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Citation:

Aaron J. Hershtal, Does Title IX Work after School - California Applies the Three Part Test to Municipal Sports, 12 Cardozo J.L. & Gender 653 (2006)

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Thu Feb 7 21:36:20 2019

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# DOES TITLE IX WORK AFTER SCHOOL? CALIFORNIA APPLIES THE THREE PART TEST TO MUNICIPAL SPORTS

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## INTRODUCTION

I grew up adjacent to a lovely park in a quiet residential neighborhood. When I visit my hometown, I walk through the park and gaze nostalgically at the Little League game being played in the baseball field. Little League baseball offers children a chance to participate in an organized game, meet other kids from the neighborhood and learn the lessons of teamwork and camaraderie that are taught almost exclusively in an athletic setting. Exclusion from participating in Little League and other youth sports robs children of valuable experiences in their formative years that cannot be duplicated. Considering the recent advancements in women's rights, it is unfortunate that Little League and other municipal sports programs continue to deprive girls of the opportunity to benefit from this experience.

"I think that we have to recognize that girls are playing in organized leagues in greater and greater numbers and we ought to be looking at how we can encourage them."<sup>1</sup> This statement, made by California Council Member Michael Feuer in 1998, epitomizes the progressive attitude of Californians with regard to women's sports. In the last fifteen years, California government officials have taken the initiative to equalize the disparity in opportunities, funding and exposure offered to professional, collegiate and high school female athletes. More specifically, California legislators have incorporated the federally-sanctioned three-part test for Title IX compliance into California state law. Nevertheless, California's recent reforms in municipal sports represent the legislature's most significant attempt to increase women's athletic opportunities.

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\* 2006 J.D. Candidate at Benjamin N. Cardozo School of Law. I would like to thank my parents for all of their love and support and for nurturing what began as a healthy outlet in athletics and developed into an obsession. Most of all, I'd like to thank my wife Emily, the greatest female athlete I know and the love of my life, for her support and patience during the writing of this article.

<sup>1</sup> Rocio De Lourdes Cordoba, *In Search of a Level Playing Field: Baca v. City of Los Angeles as a Step Toward Gender Equity in Girls Sports Beyond Title IX*, 24 HARV. WOMEN'S L.J. 139, 169 (2001) (citing Rick Orlov & Alex Roth, *City Seeks Private Aid to End Ballfield Dispute*, L.A. DAILY NEWS, Apr. 23, 1998, at N1).

Title IX is the federal law requiring gender equity in all athletic programs receiving federal funds. However, Title IX does not apply to most municipal sports programs.<sup>2</sup> In response to recent legal challenges regarding the allocation of resources in Los Angeles municipal sports programs,<sup>3</sup> several city officials committed themselves to gender equality reform. To deliver on those promises, the California state legislature passed Assembly Bill 2404 (AB 2404),<sup>4</sup> which applies federal Title IX gender equity standards to municipal sports programs. AB 2404 contains two enforcement mechanisms: (1) it provides gender equity compliance guidelines to California municipal officials; and (2) it provides a private cause of action to any girl suffering from gender discrimination in municipal sports.<sup>5</sup> Title IX dramatically improved professional and collegiate women's sports; similarly, California legislators hope that AB 2404 will curtail gender inequality at the municipal level, thereby increasing exposure and raising the skill level of the women's game.

This Note traces the rise of the gender equity in athletics movement in California and examines the necessity of AB 2404 in the scope of this broad state initiative. Followed by a brief history outlining the Title IX three part test and its application, this Note discusses the problems California legislators may face implementing AB 2404. Finally, this note prescribes methods of implementing AB 2404 which account for some of the perceived shortcomings of Title IX as well as those unique problems California legislators will encounter.

## I. GENDER EQUALITY IN CALIFORNIA

### A. *Baca v. Los Angeles*

Federal and State constitutional challenges raising gender discrimination claims in girls' sports programs have been brought against local school boards and the athletic associations governing school sports programs on behalf of school districts.<sup>6</sup> In 1999, the Southern California Chapter of the American Civil Liberties Union ("ACLU") commenced legal proceedings against the City of Los Angeles ("the City") and the Los Angeles Department of Parks and Recreation ("Parks Department") on behalf of the West Valley Girls Softball League ("WVGS") challenging the City's three decades of discriminatory practices towards the WVGS. This unique lawsuit "represents the first reported constitutional challenge

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<sup>2</sup> Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1644 (1997) [hereinafter *Cheering On Women and Girls in Sports*].

<sup>3</sup> Lourdes, *supra* note 1.

<sup>4</sup> AB 2404, Cal. Legis. 2005-06 Reg. Sess. (Cal. 2004), available at [http://www.womenssportsfoundation.org/binary-data/WSF\\_ARTICLE/pdf\\_file/1001.pdf](http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/1001.pdf).

<sup>5</sup> *Id.*; see also Rebecca Vesely, *California Takes Lead in Sports Equity*, WOMEN'S E-NEWS (Sept. 13, 2004), available at <http://www.womensenews.org/article.cfm/dyn/aid/1988/context/archive> (last visited Mar. 1, 2005).

<sup>6</sup> Lourdes, *supra* note 1, at 166.

to a city's discriminatory policies and practices in youth sports programs on the basis of gender."<sup>7</sup>

The WVGS was founded in 1969 as a private non-profit organization<sup>8</sup> and, at the time of the suit, had over 400 female participants ranging from ages 5 to 18.<sup>9</sup> Yet the allocation of resources between boys' Little League organizations in Southern California and girls' leagues, such as the WVGS, was extremely disparate. For example, the WVGS sought a permit to establish a permanent home field for its league, a privilege granted to numerous Little Leagues, but was denied a permanent home by the Parks Department. The permit denial prevented the WVGS from making necessary improvements to a permanent field in order to put them on par with male Little Leagues, and it forced the WVGS to waste valuable resources in obtaining multiple permits for temporary fields.<sup>10</sup> In addition, the lack of a permanent home field forced the WVGS teams to practice and play in various communities throughout Los Angeles, inconveniencing coaches and parents and ruining any home field advantage for the girls.<sup>11</sup>

The *Baca v. Los Angeles*<sup>12</sup> lawsuit is unique due to the defendants being sued as well as the novel constitutional grounds upon which it was brought. The ACLU, acting on behalf of the WVGS, argued that the discriminatory practices of the Parks Department violated the Equal Protection Clause of both the Federal and State constitutions, rather than asserting a Title IX argument, which has traditionally been the legal basis for challenging gender inequality in sports programs.<sup>13</sup> Although Title IX based lawsuits have been successful at the collegiate level, the ACLU chose to assert the constitutional claims instead because it feared that municipal sports would not qualify for Title IX relief.<sup>14</sup>

Findings at discovery indicated that gender discrimination in municipal sports was citywide and not limited solely to the WVGS.<sup>15</sup> Therefore, the ACLU amended the complaint and added as plaintiffs "a class of girls living in the City of

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 164.

<sup>9</sup> *Id.* at 139.

<sup>10</sup> *Id.* at 164. Many of the playing fields available to Little Leagues were immaculately groomed, with smooth playing surfaces and contained such amenities as backstops, batting cages, spectator bleachers and permanent concession stands. None of the facilities used by the WVGS in 1998 had any of the aforementioned amenities. Another display of the discriminating policies employed by the Parks and Recreation Department was that they denied a request of the WVGS when it offered to "make capital improvements to existing public land and facilities at its own expense." *Id.*

<sup>11</sup> Lourdes, *supra* note 1, at 164.

<sup>12</sup> *Id.*; *Baca v. Los Angeles*, No. 98-2865 (C.D. Cal. Apr. 16, 1998) (unpublished decision).

<sup>13</sup> Lourdes, *supra* note 1, at 167.

<sup>14</sup> For further discussion of the requirements to sue under Title IX, see *infra* Part III.C.

<sup>15</sup> See Lourdes, *supra* note 1, at 167:

The *Baca* lawsuit sought to achieve the twin goals of obtaining relief for members of the WVGS league as well as challenging the systemic, citywide practices that denied girls equality in the City's sports programs. As such the complaint specifically challenged the City's policy on the issuance of athletic field permits as well as equal access to all related programs and facilities.

Los Angeles who either play softball or would like to participate in softball or other girls' athletic programs if such programs were made available through neighborhood public parks."<sup>16</sup> The discovery process also revealed a pattern of discriminatory practices within the Parks Department.<sup>17</sup> Faced with an expanded plaintiff class and the prospect of costly litigation, the Parks Department drafted new policy guidelines aimed at increasing the municipal sports opportunities offered to all children and equally promoting those programs to ensure that both boys and girls would take advantage of them.

### *B. The Raise the Bar Initiative*

As a response to *Baca v. City of Los Angeles*<sup>18</sup> the City introduced the "Raise the Bar" program.<sup>19</sup> The purpose of Raise the Bar is to encourage and provide opportunities for girls' participation in sports programs, increase the number of girls in sports programs where they are not adequately represented and ensure that the department equitably distributes resources to all youth.<sup>20</sup> Raise the Bar's strategy promotes girls' sports programs by safeguarding and monitoring Parks Department activity to ensure long term gender equity compliance, including equal granting of permits for permanent home fields.<sup>21</sup> The Parks Department has committed to increase its outreach programs to recruit more girls to participate in youth sports programs as well as seeking greater numbers of high school and college female athletes to participate as coaches, referees and mentors in girls' leagues.<sup>22</sup>

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<sup>16</sup> *Id.* at 172.

<sup>17</sup> *Id.* at 176-80 (In depositions performed by the attorneys acting on behalf of the WVGS, high-ranking officials in the Parks Department and five recreation center managers revealed that they were not aware of any initiatives to promote girls' sports, were not aware that 82 percent of participants in the departments programs were male, admitted that they never investigated the fact, were not aware of the unique benefits that young girls received from participating in youth sports and that there were no previous problems with respect to the number of girls who were playing softball throughout the city.)

<sup>18</sup> *Id.* at 183 ("City Council Member Jackie Goldberg acknowledged the role of the *Baca* lawsuit in the initiation and development of the Raise the Bar Program's development, stating, 'First of all, I want to thank the plaintiffs who have brought this suit. I know this is a terrible thing to say, but nonetheless everybody needs a little push, and in this case, I think we really did.'"). *Id.*

<sup>19</sup> Lourdes, *supra* note 1, at 183. The Raise the Bar program was approved by the Board of the Parks and Recreation Department and unanimously ratified by the City Council on February 26, 1999.

<sup>20</sup> Los Angeles Department of Recreation and Parks: Raise the Bar Program, *available at* <http://www.laparks.org/dos/sports/raisethebar/raisethebar.htm> (last visited Feb. 8, 2005).

<sup>21</sup> Lourdes, *supra* note 1, at 186

[P]laintiff's viewed the development of the Raise the Bar Program's gender equity policy as a principal component of their settlement strategy with the City. Indeed, plaintiffs notified the court that they had agreed in principle to settle the case as early as April 1999, following the City Council's unanimous passage of the Raise the Bar Program.

