

# EVALUATING OPPORTUNITY IN COLLEGE SPORTS (TITLE IX)

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## TABLE OF CONTENTS

INTRODUCTION.....	314
I. TITLE IX PURPOSE, SCOPE, STATUTORY FRAMEWORK, AND HISTORY .....	317
A. Purpose and Scope of Title IX Coverage in College Athletics .....	317
B. Statutory and Regulatory Framework of Title IX in College Sports.....	318
C. The Three-Prong Effective Accommodations Test .....	319
D. Separate Teams—The Contact Sports Exception.....	324
E. Case Law—Historical Policy Interpretations of Title IX .....	325
1. <i>Cohen v. Brown University</i> .....	325
2. <i>Pederson v. Louisiana State University</i> .....	326
3. <i>Blair v. Washington State University</i> .....	327
II. EVALUATING THE COMPETING INTERESTS.....	327
A. Female Athletes .....	327
B. Male Athletes.....	328
C. Institutional Interests .....	329
D. Societal Interests.....	330
III. PROPOSED CHANGES TO OCR’S TITLE IX INTERPRETATION.....	331
A. Evaluating Individual Sport-Specific Comparisons in the Three- Part Test.....	331
B. Gender-Specific Sports Without an Equivocal Comparison.....	333
C. OCR’s Title IX Regulations Need to Discard the Contact Sports Exception.....	333
CONCLUSION.....	335

## INTRODUCTION

College sports have never been the same since the enactment of Title IX in 1972, which outlawed gender discrimination in educational institutions.<sup>1</sup> Title IX mandates that “[n]o 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 education program or activity receiving Federal financial assistance.”<sup>2</sup> Over the past four decades, opponents and proponents of Title IX have continued to recycle arguments that either challenge or reinforce Title IX’s application to college sports.<sup>3</sup> In the context of college sports, university compliance with Title IX will inevitably affect current college athletes, but also the direction of future college athletes who have yet to select a university to attend.<sup>4</sup>

The Office for Civil Rights (“OCR”),<sup>5</sup> a division of the Department of Health, Education and Welfare, is charged by Congress to interpret Title IX and issue as well as implement regulations regarding Title IX.<sup>6</sup> The OCR is also responsible for overseeing Title IX compliance at universities.<sup>7</sup> While universities are deemed to have “considerable flexibility”<sup>8</sup> to comply with Title IX and the OCR, the lack of stringent compliance standards ultimately results in more Title IX lawsuits because of the diversity of ways in which universities choose to comply with the statute.<sup>9</sup>

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<sup>1</sup> 20 U.S.C. § 1681 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> See Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 *MARQ. SPORTS L. REV.* 11 (2003); Emily Dane, Lecture, *When It Comes to Title IX, Please Don’t Recycle*, ST. JOHN FISHER COLLEGE (Feb. 26, 2009), <http://www.sjfc.edu/academics/arts-science/departments/gender/news-detail.dot?id=82505>; Christine I. Hepler, *A Bibliography of Title IX of the Education Amendments of 1972*, 35 *W. NEW ENG. L. REV.* 441, 443 (2013).

<sup>4</sup> Frank Deford, *Title IX At 40: What Has Changed, and What’s Next*, NPR (June 20, 2012, 3:05 AM), <http://www.npr.org/2012/06/20/155346338/title-ix-at-40-what-has-changed-and-whats-next>; Jane McManus, *NCAA Reforms: Good for Female Athletes?*, ESPN (Aug. 13, 2014), <http://espn.go.com/espn/w/news-commentary/article/11347170/espnw-why-ncaa-reforms-really-good-really-bad-women-sports>.

<sup>5</sup> *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996).

<sup>6</sup> Nat’l Collegiate Athletic Ass’n, *Title IX Frequently Asked Questions*, NCAA (Jan. 15, 2015), <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions#apply>.

<sup>7</sup> Diane Heckman, *New Rules for the Game Mark the 35th Anniversary of Title IX Involving Athletic Programs*, 234 *ED. LAW REP.* 515, 516 (2008).

<sup>8</sup> U.S. Dept. of Educ., Office for Civil Rights, *Requirements Under Title IX of the Education Amendments of 1972* (1972), <http://www2.ed.gov/about/offices/list/ocr/docs/interath.html>.

<sup>9</sup> Zachary W. Anderson, *Title IX Compliance: In the Name of Financial Stability or Gender Equality? An In-Depth Review of Title IX and the University of Nebraska at Omaha Athletic Department’s Compliance*, 10 *WILLAMETTE SPORTS L.J.* 33, 34 (2012) (“[Secretary of Health, Education and Welfare] continued to influence how universities were to comply with Title IX in

Title IX compliance requires a complete and thorough evaluation of the opportunities a university athletic program provides for each male and female athlete.<sup>10</sup> Therefore, an individual sport is not required to have identical accommodation between the male and female athletes in that sport.<sup>11</sup> In order to clarify the Title IX obligations imposed on universities, the OCR's policy interpretation maps out the "Three-Part Test," a test used to determine whether both male and female students are provided nondiscriminatory opportunities to participate in athletics.<sup>12</sup> Moreover, the OCR's policy clarification assures that a university athletic program needs to comply with merely one of the prongs of the three-part test to provide nondiscriminatory participation opportunities for individuals of both sexes.<sup>13</sup>

This Note proposes changes to how the OCR and the courts should analyze Title IX discrimination claims in the context of college sports in order to more effectively provide equality amongst female and male athletes. Specifically, instead of evaluating the male-female proportionality of a university's total student body with the proportion of male-female student athletes (prong one of the three-part test) participating in the university's athletic program as an initial inquiry for compliance with Title IX, an evaluation should be made of each individual sport at the target university. This proposed evaluation would better determine whether the university is partaking in discriminatory acts based on sex or other economic, historical, or preferential decisions. By examining the equality of individual sports in an athletic program to determine whether a Title IX violation exists, courts will have a narrow, centralized focus on comparing any discriminatory practices in a particular sport. An evaluation of an athletic program's individual sports on a case-by-case basis is necessary not only to identify the root of any discrepancies between sports that both men and women participate in, but also to provide an outlook on what is valued by a specific university, or university athletic program, as a whole. Courts implementing this analysis should be allowed the flexibility to separate any comparisons of sports without an equivocal comparison. In effect, this would maintain Title IX's design to promote female athletics and prevent discrimination. Additionally, a case-by-case analysis of a university's sports program would reduce the chance of any men's or women's athletic program being cut as a result of a university attempting to comply with Title IX through the Three-

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intercollegiate athletics, universities still struggled with Title IX compliance and over one hundred discrimination complaints from across the nation were received from 1975-1979.").

<sup>10</sup> Nat'l Collegiate Athletic Ass'n, *supra* note 6.

<sup>11</sup> *What Is Title IX?*, MYRA SADKER FOUND., <http://www.sadker.org/TitleIX.html> (last visited Mar. 12, 2016) ("Schools do not necessarily need to offer identical sports, yet they do need to provide an equal opportunity for females to play in sports of interest.").

<sup>12</sup> U.S. Dept. of Educ., Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guideline: The Three-Part Test* (Jan. 16, 1996), <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

<sup>13</sup> *Id.*

Part Test because an equal gender-ratio of a school's student body compared to the athletic participants will not automatically result in Title IX compliance.

While assessing case law following the OCR's contestable Title IX policy interpretation, this Note explores the developing arguments, competing interests, and potential consequences involved in determining whether an athletic program has violated Title IX. Additionally, the continued increase in economic and conflicting societal demands that make compliance with Title IX an ongoing struggle for universities will be explored.

