sex” when determining the extent of student demand for athletics.¹⁰³ Even today, women remain significantly underserved in access to participation opportunities.

⁹⁹ Due to the development of the analytical framework for evaluating Title IX participation claims, institutions may not rely on the burden-shifting framework or evidentiary standards developed for Title VII disparate treatment claims to defend Title IX athletics claims. The Title VII disparate treatment framework was developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary’s Honor Soc’y v. Hicks*, 113 S. Ct. 2742, 2746 (1993). The Policy Interpretation and the 1996 Clarification set out the complete and coherent framework for analyzing discrimination in participation. As the First Circuit explained in rejecting a Title VII analogy on burden of proof questions, “[I]n our view, there is no need to search for analogies where, as in the Title IX milieu, the controlling statutes and regulations are clear.” *Cohen II*, 991 F.2d at 901 (noting and rejecting analysis adopting Title VII disparate treatment standards in *Cook v. Colgate Univ.*, 802 F. Supp. 737, 743-51 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993)). The court proceeded to describe the Policy Interpretation’s three-part participation test as “inhospitable to the specialized choreography of presumption and production upon which the Burdine/McDonnell Douglas burden-shifting framework depends.” *Cohen II*, 991 F.2d at 902. It concluded that, “excepting perhaps in the employment discrimination context, the Title VII burden of proof rules do not apply in Title IX cases.” *Id.* (citations omitted). The Tenth Circuit has concurred that “Title IX and its implementing regulations offer enough guidance in setting the burden of proof that application of the Title VII model in that regard is not necessary.” *Roberts II*, 998 F.2d at 833 n.14. This is not a question simply of form. The “legitimate nondiscriminatory reason” defense under Title VII gives defendants a broader avenue of defense than is offered by the three-part test. Thus, defenses under Title VII are irrelevant under Title IX.

¹⁰⁰ See Policy Interpretation, *supra* note 11.

¹⁰¹ See 1996 Clarification, *supra* note 33.

¹⁰² Both the regulation and the Policy Interpretation also address discrimination in levels of competitive opportunities. See 34 C.F.R. § 106.41(c)(i); Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418. Because, as a general rule, men and women at the same school participate at the same competitive level (e.g., Division I or II), claims of discrimination in this regard may not arise with frequency. Since the Policy Interpretation is framed conjunctively (institutions must provide both participation opportunities and competitive schedules in a nondiscriminatory fashion) discrimination in either area provides an independent basis for a claim. See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418; *Cohen I*, 809 F. Supp. at 990-91.

¹⁰³ See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,417.

Effective Accommodation of Students' Interests and Abilities: The Three-Part Participation Test

To achieve compliance with Title IX's requirement to provide equal participation opportunities, an institution must show one of the following:

1. Intercollegiate-level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. When the members of one sex have been and are underrepresented in intercollegiate athletics, the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
3. When the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing expansion such as that cited above, 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.

2. THE THREE-PART TEST

An institution is permitted, though not required, to offer sex-segregated teams.¹⁰⁴ The analytical framework for participation claims – the “three-part test” – was thus designed specifically and only for athletics, to enable the OCR and the courts to measure equality of opportunity when a school controls and selects the athletic opportunities to be given separately to men and women.

The three-part test, which has been uniformly upheld by the courts,¹⁰⁵ begins, but does not end, with a comparison of the percentage of female athletes and the percentage of female students enrolled at an institution.¹⁰⁶ To achieve compliance with Title IX's requirement to provide equal participation opportunities, an institution must consider and satisfy one of the following:

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

¹⁰⁴ See *id.*

¹⁰⁵ Every federal appellate court to consider the Department of Education's Title IX's athletics policies has held that they are entitled to deference. See *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996) (*Cohen IV*); *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 288 (2d Cir. 2004) (deferring to Policy Interpretation); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993) (according deference to HEW's interpretation of the regulations); *Pederson v. La. State Univ.*, 213 F.3d 858, 880 (5th Cir. 2000); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 273 (6th Cir. 1994) (establishing itself as the first court to adopt the three-part test as a measure for determining compliance in athletic participation opportunities at the high school level); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1046 (8th Cir. 2002); *Neal v. Bd. of Trs.*, 198 F.3d 763, 771 (9th Cir. 1999); *Roberts II*, 998 F.2d at 828-29; cf. *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82, 95-96 (D.D.C. 2003), *aff'd*, 366 F.3d 930 (D.C. Cir. 2004), *cert. denied*, 545 U.S. 1104 (2005).

¹⁰⁶ See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418; see also Elisa Hatlevig, *Title IX Compliance: Looking Past the Proportionality Prong*, 12 SPORTS LAW J. 87 (Spring 2005) (laying out the framework of the three-part test).

2. Where the members of one sex have been and are underrepresented among intercollegiate athletics, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.¹⁰⁷

The Department of Education has repeatedly stated that institutions need comply with only one of the three prongs of the three-part test.¹⁰⁸ As it reiterated in the 2003 Clarification, “[E]ach of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored.”¹⁰⁹

a. **The Three-Part Test:** First Prong

The first prong of the three-part test asks whether the athletic participation opportunities for male and female students are provided in numbers that are “substantially proportionate” to their respective enrollments.¹¹⁰ If, for example, 51 percent of an institution’s undergraduate students are female, the institution will have complied with Title IX’s participation requirements if about 51 percent of its athletes are also female. The first prong thus reflects a fundamental principle of equality: equal opportunity exists when every student on campus, regardless of sex, has an equal chance to participate in sports.

Courts have unanimously ruled that the burden is on the plaintiff to establish noncompliance with Prong One of the test – *i.e.*, to show that the school is not offering substantially proportionate opportunities to both sexes.¹¹¹ If the plaintiff fails, the institution will be found in compliance.¹¹² If, however, the plaintiff establishes that the two rates are not substantially proportionate, the institution may still be found in compliance with Title IX’s participation requirements if it satisfies one of the other two prongs of the test.

¹⁰⁷ Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418.

¹⁰⁸ See 1996 Clarification, *supra* note 33.

¹⁰⁹ 2003 Clarification, *supra* note 35.

¹¹⁰ Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418.

¹¹¹ See *Roberts II*, 998 F.2d at 829 n.5; *Cohen II*, 991 F.2d at 901; *Roberts I*, 814 F. Supp. at 1511; *Favia*, 812 F. Supp. at 584; *Cohen I*, 809 F. Supp. at 992.

¹¹² See *Roberts II*, 998 F.2d at 829; *Cohen II*, 991 F.2d at 897-98.

Definition of “Substantial Proportionality”: In general, Prong One requires a close fit between female and male enrollment and female and male athletic participation. The 1996 Clarification makes clear that a five-percentage-point disparity between female enrollment and participation is not substantially proportionate.¹¹³ Courts have considered differentials ranging from 10.6 percent to 20 percent and have found that these clearly do not meet the substantial proportionality standard.¹¹⁴ If the number of additional opportunities that would be provided if exact parity were achieved is not sufficient to sustain a viable team, however, the institution will be considered compliant with Title IX.¹¹⁵

In no case has it yet been found that a university has achieved substantial proportionality between enrollment and participation rates.¹¹⁶ Because a finding of discrimination is institution specific, institutions are not excused by the fact that other institutions’ ratios of participation to enrollment are worse than their own.¹¹⁷ Evidence that disparities are statistically significant may be helpful in proving substantial disproportionality,¹¹⁸ but is not required.¹¹⁹

Definitions of “Students” and “Participants”: The Department looks at full-time undergraduate students in determining enrollment.¹²⁰ Participants are defined as those athletes:

1. 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

¹¹³ See 1996 Clarification, *supra* note 33. In 2003, the Commission on Opportunity in Athletics recommended that “substantial proportionality” be considered to be met if an institution was within seven percentage points of a fifty-fifty split on athletic opportunities. See *Open to All*, *supra* note 36. This recommendation was vigorously opposed in the Minority Report to the Commission’s Report and the OCR rejected the recommendation in the 2003 Clarification.

¹¹⁴ See *Roberts I*, 814 F. Supp. at 1513 (disparity of 10.6 percent not substantially proportionate); see also *Pederson*, 213 F.3d at 878 (20 percent disparity not substantially proportionate); *Bryant v. Colgate Univ.*, No. 93-CV-1029, 1996 U.S. Dist. LEXIS 8393, *31 (N.D.N.Y. June 11, 1996) (13.2 percent disparity not substantially proportionate); *Favia*, 812 F. Supp. at 585 (19.1 percent disparity not substantially proportionate); *Cohen I*, 809 F. Supp. at 991 (11.6 percent disparity not substantially proportionate); Investigator’s Manual, *supra* note 89, at 24 (“For example, if the enrollment is 52 percent male and 48 percent female, then, ideally, about 52 percent of the participants in the athletic program should be male and 48 percent female.”).

¹¹⁵ See 1996 Clarification, *supra* note 33.

¹¹⁶ In fact, data available pursuant to the Equity in Athletics Disclosure Act, Pub. L. 103-382, § 360B, 108 Stat. 3518, 3967-71 (1994), codified at 20 U.S.C. § 1092(g) (2007), suggest that the vast majority of colleges and universities have not achieved substantial proportionality. See *infra* Chapter VII for a discussion of the Equity in Athletics Disclosure Act.

¹¹⁷ See *Roberts I*, 814 F. Supp. at 1513 (“[I]f defendants are found by this Court to be in violation of Title IX, the fact that CSU’s participation statistics are better than those of other schools is of no legal consequence. The issue of whether other universities are complying with Title IX is for other courts to decide based upon individualized allegations and independent findings of fact.”); see also *Roberts II*, 998 F.2d at 830 (“[A] 10.5% [sic] disparity . . . is not substantially proportionate. The fact that many or even most other educational institutions have a greater imbalance than CSU does not require a different holding.”).

¹¹⁸ See *Roberts II*, 998 F.2d at 830 (crediting evidence of statistical significance); *Roberts I*, 814 F. Supp. at 1513 (same).