*Id.*

<sup>22</sup> Los Angeles Department of Recreation and Parks: Raise the Bar Program, *Identification of Issues*, *available at* <http://www.laparks.org/dos/sports/raisethebar/identification.htm> (last visited Feb. 8, 2005). Statistics indicate that greater numbers of girls participate in sports when women coach and referee. *Id.*

During the drafting of Raise the Bar, the ACLU became concerned that these policies were intended as a short term placating tool rather than as a long-term solution to the problem.<sup>23</sup> In response, the Parks Department created “accountability mechanisms”<sup>24</sup> which require Parks Department employees to file quarterly reports to the City Council and the Board of Commissioners. These reports include detailed analyses of girls’ participation in youth sports, and address whether the quantitative expansion goals for girls’ participation are being met.<sup>25</sup> These monitoring mechanisms tell the Parks Department whether the program is achieving its goals and allow it to quickly remedy any inefficiency hindering the progress of girls’ municipal sports.

The ACLU’s focus on the Parks Department’s inequitable permit grants resulted in the inclusion of a revised permit granting policy in the first draft of Raise the Bar.<sup>26</sup> However, the third draft of Raise the Bar abandoned the specific permit policy in favor of more blanket language which Department officials favored and claimed still addressed any future permit problems.<sup>27</sup> The use of broad language rather than specific guidelines is unfavorable because it opens the door for challenges to the permit policy, it allows the Parks Department to retain some wiggle room with regard to issuing permits, and it casts doubt on the program’s effectiveness.

Raise the Bar has been a successful first step towards gender equality in California municipal sports. Since the beginning of the program, girls’ participation in Los Angeles youth sports has increased from 11,000 in 1999 to 24,000 today.<sup>28</sup> Boys’ participation has remained steady at about 50,000 annually.<sup>29</sup> In the Los Angeles area there is an increased presence of promotional material aimed at drawing girls’ to municipal sports programs such as softball and basketball leagues.<sup>30</sup> Some feel that Raise the Bar has increased exposure to the broader problem of gender discrimination in municipal sports.<sup>31</sup> To date though, California is the only state that has passed such an initiative.

Nevertheless, *Baca* and Raise the Bar have prompted other local governmental bodies to make gender equality in sports a priority prior to the initiation of a lawsuit. AB 2404, for instance, was enacted in response to *Baca*. By providing a legislative remedy, AB 2404 protects girls suffering from gender

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<sup>23</sup> See Lourdes, *supra* note 1, at 182.

<sup>24</sup> *Id.*

<sup>25</sup> Los Angeles Department of Recreation and Parks: Raise the Bar Program, *Monitoring & Reporting*, available at <http://www.laparks.org/dos/sports/raisethebar/monitoring.htm> (last visited Feb. 8, 2005).

<sup>26</sup> Lourdes, *supra* note 1, at 181.

<sup>27</sup> *Id.*

<sup>28</sup> Vesely, *supra* note 5.

<sup>29</sup> *Id.*

<sup>30</sup> Lourdes, *supra* note 1, at 189.

<sup>31</sup> *Id.* at 190.

discrimination in municipal sports more than Raise the Bar.<sup>32</sup> Since Raise the Bar does not have efficient monitoring mechanisms or enforceable penalties, it cannot be the long-term solution to California's gender equity problem. However, Raise the Bar represents the start of a long-term statutory plan.

## II. EVOLUTION OF TITLE IX AND THE THREE PART TEST

### A. Early Case Law

It is important to review the body of case law which interprets Title IX because AB 2404 incorporates the federal Title IX standard of gender equity. Title IX is one section of the 1972 Education Amendments. Title IX's purpose is to prevent gender discrimination in any program<sup>33</sup> that receives federal funds;<sup>34</sup> however, the statute is not explicitly intended to apply to athletics programs.

After the enactment of Title IX, the Department of Health, Education and Welfare ("Department of Education") issued a policy interpretation to broaden the applicability of Title IX and to clarify its legislative purpose.<sup>35</sup> The policy interpretation explains that Title IX applies to individual intercollegiate athletic programs within an educational institution and not simply to the educational institution itself. Also, it outlines the compliance guidelines<sup>36</sup> used by the Department of Education when evaluating an institution's athletic programs for gender equity. Finally, the policy interpretation sets out a three part test to be used to determine if a particular athletic program is in compliance with Title IX equity

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<sup>32</sup> "The idea of the legislation stemmed from the American Civil Liberties Union, which in 1998 filed lawsuits against Los Angeles and two other cities in Southern California." Alaska Washington, *Gender Equity in Community Youth Programs*, Oct. 1, 2004, available at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/article.html?record=1001> (last visited Feb. 8, 2005).

<sup>33</sup> Title IX applies to any educational institution that receives Federal funds including elementary schools as well as state colleges. Private colleges fall under Title IX jurisdiction since they receive Federal funds in the form of grants that are paid directly to the educational institution, and then distributed to the student recipient. See Department of Education Student Guide to Financial Aid, available at [http://www.ed.gov/prog\\_info/SFA/StudentGuide/2002-3/pell.html](http://www.ed.gov/prog_info/SFA/StudentGuide/2002-3/pell.html) (last visited Feb. 9, 2005).

<sup>34</sup> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." Educational Amendments of 1972, Pub. L. 92-318, §§ 901-09, 86 Stat. 235 (codified at 20 U.S.C.A. §§ 1681-1688 (1990)) [hereinafter Title IX].

<sup>35</sup> U.S. Department of Education Office of Civil Rights Homepage, 44 CFR Part 26, Tuesday, Dec. 11, 1979, available at <http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html> (last visited Feb. 10, 2005).

<sup>36</sup> 34 C.F.R. 106.41, at (c)I-10

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) *Scheduling of games and practice time*; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity.

requirements.<sup>37</sup> Courts have interpreted the three-part test to mean that a plaintiff has the burden to prove, not only that there is a

disparity between the gender composition of the institution's student body and its athletic program, thereby proving that there is an underrepresented gender, but also that a second element—unmet interest—is present, meaning that the underrepresented gender has not been fully and effectively accommodated by the institutions present athletic program.<sup>38</sup>

Once the first two prongs have been met, absent the ability of the institution to offer an affirmative defense,<sup>39</sup> it will be found to be in violation of Title IX.<sup>40</sup>

Title IX greatly increased opportunities for women in collegiate athletics between 1975 and 1984. "In 1971, 31,852 women took part in college varsity sports, compared to 172,477 men. By 1977, the number of women had more than doubled to 64,375."<sup>41</sup> In 1984, the Department of Education's broad application of Title IX was challenged in *Grove City College v Bell*.<sup>42</sup> In *Grove City*, the Supreme Court ruled that Title IX does not extend to individual programs within educational institutions receiving federal funding since the funds are not directly allotted to individual programs by the federal government. Accordingly, only those programs that receive direct federal funding are subject to Title IX regulation.<sup>43</sup> *Grove City* crippled the rights of women in collegiate athletics. "As a direct result of the *Grove City* decision, the Department of Education's Office of Civil Rights, the administering agency of Title IX, ceased all compliance investigations for all programs that were not direct recipients of federal funds."<sup>44</sup> Finally, in 1988 after direct intervention from President Reagan, Congress passed the Department of

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<sup>37</sup> The Policy Interpretation, 44 Fed. Reg. 71, 413-71, 423, at 71, 418 (1979)

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, 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.

*Id.*

<sup>38</sup> *Cohen v. Brown Univ.*, 101 F.3d 155, 175 (1st Cir. 1996).

<sup>39</sup> A school may offer as an affirmative that it has a history of steadily accommodating the interest of women and is in the process of increasing opportunities to achieve proportionality.

<sup>40</sup> *Cohen*, 101 F.3d at 175.

<sup>41</sup> *Playing Fair: A Guide to Title IX in High School and College Sports*, Women's Sports Foundation, Oct. 8, 2001, available at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/geena/record.html?record=829> (last visited Feb. 9, 2005).

<sup>42</sup> See *Grove City College v. Bell*, 465 U.S. 555, 565 (1984).

<sup>43</sup> *Id.* at 580.

<sup>44</sup> T. Jesse Wilde, *Gender Equity in Athletics: Coming of Age in the 90's*, reprinted in *SPORTS LAW AND REGULATION* 444 (Joseph Gordon Hylton & Paul M. Andersen eds., 1999).

Education's Civil Rights Restoration Act which restored the program specific approach to Title IX compliance.<sup>45</sup>

Title IX advocates regained momentum following the passage of the Civil Rights Restoration Act, and gained further ground after the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*.<sup>46</sup> In *Franklin*, a student filed suit against her school district after she was sexually harassed by a sports coach employed by the school district. The school district argued that Title IX only provided equitable relief and did not provide a damages remedy. The Supreme Court reversed the Eleventh Circuit's dismissal, and in doing so, expressly held that damages were available under Title IX in addition to equitable remedies.<sup>47</sup> *Gwinnett* provides a critical financial deterrent to the maintenance of non-compliant athletic programs. The threat of severe monetary penalties, as opposed to merely facing an injunction, ensures that educational institutions will comply with Title IX and also reduces the number of lawsuits that will originate under Title IX. This type of preventive ruling clearly supports the legislative intent of Title IX to encourage increased participation by girls in sports and eliminating the need to litigate to obtain it.<sup>48</sup>

AB 2404 incorporates a number of the standards set forth in the Policy Interpretation, including the three part test, as well as the qualitative factors used to assess gender inequality. California legislators recognized that maintaining a State standard consistent with the federal standard would allow them to rely on the extensive Supreme Court and Federal precedents which delineate the boundaries of the standard and uphold the three part test.<sup>49</sup> The complex analysis needed to determine equality in sports programs makes these precedential, explanatory decisions vitally important for California to successfully incorporate the three part test.<sup>50</sup>

Title IX has created great opportunities for women in collegiate and high school athletics. The hope of California legislators is that AB 2404 will result in similar opportunities for girls in municipal sports.

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<sup>45</sup> See *id.*

<sup>46</sup> *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

<sup>47</sup> See *id.* at 73.

<sup>48</sup> Senator Bayh, the senator who sponsored Title IX remarked that its purpose is, "to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work." 118 Cong. Rec. 5808 (1972) (quoted in *Cohen*, 101 F.3d at 167).

<sup>49</sup> See, e.g., *Roberts v. Colo. Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993); *Williams v. School District*, 998 F.2d 168 (3rd Cir. 1993); *Horner v. Kentucky High School Athletic Assoc.*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994); *Cohen*, 101 F.3d 155; *Neal v. Board of Trustees*, 198 F.3d 763 (9th Cir. 1999); *Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Chalenor v. Univ. of North Dakota*, 2002 U.S. App. LEXIS 14404 (8th Cir. 2002).

<sup>50</sup> See *Cohen*, 101 F.3d at 177.

*B. Commission of Opportunity in Athletics Report*

On June 27, 2002, the United States Secretary of Education, Rod Paige, created the Secretary's Commission on Opportunity in Athletics ("Commission") to review the impact of Title IX on gender equity in sports and to suggest any improvements regarding interpretation or implementation of the existing standard.<sup>51</sup>

The Commission's report highlighted two areas of concern in Title IX enforcement.<sup>52</sup> One concern is that the Department of Education's methods of Title IX enforcement result in reduced men's athletic opportunities.<sup>53</sup> Second, the Commission alleges that the Department of Education has not provided clear guidelines to enable post-secondary institutions to comply with Title IX.<sup>54</sup> The Commission concluded that schools find the guidelines and the compliance measures unclear.<sup>55</sup> The Commission made fifteen recommendations at the end of its investigation; the Department of Education approved them all unanimously.