Part I of this Note explains the purpose of Title IX claims and determines Title IX's scope regarding college athletic programs. This part will show that college athletic programs, regardless of whether an institution is private or public, are subject to Title IX's requirements. Moreover, this part will detail the history of different policy interpretations of Title IX, as well as outline the Three-Part Test, and denote the historical frustration universities have had in complying with Title IX. While each case exhibits different problems in which universities have attempted to comply with Title IX, the common denominator among the cases remains that the outcome either places an unreasonable burden on a university or results in unjustified gender discrimination.

Part II will evaluate the competing arguments of female athletes, male athletes, and universities, and how these arguments have maintained consistency, but have been either strengthened or weakened over time by various economic and societal reasons. The continued rise in popularity and revenue in specific college sports (i.e., men's football and men's basketball) has reinforced not only the societal and economic value in maintaining these sports, but also the arguments that call for these sports to be considered separately under an evaluation of whether a university athletic program has complied with Title IX.

Part III will propose these changes: (1) when interpreting the Three-Part Test, a sport-specific comparison should be used to determine whether there are equal opportunities presented for each gender; (2) gender-specific sports without an equivocal comparison for each gender (i.e., football) should be evaluated by looking at the athletic opportunities provided to each gender while considering the opportunity of the excluded sex to participate in the sport, the economic cost and benefit of a particular sport (including if the money is dispersed between all sports), and the consequences of a finding that a particular university has violated Title IX; and (3) OCR's Title IX regulations need to discard the contact sports exception to further enhance equality between male and female athletes.

This Note will conclude by commenting on how the proposals in Part III will have a greater impact and be more effective in furthering the goals of Title IX: gender equality and prevention of sex-based discrimination.

## I. TITLE IX PURPOSE, SCOPE, STATUTORY FRAMEWORK, AND HISTORY

*A. Purpose and Scope of Title IX Coverage in College Athletics*

The purpose of Title IX is to prohibit gender-based discrimination in any educational program receiving federal financial assistance.<sup>14</sup> Therefore, by receiving federal funds, a university is subject to the Title IX requirement to provide equal accommodations for each gender.<sup>15</sup> In regards to athletic programs, the core of Title IX's purpose mandates equal opportunity to participate in athletics.<sup>16</sup> In reality, the majority of colleges and universities receive federal financial support and therefore are subject to Title IX regulations.<sup>17</sup> Title IX "requires that schools (1) provide male and female students with equal opportunities to play sports, (2) give male and female athletes their fair shares of athletic scholarship dollars, and (3) provide equal benefits and services (such as facilities, coaching, and publicity) to male and female athletes overall."<sup>18</sup> Since the enactment of Title IX, its application to athletic programs has given rise to concerns over increasing reductions in benefits and services for men's athletic programs.<sup>19</sup> For many schools, the men's football budget far exceeds the budget for any other sport, and men's athletics generally receives a vastly disproportionate share of resources in comparison to the female athletics.<sup>20</sup> When first applying Title IX to college athletics, the absence of secondary legislative material resulted in confusion over Title IX's coverage and application to college sports.<sup>21</sup>

While athletic programs initially remained under the coverage of Title IX, the Supreme Court in *Grove City College v. Bell* recognized that Title IX's provisions were "program-specific."<sup>22</sup> In other words, Title IX only applied to the programs within a university that directly received federal funds and not to the rest of the university,<sup>23</sup> leaving women seeking to participate in collegiate athletic programs with no substantive protection under Title IX.<sup>24</sup> Many university programs, such as research and development programs, are the primary beneficiaries of federal

<sup>14</sup> 20 U.S.C. § 1681 (2012).

<sup>15</sup> *Id.*

<sup>16</sup> *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993).

<sup>17</sup> *Id.* at 893.

<sup>18</sup> NAT'L WOMEN'S LAW CTR., TITLE IX 40 YEARS AND COUNTING (2012), [http://www.nwlc.org/sites/default/files/pdfs/nwlcathletics\\_titleixfactsheet.pdf](http://www.nwlc.org/sites/default/files/pdfs/nwlcathletics_titleixfactsheet.pdf).

<sup>19</sup> Anderson, *supra* note 9, at 35-36.

<sup>20</sup> *Cohen*, 991 F.2d at 893; *see also* Charles P. Beveridge, *Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletic Teams*, 1996 U. ILL. L. REV. 809 (1996).

<sup>21</sup> *Cohen*, 991 F.2d at 893.

<sup>22</sup> *Grove City Coll. v. Bell*, 465 U.S. 555, 560-62 (1984); *see also* Haffer v. Temple Univ. of the Com. Sys. of Higher Educ., 678 F. Supp. 517 (E.D. Pa. 1987), *on reconsideration sub nom.*, Haffer v. Temple Univ. of Com. Sys. of Higher Educ., No. CIV.A. 80-1362, 1988 WL 3845 (E.D. Pa. Jan. 19, 1988).

<sup>23</sup> *Cohen*, 991 F.2d at 894.

<sup>24</sup> P. Michael Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 MARQ. SPORTS L.J. 149, 168 (1990).

funding and are thus required to adhere to Title IX's requirements.<sup>25</sup> Other university programs, including many athletic programs, are not direct recipients of federal funding and therefore were not subject to Title IX at the time of the *Grove City College* decision.<sup>26</sup> This is important because athletic departments could successfully remain out of Title IX's reach so long as these departments do not receive federal money.<sup>27</sup> As a result, the *Grove City College*<sup>28</sup> decision led to a loss of women's programs and scholarships at the university level.<sup>29</sup>

In response to the *Grove City College* decision, Congress passed the Civil Rights Restoration Act of 1987<sup>30</sup> to revive Title IX regulations and offer guidelines to sports administrators to comply with the statute.<sup>31</sup> The Restoration Act mandated that "any arm of an educational institution receiv[ing] federal funds . . . must comply with Title IX's provisions."<sup>32</sup> Although the Restoration Act does not explicitly identify sports as an "arm" of a university, there is little doubt that the enactment's purpose was to create a level playing field for female athletes.<sup>33</sup> As a result of the Restoration Act, college athletic departments were without question subject to Title IX regulations.<sup>34</sup>

### *B. Statutory and Regulatory Framework of Title IX in College Sports*

While Title IX and the Restoration Act<sup>35</sup> both speak to a broad prohibition against gender discrimination in all programs of educational institutions, these laws does not explicitly address college athletics.<sup>36</sup> Consequently, the OCR—the administrative agency responsible for implementing Title IX<sup>37</sup>—plays an important role that has practical and legal consequences.<sup>38</sup> When Congress explicitly

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<sup>25</sup> Ass'n of Am. Univs., *University Research: The Role of Federal Funding* (2011), <http://www.aau.edu/WorkArea/DownloadAsset.aspx?id=11588>.

<sup>26</sup> *Cohen*, 991 F.2d at 894.

<sup>27</sup> *Id.* ("most federal money for universities is channeled through financial aid offices or invested directly in research grants—*Grove City* cabined Title IX and placed vitally all collegiate athletic programs beyond its reaching").

<sup>28</sup> *Id.*

<sup>29</sup> Villalobos, *supra* note 24.

<sup>30</sup> 20 U.S.C. § 1681 (2012).

<sup>31</sup> Villalobos, *supra* note 24, at 149.

<sup>32</sup> See *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993).

<sup>33</sup> *Id.*; *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578 (3d Cir. 1993).

<sup>34</sup> *Cohen*, 991 F.2d at 894.

<sup>35</sup> *Id.*

<sup>36</sup> Sarah Witham, Comment, *Title IX Shift in Focus from Education to Athletics*, TRINITY COL. (May 3, 2013), <http://commons.trincoll.edu/edreform/2013/05/title-ix-shift-in-focus-from-education-to-athletics/>; see also *Cohen*, 991 F.2d at 894.

<sup>37</sup> *Title IX Frequently Asked Questions*, NCAA (Jan. 15, 2015), <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions#apply>.