¹¹⁹ See, e.g., *Favia*, 812 F. Supp. at 585 (finding absence of substantial proportionality without particular showing of statistical significance); *Cohen I*, 809 F. Supp. at 991 (same).

¹²⁰ See 1996 Clarification, *supra* note 33.

2. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
3. Who are listed on the eligibility or squad lists maintained for each sport; *or*
4. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.¹²¹

As a general rule, all persons on a team's squad or eligibility list as of the date of first competition are counted as participants, even if they do not receive athletically related financial aid (*e.g.*, walk-ons) or do not actually compete in games.¹²² The Department also counts athletes who compete on teams sponsored by an institution even when the team is required to raise some or all of its operating funds.¹²³ Furthermore, an athlete who participates in more than one sport is counted separately for each team on which he or she participates.¹²⁴

The Department has also made clear that, when counting participants, institutions may not count unfilled slots to satisfy their equal opportunity obligations.¹²⁵ As courts have recognized, Title IX requires equity in real, not illusory, participation opportunities.¹²⁶ If institutions were allowed to count unfilled slots, they could evade the requirements of Title IX by making slots nominally available and then failing to engage in the recruitment or support necessary to fill those slots.

Finally, when counting participants in varsity sports, "club teams will not be considered to be intercollegiate teams except in those instances where they regularly participate in varsity competition."¹²⁷ While many schools offer club or intramural teams, these teams typically are not part of the varsity program, receive little or no support from the institution, and compete only against similar teams from other schools. While Title IX prohibits discrimination in club sports,¹²⁸ in analyzing the distribution of competitive opportunities, defendants typically cannot argue that female participation on club teams should be counted as part of the female share of varsity participation opportunities for purposes of the three-part test.

¹²¹ See *id.*, citing Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415.

¹²² See 1996 Clarification, *supra* note 33. As the OCR explained in the 1996 Clarification, the significant benefits of athletics participation, such as coaching, training, equipment, locker rooms and intangible benefits, do not depend on their cost to an institution or whether an athlete competes.

¹²³ See *id.*

¹²⁴ See *id.* However, with respect to the allocation of scholarships, athletes are counted only once. See discussion of Athletic Financial Assistance, *infra* notes 174-90 and accompanying text.

¹²⁵ See 1996 Clarification, *supra* note 33. In 2003, the Commission on Opportunity in Athletics recommended that institutions be allowed to count all available slots, whether or not filled, to determine compliance with Prong One. See *Open to All*, *supra* note 36. The OCR rejected the Commission's recommendation that institutions be allowed to count unfilled slots. See 2003 Clarification, *supra* note 35.

¹²⁶ See, *e.g.*, *Cohen v. Brown Univ.*, 879 F. Supp. 185, 202-04 (D.R.I. 1985) (hereinafter *Cohen III*).

¹²⁷ Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,413 n.1.

¹²⁸ In other words, male and female students must have equal opportunities to play in club and intramural sports. The three-part test is used to evaluate whether an institution has complied with Title IX in this regard.

Definition of "Sport": The OCR determines whether an activity is a sport and, thus, whether participants in that activity can be counted as athletes, on a case-by-case basis. In making that determination, however, the OCR provides a long list of factors to consider, including:

- (1) whether selection for a team is based on objective factors related primarily to athletic ability;
- (2) whether the activity is limited to a defined season;
- (3) whether the team prepares for and engages in competition in the same way as other teams in the athletic program with respect to coaching, recruitment, budget, try-outs and eligibility, and length and number of practice sessions and competitive opportunities;
- (4) whether the activity is administered by the athletic department; and
- (5) whether the primary purpose of the activity is athletic competition and not the support or promotion of other athletes.

Other relevant evidence regarding whether an activity is part of an institution's athletic program includes:

- (1) whether organizations knowledgeable about the activity agree that it should be recognized as a sport;
- (2) whether the activity is recognized as part of the interscholastic or intercollegiate athletic program by the athletic conference to which the institution belongs and by organized state and national interscholastic or intercollegiate athletic associations;
- (3) whether state, national, and conference championships exist for the activity;
- (4) whether a state, national, or conference rule book or manual has been adopted for the activity;
- (5) whether there is state, national, or conference regulation of competition officials along with standardized criteria upon which the competition may be judged; and
- (6) whether participants in the activity/sport are eligible to receive scholarships and athletic awards (e.g., varsity awards).¹²⁹

¹²⁹ See 2000 Cheerleading Letter, *supra* note 90 (presuming that drill teams and cheerleading are not sports, but reiterating that classification of such activities is done on a case-by-case basis). In response to an inquiry by the Michigan High School Athletic Association (MHSAA) as to whether competitive cheerleading would be considered a sport under Title IX, the OCR recommended that MHSAA collect proof that high schools throughout the state administer competitive cheerleading programs, have similar team selection criteria and competition opportunities, maintain separate sideline cheerleading programs, and provide varsity letter eligibility requirements. In keeping with this guidance, the OCR stated that competitive cheerleading could not be classified as a sport under Title IX without proof that MHSAA's practices were also applied by other athletic programs in the broad geographic area. See 2001 Cheerleading Letter, *supra* note 90.

Cutting of Men's Teams: While courts recognize that institutions cannot devote infinite resources to athletics,¹³⁰ the Department of Education has explicitly stated that cuts to men's teams are a disfavored means of complying with Prong One.¹³¹ Indeed, as the Department and courts have repeatedly recognized, Title IX does not require or encourage any cuts to men's teams.¹³²

b. **The Three-Part Test**: Second Prong

Under the second prong of the test, a school can show that it is offering equal participation opportunities by showing "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of [the underrepresented] sex."¹³³ The institution must meet both components of this test.

An institution can demonstrate a *history* of program expansion by showing, among other things, its:

- record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented gender;
- record of increasing the number of participants in intercollegiate athletics who are members of the underrepresented sex; and
- affirmative responses to requests by students or others for addition or elevation of sports.¹³⁴

A *continuing* practice of program expansion can be established through evidence of:

- 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.¹³⁵

¹³⁰ See, e.g., *Kelley*, 35 F.3d at 269; *Roberts II*, 998 F.2d at 830; *Cohen II*, 991 F.2d at 898 n.15.

¹³¹ See 2003 Clarification, *supra* note 35.

¹³² See, e.g., *Kelley*, 35 F.3d at 265; see also *infra* notes 263-68 and accompanying text.

¹³³ Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418. The underrepresented gender is typically women. See, e.g., National Collegiate Athletic Association, *2003-04 Gender Equity Report* (Sept. 2006).

¹³⁴ See 1996 Clarification, *supra* note 33.

¹³⁵ See *id.*

The burden of proof is on the defendant to establish both components of program expansion.¹³⁶ To date, no defendant has sustained its burden in this regard. Courts have specifically rejected arguments that (1) schools should get credit for teams established over ten years previously;¹³⁷ (2) promises to expand women's programs at some unspecified future date constitute the requisite expansion;¹³⁸ (3) proportionally smaller cuts for women than men satisfy the requirements of Prong Two;¹³⁹ or (4) improvement in the *quality* of existing opportunities alone represents program expansion.¹⁴⁰ In addition, courts have rejected the contention that financial problems excuse an institution from continuing to expand athletics opportunities. A school claiming that it is complying under Prong Two cannot use the cost of program expansion as a defense for failing to meet this obligation.¹⁴¹

The hypothetical fact patterns presented by the OCR in its 1996 Clarification suggest that an institution may comply with Prong Two by adding a team every few years that responds to the developing interests of the underrepresented sex.¹⁴² In addition, the examples indicate that dropping an existing team for the underrepresented sex for reasons other than a lack of interest or ability is inconsistent with program expansion under Prong Two.

¹³⁶ See *Roberts II*, 998 F.2d at 830 n.8; *Cohen II*, 991 F.2d at 902; *Barrett v. West Chester Univ.*, No. 03-CV-4978, 2003 U.S. Dist. LEXIS 21095, *17-18 (E.D. Pa. Nov. 12, 2003) (stating that the plaintiffs bear the burden with respect to the first prong and, if that burden is met, the burden shifts to the defendant to establish the second prong); *Roberts I*, 814 F. Supp. at 1511; *Favia*, 812 F. Supp. at 584; *Cohen I*, 809 F. Supp. at 992.

¹³⁷ See *Roberts II*, 998 F.2d at 830 (affirming lower court finding that expansion in the 1970s, which was not maintained subsequently, fails to satisfy the "continuing expansion" test); *Cohen II*, 991 F.2d at 903 ("While a university deserves appreciable applause for supercharging a low-voltage athletic program in one burst rather than powering it up over a longer period, such an energization, once undertaken, does not forever hold the institution harmless."); *Barrett*, 2003 U.S. Dist. LEXIS 21095, at *23 (finding that, although "there are no fixed intervals of time within which an institution must have added participation opportunities . . . periods in excess of a decade are too long to constitute continued expansion") (internal citations omitted); *Roberts I*, 814 F. Supp. at 1514 ("Although the Court agrees that the eight women's teams currently offered by CSU are an improvement over the non-existent state of women's teams prior to 1970, the Court cannot accept defendants' conclusion that the mere fact that CSU now offers women's teams is evidence of program expansion for women."); *Favia*, 812 F. Supp. at 585 (past expansion of women's athletic opportunities does not neutralize more recent cuts); *Cohen I*, 809 F. Supp. at 991 ("With respect to the 'program expansion' prong, evidence has shown that Brown does not have a *continuing* practice of program expansion for women athletes, even though it can point to impressive growth in the 1970s.") (emphasis in original).

¹³⁸ See *Boucher v. Syracuse Univ.*, 164 F.3d 113, 116 (2d Cir. 1999) (finding that a Title IX claim by female athletes against a university is not moot where the university had promised to establish a varsity women's softball team by the next year but had not yet done so); *Favia*, 812 F. Supp. at 585.