Though the Department of Education unanimously adopted the recommendations, there was dissension over the formulation of the recommendations during the drafting stage. Two Commission members, female Olympians Julie Foudy and Donna de Varona, resigned and issued an unsanctioned minority report protesting the Commission's recommendations on the ground that minority viewpoints on the Committee were not addressed before the recommendations were submitted to the Secretary.<sup>56</sup> The minority report highlights a number of recommendations that demonstrate an underlying bias against women.<sup>57</sup> The assertion that women naturally have a lower interest in athletics has been expressly refuted by the courts,<sup>58</sup> and "the dramatic increases in participation in both the high school and college levels since Title IX was passed shows that when the doors are opened to them, girls and women will rush through."<sup>59</sup> The minority report also recommends granting increased flexibility to secondary and collegiate institutions when enforcing Title IX, thereby alleviating the need to cut men's programs to achieve proportionality or to free up funds for a new women's program.<sup>60</sup>

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<sup>51</sup> See U.S. Department of Education, Secretary's Commission for Opportunity in Athletics, *Open to All: Title IX at Thirty*, Washington, D.C., 2002, at 1 [hereinafter, *Title IX at Thirty*].

<sup>52</sup> See *id.* at 3.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* at 27.

<sup>56</sup> Donna De Verona & Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics*, Save Title IX, Feb. 26, 2003, at 1, available at <http://www.savetitleix.com/minorityreport.pdf> [hereinafter *Minority Report*].

<sup>57</sup> *Id.* at 2 (asserting recommendations 15, 17, and 20 would undermine the First part of the three part test for compliance by permitting universities to count male and female student athletes in different ways).

<sup>58</sup> *Cohen*, 101 F.3d at 178-179.

<sup>59</sup> *Minority Report*, *supra* note 56, at 3.

<sup>60</sup> See *Title IX at Thirty*, *supra* note 51, at 2, 4.

Many proponents of the current system of Title IX enforcement object to the Commission's recommendations. The primary objection is that the recommendations loosen Title IX enforcement by giving the Department of Education unfettered discretion to alter the standard for enforcement.<sup>61</sup> A second objection is that the recommendations allow schools to comply with Title IX while falling far short of equal opportunity.<sup>62</sup> A final criticism is the recommended acceptance of "interest surveys" taken from a cross-section of students to determine if an institution has met the second prong of the three part test. This is objectionable since the use of women's interest in sports as a defense against providing inequitable opportunities to female athletes has been unequivocally denied by the Supreme Court.<sup>63</sup> Though Secretary Paige's goal in the creation of the commission was to "make a good thing better,"<sup>64</sup> women's activists criticize many of the recommendations for missing the point completely.<sup>65</sup>

### III. CALIFORNIA'S LEGISLATIVE RESPONSE TO THE COMMISSION'S REPORT; AB 833 AND 2404

#### *A. California's Fiscal Crisis*

California legislators face a unique challenge in attempting to legislate a regulatory scheme for gender participation. The State government will be forced to increase its administrative budget to procure the necessary facts, figures and studies to determine if AB 2404 is truly increasing athletic opportunities for women. The prospect of increased administrative costs needed to effectively regulate gender equality in youth sports should be particularly daunting to California officials since their state is one of the most fiscally mismanaged states in the country.<sup>66</sup>

Short-term deficit problems stem from a drastic drop in stock option revenues as a result of the collapse of the California technological industry in the late 1990s.<sup>67</sup> Long term issues are a result of years of imbalance between state revenues and expenditures on social services.<sup>68</sup> "This drain on state services can be attributed to the growing population, the large amount of low-income

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<sup>61</sup> *What's at Stake?*, Save Title IX, available at [http://www.savetitleix.com/at\\_stake.html](http://www.savetitleix.com/at_stake.html) (last visited Feb. 21, 2005) [hereinafter *What's at Stake?*].

<sup>62</sup> See *Minority Report*, *supra* note 56, at 14 (noting recommendation 17, which permits schools not to include walk-on male athletes in counting the number of spots on athletic teams available to men and women, will result in inaccurate reporting of these numbers in an investigation for Title IX compliance).

<sup>63</sup> See *Cohen*, 101 F.3d at 555.

<sup>64</sup> *What's at Stake?*, *supra* note 61.

<sup>65</sup> See *Minority Report*, *supra* note 56, at 1. The findings and recommendations of the Commission's Report fail to address key issues or to reflect an understanding of the "discrimination women and girls still face in obtaining equal opportunity in athletics." *Id.*

<sup>66</sup> California Budget Project 16 (Jan. 2002), available at <http://www.cbp.org/2002/r0201cht.pdf> (last visited Feb. 21, 2005) (stating that "[t]he state has run operating deficits in 13 of the last 24 years.").

<sup>67</sup> Alan Sloan, *Big Budget Thriller*, NEWSWEEK, Oct. 23, 2003, at 36.

<sup>68</sup> See *id.*

population, the increasing number of elderly Californians and the state's aging infrastructure."<sup>69</sup> California's budget is already strained with administrative expenses. For instance, program administration experienced the largest increase in allotted funds in the 2002-2003 general government expense budget.<sup>70</sup>

The fiscal crisis in California will affect the ability of the legislature to undertake new social programs. Due to a 2003 state budget deficit of thirty eight billion dollars, Governor Schwarzenegger has undertaken to reduce the deficit during his term by streamlining government agencies and eliminating waste and abuse.<sup>71</sup> UCLA economist Christopher Thornberg believes that the legislature's unreasonable budgetary commitments during the prosperous technology boom are to blame for the current budget crisis.<sup>72</sup> To remedy this problem, the Governor must reign in legislative spending when times are bad and advocate restraint when times are good to create a budget cushion for leaner times.<sup>73</sup> If Governor Schwarzenegger intends to reduce the deficit during his term and return to responsible fiscal policies, he must limit the introduction of new spending programs.

Though faced with budgetary limitations, the California legislature has demonstrated a commitment to protecting the rights of female athletes at all levels. On April 22, 2003 the California State Assembly passed the Sex Equity Education Act ("AB 833") which is aimed at creating gender equality in collegiate athletics by codifying Title IX at the state level.<sup>74</sup> Furthermore, the California legislature introduced new legislation intended to extend gender equity protection to municipal sports.<sup>75</sup>

### *B. Assembly Bill 833*

AB 833 codifies the three part test for Title IX compliance as California state law. The Commission for Opportunity in Athletics presented its recommendations to the Department of Education on July 25, 2002. The recommendations were met with hostility by some members of the Commission and the sports world. California Assemblyman Darrel Steinberg introduced AB 833 to entrench the three part test in California and to maintain the rights of female athletes within the state,<sup>76</sup> even if the federal standards changed.<sup>77</sup> After AB 833 passed the

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<sup>69</sup> *Id.*

<sup>70</sup> *See id.* at 25.

<sup>71</sup> *Id.* at 37.

<sup>72</sup> *See* Bruce Murray, *Sorting Through the Blame Game in the California State Budget Crisis*, July 10, 2003, FACSNET, available at [http://www.facsnet.org/tools/biz\\_econ/blame.php#leg](http://www.facsnet.org/tools/biz_econ/blame.php#leg) (last visited Feb. 21, 2005).

<sup>73</sup> *Id.*

<sup>74</sup> Sex Equity Act, CAL. EDU. CODE § 230 (2005).

<sup>75</sup> "The idea for the legislation stemmed from the ACLU, which filed lawsuits against three cities in Southern California, including Los Angeles, beginning in 1998." Vesely, *supra* note 5.

<sup>76</sup> *See* California Senate Judiciary Committee Analysis of AB 833, Aug. 20, 2003, available at [http://info.sen.ca.gov/pub/bill/asm/ab\\_0801-0850/ab\\_833\\_cfa\\_20030820\\_101505\\_senn\\_comm.html](http://info.sen.ca.gov/pub/bill/asm/ab_0801-0850/ab_833_cfa_20030820_101505_senn_comm.html) (stating that "[t]his bill is therefore necessary to preserve and protect the gains of women and girls under

California State Assembly, Governor Gray Davis remarked, “[M]ake no mistake California supports a woman’s right to equity in every respect. If the federal government ever decides to weaken those rights, we here in California will continue to champion that cause.”<sup>78</sup>

The crux of AB 833 is the codification of the three part test as the sole method of determining Title IX compliance in California colleges and universities.<sup>79</sup> The California State Assembly felt that recommendations twenty-three<sup>80</sup> and fourteen<sup>81</sup> of the Commission’s report threatened the rights guaranteed by the three part test.<sup>82</sup> In fact, members of the Commission had already demonstrated that the vague language of the recommendations’ granted the Secretary of Education unlimited discretion to vary from the traditional methods of enforcing Title IX; thereby creating the risk of a reduction of women’s opportunities in athletics.<sup>83</sup>

Proponents of AB 833 demonstrated the flexibility and durability of the three part test as reasons to codify it as California law. The three part test allows a school to comply by meeting any one of the three criteria set forth in the test. Thus, an institution that is in the process of increasing women’s athletic opportunities can cite a planned increase as sufficient grounds for satisfying Title IX compliance standards. A United States Government Accountability Office (“US GAO”) study recently showed that two-thirds of the schools investigated by the Office of Civil Rights achieved Title IX compliance by satisfying the second and third prongs—the former prong permitting prospective compliance and the latter permitting historical compliance—rather than the first prong that requires actual current proportionality.<sup>84</sup> Furthermore, the durability of the three part test is confirmed by the fact that no appellate court has ever overruled its use in a Title IX compliance

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Title IX and gender equity laws, threatened by the substantive changes to Title IX guidelines made by the Commission”).

<sup>77</sup> See *id.*

<sup>78</sup> Memorandum from Bonnie Slosson, Rita Mize, and Scott Lay of the Community College League of California to its chancellors, superintendents, presidents, and trustees (Oct. 6, 2003), available at <http://www.ccleague.org/leginfo/fmr/firstmon.oct03.pdf> (last visited Feb. 20, 2005).

<sup>79</sup> See CAL. EDU. CODE §230 (d) (1-3).

<sup>80</sup> Recommendation 23 recommends that the Secretary of Education explore “additional ways of demonstrating equality, other than the three pronged test.” *Title IX at Thirty*, *supra* note 51, at 39.

<sup>81</sup> Recommendation 14 asks the Office of Civil Rights “to clarify the meaning of substantial proportionality to allow for a reasonable variance in the relative ratio of athletic participation of men and women while adhering to the nondiscriminatory tenets of Title IX.” *Id.* at 36.

<sup>82</sup> See California Senate Judiciary Committee Analysis of AB 833, Aug. 20, 2003, available at [http://info.sen.ca.gov/pub/bill/asm/ab\\_0801-0850/ab\\_833\\_cfa\\_20030820\\_101505\\_senn\\_comm.html](http://info.sen.ca.gov/pub/bill/asm/ab_0801-0850/ab_833_cfa_20030820_101505_senn_comm.html) (expressing worry that exploring additional methods of compliance outside of the traditional tree part test would allow for the creation of new tests and procedures without the guidance and monitoring of Congress or the Judiciary, both of whom were instrumental in the formation and continued enforcement of the three part test since 1979).

<sup>83</sup> *Sex Equity in Education: Athletics: Hearing on AB833 Before Cal. Senate Judiciary Committee*, 03-04 Regular Sess. (Aug. 19, 2003), available at [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_0801-0850/ab\\_833\\_cfa\\_20030820\\_101505\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0801-0850/ab_833_cfa_20030820_101505_sen_comm.html).