<sup>38</sup> *Cohen*, 991 F.2d at 895; see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) ("[C]ontrary to the statute . . . [s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

delegates responsibility to an administrative agency, the agency's regulations deserve "controlling weight."<sup>39</sup> However, because Congress did not explicitly mention any committee report in the final bill discussing the scope of Title IX's coverage, the OCR published a "Policy Interpretation" detailing the measure of equal athletic opportunity.<sup>40</sup> This guideline resulted in the birth of the "Three-Part Test" that the OCR has continued to use for evaluating violations of Title IX based on gender discrimination in college athletics.

The Three-Part Test is the OCR's policy guideline for determining whether a university athletic program is within the acceptable standards of Title IX.<sup>41</sup> Although typically referred to as a "test," this policy instruction outlines three different alternatives, or "prongs," for university athletic program compliance with Title IX. In other words, a university athletic program need only satisfy one of the prongs in order to comply with Title IX regulations.<sup>42</sup>

This Note analyzes the regulatory framework behind Title IX's application to college sports and proposes three changes: (1) the application of a sport-specific comparison to determine whether there are equal opportunities presented for each gender; (2) sports without a comparable sport between genders will be evaluated individually based on a separate criteria to ensure equality and Title IX compliance; and (3) the elimination of the Contact Sports Exception. Moreover, a university's compliance with sports dominated by one gender should be evaluated on a fact-specific, case-by-case basis. The considerations should include, but should not be limited to, the strength of any student interest, the university interest, societal interest in the sport, and the university's overall Title IX compliance.

### C. *The Three-Prong Effective Accommodations Test*

The three-prong effective accommodations test (Three-Part Test) provides a tool for determining whether an athletic program is complying with the equal opportunities requirement of Title IX.<sup>43</sup> The OCR's policy interpretation of Title IX provides the analytical framework for assessing a Title IX claim under the Three-Part Test.<sup>44</sup> In essence, a university that conforms to any one of the following three prongs complies with Title IX:

<sup>39</sup> *Id.* at 843-44 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

<sup>40</sup> *Cohen*, 991 F.2d at 895.

<sup>41</sup> Office for Civil Rights, *supra* note 12.

<sup>42</sup> *Id.*

<sup>43</sup> *Pederson v. La. State Univ.*, 213 F.3d 858, 879 (5th Cir. 2000); *see also* *Beveridge*, *supra* note 20, at 820.

<sup>44</sup> OCR Policy Interpretation, 44 Fed. Reg. 71413-01 (Dec. 11, 1979), <http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>; *Pederson*, 213 F.3d at 897.

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) 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 [the underrepresented] sex; or
- (3) Whether it can be demonstrated that the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated by the present program.<sup>45</sup>

The first prong—substantially proportionate prong—is considered a “safe harbor”<sup>46</sup> for universities that have distributed athletic opportunities in numbers substantially proportionate to the gender composition of their student bodies.<sup>47</sup> This prong is the center of controversy for gender equity claims, typically by men’s athletic teams that have been cut as a result of universities seeking to comply with Title IX through this prong.<sup>48</sup> Additionally, this prong is a widely accepted compliance method by courts because it provides a measure (comparing the gender ratio of the total student body with the gender ratio of athletic participants in an entire athletic program) that presumes a university’s compliance.<sup>49</sup> To close the gap between the gender ratio of the student body and athletic program, “schools essentially have two options: they can increase women’s opportunities or make cuts in men’s athletic programs.”<sup>50</sup> One strategy for a university to comply with Title IX under the first prong of the Three-Part Test is to cut athletic programs to equate the gender ratio of athletic participants with the gender ratio of the university’s student body.<sup>51</sup> Opponents of Title IX argue that a university’s compliance under the first prong has led to a reduction in men’s athletic programs because of the financial inability to equate gender ratios by increasing female teams (especially considering the disproportionality that all-male sports contribute to this evaluation).<sup>52</sup> Compared to the other two prongs, a university that complies with

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<sup>45</sup> Beveridge, *supra* note 20, at 820.

<sup>46</sup> *Id.*; *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993).

<sup>47</sup> Jerry R. Parkinson, *Grappling with Gender Equity*, 5 WM. & MARY BILL RTS. J. 75, 102 (1996).

<sup>48</sup> Anderson, *supra* note 9, at 37.

<sup>49</sup> Elisa Hatlevig, *Title IX Compliance: Looking Past the Proportionality Prong*, 12 SPORTS LAW J. 87, 102 (2005). Increasing the budget and expenditures for revenue sports causes universities to cut smaller, non-revenue sports because of financial stresses. *Id.*

<sup>50</sup> Parkinson, *supra* note 47, at 92 (“In tough budget times, the latter becomes the more attractive alternative, and most schools, when deciding which men’s programs to cut, adopt a hands-off posture toward ‘revenue-producing’ such as football and men’s basketball. That leaves lower-profile sports, such as gymnastics, swimming, and wrestling, for the chopping block. Thus, both supporters of low-profile men’s sports and of high-profile sports (who fear that their protection from the budget ax soon may expire) have strong incentives to champion a football exemption from the proportionality standard.”).

<sup>51</sup> Hatlevig, *supra* note 49.

<sup>52</sup> Jonathan Zimmerman, *Blame Football, Not Title IX*, L.A. TIMES (Jan. 9, 2014), <http://articles.latimes.com/2014/jan/09/opinion/la-oe-zimmerman-football-title-ix-ncaa-20140109>; see also Beveridge, *supra* note 20, at 809; Julia Lamber, *Gender and Intercollegiate Athletics: Data and*

Title IX through the first prong is more likely to be successful in defending itself against a Title IX inequality claim because this prong shows the interests of the students are being met equally if the total student body enrollment for male and females, respectively, matches male and female athletic participation.<sup>53</sup> Therefore, schools seek to comply with Title IX through the first prong for greater assurance that the school will not be found to have violated Title IX.<sup>54</sup> Ultimately, compliance through the first prong will lead to a reduction in the number of athletic opportunities through the reduction of athletic programs to achieve gender equality.

The second prong—history and continued practice of program expansion—requires a showing of a continuous program expansion that is demonstrably responsive to the developing interest of the underrepresented sex.<sup>55</sup> This prong calls for a historical review of an athletic program to evaluate “when teams were offered for the disadvantaged sex (how long ago) and looks to see if there has been a contemporaneous expansion of the individual program claimed deficient.”<sup>56</sup> While there is no required look-back period for courts to consider, a university eliminating an athletic program (an option many universities choose in an attempt to comply with the first prong) will not indicate program expansion.<sup>57</sup> Notably, in a letter to regulated institutions, the OCR advised that the second prong could not be met by “increas[ing] the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation for the overrepresented sex to a proportionately greater degree than for the underrepresented sex.”<sup>58</sup> Primarily due to financial constraints, few universities would be able to comply with both the first and second prongs because a university would be unable to show continued program expansion for the underrepresented athletes to comply with the second prong while cutting programs to comply with the first prong.<sup>59</sup>

Furthermore, if a university increases the number of athletic teams for females, it should be able to comply with Title IX through the second prong; however, this compliance will only be for a period of time because there is no set

*Myths*, 34 U. MICH. J.L. REFORM 151, 153 (2001).

<sup>53</sup> Sara A. Elliott & Daniel S. Mason, *Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance*, 11 J. LEGAL ASPECTS OF SPORT 1, 11 (2001).

<sup>54</sup> *Id.* (“[B]ecause university administrators do not know the specific measurements required in order to achieve gender equity[, the first prong] provides a safe harbor for athletic programs that effectively accommodate students’ interests and abilities and may provide an alternative method for athletic departments to achieve Title IX compliance.”).

<sup>55</sup> U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (1995); see also Beveridge, *supra* note 20, at 821.

<sup>56</sup> Heckman, *supra* note 7, at 525.