¹³⁹ See *Roberts II*, 998 F.2d at 830 ("[T]he ordinary meaning of the word 'expansion' may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs."); *Roberts I*, 814 F. Supp. at 1514 ("CSU cannot show program expansion for women solely by pointing to increases in the percentage of women athletes caused by reducing the number of men athletes. CSU must either demonstrate actual expansion in women's athletic programming or establish that it has considered and improved upon the underrepresented status of women athletes when reductions in athletic programs became necessary in the past.")

¹⁴⁰ See *Cohen I*, 809 F. Supp. at 991. Improvements in the quality of athletics opportunities are relevant to the equality of treatment and benefits provided to athletes, but they are not a defense to the inequitable allocation of participation opportunities.

¹⁴¹ See *Roberts I*, 814 F. Supp. at 1518; *Favia*, 812 F. Supp. at 583, 585; *Cook*, 802 F. Supp. at 750.

¹⁴² See 1996 Clarification, *supra* note 33.

c. **The Three-Part Test: Third Prong**

An institution that has failed to provide substantially proportionate opportunities to its male and female students, and that cannot show a history and continuing practice of program expansion for the underrepresented sex, may nonetheless be found in compliance with Title IX's participation requirements if "it can be demonstrated that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program."¹⁴³ If a court case revolves around the institution's compliance with the third prong, the burden will likely be on the plaintiff to establish unmet interest and ability on the part of the underrepresented sex by a preponderance of the evidence.¹⁴⁴ Although there is a strong argument that defendants should carry the burdens of both production and persuasion with regard to their claims to have met female students' interests and abilities,¹⁴⁵ in the absence of any decisions on this subject, plaintiffs would be well advised as a cautionary matter to be prepared to sustain the burden of persuasion.

Courts have uniformly interpreted this language in accordance with its plain meaning, asking whether there are members of the underrepresented sex (almost always, but not necessarily, women) who have the interest and ability to compete but are not given the opportunity.¹⁴⁶ Some institutions have argued that men are "inherently" more interested in participating in athletics than are women and that the proper analysis should weigh the *relative* interests and abilities of men and women generally in the undergraduate student body; the courts have unanimously rejected this argument.¹⁴⁷ Under this discredited analysis, which relies on precisely the kind of stereotypes Title IX was enacted to eliminate, Prong Three would require only that the allocation of participation opportunities reflect that relative ratio of interest and ability, rather than the "full" accommodation of women's interests and abilities that is in fact anticipated under this prong. The First Circuit's analysis of why this argument is wrong is instructive:

¹⁴³ Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418.

¹⁴⁴ See *Cohen II*, 991 F.2d at 902; 2005 Clarification, *supra* note 38 (stating that the burden lies on the students or the OCR, in the case of an OCR investigation, to establish by a preponderance of the evidence that an institution is not in compliance with part three of the test). In administrative cases, the 1996 Clarification indicates that the burden is on the defendant to show that there is no unmet interest. But see 2005 Clarification (shifting burden to plaintiff to demonstrate unmet interest if e-mail survey results in presumption of compliance for university). See *infra* notes 153-54 and accompanying text for discussion of why the approach set forth in the 2005 Clarification is inconsistent with Congress' intent.

¹⁴⁵ Cf. *Sharif*, 709 F. Supp. at 361 (burden on defendant to establish "educational necessity" defense in Title IX challenge to discriminatory use of standardized test).

¹⁴⁶ See *Cohen II*, 991 F.2d at 898 ("If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test."); see also *Roberts II*, 998 F.2d at 831-32 (relying on *Cohen II* to reach the same conclusion).

¹⁴⁷ Courts have also rejected the argument that if an educational institution provides scholarships to female athletes, this is enough to satisfy the obligation of accommodating their interests and abilities. See *Favia*, 812 F. Supp. at 585 (noting that assisting women athletes in transferring and honoring their scholarships despite cutting their teams is not "full and effective accommodation").

Brown argues that DED's [Department of Education's] Policy Interpretation ... goes so far afield that it countervails the enabling legislation. Brown suggests that, to the extent students' interests in athletics are disproportionate by gender, colleges should be allowed to meet those interests incompletely as long as the school's response is in direct proportion to the comparative levels of interest. Put bluntly, Brown reads the "full" out of the duty to accommodate "fully and effectively." It argues instead that an institution satisfactorily accommodates female athletes if it allocates athletic opportunities to women *in accordance with the ratio of interested and able women to interested and able men*, regardless of the number of unserved women or the percentage of the student body that they comprise. . .

We think that Brown's perception of the Title IX universe is myopic. The fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender. Rather, the law requires that, in the absence of continuing program expansion (benchmark two), schools either meet benchmark one by providing athletic opportunities in proportion to the gender composition of the student body...or meet benchmark three by *fully* accommodating interested athletes among the underrepresented sex....¹⁴⁸

According to the OCR, an institution will be in compliance with Prong Three unless there is a sport for the underrepresented sex which meets all of the following conditions: "(a) unmet interest sufficient to sustain a varsity team in the sport(s), (b) sufficient ability to sustain an intercollegiate team in the sport(s), and (c) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region."¹⁴⁹

Assessing Interest: With regard to measuring the interest of the underrepresented sex under Prong Three, longstanding OCR policy makes clear that institutions have the obligation to consider multiple factors, including:

¹⁴⁸ *Cohen II*, 991 F.2d at 899 (emphasis in original). Because enrollment-wide distribution of interests and abilities is not relevant to the inquiry, survey or other evidence purporting to compare male and female ability and interest in athletics across the student body also should not be relevant. If the institution has not achieved substantial proportionality and cannot show a continuing history of program expansion, only the unmet interest and abilities of members of the *underrepresented* gender will be considered. See also *Neal*, 198 F.3d at 768-69 (discussing and agreeing with the *Cohen* analysis).

¹⁴⁹ See 1996 Clarification, *supra* note 33; see also *Barrett*, 2003 U.S. Dist. Lexis 21095, at *26-28 (finding that evidence of long-term participation in competitive gymnastics, testimony from coaches regarding athletes' ability, and opportunity to qualify and compete in national championship competitions are sufficient to demonstrate athletes' ability as required by the third part of the accommodation test).

- requests by students and admitted students that a particular sport be added or upgraded to varsity status;
- requests that an existing club sport be elevated to intercollegiate team status;
- student participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators, and others regarding interest in particular sports;
- results of any interviews and questionnaires of students and admitted students regarding interests in particular sports; and
- past participation by admitted students in particular interscholastic sports.¹⁵⁰

While each of the above factors focuses on current or admitted students, participation rates in high school or community sports in areas from which the institution draws its student body may also demonstrate unmet interest in a sport not offered by the institution. When an institution refuses to offer a sport that draws substantial participation in such programs and seeks to comply under Prong Three, the OCR will require the institution to prove that its current or admitted students are *not* interested in that sport. In addition, under the 1996 Clarification, the OCR expects institutions to complete periodic nondiscriminatory assessments of their students' interests and abilities to make themselves aware of unmet interest in particular sports.¹⁵¹

Moreover, the recent elimination of a viable team for the underrepresented sex will create a presumption that an institution is not in compliance with Prong Three. That presumption is rebuttable only with "strong evidence" that sufficient interest, ability, or competition no longer exists to support the team.¹⁵²

In March 2005, the OCR issued an additional clarification on assessing interests and abilities under Prong Three. The 2005 Clarification allows institutions to comply with Prong Three if no unmet interest is found among the underrepresented sex based solely on an e-mail survey of current and admitted students.¹⁵³ Many, including the National Collegiate Athletic Association, have argued that the 2005 Clarification is inconsistent with Title IX and longstanding OCR policy for several reasons. Some of these reasons include: surveys alone are insufficient to determine female student athletes' interests; surveys often merely measure the existence of past discrimination, not the interest that would be demonstrated if additional

¹⁵⁰ See 1996 Clarification, *supra* note 33 (providing that "unmet sufficient interest" is gauged by examining, among others, these six factors).

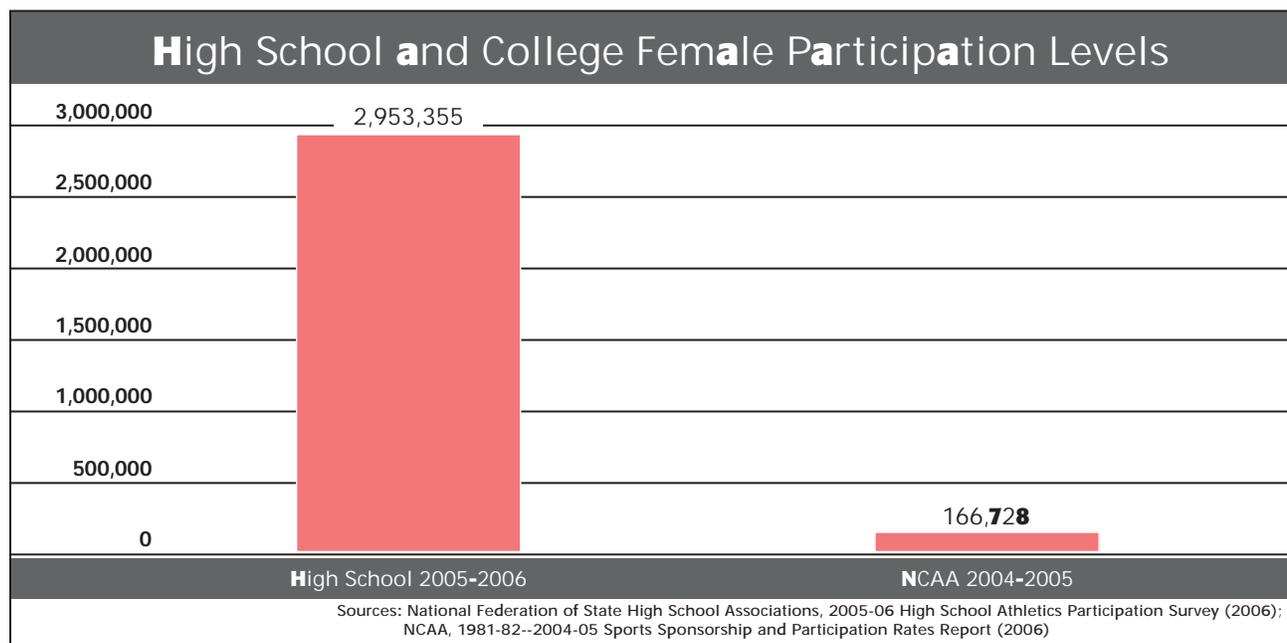
¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See 2005 Clarification, *supra* note 38.

opportunities were made available; the non-response rate for e-mail surveys tends to be high, so it is unreasonable to count non-response as lack of interest; and reliance on surveys of only current or admitted students' interests ignores the fact that schools create teams by recruiting athletes and that students interested in a sport not offered by a school are unlikely to attend that school.