<sup>84</sup> *Id.*

case and Congress has not altered the standard.<sup>85</sup> It seems then that permitting the Department of Education to adopt a new compliance standard would be contrary to the implicit wish of Congress and the Supreme Court.<sup>86</sup>

Aware of the impact that the three part test has had in opening doors for female athletes in secondary schools and postsecondary institutions,<sup>87</sup> California legislators included it as the cornerstone of AB 2404, hoping it would increase equality in municipal sports.<sup>88</sup>

### C. Assembly Bill 2404

AB 2404 passed on September 30, 2004.<sup>89</sup> It is intended to mirror the federal scheme of Title IX enforcement and apply that standard to municipal sports while guiding local governments seeking to comply with existing non-discrimination obligations.<sup>90</sup> However, since California has already codified the three part test in AB 833 and committed to eradicating gender discrimination in municipal sports through Raise the Bar, is there a need for specific legislation codifying the three part test for municipal sports or is this simply legislation for the sake of appearance?

AB 2404 is necessary to protect participants in female youth sports from gender discrimination. AB 2404 reaches outside the scope of AB 833 and provides a cause of action for girls suffering from discrimination in municipal sports. Moreover, AB 2404 protects the important benefits that are currently available to California girls who participate in municipal sports. For these two important

<sup>85</sup> *Id.* at 6 (citing *Chalenor*, 291 F.3d at 1047) (“[I]t is worth noting that the interpretation that has guided the Office for Civil Rights enforcement of nondiscrimination in athletics for over two decades, without change from Congress. No court has ever held it to be invalid.”).

<sup>86</sup> *Id.* at 7.

<sup>87</sup> See Women’s Sports Foundation, *Playing Fair: A Guide to Title IX in High School and College Sports*, available at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/geena/record.html?record=829> (last visited Feb. 23, 2005).

In 1971, only 294,015 girls were participating in high school sports, while there were over 3.5 million boys participating. By the 1972-73 school year, just after passage of Title IX, the number of girls had more than doubled to 817,073. And by 1977-78, that number was 2,083,040. Data from 1996-97 shows 2,472,043 girls participating, while boys participation numbers reached close to 4 million. Similar gains occurred in intercollegiate sports, although the gains were not as spectacular. In 1971, 31,852 women took part in college varsity sports, compared to 172,477 men. By 1977, the number of women had more than doubled to 64,375.

*Id.*

<sup>88</sup> See *Discrimination: Local Community Programs: Hearing on AB2404 Before Cal. Senate Judiciary Committee*, 03-04 Regular Session (June 22, 2004), available at [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_2401-2450/ab\\_2404\\_cfa\\_20040623\\_122243\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2401-2450/ab_2404_cfa_20040623_122243_sen_comm.html) (last visited Feb. 23, 2005).

<sup>89</sup> California Women’s Commission, *Year 2004 Legislative Agenda—Final Report*, Oct. 4, 2004, available at <http://www.statusofwomen.ca.gov/doc.asp?id=643> (last visited Feb. 23, 2005).

<sup>90</sup> *Girls and Young Women: Equal Opportunity in Community Athletic Programs: Hearing on AB2404 Before Cal. Assem. Comm. on Judiciary* (Mar. 22, 2004), available at <http://www.leginfo.ca.gov/bilinfo.html> (last visited Mar. 10, 2005) [hereinafter *Girls and Young Women*].

reasons, AB 2404 is legitimate legislation necessary to improve the lives of young girls in California.

“Many of the institutional practices that contribute to the disparate participation rates of male and female students have remained outside the reach of Title IX enforcement.”<sup>91</sup> Municipal sports do not fall within the jurisdiction of either Title IX or the relevant sections of Amended California Education Code. Only those programs that qualify as “recipients” of federal funding may be subject to regulation by Title IX.<sup>92</sup> In *NCAA v. Smith*,<sup>93</sup> the court understood “recipient” under Title IX to only include entities that receive federal financial assistance *directly* or through another such entity operating as an education program or activity which receives benefits from such assistance.<sup>94</sup> The novelty of the *NCAA* standard is that it excludes those entities that receive funds through another recipient that operates an educational program or activity and *receives or benefits from such assistance*. Even though the Supreme Court acknowledged that the *NCAA* received some indirect federal financial benefits, the court held that the receipt of a small measure of federal funds did not qualify as a “benefit” within the meaning of 34 C.F.R § 106.2 (1997). Similarly, the California Parks Department is not accessible by Federal Title IX regulation since any Federal funds it receives would be through an intermediary. According to the Supreme Court’s definition, there is no way to regulate municipal sports using Title IX.

Though some would argue that existing Civil Rights and Title IX based legislation in California suffices to make AB 2404 superfluous, that is not the case. Even under California state law, there is a need for specified protection of girls’ municipal sports. As described above, AB 833 codifies the three part test for Title IX compliance into the Sex Equity in Education Act.<sup>95</sup> Under it, California state law requires equal opportunities in state educational athletic programs.<sup>96</sup> However, since AB 833 applies strictly to educational institutions, purely recreational organizations such as the Parks and Recreation Department are outside the scope of AB 833.

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<sup>91</sup> Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REF. 13, 19 (2001).

<sup>92</sup> 20 U.S.C.S § 1681(a).

<sup>93</sup> *NCAA v. Smith*, 525 U.S. 459, 468 (1999).

<sup>94</sup> *Id.*

<sup>95</sup> *Title IX at Thirty*, *supra* note 51, at 39.

<sup>96</sup> CAL. EDU. CODE § 230.

SECTION 1. Section 230 of the Education Code is amended to read: 230. For purposes of this chapter, harassment and other discrimination on the basis of sex include, but are not limited to, the following practices:(a) On the basis of sex, exclusion of a person or persons from participation in, denial of the benefits of, or subjection to harassment or other discrimination in, any academic, extracurricular, research, occupational training, or other program or activity . . . . (c) On the basis of sex, exclusion from participation in, or denial of equivalent opportunity in, athletic programs. For purposes of this subdivision, “equivalent” means equal or equal in effect.

Some postulate that girls and young women may be protected from discrimination in municipal sports by California's more general civil rights statutes.<sup>97</sup> The Unruh Civil Rights Act protects all persons against arbitrary discrimination by a business enterprise.<sup>98</sup> In conjunction with the Unruh Civil Rights Act, Government Code §11135 specifically mandates that no person shall be discriminated against in any program operated, funded, or administered by the state or a state agency.<sup>99</sup> The definition of a "recipient" of state funds mirrors the Supreme Court's definition so that any portion of an organization receiving state funds is subject to regulation under these statutes.<sup>100</sup> Therefore, one could argue that existing state law already functions to protect young female athletes from discrimination in municipal sports.

These grounds for suit are visible *Baca v. Los Angeles*. The plaintiffs, recognizing that Title IX did not apply to the City of Los Angeles and the Parks and Recreation Department, brought suit under Equal Protection claims under both the State and Federal Constitutions.<sup>101</sup> They also brought a suit claiming discrimination by a business establishment under the Unruh Civil Rights Act. Since the City settled in *Baca*, it seems that these are sufficient grounds for proceeding to trial, which negates the need for AB 2404.

However, the enforcement guidelines of AB 2404 mandate its necessity. Local government entities must understand what constitutes gender discrimination in order to eliminate it.<sup>102</sup> Recreational organizations will be able to adapt their programs accordingly, thereby preempting prospective litigation. Proponents of AB 2404 argue that it will give local governments straight-forward rules to determine what constitutes discrimination in municipal sports, and therefore, will help realize the end of discrimination in municipal sports.

Scholars argue the merits of using the three part test as the basis for determining gender discrimination. Title IX proponents maintain that a strict, rule-based approach to Title IX enforcement gives the Department of Education a consistent standard to use when evaluating whether institutions are complying with Title IX regulations.<sup>103</sup> Critics argue that strict application of the three part test has robbed the courts of the ability to provide an equitable remedy when the strict interpretation leads to an unjust outcome.<sup>104</sup> These critics complain that strict application of Title IX has produced inequitable results, such as the reduction of

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<sup>97</sup> *Girls and Young Women*, *supra* note 90.

<sup>98</sup> CAL CIV. CODE § 51 (2005).

<sup>99</sup> *Girls and Young Women*, *supra* note 90.

<sup>100</sup> *Id.*

<sup>101</sup> Lourdes, *supra* note 1, at 166.

<sup>102</sup> *Id.*

<sup>103</sup> "One [recommendation] allows the Secretary to set a 'reasonable variance' from the current Title IX standards for equality. Because this language is open-ended, it is impossible to put a limit on the losses the Secretary could inflict on women and girls if he adopts this recommendation." *What's at Stake?*, *supra* note 61.

<sup>104</sup> See Andrew J. Boyd, Comment, *Righting the Canoe: Title IX and the Decline of Men's Intercollegiate Athletics*, 37 J. MARSHALL L. REV. 257, 271-273 (2003).

men's athletic opportunities,<sup>105</sup> despite the absence of a conclusive correlation. Even if strict enforcement of the three part test results in a marginal decline in the athletic opportunities offered to male athletes, scholars have only recently highlighted this phenomenon in relation Title IX.<sup>106</sup> Given the success of the three part test in its early years of implementation,<sup>107</sup> California legislators should apply the three part test and reap the benefits now. Whether factors such as budget cuts and economic crises<sup>108</sup> in California will result in a future reduction to boys' athletic opportunities should not be a concern for legislators at this moment given the promising early benefits of enacting the three part test.

#### IV. "KEEP GIRLS ON THE COURT TO KEEP THEM OUT OF COURT"<sup>109</sup>

AB 2404 provides tangible benefits to those girls that will gain the opportunity to participate in municipal sports. These benefits include: professional success,<sup>110</sup> improved socialization,<sup>111</sup> and a reduction in health risks.<sup>112</sup> Between

<sup>105</sup> *Id.* at 269.

<sup>106</sup> Cases such as *Kelley v. Board of Trustees*, 832 F. Supp. 237 (D. Ill. 1993), *Gonyo v. Drake Univ.*, 879 F. Supp. 1000 (D. Iowa 1995), and *Harper v. Board of Regents*, 35 F. Supp. 2d 1118 (D. Ill. 1999) have only arisen in the last 15 years. Also, the problem was first brought to the attention of Congress in 1995. See Charles Spitz, Note, *Gender Equity in Intercollegiate Athletics as Mandated by Title IX of the Education Amendments Act of 1972: Fair or Foul*, 21 SETON HALL LEGIS. J. 621, 621 (1997).

<sup>107</sup> See *supra* note 82.

<sup>108</sup> Spitz, *supra* note 106, at 623.

<sup>109</sup> Cheryl Hanna, *Bad Girls and Good Sports: Some Reflections on Violent Female Juvenile Delinquents, Title IX & The Promise of Girl Power*, 27 HASTINGS CONST. L.Q. 667, 673 (2000).

<sup>110</sup> *Id.*

Furthermore, there is growing evidence that women in business do better if they have played competitive sports. For example, eighty percent of female executives in Fortune 500 companies self-identified themselves as having been "tomboys" when they were young . . . . Darla Moore, president of Rainwater Inc., and number nineteen among Fortune Magazine's Fifty Most Powerful Women in Business in 1998 (the magazine's first such ranking), attributes her success not to the kinder, gentler, approach we expect from women in the workplace. Rather, hers is an unqualified embrace of competition: "Women's worst sin is groupthink: 'You should be a nice girl.' 'You ought to fit in.' 'You should find a female mentor.' What a colossal waste of time." She is also considered to be one of corporate America's most feared female activists—someone who fights hard to help women shatter the glass ceiling by recognizing that power comes not from the outside, but from within. She is a fierce advocate for competing to promote one's personal potential.