<sup>57</sup> *Id.*

<sup>58</sup> U.S. Dep’t of Educ., Letter from Norma Cantu, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996), <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

<sup>59</sup> Anderson, *supra* note 9. Few schools will be able to comply with Title IX’s effective accommodation requirement by continuing to expand their women’s athletics programs. *Id.*

duration for such compliance. Consequently, a university that complies with Title IX by adding athletic teams will not have certainty how long the university will remain in compliance through the second prong.<sup>60</sup> For example, a university athletic program that adds a female athletic team this year will likely be in compliance with Title IX through the second prong; however, it is uncertain whether the university will remain in compliance with Title IX in future years if no new programs are added.

A university complies with the third prong of the Three-Part Test if the university is “fully and effectively accommodating the interests and abilities of its students.”<sup>61</sup> This prong examines whether there is a legitimate interest in having certain sports teams offered to each gender or both genders<sup>62</sup> and sets a high standard for universities to demonstrate that they have sufficiently accommodated the interests of its’ student body.<sup>63</sup> The third prong is “considered one of the most viable solutions to Title IX, but perhaps also the most difficult to apply because of the hardship in maintaining a current program and meeting the needs of current interests and abilities of the underrepresented sex.”<sup>64</sup>

If a university demonstrates that females are less interested in participating in athletics, a school is not guilty of a Title IX discrimination claim simply because females disproportionately participate in the university’s athletics.<sup>65</sup> To address how courts should inquire about the “interests” and “abilities” of a particular university’s students, the OCR issued the “Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three” that contains a “User’s Guide to Developing Student Interest Surveys.”<sup>66</sup> The OCR created a Model Survey to evaluate student interests and abilities to gauge student interest in different sports.<sup>67</sup>

While the third prong—ensuring gender equality in athletics—appears to be the most reasonable to ensure the goal of Title IX in college sports is effectuated, this prong has been problematic for universities to implement because this prong

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<sup>60</sup> Karen Owoc, *Title IX and Its Effect on Men’s Collegiate Athletics* (2009), <http://usa-sports.org/TitleIX.pdf> (“Prong 2. Program Expansion where the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex (female students). *That means, if a school has added teams for women or girls recently and over the years, it is probably in compliance—although only for a period of time.*”).

<sup>61</sup> Beveridge, *supra* note 20, at 821.

<sup>62</sup> Heckman, *supra* note 7, at 525. There is no affirmative obligation to provide teams and there must be enough females to form a team. *Id.*

<sup>63</sup> *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 831 (10th Cir. 1993). Courts demand “not merely some accommodation, but full and effective accommodation.” *Id.* See also *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993).

<sup>64</sup> Anderson, *supra* note 9.

<sup>65</sup> Beveridge, *supra* note 20, at 821.

<sup>66</sup> U.S. Dep’t of Educ., Letter from Norma Cantu, *supra* note 58.

<sup>67</sup> *Id.*

leaves substantial discretion to the judiciary.<sup>68</sup> Regardless of the OCR's attempt to standardize how universities gauge the interests of each gender at a specific institution, the constantly changing student interests between different generations prevent devising any uniform model for determining the third prong.<sup>69</sup> Moreover, the expense associated with conducting such surveys to determine student interests and abilities would further deter a university from attempting to comply with Title IX through the third prong.

Comparing the three prongs of the Three-Part Test, the first prong is the path most often chosen by a university seeking to comply with Title IX because the substantial proportionate prong does not pose the same financial burden or administrative obstacles that the second and third prong of the Three-Part Test do, respectively. Moreover, a university has a financial incentive to comply with Title IX through the first prong by reducing athletic programs.<sup>70</sup> The second prong will require a university to continuously increase its budget through the expansion of athletic programs. Additionally, while the third prong may be more reasonable for universities to comply with Title IX by showing they have fully accommodated the interests of their students than the first prong, the inescapable difficulties in understanding constantly changing student interests through survey evidence gives courts flexibility when considering evidence for this prong.<sup>71</sup> Despite the OCR's numerous attempts to clarify how courts should interpret the third prong of the Three-Part Test, universities still attempt to comply with Title IX through the first prong rather than the third prong because of the innate difficulties in assessing a university's student interest and abilities.<sup>72</sup> As a result of the financial difficulties of complying with the second prong, and the difficulties in assessing students' interests for compliance with the third prong, courts continue to use the substantial proportionality prong to assess compliance with Title IX.<sup>73</sup>

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<sup>68</sup> David Klinker, *Why Conforming with Title IX Hurts Men's Collegiate Sports*, 13 SETON HALL J. SPORTS L. 73, 79 (2003). In regards to the third prong, "there are no provisions or guidelines to help universities assess students' abilities and interests, and courts have been reluctant to rule on this issue or offer any clarification." *Id.*

<sup>69</sup> *Id.* ("While an institution can comply with Title IX by accommodating the interests and abilities of the two sexes, many limitations exist in practice. A potential problem would be reconciling the issue of how to maintain a competitive program while adjusting to the changing interests and abilities of female students.")

<sup>70</sup> *Title IX—An "Incentive" to Cut Men's Collegiate Sports?*, NE NEWS NOW (May 14, 2009), <http://onenewsnow.com/education/2009/05/14/title-ix-an-incentive-to-cut-mens-collegiate-sports>.

<sup>71</sup> Anderson, *supra* note 9, at 37. Prong three of is "problematic for universities to implement because courts have not interpreted it well. *Id.* More notably, experts believe the OCR and courts have failed to provide any provisions to assess students' abilities and interest, making it nearly impossible for universities to know if they are in compliance with nonexistent parameters." *Id.*

<sup>72</sup> Klinker, *supra* note 68, at 83.

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

*D. Separate Teams—The Contact Sports Exception*

The “Contact Sports Exception” is a caveat to the Three-Part Test that allows a university to prohibit females from partaking in contact sports.<sup>74</sup> OCR regulations recognize that an athletic program may consist of gender-separate teams if either (1) the sport in which the team competes is a contact sport, or (2) the selection for such teams is based on competitive skill.<sup>75</sup> However, since Title IX’s enactment, no cases have challenged the competitive skills criteria that allow for gender-separate teams,<sup>76</sup> so Title IX lawsuits have been based on contact sports exception. Whether a sport is a “contact sport” will ultimately have an effect on a university athletic program’s compliance with Title IX because under the OCR regulations,<sup>77</sup> a university is not required to allow an excluded sex the opportunity to try out for the contact sport.<sup>78</sup> For example, football undoubtedly qualifies as a contact sport.<sup>79</sup> As a result, a university can comply with Title IX without allowing females to try out for a university’s football team.<sup>80</sup> However, if women are allowed to try out for a typically all-male contact sport, the program is subject to a more stringent anti-discrimination standard than a contact sport that does not allow the underrepresented sex to try out.<sup>81</sup> Consequently, a university has an incentive to disallow an under-represented sex (typically females) to try out for single-sex contact sports teams so that the sport falls under the contact sports exception.<sup>82</sup> Simply put, the Title IX regulations allow a university to prevent females from trying out for an all-male team deemed a contact sport without any direct repercussions based on gender inequality.<sup>83</sup>

<sup>74</sup> 34 C.F.R. § 106.41(b) (1972) (“[W]here 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.”).

<sup>75</sup> *Id.*

<sup>76</sup> Heckman, *supra* note 7, at 519.

<sup>77</sup> 34 C.F.R. § 106.41(b) (1972). Contact sports include “hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.” *Id.*

<sup>78</sup> *B.C. v. Bd. of Educ., Cumberland Reg’l Sch. Dist.*, 531 A.2d 1059, 1069 (N.J. Super. Ct. App. Div. 1987).