The validity of the 2005 Clarification has not yet been tested in court, and, given the longstanding contrary interpretation in the 1996 Clarification, the weight a court would give to the 2005 Clarification is highly questionable. Moreover, the NCAA has urged rescission of the 2005 Clarification, and several institutions already have agreed not to utilize the methods authorized by the document.¹⁵⁴ In light of these factors, institutions may be better served by following the policy set forth in the 1996 Clarification, and female students would be well advised not to accept that an institution has complied with Prong Three merely because it has conducted an e-mail interest survey.



¹⁵⁴ See Nat'l Collegiate Athletic Ass'n Executive Committee Resolution, April 2005, available at <http://www.ncaa.org/wps/portal>; see also, e.g., Letters from Princeton University, Columbia University, Yale University and Brown University to Ms. Katie Yakulis (stating that institutions have no intent of relying on survey authorized by 2005 Clarification) (on file with the National Women's Law Center). For further discussion of the ways in which the 2005 Clarification is likely to violate Title IX, see "Title IX 'Clarification': What's at Stake," available at <http://nwlrc.org/pdf/whatsatstake.pdf>.

Assessing Ability: When considering whether underrepresented students have sufficient ability to form a varsity team, Prong Three focuses on the *potential*, not actual, ability of current and admitted students. A poor competitive record or the inability of interested students to currently compete at the same level as varsity athletes does not demonstrate a lack of such potential.¹⁵⁵ Indications of ability include:

- the athletic experience and accomplishments – in interscholastic, club, or intramural competition – of underrepresented students interested in playing the sport;
- participation in other sports, intercollegiate or otherwise, that may demonstrate skill or abilities that are fundamental to the particular sport being considered;¹⁵⁶
- self-assessment of the ability to compete in a particular interscholastic varsity sport;
- 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;
- tryouts in the particular sport in which there is an interest;
- other direct observations of participation in the particular sport being considered; and
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students have the potential to sustain a varsity team.¹⁵⁷

The 2005 Clarification allows institutions assessing ability to rely exclusively on a female student's self-assessment of her own abilities to discharge their obligations.¹⁵⁸ But in responding to an e-mail survey, a female athlete may significantly underestimate her own ability and incorrectly indicate that she does not have the skill necessary to compete on a varsity team. Thus, it is risky for schools to rely solely upon e-mail surveys because those surveys are unlikely to measure potential ability.

¹⁵⁵ See 1996 Clarification, *supra* note 33; *Favia*, 812 F. Supp. at 585 (implying that the success of a team is not relevant to assessing its level of competitive ability by noting that, “[A]lthough the field hockey team had a poor win/loss record, this ... likely is the negative effect of lack of funding, scholarships, and staff”); see also *Cook*, 802 F. Supp. at 748 (finding unrealistic the expectation that the members of the women's ice hockey team would have “varsity team abilities” in light of the fact that their talents had not been nurtured as they would have been had they been treated as a varsity team).

¹⁵⁶ A female student athlete's participation in other sports may be relevant in assessing her ability to participate in a particular sport since she does not need to have played the precise sport at issue in order to have the ability to compete in it in the future.

¹⁵⁷ See 1996 Clarification, *supra* note 33.

¹⁵⁸ See 2005 Clarification, *supra* note 38.

Assessing Reasonable Expectation of Competition: If there is sufficient interest and potential ability to sustain a team not currently offered, an institution fails Prong Three unless there is no reasonable expectation of competition in its normal competitive region. The normal competitive region includes schools in the geographic area where the institution normally competes, even if the institution does not currently compete against those schools. In addition, institutions may have an obligation to actively encourage the development of competition where opportunities for the underrepresented sex within their competitive region have been limited.¹⁵⁹ Fostering student interests and abilities are at the core of Prong Three, and institutions must respond regularly to students' developing interests. Otherwise, the third prong is meaningless.¹⁶⁰

In addition, competition need not be currently available at the level at which other teams at an institution compete.¹⁶¹ The proper standard is found in the Policy Interpretation, which asks whether there is "a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions."¹⁶² Thus, the NCAA's failure to sponsor a championship in a particular sport would not be dispositive of "a reasonable expectation of intercollegiate competition."¹⁶³

3. PARTICIPATION OPPORTUNITIES: ADDITIONAL POINTS

Additional points to keep in mind in analyzing the three-part participation test described above include the following:

a. Equal Cuts

Cutting the same number of men's teams as women's teams does not provide a defense to a Title IX claim if an institution cannot satisfy one of the prongs of the three-part test. As the First Circuit stated, "Even balanced use of the budget-paring knife runs afoul of Title IX where, as here, the fruits of a university's athletic program remain ill-distributed after

¹⁵⁹ See 1996 Clarification, *supra* note 33.

¹⁶⁰ See Jerry R. Parkinson, *Grappling With Gender Equity*, 5 WM. & MARY BILL RTS. J. 75, 132 (1996).

¹⁶¹ *Cf. Favia*, 812 F. Supp. at 585 (noting that, even though there was no NCAA-sponsored gymnastics championship, the gymnastics team still had quality competition).

¹⁶² Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418; see also *Cohen II*, 991 F.2d at 898 (requiring a level of interest and ability sufficient to sustain a viable team and ensure a reasonable expectation of intercollegiate competition for that team before mandating its creation); *Cohen I*, 809 F. Supp. at 992 (same).

¹⁶³ See *Favia*, 812 F. Supp. at 585 (refusing to accept lack of NCAA championship as justification for jettisoning women's gymnastics team); *cf. Cook*, 802 F. Supp. at 747 (finding Colgate's excuse of the lack of NCAA championship for women's ice hockey to be a pretext for discrimination).

the trimming takes place.”¹⁶⁴ Furthermore, under the second prong of the test, cuts in men’s programs will not be considered as evidence of a history or continuing practice of program expansion for the underrepresented sex.¹⁶⁵

Moreover, the OCR explained in the 2003 Clarification that cutting or reducing teams in order to demonstrate Title IX compliance is a disfavored practice. The OCR therefore has stated that it will officially discourage the practice and seek other remedies when negotiating compliance agreements.¹⁶⁶

b. Number of Teams

The number of teams offered to men and women is irrelevant in analyzing whether there is discrimination in the opportunity to play sports. Students have protected rights; teams do not.¹⁶⁷ The relevant analysis is whether students have equal opportunities to play, not how those opportunities are grouped among teams. Thus, the question asked under Title IX is whether an institution has complied with the three-part test in providing participation opportunities to individual students; there is no requirement that schools provide the same number of teams to men and women.

c. Participation Opportunities in Like Sports

The Policy Interpretation separately addresses the responsibilities of institutions that offer a particular sport to members of one sex only. As a general matter, there is no requirement that an institution offer any particular sport.¹⁶⁸ However, when a sport is offered to members of one sex, an institution is obligated to offer the sport to members of the other sex if it is a contact sport¹⁶⁹ and:

- 1) the opportunities for the excluded sex have historically been limited, and

¹⁶⁴ *Cohen II*, 991 F.2d at 906 (refusing to offset university’s cutting of two women’s teams with contemporaneous cutting of two men’s teams); see also *Barrett*, 2003 U.S. Dist. LEXIS 21095, at *12-13.

¹⁶⁵ See 1996 Clarification, *supra* note 33.

¹⁶⁶ See 2003 Clarification, *supra* note 35.

¹⁶⁷ See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,422 (“Title IX protects the individual as a student-athlete, not as a basketball player, or swimmer.”).

¹⁶⁸ *Id.* at 71,417-18.

¹⁶⁹ Contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact. See 34 C.F.R. § 106.41(b) (2006).

- 2) there is sufficient interest and ability among the members of the excluded sex to sustain a viable team and there is a reasonable expectation of intercollegiate competition.¹⁷⁰

If a non-contact sport is involved, in addition to meeting the two foregoing requirements, there must also be a showing that:

- 3) members of the excluded sex do not possess sufficient skill to be selected for a single integrated team or to compete actively on such a team if selected.¹⁷¹

As a general matter, Title IX permits sex-integrated teams but does not require them when selection is based on competitive skills or when the sport involved is a contact sport. This is because the law recognizes that women must have meaningful opportunities to compete. An institution cannot avoid liability simply by asserting that a men's team is open to women without also showing that the women are meaningful participants.

However, once an institution permits a member of one sex to try out for a team maintained for the other sex, that person cannot be subject to discrimination. For example, in *Mercer v. Duke University*, a female athlete was allowed to try out for the university's football team. Although she did not initially make the team, she served as the team's manager and regularly attended practices. In the 1995 season, she was selected by the players to participate in a major football game. During that game, she kicked the winning 28-yard field goal, giving her team a victory. The coach later made her a member of the team. However, the coach did not allow her to attend summer camp, refused to let her dress for games or sit on the sidelines, and gave her fewer opportunities to participate in practices. She filed a claim against the university and the coach, alleging sex discrimination in violation of Title IX.¹⁷² The Fourth Circuit held that because the university allowed her to try out for its football team, made her a member of the team, and then discriminated against her by excluding her from participation in the sport on the basis of her sex, she had stated a claim under Title IX.¹⁷³

¹⁷⁰ See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,418.