*Id.* at 700-701.

<sup>111</sup> *Id.*

There is overwhelming evidence that a girl who plays sports past puberty has a much better chance of avoiding those self-destructive behaviors associated with adolescence than one who does not. For example, the Women's Sports Foundation, a national, non-profit, educational organization established in 1974 by Billie Jean King and many other pre-Title IX groundbreaking athletes, continues to collect data on female athletes. It found that female teen athletes are less than half as likely to be involved with an unwanted pregnancy than non-athletes, are more likely to use contraceptives, are 92% less likely to use drugs than non-athletes, and are three times more likely to graduate from high school. They also report having a greater sense of self-esteem and lower levels of depression than do non-athletes.

*Id.* at 699.

1990 and 1998, the number of girls in Juvenile Hall in San Francisco doubled, that number mostly composed of minority girls and girls from poverty stricken areas.<sup>113</sup> Between 1981 and 1997 the Department of Justice reported that the violent crime index for girls rose 103%. The number of violent crimes perpetrated declined in every other demographic.<sup>114</sup> The problem of female violence clearly is not being treated correctly in California. Violent crimes are typically perpetrated by girls who have experienced emotional and physical abuse during their youth and who are seeking an outlet for feelings of aggression and inadequacy as a result of their abuse.<sup>115</sup>

Increasing female participation in competitive sports, especially at an early age, teaches girls a healthy outlet for their aggressive, competitive feelings and curbs violent tendencies.<sup>116</sup> Research indicates that one of the most frequently cited causes of woman-on-woman violence stems from a general distrust of other women.<sup>117</sup> Expanding the availability of girls' municipal sports leagues will foster camaraderie girls might not otherwise experience.<sup>118</sup> In fact, some have argued that sports workshops should be instituted in juvenile halls to remedy the image problems plaguing young female offenders.<sup>119</sup> AB 2404 will have a positive impact on the life of women by increasing participation in youth sports and therefore giving girls the positive experiences shown to contribute to better lives as women.

By increasing girls' participation in organized sports while they are young, AB 2404 provides a much better opportunity for girls to realize the positive effects of sport. "Before the age of twelve boys and girls participate at about the same rate in athletics. However between the ages of twelve and fourteen, girls begin to drop out at a much faster rate than boys . . . ."<sup>120</sup> Federal and State legislation have thus far focused on establishing gender equity in secondary school and post-secondary school sports. Based on the numbers cited above, it is apparent that those bills

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<sup>112</sup> *Id.*

As well as raising a girl's psychological sense of well-being, there are a number of health benefits for girls who play competitive sports. For example, "one to three hours of exercise a week over a woman's reproductive lifetime (the teens to about age 40) can bring a twenty to thirty percent reduction in the risk of breast cancer, and four or more hours of exercise a week can reduce the risk almost sixty percent." Regular exercise helps curb obesity, which has been rising among children and adolescents. Sadly, the Center for Disease Control found that by the senior year of high school, only a quarter of all young women exercise vigorously on a daily basis compared with half of all boys.

*Id.* at 699-700.

<sup>113</sup> Hanna, *supra* note 109, at 683.

<sup>114</sup> *Id.* at 669.

<sup>115</sup> *Id.* at 670.

<sup>116</sup> "There is evidence that competitive sports protect boys from engaging in destructive behaviors, it may do the same for girls." *Id.* at 673.

<sup>117</sup> Hanna, *supra* note 109, at 686.

<sup>118</sup> *Id.* at 695.

<sup>119</sup> Laurie Schaffner, *Female Juvenile Delinquency: Sexual Solutions, Gender bias, and Juvenile Justice*, 9 HASTINGS WOMEN'S L.J. 1, 23, 24 (1998).

<sup>120</sup> Hanna, *supra* note 109, at 703.

protect female athletes who play beyond the statistically expected drop off period. AB 2404 protects budding female athletes from discrimination before they can be dissuaded from athletic opportunities.

The prospect of retaining an increased number of female athletes at the grassroots level will inevitably result in a larger number of women pursuing sports at an elite level.<sup>121</sup> Since Title IX was enacted, the numbers of girls playing secondary and postsecondary sports have increased along with girls' participation in sports at the grassroots level.<sup>122</sup> The resulting increase in young girls' sports participation will later correlate to increased participation at later ages.

Girls from low income families will benefit the most from AB 2404. Girls from low income neighborhoods are particularly disadvantaged by inadequate municipal sports programming during their youth. In many cases, publicly funded programs are the only option for girls from low income families to participate in athletics.<sup>123</sup> As a result, the problem of unequal participation in municipal sports is more pervasive among girls in low income communities.<sup>124</sup> Increased opportunity for young girls from low income neighborhoods to participate and hone their skills will contribute to the development of fundamental skills and an increased level of competition. AB 2404 will grant girls from low-income families greater opportunity to participate and gain from municipal sports<sup>125</sup> by expanding the number of sports available to them.

Expanding opportunities for girls' from low-income communities to play sports may afford some girls the opportunity to attend college. Exposure to more sports at a young age will give girls a greater chance of playing sports at an elite

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<sup>121</sup> *Cohen*, 101 F.3d at 188.

One need look no further than the impressive performances of our country's women athletes in the 1996 Olympic Summer Games to see that Title IX has had a dramatic and positive impact on the capabilities of our women athletes, particularly in team sports. *These Olympians represent the first full generation of women to grow up under the aegis of Title IX.* The unprecedented success of these athletes is due, in no small measure, to Title IX's beneficent effects on women's sports, as the athletes themselves have acknowledged time and again. What stimulated this remarkable change in the quality of women's athletic competition was not a sudden, anomalous upsurge in women's interest in sports, but the enforcement of Title IX's mandate of gender equity in sports.

*Id.* at 188 (emphasis added).

<sup>122</sup> *Brake*, *supra* note 91, at 15.

To put these numbers in perspective, since Title IX was enacted, the number of girls playing high school sports has gone from one in twenty-seven, to one in three. Sports participation among even younger girls has also changed dramatically; a 1998 report found that the number of girls ages six to eleven who regularly participate in vigorous sports such as soccer, volleyball, and basketball increased eighty-six percent since 1987, from 2 million to 3.8 million.

*Id.* at 15 (citations omitted).

<sup>123</sup> *Id.*

<sup>124</sup> See Team Up For Youth Press Release, July 21, 2004, available at <http://www.teamupforyouth.org/84.html> (last visited Mar. 10, 2005) (speculating that up to 70% of youth in low income areas do not participate in after school sports).

<sup>125</sup> AB 2404, Cal. Legis. 2005-06 Reg. Sess (Cal. 2006), Feb. 23, 2006, available at [http://www.leginfo.ca.gov/pub/bill/asm/ab\\_2401-2450/ab\\_2404\\_bill\\_20060223\\_introduced.pdf](http://www.leginfo.ca.gov/pub/bill/asm/ab_2401-2450/ab_2404_bill_20060223_introduced.pdf) (last visited Mar. 26, 2006).

level. Playing athletics at an elite level will allow girls from low income homes to compete for athletic scholarships at prestigious educational institutions around the country.<sup>126</sup> There are over thirty-three million dollars in college scholarships available for female athletes. This figure should increase since equal distribution of scholarship money must be proportional to the athletic participation of each gender at a post secondary institution.<sup>127</sup> As women continue to participate in athletics, experts believe the current disparity in scholarship dollars for men and women will equalize.<sup>128</sup>

Some argue that women should be afforded fewer opportunities than men on account of their naturally lower interest in sports.<sup>129</sup> However, courts no longer consider this argument valid.<sup>130</sup> Many now contend that women's "different and possibly lower interest" in sports is a result of historically paternalistic and unequal treatment.<sup>131</sup> Since Title IX was passed, an entire generation of women has grown up receiving more equal treatment and demolishing archaic conceptions of women in sports. Some now contend that women athletes will "catch up" to male athletes as they continue to experience sports on a more elite level. Indeed, in individual, rather than team sports, this seems to be the case.<sup>132</sup> The argument follows that as girls play more sports at younger ages they will increase the overall talent of women, leading to greater skill level in elite women's athletics that may rival their male counterparts.<sup>133</sup>

Another challenge that female athletes face is the common perception of female athletes as unfeminine.<sup>134</sup> Studies find that the media intentionally portrays women not as athletes, but instead, focuses on homophobia generated by strong

<sup>126</sup> See Anna Dolinsky, *Affirmative Action for Athletes?*, YALE HERALD, Jan 12, 2001, available at <http://www.yaleherald.com/archive/xxxi/2001.01.12/sports/p29.html> (last visited Nov. 7, 2004) (arguing that due to increased athletic prestige available to Ivy league colleges, admissions standards are lowered in order to recruit top athletes some from underprivileged homes). "Playing football or basketball can give underprivileged students the opportunity to go to college on scholarship." Robert Samuels, *Brains and Brawn*, THE DAILY NORTHWESTERN, Mar. 4, 2004, available at <http://www.dailynorthwestern.com/vnews/display.v/ART/2004/03/04/4046f51b95040> (last visited Nov. 7, 2004).

<sup>127</sup> Jill Filipovic, *Olympic Athletes Criticize Title IX Recommendations*, WOMEN'S ENEWS, Mar. 3, 2003, available at <http://www.now.org/eNews/march2003/030303titleix.html?printable> (last visited Nov. 3, 2004).

<sup>128</sup> See *Minority Report*, *supra* note 56, at 2.

<sup>129</sup> See *Cohen*, 101 F.3d at 178-79.

<sup>130</sup> "Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. The Policy Interpretation recognizes that women's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports." *Id.*

<sup>131</sup> Ted Leland & Karen Peters, *Title IX: Unresolved Public Policy Issues*, 14 MARQ. SPORTS L. REV. 1, 2 (2003).

<sup>132</sup> Two professional female golfers, Michelle Wie, a 16-year-old phenomenon and Annika Sorenstam, the top-ranked women's golfer, have been given sponsors' exemptions to play in official Professional Golf Association Events, and played competitively.

<sup>133</sup> Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971 (1995).

<sup>134</sup> *Id.*

female athletes.<sup>135</sup> In response to acknowledged perceptions of female athletes as lesbians, many female athletes portray themselves as overtly sexual<sup>136</sup> by posing in popular men's magazines.<sup>137</sup> The September 2000 issue of *Maxim Magazine* features a photo in which the editors posed American female Olympic athletes in "the sexiest get-ups we could create."<sup>138</sup> In response, women's rights activist Donna Lopiano, said, "any exposure in a sports magazine that minimizes athletic achievement and skill and emphasizes the female athlete as a sex object is insulting and degrading."<sup>139</sup> One athlete perceived her conduct as emphasizing that championship caliber female athletes are "not all butch lesbians. We are attractive, feminine girls who play soccer."<sup>140</sup> Today, however, it is becoming increasingly attractive to be a strong, athletic, sexy female,<sup>141</sup> in the vein of WNBA player/supermodel Lisa Leslie or model/WTA tennis star Venus Williams. Both are successful athletes who combine athletic prowess and sexual magnetism. Hopefully the perception of top female athletes as "lesbian" or "butch" is changing so that women can begin to receive credit for their athletic talents.