<sup>79</sup> *Id.*

<sup>80</sup> Jessica C. Caggiano, *Girls Don’t Just Wanna Have Fun: Moving Past Title IX’s Contact Sports Exception*, 72 U. PITT. L. REV. 119, 121 (2010) (“These regulations allow for sex-segregated athletic teams and include a contact sports exception (CSE) which provides that covered schools do not have to allow women to try out for men sports exception.”).

<sup>81</sup> *Mercer v. Duke Univ.*, 190 F.3d 643, 647 (4th Cir. 1999) (“If a university chooses not to permit members of the opposite sex to tryout for a single-sex contact -sports team, this interpretation respects that choice. At the same time, however, the reading of the regulation we adopt today, unlike the one advanced by appellees, ensures that the likewise indisputable congressional intent to prohibit discrimination in all circumstances where such discrimination is unreasonable—for example, where the university itself has voluntarily opened the team in question to members of both sexes—is not frustrated.”).

<sup>82</sup> *Id.* at 648 (“Once an institution has allowed a member of one sex to try out for a team operated by the institution for the other sex in a contact sport, subsection (b) is simply no longer applicable, and the institution is subject to the general anti-discrimination provision.”).

<sup>83</sup> Heckman, *supra* note 7, at 519.

*E. Case Law—Historical Policy Interpretations of Title IX*1. *Cohen v. Brown University*

*Cohen v. Brown University* represents the first case that engaged in an in-depth analysis of a Title IX claim applied to intercollegiate athletics.<sup>84</sup> This First Circuit decision mapped out Title IX's rugged legal terrain<sup>85</sup> and has been followed by multiple other Circuit Courts.<sup>86</sup> In *Cohen*, a female gymnast—Amy Cohen (lead plaintiff)—brought a class action lawsuit against Brown University after Brown announced it would be eliminating four varsity teams because of financial constraints.<sup>87</sup> The *Cohen* court recognized that “schools more often than not attempt to manage the rigors of Title IX by satisfying the interests and abilities of the underrepresented gender, that is, by meeting the third benchmark of the accommodations test.”<sup>88</sup> The court rejected Brown's attempt to shift the burden to the plaintiff to demonstrate a “complicated assessment of ‘interested’ students.”<sup>89</sup> The court deferred to the OCR interpretation of Title IX by evaluating an athletic program based on a comparison of the gender opportunities offered as a whole.<sup>90</sup> In the end, Brown violated Title IX by failing to comply with any of the three prongs of the OCR's Three-Part Test.

*Cohen's* precedent establishes that the university (defendant) carries the high burden of proof for the third prong—fully and effectively accommodating the interests of the underrepresented sex—when attempting to comply with Title IX.<sup>91</sup> Investment in research is necessary for a university to show the court that it fully and effectively satisfies the interests of each sex. As a result, a university will be unlikely able to comply with Title IX through the third prong of the Three-Part Test because of its substantial burden of proof. Therefore, when deciding the path a university should take to avoid a Title IX violation, the third prong presents an unstable and less desirable road that could lead to drawn-out litigation and an uphill battle for the university.

<sup>84</sup> *Cohen*, 991 F.2d at 891.

<sup>85</sup> *Id.*

<sup>86</sup> *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993) (discussing attempt to drop softball and baseball; finding ten percent disparity is too great); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578 (3d Cir. 1993) (discussing attempt to drop two men's and two women's sports); *Beasley v. Ala. State Univ.*, 966 F. Supp. 1117, 1122 (M.D. Ala. 1997); *Bryant v. Colgate Univ.*, No. 93-CV-1029, 1996 WL 328446, at \*10 (N.D.N.Y. June 11, 1996) (attempting to drop two men's and two women's sports); Lamber, *supra* note 52.

<sup>87</sup> See *Cohen*, 991 F.2d at 892 (“[B]roken down as follows: women's volleyball, \$37,127; women's gymnastics, \$24,901; men's water polo, \$9,250; men's golf, \$6,545.”).

<sup>88</sup> *Id.* at 898.

<sup>89</sup> *Cohen v. Brown Univ.*, 879 F. Supp. 185, 205 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996).

<sup>90</sup> *Id.* at 201.

<sup>91</sup> *Id.* at 205.

## 2. *Pederson v. Louisiana State University*

In *Pederson v. Louisiana State University*, female students at Louisiana State University ("LSU") alleged that LSU violated Title IX by failing to accommodate the plaintiffs' interests and abilities in intercollegiate varsity soccer and softball.<sup>92</sup> While the *Pederson* decision concluded by following the OCR's interpretation of Title IX's application to college sports,<sup>93</sup> the district court compared the equality between individual sports amongst male and female athletes to determine whether LSU provided equal opportunity for both male and female athletes.<sup>94</sup> The district court found that the plaintiffs demonstrated sufficient interest and ability in softball, however, they did not have standing to pursue a claim for soccer.<sup>95</sup> This decision was later reversed when the Fifth Circuit Court of Appeals declined to adopt the sport-to-sport comparison analytical framework.<sup>96</sup> Despite the *Pederson* district court's deviation from the *Cohen* analysis of Title IX and the OCR's policy interpretation, the regulation frames the general compliance obligation in terms of program-wide benefits, not benefits for specific programs.<sup>97</sup>

Although the *Pederson* district court's decision was reversed,<sup>98</sup> the lower court's analytical framework illustrated an alternative problem-solving method: comparing each individual sport and the equal opportunity for both sexes to participate in a given sport. Under the district court's framework, individual sports were found to have different results regarding whether the sport complied with Title IX.<sup>99</sup> By specifically identifying sports that do not comply with Title IX, a university can seek a solution to the inequality in that specific sport, instead of a program-wide solution that could ultimately affect both male and females in other sports. Moreover, the *Pederson* district court's analysis emphasizes the benefits an individual sport-to-sport comparison between male and females would have when determining compliance of an athletic program with Title IX.

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<sup>92</sup> *Pederson v. La. State Univ.*, 213 F.3d 858, 878 (5th Cir. 2000).

<sup>93</sup> *Id.* at 877.

<sup>94</sup> *Pederson v. La. State Univ.*, 912 F. Supp. 892, 904 (M.D. La. 1996), *aff'd in part, rev'd in part*, 201 F.3d 388 (5th Cir. 2000), *vacated and superseded by* 213 F.3d 858 (5th Cir. 2000), *aff'd in part, rev'd in part*, 213 F.3d 858 (5th Cir. 2000).

<sup>95</sup> *Id.*; see also Lamber, *supra* note 52, at 177.

<sup>96</sup> Lamber, *supra* note 52, at 180.

<sup>97</sup> *Id.* at 178. While the court of appeals reversed the district court with respect to the standing of the soccer plaintiffs, the court did not indicate disapproval of the lower court's sport-to-sport comparison. *Pederson*, 201 F.3d at 409. In fact, in upholding the district court's substantive decision on Title IX, the court of appeals rejected the University's argument that reliance on the fact that LSU offers men's baseball as evidence of discrimination was improper. *Pederson*, 213 F.3d 879. See also *Kelley v. Bd. of Trs. of Univ. of Ill.*, 35 F.3d 265, 271 n.8 (7th Cir. 1994) (rejecting comparison); *Cook v. Colgate Univ.*, 802 F. Supp. 737, 742-43 (N.D.N.Y. 1992) (relying on a sport-to-sport comparison).

<sup>98</sup> *Pederson*, 912 F. Supp. at 892.

<sup>99</sup> *Id.*

### 3. *Blair v. Washington State University*

In *Blair v. Washington State University*, the Supreme Court of Washington held that the trial court abused its authority by excluding football from consideration when evaluating a Title IX discrimination claim.<sup>100</sup> Despite taking into account each individual athletic team's generated revenue when comparing the disproportionate budgets for the men's and women's athletic programs, the Supreme Court declared that there is no exception for football.<sup>101</sup> Since the *Blair* decision, no court has even hinted at the possibility of a football exemption to Title IX.<sup>102</sup> In essence, *Blair* illustrates arguments opponents to Title IX continue to use to exclude football, and the case sets the precedent that football should not be excluded from any calculations when analyzing Title IX compliance.