¹⁷¹ See *id.*; *Horne*, 43 F.3d at 274.

¹⁷² See *Mercer v. Duke Univ.*, 190 F.3d 643 (4th Cir. 1999).

¹⁷³ See *id.* at 648.

D. ATHLETIC FINANCIAL ASSISTANCE

1. THE BASIC TITLE IX PRINCIPLE

Under Title IX, female and male shares of athletic financial aid must be substantially proportionate to the female and male shares of participation opportunities at educational institutions. Title IX's implementing regulations specify that to the extent an educational institution provides athletic financial aid, "it must provide reasonable opportunities for (athletic scholarship awards) for members of each sex in proportion to the number of students of each sex participating in . . . intercollegiate athletics."¹⁷⁴ The Policy Interpretation provides that in determining compliance under this portion of the regulation, the OCR will employ a financial comparison in which it divides the amount of aid available for the members of each sex by the numbers of male or female athletes and compares the results.¹⁷⁵ A college or university is in compliance with Title IX regulations if this comparison results in "substantially" equal amounts to male and female athletes or if the disparity can be explained by a legitimate, nondiscriminatory factor.¹⁷⁶

In a July 23, 1998 letter from the OCR to the General Counsel of Bowling Green University, the OCR clarified that "[i]f 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 nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the 'substantially proportionate' requirement."¹⁷⁷ The letter concludes, "Where a college does not make a substantially proportionate allocation to sex-segregated teams, the burden should be on the college to provide legitimate, nondiscriminatory reasons for the disproportionate allocation. Therefore, the use of statistical tests will not be helpful in determining whether a disparity in the allocations for the two separate athletic scholarship budgets is discriminatory."¹⁷⁸

¹⁷⁴ 34 C.F.R. § 106.37(c) (2006). Athletic financial aid includes not only scholarship grants, but also loans, work-related assistance, or other types of non-grant aid made available to students based on their status as athletes. See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415; Investigator's Manual, *supra* note 89, at 15.

¹⁷⁵ See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415.

¹⁷⁶ See *id.* see also discussion of legitimate nondiscriminatory factors, *infra* notes 186-90 and accompanying text.

¹⁷⁷ See Scholarship Clarification, *supra* note 90.

¹⁷⁸ See *id.*

2. FINANCIAL AID: ADDITIONAL POINTS

Other important points involving discrimination in athletic financial assistance include:

a. Relationship Between Financial Aid and Participation Violations

It is not yet resolved whether a financial aid violation is present if the female proportion of aid matches the female share of participation but the female share of participation is found to have been discriminatorily reduced. The OCR takes the view that there is not a scholarship violation if scholarship aid is proportionate to participation, regardless of the existence of a participation violation.¹⁷⁹ The only court to have addressed this issue suggested in dicta that in some instances the contrary conclusion should be reached.¹⁸⁰

b. Total Scholarship Dollars Are Proper Comparison

In determining compliance, the relevant inquiry focuses on the overall dollar amount of financial aid, rather than the number of scholarships.¹⁸¹ That is, an institution may award full and partial scholarships in different proportions to male and female athletes so long as total financial aid dollars are substantially proportionate to participation levels. Although neither the Title IX regulations nor the Policy Interpretation defines what level of variance demonstrates a Title IX violation, the 1998 OCR letter discussed above requires that the percentages of total athletic scholarship dollars awarded to male and female athletes be within one percent, or one scholarship (whichever is greater), of their respective athletic participation rates, absent any legitimate, nondiscriminatory reasons.¹⁸² Thus, for example, if 42 percent of a school's athletes are women, then the school will be in compliance with Title IX if it (a) provides between 41 and 43 percent of its total athletic scholarship dollars to those athletes, or (b) the variation between the total scholarship dollars provided to women and their participation rate is greater than 1 percent but less than the total amount of one scholarship offered by the institution.¹⁸³

¹⁷⁹ See Investigator's Manual, *supra* note 89, at 14-15.

¹⁸⁰ See *Haffer*, 678 F. Supp. at 538-39.

¹⁸¹ See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415 ("This section does not require a proportionate number of scholarships for men and women or individual scholarships of equal value.")

¹⁸² See Scholarship Clarification, *supra* note 90 (making clear that the OCR will no longer apply the "Z" and "T" tests, which were structured to provide a basis for determining whether any differences in the proportion of financial or average awards were statistically significant, and therefore Title IX violations); see also Investigator's Manual, *supra* note 89, at 153-59.

¹⁸³ Unlike the clear and explicit guidance provided by the OCR, recent case law provides little or no guidance regarding Title IX compliance with respect to athletic scholarships. See, e.g., *Grandson v. Univ. of Minn.*, 272 F.3d 568, 576 (8th Cir. 2001) (holding that efforts university made in fulfilling its commitments under compliance agreement with the OCR precluded a finding that disproportionately low athletic scholarships awarded to women showed that university was deliberately indifferent to its overall compliance obligations under Title IX, including 34 C.F.R. § 106.37(c)); *Beasley v. Ala. State Univ.*, 966 F. Supp. 1117 (M.D. Ala. 1997), *aff'd Beasley v. Ala. State Univ.*, 3 F. Supp. 2d 1304, 1335 (M.D. Ala. 1998) (applying the "Z" test, which has since been effectively abandoned by the OCR).

c. In-State and Out-of-State Scholarships

As a general matter, institutions may point to the differential value of in-state and out-of-state scholarships granted by public institutions as a factor explaining their failure to offer substantially equal assistance to their male and female athletes.¹⁸⁴ Historically, this was problematic because universities kept scholarship expenditures for females low by requiring that a high percentage of female athletes be in-state residents whose in-state scholarships would be less costly, while imposing no similar restrictions on male athletes. But this practice is now clearly prohibited.¹⁸⁵ Thus, differences in athletic aid attributable to the difference between in-state and out-of-state tuition will be permissible as long as they are not part of an overall practice designed to limit the availability of out-of-state scholarships for female athletes.

d. Legitimate Nondiscriminatory Factors

Disparities in levels of financial assistance may be permissible if they are based on legitimate, nondiscriminatory factors.¹⁸⁶ The Policy Interpretation gives two examples of such factors. As noted above, the first is the uneven distribution of in-state and out-of-state scholarships between male and female athletes not attributable to different policies regarding the availability of those scholarships by sex. The second is a discrepancy in scholarship expenditures for the period of time necessary to phase in scholarships when a new team is established.¹⁸⁷ In this situation, institutions may want to stagger the scholarships provided over the first four years that the new team is in existence so that all of the scholarships are not committed in the first year.¹⁸⁸ While the Policy Interpretation permits this approach, it will apply, at a maximum, only for the first four years of a team's existence. After that time, the desire to stagger scholarships will not justify disparate scholarship levels between men and women.

¹⁸⁴ See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415.

¹⁸⁵ See Investigator's Manual, *supra* note 89, at 20; see also Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415 ("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 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.").

¹⁸⁶ See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415.

¹⁸⁷ See *id.*

¹⁸⁸ A number of settlement agreements include scholarship phase-ins for new teams. See *infra* notes 338-49 and accompanying text for discussion regarding settlements.

A financial disparity may also be explained by legitimate efforts undertaken to comply with other Title IX requirements, such as participation requirements,¹⁸⁹ or by unexpected fluctuations in the participation rates of males and females.¹⁹⁰ The OCR's Scholarship Clarification cautions, however, that if an educational institution asserts a nondiscriminatory justification for a disparity in the allocation of athletic scholarship funds, it must be prepared to show that its rationale is reasonable and does not reflect underlying discrimination.

E. EQUIVALENCE IN OTHER ATHLETIC BENEFITS AND OPPORTUNITIES

1. THE BASIC TITLE IX PRINCIPLE

Independent of its requirements that institutions provide equal participation opportunities and equitable allocation of athletic scholarships, Title IX also mandates that institutions provide equal treatment in all other aspects of their male and female athletics programs. The Title IX regulation sets out ten program components that should be considered in assessing whether this standard has been met. These components serve as examples and are not exhaustive.¹⁹¹ They include, in addition to the effective accommodation of interests and abilities and scholarships discussed above, the following:

- equipment and supplies;
- scheduling of games and practice times;
- travel and per diems;
- opportunities to receive coaching and tutoring;
- assignment and compensation of coaches and tutors;
- locker rooms and practice and competitive facilities;
- medical and training facilities and services;
- housing and dining facilities and services; and
- publicity.¹⁹²

¹⁸⁹ See Scholarship Clarification, *supra* note 90, citing *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1005-06 (S.D. Iowa 1995), a reverse discrimination case brought by male wrestlers which held that the scholarship regulation “was never intended to prevent schools from allocating resources in a way designed to encourage participation by the underrepresented gender.”

¹⁹⁰ See *id.* For instance, a disparity may be explained if an athlete who had accepted an athletic scholarship decided at the last minute to enroll at another school.

¹⁹¹ See 34 C.F.R. § 106.41(c) (2006) (“the Director will consider, among other factors,” the enumerated categories); see also Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415 (“This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office for Civil Rights.”). Non-enumerated categories such as support services are thus the proper subject of inquiry, and the list of categories may vary with the particular case.

¹⁹² See 34 C.F.R. § 106.41(c)(1)-(10).

The Policy Interpretation includes discussions of each of these program components.¹⁹³ Similar analyses are found in the Investigator's Manual.¹⁹⁴ In addition, discrimination in the recruitment of athletes, while not explicitly referenced in the regulation, is specifically prohibited under the Policy Interpretation.¹⁹⁵

According to the Policy Interpretation, the appropriate analysis to determine equivalence in athletic benefits and opportunities compares the:

availability, quality and kind of benefits, opportunities and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any difference is negligible.¹⁹⁶

There is no requirement that women's and men's programs be mirror images of each other, and Title IX does not require that the same benefits be provided to women's and men's teams in the same sports. As the Policy Interpretation states, "The Department does not want and does not have the authority to force universities to offer identical programs to men and women,"¹⁹⁷ and the relevant inquiry involves equality program wide. Nonetheless, a significant disparity between men's and women's teams in the same sport may well reflect a program-wide disparity. In addition, a disparity in one of the program components listed above may alone be substantial enough in and of itself to constitute a violation.¹⁹⁸

Title IX requires equal treatment among male and female club athletes, just as it requires equal opportunity for men and women within a varsity athletic program. Club and varsity sports are treated separately under the regulations, recognizing that such programs involve different levels of competition.¹⁹⁹ Therefore, equal treatment violations are assessed by comparing teams at the same level of competition with respect to athletic benefits.²⁰⁰

¹⁹³ See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,416-17.