Nevertheless, many female athletes exploit their sexuality for reasons unrelated to gender inequality. Female athletes pose provocatively in calendars and magazines in order to raise funds necessary to keep participating in their sport,<sup>142</sup> or to increase exposure for women's sports which are grossly underrepresented in the media.<sup>143</sup> If women's sports received equal portrayal and funding then perhaps there would be less incentive for female athletes to self-sexualize. By emphasizing the equality of male and female athletes from a young age, AB 2404 will reduce the need for female athletes to overtly sexualize themselves and will create positive self-images in young girls in California.

#### V. USING FEMINIST THEORY TO IMPROVE TITLE IX ENFORCEMENT

AB 2404 will ensure that the current regime of Title IX enforcement and the benefits it has inured will be retained in the wake of proposed changes. Yet, to achieve the full impact of codifying Title IX, those responsible for enforcing AB 2404 should be mindful of the theoretical criticisms leveled at Title IX.

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<sup>135</sup> *The Women's Sports Foundation Report: Her Life Depends on It: Sport Physical Activity and the Health and Well-Being of American Girls*, The Women's Sports Foundation, May 2004, at 38, available at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/body/article.html?record=990> (last visited Mar. 10, 2005).

<sup>136</sup> This process is referred to as "self-sexualization" by feminist scholars. See *Cheering On Women and Girls in Sports*, *supra* note 2, at 1642.

<sup>137</sup> Mark O'Keefe, *Sexploitation or Pride? Female Olympians' Revealing Poses Stir Debate*, NEWHOUSE NEWS SERVICE, Sept. 15, 2000, available at <http://www.newhouse.com/archive/story1a091500.html> (last visited Mar. 3, 2005).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Hanna, *supra* note 109, at 704.

<sup>142</sup> O'Keefe, *supra* note 137.

<sup>143</sup> The Women's Sports Foundation, *supra* note 135, at 37.

Sex discrimination law is often thought to embrace a conception of equality identified by some feminist legal scholars as formal equality. The guiding principle in formal equality is that men and women should be treated alike if they are similarly situated for purposes of the policy or practice that is being challenged.<sup>144</sup>

Scholars and advocates working within this approach stress the parallels between the sexes and thus inquire “whether the asserted differences between men and women, once stripped of archaic stereotypes and overbroad generalizations, are sufficient to support treating the sexes differently, or are instead mere remnants of traditional views about the proper place of men and women.”<sup>145</sup>

Courts have traditionally attempted to remedy sexual discrimination by adopting a formal equality standard. In equal protection cases, courts assume both classes should inherently be treated equally rather than assessing whether the disadvantaged class is permanently subordinated.<sup>146</sup> Critics argue that Title IX evolved from a liberal-feminist perspective prevalent in the late 1960s and early 1970s, and that like many other liberal feminist movements at the time, “its goals were to provide access to traditionally male structures and to provide equality of opportunity once inside.”<sup>147</sup> This approach assumes formal equality among men and women.<sup>148</sup>

However, the three-part test and the policy interpretation reflect a critical approach to sex differences that does not accept existing differences in male and female interest levels as either inherent or independent of past and present opportunity structures. The test requires allocation of opportunity and resources based on the actual interest level of women in a particular sport,<sup>149</sup> rather than legitimating disparate treatment of men and women in athletics based on antiquated notions regarding their levels of interest.<sup>150</sup> Increasingly, courts are recognizing that the athletic organizations within which women participate create an institutionalized framework that breeds discrimination.<sup>151</sup>

Though this interpretation of the three-part test has been uniformly adopted, critics still argue that Title IX is a type of reverse affirmative action that operates on a quota system, and unfairly deprives male athletes of athletic opportunities in favor of women who are not interested in them.<sup>152</sup> Those critics mistakenly

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<sup>144</sup> Brake, *supra* note 91, at 25.

<sup>145</sup> *Id.* at 25-26.

<sup>146</sup> *Id.* at 34.

<sup>147</sup> *Cheering on Women and Girls in Sports*, *supra* note 2, at 1634.

<sup>148</sup> Brake, *supra* note 91, at 45.

<sup>149</sup> *Id.* at 55. In *Cohen*, Brown University criticized the court's construction of the third prong of the three part test arguing that a student conducted survey showing a lower interest among females on campus in athletics justified the fewer opportunities offered to women at the university. The court found that “no measurement of existing interest levels would be reliably independent of existing opportunity structures.” *Id.*

<sup>150</sup> *Id.* at 49.

<sup>151</sup> *Neal*, 198 F.3d at 768; *Pederson*, 213 F.3d at 878.

<sup>152</sup> *Nat'l Wrestling Coaches Assoc., v. Dept. of Educ.*, 366 F.3d 930, 935-936.

assume a formal equality approach in their assessments of gender discrimination. Critics of the three-part test fail to recognize that the court's interpretation of it goes well beyond a formal equality viewpoint and assesses institutional components of discrimination.<sup>153</sup> "Those who call the test a 'quota' fail to acknowledge the extent to which universities themselves determine the gender ratio of their athletic participation."<sup>154</sup>

Although it seems that the three-part test will reduce gender inequality in women's sports, as it has in collegiate sports, some are convinced that we can do better. Feminist critics of the three-part test feel that it is still not addressing the underlying structure of athletic and educational institutions that foster gender discrimination.<sup>155</sup> "Feminist critics contend that Title IX has done nothing to change the structures, practices, or policies of sports at the vast majority of high schools and colleges."<sup>156</sup> Rather, they argue, Title IX simply lets women and girls "join in."<sup>157</sup> Feminist critics of Title IX see the perceived incongruity between femininity and the masculine perception of athletics as the primary problem with current athletic institutional framework.<sup>158</sup> Eliminating the stereotypes that require female athletes to make this distinction is paramount to furthering the cause of female athletes beyond the current Title IX regime.

Scholars propose extending the application of the proportionality test to secondary schools as a way of promoting a feminist empowerment and re-socialization of sports.<sup>159</sup> As a matter of law, courts may apply the three part test to secondary institutions.<sup>160</sup> However, courts have not applied the "substantial proportionality" test in cases involving secondary schools.<sup>161</sup> Adopting the "substantial proportionality" test will increase the number of girls and women participating in sports by increasing the number of participants at the high school level, rather than assessing interest at a post-secondary institution where women's interests have already been curtailed by recruitment and a general lack of involvement.<sup>162</sup> However, making the interest assessment at the high school level also fails to correctly address the problem of negative socialization, since girl's negative socialization towards sports is already formed at that stage as well.<sup>163</sup>

AB 2404 will curtail negative socialization of female athletes at a young age. Addressing the problem of negative socialization in high school may already be too late to change girls' perceptions of their role in athletics.<sup>164</sup> In order to achieve re-

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<sup>153</sup> Brake, *supra* note 91, at 60.

<sup>154</sup> Cohen, 101 F.3d at 177.

<sup>155</sup> Brake, *supra* note 91, at 68.

<sup>156</sup> *Id.*

<sup>157</sup> *Cheering on Women and Girls in Sports*, *supra* note 2, at 1636.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1641.

<sup>160</sup> *Id.* at 1642.

<sup>161</sup> *Id.* at 1641.

<sup>162</sup> *Cheering On Women and Girls In Sports*, *supra* note 2, at 1642.

<sup>163</sup> The Women's Sports Foundation, *supra*, note 135, at 30.

<sup>164</sup> *Cheering On Women and Girl's In Sports*, *supra* note 2, at 1643.

socialization, scholars advocate eliminating the frameworks that foster them at the community and municipal level of sports.<sup>165</sup> AB 2404 accomplishes that by applying the three part test to municipal sports.

Young girls receive and therefore internalize far fewer socializing messages regarding their role in athletics than high school girls who are bombarded with messages regarding their sexuality and their role in athletics.<sup>166</sup> Devoid of negative socializations, the interest level of young girls in municipal sports should be valued by courts as an accurate indicator of whether a municipality is complying with Title IX.<sup>167</sup> Adopting the three-part test ensures that the interest level of the girls in a community will be gauged in any action brought under AB 2404.

Finally, AB 2404 prevents negative socialization of young girls by ensuring that boys and girls receive comparable facilities for municipal sports. "To have secondary facilities makes girls feel as if they are second-rate themselves."<sup>168</sup> The majority of girls who experience discrimination in municipal sports are likely to stop playing rather than undertake a legal battle to stop the discrimination.<sup>169</sup> By eliminating feelings of athletic inadequacy in young girls, AB 2404 will ensure that more girls continue to play sports beyond their youth. The three part test as applied to municipal sports lacks many of the problems that feminist scholars have highlighted in federal Title IX enforcement.

## VI. PROBLEMS IMPLEMENTING AB 2404

### *A. California's Colossal Deficit*

As discussed earlier, California faces the worst budget crisis of any state in the country.<sup>170</sup> Increasing spending obviously aggravates the budget crisis. The State Department of Finance opposed AB 2404 citing California's budget as a potential problem for implementing the bill. The State Department of Finance ("DOF") states

This bill would extend to all local government sport programs the requirement for equal access for girls and young women that is already mandated for educational institutions receiving either State or federal funding. This bill would also create an independent right to bring a civil action for equitable and monetary relief. This bill would result in a reimbursable State mandate by creating an independent right to bring a civil action, for which local agencies could incur a cost to defend, and by requiring local agencies to provide equal access to facilities, equipment, locker rooms, and other items. The cost to reimburse local agencies

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<sup>165</sup> *Id.* at 1644.

<sup>166</sup> *Id.* at 1642.

<sup>167</sup> See Lourdes, *supra* note 1, at 161.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See *supra* Part III.A.

statewide for the activities required by this bill is unknown, but we assume those costs to be significant given the large number of local entities that offer sports programs and activities.<sup>171</sup>

It may not be particularly wise for the state to enact legislation which will probably have significant costs due to the difficulty involved in creating equality. It does not appear that curbing spending on state and local programs is the plan to reduce the enormous state deficit.<sup>172</sup> On July 31, 2004 Governor Schwarzenegger approved a record \$101 billion state budget for 2004-2005.<sup>173</sup> Instead of cutting essential programs the "balanced" budget relies on borrowing \$3.4 billion to pay off accumulated debts.<sup>174</sup> "California's Legislative Analyst Office is arguing that even after the Governor's 2004-2005 budget with real spending cuts, California will still face a \$6 billion dollar shortfall for 2004-2005."<sup>175</sup> Eventually, the state will be forced to reduce social programs. When the cuts occur, the question is what the consequences will be if the state is forced to reduce funds to municipalities and can no longer maintain the gender equity it created. Case law interpreting the application of Title IX to such a scenario indicates the probable result.

### *B. Cutting Men's Programs*

California legislators must be aware that an unintended effect of AB 2404 may be a reduction in opportunities or the ability to offer high caliber facilities to male athletes. One of the bases for the Commission's report recommending changes to Title IX enforcement (and an argument that is echoed by critics of Title IX around the country) is that Title IX results in cuts to men's athletic budgets to accommodate expanding women's programs.<sup>176</sup> In collegiate sports in the last fifteen years "[t]he percentage increase in expenditures for adding a women's team depends on the size of the institution's athletic program."<sup>177</sup> However, even for the richest NCAA Division I institution, adding a single woman's team results in at least a 3 percent budget increase.<sup>178</sup> Educational institutions find that the easiest

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<sup>171</sup> Senate Judiciary Committee Analysis of AB 2404, June 23, 2004, available at [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_2401-2450/ab\\_2404\\_cfa\\_20040816\\_112910\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2401-2450/ab_2404_cfa_20040816_112910_sen_floor.html) (last visited Mar. 3, 2005).