The *Blair* decision, in conjunction with the contact-sports exception, results in the sport of football being the crux of a university's decision on how to comply with Title IX. College football's significant expenses take up a considerable amount of a university athletic program's budget<sup>103</sup> and heavily contribute to the unbalanced ratio of male and female athletes in a university's athletic program.<sup>104</sup> In contrast, men's sports such as golf, gymnastics, swimming, and wrestling generally take 1%-2% of an athletic program's total budget.<sup>105</sup> Additionally, these sports more easily allow a university to provide equal opportunities because of the low cost and substantially equal participation between men and women athletes.<sup>106</sup>

## II. EVALUATING THE COMPETING INTERESTS

### A. *Female Athletes*

Advocates for female athletes have consistently maintained their interest in female athletes receiving equal opportunities in college athletics, including equal coaching, equipment, scholarships, and facilities.<sup>107</sup> Female athletes also seek inclusion in contact sports (i.e., football). Moreover, while a university is seeking to comply with Title IX's requirements, female athletes have an interest in

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<sup>100</sup> *Blair v. Wash. State Univ.*, 740 P.2d 1379, 1383 (Wash. 1987).

<sup>101</sup> *Id.*

<sup>102</sup> Parkinson, *supra* note 47, at 93.

<sup>103</sup> Barry Petchsky, *SEC Schools Spend \$163,931 Per Athlete, and Other Ways the NCAA Is a Bonfire For Your Money*, DEADSPIN (Jan. 16, 2013, 11:35 AM), <http://deadspin.com/5976391/sec-schools-spend-163931-per-athlete-and-other-ways-the-ncaa-is-a-bonfire-for-your-money>.

<sup>104</sup> College Football & Scholarship Opportunities, SCHOLARSHIPSTATS.COM, <http://www.scholarshipstats.com/football.html> (last visited Feb. 21, 2016). The average NCAA Division I Football team size consists on 118 athletes. *Id.* Presumably, the vast majority of the athletes that partake in NCAA Division Football are male athletes. *Id.*

<sup>105</sup> Anderson, *supra* note 9, at 40.

<sup>106</sup> *Id.*

<sup>107</sup> *The Battle for Gender Equity in Athletics in Colleges and Universities*, NATIONAL WOMEN'S LAW CTR. (2011), [http://www.nwlc.org/sites/default/files/pdfs/2011\\_8\\_battle\\_in\\_college\\_athletics\\_final.pdf](http://www.nwlc.org/sites/default/files/pdfs/2011_8_battle_in_college_athletics_final.pdf).

universities maintaining the current athletic programs available to female athletes, as well as their male counterparts.

As a result of Title IX, as in *Cohen*, schools facing financial troubles have the option to eliminate both men and women sports in order to comply with the first prong of the Three-Part Test.<sup>108</sup> By eliminating a sport offered to both male and female athletes separately, a university can balance the gender ratio of its' student athletes by choosing which sport of each gender to eliminate. Additionally, cutting a sport offered to both sexes will cast doubt on any contention that there is an unfair elimination of one gender's athletic opportunities because the decision to discontinue sports from both genders gives the appearance of equality, or at least a step towards equality. Regardless, any elimination of female sports has negative consequences for female athletes.<sup>109</sup> Therefore, female athletes prefer universities to find alternative ways to comply with Title IX instead of eliminating sports.<sup>110</sup> If females have any interest in participating in contact sports,<sup>111</sup> then the elimination of the contact sports exception would be the ideal solution to providing broader, and consequently more equal, opportunities for female athletes.

### B. Male Athletes

Parallel to the interest of female athletes for universities to refrain from eliminating female sports, male athletes prefer universities comply with Title IX without cutting any male athletic programs, especially considering that "many institutions have eliminated men's sports teams believing that it is the only way to achieve equality."<sup>112</sup> Because males are not the underrepresented gender in college sports, male athletes have an interest in maintaining their athletic opportunities. In theory, male athletes would rather have universities comply with Title IX through the third prong of the Three-Part Test out of fear that a university may cut male athletic programs to satisfy the first prong through a balance gender ratio, or, the second prong because of budget constraints related to an expanding athletic department.

Even though equal opportunity for female athletes, not male athletes, is the primary purpose of Title IX,<sup>113</sup> the interests of male athletes to maintain their current athletic opportunities cannot be disregarded.<sup>114</sup> Although the percentage of

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<sup>108</sup> *Cohen*, 991 F.2d at 892; see also *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 335 (3d Cir. 1993). Because of "budgetary concerns, I.U.P. decided to shrink the size of its athletic department." *Id.* "It announced plans to discontinue four varsity athletic programs, the men's tennis and soccer teams and the women's gymnastics and field hockey teams." *Id.*

<sup>109</sup> Katie Thomas, *Colleges Cut Men's Programs to Satisfy Title IX*, N.Y. TIMES (May 1, 2011), [http://www.nytimes.com/2011/05/02/sports/02gender.html?\\_r=0](http://www.nytimes.com/2011/05/02/sports/02gender.html?_r=0).

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

<sup>111</sup> *Blair v. Wash. State Univ.*, 740 P.2d 1379, 1379 (Wash. 1987).

<sup>112</sup> Thomas, *supra* note 109; Klinker, *supra* note 68, at 88.

<sup>113</sup> Klinker, *supra* note 68, at 94.

<sup>114</sup> *Id.* at 95.

female athletes in college sports has increased since the enactment of Title IX,<sup>115</sup> female participation levels in college athletics has leveled off at 30%.<sup>116</sup> While this could indicate that schools do not have the financial means or time to balance the gender ratio in their athletic program since Title IX's enactment, a more likely reason behind stagnant female participation is that the interests of female athletes from each generation differ from the previous or following generation.<sup>117</sup> In order to combat any further reduction of athletic opportunities for males, male athletes have a greater incentive to convince courts to use alternative analytical frameworks rather than comparing the gender ratios of a whole athletic program within the university's student body.<sup>118</sup> Under the *Cohen* framework, male athletes face a greater chance of a reduction in athletic opportunities when a university chooses to comply with Title IX through the first prong of the Three-Part Test.<sup>119</sup>

### C. Institutional Interests

Universities have a dual-interest in providing an equal opportunity for their student-athletes and satisfying the different interests of each gender to the university's upmost capabilities. While universities have an interest in establishing a bright-line standard for courts to evaluate Title IX's application to college sports, so that universities will fully understand what is required of them to comply with Title IX, universities also maintain an interest in having flexible guidelines under which a court would find a university in compliance with Title IX. Additionally, universities may have an interest in ensuring the survival of certain sports, either for economic, competitive, or prestigious reasons unique to each university.<sup>120</sup>

With the university athletic program's financial budget constraining the university from satisfying all student athletic interest at any expense, a university that chooses to satisfy gender-equal athletic opportunity in compliance with Title IX will choose between the university's other interests regarding individual sports to sacrifice.<sup>121</sup> For example, a university may decide which sports—each carrying a university-specific aspects of competition, finances, and prestige—to eliminate if a university chooses to comply with the first prong by cutting programs in order to comply with Title IX. Moreover, a university seeking to comply with Title IX through the second prong will inevitably sacrifice their financial interests.<sup>122</sup>

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<sup>115</sup> *Empowering Women in Sports*, FEMINIST MAJORITY FOUND., <http://www.feminist.org/research/sports/sports3.html> (last visited Feb. 2, 2016).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Cohen*, 991 F.2d at 892 (“[A]t Brown, as most schools, women are a relatively inconspicuous part of the storied athletic past. Historically, colleges limited athletics to the male sphere, leaving few women’s teams that sprouted to scrounge for resources.”).