¹⁹⁴ See Investigator's Manual, *supra* note 89, at 29-102.

¹⁹⁵ See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,417.

¹⁹⁶ *Id.* at 71,415

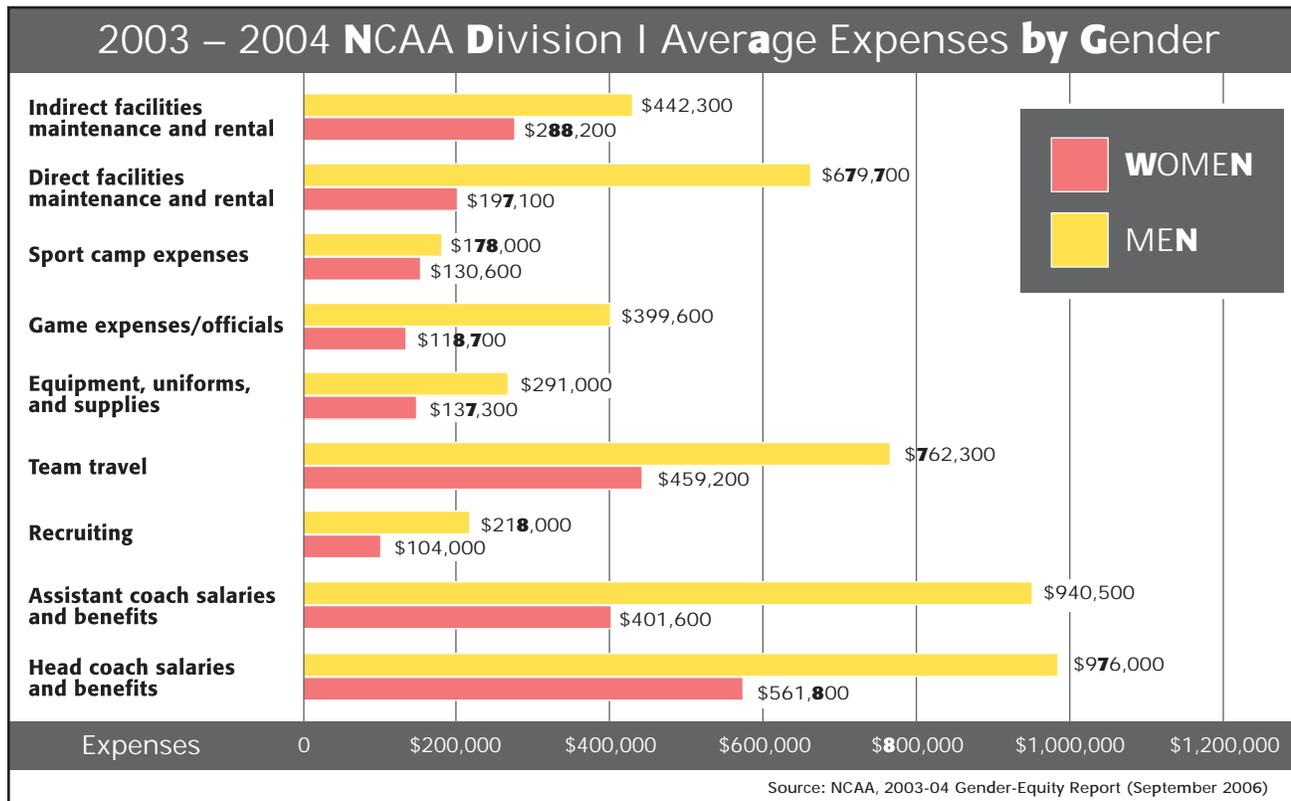
¹⁹⁷ Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,421. The Policy Interpretation states that "neither the statute nor the regulations calls for identical programs for male and female athletes. Absent such a requirement, the Department cannot base noncompliance upon a failure to provide arbitrarily identical programs, either in whole or in part." It also rejects the argument that compliance should typically be measured by sport-specific comparisons. *Id.* at 71,422.

¹⁹⁸ See *id.* at 71,417.

¹⁹⁹ The Policy Interpretation analyzes club teams as varsity teams only if they "regularly participate in varsity competition." Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,314-13 n.1.

²⁰⁰ See, e.g., *Bryant*, 1996 U.S. Dist. LEXIS 8393 at *18 (holding that female athletes failed to establish an injury within their level of competition).

Cases alleging inequities in athletics program benefits are very fact specific. Examples of decisions addressing discrimination in the treatment of student-athletes under Title IX are set forth below.



Inequities in Equipment, Fields, and Facilities: In *Daniels v. School Board of Brevard County*,²⁰¹ the district court issued a preliminary injunction ordering the School Board of Brevard County to remedy a number of inequalities faced by the girls' softball program, including the lack of an electronic scoreboard, batting cage, bleachers, adequate signs to publicize games, bathroom facilities, concession stand/press box/announcer's box, field maintenance, and lighting.²⁰² The court specifically noted the importance of having lighting

on the field because it gave the team more flexibility to schedule practices and because the ability to host nighttime games "affects spectator attendance, parental involvement, and player and spectator enjoyment."²⁰³

²⁰¹ 985 F. Supp. 1458 (M.D. Fla. 1997) (addressing inequities at Merritt Island High School).

²⁰² *Daniels*, 985 F. Supp. at 1460-61.

²⁰³ *Id.* at 1461; see also *Landow v. Sch. Bd. of Brevard County*, 132 F. Supp. 2d 958 (M.D. Fla. 2000) (issuing preliminary injunction requiring the school board to develop a plan to remedy unequal treatment of girls' softball team). Defense counsel in *Landow* suggested that the plaintiffs made "mountains out of molehills" in making their complaints. The court responded that "matters that might otherwise be accurately characterized as molehills can assume mountainous proportions when viewed from the perspective of someone who is already subjected to disparate treatment. In other words, persons who already perceive that they are viewed with less esteem than their peers understandably may consider with resentment and suspicion circumstances and conduct that might ordinarily seem less sinister." *Id.* at 967.

In *Mason v. Minnesota State High School League*,²⁰⁴ the district court refused to dismiss a suit alleging inequities in the facilities used for the boys' and girls' state hockey tournament.²⁰⁵ The court held that the plaintiffs, girls' high school hockey players, established an issue of material fact as to whether the venue for their state hockey tournament (an arena at the University of Minnesota) was inferior to the venue for the boys' state hockey tournament (the Xcel, where the Minnesota National Hockey League team played).²⁰⁶ Compared to the Xcel, the University of Minnesota arena had a smaller seating capacity, smaller locker rooms, and no capacity for video replay on the scoreboard.²⁰⁷ The court noted that the Minnesota State High School League held two other girls' tournaments at Xcel, showing that the Xcel had the potential to host smaller crowds, and said that crowd size may influence the allocation of resources only when it "does not limit the potential for women's athletic events to rise in spectator appeal."²⁰⁸ The court held that there were issues of material fact as to whether the venue for the girls' tournament was inferior and left the determination of inequities to the factfinder.²⁰⁹

Inequities in Scheduling of Seasons: Several lawsuits at the high school level have challenged the scheduling of sports seasons. Scheduling of games is one of the factors listed in the Title IX regulations, and the Title IX Athletic Investigator's Manual specifically discusses assessing the season of sport and length of season as part of this component.²¹⁰ After Title IX's enactment, educational institutions scrambled to add more girls' sports to athletic programs, and some institutions scheduled the girls' sports seasons so as not to conflict with existing boys' sports.²¹¹ As a result, girls were scheduled to play their sports in nontraditional and less advantageous seasons.

²⁰⁴ No. 03-6462, 2004 U.S. Dist. LEXIS 13865 (D. Minn. July 15, 2004).

²⁰⁵ *Mason*, 2004 U.S. Dist. LEXIS 13865, at *17 (D. Conn. July 15, 2004).

²⁰⁶ *Id.* at *15.

²⁰⁷ *Id.* at *5.

²⁰⁸ *Id.* at *14.

²⁰⁹ In addition to its analysis of Title IX, the court in *Mason* seemingly also made findings under the Equal Protection Clause, stating that the defendant did not show that the gender classification was "exceedingly persuasive." *Mason*, 2004 U.S. Dist. LEXIS 13865, at *12. Other cases have also addressed athletics inequities under legal authorities beyond Title IX. See, e.g., *Blair v. Wash. State Univ.*, 740 P.2d 1379 (Wash. 1987) (Washington State Equal Rights Amendment); *Haffer v. Temple Univ.*, 678 F. Supp. 517 (E.D. Pa. 1987). *Haffer* was originally brought under Title IX, but all non-scholarship Title IX claims were dismissed following the Supreme Court's decision in *Grove City Coll. v. Bell*. See *Haffer*, 678 F. Supp. at 522 n.2. Since Temple is a state school, equal protection claims were substituted and the case proceeded under a constitutional theory of discrimination. The case went to trial several weeks after the Restoration Act was passed but was settled without a ruling on plaintiffs' motion to reinstate the Title IX claims. *Haffer* is still particularly helpful because it tracks the Title IX regulatory categories and thus provides a model for Title IX cases. See *id.*, 678 F. Supp. at 530-34.

²¹⁰ 34 C.F.R. § 106.41(c)(3); see Investigator's Manual, *supra* note 89.