<sup>172</sup> Governor Schwarzenegger recently approved three billion dollars to be devoted to stem cell research. *California Gives Go Ahead to Stem Cell Research*, MSNBC NEWS, Nov. 3, 2004, available at <http://www.msnbc.msn.com/id/6384390/> (last visited Nov. 7, 2004).

<sup>173</sup> The State Budget and It's Impact on CVUSD, Oct. 25, 2004, available at <http://www.cv.k12.ca.us/10.25.2004Budget.html> (last visited Mar. 3, 2005).

<sup>174</sup> *Id.*

<sup>175</sup> California 2004-2005 Education Budget Analysis, available at <http://www.rppi.org/edbudget.html> (last visited Mar. 3, 2005).

<sup>176</sup> "The Commission found that it is extremely difficult to obtain a set of data that is accepted by all parties. However, all agree that there has been a troubling decrease in athletic opportunities for boys and men." *Title IX at Thirty*, *supra* note 51, at 24.

<sup>177</sup> Danielle Ganzi, *After the Commission: The Government's Inadequate responses to Title IX's Negative Effect on Men's Intercollegiate Athletics*, 84 B.U. L. REV. 543, 556 (2004).

<sup>178</sup> *Id.*

way to comply with Title IX and to limit their budget increase is to cut men's programs.<sup>179</sup>

Though the approach of cutting men's teams has been met unfavorably, at least one court has found a way to balance increasing women's opportunities, limiting cuts to men's programs and budget increases. It may be inefficient for schools to attempt to comply with Title IX through the proportionality requirement.<sup>180</sup> Focusing on accommodating the interest of women on campus may be a more viable compliance.<sup>181</sup> In *Cohen v. Brown University* the court found that the appropriate remedy for Brown University to achieve compliance was not cutting men's programs,<sup>182</sup> but rather upgrading a number of women's teams to varsity status, thereby accommodating the interests of those females on campus.<sup>183</sup> To finance the additional women's positions, Brown would be forced to eliminate far fewer than the 213 men's positions suggested in its original compliance scheme. This case stands for the principle that an institution can comply with Title IX by satisfying the third prong "without approaching satisfaction of the standards of prong one."<sup>184</sup>

Stanford University takes a novel approach to complying with the interest component of the three-part test. Because courts have not articulated a clear standard as to what a school must do to "meet the needs and interests" of the underrepresented gender, schools are left without guidelines as how to measure the interest of female students on campus.<sup>185</sup> Stanford assessed interest by introducing rowing as a women's sport and then gauging the reaction on campus. After a large

<sup>179</sup> *Nat'l Wrestling*, 33 F.3d at 949.

Plaintiffs cite a report by the General Accounting Office, "Intercollegiate Athletics: Four-Year Colleges' Experience Adding and Discontinuing Teams" (March 2001) ("GAO Report"), saying that schools had cut 519 men's teams between 1981-82 and 1998-99, including 171 wrestling teams. Of the 272 responding schools that had cut a men's team in the period 1992-93 to 1999-2000 31% cited the need to meet gender equity goals or requirements.

*Id.* at 949.

<sup>180</sup> The proportionality requirement mandates that the percentage of women athletes at an institution be equal to the percentage of male athletes. The problem is that strict proportionality has resulted in the creation of spots for women athletes that are not being used. These positions are created at the expense of men's programs. See Dr. Bruce D. Gabrielson, *Contributing Factors to Youth Violence: A Position Paper Opposing Further Title IX Implementation*, WRESTLING USA MAG., Dec. 15, 1997, available at <http://www.blackmagic.com/ses/wrest/reference/youthviol.html> (last visited Mar. 4, 2005).

<sup>181</sup> See *Cohen*, 101 F.3d at 187.

<sup>182</sup> "In order to bring Brown into compliance with prong one under defendants' Phase II, I would have to order Brown to cut enough men's teams to eradicate approximately 213 men's varsity positions. This extreme action is entirely unnecessary." *Id.*

<sup>183</sup> "The easy answer lies in ordering Brown to comply with prong three by upgrading the women's gymnastics, fencing, skiing, and water polo teams to university-funded varsity status. In this way, Brown could easily achieve prong three's standard of 'full and effective accommodation of the underrepresented sex.' This remedy would entail upgrading the positions of approximately 40 women." *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> "For example, it is not clear exactly which population of prospective women athletes is most appropriate for comparison (e.g., enrolled female students, female students who applied for admission, high school students in the region, etc)." See Leland & Peters, *supra* note 131, at 3.

turnout to the initial meetings, the school realized that it could field a competitive lightweight team based on the skill level and number of women in attendance. The school effectively created a lightweight crew team, comprised mostly of non-scholarship athletes already on campus. This strategy for gauging interest eliminates the problem of creating spots for female athletes that go unused in order to meet the proportionality requirement by slowly introducing a sport and then increasing participation based on genuine interest expressed by students already on campus rather than relying on university mandated team sizes.<sup>186</sup> Park and Recreation Department officials in California should consider this option before thoughtlessly adding programs for girls where interest is not shown.

If an institution resorts to cutting men's athletic programs a problem arises; which programs should be cut? There is growing concern among Title IX critics that universities choose to cut low revenue sports, such as track, wrestling, and swimming rather than high revenue producing sports such as men's football or basketball.<sup>187</sup> Critics contend that Title IX invariably leads to a reduction in the breadth of athletic opportunity universities offer to their male students.<sup>188</sup> Although major Division I Football programs consume a tremendous amount of the athletic department's budget, the football program is also responsible for generating the majority of the athletic department's revenue through alumni donors, television contracts and merchandising.<sup>189</sup> Because of these benefits, cutting the football program is not an option. This leads universities to eliminate lower revenue sports to provide funding for new women's sports.<sup>190</sup> Furthermore, due to the disproportionate size of football teams, it is difficult for an institution to comply with the proportionality prong of the three part test without cutting multiple low revenue sports with smaller teams.

The result of cutting low revenue sports programs may seriously impact those sports on the municipal level as well. Reducing or eliminating minor/low revenue sports at the college level is leading to an increased focus on major sports, such as football and basketball in youth sports.<sup>191</sup> Furthermore, cuts of certain college sports programs are mirrored in cuts to high schools and municipal sports.<sup>192</sup> As exposure for major sports increases, "a great deal of parental interest and support has become focused towards professional excitement, ultimate financial rewards, or forcing the young athlete to get ahead or get into college by developing their major sport talents."<sup>193</sup> This has shifted the focus away from minor sports which allow

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<sup>186</sup> *Id.* at 4.

<sup>187</sup> See Armand B. Alacbay, *Are Intercollegiate Sports Programs a Buck Short? Examining the Latest Attack on Title IX*, 14 GEO. MASON U. CIV. RTS. L.J. 255, 287 (2004).

<sup>188</sup> See *Nat'l Wrestling*, 366 F.3d 930; *Kelley*, 832 F.Supp 237); *Gonyo v. Drake Univ.* 837 F.Supp 989 (D. Iowa 1993).

<sup>189</sup> *Nat'l Wrestling*, 366 F.3d 930.

<sup>190</sup> *Id.*

<sup>191</sup> Gabrielson, *supra* note 180, at 8.

<sup>192</sup> *Id.* at 6.

<sup>193</sup> *Id.* at 3.

broader participation in comparison to major sports where, due to increased skill levels and less opportunities, young athletes will be excluded.<sup>194</sup> As family support and community financial commitment to minor sports decreases, the prospect of young athletes continuing on with that sport in the future is drastically decreasing.<sup>195</sup>

Studies specifically indicate that young males without a sport to play will resort to violence or gang related activities in order to find the peer groups that would have been available to them through athletics.<sup>196</sup> Cutting low revenue collegiate men's teams may pose a great risk to young athletes.

"Title IX should not be the scapegoat for irresponsible nonprofit institutions of higher education that operate their football and men's basketball programs like professional franchises."<sup>197</sup> While it is acknowledged that increases in funding to big time football programs may exceed the increased costs of new women's opportunities, big time football programs do not affect the ability of women's sports to thrive in universities.<sup>198</sup> In fact, data analyzing the women's national champions in fourteen NCAA Division I sports, reveals that female athletes may benefit directly from going to a school with a big time football program because they are five times more likely to be a top sixteen finisher than if they go to a school without a big time football program.<sup>199</sup> Furthermore, football programs bring in much needed revenue which, among other things, is directed towards scholarships for female athletes.<sup>200</sup> While Title IX critics feel that the presence of big time football programs erases any alternative for universities except to cut low revenue sports,<sup>201</sup> the impact of those cuts can be tempered.<sup>202</sup> Universities can limit necessary cuts by focusing on the interests of women athletes before implementing new programs.

Furthermore, institutions could implement cost containment strategies beyond cutting teams. Some universities have partnered with local communities to develop facilities that could be used by local schools and communities.<sup>203</sup> Schools

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<sup>194</sup> *Id.*

<sup>195</sup> Gabrielson, *supra* note 180, at 4.

<sup>196</sup> *Id.* at 6.

<sup>197</sup> Leland & Peters, *supra* note 131, at 7.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 8.

<sup>200</sup> *Id.* at 9. (A ranking of the top eighteen universities that award athletic financial aid to women revealed that all had big time football programs.)

<sup>201</sup> Alacbay, *supra* note 187, at 287.

<sup>202</sup> *Cohen*, 101 F.3d at 187.

It is clearly in the best interest of both the male and the female athletes to have an increase in women's opportunities and a small decrease in men's opportunities, if necessary, rather than, as under Brown's plan, no increase in women's opportunities and a large decrease in men's opportunities. Expanding women's athletic opportunities in areas where there is proven ability and interest is the very purpose of Title IX and the simplest, least disruptive, route to Title IX compliance at Brown.

*Id.*

<sup>203</sup> Ganzi, *supra* note 177, at 558.

have focused on increasing women's opportunities in sports where men's teams were already established thereby allowing them to co-exist with shared facilities.<sup>204</sup> Finally, another strategy commonly used is to hire coaches that could serve as full-time faculty, thus diluting the university's expense of taking on additional specialized staff members.<sup>205</sup>

Implementing these cost cutting policies along with AB 2404 will alleviate the pressure on the Parks Department to reduce opportunities for boys' municipal sports. Municipalities will be forced to make tough economic decisions if they intend to increase funding girls' municipal sports. However, there are revenue producing strategies that may offset the need to cut men's programs. If the city is forced to build new facilities to accommodate an increase in the number of girls participating, those new facilities could be rented for private sporting events as tournament hosting sites. This revenue could offset the cost of construction or improvement and provide girls with much needed quality facilities. Additionally, municipalities could look to partner with prominent athletic apparel companies, local sports teams, or corporations, by offering these entities the positive public exposure associated with building youth sports programs. Though there is a brewing controversy over the licensing of corporate naming rights to stadiums<sup>206</sup> it has proven to be a very valuable source of revenue. Aside from stadium naming rights, corporate sponsors have purchased naming rights to youth sports initiatives in an effort to enhance their community reputation.<sup>207</sup> Such corporate sponsorship would be well suited to sponsoring youth sports programs in California. As a last resort, the municipality will likely be forced to raise municipal taxes to raise funds for such new programming. Though the state faces financial constraints, its own priorities will necessarily determine the path to compliance it elects to take.<sup>208</sup>

#### VII. REGULATE DON'T LEGISLATE! ALTERNATIVE SUGGESTIONS FOR ACHIEVING GENDER EQUITY IN CALIFORNIA MUNICIPAL SPORTS

By passing AB 2404 California will be required to accommodate the interests of girls in its municipal sports programs. It can choose to do so by creating more girls only sports teams or it can create more coeducational opportunities by opening existing boys' teams to girls. It is possible that mixed gender municipal sports programs could alleviate the economic expense of creating separate, but equal, municipal sports programs and facilities for boys and girls.