<sup>119</sup> *Id.*

<sup>120</sup> Carrie Lukas, *Title IX’s Dark Legacy*, U.S. NEWS (June 22, 2012), <http://www.usnews.com/opinion/articles/2012/06/22/title-ixs-dark-legacy>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

Attempting to satisfy the third prong, a university not only diminishes its financial interest by collecting survey evidence to present to a court, but also risks the chance the evidence is unable to satisfy this prong to comply with Title IX. A university is inevitably forced to choose between its competing interests. Once a university chooses a course to comply with Title IX—whether it be prestige in maintaining a football program, competing in women's lacrosse, or ensuring equal athletic opportunity between male and female athletes at all costs—a university exposes its underlying priorities. Male and female athletes (not to mention non-student-athletes) should take into consideration information about a university's interests when deciding what college to attend in order to satisfy their own interests and priorities.

#### *D. Societal Interests*

Considering that nearly thirty-five million Americans watched the 2015 College Football Championship Playoff Game,<sup>123</sup> there is no denying the excitement towards college football in America. In fact, since the 1950s, the continued rise to dominance of college football has today resulted in over fifty-five million Americans attending a college football game each year.<sup>124</sup> Due to football's popularity, the societal interest in football may influence a university to maintain a football program for financial reasons.<sup>125</sup> Often, football's popularity brings along with it strong alumni pride for their alma mater's athletic program, including the prestige and competitiveness, which will affect a university's own interest to keep their alumni pleased with the current state of the university.<sup>126</sup>

The interest in men's college basketball has also continued to expand with an average attendance of over 5,000 at NCAA Division I Men's Basketball games.<sup>127</sup> By comparison, attendance at NCAA Division I Women's Basketball games averages around 1,500 attendees.<sup>128</sup> While the disparity between attendance and viewership in comparable male and female college sports does not necessarily lead to the conclusion that society has a greater interest in one gender playing a given sport over the other, the important point to take away from college basketball is that sports for men and women that are equivocal will likely coexist with one another at

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<sup>123</sup> Brad Adgate, *College Football Championship on ESPN Sets Cable TV Viewership Record with First 30+ Million Audience*, FORBES (Jan. 14, 2015), <http://www.forbes.com/sites/bradadgate/2015/01/14/cables-biggest-night/>; Jason Lisk, *College Football Playoff Games Had Three Times as Many Viewers as Any Other Bowl Game*, BIG LEAD (Jan. 14, 2015), <http://thebiglead.com/2015/01/14/college-football-playoff-games-had-three-times-as-many-viewers-as-any-other-bowl-game/>.

<sup>124</sup> *Intense Interest In College Football Continues*, NAT'L FOOTBALL FOUND. (Apr. 9, 2014, 3:00 PM), <http://www.footballfoundation.org/tabid/567/Article/54743/Intense-Interest-in-College-Football-Continues.aspx>.

<sup>125</sup> *Id.*

<sup>126</sup> Mike Fish, *Most Powerful Boosters*, ESPN (Jan. 12, 2006), <http://sports.espn.go.com/nfl/news/story?id=2285986>.

<sup>127</sup> NAT'L COLLEGIATE ATHLETIC ASS'N, 2014 NCAA MEN'S BASKETBALL ATTENDANCE (2014), [http://fs.ncaa.org/Docs/stats/m\\_basketball\\_RB/Reports/attend/2014.pdf](http://fs.ncaa.org/Docs/stats/m_basketball_RB/Reports/attend/2014.pdf).

<sup>128</sup> *Id.*

a university.<sup>129</sup> Sports offered separately for both men and women provide a more straightforward comparison for courts to analyze when determining a Title IX violation.

Society exhibits a greater interest in college football and basketball because of the viewing capabilities and capacities, as well as the overall participation of players in these sports. Sports that are not shown on television do not capture the same level of society's interest, and therefore society often does not notice when such sports are eliminated until the athletes bring it to the public's attention. The overwhelming societal interest in major college sports, such as football and basketball, is to preserve these sports when universities eliminate them to attempt to comply with Title IX obligations.

### III. PROPOSED CHANGES TO OCR'S TITLE IX INTERPRETATION

#### *A. Evaluating Individual Sport-Specific Comparisons in the Three-Part Test*

The Three-Part Test's analytical framework for evaluating Title IX compliance has continuously been reinterpreted and called into question.<sup>130</sup> By comparing the gender ratio between a university's student body and athletic program participation, the current framework requires schools with a football program to make decisions on how to comply with Title IX and provide equal opportunities for female athletes. Because NCAA Division I football teams are allowed eighty-five (85) scholarships,<sup>131</sup> the disproportionate distribution of male athletic scholarships to football results in female athletes receiving more scholarships than males for every other sport that both male and female athletes participate in.<sup>132</sup> While this gives female athletes greater opportunities to receive scholarships in sports offered to both genders (i.e., basketball, swimming, soccer) and balances the total athletic scholarships of male and female athletes, male athletes in non-football sports do not receive the same equal opportunity for their respective sports.<sup>133</sup> Moreover, if in the event a female did try-out and make a football team, would she then be guaranteed a scholarship because she is the only female on the team? One might think so—to balance the reception of equal opportunities to some extent; however, if a female were to receive a football scholarship simply because she is the only female athlete on the team, universities will likely be unwilling to consider a female participant on the football team.

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<sup>129</sup> Shira Boss-Bicak, *25 Years of Coeducation*, COLUMBIA COLLEGE TODAY (2009), [http://www.college.columbia.edu/cct/jul\\_aug09/features1](http://www.college.columbia.edu/cct/jul_aug09/features1).

<sup>130</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978); *Blair v. Wash. State Univ.*, 740 P.2d 1379 (Wash. 1987); *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999); *Boucher v. Syracuse Univ.*, 164 F.3d 113, 115 n.1 (2d Cir. 1999).

<sup>131</sup> Nat'l Collegiate Athletic Ass'n, *College Athletic Scholarship Limits 2013-14*, SCHOLARSHIPSTATS.COM, <http://www.scholarshipstats.com/ncaalimits.html> (last visited Mar. 3, 2016).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

The proposed solution of a sport-to-sport comparison within a university athletic program will ultimately isolate any issues of discrimination within a university and expose the underlying university's interest (besides providing equal opportunity for both genders and complying with Title IX). By identifying which sports provide unequal opportunities, or partake in discriminatory acts within a university's athletic program, universities will aim towards balancing the gender opportunities in those individual sports, rather than resorting to reducing sports programs (both male and female) in an attempt to satisfy the first prong of the Three-Part Test.<sup>134</sup> Additionally, comparing individual sports will allow courts narrowly to identify sports that have made progress toward equal opportunity, which will make for an easier determination and knowledge of whether a university is complying with Title IX through prong two of the Three-Part Test. Finally, an individual sport comparison to whether a university has complied with Title IX through the third prong is the superior alternative of the current analytical framework because courts will be able to better understand a university's underlying interest (competition, preserving a specific sport, prestige, etc.). Additionally, an individual sport comparison will simplify a court's assessment of whether a sport's program complies with Title IX due to the narrow scope of the inquiry, and mandate a higher standard for gender equality—the goal of Title IX. Through an understanding of what a university values when it complies with Title IX, courts will be able to make a consistent and predictable decisions on whether a university athletic program complies with Title IX. While the current student interests are important to consider, the historical values and reputation of a university should hold significant weight because any given set of current student interests will be difficult to gauge and would inevitably change with the next generation of students.<sup>135</sup>

Opponents of this proposal will argue the current analytical framework of the Three-Part Test is more valuable, because of the amount of effort already invested in interpreting the same test for the past forty years would be wasted, than any solution that would be somewhat questionable.<sup>136</sup> However, the risk this proposal carries is substantially low not only because the burden is on courts to evaluate any alleged discriminatory individual sports programs (instead of the entire athletic department) but also because the potential solution is substantially more practical. As a more realistic solution, instead of requiring the entire athletic program to reform, the university would be required to make changes to individual sports to ensure equal opportunities are present.