²¹¹ See *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805 (W.D. Mich. 2001), *aff'd* *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 377 F.3d 504 (6th Cir. 2004), *vacated by Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 1012 (2005), *reaffirmed by Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006), *cert. denied*, *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 2007 U.S. LEXIS 3813 (2007); *Alston v. Va. High Sch. League*, 144 F. Supp. 2d 526, 538 (W.D. Va. 1999).

In *Communities for Equity v. Michigan High School Athletic Association*, the U.S. Court of Appeals for the Sixth Circuit held that such scheduling is discriminatory.²¹² Specifically, it found, among other things, that the athletic association scheduled six girls' sports, and no boys' sports, in seasons when girls could not participate in club programs, when recruiters were not able to watch the girls play, and when the girls' teams could not be nationally ranked. These conditions made it harder for girls to obtain scholarships and deprived them of opportunities enjoyed by boys who played the same sports in the traditional or advantageous season.²¹³ The Sixth Circuit ultimately held that the scheduling violated the Equal Protection Clause, Title IX, and Michigan state law, rejecting the athletic association's proffered justifications as insufficient to satisfy applicable legal standards.²¹⁴

Other cases have also addressed the scheduling of sports seasons. In *Alston v. Virginia High School League*, the Virginia High School League (VHSL) scheduled the girls' seasons in such a way that when certain schools were reclassified into different divisions, some girls' sports conflicted, and the girls who played in both sports were forced to choose between them.²¹⁵ Because no boys' sports faced this dilemma when reclassifications occurred, the court denied VHSL's motion for summary judgment, finding an issue of material fact as to whether the inequity was substantial.²¹⁶ A federal jury eventually delivered a verdict in favor of the plaintiffs, finding that the VHSL's scheduling of seasons violated Title IX and awarding \$187,000 in damages.²¹⁷

²¹² The Sixth Circuit originally decided *Communities for Equity* based on the Equal Protection Clause. *Cmtys. for Equity*, 377 F.2d at 506. The Supreme Court granted certiorari to review the case, then vacated the judgment and remanded to the Sixth Circuit in light of its decision in *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), in which it held that an enforcement mechanism under the Telecommunications Act of 1996 precluded relief under § 1983. *See Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 1012 (2005). In 2006, the Sixth Circuit concluded that the plaintiff could seek relief for constitutional claims under 42 U.S.C. § 1983 as well as under Title IX, and once again concluded that the scheduling of seasons resulted in unequal treatment of women in comparison to men, this time basing its decision on Title IX, the Equal Protection Clause, and Michigan's Elliott-Larsen Civil Rights Act. *See Cmtys. for Equity*, 459 F.3d at 691-97, *cert. denied*, *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 2007 U.S. LEXIS 3813 (2007). There is a circuit court split on the issue of whether a plaintiff can seek relief under both 42 U.S.C. § 1983 and Title IX. *See supra* note 77.

²¹³ *Cmtys. for Equity*, 377 F.3d at 506-10.

²¹⁴ *Id.* at 512-13; *see also Cmtys. for Equity*, 459 F.3d at 691-97. *But see Ridgeway v. Mont. High Sch. Ass'n*, 633 F. Supp. 1564, *1581 (D. Mont. 1986) (scheduling girls' basketball and volleyball outside their traditional seasons was substantially related to the governmental objectives of maximizing student participation, availability of coaching staff, availability of officials, availability of facilities, and team support). *Ridgeway* is of little use in analyzing equal treatment claims, however, because the court did not address whether boys in Montana faced the same disadvantages as girls. In addition, the Montana Department of Labor and Industry later ordered the Montana High School Association to move girls' volleyball and girls' basketball to their traditional seasons. *See Ries v. Mont. High Sch. Ass'n*, No. 9904008792 (Mont. Dept. of Labor and Industry, Aug. 11, 2000).

²¹⁵ *Alston v. Va. High Sch. League, Inc.*, 144 F. Supp. 2d 526, 528 (W.D. Va. 1999).

²¹⁶ *Id.* at 536. The scheduling affected approximately forty to seventy girls every other year. *Id.*

²¹⁷ *Alston v. Va. High Sch. League*, No. 97-0095-C (W.D. Va.); *see* Judith Evans, *Court Rules Against VHSL: Nontraditional Girls Sports Seasons Seen as Discriminatory*, WASH POST, July 21, 2000, at D06.

In *McCormick v. School District of Mamaroneck*, girls who played soccer at two high schools were not able to play in the state championships because their season was scheduled in the spring and the state championships were held in the fall, when all other girls' soccer teams in the state played.²¹⁸ The boys' soccer teams at the plaintiffs' schools played in the fall and were eligible for the state championships.²¹⁹ Noting that the Policy Interpretation lists the opportunities to engage in available pre-season and post-season competition as a factor in determining equivalence under Title IX,²²⁰ the court held that scheduling girls' soccer in the spring violated Title IX because it denied the girls the opportunity to play in the state championship, while the boys were not denied this opportunity. The Court also noted that the scheduling decisions sent a message to the girls that they were not expected to succeed.²²¹

2. EQUIVALENCE IN SUPPORT AND TREATMENT: ADDITIONAL POINTS

Points to keep in mind regarding the analysis of the nondiscriminatory treatment of student-athletes include the following:

a. Per Capita Equity in Spending

Although there is no requirement of per capita equity in expenditures, the fact finder "may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex."²²² In other words, it is not the amount of money spent, but what the money buys, that determines whether disparities are discriminatory. Often there will be a direct relationship between expenditures and treatment. For example, if more is spent on travel for male than female athletes, the likely explanation is that the men are traveling further and/or in better style. Either difference could well state a violation.

²¹⁸ *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 280 (2d Cir. 2004).

²¹⁹ *Id.* at 281.

²²⁰ *Id.* at 289, citing Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,416.

²²¹ *Id.* at 294-95. There is no independent right to participate in state championships; there is a right to equal treatment. The court suggested that one possible remedy was to alternate seasons so that one year boys would play in the spring and not go to the state championship and the next year the girls would not attend. The defendant's argument that the boys and their parents would not stand for this arrangement illustrated the plaintiff's point: "If the schools think that [what] we are asking for is not important, I have a suggestion: try to move the boys' soccer to the spring and see what they do." *Id.* at 298 n.22.

²²² 34 C.F.R. § 106.41(c) (2006); see also Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,420; accord *Cohen II*, 991 F.2d at 896 n.9 (quoting regulation); *Cohen I*, 809 F. Supp. at 994 (noting that although disparities in expenditures alone do not violate Title IX, they are relevant to evaluating whether an institution has complied with § 106.41(c)).

Different expenditures on other items, such as uniforms or equipment, may or may not suggest differential treatment. For instance, football uniforms are more expensive than swimsuits. Among the questions to consider in this context are whether male and female athletes are treated equally with respect to quality of the uniforms they are provided, how often uniforms are replaced, the availability of practice uniforms and/or warm-up clothing, and who is responsible for laundering the uniforms and other athletic clothing.

b. Coaching and Tutoring

The provisions addressing coaching and tutoring create two sets of rights: those of the coaches and tutors to not be discriminated against themselves in connection with their compensation and assignment, and those of the student-athletes to receive nondiscriminatory coaching and tutoring.²²³ Title IX's subpart E regulations²²⁴ confer the full range of employment protections on coaches and tutors, as well as on other employees of athletics departments.²²⁵

In addition, discrimination against coaches may be actionable as discrimination against their teams. For example, discrimination against coaches in compensation or assignment policies and practices may be a violation of the Title IX rights of the students they coach, regardless of the coach's gender, if it "den[ies] male and female athletes coaching of equivalent quality, nature, or availability."²²⁶ As a corollary, given that Title IX bars retaliation,²²⁷ coaches and other employees are also protected, regardless of their own gender, if they are penalized for protesting Title IX violations against their teams or for attempts to rectify inequalities between men's and women's athletics.²²⁸

²²³ See 34 C.F.R. § 106.4 1(c)(5) and (6).

²²⁴ See 34 C.F.R. §§ 106.51-61.

²²⁵ Notwithstanding the language in the Policy Interpretation that the Department of Education does not have jurisdiction over the employment practices of covered programs, Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,416 n.6, the Department has enforced these regulations, in coordination with the Equal Employment Opportunity Commission, since the Supreme Court's decision in *North Haven Bd. of Educ. v. Bell*. See 456 U.S. 512 (1982). The Policy Interpretation's language predates the Supreme Court's decision in *North Haven* and has never been adjusted.

²²⁶ See 34 C.F.R. § 106.51; Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,416; Investigator's Manual, *supra* note 89 at 58 (indicating that lower compensation for coaches in women's program could negatively affect female athletes and constitute a violation); see also Equal Opportunity Employment Commission Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions (October 29, 1997) (stating that sex of student-athletes is not a gender-neutral factor justifying a salary disparity for male and female coaches), available at <http://www.eeoc.gov/policy/docs/coaches.html>.

²²⁷ See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). In this case, the plaintiff, a public school teacher and girls' basketball coach, received negative work evaluations and was removed from his coaching position after he complained to his supervisors about the lack of adequate funding, equipment, and facilities for the girls' basketball team. *Id.* In upholding the retaliation claim under Title IX, the Court stated that "it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint." *Id.* at 179. For further discussion see *supra* notes 52-57 and accompanying text.