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Andrew D. Goodman, *The Public Financing of Professional Sports Stadiums: Policy and Practice*, 9 SPORTS LAW. J. 173, 189 n. 65 (2002).

<sup>207</sup> For instance Sierra Mist and Capri Sun both sponsor youth soccer development in conjunction with Major League Soccer. See Major league Soccer Programs, available at <http://www.mlsnet.com/MLS/programs/> (last visited Mar. 6, 2005).

<sup>208</sup> See *Cohen*, 101 F.3d at 185-186.

The legality of separate but equal teams is generally accepted provided that the interests of both men and women are being met.<sup>209</sup>

This result has been justified by one or more of the following reasons: (1) there are physical and psychological differences between males and females; (2) the maintenance of separate teams promotes athletic opportunities for women; and, as a corollary to (2), (3) if there were not separate teams, men might dominate in certain sports.<sup>210</sup>

When those teams do not present equal opportunity for both boys and girls to participate, courts have found those to be illegal sexual discrimination.<sup>211</sup>

However, there is no consensus that these justifications are accurate. “[A]n overriding purpose of Title IX is to determine the nature of equality for men and women in contexts in which their differences are particularly relevant.”<sup>212</sup> However, “in Title IX, Congress was more concerned with equalizing the opportunity for gender groups in sports, rather than simply finding coeducational or single sex sports teams per se legal or illegal.”<sup>213</sup> Assuming that there are sufficient grounds to dispute the purported justifications cited above, the California Parks Department should consider offering more coeducational municipal sports teams in order to reduce the cost of adding all new girls’ municipal sports programs.<sup>214</sup>

<sup>209</sup> See Att’y Gen. v. Mass. Interscholastic Athletic Ass’n, 393 N.E.2d 284, 288 (1979).

<sup>210</sup> Israel v. W. Va. Secondary Sch. Activities Comm’n, 388 S.E.2d 480, 485 (W. Va. 1989).

<sup>211</sup> In addition to the text of Title IX, the Department of Education has promulgated regulations governing the administration of programs that receive federal funding:

*Separate Teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

45 C.F.R. §86.41(b) (1978) (emphasis added). See Opinion of the Justices, 374 Mass. 836 (1977); Darrin v. Gould, 85 Wash. 2d 859 (1975); Packer v. Pennsylvania Interscholastic Athletic Ass’n, 18 Pa. Commw. Ct. 45 (1975).

<sup>212</sup> Yellow Springs School District Bd. of Educ. v. Ohio High School Athletic Ass’n, 647 F.2d 651, 657 (6th Cir. 1981).

<sup>213</sup> *Id.*

<sup>214</sup> In 1952, the Educational Council of Arkansas issued a statement regarding the inferiority of separate African-American Schools in Little Rock, Arkansas. “The separate educational facilities for Negroes in this city are not equal to those for whites . . . [t]he material basis of education could, of course, be equalized but at a staggering cost to the taxpayer . . . [t]he only practical, realistic, and ethical answer is integration.” *Educational Council Issues Report on Separate but Equal*, Old State House Museum, Fall 1989, available at [http://www.oldstatehouse.com/educational\\_programs/classroom/arkansas\\_news/detail.asp?id=43&issue\\_id=5&page=2](http://www.oldstatehouse.com/educational_programs/classroom/arkansas_news/detail.asp?id=43&issue_id=5&page=2) (last visited Mar. 8, 2005) (emphasis added).

There are a number of cases in which the courts have permitted girls to participate on coeducational sports teams.<sup>215</sup> The existence of a girls' team in a particular sport does not bar a girl from trying out or participating on a boys' team. In *Morris v. Michigan State Bd. of Education*,<sup>216</sup> the Sixth Circuit permitted two high school girls to tryout for and participate on the boys non-contact sports teams.<sup>217</sup> Alternatively, girls have consistently been awarded the right to play on boys' teams where no comparable women's team exists. The legality of coeducational teams in secondary and postsecondary institutions is strong precedent for its permissibility in municipal sports as well.

The physical differences between men and women do not create sufficient differences in their athletic abilities to merit sex-separate teams in municipal sports. While it is acknowledged that men on average possess larger muscle mass, higher proportion of lean body tissue, greater cardiovascular capacity, and greater height,<sup>218</sup> those capabilities do not necessarily translate into greater performance in athletics. Women have greater balance, greater endurance, a lower incidence of injury than men, and retain body heat longer.<sup>219</sup> "Coordination, concentration, strategic acumen, and technique or form (capabilities of both sexes) intermix with strength and speed (where males have some biologic advantages) to produce athletic results."<sup>220</sup> Since many of the physical differences in men come with the onset of puberty, young boys and girls have more similar skill sets.<sup>221</sup> The absence of physical superiority makes implementing coeducational teams in municipal sports extremely desirable.

Implementing coeducational municipal sports teams would permit the Parks Department to increase opportunities for women, while reducing the cost of expansion. The argument that allowing coeducational teams will reduce the number of female participants as more skilled male athletes will inevitably take those spots<sup>222</sup> is rebutted as the skill levels of young boys and girls are effectively similar at young ages. However, if one were to accept the argument as the basis for maintaining sex-separate teams, in sports where male physical advantages are moot, such as gymnastics, swimming and riflery, the argument fails.<sup>223</sup> The corollary justification that boys would dominate certain sports if teams were mixed is less compelling given the skill set similarity of boys and girls at young ages. Courts have recognized that there will be difficulties in maintaining fair

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<sup>215</sup> See *Brenden v. Independent School Dist.*, 477 F.2d 1292 (8th Cir. 1973); *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F. Supp. 1117 (E.D. Wis. 1978); *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977); *Haas v. South Bend Community School Corp.*, 289 N.E.2d 495 (Ind. 1972).

<sup>216</sup> See *Morris v. Michigan State Board of Education*, 472 F.2d 1207 (6th Cir. 1973) (where two high school girls were denied tryouts to play on the boys varsity tennis team).

<sup>217</sup> *Id.* at 289.

<sup>218</sup> *Mass. Interscholastic Athletics Ass'n.*, 393 N.E. 2d at 293 n. 34.

<sup>219</sup> *Id.*

<sup>220</sup> *Mass. Interscholastic Athletics Ass'n.*, 393 N.E. 2d at 293.

<sup>221</sup> *Cheering On Women and Girls In Sports*, *supra* note 2, at 1643.

<sup>222</sup> *Mass. Interscholastic Athletics Ass'n.*, 393 N.E. 2d at 295.

<sup>223</sup> *Id.*

competition among mixed sports teams, “but it would be premature to assume that the difficulties are insurmountable.”<sup>224</sup> Though there may be some initial periods where competition is affected, remedying those problems calls “merely for a modicum of toleration and some imaginative willingness to try new combinations.”<sup>225</sup> Preventing the Parks Department from creating coeducational municipal sports teams, based on suspect gender stereotypes, is fiscally irresponsible and frustrates the spirit of AB 2404.

Finally, to determine the viability of coeducational sports teams as an economical way of complying with AB 2404, the Parks Department must assess the competing scholarship regarding the effect of coeducational sports teams on young girls. There is extensive scholarship describing the unique benefits of playing in an all-girls environment. In *Baca*, the plaintiffs highlighted the benefits to young girls of playing on a women-only sports team. The plaintiffs argued that girls benefit from “close-knit social networks of single sex sports teams” where they develop self-confidence.<sup>226</sup> In addition, the plaintiffs argued that participation in distinctive female sports challenges traditional myths regarding female frailty.<sup>227</sup> Finally, the plaintiffs concluded that coed sports teams result in the disparate treatment of young girls, and thus girls-only teams should be fostered by providing them with equal facilities.<sup>228</sup> Though these arguments are made in support of expanding women’s rights, they incorporate stereotypes of girls as inferior and suffering indignity by participation on coed teams. An analysis more focused on changing the negative perception of girls in sports is more productive for the rights of young women than simply arguing for greater funding in segregated athletics.

Conversely, some feminist scholars advocate participation on coed teams specifically at a young age in order to foster positive athletic images in young girls. Some feminist scholars feel that sex-segregated teams send a message to girls that they are somehow different than boys in relation to sports.<sup>229</sup> Since many teams in municipal sports are sex-separate<sup>230</sup> this socialization of girls begins at a very young age. This socialization is based in the masculine dominated conception of sports that our society perpetuates. The result is that “many communities call for separate teams because parents are concerned that boys will be humiliated when girls outperform them.”<sup>231</sup> These advocates argue that coeducational sports teams will not set back girls sports, but rather, “immuniz[ing] girls’ teams totally from any possible contact with boys might well perpetuate a psychology of ‘romantic

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Lourdes, *supra* note 1, at 161.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Cheering On Women and Girls in Sports*, *supra* note 2, at 1641.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

paternalism' inconsistent with such development and hurtful to it in the long run."<sup>232</sup>

Taking into account the existing scholarship advancing both the positive and negative impact on young girls of playing on coeducational sports teams, perhaps the best solution for the California Parks and Recreation Department is to choose a middle ground. One court has suggested instituting strict performance guidelines for boys and girls playing on coeducational teams to assure that the effects of the small biological differences between boys and girls are reduced:

Use of standards focusing on height, weight, or skill rather than solely on gender represents one such approach: males would thus be admitted who could not dominate the mixed teams or overwhelm the opposition. Admission could perhaps be regulated by handicapping in a sport like golf. On another level also, lesser measures than complete exclusion suggest themselves. Where boys' teams were not feasible, admission of boys to girls' teams could be limited, not to exceed reasonable numbers. In particular situations, rotating systems might be adopted by which qualified boys were admitted but only a certain number could play in a given game.<sup>233</sup>

Adopting this method of creating coed municipal sports teams would allow the California Parks and Recreation Department to limit the cost of expanding municipal sports opportunities for girls by taking advantage of existing facilities without affecting the safety or psyche of those girls.

California legislators took a bold step forward by adopting the three-part test in AB 2404 to end gender discrimination in municipal sports. The California legislature should be applauded for setting a standard of equality many states will hopefully soon follow. Though the three-part test has been extensively criticized, it has proven to be an effective and durable test for establishing Title IX compliance. By enacting the three-part test, California legislators have an opportunity to remedy some of its failings by slightly altering the administration of the test. By focusing on the interest accommodation portion of the test to ensure compliance and by implementing coeducational teams to reduce the financial burdens of increased girls' participation, California can provide beneficial opportunities to both boys and girls in its municipal sports programs. Everyone should have the opportunity to play little league. California is making sure that happens.

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<sup>232</sup> *Mass. Interscholastic Athletics Ass'n.*, 393 N.E. 2d at 296.

<sup>233</sup> *Id.* at 361.