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<sup>134</sup> *Bakke*, 438 U.S. at 307; *Blair*, 740 P.2d at 1379; *Mercer v. Duke Univ.*, 190 F.3d 643, 647 (4th Cir. 1999); Grace-Marie Mowery, *Creating Equal Opportunity for Female Coaches: Affirmative Action Under Title IX*, 66 U. CIN. L. REV. 283, 283 (1997); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

<sup>135</sup> Jordan Weissman, *Does It Matter Where You Go to College*, ATLANTIC (May 17, 2012), <http://www.theatlantic.com/business/archive/2012/05/does-it-matter-where-you-go-to-college/257227/>.

<sup>136</sup> Villalobos, *supra* note 24.

### *B. Gender-Specific Sports Without an Equivocal Comparison*

In addition to the comparison of individual sports between each gender, gender-specific sports (i.e., football) must be evaluated on separate criteria other than sports with a comparable gender equivalent. By analyzing each sport individually, the outlier sports without a comparable gender equivalent should only be examined under prong three—fully and effectively accommodating the interests of the underrepresented sex—with a strong consideration of the varying interest of the specific university, male athletes, female athletes, and societal surrounding interests. This method will remove any incentive to eliminate programs in order to satisfy the first prong—substantially proportionate—and preserve the existence of such programs, which comports with the common interest amongst male athletes, a university, and society.

Opponents to this framework will contend that sports, such as football, are being excluded from this Title IX compliance analysis because there is no comparison for football and females are being wrongfully ignored for having less total opportunities due to the substantial athletic opportunities football presents.<sup>137</sup> However, with the elimination of the contact sports exception, females will have more opportunities in male-dominant contact sports. Moreover, if the economic justification of having a college football team is not enough to persuade opponents of the need to preserve these programs, the effect of weighing a football program in a gender-ratio analysis for an athletic program will significantly increase the chances a university has violated Title IX because of the immediate impartiality it presents under the Three-Part Test.

### *C. OCR's Title IX Regulations Need to Discard the Contact Sports Exception*

The contact sports exception allows sports teams to legally discriminate against female athletes seeking to participate in any sport that involves “bodily contact,”<sup>138</sup> most notably football.<sup>139</sup> Requiring contact sports teams to allow both genders to try-out for the team is practical if the female has a desire to participate and there exists no equivalent for the underrepresented gender. Additionally, permitting females to try-out for any athletic team also is necessary to provide an equal opportunity to female athletes that have the competitive abilities to participate in the sport but are otherwise prevented from trying out because of the contact sports exception. As a result of this exception, contact sports programs invite opportunities for discrimination because universities may prohibit females from even trying out for fear of setting a precedent for future female athletes to try out, or risking potential lawsuits if any future female athletes are prevented from

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<sup>137</sup> *Id.*; see also Lindsay N. Demery, *What About the Boys? Sacking the Contact Sports Exemption and Tackling Gender Discrimination in Athletics*, 34 T. JEFFERSON L. REV. 373, 382 (2012); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 828 (10th Cir. 1993); Lamber, *supra* note 52.

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

<sup>139</sup> Mercer v. Duke Univ., 401 F.3d 199, 206 (4th Cir. 2005).

trying out.<sup>140</sup> Moreover, eliminating the contact sports exception would prevent any risk that the exclusion of females based on the exception would be used as a proxy to discriminate based on sex.

In regards to participation and expenses, college football is a male-dominant sport that cannot be paralleled by any female (let alone any female-only) college sport.<sup>141</sup> Football's inclusion in a Title IX analysis heavily imbalances the gender ratio in a college sports program compared to a program without a football program.<sup>142</sup> If universities were required to allow females to try-out (in hopes of ideally participating) in contact sports, then the gender ratio in a school with a football team would be more balanced.<sup>143</sup> Moreover, allowing females to try-out for a contact sports team, especially if they are deprived of an equal opportunity based on the lack of participation or interest in their gender, would likely increase a university's chances of showing a court that a university is attempting to fully and effectively satisfy the interests of the underrepresented gender.<sup>144</sup> Lastly, while females could be at significant disadvantage in contact sports and risk injury playing against male competitors, this concern is overshadowed if allowing female participation will fulfill the interests and abilities of female athletes.<sup>145</sup> Although it may be contrary to the societal norm, a female seeking to participate in a male-dominant contact sport has a strong interest in the sport, so she should not be excluded simply because no female-equivalent sport is available for her to participate in.<sup>146</sup> If a female athlete believes she can participate in a male only contact sport, then is it not discriminatory to deny her this right to participate because a university offers the sport only to males?

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

<sup>141</sup> Jacqueline McDowell & Spencer Schaffner, *Football, It's a Man's Game: Insult and Gendered Discourse in the Gender Bowl*, 22 DISCOURSE & SOC'Y 548, 553 (2011), <http://www.english.illinois.edu/~people/faculty/schaffner/schaffner.mcdowell.2011.discourse.and.society.pdf>; *Sports, Media and Stereotypes Women and Men in Sports and Media*, CTR. FOR GENDER EQUALITY IN ICELAND (2006), [http://www.mujierydeporte.org/documentos/docs/sms\\_summary\\_report.pdf](http://www.mujierydeporte.org/documentos/docs/sms_summary_report.pdf).

<sup>142</sup> Alicia Irons, *The Economic Inefficiency of Title IX*, MAJOR THEMES IN ECON. (2006), <http://business.uni.edu/economics/Themes/irons.pdf>; Jonathan Zimmerman, *Blame Football, Not Title IX*, L.A. TIMES (Jan. 9, 2014), <http://articles.latimes.com/2014/jan/09/opinion/la-oe-zimmerman-football-title-ix-ncaa-20140109>.

<sup>143</sup> *Id.*

<sup>144</sup> See Demery, *supra* note 137; *Title IX and Other Women's Issues*, US LEGAL (2003), <http://sportslaw.uslegal.com/title-ix-and-other-womens-issues/>.

<sup>145</sup> Zoe Meyer, *Girls Playing with the Boys, and Boys Playing with the Girls*, SERENDIP STUDIO (Jan. 8, 2008), <http://serendip.brynmawr.edu/exchange/node/1753>; Allie Grasgreen, *Equal Opportunity, Unequal Interests*, INSIDE HIGHER ED. (Nov. 15, 2012), <https://www.insidehighered.com/news/2012/11/15/lower-female-interest-sports-calls-title-ix-application-question-study-says>.

<sup>146</sup> *Id.*; see also Erin Riley, *Sexism in Sport Excludes Women from One of Australia's Most Important Cultural Products*, GUARDIAN (Mar. 10, 2015), <http://www.theguardian.com/commentisfree/2015/mar/11/sexism-in-sport-excludes-women-from-one-of-australias-most-important-cultural-products>.

## CONCLUSION

Title IX's purpose in college sports is to promote equal opportunity in college athletics for females and remove gender discrimination. In order to accomplish this goal, the OCR's interpretation of the Three-Part Test and acceptance of the contact sports exception has resulted in encouraging bad behavior by universities and a lack of equal opportunity in contact sports. The evolution of Title IX in college sports will ultimately change the landscape of college athletics. Rather than reducing athletic programs in order to comply with Title IX, this Note's proposed individual sport-to-sport analysis for university compliance with Title IX will encourage universities to maintain their current athletic opportunities while also pin-pointing unequal treatment in specific sports within a university athletic program. In theory, this will balance the competing interests of both female and male athletes, universities, and society as a whole while also perpetuating Title IX's goal to provide gender equality.