²²⁸ See *id.* 34 C.F.R. § 100.7(e) (2005), as applied to Title IX by 34 C.F.R. § 106.71 (2006) (importing Title VI procedures to prohibit retaliation for the assertion of rights guaranteed by Title IX).

c. No Exception for Football or Other “Revenue-Producing” Sports

There is absolutely no exemption for, or different treatment permitted of, football, “revenue producing sports,” or any other subset of teams.²²⁹ The Policy Interpretation also explicitly rejects any argument that “major” and “minor” sports should be compared only with each other. It explains that:

no subgrouping of male or female students (such as a team) may be used in such a way as to diminish the protection of the larger class of males and females in their rights to equal participation in educational benefits or opportunities. Use of the “major/minor” classification does not meet this test where large participation sports (e.g., football) are compared to smaller ones (e.g., women’s volleyball) in such a manner as to have the effect of disproportionately providing benefits or opportunities to the members of one sex.²³⁰

d. Permissible Explanations for Disparities

There may be permissible, nondiscriminatory explanations for certain disparities.²³¹ The Policy Interpretation, for example, makes several references to the unique demands of football. While not all differences will be discriminatory, it is important to look carefully at asserted “nondiscriminatory” reasons and not take them at face value.²³² For example, an institution may claim that football, because of a high injury rate, needs the largest per-capita complement of trainers. In this example, it is important to look at the treatment of other high-injury sports, such as women’s gymnastics. An institution may also claim that high event management expenditures on football or men’s basketball are justified by the unique nature of those sports. Event management expenditures for women’s sports that may draw equally to – or outdraw – these men’s sports should be carefully reviewed; moreover, the institution’s allocation of promotion, publicity, and marketing resources to women’s sports must also be analyzed to see if women’s sports are drawing smaller crowds because of reduced resources in these areas.²³³

²²⁹ See Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,421.

²³⁰ *Id.* at 71,422. Similarly, if a greater percentage of male than female athletes are included in a university’s top “tier” of teams, it will not be a defense that benefits and resources are allocated according to the tier in which a team is placed.

²³¹ See *id.* at 71,415-16.

²³² See *id.*

²³³ See *Haffer*, 678 F. Supp. at 529-30 (in denial of defendant’s motion for summary judgment, acknowledging plaintiffs’ evidence regarding a link between certain expenditures and revenues).

One explanation for certain disparities that has been rejected by a court is the inconvenience to athletic program administration. In *McCormick v. School District of Mamaroneck*, for instance, the defendant school districts argued that it was not possible to schedule the girls' soccer season in the spring when the state tournament was held because there would be a lack of field space, a new coach would need to be hired, and there might be a shortage of officials.²³⁴ The court held that these were not sufficient reasons to justify the inferior treatment of girls.²³⁵

e. Booster Clubs and Outside Funding

The fact that booster clubs or donors may contribute disproportionately more funds to certain men's sports does not constitute a defense to less favorable treatment of female athletes, although it is often offered as one. There are two reasons for this conclusion.

First, with the passage of the Civil Rights Restoration Act, institutions can no longer justify discriminatory treatment based on different funding sources.²³⁶ As the Restoration Act made clear, Title IX prohibits discrimination in all programs and activities of an institution that receives any federal funds, regardless of how a particular program or activity is funded.²³⁷ The fact that there may be different funding sources for different teams is irrelevant to the institution's obligation to ensure equal treatment for the male and female sports programs it sponsors. The OCR concurs in this analysis. According to the Investigator's Manual:

²³⁴ *McCormick*, 370 F.3d at 297.

²³⁵ *Id.* But see *Ridgeway v. Mont. High Sch. Ass'n*, 633 F. Supp. 1564 (D. Mont. 1986) (in Title IX and Equal Protection case, court did not order that girls' basketball and volleyball be moved to their traditional seasons because the placement of the seasons were substantially related to the governmental objectives of maximizing student participation, availability of coaching staff, availability of officials, availability of facilities, and team support). The Montana High School Association was later ordered by the Montana Department of Labor and Industry to move girls' volleyball and girls' basketball to their traditional seasons. *Ries v. Mont. High Sch. Ass'n*, No. 9904008792 (Mont. Dept. of Labor and Industry, Aug. 11, 2000).

²³⁶ See *supra* notes 42-45 and accompanying text for discussion of the Restoration Act.

²³⁷ See 20 U.S.C. § 1687 (2005); 2003 Clarification, *supra* note 35.

[W]here booster clubs provide benefits or services that assist only teams of one sex, the institution shall ensure that teams of the other sex receive equivalent benefits and services. If booster clubs provide benefits and services to athletes of one sex that are greater than what the institution is capable of providing to athletes of the other sex, then the institution shall take action to ensure that benefits and services are equivalent for both sexes.²³⁸

That an institution may receive dedicated funds for certain teams or purposes in no way affects its responsibility to treat all of its student-athletes in a nondiscriminatory fashion. The court in *Daniels* agreed when it rejected the argument that the school district could not be held responsible for the fundraising efforts of the booster clubs.²³⁹ The court said, “[T]he [booster club] funding system is one to which Defendant has acquiesced; Defendant is responsible for the consequences of that approach.”²⁴⁰ Thus, while institutions are not barred from accepting booster club funds, they must take steps to ensure that those funds do not contribute to any inequality in the treatment of male and female teams. So, for example, schools can spread booster funds equitably between male and female programs or procure or allocate additional funds to ensure that teams that do not receive booster funding receive equal treatment.

Second, under the “significant assistance” regulation,²⁴¹ institutions may not “[a]id or perpetuate discrimination against any person by providing significant assistance to any agency, organization or person which discriminates on the basis of sex in providing any aid, benefit, or service to students or employees.” The theory of the regulation is that an institution that provides significant assistance to an independent, but discriminatory, entity essentially adopts the discriminatory policies as its own.²⁴² Thus, when male and female athletes are treated differently as the result of booster club contributions to a male or female team, an institution will be liable if it has provided any kind of “significant assistance” (e.g., lists of alumni or parent names and addresses, office services) to that booster club.

²³⁸ Investigator’s Manual, *supra* note 89, at 5; see also *Cohen I*, 809 F. Supp. at 996 (concluding that “all monies spent by Brown’s Athletic Department, whether originating from university coffers or from the Sports Foundation [booster club] must be evaluated as a whole under § 106.41(c)”).

²³⁹ *Daniels*, 985 F. Supp. at 1462.

²⁴⁰ *Id.* The Eighth Circuit in *Chalenor v. University of North Dakota* affirmed this notion in stating that outside funding cannot relieve an educational institution of its Title IX obligations, stating that “[o]nce a university receives a monetary donation, the funds become public money, subject to Title IX’s legal obligations in their disbursement.” 291 F.3d at 1042, 1048 (8th Cir. 2002).

²⁴¹ 34 C.F.R. § 106.31(b)(6) (2006).

²⁴² See, e.g., *Iron Arrow Honor Soc’y v. Heckler*, 702 F.2d 549, 561 (5th Cir. 1983) (“All federal programs ... are necessarily infected by what amounts to a general and overriding policy of the University. This infection results from the University’s close historical ties with Iron Arrow [an all-male, prestigious honor society].”), *vacated on other grounds*, 464 U.S. 67 (1983).

f. Recruitment

As the Department of Education has made clear, the regulatory requirement that recipients of federal funds “provide equal athletic opportunity for members of both sexes”²⁴³ includes nondiscrimination in the recruitment of student athletes.²⁴⁴ This prohibition applies to the athletic recruiting practices of all institutions receiving federal funds and is not limited by the Title IX statutory provision that exempts the admissions practices of private undergraduate institutions from Title IX requirements.²⁴⁵ This is because “[t]he athletic recruitment practices of institutions often affect the overall provision of opportunity to male and female athletes”²⁴⁶ already enrolled as students. Accordingly, in *Cohen I*, the court explained that, as a result of a three-to-one differential in recruiting expenditures in favor of the male athletes, “[T]he bottom line is that Brown knows full well that the two women’s teams will not be able to effectively compete at an intercollegiate level without . . . recruitment assistance.”²⁴⁷ Similarly, in *Roberts II*, the court held that “insofar as recruiting is integral to team development, it is a core coaching function. Under the Title IX regulations, defendant would not be permitted to hobble a coach’s efforts to improve his or her team.”²⁴⁸

F. FUNDING CONSTRAINTS ARE NOT A DEFENSE

A defense frequently asserted by educational institutions in athletics discrimination cases is that they simply do not have the funds necessary to end the discrimination alleged. However, lack of funds is not a cognizable defense under Title IX.²⁴⁹ A school experiencing financial difficulties has the flexibility to make adjustments as long as the adjustments do not violate Title IX.²⁵⁰

²⁴³ 34 C.F.R. § 106.41(c) (2006).

²⁴⁴ Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,415 (“Section 86.41(c) [now § 106.41(c)] also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this Section also addresses recruitment of student athletes and provision of support services.”); *id.* at 71,417 (“compliance will be assessed by examining the recruitment practices of the athletic programs for both sexes to determine whether the provision of equal opportunity will require modification of those practices.”); *see also Cohen I*, 809 F. Supp. at 997 (“Recruitment is not listed under § 106.41(c), but is considered a target area in the Policy Interpretation.”).

²⁴⁵ 20 U.S.C. § 1681(a)(1) (2007).

²⁴⁶ Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,417.

²⁴⁷ *Cohen I*, 809 F. Supp. at 993.

²⁴⁸ *Roberts II*, 998 F.2d at 834. *But see* Investigator’s Manual, *supra* note 89, at 100 (suggesting recruitment violations will not be found without violations of athletic financial assistance or accommodation of athletics interests and abilities).

²⁴⁹ *See, e.g., Roberts I*, 814 F. Supp. at 1518 (“[A] financial crisis cannot justify gender discrimination.”); *Favia*, 812 F. Supp. at 585, *mot. to modify order denied*, 7 F.3d 332 (3d Cir. 1993) (finding that financial concerns alone cannot justify gender discrimination); *Cook*, 802 F. Supp. at 750 (“[I]f schools could use financial concerns as a sole reason for disparity of treatment, Title IX would become meaningless.”); *Haffer*, 678 F. Supp. at 530 (finding that financial concerns alone cannot justify gender discrimination).

²⁵⁰ *See, e.g., Kelley*, 35 F.3d at 269; *Roberts II*, 998 F.2d at 830 (“We recognize that in times of economic hardship, few schools will be able to satisfy Title IX’s effective accommodation requirement by continuing to expand their women’s athletic programs . . . Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men’s and women’s athletic participation rates become substantially proportionate to their representation in the undergraduate population.”); *Cohen I*, 991 F.2d at 898 n.15 (“Title IX does not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent).”).